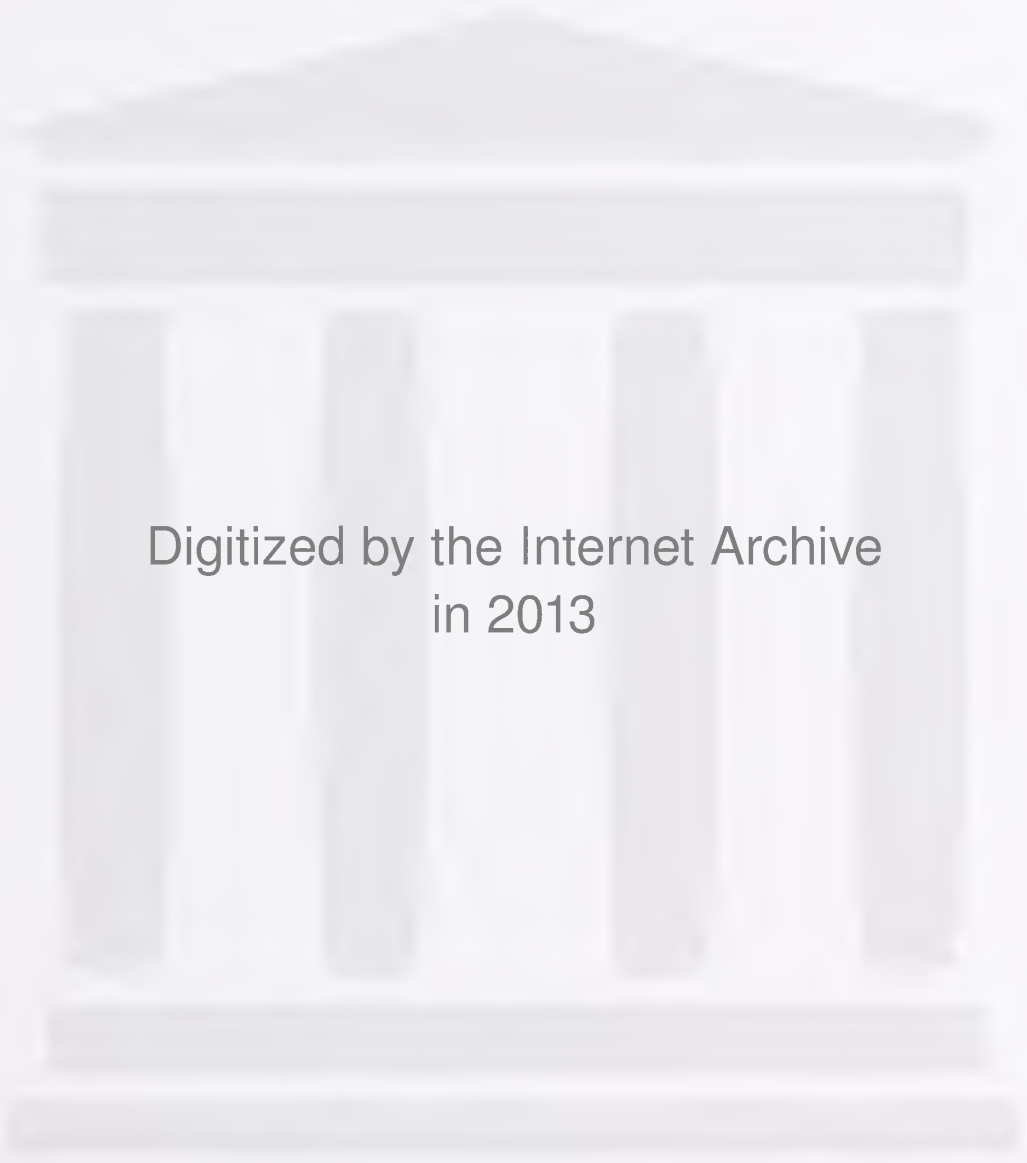
1-1-1998

Exercising the Doctrine of Judicial Review by Establishing a Constitutional Court in Mexico

Irma Leticia Leal-Moya

EXERCISING THE DOCTRINE OF JUDICIAL REVIEW BY ESTABLISHING A CONSTITUTIONAL COURT IN MEXICO

Irma Leticia Leal - Moya



Exercising the Doctrine of Judicial Review by Establishing a Constitutional Court in Mexico

by

Irma Leticia Leal-Moya

JD., Universidad de Guadalajara, Mexico 1995

A Thesis Submitted to the Graduate Faculty

of The University of Georgia in Partial Fulfillment

of the

Requirements for the Degree

Master of Laws

Athens, Georgia

1998

EXERCISING THE DOCTRINE OF JUDICIAL REVIEW BY ESTABLISHING A CONSTITUTIONAL COURT IN MEXICO

by

IRMA LETICIA LEAL-MOYA

Approved:

C Ronald Ellington Date 5/27/98
Major Professor

Date 5/27/98
Chairman, Reading Committee

Approved:

Gordhan L. Patel
Graduate Dean

June 4, 1998
Date

Table of Contents

Introduction

A number of prominent legal scholars have proposed that a "logical" product of European thinking and "colonial experiences" was the American system of judicial review. Such a doctrine is based upon the existence of a higher law over other lower laws and in the judicial control practiced over executive actions and legislative statutes.[1] If the doctrine has an actual basis in fact, however, why did we not see the same "logical" result in Latin America, for instance, in Mexico, where the colonizer was also a European country and the nation also endured the "colonial experience"? The reasons are many but the most important depend on historic and philosophical motivations. A matter of great relevance is the distinct character of the legal traditions of each country, the common law influence from the British and the civil law experience from Roman Law.[2] The opposing philosophical thoughts prevailing in Europe at that time were also significant.

Several factors caused the United States and Mexico to have different legal frameworks. On the one hand, the power of the Supreme Court of the United States is a

---

[1] MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 25 (1971)[hereinafter CAPPELLETTI, JUDICIAL REVIEW]. *See also* ALLAN R. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW 89-90 (1989 Cambridge) [hereinafter BREWER-CARÍAS]. *See* A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 142 (1919). Certainly, the maxim of judicial review itself is "wholly and exclusively American."

[2] JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 34-38 (2nd ed. 1985) [hereinafter THE CIVIL LAW TRADITION]. *See also* Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective (A Bicentennial Celebration of the Constitution: The Third Circuit Judicial Conference in Philadelphia Essay)*, 49 U. Pitt. L. Rev. 891; 900 (1988) [hereinafter Barker, *Constitutionalism in the Americas*].

very active one within the decision-making sphere.[3] On the other hand, the mechanical duties of judges in Mexico have labeled the judicial branch as a passive and undependable one.[4] The significant differences of both judicial institutions-from their functions, competence, and organization-will be reviewed in this paper, but it will primarily analyze and discuss the judicial review doctrine, its different facets, its procedure, and its effects.

The most significant political principles which facilitate the establishment of the judicial review doctrine are all linked to Federalism.[5] States with a federal form of government are more likely than others to have an equal distribution of powers in an attempt to prevent usurpation of authority by any branch over the other.[6] In states with a federal government, the need to maintain a satisfactory balance has led to the establishment of judicial control. It has been asseverated that the construction of judicial review has had two principal expectations. The first is judicial protection of individual rights. The second is ample protection of the Constitution, which is an organic instrument to control the diverse powers of a government.[7]

To ensure that the concept under examination is clear, judicial review as used herein is "any judicial action that involves the review of an inferior legal norm for conformity with a higher one, with the implicit possibility that the reviewing court may

---

[3] Robert F. Utter and David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 Ohio St. L.J. 559, at 560 [hereinafter Utter and Lundsgaard].

[4] James F. Smith, *Confronting Differences in the United States and Mexican Legal System in the Era of NAFTA*, 1 U.S.-Mex. L.J. 85, 88-89 (1993) [hereinafter Smith, *Confronting Differences*].

[5] *See* BREWER-CARÍAS, *supra* note 1 at 117-124.

[6] The principle of Separation of Powers contemplates three "autonomous entities" with their own independence to perform their functions (Legislative, Executive and Judicial) GEOFFREY STONE ET AL. CONSTITUTIONAL LAW 385-392 (3rd ed. 1996) [hereinafter STONE].

invalidate or suspend the inferior norm if necessary or desirable."[8] This definition attempts to define judicial review in all its possible versions. For some scholars, the different manifestations of judicial action have been many, but the ends procured are very similar. The doctrine of judicial review can also vary according to the means of procedures employed and even in its effects, but the organ of control is always purely judicial. Characteristically, judicial review is practiced by systems with a written Constitution, which regularly is the supreme law over the other ordinary laws.[9] Hence, those systems have searched for effective mechanisms to guarantee the defense of their constitutions by giving a power to ordinary judges (in the American model) or special Constitutional Courts (European model) to declare the unconstitutionality of state laws enacted in violation of the Constitution.[10] Although there could be as many forms to warrant the constitutionality of laws and regulations as there are countries with a written Constitution, the scope of this study is limited to analyzing the two most important models, the American system in the United States and the European model in Germany.[11] The final analysis includes the form of judicial review in Mexico, which is a combination of both models and is characterized as a mixed form.

---

[7] *See* BREWER-CARÍAS, *supra* note 1 at 117; *see also* Louis Favoreu, *Constitutional Review in Europe*, 41 *in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTIONALISM ABROAD (Louis Henkin & Albert Rosenthal eds., 1990)[hereinafter Favoreu, *Constitutional Review in Europe*].

[8] *See* Utter & Lundsgaard, *supra* note 3, at 559-561. The authors make clear that the definition of judicial review includes the review of statutes legislatively enacted and of administrative and executive decrees to be in accordance to the Constitution.

[9] *See* BREWER-CARÍAS, *supra* note 1 at 112.

[10] *Id.*, at 124. Professor Brewer-Carías associates the concept of judicial review with the rule of law, stating that the powers of the public bodies forming the state emanate from the law, and this precise law which created and established the powers also limits that power. That is, countries which follow the rule of law have limited governmental powers and excersise a form of judicial control.

[11] *Id.* at 112-124. Accordingly, these two types of judicial control over the constitutionality of legislation are the broadest division.

Chapter I.

The American Model of Judicial Review

a) Origin and Scope

The Constitution of the United States vests the judicial power of the United States in one Supreme Court and in such inferior Courts as Congress may create.[12] As mentioned before, this system of control empowers all judges and courts of a given country to act as constitutional judges. Any controversy brought to the court, no matter its nature, is resolved by the same court. That is to say, Constitutional issues may appear in any case, and judges will give them regular treatment. The American or diffuse model is considered to have its origin in the United States of America and particularly in the Supreme Court decision of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), by Chief Justice John Marshall.[13]

Marbury v. Madison is, as noted, the landmark case for the concept of judicial review. However, there is an argument that long before, the courts had already practiced this peculiar jurisdiction.[14] As a matter of fact, historical legal literature attributes the

---

[12] U.S. CONST. art. III, § 1. From time to time, the term "Supreme Court" will be used to refer that judicial power.

[13] GERALD GUNTHER, CONSTITUTIONAL LAW 1 (12th ed. 1991)[hereinafter GUNTHER]. *See also* ROBERT L. CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW 125-127 (1989) [hereinafter R. CLINTON].

[14] *See* GUNTHER *supra* note 13 at 1-71. *See also* THOMAS J. HIGGINS, JUDICIAL REVIEW UNMASKED 11-26 (1981). *See generally* William Castro, *James Iredell and the American Origins of Judicial Review*, 27 Conn. L. Rev. 329 (1995), which supports the early conceptions of judicial review made by Justice Iredell in the 1780s. Sixteen

origin of judicial review to the American colonial experience, in which the British government conducted a systematic review of colonial legislation so that the new colonial laws would not be contrary to the laws of England. This control was exercised initially by royal governors and finally through the Privy Council in London.[15] Analogously, in the eighteenth century, the Supreme Court and several other Federal and State Courts considered that the legislative branch had a "delegated and limited" power under the Constitution and that in order to be effective, such limits should be observed by law. When law is applied, it must be interpreted and applied by the courts.[16]

Accordingly, Alexander Hamilton, through his papers in the *Federalist,* had readily accepted the concept of judicial review.[17] Almost all North American judges of the late eighteenth century maintained the doctrine of judicial review without a stipulated legal body endorsing this power. The practice of judicial review brings to the surface the controversial issue of constitutional justification to interpret the political document. For many, this power is found "nowhere" in the Constitution.[18] Therefore, it is assumed that the power of the judiciary is not legitimate because it is not supported by the Constitution.[19]

---

years before *Marbury* was decided, the Supreme Court of North Carolina suggested the supremacy of the Constitution over legislative acts. Other cases resolved by the U.S. Supreme Court and other State Courts before 1803 are, for instance, *Kemper v. Hawkins*, Va. Cas. 20 (1793), *Vanhore's Lesse v. Dorrence*, 2 Dall. 304 (1795).

[15] CHARLES GROVE HAINES, THE CONFLICT OVER JUDICIAL POWERS IN THE UNITED STATES TO 1870 1-35 (1970).

[16] *See* R. CLINTON, *supra* note 13, at 125-127.

[17] *Id.* at 65. *See also* The Federalist No. 78, at 9 (Alexander Hamilton) (Ronald Rotunda ed., 1997). Certainly, Hamilton saw particular limitations to the legislative authority contained in a "limited Constitution" which requires an independent judiciary. Thus, the maintenance of those limitations are to be guarded exclusively by the "Courts of Justice." "The interpretation of the laws," he adds, "is the proper and peculiar province of the Courts."

[18] ALEXANDER M. BICKEL, THE LAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1(1986) [hereinafter BICKEL].

[19] The legitimacy of this doctrine has been subject to many debates not only by judges and academics but also by politicians. The legitimacy of this power has raised two questions. 1. Did the Constitution grant this power. If not, why is the Court exercising it? 2. If granted, what is the lawful scope to interpret and even nullify acts of an

The framers of the Constitution did not set forth a provision for the exercise of judicial review, not even by "implication." On that account, their silence is interpreted as if they did not intend for it to be assumed.[20] Nevertheless, Marshall found the foundations of judicial control in the Constitution on the basis of the Supremacy clause: Article VI paragraph 2, which reads:

> This Constitution, and the Laws of the United states which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding . . . "

Marshall asserted that when the framers were writing the Constitution, they were building the "fundamental and paramount" law of the nation, and that all acts contrary to it were void. In addition, he supported his theory with the fact that written Constitutions are construed to be the fundamental rules. Finally, when there is a disparity between the Constitution and an inferior law, he stated, "this is the judicial department's task to interpret and resolve which law should prevail."[21]

---

elected legislature? However, this section will focus only on the most considerable historical precedent of judicial control and its ordinary competence for comparative purposes. *See* detailed discussion *infra* Chapter IV § c) & d). For a broader discussion of the legitimacy of judicial review see, for example, EUGENE V. ROSTOW, THE SOVEREIGN PREROGATIVE (1962); BOUNDING, GOVERNMENT BY JUDICIARY (1932); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); ALEXANDER M. BICKEL, THE LAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1(1986); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW (1986); Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of Constitutional Justice*, 35 Cath. U.L Rev. 1 (1985); Johnny C. Burris, *Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review*, 12 Okla. City U. L. Rev. 585 (1987).

[20] *See* Charles A. Beard, *The Supreme Court-Usurper or Grantee?* 27 Political Science Quarterly 1, *in* ESSAYS IN CONSTITUTIONAL LAW 24-58, (Robert McCloskey ed., 1957). A recompilation of strategic documents, writings, speeches, papers and recorded activities of the members of the Convention of 1787 by Beard was the evidence that "the purpose and spirit of the federal Constitution and of all those Fathers" was to exercise judicial control over the other two powers of government; *See also* BICKEL, *supra* note 18 at 15, 16.

[21] *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). This notion was emphatically stressed in another Supreme Court decision years later in the case *Cooper v. Aaron* 358 U.S. 1, 78 Ct. 1401, 3 L. Ed. 2d 5 (1958). Suggesting that in *Marbury v. Madison,* Chief Justice Marshall "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."

In order to approach fully the scope of American judicial review, a brief synopsis of the facts of *Marbury v. Madison* is necessary. William Marbury was one of the four new justices of peace for the District of Columbia appointed by the Federalist President John Adams as he was leaving office March 3, 1801.[22] The new Republican administration of Thomas Jefferson succeeded on the following day. The Federalists did not deliver the appointments of formal commissions that had not been delivered before the end of the Adams administration. The appointees brought suit in an original action in the Supreme Court seeking a writ of mandamus directed to Secretary of State James Madison to compel him to deliver the commissions.[23] Marbury and the other plaintiffs relied on Section 13 of the Judiciary Act of 1789 to support jurisdiction in the Supreme Court to hear their demand. This Judiciary Act had been enacted by a Federalist-controlled Congress a month before Adams left office.[24]

The court faced a number of issues. The first part of the decision deals with the plaintiff's right to the commission and the appropriate legal remedy to obtain that right.[25] Subsequently, the court resolved that such a remedy for the violation of the right was a writ of mandamus. Thereupon, the court examined its power to issue the writ by exercising its original jurisdiction. However, Marshall concluded that the exercise of such original jurisdiction was in conflict with Article III of the Constitution,[26] and that in

---

[22] *See* R. CLINTON, *supra* note 13 at 82-101.
[23] *Id.*
[24] Section 13 of the Judiciary Act of 1789 among other things provided that the Supreme Court may have appellate jurisdiction from the Circuit Courts and the Courts of the States and to issue writs of prohibition to the District Courts and issue writs of mandamus in cases warranted by principles of usage of law, to any courts appointed, or persons holding office, under the authority of the United States. *See* RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 1 (5th ed. 1997) [hereinafter R. ROTUNDA].
[25] *See Marbury*, 5 U.S. at 154-73.
[26] U.S. CONST. art. III, § 2 grants the Supreme Court limited original jurisdiction: "In all Cases affecting Ambassadors, other public Ministers an Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate

giving the Supreme Court original jurisdiction to issue the writ, Section 13 of the Judiciary Act conflicted with Article III and was, therefore, unconstitutional.

The decision points out that Article III, § 2 clearly delimits the jurisdiction of the Supreme Court and under no circumstances could Congress modify it, transgressing the spirit of the Constitution.[27] The Act was found unconstitutional on the basis of the Supremacy Clause (Article IV).[28] Marshall's opinion erected what it is now the accepted foundation that legitimizes judicial review as a power of the Court.

The Court touched a very consequential point when considering the invalidity of ordinary laws. "Were courts bound by those laws notwithstanding its invalidity?" The answer was an incisive one: "It is emphatically the province and duty of the judicial department to say what the law is."[29] The Supreme Court assumed responsibility as the final authority to interpret the Constitution, and in giving this answer, the judgment created the theory of judicial review.[30] Judicial authority was deduced from the whole Constitutional system by the Supreme Court.

The justification to determine why the judicial branch and not another branch of government should decide the constitutionality of legislative enactments or executive actions, among other considerations already mentioned, was that judges take an oath to uphold the Constitution. In spite of the fact that all officials of government take an oath, this type of oath, Marshall argued, is a fundamental element to the official character of a

---

Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make"

[27] Section 13 of the Judiciary Act conflicted with the provisions quoted previously (note 24). The Act gave the Supreme Court original jurisdiction in an area where, arguably, the Constitution conferred only appellate jurisdiction.

[28] *See Marbury*, 5 U.S. at 177-78

[29] *See id.*

judge.[31] Moreover, a judge would not promise to perform his obligations to the Constitution if the Constitution would not form part of the rules of the judiciary.[32]

b) The Supreme Court Approach to Applying Judicial Review

The American system of judicial review[33] is categorized as having a "rigid" Constitution.[34] In order to amend the Constitution, the ordinary legislative processes are not sufficient, and special procedures are necessary. Hence, another characteristic of American judicial review is the applicability of the principle of *lex superior derogat legi inferiori* to determine the constitutionality of laws.[35]

The practice of controlling the constitutionality of acts and legislation has produced two different methods to construe the Constitution by judges: the interpretative and the non-interpretative methods.[36] The first form limits judges to make use of only those norms included in a written Constitution. Courts consult the literal and historic meaning of language in the Constitution, support their opinions in the structure of the

---

[30] *See* R. CLINTON, *supra* note 13 at 98, stating that this part of the opinion is the cause why *Marbury* is celebrated.
[31] *See Marbury*, 5 U.S. at 180.
[32] *Id.*
[33] Note that this type of judicial control is also established principally in onetime British colonies, such us, India, Canada and Australia. Curiously, the decentralized system of review has been also adapted in Japan and Switzerland, Norway and Sweden. *See* CAPPELLETI, JUDICIAL REVIEW, *supra* note 1 at 47-49.
[34] The opposite of this classification is the "flexible" Constitution which is part of the legal systems in England, New Zealand and Israel, countries with unwritten and therefore flexible Constitutions. BREWER-CARÍAS, *supra* note 1 at 103.
[35] *Id.* at 104; making allusion to Chief Justice Marshall who applied this principle when resolving *Marbury v. Madison.*
[36] JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1-2 (1980)[hereinafter ELY]. MICHAEL PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982). *See also* Thomas Grey, *Do we have an Unwritten Constitution?*, 27 Stan. L.Rev. 703 (1975)[hereinafter *Unwritten Constitution?*].

Constitution as a whole, and try to follow the intention of the drafters.[37] Then, the judges are able to perform judicial review of legislation.

Nonetheless, the progressive transformation of the country has facilitated the development of the non-interpretive method of judicial review. This means that when judging an act or legislation for its constitutionality, judges are not restrained by the literal meaning of the written Constitution to judge those laws or acts, but they also may rely on fundamental principles of the society and the political system. This non-interpretive system has been widely used in most of the major cases resolved by the U.S. Supreme Court over the years.[38] Such cases include, among others, *Brown v. Board of Education of Topeka*,[39] *Roe v. Wade*,[40] and *Furman v. Georgia*.[41] Principles of natural justice are the parameter of this form of judicial control, sometimes even without regard to the content of the Constitution.[42] This is due to the ambiguity or open-endedness of provisions in the Constitution to determine particular constitutional questions.

The reasons underlying which form of interpretation the courts apply depends on the significance of the Constitution and the period of time in which the members of the court are living. For many, it is fortunate to make use of this type of interpretation owing to the easy adaptation of the Constitution to the current values of society and of the

---

[37] Historically, it was the form of interpretation when pursuing judicial review in *Marbury* and many other following cases.
[38] *Id.* It is well known that the Warren Court followed this form of interpretation in its decisions guided by principles of liberty and justice.
[39] 347 U.S. 483 (1954); segregation issue.
[40] 410 U.S. 113 (973); abortion issue.
[41] 408 U.S. 238 (1972); death penalty issue.
[42] *See* BREWER-CARÍAS, *supra* note 1 at 106.

political system to maintain a "Constitution alive."[43] Therefore, the non-interpretative method has been "crucial" as confirmed by the U.S. Supreme Court.[44]

Judicial review of legislation and executive acts is practiced by all courts [45] but the United States' courts have broad standing rules which limit who can bring an action to the courts.[46] There are restraints on the courts when adjudicating. "An American court can only adjudicate when there is litigation; it deals with a particular case, and it cannot act until its jurisdiction is invoked."[47] These particulars lead me to comment about two essential aspects of the judicial process: In which cases does the court have jurisdiction, and secondly, who has the right to seek judicial relief and have access to federal courts?

To cover the first point, it is necessary to consider the Article III, Section 2 "case or controversy" requirement by which a concrete dispute is necessary.[48] Courts are not allowed to issue opinions on "abstract" or "hypothetical" questions; consequently, advisory opinions[49] are banned within the United States' judicial jurisdiction because of the absence of two prerequisites: a party who has suffered an injury and a real and

---

[43] *Id.* at 110. *See also Unwritten Constitution?, supra* note 36 at 703.

[44] An example of this approach occurred when the Supreme Court was deciding *Brown v. Board of Education of Topeka,* where Chief Justice Warren said in 1954: "In approaching this problem we cannot turn the clock back to 1868 when the amendment [the Fourteenth Amendment] was adopted . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation."

[45] Both State Courts and Federal Courts have jurisdiction over constitutional matters.

[46] In light of the number of courts which have constitutional adjudication, judicial review permits not only public authorities to bring constitutional issues to the court (like in the European Model) but individuals as well. *See* Utter and Lundsgaard, *supra* note 3, at 591-596.

[47] *See* Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 56., citing Alexis de Tocqueville, *De la Democracie en Amerique*, 1835, collectium 10/18 (Paris: 1863).

[48] Article III, § 2 provides that "Judicial Power shall be extend to specified 'cases' and 'controversies.'" To this restrain there is added another one called "prudential." Only if a case completes those requirements will the case be considered to be heard or "justiciable." *See* STONE, *supra* note 6, at 88.

[49] The U.S. judicial body has declined to issue advisory opinion since as early as 1793, when President Washington wrote to the Supreme Court asking informal advice on several legal topics and with national relevance, however, the Supreme Court refused to give its advice in view of the Separation of Powers principle. For a complete view of exchanges of letters, *see* Correspondence and Public Papers of John Jay, vol 3.

immediate conflict.[50] That limitation complies with the Separation of Powers principle as it was stated in *Flast v. Cohen,*[51] which Justice Warren wrote as follows:

> [T]he Cases and Controversies requirement limits the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution though the judicial process. And in that part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine.

Hence, constitutional questions need not be brought in a specific court nor do they require a special procedure. Constitutional questions can arise incidentally during a regular proceeding,[52] as long as the case and controversy requirements are met.

Secondly, who is able to be heard in the courts to claim the enforcement of a legal obligation? Contrary to the foregoing, wherein the focus is on the nature of the issue, here the focus is the party and his or her position in the controversy. As Justice Scalia affirmed in 1992 when delivering the opinion of the court in *Lujan v. Defenders of Wildlife*,[53] to have access to federal courts, the litigant must fulfill three conditions to have standing:

> First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a casual connection between the injury and the conduct complained of-the injury has to be "fairly... traceable to the challenged action of the defendant, and not... the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a

---

[50] *See* STONE, *supra* note 6, at 90. *See also* GUNTHER, *supra* note 13, at 1591-1594.
[51] 392 U.S. 83 (1968).
[52] *See* CAPPELLETI, JUDICIAL REVIEW, *supra* note 1, at 67-69, 84.
[53] 504 U.S. 555 (1992). Other important cases concerning standing, *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Flast v. Cohen*, 392 U.S. 83 (1968); *United States v. Richardson*, 418 U.S. 166 (1974); *Warth v. Seldin* 422 U.S. 490, (1975); *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 454 U.S. 464 (1982); *Allen v. Wright*, 468 U.S. 737 (1984). However, *Frothingham* contains a more precise and modern standing criteria.

favorable decision."

In other words, there are three requirements that legitimize the right of a litigant to sue. It must be demonstrated that an "injury in fact" exists; besides, the injury must be one which was "caused" by the action being complained, and finally, there must be a significant probability that that injury will be "redressed" by giving the litigant the relief he seeks. These conditions are used as filters for screening out cases unsuited for judicial determination.[54]

Above all, the applicant must demonstrate the invalidity of the law which he considers invalid. Considering the presumable constitutionality of laws passed through the examination of Congress to be in agreement with the Constitution,[55] the invalidity of a law should be "clearly demonstrated" by the plaintiffs.[56]

c) The Supreme Court and Its Autonomy

"Where independence exists, it is believed that the courts are able to be more forceful mechanisms for the defense of constitutionalism and justice."[57] To abolish extraneous pressure and fear of removal, the judicial body has in its favor certain

---

[54] *See* GUNTHER, *supra* note 13, at 1622.

[55] *Ogden v. Saunders*, 12 Wheat. (25 U.S.) 213 (1827).

[56] *Fletcher v. Peck,* 6 Cranch (10 U.S.) 87 (1810). In this case, coincidentally, Chief Justice Marshall rendered the opinion of the Court. He noted that the fact to resolve the constitutionality of a law was a "delicate" task for the Supreme Court; therefore, the principle was instituted when an "opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Moreover, the reasoning by which Marshall reached that conclusion was to adjust to the Separation of Powers Principle.

[57] Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 Am. J. Comp. L. 605, 606 (1996) [hereinafter Larkins]. Asserting the absence of autonomy, the judiciary can be "easily manipulated" to perform its duties of constitutional scrutiny of arbitrary governmental acts. *See also* Judge Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, Address on

"instruments to obtain its independence, dignity and effectiveness in its performance."[58] These instruments are appointment, life tenure, restricted grounds for removal and remuneration.[59] The U.S. Supreme Court Justices are appointed by the President subject to the advice and consent of the Senate.[60] The appointment process creates an equilibrium between the executive and legislative branches; consequently, the possibilities of favoritism of a judge towards the President because of the considerations of his/her appointment, in a sense, are blocked.[61] The most important promotions of judicial independence, according to many,[62] are appointment for life with consistent payment. Both are provided by the Constitution,[63] and both are enough to isolate the courts politically and to guarantee their independence.[64]

The only way to remove judges from their judicial offices is through the impeachment process. "Judges shall hold their Offices during good Behaviour."[65] Otherwise, they may be "removed from Office on Impeachment for, and Conviction of

---

250th Anniversary of the Supreme Judicial Court of Massachusetts at Mass. Bar Ass'n. Nov. 21, 1942). Stating that "a condition upon the success of our system is that the judges should be independent"

[58] Russell R. Wheeler and A. Leo Levin, Symposium, *Judicial Discipline and Removal in the United States*, available in WESTLAW, LAT database, 1979 WL 24794 (F.J.C.)[hereinafter Russell & Levin]. *See also* H. FIX ZAMUDIO, *Función del Poder Judicial en los Sistemas Constitucionales Latinoamericanos,* Universidad Nacional Autónoma de México, 30 (1977 Mex.) [hereinafter ZAMUDIO, *Función del Poder Judicial*].

[59] *See* ZAMUDIO, *Función del Poder Judicial, supra* note 58, at 30. Note that there are other circumstances that may influence the judges' independence, for instance, ideology, stability and responsibility etc.

[60] U.S. CONST. art. II, § 2, cl. 2. ". . . [The President] shall have power, by and with the Advice and consent of the Senate... appoint... Judges of the Supreme Court..."

[61] The appointment process indicates that judges are subject to political pressure to a very minor degree. For a broader discussion of appointments of Judges of the Supreme Court, *see* for example, H. ABRAHAM, JUSTICES AND PRESIDENTS (1985). J. SCHMIDHAUSER, JUDGES AND JUSTICES (1979). Charles Black, Jr., *A Note on Senatorial Considerations of Supreme Nominees*, 79 Yale L.J. 657 (1970). Davis A. Strauss and Cass R. Sunstein, *The Senate, The Constitution and the Confirmation Process*, 101 Yale L.J. 1491 (1992).

[62] *See* Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 45. When comparing the American and European models of judicial review, Professor Favoreu found judges of the United States "largely immune from political pressure who enjoyed tenure for life."

[63] U.S. CONST. art. III, § 1.

[64] Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. Miami Inter-Am L. Rev 57, 60 (1993), emphasizing that in its last part, Article III, § 1 (a Compensation, which shall no be diminished during their Continuance in Office) creates a strong fortification for filtration of political control.

[65] U.S. CONST. art. III, § 1.

Treason, Bribery or Other High Crimes and Misdemeanors."[66] Moreover, this accusation requires the concurrence of two-thirds of the Members present of the Senate,[67] making the impeachment process less threatening. But above all, Judges should not be prosecuted "for reaching decisions which are unpopular," since such prosecution would be a violation of their most fundamental judicial obligations.[68]

Last, but not least, all of these elements constitute the freedom of judges to decide the cases with neither fear nor influence of external factors.[69]

d) Effects of Constitutional Adjudication

Originally, the effect of judicial review in diffuse systems is an *inter partes* one. That is to say, the judgment made by the court deciding the nullity of a law must not go beyond the parties and the particular case.[70] As a result, with its decision the court indicates that the null law should be considered out of existence for the parties involved in the case.

This principle, however, has been modified, particularly in the United States[71] because of the rule of *stare decisis* (let the decision stand).[72] For example, when a

---

[66] U.S. CONST. art. II, § 4.
[67] U.S. CONST. art. I, § 3, cl. 6.
[68] *See* Larkins, *supra* note 57, at 609.
[69] *See* Russell & Levin, *supra* note 58.
[70] *See* CAPPELLETI, JUDICIAL REVIEW, *supra* note 1, at 86. *See also* BREWER-CARÍAS, *supra* note 1, at 149.
[71] In other countries such as Japan with a diffuse system of judicial review, the decisions of the courts concerning constitutional issues still have the original *inter partes* effect.
[72] The *stare decisis* rule was emerged as early as the development of English common law. The notion of *stare decisis et non quieta movere* stands by the thing decided and not disturb the calm. Practically, this principle "describes obedience to precedent" and embodies important values of the rule of law: fairness, stability, predictability and efficiency. It "ensures that like cases will be treated alike, otherwise no equal justice would be apply." *See* James C. Rehnquist, *The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court,* 66 B.U. L.Rev. 345, 347 (1986). *See also, Constitutional Stare Decisis,* 103 Harv. L. Rev. 1344, 1345 (1990). For a broader discussion of the *stare decisis* doctrine and its applicability in current cases *see* Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and*

decision is given by the Supreme Court in constitutional matters, "the Court's interpretations of the Constitution must be obeyed by everyone, rather than only by the parties to the case."[73] Thus, in the United States nowadays, judicial decisions have a more expansive effect. Decisions will be binding on all subject to the court's jurisdiction. Moreover, the general acceptance under common law is that judicial decisions of the Supreme Court are of prevalent applicability.[74]

The principal motivation behind the United States' adoption of this system of judicial review with a broader effect called *erga omnes* has been due to deliverance of judicial decisions that are adjusted to "present realities." Otherwise, decisions would be outdated to current times.[75] Furthermore, the United States Supreme Court has followed this principle to maintain a uniform interpretation of the Constitution and to evade contradictory decisions on constitutional matters.[76]

Subject Matter in the Application of Stare Decisis after Payne v. Tennessee, 82 Geo. L.J. 1689 (1994). Todd E. Freed, *Is Stare Decisis still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis,* 57 Ohio St. L.J. 1767 (1996).

[73] *See Cooper v. Aaron* 358 U.S. 1, (1958). Justice Frankfurter rendered the opinion of the Court suggesting that inferior courts are bound by decisions of superior courts. He reinstated the obligatory effects of earlier decisions concerning desegregation issues. The reasoning of the court was on the basis of the Supremacy Clause (Article VI) making of the Constitution the "fundamental and paramount law of the nation."

[74] *See* Utter and Lundsgaard, *supra* note 3, at 589; noting that in the United States, people are most familiar with *erga omnes* effect, and even the judges themselves feel comfortable adopting new ruling from higher courts.

[75] *See* CAPPELLETI, JUDICIAL REVIEW, *supra* note 1, at 85, 86, 87, 88; citing Alexander Bickel, The Least Dangerous Branch 115, (1962).

[76] *See* BREWER-CARÍAS, *supra* note 1, at 149, 150. *See also,* HUMBERTO J. LA ROCHE, EL CONTROL JURISDICCIONAL DE LA CONSTITUCIONALIDAD EN VENEZUELA Y LOS ESTADOS UNIDOS, 129, 155 (1972 Venezuela).

Chapter II.

The European Model of Judicial Review in Germany

a) Origin and Scope

The Austrian or European Model of judicial review is recognized as the centralized or concentrated form of judicial control due to its own form of organization, which confines the power of review to *one single judicial organ.*[77] This single judicial organ is translated as a Constitutional Court, Tribunal or Council. Characteristically, the Constitution of any country with this type of judicial review literally will create such a constitutional court.[78]

Under the Austrian model, the "specialized" courts have been created particularly to review only constitutional issues. Therefore, ordinary courts are constrained from hearing constitutional cases, and when a constitutional question arises before them, they are obliged to submit the case to the constitutional court, which pronounces a judgment. Another feature of the centralized system is the abstract form of review, under which

---

[77] *See* Favoreu, *Constitutional Review in Europe, supra* note 7, at 40, 41.

[78] Within the concentrated system, judicial review can be exercised only if the *expressis verbis* condition is included in the Constitution. Thus, the Federal Republic of Germany adopted the centralized system of judicial review through its Constitution of Bonn of 1949, The Italian Republic by the Constitution of 1948, Cyprus by its Constitution of 1960, and Turkey by the Constitution of the 1961; *see* MAURO CAPPELLETI AND WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW 73, 74, 75 (1979) [hereinafter CAPPELLETI & COHEN, COMPARATIVE CONSTITUTIONAL LAW]. More recently, in 1989, several Central and Eastern European states have institutionalized the centralized form of judicial review: Poland, Hungary, Romania and Bulgaria; *See* Herman Schwartz, *The New East European Constitutional Courts,* 13 Mich. J. Int'l. L. 741(1992).

courts do not examine the factual circumstances of a particular case.[79] Moreover, the final judgment declaring a law unconstitutional has a general[80] effect over all other courts which should not enforce that null law any longer.[81]

Historically, the European form of judicial control was intended to have the same structure and legal effects as the American model; however, its implementation was followed by inconvenient circumstances.[82] Nevertheless, Europeans felt inspired by the North American constitutionalism under which the first modern written Constitution and Bill of Rights were born. The principle of Separation of Powers was also imported from the United States to Europe. Constitutional review, in particular, was of special interest to the Old World. Eventually, Europeans found the technique to adjust this constitutional machinery to their own institutional and sociological needs.[83]

Due to its individuality, the concentrated system of judicial review in Austria will be analyzed briefly and the German centralized method in more depth.[84]

Early in the twentieth century, the North American model was quite popular in Germany, France and Italy so that strong campaigns in favor of adapting this novelty to their judicial systems led important writers and politicians to reach an agreement. Namely, late in 1925 the French *Academie des Sciences Morales et Politiques* sponsored a conference at which prominent public law specialists concurred to influence ordinary

---

[79] *See* CAPPELLETTI, JUDICIAL REVIEW *supra* note 1, at 71, 72, suggesting that while in the United States judicial review is performed as "an incidental issue," in Germany this has to be exercised as "a principal issue" by a special organ and through special proceedings.

[80] This type of legal effect of judgments is called *erga omnes. See infra* pp. 39-42.

[81] *See* Favoreu, *Constitutional Review in Europe, supra* note 7, at 41.

[82] The American system did not prospered in Europe by virtue of the supremacy of the parliament, whose idiosyncrasy was to create laws but not expose them to judicial scrutiny. Hence, European judges did not have the capability of performing the active and audacious role of those judges of the United States. *See, e.g.,* Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 44, 45.

[83] *Id.*

judges to review the constitutionality of legislation.[85] In a parallel development, on the basis of the Federal Weimar German Constitution, in November 4, 1925, the highest German court, called Tribunal of the Empire, recognized the "power and the duty of the judge to examine the constitutionality of statutes of the Empire."[86] Nonetheless, ordinary judges rarely admitted the unconstitutionality of legislation so, practically, judges avoided the exercise of judicial review. In Italy, for instance, judicial review of legislation by ordinary courts was practiced only once through a decision by the Court of Cassation on July 28, 1947.[87]

The device did not find favor in European countries. The incompatibility of their legal systems was one of the most remarkable disadvantages. In the United States, the process of common law adjudication helped judicial review to germinate and to develop, whereas in most European countries the supremacy of legislative codes were not exposed to supervision by a judge.[88]

Another reason, which in terms of constitutionalism is crucial for the foundation of judicial review, was the absence of the notion of the supremacy of the Constitution over all existing legal orders. For instance, at that time, the position of the French Parliament was a significant factor in the American model's failure. If faced with a decision of unconstitutionality from the court, Parliament simply required the same majority which originally proposed the unconstitutional law to reaffirm its position in

---

[84] Although the overall pattern has been the same, Germany, France, Italy and countries of Central and Eastern Europe have adjusted it to their own legal and political practices.
[85] Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 43.
[86] *Id.; see also* BREWER-CARÍAS, *supra* note 1, at 203, 204, quoting the decision delivered by the Tribunal of the Empire, according to Article 102 of the Federal Weimar Constitution.
[87] Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 43.
[88] *Id.* at 44, 45; distinguishing the supremacy of the Constitution in the United States and the preeminence of legislation at that time in Europe.

order to make its desire prevail.[89] Moreover, contrary to the single judiciary system of the United States presided over by the Supreme Court, in Europe a plural judicial system was not suitable for the installation of a diffuse judicial control model.[90] Having more than one higher court in a given judicial system can lead to the creation of inconsistent interpretation and application of the Constitution. But, essentially, the "organs" were not capable of performing that duty. The European body of judges lacked the creativity and aggressiveness to deal with "quasi-political functions involved in judicial review."[91] The pusillanimity of Continental judges was due to their having a "bureaucratic career" and narrow judicial functions limited to civil service.[92] Only parliament could create the law and determine its fidelity to the Constitution disqualifying the judiciary as a equivalent branch with legitimate power to check legislative and executive acts.[93] Ultimately, after the failure of the American system, Europeans adopted the Austrian model designed for those countries with legal systems different from those of the United States.

The original formula of the Austrian model is embodied in the Austrian Constitution of October 1, 1920, proposed by the Austrian jurist Hans Kelsen.[94] The creation of this Constitution was the construction of a new democratic state concentrated in the judicial revision of legislation. Basically, the supremacy of the Constitution was the

---

[89] *Id.* at 45, 46; referring to *Carré de Malberg, La loi.*

[90] *Id.* at 45. In Germany, for instance, there is a court for each ordinary jurisdiction, one high court for civil and criminal questions, another for administrative matters, and a different one for tax disputes, labor problems and controversies involving social legislation.

[91] CAPPELLETTI, JUDICIAL REVIEW *supra* note 1, at 62-64; *See also* CAPPELLETI & COHEN, COMPARATIVE CONSTITUTIONAL LAW *supra* note 78 at 14.

[92] *See* THE CIVIL LAW TRADITION *supra* note 2, at 38. Establishing that judges from judicial traditions different from those of North American heritage have the influence of the early Roman Law in which judges (*iudex)* performed an exclusive role of arbitrator. "The settlement of disputes according to formulae supplied by another official (*praetor)*" was the main duty of the *iudex.* Since judges had limited knowledge of law their judicial power was also limited.

[93] Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 56.

enlightenment of his project, and thus a Constitutional Court as guarantor of that supremacy was designed. This court specially created by the constitutional provisions was not to be part of the ordinary judicial body,[95] yet it was to be the highest organ of the judicial system.

In contrast, the rest of the courts of the system would continue dealing with ordinary cases.[96] The original concentrated model of judicial review was designated to hear exclusively complaints of the federal executive, to review the constitutionality of state legislation and of the state governments, and to review the constitutionality of federal laws. Therefore, access by individuals was denied, and constitutional questions could not be raised during a concrete case.[97]

Hence, the question of the constitutionality of a law is brought before the court in an abstract and direct petition without referring a particular case and must be brought within the period of three years after the official publication of the law in question.[98]

After that phase, the oldest constitutional court in Europe extended its jurisdiction to electoral matters and disputes between the federal government and state authorities. The Austrian Court began to function also as a Superior Court of Justice to hear accusations of Parliament against the head of state or ministers. And the most notable

---

[94] *See* CAPPELLETI & COHEN, COMPARATIVE CONSTITUTIONAL LAW, *supra* note 78 at 13, 73. Note that the Czechoslovakian Tribunal was simultaneously created in its Constitution of February 29, 1920. However, the Czechoslovakian Tribunal did not succeed and soon it vanished; s*ee, e.g.,* BREWER-CARÍAS, *supra* note 1 at 195.

[95] Unequivocally all provisions regulating constitutional courts are isolated from the rest of ordinary courts' regulations. *See, e.g.,* FR. CONST. arts. 56-62; F.R.G. CONST. arts. 92-100; ITALY CONST. arts. 134-137; HUNG. CONST. § 32-A.

[96] *See* BREWER-CARÍAS, *supra* note 1, at 195,196.

[97] *See* CAPPELLETI & COHEN, COMPARATIVE CONSTITUTIONAL LAW, *supra* note 78 at 13. *See also* CAPPELLETTI, JUDICIAL REVIEW, *supra* note 1 at 71, 72, 73. Note, however, that in a 1929 reform of the Constitution, the access to the Constitutional Court was permitted "under some conditions to concrete needs of individuals." *See* Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 52.

[98] Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 51.

move was the consolidation of review of administrative acts alleged to violate fundamental rights protected by the Constitution.[99]

Access to the Constitutional Court has been also extended so that now not only the state governments can seek judicial review but the state legislature authority also. Even the court itself can raise constitutional questions.[100] The ways to seek constitutional review were expanded from direct petition to incidental form of judicial review. That is, when the higher Administrative Court, the Supreme Court and the Courts of Appeals face the dilemma of applying to a concrete case a statute whose constitutionality is questionable, an incidental referral is made by those courts to the Constitutional Court. Meanwhile, the main case is suspended and it can proceed only after the Constitutional Court adopts a judgment on the point at issue.[101] Therefore, it is considered that even though the Courts of Appeals, the Supreme Court and the Administrative Court cannot make use of judicial review power, these incidental means for judicial review allow them to acknowledge the unconstitutionality of laws but without annulling them. Since ordinary judges are banned from exercing any control over the constitutionality of legislation, the Constitutional Court has the "monopoly" of constitutional litigation.[102]

When reaching for resolution of a particular case, if the Constitutional Court finds that the statute or executive regulation applied to that resolution is unconstitutional, it can, as mentioned earlier, raise the question of unconstitutionality. However, this power is restricted. The Constitution establishes that even though the "Constitutional Court is convinced that a statute is unconstitutional, if the complete annulment of the statute

---

[99] AUS. CONST. art. 140.
[100] Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 52.
[101] *See* BREWER-CARÍAS, *supra* note 1, at 200.

would mean a manifest prejudice against the juridical interest of the individual claimant in a direct action, or of the plaintiff in the proceeding in which an incidental question was brought before the court, it must not annul the statute."[103] This measure coincides with later reforms made to the Austrian Constitution to hear individual claims. Individuals have access to the Constitutional Court in two instances. First, an individual can bring a "direct action" or claim complaining that a statute or regulation can affect his rights directly. However, it is necessary to demonstrate that the law in question applies directly to him[104] and that no administrative or judicial decisions have been made in regard to that law. Second, by an "indirect claim" individuals can allege a violation of their fundamental rights against administrative acts, but only when it is demonstrable that the administrative act was executed under a presumably unconstitutional law or statute. Thus, the court will limit itself to decide only the constitutional issue.[105]

The Austrian Superior Court is composed of the president and the vice-president, twelve members and six alternative members appointed by the President of the Republic and with the approval of the legislative authorities. All of them are chosen from among renowned judges of the highest ordinary courts, public officers and notable law professors. In order to secure the impartiality of constitutional judges, members are banned from participating in or being allied to political parties. Moreover, the president and vice-president of the Constitutional Court should not have occupied a political position in the government for four years before their designation.[106]

---

[102] *Id.*, at 196. *See also* Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 41.
[103] AUS. CONST. art 140(3).
[104] AUS. CONST. art. 140(1).
[105] AUS. CONST. art. 140(3).
[106] *See* BREWER-CARÍAS, *supra* note 1, at 197.

Thus, the Austrian model has had great influence in other European countries which exercise constitutional control. Germany, Italy and France, after the failed attempts to adopt the American style, decided to adopt the concentrated model, which offered a more appropriate structure for European judicial review.[107] Hence, since 1951 Germany has nourished this judicial activity, making the German Federal Constitutional Court the "most powerful in Europe since it has the widest jurisdiction."[108] Additionally, soon after its establishment, through a remarkable case the court instituted its authority. The Southwest Case (1951)[109] set forth the fundamental principles of constitutional interpretation and the court's most important constitutional policy. In fact, four striking conclusions were decided in this case:[110]

---

[107] Although it is considered that France practices a form of judicial control, it is not applied to its fullest. The French Constitutional Council *(Counseil Constitutionnel)* exercises *priori* abstract review; this form of review is done before the promulgation of the legislation. Professor Cappelletti estimates that France, in fact, "has been much more reluctant than most of the rest of Europe to participate in the 'constitutional revolution.'" Throughout its history, France has adopted parliamentary supremacy due to past events. During the *ancien regime*, higher courts of justice committed a large number of abuses. Their duty was to review acts of government to be in accordance with the fundamental laws of the realm, however, the "judges were so deeply rooted in the feudal regime that they found any liberal innovation unacceptable." Therefore, a popular repugnant attitude against judicial power arose. Nowadays, prominent French jurists point out that in the last fifteen years France has become as effective as other European countries exercising judicial review of the constitutionality of legislation. Nonetheless, Professor Cappelletti still finds at least two serious limitations in the French system of judicial review: 1) Individuals whose fundamental rights have been violated have no access to the *Conseil Constitutionnel*. 2) Legislation can be reviewed only between its enactment and promulgation, and once it is publicized, no judge can refuse to apply a law for unconstitutional reasons. *See* Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of Constitutional Justice*, 35 Cath. U.L. Rev. 110-14, 17-18 (1985)[hereinafter Cappelletti, *Repudiating Montesquieu?*]. Due to the fact that the present work intends to analyze the most effective forms of judicial review to be compared to the less effective one of Mexico, the French system of judicial review will not be included in this study. For a broader study of judicial review in France, *see,* Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. Rev. 363 (1982); Mike Bothwell, *Nicolo and the Push to 1992- The Evolution of Judicial Review in France*, 1990 B.Y.U. L. Rev. 1649 (1990).

[108] *See* Favoreu, *Constitutional Review in Europe supra note* 7, at 52.

[109] DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 23 (2nd ed. 1997) [hereinafter CONSTITUTIONAL JURISPRUDENCE OF F. R. G.]; citing the BVerfGE 1:14 case, (October 23, 1952) (Second Senate).

[110] DONALD P. KOMMERS, JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT, 209 (Sage Series on Politics and the Legal Order, vol. 5, 1976) [hereinafter JUDICIAL POLITICS IN WEST GERMANY].

1. The Constitutional Court is absolutely supreme in interpretation of the Basic Law (German Constitution).

2. It is the function of the court to examine the legality or validity of public policy.

3. The interpretation of constitutional provisions shall be within the context of the Basic Law as a whole.

4. Certain fundamental principles (democracy, rule of law and federalism) are inferred from the Basic Law as a whole.[111]

In the United States, the practice of judicial review was announced in Chief Justice Marshall's interpretation of the text of the Constitution. The judicial review power of the German Constitutional Court, by contrast, is confined by the Basic Law to pass upon the validity of legislative or executive decisions. Hence, the jurisdiction of the Federal Constitutional Court involves several important functions: protection of basic rights,[112] declaration of the unconstitutionality of political parties if they threaten to damage the democratic order or put at risk the existence of the Federal Republic of Germany,[113] and protection of federalism by resolving the federal-state conflicts, disputes between high state organs and intrastate constitutional disputes.[114] Furthermore, the court has "collateral norm control" jurisdiction through concrete judicial review initiated by a reference of ordinary courts which find relevant federal or state laws that violate the Basic Law.[115] In addition, the court should also determine the compatibility of federal and state

---

[111] *Id.* Comparing the Southwest case to American cases, such *Marbury v. Madison* and *McCulloch v. Maryland* due to their importance.
[112] *See* F.R.G. CONST. art. 1, *in* Federal Law Gazette II at 885.
[113] F.R.G. CONST. art. 21(2).
[114] F.R.G. CONST. arts. 84, (4); 93 (1) *1,3;* 99.
[115] F.R.G. CONST. art. 100 (1), (3).

case has arisen is in conflict with the Constitution. This court has the obligation to refer the case to the constitutional court and suspend the case until the constitutional question is resolved before proceeding with the ordinary lawsuit.[123] That is, every German court has the right to review the constitutionality of a law, yet the power to declare such a law null is exclusive to the Constitutional Court.[124]

The procedure of concrete judicial review provided in Article 100 of the Basic Law stipulates that the presumable unconstitutional law should be relevant to the issue and that the statute "has to be of importance" to the decision.[125] Accordingly, between ordinary courts and the Constitutional Court there exists an understanding when the condition of relevance is absolute. "A statute is only relevant, and hence qualified for concrete judicial review, if the subsequent decision of the court would be different if the statute were to be ruled unconstitutional by the constitutional court and therefore not applicable to the case in question."[126] Notwithstanding, the unconstitutionality of the law is entirely clear, only the Constitutional Court is able to question the constitutionality of a law. The importance and legal significance of concrete judicial review rests on the fact the Constitutional Court, aside from deciding exclusively if the law is constitutional or not, is dealing with a certain problem, and its carefully substantiated decision itself is of great importance. Hence, in most of the cases referred to the Constitutional Court for a

---

[123] Jörn Ipsen, *Constitutional Review of Laws, in* MAIN PRINCIPLES OF THE GERMAN BASIC LAW: The Contributions of the Federal Republic of Germany to the First World Congress of the International Association of Constitutional Law 111-113 (Christian Starck ed., 1983) [hereinafter Ipsen, *Constitutional Review of Laws*]. *See also* Steinberger, *supra* note 121, at 215. Donald P. Kommers, *German Constitutionalism: A Prolegomenon,* 40 Emory L. J. 837, 841, (1991) [hereinafter *German Constitutionalism*].

[124] *See* Steinberger, *supra* note 121, at 215, 223; noting that the only statutes subject to review are those formally enacted after the entry into force of the Basic Law (1949).

[125] *See* Ipsen, *Constitutional Review of Laws, supra* note 123, at 114, 115.

[126] *Id.* at 115.

concrete examination, with its ruling, the court settles almost all of the legal controversies.[127]

A more characteristic proceeding of the German system of judicial review is abstract review of laws.[128] This review involves a resolution of uncertainties about the compatibility of federal or state laws with the Basic Law or differences on the compatibility of state law with federal law.[129] The only applicants are the federal or state government or one-third of the members of the federal Parliament.[130] Therefore, it is not necessary for a real controversy, conflicting parties, nor injury in fact for the court to decide a constitutional question.[131] Applicants are required to submit written briefs and, less often, oral arguments. If the final judgment declares the law in question incompatible with the Basic Law, it signifies the nullity of the law. Certainly, the court engages in an "objective" proceeding, since the court's duty is to determine the validity or invalidity of a legal norm or statute.[132] The significance of this proceeding consists of a provision of supplementary protection to the Constitution due to the lack of contentiousness, because there is an applicant but not opponent on the petition.[133] The criteria adopted by the Court when exercising abstract judicial review is consequently in accordance with the general principles of the Constitution, adopting constitutional rules of procedure. Abstract judicial review, as an objective procedure to safeguard the Constitution, is not restricted.

---

[127] *Id.* at 116, 117.

[128] The range of abstract judicial review is much larger than that of concrete judicial review. Thus, matters subject to abstract judicial review include subordinate legislation, for example, executive orders, ordinances, and statutory instruments. *Id.* at 119.

[129] Contrary to concrete judicial review, every enacted norm is subject to abstract judicial review. Thus, statutes formally enacted before the entry into force of the Basic Law (1949) are equally examined as the post-constitutional statutes. *See id.*

[130] *See* Ipsen, *Constitutional Review of Laws, supra* note 123, at 118.

[131] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 13, 14. *See also* Denninger *supra* note 118, at 1026.

[132] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 13, 14.

It allows the Constitutional Court to review a law in every imaginable aspect.[134] The chief characteristic of this proceeding lies in its highly political nature due to the participation of governmental parties in the cases.

As noted, the court confines itself to declaring laws null and void or simply incompatible with provisions of the Basic Law and is not subject to case and controversy requirements. However, some limitations apply to the Constitutional Court.[135] If faced with moot questions, the court will refuse to decide the case. Also, in cases coming before the court on concrete judicial review, when the ordinary court refers the case to the constitutional court, it must prove that a constitutional question arises within the framework of actual litigation. Even in abstract review cases, the court must be certain that a real conflict of opinion exists between the norm and the governing institution exists.[136]

Likewise, the court is bound to exercise concrete judicial review of a law that dates prior to promulgation of the ratification of the Basic Law of 1949.[137] The principle of self-restraint has had significant effect also in the German Constitutional Court, and the court has imposed on itself certain limits when exercising its functions such as the refusal to review trivial constitutional complaints and all those in which the result would not clarify important constitutional questions.[138] The court will not anticipate a question of constitutionality in advance of the necessity for deciding it, nor will it issue temporary

---

[133] *See* Ipsen, *Constitutional Review of Laws, supra* note 123, at 121.
[134] *Id.* at 121, 122.
[135] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 50, 51.
[136] *Id.,* noting that Justiciability of constitutional complains depends of certain attributes of concreteness and particularity.
[137] *Id., see* Steinberger, *supra* notes 121 & 124 and accompanying text; *see also* Ipsen, *Constitutional Review of Laws, supra* note 123.
[138] *See* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 52.

injunctions against government agencies. Preferably, in such cases the Constitutional Court proceeds until it has time to consider the matter on its merits.[139] It has been emphasized by the court that it will not review or comment on issues which are "purely" political and already resolved by parliament as part of its duty.[140]

b) Methods the Constitutional Court Utilizes to Decide Constitutionality

The means on which the Constitutional Court relies in deciding constitutional questions ranges from textual interpretation to teleological explanation and from the principle of proportionality to an objective order of values. The Constitutional Court usually initiates its constructive task by looking at the technical meaning of the words and phrases in a given constitutional provision; in this context, the court also makes a structural analysis of the Basic Law as a whole.[141] Judges then examine the purpose of the Basic Law based on its language. Even though the principle of proportionality does not emanate from the Basic Law, the Constitutional Court has adopted it based on the rule of law to determine if legislation or other governmental acts conform to the values and principles of the Basic Law.[142]

The other form of interpretation developed by the Constitutional Court is called the objective order of values, which derives from the gloss of the Constitutional Court and is included in the Basic Law. According to this notion, the Basic Law incorporates the basic value decisions of the founders, the most fundamental of which is to achieve a

---

[139] *Id.* at 50, 51.
[140] Ipsen, *Constitutional Review of Laws, supra* note 123, at 133.
[141] JUDICIAL POLITICS IN WEST GERMANY, *supra* note 110, at 208-212.

free democratic order, such as a federal parliamentary democracy reinforced by basic rights and liberties.[143] These basic values are objective because they are said to have an independent reality under the Constitution, imposing on all organs of government an affirmative duty to see that they are realized in practice.[144] For example, every basic right in the Constitution is a negative right against the state, but it also represents a value which imposes positive obligations on the states to ensure that it becomes an integral part of the general legal order, including not only rights of individuals but all legal relationships.[145]

In recent years, the Constitutional Court has adopted a new position when deciding cases in which basic rights are implicated. It is referred to as "moderate liberal jurisprudence."[146] This position tends to favor and support an individual's claims without abandoning the equal treatment principle, however.[147]

c) The Constitutional Court and Its Autonomy

The autonomy that the Federal Constitutional Court has achieved has been a result of its tenacious performance. Although the Constitutional Court was described by the 1951 Federal Constitutional Court Act as "an autonomous court of the Federation independent of all other constitutional organs," the Constitutional Court did not enjoy that

---

[142] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 45, 46. The principle of proportionality is roughly the equivalent of the doctrine of Due Process of Law in the United States. *See, e.g.*, JUDICIAL POLITICS IN WEST GERMANY *supra* note 110, at 210.

[143] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 47.

[144] *Id.*

[145] *Id.*, quoting Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 41 Maryland L. R. 261 (1989).

[146] *See* JOHNSON, THE FEDERAL CONSTITUTIONAL COURT, *supra* note 119, at 134.

[147] *Id.* The Court adopted this posture when deciding the abortion cases in 1975 and 1993. For a deeper discussion about these cases, *see infra* Chapter IV § b), c) & d).

independence early in its establishment.[148] It was subjugated to the control of the Federal Ministry of Justice. Despite this, in its very first months, justices started a battle to achieve their autonomy by claiming that the Federal Ministry was acting against the Basic Law. They also argued that the Constitutional Court was a supreme constitutional organ of equal rank of the federal president and the parliament, and that justices were not simple civil servants or ordinary federal judges but the supreme guardians of the Basic Law.[149]

Moreover, they stressed that members of the Constitutional Court had a greater duty than those of the president and parliament: to ensure that other constitutional organs observe the limits of the Basic Law.[150] Finally, the court achieved, among other things, budgetary independence,[151] internal administrative control,[152] an equal position with the other correlative branches[153] and suggestions for removal of justices made exclusively by the Federal Constitutional Court itself to the Federal President (but Parliament may not impeach Justices).[154]

But above all, another victory was accomplished when their independence was crowned with the amendment of the disciplinary code regulating the German judiciary. The reform reads: "The provisions of this law apply to justices of the Federal

---

[148] JUDICIAL POLITICS IN WEST GERMANY, *supra* note 110, at 83. *See also* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 15, 16.

[149] *See* JUDICIAL POLITICS IN WEST GERMANY, *supra* note 110, at 84.

[150] *Id.* Stating that the Federal Constitutional Court functions as a constitutional organ of the Federal Republic and as a Court of Law.

[151] The salary of the President of the Constitutional Court is as high as that of one of the members of the cabinet.

[152] Early, at the establishment of the Constitutional Court, the Basic Law authorized parliament to regulate the court's organization and procedure. *See* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 15, 23. With its achievement, the Constitutional Court was able to control internal matters such as the hiring, firing and supervision of all law clerks, administrative personnel and staff library. *See also* JUDICIAL POLITICS IN WEST GERMANY, *supra* note 110, at 84, 85.

[153] The President of the Federal Constitutional Court now enjoys the fifth-highest position in the Federal Republic of Germany, after the federal president, the Chancellor, and the presidents of the two houses of parliament (*Bundesrat* and *Bundestag).* The rest of the Justices follow in rank.

[154] JUDICIAL POLITICS IN WEST GERMANY, *supra* note 110, at 85; allowing Justices to concentrate better on their judicial functions without political ties to parliament.

Constitutional Court only to the extent that they are compatible with their special status under the Basic Law and with the Federal Constitutional Court Act" (FCCA).[155]

In 1969 the Basic Law was amended to confirm the special status of the Court in Germany's political system, so that today, during a state of emergency and defense "the constitutional status and the performance of the constitutional functions of the Federal Constitutional Court and its judges shall not be impaired."[156] Finally, the Basic Law states that "[t]he judges are independent and subject only to the law."[157] According to this provision, all courts are independent of orders of other correlative branches, being "bound only by law and justice."[158] The court has also insisted that judicial independence is achieved by a predetermined and stable remuneration which should be regulated by law and removed from the intervention of the executive branch.[159]

A Justice's tenure in court is a term of twelve years which is not renewable nor extendible beyond the retirement age of sixty-eight.[160] The Basic Law and the FCCA provide general regulations regarding the process of removing and impeaching constitutional judges. A singular provision contained in the FCCA states that constitutional

---

[155] *Id.,* citing the German judiciary code "*Deutsches Richtergesetz,* vol. 8 September 1961(BGBI. I, p.1665), sec. 92."

[156] *See* F.R.G. CONST. art. 115g. Likewise, the Federal Constitutional Court Act (FCCA) states that "the Federal Constitutional Court shall be a federal court of justice independent of all other constitutional bodies. *See* FCCA art. 1 (1) *in* POLITICS AND GOVERNMENT IN GERMANY 1944-1994, BASIC DOCUMENTS 289 (Carl- Christoph Schweitzer et al. eds. 1995) [hereinafter FCCA].

[157] F.R.G. CONST. arts. 20(3), 97(1). *See also* Denninger, supra note 118, at 1025.

[158] Ulrich Karpen, *Application of the Basic Law*, *in* MAIN PRINCIPLES OF THE GERMAN BASIC LAW: The Contributions of the Federal Republic of Germany to the First World Congress of the International Association of Constitutional Law 76 (Christian Starck ed., 1983).

[159] CAPPELLETI & COHEN, COMPARATIVE CONSTITUTIONAL LAW, *supra* note 78, at 330.

[160] *See* FCCA art. 4 (1), (2), (3), (4). *See also* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 20, 21; indicating that justices who reach the age of sixty-eight without completing twelve years in function should leave office, regardless.

judges "may ask to be released from service at any time."[161] Moreover, the Basic Law emphasizes that:

> Judges appointed on a tenured, full-time basis to an established post cannot, against their will, be dismissed, or permanently or temporarily suspended from office, or transferred to another post, or retired before the expiration of their term of office except by virtue of a judicial decision and only on the grounds and in the form provided by law . . . In the event of changes in the structure of the courts or their areas of jurisdiction, judges may be transferred to another court or removed from their office, provided they retain their full salary. [162]

Both provisions are enacted to procure the right to an impartial judge, free from improper influence.[163] The process of appointing the members of the court is realized by the two houses of parliament, with half of the members elected by the *Bundestag* and half by the *Bundesrat.*[164] Since the Constitutional Court is integrated by two independent panels, both composed of eight justices,[165] each house elects four members of each panel. This process of appointing the members of the court permits that each house has candidates of different political groups. Nonetheless, the FCCA indicates that "[t]hree judges of each panel shall be elected from among the judges of the highest federal courts of justice" who have an historical service for at least three years.[166] However, the Basic Law reserves that the elected judges should not belong to any house of parliament, the

---

[161] FCCA art. 12.
[162] *See* F.R.G. CONST. art. 97(2)
[163] CAPPELLETI & COHEN, COMPARATIVE CONSTITUTIONAL LAW, *supra* note 78, at 321, 322.
[164] FCCA art. 94.
[165] FCCA art. 2 (1), (2); The most important structural feature of the Constitutional Court is its division into two panels with mutually exclusive jurisdiction and personnel. The twin-panel idea was to achieve a fluid system in a fixed collegial body like that of the U.S. Supreme Court. The First panel has jurisdiction over constitutional issues or "non political" matters, i.e. concrete and abstract norm control and constitutional complaints. By contrast, the Second panel is vested with jurisdiction over "political" cases, i.e. constitutional conflicts between organs and levels of government, settlement of contested elections and ruling in the constitutionality of political parties. *See, e.g.,* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 16-18; *See* JUDICIAL POLITICS IN WEST GERMANY *supra* note 110, at 86, 87.

federal or state government.[167] It has been considered that constitutional judges are chosen according to their views on federalism and regardless of individual ideologies.[168]

d) Effects of Constitutional Adjudication

Originally, the effect of constitutional adjudication in this system is of general applicability since the judges are not responsible for deciding a concrete case, but rather for deciding the abstract question of the constitutionality of a law.[169] The syllogism in a concentrated system of review, therefore, is that the decision should apply to everybody and to all state organs, and thus the *erga omnes* principle operates.[170] That is, when a judge declares an act unconstitutional, the ruling means that the act is null and consequently has no further legal effect for anybody, as if it were abolished by a subsequent legislative act so it should disappear from the legal order.[171] Due to the fact that the form of review in the concentrated system is fundamentally of invalidity and effectiveness of a law contrary to the Constitution, the judgment of unconstitutionality functions prospectively *pro futuro* or *ex nunc*, without any retroactive effect.[172]

Thus, remarkably, within the archetype of the Austrian model, an unconstitutional law may have validity and efficacy up to the moment when the decision of the Constitutional Court is published. But above all, the court may even order that the invalidation of the law shall operate only from a fixed date subsequent to the publication

---

[166] FCCA art. 2 (3).
[167] *See* F.R.G. CONST. art. 94(1); *See also* FCCA art. 3(3)
[168] PHILIP BLAIR, FEDERALISM AND JUDICIAL REVIEW IN WEST GERMANY 22, 24 (1981).
[169] *See* BREWER-CARÍAS, *supra* note 1 at 193-194.
[170] *See* Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 41.
[171] *See id. See also* CAPPELLETTI, JUDICIAL REVIEW, *supra* note 1, at 85, 86.
[172] CAPPELLETTI, JUDICIAL REVIEW, *supra* note 1, at 88-91.

of the decision, but nevertheless, the delay should not exceed a period of time of one year.[173]

However, modern practical considerations have influenced the Federal German Constitutional Court to consider the judgment of unconstitutionality of retroactive effect *ex tunc* rather than prospective significance *ex nunc*.[174] It was considered absurd and even unfair to leave the injured plaintiff in a constitutional suit without a remedy. In other words, the strict applicability of prospective effect of judgments permits the decision of the court not to have any effect upon the very case pending before the court in the course of which the question of constitutionality arose.[175] That concern reached specially the criminal sphere where it was provided a set of regulations to permit new trials in criminal cases in which a court convicts a defendant under a subsequently voided statute.[176]

Accordingly, the German Constitutional Court in practice has either adopted retroactive-prospective effect theories or instead demonstrated a realistic approach adjusting case by case the extent of its decisions.[177] Peculiarly, the court also has the discretion to employ diversified decisional modes. For example, it can declare a law totally null or simply incompatible with the Basic Law. In the first case the law instantaneously ceases to operate; in the second case, by contrast, it remains in force

---

[173] *Id.* at 89.

[174] *Id.* at 91; identifying three as the most notable motivations which persuaded not only Germany but also the United States and Italy to abandon the strict adherence to the theory of the constitutive non-retroactive effect of judgments: 1. The need to grant relief to the plaintiff who brings his constitutional complain before the court. 2. The reliance factor which direction is the "pragmatic and broad-minded way of thinking." 3. The Criminal defendant: a notion that strongly defends the retroactive application of a constitutional decision upon a person who is serving a penal sentence after being convicted of violating a law subsequently declared unconstitutional. *Id.* at 91-96. *See also* BREWER-CARÍAS *supra* note 1, at 213, 214.

[175] CAPPELLETTI, JUDICIAL REVIEW, *supra* note 1, at 88-92.

[176] *See* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 54; citing article 79 (1) of the FCCA.

[177] CAPPELLETTI, JUDICIAL REVIEW, *supra* note 1, at 94, 95.

because the law was held unconstitutional but not void.[178] Among the reasons why the court declares a law unconstitutional but not null are to diminish political impact in its decisions and to avoid the burden as a result of a complete avoidance of a law.[179] Interesting enough, in these circumstances the court advises the legislative branch to make the necessary corrections within a period of time also designated by the court.[180] In all cases, the court's decision, including those that declare a legal provision compatible with the Basic Law, have the force of binding law, and consequently, all constitutional organs of the federation, all authorities, all courts and all individuals are bound.[181] The legislature is constrained from re-enacting a law after it has been announced unconstitutional. Moreover, the binding effect principle applies, in fact, to the ruling of the case and to the fundamental reasoning on which it was grounded.[182] Exceptionally, when those binding effects do not approach the Constitutional Court, it is not ruled by the *stare decisis* principle as in the case of the United States Supreme Court where it obeys its precedent rulings.[183] While reluctant to depart from principles laid down in its case law, the court will readily do so but only if convinced that it erred in an earlier ruling.[184]

Despite the fact that in Germany, as a code-based system, the judiciary performs a passive role, the institutionalization of a Constitutional Court resulted in an achievement of a democratic-libertarian form of government with the capability to check and limit

---

[178] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 53.
[179] *See* Ipsen, *Constitutional Review of Laws supra* note 123, at 132, 133; Referring to Constitutional Court's decisions saying that consequences of invalidity would be too far-reaching.
[180] *Id.; See also* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 53.
[181] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 54; *See also* BREWER-CARÍAS, *supra* note 1, at 213, 214.
[182] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 54; indicating that basic standards of review in which the law is upheld or nullified, but not the various arguments arranged in support of a particular result are which constitutes those fundamental reasoning.
[183] *Id. See also supra* note 72 and accompanying text.
[184] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 54.

correlative branches and subsequently to avoid abuses to individuals.[185] Furthermore, the court's moral authority and the willingness of the political arms of the government to obey its mandates have resulted in an absolute legitimacy of court's performance[186] which reflects its "complex legal political role with great success and a high regard for continuity."[187]

[185] *See generally,* Cappelletti, *Repudiating Montesquieu? supra* note 107; emphasizing the importance of "Constitutional Justice" as an instrument to attain Separation of Powers and to protect of human rights.
[186] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 55.
[187] *See* JOHNSON, THE FEDERAL CONSTITUTIONAL COURT, *supra* note 119, at 131.

Chapter III.

The Mexican Version of Judicial Review (The *Amparo* Proceeding)

a) Origin and Scope

Legal scholars have defined the constitutional control practiced in Mexico as a judicial review similar to the European one.[188] For others, however, it is the American model which Mexico has followed.[189] It has also been suggested that the Mexican system is "mixed or composite," due to the fact that the constitutional question does not arise exclusively as a direct action, as in the European model, nor does it emerge in an incidental form during an ordinary case, as in the American system.[190]

The power to resolve constitutional controversies is conferred to federal courts together with the Supreme Court of Justice of the Nation as the highest court,[191] in which the exercise of the Judicial Power of the Nation is also deposited.[192] One may say that the

---

[188] *See* CAPPELLETTI, JUDICIAL REVIEW *supra* note 1, at 76, 77. His deductions come from the idea that in Germany and Italy the processes of control are brought as a direct action, purely to examine the constitutionality of a given law before the court as it is practiced in Mexico. *See also* HECTOR FIX ZAMUDIO, EL JUICIO DE *AMPARO* 80, 81 (1961 Mex.)[hereinafter FIX ZAMUDIO, JUICIO DE *AMPARO*]; stating that in Germany individuals make use of constitutional complaint proceeding to reclaim their violated rights which are protected by the Basic Law, while similarly in Mexico, particulars make use of the *Amparo* proceeding to protect their rights protected by the Constitution against acts of authorities.

[189] *See* BREWER-CARÍAS, *supra* note 1 at 156, 163. Noting that after the great influence of the United States' legal system during the nineteenth century, Mexico conserves a peculiar system with the so-call trial for constitutional protection which he considers a "unique and complex institution." *See also* RICHARD D. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE *AMPARO* SUIT (1971) [hereinafter BAKER]. *See* FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 68-70, 170, 379.

[190] *See* CAPPELLETTI, JUDICIAL REVIEW, *supra* note 1, at 77.

[191] *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 105 (Mex) [hereinafter Mex. Const.]. The Supreme Court is made up of eleven justices and consists of two chambers, one for administrative and labor cases, the other for civil and criminal cases.

[192] Mex. Const. art. 94 paragraph 1.

hierarchical position of the Supreme Court of Justice is equivalent to that of the Supreme Court of the United States and to the Constitutional Tribunal in Germany as the highest court within its political legal system.[193]

The effect produced by constitutional decisions is only *inter partes* and can never consist of general declarations with *erga omnes* effect. Peculiarly, the court's decisions are allowed to declare laws unconstitutional but rarely null or void,[194] and those unconstitutional laws remain in effect.[195] The fact that declarations of unconstitutionality made by the Supreme Court of Justice affect solely the parties of the case at bar conforms to historical and ideological factors. The power to declare a law unconstitutional with binding effect on all governmental bodies is seen as an interference by the judiciary in the legislative branch. Hence, the practice of allowing laws found violative of the Constitution to remain in effect is a way of preventing the Supreme Court of Justice from assuming legislative functions which constitutionally belong to the people and their elected representatives.[196]

The first vestiges of constitutional control in Mexico were not of judicial character.[197] The *Supremo Poder Conservador,* a political agency of constitutional

---

[193] To distinguish the two Supreme Courts, the words "of Justice" will be added to the Mexican Supreme Court.
[194] Late December 1994, a Constitutional Judicial Reform was implemented to declare a law invalid as long as a majority of eight members of the Supreme Court of Justice agree; *see* Mex. Const. art. 105, § II. The 1994 reforms and *Acciones de Inconstitucionalidad*, as main part of these reforms, are described in Chapter V § b).
[195] *Id.* art. 107 (II); *see also* FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 235, 285, 286, 379; noting that it is the "relativity principle," a characteristic legal standard in the Mexican legal system. For further discussion *see infra* Chapter III § c).
[196] Mex. Const. art. 71 § 2nd (I, II). *See also* Lucio Cabrera and William C. Headrick, *Notes on Judicial review in Mexico and The United States* published in Revista Jurídica Interaméricana vol. V., *in* COMPARATIVE CONSTITUTIONAL LAW: MEXICO, UGANDA & UNITED STATES, Cases, Articles, Comments and Questions 248, 254 (Fletcher N. Baldwin, Jr. ed., 1974)[hereinafter Cabrera & Headrick].
[197] *See* BAKER *supra* note 189.

defense, was created by the Constitution of 1836 and is also known as the *Siete Leyes*.[198] This institution's main duties were to arbitrate and to constrain the three ordinary branches of the government to follow the Constitution. Also among other tasks,[199] it had the capability to declare the nullity of legislation, any executive act or even any proceeding of the Supreme Court of Justice contrary to the Constitution.[200] Its functions did not last for long, since it did not have a political structure strong enough to allow it to carry out such great and arbitrary power.[201] The five members of the *Supremo Poder Conservador* were said to be responsible "only to God and public opinion." All its decisions were declared to be immediately obligatory and immune from question or objection.[202]

After functioning for five years, an 1840 reform to the *Siete Leyes* suspended the *Supremo Poder Conservador.* The new reform proposed that some of those functions would be better performed by a judicial organ.[203] The study of Alexis de Tocqueville, *Democracy in America*, had a great influence on politicians and legal scholars at that time. Through Tocqueville's masterpiece, they found that the United States Supreme Court was the organ to interpret and to resolve constitutional questions. Also during a congressional session a minority report was submitted[204] alleging that the United States Supreme Court went far to account for the peace and tranquillity of its country by

---

[198] *See* FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 61, 62. *See also* BAKER *supra* note 189, at 8, 9; EMILIO RABASA, EL ARTÍCULO 14 Y EL JUICIO CONSTITUCIONAL 231 (1969 Mex.)[hereinafter EMILIO RABASA]; *See* FELIPE TENA RAMÍREZ, DERECHO CONSTITUCIONAL MEXICANO 457, 458 (1968 Mex.)[hereinafter TENA RAMÍREZ]. It was a clear influence of the French culture among Mexican scholars. They imitate the *Sénat Conservatour,* institutionalized in the VIII French Constitution from ideas of Napoleon Bonaparte.

[199] Technically, it was granted with a great range of power over procedures, polices and personnel of government.

[200] *See* BAKER *supra* note 189, at 8, 9; *See also* FIX ZAMUDIO, JUICIO DE *AMPARO supra* note 188, at 61, 62.

[201] The *Supremo Poder Conservador* lacked the command of the armed forces, impartiality, political independence, integrity and a docile population.

[202] *See* BAKER *supra* note 189, at 9.

[203] *See* EMILIO RABASA, *supra* note 198, at 231.

holding "an immense power."[205] Yet, this power was not that of the "brute use of violence" but a force based on judicial opinions in imparting "justice and equity."[206] The report also stated that the judiciary was apart from common stresses and temptations of public life, and because of its insolation possessed an impartiality that was indispensable for the "calm and just resolution of those great constitutional questions upon which the preservation of public peace and good order may largely depend."[207] The report proposed that by a trial utilizing the ordinary procedures of a lawsuit, the Supreme Court of Justice should decide the constitutionality of laws whenever the executive fourth part of the deputies should challenge their validity.[208] The same procedure was also recommended for testing the constitutionality of executive acts by Congress.[209]

Despite the aims to imitate the United States model, the final result was far from the original. In practice, the proceedings consisted of a suit between official persons, a direct contest between two or more branches of government in their official capacity.[210] At that time the political conditions prevailing in Mexico were not suitable for the installation of any "constitutional technique."[211] However, those considerations are of relevant importance as the foundations of judicial control of constitutionality which gradually gained predominance in the country.[212]

Years later, as a result of separatist acts, a state member of the Mexican union (Yucatán) commissioned one notable state-native jurist to design a totally new

---

[204]The report was presumably elaborated by José Fernando Ramírez, a member of the Chambers of Deputies.
[205] *See* TENA RAMÍREZ, *supra* note 200, at 459, 460.
[206] *Id.*
[207] *See* BAKER, *supra* note 189, at 10, 11.
[208] *Id.* at 11.
[209] *See* TENA RAMÍREZ, *supra* note 198, at 459.
[210] BAKER, *supra* note 189, at 10, 11.
[211] TENA RAMÍREZ, *supra* note 198, at 459.

Constitution sufficient to create an independent state. Having experienced an anarchic system and the arbitrariness of despotic authorities, Manuel Crescencio Rejón created a judicial procedure of constitutional defense for the Yucatán State late in 1840.[213] Influenced by the United States Constitution, he included a bill of rights, which was to be protected by a Supreme Court. This court was to be created with sufficient power to defend individuals in the enjoyment of both their civil and political rights against the application of unconstitutional laws and illegal executive actions.[214] It was intended that the Supreme Court would also exercise a general and inclusive power of constitutional defense, covering the organic sections as well as the bill of rights. In all cases, the courts were to act only upon the motion of the injured party and exclusively for the purpose of making reparation for the injury suffered.[215] Once again, Tocqueville's *Democracy in America* played an important role in Rejón's work. His understandings of the institution of judicial review and his expectations about its legal effect and practical results were included in the exposition of motives[216] of the proposed Constitution:

> The political power which the Americans have entrusted to their courts of justice is. . . immense, but the evils of this power are considerably diminished by the impossibility of attacking the laws except through the courts of justice. If the judge had been empowered to contest the law on the ground of theoretical generalities, if he were able to take the initiative and to censure the legislator, he would play a prominent political part; and as the champion or the antagonist of a party, he would have brought the hostile passions of the nation into the conflict. But when a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice; his decision bears upon the interest of an individual, and the law is

---

[212] *Id.*
[213] *See* EMILIO RABASA, *supra* note 198, at 231.
[214] BAKER, *supra* note 189, at 12-14.
[215] *Id.* at 15.
[216] "Exposition of motives" is a statement appended to a proposed statute or other legal drafts explaining the necessity for such legislation and, normally, the manner in which the proposal is to function.

> slighted only incidentally. Moreover, although it is censured, it is not abolished; its moral force may be diminished, but its authority is not taken away; and its final destruction can be accomplished only by the reiterated attacks of judicial functionaries.[217]

Rejón's thoughts coincided with Tocqueville's in a view which is more consistent with the civil law system than with the common law system, and therefore the adaptation of the American model was restricted rather than total, partly because of the French influence.[218] However, it was unavoidable that constitutional control by judicial means would be introduced into Mexican political thought.

Thereupon, Rejón added his owns ideas for the inception of a new constitutional institution. In one of the articles, he created what it is now recognized as a constitutional procedure in Mexico. He wrote: "It is the duty of the Supreme Tribunal to provide protection (*amparo*) to all those who ask it against unconstitutional laws or decrees and illegal executive acts, in order to repair the injury caused to their constitutional rights."[219]

It was not until 1847 that Rejón's project was institutionalized at a national level by another prominent jurist, Mariano Otero. Otero structured Rejón's ideas to implement them in a federal Constitution.[220] Today, the Mexican Constitution in force embodies the

---

[217] IGNACIO BURGOA, EL JUICIO DE *AMPARO* 117, 118 (1977 Mex.), referring *Democracy in America* by Alexis de Tocqueville. *See also* TENA RAMÍREZ, *supra* note 198, at 460-463.

[218] BAKER, *supra* note 189, at 33; noting that from advocates' arguments of judicial control of constitutionality, it is evident the great influence of French scholars, such as Montesquieu, Rousseau, Sismondi de Sismondi, Tocqueville and Villemain. Thus, the general ideas of constitutionalism, the purposes of government, and the rights of men were the heritage of the French Revolution; s*ee* FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 371-374.

[219] EMILIO RABASA *supra* note 198, at 232; emphasizing that this was the first time that the term *"amparar,"* (to protect), was employed to consecrate constitutional limitations.

[220] *See* TENA RAMÍREZ, *supra* note 198, at 460-465, stating that Otero's will was placed at service of Rejón's thought.

principles and ideas of both Rejón and Otero, who are considered the founders of judicial control of legislation.[221]

The principle of the supremacy of the Constitution is established in the Mexican Constitution, which is considered as "rigid."[222] However, in Mexico the provision of constitutional supremacy has not been broadened as much as Chief Justice Marshall did for the United States' counterpart. Marshall's reasoning allowed every court in the United States to declare a statute unconstitutional whenever, in the course of any suit, a conflict arises between a statute and the Constitution.[223] Nor did Mexicans proceed as Professor Hans Kelsen did in Europe in institutionalizing judicial review to be exercised by a specialized court.[224] The theory of judicial review in Mexico was, instead, a development based on legislation and an original purpose of protecting individual rights. Thus, in Mexico, what is called "judicial review" in the United States and in Europe, corresponds to the *Amparo* proceeding or "*Juicio de Amparo,*"[225] which is used to declare laws and acts of authority unconstitutional.[226]

---

[221] FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 371-374.

[222] *See* Mex. Const. art. 133; it reads, "[t]his Constitution, the Laws of Congress of The Union that emanate therefrom, and all Treaties that have been made and shall be made in accordance herewith by the President, with the approval of the Senate, shall be the Supreme Law of the whole Union. The Judges of each State shall comply with the said Constitution, Laws and Treaties, . . . anything in the Constitution or Laws of the States notwithstanding." Although Mexican magistrates classify their Constitution as rigid since it cannot be amended by ordinary legislation, in practice, it has been quite easy to amend. Article 135 requires a two-third vote of each legislative house and an absolute majority vote of the state legislatures to amend the Constitution; however, Mexico has amended its Constitution 359 times in less than half the time that the United States has exercised twenty-six amendments. *See* Smith, *Confronting Differences, supra* note 4, at 94, 95. However, according to Mexican scholars in the Roman Law tradition there was a need for certainty in laws, writing complete legal codes. Therefore, the big number of reforms in the Constitution concurs with the idea of "perfection of law;" *see, e.g.,* SERGIO ELIAS GUTIERREZ & ROBERTO RIVES, LA CONSTITUTION MEXICANA AL FINAL DEL SIGLO XX (1995 Mex.). *See also* MERRYMAN, THE CIVIL LAW TRADITION *supra* note 2.

[223] *See* Barker, *Constitutionalism in the Americas, supra* note 2, at 910.

[224] CAPPELLETI & COHEN, COMPARATIVE CONSTITUTIONAL LAW, *supra* note 78 at 13.

[225] The primary purpose of the *Amparo* proceeding from its inception to the present day has been the preservation of freedom from unjustified imprisonment and of private property against arbitrary acts of government.

[226] Cabrera & Headrick, *supra* note 196, at 248.

principles and ideas of both Rejón and Otero, who are considered the founders of judicial control of legislation.[221]

The principle of the supremacy of the Constitution is established in the Mexican Constitution, which is considered as "rigid."[222] However, in Mexico the provision of constitutional supremacy has not been broadened as much as Chief Justice Marshall did for the United States' counterpart. Marshall's reasoning allowed every court in the United States to declare a statute unconstitutional whenever, in the course of any suit, a conflict arises between a statute and the Constitution.[223] Nor did Mexicans proceed as Professor Hans Kelsen did in Europe in institutionalizing judicial review to be exercised by a specialized court.[224] The theory of judicial review in Mexico was, instead, a development based on legislation and an original purpose of protecting individual rights. Thus, in Mexico, what is called "judicial review" in the United States and in Europe, corresponds to the *Amparo* proceeding or "*Juicio de Amparo,*"[225] which is used to declare laws and acts of authority unconstitutional.[226]

---

[221] FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 371-374.

[222] *See* Mex. Const. art. 133; it reads, "[t]his Constitution, the Laws of Congress of The Union that emanate therefrom, and all Treaties that have been made and shall be made in accordance herewith by the President, with the approval of the Senate, shall be the Supreme Law of the whole Union. The Judges of each State shall comply with the said Constitution, Laws and Treaties, . . . anything in the Constitution or Laws of the States notwithstanding." Although Mexican magistrates classify their Constitution as rigid since it cannot be amended by ordinary legislation, in practice, it has been quite easy to amend. Article 135 requires a two-third vote of each legislative house and an absolute majority vote of the state legislatures to amend the Constitution; however, Mexico has amended its Constitution 359 times in less than half the time that the United States has exercised twenty-six amendments. *See* Smith, *Confronting Differences, supra* note 4, at 94, 95. However, according to Mexican scholars in the Roman Law tradition there was a need for certainty in laws, writing complete legal codes. Therefore, the big number of reforms in the Constitution concurs with the idea of "perfection of law;" *see, e.g.,* SERGIO ELIAS GUTIERREZ & ROBERTO RIVES, LA CONSTITUTION MEXICANA AL FINAL DEL SIGLO XX (1995 Mex.). *See also* MERRYMAN, THE CIVIL LAW TRADITION *supra* note 2.

[223] *See* Barker, *Constitutionalism in the Americas, supra* note 2, at 910.

[224] CAPPELLETI & COHEN, COMPARATIVE CONSTITUTIONAL LAW, *supra* note 78 at 13.

[225] The primary purpose of the *Amparo* proceeding from its inception to the present day has been the preservation of freedom from unjustified imprisonment and of private property against arbitrary acts of government.

[226] Cabrera & Headrick, *supra* note 196, at 248.

The constitutional foundations of Mexican judicial review are based almost exclusively upon the explicit authorization contained in Articles 103 and 107 of the Constitution:

> Article 103: The Federal courts shall decide all controversies that arise:
>
> I. From laws or acts of the authorities that violate individual guarantees;
>
> II. From laws or acts of the federal authority restricting or encroaching on the sovereignty of the states, and
>
> III. From laws or acts of the state authorities that invade the sphere of federal authority.
>
> Article 107: All controversies mentioned in Article 103 shall be subject to the legal forms and procedures prescribed by law in accordance with the following rules:
>
> I. The *Amparo* suit shall always be prosecuted at the instance of the injured party.

Under these provisions, the exercise of all constitutional questions are decided by means of a single action. The procedural rules are contained in the *Amparo* Law, Regulating Articles 103 and 107 of the Constitution and in the Organic Law of the Judicial Power of the Federation.

Although the Mexican *Amparo* proceeding[227] is considered an "essential unity," it has five facets:[228]

1. The *Amparo* as protection of liberty. It was built to protect fundamental rights (guarantees) of the individuals established in the first twenty-eight articles of the

---

[227] Before 1857 the *Amparo* institution was exercised exclusively in Mexico. However, this Mexican invention was of great influence in other countries which have adopted this institution. In Argentina since 1957 the *Amparo* was established not by provision or statute but by a decision of the Argentine Supreme Court. However, note that the Argentine Supreme Court adopted a decentralized system of judicial review in 1887 without explicit constitutional support. Today, Argentina's 1994 constitutional reform authorizes judicial review; *See* Barker, *Constitutionalism in the Americas, supra* note 2, at 910. Spain also adopted the *Amparo* model by its Constitution of 1931, Honduras in 1886, Cuba in 1900 and Nicaragua in 1948, *see* FIX ZAMUDIO, JUICIO DE *AMPARO supra* note 188, at 70-72.

[228] Professor Fix Zamudio designed this classification in order to facilitate the study of this "complex procedural institution," *see* FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 376, 377.

Constitution.[229] The procedure can be initiated on behalf of someone who is impeded by another person, at any time of the day or night, and before any judicial authority whose jurisdiction is the same as the authority trying to execute the violation, but with the obligation to refer the case to the corresponding federal court.[230]

2. Administrative *Amparo,* brought by individuals, challenges acts of the public administration that violate the Constitution or federal laws.[231]

3. Judicial *Amparo* (cassation) proceeds against judicial or quasi-judicial decisions on the basis of error in selecting, applying, or interpreting secondary legislation; that is, all laws except articles of the Constitution.[232]

4. Agrarian *Amparo* is a variation of the administrative *Amparo.* Its creation was an attempt to protect groups of organized peasants in accordance with the Mexican system of communal agrarian propriety. It consists of an exceptional procedure, under the supposition that it serves people who lack legal knowledge and the economic means to obtain adequate counseling.[233]

5. An *Amparo* Against Laws is used to challenge laws which violate the Constitution; therefore, such an action provides the judiciary with a means of directly reviewing the constitutionality of legislation. This facet of the *Amparo* is considered as

---

[229] In essence the rights protected in this first section of the Constitution are those rights inherent to human beings, such as the right to life, to liberty, traditional civil liberties such as freedom of speech, press and assembly, property and social rights, rights in civil and criminal procedure and the right to be protect from torture, exile and deportation, etc.

[230] FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 378. The *writ of habeas corpus,* instrument used in the United States to protect individual freedom against arbitrary arrest, was the archetype for this aspect of the *Amparo.* It protects not only the right of liberty but also all individuals guarantees contained in the Constitution.

[231] *Id.* at 382, 383.

[232] *Id.* at 381, 382. *See also* BAKER *supra* note 189, at 174, 175.

[233] Pedro Pablo Camargo, *The Claim of "Amparo" in Mexico: Constitutional Protection of Human Rights, in* COMPARATIVE CONSTITUTIONAL LAW: MEXICO, UGANDA & UNITED STATES, Cases, Articles, Comments and Questions 412 (Fletcher N. Baldwin Jr. ed., 1974). [hereinafter *The Claim of "Amparo"*].

the most specific in its aspects of constitutional justice, it being of special interest in this work .[234]

Briefly, the first four facets of the *Amparo* are used as a means for judicial review of legislation when a constitutional question, having been raised in a particular proceeding, is determined to be adverse to the interest of the party raising the issue. That is, if an individual alleges that a judicial decision was given under the basis of an invalid statute and that such decision has been affecting his constitutional rights, the individual can exercise an *Amparo* against the judicial decision and seek judicial review of legislation.[235] This allegation must be brought before one of the Collegiate Circuit Courts, according to their respective jurisdictions, or to the Supreme Court of Justice. If the case is brought before the former, a review by the Supreme Court of Justice would be granted again only if a constitutional issue is involved.[236] However, the Supreme Court of Justice may refuse to review a decision of the Collegiate Circuit Court if it was based on a precedent established by the Supreme Court of Justice as to the constitutionality of a law or the direct interpretation of a provision of the Constitution.[237]

In all of the first four aspects of the *Amparo,* judicial review of legislation has an incidental character within a concrete judicial proceeding. For these particularities, the Mexican system of judicial review is considered to exercise the American model of judicial review. Nevertheless, in Mexico only federal courts have jurisdiction for the *Amparo* proceeding, and the parties involved in the suit are always individuals against a

---

[234] *Id.* at 378, 379. *See also* BAKER, *supra* note 189, at 164-174.
[235] FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 378.
[236] *Id. See also* Mex. Const. art. 107 IX: Resolutions, in direct *Amparo* rendered by a Collegiate Circuit Court, are not revisable unless the decision involves the unconstitutionality of a laws or establishes a direct interpretation of a provision of the Constitution. In that case it may be taken to the Supreme Court of Justice, limited exclusively to the decision of actual constitutional questions.

public authority, so to speak: the legislator who approved the law, the judge who has dictated the decision or the administrative authority which has executed the act.[238]

According to Professor Fix Zamudio, the fundamental characteristic of the *Amparo* Against Laws is that it is "a strict constitutional proceeding" because it safeguards the principle of the supremacy of the Constitution against "legislative acts that infringe fundamental precepts."[239] Hence, the Supreme Court of Justice has ruled that the constitutionality of a law can be attacked even in the absence of an administrative or judicial act.[240] For instance, in the other four facets of the *Amparo,* the subject matter is the interpretation and manner of application of a law in a concrete case, but in *Amparo* Against Laws, the judicial examination turns upon the text of the law and the legislative intent, when confronted with the requirements established by the Constitution. Some assume that *Amparo* Against Laws, precisely for that particular mechanism mentioned, is similar to abstract judicial review exercised by the Federal Constitutional Court in Germany.[241] Nevertheless, by others, this side of the *Amparo* is the closest expression of judicial review like that exercised in the United States.[242]

---

[237] *Id.*

[238] Cabrera & Headrick, *supra* note 196, at 249, 252.

[239] FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 169, 378, The *Amparo* against laws is a product of an evolution of the classic *Amparo*. For many this transformation is a "degeneration" of the original model. However, this facet of the *Amparo* grew overwhelmingly in order to establish a unitary system of interpretation of the legal norm.

[240] BAKER, *supra* note 189, at 164.

[241] Cabrera & Headrick, *supra* note 196, at 249, 252.

[242] FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 169. *See generally,* BAKER *supra* note 189, suggesting that there are certain similarities between *Amparo* against laws and the jurisdictional possibilities afforded in the United States by actions that enjoin the enforcement of allegedly unconstitutional laws and, in an even more limited sense, actions that seek declaratory judgments on constitutional questions.

Amparo Against Laws is a "direct[243] constitutional action" which should be brought in first instance before the Federal District Courts. Then the Supreme Court of Justice in Plenary Session can review the sentence (under what is, in reality, an appellation).[244] This process constitutes an actual suit (specific case) in which the organs of the state are the adversaries of the plaintiff, such as the federal or state legislatures that passed the law, the president or the governors of the states who signed it and the Departments of State that ordered its publication. *Amparo* Against Laws is not the case where the constitutional question arises incidentally during an ordinary litigation. By contrast, it is an action to combat an unconstitutional law right after its promulgation or after the first act of application of the law which has aggrieved the plaintiff.[245]

The aforementioned rebuts the suggestion that in the *Amparo* Against Laws, the form of review is abstract since it requires an injured party in a "particular case" to promote the suit against those who may be responsible. [246] With this observation, *Amparo* Against Laws seems to have more similarities to the United States system, where the case and controversy requirements are obligatory.[247]

As a procedural formality, fixed rules govern the period in which the action should be brought, and when the *Amparo* Against Laws is brought against a so-called self-executing law (that is, against a law which obligates a person to perform some positive act in order to comply therewith without a previous request by the government). The proceedings should be brought within thirty working days from the day the law came

---

[243] Direct *Amparo* is a suit tried on original jurisdiction and a single instance before the Supreme Court of Justice.
[244] Cabrera & Headrick, *supra* note 196, at 249, 252. *See also* FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 176, 379.
[245] FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 177, 378-380.
[246] *Id.*

into force. But if this period of time elapses, the law can be attacked within fifteen days from the time the affected person is notified of the first act of application executed to his detriment.[248]

The situation is different for laws that are not self-executing. For instance, under all those laws which do not impose the obligation to carry out a positive act until the government actually applies the law, the statute of limitations for bringing an *Amparo* is fifteen days from the date of notice of the first act of application.[249]

According to Article 73, § VI of the *Amparo* Law, there should be a personal injury before the courts declare jurisdiction. It is also essential that the regulation contested be a law in the constitutional sense.[250] The admissibility of the suit has been established as a general jurisdictional principle based in the *Amparo* Law and in *jurisprudencia*[251] with a clear notion that the mere existence of an unconstitutional statute is not sufficient, and that a legal injury should be demonstrated.

The rules governing interpretation of the *Amparo* suit as a whole are *stricti juris* (strict law). This principle requires the courts to confine their attention to, and base their decisions exclusively on, those conclusions of law wherein the plaintiff, in his formal written complaint, tries to demonstrate that his constitutional rights have been violated by

---

[247] *Id.* at 116.

[248] *Id. See Amparo* Law, Regulating Articles 103 and 107 of the Constitution arts. 21, 22[hereinafter *Amparo* Law]; *See also,* BAKER *supra* note 189, at 166-168.

[249] *Amparo* Law, arts. 21, 22; FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 177, 378, 380. These terms caused insecurities not only for plaintiffs but also for judges themselves since it was extremely difficult to determine when a law, by its sole promulgation, was affecting interests of the applicant. Individuals were unknowing about the defined criterion to determine when it was the proper time to bring their actions. Otherwise they were exposed to having their petitions dismissed by different standards used by the courts. *See id.*

[250] Status of law attaches only to statutory provisions enacted by the constituted legislative bodies and those as result of legitimate excersise of the executive of extraordinary legislative functions. Therefore, Administrative regulations are not considered laws and should not be attacked through *Amparo* Against Laws proceeding.

the challenged act.[252] The courts are not allowed to add anything to correct possible defects in the complaint in civil cases, but this principle is not applied strictly in all other types of *Amparo* in which courts are permitted to instruct the applicant to supply any omitted formal element.[253] The term granted is of five days, but if the time has expired, the suit must be dismissed.[254] *Amparo* suits enable courts to enforce the Constitution by protecting individual rights in particular cases, but they prevent the courts from using this power to make law for the entire nation.[255]

b) The Supreme Court of Justice and Its Autonomy

The authority of the Supreme Court of Justice has been limited for historical reasons and by current political factors. In Mexico, with a civil law tradition, judges habitually play a modest role limited to interpreting and applying the law, but not making it.[256] The constitutional and political powers granted to the executive branch have overshadowed and limited not only the judiciary but the legislature as well.[257]

The appointment process for seats in the Supreme Court of Justice consist of a proposal by the President of three candidates to the Senate for its approval. Once the

---

[251] *Jurisprudencia* (Jurisprudence) in Mexico are decisions of the Supreme Court of Justice binding in lower courts when a question has been decided identically in five consecutive judgments by a high majority of the justices; s*ee Amparo* Law art. 192.

[252] BAKER, *supra* note 189, at 185.

[253] *Id.* All other types of *Amparo* include complaints in criminal matters, labor disputes on behalf of workers, agrarian issues and finally when the act complained is based on laws declared unconstitutional by *jurisprudencia* of the Supreme Court of Justice; *See* Mex. Const. art. 107.

[254] *Id.* at 186.

[255] *See* Barker, *Constitutionalism in the Americas, supra* note 2, at 907.

[256] *See* MERRYMAN, THE CIVIL LAW TRADITION, *supra* note 2, at 34-38.

[257] *See, e.g.,* Mex. Const. chapter III describing the powers of the President. *See also* JORGE CARPIZO, EL PRESIDENCIALISMO MEXICANO (1987), illustrating the constitutional and extraordinary political powers of the executive.

Senate examines the candidates, a two-thirds vote designates the new magistrate.[258] This new mechanism is a result of a series of strong external and internal criticisms made against the impartiality and subordination of the Supreme Court of Justice.[259] Prior to the 1994 Constitutional Judicial Reform, the President had the discretion to appoint the nominees and the Senate to approve them.[260]

Article 17 of the Constitution provides that both federal and state laws should establish the needed means to guarantee the independence of the courts and their resolutions. Likewise, the Constitution says that their salaries may not be decreased and that the term of their function is for fifteen years.[261] Nevertheless, "the power and prestige of the Supreme Court of Justice pales in comparison to the high court of the United States."[262]

c) Effects of Constitutional Adjudication

The legal effects of all decisions taken by the Supreme Court of Justice in any action are strictly *inter partes* and always subject to the "principle of relativity".[263] This principle also known as the "Otero Formula"[264] consigned in Article 107, § II:

> The judgment shall be such that it affects only private individuals, being limited to affording them shelter and

---

[258] Mex. Const. art. 94.
[259] *See* Smith, *Confronting Differences, supra* note 4, at 103. *See also* Harvard Law Review Association, *Liberalismo contra Democracia: Recent Judicial Reform in Mexico*, 108 Harv. L. Rev. 1919; 1928 (1995)[hereinafter *Liberalismo contra Democracia*]; Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 Am. U. J. Int'l L. & Pol'y 295; 316 (1995)[hereinafter *The Rebirth of the Supreme Court of Mexico*].
[260] *See Liberalismo contra Democracia supra* note 259, at 1929.
[261] Mex. Const. art. 94.
[262] *See* Smith, *Confronting Differences, supra* note 4, at 103.
[263] *Liberalismo contra Democracia supra* note 259, at 1929.
[264] The Jurist Mariano Otero was the creator of this principle. He included this provision in a national level in the Act of Reforms of 1847.

> protection in the special case to which the complaint refers, without making any general declaration about the law or act on which the complaint is based.

The emphasis on the particular case corresponds to the original purposes of institutionalizing an instrument to protect the governed against arbitrary acts of authority.[265] It also coincides with history and more particularly with the French influence, where once judges were "nothing but the mouth which pronounces the words of the law, they are inanimate beings who cannot moderate either the force or the rigor of the law."[266] Hence, final judgments do not create a law that is obligatory for all; by contrast, the lawmaking process is only the duty of the legislature. This concept was religiously adopted in the Mexican *Amparo* proceeding.[267]

Occasionally, inferior courts may be subject to precedent judgments of the Supreme Court of Justice and Collegial Circuit Courts. Lower courts[268] are bound when five consecutive decisions to the same effect, uninterrupted by any incompatible rulings, conform to *jurisprudencia* (jurisprudence).[269] Each decision contributing to the formation of *jurisprudencia* must be approved by a majority of eight votes out of eleven. A jurisprudential thesis contains a brief restatement of a single point of law, abstracted and

---

[265] Cabrera & Headrick, *supra* note 196, at 254.

[266] FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 174. *See also* Cappelletti, *Repudiating Montesquieu? supra* note 107, at 12, citing Montesquieu, *De L'Esprit Des Lois.*

[267] *See* Cabrera & Headrick, *supra* note 196, at 254. At the beginning of the establishment of the *Amparo,* the constituents of 1856 stated: " It is required that absurd and vicious laws rather succumb partially by decisions of the tribunals than extinguish them noisily and scandalously in a fight between the sovereignties of states and federation." *See* FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 189, citing Ponciano Arriaga.

[268] District Courts, Military Courts, Administrative and Labor Courts, both federal and state courts.

[269] *Jurisprudence* binds on Unitary and Collegial Circuit Courts, District Courts, Military Courts, Administrative and Labor Courts, both federal and state courts. BAKER, *supra* note 189, at 551.

summarized from the conclusions of law.[270] However, adoption of *jurisprudencia* does not resemble the *stare decisis* doctrine solidly practiced in the United States.[271]

[270] *Id.*

[271] *Id.* The obligatory effect of *Jurisprudencia* is limited for two reasons: 1. *Jurisprudencia* is binding exclusively on lower courts excepting all those governmental and administrative organs. 2. When an obligated entity decides to ignore *jurisprudencia,* the only resource available to persons affected by this omission is another *Amparo* complaint.

Chapter IV.

Judicial Review at Work

a) Judicial Review at Work in the Field of Constitutional Rights in the United States

The use of judicial review to protect the rights of individuals has become a matter of relevant importance not only in America but also in Europe. In fact, the protection of individual rights by judicial review has been the second major justification for the use of this legal instrument in Germany. In the legal system of the United States, judicial review has been a main instrument not only to secure the rights of the people but also to expand the meaning of the rights granted by the Constitution. For instance, judicial review and the Due Process Clause of the Fourteenth Amendment have played key roles in expanding the meaning and scope of the Bill of Rights.

Both the Supreme Court of the United States and the Federal Constitutional Court of Germany have the authority to determine the proper application of the rights granted by the constitutions of their countries.[272] In the legal systems of Germany and the United States, this power emerges from the institution of judicial review, which has been termed

---

[272] Dieter Grimm, *Human Rights and Judicial Review in Germany, in* HUMAN RIGHTS AND JUDICIAL REVIEW, A COMPARATIVE PERSPECTIVE 267, 270 (David M. Beatty ed., 1994)[hereinafter Grimm]. *See also* William Safran, *The Influence of American Constitutionalism in Postwar Europe: The Bonn Republic Basic Law and the Constitution of the French Republic, in* AMERICAN CONSTITUTIONALISM ABROAD, SELECTED ESSAYS IN COMPARATIVE CONSTITUTIONAL HISTORY 91, 103 (George Athan Billias ed., 1990). *See also* Norman Dorsen, *How American Judges Interpret the Bill of Rights,* 11 Const. Comment, 379, (1994)[hereinafter Dorsen]. *See also* David L. Faigman, *Reconciling Individual Rights and Government Interests, Madisonian Principles versus Supreme Court Practice,* 78 Va. L. Rev. 1521, 1522 (1992)[hereinafter Faigman].

the greatest contribution that the United States has made to "political theory and civil liberty."[273]

Once the Bill of Rights was created in the United States the next step was its implementation, which James Madison declared should be accomplished through "independent tribunals."[274] Madison, the father of the Bill of Rights, expressed to his fellow members of Congress the following view:

> Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they [the courts] will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[275]

History, however, developed a course of events different from what Madison had predicted because the Supreme Court had little opportunity to apply his premises during its first 130 years of existence.[276] This may be due to two facts: the Bill of Rights itself did not apply to state governments only the national government, and the Civil War amendments (XIII, XIV, and XV) did not acquire any substantial importance until the present century.[277] Today most of the safeguards against national actions are also available against state actions through the Fourteenth Amendment and the process of gradual incorporation of the various protections listed in the Bill of Rights.[278]

---

[273] Grimm, *supra* note 272, at 59. *See also* Dorsen, *supra* note 272, at 379; BREWER-CARÍAS, *supra* note 1, at 136; Steinberger, *supra* note 121 at 214.
[274] ELDER WITT, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT, 374 (2nd. ed., 1992)[hereinafter WITT].
[275] *Id.*
[276] *Id.*
[277] M. GLENN ABERNATHY & BARBARA A. PERRY, CIVIL LIBERTIES UNDER THE CONSTITUTION, 16 (1993)[hereinafter ABERNATHY & PERRY].
[278] *Id.*

The *Slaughter-House Cases*,[279] *United States v. Reese*,[280] *United States v. Cruikshank*,[281] *Hurtado v. California*,[282] and *Plessy v. Ferguson*[283] are clear examples of the limited view that the Supreme Court had with regard to the effect of these amendments.[284] In the *Slaughter-House Cases* the Court ruled that there were two different citizenships, and that the Privileges and Immunities Clause of the Fourteenth Amendment applied only to the "citizens of the United States."[285] In *United States v. Reese,* according to the decision of the Court, the Thirteenth Amendment did no more than abolish slavery.[286]

In addition, the Court held in *United States v. Cruikshank* that the Due Process clause could not be applied against a private individual charged in the killings of at least 60 freedmen, since the Fourteenth Amendment banned only states and governmental actors from depriving any person of life, liberty, or property without Due Process of Law; "but this adds nothing to the rights of one citizen as against another."[287] In *Hurtado v.*

---

[279] *Slaughter-House Cases*, 83 U.S. 36 (1872)

[280] 92 U.S. 214 (1875). *See also* STONE, *supra* note 6 at 509 The case involved two Kentucky municipal elections inspectors who refused to allow a black man to vote. The offended alleged party that the inspectors had violated the voting right sections of the 1870 Enforcement Act. However, the Court held that because the relevant sections of the act were not expressly limited to actions being racially motivated, they exceeded the power of Congress under the Fifteenth Amendment, and that the prosecution could not proceed.

[281] 92 U.S. 542 (1875). *See also* STONE, *supra* note 6 at 510. The case arose from a dispute of an electoral victory between Republicans and Democrats in Louisiana, 1872. The Republicans gained control of the parish courthouse, where they were attacked by a factual army of "old time Ku Klux Klan," who killed at least 60 freedmen. Of the ninety-seven defendants indicted under the Enforcement Act of 1870, only nine were brought to trial, and only three were convicted. The Supreme Court reversed these convictions on the grounds that punishment of the killings exceeded the power of Congress under the Fourteenth Amendment.

[282] *Hurtado v. California* 110 U.S. 516 (1884). *See also* GUNTHER, *supra* note 13, at 413. This case sustained a California statute which allowed criminal proceeding to be instituted by information rather than by grand jury indictment. While using the phrase "principles of liberty and justice," the Court inclined to minimize federal intervention in state criminal procedures.

[283] *Plessy v. Ferguson,* 163 U.S. 537 (1897). In *Plessy,* the Court found that "equal but separate-public-accommodations" for white and black did not violate the Fourteenth Amendment since it was designed to enforce absolute equality of the two races, but not intended to abolish distinctions based on color.

[284] WITT, *supra* note 274, at 375.

[285] *Slaughter-House Cases*, 83 U.S. 36 (1872).

[286] WITT, *supra* note 274, at 375. *See also* STONE, *supra* note 6 at 509.

[287] STONE, *supra* note 6 at 510. *See also* WITT, *supra* note 274, at 375.

California the Court decided that the Due Process clause did not expand the particular guarantees of the Bill of Rights against state actions.[288] In *Plessy v. Ferguson,* the Court found that there was no denial of equal protection by having "equal but separate public accommodations" for white and black people.[289]

Although the Court continued to restrict the effects of the Civil War Amendments until nearly the end of the 19th century, it eventually turned to a more extensive interpretation of these amendments.[290] This was to some extent made possible because Congress expanded the jurisdiction of the federal courts to hear a broader category of cases arising under the Constitution or federal laws in 1875.[291]

Later on, the Supreme Court went thorough a polemic period that was characterized by having the Court applying the Bill of Rights more effectively to protect property than to protect individuals. Cases like *Yick Wo v. Hopkins,*[292] *Boyd v. United States,*[293] *Weeks v. United States,*[294] *Truax v Raich,*[295] and *Guinn v. United States*[296]

---

[288] WITT, *supra* note 274, at 375. *See also* GUNTHER, *supra* note 13, at 413.
[289] WITT, *supra* note 274, at 375. *See also* GUNTHER, *supra* note 13, at 413.
[290] WITT, *supra* note 274, at 377.
[291] *Id.* "Congress made possible this shift in the federal judicial concern by expanding in the class of persons who could ask a federal judge to issue a writ of *habeas corpus* ordering their release from custody. This new law allowed persons detained by state officials to win their release if they could show that their detention was in violation of their constitutional rights. . . Several years later Congress further expanded the Supreme Court jurisdiction, authorizing the Court to hear appeals in criminal cases."
[292] *Yick Wo v. Hopkins,* 118 U. S. 356 (1886). *See also* WITT, *supra* note 274, at 378. In 1886 the Court decided that the Equal Protection clause guaranteed aliens the right to run laundries free from discriminatory licensing requirements by city officials. *See also* C. HERMAN PRITCHETT, CONSTITUTIONAL CIVIL LIBERTIES, 253, 254 (1984)[HEREINAFTER CIVIL LIBERTIES].
[293] 116 U.S. 616 (1886). The Court declared that the Fourth and the Fifth amendments offered total protection against federal seizure for an individual's private papers. *See also* CIVIL LIBERTIES, *supra* note 292, at 198. RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW, THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS, 556, (1995)[hereinafter THE BILL OF RIGHTS]. Stressing that the Fourth and Fifth Amendments were described as safeguards against all government invasions of "the sanctity of a man's home and the privacy of life."
[294]232 U.S. 383 (1914). In support of the ruling in *Boyd,* the Court held that evidence illegally obtained by federal agents could be excluded from use in federal courts through the "exclusionary rule." *See also* THE BILL OF RIGHTS , *supra* note 293, at 261. *See also* CIVIL LIBERTIES, *supra* note 292, at 189.
[295] 239 U.S. 33 (1915) By invoking the Fourteenth Amendment, the Supreme Court struck down state legislation restricting the freedom of aliens to work.) *See also* GUNTHER, *supra* note 13, at 763. Discussing the *Truax* case and how the Equal Protection clause gradually expanded its scope to all ethnic groups seeking protection against

reanimated the hope that the Supreme Court would finally employ its power to protect individuals against the government.[297]

It was not until 1925 that the Fourteenth Amendment acquired its current importance and scope to protect individual rights against either state or federal actions.[298] *Gitlow v. New York*[299] was the path-breaking case for a new era of Supreme Court decisions expanding the reach of personal freedom and liberties.[300] The case involved a left-wing socialist who published and distributed a Left Wing Manifesto calling for class revolution and the organization of the proletarian state. He was arrested in New York for violating a criminal anarchy law, which, he argued before the Supreme Court violated his rights guaranteed in the First Amendment. Although the Court upheld the law, "the majority stated that freedom of speech and of the press are among the fundamental personal rights and liberties protected by the Due Process clause of the Fourteenth Amendment from impairment by the states."[301]

The "incorporation process" of the Bill of Rights into the Fourteenth Amendment then began by assimilating the First Amendment, and continued for approximately fifty

---

official discrimination. WILLIAM B. LOCKHART ET AL, CONSTITUTIONAL RIGHTS AND LIBERTIES, CASES-COMMENTS-QUESTIONS, 1058 (7TH ed. 1991)[hereinafter LOCKHART].

[296] 238 U.S. 347 (1915) The case involved an Oklahoma "grandfather clause" requiring only black people to take a literacy test before they could be qualified to vote. The court held that this clause violated the Fifteenth Amendment. *See also* CIVIL LIBERTIES, *supra* note 292, at 340. *See also* LOCKHART, *supra* note 295 at 977.

[297] WITT, *supra* note 274, at 378.

[298] *Id. See also* CIVIL LIBERTIES, *supra* note 292, at 225.

[299] *Gitlow v. New York,* 268 U.S. 652 (1925)

[300] WITT, *supra* note 274, at 378. *See also* CIVIL LIBERTIES, *supra* note 292, at 20.

[301] WITT, *supra* note 274, at 378.

years more.[302] By the mid-1970s, the Supreme Court had expanded the Bill of Rights protection at least to the extent that Madison had proposed a century earlier.[303]

i. The Substantive Due Process of the Fourteenth Amendment

Substantive and Procedural Due Process emanate from both the Fifth Amendment and the Fourteenth Amendment, respectively. This work examines only the Due Process clause of the Fourteenth Amendment, which imposes the obligations of Due Process on the states.[304] As early as 1873, in the *Slaughter-House Cases*, the Substantive Due Process concept was first suggested by Justice Joseph P. Bradley.[305] In his dissenting opinion, Justice Bradley stressed that any law "which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without Due Process of Law."[306]

In 1877, *Munn v. Illinois*[307] gave an opportunity to the Court to get closer to the concept Justice Bradley had suggested four years earlier in the *Slaughter-House Cases*.[308] Although the Court upheld the state regulation, it analyzed this regulation on Substantive

---

[302] WITT, *supra* note 274, at 378. *See also* STONE, *supra* note 6 at 804. Describing how the Supreme Court has gradually incorporated most of the rights guaranteed in the first eight amendments applicable to the states by the Due Process clause of the Fourteenth Amendment.
[303] WITT, *supra* note 274, at 378.
[304] U.S. CONST. amend. XIV § 1. ". . . [N]or shall any state deprive any person of life, liberty, or property, without Due Process of Law."
[305] WITT, *supra* note 274, at 518.
[306] *Id.* See also *Slaughter-House Cases*, 83 U.S. 36, 122 (1872). *See also* CIVIL LIBERTIES, *supra* note 292, at 293.
[307] 94 U.S. 113 (1877).The case involved a state law, which regulated the maximum charges for grain elevators. The Court stressed that the critical point in deciding the case was whether private property was affected by public interest. The Court held that the businesses regulated in Munn were public rather that private. *See also* GUNTHER, *supra* note 13, at 437.

Due Process grounds and found that the substance of the grain storage business was "affected with a public interest" and therefore subject to state regulations.[309] Ten years later, in 1887, the Court showed a new approach in *Mugler v. Kansas.*[310] It stressed that state legislation would be valid under the state police power only if it unequivocally concerned the protection of the public health, safety or morals, and only if it did not violate rights secured by the fundamental law.[311] In 1890 the slow movement to Substantive Due Process was completed: the Court finally used it to strike down a state law regulating economic matters in *Chicago, Milwaukee and St. Paul R.R. Co. v. Minnesota.*[312]

Seven years later, in 1897, for the first time the Court employed Substantive Due Process to invalidate a Louisiana statute on the "liberty of contract" grounds.[313] The case was *Allgeyer v. Louisiana,*[314] and the Court decided that the statute violated the Fourteenth Amendment's Due Process clause because it deprived the defendants of their liberty to enter into contracts.[315] During subsequent years the Court continued to decide

---

[308] WITT, *supra* note 274, at 518. *See also* THE BILL OF RIGHTS, *supra* note 293, at 81. Stating that the narrow procedural interpretation given to the Due Process clause in the *Slaughter-House Cases* was reaffirmed by the Court in *Munn.*

[309] STONE, *supra* note 6 at 815. *See also* WITT, *supra* note 274, at 518. *See also* CIVIL LIBERTIES, *supra* note 292, at 293. Indicating that although the Court refused to interfere with the state regulation, it appraised the legislation on Substantive Due Process grounds.

[310] 123 U.S. 623. "The Court upheld a state law prohibiting the sale of alcoholic beverages, but continued that not every regulatory measure is to be accepted as a legitimate exertion of the police power of the states." *See also* GUNTHER, *supra* note 13, at 438.

[311] STONE, *supra* note 6 at 816. *See also* WITT, *supra* note 274, at 518. *See also* CIVIL LIBERTIES, *supra* note 292, at 293. *See also* GUNTHER, *supra* note 13, at 438.

[312] 134 U.S. 418 (1890). "The Court held unconstitutional a state statute authorizing a commission to set final and unreviewable railroad rates." *See also* ROTUNDA, *supra* note 24, at 365.

[313] WITT, *supra* note 274, at 518.

[314] 165 U.S. 578 (1897). The case involved a Louisiana statute prohibiting anyone in the state from issuing insurance on property in its territory with companies that had not been admitted to do business in the state.

[315] GUNTHER, *supra* note 13, at 439. Indicating that Justice Peckham's broad articulation of the "liberty of contract" gave the case its special significance in the development of Substantive Due Process, and considering this case as the first one in which the Court invalidated a state law on Substantive Due Process basis. *See also* THE BILL OF RIGHTS , *supra* note 293, at 81. Considering also this case as the first one in which the Court invalidated a state law on Substantive Due Process basis, and stressing Justice Peckham's principle that the right

cases under the two doctrines developed by that time with regard to Substantive Due Process: 1. Business affected with a public interest could be regulated by the state; and 2. Government should not interfere with the freedom of contract.[316]

The Court upheld several state regulations under the public interest approach; however, in the 1920s, it reduced the areas of economic life to be embraced by this heading.[317] Regarding protection of the liberty of contract doctrine, the Court invalidated a number of state laws regulating wages and hours; nevertheless, in 1898 the Court upheld a state law regulating minimum working hours for miners in *Holden v. Hardy*.[318]

In spite of the fact that the Court had upheld a ten-hour regulation for miners in *Holden,* it found an abridgment of contract liberty in *Lochner v. New York,*[319] which involved a state law setting a ten-hour day, sixty-hour week as the maximum for bakers.[320] The case is a classic illustration of the Substantive Due Process approach since the Court declared the legislation unconstitutional because it disagreed with the substantive reasonableness of the need for and terms of the enactment.[321]

---

to make contracts was a part of the liberty guaranteed by the Due Process Clause. *See also* LOCKHART, *supra* note 295 at 76. (Sharing the same point of view of the last two authors.)

[316] WITT, *supra* note 274, at 518.

[317] *Id.*

[318] 169 U.S. 366 (1898). Stating that the Court justified its decision in light of the special health problems of such workers and the unequal bargaining power of the parties.

[319] 198 U.S. 45 (1905). The Court regarded the New York statute as not valid labor law, and it declared that state police power extended only to protection of the public welfare. Moreover, the Court implied that there was not enough public interest to justify the law's encroachment of the liberty of contract. The court also rejected the health and safety argument in support of the regulation.

[320] CIVIL LIBERTIES, *supra* note 292, at 293. *See also* WITT, *supra* note 274, at 518. *See also* GUNTHER, *supra* note 13, at 439. *See also* LOCKHART, *supra* note 295 at 77. *See also* STONE, *supra* note 6 at 817. *See also* ROTUNDA, *supra* note 24, at 366. *See also* THE BILL OF RIGHTS , *supra* note 293, at 83 & 84.

[321] ABERNATHY & PERRY, *supra* note 277, at 27.

ii. Disavowal of Substantive Due Process

The period from 1905 to 1930 was characterized by invalidation of economic legislation on the basis of Substantive Due Process.[322] The Court, however, was ready to abandon the close judicial scrutiny of economic regulations in *Nebbia v. New York*,[323] which coincided with the Great Depression and the New Deal.[324] The chronology suggests that the Court was compelled to cede its "super-legislative" role in matters of appropriateness of economic regulations to the wisdom of the legislators.[325] Although *Nebbia* involved a state legislation regulating an industry not affected by public interest, the Court upheld it; indeed, the Court was clearly determined not to impose upon legislatures its own view about correct economic policy, as the *Lochner* Court had earlier done.[326]

After *Nebbia*, other cases such as *West Coast Hotel v. Parrish*,[327] *United States v. Darby Lumber Co.*,[328] and *Olsen v. Nebraska*[329] ratified the Court's new position.[330] "Subsequently, the Court has declared that it does not sit as a super-legislature to weight the wisdom of legislation nor to decide whether the policy it expresses offends the public

---

[322] GUNTHER, *supra* note 13, at 444. *See also* LOCKHART, *supra* note 295 at 80. *See also* STONE, *supra* note 6 at 831.

[323] 291 U.S. 502 (1934) The Court upheld a New York regulatory scheme for fixing milk prices. The Court's decision stated that Due Process demanded only that states adopted reasonable economic policy to promote public welfare, substantially related to object sought to be attained.

[324] WITT, *supra* note 274, at 518. *See also* LOCKHART, *supra* note 295 at 80. Indicating that from *Lochner* to *Nebbia* the Court constantly "substituted its judgment for that of Congress and state legislatures on the wisdom of economic regulations interfering with contract and property interests." *See also* STONE, *supra* note 6 at 831, CIVIL LIBERTIES, *supra* note 292, at 306, THE BILL OF RIGHTS , *supra* note 293, at 84.

[325] WITT, *supra* note 274, at 518.

[326] *Id.* *See also* CIVIL LIBERTIES, *supra* note 292, at 306, 307.

[327] 300 U.S. 379 (1937). The case involved a Washington wage law stabilizing a minimum wage for women. *See also* STONE, *supra* note 6 at 833, GUNTHER, *supra* note 13, at 455, WITT, *supra* note 274, at 519, LOCKHART, *supra* note 295 at 85, THE BILL OF RIGHTS , *supra* note 293, at 85.

[328] 312 U.S. 100 (1941). The case involved minimum wages and maximum hours regulations, which the Court upheld in 1941. *See also* WITT, *supra* note 274, at 519, STONE, *supra* note 6 at 834.

[329] 313 U.S. 236 (1941). The Court upheld state regulation dictating the maximum fee that an employment agency could collect from employees. *See also* WITT, *supra* note 274, at 519, STONE, *supra* note 6 at 834.

welfare."[331] The modern Court has pushed aside Due Process complaints against economic regulation and has not invalidated such laws on the grounds of Substantive Due Process since 1937.[332]

iii. The Revival of Substantive Due Process and Equal Protection

At the time the Court was abandoning its *Lochner* Substantive Due Process approach to supervising economic regulations, it was already developing a line of rulings under the equal protection guarantee that allowed it another way to judge legislative measures.[333]

In *Skinner v. Oklahoma*,[334] the Court added the Substantive scrutiny of Due Process to the concept of Equal Protection.[335] *Skinner* involved an Oklahoma regulation which provided for compulsory sterilization of persons convicted three times of felonies showing "moral turpitude."[336] The Court regarded this law as denial of equal protection, and the Court's decision rested on a view allied to Substantive Due Process.[337]

The Court also developed in this case a "two-tier" review holding that when fundamental rights are impaired by a statute, the court's scrutiny is stricter.[338] This "two-tier" review consists of a rational relation between the compelling objectives of the state

---

[330] WITT, *supra* note 274, at 519.
[331] *Id.*
[332] GUNTHER, *supra* note 13, at 462, STONE, *supra* note 6 at 834. Stating that since 1937, "the Court's abandonment of *Lochner*-style Substantive Due Process review of economic regulations has been unequivocal."
[333] WITT, *supra* note 274, at 519.
[334] 316 U.S. 535 (1942).
[335] WITT, *supra* note 274, at 519. *See also* CIVIL LIBERTIES, *supra* note 292, at 314. Stating that while Justice Douglas invoked equal protection in striking down the Oklahoma act, Justice Stone used Due Process for the same end.
[336] GUNTHER, *supra* note 13, at 492. *See also* WITT, *supra* note 274, at 519; LOCKHART, *supra* note 295 at 147; STONE, *supra* note 6 at 843.
[337] WITT, *supra* note 274, at 519. *See also* GUNTHER, *supra* note 13, at 492; STONE, *supra* note 6 at 844; LOCKHART, *supra* note 295 at 148.
[338] CIVIL LIBERTIES, *supra* note 292, at 315. *See also* GUNTHER, *supra* note 13, at 492, 493.

and the appropriateness of the means employed by the legislature to accomplish those ends.[339]

The *Skinner* decision, which gave birth to cases such as *Griswold v. Connecticut*,[340] *Eisentand v. Baird*,[341] and *Roe v. Wade*,[342] also benefited matters of personal choice in family life, under its new Substantive Due Process approach.[343]

iv. Considerations About the Judicial Development of Rights Jurisprudence.

The Due Process clause of the Fourteenth Amendment became the main instrument used by the Supreme Court to strike down state actions that violate individual rights.[344] This process of incorporation or nationalization that the Court has developed concerning the applicability of the Bill of Rights has brought an essential homogenization of state and federal rights.[345] The case-by-case work of the Supreme Court in this regard has secured state compliance with federal requirements.[346] Moreover, it has successfully counteracted the state-rights rallying cry of proponents of racial apartheid, as well as

---

[339] CIVIL LIBERTIES, *supra* note 292, at 315.

[340] 381 U.S. 479 (1965) Considered a landmark case, *Griswold* involved a Connecticut law forbidding the use of contraceptives. The Court held in this case that the principle of privacy was a value protected by the Constitution and struck down the Connecticut statute. *See also* STONE, *supra* note 6 at 941-955; WITT, *supra* note 274, at 519; LOCKHART, *supra* note 295 at 148-152, 153, 154; ABERNATHY & PERRY, *supra* note 277, at 427; ROTUNDA, *supra* note 24, at 649-558; GUNTHER, *supra* note 13, at 493-504 & 505.

[341] 405 U.S. 438 (1972) *Eisenstand* involved a Massachusetts law forbidding the distribution of contraceptives only to unmarried persons. Looking to the different treatment given by the state legislation to married and unmarried people, the Court held that this law constituted a violation of the equal protection clause. *See also* ABERNATHY & PERRY, *supra* note 277, at 429; STONE, *supra* note 6 at 954; GUNTHER, *supra* note 13, at 504; LOCKHART, *supra* note 295 at 154 & 155; ROTUNDA, *supra* note 24, at 556.

[342] *Roe v. Wade*, 410 U.S. 113 (1973). The case involved a Texas statute making it a crime to procure an abortion, except to save the life of the mother. The Court struck down the statute arguing that it was in violation of both the Due Process clause and the right of privacy of the Fourteenth Amendment. *See also* WITT, *supra* note 274, at 519; ROTUNDA, *supra* note 24, at 558-664; STONE, *supra* note 6 at 955-960; ABERNATHY & PERRY, *supra* note 277, at 429-432; LOCKHART, *supra* note 295 at 155-164.

[343] WITT, *supra* note 274, at 519.

[344] Keith S. Rossen, *Federalism in the Americas in Comparative Perspective*, 26 U. Miami Iter-Am. L.R. 1, 39 & 40 (1994). *See also* Louis Henkin, *A Bill of Rights-and-a Half,* 32 Tex. Int'l L.J. 483, 484 (1997)[hereinafter Henkin].

[345] Henkin, *supra* note 344 at 484, 485.

opponents to reforming state criminal justice systems in order to guarantee compliance with federal constitutional standards.[347]

In addition, this process has enriched, in value and quantity, the rights enumerated in the Bill of Rights since the Court's decisions show protection of rights not written nor implied in the Constitution; for instance, the presumption of innocence and the requirement of guilt beyond a reasonable doubt for conviction of a crime.[348] The criterion of the Court while deciding civil rights cases has made it feasible to have equality as a principle giving life to universal suffrage, which many would rather relate to the principle of democracy and representative government.[349] It is also possible to find in the Supreme Court Reports the concept of liberty, which includes individual autonomy and safeguards for such autonomy against deprivation by government, "not only by Procedural Due Process of Law (that is, by the requirement of the rule of law and fair procedures) but also by Substantive Due Process (a requirement that all liberty, as well as life and property, be protected against arbitrary governmental action)."[350]

The protection of rights by judicial development of jurisprudence has also improved some aspects of judicial review.[351] The Court has policed its jurisdiction by adhering to the case or controversy requirements, which in general prevent the Courts from giving advisory opinions; from deciding political questions; from having before

---

[346] Rossen, *supra* note 344 at 40.
[347] *Id.*
[348] Henkin, *supra* note 344 at 485.
[349] *Id.* Stating that the criterion of the Court was "if one person votes, all must be entitled to vote and to vote equally." *See also* WITT, *supra* note 274, at 381.
[350] Henkin, *supra* note 344 at 485.
[351] *Id.*

them someone without standing, or some kind of personal stake in the controversy; and from deciding issues that are either premature or moot.[352]

In addition, the case or controversy requirement serves at least three important objectives. First, it reduces the possible friction among the branches produced by judicial review by limiting the occasions for judicial intervention. Second, it reduces the possibilities of having abstract, hypothetical, or speculative cases reaching Courts by ensuring that constitutional issues will be resolved only in the context of concrete disputes. Third, it keeps alive the principles of individual autonomy and self-determination by ensuring that Courts will render decisions at the behest of those actually injured.[353]

b) Judicial Review at Work in the Field of Constitutional Rights in Germany

i. Concrete and Abstract Judicial Review and Individual Rights

On the basis of abstract judicial review, the federal Constitutional Court in Germany can review any law as to its congruity with the individual rights embodied in the Basic Law under Article 93(1)2[354] of the Basic Law.[355] The Constitutional Court is vested with this power, and can conduct such a review on petition of the federal government, of the government of a Land, or of one third of the members of the

---

[352] *Id. See also* STONE, *supra* note 6 at 88.

[353] STONE, *supra* note 6 at 88, 89.

[354] F.R.G. CONST. art. 93(1)2 "The Federal Constitutional Court decides: . . . in cases of differences of opinion or doubts on the formal and material compatibility of Federal law or Land law with this Basic Law, or on the compatibility of Land law with other Federal law, at the request of the Federal government, of a Land government or of one-third of the *Bundestag* members.. . ."

[355] Grimm, *supra* note 272, at 271. *See also* JUDICIAL POLITICS IN WEST GERMANY, *supra* note 110, at 106. Stating that abstract judicial review is not "an adversary proceeding in a strict legal sense. But neither are the decisions of the Court in such cases merely advisory opinions; for the question of a law's validity is squarely before the Court, and a decision against its validity renders it null and void."

parliament. In extraordinary circumstances, the Constitutional Court can also analyze a law on application of an individual whose fundamental rights are directly affected by a given statute and not merely by its application.[356] The Constitutional Court is meant to devote itself to the "objective" judgment of the validity or invalidity of a legal norm or statute when judging cases on abstract judicial review,[357]

The Constitutional Court can review the compatibility of law with the individual rights protected in the Basic Law on the request of any ordinary court which has to employ a law whose constitutionality is unclear. The federal Constitutional Court exercises this power under Article 100[358] of the Basic Law,[359] and it executes this review of laws on the basis of concrete judicial review.[360]

The petition of the ordinary court must be signed by those judges who have a voice in favor of referral and must be accompanied by a declaration of the legal provision at issue, the provision of the Basic Law presumably transgressed, and the extent to which a constitutional decision is fundamental to resolve the disagreement.[361]

The Constitutional Court is extremely strict in checking the prerequisites of referral when a court brings a statute before it on the grounds of unconstitutionality because the Federal Constitutional Court does not have the obligation to engage in

---

[356] Grimm, *supra* note 272, at 271. *See also* F.R.G. CONST. art. 93(1)2, 4a.

[357] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 1. Explaining that the proceeding is described as objective because "it is intended to vindicate neither an individual's subjective right nor the claim of the official entity petitioning for review; its sole purpose is to declare what the Constitution means."

[358] F.R.G. CONST. art. 100(1). "Where a court considers a law unconstitutional, the validity of which is relevant to its decision, the proceedings shall be stayed, and a decision shall be obtained from the Land court competent for constitutional disputes if the matter concerns the violation of the Constitution of a Land, or from the Federal Constitutional Court if the matter concerns the violation of the Basic Law. . ."

[359] Grimm, *supra* note 272, at 271.

[360] *Id.*

[361] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 13. Adding that the Federal Constitutional Court will discard the case "if the judges below it manifest less than a genuine conviction that a law or provision

judicial review every time it is suggested by ordinary courts.[362] The Court is compelled to require compliance with the Constitution only in the cases foreseen in Article 100(1) of the Basic Law.[363]

Concrete judicial review is a greatly important model of procedure in the judicial practice of Germany. Statistically, it is second in the order list behind the procedure for individual constitutional complaints. Nevertheless, its importance does not rest in the number of cases because most of the cases submitted to the Constitutional Court are not successful, instead its importance lies in the fact that often what consequences can arise from a specific statute are only realized in the day-to-day practice of law.[364]

The consequence of both abstract and concrete judicial review has been a high standard of exacting compliance with the Basic Law and its rights. Although in most cases the complaint of unconstitutionality does not prosper in the Constitutional Court, either for lack of substance or lack of importance to the evolution of Constitutional law, this kind of complaint is extremely popular as a source of potential relief.[365]

In spite of the fact that most complaints of unconstitutionality do not prosper in the Constitutional Court, the lower courts are ready to find constitutional aspects in their dockets and to present such issues. "So far these structures have strengthened most constitutional rights to the extent that it seems as if the Constitution and the courts, and not the people themselves, are the best guardians of individual rights."[366]

---

of law is unconstitutional or if the case can be decided without settling the constitutional question." *See also* JUDICIAL POLITICS IN WEST GERMANY, *supra* note 110, at 105-106.

[362] Ipsen, *Constitutional Review of Laws*, *supra* note 123, at 114-115.

[363] *Id.*

[364] *Id.*

[365] Helmut Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines in,* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 51 (Ulrich Karpen ed. 1988).

[366] *Id.*

In addition, in exceptional circumstances, under Article 100 of the Basic Law, the Constitutional Court can also review a law on a petition of an individual whose fundamental rights are directly threatened by a statute and not merely by its application.[367]

ii. Individual Complaints

The Constitutional Court can review any act of a public authority to verify its conformity with individual rights on the basis of Article 93(1)4a[368] of the Basic Law, and upon individual complaint.[369] The individual must first exhaust all possible means of relief in ordinary courts before submitting a complaint to the Constitutional Court.[370]

In exceptional circumstances, the Constitutional Court will accept a constitutional complaint even if the applicant has not exhausted all legal remedies. This may take place if the complaint involves an issue of "general importance" or if the complainant will suffer a grave injury by exhausting all his/her remedies.[371]

The constitutional complaint must be put to use within a certain period of time; stipulate the unsuited action or omission, and the bureau accountable for that; and particularize the constitutional right that has been violated.[372] In agreement with Article 93(1) 4a of the Basic Law, any person, natural or legal, possessing rights under the Basic

---

[367] Grimm, *supra* note 272, at 271.
[368] F.R.G. CONST. art. 93(1)4a.
[369] Grimm, *supra* note 272, at 271. *See also* Ipsen, *Constitutional Review of Laws*, *supra* note 123, at 125; CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 14.
[370] Grimm, *supra* note 272, at 271. *See also* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 14.
[371] JUDICIAL POLITICS IN WEST GERMANY, *supra* note 110, at 107.
[372] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 14. *See also* JUDICIAL POLITICS IN WEST GERMANY, *supra* note 110, at 107.

Law, may initiate a complaint of unconstitutionality if one of his or her rights has been violated by public authority.[373]

Constitutional complaints may also be made against any governmental action, including judicial decision, administrative decrees, and legislative acts in accordance to the public authority clause of Article 93(1)4a.[374] With regard to judicial decisions, the complainant must file his complaint within a month after the decision has been handed down. With regard to a statute not the subject of a judicial proceeding, and concerning which no other legal redress is possible, a constitutional complaint can be brought against it within a year after its enactment.[375]

However, jurisdiction over individual complaints is not a universal legal remedy that individuals may employ against any act. To present a complaint before the Federal Constitutional Court, a complainant must have his or her rights violated by an act of the state.[376] Jurisdiction over individual complaints is not intended to be a general protection of the Constitution but rather a means to protect the individual citizen against infringements of his or her essential rights.[377]

In addition, the injury endured by the complainant must be a current and direct result of the transgression on his or her rights by the governmental action. Certainly, the purpose for the "current" result prerequisite is to keep out acts that have been disposed of,

---

[373] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 14.
[374] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 15. *See also* JUDICIAL POLITICS IN WEST GERMANY, *supra* note 110, at 107; Ipsen, *Constitutional Review of Laws*, *supra* note 123, at 125.
[375] JUDICIAL POLITICS IN WEST GERMANY, *supra* note 110, at 107
[376] Ipsen, *Constitutional Review of Laws*, *supra* note 123, at 125.
[377] *Id.*

or future acts; the second requirement is used as an obstacle to *in rem* proceedings meant against laws by individuals not adversely affected by a statute.[378]

iii. Judicial Review Achievements Concerning the Protection of Fundamental Rights

The significance of the articles relating to individual rights in the Basic Law has been improved by the Constitutional Court's interpretation of these precepts. For instance, the Constitutional Court allocated a totally new system of judicial review and individual rights protection, which guards individual activity not yet considered by the Basic Law, on the basis of Article 2.[379] Any time the government interferes with an individual activity not referred to in some constitutional article, the Constitutional Court can review it under Article 2(1).[380]

The principle of Proportionality is another important means introduced by the Constitutional Court to protect fundamental rights. This principle arises from Article 1 and sets fundamental rights as superior to the law.[381] The Constitutional Court has ruled that laws can restrain individual rights, but only in order to make conflicting rights compatible or to protect the rights of other people or to protect important community welfare.[382]

To make certain that legislation and other governmental actions are in congruity with the values and principles of the Basic Law, the Constitutional Court developed a

---

[378] *Id.*
[379] *Id.*
[380] *Id.* Citing the case BVerfGE 6, 32 (36 f.) *Elfes*; 80, 137 (152 f.)
[381] *Id. See also* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 46.
[382] Grimm, *supra* note 272, at 275. Case BVerfGE 19, 342 (348 ff.) 30, 292 (315).

three-step test. First, any time parliament passes a law infringing on a basic right, the means used must be necessary to the accomplishment of a lawful end. Second, it must be indispensable to achieve this end. Third, there must exist an appropriate relationship between the individual right limited by the law and the purpose of the restriction. The burden on the right must not be extreme relative to the benefits secured by the state's objective.[383]

Another important characteristic of the Constitutional Court protection of fundamental rights is its interpretation of these rights not only as subjective ones but also as objective principles.[384] On one hand, while understood as subjective rights, individual rights require the state to refrain from particular conduct. On the other hand, as objective values, fundamental rights require the state to take special actions either to protect these rights or to give true effect to them.[385]

The Constitutional Court has made various departures from the premise that fundamental rights are also objective principles.[386] The principle of objectivity concerning individual rights has had an extraordinary impact in the area of private law. Conventionally, private law was considered as being outside the range of individual rights which were regarded as being a part of public law, regulating only the relationship between the individual and the state. The new doctrine brings the entire legal order under the power of fundamental rights protection.[387]

---

[383] *Id.* at 276. *See also* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 46.
[384] Grimm, *supra* note 272, at 276. The *Lüth* case, a leading decision, BVerfGE 7, 198 (204ff.) *See also* Christian Starck, *Constitutional Definition and Protection of Rights and Freedoms, in* 37 RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW 19, 33 (Christian Starck ed., 1987)[hereinafter Starck]. *See also* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 48.
[385] Grimm, *supra* note 272, at 276. *See also* Starck, *supra* note 387, at 33.
[386] Grimm, *supra* note 272, at 277.
[387] *Id.*

The Constitutional Court stated that regarding the importance of this system of values, these objective rights "must apply as a constitutional axiom throughout the whole legal system," affecting private as well as public law.[388] Under this new doctrine, all decisions of the ordinary courts are subject to constitutional review, supposing that the law they apply touches an individual right.[389]

The objective system of values has given birth to a parallel exploration for an appropriate theory of fundamental rights, which faces an interpretative difficulty when it is confronted with open-ended words such as "democracy," "constitutional order," and "free democratic basic order."[390] In regard to the objective system of values, German constitutional theorists have advanced five normative theories of fundamental rights: liberal, institutional, value-oriented, democratic, and social:

> Liberal theory, based on postulates of economic liberty and enlightened self-determination, emphasizes the negative rights of the individual against the state. Institutional theory focuses on guaranteed rights associated with organizations or communities such as religious groups, the media, universities (research and teaching), and marriage and the family. Value oriented theory places its emphasis on individual dignity as it relates to rights flowing from the nature of the individual personality. Democratic theory is concerned with certain political functions incident to the rights of speech and association and the role of elections and political parties. Social theory, finally, highlights the importance of social justice, cultural rights, and economic security.[391]

All these normative explanations find support in either the literature of constitutional theory or in judgments of the Constitutional Court, which seems to be glad

---

[388] *Id.* at 48, 49.
[389] Grimm, *supra* note 272, at 277.
[390] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 49.
[391] *Id.*

to resolve fundamental rights questions on a case-by-case basis, using what this Court considers as the most convincing theory suitable in a given circumstance.[392]

Another corollary that the Constitutional Court has drawn from the concept that individual rights are also objective principles is that governments may be compelled to furnish a person or a group of individuals with the essential means to make use of a right. This new concept introduced a shift from a purely formal tenet of freedom to a real notion of constitutionally protected freedom.[393]

This substantial notion of constitutionally protected freedom consists of the utilization of the right of freedom by the individual to obtain from government the indispensable assistance to make individual rights valuable. This concept depends upon the condition that, without government help, a human right would be completely valueless for a person. It is also true when government constrains the exercise of a right to requisites which could not normally be met without public furtherance.[394]

The Constitutional Court took the first step towards this new notion in 1972 in the *Numerus Clausus* case, which involved the medical schools of the universities of Hamburg and Munich.[395] This case arose out of restrictive admission policies which students, cast out because of these restraints but otherwise seemingly qualified for admission, sued challenging the regulations before the administrative courts in their corresponding states.[396] Skeptical about the harmony of these admission policies with the

---

[392] *Id.*
[393] Grimm, *supra* note 272, at 278.
[394] *Id.*
[395] *Id. Numerus Clausus* case BVerGE 33, 303 (330 ff.) *See also* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 282.
[396] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 282.

right of all Germans to freely select a trade or an occupation under Article 12,[397] the two courts submitted the question to the Constitutional Court.[398]

The Constitutional Court decided that education is the first step in pursuing a profession; "both are integral parts of a coordinated life process."[399] Moreover, in the domain of education, the Court stated, the constitutional protection of basic rights is not restricted to the function of defense against state intervention conventionally attributed to the fundamental liberty rights.

According to the Constitutional Court, fundamental rights in their capacity as objective norms also set up a value order that stands for a fundamental constitutional decision in all areas of law.[400] The Constitutional Court declared that "any absolute numerical limit on admission into a course of study is unconstitutional unless the institution applying it can demonstrate that all available space is completely filled."[401]

A significant feature regarding the judgment of this case was that the Constitutional Court refrained from obliging the government to expend a huge amount of money to fulfill its duty, and instead, it ruled that in the long run the government should take steps to ameliorate the situation.[402]

A third principle the Constitutional Court has developed from the objective quality of fundamental rights is the legislatures' obligation to protect individual rights against threats from private individuals or groups.[403] This principle arose in 1975 from

---

[397] *See* F.R.G. CONST. Art. 12. Guarantees the right to choose an occupation and forbids any compelled activity except within the framework of a traditional compulsory public service which applies generally to all.
[398] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 282.
[399] *Id.* at 283.
[400] *Id.* at 284.
[401] *Id.* at 288.
[402] Grimm, *supra* note 272, at 279.
[403] *Id.*

the *First Abortion* case, which involved an act of the legislature making abortions unpunishable if performed within the first three months of pregnancy.[404] The Abortion Law Reform Bill was adopted by the *Bundestag* in 1974, by 247 votes to 233, with the opposition of the Christian Democrat and Christian Social Union parties. Immediately on its signature by the President, the new law was challenged before the Constitutional Court by the Christian Democrat and Christian Social Union Opposition parties in the *Bundestag,* joined by the administrations of five state governments controlled by the same party.[405] The case arose before the court as an abstract judicial review in which party feelings ran deeply reflecting religious-sectarian positions.

This new Abortion Law had amended the German Criminal Code in important aspects: First, the non-penalizing of abortions within the first twelve weeks of pregnancy; second, the non-penalizing of abortions after the first twelve weeks, if medical grounds were present. The Federal Constitutional Court's majority decision was based upon two principles, protection of human dignity and the right of liberty, provided by the Basic Law in its Articles 1(1) and 2(2).

> Article 1(1): The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.
> Article 2(2): Everyone shall have the right to life and to inviolability of his person.

The Court found a positive obligation on the part of the state to protect life, developing life, even against the mother, and this was the reasoning for holding the

---

[404] *Id.* BVerGE 39, 1(42). *See also* Klaus Stern, *General Assessment of the Basic Law-A German View in,* 14 GERMAN AND ITS BASIC LAW 17, 51 (Paul Kirchhof & Donald P. Kommers eds. 1993). CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 53-54.

Abortion Law unconstitutional.[406] In the meantime the court decreed provisional rules to operate until the new law could be passed by the *Bundestag*, and in terms of which abortion should not carry a penalty if performed after consultation with a doctor and if any one of the following grounds existed: danger to the health or life of the mother, not avoidable by other mean; the existence of an irremediable defect on the unborn child that would make continuation of the pregnancy unreasonable(this within the first twenty-two weeks); origins of the pregnancy in rape or another serious offense(this within the first twelve weeks).[407]

The Constitutional Court ruled that the right to life in Article 2(2) of the Basic Law not only prohibits the government from exterminating life itself but, in addition, it demands that the state guard individual life against transgressions by others.[408] The addressee of this constitutional obligation is the legislature which has to pass laws securing protection of fundamental rights.[409]

In 1993, in a *Second Abortion* case, the Court held that the protection has to be a sufficient one in view of the rank and importance of the basic right at stake. Where limitations of a individual right can go too far, a protection can fall short from its goal.[410] The ruling of the Constitutional Court stands in sharp contrast with the more traditional approach undertaken, for example, by the Austrian Court when it was asked to decide a very similar case. According to the Austrian Court no constitutional question was

---

[405] Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 Am. J. Comp. L. 273, 275 (1995). [hereinafter *Casey in the Mirror*].
[406] *Id.* at 275-279.
[407] *Id.* Discussing the form and effect of the Court's decisions, the author comments that while invalidating the Abortion Statute, the Constitutional Court practically rewrote the law, which Parliament afterward felt obligated to pass.
[408] *See* Grimm, *supra* note 272, at 279.
[409] *Id.*

involved since the state did not kill fetuses, but only abstained from punishing abortion.[411]

Despite the *Second Abortion* case which gave rise to this new approach, the representative case for the protection of fundamental rights against threats stemming from third parties is a case involving new technical, economic, or social developments endangering basic rights.[412] According to the Constitutional Court, if an individual right is gravely bothered by developments such as atomic energy, automatic data processing, genetic engineering, or the like, the legislature is constitutionally responsible for taking measures to secure the right threatened.[413]

c) Success of Judicial Review v. Danger of *"Judicial Activism"*

As already seen, the United States and Germany both have a strong commitment to the protection of individual rights within their legal systems. This commitment is rooted in different backgrounds; nevertheless, the results of this commitment have been widely and generally recognized.

The Supreme Court, when exercising its power of judicial review, has since World War II successfully focused on individual rights as the primary check on the abuse of governmental authority.[414] In the United States, the Substantive Due Process of Law of the Fourteenth Amendment has played an important role in securing the protection of

---

[410] *Id.* at 279-280.
[411] *Id.* at 280.
[412] *Id.*
[413] Grimm, *supra* note 272, at 281.
[414] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 776-1683 (2nd ed. 1978).

civil liberties against actions of the states which violate fundamental rights.[415] While reviewing the constitutionality of state acts, the Supreme Court has utilized the Substantive Due Process clause to expand the scope of the Bill of Rights and to standardize its application nationwide. This work of the Court has been known as the "incorporation process" or "the incorporation controversy" of the Bill of Rights into the Fourteenth Amendment.[416]

The German legal system, on the other hand, possesses a fundamental-rights-distinctive feature, which has also played a major role in the protection of individual rights included in the Basic Law. In the context of Article 1(1) of the Basic Law, human dignity is the immovable base of the constitutional order, which the state is obliged not only to respect but also to protect.[417] In addition to this important precept, Article 1(3) settles the character of directly valid law that fundamental rights enjoy; and second, the binding effect of these rights over the legislature, executive, and judiciary.[418]

In addition, the power given to the Courts responsible for the enforcement of such rights has played a key role. These Courts have the authority to determine the proper application of the rights bestowed in the constitutions of their countries.[419] In both cases, this authority emanates from the institution of judicial review, which is perhaps the finest contribution made by the United States to political theory and civil liberty.[420] The United States Supreme Court and the Federal Constitutional Court of Germany have been the

---

[415] WITT, *supra* note 274, at 378. *See also* STONE, *supra* note 6 at 804.
[416] STONE, *supra* note 6 at 804. *See also* CIVIL LIBERTIES, *supra* note 292, at 247; William J. Brennan, Jr.; *The Bill of Rights and the States in,* THE EVOLVING CONSTITUTION, ESSAYS ON THE BILL OF RIGHTS AND THE U.S. SUPREME COURT 254, 256-257 (Norman Dorsen ed., 1989).
[417] Grimm, *supra* note 272, at 270.
[418] *Id. See also* Günter Dürig, *An Introduction to the Basic Law of the Federal Republic, in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, 11-16, (Ulrich Karpen ed. 19880).
[419] *Id. See also* Safran, supra note 272 at 103; Dorsen, *supra* note 272 at 379; Faigman, *supra* note 272 at 1522.

institutions that have shaped the constitutional protection of fundamental rights in the national level.[421]

In the United States, for instance, the extensive body of constitutional protection for individuals has been elaborated from the few textual provisions set forth in the Constitution.[422] As first adopted, the Bill of Rights was greatly imperfect. Among some of its deficiencies, it could be mentioned that it did not outlaw slavery; that it did not prescribe equality in rights for all persons subject to U.S. jurisdiction; that it did not guarantee the equal protection of the laws; and that it did not rule and restrict the states.[423]

By this day, in the Supreme Court reports, one can find rights that Americans think are in their Constitution, but are not, or are there only invisibly, such as the presumption of innocence and the requirement of guilt beyond a reasonable doubt for conviction of crime. There one will find universal suffrage, though as a product not of commitment to democracy and representative government but commitment to equality: if one person votes, all must be entitled to vote and vote equally.[424] This does not all owe to judicial review, the Civil War Amendments changed the constitutional landscape by nationalizing the protection of individuals rights.

The individual enjoys the protection of his/her life, property or liberty against deprivation by arbitrary governmental action. Said rights are categorized so that they weight heavily in the balance and are defended against any but important, even compelling, public interests. In all, the Supreme Court renders precise levels of judicial

---

[420] Grimm, *supra* note 272, at 59, 271. *See also* Dorsen, *supra* note 272, at 379; BREWER-CARIAS, *supra* note 1 at 136; Steinberger, *supra* note 121 at 214.
[421] Grimm, *supra* note 272 at 65.
[422] *Id.* at 65.
[423] Henkin, *supra* note 344 at 484.
[424] *Id.*

review-some superfluous, some careful, some strict.- The comparative weight of the rights and of the competing public interest in the constitutional balance determines the level of scrutiny and restrains government from encroaching civil rights.[425]

In Germany, the Constitutional Court has certainly been active in terms of unfolding and developing the Constitution too. It has elaborated a theory of fundamental rights which surpasses the jurisprudence of most other countries with judicial review. First, the notion that there is a protective duty implicit in the concept of fundamental rights has given great importance to the German Constitution.[426]

In addition, the Constitutional Court has employed judicial review and its scrutiny to strictly control state acts where personal or political liberties are infringed upon or where fundamental requirements of equality are neglected. So that, the Court brings a good deal of political and juridical decisions under the control of the Constitution and, hence submits them to judicial review.[427] In the end, there can be no doubt that this leads to a reduction of parliamentary power, yet in the name of fundamental rights. The freedom that predominates in this system is more the sort of right guaranteed by fundamental rights than the sort of freedom guaranteed by democratic participation.[428]

Both the United States and German constitutional models have been internationally recognized for possessing one of the most reliable judiciaries in the world. Each system's success in the protection of fundamental rights has enabled a high percentage of its citizens to feel confident about to their judiciary's performance.[429]

---

[425] *Id.*
[426] *See* Grimm, *supra* note 272 at 65.
[427] *Id.*
[428] *Id.*
[429] William Rehnquist, *Constitutional Courts-Comparative Remarks*, *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE-A GERMAN AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds.,

Despite the foregoing achievements, judicial review has also been blamed as the instrument that allows the Supreme Court to make decisions on "social policy issues" that judges should not decide.[430] Judge Learned Hand contended that there was "nothing in the United States Constitution that gave courts any authority to review acts of Congress." Judges must keep in mind criticism like this when considering overturning statutes or executive actions, particularly because of the arguments about the propriety of judicial review in a democratic system. Other argument aimed at limiting judicial review is that each branch of government should decide for itself what is constitutional and then should act on the basis of its own conclusions.[431]

Others find judicial review disparaged because of its undemocratic character.[432] Justices, who are appointed for life and remain on the Supreme Court long after they are out of tune with the nation's view, can invalidate acts of periodically elected government. A response to this argument is that when the Supreme Court strikes down statutes as "void for vagueness," Congress can rewrite the statute clearer. Even when the Court invalidates statutes as unconstitutional, such rulings can be overturned directly by constitutional amendment.[433] Another response to the claim that judicial review is

---

1989). David Ponte, "*PNUD: La Confianza en la Justicia Mexicana, de las Más Bajas*" LA JORNADA NEWSPAPER, (Ciudad de México) Octubre, 9, 1997 at 1.

[430] STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM, 3-5 (2nd ed. 1984)[hereinafter WASBY].

[431] *Id.* President Andrew Jackson made his own judgment by vetoing legislation for a national bank even though Marshall, in *McCulloch v. Maryland*, had early sustained the validity of such bank. Likewise, President Jefferson though Supreme Court determinations about statutes' validity were entitled to respect but were not binding on him as president.

[432] BICKEL, *supra* note 18 at 16, 17. "[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That without mystic overtones is what actually happens..., and it is the reason the charge can be made that judicial review is undemocratic."

[433] *See* WASBY, *supra* note 430, at 220. Formally, Congress has overturned Supreme Court decisions in several occasions: The Eleventh Amendment (no suits against states by citizens of another state) overturned *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); the Sixteenth Amendment (income tax) reversed *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1894); the Twenty-sixth (18-year-old vote) overturned *Oregon v. Mitchell*, 400 U.S.

undemocratic is Alexander Bickel's, that judges are better at judicial review precisely because of their insulation from political pressure. That insulation permits them to follow "the ways of the scholar," in finding the meaning of the text.[434] Frequent exercise of judicial review will also make it less likely that those seeking policy changes will press legislators and political executives for action, and will put a restraint on legislators' willingness to meet their responsibilities to deal with social problems.[435]

Chief Justice Burger in *Plyler v. Doe*[436] said, "[w]hen this Court rushes in to remedy what it perceives to be the failings of the political process, it deprives those processes of an opportunity to function." On the contrary, others say, the court's action can help establish an agenda of issues given active consideration by the other branches and can stimulate activity to deal with otherwise ignored problems.[437]

At the core of the contention about the undemocratic character of judicial review is the argument that courts must protect the minority rights that are part of democracy by enforcing rights of free speech, assembly, petition and press. John Ely argues that judicial review is necessary to protect politically powerless minorities against majoritarian excesses.[438] For him, judges, in the exercise of judicial review, should not search for fundamental values to be enforced, or substantive results to be imposed, but should focus on restrictions on the "opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodations those

---

112 (1970); and the post-Civil War Amendments eliminating slavery, redefining citizenship, and protecting civil rights.

[434] *See* BICKEL *supra* note 18 at 25, 26.

[435] *See* WASBY, *supra* note 430, at 221.

[436] 102 S.Ct. 2382 at 2414 (1982).

[437] *See* WASBY, *supra* note 430, at 221. Stating that after the Court's reapportionment rulings, state legislatures learned to deal with redistricting and those rulings opened up the political process.

[438] ELY, *supra* note 36 at 73-179.

processes have reached."[439] The Constitution virtually "represents everyone's interests at the point of substantive decision and that application of substantive policy will not be manipulated to reintroduce discrimination." The document "has sought to assure that an effective majority not systematically treats others less well than it treats itself."[440]

Even some who recognize that judicial review allows courts to make policy contend that judicial review may be exercised as long as the decisions are "principled." Legislators and political executives stand for pragmatism; courts, on the other hand, must stand for principle, deliberateness, the use of rationality and logic, and detachment from the turmoil and passion of political conflict. As Alexander Bickel would say:[441]

> [T]he root idea is that the process is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable.

Professor Wechsler adds "the duty [of the judiciary] is not that of policing or advising legislatures or executives, but rather simply to decide the litigated case and to decide it in accordance with the law."[442]

The Supreme Court is no more than a coordinate institution of government, in no way superior to executive and legislative institutions with which it is linked in obligation of mutual respect. The so-called rules of "judicial auto-limitations," noted by Justice Brandeis in his concurring opinion in *Ashwander v. Tennesse Valley Authority* 297 U.S. 346 (1936), tried to minimize the opportunities for unnecessary political conflict between

---

[439] *Id.*
[440] *Id* at 100,101.
[441] *See* BICKEL *supra* note 18 at 58.

the Supreme Court and the executive and legislative branches.[443] After the United Sates Supreme Court had called attention to the great gravity and delicacy of its function in passing upon the validity of an act of its correlative branches, Brandeis set out certain disciplines that the court has developed for its own governance to avoid unnecessary pressures.[444] The court's obligations of self-restraint may became the stronger, in political and constitutional terms, if the judges are not elected or submitted to legislature-based ratification of their appointments to the court; for their claims to constitutional legitimacy and to a mandate to control the popularly-elected institutions of government are then at their lowest.[445] In the United States what exists, is the historical contextual evidence that provides significant, but not definitive, support for the claim that judicial review is not an illegitimate usurpation of power.[446]

Conversely, Germans accept the Constitutional Court as a legitimate participant in the large community decision-making process.[447] Most scholars and legal professionals applaud the Constitutional Court's decisive influence upon the development of German Constitutional Law. Germans are comfortable with the court as the final authoritative interpreter of the Basic Law for several reasons. The authority of the Court to exercise judicial review is clearly stipulated in the Basic Law. A democratic legislature elects the members of the Constitutional Court and dissenting opinions were permitted in 1971.[448]

---

[442] GUNTHER, *supra* note 13, at 3-20

[443] EDWARD MCWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW 99-101 (1986).[hereinafter MCWHINNEY].

[444] *Id.* The Brandeis rules of judicial auto-limitation have been rigorously applied in the almost ritualistic insistence of an actual case-controversy as the necessary base of constitutional jurisdiction, and on the continuing rejection of any notion of rendering Advisory Opinions. *See supra* Chapter I § b).

[445] *Id.*

[446] Johnny C. Burris, *Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review*, 12 Okla. City U. L. Rev. 585, 654, 655 (1987).

[447] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 55.

[448] *Id.*

Despite its democratic legitimacy the Constitutional Court still has been criticized for "politicizing justice."[449] Proposals to reduce the tension between the Court and the legislative bodies include changes in procedural and substantive law. Among these proposals is the judicial self-restraint principle which should be exercised by the court whenever political issues are at stake. Despite the fact that this principle has been established by the Constitutional Court itself, the court does not have the option to refuse a decision because of the political issue involved.[450] The principle of judicial self-restraint serves only as a method of the review; it does not block the court from deciding the case. By this, the Constitutional Court takes part in the legislative procedure, not because it is authorized by the Basic Law but rather because the government and the opposition take the view that an enacted statute is only incontestably valid after it has been reviewed and confirmed by the Constitutional Court.[451]

Another stream of commentaries identified with neo-Marxist critics say that the court serves as a brake on social change and is the main force responsible for the imposition of a constitutional ideology that sanctifies consolidation and stability, defends the *status quo*, and promotes consensus politics. These critics manifest far less sympathy for the Court's institutional role in German politics. The grounds for this criticism is the invalidation of reforms regarded as progressive and liberalizing by large parts of German society.[452]

---

[449] *Id.* In cases like *The Party Finance IV, the First Abortion and in Census Act and Higher Education Admissions* the Constitutional Court has been criticized for exceeding the limits of judicial power since it "took a quasi-legislative position."

[450] Ipsen, *Constitutional Review of Laws, supra* note 123, at 128-135.

[451] *Id.*

[452] The nation's shocking experience with a totalitarian regime was the main reason to draft the Basic Law in 1949. Germans became aware of the fact that it was the *Staat,* the government and all its staff, that had

Therefore, The United States Supreme Court and the German Constitutional Court have developed "special constitutional-legal categories" for legally immunizing themselves against the necessity to make pronouncements, on demand, as to the alleged constitutionality or unconstitutionality of particular exercises in constituent power or assertions of executive or legislative authority. Such categories become instruments of judicial self-restraint as of the political question doctrine in the United States.[453]

d) Distinctions Between the American System of Judicial Review and that of Germany

Germans have a strong commitment to the Rule of Law as the best protection against oppression; therefore, the Basic Law leaves nothing to inference, as it enumerates all of the Constitutional Court's jurisdiction.[454] Perhaps, for this reason, the source and authority of the Federal Constitutional Court in Germany are practically undisputed. The United State Supreme Court, by contrast, established its own power of judicial review, and therefore the chief duty of constitutional theory is to find and establish the limits and sources of judicial review.[455] Although judicial review is one of the landmarks of North American constitutionalism, ironically, there is no totally persuasive theoretical explanation of where the Supreme Court's power to invalidate the acts of elected officials comes from nor the occasions for the use of such a power. The struggle for the

---

committed the most atrocious crimes. They witnessed that their legal order before the enactment of the Basic Law, had allowed brutal inhumanity and immorality.

[453] *See* MCWHINNEY *supra* note 438.

[454] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 30.

[455] *See Id.* at 842. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 117 (2nd ed. 1994).

explanation for judicial review continues within the scope of American constitutional theory.[456]

In contrast, the German Basic Law grants to the Constitutional Court the power of judicial review, but there are still some controversies over its use. Judicial nullification of majoritarian policy (legislative acts) causes as much debate as in the United States. The difference is that in Germany the criticism is directed against governmental agencies or political parties who use constitutional litigation for political aims.[457] After all, the countermajoritarian problem, a major difficulty in the United States, is not a serious problem in Germany since the Basic Law justifies the exercise of judicial power.

The countermajoritarian difficulty occurs in Germany to the extent that the Constitutional Court resolves cases on the basis of historical and functional considerations. The Court has resorted to theories of its own creation; one of them, as mentioned earlier, is the objective order of values. By using this standard, the Court has declared unconstitutional a number of important statutes, including the Abortion Reform Act in the *First Abortion* case.[458] Some of the judgments have provoked criticisms regarding the fact that judges are imposing their own personal values on the nation as a whole.

For several reasons the exercise of judicial review is somehow less difficult in Germany than in the United States.[459] First, in Germany, not the executive branch but the legislative branch elects the members of the Court by a two-thirds vote for a single

---

[456] *See generally,* ROBERT BORK, THE TEMPTING OF AMERICA 1990); JOHN ELY, DEMOCRACY AND DISTRUST (1980); and RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977).
[457] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 55.
[458] *Id.* at 336-348. *See generally Casey in the Mirror, supra* note 405.
[459] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 58.

nonrenewable term of twelve years.[460] The intervention here of *Bundestag* and *Bundesrat* makes somewhat less tense the relationship between legislatures and the Constitutional Court. Moreover, the U.S. Supreme Court justices, on the contrary, serve a life term, and this often prevents the Supreme Court from growing and changing.[461]

Second, the Federal Constitutional Court practices certain techniques to interpret the Basic Law. These techniques might be brought together under the general heading of constitutional textualism.[462] The civil law tradition, with specific norms and structures, leads to legal positivism when adjudicating, so the Constitutional Court frequently judges as if it is strictly adhering to the constitutional text. But the Court also employs systematic and teleological models of investigation.[463] The focus is often on the text as a whole from which judges are to ascertain the aims and objects, or telos, of the Basic Law, a style of reasoning that allows judges to incorporate broad value judgments into their decisions. Such a style has been employed on the Supreme Court's Substantive Due Process judgments.[464] The Constitutional Court uses history to assert judgments decided on the basis of teleological reasoning, although, on the other hand, original intent plays no significant role in German constitutional interpretation. Meanwhile, in the United States, the subjective understanding of the Framers and the importance it should be given in constitutional adjudication is much debated.[465] This kind of thinking contributes to more uncertainty when reaching decisions.[466]

---

[460] *See supra* note 160 and accompanying text.
[461] *Id.*
[462] CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 40-57.
[463] *Id.*
[464] *Id.*
[465] *Id.*
[466] *Id.*

example, in 1954, the Supreme Court decided *Brown v. Board of Education of Topeka*, which abolished separate schools for black and white students in the schools of Kansas and other schools on the grounds that such separation violated the Fourteenth Amendment.[472] In *Abington School District v. Schempp* and *Engel v. Vitale,* the Supreme Court ruled that public schools could not hold prayer and Bible-reading exercises for their students.[473] Also in *Roe v. Wade*, 410 U.S. 113 (1973), the right to abortion; and finally, in the search and seizure cases, *Mapp v. Ohio* applied to the states the exclusionary rule, under which evidence illegally seized by the police could not be used against a defendant in a state courts.[474] At the same time, the Constitutional Court has been in "the eye of political storm." For example, in 1975, the *First Abortion* case, which invalidated a permissive abortion statute, was severely criticized on the grounds that judicial recriminalization of abortion during the first trimester of pregnancy exceeded the bounds of judicial power. Critics argued that the implementation of Basic Law's objective values in the case was a legislative task.[475] In the famous *Party Finance IV* case the Constitutional Court, crossed boundaries when it told parliament that federal funding would have to be provided to minor political parties securing 0.5 percent of all votes cast in a federal election instead of the 1.5 percent limit previously established by law.[476]

---

[471] Neal Tate, *Comparative Judicial Review and Public Policy: Concepts and Overview*, *in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY, 7 (Donald Jackson and Neal Tate eds., 1992) [hereinafter Tate].
[472] 347 U.S. 483, 486-88 (1953).
[473] 374 U.S. 203, 205 (1963), and 370 U.S. 421, 422-25 (1962).
[474] 367 U.S. 643, 658-60 (1961).
[475] *See generally, Casey in the Mirror, supra* note 405.
[476] *See Party Finance* case 24 BVerfGE 260 (1968) *in* CONSTITUTIONAL JURISPRUDENCE OF F. R. G., *supra* note 109, at 210.

But once the Courts have ruled that specific rights are constitutionally protected, the social controversy does not come to an end. However, the Courts are not able to continue a persuasive process within local legislatures and among citizens.[477]

Another distinction is the extensiveness of the practice of judicial review. The United States employs the all-courts model. Any court may exercise judicial review, and a declaration of unconstitutionality on the part of a lower court judge need not be approved by any higher authority to be effective. Although cases can be appealed to the Supreme Court, the policy influence of the judiciary is maximized in the United States because all courts can review constitutional questions.[478] Germany, on the contrary, exercises judicial review exclusively by the "special" Constitutional Court. To restrict the power of judicial review only to a constitutional court might increase the breadth of the typical constitutional question posed to the courts, but it also reduces the number of occasions and range of policy issues on which the courts can exercise judicial review.[479]

Finally, the competence of the Constitutional Court is wider than that of the Supreme Court. The Constitutional Court has many duties that the United States Supreme Court does not assume in that it can resolve political questions and engage in abstract judicial review. However, from the jurisdictional perspective the Constitutional Court is limited to adjudicate only upon constitutional questions. Unlike the United States Supreme Court, the specialized court is not a general court of final appeal.[480]

---

[477] *See* Tate, *supra* note 471, at 4.
[478] *Id.*
[479] *Id.* at 7.
[480] *Id.*

Chapter V.

Establishing a Constitutional Court in Mexico

a) The Ineffectiveness of the Mexican Judiciary

The weak state of the Federal Judiciary in Mexico was demonstrated in the most recent 1994 Constitutional Amendment concerning the judiciary. The current president of Mexico, Ernesto Zedillo, resembling the historical example of some of his predecessors, has limited, even more, the power of the existing Supreme Court of Justice.[481] Some of the principal features of these reforms, which touched twenty-seven constitutional articles, are the decrease in the number of ministers from twenty-one to eleven, and the removal of the "floating" ministers of the Supreme Court of Justice.[482] The number of specialized *Salas* was also reduced from four to two, one for civil and penal cases, the other for administrative and labor cases.[483]

In addition, these amendments also altered the ministers' tenure in office by reducing it from a lifetime appointment to a fifteen-year term, without the possibility of re-designation.[484] The President still holds the power to nominate candidates for

---

[481] Michael C. Taylor, *Why Do Rule of Law In Mexico? Explaining the Weakness of Mexico's Judicial Branch,* 27 N.M. L. Rev. 141, 149 [hereinafter Taylor]. *See also The Rebirth of the Supreme Court of Mexico, supra* note 259, at 297.

[482] *Id.*, at 149. *See also The Rebirth of the Supreme Court of Mexico, supra* note 259, at 302. *See also* IGNACIO BURGOA, DERECHO CONSTITUCIONAL MEXICANO, 882 (1997) [hereinafter BURGOA, ed. 1997]; *Liberalismo Contra Democracia, supra* note 259, at 1929.

[483] Taylor, *supra* note 481, at 149. *See also* BURGOA, ed. 1997, *supra* note 482, at 882.

[484] Taylor, *supra* note 481, at 149. *See also* BURGOA, ed. 1997, *supra* note 482, at 886.

Supreme Court ministers to the Senate.[485] The variation now is that the President will suggest to the Senate a list of three candidates to occupy a seat in the Supreme Court of Justice.[486] Then, by a super majority vote, the Senate has to select one of the candidates.[487] If the Senate eliminates all three candidates, the President must offer another list of three different nominees. If the Senate again rejects the list, the President at this stage has the authority to select which candidate will take over each open ministerial seat.[488]

The *Acciones de Inconstitucionalidad* (Unconstitutional Actions) Procedure is one of the innovations added by the 1994 Reforms. This procedure has particularly attracted the public scrutiny and has been regarded as the most original reform of 1994.[489] This new and "original" procedure implanted in the Mexican Constitution is important for this work for at least two reasons.

First, the establishment of the *Acciones* to the Constitution carried the *erga omnes* effect into the Mexican legal system for the first time. Nevertheless, this remarkable accomplishment has been surrendered by strict procedures that have rendered it largely inconsistent.[490] Second, the *Amparo* trial was not enhanced at all by the implementation of the Unconstitutional Actions Procedure but condemned to exist under the Mariano Otero Formula.[491]

---

[485] BURGOA, ed. 1997, *supra* note 482, at 882-883.
[486] *Id. See also* Taylor, *supra* note 481, at 149.
[487] Taylor, *supra* note 481, at 149.
[488] *Id.*
[489] *Id.* at 150
[490] BURGOA, ed. 1997, *supra* note 482, at 888; Taylor, *supra* note 481, at 151.
[491] *See The Rebirth of the Supreme Court of Mexico*, *supra* note 259, at 314.

The objective of *Acciones de Inconstitucionalidad* procedure is to determine a disagreement between constitutional requirements and federal or state legislation.[492] This procedure permits the Supreme Court of Justice to declare unconstitutional legislation invalid. Since the Supreme Court of Justice never before had been given this power, it represents an unparalleled event in the Mexican legal system.[493]

The Mexican Supreme Court's new capability to make judgments with *erga omnes* effect certainly constitutes a paramount development in the Mexican constitutional history.[494] Nonetheless, the conditions for using the *Acciones de Inconstitucionalidad* make this procedure useless in at least two circumstances. First, the claim must be brought by the General Attorney or by thirty-three percent of either House of Congress.[495] Since the General Attorney is a presidential nominee who can be removed from office at the president's will, and legislation is not sanctioned without presidential support, it is improbable that a General Attorney would ever promote a constitutional challenge against legislation.[496] Congress may be more likely to bring a constitutional complaint; however, the constitutionality of a statute should not depend upon the legislative support that a given constitutional challenge generates.[497] Furthermore, it is hard to obtain a thirty-three percent vote in opposition to a majority-upheld statute in a scheme where the number of ruling-party federal legislators is greater than the number of all other parties' legislators in Congress.[498]

---

[492] BURGOA, ed. 1997, *supra* note 482, at 888.
[493] Taylor, *supra* note 481, at 151.
[494] *See The Rebirth of the Supreme Court of Mexico*, *supra* note 259, at 322.
[495] *Id. See* Mex. Const., art. 105, sec. II(c). *See also* BURGOA, ed. 1997, *supra* note 482, at 888.
[496] BURGOA, ed. 1997, *supra* note 482, at 888. *See also* Taylor, *supra* note 481, at 163.
[497] Taylor, *supra* note 481, at 163.
[498] *Id. See also* BURGOA, ed. 1997, *supra* note 482, at 888.

Second, the requirement to raise this procedure within thirty days of the law's publication has provoked criticism for several reasons.[499] Thirty days is such a short period of time that it may make the Supreme Court of Justice unlikely to acquire enough evidence on the practical ramifications of the challenged legislation.[500] Moreover, since it may take months or even years before a statute's constitutional breaches become clear, this requirement has been considered as irrational.[501]

Finally, the "super qualified majority" requirement involving the Supreme Court of Justice decision in the *Acciones de Inconstitucionalidad* procedure represents another obstacle for those seeking relief through this procedure.[502] The requirement compels the Supreme Court of Justice to declare a law unconstitutional only if a majority of eight ministers out of eleven so decides.[503]

In short, the requirement means that in spite of the opinion of the challenging governmental body (either the General Attorney or Congress), and despite the Supreme Court's simple majority vote (six or seven votes out of eleven) against that law, it will remain effective and legally enforceable if a "super qualified majority" does not concur.[504]

In sum, the 1994 Reforms are not a great leap forward in the autonomy and power of the judiciary. This overview of the *Acciones de Inconstitucionalidad* procedure is by no means exhaustive. The incorporation of the recent amendments under the current Mexican legal system was accompanied by obstacles and tricks that render them useless.

---

[499] *See* Mex. Const., art. 105, sec. II. *See also* Taylor, *supra* note 481, at 151 & 163.
[500] *Id.*
[501] Taylor, *supra* note 481, at 151 & 163.
[502] *See* Mex. Const., art. 105, sec. II.
[503] *See* Mex. Const., art. 105, sec. II. *See also The Rebirth of the Supreme Court of Mexico*, *supra* note 259, at 315.

Trivial procedures, such as the *Acciones de Inconstitucionalidad*, emphasize only the urgency for more serious thoughts concerning the implementation of new institutions and safeguards of constitutional values in Mexico.

b) Acciones de Inconstitucionalidad Procedure v. the Amparo Trial

The *Acciones de Inconstitucionalidad* procedure does not seem to have brought about any factual or palpable betterment to the eroded power of the federal judiciary in Mexico.[505] Obviously, the object to be attained by introducing the *Acciones de Inconstitucionalidad* procedure was only to make apparent a new kind of federalism in Mexico.[506] Although, the 1994 Reforms seem to bring a new era of constitutionalism in Mexico, the chance for real utilization of the *Acciones de Inconstitucionalidad* procedure has been extremely limited.[507]

As mentioned above, either Congress or the General Attorney are the only ones entitled to bring *Acción de Inconstitucionalidad* before the Supreme Court of Justice. Within the government structure, congressmen stand for the interests of the citizenry.[508] However, in Mexico there is a immense abyss between them and the people.

Usually, Mexican congressmen interested in positive changes for Mexican society barely ever succeed in defending a just public claim in the Congress. The situation is mainly due to the fact that congressmen in the ruling party constitute the vast majority of federal members of Congress. Thus, it is inconceivable that a complaint about the unconstitutionality of a law will obtain a thirty-three percent vote in a scheme where the

---

[504] *See The Rebirth of the Supreme Court of Mexico*, *supra* note 259, at 315.
[505] BURGOA, ed. 1997, *supra* note 482, at 888.
[506] *See The Rebirth of the Supreme Court of Mexico*, *supra* note 259, at 318
[507] See Taylor, *supra* note 481, at 149. *See also* BURGOA, ed. 1997, *supra* note 482, at 882-886.

number of ruling-party federal legislators is larger than the number of all other parties' legislators in Congress.

Additionally, asking the General Attorney to raise a challenge under the *Acciones de Inconstitucionalidad* procedure makes little practical sense. The General Attorney, who is a presidential appointee, may be discharged by the President at will. Therefore, this official is totally unlikely to employ such a procedure against a law that was approved with presidential support.[509]

The *Amparo* trial, already reviewed in this paper, is the only available institution to offer practical safeguards for the constitutional order in Mexico. However, the *Amparo* also possesses certain features that limit both its own scope and the power of the Mexican judiciary.[510]

The decisions resulting from *Amparo* suits do not bear the *erga omnes* effect but rather are restricted to ruling only that the law challenged not be used against the person submitting the application.[511] The law impugned will continue to be applicable since the Federal Judicial branch does not possess powers to "abrogate or derogate a law."[512] This sole fact makes the work of the Mexican judiciary twice as complicated.

Since the *Amparo* does not invalidate the law judged incompatible with the constitutional order, the law continues in force despite its inappropriate legal character. The *Amparo* simply annuls the single act of the authority in the specific case presented to the Court. For instance, if the law challenged consists of a tax violation of the

---

[508] *See* Mex. Const., arts. 51, 52.
[509] Taylor, *supra* note 481, at 151 & 163.
[510] Rafael Estrada-Samano, *Administration of Justice in Mexico: What does the Future Hold?*, 3 U.S.-Mex. L.J. 35, 43.
[511] *Id. See also The Claim of "Amparo" supra* note 233, at 417.
[512] *See The Claim of "Amparo" supra* note 233, at 421.

constitutional right not to be deprived of a living, the favorable judgment absolves the applicant from paying the levy.[513] However, the rest of the population is not immune from the same unconstitutional tax law unless they too file an *Amparo* suit.[514]

In addition, the Mexican Supreme Court's scope of action is severely restricted due to the nature of the *Amparo*. The Court finds itself bound by this instrument because the *Amparo* was conceived in the Roman Law tradition, which excludes the judiciary from nullifying legislative or executive acts in order to avoid any friction between any of these branches.[515].

With regard to the restrictions, the power to nullify with *erga omnes* effect unconstitutional laws that threaten the constitutional precepts is still a necessity to be fulfilled in Mexico. To satisfy this need in the Mexican legal order, I propose the establishment of a Constitutional Court in Mexico, which would have the power to nullify legislative or executive acts on the grounds of their unsuitable character with regard to the Constitution.

c) The Need for a Constitutional Court in Mexico

The necessity of creating this Court is based mainly on two factors: First, the lack of reliable instruments to protect the constitutional order in Mexico, and second, the current Mexican judiciary is largely discredited. By this time, the people's faith in the judiciary has fallen as low as a twenty-two percent approval rate, according to the United

---

[513] BREWER-CARÍAS, *supra* note 1 at 167.
[514] Cabrera & Headrick, *supra* note 196, at 258.
[515] Taylor, *supra* note 481, at 153. *See also* EDUARDO PALLARES, DICCIONARIO TEÓRICO Y PRÁCTICO DEL JUICIO DE AMPARO, 16 (1967).

Nations Program for Development.[516] This situation is extremely worsened by the symbiotic character of this branch in relation to the executive branch.

Therefore, the current role of the judiciary in Mexico justifies an urgent need for creating a Constitutional Court there. Besides the inefficacy of the *Acciones de Inconstitucionalidad* procedure and the *Amparo* trial, the Mexican Judiciary itself is incapable of successfully carrying out the duty of applying judicial review. In Mexico, this task must be isolated form the current judiciary because of its discredit before the society, which views the judiciary as an inefficient governmental agency, deeply tied to the corrupt executive branch.

As a result, if the power of judicial review is deposited in the current Mexican judiciary, the public will distrust its legitimacy for exercising such an important power. Mexico requires the adoption of an institution to guard the Constitution, whose integrity is essential for society and for a healthy governmental structure. Otherwise, the lack of checks will, sooner or latter, be conducive to anarchy or to a dictatorship.[517]

To avoid such ends, Professor Cappeletti suggests the adoption of "a new kind of constitutional norms, institutions and processes . . . in an attempt to thereby limit and control the political power."[518] To achieve that end, he asserts, it is necessary to adopt judicial review of the constitutionality of state action. This development, he says, has changed the governmental structure of much of Continental Europe over the last forty years or so.[519] Mexico should also be open to "constitutional justice," in which

---

[516] David Ponte, "*PNUD: La Confianza en la Justicia Mexicana, de las Más Bajas*" LA JORNADA NEWSPAPER, (Ciudad de México) Octubre, 9, 1997, at 1. Commenting that Mexican public's confidence in the Mexican judiciary is one of the lowest in the world.
[517] FIX ZAMUDIO, JUICIO DE *AMPARO, supra* note 188, at 51.
[518] Cappelletti, *Repudiating Montesquieu? supra* note 107, at 5.
[519] *Id.*

governmental power is limited by a constitutional norm and in which procedures have been designed and institutions created to enforce such limits.[520]

Hence, being a country with a civil law tradition, Mexico may well adopt the proper system. The implementation of the European model could be suitable for several reasons. First, the centralized system lacks the *stare decisis* doctrine in civil law jurisdiction.[521] Civil law judges are unfamiliar with this principle, so allowing each judge to decide on the constitutionality of statutes could result in a law being disregarded as unconstitutional by some judges, while being held constitutional and applied by others.[522] Hence, a single judicial body could be made capable of giving decisions of general binding effect when dealing with the constitutionality of legislation, and the conflicts and chaotic uncertainties can be avoided.[523]

Second, in the European model, the concept of Separation of Powers is different from that of the American system.[524] In the United States, for example, the recognition of the judiciary as a third power is a progressive achievement to limit the executive and legislative branches of government.[525] In the concentrated system, by contrast, the authority of the American judges could be interpreted as a political one, since they interpret and make law encroaching on the legislative power. Therefore, according to Hans Kelsen, a single court entrusted with constitutional review constitutes not a third parallel power but one above the others that is charged with monitoring the three essential

---

[520] *Id.*
[521] CAPPELLETTI, JUDICIAL REVIEW, *supra* note 1, at 55-60.
[522] *Id.*
[523] *Id.*
[524] *Id.*, at 54.
[525] *Id. See also*, Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 55.

functions of the state (executive, legislative and judicial branches).[526] Professor Favoreu affirms that the impetus for constitutional courts in Europe owes much to the increased concentration of political power.[527]

Third, the centralized system reflects the unsuitability of ordinary civil law courts for judicial review.[528] The United States Supreme Court has ordinary jurisdiction just like the rest of the courts, and even for constitutional questions a special procedure is not required. Therefore, the Supreme Court is equivalent to the highest court of appeals, but not compatible with the specialized constitutional courts.[529] However, the traditional civil law courts lack the structure, procedures and mentality required for an effective control over the constitutionality of legislation.[530]

Therefore, as Professor Cappelletti concludes, these are the most important reasons why a civil law country, when adopting judicial review, should not use existing judicial organs. It is healthier to create a totally new judicial corpus despite the inherent problems of coordination.[531]

---

[526] Favoreu, *Constitutional Review in Europe*, *supra* note 7, at 56, noting that the Constitutional Court is neither part of the judicial order nor part of the judicial organization. It remains outside the traditional categories of state power, and its main function is to ensure that the Constitution is respected in all areas.
[527] *Id.* at 56.
[528] CAPPELLETTI, JUDICIAL REVIEW, *supra* note 1, at 60.
[529] *Id.* Although a civil law country, the Mexican Supreme Court of Justice has tried unsuccessfully to excersise judicial review. According to this notion in Mexico a specialized court could be institutionalized for constitutional litigation and leave the Supreme Court of Justice with its ordinary jurisdiction.
[530] *Id.* at 62. Civil law countries lack the "compact and manageable structure of the United States Supreme Court. Characteristically, in Mexico there are several specialized courts, such as the Federal Fiscal Court, Court of the Federal District for Administrative Conflicts and Federal Electoral Conflicts Court." *See* Mex. Const. art. 94.
[531] CAPPELLETTI, JUDICIAL REVIEW, *supra* note 1, at 65, 66.

Conclusion

The American system of judicial review has been very attractive to many countries. No special procedure for constitutional questions is required; all disputes, whatever their nature, are decided by the same courts, and extraordinarily the principle of *stare decisis* rules the legal effects of cases decided. The only requirement is that this machinery has to be implemented in a common law system with a liberal democratic system. Hence, countries wishing a similar system, but impeded by their civil law tradition, sought an alternative instrument to review inferior laws to assure conformity with a higher, more fundamental law. The European model is the result of this desire. This model concentrates judicial review power in one single judicial organ, whose foundation is manifested in the Constitution and whose decisions have a general effect. This model has been adopted for an important number of western, central and eastern European countries.

Despite decades of constitutional transformation, institutional arrangements prevent the Mexican judicial system from achieving effective instruments to enforce basic constitutional principles and maintain an equilibrium of powers. The *Amparo* represents an obstacle for major changes and until it is reformed, constitutional guarantees remain threatened in Mexico.

Mexico aspires for a democratic government and needs a judicial check in its co-equal branches. Therefore, it needs to join the constitutional movement. Constitutionalism has

made great progress in countries that have established constitutional courts. Because of their decisions, constitutional courts have engendered respect for constitutions and fundamental rights. Modern constitutions necessarily include constitutional supremacy and constitutional review both of which are missing from the Mexican System.