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## Judicial Review in Comparative Perspective†

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*Judicial review of legislation has frequently been called a uniquely American institution. Professor Cappelletti casts profound doubt on the accuracy of this characterization, pointing out that our system of review has both historical antecedents and contemporary analogues. By employing the comparative approach, the author not only sheds considerable light on the philosophical underpinnings of judicial review, but reminds us once again that seemingly disparate political and legal systems are yet responses to basic problems of social ordering that are common throughout the world community.*

In the realm of thought, it is supremely just and right that all frontiers should be swept away.

There is too little of high spiritual value scattered over the earth for any epoch to say: we are utterly self-sufficient; or even: we prefer our own.

*Jacob Burckhardt<sup>1</sup>*

Few institutions reveal the temper of our times as clearly as judicial review of legislation. A comparative analysis of judicial review demonstrates not only that the institution represents a fascinating synthesis of two seemingly contradictory schools of thought, but also that it tells us much of our own psychological responses to the tyrannies of our age.

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1. J. BURCKHARDT, *FORCE AND FREEDOM* 80 (J. Nichols transl. 1955).

Written constitutions, and the subordination by the courts of statutory law to those constitutions, represent innovations with deep philosophical roots. From the earliest times men have sought to create or discover a hierarchy of laws and to guarantee observance of this hierarchy. Indeed, this search is one aspect of man's never-ending attempt to find something immutable in the continuous change that is his destiny. Laws change, but the Law must remain, and with it society's fundamental values; a law which contravenes that Higher Law is not a law at all.

Basically this doctrine lies at the root of all natural law theories, whether secular or divine, and implies the right to disobey the unjust law, whatever sacrifice disobedience may entail. From a realistic point of view, of course, these theories themselves are based on an illusion. The Law also changes, and even the fundamental values are mutable. One could say, to paraphrase Benjamin Constant, that the liberty of today is not that of other times, and the same can be said of justice and all other values. But the utopian desire which natural law doctrines express is an irrepressible facet of human nature. Natural law theories will therefore be continually revived, especially in moments of acute crisis.

One such revival has occurred in our own time. Particularly in the civil law world, the nineteenth century was heavily influenced by positivist thought, which feared any attempt by the judiciary to impose higher or constitutional standards on ordinary legislation. The popular legislature was seen as the only source of law, and its statutes were to control all cases brought before the courts. When the Nazi-Fascist era shook this faith in the legislature, people began to reconsider the judiciary as a check against legislative disregard of principles once considered immutable. They began, in a sense, to "positivize" these principles, to put them in written form and to provide legal barriers against their violation.

This process took place in three stages. The first step was the written constitution, primarily conceived as a codification of individual and social values. Here we find the necessarily vague terms of these values being transformed into positive law in an attempt to give legal significance and positive meaning to meta-legal ideals.

The second step was to give a rigid character to modern constitutions, conferring a relative immutability on the superior law and the values it enshrines. This rigidity was in marked contrast to such nineteenth century constitutions as Italy's *Statuto Albertino*, which the legislature could change at any time by ordinary statute.

The final step was to provide a means for guaranteeing government's obedience to the constitution, separate from the legislative power

itself and embodied in the active work of the judges or, in some systems, of a special constitutional court. This active work of the judiciary makes the necessarily vague terms of constitutional provisions more concrete and gives them practical application. Through this work the static terms of the constitution become alive, adapting themselves to the conditions of everyday life. It is in this way that the values embodied in the Higher Law become practical realities. Hence this framework of modern constitutions and judicial review synthesizes the ineffective and abstract ideals of natural law with the concrete provisions of positive law. Through modern constitutionalism, in short, natural law, put on an historical and realistic footing, has found a new place in legal thought.

Another characteristic of modern constitutionalism, beyond the desire to incorporate immutable ideals into positive law, shows a similar convergence of natural law and positivism. Natural law proclaimed its ideals not only immutable, but also universally valid, while positivism confined the validity of law to the boundaries of national sovereignty. In modern constitutionalism there is a clear trend toward a universal acceptance of certain values. Although the constitution remains supreme law only for a particular state, there is a remarkable and growing similarity in the ideals of many, particularly Western, constitutions.

This trend is especially apparent in the context of judicial review. Part II of this Article describes the spread of judicial review from the United States to numerous other countries, in Europe and elsewhere. With its recent introduction in Yugoslavia, it has even taken root in an entirely different ideological and constitutional environment. Moreover, it will be seen that originally there were two entirely distinct systems of judicial review, separated by deep theoretical differences. But, even here, the converging trend of modern jurisprudence is reflected in a muting of the original sharp contrast. It is precisely in this blurring of sharp ideological distinctions and in this gradual tendency towards harmonization of legal institutions that the comparative method reveals its importance.

We live in an age characterized above all by cultural and economic movements that cut across national boundaries. This internationalism is reflected in the enormous growth of interest in comparative law, not only in the constitutional area, but in every branch of jurisprudence. Traditional natural law theories were doomed to failure because they could not give substance to their airy formulations and had no instrument to effectuate themselves. Positivism, on the other hand, limited to the actual application of the law on a purely national level, could not satisfy the grander desires of man. The modern comparative school seeks to combine the virtues of both natural law and positivism by adopting the realistic methods of positivism in the search for common ele-

ments in legal institutions of various nations and for the common values that they express.<sup>2</sup> The comparative method is the indispensable tool of this new approach, for it offers the practical means by which the search for the common core of legal systems can be pursued.<sup>3</sup>

Constitutions express the positivization of higher values, judicial review is the method for effectuating these values, and the comparative method is the instrument of the movement towards harmonization and of the search for internationally acceptable values. Together, these three form an integral part of the new direction in modern jurisprudence.

## I

### HISTORICAL ANTECEDENTS OF JUDICIAL REVIEW

While judicial review as a working method of subordinating state action to higher principles was first effectively implemented in the United States, the idea did not spring new and fully developed from the brow of John Marshall. Rather, the American version of judicial review was the logical result of centuries of European thought and colonial experience which had made Western man generally willing to admit the theoretical primacy of certain kinds of law and had made Americans in particular ready to provide a judicial means of enforcing that primacy.<sup>4</sup>

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2. In the field of private international law, others have already used the comparative method to begin a genuine "third school," the forerunner of which was Ernst Rabel. This school synthesized both the universalist school of the 19th century, headed by such people as Savigny and Mancini, and the positivist and particularist school prevalent in Europe at the turn of the century with the emergence of such scholars as Bartin, Kahn, Dicey, and Anzilotti. See Zweigert, *Die dritte Schule im internationalen Privatrecht*, in *FESTSCHRIFT FÜR LEO RAAPE* 35 (1948). See also M. CAPPELLETTI, *PROCESSO E IDEOLOGIE* 339, 368-71, 382 (1969); M. CAPPELLETTI, *EL VALOR DE LAS SENTENCIAS Y DE LAS NORMAS EXTRANJERAS EN EL PROCESO CIVIL* 5, 57-62, 85-86 (1968). This development, however, is not confined to private international law, but can be found in constitutional law, and the law in general. I would consider it to be the central feature of modern jurisprudence.

3. See Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Comparative Study*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW* 65 (K. Nadelmann, A. von Mehren & J. Hazard eds. 1961).

4. For a thesis suggesting that judicial review was a distinctively American contribution to political theory, see J.A.C. GRANT, *EL CONTROL JURISDICCIONAL DE LA CONSTITUCIONALIDAD DE LAS LEYES* (1963). See also C. FRIEDRICH, *THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD* 92 (1967) ("the basic idea of judicial review is of American origin"). Alexis de Tocqueville was suggesting a similar idea when, speaking of the right of American courts to refuse to apply a law which they consider unconstitutional, he wrote: "I know that a similar right has sometimes been claimed by courts in other lands, but it has never been conceded." A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 90-91 (J. Mayer & M. Lerner eds. 1966).

Admittedly any attempt made to find exact historical precedents for judicial review would be a hazardous undertaking. For example, voiding of colonial statutes by the Privy Council as contrary to imperial legislation or voiding of state or local law as viola-

### A. Higher Law Conceptions in Classical Antiquity

The belief in the need to subordinate certain acts of the law-making power to higher, more permanent principles is not confined to our own time. It may be traced, through the Enlightenment philosophers, the English courts of equity, the French *Parlements*, the medieval scholastics, and early Church fathers to its earliest direct origins in Greco-Roman civilization.<sup>5</sup>

Ancient Athenian law, for example, distinguished between a *nómos*, corresponding to a law in the strict sense, and a *pséphisma*, which in our times might be called a decree. *Nómoi* might in a certain sense be compared to modern constitutional laws,<sup>6</sup> for they often concerned the organization of the state and could be amended only by an extraordinary and very complex procedure.<sup>7</sup> Indeed, revision of the laws was an extremely serious matter and was surrounded by most carefully conceived and unusual guarantees. Heavy liability was placed on the person who proposed an amendment that was not eventually ratified or, even if ratified, subsequently proved inadvisable. This reflected the Greeks' general notion that the law ought to be something fixed and "withdrawn from the tumultuous vicissitudes of political life and from the headstrong impulses of the assemblies."<sup>8</sup>

Thus the power to change the laws was withdrawn from the whims of a majority in the popular assembly, the *ecclesia*. The *ecclesia*, however, did have its own kind of direct legislative power. Its enactments took the form of *pséphismata*, or decrees, which could deal with a wide range of matters. A *pséphisma* could even consist of norms of general effect, binding on all the citizens, in which case it was said to be assimilated to the laws, the *nómoi*.<sup>9</sup>

tive of a national (federal) constitution, is not the same as voiding of a federal statute by the judiciary as contrary to a federal constitution. Our theme—the influence of higher law ideas in Western history, and the use of the judiciary to guarantee this law—applies, however, to all these cases.

5. See generally E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955). See also M. BATTAGLINI, *CONTRIBUTO ALLA STORIA DEL CONTROLLO DI COSTITUZIONALITÀ DELLE LEGGI* (1957); R. MARCIC, *VERFASSUNG UND VERFASSUNGSGERICHT 177-82* (1963); L. BETH, *POLITICS, THE CONSTITUTION AND THE SUPREME COURT 2-14* (1962) and the bibliographical references therein; Deener, *Judicial Review in Modern Constitutional Systems*, 46 *AM. POL. SCI. REV.* 1079 (1952).

6. See Paoli, *Nomothetai*, in 8 *NUOVO DIGESTO ITALIANO* 1049 (1939); cf. 1 V. EHRENBERG, *DER STAAT DER GRIECHEN* 38, 42-43, 74-75 (1957).

7. 1 V. EHRENBERG, *supra* note 6, at 55, 75; C. HIGNETT, *A HISTORY OF THE ATHENIAN CONSTITUTION TO THE END OF THE FIFTH CENTURY B.C.* 299-305 (1952); U.E. PAOLI, *STUDI SUL PROCESSO ATTICO* 55 (1933); 2 P. DE FRANCISCI, *ARCANA IMPERII* 100 (1948).

8. U.E. PAOLI, *supra* note 7, at 23, 27-33.

9. *Id.* at 55-56. See also 2 P. DE FRANCISCI, *supra* note 7, at 105, 115; 1 V. EHRENBERG, *supra* note 6, at 42.

During some of the more politically troubled times in the life of Athens, the tendency to legislate by *pséphismata* became dominant. Nevertheless, it remained a fundamental principle that the decree, whatever its content, could not conflict with the *nómoi* in either form or substance.<sup>10</sup>

Two consequences attended the enactment of an "unconstitutional" *pséphisma*. First, the legislator who had proposed the illegal decree incurred criminal liability, which gave rise to a public right of action called *graphè paranómon*. Second, *pséphismata* that were in conflict with the *nómoi* were considered void.<sup>11</sup> The Athenian judges, although in principle obliged to decide cases on the basis of both the laws and the decrees, were bound by the latter only insofar as they were consistent with the former.

This Greek distinction between ephemeral, man-made rules and the unchanging precepts of the universal, natural, or divine law has become a fundamental feature of Western thought. Plato, for example, taught that law should reflect the divine order of things, being superior and not adaptable to the changing interests of men or classes of men. For Aristotle, the laws were norms above human passions,<sup>12</sup> and, significantly, he formulated a doctrine of the supremacy of the laws<sup>13</sup> and of the illegality of an unjust law.<sup>14</sup> In addition, Sophocles, the Stoic philosophers, Cicero, and Roman jurisprudence as a whole all subscribed to the idea of "one eternal and unchangeable law binding all nations through all time . . . ."<sup>15</sup>

### B. Higher Law Conceptions in Medieval Thought

Through Augustine, Isidore of Seville, Gratian and others,<sup>16</sup> Greco-Roman conceptions of higher law assumed a prominent position in the thought of the Middle Ages, though such conceptions, to be sure, were given considerable theological content. In the writings of Thomas Aquinas, for example, natural law was conceived as a *lex superior* of

10. U.E. PAOLI, *supra* note 7, at 56; 2 P. DE FRANCISCI, *supra* note 7, at 115-16; 1 V. EHRENBERG, *supra* note 6, at 42-43, 55.

11. 2 P. DE FRANCISCI, *supra* note 7, at 104, 116. See also M. BATTAGLINI, *supra* note 5, at 8-10.

12. U.E. PAOLI, *supra* note 7, at 29.

13. See Passerin d'Entrèves, *Legalità e legittimità*, in 2 STUDI IN ONORE DI EMILIO CROSA 1305, 1309 (1960).

14. E. CORWIN, *supra* note 5, at 7.

15. From Cicero's *De Republica*, as quoted in E. CORWIN, *supra* note 5, at 10. See also, e.g., B.F. BROWN, THE NATURAL LAW READER 47-60 (1960); Fassò, *Giusnaturalismo*, in 7 NOVISSIMO DIGESTO ITALIANO 1106 (1961); H. COING, NATURRECHT ALS WISSENSCHAFTLICHES PROBLEM 6 (1965). E. CORWIN, *supra* note 5, at 9-17, quotes several passages from Cicero as genuine "anticipations of judicial review."

16. E. CORWIN, *supra* note 5, at 18.

divine origins to which all other norms were subjected.<sup>17</sup> As one modern jurist writes,

[T]he act of the sovereign which violated the limits placed by natural law was declared null and void. The judge, whose job it was to apply the law, was bound to consider as void (and therefore not binding) both administrative acts and laws contrary to [natural] law even if they emanated from the Pope or the Emperor. According to some theories, even individual subjects were freed from the duty to obey, when faced with a commandment which did not conform with the [natural] law, to such an extent that the forceful imposition of an unjust law justified armed resistance and even tyrannicide.<sup>18</sup>

In place of the Roman or pseudo-Roman tenet that the sovereign is not subject to the laws, *princeps legibus solutus*, some wished to substitute its opposite: *princeps legibus tenetur*, the sovereign is subject to the laws. Others formulated a more moderate theory, according to which the sovereign was not bound by civil law but was, however, bound by natural law.<sup>19</sup>

Medieval theory, therefore, distinguished sharply between two types of norm: *jus naturale*, which was superior and inviolable, and *jus positivum*, which was binding only if in conformity with the former. Medieval practice, however, did not.<sup>20</sup> Nor is this fact surprising. A judge, faced with an apparent conflict between positive legislation and natural law theory, had to choose between applying the law of his state or the ill defined principles of a legal system lacking both sanctions and institutions. Given this choice, it is easy to see why the judge would apply the positive law to concrete cases, leaving to philosophers the airy formulations of natural law.

It was left to times nearer our own to provide the instruments whereby these norms could be assimilated within a unitary legal order. There was some divergence in the manner in which the natural law precepts evolved, were positivized<sup>21</sup> and assimilated into the sphere of positive law in various states. But a cursory glance at both French and English legal developments will show that the links between these early

17. E.g., THOMAS AQUINAS, *SUMMA THEOLOGICA* II-II, q. 60, art. 5; *id.* I-II, q. 95, art. 2; see Passerin d'Entrèves, *Diritto naturale e distinzione fra morale e diritto nel pensiero di S. Tommaso d'Aquino*, 29 *RIVISTA DI FILOSOFIA NEO-SCOLASTICA* 373, 373-74 (1937). But see G. FASSÒ, *LA LEGGE DELLA RAGIONE* 108 (2d ed. 1966).

18. M. BATTAGLINI, *supra* note 5, at 13. The most thorough account of what has been mentioned in the text can be found in the famous works of O. VON GIERKE, *JOHANNES ALTHUSIUS UND DIE ENTWICKLUNG DER NATURRECHTLICHEN STAATSTHEORIEN* 272-73, *passim* (1880) and *LES THÉORIES POLITIQUES DU MOYEN AGE* 160-63 (J. de Pange transl. 1914). See also E. CORWIN, *supra* note 5, at 19-20.

19. M. BATTAGLINI, *supra* note 5, at 14.

20. See E. CORWIN, *supra* note 5, at 23.

21. See P. PIOVANI, *GIUSNATURALISMO ED ETICA MODERNA* 46 (1961).

higher law theories and modern conceptions of judicial review are close indeed.

### C. France: The Parlements and Popular Sovereignty

The French have clung tenaciously to the idea that no judicial organ should be given the power to review statutes for conformity with a supposed higher law.<sup>22</sup> The Constitutions of 1799, 1852, 1946, and 1958 did admit the possibility of constitutional control of legislation, but until recently such control has been, at best, theoretical, and it has always been entrusted to specifically political, non-judicial bodies.<sup>23</sup>

This rejection of judicial review does not mean that France has been immune to the attractions of higher law theory. There were, in

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22. See, e.g., N. ALCALÁ-ZAMORA Y CASTILLO, ENSAYOS DE DERECHO PROCESAL CIVIL, PENAL Y CONSTITUCIONAL 514 n.26 (1944); C.-A. COLLIARD, LIBERTÉS PUBLIQUES 38-39 (3d ed. 1968); H. GALLAND, LE CONTRÔLE JUDICIAIRE DE LA CONSTITUTIONNALITÉ DES LOIS AUX ETATS-UNIS 14 (1932); Eisenmann & Hamon, *La Juridiction Constitutionnelle en Droit Français (1875-1961)*, in MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART 231, 238-39 (H. Mosler ed. 1962) [hereinafter cited as MAX-PLANCK-INSTITUT]; Pierandrei, *Corte costituzionale*, in 10 ENCICLOPEDIA DEL DIRITTO 874, 887 (1962); Engel, *Judicial Review and Political Preview of Legislation in Post-War France*, 6 INTER-AM. L. REV. 53, 65-72 (1964); King, *Constitutionalism and the Judiciary in France*, 80 POL. SCI. Q. 62 (1965).

23. On the failure of the first two attempts to provide for a political control of constitutionality, those of the Constitutions of 1799 and 1852, see C.-A. COLLIARD, *supra* note 22, at 38-39; M. EINAUDI, LE ORIGINI DOTTRINALI E STORICHE DEL CONTROLLO GIUDIZIARIO SULLA COSTITUZIONALITÀ DELLE LEGGI NEGLI STATI UNITI D'AMERICA 13-14 (1931); Engelhardt, *Das richterliche Prüfungsrecht im modernen Verfassungsstaat*, 8 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART (Neue Folge) [JBÖFFR (N.F.)] 101, 102-03 (1959). With reference to the Constitution of 1946, see generally J. LEMASURIER, LA CONSTITUTION DE 1946 ET LE CONTRÔLE JURIDICTIONNEL DU LÉGISLATEUR (1954); Buerstedde, "Le comité constitutionnel" der französischen Verfassung von 1946, 7 JBÖFFR (N.F.) 167 (1958); Eisenmann & Hamon, *supra* note 22, at 242-43; Engel, *supra* note 22, at 53-57; Massart, *Il controllo di legittimità costituzionale nella nuova Costituzione francese*, in 2 STUDI IN MEMORIA DI L. MOSSA 603, 605-07 (1961); Engelhardt, *supra* at 103. According to C.-A. COLLIARD, *supra* note 22, at 35, the system adopted by the French Constitution of 1946 "represented . . . the caricature of constitutional control." On the post-1958 *Conseil Constitutionnel*, see M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD ch. I, § 2 (1971).

Not all the constitutions inspired by the ideology of the French Revolution rejected the idea of *judicial* review. When the French armies caused the Republic of Naples to be proclaimed in 1799, a committee was appointed to draw up a constitution for the new state. The resulting document followed, by and large, the lead of the French Constitution of 1793, but in one interesting particular it declined to imitate this example. Claiming that a legislature on the French model "could concentrate in itself all powers and become despotic," the committee recommended the establishment of a "Supreme Tribunal," or "corpo degli eforti," a judicial body which would declare if a legislative act was unconstitutional and would recommend that the legislature abrogate it. Though the proposed constitution was never adopted, its original approach to constitutional control remains noteworthy. A. AQUARONE, M. D'ADDIO & G. NEGRI, LE COSTITUZIONI ITALIANE 269 (1958); M. BATTAGLINI, *supra* note 5, at 69.



fact, attempts during the *Ancien Régime* to affirm certain fundamental precepts. The *Parlements*, the higher courts set up in various French cities, came to assert in their relations with the French sovereign a power and duty "to examine all laws and decrees which come before us to see that there is in them nothing contrary . . . to the fundamental laws of the realm."<sup>24</sup> Through the work of the French *Parlements*, a doctrine was formulated which had a great effect on Montesquieu<sup>25</sup> and which shows a striking similarity to modern ideas of judicial review. This was the theory of the *heureuse impuissance*, of the "happy powerlessness" of the sovereign legislator to issue what we would today call unconstitutional laws.

But even as the judges proclaimed this limit on the royal power, the monarchs attempted to provide a means of insuring the supremacy of their own will. A *demande en cassation*, challenging a decision by a *Parlement*, could be brought before the sovereign's *Conseil des Parties*, which could in turn annul a decision found to have been reached in violation of royal ordinances.<sup>26</sup>

Despite the existence of this check on the *parlementaires*, these judges of the higher courts acquired a reputation of interfering far too often with the activities of other state organs. Such interferences, though they might at times have been a salutary antidote to the absolutist tendencies of the monarchy,<sup>27</sup> more frequently smacked of an ar-

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24. Cotta, *Montesquieu, la séparation des pouvoirs et la Constitution fédérale des Etats-Unis*, 1951 REVUE INTERNATIONALE D'HISTOIRE POLITIQUE ET CONSTITUTIONNELLE 229, 234-35, quoting 1 REMONSTRANCES DU PARLEMENT DE PARIS AU XVIII<sup>e</sup> SIÈCLE 88 (J. Flammeimont & M. Tourneux eds. 1888). See also Derathé, *Les philosophes et le despotisme*, in UTOPIE ET INSTITUTIONS AU XVIII<sup>e</sup> SIÈCLE 57, 72-75 (P. Francastel ed. 1963) (Congrès et colloques vol. 4). On the evolution of the *Parlements* in the 17th and 18th centuries and on their function as "gardiens des lois fondamentales," see J. ELLUL, HISTOIRE DES INSTITUTIONS 342 (5th ed. 1956). But even earlier, from the 16th century, one sees the development in France of the theory of *leges imperii* which, although distinct from divine and natural law, yet, like these, were not subject to amendment either by the king or by the *Etats généraux*. Cf. A. LEMAIRE, LES LOIS FONDAMENTALES DE LA MONARCHIE FRANÇAISE D'APRÈS LES THÉORICIENS DE L'ANCIEN RÉGIME 71-150 (1907); R.H. GIESEX, THE JURISTIC BASES OF DYNASTIC RIGHT TO THE FRENCH THRONE (1961).

Even in other parts of Europe local courts attempted, from time to time, to assert a power of control similar to that of the French *Parlements*. See von Weber, *Schöppenstuhl und Landesherr*, in FESTSCHRIFT FÜR RICHARD THOMA 257 (1950); Engelhardt, *supra* note 23, at 102.

25. See Cotta, *supra* note 24, *passim*, especially at 235 with reference to R. BICKART, LES PARLEMENTS ET LA NOTION DE SOUVERAINETÉ NATIONALE AU XVIII<sup>e</sup> SIÈCLE 33 (1932).

26. See 1 P. CALAMANDREI, LA CASSAZIONE CIVILE 264-402 (1920); 1 E. GLASSON & A. TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANISATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE 253-64 (3d ed. 1925); Calamandrei, *Cassazione civile*, in 2 NUOVO DIGESTO ITALIANO 987, 987-88 (1937).

27. Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1210 (1966).

bitrary abuse of the judicial power.<sup>28</sup> This was perhaps inherent in the attitude held by many judges toward their office. For them, judicial office was a "property right, a part of their estate," owned by them "by the same title they held their houses and lands."<sup>29</sup> As with their own property, "they bought and sold judgeships, transmitted them by bequest, and rented them out when they wished to hold them for their minor children."<sup>30</sup> Above all, they exploited their offices to the utmost—clearly at the expense of the litigants—just as a good landlord knows how best to exploit his property. Not without reason were these judges among the bitterest enemies of even the slightest liberal reform. They were the fiercest opponents of the Revolution, whose guillotine was soon to reap a rich harvest of their most honorable heads.

Largely because of these abuses of the judicial function, the ideology of the Revolution, enshrined in the works of Rousseau and Montesquieu, stressed the omnipotence of statutory law, the equality of man before the law, and the rigid separation of powers in which the judge, the passive *bouche de la loi*, performed the sole task of applying the letter of the law to individual cases—a task conceived as purely mechanical and in no way creative.

The legislature, therefore, as the voice of popular sovereignty, was seen as the best guarantor of fundamental rights. Concomitantly, and most significantly from the standpoint of the development of constitutional controls in continental Europe, there arose that "hostility which in France . . . has always been fostered against the notion that the acts of the superior organs and especially of the parliamentary assemblies, as representatives of national sovereignty, might be subjected to control" by the judiciary.<sup>31</sup>

#### D. *England and Her Colonies*

Like France—indeed a century before France—England stoutly upheld the idea of parliamentary supremacy, though for different reasons. While both countries were long exposed to higher law theories, the English judiciary, unlike the French *Parlements*, generally enjoyed the respect of all as a protector of individual liberties against government abridgment.<sup>32</sup> These two traditions—a consciousness of principles su-

28. Cf. Buerstedde, *supra* note 23, at 172-73, 187; Eisenmann & Hamon, *supra* note 22.

29. 1 G. CHIOVENDA, *ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE* 134 (2d ed. 1935) and authorities cited therein. See also P. CUCHE & J. VINCENT, *PROCÉDURE CIVILE* 138 (13th ed. 1963); P. HERZOG, *CIVIL PROCEDURE IN FRANCE* 45 (1967).

30. Carré, quoted in 1 G. CHIOVENDA, *supra* note 29.

31. Pierandrei, *supra* note 22. As an example, see E. LAMBERT, *LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ETATS-UNIS* (1921). See also King, *supra* note 22, at 63.

32. See, e.g., R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF*

perior even to statutory law, and a profound regard for the judiciary and for its independence—were inherited by the American colonists, who were to find them most useful in their own situation during the revolutionary period and thereafter.

Pollock affirms the influence of natural law theories, at the same time explaining the failure of the bench and bar to admit such influence:

It is not credible that a doctrine which pervaded all political speculation in Europe, and was assumed as a common ground of authority by the opposing champions of the Empire and the Papacy, should have been without influence among learned men in England. If it be asked why the sages of the Common Law did not expressly refer to the Law of Nature, the answer is that at no time after, at latest, the Papal interference in the English politics of the first half of the thirteenth century, was the citation of Roman canonical authority acceptable in our country, save so far as it was strictly necessary . . . . These considerations appear sufficient to explain why 'it is not used among them that be learned in the laws of England to reason what thing is commanded or prohibited by the Law of Nature.'<sup>33</sup>

Prior to the seventeenth century, therefore, the English judicial tradition had often tended to assign a subordinate role to the legislative function of King and Parliament,<sup>34</sup> holding that law was not created but ascertained or declared. Common law was fundamental law, and, although it could be complemented by the legislator, it could not be violated by him. Hence law was largely withdrawn from arbitrary interventions of King and Parliament. This was the tradition Coke inherited and used as a weapon in his struggle against the exercise of arbitrary power by King James I.<sup>35</sup> The King claimed to be endowed with reason equal to that of the judges, his "delegates," and consequently claimed to be able to exercise the judicial power personally. Coke, however,

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LIBERTY 16 (1957). At times, of course, the judiciary, even in common law countries, jeopardized the respect it generally enjoyed. Examples are the English Star Chamber and the American Supreme Court in the early 20th century. See L. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932); R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); E. LAMBERT, *supra* note 31.

33. F. POLLOCK, *THE EXPANSION OF THE COMMON LAW* 112-13 (1904).

34. See, for example, a well known passage of Bracton's *De Legibus et Consuetudinibus Angliae*, reported in E. CORWIN, *supra* note 5, at 27. See also *id.* at 39, 49 n.27; E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 10-57 (1948).

35. See von Mehren, *The Judicial Conception of Legislation in Tudor England*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 751 (P. Sayre ed. 1947); Cotta, *supra* note 24, at 235. For a more recent analysis of Coke's thought, see J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 30-47 (1955) (it may be said, in general, that the tendency of many commentators, especially Americans, to see in Coke a forerunner of the principle of judicial review has been criticized by others, especially the English, who interpret the thought of Coke in a more restrictive fashion).

replied that only judges could exercise that power, for only they were learned in the difficult science of law "which requires long study and experience, before that a man can attain to the cognizance of it."<sup>36</sup> On the other hand, Coke affirmed "the traditional supremacy of the common law over the authority of Parliament."<sup>37</sup> "[I]t appears in our books," stated Coke in the famous *Bonham's Case* of 1610, "that in many cases, the common law will . . . controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void."<sup>38</sup> Elsewhere Coke asserted further that

Fortescue and Littleton, and all others agreed that the law consists of three parts. First, common law. Secondly, statute law . . . the third custom which takes away the common law: but the common law corrects, allows, and disallows, both statute law, and custom, for if there be repugnancy in statute; or unreasonableness in custom, the common law disallows and rejects it . . .<sup>39</sup>

But the essential questions were who ought to control and ascertain such "repugnancy or unreasonableness," and who ought to guarantee the supremacy of the common law against arbitrary decisions of the sovereign on the one hand and of Parliament on the other. Coke's answer, at this point in his life, was clear: that control and that guarantee were the judges' task.

While the influence of Coke's doctrine in *Bonham's Case* is debatable, Coke unquestionably reflected the attitude of many common law judges. This attitude deified the common law and looked with a jaundiced eye on any statute in derogation of that law. While few denied

36. E. CORWIN, *supra* note 5, at 38-39.

37. Cotta, *supra* note 24, at 235. See generally 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 428-56 (3d ed. 1945).

38. 77 Eng. Rep. 646, 652 (C.P. 1610). For an excellent commentary on *Bonham's Case*, see Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

Professor Thorne has suggested that Coke's statement does not show a receptivity to natural law ideas but that his "argument is derived from the ordinary common law rules of statutory interpretation," in particular the doctrine of repugnancy. Thorne, *Dr. Bonham's Case*, 54 LAW Q. REV. 543, 549-51 (1938). Professor Thorne admits, however, that the "repugnancy" of the statute in *Bonham's Case* lay in its inconsistency with a fundamental common law principle rather than with itself. *Id.* Thus Coke's statement reflected a belief that statutes could not contradict fundamental law, even if this belief stemmed more from English legal rules than from natural law ideas current on the continent. See R. BERGER, CONGRESS V. THE SUPREME COURT 350 (1969). This view was shared by common law judges at the time. C.K. ALLEN, LAW IN THE MAKING 446 (7th ed. 1964): "[I]t would have required considerable audacity . . . to deny that the only ultimate, supreme authority lay in a law higher than any man-made ordinance . . ."

39. *Rowles v. Mason*, 123 Eng. Rep. 892, 895 (C.P. 1612). See E. CORWIN, *supra* note 5, at 50-51; Cotta, *supra* note 25, at 236.

that Parliament could change the law, most retained a residual feeling that the long established principles of the common law were in some way superior to statutory innovations. Hence, statutes were, if at all possible, construed so as to preserve "the previous policy of the law."<sup>40</sup> In Professor Plucknett's words, "By the reign of Elizabeth . . . many lawyers . . . gloried in the liberty which the courts enjoyed in playing fast and loose with statutes."<sup>41</sup>

Though the Glorious Revolution of 1688 marked the triumph of legislative supremacy in England, the American colonies had nonetheless inherited both Coke's ideas regarding the subordination of Crown and Parliament to higher law and a judiciary accustomed to interpreting legislative enactments and at times ignoring those which violated higher principles.<sup>42</sup> This legacy proved useful. James Otis invoked *Bonham's Case* against the Writs of Assistance,<sup>43</sup> and when, after independence, various state legislatures attempted to abolish debt collection, debase the currency, and otherwise trample upon previously inviolable rights, the Federalists were quick to see the relevance of defining fundamental law in a national constitution and of using the judiciary to enforce that law.<sup>44</sup>

Paradoxically, the Glorious Revolution not only failed to stem, but actually spurred the development of this new doctrine of judicial review. Under English law, every corporation, from private companies to municipalities, "is entitled to act only within the limits of its own charter or constitution."<sup>45</sup> From that principle, it follows that every act that exceeds the authority conferred on the corporation is null and void and cannot be enforced in the courts.<sup>46</sup>

The English colonies, often founded as commercial enterprises, were

40. "The general words of an Act are not to be so construed as to alter the previous policy of the law unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched." *Minet v. Leman* (1855), as quoted in A. HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 232 (1966).

41. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 334 (5th ed. 1956).

42. B.F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 12 (1942); Dietze, *Judicial Review in Europe*, 55 *MICH. L. REV.* 549 (1957). For the influence of Coke's doctrine in the American colonies, see R. BERGER, *supra* note 38, at 23-28.

43. See A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION* 66-68 (3d ed. 1963). "That acts of Parliament against natural equity are void. That acts against the fundamental British constitution are void." These words embodied ideas long familiar to New England minds: the supremacy of natural law, the idea of a supreme constitution, the doctrine of natural rights, and the limited power of human government." *Id.* at 67.

44. *Id.* at 99-109. Between 1787 and 1803 more than 20 state courts voided local statutes.

45. J.A.C. GRANT, *supra* note 4, at 29.

46. *Id.*

managed under Crown charters.<sup>47</sup> These charters may be considered the first constitutions of the colonies,<sup>48</sup> both because they had a binding effect on colonial legislation and also because they regulated the fundamental legal structure of the colonies themselves. Frequently these charters expressly provided that the colonies could pass their own laws only if these laws were "reasonable" and "not contrary to the laws of the Kingdom of England."<sup>49</sup> Such provisions clearly imply that the laws should not be contrary to the sovereign will of the English Parliament.<sup>50</sup> Thus it was by reason of this supremacy of the English law and Parliament that in numerous cases<sup>51</sup> the Privy Council of the King held that the colonial laws could not stand if they were opposed to the colonial charters or to the laws of the Kingdom.<sup>52</sup>

For these reasons, the principle of parliamentary supremacy—and hence the supremacy of positive law<sup>53</sup>—which was introduced in England following the Glorious Revolution, produced quite different results in America than in England. In England the result was to remove every control over the validity of legislation from the judges, despite the early successes of Lord Coke's doctrine. In America, on the contrary, the result was to empower the colonial judges to disregard local legislation not in conformity with the English law. Thus the apparent

47. *Id.*

48. "Imperially granted constitutions or charters," according to the definition by McWhinney, *Constitutional Review in the Commonwealth*, in MAX-PLANCK-INSTITUT, *supra* note 22, at 75, 78.

49. J.A.C. GRANT, *supra* note 4, at 29-30. See also R. MARCIC, *supra* note 5, at 179.

50. See E. MCWHINNEY, *JUDICIAL REVIEW* 13-14, 57-58 (4th ed. 1969).

51. It has been reckoned that more than 600 colonial laws were invalidated by the Privy Council from 1696 to 1782. W.J. WAGNER, *THE FEDERAL STATES AND THEIR JUDICIARY* 87 (1959). It is not clear, however, whether this figure includes all of the English colonies, or is limited to those which came to comprise the original thirteen states. It would seem that the former is the case. J.H. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 524 (1950), notes that the function of "legislative" review (unconnected with concrete cases) exercised by the Privy Council vastly overshadowed that of judicial review. He shows that only 234 *judicial* appeals were entered in the Register of the Privy Council for the period from 1696 to 1783. *Id.* at 667. Another author appears to confirm this, saying that between 1691 and 1775, 59 Massachusetts statutes were disallowed under the general royal power to refuse assent to colonial legislation. During the same period, the Privy Council, in exercising its *judicial* function as a court of appellate jurisdiction, reviewed the validity of colonial legislation "at least four times with respect to legislation in the American colonies," the first case being that of *Winthrop v. Lechmere*, 3 Acts P.C., Col. Ser. 139 (1727). B. STRAYER, *JUDICIAL REVIEW OF LEGISLATION IN CANADA* 12-13 (1968).

52. See, e.g., *Winthrop v. Lechmere*, 3 Acts P.C., Col. Ser. 139 (1727); *Phillips v. Savage*, 3 Acts P.C., Col. Ser. 432 (1737); J.A.C. GRANT, *supra* note 4, at 30; C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 50 (2d ed. 1932); B. STRAYER, *supra* note 51, at 12. On the Privy Council as the "Final Appellate Tribunal for the Overseas Empire," see E. MCWHINNEY, *supra* note 50, at 13-14, 49-60.

53. M. EINAUDI, *supra* note 23, at 21.

paradox has been explained: how the English principle of the uncontrolled supremacy of the legislature helped, rather than hindered, the formation in America of an opposite system. This explanation is confirmed by the experience of other ex-colonies, including Canada, Australia, and India, which likewise adopted judicial review upon attaining independence.<sup>54</sup>

When the English colonies in America proclaimed their independence in 1776, one of their first acts was to substitute for the old charters new constitutions consisting of the fundamental laws of the newly independent states. And, just as laws contrary to the charters and to the laws of the Kingdom had been considered null and void by the judges, so it is not surprising that laws contrary to the new constitutions of the independent states should also be held null and void in the same way.<sup>55</sup> Though there is controversy over the authenticity of a number of precedents in this line of cases, several of them seem to be well verified.<sup>56</sup>

It should be emphasized, therefore, that more than a century of American history and a strong line of precedents—to say nothing of contemporary writings<sup>57</sup>—stood behind Chief Justice Marshall in 1803 when, interpreting the somewhat vague terms of the Federal Constitution's supremacy clause,<sup>58</sup> he enunciated "the principle, supposed to be essential to all written constitutions, that a law repugnant to the con-

54. See Davison, *The Constitutionality and Utility of Advisory Opinions*, 2 U. TORONTO L.J. 254, 255 (1938); E. McWHINNEY, *supra* note 50, at 13-14, 49-60; McWhinney, *supra* note 48; Kapur, *The Supreme Court of India*, 11 JBÖFFR (N.F.) 1, 2-3, 8, *passim* (1962).

According to McWhinney, *supra* at 78: "So far as the Supreme Courts of the individual Commonwealth Countries exercise judicial review of the constitution in their own right as the final appellate tribunals for their own particular countries, they may be said to be the lineal successors of the Privy Council." Hence the Privy Council is the essential link in the paradoxical development of judicial review in the ex-colonies. Note, however, the exception of South Africa, where "the virtual absence of judicial review as known in the United States" is lamented. Karis, *The Republic of South Africa*, 15 JBÖFFR (N.F.) 589, 613 (1966).

55. See M. EINAUDI, *supra* note 23, at 21-31; Engelhardt, *supra* note 23, at 103.

56. See R. BERGER, *supra* note 38, at 38-39; 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 969-73 (1953); Levy, *Judicial Review, History, and Democracy: An Introduction*, in *JUDICIAL REVIEW AND THE SUPREME COURT* 1, 10 (L. Levy ed. 1967). For early federal precedents see H. DEAN, *JUDICIAL REVIEW AND DEMOCRACY* 23-24 (1966); C. HAINES, *supra* note 52, at 148-70.

57. One might cite in particular those of James Otis and John Adams. See S. CATINELLA, *LA CORTE SUPREMA FEDERALE NEL SISTEMA COSTITUZIONALE DEGLI STATI UNITI D'AMERICA* 30-31, 162, *passim* (1934); E. CORWIN, *supra* note 5, at 77-80. For an analysis of the not-only-American ideology behind Marshall's enunciation of the principle of judicial review, see R. GROSSMANN, *DIE STAATS- UND RECHTSIDEOLOGISCHEN GRUNDLAGEN DER VERFASSUNGSGERICHTSBARKEIT IN DEN VEREINIGTEN STAATEN VON AMERIKA UND IN DER SCHWEIZ* (1948).

58. U.S. CONST. art. VI, cl. 2.

stitution is void; and that courts, as well as other departments, are bound by that instrument."<sup>59</sup>

### E. *The Evolution of Constitutional Justice*

So it is that judicial review, though it may come in varying forms to different countries and at different times, is the result of an evolutionary pattern common to much of the West in both civil and common law countries. First, there was a period of natural justice, when the acts of crown and parliament alike were said to be subject to a higher, unwritten law. Then, with the Glorious Revolution in England and the French Revolution a century later, came the era of positive or legal justice, characterized by the primacy of the written statute and the popular legislature, and the relative powerlessness of both judges and natural law theories.<sup>60</sup> This era carried a new flag to the citadel of justice: the "principle of legality." Institutions such as the *Cour de cassation* and the *Conseil d'Etat* were the instruments used to implement that principle.<sup>61</sup>

Finally, our own time has seen the burgeoning of constitutional justice, which has in a sense combined the forms of legal justice and the substance of natural justice. Desirous of protecting the permanent will, rather than the temporary whims of the people,<sup>62</sup> many modern states have reasserted higher law principles through written constitutions. Thus there has been a synthesis of three separate concepts: the supremacy of certain higher principles, the need to reduce even the higher law to written form, and the employment of the judiciary as a tool for enforcing the constitution against ordinary legislation. This union of concepts first occurred in the United States, but it has since come to be considered by many as essential to the rule of law anywhere.

This does not mean that the periods which preceded that of constitutional justice were without rational foundation. The principle of legality certainly improved upon the version of natural law ideas used to justify the arbitrariness of such previous courts as the French *Parlements*. Yet the legality principle itself proved subject to perversion during the

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59. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

60. For an illustration of the downgrading of natural law theories during the 19th and early 20th centuries, see Kohler, *Rechtsphilosophie und Universalrechtsgeschichte*, in 1 F. HOLTZENDORFF, *ENZYKLOPÄDIE DER RECHTSWISSENSCHAFT* 1, 3-4 (7th ed. V. Kohler 1915). See H. COING, *supra* note 15, at 8, 13.

61. See M. CAPPELLETTI, *supra* note 23, ch. I.

62. "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *THE FEDERALIST* No. 78, at 335 (1831) (A. Hamilton); see M. EINAUDI, *supra* note 23, at 9; Kadish, *Judicial Review in the United States Supreme Court and the High Court of Australia*, 37 *TEXAS L. REV.* 1, 8 (1958).



twentieth century, as illustrated by the racial laws enacted under the Nazi-Fascist regimes. Modern constitutionalism is a sort of Hegelian synthesis which attempts to apply the lessons, while avoiding the pitfalls, of the past.<sup>63</sup>

## II

### CENTRALIZED VERSUS DECENTRALIZED JUDICIAL REVIEW

Though the events of the twentieth century brought the West as a whole to see the value of judicial review of legislation, the historical and philosophical differences between the Western states has prevented their adopting identical systems to exercise such control. Deep-seated suspicions of the judicial office, commitments to legal positivism, and other more practical considerations have meant that judicial review in various countries is conducted by different organs of review, which employ different methods, and whose decisions may have different effects.<sup>64</sup>

From a comparative standpoint, one of the most instructive features of any system of judicial review is the state's choice of either a cen-

63. It has been said that "the civil and political liberties upon which the modern State is founded are triumphs of natural law," Fassò, *supra* note 15, at 1108, and that "the problem of natural rights can today only be confronted on the level of constitutionalism," Matteucci, *Positivismo giuridico e costituzionalismo*, 17 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE [RIV. TRIM. CIV.] 988 (1963).

For an analysis of the evolution of both civil and common law worlds from "natural justice" through "legal justice" to "constitutional justice," see Cappelletti, *The Significance of Judicial Review of Legislation in the Contemporary World*, in 1 JUS PRIVITUM GENTIUM 147, 155-59 (E. von Cammerer ed. 1969).

64. For treatment of the methods of judicial review and the effects of constitutional decisions, see M. CAPPELLETTI, *supra* note 23, chs. IV-V.

Clearly it will not be possible to make a sort of universal encyclopedia, and this study makes no claim to completeness. For example, one institution which we have intentionally omitted from our analysis despite its interesting origins is the Brazilian *mandado de segurança*. Also, we have given only a summary treatment to the Mexican (and no longer only Mexican) *juicio de amparo*. See the interesting study of Buzaid, "Juicio de Amparo" e *Mandado de Segurança*, 3 REVISTA DE DIREITO PROCESSUAL CIVIL 30 (1962). On the problem of the admissibility of *mandado de segurança* even against legislative acts, see *id.* at 65-66. In fact the largest gap in this comparative study is the omission of the Latin American countries, several of which have some kind of judicial review. For information on this subject, see J.A.C. GRANT, *supra* note 4, at 73; E. VESCOVI, EL PROCESO DE INCONSTITUCIONALIDAD DE LA LEY 27-48, *passim* (1967); H. FIX ZAMUDIO, VEINTICINCO AÑOS DE EVOLUCIÓN DE LA JUSTICIA CONSTITUCIONAL 1940-1965, at 25-50 (1968); C. LÚCIO BITTENCOURT, O. CONTRÔLE JURISDICCIONAL DA CONSTITUCIONALIDADE DAS LEIS (2d ed. 1968).

Also omitted is a discussion of judicial review in certain of the newly emergent African and Asian states, though the adoption of this institution by non-Western cultures is of deep significance and is certainly deserving of separate study. For examples, see J. BUCHMANN, L'AFRIQUE NOIRE INDEPENDANTE 184 (n.d.); P. CONTINI, THE SOMALI REPUBLIC: AN EXPERIMENT IN LEGAL INTEGRATION 40-42 (1969); H. FIX ZAMUDIO, *supra* at 51-63, 90-99.

tralized or a decentralized system.<sup>65</sup> The decentralized or American system gives all the judicial organs within it power to determine the constitutionality of legislation. In contrast, the centralized or Austrian system confines this power to a single judicial organ. Both of these systems have been introduced, even very recently, in several countries, and thus have served as models outside their countries of origin.<sup>66</sup>

### A. Decentralized Judicial Review

The decentralized model had its origin in the United States, where judicial review remains a most characteristic and unique institution.<sup>67</sup> It is found primarily in several of Britain's former colonies, including Canada, Australia, and India.<sup>68</sup> The American system has also been

65. Alternative terminology would call the systems "diffuse" and "concentrated." P. CALAMANDREI, *LA ILLEGITTIMITÀ COSTITUZIONALE DELLE LEGGI* 5 (1950); 3 P. CALAMANDREI, *OPERE GIURIDICHE* 349 (M. Cappelletti ed. 1968) [hereinafter cited as *OPERE GIURIDICHE*]. In German terminology one talks of an *allgemeines Prüfungsrecht* (or *allgemeine Normenkontrolle*) and of a *konzentriertes Prüfungsrecht* (or *konzentrierte Normenkontrolle*). See, e.g., Engelhardt, *supra* note 23, at 107-08.

66. There are also what might be called "mixed" or "intermediate" systems: e.g., in Mexico, where because of a prima facie divergence between articles 103 and 133 of the Constitution, it would be difficult to put the system into one or other of the categories given in the text; see also for other references H. FIX ZAMUDIO, *EL JUICIO DE AMPARO* 167-94, 246-57, 296-98, 378-80 (1964). This is true not only from the point of view of the *organs* of control, but also from that of the *method* by which questions of constitutional legitimacy are resolved. Even in the latter respect the Mexican system has a place somewhere between the systems working "by way of direct action" and those working "by way of defense." Another mixed system is the Irish one. See J.M. KELLY, *FUNDAMENTAL RIGHTS IN THE IRISH LAW AND CONSTITUTION* 15-36 (2d ed. 1968); Azariti, *I vari sistemi di sindacato sulla costituzionalità delle leggi nei diversi paesi*, in *LA CORTE COSTITUZIONALE* 1, 35-36 (1957).

Particularly complex, and as yet unclear is the system of judicial review vaguely affirmed for the first time by the Israeli Supreme Court in its decision of July 3, 1969. See Klein, *Les problèmes constitutionnels de l'Etat d'Israël et le contrôle de la constitutionnalité des lois*, 85 *REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER* [REV. DR. PUBL.] 1105, 1117, 1122-24 (1969); Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 *COLUM. L. REV.* 1217 (1970).

67. See M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 3 (1964); B. F. WRIGHT, *supra* note 42, at 5.

68. See J. BROSSARD, *LA COUR SUPRÊME ET LA CONSTITUTION* 66, 75 (1968); E. McWHINNEY, *supra* note 50; McWhinney, *supra* note 48, at 75; Econoinou, *Le Contrôle juridictionnel de la Constitutionnalité des lois dans les Pays de Droit Commun*, 11 *REVUE HELLÉNIQUE DE DROIT INTERNATIONAL* 336 (1958); Engelhardt, *supra* note 23, at 105, 110; Kadish, *supra* note 62.

The statement in the text may need qualification as regards India. M. AMAM, *THE INDIAN SUPREME COURT AND THE CONSTITUTION* 18 (1968); Geck, *Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices*, 51 *CORNELL L.Q.* 250, 256 (1966).

Engelhardt, *supra* note 23, at 110, claims that in Canada (and to some extent in Australia) the system adopted is as follows: the question of the validity of a law, having been raised as a preliminary issue in a civil case either by one of the parties or by the judge on his own motion, must always be referred by the inferior court to the Supreme

introduced in Japan under the current Constitution of 1947.<sup>69</sup>

In Europe as well, the American system has had and still has its analogues. A certain parallel can be found in Swiss law, where alongside a direct action before the Federal Tribunal (*staatsrechtliche Beschwerde* or *recours de droit public*), there exists a general right of review (*richterliches Prüfungsrecht*) in the ordinary courts. Although this judicial review is limited to the laws of the Cantons and has much less practical importance than the direct action just mentioned, the Swiss judges have a general power to disregard laws of the Cantons in conflict with the Federal Constitution. This power has been derived from the principle that federal law "breaks" cantonal law (*Bundesrecht bricht kantonales Recht*). However, there is no judicial control over the constitutionality of federal laws; this limitation has been criticized by mod-

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Court, which therefore has a sort of monopoly over constitutional interpretation. From this premise Engelhardt comes to a much wider conclusion, namely that the trend is either to entrust judicial review to one special organ, or, at least, to confine it to *one* of the ordinary courts. However, the premise is only partly correct. In reality the current Canadian system is substantially "identical to that of the United States." Grant, *Judicial Review in Canada: Procedural Aspects*, 42 CAN. B. REV. 195, 197-98 (1964); J.A.C. GRANT, *supra* note 4, at 86. See also J. BROSSARD, *supra* at 140-41, 143, 150-52; Russell, *The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform*, 6 OSGOODE HALL L.J. 1, 7-8 (1968). The same can be said, to a large extent, for the systems adopted by other countries in the Commonwealth. Nevertheless, it is true that in Canada there exist, alongside the normal (decentralized) method of judicial review, certain "special procedures to litigate constitutional issues." Grant, *supra* at 200. One of these, which has been adopted in six of the ten Canadian Provinces, is the possibility of bringing the question of constitutionality before the Supreme Court *per saltum* by suspending the case in which it has arisen. This procedure has the purpose of obtaining a speedy and unchallengeable decision upon the preliminary issue, which would anyway, in the last instance, have come before the Supreme Court. One writer has said, however, that he knows "of no cases which have actually reached the Supreme Court through the use of this machinery." Russell, *supra* at 8 n.20. See also B. LASKIN, *CANADIAN CONSTITUTIONAL LAW* 151 (3d ed. 1966); J. BROSSARD, *supra* at 142-43.

In South Africa, judicial review was, for practical purposes, abolished in 1961. This has been seen as an effort to counter the Supreme Court's opposition to policies of racial discrimination in that country. See H. FIX ZAMUDIO, *supra* note 64, at 60-61; see note 54 *supra*.

69. See Kiyomiya, *Verfassungsgerichtsbarkeit in Japan*, in MAX-PLANCK-INSTITUT, *supra* note 22, at 326, 328, 336; Hayashida, *Constitutional Court and Supreme Court of Japan*, in 2 DIE MODERNE DEMOKRATIE UND IHR RECHT 407, 422-23 (K. Bracher & C. Dawson eds. 1966). Upon the curious origins of the Japanese Constitution of 1947, which was half way between an imposition and an imitation of American ideas, see Abe, *Die Entwicklung des japanischen Verfassungsrechts seit 1952*, 15 JBÖFFR (N.F.) 513, 516 (1966); Nathanson, *Constitutional Adjudication in Japan*, 7 AM. J. COMP. L. 195, 217 (1958).

Note also that though the Japanese Supreme Court in 1952 conclusively decided to entertain constitutional cases in accordance with the "decentralized" American pattern, there had been some previous academic opinions advanced that the Japanese high court ought to hear constitutional cases in the abstract while sitting as a special constitutional court. H. FIX ZAMUDIO, *supra* note 64, at 53; Henderson, *Introduction, Symposium on the Japanese Constitution*, 43 WASH. L. REV. 887, 1009 (1968).

ern writers, although it is a traditional feature of the Swiss legal system.<sup>70</sup>

Norwegian law, since the end of the last century, and Danish law, from the beginning of this century, have also asserted the power of the courts to review the conformity of legislation with the constitution and to disregard, in the concrete case, a law held unconstitutional. Admittedly, this power has been used with extreme moderation and fairly infrequently.<sup>71</sup> A similar power has also been asserted in Sweden in the last few years.<sup>72</sup>

Germany and Italy, where today we find the centralized rather than the decentralized system, also experimented briefly with the Amer-

70. On the *staatsrechtliche Beschwerde* or *recours de droit public*, which can be brought, within a short time limit, against legislative enactments of the Cantons which contravene provisions enshrined in the constitution, see M. CAPPELLETTI, LA GIURISDIZIONE COSTITUZIONALE DELLE LIBERTÀ 23-35 (1955); Z. GIACOMETTI, DIE VERFASSUNGSGERICHTSBARKEIT DES SCHWEIZERISCHEN BUNDESGERICHTES (1933); J. ROUSSY, LE CONTRÔLE JUDICIAIRE DE LA CONSTITUTIONNALITÉ DES LOIS FÉDÉRALES AUX ETATS-UNIS ET EN SUISSE 128-47 (1969); Imboden, *Verfassungsgerichtsbarkeit in der Schweiz*, in MAX-PLANCK-INSTITUT, *supra* note 22, at 506, 510-11, 515-23. See M. CAPPELLETTI, *supra* note 23, ch. I, § 8c.

For the general power-duty of all Swiss courts (and not only the Federal Tribunal) not to apply cantonal laws conflicting with the constitution, even if the time limit for the *staatsrechtliche Beschwerde* may have elapsed, see Imboden, *supra* at 507, 511-23; J. ROUSSY, *supra* at 126, 155. On the inadmissibility of any type of judicial control of federal laws, see A. FAVRE, DROIT CONSTITUTIONNEL SUISSE 427-29 (1966); R. GROSSMANN, *supra* note 57, at 3-4; Imboden, *supra* at 513-14; Schindler, *Richterliches Prüfungsrecht und politischer Mehrheitswille*, 74 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 289, 289-90, 312-13 (1955). For an account of current criticisms of this exclusion, which are largely inspired by the United States system, see E. WOLF, VERFASSUNGSGERICHTSBARKEIT UND VERFASSUNGSTREUE IN DEN VEREINIGTEN STAATEN 1-4, 230-37 (1961), who is in opposition to the critics.

71. See generally F. CASTBERG, DIE ZUSTÄNDIGKEIT DER GERICHE IN USA UND NORWEGEN ZUR PRÜFUNG DER VERFASSUNGSMÄSSIGKEIT VON GESETZEN (1960); Castberg, *Verfassungsgerichtsbarkeit in Norwegen und Dänemark*, in MAX-PLANCK-INSTITUT, *supra* note 22, at 417, 418-21, 428; Engelhardt, *supra* note 23, at 104. For further information on the Norwegian system, see Cappelletti & Adams, *supra* note 27, at 1217.

72. Up to 1964, despite some academic opinions to the contrary, it was held in Sweden, as opposed to Norway and Denmark, that the judges did not have the power of judicial review of legislation. R. GINSBURG & A. BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 10, 131 (1965); Herlitz, *Verfassungsgerichtsbarkeit in Schweden*, in MAX-PLANCK-INSTITUT, *supra* note 22, at 489, 494-97. This view was, however, upset by the noteworthy decision of the Swedish Supreme Court on November 13, 1964, published in 1964 NYTT JURIDISKT ARKIV 471 and 1965 NORDISK DOMSSAMLING 429. On this see the discussion of G. Petré in 1966 SVENSK JURISTTIDNING 432.

As for another Scandinavian country, Finland, it is still the rule that no judicial review of legislation is allowed. Kastari, *Verfassungsgerichtsbarkeit in Finnland*, in MAX-PLANCK-INSTITUT, *supra* note 22, at 198, 215-17; Merikoski, *The System of Government*, in THE FINNISH LEGAL SYSTEM 39-40 (J. Uotila ed. 1966); Saario, *Control of the Constitutionality of Laws in Finland*, 12 AM. J. COMP. L. 194, 203-05 (1963). This rule has not, however, failed to provoke considerable discussion in Finnish academic circles. See the references in *id.* at 203-05 nn.32, 34 & 35.

ican type of control: Germany under the Weimar Constitution,<sup>73</sup> and Italy from 1948 to 1956—that is to say, from the adoption of its first “rigid” constitution until the Constitutional Court began to function.<sup>74</sup>

The rationale behind giving the entire judiciary the duty of constitutional control is, on its face, both logical and simple, as is apparent from Chief Justice Marshall’s opinion in *Marbury v. Madison*<sup>75</sup> and earlier from the writings of Alexander Hamilton.<sup>76</sup> It is the function of the judiciary, the argument goes, to interpret the laws in order to apply them in concrete cases. When two such laws are in conflict, it is the judge who must determine which law prevails and then apply it. When the conflict is between enactments of different normative force, the obvious criterion to be applied is that the higher law prevails: *lex superior derogat legi inferiori*. A constitutional norm, if the constitution is rigid, prevails over an ordinary legislative norm in conflict with it, just as ordinary legislation prevails over subordinate legislation,<sup>77</sup> or,

73. See, e.g., W. APALT, *GESCHICHTE DER WEIMARER VERFASSUNG 286-89* (2d ed. 1964); C. FRIEDRICH, *supra* note 4, at 82; H. SPANNER, *DIE RICHTERLICHE PRÜFUNG VON GESETZEN UND VERORDNUNGEN 5* (1951); Engelhardt, *supra* note 23, at 106; Friesenhahn, *Die Verfassungsgerichtsbarkeit in der Bundesrepublik Deutschland*, in MAX-PLANCK-INSTITUT, *supra* note 22, at 89, 96-97; Geck, *supra* note 68, at 254. Extensive information on the subject can be found in Dietze, *supra* note 42, at 544.

74. This transition period (on which see art. VII, para. 2, of the “Disposizioni transitorie e finali” of the constitution) was to last until the Constitutional Court, provided for by the constitution, began to function in 1956.

Some other European precedents of decentralized control of the constitutionality of legislation are mentioned in S. CATINELLA, *supra* note 57, at 111-30; Deener, *supra* note 5, at 1083; Engelhardt, *supra* note 23, at 104. These precedents are cases at the beginning of this century in which Rumanian and Greek courts refused to apply unconstitutional laws, and also article 63 of the Portuguese Constitution of 1911, which expressly gave the courts power to disregard such laws. For further developments in these countries, see Azzariti, *supra* note 66, at 20 (Rumania), 28-29 (Greece), 31-32 (Portugal); Deener, *supra* note 5, at 1087; Engelhardt, *supra* note 23, at 104.

Professor Lucas Prakke of the University of Amsterdam kindly informs me that a proposal for the introduction of a decentralized system of judicial review has been under serious consideration in Holland. It is included in the tentative text of a new constitution published by the Ministry of the Interior and approved by an advisory committee on matters of constitutional and electoral law.

75. 5 U.S. (1 Cranch) 137 (1803). Some have even said that Marshall’s emphasis on logic, to the exclusion of citation to the historical precedents for judicial review, has made it easier for those inimical to judicial review to challenge it as an “usurpation”:

If Marshall had made it clear that he was using arguments put forward long before . . . and if he had shown that he conceived of his task not as demonstrating beyond the palest shadow of a doubt the correctness of the doctrine of judicial review, but rather as establishing that this doctrine had decidedly better claims than its opposite, then perhaps the “usurpation” myth would have enjoyed less perennial appeal.

C. BLACK, *THE PEOPLE AND THE COURT* 26 (1960).

76. *THE FEDERALIST* No. 78 (A. Hamilton); see C. BLACK, *supra* note 75, at 158, 229; Kadish, *supra* note 62, at 7-8.

77. In Italy, for instance, administrative “regulations” have to be disregarded by

as the Germans would say, *Gesetze* prevail over *Verordnungen*.<sup>78</sup> Hence, one must conclude that any judge, having to decide a case where an applicable legislative norm conflicts with the constitution, must disregard the former and apply the latter.<sup>79</sup>

### B. Centralized Judicial Review

Despite the compelling logic of the argument for decentralized review, the centralized system is not without its adherents—all of them civil law countries—or its rationale.<sup>80</sup> The archetype of this system is contained in the Austrian Constitution of October 1, 1920, the so-called *Oktoberverfassung*, as amended by the *Novelle* of 1929. This constitution, based on the proposals of Hans Kelsen, was reenacted after World War II.<sup>81</sup> In recent years, the centralized system was adopted by the Italian Constitution of 1948,<sup>82</sup> and the Bonn Constitution of 1949,<sup>83</sup> both still in force. Even more recently, this system was introduced in Cyprus in 1960,<sup>84</sup> Turkey in 1961,<sup>85</sup> and Yugo-

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the courts if contrary to the "laws." See Law of Mar. 20, 1865, all. E, art. 5, 11 Rac. Uff. 516; P. CALAMANDREI, *LA ILLEGITTIMITÀ COSTITUZIONALE DELLE LEGGI* 8-9 (1950) 8-9; 3 *OPERE GIURIDICHE* 352. In France also the *acte réglementaire illégal* has to be disregarded by the courts in consequence of an *exception d'illégalité*. The ordinary courts do not, however, annul such administrative acts with general effect, but can only disregard them for the case at hand. Nonetheless, this does not prevent an action before the *Conseil d'Etat* for annulment with general effect. See C.-A. COLLIARD, *supra* note 22, at 142-43.

78. Friesenhahn, *supra* note 73, at 144-45.

79. A. DE TOCQUEVILLE, *supra* note 4, at 91-92, had already observed that, if the constitution is "the primary law," the logical result is that the courts ought to obey the constitution in preference to all other laws: "[T]his touches the very essence of judicial power; it is in a way the natural right of a judge to choose among legal provisions that which binds him most strictly." The different French approach can be explained, according to Tocqueville, on the basis of the "*raison d'Etat*" rather than the "*raison ordinaire*" which has prevailed in the United States. The result is that in France, unlike the United States, the superiority of the constitution is more nominal than effective: "[B]y refusing to give the judges the power to declare laws unconstitutional we indirectly give the legislative body the power to change the constitution, since there is no legal barrier to restrain it." *Id.* at 91.

80. See Melichar, *Die Verfassungsgerichtsbarkeit in Österreich*, in MAX-PLANCK-INSTITUT, *supra* note 22, at 439, 439-45, 486, *passim*.

81. Law of May 1, 1945, [1945] StGBI. No. 4.

82. COSTITUZIONE arts. 134-37 (Italy, 1948); see Constitutional Law of Feb. 9, 1948, [1948] Gaz. Uff. 574, [1948] La Legislazione Italiana (Giuffrè) 177; Constitutional law of Mar. 11, 1953, [1953] Gaz. Uff. 982, [1953] La Legislazione Italiana (Giuffrè) 355; Law of Mar. 11, 1953, [1953] Gaz. Uff. 984, [1953] La Legislazione Italiana (Giuffrè) 364.

83. GRUNDGESETZ arts. 93-94, 99-100 (W. Ger., 1949); see Law of Mar. 12, 1951, [1951] BGBl. I 166.

84. See Blümel, *Die Verfassungsgerichtsbarkeit in der Republik Zypern*, in MAX-PLANCK-INSTITUT, *supra* note 22, at 643, 676-708. The English text of the Cypriot Constitution can be found in 3 A. PEASLEE, *CONSTITUTIONS OF NATIONS* 138 (3d ed. 1968). See also Tzermias, *Die Verfassung der Republik Zypern*, 10 JBÖFFR (N.F.)

slavia in 1963.<sup>86</sup> In Yugoslavia, the only Communist country to adopt any system of judicial review, constitutional control is exercised at the national level by the Federal Constitutional Court, and on the regional level by constitutional courts in the six republics.<sup>87</sup>

Three principal reasons account for adoption of a centralized system of judicial review in a growing number of civil law countries. These

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485 (1961).

The Cypriot Constitution is *sui generis*, both because of the extraordinary efforts made to protect the rights of the Greek and the Turkish populations and because of the combination of continental and common law influences evident in the provisions concerning judicial review. Such review is concentrated, theoretically, in one Supreme Constitutional Court; initiative may be either by certain high officials or by parties involved in ordinary litigation.

In 1964 an Administration of Justice Act was passed which, in light of the conflicts between the two major communities, temporarily joined the functions of the special Constitutional Court and the High Court (the court of last instance in ordinary litigation) in a single Supreme Court. See 3 A. PEASLEE, *supra* at 137, 216. The consequences of this merger are far-reaching. Recent decisions by the new Supreme Court seem to transform the centralized system, clearly provided for by the Constitution, into a decentralized one, in which all courts may decide constitutional issues raised before them. See *Attorney-General v. Mustafa Abraham*, 1964 Cyprus L.R. 195, 205-06, 269-74.

85. See Ülkü Azrak, *Verfassungsgerichtsbarkeit in der Türkei*, 11 JBÖFFR (N.F.) 73 (1962); Abadan, *Die türkische Verfassung von 1961*, 13 JBÖFFR (N.F.) 325, 408-11 (1964); Bekir Balta, *Die Verfassungsgerichtsbarkeit in der Türkei*, in MAX-PLANCK-INSTITUT, *supra* note 22, at 550. An English translation of the Turkish Constitution can be found in 3 A. PEASLEE, *supra* note 84, at 404.

86. KONSTITUTSIA (Constitution) arts. 241-54 (Yugo., 1963); Law of Dec. 31, 1963, Concerning the Yugoslav Constitutional Court, [1963] Sluzbenijh list No. 52. Both documents are translated in 7 & 14 INSTITUT DE DROIT COMPARÉ, RECUEILS DES LOIS DE LA RSF DE YOUGOSLAVIE (1963 & 1965). See generally Djordjevic, *Les Cours constitutionnelles en Yougoslavie*, 14 No. 4 LE NOUVEAU DROIT YOUGOSLAVE 9 (1963); Krbek, *Die Verfassung der Sozialistischen Föderativen Republik Jugoslawien vom 7.4. 1963*, 13 JBÖFFR (N.F.) 243, 267-68, 280-82 (1964); Srzentic, *Sur les nouvelles juridictions constitutionnelles de Yougoslavie*, 15 Nos. 1-3 LE NOUVEAU DROIT YOUGOSLAVE 21 (1964). See also W. GELLHORN, OMBUDSMEN AND OTHERS 273-78 (1966); Lacy, *Yugoslavia: Practice and Procedure in a Communist Country*, 43 ORE. L. REV. 1, 13-14 (1963); Rozmaryn, *La Constitution, loi fondamentale de l'Etat socialiste*, in P. BISCARETTI DI RUFFIA & S. ROZMARYN, LA CONSTITUTION COMME LOI FONDAMENTALE DANS LES ETATS DE L'EUROPE OCCIDENTALE ET DANS LES ETATS SOCIALISTES 77, 111-12 (1966); Franchi, *Note sulla giurisdizione costituzionale Jugoslava*, 21 RIVISTA DI DIRITTO PROCESSUALE [RIV. PROC.] 397 (1966); Vigoriti, *La giurisdizione costituzionale in Jugoslavia*, 20 RIV. TRIM. CIV. 298 (1966).

87. Constitutional Act No. 143, Oct. 27, 1968, arts. 100-01, [1968] Sbirka Zákonů 381, provided a similar system for Czechoslovakia. For a translation of the Act, see Z. JIČINSKY & J. SKÁLA, THE CZECHOSLOVAK FEDERATION (1969). The final implementing legislation has not yet been enacted, and under the present circumstances is not likely to be.

One cannot fail to notice that this new element in constitutional law profoundly transforms Communist theories of state and law. Cf. Ferretjans, *La Constitution du 7 avril 1963 de la République socialiste fédérative de Yougoslavie et l'unité marxiste du pouvoir d'état*, 79 REV. DR. PUBL. 939, 948-51 (1963); Kastari, *Le caractère normatif et la prééminence hiérarchique des Constitutions*, 18 REVUE INTERNATIONALE DE DROIT COMPARÉ 831, 845-46 (1966).

are: First, the Continental conception of the separation of powers; second, the absence of a principle comparable to *stare decisis* in civil law jurisprudence; and third, the unsuitability of the civil law judiciary.

### 1. *The Theory of Separation of Powers*

The centralized system reflects a different conception of the separation of powers, and is based on a radically different doctrine from that upon which decentralized review is founded. The civil law countries tend to adhere more rigidly to the doctrines of the separation of powers and the supremacy of statutory law. Originally these doctrines meant, to Montesquieu,<sup>88</sup> Rousseau, and others haunted by fears of a self-seeking, anti-democratic judiciary, that any judicial interpretation or, a fortiori, invalidation of statutes was a political act, and therefore an encroachment on the exclusive power of the legislative branch to make law. Even today, although the advisability of some sort of control over the constitutionality of legislation is admitted, the essentially political aspects of this function are recognized.<sup>89</sup> The centralized systems therefore refuse to grant this power to the judiciary generally. The ordinary judge must accept and apply the law as he finds it.<sup>90</sup> Several scholars have noted a genuine presumption of legislative validity in these countries.<sup>91</sup> The only attenuation of these notions lies in the power of ordinary judges to suspend litigation pending reference to the Constitutional Court of a constitutional issue which has been raised below. In Austria, even this power is severely curtailed.<sup>92</sup>

This recognition of the political character of judicial review is reflected both in the manner of appointing the members of the constitutional courts and in the sort of questions entertained by such courts. The agencies appointing the judges are usually prescribed by the constitu-

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88. Diverging interpretations of Montesquieu's doctrine, formulated in his *L'Esprit des lois*, are well known. For a recent analysis, see M. VILE, CONSTITUTIONALISM AND SEPARATION OF POWERS 76-97 (1967). See also Eckhoff, *Impartiality, Separation of Powers, and Judicial Independence*, 9 SCANDINAVIAN STUDIES IN LAW 9, 22 (1965).

89. See notes 119-20 *infra* and accompanying text.

90. See, e.g., Friesenhahn, *supra* note 73, at 136-37; Melichar, *supra* note 80, at 445, 459-60.

91. See, e.g., Cereti, *Funzione legislativa e controllo di legittimità*, 8 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 57 (1958). References and criticisms of the "presumption of the validity of legislation," a notion usually attributed to Laband, can be found in M. CAPPELLETTI, LA PREGIUDIZIALITÀ COSTITUZIONALE NEL PROCESSO CIVILE 84-88 (1957); C. ESPOSITO, LA VALIDITÀ DELLE LEGGI 34-42 (2d ed. 1964); Dietze, *supra* note 42.

92. See M. CAPPELLETTI, *supra* note 23, ch. IV. Briefly, in Austria only the Supreme Court for civil and criminal matters and the central Administrative Court have the power to suspend a case and refer issues to the Constitutional Court. In Italy and Germany all the courts have this power.



tion itself and an effort is made to ensure that the courts' membership reflects all major political groupings, so that the courts are "not the prolonged arm of some other state organ or of the political parties."<sup>93</sup> Similarly, the centralized constitutional courts do not shy away from considering issues which the United States Supreme Court would reject as essentially political. The American Court has often avoided questions which it has called "political," regarding, for example, the executive's conduct of foreign relations or whether the legislature has faithfully observed its own procedures in passing a statute or constitutional amendment.<sup>94</sup> In contrast, Europe's centralized constitutional courts, consistent with their admittedly quasi-political role, may at times entertain such dangerous questions.<sup>95</sup>

## 2. *The Absence of Stare Decisis*

Apart from theory, centralized judicial review provides the practical means of enforcing a consistent body of constitutional law in civil law countries, which do not subscribe to the common law doctrine of stare decisis. In the American system, every court, high and low, has both the power and the duty to determine the constitutionality of the statutes that come before it. This would likely lead different judges to reach inconsistent results on close questions were it not for stare decisis. Under this doctrine, courts are bound to follow their own prior decisions and, more importantly for the present purpose, the precedents of higher courts in the same jurisdiction.<sup>96</sup> The existence of a single supreme

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93. Geck, *supra* note 68, at 258.

94. This policy, grounded both in the conviction that some questions are better answered by other branches of the government and in a realistic desire to avoid provoking a direct clash with the other branches of government which could, after all, simply refuse to obey the courts, is facilitated by such doctrines as "ripeness," "case or controversy," "standing," and "political question." See M. SHAPIRO, *supra* note 67, at 174; M. CAPPELLETTI, *supra* note 23, ch. IV, § 6.

95. Thus the European constitutional courts and the French *Conseil Constitutionnel* may be specifically charged with determining the constitutionality of political parties (art. 21, para. 2, of the German Basic Law of 1949) and the validity of elections (art. 41 of the German Basic Law and arts. 58-60 of the French Constitution of 1958), with deciding the most delicate conflicts of jurisdiction between legislature and executive (arts. 34, 37 and 61 of the French 1958 Constitution; art. 134 of the Italian 1948 Constitution; art. 93, paras. 1 and 3 of the German Basic Law), with deciding the validity of treaties (see Geck, *supra* note 68, at 265), etc. Also to be considered is the fact that the continental constitutional courts do not confine their deliberations to the facts of the specific case but rather tend to treat issues in the abstract, since they are obliged to make a final decision, regarding a given law, which will be valid *erga omnes*. Finally, the civil law jurisdictions do not have the certiorari device which permits the Supreme Court to refuse to hear cases which it may feel are too delicate to be decided at a given time.

96. See J. BROSSARD, *supra* note 68, at 153; M. FRANKLIN, *THE DYNAMICS OF AMERICAN LAW* 211-12, 295-319, 388, 569-70 (1968); Cappelletti & Adams, *supra* note 27, at 1215. In Mexico there have been attempts to arrive at similar results and to avoid

court, combined with the lower courts' duty to follow superior precedents, insures the uniformity of constitutional adjudication.<sup>97</sup> To be sure, an American law that has not been applied because found unconstitutional by the Supreme Court remains on the books. Yet it becomes dead law, because stare decisis prevents its future application by lower courts.<sup>98</sup>

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the difficulties mentioned in the text. Thus there has been a limited binding force given to precedents ("*jurisprudencia*") of the *Suprema Corte de Justicia de la Nación*. See Cappelletti, *Amparo*, in 2 ENCICLOPEDIA DEL DIRITTO 329, 330 (1958). Also there has been the new institution of the *suplencia de la queja deficiente*, which, I am told, has been scarcely used: notwithstanding the individual effects of judgments of unconstitutionality, a Mexican court may draw the plaintiff's attention to the fact that the state action, which is the subject of the plaintiff's claim, had already been declared unconstitutional in prior decisions of the *Suprema Corte*. See J. CASTRO, *LA SUPLENCIA DE LA QUEJA DEFICIENTE EN EL JUICIO DE AMPARO* 59-60 (1953); H. FIX ZAMUDIO, *supra* note 66, at 190, 403-04, 406-08.

97. The rule of stare decisis is not only less strictly observed in America than in England generally, but in America it is less strictly adhered to in constitutional cases than in others. This is because of the more dynamic nature and greater flexibility of constitutional law which demands more creative interpretation. See *Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting); M. FRANKLIN, *supra* note 96, at 211-12, 295-319, 388, 569-70; Kadish, *supra* note 62, at 152 & n.82.

Yet, it is interesting to note that the fundamentally important result of changing what would be a mere *cognito incidental* of unconstitutionality, valid only for the particular case, into a statement of the law with validity *erga omnes*, has been achieved through the rule of stare decisis. It would, therefore, seem to me to be difficult to agree with certain attempts, both old and recent, to deny or modify excessively the importance of stare decisis as one of the elements differentiating the so-called Anglo-Saxon systems from the continental ones. See, e.g., Ancel, *Réflexions sur l'étude comparative des Cours suprêmes et le "Recours en Cassation,"* 1 ANNALES DE L'INSTITUT DE DROIT COMPARÉ DE L'UNIVERSITÉ DE PARIS 301 (1934); Zajtay, *Begriff, System und Präjudiz in den kontinentalen Rechten und im Common Law*, 165 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 97, 103-06 (1965). When one asserts, as many have done, see, e.g., E. WOLF, *supra* note 70, at 215, that "in the field of constitutional law the principle of stare decisis has been practically suppressed," this is only half the truth. It is true that the Supreme Court has been assuming the right to change its own legal doctrines and hence to go against previous decisions. But, on the other hand, there can be no doubt that the decisions of the Supreme Court itself are considered as fully binding and are followed by the lower courts and other public organs.

98. Kauper, *Judicial Review of Constitutional Issues in the United States*, in MAX-PLANCK-INSTITUT, *supra* note 22, at 568, 611, 629; Cappelletti & Adams, *supra* note 27, at 1215; see references in Prakke, *Reflections on Judicial Review of Legislation*, 4 ACTA POLITICA 385, 418-19 (1969). The same is true for Canada. Cf. J. BROSSARD, *supra* note 68, at 151-55, 235-36.

One scholar sees no reason in principle why a statute cannot be revived after being declared unconstitutional. Nimmer, *A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875*, 65 COLUM. L. REV. 1394 (1965). However, perhaps the only instance of such a revival is *In re Rahrer*, 140 U.S. 545 (1891). The Supreme Court upheld a Kansas statute it had formerly declared unconstitutional as an infringement of congressional power under the commerce clause. In the time between the two decisions, Congress authorized such state action. The Court said that the Kansas statute became effective immediately after this authorization, without the Kansas Legislature reenacting the statute. Also of interest is the opinion of the Attorney General that the District of Columbia minimum wage law, ruled unconsti-

In this way, the simple reasoning of Hamilton in the *Federalist*<sup>99</sup> and Marshall in *Marbury v. Madison*<sup>100</sup> has had more far-reaching effects than would at first have been imagined. In truth, this reasoning tended to resolve the problem of unconstitutionality of legislation in terms of simple statutory interpretation. Since, the argument ran, the Constitution is a superior law, the judge, having to decide a case where the applicable law is in his opinion unconstitutional, must give precedence to the Constitution. The judge does not invade the realm of the legislative power; he is not attempting to legislate. He simply disregards the "lower" law in the concrete case.<sup>101</sup> However, through the instrument of stare decisis, this "non-application" in the particular case becomes in practice a genuine quashing of the unconstitutional law which is final, definite and valid for every future case. In short, it becomes a true annulment of the law with, at least in theory, retroactive effects.<sup>102</sup>

Since the principle of stare decisis is foreign to civil law judges,<sup>103</sup> a system that allowed each judge to decide for himself the constitutionality of statutes could result in a law being disregarded as unconstitutional by some judges, while being held constitutional and therefore applied by others. Furthermore, the same court that had one day disregarded a given law might uphold it the next day, having changed its mind about the law's constitutionality.<sup>104</sup> Differences could arise between judicial bodies of different type or degree, for example between ordinary

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tutional in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), automatically came back into force when the Supreme Court reversed this case in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). 39 OP. ATT'Y GEN. 22 (1937).

99. THE FEDERALIST NO. 78 (A. Hamilton).

100. 5 U.S. (1 Cranch) 137 (1803).

101. See C. ESPOSITO, *supra* note 91, at 21; Kadish, *supra* note 62, at 8 (quoting Hamilton); notes 75-79 *supra* and accompanying text.

102. See generally M. CAPPELLETTI, *supra* note 23, ch. V.

103. One can well say that the rule of stare decisis is foreign to the spirit of civil law systems, while recognizing the prime importance of judicial decisions as informal sources of law (the so-called *auctoritas rerum similiter judicatarum*). It is true that in a few civil law countries a binding force was or still is given to precedents, but this practice has been always by way of exception and without any notable degree of practical success. Thus the French *Parlements* before the Revolution not only introduced a type of judicial review [see notes 24-25 *supra* and accompanying text], but may also have formulated a doctrine of the binding force of precedents; the doctrine, however, was suppressed by the Revolution. See R. DAVID & H.P. DE VRIES, *THE FRENCH LEGAL SYSTEM* 113 (1958). For other more recent (Hungary) or still valid (Spain) examples of civil law systems in which judicial decisions are or were binding, at least in part, see R. DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* 141 (3d ed. 1969) (with references); Zajtay, *supra* note 97, at 97, 103 & nn.30-31.

104. Azzariti, *supra* note 66, at 9; Biscaretti di Ruffia, *La Costituzione, en tant que loi fondamentale, en Europe occidentale*, in P. BISCARETTI DI RUFFIA & S. ROZMARYN, *supra* note 86, at 27, 72-73; Engelhardt, *supra* note 23, at 108; Pierandrei, *supra* note 22, at 881, 886-87.

courts and administrative tribunals,<sup>105</sup> or between the younger, more radical judges of the inferior courts and the older, more tradition-conscious judges of the higher courts. This was notoriously what happened in Italy from 1948 to 1956 and what continues to happen on a large scale in Japan.<sup>106</sup> The extremely dangerous result could be a serious conflict among the judicial organs and grave uncertainty as to the law. Moreover, even though a particular law has been held unconstitutional in one case, other affected parties would still have to raise the issue of constitutionality *de novo*. A Japanese writer offers a typical example.<sup>107</sup> A plaintiff files suit claiming that a certain tax law is unconstitutional and obtains a judgment to that effect; but, the writer continues, "according to the individual-effect theory, the law *per se* remains in force and binding on taxation offices." As a result, every other interested party must initiate a separate action to escape the effects of the law.<sup>108</sup>

And so, though the American system has been introduced in several civil law countries, it has not been an unqualified success.<sup>109</sup> Weimar Germany, and post-war Italy prior to the institution of its Constitutional Court, fully revealed the unsuitability of the decentralized method for civil law countries; and the same may now be said for Japan. In Norway, Denmark and Sweden, on the other hand, the problem is not acute, but only because decentralized judicial review is relatively unimportant and the judges exercise the power with extreme prudence and moderation.<sup>110</sup> In other civil law countries, this type of judicial review has not been successful, with the possible exception of Switzerland,

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105. Eugelhardt, *supra* note 23, at 108, rightly points out (also on the basis of the Greek experience, to which we might add the Italian one of 1948-1956) that in countries where, unlike the United States, separate courts deal with administrative law, a great danger arises which the American system avoids. This is the danger of conflicts between the ordinary courts and the administrative courts, culminating in conflicts between the two respective supreme organs.

106. See Abe, *supra* note 69, at 537; Kiyomiya, *supra* note 69, at 336-37.

107. See Hayashida, *supra* note 69, at 424-25.

108. One might take issue with the theory that a law remains binding on the public administration, although considered unconstitutional by the public administration itself. Hayashida states that "regarding the executive, even if the cabinet considers a law unconstitutional, it shall hold itself responsible to the Diet for any failure to apply and administer the law as long as it remains in force." *Id.* at 425. However, such a discussion would have little practical value. In fact, this theory, which I believe is unfounded, is accepted not only in Japan but also in Italy and other countries despite the "rigid" nature of the Constitution. See the criticisms in M. CAPPELLETTI, *supra* note 91, at 76-82, 84-88.

109. See Cappelletti & Adams, *supra* note 27, at 1213-16.

110. On the minor practical importance of judicial review in the Scandinavian countries, see F. CASTBERG, *supra* note 71, at 10; J. STORING, *NORWEGIAN DEMOCRACY* 156 (1963); Castberg, *supra* note 71, at 417, 420; Eckhoff, *supra* note 88, at 28. See also *DANISH COMM. ON COMPARATIVE LAW, DANISH AND NORWEGIAN LAW* 13 (1963).

where the type of judicial review adopted is much more of a compromise between the two systems.<sup>111</sup>

Accordingly, in establishing a system of judicial review, the countries to whom the notion of *stare decisis* was foreign had to work with legal instruments very different from those of the United States and other common law countries. In the former countries it was thought essential to find an adequate substitute for the American Supreme Court. The need was felt for a judicial body capable of giving decisions of general binding effect in cases dealing with the constitutionality of legislation. It was hoped that such special bodies could avoid the conflicts and chaotic uncertainties of which we have spoken above.

### 3. *The Unsuitability of the Ordinary Courts*

The American Supreme Court, and, for example, its Japanese counterpart under the Constitution of 1947<sup>112</sup> are far from being the equivalents of the European constitutional courts. While the latter concern themselves solely with constitutional questions, the jurisdiction of the Supreme Court of the United States is not so confined, since most cases come to it through the normal appellate system and not through any special procedure. Even for constitutional questions no extraordinary procedure is used. To view such writs as *habeas corpus* or *certiorari* as the basis for judicial review is to make a fundamental, though rather frequent, error.<sup>113</sup> The Supreme Court, therefore, should be compared not to the special constitutional courts, but rather to the highest courts of appeal on the continent, such as the Austrian *Oberster*

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111. As for Switzerland, it would not be right to speak of a failure of the system adopted there. But one might add that it would be possible to agree with one Swiss writer who holds that in Switzerland, unlike in the United States, judicial review has never become a leading constitutional principle. R. GROSSMANN, *supra* note 57, at VIII. In fact the success of the Swiss system is due much less to the "decentralized" power of control outlined above and much more to the remedy of *staatsrechtliche Beschwerde* upon which only the Federal Tribunal is competent to judge. See note 70 *supra* and accompanying text. Thus, in this more important aspect, Swiss law presents us with a system of centralized rather than decentralized control. See R. GROSSMANN, *supra* note 57, at 3-4; Z. GIACOMETTI, *supra* note 70, at 6-7, 14. Note also that judgments of unconstitutionality emanating from the Swiss Federal Tribunal have general binding effect. See M. CAPPELLETTI, *supra* note 70, at 35; G. CODDING, JR., *THE FEDERAL GOVERNMENT OF SWITZERLAND* 102-03, 106 (1961); F. FLEINER & Z. GIACOMETTI, *SCHWEIZERISCHES BUNDESSTAATSRECHT* 887-88, 897-98 (1949); W.J. WAGNER, *supra* note 51, at 109; Imboden, *supra* note 70, at 516.

112. Cf. J. MAKI, *COURT AND CONSTITUTION IN JAPAN* xv, *passim* (1964); Haya-shida, *supra* note 69, at 421.

113. J.A.C. GRANT, *supra* note 4, at 34. While formally the United States Supreme Court is a court of ordinary appellate jurisdiction, in practice there has been a tendency for the Court to assume a position not unlike the European constitutional courts. See note 134 *infra* and accompanying text.

*Gerichtshof*, the German *Bundesgerichtshof*, or the Italian *Corte di cassazione*.

At this point one might enquire why those countries which decided to have a centralized system of judicial review wanted to create special constitutional courts, and did not grant jurisdiction over constitutional matters to the already existing highest courts of appeal.<sup>114</sup> Constitutional jurisdiction might have been granted to these courts alone without authorizing all judges to review legislation. Furthermore, one of the inherent difficulties of judicial review in a civil law country might have been overcome by making decisions of constitutionality issued by these courts binding on all inferior courts. The Swiss Federal Tribunal could have provided a useful precedent for such a scheme.<sup>115</sup>

But despite their theoretical suitability, the traditional highest courts of most civil law countries were found to lack the structure, procedures, and mentality required for effective constitutional adjudication. First, the European high courts lack the compact, manageable structure of the United States Supreme Court. Typical is Germany where there are no less than five high courts, one each for ordinary civil and criminal questions, administrative matters, tax disputes, labor problems, and controversies involving social legislation.<sup>116</sup> Even within a given high court there are several different divisions, each of which sits and decides cases independently of the other divisions. It is difficult to imagine how, amidst such a welter of judges and jurisdictions, a consistent and carefully considered constitutional jurisprudence could ever be developed.<sup>117</sup>

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114. Moreover, one might ask why a centralized system on the European model has been suggested even for Japan by some of the several critics of the "American" method adopted in that country in 1947. See Kiyomiya, *supra* note 69, at 336; Haya-shida, *supra* note 69, at 426. See also note 69 *supra*.

115. See notes 70 & 111 *supra* and accompanying text. The system introduced by art. 34 of the Irish Constitution of July 1, 1937, could also have been an interesting precedent. See note 66 *supra*. The same might be said of certain countries in Latin America, such as Uruguay, where control of constitutionality is concentrated exclusively in the ordinary supreme court, the lower judges being bound to suspend the particular case in which the constitutional question arises. However, the judgments of the Supreme Court of Uruguay are not valid *erga omnes* but are confined to the concrete case, so that the effectiveness of the system—given the lack of *stare decisis*—is severely limited. Cf. E. VESCOVI, *supra* note 64, at 36-37, 47-48, 61-65, *passim*. For the Canadian system, see note 68 *supra*.

116. See 1 E. COHN, *MANUAL OF GERMAN LAW* 36 (1968); Baur, *Introduction to GERMAN ASS'N OF COMPARATIVE LAW, BIBLIOGRAPHY OF GERMAN LAW* 2, 34-48 (1964). On the highest courts in various countries, see J. MAGNUS, *DIE HÖCHSTEN GERICHTE DER WELT* (1929).

117. Furthermore, since more judges belong to a division than are required to decide a single case, the individual judges called to take part in decisions by a single division may vary from case to case. Consider, for example, that a few hundred judges belong to the Italian Court of Cassation. See G. DI FEDERICO, *LA GIUSTIZIA COME ORGANIZZAZIONE: LA CORTE DI CASSAZIONE* 55 (1969).

Procedurally, these courts of last instance are also handicapped by their frequent lack of any discretionary power to refuse jurisdiction, of a device similar to the certiorari of the United States Supreme Court. To illustrate, the Italian Court of Cassation must hear every case brought before it, an average of three to four thousand civil cases per year, while the Italian Constitutional Court delivers from one to two hundred judgments annually. Thus, if the Court of Cassation were to have jurisdiction over constitutional cases as well, such cases would represent a fairly insignificant portion of its workload. These cases would receive neither the time nor the consideration that they require. The situation is very similar for the superior courts of other civil law countries, such as Germany.

Lastly, the bulk of Europe's judiciary seems psychologically incapable of the value-oriented, quasi-political functions involved in judicial review.<sup>118</sup> Continental judges are usually "career judges" who enter the judiciary at a very early age and are promoted to the higher courts largely on the basis of seniority. Their professional training develops skills in technical application of statutes rather than in making policy judgments. The exercise of judicial review, however, is rather different from the usual judicial function of applying the law.<sup>119</sup> Modern constitutions do not limit themselves to a fixed definition of what the law is, but contain broad programs for future action. Therefore the task of fulfilling a constitution often demands a higher sense of discretion than the task of interpreting ordinary statutes; that is certainly one reason why Kelsen, Calamandrei and others have considered it to be a legislative rather than a purely judicial activity.<sup>120</sup>

In the United States, the Supreme Court itself first undertook the task of judicial review, but to impose this function on European higher

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118. This seems equally true for Yugoslavia, the first Communist country to adopt judicial review. W. GELLHORN, *supra* note 86, at 273-74 n.43, indicates that Marshall Tito's government was readily won over to the idea of judicial review. However, the lawyers and judges of the Supreme Court opposed it, and were almost impossible to convince.

119. This subject has been much discussed. See, e.g., Cappelletti, *L'attività e i poteri del giudice costituzionale in rapporto con il loro fine generico*, in 3 SCRITTI GIURIDICI IN MEMORIA DI P. CALAMANDREI 83 (1958); Kirchheimer, *Prinzipien der Verfassungsinterpretation in den Vereinigten Staaten*, 11 JBÖFFR (N.F.) 93, 97 (1962); Leibholz, *Das Spannungsverhältnis von Politik und Recht und die Integrationsfunktion des Bundesverfassungsgerichtes*, in INTEGRITAS—GEISTIGE WANDLUNG UND MENSCHLICHE WIRKLICHKEIT 211 (D. Stolte & R. Wisser eds. n.d.); Zweigert, *Zum richterlichen Charisma in einer ethisierten Rechtsordnung*, in FESTGABE FÜR CARLO SCHMID 299, 303-05 (1962). See generally F. CAHILL, JR., JUDICIAL LEGISLATION 46-69 (1952); G. ROELLECKE, POLITIK UND VERFASSUNGSGERICHTSBARKEIT (1961); Bachof, *Der Verfassungsrichter zwischen Recht und Politik*, in SUMMUM IUS SUMMA INIURIA 41 (1963).

120. See Cappelletti, *Il controllo di costituzionalità delle leggi nel quadro delle funzioni dello Stato*, 15 RIV. PROC. 376, 384-99 (1960) and authorities cited therein.

courts, to whom such an activity would be unfamiliar and foreign to their traditions, was not considered suitable. In fact, these considerations had been amply borne out in practice. We have already noted that both Weimar Germany,<sup>121</sup> and Italy from 1948 to 1956,<sup>122</sup> experimented with the decentralized system of judicial review. Since the power was exercised by all the courts, cases came in the last instance before the *Reichsgericht* or the *Corte di cassazione*, the highest ordinary courts in the respective countries. In Germany, however, the system certainly did not produce satisfactory results.<sup>123</sup> In Italy, the Court of Cassation, often with the acquiescence of the *Consiglio di Stato*, used its powers of interpretation much more in the sense of "unfulfilling" the Constitution than of fulfilling it.<sup>124</sup> During these eight years, the Court of Cassation, even more than other courts, gave the best possible proof of its unsuitability to judge constitutional questions. Apparently, the long traditions of this court together with the professional deformation of its elderly career judges, instead of being of benefit, were much more of a handicap to the court in its new role.<sup>125</sup>

Nor are such practical confirmations of the unsuitability of decentralized review in civil law countries confined to Germany and Italy. In the Scandinavian countries, the modest role of the supreme court, and of the judiciary in general, in matters of judicial review is generally recognized.<sup>126</sup> In Japan it appears that in the first 20 years after the promulgation of the constitution, the Japanese supreme court has found statutes unconstitutional in, at best, two cases; and in only one of these situations was the statute in question still in effect at the time of the decision. This may be attributable to the way of thinking of the career judges in that court.<sup>127</sup> Finally, in Switzerland the success of

121. See note 73 *supra* and accompanying text.

122. See note 74 *supra* and accompanying text.

123. See S. CATINELLA, *supra* note 57, at 118-21; H. SCHORN, *DER RICHTER IM DRITTEN REICH* 23 (1959); H. SPANNER, *supra* note 73, at 4-6, 22-28, 38; Dietze, *supra* note 42, at 545-47.

124. See Calamandrei, *Come si fa a disfare una Costituzione*, in *DIECI ANNI DOPO: 1945-1955*, at 209 (1955), reprinted in 3 *OPERE GIURIDICHE* 511.

125. It might not be too presumptuous to suppose that the French Court of Cassation would not have been much more sensitive to problems of legislative constitutionality than its Italian counterpart. In fact, although on several occasions scholars including such well known figures as Hauriou, Duguit, Jèze, and Duverger have affirmed the possibility for French courts to exercise a power of judicial review, "the Court of Cassation . . . has rigidly refused to examine the constitutionality of legislative enactments." Eisenmann & Hamon, *supra* note 22, at 240. This may indicate on the part of the Court of Cassation, even more than on the side of the Council of State, "a certain insensitivity" to constitutional problems. Cf. Vedel, *Préface* to F. BATAILLER, *LE CONSEIL D'ÉTAT JUGE CONSTITUTIONNEL IV* (1966).

126. See note 110 *supra* and accompanying text.

127. Cf. J. MAKI, *supra* note 112, at xxx, xliii; Henderson, *supra* note 69, at 1016; Kiyomiya, *supra* note 69, at 336. Bibliographical materials do not, however, fully



the *Tribunal fédéral* in matters of judicial review confirms, rather than denies, this observation, if one remembers that that court is composed of 26 judges who are not career judges but elected by the Federal Assembly.<sup>128</sup>

The Justices of the Supreme Court of the United States, on the other hand, would seem in the light of almost two centuries of experience to have demonstrated, on the whole, their suitability for their delicate task. While the Court has often reached results that many would condemn, it has not suffered from the hesitancy and unfamiliarity with constitutional adjudication of European decentralized systems. Indeed, some of the greatest names in American history have been those of Justices. This fact is, of course, due to various circumstances, but one that deserves emphasizing is that judicial review was a product of the Supreme Court itself. It may be said that the Court has necessarily had to achieve a high level of performance in order to fulfill a function with which the courage of its early Justices had endowed it. Furthermore, there is the fact that the members of that Court—and the same applies to the other federal courts—are not career judges, as is the usual case with the ordinary European judges. They are politically appointed, and not necessarily from the ranks of the lower courts.

These, then, seem to be the most important reasons why, when adopting judicial review, several civil law countries chose not to use existing judicial organs and the members of the professional judiciary. Rather, they preferred to introduce entirely new and special judicial bodies, despite the serious problems of coordination arising from this choice.<sup>129</sup> Naturally these special courts, as all the other judicial organs,

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clarify this point. One or two cases are mentioned in Ito, *The Rule of Law: Constitutional Development*, in *LAW IN JAPAN* 205, 238 (A. von Mehren ed. 1963); Nathanson, *supra* note 69, at 202, 216. See also T. McNELLY, *CONTEMPORARY GOVERNMENT OF JAPAN* 168 (1963), who writes that "the Supreme Court [of Japan], with the exception of certain laws passed to implement Occupation directives, has never held any law, order, regulation, or official act unconstitutional." Nor does the situation seem to have improved in recent years. See Abe, *supra* note 69, at 537. See also R. DAVID, *supra* note 103, at 552. Von Mehren, *Commentary: Part II*, in *LAW IN JAPAN*, *supra* at 422, 424, writes that the Supreme Court of Japan

is composed of fifteen justices of whom five are . . . to be career judges and five lawyers. Both the conception of law held by this group and its conditioning experiences lead the lawyers and career judges to be hesitant to declare legislation unconstitutional or to interfere with governmental process on constitutional grounds.

128. Election is for a term of six years; however, they are usually re-elected. See G. CODDING, *supra* note 111, at 103; Zellweger, *The Swiss Federal Court as a Constitutional Court of Justice*, 7 J. INT'L COMM'N JUR. 101 (1966).

129. On the problems of coordinating the work of a constitutional court with that of the other courts, see Calamandrei, *Corte costituzionale e Autorità giudiziaria*, 11 pt. 1 RIV. PROC. 7 (1956), reprinted in 3 *OPERE GIURIDICHE* 609; Merryman & Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 AM. J. COMP. L. 665 (1967). In addition, the creation of a "sovereign" constitutional court cannot but

have full independence and autonomy. However, their members—or at least the majority of them—are not career judges, but, following the analogy of the American Supreme Court, are selected from diverse backgrounds and appointed by the highest legislative or executive organs of the state.<sup>130</sup>

### C. *Converging Trends*

For the sake of clarity, a dichotomy has been drawn between centralized and decentralized forms of judicial review, a dichotomy which in fact exaggerates the differences between the two systems. For the sake of balance, several points of convergence between the two approaches should now be emphasized. The twentieth century has blurred long-standing distinctions between the natural law and the positive law, between precedent-oriented and statute-oriented courts, and between varying theories of separation of powers, distinctions which lay at the bottom of the assumed differences in attitude toward judicial review.

The very establishment of special constitutional courts with the power to review and invalidate statutes for failure to conform with the constitution was, of course, a considerable compromise with that conception of the separation of powers which would deny such a power to all judicial organs.<sup>131</sup> True, the ordinary courts remain barred from judicial review in countries with a centralized system of control. Even in these countries, however, the ordinary courts have a role to play in this task. They often must make the initial judgment as to whether a constitutional issue ought to be referred to the special court.<sup>132</sup> This duty,

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raise further problems of coordination vis-à-vis other state powers and organs. See, e.g., P. BARILE, *La Corte costituzionale organo sovrano: implicazioni pratiche*, in SCRITTI DI DIRITTO COSTITUZIONALE 226 (1967); Barile, *Legami fra la Corte costituzionale e le funzioni esecutiva e legislativa e influenza di queste su quella*, in *id.* at 444.

130. Of the 14 judges on the Austrian *Verfassungsgerichtshof*, 8 are nominated by the President of the Republic after receiving recommendations from the Government, and 6 are nominated by the President from a list submitted by both houses of parliament. OKTOBERVERFASSUNG art. 147 (1920, amended 1929) (Aus.). The Italian *Corte costituzionale* is composed of 15 judges, one-third of whom are nominated by the President of the Republic, one-third by the Legislature, and one-third by the higher civil, penal, and administrative courts. COSTITUZIONE art. 135 (Italy, 1948). In West Germany, all 16 judges of the *Bundesverfassungsgericht* are selected by the legislature, half by the *Bundestag* and half by the *Bundesrat*. GRUNDGESETZ art. 94 (W. Ger., 1949). In all three countries, the choice must be made from persons who, apart from meeting other requirements, have completed regular studies in law. See generally C. FRIEDRICH, *supra* note 4, at 86; Engelhardt, *supra* note 23, at 110-13; Geck, *supra* note 68, at 258-62.

131. See notes 88-92 *supra* and accompanying text; Azzariti, *supra* note 66, at 40-41. The *judicial* nature of these constitutional courts is expressed explicitly in GRUNDGESETZ art. 92 (W. Ger., 1949), and at least implicitly in OKTOBERVERFASSUNG art. 140, § VI (1920, amended 1929) (Aus.). See Ermacora, *Die österreichische Verfassungsgerichtsbarkeit seit 1945*, 8 JbÖFFR (N.F.) 49, 49-54, 61 (1959) (citing authorities); Geck, *supra* note 68, at 257.

132. See M. CAPPELLETTI, *supra* note 23, ch. IV.

as well as the obligation to recognize the binding effect of constitutional court decisions,<sup>133</sup> may help to stimulate a constitutional consciousness in the European judiciary similar to that which has been found for nearly two centuries in its American counterpart.

Nor is the movement toward convergence confined to the European side of the Atlantic. Through the use of certiorari, the United States Supreme Court is gradually confining itself to only the most significant—mostly constitutionally grounded—questions.<sup>134</sup> This is, of course, the exact role of the European constitutional courts, which have no jurisdiction at all in ordinary cases. Likewise, the role of the American Supreme Court is now openly admitted to be partly political. Its membership has always been specially appointed by a popularly elected President, and recent confirmation hearings by the Senate show an increasing recognition of the highly political functions of that Court. Nor does the Court seem to avoid politically delicate questions as zealously as it once did, as is illustrated by its racial discrimination and reapportionment decisions.<sup>135</sup>

Judicial review in the world today is, therefore, a continuum ranging from those countries, like the Soviet Union, whose only control of constitutionality is non-judicial,<sup>136</sup> to those states where this control is pre-eminently judicial, as in the United States. The other states, searching for forms which accord with their philosophies and yet answer the demands of our time, give the best evidence that judicial review is not only a viable but also a most flexible institution.

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133. See *id.* ch. V.

134. See P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 183 (1961); McWhinney, *Federal Constitutional Courts and Their Judges as Instruments of a Democratic Polity*, in 2 *DIE MODERNE DEMOKRATIE UND IHR RECHT*, *supra* note 69, at 516; Frankfurter & Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 *HARV. L. REV.* 1110, 1111 (1927); Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 *YALE L.J.* 1, 2-3 (1925).

In 1950, 33% of the cases decided by the Supreme Court raised a constitutional question as a principal issue. In 1955, this percentage was 29%; in 1960, it was 35%; in 1965, it was 39%. In 1966, 1967, 1968 and 1969, constitutional questions were the principal issues in 47%, 46%, 54% and 45% of the cases, respectively. These figures were gleaned from the *Harvard Law Review's* annual feature, *The Supreme Court, 1950 Term*, 65 *HARV. L. REV.* 107, 183 (1951), *1955 Term*, 70 *HARV. L. REV.* 83, 101 (1956), *1960 Term*, 75 *HARV. L. REV.* 40, 86 (1961), *1965 Term*, 80 *HARV. L. REV.* 90, 145 (1966), *1966 Term*, 81 *HARV. L. REV.* 69, 129 (1967), *1967 Term*, 82 *HARV. L. REV.* 63, 305 (1968), *1968 Term*, 83 *HARV. L. REV.* 7, 281 (1969), *1969 Term*, 84 *HARV. L. REV.* 1, 250 (1970).

135. *E.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), 349 U.S. 294 (1955); *Baker v. Carr*, 369 U.S. 186 (1962); see M. SHAPIRO, *supra* note 67, at 174-252; Kauper, *The Supreme Court: Hybrid Organ of State*, 21 *SW. L.J.* 573 (1967).

136. On the political, nonjudicial systems of control, see M. CAPPELLETTI, *supra* note 23, ch. I.

## CONCLUSION

Judicial review is a theme with many variations and subtle implications. The basic theme is a product of our common Western history. The variations arise inevitably from differences of experience and outlook within this larger framework. The subtleties, finally, center about the ambiguous nature of judicial review in any democratic state.

The theme of modern constitutionalism is the embodiment of natural law principles in the positive law of the state. While classical antiquity and medieval Europe had at times affirmed the theoretical right of the citizen to disobey an unjust law, the right remained theory only. It was left to times nearer our own to seek an instrument to protect principles considered fundamental.

With the French Revolution there was a temporary split in the evolutionary pattern of the West. The newly freed American colonies clung to older concepts, which subordinated both the executive and the legislature to a higher law, and gave new meaning to these ideas by embodying the higher law in a written constitution, interpreted and applied by judges. Continental Europe, however, chose to move from concepts of natural justice toward those of legal justice. The popular legislature was seen as the best guarantor of universal values. It was given the duty of codifying the law, and institutions like *Cassation* were meant to ensure the conformity of other state action to the standards of the codes.

After the sad experiences of the first half of this century, there arose in Europe the need to put a check upon the legislature itself, for it had become evident that even legislation could be the source of great abuses. Hence Europeans, and non-Europeans as well, embarked on the path taken by the Americans so long before. Higher law was to be expressed in constitutions that were difficult to amend. The judiciary, or a part of it, was to be the instrument for assuring conformity to this higher law. The Old World moved from legal to constitutional justice.

Though civil and common law countries are back on the same road, differences in approach to judicial review remain as a testimony to past divergencies. The United States, and those countries that have followed its example, strive to this day to confine judicial review within the traditional judicial framework, the political nature of the process being, whenever possible, carefully disguised. The civil law countries, with specially appointed courts, utilize special procedures to focus directly on statutes, not cases, and thus take a franker view of the whole process. Yet, paradoxically, the elaborate fictions of the American judges may well allow them to perform their political functions less dangerously than do their European brethren.

So it is that in spite of its nearly universal appeal, judicial review remains an enigmatic institution. It operates principally in states with democratic philosophies, yet it claims authority to frustrate, in certain situations, the will of the majority.<sup>137</sup> Its decisions are often pre-eminently political, yet they are made by men not themselves responsible to the electorate. The theoretical power of the judge of constitutionality is awesome, yet in the end he has neither sword nor purse and must depend on others to give his decisions meaning.

Most importantly, judicial review in the contemporary world reveals a breakdown of old dichotomies. There was, perhaps, too much emphasis on difference when distinctions were made between natural and positive law, centralized and decentralized review, as well as between the civil law and common law worlds. The two worlds are becoming one, certainly in terms of the questions that have been discussed in this Article. On both sides of the Atlantic, constitutional lawyers talk of the dangers, or advantages, of judicial activism, of the creative aspect of judicial interpretation, of the rights of the accused, and so on. Insofar as judicial review has encouraged this convergence, it has further justified itself.

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137. Cf., e.g., H. DEAN, *JUDICIAL REVIEW AND DEMOCRACY* (1966); E. ROSTOW, *The Democratic Character of Judicial Review*, in *THE SOVEREIGN PREROGATIVE* 147 (1962).