ALLAN R. BREWER-CARÍAS
Professor, Central University of Venezuela

CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS IN COMPARATIVE LAW

General Report, XVIII INTERNATIONAL CONGRESS OF COMPARATIVE LAW

INTERNATIONAL ACADEMY OF COMPARATIVE LAW,

WASHINGTON 2010

CONTENT

AUTHOR'S NOTE

This is General Report on the subject of *Constitutional Courts as Positive Legislators*, Written for the XVIII International Congress of Comparative Law held in Washington, D.C., in July 2010, organized by the International Academy of Comparative Law with the support of the American Association of Comparative Law.

Following the general guidelines that I sent out, the National Reporters wrote their National Reports, which were the main source of information I had for writing the General Report, which of course was complemented by my own research.

I received 36 National Reports from 31 countries: 19 from Europe, including 6 from Eastern Europe; 10 from the American continent (3 from North America, 5 from South America, and 2 from Central America); one from Asia, and one from Australia.

Those Reports received were the following:

ARGENTINA: I. Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, "*Constitutional Courts as Positive Legislators (Argentina)"* (18 pp.).

II, Néstor Pedro Sagües, "*La Corte Suprema Argentina como legislador positivo*" (24 pp.).

AUSTRALIA: Cherryl Saunders, "*Interpretation and Review*" (54 pp.).

AUSTRIA: Konrad Lachmayer, "*Constitutional Courts as Positive Legislators*" (13 pp.).

BELGIUM: Patricia Popelier, "*L'activité du judge constitutional belge comme législateur*" (16 pp.).

BRAZIL: I. Thomas Bustamante and Evanilda de Godoi Bustamante, "*Constitutional Courts as Negative Legislators: The Brazilian Case*" (29 pp.).

II, Marcelo Figuereido, "*Judicial Remedies Aimed to Fill the Legislative Gaps resulting from State Omissions under Brazilian Law*" (12 pp.).

III. Luis Roberto Barroso, Thiago Magalhães, and Felipe Drummond, "*Notas sobre a questão do Legislador Positivo*" (47 pp.).

CANADA: Kent Roach, "Constitutional Courts as Positive Legislators: Canada Country Report" (25 pp.).

COLOMBIA: I. Germán Alfonso López Daza, "*Le juge constitutionnel colombien, législateur-cadre positif: un gouvernement des juges"* (16 pp.).

II, Sandra Morelli, "*The Colombian Constitutional Court: from Institutional Leadership, to Conceptual Audacity"* (20 pp.).

COSTA RICA: Rubén Hernández Valle, “Las Cortes Constitucitnales como Legisladores positivos” (43 pp.).

CROATIA: Sanja Barić and Petar Bačić, “Constitutional Courts as Positive Legislators. National Report: Croatia” (29 pp).

CZECH REPUBLIC: Zdenek Kühn, “Czech Constitutional Court as Positive Legislator? ” (17 pp.).

FRANCE: Bertrand Mathieu, “Le Conseil constitutionnel ‘législateur positif. Ou la question des interventions du juge constitutionnel français dans l’exercise de la function legislative” (18 pp.).

GERMANY: Ines Härtel, “Constitutional Courts as Positive Legislators” (22 pp.).

GREECE: Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, “Constitutional Courts as Positive Legislators. Greek National Report” (24 pp.).

HUNGARY: Lóránt Csink, Józef Petrétei and Péter Tilk, “Constitutional Court as Positive Legislator. Hungarian National Report” (7 pp).

INDIA: Surya Deva, “Constitutional Courts as Positive Legislators: The Indian Experience,” (11 pp.).

ITALY: Giampaolo Parodi, “The Italian Constitutional Court as Positive Legislator” (13 pp.).

MEXICO: Eduardo Ferrer Mac-Gregor, “La Corte Suprema de Justicia como Tribunal Constitucional” (27 pp.).

NETHERLAND: Jerfi Uzman, Tom Barkhuysen and Michiel L. van Emmerik, “The Dutch Supreme Court: A Reluctant Positive Legislator?” (54 pp).

NICARAGUA: Sergio J. Cuarezma Terán and Francisco Enríquez Cabistán, “La estructura normativa de la Constitución Política de Nicaragua y sus mecanismos de tutela” (55 pp.).

NORWAY, Eivind Smith, “Constitutional Courts as ‘Positive Legislators:” Norway” (7 pp.).

PERU: I. Fernán Altuve Febres, “El Juez Constitucional como legislador positivo en el Perú” (30 pp.).

II. Francisco Eguiguren and Liliana Salomé, “Función contra-mayoritaria de la Juridicción Constitucional, su legitimidad democrática y los conflictos entre el Tribunal Constitucional y el Legislador” (18 pp.).

POLAND, Marek Safjan, “The Constitutional Courts as a Positive Legislator” (18 pp.).

PORTUGAL: Joaquim de Sousa Ribeiro and Esperança Mealha, “Constitutional Courts as Positive Legislators” (11 pp.).

SERBIA: Boško Tripković, “*A National Report for Serbia on the topic Constitutional Courts as “Positive Legislators*” (19 pp.).

SLOVAK REPUBLIC: Ján Svák and Lucia Berdisová, "*Constitutional Court of the Slovak Republic as Positive Legislator via Application and Interpretation of the Constitution*" (14 pp.).

SPAIN: Francisco Fernández Segado, "*El Tribunal Constitucional como Legislador Positivo (Spain)"* (48 pp.).

SWEDEN: Joakim Nergelius, "*Human Rights and Judicial Review*" (29 pp.).

SWITZERLAND, Tobias Jaag, "*Constitutional Courts as Positive Legislators: Switzerland*" (23 pp.).

UNITED KINGDOM: John Bell, "*Constitutional Courts as 'Positive Legislators': United Kingdom*" (8 pp.).

UNITED STATES: Laurence Claus and Richard S Kay, "*Constitutional Courts as Positive Legislators' in the United States*" (38 pp.).

VENEZUELA: Daniela Urosa, "*Cortes Constitucionales como Legisladores Positivos: La experiencia venezolana*" (30 pp.).

I thank again all the National Reporters for their cooperation in providing me with precious and current information on the subject.

The General Report and the National Reports were discussed at the congress. All of them were published in the book: Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators in Comparative Law*, Cambridge University Press, 2011, with the following parts: Part 1 includes my General Report; Part 2 includes the National Reports I received on the subject, in English and French, which are the official languages of the academy; and Part 3 includes the Synthesis Report I prepared for my oral presentation at the XVIII Congress, at the George Washington Law School, in Washington, D.C., on July 27, 2010.

This was not the first time I have had the privilege of being a general reporter for the International Academy's congresses. I was first appointed general reporter by the academy forty-five years ago, on the subject of *Le régime des activités industrielles et commerciales des pouvoirs publiques*, for the VII International Congress of Comparative Law, held in Uppsala, Sweden, in August 1966. On that occasion, Professor Robert Goldschmidt proposed my name for that task. He was a very well-recognized commercial law professor, who at the time was head of the Private Law Institute of the Central University of Venezuela and head of the Comparative Law Center of the Ministry of Justice. On that occasion he had been appointed general reporter on the subject by the academy, but because it was a public law subject (not a commercial law one), he asked me to allow him to propose my name to the academy, instead of his own, to write the general report. It was thanks to Robert Goldschmidt that I got in touch with the academy, at a time when I was a very young professor, with some books and articles already published but not at all known in the comparative law world. In any case, the appointment from the academy allowed me not only to write an extensive general report on public enterprise in comparative

law[1] but also to begin close relations with the academy and all the very distinguished comparatist lawyers with whom I developed close friendships and long-standing academic relations. This was the time of professors Gabriel Marty, C.J. Hamson, John Hazard, Anthony Jolowicz, and Roland Drago, among others, who privileged me with their friendship. The Uppsala general report was published as the book *Les enterprises publiques en droit comparé* by the Faculté international pour l'ensignement du droit comparé, Paris 1968, with a foreword by Professor Roland Drago, who was later secretary-general of the academy.

In subsequent congresses, I was also appointed general reporter for different subjects: *Les limites a la liberté d'information (presse, radio, cinema et télévisión)*, at the VIII International Congress of Comparative Law, in Pescara, Italy, August–September 1970;[2] *Regionalization in Economic Matters*, at the IX International Congress of Comparative Law, in Tehran, August–September 1974;[3] *La décentralization territoriale, autonomie territoriale et régionalization politique*, at the XI International Congress of Comparative Law, in Caracas, August–September 1982;[4] *Les limitations constitutionnelles et légales contre les impositions confiscatoires*, at the XII International Congress of Comparative Law, in Montreal, August 1990;[5] and *Constitutional Implications of Regional Economic Integration*, at the XV International Congress of Comparative Law, in Bristol, United Kingdom, July–August 1998.[6] All these general reports were published in my book *Études de droit public comparé* (published in 2000 by Bruylant in Brussels).

I was formally elected an associate member of the academy many years ago, and in 1982, on the occasion of the XI International Congress of Comparative Law held in Caracas, which I helped organize, I was elected titular member and vice president, a position that I held for almost thirty years. On the occasion of the 2010 Congress in Washington, I decided to step down, giving way to other comparatists from Latin America to join the board.

This work, once more, as General Reporter is a good occasion to thank again all the members of the board of the Academy for all their support on my academic activities during the almost the half century that has passed since I first delivered a General Report

---

1 See Allan R. Brewer-Carías, "Le régime des activités industrielles et commerciales des pouvoirs publics en droit comparé," in *Rapports Généraux au VII^e Congrès International de Droit Comparé, Acta Instituti Upsaliensis Jurisprudentiae Comparativae*, Stockholm 1966, pp. 484–565.

2 See Allan R. Brewer-Carías, "Las limitaciones a la libertad de información en el derecho comparado (prensa, radio, cine y televisión)," *Revista Orbita*, nos. 5–6, Caracas 1973, pp. 55–88.

3 See Allan R. Brewer-Carías, "Regionalization in Economic Matters in Comparative Law," in *Rapports Generaux au IX Congrés International de Droit Comparé, Teherán 1974*, Brussels 1977, pp. 669–696.

4 See Allan R. Brewer-Carías, "La descentralización territorial: Autonomía territorial y regionalización política," en *Revista de Estudios de la Vida Local*, nº 218, Instituto de Estudios de Administración Local, Madrid, April–June 1983, pp. 209–232.

5 See Allan R. Brewer-Carías, "Les protections constitutionnelles et légales contre les impositions confiscatories," *Rapports Généraux XIIIe Congres International*, Académie Internationale de Droit Comparé, Montreal 1990, pp. 795–824.

6 See Allan R. Brewer-Carías, *Las implicaciones constitucionales de la integración económica regional*, Cuadernos de la Cátedra Allan R. Brewer-Carías de Derecho Público, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas 1998.

at the University of Uppsala. In particular, I express my thanks to Professor Roland Drago, for many decades the secretary-general of the academy, who through his persistent work positioned the Academy among the most recognized institutions in current comparative law.

Beatriz, my wife, went with me to the Uppsala Congress in 1966, and she has accompanied me during the past decades in all my academic ventures and relations with the academy. She has been the permanent witness to the hours, days, weeks, and years that the academic life requires; and in the particular case of the work published in this book, she has been even a closer witness in these years of exile in New York – a result of the authoritarian government in Venezuela that since 1999 has seized all branches of government, demolishing with absolute impunity democratic institutions and the rule of law.[7]

It was thanks to her fortitude, support, love, and understanding, that during the difficult months of 2010, I was able to finish this work on time. That is why I dedicate the published book to her, with all my love.

New York, July 2011

[7] See Allan R. Brewer-Carías, *Dismantling Democrary. The Chávez Authoritarian Experiment*, Cambridge University Press, New York, 2010.

INTRODUCTION

HANS KELSEN, JUDICIAL REVIEW, AND THE NEGATIVE LEGISLATOR

At the beginning of the twentiest century, Hans Kelsen, in his very well-known article "La garantie juridictionnelle de la constitution (La justice constitutionnelle)," published in 1928, in the *Revue du droit public et de la science politique en France et a l'étranger*, began to write for non-German-speaking readers about constitutional courts as "negative legislators."[1] As Kelsen was one of the most important constructors of modern public law of the twentieth century, it is indeed impossible to write about the opposite assertion – on constitutional courts as positive legislators – without referring to his thoughts on the matter.[2]

In his article, while sharing his experience on the establishment and functioning of the Constitutional Court of Austria in 1920, conceived of as an important part of the concentrated system of judicial review that he had introduced for the first time in Europe,[3] Kelsen began to explain the role of such constitutional organs established outside of the judicial branch of government, but with jurisdictional powers to annul statutes they deemed unconstitutional.

The Austrian system, which was established the same year as that in Czechoslovakia,[4] according to Kelsen's own ideas,[5] sharply contrasted with, at that time, the already well-established and well-developed diffuse system of judicial review adopted in the United States, where for more than a century, courts and the Supreme Court had already developed a very active role as constitutional judges.[6]

---

1 See Hans Kelsen, "La garantie juridictionnelle de la constitution (La justice constitutionnelle)," *Revue du droit public et de la science politique en France et a l'ètranger*, Librairie Général de Droit et de Jurisprudence, Paris 1928, pp. 197–257. See also the Spanish text in Hans Kelsen, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001.

2 As all the national reporters, in one way or another, have done in their national reports for subject IV.B.2 of the eighteenth International Congress of Comparative Law, Washington, D.C., July 2010. See the text of all national reports in Part 2 of this book.

3 See generally Charles Eisenmann, *La justice constitutionelle et la Haute Cour Constitutionelle d'Autriche* (reprint of the 1928 edition, with H. Kelsen's preface), Economica, Paris 1986; Konrad Lachmayer, *Austrian National Report*, p. 1.

4 See Zdenek Kühn, *Czech National Report*, p. 1.

5 Kelsen called constitutional justice his "most personal work." See Theo Öhlinger, "Hans Kelsen y el derecho constitucional federal austriaco: Una retrospectiva crítica," *Revista Iberoamericana de Derecho Procesal Constitucional*, nº 5, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2006, p. 219.

6 For the purpose of this general report, the expression "constitutional courts" refers generally to constitutional tribunals or courts – specifically established in many countries as constitutional jurisdictions, with powers to annul with *erga omnes* effects unconstitutional statutes, as well as to supreme courts or tribunals also acting as constitutional jurisdictions, or any court or tribunal when acting as constitutional judges.

It is true that the classic distinction of the judicial review systems in the contemporary world, between the concentrated systems of judicial review and the diffuse systems of judicial review,[7] has developed and has changed, and is difficult to apply in many cases clearly and sharply.[8] Consequently, in almost all democratic countries, a convergence of principles and solutions on matters of judicial review has progressively occurred,[9] to the point that nowadays it is possible to say that there are no means or solutions that apply exclusively in one or another system.[10] Nonetheless, this fact, in my opinion, does not deprive the distinction of its basic sense.

In effect, and in spite of criticisms of the concentrated-diffuse distinction,[11] the distinction remains very useful, particularly for comparative law analysis, and it is not possible to consider it obsolete.[12] The basis of the distinction, which can always be considered valid, is established between, on the one hand, constitutional systems in which all courts are constitutional judges and have the power to review the constitutionality of legislation in decisions on particular cases and controversies, without such power necessarily being expressly established in the Constitution, and on the other hand, constitutional systems in

---

7 See generally Mauro Cappelletti, *Judicial Review in Contemporary World*, Bobbs-Merrill, Indianapolis 1971, p. 45; Mauro Cappelletti and J. C. Adams, "Judicial Review of Legislation: European Antecedents and Adaptations," *Harvard Law Review* 79, nº 6, April 1966, p. 1207; Mauro Cappelletti, "El control judicial de la constitucionalidad de las leyes en el derecho comparado," *Revista de la Facultad de Derecho de México* 61, 1966, p. 28; Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; Allan R. Brewer-Carías, *Étutes de droit pubic comparé*, Bruylant, Brussels 2000, pp. 653 ff.

8 See, e.g., Lucio Pegoraro, "Clasificaciones y modelos de justicia constitucional en la dinámica de los ordenamientos," *Revista Iberoamericana de Derecho Procesal Constitucional*, nº 2, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2004, pp. 131 ff.; Alfonse Celotto, "La justicia constitucional en el mundo: Formas y modalidades," *Revista Iberoamericana de Derecho Procesal Constitucional*, nº 1, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2004, pp. 3 ff.

9 See, e.g., Francisco Fernández Segado, *La justicia constitucional ante el siglo XXI. La progresiva convergencia de los sistemas americano y europeo-kelseniano*, Librería Bonomo Editrice, Bologna 2003, pp. 40 ff.

10 On the effort to establish a new basis for new distinctions, see Louis Favoreu, *Les cours constitutionnelles*, Presses Universitaires de France, 1986; Michel Fromont, *La justice constitutionnelle dans le monde*, Dalloz, Paris 1996; D. Rousseau, *La justice constitutionnelle en Europe*, Montchrestien, Paris 1998.

11 See Francisco Fernández Segado, "La obsolecencia de la bipolaridad 'modelo Americano-modelo europeo-kelseniano' como criterio analítico del control de constitucionalidad y la búsqueda de una nueva tipología explicativa," in *La justicia constitucional: Una visión de derecho comparado*, Ed. Dykinson, Madrid 2009, vol. 1, pp. 129–220; Guillaume Tusseau, *Contre les "modèles" de justice constitutionnelle: Essai de critique métodologique*, Bononia University Press, Universitá di Bologna, Bologna 2009 (bilingual French-Italian edition); Guillaume Tusseau, "Regard critique sur les outils méthodologique du comparatisme. L'example des modèles de justice constitutionnelle," *IUSTEL: Revista General de Derecho Público Comparado*, nº 4, Madrid, January 2009, pp. 1–34.

12 In fact, what can be considered obsolete is the distinction that derives from an erroneous denomination that has been given to the two systems, particularly by many in Europe, contrasting the so-called American and European systems. This ignores that the "European system," which cannot be reduced to the existence of a specialized Constitutional Court, was present in Latin America a few decades before its introduction in the Czechoslovak Constitution and that the "American system" is not at all endemic to countries with common law systems, having been spread since the nineteenth century into countries with Roman law traditions. See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; Vicki C. Jackson and Mark Tushent, *Comparative Constitutional Law*, 2nd ed., Foundation Press/Thomson West, New York 2006, pp. 465 ff., 485 ff. Also, as has been pointed out by Francisco Rubio Llorente, it is impossible to talk about a European system, when within Europe there are more differences between the existing systems of judicial review than between any of them and the American system. See Francisco Rubio Llorente, "Tendencias actuales de la jurisdicción constitucional en Europa," in *Manuel Fraga: Homenaje académico*, Fundación Canovas del Castillo, Madrid 1997, vol. 2, p. 1416.

which a constitutional jurisdiction is established assigning its exercise to a constitutional court, tribunal or council or to the supreme or high court or tribunal of the country, as the only court with jurisdictional power to annul statutes contrary to the Constitution – such courts or the assignment of power to them must be expressly provided for in the Constitution. This is the basic ground for the distinction that still exists in comparative law, even in countries where both systems function in parallel, as it happens in many Latin American countries.[13] It is in this sense that this book refers to the concentrated system and the diffuse system of judicial review.[14]

In this sense, the concentrated system of judicial review, after being adopted since the nineteenth century in many Latin American countries, was adopted in Europe following Kelsen's ideas set forth in the 1920 constitutions of Czechoslovakia and Austria based on the principle of constitutional supremacy and its main guarantee, that is, the nullity and the annulability of statutes and other State acts with similar rank, when they are contrary to the Constitution. Given the general fear regarding the Judiciary and the prevailing principle of the sovereignty of parliaments, the system materialized through the creation of a special constitutional court established outside of the judicial branch of government with the power not only to declare the unconstitutionality of statutes that violate the Constitution but also to annul them with *erga omnes* effects, that is, to expel them from the legal order.

Kelsen's initial arguments were developed to confront the problems that such powers of judicial review in the hand of a new constitutional organ different from the Legislator could arise in Europe regarding the principle of separation of powers and, in particular, its incidence in legislative functions. But the fact was that the system, by that time and without the need to create a separate constitutional court, was already in existence, with similar substantive trends in some Latin American countries such as Colombia and Venezuela, where the annulment powers regarding unconstitutional statutes had been granted since 1858 to supreme courts of justice.[15]

On the other hand, at the time when the concentrated system of judicial review was formulated in Europe, it contrasted sharply with the diffuse or decentralized system of judicial review that had developed in the United States since the 1808 Supreme Court case *Marbury v. Madison*, 1 Cranch 137 (1803), which beginning in the nineteenth century also spread to many Latin American countries, including Argentina, Brazil, Colombia, and

---

[13] As is, for instance, the case of Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru, and Venezuela, as well as Portugal, and in a certain way Greece, and Canada. See Allan R. Brewer-Carías, "La jurisdicción constitucional en América Latina," in Domingo García Belaúnde and Francisco Fernández Segado (coords.), *La jurisdicción constitucional en Iberoamérica*, Dykinson S.L. (Madrid), Editorial Jurídica Venezolana (Caracas), Ediciones Jurídicas (Lima), Editorial Jurídica E. Esteva (Uruguay), Madrid 1997, pp. 117–161.

[14] See Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America : A Comparative Study of Amparo Proceeding*, Cambridge University Press, New York 2009, pp. 81 ff.

[15] On the origins of the Colombian and Venezuelan systems, see Allan R. Brewer-Carías, *El sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela*, Universidad Externado de Colombia, Pontificia Universidad Javeriana, Bogotá 1995. See Sandra Morelli, *Colombian National Report II*, p. 2.

Venezuela,[16] and was adopted in some European countries, including Norway,[17] Denmark, Sweden, and Greece.[18]

Summarizing, when Kelsen formulated his arguments in support of the concentrated system of judicial review in Europe, the same system had already existed for more than six decades in Latin America, and the diffuse system had existed for almost a century in North America and later also in Latin America and in some European countries.

But the fact is that it was through Kelsen's proposals and writings that judicial review developed in Europe, eventually contributing to end the principle of parliamentary sovereignty. Kelsen himself not only drafted the proposal to incorporate the new Constitutional Court in the 1920 Austrian Constitution but also was a distinguished member of that tribunal for many years, where he acted as its judge rapporteur. He was then key in implementing the concentrated system of judicial review that over the following decades, and particularly after World War II, developed throughout Europe. Even in France, with its traditional and initial a priori concentrated system of judicial review, the result of the jurisprudence of the Constitutional Council has been considered the "symbolic end of the sovereignty of the law," given the current consideration of the law as "the expression of the general will *within the respect of the Constitution.*"[19]

The basic thoughts of Kelsen on the matter, as already mentioned, directed at non-German-speaking readers, were expressed in his 1928 article "The Jurisdictional Guarantee of the Constitution (Constitutional Justice),"[20] in which he considered the general problem of the legitimacy of the concentrated system of judicial review. In particular, he analyzed the compatibility of the system with the principle of separation of powers, based on the fact that an organ of the State other than the Legislator could annul statutes without the decision to do so being considered an invasion of the Legislator's domain.

In this regard, after arguing that "to annul a statute[] is to establish a general norm, because the annulment of a statute has the same general character of its adoption," and after considering that to annul a statute is "the same as to adopt it but with a negative sign, and consequently in itself, a legislative function," Kelsen considered that the court that has the

---

16 See Allan R. Brewer-Carías, "La jurisdicción constitucional en América Latina," in Domingo García Belaúnde-Francisco Fernández Segado (coords.), *La jurisdicción constitucional en Iberoamérica*, Dykinson S.L. (Madrid), Editorial Jurídica Venezolana (Caracas), Ediciones Jurídicas (Lima), Editorial Jurídica E. Esteva (Uruguay), Madrid 1997, pp. 117–161.

17 See Eivind Amith, *Norway National Report*, p. 1.

18 See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, pp. 2–3.

19 See Bertrand Mathieu, *French National Report*, p. 5.

20 See Hans Kelsen, "La garantie juridictionnelle de la constitution (La justice constitutionnelle)," *Revue du droit public et de la science politique en France et a l'ètranger*, Librairie Général de Droit et de Jurisprudence, Paris 1928, pp. 197–257. See also Hans Kelsen, "Judicial Review of Legislation : A Comparative Study of the Austrian and the American Constitutions," *Journal of Politics* 4, nº 2, Southern Political Science Association, May 1942, pp 183-200; "El control de la constitucionalidad de las leyes: Estudio comparado de las Constituciones Austríacas y Norteamericana," *Revista Iberoamericana de Derecho Procesal Constitucional*, No 12, Editorial Porrúa, Mexico 2009, pp. 3-17; "Le contrôle de constitutionnalité des lois. Une étude comparative des Constitutions autrichienne et américaine," *Revue française de droit constitutionnel*, nº 1, Presses Universitaires de France, Paris 1999, pp. 17–30.

power to annul statutes is, consequently, "an organ of the Legislative branch."[21] Nonetheless, Kelsen finished by affirming that, although the "activity of the constitutional jurisdiction" is an "activity of the Negative Legislator," this does not mean that the constitutional court exercises a "legislative function," because that would be characterized by the "free creation" of norms. The free creation of norms, however, does not exist in the case of the annulment of statutes, which is a "jurisdictional function" that can only be "essentially accomplished in application of the norms of the Constitution," that is, "absolutely determined in the Constitution."[22] His conclusion was that the constitutional jurisdiction accomplishes a "purely juridical mission, that of interpreting the Constitution," with the power to annul unconstitutional statutes the principal guarantee of the supremacy of the Constitution.[23]

As I argued a few years ago, in reality, constitutional courts do not "repeal" a statute in annulling it, and the annulment they can pronounce is not based on discretionary powers but on constitutional and legal criteria, on the application of a superior rule, embodied in the Constitution. Thus, in no way do they exercise a legislative function. The function of a constitutional court, as argued by Kelsen, is thus jurisdictional; the same that is assigned to an ordinary court but characterized as a guarantee of the Constitution. And, if it is true that constitutional judges in many cases decide political issues when considering the constitutionality of legislative acts, they do so by legal methods and criteria, in a process initiated by a party with the required standing.[24] Only exceptional constitutional courts are authorized to initiate *ex officio* constitutional proceedings.

Eventually, Kelsen, in the same article, summarized the "result" of judicial review in the concentrated system, highlighting that, to guarantee the Constitution, it is indispensable for the unconstitutional statute to be annulled by a constitutional court ruling, that has as a matter of principle and in the interest of legal security, *ex nunc, pro futuro* effects (i.e., nonretroactive effects), a rule that nonetheless could be mitigated. Kelsen also considered that the annulment of a statute did not produce the rebirth of old statutes abrogated by the annulled one, a decision that nonetheless he considered could be assigned to the constitutional court, evidencing in such case the "legislative character" of its function.[25]

My purpose in this study is to analyze in comparative law all those situations in which constitutional courts interfere not only with the Legislator and its legislative functions but also with the "constitutional legislator," that is, with the Constituent Power,[26] by assuming,

---

[21] See Hans Kelsen, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001, p. 54.

[22] *Id.*, pp. 56–57. See Allan R. Brewer-Carías, *Études de droit public comparé*, Bruylant, Brussels 2003, p. 682.

[23] See Hans Kelsen, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001, p. 57.

[24] See Allan R. Brewer-Carías, *Études de droit public comparé*, Bruylant, Brussels 2003, p. 685. See also A. Pérez Gordro, *El Tribunal Constitucional y sus funciones*, Barcelona 1982, p. 41. See the comment of Laurence Claus and Richard S. Kay, *U.S. National Report*, pp. 4, 6.

[25] See Hans Kelsen, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001, pp. 82–86.

[26] I will use the expression "Constituent Power" in order to refer to the will of the people (original constituent power) when approving a Constitution (for instance through a referendum), or to a Constituent Assembly when sanctioning a

in one way or another, the role of positive legislators. For such purpose, I divide this general report into five chapters. The first analyzes the general aspects of judicial review of the constitutionality of legislation exercised by constitutional courts, as well as the courts' relation with the Legislator. The second chapter examines cases in which the constitutional courts interfere with the Constituent Power, by enacting constitutional rules and even mutating[27] the Constitution. The third chapter explores the role of constitutional courts that interfere with the Legislator regarding existing legislation, assist the Legislator, complement statutes and add provisions to them through constitutional interpretation, and determine the temporal effects of legislation. The fourth chapter analyzes the role of constitutional courts that interfere with the Legislator regarding absolute and relative legislative omissions and, in some cases, act as provisional legislators. The fifth chapter discusses the role of constitutional courts as legislators on matters of judicial review.

Constitution, or to any organs of the state with constitutional power to review or change the Constitution. See generally, Pedro de Vega, *La Reforma Constitucional y la Problemática del Poder Constituyente*, Ed. Tecnos, Madrid 2000; Allan R. Brewer-Carías, *Poder Constituyente Originario y Asamblea Nacional Constituyente*, Editorial Jurídica Venezolana, Caracas 1998.

[27] The expresión "constitutional mutation" is used in order to refer to the changes made to the content of a constitutional provision when without formally "reforming" its text, by means of a judicial interpretation it result with a different meaning. See Salvador O. Nava Gomar, "Interpretación, mutación y reforma de la Constitución. Tres extractos," in Eduardo Ferrer Mac-Gregor (coord.), *Interpretación Constitucional*, vol. II, Editorial Porrúa, Universidad Nacional Autónoma de México, México 2005, pp. 804 ss. See also generally on the subject, Konrad Hesse, "Límites a la mutación constitucional," in *Escritos de derecho constitucional*, Centro de Estudios Constitucionales, Madrid 1992, pp. 79–104; and Rogelia Calzada Conde, "Poder Constituyente y mutación constitucional: especial referencia a la interpretación judicial," in *Jornadas de Estudio sobre el Título Preliminar de la Constitución*, Ministerio de Justicia/Secretaría General Técnica/Centro de Publicaciones, Madrid 1988, vol. 11., pp. 1.097–1.111.

Chapter 1

JUDICIAL REVIEW OF LEGISLATION AND THE LEGISLATOR

I. THE SYSTEMS OF JUDICIAL REVIEW AND THE ROLE OF CONSTITUTIONAL COURTS

The result of Kelsen's proposals and their applications in Europe was the development of the concentrated system of judicial review, which attributed specially created constitutional bodies (constitutional courts, tribunals or councils) generally conceived of outside the Judiciary with the power to annul, with *erga omnes* effects, unconstitutional statutes –this was the initial pattern followed after World War II in Germany, Italy, France, Spain, and Portugal. The system developed as the result of a compromise between the need for a judicial review system derived from the notion of constitutional supremacy and the traditional European idea of the separation of powers, which had denied the courts any power to invalidate statutes.

But in spite of the importance of Kelsen's contributions, it is improper to identify the concentrated system of judicial review as a whole with a so-called "European model," because there are also concentrated systems of judicial review in which the exclusive and original jurisdiction to annul statutes, without the creation of a special court or tribunal, has fallen to the existing supreme courts of justice, located at the apex of the Judicial Power, as has been the case, since the nineteenth century, in many Latin American countries.[1] In addition, in many Latin American countries, the judicial review system has developed as a mixed system, combining the diffuse and the concentrated methods that function in parallel,[2] as is also the case in Portugal,[3] Greece,[4] and Canada.[5]

---

[1] The "European model" is referred to the concentrated system of judicial review when the constitutional jurisdiction is assigned to a special constitutional court. Other countries without special constitutional courts also follow the concentrated system of judicial review by assigning the constitutional jurisdiction to existing supreme courts. In this sense, the concentrated system of judicial review has been adopted in Brazil, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. But only in Bolivia, Colombia, Chile, Guatemala, Peru, and Ecuador is the constitutional jurisdiction assigned to special constitutional courts or tribunals. In the other countries, it is exercised by the existing supreme courts. Only in Bolivia, Costa Rica, Chile, Ecuador, El Salvador, Honduras, Panama, Paraguay, and Uruguay does the system remain exclusively concentrated. In the other countries it has been mixed with the diffuse system, functioning in parallel. See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; and Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceeding*, Cambridge University Press, New York 2009.

[2] As in Brazil, Colombia, Dominican Republic, Guatemala, Mexico, Nicaragua, Peru, and Venezuela. See *Id.*

[3] See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, p. 1.

[4] See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, pp. 6–7.

In addition, we must remind that before Kelsen's ideas took root in Europe, also since the nineteenth century, the other main system of judicial review, the diffuse or decentralized one, was developed in the United States as a consequence of the same principle of the supremacy of the Constitution. According to this diffuse system, all judges and courts are empowered to act as constitutional judges, in the sense that when applying the law, they are allowed to decide the law's constitutionality; therefore, they are empowered to decide not to apply a statute that they consider unconstitutional when deciding a particular judicial case or controversy, giving priority to the Constitution. In this system, the courts are empowered not to formally annul statutes with *erga omnes* effects but to only declare their unconstitutionality with *inter partes* effects.

Although the system was first implemented in the United States, and was followed in many common law countries, it cannot be considered a system peculiar to the common law system, and thus incompatible with the civil or Roman law tradition.[6] As mentioned already, it had existed and developed since the nineteenth century in parallel with the concentrated system in many Latin American countries,[7] all of them being part of the Roman law family of legal systems, as well as in some European countries.

In any case, an important aspect to bear in mind is that in diffuse systems of judicial review, when the final decision in a case reaches the supreme court or tribunal, according to the principle of *stare decisis*, the practical effects of the non–application of a statute declared unconstitutional are similar to the practical effects of its annulment, in the sense that even if the statute continues to appear in the books, in practice it is considered null and void.

In addition, even in countries with the diffuse system of judicial review that have not developed the *stare decisis* doctrine, the effects of the supreme court decisions on matters of judicial review are similar, because of the authority that the legal and judicial communities give to supreme court decisions. This is the case in the Netherlands,[8] and also the case in Argentina, where the Supreme Court, since its early decisions, has progressively imposed the doctrine of *stare decisis.*[9] It has been considered as a *de facto stare decisis* doctrine[10] regarding the interpretation of the Constitution and of federal laws, which aims to provide

---

5 See Kent Roach, *Canadian National Report*, p. 1.

6 See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; Vicki C. Jackson and Mark Tushent, *Comparative Constitutional Law*, 2nd ed., Foundation Press and Thomson West 2006, pp. 465 ff., 485 ff.

7 The diffuse system of judicial review has been adopted in Argentina, Brazil, Colombia, Dominican Republic, Guatemala, Mexico, Nicaragua, Peru, and Venezuela. Only in Argentina does it remain exclusively diffuse. In the other countries, the diffuse system is combined with the concentrated one. See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; and *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceeding*, Cambridge University Press, New York 2009.

8 See J. Uzman, T. Barkhuysen, and M. L. van Emmerik, *Dutch National Report*, p. 18.

9 Néstor P. Sagües has called this "Argentinean *stare decisis*." See Néstor P. Sagües, "Los efectos de las sentencias constitucionales en el derecho argentino," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, pp. 345–347; *Argentinean National Report II*, p. 3.

10 See Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 3.

litigants with some degree of certainty as to how the law must be interpreted, a requirement the court finds embedded in the due process clause of the Constitution. In the Argentine *García Aguilera* case decided in 1870, barely eight years after the court's establishment, the Supreme Court held, in a since then oft-repeated statement, that "lower courts are required to adjust their proceedings and decisions to those of the Supreme Court in similar cases,"[11] from which they can depart only if they give "valid motives."[12]

In all the systems of judicial review – whether concentrated or diffuse, hybrid or mixed – what is clear is that the main role of constitutional courts is to interpret and apply the Constitution to test the constitutionality of statutes and thus preserve the Constitution's supremacy. Thus, constitutional courts are always subordinate to a constitution, not having in principle any power to modify or mutate it or to usurp powers assigned to other State organs. Their essential function is to guarantee the supremacy and integrity of the Constitution by declaring unconstitutional or annulling State acts that violate it, all while being obliged to obey the Constitution by exercising the powers expressly attributed to them in it. Constitutional courts, therefore, are not allowed to assume constituent powers (e.g., issuing decisions that illegitimately modify or mutate the Constitution) or to usurp powers attributed to other constituted powers or organs of the State, like the Executive or the Legislative branches. The contrary is to be considered as a case of the pathology of judicial review.

Regarding other key principles, in general terms, in the exercise of their functions, constitutional courts do so in the course of judicial processes normally initiated by an interested party with due standing in cases or controversies. In the diffuse system it must be a party to the particular case or process, and in the the concentrated system it must be a petitioner with a specific interest to file direct actions on the unconstitutionality of statutes before constitutional courts.[13] As mentioned by Zdenek Kühn, in reference to the Constitutional Court of the Czech Republic, "unlike its short-lived federal predecessor (the Constitutional Court of Czechoslovakia) the Czech Constitutional Court does not have the power to provide generally binding interpretation of the Constitution which would have no connection to either abstract constitutional review or constitutional complaint."[14]

So even in cases of constitutional courts with express constitutional powers to interpret in an abstract way the Constitution, that is, without any reference to a particular action, omission, or decision of a State body, a factual dispute must always exist, for example between two constitutional bodies regarding the interpretation of the Constitution. This is, for instance, the case of Slovakia, where article 128 of the Constitution expressly states that "the Constitutional Court shall give an interpretation of the Constitution or constitutional law if the matter is disputable." The same Constitutional Court of Slovakia has stated that

---

[11] Fallos 9:53 (1870), in Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 4 (footnote 11).

[12] See Néstor P. Sagües, *Argentinean National Report II*, p. 3.

[13] See generally Richard S. Kay (ed.), *Standing to Raise Constitutional Issues: Comparative Perspectives, XVIth Congress of the International Academy of Comparative Law, Académie Internationale de Droit Comparé, Brisbane 2002*, Bruylant, Brussels 2005.

[14] See Zdenek Kühn, *Czech National Report*, p. 2.

the "Constitutional Court does not decide if the state bodies did break the Constitution by the wrong interpretation" or decide on the constitutionality "of the action, omission or decision of state body, which led to origination of the dispute. The court only provides the interpretation of the disputed part of a constitutional statute."[15]

In Slovakia, petitions for the abstract interpretation of the Constitution can be filed only by some public officials or State bodies[16] and, as mentioned, when a dispute occurs between two State bodies standing against each other with different opinions on the interpretation of a constitutional provision.[17] As a result of the exercise of this competency, the decisions of the Constitutional Court of Slovakia directly complement the normative text of the Constitution, its wording having identical legal power and binding effect as the text of the Constitution itself.[18] This power of judicial review has been used especially since 1993, after the establishment of the Slovak Republic, having an important influence on the shaping of constitutional order of the new State, for instance in matters related to the position and authority of the President of the Slovak Republic.

In Canada, the Constitution can also be interpreted by constitutional courts in an abstract way, without the need for any live cases and controversies. An important feature of the Canadian system of judicial review, is the statutory powers of the federal government to refer abstract legal and constitutional questions to the Supreme Court on a "reference procedure" including those involving the constitutionality of legislation. It has been through this reference procedure that the courts have developed the most important roles as positive legislators, in some cases mutating the Constitution.[19]

A deformation of this possibility of a constitutional court to interpret with binding effects a constitution in an abstract way, that is, without any particular case or dispute involved, at the request of the government or at the request of any individual, has been developed by the Constitutional Chamber of the Supreme Tribunal of Venezuela, without any constitutional or legal support. The Chamber, in effect, has "created" a "recourse for the abstract interpretation of the Constitution," whose indiscriminate use has had catastrophic consequences for democracy, given way to an institutional path contrary to democracy and the rule of law.[20] The result has been the reinforcement of an authoritarian government that

---

15 The Court has also said: "It follows that the decisions on interpretation of the Constitutional Court of the Slovak Republic does not have and can not have any legal effects in connection with actions, omissions or decisions of state bodies that led to origination of the dispute alike in the cases of proceeding according to art. 125a and art. 152 of the Constitution." See Decision nº II. ÚS 69/99. See Ján Svák and Lucia Berdisová, *Slovakian National Report*, p. 3 (footnote 2).

16 By at least one-fifth of the Members of the National Council of the Slovak Republic, the President of the Slovak Republic, the Government of the Slovak Republic, a court, the Attorney General, or the Public Defender of Rights.

17 "Constitutionally relevant dispute on interpretation of the constitution is a dispute on rights or duties between bodies of the state which have such rights and duties prescribed in the constitution." See Decision nº I. ÚS 30/97. See Ján Svák and Lucía Berdisová, *Slovakian National Report*, p. 3 (footnote 3)

18 See Ján Svák and Lucia Berdisová, *Slovakian National Report*, p. 3.

19 See Kent Roach, *Canadian National Report*, pp. 1, 9.

20 See generally Allan R. Brewer-Carías, "Le recours d'interprétation abstrait de la Constitution au Vénézuéla," in *Renouveau du droit constitutionnel. Mélanges en l'honneur de Louis Favoreu*, Paris 2007, pp. 61–70; Brewer-Carías, *Crónica de la "in"justicia constitucional: La Sala Constitucional y el autoritarismo en Venezuela*, Editorial Jurídica Venezolana, Caracas 2007.

has developed over the past decade despite its initial electoral origin (1998).[21] This deformation of judicial review powers is also a case of the pathology of judicial review.

In other cases, as an exception to the rule of standing, in some cases constitutional courts can issue rulings also for the abstract interpretation of the Constitution by acting *motu proprio*, that is, without the request of any specific party, whether an individual or a State entity. This is the case, for instance, of the Constitutional Courts in Croatia and in Serbia. In Croatia, the Constitutional Court has cautiously avoided using this power, showing a considerable measure of deference, except in cases where an obviously unconstitutional act has unconstitutionally regulated the Constitutional Court itself.[22] In the case of Serbia, in contrast, the Constitutional Court has often initiated proceedings *ex officio* to assess the constitutionality of statutes, which in practice blurs the difference between requests for judicial review filed by authorities (initiatives) having the needed standing. In addition, when the Court declines to start a procedure on an initiative, it usually states its opinion on the constitutionality of the challenged act. Only when it rejects an initiative for formal reasons does the court not assess the constitutionality of the act in the reasoning of the decision. However, the court can, in any case, put the proceeding in motion independently, even when the initiative has been filed having formal inaccuracies.[23]

In other cases, as in Venezuela, the Constitutional Chamber of the Supreme Tribunal has also assumed *ex officio* judicial review powers but in this case without any constitutional or legal authorization, in what can also be considered a case of the pathology of judicial review.[24]

The general principle in any case is that, in general terms, in exercising judicial review, constitutional courts do not act as advisory institutions, without the request of a particular party based on a particular interest, even if the action of unconstitutionality is conceived as an *actio popularis*, that is, a popular action that can be filed by any citizen. In Australia, for example, the High Court held in 1921:

> The Parliament could not confer on a court jurisdiction to give advisory opinions even when such opinions were confined to the validity of enacted legislation and when the determination of the court was "final and conclusive." Under such an arrangement there was no "matter" within the meaning of the Constitution, because there was no "immediate right, duty or liability to be established by the determination of the Court," which would be

---

[21] See generally Allan R. Brewer-Carías, *Dismantling Democracy. The Chávez Authoritarian Experiment*, Cambridge University Press, New York 2010; Brewer-Carías, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999–2009)," in *Revista de Administración Pública*, nº 180, Centro de Estudios Constitucionales, Madrid 2009, pp. 383–418.

[22] See Decision nº U-I-39/2002, Official Gazette *Narodne novine*, nº 10/2002; Sanja Barić and Petar Bačić, *Croatian National Report*, p. 7.

[23] See Boško Tripković, *Serbian National Report*, p. 6.

[24] See Allan R. Brewer-Carías, "Régimen y alcance de la actuación judicial de oficio en materia de justicia constitucional en Venezuela," *Estudios Constitucionales: Revista Semestral del Centro de Estudios Constitucionales* 4, nº 2, Universidad de Talca, Santiago, Chile 2006, pp. 221–250.

> obliged to make a "declaration of the law, divorced from any attempt to administer that law.[25]

Also in Hungary, in the early phase of court operations, the Constitutional Court declared that it did not undertake answering hypothetical constitutional questions, and in several decisions, it entered to consider how abstract the question raised was. On the one hand, the Court, interpreting its competence narrowly, requires necessary closeness between the statement of facts and the related provision of the Constitution, and it provides interpretation of the Constitution only to resolve a "particular constitutional problem."[26] On the other hand, the Court demands certain distance; it requires that the issue not be closely related to the case and that the decision not become factual,[27] because the Court is not a counsel but the judge of Parliament.[28]

II. CONTROL OF CONSTITUTIONALITY AND CONTROL OF CONVENTIONALITY

In democratic regimes, all judicial review methods have as their main purpose the guarantee of the supremacy of the Constitution. Consequently, when constitutional courts exercise judicial review, they have the task of comparing statutes or primary legislation with the provisions of the Constitution. That is why judicial review is, fundamentally, a constitutional control of legislation or the exercise of judicial control over the constitutionality of legislation.

Nonetheless, the constitutions of many countries, by giving constitutional or supralegal rank to international treaties, also allow the courts, within their constitutional functions of judicial review, the possibility of exercising what can be called "control of conventionality" of statutes, in the sense of guaranteeing the subjection of primary legislation to international conventions, particularly on matters of human rights.[29] This is the case, for instance, in

---

[25] See *In re Judiciary and Navigation Acts (Advisory Opinions* case) (1921) 29 CLR 257; Cheryl Saunders, *Australian National Report*, p. 4.

[26] The Court refused to make a statement about the possibility of raising interest rates on housing loans, because it would have meant interpreting the "constitutional provision in some abstract way unrelated to any individual problem, or . . . a possibility for unbound interpretation." See Decision nº 31/1990, in Lóránt Csink, Józef Petrétei, and Péter Tilk, *Hungarian National Repor*t, p. 7 (footnote 24).

[27] Upon this, the Court did not interpret whether the petition for the dismissal of the director of public radio can be considered to violate freedom of the press; it could have given, therefore, a statement-of-fact answer for the dispute of the Prime Minister and the President of the Republic. See Decision nº 36/1992, in Lóránt Csink, Józef Petrétei and Péter Tilk, *Hungarian National Repor*t, p. 7 (footnote 26).

[28] See Decision nº 16/1991, in Lóránt Csink, Józef Petrétei, and Péter Tilk, *Hungarian National Repor*t, p. 7.

[29] See, e.g., Ernesto Rey Cantor, *El control de convencionalidad de las leyes y derechos humanos*, Editorial Porrúa, Mexico City 2008; Juan Carlos Hitters, "Control de constitucionalidad y control de convencionalidad. Comparación (Criterios fijados por la Corte Interamericana de Derechos Humanos), in *Estudios Constitucionales* 7, nº 2, Santiago de Chile 2009, pp. 109–128; Fernando Silva García, "El control judicial de las leyes con base en tratados internacionales sobre derechos humanos," in *Revista Iberoamericana de Derecho Procesal Constitucional*, nº 5, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2006, pp. 231 ff; Víctor Bazán, "Corte Interamericana de derechos humanos y Cortes Supremas o Tribunales Constitucionales latinoamericanos: el control de convencionalidad y la necesidad de un diálogo interjurisdiccional crítico," in *Revista Europea de Derechos Fundamentales*, nº. 16/2, 2010, pp. 15–44.

Argentina and Venezuela, where international treaties on human rights have been given constitutional hierarchy, that is, the same rank as constitutional provisions.[30]

In Argentina, even before the 1994 constitutional reform that formally gave "constitutional hierarchy" to a series of enumerated international documents, particularly on matters of human rights (article 75.22), the Supreme Court in *Ekmekdjián v. Sofovich* (1992),[31] on the right to correction (rectification) and response regarding published informations, recognized that international treaties have precedence over internal legislation. Decisions in this vein multiplied after the 1994 constitutional reform in which the Court held that constitutional review includes, as well, comparing internal laws and regulations with international conventions, with the power to declare such laws "unconventional,"[32] that is, contrary to an international convention. In this regard, for instance, the Court compared the provision of the American Convention on Human Rights that guarantees the right to appeal before a superior court as one of the due process rules (article 8.2.h), with provisions of the Argentine criminal legal system that, in some cases, establish a single-instance trial by limiting review of the judgment before the Penal Cassation Court. Consequently, the Supreme Court in the *Casal* case (2005) held that the only way to square the requirement established in the American Convention with the Argentine criminal legal system was to interpret article 456 of the Criminal Procedural Code as allowing an ample review of the prior ruling.[33]

In Venezuela, all international treaties on human rights have the same constitutional hierarchy as the Constitution (article 23) and even prevail in application over the same Constitution if those treaties establish more favorable provisions for the exercise of particular rights. Thus, the Constitutional Chamber of the Supreme Tribunal, during the first years of enforcement of the 1999 Constitution, on many occasions annulled statutes because they were contrary to the American Convention on Human Rights, for instance on matters of the right to political participation and the right to appeal before a superior court in all judicial processes.[34] Unfortunately, this constitutional provision of article 23 of the Constitution, in more recent years, has been illegitimately mutated by the same Constitutional Chamber, adopting at the request of the Attorney General, denying the general power of all court to give preference to international treaties on human rights over

---

[30] See Allan R. Brewer-Carías, "La aplicación de los tratados internacionales sobre derechos humanos en el orden interno," *Revista Instituto Interamericano de Derechos Humanos*, nº 46, San José, Costa Rica, 2007, pp. 219–271.

[31] See Fallos 315:1492 (1992). See Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 14 (footnote 55). See Néstor Pedro Sagües, *Argentinean National Report II*, p. 19.

[32] See *Mazzeo*, Fallos 330 (2007). See Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 14 (footnote 57).

[33] Fallos, 328:3399 (2005). See Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 14 (footnote 59).

[34] See Decision nº 87 of March 13, 2000. "*C. A. Electricidad del Centro (Elecentro) v. Superintendencia para la Promoción y Protección de la Libre Competencia (Procompetencia)*," *Revista de Derecho Público*, nº 81, Editorial Jurídica Venezolana, Caracas 2000, pp. 157 ff. See Carlos Ayala Corao, "Las consecuencias de la jerarquía constitucional de los tratados relativos a derechos humanos," in *Rumbos del Derecho Internacional de los Derechos Humanos, Estudios en Homenaje al Profesor Antonio Augusto Cancado Trindade*, vol. 5, Sergio Antonio Fabris Editor, Porto Alegre, Brazil, 2005.

internal law, and even deciding in 2008 that the rulings of the Inter-American Court on Human Rigths are non-executable in the country.[35]

In effect, in Decision No. 1.939 of December 18, 2008, the Constitutional Chamber of the Supreme Tribunal, in deciding a recourse of interpretation of a decision adopted by the Inter-American Court on Human Rights filed by the Attorney General, rejected the general prevalence of international treaties on human rights regarding internal law, except only when the matter is decided by the Chamber itself.[36] On the other hand, the constitutional rank of international treaties on human rights was proposed to be eliminated in a draft constitutional reform proposal made by a Presidential Council desgned by the President in 2007.[37] Eventually, the proposal was not included in the constitutional reform submitted to popular vote, which that year was rejected by the people. However, what the authoritarian regime was not able to attain thorugh a constitutional reform, in a certain way was carried out by the Constitutional Chamber of the Supreme Court.[38]

As mentioned before, in the same decision, and contrary to the express provision of the same article 23 of the Constitution that established the "direct and immediate application by the courts and other bodies of the State" of human rights treaties, the Constitutional Chamber decided to reserve to itself the power to determine which provisions of treaties would prevail in the internal legal order.[39] With this unconstitutional decision, the Constitutional Chamber illegitimately mutated the Constitution: according to article 23, the authority to apply international treaties on human rights corresponds not only to the Constitutional Chamber but also to all the courts of the Republic when acting as constitutional judges, for instance, when exercising the diffused control of the constitutionality of statutes or when deciding cases of amparo. The intention of the Constitutional Chamber to resereve for itself this aspect of judicial review is not in accordance to the Constitution and to the judicial review system it establishes.

In any case, and referring to the same sort of control of "conventionality" of statutes in democratic countries, this control has developed in all European countries where European Union law, and particularly the European Convention of Human Rights, have prevalence

---

[35] See Decision nº 1.939 of December 18, 2008, Attorney General Office case, http://www.tsj.gov.ve/decisiones/scon/Diciembre/1939-181208-2008-08-1572.html. See comments in Allan R. Brewer-Carías, "La interrelación entre los Tribunales Constitucionales de América Latina y la Corte Interamericana de Derechos Humanos, y la cuestión de la inejecutabilidad de sus decisiones en Venezuela," in Armin von Bogdandy, Flavia Piovesan, and Mariela Morales Antonorzi (coords.), *Direitos humanos, democracia e integração jurídica na América do Sul*, Juris Editora, Rio de Janeiro 2010, pp. 661–701.

[36] See the case *Gustavo Alvarez Arias*, http://www.tsj.gov.ve/decisiones/scon/ Diciembre/1939-181208-2008-08-1572.html.

[37] See *Consejo Presidencial para la Reforma de la Constitución de la República Bolivariana de Venezuela, "Modificaciones propuestas."* The complete text was published as *Proyecto de Reforma Constitucional. Versión atribuida al Consejo Presidencial para la reforma de la Constitución de la república Bolivariana de Venezuela*, Editorial Atenea, Caracas, July 1, 2007.

[38] See Allan R. Brewer-Carías, *Reforma constitucional y fraude a la Constitución. Venezuela 1999–2009*, Academia de Ciencias Políticas y Sociales, Caracas 2009, pp 249–261.

[39] See *Revista de Derecho Público*, nº 93–96, Editorial Jurídica Venezolana, Caracas 2003, pp. 135 ff.

over national law.[40] In particular, the case of the Netherlands must be highlighted. There, as no judicial review of the constitutionality of statutes is allowed in the Constitution, judicial review has developed only as a control of the "conventionality" of such statutes to ensure their subjection to international conventions, specifically on matters of human rights.

In effect, according to article 120 of the Dutch Constitution, "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts," which means that judicial review of primary legislation is prohibited, the courts being banned not only from determining the unconstitutionality of statutes but also from declaring them incompatible with the Kingdom Charter.[41] Nonetheless, article 94 of the same Constitution establishes that "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions," thus leading to the very important development of the system of judicial review of "conventionality" of statutes, particularly on matters of human rights.

Thus, the Dutch system is referred to as a system of "constitutional fundamental rights review by the judiciary" or as "fundamental rights review of parliamentary legislation," that is, regarding the powers of the courts and particularly of the Hoge Raad (High Court) to review acts of Parliament for their compliance with convention rights if the treaty is ratified and insofar as the individual provisions are self-executing.[42] This means that, in the Netherlands, statutes can be reviewed by the courts for their consistency with the written provisions of international law, particularly the UN International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which has become the most important civil rights charter for the Netherlands.[43]

Such judicial review has also developed regarding European Union law, which also contains provisions on fundamental rights, in the sense that, because international treaties have precedence over national law, the courts must examine whether national law is compatible with the law of the European Union and, if necessary, either construe national law consistently with European Union law or set it aside if such an interpretation proves impossible under national constitutional law.[44]

In Greece, although the Constitution has no explicit provision for the control of the conventionality of statutes, the courts have held that international treaties have

---

[40] In the case of Poland, as mentioned by Marek Safjan, "The national court, denying application of a national norm which is contradictory to the European law or interpreting creatively a national norm in the spirit of a European norm *de facto* applies in the legal system a new, earlier non-existent, norm, thus becoming in a way a positive legislator on the level of a specific case." See Marek Safjan, *Polish National Report*, p. 16. Also in Slovakia, according to article 154c of the Constitution, having international treaties, particularly the European Convention of Human Rights, precedence over laws, the courts (including the Constitutional Court) exercise control of conventionality, by giving preference to convention. See Ján Svák and Lucia Berdisová, *Slovak National Report*, pp. 11, 12.

[41] See J. Uzman, T. Barkhuysen, and M. L. van Emmerik, *Dutch National Report*, pp. 2, 5.

[42] *Id.*, pp. 1, 2, 9, 12, 22.

[43] *Id.*, p. 7.

[44] *Id.*, pp. 2, 31, 32.

supralegislative status (article 28.1 of the Constitution), which is sufficient basis to exercise control of conventionality if the treaty in question is self-executing, such as the European Convention on Human Rights. In the same sense of the control of constitutionality, if Greek courts find that a statutory provision is inconsistent with international law, that provision cannot be applied in the pending case. However, unconventional legislation remains in effect and thus can be applied in a future occasion.[45]

The situation in the United Kingdom must also be mentioned. The British Constitution is not a single and overarching written document like the constitutions of other contemporary democratic states. In addition, it is not possible in principle to formally distinguish a constitutional statute from an ordinary statute. Nonetheless, the British Constitution undoubtedly exists, and it is possible to attach the label "constitutional" to some legal[46] and nonlegal rules,[47] called "conventions of the Constitution," which are considered binding rules of political morality and called the "common law constitution," as a set of legal principles and rules that have been laid down over time, typically by judges.[48] It is possible, therefore, to identify a judicial process of controlling the subjection of statutes to these conventions, which can be called "constitutional review."[49] As it has been summarized by John Bell:

> Britain has neither "specific constitutional or statutory provisions that empower constitutional judges, by means of interpreting the Constitution, to adopt obligatory decisions on constitutional matters" nor specific decisions on constitutional matters. But this would be too simplistic an approach. The nature of a common law constitution is that the basic "rules of recognition" (H. L. A. Hart) are not contained in statute, but are in the common law. The principles are rather like the "fundamental principles recognized by the laws of the Republic" in French law, which are not laid down by statute, but which are judicially identified, even if formally not created by judges. There do arise a number of issues on which ordinary judges have to take decisions which are binding and which could be characterized as constitutional.[50]

In this respect, regarding the conventions to the British Constitution, it is also possible to call this process of constitutional review – of course, in its own historical context – a judicial control of conventionality.

But in other constitutional matters, given the recent evolution of the British Constitution by the creation of a Supreme Court in 2009, it is also possible to distinguish constitutional review powers exercised by the courts. This is the case on matters of devolution, regarding the control of the validity of the legislation of the three devolved assemblies (Wales,

---

45 See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 10.

46 An example is the agreement reached by the Prime Ministers of the British Empire in 1931 for the U.K. Parliament to not legislate for Dominions without consent of their parliaments. See John Bell, *British National Report*, p. 1.

47 One example is the Nolan principles (1995), which govern standards in public life and introduce a set of values governing the holders of a range of public offices. See John Bell, *British National Report*, p. 2.

48 See John Bell, *British National Report*, p. 1.

49 *Id.*, p. 2.

50 *Id.*, p .3.

Scotland, and Northern Ireland) that can be referred to the Supreme Court by the British Secretary of State, the British Attorney General, or the national Attorneys General (or equivalent), or by the national courts before which the issue is raised.[51]

But the most important recent developments in the United Kingdom on matters of constitutional review have been regarding the compatibility of British statutes with European Union law, that is, on matters of control of conventionality. An example is the matter decided on the compatibility of a British statute concerning the limits for fishing with European Union law, which was raised and decided by the lowest tier of criminal law courts, the Magistrates' Court.[52] But most important in this process of developing constitutional review in the United Kingdom is the example of the protection and interpretation of human rights, particularly after the Human Rights Act was passed in 1998 to implement the European Convention on Human Rights. The Act is considered by John Bell as a major "constitutional statute on fundamental rights" and can lead "to either the narrowing of the scope of legislation by means of an interpretation, which makes the statute compatible with the Convention, or a declaration of incompatibility, which empowers a minister to amend or repeal an incompatible statutory provision."[53] In addition, the question concerning the compatibility of British law with EU law can be raised before the British courts, and if the matter does not give rise to a serious difficulty in interpretation, the courts can apply European law directly and refuse to apply a British statute.[54] Compatibility with EU law is the only area in which British judges have the power to strike down legislation of Parliament, an approach that was definitively adopted after the European Court of Justice specifically stated that the British courts ought not to apply a British act of Parliament that was incompatible with European legislation.[55]

In any case, the court's decision in these cases does not annul an act of Parliament. As expressed by John Bell:

> The Government has to decide whether to propose an amendment of the law to bring it into line with the Convention or to take other action to maintain the incompatibility, e.g. by registering a formal derogation from the Convention. This is the nearest that English judges come to a constitutional review.[56]

As Lord Bingham highlighted in the case *A (FC) v. Secretary of State for the Home Department*:

---

51 *Id.*, p. 2.

52 *Id.*, p. 3.

53 See N. Bamforth, "Parliamentary Sovereignty and the Human Rights Act 1998," [1998] Public Law 572. See John Bell, *British National Report*, p. 3.

54 Case 283/81, *Srl CILFIT v. Minister of Health*, [1982] ECR 3415. See John Bell, *British National Report*, p. 3 (footnote 14).

55 See *R v. Secretary of State for Transport, ex parte Factortame Ltd.*, [1990] 2 AC 85; *R v. Secretary of State for Transport, ex parte Factortame Ltd (*nº *2)*, [1991] 1 AC 603; *R v. Secretary of State for Employment, ex parte Equal Opportunities Commission*, [1995] 1 AC 1. See John Bell, *British National Report*, p. 3 (footnotes 15–16).

56 See John Bell, *British National Report*, p. 3.

> The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. [57]

This case of the House of Lords was issued to decide the challenge filed by a number of individuals regarding their detention without trial on the basis of them being a danger to national security, according to the Anti-Terrorism, Crime, and Security Act of 2001. The House of Lords declared the corresponding provision incompatible with articles 5 and 14 of the European Convention.

This control of "conventionality" of statutes, therefore, as is the case in the Netherlands, is the most common constitutional review procedure in the United Kingdom; it has been applied in numerous cases and is considered the most significant constitutional function that the new Supreme Court will have in the future.[58]

In Sweden, there is a very weak diffuse method of judicial review that has developed after the constitutional reform of 1979, which established the power of judicial review only when Parliament has issued an unconstitutional statute due to a "manifest error."[59] It has only been after the beginning of the Europeanization of Swedish law in the late 1990s that some sort of judicial review has been developed, mainly as a result of the progressive subordination of Swedish law to European law and particularly to the European Convention on Human Rights. Consequently, the most important cases of judicial review have been cases of control of conventionality decided by the courts, which have compared national legislation with the provisions of the European Convention on Human Rights.[60]

Finally, also regarding the control of conventionality of statutes, the situation of France must be highlighted. In France, the Cour de Cassation and the Conseil d'État have developed control of conventionality of statutes besides and in parallel to the traditional *a priori* judicial review power of legislation exercised by the Constitutional Council. As it has been summarized by Bertrand Mathieu, it has been due to the requirements imposed by international law, particularly by European Union law and the law of the European Convention on Human Rights that, first, the Cour de Cassation and, later, the Conseil d'État, have proceeded to reject the application of laws deemed *inconventionnelles*, that is, contrary to the conventions. The jurisprudence in such cases have been constructed not only on the basis of article 55 of the Constitution, which assigns the treaties or international agreements regularly ratified or approved superior authority regarding the laws, but also because of the refusal of the Conseil Constitutionnel to examine the *conventionalité de la loi* in accordance with its attributions on matters of control of the constitutionality of statutes.

---

57 See [2004] HL 56. See John Bell, *British National Report*, p. 5 (footnote 25).

58 See John Bell, *British National Report*, p. 6.

59 Chapter 11, article 14 of the Instrument of Government. See Joakim Nergelius, *Swedish National Report*, pp. 17–18.

60 See *Lassagard* case, Administrative Court of Appeal of Jönköping, 1996, which declared that the absence of judicial review in the particular case (agricultural subsidy) was contrary to article 6 of the ECHR; see also *Lundgren* case, Supreme Court, 2005, in which the extension of a criminal judicial procedure was also considered contrary to article 6 of the ECHR. See Joakim Nergelius, *Swedish National Report*, pp. 21–29.

The consequence of this situation on matters of judicial review has been a clear division of tasks: the control of the constitutionality of laws in an abstract and *a priori* way is exercised by the Conseil Constitutionnel when requested by political authorities,and the control of conventionality of laws is exercised by the ordinary judicial or administrative judges, in specific cases and controversies, particularly regarding fundamental rights and freedoms, which the Conseil Constitutionnel has refused to examine. On this situation, Bertrand Mathieu has referred to the paradox that exists in France between the traditional theory and platonic assertion of constitutional preeminence, and the jurisdictional impotence regarding constitutional provisions.[61]

III. THE INTERPRETATION OF THE CONSTITUTION AND THE INFLUENCE OF THE CONSTITUTIONAL COURTS ON CONSTITUTIONAL AND LEGAL REFORMS

The main tool of constitutional courts is the power to interpret the Constitution to ensure its application, enforceability, and supremacy by adapting the Constitution when changes and time require such task but without assuming the role of a constituent power or of the Legislator – they cannot on a discretionary political basis create legal norms or provisions that cannot be deducted from the Constitution itself.[62]

That is why, as a matter of principle, constitutional courts are considered "negative legislators" particularly when deciding to annul statutes,[63] and they cannot act as "positive legislators" in the sense of creating *ex novo* pieces of legislation or introducing "reforms" to statutes. In the words of Laurence Claus and Richard S. Kay, "We will treat judges as engaged in positive lawmaking when they originate a scheme of law as opposed to merely considering, revising or rejecting schemes conceived by other legislative actors" or "for a constitutional court to be positive lawmaker under this terminology would involve the court in considering, propounding, and creating a scheme of regulation of its own conception."[64]

That is, constitutional courts cannot innovate in the legal order in a discretionary way, as they do not have the authority to create new law.[65] As the Federal Supreme Tribunal of Brazil has explained with respect to its decisions that annul statutes:

> The Federal Supreme Tribunal, when exercising the abstract judicial review of objective law positivized in the Constitution of the Republic, act as a virtual Negative Legislator, so its declaration of unconstitutionality comprise an exclusion judgment of control that, based on the attributions assigned to the Tribunal, consists in removing from the positive legal

---

61 See Bertrand Mathieu, *French National Report*, p. 3.

62 See Jorge Carpizo, *El Tribunal Constitucional y sus límites*, Grijley, Lima 2009, pp. 56, 68.

63 In this sense, in some countries, as in Chile, it has been said that the Constitutional Tribunal can act only as negative legislator. See Francisco Zúñiga Urbina, "Control de constitucionalidad y sentencia," *Cuadernos del Tribunal Constitucional*, nº 34, Santiago de Chile 2006, pp. 107, 109.

64 See Laurence Claus and Richard S. Kay, *U.S. National Report*, pp. 3, 5.

65 See Luis Roberto Barroso et al., "Notas sobre a questão do legislador positivo," *Brazilian National Report III*, pp. 19–20; Néstor Pedro Sagües has mentioned that constitutional jurisdiction transforms itself into positive legislation, when it generates infraconstitutional provisions compatible with the Constitution, with the excuse of controlling the constitutionality of the legal order, in *Argentina National Report II*, p. 3.

> order, the State invalid expression non conformed with the model included in the Constitution of the Republic.[66]

In another case, the same Brazilian Federal Supreme Tribunal, in reviewing Law Nº 9.504/97 on the free use of television and radio programs by political parties challenged because considered contrary to the principle of equality, argued:

> The declaration of unconstitutionality in the way it was requested, would modify the system of the law, altering it sense, which is a legal impossibility, because the Judicial Power, when controlling the constitutionality of normative acts, only acts as negative legislator and not as positive legislator.[67]

The consequence of this classical approach is that, constitutional courts being negative legislators, the direct effect of the constitutional courts' decisions excluding from the legal order pieces of legislation, is that the Legislator, in response, very frequently decides to reform the legislation or to enact a new piece of legislation, to comply with the constitutional court criteria.[68] Also, constitutional reforms have occurred after decisions adopted by constitutional courts to follow the doctrine they established.

For instance, in Argentina, Law No. 26,025 was passed to modify the rules applicable to the Supreme Court's appellate jurisdiction (article 117 of Constitution), after the Supreme Court ruled on the unconstitutionality of previous legislation that provided that all cases ordering the government to pay social security benefits were to be appealed before the Supreme Court. Because the rule actually delayed the payment of pensions to elderly people, in *Itzcovich* case (Fallos 2005), the Court declared that the appeal procedure had become unconstitutional in that it affected petitioner's right to a speedy trial.[69]

Something similar happened on matters of marriage law. Although the Argentinean Constitution recognizes the right to marriage, the Civil Code established that divorce did not entail the right to a new marriage, a clause whose constitutionality the courts upheld several times. However, in 1986, the Supreme Court applied what was called a "dynamic," or living constitution, approach considering in *Sejean* case[70] that changes to society's perception of a topic require giving new scope to the right to human dignity, and thus it declared unconstitutional the statute that had been in force for almost a century. This decision was

---

66 STF, *DJ*, June 18, 1993, Rcl 385 QO/MA, Rel. Min. Celso de Mello, in Luis Roberto Barroso et al., "Notas sobre a questão do legislador positivo," *Brazilian National Report III*, p. 9.

67 See STF, *DJ*, December 10, 1999, ADI 1.822/DF, Rel. Min. Moreira Alves, in Luis Roberto Barroso et al., "Notas sobre a questão do legislador positivo," *Brazilian National Report III*, p. 15.

68 For instance, in the Netherlands, legislation was issued after the *Dutch Citizenship* case (Supreme Court judgment of October 12, 1984, NJ 1985/230). See J. Uzman, T. Barkhuysen, and M. L. van Emmerik, *Dutch National Report*, p. 21.

69 See Fallos: 328:566 (2005). See Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, pp. 13–14 (footnote 54).

70 See Fallos 308:2268 (1986). See Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 15 (footnote 61).

the prelude to reforming the law of civil marriage, which, following the Supreme Court decision, allowed for the possibility of a subsequent marriage.[71]

With respect to Portugal, as mentioned by Joaquim de Sousa Ribeiro, it is a fact that, "even though the Constitutional Court does not play a part in the law making process, many amendments made to existing legislation are the result of its ruling, either to incorporate or to set aside the Court's ruling on the subject."[72]

IV. THE QUESTION OF CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS

In any case, in the contemporary world, the truth is that judicial review has progressively evolved, surpassing the former rigid character of courts only being negative legislators,[73] as a result of the development of new principles that, at the time of Kelsen's proposals, were not on the agenda of constitutional courts and judges.[74]

That is why, for instance, in Brazil, the Federal Supreme Tribunal in some cases has considered the same notion of negative legislator that it defended in many previous decisions an "ancient dogma" and a "myth."[75]

Consequently, new principles have developed; for example, the principle of preservation of statutes, derived from the presumption of constitutionality they have, has empowered constitutional courts to interpret statutes according to or in harmony with the constitution,[76] in order to avoid any legislative vacuum, bypassing the need to declare statutes unconstitutional. This is today one of the main tools of constitutional courts when interpreting the constitution, which they have used in some cases, to fill permanently or temporarily the vacuums that annulling the statute could originate.

Another important role that has progressively developed during the past decades, far from the role of declaring null unconstitutional statutes, is the power of constitutional courts on matters of judicial review, not regarding existing legislation, but regarding the absence of statutes or the omissions or abstention incurred by the Legislator when sanctioning statutes.[77]

That is, constitutional courts also control the omissions of the Legislators to produce the legislation that they have the constitutional obligation to sanction. These omissions can be

---

71 See Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 5.

72 See Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, p. 9.

73 See Francisco Fernández Segado, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas estereotipadas vinculadas a ellas," *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 195.

74 That is why Francisco Javier Díaz Revorio, referring to the European system of judicial review has said, "We are debtors of Kelsen, but not 'slaves' of his ideas," in *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 305.

75 See Luis Roberto Barroso et al., "Notas sobre a questão do legislador positivo," *Brazilian National Report III*, p. 22.

76 See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 288; See Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, p. 7.

77 These judicial review powers do not correspond with Kelsen's pattern of judicial review as negative legislation. See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 278.

absolute or relative, and judicial review, in both cases, has contributed to the development of new trends in the control of constitutionality of statutes, which converts constitutional courts into a sort of legislative assistant. Nonetheless, in some cases, where judicial review of legislative omissions is not effectively developed, control of those omissions is only possible in an indirect way, by claiming State liability for the absence of a legislative act.[78]

In contrast, the same change of the scope of judicial review has occurred in diffuse or decentralized systems of judicial review, where, in practice, as was stated by Christopher Wolfe, supreme courts, "once a distinctively judicial power, essentially different from legislative power, [have] become merely another variant of legislative power"; considering that, although the Court had never proclaimed it, for the legal profession, "judicial review is an essentially legislative activity"; as such, the controversy is "generally restricted to how this power should be employed, actively or with restraint."[79]

That is why it is sometimes difficult to understand, particularly for non-American lawyers, the exact extent of the expression that any nominee to the U.S. Supreme Court must repeat again and again before the Senate in confirmation hearings: "the task of a judge is not to make law; it is to apply the law."[80] This approach has been considered a "myth" that, as it has been said by Geoffrey R. Stone, must be exposed before there can be a serious discussion about the proper role of U.S. judges:

> Faithfully applying our Constitution's 18th- and 19th-century text to 21st-century problems requires not only careful attention to the text, fidelity to the framers' goals and respect for precedents, but also awareness of the practical realities of the present. Only with such awareness can judges, in a constantly changing society, hope to keep faith with our highest law.
>
> This does not mean judges are free to make up the law as they go along. But it does mean that constitutional law is not a mechanical exercise of just "applying the law."[81]

In any case, it is a fact in the contemporary world that constitutional courts have progressively assumed a more important role assisting the Legislator in its functions and even creating norms that they can deduct from the constitution.[82] In some cases, they are more than auxiliaries to the Legislator; they substitute for it, assuming the role of positive legislators by issuing temporary or provisional rules to be applied on specific matters.

---

78 This is what has been envisaged in Greece. See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 5.

79 See Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*, Basic Books, New York 1986, p. 3; Wolfe, *La transformación de la interpretación constitucional*, Civitas, Madrid 1991, p. 15.

80 This was what Judge Sonia Sotomayor said in the confirmation hearing before the Senate on July 13, 2009. See Peter Baker and Neil A. Lewis, "Sotomayor Vows 'Fidelity to the Law' as Hearings Start," *New York Times*, July 14, 2009, p. A15.

81 See Geoffrey R. Stone, "Our Fill-in-the-Blank Constitution," Op-Ed, *New York Times*, April 14, 2010, p. A27.

82 See Iván Escobar Fornos, "Las sentencias constitucionales" in *Estudios Jurídicos*, vol. 1, Ed. Hispamer, Managua 2007, p. 489.

This has occurred, for instance, in many cases by means of the application of the principle of progressiveness and the prevalence of fundamental rights, like the right to equality and nondiscrimination, in the interest of the protection of citizens' rights and guarantees, in which cases the interference of the courts in the legislative function has been considered legitimate and according to the constitutional principles and values.

Nonetheless, the legislative agenda of constitutional courts has also included other areas of activism, sometimes with political purposes. For example, in many cases, as has been the case in the former Socialist countries of Eastern Europe, constitutional courts have had an important role implementing, developing, and strengthening the Constitution, and particularly the newly established democratic regime and the rule of law principles.[83]

But in other countries, quite far from the protection of fundamental rights and the consolidation of democratic principles, the danger of constitutional courts encroaching on the legislative power to contribute to the dismantling of the principle of separation of powers is not just a "phantom," as Hamilton pointed out in another context two centuries ago.[84] On the contrary, it has been a tragic reality, particularly in countries ruled by authoritarian governments. In some countries, constitutional courts have assumed with absolute impunity the task of supporting and legitimizing unconstitutional statutes and government acts, in many cases usurping the constituent and legislative powers, of course without any sort of argument to support the partisan judicial decisions taken supposedly in the best interest of the country or for the good of the nation.[85]

Worse, in those cases, it is not a matter of considering "the Judge as Legislator for Social Welfare,"[86] as was the case in the United States at the beginning of the twentieth century, which Benjamin Cardozo considered a necessity,[87] but a matter of the court being an instrument to support an authoritarian government,[88] and even to restrict constitutional freedoms, which cannot be accepted. This happened, for instance, regarding freedom of expression in Venezuela, in 2001, when the constitutional court *ex officio* restricted the

---

[83] For instance, in the process of transformation of the former Socialist States into contemporary democratic States subjected to the rule of law. See, for instance, Marek Safjan, *Polish National Report*, pp. 7, 10; Sanja Barić and Petar Bačić, *Croatian National Report*, pp. 18, 21, 28; Boško Tripković, *Serbian National Report*, pp. 1, 14.

[84] He said in Paper nº 81 of *The Federalist*, "The Judiciary Continued, and the Distribution of the Judiciary Authority," that "It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom." See Clinton Rossiter (ed.), *The Federalist Papers*, Penguin Books, New York 2003, pp. 483–484.

[85] See Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*, Basic Books, New York 1986, p. 101; *La transformación de la interpretación constitucional*, Civitas, Madrid 1991, p. 144.

[86] *Id.* pp. 223 ff. and 305 ff.

[87] Benjamin Cardozo recognized "without hesitation that judges must and do legislate," though "only between gaps" of the law. See Benjamin Cardozo, *The Nature of the Judicial Process*, Yale University Press, 1921, pp. 10, 113, 165. See the references in Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*, Basic Books, New York 1986, pp. 230, 231, 315, 316.

[88] As it has been the case in Venezuela during the past years. See the comments on the most relevant Constitutional Chamber of the Supreme Tribunal decision in Allan R. Brewer-Carías, *Crónica de la "in"justicia constitucional: La Sala Constitucional y el autoritarismo en Venezuela*, Edigtorial Jurídica Venezulana, Caracas 2007; Brewer-Carías, *Reforma constitucional y fraude a la Constitución (1999-2009)*, Academia de Ciencias Políticas y Sociales, Caracas 2009.

citizens' right to response and to rectification regarding the President of the Republic's media statements;[89] and in 2008, when the same constitutional court decided to confiscate the assets of a private TV station.[90]

In any case, in all the countries that have developed systems to control the constitutionality of statutes, discussions have developed regarding the limits of judicial review, the extent of the effects of the constitutional courts, decisions, and the degree of interference allowed in constitutional states by constitutional courts regarding legislative functions. These discussions have always existed and will continue to exist. They began in all countries with the adoption of judicial review of legislation, and they will continue to exist with constitutional courts, which are the supreme interpreters of the Constitution and have the power to guarantee its supremacy, to interpret statutes according to the Constitution's provisions, to guarantee the enforcement of fundamental constitutional rights, and to resolve conflicts between the different constitutional organs of the State.

The fact is, at the beginning of the twenty-first century, that there is no doubt that constitutional courts are no longer confined to be negative legislators in the traditional way, because their role is no longer reduced when controlling the constitutionality of statutes, to declare their unconstitutionality, or to annul them when contrary to the Constitution. Constitutional courts have progressively assumed a more active role when reviewing legislative acts vis-à-vis the Constitution.

Nonetheless, what is essential to bear in mind even in cases of new roles and powers is that constitutional courts are, above all, subjected to the Constitution, and as such, they are constituted organs of the State.[91] Thus, they are also subjected to the principle of separation of powers and consequently they are not legislators, as the legislative function is assigned in the Constitution to the legislative body. They can assist the legislators in accomplishing their functions, but they cannot substitute for the legislators and enact legislation.[92] The legislative organs of the States that are contemporary democracies, integrated by representatives elected by universal suffrage, are called to enact legislation through a constitutionally prescribed procedure and are subject to political accountability before the

---

89 See Decision nº 1013 of June 12, 2001, *Elías Santana* case. See http://www.tsj.gov.ve/ decisiones/scon/Junio/1013-120601-00-2760%20.htm. See the comments in Allan R. Brewer-Carías et al., *La libertad de expresión amenazada (Sentencia 1013),* Instituto Interamericano de Derechos Humanos, Editorial Jurídica Venezolana, Caracas and San José 2001; "El juez constitucional vs. la libertad de expresión: La libertad de expresión del pensamiento y el derecho a la información y su violación por la Sala Constitucional," in Allan R. Brewer-Carías, *Crónica de la "in"justicia constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Caracas 2007, pp. 419–468. See also Daniela Urosa Maggi, *Venezuelan National Report*, pp. 16–17.

90 See decision of the Constitutional Chamber nº 956 of May 25, 2007 in Allan R. Brewer-Carías, "El juez constitucional en Venezuela como instrumento para aniquilar la libertad de expresión plural y para confiscar la propiedad privada: El caso RCTV," *Revista de Derecho Público*," nº 110, Editorial Jurídica Venezolana, Caracas 2007, pp. 7–32.

91 As stated by the Constitutional Tribunal of Peru: "the fact of the Constitutional Tribunal being the supreme interpreter of the Constitution, does not change its character of constituted power, and as all of them, subjected to the limits established in the Constitution." Decision of February 2, 2006, STC 0030-2005. See Fernán Altuve Febres, *Peruvian National Report II*, pp. 27–28. See also Rubén Hernández Valle, *Costa Rican National Report*, p. 43.

92 See Humberto Nogueira Alcalá, "La sentencia constitucional en Chile: Aspectos fundamentales sobre su fuerza vinculante," *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 315.

electors. This legislative framework of State action cannot be substituted for by constitutional courts' attempts to legislate in place of the legislators.[93] On the contrary, they risk being considered "illegitimate oligarchies."[94]

That is why, for instance, one can find declarations from constitutional courts themselves explaining their limits, as the Federal Supreme Tribunal of Brazil did in deciding a direct action of unconstitutionality involving article 45.1 of the Constitution, which established the integration of the House of Representatives. The Court said that the only organ that could establish the number of Federal Representatives for each of the Member States was the National Congress, through the corresponding legislation:

> The absence of a complementary law (*vacum juris*) that constitutes the necessary normative instrument cannot be filled by any other State act, specially one with jurisdictional character like this Court. The admission of such possibility would imply to transform the Federal Supreme Tribunal, when exercising the concentrated control of constitutionality, into a positive legislator, a role that the Court refuses itself to assume.[95]

But in spite of this self-restraint approach, it is possible to find examples of such illegitimate oligarchies in other countries, like Venezuela, where the Constitutional Chamber of the Supreme Tribunal has attributed to itself a general power called normative jurisdiction, according to which:

> in specific cases where a constitutional infraction arises, the Chamber has exercised jurisdiction in a normative way, giving immediate enforcement to constitutional provisions, establishing its scope or ways of exercise, even in the absence of statutes directly developing them.[96]

It is true that this normative jurisdiction has been mainly used regarding programmatic constitutional provisions referring to fundamental rights, to allow their immediate enforcement, but unfortunately, it has also been used for other purposes by the authoritarian government that has existed in the country since 1999.[97] In any case, the Venezuelan Constitutional Chamber has based its normative jurisdiction on article 335 of the Constitution, which confers to it the role of guaranteeing the supremacy and effectiveness of

---

93 As mentioned by Rubén Hernández Valle, "the activity of the courts is not to create law, but to interpret law. Consequently, Constitutional Courts cannot substitute the Legislator will, because constitutional interpretation, in spite of being conditioned by evident political components, is always juridical interpretation." See Rubén Hernández Valle, *Costa Rican National Report*, p. 42.

94 See P. Martens, "Les cours constitutionelles: des oligarchies illegitimes?" in *La Republic des judges*, Actes du Colloque Organize par le Jeune Barreau de Liège le 7 Février 1997, pp. 53–72, quoted by Christian Behrendt, "L'activité du judge constitutionnel comme législateur-cadre positif," summary of the thesis published in *Revue Européenne de Droit Public*, 2010, p. 16.

95 See STF, *DJ*, May 19, 1995, ADI 267 MC/DF, Rel. Min. Celso de Mello. See Luis Roberto Barroso et al., "Notas sobre a questão do legislador positivo," *Brazilian National Report III*, pp. 14. In another case, the Federal Supreme Tribunal reviewed the electoral law (Lei nº 9.504/97).

96 See Decision nº 1571 of August 22, 2001, case *Asodeviprilara*; http://www.tsj.gov.ve/decisiones/scon/Agosto/1571-220801-01-1274%20.htm; Daniela Urosa Maggi, *Venezuelan National Report*, p. 3.

97 See generally Allan R. Brewer-Carías, *Dismantling Democracy: The Chávez Authoritarian Experiment*, Cambridge University Press, New York 2010.

constitutional provisions and principles and of issuing binding interpretations of the same, arguing that this provision of the Constitution:

> allows the normative jurisdiction particularly regarding programmatic provisions that exists in the Constitution, which would by timely suspended up to when the Legislator could be so kind to develop them, remaining in the meantime without effects.[98]

For such purpose of exercising its normative jurisdiction, which in its broader sense is an example of a case of the pathology of judicial review, the constitutional court in Venezuela has even rejected the general procedural law principle that requires the courts to act only at the request of a party with standing, assuming it *ex officio*, without any specific party request or judicial controversy developed on the deciding matter.[99]

That is why, as with any power attributed to a State organ with no possibility of itself being controlled, judicial review can also be distorted and abused without any possibility for the citizens or other constitutional organs of the State to control their actions.

The main question that remains to be anwered on this matter of abuse of constitutional jurisdiction remains, *Quis custodies ipso custodiem*?[100] There is no answer, because there are no State organs that can control constitutional jurisdictions, nor can citizens by means of electoral processes.

Constitutional jurisdiction, therefore, is the only State organ not subjected to checks and balance or control, so the abuse of its functions are out of the reach of the enforcement of constitutional provisions. That is why George Jellinek said that the only guarantee regarding the guardian of the Constitution eventually lies in its "moral conscience";[101] and Alexis de Tocqueville was accurate in his observations of the U.S. Federal Constitution:

> The peace, the prosperity, and the very existence of the Union are vested in the hands of the seven Federal judges. Without them the Constitution would be a dead letter. . . .
>
> Not only must the Federal judges be good citizens, and men of that information and integrity which are indispensable to all magistrates, but they must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles that can be subdued, nor

---

98 See Decision nº 1571 of August 22, 2001, case *Asodeviprilara*; http://www.tsj.gov.ve/decisiones/scon/Agosto/1571-220801-01-1274%20.htm; Daniela Urosa Maggi, *Venezuelan National Report*, pp. 3–4.

99 See Allan R. Brewer-Carías, "Régimen y alcance de la actuación judicial de oficio en materia de justicia constitucional en Venezuela," *Estudios Constitucionales: Revista Semestral del Centro de Estudios Constitucionales* 4, nº 2, Universidad de Talca, Santiago, Chile 2006, pp. 221–250; Daniela Urosa Maggi, *Venezuelan National Report*, pp. 4, 5, 22.

100 See Jorge Carpizo, *El Tribunal Constitucional y sus límites*, Grijley, Lima 2009, pp. 44, 47, 51; Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación," *Revista de Derecho Público*, nº 105, Editorial Jurídica Venezolana, Caracas 2006, pp. 7–27; *VIII Congreso Nacional de Derecho Constitucional*, *Perú*, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, September 2005, pp. 463–489.

101 See George Jellinek, *Ein Verfassungsgerichtshof fur Österreich*, Alfred Holder, Vienna 1885, quoted by Francisco Fernández Segado, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas estereotipadas vinculadas a ellas," *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 196.

> slow to turn away from the current when it threatens to sweep them off, and the supremacy of the Union and the obedience due to the laws along with them.
>
> The President, who exercises a limited power, may err without causing great mischief in the state. Congress may decide amiss without destroying the Union, because the electoral body in which the Congress originates may cause it to retract its decision by changing its members. But if the Supreme Court is ever composed of imprudent or bad men, the Union may be plunged into anarchy or civil war.[102]

In the same sense, Alexander Hamilton, warned about the "authority of the proposed Supreme Court of the United States," and particularly the following:

> [Its] power of construing the laws according to the *spirit* of the Constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body.

He concluded:

> [T]he legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless.[103]

This is important to bear in mind, particularly in democratic regimes, where the conversion of constitutional courts into legislators violates the principle of separation of powers and transforms them into State organs not subject to political liability. In other words, the blurring of the limits between interpretation and normative jurisdiction "could transform the guardian of the Constitution into sovereign."[104]

The truth is that, in many countries, given the political regime or the condition of the members of constitutional courts, the important instruments designed to guarantee the supremacy of the Constitution, the enforcement of fundamental rights, and the functioning of the democratic regime have been the most diabolical instruments of authoritarianism, legitimizing the actions contrary to the Constitution taken by the other branches of government,[105] and sometimes on their own initiative by the obsequious servants of those in power. These cases, of course, make a mockery of judicial review, because as Mauro Cappelletti affirmed a few decades ago, judicial review is incompatible with

---

[102] See Alexis de Tocqueville, *Democracy in America*, ch. 8, "The Federal Constitution," trans. Henry Reeve, revised and corrected, 1899, http://xroads.virginia.edu/ ~HYPER/DETOC/1_ch08.htm See also Jorge Carpizo, *El Tribunal Constitucional y sus límites*, Grijley, Lima 2009, pp. 46–48.

[103] See Alexander Hamilton, nº 81 of *The Federalist*, "The Judiciary Continued, and the Distribution of the Judiciary Authority"; Clinton Rossiter (Ed.), *The Federalist Papers*, Penguin Books, New York 2003, pp. 480. See also Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 10.

[104] See Francisco Fernández Segado, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas estereotipadas vinculadas a ellas," *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 161.

[105] See Néstor Pedro Sagües, *La interpretación judicial de la Constitución*, LexisNexis, Buenos Aires 2006, p. 31.

authoritarianism and not tolerated by authoritarian regimes that are enemies of freedom.[106] This illness of judicial review, that is also a case of the pathology of judicial review, occurs when constitutional courts, as docile instruments of governments, openly assume the role of the legislator, usurping its powers and functions or, even worse, assuming the role of the constituent power by mutating the Constitution in an illegitimate way.[107] Unfortunately, this has been the case of constitutional courts acting at the service of authoritarian governments, and the Constitutional Chamber of the Supreme Tribunal of Justice in Venezuela is an example. In many aspects, that example shows how serious the illness is that is affecting constitutional jurisdiction and turning constitutional justice into unconstitutional justice.[108]

---

[106] See Mauro Capelletti, "¿Renegar de Montesquieu? La expansión y legitimidad de la justicia constitucional," *Revista Española de Derecho Constitucional* 6, nº 17, Madrid 1986, p. 17; Francisco Eguiguren and Liliana Salomé, *Peruvian National Report I*, p. 7.

[107] See regarding the case of the Constitutional Chamber in Venezuela, Allan R. Brewer-Carías "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999–2009)," in *Revista de Administración Pública*, nº 180, Madrid 2009, pp. 383–418; "La ilegítima mutación de la Constitución por el juez constitucional y la demolición del Estado de derecho en Venezuela," in *Revista de Derecho Político*, nº 75–76, Homenaje a Manuel García Pelayo, Universidad Nacional de Educación a Distancia, Madrid, 2009, pp. 289–325.

[108] See generally Allan R. Brewer-Carías, *Crónica de la "in"justicia constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Editorial Jurídica Venezolana, Caracas 2007.

Chapter 2

CONSTITUTIONAL COURTS' INTERFERENCE WITH THE CONSTITUENT POWER

Constitutional courts, being constitutional organs leading with constitutional questions, in many cases interfere not with the ordinary Legislator, but with the constitutional legislator, that is with the constituent power, by enacting constitutional rules when resolving constitutional disputes between state organs or even by legitimately making changes to a constitution by means of adapting its provisions and giving them concrete meaning.

I. CONSTITUTIONAL COURTS' RESOLUTION OF DISPUTES OF CONSTITUTIONAL RANK AND ENACTMENT OF CONSTITUTIONAL RULES

The principle of the supremacy of the Constitution, particularly regarding rigid Constitutions, implies that the Constitution and all constitutional rules can be enacted only by the constituent powers established and regulated in the same constitution. This constituent power can be the people, directly expressing their will (e.g., by means of a referendum) or an organ of the State acting as a derived constituent power. The consequence is that no constituted power of the State by itself can enact constitutional rules, except when expressly authorized by a constitution to participate in a constitution-making process.

Nonetheless, in contemporary constitutional law, there are cases in which constitutions authorize, exceptionally and indirectly, organs of the State to enact constitutional rules. For instance, this is the case of parliaments when the constitution has authorized them to enact laws with constitutional rank (i.e., constitutional laws). In other cases, constitutions expressly authorize constitutional courts to enact constitutional rules when deciding conflicts regarding attributions of State organs, for instance on matters of political decentralization. This is particularly true in federal States, which are always constructed on a constitutional system of territorial distribution of powers between the federal (national) and state level, and even in some cases, a municipal level.

When resolving conflicts of competencies between constitutional organs, constitutional courts without a doubt enact constitutional rules. It is in this sense that Konrad Lachmayer, with respect to Austria, says that, since 1925, article 138.2 of the Constitution has enabled the Constitutional Court to act as a positive legislator, giving positive powers to the court in the sensitive area of the division of competences between the Federation and the states (*Länder*). The provision reads as follows: "The Constitutional Court furthermore determines at the request of the Federal Government or a state Government whether a legislative or executive act is part of the competence of the Federation or the States." This means that the

Constitutional Court has the final say on the question of whether ultimate authority belongs to the Federation or to the states (*Länder*).

Because in the Austrian concept of a federal state, concurring competences between the federal level of government and the states do not exist, but only exclusive competencies according to a strict separation of powers, the decisions of the Constitutional Court, established in article 138.2 of the Constitution, is understood to be an authentic interpretation of the Constitution, meaning that the Constitutional Court, when deciding conflicts between constitutional entities, "enacts constitutional law."[1]

In other federal states with the same concentrated system of judicial review as Austria, constitutional courts are also empowered to decide on constitutional conflicts between the Federation and the states, and consequently to determine the territorial level of government to which correspond the competence in conflict. This is the case, for instance, of Venezuela, where the Constitutional Chamber of the Supreme Tribunal is empowered to arbitrate constitutional controversies raised between national, state, and municipal bodies (article 336.9 of the Constitution)[2] in a system in which, in addition to exclusive competencies of the three levels of government, there are also concurrent competencies. The decision of the Constitutional Chamber, when determining the level of government that possesses the competency, undoubtedly has constitutional value.

Nonetheless, this judicial review power can become an instrument for illegitimately mutating the Constitution in a way contrary to its provisions. This happened precisely in Venezuela, in particular, regarding the distribution of competencies between the various territorial levels of government (municipalities, states, and national government), which can be changed only by means of a constitutional reform.[3] Specifically, it happened regarding the competency referred to the conservation, administration and use of roads and national highways, and administration and use of national ports and airports of commercial use, which the Constitution assigns in an "exclusive" way to the states (article 164.10). In 2007, by proposing a constitutional reform, the National Executive intended to centralize this competence of the states,[4] but it was rejected by the people in referendum. Nonetheless, what could not be achieved through popular vote was achieved by the Constitutional Chamber of the Supreme Tribunal in Decision No. 565 of April 15, 2008,[5] issued deciding

---

1 See Konrad Lachmayer, *Austrian National Report*, pp. 1–2.

2 See, e.g., Decision nº 2401 of October 8, 2004, "*Gobernador del Estado Carabobo v. Poder Ejecutivo Nacional*," *Revista de Derecho Público*, nº 99–100, Editorial Jurídica Venezolana, Caracas 2004, p. 317.

3 See Allan R. Brewer-Carías, "Consideraciones sobre el régimen de distribución de competencias del poder público en la Constitución de 1999," in Fernando Parra Aranguren and Armando Rodríguez García (eds.), *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, con ocasión del Vigésimo Aniversario del Curso de Especialización en Derecho Administrativo*, vol. I, Tribunal Supremo de Justicia, Caracas 2001, pp. 107–136.

4 See Allan R. Brewer-Carías, *Hacia la consolidación de un estado socialista, centralizado, policial y militarista: Comentarios sobre el sentido y alcance de las propuestas de reforma constitucional 2007*, Editorial Jurídica Venezolana, Caracas 2007, pp. 41 ff.; Brewer Carías, *La reforma constitucional de 2007 (Comentarios al proyecto inconstitucionalmente sancionado por la Asamblea Nacional el 2 de Noviembre de 2007)*, Editorial Jurídica Venezolana, Caracas 2007, pp. 72 ff.

5 See Constitutional Chamber, Decision nº 565 of April 15, 2008, case: *Attorney General of the Republic, interpretation recourse of article 164,10 of the 1999 Constitution of 1999*, http://www.tsj.gov.ve/decisio-

an autonomous recourse for constitutional interpretation filed by the attorney general. In such ruling, the "exclusive attribution" of the states was converted into a "concurrent" competency that the National Government can revert it in its favor. With this interpretation, the Constitutional Chamber illegitimately mutated the Constitution; usurped popular sovereignty; and changed the federal form of government by mutating the territorial distribution system of powers between the National Power and the states.

The U.S. Supreme Court can also be mentioned regarding the delimitation of the powers of the federal government in relation to the states. In this regard, since 1937, the Supreme Court has developed an expansive constitutional interpretation of congressional authority, according Congress broad authority to regulate under constitutional provisions like the commerce clause of the U.S. Constitution. Article 1, section 8, of the Constitution states, "The Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," This provision was initially interpreted in *Gibbon v. Ogden*, 22 U.S. (9 Wheat) I (1824), in which Chief Justice John Marshall, writing for the Court, defined *commerce* to include "all phases of business" and "among the several States" to refer to interstate effects, even if commerce occurs within a state. This clause, "the focus of most of the Supreme Court decisions that have considered the scope of congressional power and federalism,"[6] led to the adoption of very important Supreme Court decisions that were issued after the invalidation of various important pieces of New Deal legislation, like *National Labor Relations Board v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937), *United States v. Darby* 312 U.S. 199 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942).

In these decisions, the Supreme Court ceased to distinguish between commerce and other kind of business, such as mining, manufacturing, and production, allowing Congress to exercise control over all business; ceased to distinguish between direct and indirect effects of interstate commerce, allowing Congress to regulate any activity that cumulatively had an effect on interstate commerce; and ceased to consider the Tenth Amendment as a limit on congressional power. Under the test developed, during the following decades, according to Erwin Chemerinsky, it has been difficult to imagine anything that Congress cannot regulate under the commerce clause, so long as it does not violate another constitutional provision.[7] By means of the case law on matters related to the federal State, the Supreme Court's decisions, without doubt, eventually have enacted constitutional rules.

However, in enacting rules about constitutional disputes regarding constitutional distribution of powers in federal States, constitutional courts are not authorized to enact

---

nes/scon/Abril/565-150408-07-1108.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, pp. 15–16. See the comments in Allan R. Brewer-Carías, "La ilegítima mutación de la Constitución y la legitimidad de la jurisdicción constitucional: la 'reforma' de la forma federal del Estado en Venezuela mediante interpretación constitucional," in *Memoria del X Congreso Iberoamericano de Derecho Constitucional*, Instituto Iberoamericano de Derecho Constitucional, Asociación Peruana de Derecho Constitucional, Instituto de Investigaciones Jurídicas–UNAM y Maestría en Derecho Constitucional–PUCP, IDEMSA, Lima 2009, vol. 1, pp. 29–51.

6 See Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, Aspen Publishers, New York, 2006, pp. 243 ff.

7 *Id.*, pp. 259–260.

constitutional rules or to give constitutional rank to provisions adopted by constitutional organs of the State not authorized to enact constitutional rules. The contrary would be a violation of a constitution, as occurred also in Venezuela, where the Constitutional Court gave constitutional rank and even supraconstitutional rank to provisions that the people had not approved. In effect, after the popular approval of the 1999 Constitution, the National Constituent Assembly adopted a set of "constitutional transition" provisions, not approved by the people, by means of a decree of the "Regime of Transition of the Public Power."[8] In the decree, the Constituent Assembly dismissed all heads of the branches of government, including members of the Supreme Tribunal, and appointed new ones, changing the content of the transition provisions contained in the text of the Constitution. The decree was challenged before the Constitutional Chamber of the Supreme Tribunal of Justice, which issued Decision No. 6, of January 27, 2000,[9] ruling that the National Constituent Assembly had "supraconstitutional" power to create constitutional provisions without popular approval, admitting the existence in the country of two parallel transitional constitutional regimes: the one contained in the transition provisions of the Constitution approved by the people and those approved by the National Constituent Assembly without popular approval. In this way, the Chamber illegitimately changed the Constitution, thus violating popular sovereignty and giving birth to a long period of constitutional instability that still has not ended. This constitutional mutation was ratified by the same Constitutional Chamber in Decision Nº 180 of March 18, 2000.[10]

II. CONSTITUTIONAL COURTS AND JUDICIAL REVIEW OF PROVISIONS OF THE CONSTITUTION AND OF CONSTITUTIONAL REFORMS AND AMENDMENTS

Constitutional courts can also enact constitutional rules when they are empowered to review the Constitution itself, as is the case in Austria, where the Constitutional Court is empowered to confront the Constitution with its own basic principles, like the principle of democracy, the federal state, the rule of law, separation of powers, and the general system of human rights. Exercising this power, the Austrian Constitutional Court declared in 2001 a constitutional provision itself as unconstitutional, annulling it.[11] The reason for this decision was the ongoing policy of the Austrian legislator to (indirectly) legitimize unconstitutional provisions, which the Constitutional Court had annulled, by creating new constitutional provisions mirroring the former unconstitutional ones. In this case, the Constitutional Court

---

8 *Gaceta Oficial* nº 36.859, December 29, 1999.

9 See *Milagros Gómez et al*. case, in *Revista de Derecho Público*, nº 81, Editorial Jurídica Venezolana, Caracas, 2000, pp. 81 ff., http://www.tsj.gov.ve/decisiones/scon/Enero/06-270100-000011.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 14.

10 See *Allan Brewer-Carías et al.* case, in http://www.tsj.gov.ve/decisiones/scon/Marzo/180-280300-00-0737%20.htm. See the comments in Allan R. Brewer-Carías, *Golpe de estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, Mexico City 2002, pp. 367 ff.; Brewer-Carías, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: El caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)," *Revista de Administración Pública*, nº 180, Madrid 2009, pp. 383–418. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 14.

11 See, e.g., Constitutional Court, Decision VfSlg 16.327/2001; Konrad Lachmayer, *Austrian National Report*, p. 6 (footnote 20).

declared void a constitutional provision excluding parts of the Public Procurement Act from its compliance with the Constitution. The scope of review by the Court was limited to the basic principles of the Constitution, holding that the democracy principle and the *Rechtsstaat* principle were violated by exempting constitutional compliance with a significant aspect of legislation (public procurement) in a general manner.[12]

In the same sense, constitutional courts can enact constitutional rules when exercising judicial review over constitutional amendments. For instance, in Colombia, according to article 379 of the Constitution, all constitutional review procedures, including the convening of popular referendum or constituent assemblies are subject to judicial review by the Constitutional Court, which can declare them unconstitutional if they violate rules of procedure.[13] In Ecuador, article 433 of the Constitution assigns the Constitutional Court the power to determine which constitutional review procedure (reform or amendment) must be applied. The Constitution of Bolivia allows the Constitutional Tribunal to decide on actions of unconstitutionality filed against the procedures of partial reform of the Constitution.[14]

Greek courts also have affirmed their power to engage in judicial review of constitutional amendments, although without specifying the exact constitutional basis or engaging in any meaningful scrutiny of constitutional amendments.[15]

The situation is completely different in cases where constitutional courts exercise judicial review powers regarding reforms or amendments of the Constitution on their merits, not only on matters of procedure. This happens for instance, when the constituent powers try to change constitutional clauses that, according to the express terms of the Constitution, are declared as principles or provisions that cannot be modified or changed. For instance, the Constitution of Brazil establishes: "No proposal of amendment shall be considered which is aimed at abolishing: I. The federative form of State; II. The direct, secret, universal and periodic vote; III. The separation of the Government Powers; IV. Individual rights and guarantees" (article 64, para. 4).

Nonetheless, the powers of a constitutional court to exercise judicial review of the merits of constitutional reforms or amendments, even in cases of clauses that the Constitution stipulates as not modifiable, must be expressly established as one of its competency, as has been established in many countries regarding review on procedural matters concerning constitutional reforms or amendments. On the contrary, the exercise by the constitutional court of judicial review powers not authorized in the Constitution as to the merits of constitutional reforms or amendments would eventually lead the Court to substitute itself

---

12 *Id.*, p. 9.

13 See Mario Alberto Cajas Sarria, "Acerca del control judicial de la reforma constitucional en Colombia," *Revista Iberoamericana de Derecho Procesal Constitucional*, nº 7, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico 2007, pp. 19 ff.

14 See Allan R. Brewer-Carías, *Reforma constitucional y fraude a la Constitución. Venezuela 1999-2009*, Academia de Ciencias Políticas y Sociales, Caracas 2009, pp. 78 ff.; Brewer-Carías, "La reforma constitucional en América Latina y el control de constitucionalidad," in *Reforma de la Constitución y control de constitucionalidad. Congreso Internacional, Pontificia Universidad Javeriana, Bogotá Colombia, junio 14 al 17 de 2005*, Pontificia Universidad Javeriana, Bogotá, 2005, pp. 108–159.

15 See Supreme Special Court Judgment nº 11/2003, *DtA* 2009, 553 (555–556); Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 11 (footnote 85).

for the constituent power. This is what happened, for instance, in Colombia in a decision No. C-141 issued by the Constitutional Court on February 26, 2010, in which the Court annulled Law No. 1,354 of 2009, which convened a referendum to approve reforms to article 197 of the Constitution to allow the reelection for a third period of the President of the Republic.[16] In this case, the Court, in addition to considering various procedural vices affecting the popular initiative of the legislation, and the legislative process followed in the approval of the challenged law, also considered the existence of "vices or excesses in the exercise of the power of constitutional reform." Referring to jurisprudence established since 2003 "under the name of the theory of substitution, the Court confirmed that "it is not feasible any constitutional reform ignoring structural principles or defining elements of the Constitution of 1991," and it affirmed its power to exercise judicial review even regarding the law convening a constitutional reform referendum. As to Law 1,354 of 2009, the Court "found that it ignores some structural axes of the Political Constitution like the principle of separation of powers and the system of checks and balances, the rule of alternation and presidential terms, the right to equality and the general and abstract nature of the laws."[17] The general conclusion of the Constitutional Court's Decision of 2010 to declare the unconstitutionality and to annul Law No. 1,354 was that it was not just "a matter of mere procedural irregularities but of substantial violations of the democratic principle, one of whose essential components is the respect of the forms provided so that the people can express itself."[18]

Regarding this decision of the Constitutional Court, Sandra Morelli has considered it "nothing less than surprising that to find the national body responsible for guarantying the supremacy of the Constitution and its preservation, in sharp contrast with the content of Article 247 of the Constitution that limit[s] its competence to consider vices of procedure when exercising control of constitutionality on the laws convening a constitutional referendum, and that it does it raising the issue that the proposed constitutional reform would constitute a substitution of the constitutional system, in a way that only the primary constituent would be legitimized for such purpose." According to Morelli, "the Colombian constitutional court, on the one hand, is curtailing the powers to reform of the constituted bodies, and on the other, referring to powers, the mutations of the constitution."[19]

In India, the Supreme Court has changed the Constitution on matters of constitutional amendments by establishing substantive limitations on the power of the parliament to amend the Constitution, not provided for in article 368 of the Constitution. In this respect, the Indian Supreme Court, in *Kesvananda Bharti v. State of Kerala*, interpreted an "implied" limitation on the power of Parliament to amend the Constitution, in the sense that

---

[16] Initially the Court published Communiqué nº 9, on February 26, 2010, containing the basic ruling. See http://www.corteconstitucional.gov.co/comunicados/No.%2009%20Comunicado%2026%20de%20febrero%20de%202010.php. See also Sandra Morelli, *Colombian National Report*, pp. 13–16; Germán Alfonso López Daza, *Colombian National Report I*, p. 6. The full text of the decision was later published in 2011. See in http://www.corteconstitucional.gov.co/ relatoria/2010/c-141-10.htm.

[17] *Id*., p. 19.

[18] *Id*., p. 20.

[19] *Id*., p. 22.

it cannot amend the basic features or basic structure of the Constitution.[20] Consequently, judicial review is interpreted as a basic feature of the Constitution,[21] which means that even a constitutional amendment cannot remove the power of judicial review, thus converting the Supreme Court, according to Surya Deva, to "probably the most powerful court in any democracy."[22]

Finally, a case in Venezuela must be mentioned in which the Constitutional Chamber of the Supreme Tribunal of Justice refused to control the constitutionality of a constitutional review procedure that was challenged on grounds of its unconstitutionality. The 1999 Venezuelan Constitution establishes three different and precise procedures for constitutional reforms: the "Constitutional Amendment," the "Constitutional Reform," and the "National Constituent Assembly," depending on the degree and importance of the proposed reforms, the latter being needed for major reforms aiming to transform the State. In 2007, at the initiative of the President of the Republic, the National Assembly sanctioned a "Constitutional Reform" directed to transform the Democratic Decentralized Social State established in the 1999 Consitution into a Socialist, Centralized and Militaristic State.[23] The reform procedure that was followed was challenged before the Constitutional Chamber, but it refused to hear the popular actions filled against it on the grounds that they were "not allowed to be proposed" (*improponibles*) pending the definitive approval of the reform, renouncing to be the guardian of the Constitution'supremacy.[24] Nonetheless, it was the people in the December 7, 2007 referendum who rejected the unconstitutional reform.[25]

III. CONSTITUTIONAL COURTS' ADAPATION OF THE CONSTITUTION AND THE QUESTION OF LEGITIMATE CHANGES TO THE CONSTITUTION

The situation is different when constitutional courts adapt constitutional provisions through interpretation. Undoubtedly, one of the main roles of constitutional courts during judicial review of statutes is to interpret the Constitution and to adapt its provisions

---

[20] See Surya Deva, *Indian National Report*, pp. 5–6.

[21] See *Waman Rao v. Union of India*, AIR 1981 SC 271; *S P Sampath Kumar v. Union of India*, AIR 1987 SC 386; *L Chandra Kumar v. Union of India*, AIR 1997 SC 1125. See Surya Deva, *Indian National Report*, p. 6 (footnote 41).

[22] See Surya Deva, *Indian National Report*, p. 6.

[23] See on the reform proposal Allan R. Brewer-Carías, *Hacia la consolidación de un Estado Socialista, Centralizado, Policial y Militarista. Comentarios sobre el sentido y alcance de las propuestas de reforma constitucional 2007*, Colección Textos Legislativos, nº 42, Editorial Jurídica Venezolana, Caracas 2007; Brewer-Carías, *La reforma constitucional de 2007 (Comentarios al Proyecto inconstitucionalmente sancionado por la Asamblea Nacional el 2 de noviembre de 2007)*, Colección Textos Legislativos, No.43, Editorial Jurídica Venezolana, Caracas 2007; Brewer-Carías, *Reforma constitucional y fraude a la Constitución (1999–2009)*, Academia de Ciencias Políticas y Sociales, Caracas 2009.

[24] See Allan R. Brewer-Carías, "El juez constitucional vs. la supremacía constitucional o de cómo la jurisdicción constitucional en Venezuela renunció a controlar la constitucionalidad del procedimiento seguido para la 'reforma constitucional' sancionada por la Asamblea Nacional el 2 de noviembre de 2007, antes de que fuera rechazada por el pueblo en el referendo del 2 de diciembre de 2007," in Eduardo Ferrer Mac-Gregor y César de Jesús Molina Suárez (Coordinarores), *El juez constitucional en el Siglo XXI*, Universidad nacional Autónoma de México, Suprema Corte de Justicia de la Nación, México 2009, Tomo I, pp. 385–435.

[25] See the comments in Allan R. Brewer-Carías, "La reforma constitucional en Venezuela de 2007 y su rechazo por el poder constituyente originario," in José Ma. Serna de la Garza (coord.), *Procesos Constituyentes contemporáneos en América latina. Tendencias y perspectivas*, Universidad Nacional Autónoma de México, México 2009, pp. 407–449.

according to constitutional principles and values, particularly on matters of protecting fundamental rights. In such cases, according to Laurence Claus and Richard S. Kay, constitutional courts "engage in positive constitutional lawmaking," particularly when the rule they "formulate, creates 'affirmative' public duties."[26] Consequently, it is possible to accept judge-made constitutional "mutations," this expression understood to mean "change[s] in the interpretation of a constitutional provision, the meaning of which is altered in spite of the maintenance of the same wording of the Constitution."[27] But in this there are some risks. As I wrote a few years ago, if it is true that "constitutional courts, certainly, can be considered as a phenomenal instrument for the adaptation of the Constitution, and the reinforcement of the rule of law," then it is also true that "they can also be a diabolic instrument of constitutional dictatorship, not subjected to control, when they validate constitutional violations made by authoritarian regimes or when separation of powers is not assured."[28]

These constitutional mutations, when reinforcing the rule of law, generally take place as a consequence of enforcing the fundamental values and principles of the Constitution, particularly the protection of fundamental rights and the strengthening of democratic rule. Nonetheless, they have also occurred in other constitutional matters related to the general organization of the State.

1. Adapting the Constitution on Matters of Fundamental Rights Guarantees

Regarding the protection of fundamental rights, the mutation of the Constitution in many countries has resulted from constitutional courts "discovering" fundamental rights that were not expressly listed in a constitution, and consequently enlarging the scope of the constitutional provisions. In this regard, constitutional courts always have had an additional duty over that of the ordinary judge, in that they must defend the Constitution and its foundational values at a given time.[29]

This is why it is considered legitimate for constitutional courts, in their interpretative process, to adapt a constitution to the current values of society and the political system, precisely "to keep the constitution alive."[30] To that end, because a constitution is not a static

---

[26] See Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 6.

[27] See Salvador O. Nava Gomar, "Interpretación, mutación y reforma de la Constitución: Tres extractos," in Eduardo Ferrer Mac-Gregor (coord.), *Interpretación constitucional*, vol. 2, Editorial Porrúa, Universidad Nacional Autónoma de México, Mexico City 2005, pp. 804 ff. See also Thomas Bustamante and Evanlida de Godoi Bustamante, *Brazilian National Report*, p. 28. See generally Konrad Hesse, "Límites a la mutación constitucional," in *Escritos de derecho constitucional*, Centro de Estudios Constitucionales, Madrid 1992, pp. 79–104.

[28] See Allan R. Brewer-Carías, "La reforma constitucional en América Latina y el control de constitucionalidad," in *Reforma de la Constitución y control de constitucionalidad. Congreso Internacional junio 14 al 17 de 2005*), Pontificia Universidad Javeriana, Bogotá, 2005, pp. 108–159.

[29] This has been particularly true, for instance, in the process of the transformation in the former socialist States of Eastern Europe to contemporary democratic States subject to the rule of law. See, e.g., Marek Safjan, *Polish National Report*, pp. 7, 10; Sanja Barić and Petar Bačić, *Croatian National Report*, pp. 18, 21, 28; Boško Tripković, *Serbian National Report*, pp. 1, 14.

[30] See Mauro Cappelletti, "El formidable problema del control judicial y 1a contribución del análisis comparado," *Revista de Estudios Políticos* 13, Madrid 1980, p. 78; "The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis," *Southern California Law Review*, 53, 1980, p. 409 ff.

document, constitutional courts must be creative in effectively applying constitutions that may have been written, for instance, in the nineteenth century, particularly when controlling the constitutionality of legislation according to the evolving social needs and institutions of the country.

This also occurs in the case of more recent constitutions, where fundamental rights sometimes are expressed in a vague, and elusive way, with provisions expressed in ambiguous, but worthy, terms, such as *liberty*, *democracy*, *justice*, *dignity*, *equality*, *social function*, and *public interests*.[31] This leads to the need for judges to have an active role when interpreting what have been called a constitution's "precious ambiguities"[32] and "majestic generalities."[33]

It is precisely in these matters, as mentioned by Laurence Claus and Richard S. Kay, that the U.S. Supreme Court's elaboration of constitutional principles and values "provides perhaps the most salient example of positive lawmaking in the course of American constitutional adjudication." For instance, the Court interpreted the equal protection clause of the Fourteenth Amendment to expound the nature of equality; it argued about the constitutional guarantee of due process (Amendments V and XIV), and the open clause of Amendment IX, to construct a sense of liberty.[34] As Geoffrey R. Stone has pointed out regarding the text of the U.S Constitution:

> It defines our most fundamental rights and protections in an open-ended terms: "freedom of speech," for example, and "equal protection of laws," "due process of law," "unreasonable searches and seizures," "free exercise" of religion and "cruel and unusual punishment." These terms are not self-defining; they did not have clear meaning even to the people who drafted them. The framers fully understood that they were leaving it to future generations to use their intelligence, judgment and experience to give concrete meaning to the expressed aspirations.[35]

In particular, for instance, it was in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), that this process of mutating the U.S. Constitution began for matters of fundamental rights. It is important to bear in mind that the 1789 U.S. Constitution and the 1791 amendments did not establish the principle of equality and that the Fourteenth Amendment

---

31 See Mauro Cappelletti, "Nécessité et légitimité de la justice constitutionnelle," in Louis Favoreu (ed.), *Cours constitutionnelles européenes et droit fundamentaux*, Economica, Presses Universitaires d'Aix-Marseille, 1982, p. 474.

32 "If it is true that precision has a place of honor in the writing of a governmental decision, it is mortal when it refers to a constitution which wants to be a lively body." S. M. Hufstedles, "In the Name of Justice," *Stanford Lawyers* 14, nº 1 (1979), pp. 3–4, quoted by Mauro Cappelletti, "Nécessité et légitimité de la justice constitutionnelle," in Louis Favoreu (ed.), *Cours constitutionnelles européennes et droit fondamentaux*, Economica, Presses Universitaires d'Aix-Marseille, 1982, p. 474; L. Favoreu, *Le contrôle juridictionnel des lois et sa légitimité. Développements récents en Europe Occidentale*, Association Internationale des Sciences Juridiques, Colloque d'Uppsala 1984, (mimeo), p. 32.

33 See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). See Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 12 (footnote 33).

34 See Laurence Claus and Richard S. Kay, *U.S. National Report*, pp. 12–13.

35 See Geoffrey R. Stone, "Our Fill-in-the-Blank Constitution," op-ed, *New York Times*, April 14, 2010, p. A27.

(1868) included only the equal protection clause, which until the 1950s had been interpreted differently.

This process converted the Court, according to Claus and Kay, into "the most powerful sitting lawmaker in the nation,"[36] by having used old but renewed means of relief, particularly equitable remedies, to move beyond prohibitory to mandatory relief. This is one of the most striking developments in modern constitutional law, and it produced changes impossible to imagine a few years earlier. As aforementioned, these means were broadly applied in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), where the Supreme Court held that racial segregation in public education was a denial of the "equal protection of the laws," which, under the Fourteenth Amendment, no state was to deny to any person within the state's jurisdiction. The Court needed to answer various questions to find segregation unconstitutional, such as whether the ruling should order that African American children "forthwith be admitted to schools of their choice" or whether the court should "permit an effective gradual adjustment" to systems.[37] Eventually, these inquiries led the Supreme Court, in May 1954, to declare racial segregation incompatible with the Fourteenth Amendment. It issued the final ruling in the case in May 1955, two and a half years after the initial argument.[38]

In effect, in *Brown*, the Supreme Court changed the meaning of the Fourteenth Amendment. Chief Justice Warren said:

> In approaching this problem we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

This assertion led Chief Justice Warren to conclude:

> [I]n the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs, and others similarly situated from whom the actions have been brought are by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

In other contexts, particularly in France, where the Constitution does not make a declaration of fundamental rights, the role of the Constitutional Council during the past decades must be highlighted, beginning with the important decision adopted on July 16,

---

[36] See Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 20. On the different stages in the process of law regarding those clauses, see *id.*, pp. 13–14. The authors argue that "the law of liberty and equality in America is now, in large measure, ultimately created and shaped by the Supreme Court," p. 14.

[37] *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953). See Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 26 (footnote 89).

[38] *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953). See Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 27 (footnote 91).

1971, concerning freedom of association.[39] In that case, the Constitutional Council accepted the positive legal value of the Preamble to the 1958 Constitution with all its consequences,[40] which conformed with what Louis Favoreu called the *bloc de constitutionnalité*.[41]

Consequently, regarding the particular law establishing a procedure to control the acquisition of legal capacity by association, the Constitutional Council considered it against the Constitution,[42] arguing that the Preamble to the 1946 Constitution referred to the "fundamental principles recognized by the laws of the Republic," among which the principle of liberty of association was to be included. The Council, in accordance with such principle, considered that associations were to be constituted freely and able to develop their activities with the only condition of filing a declaration before the Administration, that was not submitted to a previous authorization by either administrative or judicial authorities. Thus, the Constitutional Council decided that fundamental constitutional principles were included not only in the Preamble of the 1958 Constitution but also in the Preamble of the 1946 Constitution, and through it in the Declaration of Rights of Man and Citizens of 1789. Thus, the limits imposed on associations by the proposed bill establishing prior judicial control of the Declaration were considered unconstitutional. In this way, according to Jean Rivero:

> The liberty of association, which is not expressly established either in the Declaration or by the particularly needed principles of our times, but which is only recognized by a Statute of 1 July 1901, has been recognized by the Constitutional Council decision, as having a constitutional character, not only as a principle, but in relation to the modalities of its exercise.[43]

This sort of adaptation of the French Constitution was also developed by the Constitutional Council in the well-known *Nationalization* case in 1982, which applied the article concerning the right of property in the Declaration of the Rights of Man and Citizen of 1789 and declared the right to property as having constitutional force. In its decision of January 16, 1982,[44] even though the article of the 1789 Declaration concerning property

---

[39] See L. Favoreu and L. Philip, *Les grandes décisions du Conseil Constitutionnel*, Dalloz, Paris 1984, p. 222–237; Bertrand Mathieu, *French National Report*, p. 2.

[40] See L. Favoreu, "Rapport général introductif," in *Cours constitutionnelles européenes et droit fondamentaux*, Economica, Presses Universitaires d'Aix-Marseille, 1982, pp. 45–46.

[41] See L. Favoreu, "Le principe de Constitutionalité. Essai de definition d'apres la jurisprudence du Conseil Constitutionnel," *Recueil d'Étude en Hommage a Charles Eisenman*, Paris 1977, p. 34. On comparative law, see also Francisco Zúñiga Urbina, "Control de constitucionalidad y sentencia," *Cuadernos del Tribunal Constitucional*, nº 34, Santiago de Chile 2006, pp. 46–68.

[42] See the Constitutional Council decision in L. Favoreu and J. Philip, *Les grandes décisions du Conseil Constitutionnel*, Dalloz, Paris 1984, p. 222. See the comments of the July 16, 1971, decisions in J. Rivero, "Note," *L'Actualité Juridique. Droit Administratif*, Paris, 1971, p. 537; J. Rivero, "Principles fondamentaux reconnus par les lois de la République; une nouvelle catégorie constitutionnelle?" *Dalloz 1974*, Chroniques, Paris 1974, p. 265; J. E. Bradsley, "The Constitutional Council and Constitutional Liberties in France," *American Journal of Comparative Law* 20, nº 3 (1972), p. 43; B. Nicholas, "Fundamental Rights and Judicial Review in France," *Public Law*, 1978, p. 83.

[43] See J. Rivero, "Les garanties constitutionnelles des droits de l'homme en droit français," in *IX Journées Juridiques Franco-Latino Américaines*, Bayonne, May 21–23, 1976 (mimeo), p. 11.

[44] See L. Favoreu and L. Philip, *Les grandes décisions du Conseil Constitutionnel*, Dalloz, Paris 1984, pp. 525–562.

rights was considered obsolete, and so its interpretation could not result in a completely different sense from the one defined in 1789,[45] the Constitutional Council stated:

> Taking into account that if it is true that after 1789 and up to the present, the aims and conditions of the exercise of the right to property have undergone an evolution characterized both, by a notable extension of its application to new individual fields and by limits imposed by general interests, the principles themselves expressed in the Declaration of Rights of Man have complete constitutional value, particularly regarding the fundamental character of the right to property, the conservation of which constitutes one of the aims of political society, and located on the same rank as liberty, security and resistance to oppression, and also regarding the guarantees given to the holders of that right and the prerogatives of public power.[46]

In this way, the Constitutional Council not only created a constitutional right by giving the 1789 Declaration constitutional rank and value but also adapted the "sacred" right to property established two hundred years earlier to the limitable right of our times, thus allowing the Council to declare unconstitutional certain articles in the Nationalization statute regarding the banking sector and industries of strategic importance (especially in electronics and communications).

The role of constitutional courts in adapting the Constitution to guarantee fundamental rights not expressly established in the Constitution, even in the absence of open constitutional clauses like the Ninth Amendment to the U.S. Constitution, has been commonly accepted, mainly because of the principle of progressiveness in the protection of fundamental rights.[47]

In Switzerland, for instance, before the 1999 constitutional reform was sanctioned, which included an extended declaration of fundamental rights, the Federal Supreme Court interpreted the previous 1874 Constitution, which included only a few fundamental rights, as allowing for very important unwritten fundamental rights, including the guarantee of property (1960);[48] freedom of expression (1961);[49] the right to personal freedom within the meaning of a right to physical and mental integrity (1963);[50] freedom of language (1965);[51] the right to existence and care, including a minimum of governmental assistance in case of

---

[45] See L. Favoreu, *Le contrôle juridictionnel des lois et sa légitimité. Développements récents en Europe Occidentale*, Association Internationale des Sciences Juridiques, Colloque d'Uppsala 1984 (mimeo), p. 32.

[46] See L. Favoreu and L. Philip, *Les grandes décisions du Conseil Constitutionnel*, Dalloz, Paris 1984, p. 526; L. Favoreu, "Les décisions du Conseil Constitutionnel dans l'affaire des nationalisations," *Revue du Droit Public et de la Science Politique en France et à l'Étranger* 98, nº 2, Paris 1982, p. 406.

[47] See Pedro Nikken, *La protección internacional de los derechos humanos: Su desarrollo progresivo*, Instituto Interamericano de Derechos Humanos, Ed. Civitas, Madrid 1987; Mónica Pinto, "El principio *pro homine*: Criterio hermenéutico y pautas para la regulación de los derechos humanos," in *La aplicación de los tratados sobre derechos Humanos por los tribunales locales*, Centro de Estudios Legales y Sociales, Buenos Aires 1997, p. 163.

[48] See Supreme Court, in ZBl 62/1961, 69, 72; Tobias Jaag, *Swiss National Report*, p. 11 (footnote 49).

[49] See BGE 87 I 114, 117; Tobias Jaag, *Swiss National Report*, p. 11 (footnote 51).

[50] See BGE 89 I 92, 97 ff.; Tobias Jaag, *Swiss National Report*, p. 11 (footnote 56).

[51] See BGE 91 I 480, 485 ff. This includes the right to use one's native language. See Tobias Jaag, *Swiss National Report*, p. 12 (footnote 59).

need (1995);[52] freedom of assembly and freedom of expression, which encompass the right to hold public demonstrations (1970);[53] and the freedom to demonstrate.[54] Also, before the 1999 constitutional reform, the Federal Supreme Court recognized the freedom to elect and vote as a constitutional right;[55] most important, it enforced the right of women to participate in the Landsgemeinde (assembly of the citizens as the highest legislative body) of the Canton Appenzell-Innerrhoden,[56] where the Cantonal Constitution provided that only men could participate in such an assembly. All these rights were later included in the 1999 Constitution.

In Germany, the Federal Constitutional Tribunal has also developed an important process of interpreting the constitution to protect fundamental rights. Ines Härtel refers to a 2008 decision adopted by the Federal Constitutional Tribunal regarding the searches of computers. in which the Tribunal created a "new" basic right on the "warranty of confidentiality and integrity in information technology systems." In this case, in the course of the judicial review process of a provision of a North Rhine–Westphalia law regarding the change of the statute by the Federal Office for the Protection of the Constitution, the Tribunal ruled on the protection of general personal rights provided in article 2, section 1, in conjunction with article 1, section 1, of the Constitution,[57] in particular within the tension between liberty and security that affects the handling of personal data and information.

In Poland, the Constitutional Tribunal has developed judicial activism regarding the expansion of human rights, particularly after 1989, with the fall of the country's totalitarian system and the need to build the structures of a democratic state of law. The Constitutional Tribunal was pushed to interpret the standards of rights and freedoms not directly expressed in the Constitution, and to complement existing constitutional provisions, according to the new democratic values and system. Consequently, the Tribunal derived such fundamental rights as the right to the protection of human life before birth,[58] the right to trial,[59] the right to privacy,[60] ban on retroactivity,[61] the rule of protection of duly acquired rights,[62] the

---

52 See BGE 121 I 367, 370 ff.; Tobias Jaag, *Swiss National Report*, p. 12 (footnote 61).

53 See BGE 96 I 219, 223 ff.; Tobias Jaag, *Swiss National Report*, p. 11 (footnote 52).

54 See BGE 100 Ia 392, 400 ff.; Tobias Jaag, *Swiss National Report*, p. 11 (footnote 53).

55 *Cf.* BGE 121 I 138, 141 ff.; Tobias Jaag, *Swiss National Report*, p. 12 (footnote 64).

56 See BGE 116 Ia 359 ff.; Tobias Jaag, *Swiss National Report*, p. 13 (footnote 66).

57 See BVerfG, Reference nº 1 BvR 370/07 from February 27, 2008, available at http://www.bverfg.de/entscheidungen/rs20080227_1bvr037007.html; I. Härtel, *German National Report*, p. 12.

58 See Decision of May 28, 1997, K 26/96, OTK ZU 1997/2/19; Marek Safjan, *Polish National Report*, p. 9 (footnote 22).

59 See Decision of January 7, 1992, K 8/91, OTK ZU 1992, part 1, pp. 76–84; of June 27, 1995, K4/94, OTK 1993, part 2, pp. 297–310; Marek Safjan, *Polish National Report*, p. 9 (footnote 23).

60 See Decision of June 24, 1997, K21797, OTK ZU 1997/12/23; Marek Safjan, *Polish National Report*, p. 9 (footnote 24).

61 See Decision of August 22, 1990, K7/90, OTK 1990, pp. 42–58; Marek Safjan, *Polish National Report*, p. 9 (footnote 25).

62 See Decision of February 25, 1992 K3/9, OTK 1992, part 1, item 1; Marek Safjan, *Polish National Report*, p. 9 (footnote 26).

protection of business and legal security,[63] and the principle of proportionality, for instance in the imposition of sanctions.[64]

Also in Poland, the Court has been charged with giving specific content to programmatic clauses established in the Constitution, particularly during the transformation from an authoritarian socialist State to one of democratic rule of law. In this process, the broad catalog of general rules established in the Constitution related to social and economic rights, and the definition of the economic system as a "social market economy" (article 20 of the Constitution) were developed by the Constitutional Court. That is why, regarding these rules, Judge Marek Safjan said, that "if these rules are not to remain a pure ideology and constitutional decorum, expressing the 'wishful thinking' attitude of the authors of the Constitution, the Constitutional Court by turning rules into norms, and seeking at least a minimal normative content in the so-called program norms," has exercised "an increasingly stronger influence on the directions of state policy in these dimensions."[65] For such purpose, the Court following the superior values in the Constitution, has filled in these concepts, pinpointing and determining their boundaries. As Judge Safjan explains:

> It is characteristic for each Constitution to employ a large number of "open" norms having undefined (fuzzy) normative scope, expressing fundamental legal values and creating "axiology of the Constitution." This search for a normative content hidden in the general, undefined constitutional expressions, as well as decoding other – more precise and concrete – norms out of them, setting limits to the application of rules and establishing a special "hierarchy" between the colliding rules and values – is inscribed into the nature of interpretation of the Constitution and is closely connected with the essence of the function of each constitutional court.[66]

With respect to the principle of proportionality, the Constitutional Court of Croatia also has developed this principle, determining that the State must draft legislation related to individual rights and liberties, including in their regulation, appropriate and proportional solutions in the scope of their limitations. The 1990 Constitution refers only to the proportionality principle in article 17 on the restriction of rights and freedoms during a state of emergency, without establishing it as a clear general principle of Croatian Constitutional Law. Consequently, during regular or normal circumstances, article 16 applies, which states only that rights and freedoms can be restricted by law only "to protect freedoms and rights

---

[63] See Decision of July 15, 1996, K5/96, OTK ZU 1996, part 2, pp. 16–28; Marek Safjan, *Polish National Report*, p. 9 (footnote 28).

[64] See Decision of April 26, 1995, K11/94, OTK 1995, part 1, item 12; Marek Safjan, *Polish National Report*, p. 9 (footnote 29).

[65] See Marek Safjan, *Polish National Report*, p. 12. On decisions establishing positive normative content from the so-called program norms, see, e.g., National Health Fund of January 7, 2004, K14703, OTK ZU 2004/1A/1; the protection of consumer (biofuels) of April 21, 2004, K33/03, OTK ZU 2004/4A/31; the protection of tenants judgments of January 12, 2001, P11/98, OTK ZU2000/1/3; and April 19, 2005, K 4/05, OTK ZU 2005/4A/37; and the social market economy of January 29, 2007, P5/05,2007/1A/1. See Marek Safjan, *Polish National Report*, p. 12 (footnote 37).

[66] See Marek Safjan, *Polish National Report*, p. 7.

of others, public order, public morality and health."[67] Because the legislators had displayed what was considered political immoderateness by disproportionately restricting rights and freedoms, the Constitutional Court gradually started to apply the proportionality principle in all matters, clearly indicating to legislators the limitations that they could impose on rights and freedoms to protect the general well-being of individuals and their communities.[68]

In Greece, the Council of State, which rules on matters of judicial review, has explicitly recognized the constitutional rank of the proportionality principle as a corollary of rule of law.[69] In contrast, since 1998, the Council of State has construed the constitutional principle of gender equality to allow positive measures that aim to establish true equality between men and women.[70] After a long debate between constitutional scholars and the courts, the Council of State ultimately followed the *Areios Pagos* court by extending the scope of a statutory provision to groups of persons who had been unconstitutionally excluded. In addition, especially since 1993, the Council of State has derived the principle of sustainable development from the Greek Constitution's environmental clauses (article 24) and in connection with European Union law. On this basis, the Council of State has emphasized that the sole constitutionally permissible form of economic development is sustainable development that incorporates the needs of future generations. With the 2001 constitutional amendments, the Greek Constitution explicitly established the principle of sustainable development (article 24.1.1)[71]

Regarding the same matter of constitutional courts mutating constitution provisions on fundamental rights, in Portugal, the Constitutional Tribunal, in Decision No. 474/95, established that, although the wording of article 33 of the Constitution prohibited, at that time, only extradition for crimes for which the death penalty was legally possible, the principles of the Constitution also prohibited extradition for crimes punishable by life imprisonment. Furthermore, the Court's ruling provides the keystone for the interpretation of the conditions that must be fulfilled to allow for extradition of persons charged with crimes for which a sentence of death or life imprisonment is possible.[72] The consequence of this mutation was an amendment to the Constitution introduced in 1997 on the wording of article 33.4 of the Constitution, concerning extradition for crimes punishable under the applicant state's law by a sentence or security measure which deprives or restricts freedom in perpetuity or for an undefined duration.

---

67 In the 2000 constitutional amendment, the principle was also incorporated in article 17: "Every restriction of freedoms or rights shall be proportional to the nature of the necessity for restriction in each individual case."

68 See Sanja Barić and Petar Bačić, *Croatian National Report*, pp. 23 ff.

69 See Council of State Judgment nº 2112/1984, *ToS* 1985, 63 (64); Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 14.

70 See Council of State (Full Bench) Judgment nº 1933/1998, *ToS* 1998, 792 (793). After the 2001 amendments, the Constitution explicitly allows the "adoption of positive measures for promoting equality between men and women" (art. 116, sec. 2). See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 16 (footnote 123).

71 See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 22.

72 See Ruling nº 384/05, summary of which can be found in *Bulletin on Constitutional Case-Law*, Venice Commission, Edition 2005, vol. 2, pp. 269–271, in Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, pp. 9–10.

In India, the Supreme Court has introduced important changes in the Constitution, particularly by expanding the scope of fundamental rights. For instance, article 21 of the Constitution establishes, "No person shall be deprived of his life or personal liberty except according to procedure established by law." The Supreme Court ruled in 1970, reversing a previous position, that the expression "procedure established by law" in the article refers to a procedure that must be "right, just and fair." Thus, the Court gave itself the authority to judge whether a procedure laid down by the Legislator conformed to the principles of natural justice,[73] which is especially remarkable because the constituent assembly, after a long debate, had expressly rejected the due process clause.[74]

In contrast, regarding the right to life under article 21 of the Indian Constitution, the Supreme Court has interpreted it to include the right to health,[75] the right to livelihood,[76] the right to free and compulsory education up to fourteen years of age,[77] the right to an unpolluted environment[78] and to clean drinking water,[79] the right to shelter,[80] the right to privacy,[81] the right to legal aid,[82] the right to a speedy trial,[83] and various rights of persons under trial (convicts and prisoners).[84] The Court extended the meaning of *life* by, among other things, reading nonjusticiable directive principles of State policy into fundamental rights. As Surya Deva affirmed, the effect of this judicial extension of fundamental rights had a direct bearing on the power of judicial review: the more fundamental rights are recognized, the broader would be the scope for judicial review.[85]

In the Slovak Republic, the Constitutional Court has played an important role in mutating and complementing the Constitution to guarantee the protection of fundamental rights. This

---

73 *Maneka Gandhi v. Union of India*, AIR 1879 SC 597. See Surya Deva, *Indian National Report*, p. 4 (footnote 24).

74 See Surya Deva, *Indian National Report*, p. 4.

75 See *Parmanand Kataria v. Union of India*, AIR 1989 SC 2039; *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 4 SCC 37; Surya Deva, *Indian National Report*, p. 5 (footnote 28).

76 See *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180; *DTC Corporation v. DTC Mazdoor Congress*, AIR 1991 SC 101. In *id.*, p. 5 (footnote 29).

77 See *Unni Krishnan v. State of AP*, (1993) 1 SCC 645. In *id.*, *p.* 5 (footnote 30).

78 See, e.g., *Indian Council for Enviro Legal Action v. Union of India*, (1996) 3 SCC 212; *M C Mehta v. Union of India*, (1996) 6 SCC 750; *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647; *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664. In *id.*, p. 5 (footnote 31).

79 See *A P Pollution Control Board II v. M V Nayudu*, (2001) 2 SCC 62. In *id.*, p. 5 (footnote 33).

80 See *Gauri Shankar v. Union of India*, (1994) 6 SCC 349. In *id.*, p. 5 (footnote 32).

81 See *Kharak Singh v. State of UP*, AIR 1963 SC 1295; *Govind v. State of MP*, AIR 1975 SC 1378; *R Raj Gopal v. State of Tamil Nadu*, (1994) 6 SCC 632; *PUCL v. Union of India*, AIR 1997 SC 568; *'X' v. Hospital Z*, (1998) 8 SCC 296. In *id.*, p. 5 (footnote 34).

82 See *M H Hoskot v. State of Maharashtra* AIR 1978 SC 1548; *Hussainara Khatoon v. State of Bihar* AIR 1979 SC 1369; *Khatri v. State of Bihar* AIR 1981 SC 928; *Suk Das v. Union Territory of Arunachal Pradesh* AIR 1986 SC 991. In *id.*, p. 5 (footnote 35).

83 See *Hussainara Khatoon (I) to (VI) v. Home Secretary, Bihar* (1980) 1 SCC 81; *Kadra Pahadiya v. State of Bihar* AIR 1982 SC 1167; *Common Cause v. Union of India* (1996) 4 SCC 33 and (1996) 6 SCC 775; *Rajdeo Sharma v. State of Bihar* (1998) 7 SCC 507 and (1999) 7 SCC 604. In *id.*, p. 5 (footnote 36).

84 See *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675; *Prem Shankar v. Delhi Administration* AIR 1980 SC 1535; *Munna v. State of UP* AIR 1982 SC 806; *Sheela Barse v. Union of India* AIR 1986 SC 1773. In *id.*, p. 5 (footnote 37).

85 See Surya Deva, *Indian National Report*, p. 5.

has happened, for instance, on matters of the right to personal freedom and physical integrity, particularly regarding the extension of the duration of pretrial detentions without the basis of a decision of the court,[86] and on matters of the right to enter and leave the territory of the Slovak Republic freely, which is guaranteed in the Constitution. In the latter case, the Court interpreted this right in such a way that it deduced an obligation of State bodies to actively participate in its protection. According to the Court, the constitutional provision means not only that State bodies are not allowed to create obstacles to the free return of a citizen to the territory of the Slovak Republic but also that State bodies are obliged to actively help citizens to return to the territory. Consequently, the bodies of the Slovak Republic (e.g., the Ministry of Foreign Affairs) have an obligation to help citizens to return to Slovak Republic when they have been kept abroad against their will, even if that obligation is not enumerated in the law and State bodies did not have the explicit requirement to do so.[87]

Of course, all these constitutional mutations are considered legitimate because they follow the basic principle of the progressive protection of human rights. On the contrary, they represent also a case of the pathology of judicial review when courts make such mutations to reduce the scope of protection of fundamental rights, as in Venezuela, where the Constitutional Chamber of the Supreme Tribunal of Justice, in Decision No. 1.939 of December 18, 2008,[88] ignored the decisions of the Inter-American Court on Human Rights by declaring that its rulings condemning the Venezuelan State for violations of human rights are unenforceable in Venezuela. This also occurred with the decision of the Chamber issued on August 5, 2008, in the case of the former judges of the First Court on Contentious Administrative Jurisdiction who were illegitimately dismissed without any sort of judicial guarantees (*Apitz Barbera et al. [First Court on Contentious Administrative Matters] v. Venezuela*[89]). In its decision, the Constitutional Chamber accused the Inter-American Court on Human Rights of usurping the power of the Supreme Tribunal.[90] This decision contradicted article 31 of the Constitution, which established the right of access to international protection in matters of human rights, with the State being obligated to carry out the decisions of such international bodies. But the Constitutional Chamber did not stop there. In an evident usurpation of powers, it requested that "the National Executive . . .

---

86 See decisions I. ÚS 6/02, I. ÚS 100/04, II. ÚS 111/08, II. ÚS 8/96; Ján Svák and Lucia Berdisová, *Slovak National Report*, pp. 12–13.

87 See Decision nº II. ÚS 8/96; Ján Svák and Lucia Berdisová, *Slovak National Report*, pp. 12.

88 See *Gustavo Álvarez Arias et al.* In fact, the case can be identified as "*Venezuelan Government vs. Inter-American Court on Human Rights.*" See http://www.tsj.gov.ve/ decisiones/scon/Diciembre/1939-181208-2008-08-1572.html. See the comments in Allan R. Brewer-Carías, *Reforma constitucional y fraude a la Constitución (1999–2009)*, Academia de Ciencias Políticas y Sociales, Caracas 2009, pp. 253 ff.

89 See.http://www.adc-sidh.org/images/files/apitzbarberaingles.pdf. Judgment of August 5, 2008 (*(Preliminary Objection, Merits, Reparations and Costs)*

90 The issue had been affirmed by the Constitutional Chamber in its known Decision nº 1.942 of July 15, 2003, in which, when referring to the International Courts, the Chamber stated that, in Venezuela, "above the Supreme Court of Justice and according to article 7 of the Constitution, there is no jurisdictional body, unless stated otherwise by the Constitution or the law, and even in this last possible case, any decision contradicting the Venezuelan constitutional order, lacks of application in the country." See "Impugnación de artículos del Código Penal, Leyes de desacato," *Revista de Derecho Público*, nº 93–96, Editorial Jurídica Venezolana, Caracas 2003, pp. 136 ff.

proceed to denounce the Convention, in view of the evident usurpation of functions in which the Inter American Court on Human Rights has incurred into with the ruling object of this decision." With this, the Venezuelan State continued in its process of separating from the American Convention on Human Rights and avoiding the jurisdiction of the Inter-American Court on Human Rights, using the Supreme Tribunal for this purpose.

Another case in which the Constitutional Chamber of the Supreme Tribunal of Venezuela changed constitutional provisions affecting fundamental rights is refer to the political right to participation by means of referendum, established in article 72 of the 1999 Constitution as a political right of the people to revoke or repeal the mandates of all popular elected offices. The petition for such a referendum must derive from popular initiative, and the mandate is considered revoked when "a number of electors equal or higher than those who elected the official, vote in favour of the revocation."[91] Nevertheless, in a clearly unconstitutional way, the Constitutional Chamber, in Decision No. 2750 of October 21, 2003,[92] abstractly interpreting article 72 of the Constitution, endorsed a resolution of the National Electoral Council (Resolution No. 030925-465 of September 25, 2003) and decided against the Constitution by adding to the provision that the revocation of the mandate can proceed only if votes to revoke, even if greater than those cast for the election, "do not result to be lower than the number of electors that voted against the revocation." As to the revoked public official, the Chamber considered that, "if the option of his permanence obtains more votes in the referendum, he should remain in office." In this way, the Chamber illegitimately changed the nature of the revocation referendum, turning it into a "ratifying" referendum of mandates.[93]

The position of the Venezuelan Supreme Tribunal on the Constitution contradicts the general one of constitutional courts: they cannot substitute for the constituent power by deducing concepts in a way that goes against what is written in the Constitution, nor can they interpret the Constitution in a way so as to arrive at concepts that could be contrary to the constitutional text and its fundamental values. As Jorge Carpizo has pointed out:

---

[91] This was ratified by the Constitutional Chamber in several decisions: Decision nº 2750 of October 21, 2003, case: *Carlos Enrique Herrera Mendoza (Interpretación del artículo 72 de la Constitución* (Exp. 03-1989), *Revista de Derecho Público*, nº 93–96, Editorial Jurídica Venezolana, Caracas 2003; and Decision nº 1139 of June 5, 2002, case: *Sergio Omar Calderón Duque and William Dávila Barrios*, *Revista de Derecho Público*, nº 89–92, Editorial Jurídica Venezolana, Caracas 2002, p. 171. The same criterion was followed in Decision nº 137 of February 13, 2003, case: *Freddy Lepage Scribani et al.* (Exp. 03-0287).

[92] See Carlos E. Herrera Mendoza, *Interpretación del artículo 72 de la Constitución, Revista de Derecho Público*, nº 93–96, Editorial Jurídica Venezolana, Caracas 2003.

[93] This mutation had a precise purpose in 2004: to avoid revocation of the mandate of the President of the Republic (Hugo Chávez). He had been elected in August 2000 with 3,757,744 votes, so a greater number of votes in a revocation referendum twould have been enough to revoke his mandate. The number of votes in favor of the revocation of the mandate of the President of the Republic, cast in the August 15, 2004 revocation referendum, was 3,989,008, reason for which his mandate could be considered constitutionally revoked. Nonetheless, the National Electoral Council, because more votes were cast against his revocation of the President mandate, on August 27, 2004 decided instead to "ratify" the President of the Republic in his position until the culmination of the constitutional term in January 2007. See *El Nacional*, Caracas, 08-28-2004, pp. A-1 and A-2. See the comments in Allan R. Brewer-Carías, "La Sala Constitucional vs. El derecho ciudadano a la revocatoria de mandatos populares o de cómo un referendo revocatorio fue inconstitucionalmente convertido en un 'referendo ratificatorio,'" in *Crónica sobre la "in"justicia constitucional: La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público, Universidad Central de Venezuela, nº 2, Editorial Jurídica Venezolana, Caracas 2007, pp. 350 ff.

> [C]onstitutional courts cannot usurp the functions of the Constituent Power, and consequently, they cannot create provisions or principles that could not be referred to the Constitution; they can deduct implicit principles from those expressly included, like human dignity, liberty, equality, juridical security, social justice, Welfare State.[94]

In the same sense, as Sandra Morelli has pointed out, constitutional courts cannot be "above the Constitution," and they cannot "appropriate the Constitution for themselves, in an abusive way," such as by invading the field of the Legislator or of the Constituent Power. The contrary would open the door to "irresponsible judicial totalitarianism."[95]

2. The Mutation of the Constitution on Institutional Matters

But constitutional mutations by constitutional courts have not occurred only in the field of fundamental rights; they have also occurred with respect to other key constitutional matters, including the organization and functioning of the State.

For instance, the German Federal Constitutional Tribunal also issued a decision mutating the Constitution, in the case *AWACS-Urteil* on July 12, 1994.[96] The Tribunal reviewed the constitutionality of the deployment, in peacetime, of missions of German Armed Forces to foreign countries. The decision referred to the modalities surrounding the deployment, and the Tribunal concluded that the deployment of troops to foreign countries required the consent of the legislative branch. Although this assertion is reasonable – the Tribunal considered it "a requirement that derives directly from the Constitution" – the truth is that it was not expressly established in the Constitution, and the Legislator had sanctioned no legislative development on the matter. In this case, the Tribunal not only mutated the Constitution but even issued a detailed substitute legislation (provisional measures) contained in the decision, ordering the Legislator and the Executive to proceed according to it until a statute was adopted to establish in a more detailed way "the formal participation of the Legislator in the adoption of decisions related with the use of German troops in military missions."[97]

In Austria, the Constitutional Court has also filled in the fundamental principles of the Constitution, which has had substantial influence on the interpretation of Austrian constitutional law.[98] The most important example is the principle of *Rechtsstaat* (rule of law), from which various concepts have been derived, including the principle of legality and, from it, the principle of clarity, which obliges the legislator to provide clear and detailed provisions, the principle of comprehensibility of legislative acts,[99] and the principle

---

94 See Jorge Carpizo, *El Tribunal Constitucional y sus límites*, Grijesly Ed., Lima 2009, pp. 56, 68.

95 See Sandra Morelli, *La Corte Constitucional: Un papel por definir*, Academia Colombiana de Jurisprudencia, 2002; *Colombian National Report II*, p. 3.

96 See BVferG, July 12, 1994, BVeffGE 90, 585–603; Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 352–356; I. Härtel, *German National Report*, p. 20.

97 See BVferG, July 12, 1994, BVeffGE 90, 286 (390), in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, p. 354.

98 See Konrad Lachmayer, *Austrian National Report*, p. 8.

99 See VfSlg 12.420/1990, in Konrad Lachmayer, *Austrian National Report*, p. 8 (footnote 24).

of effective legal protection,[100] which obliges Parliament to provide sufficient and adequate legal protection to individuals. Through these interpretations, the Court created new constitutional limitations on Parliament, which had to adapt its legislation to the Court's new standards.

In the same line, the Austrian Court has sometimes even created a new constitutional framework for Parliament to follow when enacting legislation in areas not expressly provided for in the Constitution, such as the privatization process. In four main judgments,[101] the Court established an obligatory framework for privatizing state functions exercised by specific organizations, thus intervening in the legislative function and governmental policy and defining the functions and tasks of the State itself. The Court derived the rules from different provisions of the Constitution, requiring, for instance, the application in all privatization processes of the principles of rationality, efficiency, and legality, as well as the principle of the hierarchical structure of Public Administration. In contrast, according to these rules, the State is only authorized to privatize singular tasks, not an entire area of State functions; and in any case, the State has to provide effective control mechanisms with regard to private organizations performing the tasks of State authorities. Finally, the Court defined core areas of State functions that cannot be privatized at all, including foreign affairs, internal affairs, jurisdiction (judicial system), and criminal law. In this way, the Court created a new understanding of the Constitution and imposed it on all State authorities.[102]

Also regarding the limits of privatization, the Greek Council of State has held that the principles of popular sovereignty and separation of powers do not allow conferring police powers to privatize legal entities.[103]

In the Slovak Republic, where the Constitutional Court has the exceptional attribution of rendering abstract interpretations of the Constitution in cases of disputes between two State bodies with different interpretations of a constitutional provision, the Court has issued important decisions that have mutated and complemented the Constitution. This has happened, for instance, regarding the position and authority of the President of the Republic within the general organization of the State. In the original text of the Constitution of the Slovak Republic, inspired by the classical parliamentary form of the government, the President had the relatively weak position of a *porvoir neuter*. It was the Constitutional Court that directly strengthened the President's position through interpretation of the Constitution, affirming in 1993 that, "even if the Government of the Slovak Republic ("government") is the highest executive body (art. 108), the constitutional position of the President of Slovak Republic is in fact dominant towards the constitutional position of the

---

100 See VfSlg 11.196/1986; Konrad Lachmayer, *Austrian National Report*, p. 8 (footnote 25).

101 See "Austro Control" decision VfSlg 14.473/1996, "Bundeswertpapieraufsicht" (Federal Bond Authority) decision VfSlg 16.400/2001, "E-Control" decision VfSlg 16.995/2003, "Zivildienst-GmbH" (Compulsory Community Service Ltd) decision VfSlg 17.341/2004; Konrad Lachmayer, *Austrian National Report*, p. 11 (footnote 31).

102 See Konrad Lachmayer, *Austrian National Report*, p. 11.

103 See Council of State (Full Bench) Judgment nº 1934/1998, *ToS* 1998, 598 (602–603) (concerning enforcement of no-parking zones); Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 16 (footnote 125).

government."[104] The question debated was whether the President had the right or the constitutional obligation to appoint members of the government on the basis of a motion by the Prime Minister. The Court added that, "to create inner balance within the executive power, the Constitution of the Slovak Republic assigns the President of the Slovak Republic only the obligation to deal with the motion of the Prime Minister, it is not his obligation to comply with it.[105] This decision of the Court had serious consequences for the constitutional system of the Slovak Republic, as it strengthened the position of the President, and made the Court, as mentioned by Ján Svák and Lucia Berdisová, "the direct creator of the constitutional system of the Slovak Republic."[106]

This constitutional mutation was latter reaffirmed in the matter of the competence to appoint the Chief of the General Staff of the Army, which a law had vested in the government. Nonetheless, with article 102 of the Constitution establishing the competence of the President to appoint and recall "higher state officials," the Court interpreted "higher state official" in deciding that there is no "obstacle that could keep the President from the execution of his competence towards Chief of the General Staff of the army as a higher state official."[107]This decision, issued in connection with the direct interpretation of the Constitution by the Court, is considered to have "de facto transformed classical parliamentary form of government into some kind of semi-presidential form, and yet without the change of the normative text of the Constitution."[108]

In Canada, where the Supreme Court also has the exceptional power to issue reference judgments at the request of public officials and entities of the State, among the most important Supreme Court decisions on constitutional matters are those in which the Court has created and declared constitutional rules. In particular, in the 1981 *Patriation Reference*,[109] the Court laid down the basic rules governing the patriation of Canada's Constitution from the United Kingdom; and in the 1998 *Quebec Secession Reference*,[110] the Supreme Court dealt with the possible secession of Quebec from Canada. These two cases were decided at the request of the federal government, which has statutory powers to refer questions of law, including those involving the constitutionality of legislation, directly to the Supreme Court of Canada.[111] In the decisions, the Supreme Court laid down some basic rules for guiding constitutional change and warned of potential constitutional crises that could arise from arguably unconstitutional acts, such as an attempt by the federal government to change the powers of the provincial legislatures without their consent or a similarly unilateral decision by the Quebec legislature to declare its sovereignty and secession from Canada.

---

104 See Decision nº I. ÚS 39/93; Ján Svák and Lucia Berdisová, *Slovak National Report*, p. 4.

105 *Id.*

106 *Id.*

107 See Decision nº PL. ÚS 32/95; Ján Svák and Lucia Berdisová, *Slovak National Report*, p. 5.

108 *Id.*

109 [1981] 1 S.C.R. 753, in Kent Roach, *Canadian National Report*, p. 9.

110 [1998] 2 S.C.R. 217, in Kent Roach, *Canadian National Report*, p. 9.

111 See Kent Roach, *Canadian National Report*, p. 9.

IV. THE PROBLEM OF ILLEGITIMATE MUTATIONS OF THE CONSTITUTION

If constitutions are superior laws that support the validity of all the legal order, one of the institutional solutions to ensure their enforcement is the existence of a constitutional court,that must act as its guardian, with powers to annul unconstitutional State acts or to declare their unconstitutionality.

In democracies, these courts have always been the main institutional guarantee of freedom and of the rule of law. As such guardian, and as it in any rule-of-law system, the submission of the constitutional court to a constitution is absolute, not subject to discussion,[112] because it would be inconceivable that the constitutional judge can violate the Constitution that he or she is called on to apply. As a matter of principle, it is possible to imagine that other bodies of the State could violate the Constitution (e.g., Parliament), but not its guardian. For such purpose and to ensure that this does not occur, a constitutional court must have absolute independence and autonomy, because on the contrary, a constitutional court subject to the will of the political power, becomes the most atrocious instrument of authoritarianism instead of the guardian of the Constitution. Thus, in the hands of judges subject to political power, the best constitutional justice system is a dead letter for individuals and an instrument for defrauding the Constitution.

Unfortunately, the latter is what has been occurring in Venezuela since 2000. The Constitutional Chamber of the Supreme Tribunal, far from acting within the expressed constitutional attributions, has been adopting decisions that in some cases contain unconstitutional interpretations of the constitution,[113] not only about its own powers of judicial review but also about substantive matters. It has changed or modified constitutional provisions, in many cases to legitimize and support the progressive building of the authoritarian State. That is to say, it has distorted the content of the Constitution, through illegitimate and fraudulent "mutation," which in some cases the people have rejected through referendum.[114]

One of the most important instruments for accomplishing these mutations of the Constitution is the already-mentioned creation of a recourse for abstract interpretation of the Constitution, in which case constitutional interpretations is not made deciding a particular case or controversy or deciding other means of judicial review, but abstractly.

---

[112] See Néstor Pedro Sagües, *La interpretación judicial de la Constitución*, LexisNexis, Buenos Aires 2006, p. 32. In article 204 of the Portuguese Constitution, it is expressly set forth that "in matters brought before them for decision, the courts shall not apply any rules that contravene the provisions of this Constitution or the principles contained there."

[113] See Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación," in *VIII Congreso Nacional de derecho Constitucional, Perú*, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, September 2005, pp. 463–489; and Brewer-Carías, *Revista de Derecho Público*, nº 105, Editorial Jurídica Venezolana, Caracas 2006, pp. 7–27. See also Allan R. Brewer-Carías, *Crónica sobre la "in"justicia constitucional: La Sala Constitucional y el autoritarismo en Venezuela*, Editorial Jurídica Venezolana, Caracas 2007; Brewer-Carías, *Reforma constitucional y fraude a la Constitución*, Academia de Ciencias Políticas y Sociales, Caracas 2009.

[114] As mentioned, constitutional mutation occurs when the content of a constitutional standard is modified in such a way that, even when the standard maintains its content, it receives a different meaning. See Néstor Pedro Sagües, *La interpretación judicial de la Constitución*, LexisNexis, Buenos Aires 2006, pp. 56–59, 80–81, 165 ff.

This has happened in many cases of autonomous requests for interpretation filed at the request of the same national executive through the attorney general for the purpose of strengthening authoritarianism, the most notorious of which have being the following:

First, regarding article 6 of the Constitution that establishes the fundamental principles of republican government, in an immutable way, expressly including the democratic, elective, and alternate character of the government; principles that have been incorporated in Venezuelan constitutions since 1830. In particular, the principle of alternation in government, as pointed out by the Electoral Chamber of the Supreme Tribunal of Justice in Decision No. 51 of March 18, 2002,[115] implies "the successive exercise of a position by different persons, belonging or not to the same party," conceived to face the desire to remain in power. Nevertheless, in Decision No. 53 of February 3, 2009, the Constitutional Chamber confused "alternate government" with "elective government" to conclude that the principle of alternation implies only "the periodic possibility to choose government officials or representatives." The result was not only to mutate the Constitution, eliminating the principle of alternating government, but to allow a referendum that took place on February 15, 2009, for the people to vote for a "constitutional amendment" to allow for continuous reelection for elective positions. The 2009 amendment was approved in the referendum, and the Constitution was then formally changed to eliminate the principle of alternate government, which by the way was conceived as unmodifiabale in article 6 of the Constitution.[116]

Second, article 67 of the 1999 Constitution expressly establishes that "the financing of political associations with Government funds will not be allowed," a provision that in 1999 radically changed the previous regime of public financing of political parties.[117] This express constitutional prohibition regarding public financing of political parties was also one of the matters referred to in the 2007 proposed constitutional reform,[118] which sought to modify article 67 to provide that "the State will be able to finance electoral activities." As already mentioned, the 2007 constitutional reform proposal was rejected by popular vote in a referendum of December 2, 2007;[119] but the Constitutional Chamber of the Supreme Court of Justice, in Decision No. 780 of May 8, 2008, also illegitimately mutated the Constitution,

---

[115] See Allan R. Brewer-Carías, "El juez constitucional vs. la alternabilidad republicana (La reelección continua e indefinida)," *Revista de Derecho Público*, nº 117, Editorial Jurídica Venezolana, Caracas 2009, pp. 205–211.

[116] *Id.*

[117] As was established in article 230 of the Organic Law of Suffrage and Political Participation of 1998. See Allan R. Brewer-Carías, "Consideraciones sobre el financiamiento de los partidos políticos en Venezuela," in *Financiamiento y democratización interna de partidos políticos: Memoria del IV Curso Anual Interamericano de Elecciones*, San José, Costa Rica, 1991, pp. 121–139; Brewer-Carías, "Regulación jurídica de los partidos políticos en Venezuela," in *Estudios sobre el Estado constitucional (2005–2006)*, Cuadernos de la Cátedra Fundacional Allan R. Brewer Carías de Derecho Público, Universidad Católica del Táchira, nº 9, Editorial Jurídica Venezolana. Caracas, 2007, pp. 655–686.

[118] See *Proyecto de exposición de motivos para la reforma constitucional, Presidencia de la República, Proyecto Reforma Constitucional: Propuesta del presidente Hugo Chávez Agosto 2007; Proyecto de Reforma Constitucional, Prepared by the President of the Bolivarian Republic of Venezuela, Hugo Chávez Frías*, Editorial Atenea, Caracas, August 2007, p. 19.

[119] See Allan R. Brewer-Carías, "La proyectada reforma constitucional de 2007, rechazada por el poder constituyente originario," in *Anuario de Derecho Público 2007*, Universidad Monteavila, Caracas 2008, pp. 17-65.

contrary to the popular will. The Chamber ruled that the constitutional prohibition only "limit[ed] the possibility to provide resources for the internal expenses of the different forms of political associations, but…said limitation is not extensive to the electoral campaign, as a fundamental stage of the electoral process." That is, the Constitutional Chamber, again, usurped the constituent power, substituted itself for the people, and reformed the provision, thus expressly allowing for government financing of the electoral activities of the political parties and associations, contrary to what the Constitution provides for.

Finally, the decision of the Constitutional Chamber to modify article 203 of the Constitution must be mentioned, as here the Chamber mutated an important constitutional rule of procedure for the approval of organic laws. Article 203 of the Constitution, in effect, defines the various types of organic law[120] and establishes in general terms that, to reform an organic law, a special quorum of two-thirds of the votes of members of the National Assembly is required. The Constitutional Chamber, in Decision No. 34 of January 26, 2004,[121] ruled that such a special quorum was not necessary to initiate the discussion of organic law drafts to reform existing organic laws that have such denomination in the Constitution, thus illegitimately changing a constitutional procedural condition regarding the approval of statutes.

Constitutional mutations have also occurred in other countries through judicial decisions, particularly on matters of presidential reelections, which in Latin American constitutional history has always provoked political conflicts because of the traditional general prohibition on reelection. Sometimes, the prohibition has been embodied in provisions considered immutable, as was the case in Honduras, where attempts by former President Manuel Zelaya in 2009 to change the constitutional prohibition on reelection by means of a constitutional assembly provoked one of the most bitter political conflicts in the region in the past decades.[122]

A similar constitutional provision prohibiting the continuous reelection of the President of the Republic is also established in article 147 of the Constitution of Nicaragua, which nonetheless was "reformed" by the Supreme Court of the country in Decision No. 504 of October 19, 2009, when ruling on an amparo action filed against a decision of the Supreme Electoral Council, in which the Council rejected a request to apply the principle to equality to all public officials on matters of election. In the case, no specific candidacy was involved, and the decision consisted in a rejection of the petition due to the lack of attributions of the

---

[120] According to article 203, "organic laws" are those qualitied as such in the text of the Constitution itself, as well as those enacted for the purpose of organizing the branches of government, or for the regulation of constitutioonal rights, or which serve as normative framework of other statutes.

[121] See *Vestalia Araujo* case, interpretation of article 203 of the Constitution, at http://www.tsj.gov.ve/decisiones/scon/Enero/34-260104-03-2109%20.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 14.

[122] See Allan R. Brewer-Carías, "Reforma constitucional, asamblea nacional constituyente y control judicial contencioso administrativo: El caso de Honduras (2009) y el precedente venezolano (1999)," *Revista Aragonesa de Administración Pública*, nº 34 (June 2009), Gobierno de Aragón, Zaragoza 2009, pp. 481–529. In 2010, the Constitution of Honduras was changed in order to establish the possibility of the reelection of the President of the Republic.

Supreme Electoral Council to decide on such matter. In the decision, nonetheless, the Supreme Court, incomprehensibly declared article 147 of the Constitution "inapplicable," mutating in an illegitimate way the Constitution, by eliminating from its text the entrenched prohibition on reelection.[123]

[123] See Sergio J. Cuarezma Terán and Francisco Enríquez Cabistán, *Nicaragua National Report*, p. 43.

CONSTITUTIONAL COURTS AND THE CONSTITUENT POWER

Chapter 3

CONSTITUTIONAL COURTS' INTERFERENCE WITH THE LEGISLATOR ON EXISTING LEGISLATION

Leaving aside the relation between constitutional courts and the constituent power, the most important and common role of constitutional courts has been developed with respect to legislation, controlling its submission to the Constitution. This role is performed by the courts, not only acting as the traditional "negative" Legislator but also as a jurisdictional organ of the State designed to complement or assist legislative organs in their main function of establishing legal rules.

This role has been assumed by the courts since the initial conception of the diffuse system of judicial review in the United States, deciding not to apply statutes when considered contrary to the Constitution, thus giving preference to the latter; or in the concentrated system of judicial review, which has extended throughout the world during the last century, in which constitutional courts have the power to annul unconstitutional statutes. In all systems, in accomplishing their functions, constitutional courts have always, in some way, assisted the Legislator. At the beginning, in a limited manner, they provided only for the nullity or inapplicability of statutes declared contrary to a Constitution; subsequently, they broadly interpreted the Constitution, and the statutes in conformity with it, giving directives or guidelines to the Legislator to correct the legislative defects.

I. CONSTITUTIONAL COURTS' INTERPRETATION OF STATUTES IN HARMONY WITH THE CONSTITUTION

During the past decades, given the increasing role of constitutional courts not only as the guarantors of the supremacy of a constitution but also as its supreme interpreter through decisions with binding effects on courts, public officials, and citizens, courts have move beyond their initial role as negative legislators, ruled by the traditional unconstitutionality and invalidity-nullity dichotomy.[1] In that trend, their powers have progressively extended, and courts have assumed a more active role interpreting constitutions and statutes, in order not only to annul or not to apply them when unconstitutional but also to preserve the Legislator's actions and the statutes it has enacted, thus interpreting them in harmony with the Constitution.

Thus, when a statute can be interpreted accordingly or contrary to the constitution, courts often make efforts to preserve its validity by choosing to interpret it in harmony with the Constitution and by rejecting interpretations that could result in the statute being declared unconstitutional. This is a general principle currently applied in comparative law.

---

[1] See F. Fernández Segado, *Spanish National Report*, pp. 8 ff.

This role of courts has been a classical principle in the U.S. Supreme Court judicial review doctrine, formulated by Justice Brandeis:

> When the validity of an act of Congress is drawn in question, and even, if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[2]

This approach to judicial review, followed in all countries, responds to the principle of conservation or preservation of legislation (norm preservation) when issued by the democratically elected representative body of the State, whose legislative acts are covered by their presumption of constitutionality.[3] This principle has led to two lines of action: (1) by overestimating the presumption, in which the validity of the legislation is assumed until a decision is adopted, and (2) by preserving the piece of legislation by interpreting it according to the Constitution.

In the first case, in Greece, for example, courts traditionally have failed to meaningfully and consistently scrutinize the constitutionality of legislation, instead emphasizing the need to respect legislative prerogatives and considering the mere existence of legislation that restricts constitutional rights a sufficient basis to uphold its constitutionality.[4]

In the second case, it has been the practice of constitutional courts in all judicial review systems to issue so-called interpretative decisions, which the Constitutional Tribunal of Spain has defined as those

> that reject an unconstitutionality action, that is to say, that declare the constitutionality of the challenged statutory provision, provided that it be interpreted in the sense that the Constitutional Tribunal considered according to the Constitution, or not to be interpreted in the sense that it is considered not according.[5]

Of course, in this regard, interpretative decisions are those that interpret statutes in harmony with the Constitution to preserve their enforcement and to avoid declaring them contrary to the Constitution, a notion that cannot be applied when the courts interpret the Constitution according to a statute to also avoid the declaration of the statute's unconstitutionality. As has been indicated for Greece, if it is true that to avoid reaching a holding of unconstitutionality, Greek courts have regularly interpreted statutory law as

---

2 See *Ashwander v. TVA*, 297 U.S. 288, 346–48 (1936). The principle was first formulated in *Crowell v. Benson*, 285 U.S. 22, 62 (1932). See "Notes. Supreme Court Interpretation of Statutes to avoid constitutional decision," *Columbia Law Review*, Vol. 53, nº 5, New York, May 1953, pp. 633–651.

3 This presumption implies the following (1) the protection of the statutes, as well as of the functions of the Legislator and its independence; (2) in case of doubt, the unconstitutionality must be rejected; (3) if two criteria exist regarding the interpretation of a statute, the one in harmony with the Constitution must be chosen; (4) when two interpretations, one contrary to the Constitution and the other according to it, the latter must be chosen. See Iván Escobar Forns, "Las sentencias constitucionales y sus efectos en Nicaragua," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, pp. 105–106. See also I. Härtel, *German National Report*, p. 6.

4 See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 12.

5 See Decision STC 5/1981, February 13, 1981, FJ 6 in Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 67; José Julio Fernández Rodríguez, *La justicia constitucional europea ante el Siglo XXI*, Tecnos, Madrid 2007, p. 129.

conforming to the Constitution, in so doing, "they have occasionally interpreted the Constitution to be in accordance with statutory law rather than conversely or they have exceeded the permissible limits of interpretation to avoid reaching a judgment of unconstitutionality." This refers to the case in which the Council of State construed the statutorily required "permission" of the Orthodox Church for the construction of religious sites of other denominations – against the wording of the statutory law in force at the time – to be a mere nonbinding opinion for the executive branch.[6] On the basis of this interpretation, Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis state that the Council of State found no violation of religious freedom according to the Greek Constitution and the European Convention on Human Rights. In construing statutory legislation contrary to its wording, however, the Council of State substituted its own formulation for that of Parliament, arguably engaging in positive legislation.[7]

In any case, the technique to interpret statutes in harmony or in conformity with the Constitution to preserve their validity has been also applied in cases of the control of "conventionality" of statutes, regarding their conformity with international treaties. With respect to the Netherlands, J. Uzman, T. Barkhuysen, and M. L. van Emmerik stated:

> [T]he courts generally assume that unless Parliament expressly deviates from its international obligations, it must clearly have intended any provision in its Act to be consistent with a given treaty. This assumption is the basis for the courts' usual practice to interpret national law as far as possible in a way consistent with the rights laid down in conventions such as the ECtHR. And it is this practice that has given rise to a few of the most celebrated but also deeply notorious (some might even say activist) Supreme Court judgments.[8]

The technique, in principle, cannot be considered invasive regarding the attributions of the Legislator, and on the contrary, being conceived to help the Legislator, its purpose is to preserve its normative products and, in a certain way, from a practical point of view, to avoid unnecessary legislative vacuums that result from the declaration of a statute as invalid or null.[9] In any case, this judicial review technique of interpretative decisions in which the unconstitutionality of a statute is rejected has helped mold constitutional courts into important constitutional institutions that assist and cooperate with the legislator in its legislative functions.

Constitutional courts have widely used these sorts of interpretative decisions.[10] In Italy, for instance, the Constitutional Court has disregarded the interpretation proposed by the *a*

---

6 See Council of State (Full Bench) Judgment nº 1444/1991, nº *V* 1991, 626 (627); Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 13 (footnote 94).

7 See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 13.

8 See J. Uzman, T. Barkhuysen, and M. L. van Emmerik, *Dutch National Report*, pp. 8, 24, 32, 37.

9 See this assertion regarding the Italian and Spanish judicial review practice in Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 92; F. Fernández Segado, *Spanish National Report*, p. 5.

10 See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, pp. 59 ff.; F. Fernández Segado, *Spanish National Report*, p. 25 ff.; I. Härtel, *German National Report*, pp. 6–7.

quo judge in the remittal ordinance regarding the unconstitutionality of a legal provision and instead has recommended a different interpretation of the same provision, one that is compatible with the Constitution. In other words, "with the interpretative decision of rejection, the question raised is declared groundless, on condition that one interprets the provision challenged in the sense indicated in it."[11] The Court's decision imposes on the *a quo* judge a negative obligation in that he or she is obliged to not insist on attributing to the provision the meaning disregarded by the Court.

Nonetheless, as interpretation is a delicate function, many times accomplished on the border between constitutionality and unconstitutionality, constitutional courts have also established limits or self-restraint regarding interpretative decisions with respect to the wording of the text to be interpreted and the intention of the Legislator when sanctioning the law.[12] In this regard, for instance, the Spanish Constitutional Tribunal has summarized the scope of interpretative decisions in decision STC 235/2007 of November 7, 2007, as follows:

> a) The effectiveness of the norms preservation principle must not ignore or configure the clear text of legal provisions, due to the fact that the Tribunal cannot reconstruct provisions against their evident sense in order to conclude that such reconstruction is the constitutional norm;
>
> b) The interpretation accordingly cannot be a contra legem interpretation, the contrary would imply to disfigure and manipulate the legal provisions; and
>
> c) It is not the attribution of the Tribunal to reconstruct a norm that is explicit in the legal provision, and, consequently, to create a new norm and the assumption by the Constitutional Tribunal of a function of Positive Legislator that institutionally it does not have.[13]

It must also be mentioned that the technique of interpreting the law in harmony with the Constitution to avoid a declaration of unconstitutionality has also been applied in France, by means of *a priori* judicial review, which has been traditionally exercised by the Constitutional Council. The technique is used to consider whether the Legislator has respected the Constitution in interpreting the law according to it.[14] In these cases, the Constitutional Council has a double task: on the one hand, it interprets the statute according to the Constitution; on the other hand, it addresses a directive to the Legislator on the conditions of the exercise of its attributions and, eventually, a directive to the authorities who must apply the law on how they must perform their duties.[15]

As Lóránt Csink, József Petrétei, and Péter Tilk highlighted in referring to Hungary, by setting constitutional requirements regarding the law, the Constitutional Court necessarily gives a narrow interpretation of the norm, thus reducing the possible constitutional

---

[11] See Gianpaolo Parodi, *Italian National Report*, p. 3.

[12] See BVerfGE, 69,1 (55); 49, 148 (157), in I. Härtel, *German National Report*, p. 6 (footnote 33).

[13] See Francisco Fernández Segado, *Spanish National Report*, p. 34.

[14] E.g., Decisions 2000-435 DC, 2001-454 DC, 2007-547 DC, in Bertrand Mathieu, *French National Report*, p. 13.

[15] See Bertrand Mathieu, *French National Report*, p. 13.

meanings. In these cases, the Court does not annul the challenged law but modifies its meaning, and in some cases, it creates a new norm – one that may result in a Court order "to neglect significant parts of the norm," even contradicting "the will of the legislator."[16] In these cases, the Court chooses one possible interpretation from the alternatives, not necessarily the same one the Legislator thought of; that is, the Court interprets the law extensively by determining a requirement that totally alters the effect of the law or gives a new statement that was not originally in the norm, thus creating a new norm.[17] The Constitutional Court's decision establishing new content for a provision is the result of a constitutional interpretation in order to make the law constitutional.[18]

Regarding all these functions of constitutional courts in interpreting statutes in harmony with the Constitution, their interference with the Legislator, and their legislative functions regarding existing and in-force legislation, they can be studied through two courses of action: by complementing legislative functions as provisional Legislators or adding rules to existing Legislation through interpretative decisions and by interfering with the temporal effects of existing legislation.

II. CONSTITUTIONAL COURTS COMPLEMENTING THE LEGISLATOR BY ADDING NEW RULES (AND NEW MEANING) TO THE EXISTING LEGISLATIVE PROVISION

Through interpretation, constitutional courts frequently create new legislative rules by altering meaning or adding what is considered lacking in the provision so that it is in harmony with the Constitution.

These additive decisions have been extensively studied particularly in Italy, where it is possible to find the widest variety of decisions issued by the Constitutional Court in declaring unconstitutional a statutory provision. They have been widely studied, analyzed, and classified under the general category of "manipulative" decisions. As Gianpaolo Parodi has explained in the Italian National Report, these decisions of acceptance of unconstitutionality, despite leaving the text of the provision unaltered, transform its normative meaning, at times reducing and at other times extending its sphere of application, not without, especially in the second case, introducing a new norm into the legal system or creating new norms. In this regard, one speaks of manipulative (or manipulating) decisions, and among them, the typically additive and substitutive decisions.[19]

The difference between interpretative decisions and manipulative decisions has also been established by Parodi as follows:

> The first of the two, indeed, preferably makes reference to the subject of the ruling: a norm obtainable in an interpretative way from a legislative statement, rather than a provision, or

[16] See Decision 48/1993 (VII.2) and Decision 52/1995 (IX.15), in Lóránt Csink, József Petrétei, and Péter Tilk, *Hungarian National Repor*t, p. 4 (footnote 10).

[17] See Decision 41/1998 (X.2), Decision 60/1994 (XII.24), and Decision 22/1997 (IV.25), in Lóránt Csink, József Petrétei, and Péter Tilk, *Hungarian National Report*, p. 4 (footnote 12).

[18] See Lóránt Csink, József Petrétei, and Péter Tilk, *Hungarian National Repor*t, p. 4.

[19] See Gianpaolo Parodi, *Italian National Report*, p. 6.

> one of its segments (in this sense, the notion fits both the interpretative decisions of acceptance in a strict sense, and the "non textual" decisions of partial acceptance); the notion of manipulative decision usually throws light on a peculiar effect of the ruling: of alteration and, precisely, manipulation of the meaning *prima facie* of the provision contested, which, on the textual plane remains unaltered.[20]

Within the additive decisions (*sentenze additive*), it is possible to distinguish additive decisions of principle, because the principles formulated in the Court's decision are established to guide "both the legislator, in the necessary normative activity subsequent to the ruling, aimed at remedying the unconstitutional omission; and ordinary judges, so that, while waiting for the legislative intervention, they find, with integration of law, a solution for the controversies submitted to them."[21]

In these cases, as pointed out by the Italian Constitutional Court in 1991, although a declaration of constitutional illegitimacy of a legislative omission leaves to the Legislator its undeniable competence to discipline the matter, even retroactively, through general legislation, "it gives a principle to which the ordinary judge is able to make reference to place a remedy in the meantime to the omission at the time of identification of the rule for the concrete case."[22]

In many cases, through additive decisions, constitutional courts establish that the challenged provision is lacking something for it to be in accordance with the Constitution; deciding that, from that moment on, the provision must be applied as if that something is not missing. As the Constitutional Tribunal of Peru has said, by means of additive decisions:

> [T]he unconstitutionality of a provision or of part of it is declared, in which the needed part for it to result in harmony with the Constitution has been omitted (in the part in which the provision does not establish that). In such cases, the whole provision is declared unconstitutional, but only its omission, so after the declaration of its unconstitutionality it will be obligatory to include within it the omitted aspect.[23]

These decisions, frequently issued to guarantee the right to equality and to nondiscrimination,[24] eventually transform an unconstitutional provision into a constitutional one by adding to the norm what is lacking, or even by substituting something into the provision. In other words, without affecting the challenged provision, they extend or expand

---

[20] See Gianpaolo Parodi, *Italian National Report*, pp. 6–7.

[21] See Gianpaolo Parodi, *Italian National Report*, p. 10.

[22] See Decision nº 295/1991, in Gianpaolo Parodi, *Italian National Report*, p. 10.

[23] See Decision of January 3, 2003 (Exp. nº 0010-2002A1-TC), in Fernán Altuve Febres, *Peruvian National Report II*, p. 13.

[24] See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, pp. 183, 186, 203, 204, 274, 299, 300; José Julio Fernández Rodríguez, *La inconstitucionalidad por omisión: Teoría general. Derecho comparado. El caso español*, Civitas, Madrid 1998, pp. 232 ff.; Joaquin Brage Camazano, "Interpretación constitucional, declaraciones de inconstitutionalidad y arsenal sentenciador (Un suscinto inventario de algunas sentencias 'atípicas')," in Eduardo Ferrer Mac-Gregor (coord.), Interpreación Constitucional, Ed. Porrúa, Vol. I, México 2005, pp. 192 ff.; Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, p. 8.

its normative content by establishing that such content must include something that is not expressly established in its text.[25] Although these decisions, in a certain way, change the scope of legislative rules regardless of any amended wording, as mentioned by Joaquim de Sousa Ribeiro, "the Court's ruling does not put up a norm *ex nihilo*. Those decisions only put forward a solution imposed by the Constitution provisions and principles by extending a rule already chosen by the legislator."[26]

Of course, the additive rulings as expressed by the Italian Constitutional Court cannot imply a discretional appraisal regarding the challenged provision, in that the Constitutional Court cannot intervene when it is a matter of choosing between a plurality of solutions, all of which are admissible – in that case, the discretion corresponds only to the Legislator.[27] However, they cannot refer to matters that must exclusively be regulated by the Legislator, such as criminal matters.[28]

One example of these additive decisions is one issued by the Constitutional Court of Italy in 1969 regarding the constitutionality of article 313.3 of the Criminal Code, in which the prosecution for insults against the Constitutional Court itself was subjected to previous authorization from the Ministry of Justice and Grace. The Court considered that such authorization contradicted the independence of the Court, arguing that the provision was unconstitutional, deducting that the authorization was to be given by the same Court,[29] and forcing the provision – according to Díaz Revorio – to say something that it was not capable of saying and even eliminating the part of it considered incompatible with the independence of the Court.[30] Another decision of this sort of the Italian Constitutional Court was issued in 1989 regarding a provision of the Criminal Code that sanctioned those refusing to serve in the military because of conscience with prison terms of two to four years. The Constitutional Court, asked to review the provision, ruled that the sanction was contrary to the constitutional right to equality because the same Criminal Code established a sanction of only six months to two years in a similar situation for those who were called to serve in the military but refused to serve without motives or because of nonserious motives. The consequence was a declaration of unconstitutionality of the provision "in the part in which the minimal sanction is established in two years instead of six months, and in the part in

---

25 See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, pp. 28, 32, 33, 45, 97,146, 165, 167, 292.

26 See Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, p. 9.

27 See Decision Nos. 109 of April 22, 1986, and125 of January 27, 1988, in Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 273 (footnote 142); Francisco Fernández Segado, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas estereotipadas vinculadas a ellas," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 164–165.

28 See Patricia Popelier, *Belgian National Report*, pp. 13–14; Iván Escobar Forns, "Las sentencias constitucionales y sus efectos en Nicaragua," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, pp. 110.

29 See Decision nº 15, February 12, 1969, in Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, pp. 151–152.

30 See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 152.

which the maximal sanction is established in four years instead of two years."[31] The result was that the Constitutional Court substituted the sanction of two to four years with another one of six months to two years.

In Germany, one of the typical additive decisions adopted by the Federal Constitutional Court is one regarding the Political Parties Law, which lowered the parties' required threshold of votes with regard to the reimbursement of election campaign costs from 2.5 percent to 0.5 percent.[32]

In Spain, an example of additive or substitutive decision is the one issued by the Constitutional Tribunal in 1988 when deciding on the constitutionality of article 7.4 of the Inter-Territorial Compensation Fund established for financing projects of the Autonomous Communities of the State, which established that, in some cases, the decision regarding the project proposals needed approval "of the Government Council of the Autonomous Communities." The Tribunal considered that this was unconstitutional, because to determine which organ of the Autonomous Communities was to intervene in the approval was a matter corresponding to their own autonomy, and the Court ruled that the reference to the Government Councils must be understood as a reference to the Autonomous Communities, without specific reference to any of their organs.[33]

Another example from the Spanish Constitutional Tribunal is the decision issued in 1993 regarding the benefit of Social Security pensions to the "daughters and sisters" of a holder of a retirement pension, which the Tribunal considered unconstitutional because, contrary to the constitutional guarantee of equality, it excluded "sons and brothers" from the benefit, extending the benefits to the latter.[34] In the same sense is a 1992 decision of the Constitutional Tribunal regarding the Urban Tenants Law, whose article 58.1 established that upon the death of a tenant, his spouse could subrogate in his rights and duties. The Court considered that the absence in the provision of any reference to those living *more uxorio* in a marital-like relationship with the deceased tenant was contrary to the right to equality and thus unconstitutional; the result was that the provision was also to be applied to them.[35] Regarding all these cases, as mentioned by F. Fernández Segado, it is possible to consider the Spanish Constitutional Tribunal as a "real positive legislator."[36]

In Portugal, additive decisions have been issued by the Constitutional Tribunal in applying the principle of equality in the sense that, if a norm grants favors to certain groups

---

[31] See Decision nº 409 of July 6, 1989, in Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 153.

[32] See BVerfGE 24, 300 (342 f.), in I. Härtel, *German National Report*, p. 19.

[33] See decision STC 183/1988, October 13, 1988, in Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, pp. 154–155.

[34] See Decision STC 3/1993, January 14, 1993, in Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, pp. 177, 274; F. Fernández Segado, *Spanish National Report*, p. 42.

[35] See Decision STC 222/1992, December 11, 1992, in Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, pp. 181, 182, 275; F. Fernández Segado, *Spanish National Report*, p. 41.

[36] See F. Fernández Segado, *Spanish National Report*, p. 48.

of persons while excluding or omitting others in violation of an equal protection clause, the exclusion or omission is considered unconstitutional. If the Court has no power to bring about an equal solution for the excluded group, in what has been considered rare cases, the Court's ruling, by itself, has made possible the inclusion of certain groups under the scope of rules that omitted or excluded them. For instance, as pointed out by Sousa Ribeiro, in Ruling No. 449/87, the Court held unconstitutional a norm that established different allowances for a widower and widow in case of death caused by work accident. Furthermore, it stated that the only solution that would comply with the Constitution would be one that granted equal treatment to both, meaning that the favor granted to the widow should be extended to the widower. In addition, in Ruling No. 359/91, the Court considered and ruled on a request from the Ombudsman for not only a successive abstract review of the rules laid down by the Civil Code concerning the transmission of the position of the tenant in the event of divorce when interpreted as not applicable to *de facto* unions, even if the couple in question had underage children, but also a review of the "unconstitutionality by omission of a legislative measure which expressly states that those rules are applicable, with the necessary adaptations, to *de facto* unions of couples with underage children." In this decision, the Court issued a declaration with generally binding force of the unconstitutionality of that interpretation for breaching the principle of nondiscrimination against children born outside wedlock, but it did not find unconstitutionality by omission. As a result of the Court's decision, the rules of the Civil Code were thereafter understood as including such *de facto* unions.[37] According to Sousa Ribeiro, such decisions can be considered additive decisions, as their implementation changes the scope of legislative rules regardless of any amendment to the wording of such rules.[38]

Also in Greece, regarding violations of the constitutional equality principle due to the unconstitutional exclusion of persons or groups from a State benefit or the preferential treatment of one person or group at the expense of another, in exercising the diffuse method of judicial review, civil courts have regularly extended preferential treatment to remedy a violation of the equality principle – regardless of whether the discriminatory legislation accords preferential treatment as a general rule or exceptionally.[39] The extension to judges, of legislation concerning remuneration of higher public servants[40] is usually considered a common manifestation of this jurisprudence. Ordinary administrative courts have generally followed the same approach, invoking in their reasoning the European Court of Justice's case law on the principle of equal pay for male and female workers for equal work or work of equal value.[41] More recently, the Council of State has aligned its jurisprudence with that

---

37 See Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, p. 8.

38 See Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, p. 9.

39 See, e.g., Areios Pagos Judgment Nos. 3/1990, *NoV* 1990, 1313 (1314); 7/1995 (Full Bench), *EErgD* 1996, 494 (495); 1578/2008, *EErgD* 2009, 180 ff.; Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 18 (footnote 140).

40 See, e.g., Areios Pagos Judgment nº 40/1990, *EEN* 1990, 579 ff. (579); Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 18 (footnote 144).

41 See, e.g., Athens Administrative Court of First Instance Judgment Nos. 10391/1990, *DiDik* 1991, 1309 (1309–1310); 3151/1992, *DiDik* 1993, 350 (351). See also Athens Administrative Court of Appeals Judgment nº 3717/1992, *DiDik*

of the Areios Pagos Court, also extending preferential treatment in cases of violation of the constitutional equality principle, as in cases of gender discrimination in social security legislation.[42] Accordingly, as affirmed by Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, "in extending the applicability of discriminatory, and thus unconstitutional, legislation, Greek courts exercise legislative power in a positive sense."[43]

In a similar way, in South Africa, the Constitutional Court, referring to a 1991 statute (reformed in 1996) that assigned the spouse of a permanent resident in the country the right to automatically obtain a residence permit, considered it discriminatory and unconstitutional because it did not include foreigners in homosexual relationships. The Court complemented the text to include after the word *spouse* the phrase "or the same sex partner in a stable condition."[44]

In Canada, it is also possible to find similar additive judicial review decisions, also on matters of family law and regarding the right to equality, thus supported by constitutional values, in which the Court may read in or add words to legislation to cure a constitutional defect. A famous example is the decision issued by the Supreme Court in *Vriend v. Alberta*, where the Court, though considering Alberta's human rights code unconstitutional because it violated equality rights by failing to protect gays and lesbians from discrimination, decided to add or read into the provision the inclusion of sexual orientation as a prohibited grounds of discrimination rather than striking down the legislation.[45] A similar use of the power was the decision of the Ontario Court of Appeal to strike down the definition of marriage as a union of a man and a woman and to substitute the gender-neutral concept of a union between persons to allow for same-sex marriages, considering that religious views about marriage could not justify excluding same-sex couples from the civil institution of marriage.[46] Although such remedies are not used in a routine fashion to cure all constitutional defects, they, according to Kent Roach, "amount to judicial amendments or additions to legislation."[47]

In Poland, the Constitutional Tribunal has developed these kinds of judgments, which are not directly established in the Constitution or in the governing statute. As mentioned by Marek Safjan, "the Tribunal adopts one of the following formulas: 'provision X complies with the Constitution under the condition that it will be understood in the following way . . . ', or 'provision X understood as follows . . . complies with the Constitution' or 'provision X

1993, 138 (138–139); Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 19 (footnote 146).

42 See, e.g., Council of State Judgment Nos. 1467/2004 (Full Bench), *Arm* 2004, 1049 (1050); 3088/2007 (Full Bench), *DtA* 2009, 540 (541); see also Council of State Judgment nº 2180/2004 (Full Bench), *NoV* 2005, 173 (174–175) (extending to pilots remuneration provisions for the cabin crew). See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 19 (footnote 148).

43 See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 19.

44 See Iván Escobar Fornos, "Las sentencias constitucionales y sus efectos en Nicaragua," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, pp. 111–112.

45 See *Vriend v. Alberta* [1998] 1 S.C.R. 493; Kent Roach, *Canadian National Report*, pp. 6, 14 (footnotes 5 and 27).

46 See *Halpern v. Ontario* (2003) 65 O.R. (3d) 161 (C.A.); Kent Roach, *Canadian National Report*, pp. 7, 14 (footnotes 6 and 29).

47 See Kent Roach, *Canadian National Report*, p. 7.

understood in the following way . . . does not comply with the Constitution. . . '. The so called partial judgments usually go further because they directly determine the normative elements included in the provision, which do not comply with a hierarchically higher act (e.g. 'provision X up to an extent in which it envisages that . . . does not comply with the Constitution')."[48]

As an example of these decisions,[49] which have been compared with laparoscopic surgery versus an invasive operation, is the case on interpreting the Civil Code to regulate the liability of the State for damage inflicted to an individual by public functionaries.[50] Issuing an interpretative judgment, and therefore avoiding derogation of a Civil Code provision, the Tribunal established a totally new regime of *ex delicto* liability for damages of the State, on the basis of an objective premise of illegality and eliminating the fault of the functionary as a premise of public authority liability.[51]

In Hungary, additive decisions can also be found as a consequence of the Constitutional Court's decisions declaring partial nullity of laws, called mosaic annulment. In this regard, Lóránt Csink, József Petrétei, and Péter Tilk point out that the Court has always tried to annul the least possible from the law, that is, only to annul what is necessary to restore constitutionality. For this purpose, as they argued, partial annulment pushed the Court far from negative legislation, as the text that remained in force after the annulment often had a different and sometimes contradictory meaning from the one before constitutional review. This has been the case, for instance, when some words have been annulled, with the result of expanding the scope of grantees of a tax law, either in the field of substantive law[52] or in the field of procedure law;[53] when certain texts of a law restrain a fundamental right concerning the publicity of declarations of properties of local government deputies;[54] and when the competence to determine compensation in matters of criminal law was removed from the minister of justice to the courts, just annulling some words of the Criminal Procedure Code.[55] Another case refers to a decision declaring unconstitutional a comma in a

---

48 See Marek Safjan, *Polish National Report*, pp. 13–14.

49 The Polish Supreme Court has opposed this practice of the Constitutional Tribunal, arguing that the process of interpretation is strictly connected with the process of application of a given norm, not with the procedure of its evaluation from the point of view of its conformity with a hierarchically higher act. See Marek Safjan, *Polish National Report*, p. 14.

50 See decision of the Constitutional Tribunal of December 4, 2001, in the case SK18/00, OTK ZU 2001/8/256, in Marek Safjan, *Polish National Report*, p. 14 (footnote 43).

51 See Marek Safjan, *Polish National Report*, pp. 14, 15.

52 See Decision 87/2008 (VI.18). The decision found it discriminatory that only one group of contributors enjoyed tax preferences. The Court annulled the regulation in a way that the preference would also pertain to the members of the other group; Lóránt Csink, József Petrétei and Péter Tilk, *Hungarian National Report*, p. 5 (footnote 18).

53 See Decision 73/2009 (VII.10). The Court found it unconstitutional that the law did not grant the possibility of reducing or releasing tax liabilities of individuals. Such a possibility is the result of mosaic annulment. See Lóránt Csink, József Petrétei, and Péter Tilk, *Hungarian National Report*, p. 5 (footnote 19).

54 See Decision 83/2008 (VI.13). The decree of the local government allowed only Hungarian citizens to check the declarations and only after certifying their identity. These texts have been annulled. See Lóránt Csink, József Petrétei, and Péter Tilk, *Hungarian National Report*, p. 5 (footnote 20).

55 See Decision 66/1991 (XII.21) See in Lóránt Csink, József Petrétei, and Péter Tilk, *Hungarian National Report*, p. 5.

sentence containing an enumeration because it resulted in a different meaning of the sentence, a meaning that was not in conformity with the Constitution.[56]

In the Czech Republic, the Constitutional Court has issued interpretative decisions that read text differently or add sense to constitutional provisions. A typical example, mentioned by Zdenek Kühn, is the judgment in the *Clearance of Defense Counsel* case of January 28, 2004, regarding a law mandating that, in criminal cases in which classified information might be discussed, the defense attorneys are subject to a security clearance. As a result, no defense attorney was available for the defendant in the criminal case before the district court, and the defendant was effectively denied of his or her right to legal aid. Therefore, the district court petitioned the Constitutional Court to annul the law if it included also the "defense attorneys" among those who were subject to a security clearance. The Court rejected this reading of the law and found, against its clear wording, that defense attorneys in criminal proceedings are not subject to this type of clearance. Aware of the controversial nature of its reasoning, the Court added the second part to its verdict, creating a new exception to the clear wording of the law. Hence, the verdict of the judgment includes two parts:

> I. The petition is rejected.
>
> II. Clearance of defense attorney in criminal proceedings for purposes of access to classified information through a security clearance by the National Security Office is inconsistent with Art. 37 par. 3, Art. 38 par. 2, and Art. 40 par. 3 of the Charter of Fundamental Rights and Freedoms and with Art. 6 par. 3 let. c) of the Convention on Protection of Human Rights and Fundamental Freedoms.[57]

In this case, the Constitutional Court explained why it included the second part based on the principle of the primacy of constitutionally consistent interpretation over unconstitutional interpretations, adding that "for these reasons, in these proceedings on review of norms, given a negative verdict with interpretative arguments, the Constitutional Court placed the fundamental constitutional principle, arising from a number of significant grounds, in the verdict section of the judgment."[58]

In another case, the *Permanent Residence Case* of 1994, the Constitutional Court annulled the requirement that the Czech citizens who were allowed to claim restitution of their property have permanent residence in the Czech Republic. The Court found the requirement discriminatory and annulled the rule that set the deadline for claiming restitution. The law thus lost much of its clarity because the effect of annulling the deadline was doubtful. The problem was explained in the Court's reasoning:

> However, if the consequences of legalizing this unconstitutional condition are to be repaired, it is not only necessary to cancel the condition itself, but …it is also necessary to

---

[56] See Decision 16/1999. (VI.11), in Lóránt Csink, József Petrétei, and Péter Tilk, *Hungarian National Report*, p. 5.

[57] See Decision Pl. ÚS 41/02 of January 28, 2004, published as N. 98/2004 Sb. See http://angl.concourt.cz/angl_verze/doc/p-41-02.php; Zdenek Kühn, *Czech National Report*, p. 9 (footnote 41).

[58] See Zdenek Kühn, *Czech National Report*. p. 9.

> ensure that the new wording of . . . the Act [after annulment] can realistically be brought to life. This can be achieved only by opening the period . . . for exercising a claim before the court *for those citizens for whom the condition of permanent residence in the country* has heretofore made impossible the exercise of their right to issuance of a thing.[59]

However, in that case, as explained by in Zdenek Kühn, it was far from clear what the annulment of the deadline effectively meant. In any case, the answer to the law's interpretation could have been found not in the law's text but in the Court's justification of its judgment. Only in referring to the Court's judgment did it become clear that the deadline was newly opened only for those who were prohibited to do so under the earlier version of the law (those citizens who had no permanent residence in the Czech Republic) and when the period of time commenced.[60]

The Constitutional Court of Croatia has also developed additive decisions, creating policies by way of strengthening the rule of law and protection of human rights. An important case highlighted by Sanja Barić and Petar Bačić is the one referred to the annulment in 1998 of some provisions of the Pension Adjustment Act, in which the Court considered unconstitutional the fact that, since 1993, the Government ceased to adjust pensions according to increased inflation and cost of living, even though it continued to do so with wages. The result was that during four years (1993–1997) wages increased twice as much as pensions (the average pension was half the average wage), which meant that the standard of living for retired persons was half the one corresponding to the average working population. Therefore, the Constitutional Court ruled that "this legal arrangement…changed the social status of retired persons to such an extent that it created social inequality of citizens" and that the contested provisions "contravene[d] with basic constitutional provisions of article 3 of the Constitution of the Republic of Croatia, which guarantee equality, social justice, and the rule of law; and with article 5 of the Constitution, which states that laws are to be in conformity with the Constitution."[61] As a consequence of the Court decision, retired persons were to receive the unpaid pensions for the period 1993–1997, and six years later, the Croatian Parliament sanctioned the Law on the Enforcement of the Constitutional Court's Ruling, dated May 12, 1998.[62]

In many countries, these decisions have been considered invasive regarding legislative attributions because, through them, the Constitutional Court, by interpretation, proceeds to supplant the Legislator, affecting at length the system of separation of powers. They have also been considered judicial decisions adding a *quid novi* that transforms the negative into positive, so that a Tribunal converts itself from a judge of the constitutionality of statutes

---

[59] See Decision Pl. ÚS 3/94 of July 12, 1994, published in Czech as 164/1994 Sb. See http://angl.concourt.cz/angl_verze/doc/p-3-94.php; Zdenek Kühn, *Czech National Report*, p. 10 (footnote 47).

[60] See Zdenek Kühn, *Czech National Report*, pp. 8–9.

[61] See Decision nº U-I-283/1997. of May 12, 1998; Sanja Barić and Petar Bačić, *Croatian National Report*, p. 15.

[62] See Decision on the Promulgation of the Law on the Enforcement of the Constitutional Court's Ruling, dated May 12, 1998, Official Gazette "*Narodne novine*," nº 105/2004; Sanja Barić and Petar Bačić, *Croatian National Report*, p. 15 (footnote 30).

into a constitutional "cleaner" of the same, thus invading the sphere of other branches and adding legislative norms, or positive legislation.[63]

In some way, a similar position is found in the Netherlands regarding the control of conventionality of statutes. The Supreme Court ruled in 1980, in the *Illegitimate Child Case*, that Article 959 of the Civil Procedure Code was to be interpreted in the light of Articles 8 and 14 of the European Convention, to ignore the difference established regarding the procedural treatment between cases concerning the custody of legitimate and illegitimate children, thus allowing the relatives of an orphan born out of wedlock to appeal a decision of the local magistrate withholding custody, which the Civil Procedure Code granted only to legally recognized kin.[64] On the basis of the interpretation already adopted by the European Court of Human Rights regarding the Convention, the Supreme Court accepted the right to appeal for relatives of children born outside of marriage. The same approach was followed in the 1982 *Parental Veto on Underage Marriage Case*, where the Supreme Court spontaneously introduced the duty for parents to justify their decision not to let their underage children enter marriage.[65] Where refusing their consent would be evidently unreasonable, the courts were allowed to substitute the parents' withheld permission, ignoring Article 1:36 (2) of the Civil Code, which prohibited the courts from allowing a marriage where one of the parents objected to it. Again, this judgment was backed up by several decisions of the European Commission on Human Rights,[66] which eventually led to the adoption of more self-restraint on matters of control of conventionality, in the sense that the Court more recently recognized that it was not empowered to set aside national provisions for their inconsistency with Convention law, purely on the basis of its own interpretation of the Convention but only on the prevailing interpretation offered by the European Court.[67]

Also in the area of family law, in the Netherlands, the Supreme Court has developed its own ability to regulate certain areas of the law by means of the exercise of its power of judicial review of "conventionality" of statutes. In effect, in the *Spring Cases*,[68] the Court considered the provisions of Dutch law that stated that when a child was born to unmarried parents or parents who had never been married before or did not have any intention of doing so in the near future, such parents could exercise no parental authority at all, being able to only obtain shared guardianship; the Court found that this violated Articles 8 and 14 of the

---

63 See the opinions of M. A. García Martínez, F. Rubio Llorente, G. Silvestri, T. Ancora, and G. Zagrebelsky, in Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 254 (footnotes 70–76).

64 See Supreme Court judgment of 18 January 1980, *NJ* 1980/463 (*Illegitimate Child*); Jerfi Uzman; Tom Barkhuysen and Michiel L. van Emmerik, *Dutch National Report*, p. 14 (footnote 37).

65 See Supreme Court judgment of 4 June 1982, *NJ* 1983/32 (*Parental Veto on Underage Marriage*); Jerfi Uzman, Tom Barkhuysen, & Michiel L. van Emmerik, *Dutch National Report*, p. 14 (footnote 39).

66 See Jerfi Uzman, Tom Barkhuysen and Michiel L. van Emmerik, *Dutch National Report*, p. 14.

67 See Supreme Court judgment of 19 October 1990, *NJ* 1992/129 (*Gay Marriage*); Supreme Court judgment of 10 August 2001, *NJ* 2002/278 (*Duty of Support*); Jerfi Uzman; Tom Barkhuysen and Michiel L. van Emmerik, *Dutch National Report*, p. 16 (footnote 46).

68 See Joint Supreme Court decisions of 21 March 1986, *NJ* 1986/585–588 (*Spring Decisions*); Jerfi Uzman; Tom Barkhuysen and Michiel L. van Emmerik, *Dutch National Report*, p. 15 (footnote 43) and p. 24.

European Convention. From that decision, the Court set aside certain provisions of the Civil Code and interpreted others so that they might be read consistently with the Convention, and it eventually elaborately tried to regulate the conditions under which a request for joint parental authority was to be granted by the courts; it devoted an entire page in the case reports to describe the conditions and provide lower courts with a "manual" for how to work through such difficult cases.[69]

In Latin America, a typical additive and substitutive decision can be found in Peru, in the decision adopted by the Constitutional Tribunal in 1997 regarding article 337 of the Civil Code, where, for purposes of a spouse seeking divorce, it "understood that the term '*sevicia*' [extreme cruelty] must be substituted by the phrase 'physical and physiological violence, that is, not only referred to physical cruelty."[70] In Costa Rica, the Constitutional Chamber of the Supreme Court has issued additive decisions on matters of citizenship, as when interpreting that, when article 14.4 of the Constitution establishes that when foreign women marry Costa Ricans, they are Costa Ricans by naturalization if they lost their nationality, the word *woman* must be read as *person* to include men, thus overcoming the discrimination that results from the word "woman" regarding foreign men married to a Costa Rican females. The Court said:

> In order to avoid inequalities and future discriminations that could come from the application of the Constitution, exercising the attributions the Constitution assigns the Chamber, it is resolved that when statutes uses the terms "men" or "women," they must be understood as synonymous to the word "person," eliminating all possible "legal" discrimination because of gender; a correction that must be applied by all public officials when requested to take any decision that would require to apply provisions in which such terms are used.[71]

In another case, the Constitutional Chamber of the Supreme Court of Costa Rica, interpreting the Currency Law, considered the matter of the essential contents of contracting freedom and concluded in relation to contractual obligations established in foreign currencies that the exchange rate to be applicable in case of payment in national currency, to avoid the violation of property rights, must be the market rate, that is, the effective commercial value of the foreign currency at the moment of payment, and not the official rate, as indicated in article 6 of the Currency Law. Consequently, the Court established how the provision of the Currency Law was to be read.[72]

In Venezuela, a few examples of additive decisions issued by the Constitutional Chamber can be identified. One of them pertains to a provision of the Organic Law of the Attorney General of the Republic (article 90), in which it is established, in judicial process in which the Republic is a party, the need for consent from the Attorney General regarding the bail to be requested to lift some precautionary measures. In Decision No. 1104 of May 23, 2006,

---

69 See Jerfi Uzman; Tom Barkhuysen and Michiel L. van Emmerik, *Dutch National Report*, p. 24.

70 See Decision of April 29, 1997 (Exp. nº 0018-1996-1-TC), in Fernán Altuve Febres, *Peruvian National Report II*, pp. 14–15.

71 See Decision Voto 3435-92, in Rubén Hernández Valle, *Costa Rican National Report*, p. 38.

72 See Decision Voto 3495-92, in Rubén Hernández Valle, *Costa Rican National Report*, p. 39.

the Chamber declared the partial nullity of this provision because it violated the right to defense and due process, and it established a new wording for the challenged provision, in the sense that the bail must be approved by the corresponding judge and not the Attorney General.[73] Another example is the Organic Law of Public Defense, an institution established in the Constitution as part of the judicial system. Nonetheless, article 3 of the Law specified that the Public Defense Service was to depend on the Public Defender's office, which was considered unconstitutional and annulled by the Chamber, which established in Decision No. 163 of February 28, 2008, that the provision was to be read in the sense of attaching the Service to the Supreme Tribunal of Justice, not to the Peoples' Defender Office.[74] In addition, in the same decision, the Chamber annulled *ex officio* the provisions establishing the attribution of the Peoples' Defender to appoint the Head of the Public Defense Service, providing for another regime of appointment by the Supreme Tribunal; and it annulled the provision establishing the approval by the People's Defender of the Budget of the Public Defense Service, changing the wording of the Law to attribute that function to the Supreme Tribunal.[75]

This technique of additive rulings on matters of judicial review can also be identified in countries with a diffuse system of judicial review, like Argentina, where the Supreme Court has issued additive decisions on monetary matters. In the *Massa* case,[76] regarding the compulsory conversion of foreign currency into pesos through various emergency legal provisions, the Court ruled that the regime did not violate property rights recognized in the Constitution providing that a conversion of 1.40 pesos to one U.S. dollar be ensured, with a stabilization coefficient and an annual interest rate of 4 percent. This was a judicial addition to the legal emergency regime to avoid it being declared unconstitutional.[77] In human rights cases, the Supreme Court has also issued additive rulings, like in the *Portillo* Case (1989), where the Court was required to rule on the constitutionality of mandatory military service. The petitioner claimed that, to the extent that military service might require the killing of another individual, it affected the petitioner's deep religious beliefs in violation of the free exercise of religion clause of the Constitution. The Court held that, in peacetime, compliance with military service as established by Congress violated such a clause, but it still required the petitioner to serve time in alternative civil service, thus redefining the

---

[73] See Decision nº 1104 of May 23, 2006, *Carlos Brender* case; http://www.tsj.gov.ve/decisiones/scon/Mayo/1104-230506-02-1688.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 27.

[74] See Decision nº 163 of February 28, 2008, *Ciro Ramón Araujo* case. See http://www.tsj.gov.ve/decisiones/scon/Febrero/163-280208-07-0124.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, pp. 27–28.

[75] *Id.*, p. 28.

[76] See Fallos 329:5913 (2006); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 17 (footnote 71). See also the *Bustos* case, Fallos 327:4495 (2004). *Id.*, p. 17 (footnote 70).

[77] See Néstor P. Sagües, "Los efectos de las sentencias constitucionales en el derecho argentino," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 339; Néstor Pedro Sagües, *Argentinean National Report II*, p. 19.

concept of "national defense" despite the fact that Congress did not provide for such an alternative.[78]

Even in France, where the judicial review system until 2009 was reduced to the *a priori* review of legislation not yet in force, the Constitutional Council has exercise its attributions, adding provisions to the reviewed statute and modifying the scope of application of the law. For example, in Decision 82-141 DC of July 27, 1982 regarding the control of constitutionality of the draft statute on TV communications (*communications audiovisielle*), the Council extended the scope of the right to response, interpreting the phrase "without lucrative purpose" to establish the titleholder of the right. As mentioned by Bertrand Mathieu, in this case, the Council has said what the law is, instead of the Legislator, which established the right to response in television communications only to a category of persons. By eliminating those restrictions, the Council extended the scope of the right, substituting itself for the will of the Legislator. The Constitutional Council considered that the Constitution established such right of response without it being reserved to some persons.[79]

III. CONSTITUTIONAL COURTS COMPLEMENTING LEGISLATIVE FUNCTIONS BY INTERFERING WITH THE TEMPORAL EFFECTS OF LEGISLATION

One of the most common interferences of the Constitutional Courts regarding legislative functions is the power of the Courts to determine the temporal effects of legislation enacted by the Legislator. In general terms, in comparative law, three different situations can be distinguished: first are cases in which the Constitutional Court determines when an annulled legislation will cease to have effects at some point in the future; second are cases in which the Constitutional Court, by assigning retroactive or nonretroactive effects to its decisions, determines the date on which legislation ceases to have effects; third are cases in which the Constitutional Court, when declaring null an unconstitutional statute, decides to bring back previously repealed legislation.

The matter, for instance, has been expressly regulated in the Constitution of the Republic of South Africa of 1996, which provides the following:

> Article 172. Powers of courts in constitutional matters.
>
> 1. When deciding a constitutional matter within its power, a court:
>
> a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> b) may make any order that is just and equitable, including
>
> i. an order limiting the retrospective effect of the declaration of invalidity; and

---

[78] See Fallos 312:496 (1989); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 15 (footnote 63).

[79] See Bertrand Mathieu, *French National Report*, p. 16. See the decision in http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1982/82-141-dc/decision-n-82-141-dc-du-27-juillet-1982.7998.html.

ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

1. The Power of the Constitutional Court to Determine When Annulled Legislation Will Cease to Have Effects: Postponing the Effect of the Court's Ruling

The first of the cases in which constitutional courts interfere with the legislative function, by modulating the temporal effects of its decision declaring unconstitutional or null a statute, is when the Court establishes *vacatio sentenciae*, determining when annulled legislation will cease to have effects by postponing the beginning of the effects of its own decision and thus extending the application of the invalidated statute.

In principle, it is a general rule in systems of judicial review in which the constitutional courts have power to annul unconstitutional statutes,[80] as was, for instance, established since the beginning in the 1920 Austrian Constitution (article 140.3), that the Constitutional Court's decisions must be published in an Official Journal. This means, that in principle, as the Court's decisions have *erga omnes* effects as products of the negative legislator, the judicial review decision annulling a statute begins to have effects since the date of its publication, unless the Court establishes another date to avoid legislative vacuums, giving time to the Legislator to enact a new legislation to replace the annulled one. In the Austrian Constitution, the Court can postpone the effects of its decision for a term of up to six months, and in the constitutional reform of 1992 this was extended to eighteen months (art. 140.5).[81] In these cases of extending the beginning of the effects of the Court's decisions, the annulled statute remains in force until the extinction of the term or the intervention of the Legislator by enacting a statute to replace the annulled one. Consequently, as the Court has the power to extend the effects of an annulled statute, it can be said that, since the beginning of the concentrated system of judicial review in Europe, the Austrian Constitutional Court was "a corrective jurisdictional legislator and not only a simple negative jurisdictional legislator."[82]

In Greece, article 100.4, para. 2, of the Constitution, provides that the Supreme Special Court invalidates unconstitutional statutory provisions "as of the date of publication of the respective judgment, or as of the date specified in the ruling," thus implicitly recognizing

---

[80] Although in some countries like Portugal, "The Court has never postponed the effects of its ruling by safeguarding effects produced after the declaration of unconstitutionality (and according to the prevailing opinion on this subject the effects of annulment could not be postponed)." See Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, p. 6.

[81] See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 266; Francisco Fernández Segado, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitutionalidad y a la relatividad de ciertas fórmulas estereotipadas vinculadas a ellas," in *Anuario Iberoamericano de Justicia Constitucional*, nº 12, 2008, Centro de Estudios Políticos y Constitucionales, Madrid 2008, pp. 174, 188.

[82] See Otto Pfersmann, "Preface," in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, p. xxxiii; Konrad Lachmayer, *Austrian National Report*, p. 7.

that the Supreme Special Court can establish a different date for the beginning of the effects of the invalidation of the unconstitutional statute.[83]

This also occurs in Belgium, where the Constitutional Court (formerly the Arbitration Court), according to its Organic Law (article 8.2), has the power to provisionally maintain the effects of an invalidated statutory provision – in this case, not for a specific period of time but for the time the Court determines.[84] This term has been established in different ways according to the Court appreciation of facts, for instance, as referred to by Christian Behrendt, to the publication of the Court decision in the *Moniteur*, to the end of the academic year, to the end of the fiscal year, and to the nomination of the Officials of an organ of the State.[85] In such cases, the effects of the annulled provision cease automatically, thus creating a legislative vacuum, which the Legislator is compelled to fill. This was the case of a 2002 statute modifying the rules for the publication of the *Moniteur* and establishing its exclusive electronic publication, reducing the physical (paper) publication for public consultation to only three copies. Because of the discriminatory character of the reform, impeding the access of some citizens to the Official Journal, the Court in 2004 declared invalid the statute but provided that it was to continue to have effects (*delai d'abrogation*) until July 31, 2005, imposing on the Legislator the obligation to determine alternative rules to overcome the inequalities.[86] That is why, in some cases, the Constitutional Court has determined that the term during which the unconstitutional statute must remain in force extends up to the moment in which the corresponding Legislator issues a new legislation on the matter.[87]

In the Czech Republic, the Constitutional Court has postponed the effects of a decision issued in 2000 to offer the legislature time to enact a new law that would enact a mechanism for just terms in rent.[88] Nonetheless, the most celebrated example is the case of the annulment of the law on judicial review of administrative acts, which did not fit the requirements of the Czech Constitution and, above all, the European Convention of Human Rights. The Constitutional Court repeatedly urged the legislature to enact a new and constitutionally consistent law. Finally, as mentioned by Zdenek Kühn, the Court lost its patience and annulled all of part 5 of the Code of Civil Procedure related to administrative judiciary. It noted that the law as a whole suffered serious constitutional deficits, even though there were many provisions that would be included in a new law, stating:

---

83 See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 20 (footnote 152).

84 See Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, p. 87, 230, 235, 286, 309; P. Popelier, *Belgian National Report*, pp. 4–7.

85 See Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, p. 236.

86 See CA arrêt 106/2004, June 16, 2004. See also the references in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 313–320.

87 Arrêt 45/2004; Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, p. 87, 235, 309–321.

88 See judgment of June 21, 2000, Pl. ÚS 3/2000, *Rent Control I*, published as nº 231/2000 Sb.; Zdenek Kühn, *Czech National Report*, p. 12 (footnote 57).

> After taking into account all calls made by the Court to both the legislature and the executive branch, and after considering the current state of work on the reform of administrative judiciary, the Court decided to delay the effects of its judgment until December 31, 2002. As it would take some time before enacting the law and its entering into force, it is clear that it is the task for this legislature to enact a new law.[89]

Eventually, the legislature, which delayed the enactment of the new law on administrative judiciary for almost ten years, enacted a new law.

In France, the constitutional law No. 2008-724 of July 23, 2008 reforming article 62 of the Constitution on the judicial review system established that in the case of statutory provisions declared unconstitutional according to article 61-1 (exception of unconstitutionality), the decision has effect since its publication, as the Constitutional Council is authorized to fix another ulterior date. In Croatia, to avoid legal uncertainties occurring in the period between the adoption and publication of a repeal decision by the Constitutional Court, article 55.2 of the 2002 Constitutional Act on the Constitutional Court states:

> The repealed law or other regulation, or their repealed separate provisions, shall lose legal force on the day of publication of the Constitutional Court decision in the Official Gazette Narodne novine, unless the Constitutional Court sets another term.[90]

The same general principle has been applied in Germany, although without such a clear provision as those in Belgium, France, or Croatia. Article 35 of the Federal Constitutional Court of Germany only establishes regarding the execution of its decision that, in individual cases, the Court can establish how such execution will take place. Given this provision, it can be considered usual practice for the Federal Constitutional Court to establish a term for its decision to by applied, which is fixed according to different rules, for instance, a precise date or a particular fact like the end of the legislative term.[91] One recent case, highlighted by I. Härtel, concerns the inheritance tax statutory provision.[92] In some aspects the provision was unconstitutional, but the Tribunal did not annul it but referred it to the Legislator to reform it in conformity with the Constitution, thus maintaining the applicability of the unconstitutional statute until a new legislative regulation could be established. As I. Härtel said: "The continuing implementation was seen as necessary to prevent a situation of legal uncertainty during the interim period, especially affecting, and potentially complicating, the regulations regarding succession of property during a transferor's lifetime. The *BVerfG* has therefore, as a kind of 'emergency legislator,' created a law-like condition (*Steiner*, ZEV

---

89 See the judgment of June 27, 2001, Pl. ÚS 16/99, *Part Five of the Code of Civil Procedure – Administrative Judiciary*, published as nº 276/2001 Sb.; Zdenek Kühn, *Czech National Report*, p. 14 (footnote 63) (the Court was referring to the fact of parliamentary elections, which were due in June 2002).

90 See Sanja Barić and Petar Bačić, *Croatian National Report*, p. 17.

91 See BVferG, May 22, 1963 (Electoral Circuits), in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 299–300. See BVferG, November 7, 2006 (Inheritance Tax); I. Härtel, *German National Report*, p. 7.

92 See BVerfG, court order from 2006-11-7, reference number: 1 BvL 10/02; I. Härtel, *German Report*, pp. 7–8.

2007, 120 (121)); it has 'invented' a new decision type (*Schlaich/Korioth*, Das Bundesverfassungsgericht, 7th ed. 2007, margin number 395)."[93]

In Italy, the Constitution clearly establishes that when the Constitutional Court declares unconstitutional a statutory provision, it ceases in its effects the day after its publication (article 136, Constitution), which implies that the Constitutional Court cannot postpone the annulment effects or extend the application of the annulled provision.[94] Nonetheless, it is possible to identify in the jurisprudence important cases of deferring the effects in time of a declaration of unconstitutionality. As mentioned by Gianpaolo Parodi, "in these cases, the Court declared the unconstitutional character of legislative provisions by the state successive to the constitutional law no. 3/2001 and detrimental to the new regional attributions, explaining that the state discipline censured would not have ceased to find application until the arrangement and the coming into force of the new regional regulations and setting aside the administrative procedures in progress and founded on the first, even if not yet exhausted, to avoid that, due to the situation of normative void determined by the ruling of acceptance, the guarantee of constitutional rights might result compromised."[95]

In Canada, the Supreme Court has also developed innovative remedies of delaying or suspending the declaration of invalidity for periods of six to eighteen months to provide legislatures an opportunity to enact new constitutional legislation so that there are no lacunae in the legal regime. It was first used in the case *Manitoba Language Reference*, where in the Province of Manitoba all laws were unconstitutional because they had not been translated into French. The Court delayed the declaration of invalidity under s. 52(1) of the Constitution Act (which says that laws inconsistent with the Constitution are of no force and effect) and justified the use of a suspended declaration of invalidity on the basis that the immediate striking down of all of Manitoba's laws would offend the rule of law. The practical effect of this decision, however, was that Manitoba translated all of its laws over a period of time supervised by the court.[96] Since that time, as mentioned by Kent Roach, "the use of suspended declarations of invalidity has increased, though the Court formally maintains that the remedy should only be used in cases where an immediate declaration of invalidity will threaten the rule of law or public safety or deprive people of benefits simply because the benefit has been extended in an unconstitutionally under inclusive manner."[97] Kent Roach also mentions that the South African Constitution follows the Canadian example and specifically provides for suspended declarations of invalidity (article 172). It must be noted, that, although it may have that practical effect, the suspended declaration of invalidity is not a mandatory order that the legislature enact new legislation. The legislature

---

93 See I. Härtel, *German National Report*, p. 8.

94 In the 1997 proposed reform of the Constitution, which was not approved, one of the reforms aimed to allow the Constitutional Court to postpone the effects of annulment for up to one year. See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 125 (footnote 166).

95 On the subject of education, see Const. C., Judgment Nos. 370/2003; 13 and 423/2004. See also Gianpaolo Parodi, *Italian National Report*, p. 13.

96 See *Manitoba Language Reference* [1985] 1 S.C.R. 721; Kent Roach, *Canadian National Report*, p. 7 (footnote 8).

97 See *Schachter v. Canada* [1992] 2 S.C.R. 679; Kent Roach, *Canadian National Report*, p. 8 (footnote 9).

is legally free to do nothing. In such an event, the court's declaration of invalidity takes effect once the period of delay has expired.[98]

In Brazil, in contrast, in the 2006 Law No. 11.417 developing the provision of article 103-B of the Constitution, when regulating the institution known as *súmula vinculante* and establishing the general principle of the immediate effects of the decisions of the Federal Supreme Tribunal, it authorizes the Tribunal to decide for the effects to start in another moment, taking into account legal security reasons or exceptional public interest.[99] The same sort of regulation is found in article 190.3 of the Polish Constitution, where regarding the decisions of the Constitutional Tribunal, after establishing that they shall take effect from the day of its publication, it authorizes the Constitutional Tribunal to specify another date for the end of the binding force of a normative act, a period that may not exceed eighteen months for a statute or twelve months for any other normative act.[100] As has been said by Marek Safjan, "no other organ, except for the constitutional court, may order application of norms declared unconstitutional, which is paradoxical considering that the fundamental role of any constitutional court is to eliminate unconstitutional statutes and not to let them remain in force."[101]

In Spain, the Organic Law on the Constitutional Tribunal has no express provision on this matter, as the Tribunal ruled in Decision 45/1989 that it could not postpone the beginning of the effects of its nullity decision "due to the fact that the Organic Law does not empower the Tribunal, in a different way to what occurs in another system, to postpone or put off the moment of the effectiveness of the nullity."[102] Nonetheless, in subsequent decisions, the Constitutional Tribunal, without legal support, has assumed the power to postpone the beginning of the effects of its nullity decisions, as was the case of the Law 6/1992 establishing the territorial area of the Santoja y Noja Marsh, considered unconstitutional because it interfered with the competencies of the Autonomous Communities. To avoid any lack of protection regarding the environment, the Tribunal postponed the effects of its annulment up to the moment that the corresponding Autonomous Community exercised its legislative attributions.[103] Although the power the Tribunal assumed was proposed to be incorporated in the 2007 reform of the Organic Law, it was not passed, evidence of the role of the Tribunal as positive legislator on matters of judicial review.[104]

Something similar is accepted in Mexico, where the Supreme Court is empowered to postpone the effects of a decision annulling a statute according to its evaluation of the effects of the legislative vacuum produced by the annulment. No maximum term is

---

98 See Kent Roach, *Canadian National Report*, p. 8.

99 See Jairo Gilberto Schäfer and Vânia Hack de Almeida, "O controle de constitutionalidade no dereitto brasileiro e a possibilidade de modular os efeitos da decisão de inconstitutionalidade," in *Anuario Iberoamericano de Justicia Constitucional*, nº 12, 2008, Centro de Estudios Políticos y Constitucionales, Madrid 2008, p. 384.

100 See Marek Safjan, *Polish National Report*, p. 4 (footnote 13).

101 *Id.*, p. 6.

102 See STC 45/1989, February 20, 1989, in F. Fernández Segado, *Spanish National Report*, pp. 16–17.

103 See STC 195/1998, October 1, 1998, in F. Fernández Segado, *Spanish National Report*, p. 18.

104 See the critic of F. Fernández Segado, *Spanish National Report*, pp. 13, 17.

established in these cases.[105] In Peru, the Constitutional Tribunal applied *vacatio sentenciae* when annulling in 2002 the Fujimori Government's antiterrorist laws, "to allow the democratic legislator in a short and reasonable delay," to issue legislation on procedural matters that could rationally allow for retrials in cases of those already condemned for treason.[106] In Colombia, the Constitutional Court has often postponed the effects of its decisions annulling statutes.[107]

Finally, it must be mentioned that this possibility of postponing the date on which the effects of a decision begin has also been applied in countries with a diffuse system of judicial review, as in Argentina, where the Supreme Court, to avoid chaotic consequences from the immediate application of its declaration of unconstitutionality of a statutory provision, postponed the beginning of the effects for one year after the decision was published.[108] In other cases, the Supreme Court has clearly ruled for future cases, expanding the scope of protection of the declaratory judgments (*acción declarativa de certeza*), regulated by Article 322 of the National Code of Federal Civil and Commercial Procedure. For instance, in the *Rios* case, decided in 1987, a statute provision providing that only political parties could present candidates to federal elections was challenged because it violated the right to elect and be elected for public office. Even though at the time of the decision the election had passed, the Supreme Court accepted the case, to establish precedent that settles the matter for future cases, thus reaffirming its role as final interpreter of the Constitution and its pretense to expand the effect of its rulings beyond the case being heard.[109]

In the same trend, in the Netherlands, regarding the control of conventionality of statutes, the Supreme Court has postponed the effects of some of its decisions, "true prospective" ones, when the Court does not apply its new interpretation in the case at hand but postpones it.[110]

---

[105] See Tesis Jurisprudencial P./J 11/2001, in SJFG, Vol. XIV, Sept. 2001, p. 1008. See the reference in Héctor Fix Zamudio and Eduardo Ferrer Mac-Gregor, *Las sentencias de los Tribunales Constitucionales*, Ed. Porrúa, Mexico City 2009, p. 69; and "Las sentencias de los tribunales constitucionales en el ordenamiento mexicano," in *Anuario Iberoamericano de Justicia Constitucional*, nº 12, 2008, Centro de Estudios Políticos y Constitucionales, Madrid 2008, pp. 247–248.

[106] See Domingo García Belaúnde and Gerardo Eto Cruz, "Efectos de las sentencias constitucionales en el Perú," in *Anuario Iberoamericano de Justicia Constitucional*, nº 12, 2008, Centro de Estudios Políticos y Constitucionales, Madrid 2008, pp. 283–284; Francisco Eguiguren and Liliana Salomé, *Peruvian National Report I*, p. 10.

[107] See, e.g., Decision C-221 of 1997; C-700 of 1999; C-442/01; C-500/01; C-737/01; Germán Alfonso López Daza, *Colombian National Report I*, p. 11 (footnote 26).

[108] See *Rosza* case, *Jurisprudencia Argentina*, 2007-III-414, in Néstor P. Sagües, "Los efectos de las sentencias constitucionales en el derecho argentino," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 352.

[109] See Fallos 310:819 (1987); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 10.

[110] See Supreme Court judgment of 12 May 1999, *NJ* 2000/170 (*Labour Expenses Deduction*); J. Uzman, T. Barkhuysen, and M.L. van Emmerik, *Dutch National Report*, p. 26 (footnote 79).

2. *The Power of the Constitutional Court to Determine When Annulled Legislation Will Cease to Have Effects: Retroactive or Nonretroactive Effects of Its Own Decisions*

But regarding the effects of the judicial decisions declaring a statute unconstitutional, another aspect of the temporal effects of the annulment is the retroactive or nonretroactive effects given to the Constitutional Court's decisions. The Court can determine the point in the past at which an annulled legislation ceased to have effects.

This Constitutional Court ruling depends on the nature of the judicial review decision, and it varies according to the system adopted in the given country. If the Court decisions are considered declarative by nature, with *ex tunc* or *ab initio* effects, the judicial review decisions declaring the unconstitutionality of statutes have retroactive effects, and the result is that the statute is considered as if it never had produced effects. If the decisions of the Court declaring a statute unconstitutional are considered constitutive, with *ex nunc* or *pro futuro* effects, the judicial review decisions declaring the statute unconstitutional have nonretroactive effects, not affecting the effects produced by the statute up to its annulment. In some countries, a rule has been established in the statute regulating the Constitutional Court, and in others, the decision to opt for a solution corresponds to the Constitutional Court itself when having the power to determine when the effects of the annulled legislation ceased. In any case, any rigidity on the matter has passed.

A. The Possibility of Limiting the Retroactive *Ex Tunc* Effects Regarding Declarative Decisions

In the case of a classical diffuse system of judicial review, as in the United States, the Supreme Court decisions declaring the unconstitutionality of statutes have in principle declarative effects, in the sense of considering the statute null and void, as if "it had never been passed"[111] or had never "been made";[112] that is, they are generally considered to have *ex tunc* or retroactive effects. Nonetheless, this initial doctrine has been progressively relaxed, given the possible negative or unjust effects that could be produced by the Court's decisions regarding the effects that the unconstitutional statute has already produced. This was, for instance, specifically highlighted by Justice Clark in *Linkletter v. Walker* (1965), in applying a new constitutional rule to cases previously finalized. The Court said:

> Petitioner contends that our method of resolving those prior cases demonstrates that an absolute rule of retroaction prevails in the area of constitutional adjudication. However, we believe that the constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, we think the federal constitution has no voice upon the subject. Once the premise is accepted that we are neither required to apply, nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case by

[111] See *Norton v. Selby County*, 118 U.S. 425 (1886), p. 442. See the critics to this ruling in J. A. C. Grant, "The Legal Effect of a Ruling That a Statute Is Unconstitutional," *Detroit College of Law Review*, 1978, nº 2, p. 207, in which he said: "An unconstitutional act may give rise to rights. It may impose duties. It may afford protection. It may even create an office. In short, it may not be as inoperative as though it had never been passed." See also Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 21 (footnote 21).

[112] See *Vanhorne's Lessee* v. *Dorrance* case (1795), 2 Dallas 304.

> looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.[113]

Therefore, considering that "the past cannot always be erased by a new judicial decision,"[114] the principle of the retroactive effects of the Supreme Court decisions in constitutional matters has been applied in a relative way. "The questions – said the Supreme Court in *Chicot County Drainage District v. Baxter State Bank* (1940) – are among the most difficult of those that have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."[115] The Supreme Court in any case has abandoned the absolute rule[116] and has recognized its authority to give or to deny retroactive effects to its ruling on constitutional issues; the Supreme Courts of the states have done the same during recent decades.

For instance, in criminal matters, the Courts have given full retroactive effects to their rules when they benefit the prosecuted. In particular, they have given retroactive effects to decisions in the field of criminal liability, for example, allowing prisoners on application for *habeas corpus* to secure their release on the grounds that they are held under authority of a statute that, subsequent to their conviction, was held unconstitutional.[117] The Court has also given retroactive effects to its decisions on constitutional matters, when it considers the rules essential to safeguard against the conviction of innocent persons, such as the requirement that counsel be furnished at the trial (*Gideon v. Wainwright*, 327 U.S. 335, 1963), or when the accused is asked to plead (*Arsenault* v. *Massachusetts*, 393 U.S. 5, 1968), or when it is sought to revoke the probation status of a convicted criminal because of his or her subsequent conduct (*McConnell v. Rhay*, 393 U.S. 2, 1968), as well as the rule requiring proof beyond a reasonable doubt (*Ivan v. City of New York*, 407 U.S. 203, 1972). Its ruling concerning the death penalty has also been made fully retroactive (*Witherspoon v. Illinois*, 391 U.S. 510, 1968).[118]

In other criminal cases, the position of the Court has been to give no retroactive effects to its rulings on constitutional issues when it also benefits the prosecuted. As J. A. C. Grant said, in 1977, the Supreme Court held that any change in the interpretation of the Constitution that has the effect of punishing acts that were not penalized under the earlier interpretation cannot be applied retroactively; as it is stated in *Marks v. United States* (1977), "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties, is fundamental to our concept of constitutional liberty."[119]

---

113 See *Linkletter v. Walker*, 381 U.S. 618 (1965).

114 See *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), p. 374.

115 *Id.*

116 See Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 21.

117 See *Ex parte Siebold*, 100 U.S. 371 (1880).

118 See J. A. C. Grant, *loc. cit.*, p. 237.

119 See *Marks v. United States*, 430 U.S. 188 (1977), p. 191; J. A. C. Grant, *loc. cit.*, 238.

Therefore, the rule of retroactiveness of the effects of the Court's decisions in criminal cases is not absolute and has been applied by the Court in considering the justice of its application in each case. Consequently, when the decision has not, for instance, affected the "fairness of a trial" but only the rights to privacy of a person, the Court has denied the retroactive effects of its ruling.

It must also be mentioned that, even in cases of rules related to the idea of the type of trial necessary to protect against convicting the innocent, the rules established by the Supreme Court have been made wholly prospective when to give them retroactive effect would impose what the Court considers unreasonable burdens on the government brought about at least in part by its reliance on previous rulings of the Supreme Court. This happened in *De Stefano v. Woods* (392 U.S. 631 (1968)), which established that state criminal trials must be by jury, and in *Adam v. Illinois* (405 U.S. 278 (1972)), which established the right to counsel at the preliminary hearing whose retroactivity the Court said "could seriously disrupt the administration of our criminal laws." In contrast, in civil cases, it has been considered that the new rule established in a court decision on constitutional matters cannot disturb property rights or contracts previously made. In this respect, the Supreme Court in *Gelpcke v. Dubuque* (68 U.S. (1 Wall) 175 (1864)) considered that a decision of the Supreme Court of Iowa was to be given prospective effect only:

> The sound and true rule is, that if the contract, when made, was valid by the laws of the state as then expounded . . . and administered in its courts of justice, its validity and. obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.

In other countries that have adopted the diffuse system of judicial review, following the U.S. model, as is the case of Argentina, the same modality of mitigating the retroactive effects of the decisions declaring the unconstitutionality of statutes has been adopted.[120]

The same mitigating process regarding the general rule of the retroactive effects of the judicial review decisions has also been developed in countries, like the Netherlands, regarding the control of conventionality of statutes. Departing from the initial general rule of the retroactive effect of the Supreme Court rulings on the matter, since the 1970s, as referred to by J. Uzman, T. Barkhuysen, and M. L. van Emmerik. These have embraced a lawmaking duty, openly discussing the consequences of judicial review decisions and giving in some cases prospective effects –called qualified prospective decisions– when the Court immediately applies its new interpretation or rule but limits the possibilities for other parties than those in the case at hand to appeal to the new rule. An example is the 1981 *Boon v. Van Loon* case, where the Court changed its case law on the ownership of pensions in divorce law[121] but explicitly limited the temporal effect of its new course to the case at hand

---

[120] See *Itzcovich* case, *Jurispudencia Argentina* 2005-II-723, in Néstor P. Sagües, "Los efectos de las sentencias constitucionales en el derecho argentino," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 351.

[121] See Supreme Court judgment of 27 November 1981, *NJ* 1982/503 (*Boon v. Van Loon*); J. Uzman, T. Barkhuysen, and M. L. van Emmerik, *Dutch National Report*, p. 42 (footnote 138).

and future cases. Where the divorce had already been pronounced, no appeal to the new rule would be possible.[122]

However, it must be mentioned that not all countries following the concentrated system of judicial review have adopted the constitutive effects of the decision annulling the unconstitutional statute. In Germany, for instance, the proclaimed principle is the contrary one. As a matter of principle, the decisions of the Federal Constitutional Tribunal when annulling a statute have *ex tunc* and *eo ipse* effects, considering that the annulled statute should never have produced legal effects.[123] Nonetheless, in practice the reality is another, and it is not common to find decisions annulling statutes with purely *ex tunc* effects, except if with the *ex tunc* annulment of the statute the situation of conformity with the Constitution is immediately reestablished.[124] In contrast, the Law regulating the functions of the Federal Constitutional Tribunal establishes in article 95.1 the possible *ex tunc* effects on criminal matters, prescribing that "new proceedings may be instituted in accordance with the provisions of the Code of Criminal Procedure against a final conviction based on a rule which has been declared incompatible with the Basic Law or null and void in accordance with Article 78 above or on the interpretation of a rule which the Federal Constitutional Court has declared incompatible with the Basic Law." In article 95.2, it adds that, "in all other respects, subject to the provisions of Article 95 (2) below or a specific statutory provision, final decisions based on a rule declared null and void pursuant to Article 78 above shall remain unaffected."[125]

In Poland, the decisions of the Constitutional Tribunal annulling statutes according to article 190.4 of the Constitution imply, in addition to the ban on application of the unconstitutional norm in the future, an opportunity to modify past decisions issued, for instance, by courts and administrative organs on the basis of the provisions found unconstitutional, before the judgment was passed. Such provision states that the Constitutional Tribunal's decision "shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings."[126]

In Portugal, the effects given to the annulment decisions of the Constitutional Tribunal are also retroactive, although article 282.4 of the Constitution limits the retroactivity of the decision when motives of juridical security, equity, or public interests prevent application of the retroactive principle.[127] Also in Brazil, decisions delivered by the Supreme Federal

---

122 See J. Uzman, T. Barkhuysen, and M. L. van Emmerik, *Dutch National Report*, pp. 41–42.

123 See I. Härtel, *German National Report*, p. 10.

124 See Francisco Fernández Segado, *Spanish National Report*, pp. 8, 14.

125 Cf. Francisco Fernández Segado, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas estereotipadas vinculadas a ellas," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, pp. 190–191.

126 See Marek Safjan, *Polish National Report*, p. 5.

127 See María Fernanda Palma, "O legislador negativo e o interprete da Constitucão," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, pp. 174, 329; Francisco Fernández Segado, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas esterotipadas vinculadas a ellas," in *Anuario*

Tribunal applying the concentrated method of judicial review of the constitutionality of laws normally have *ex tunc* or retroactive effects. Nevertheless, as pointed out by Thomas Bustamante, "the Supreme Court may restrict the effects of the pronouncement of unconstitutionality of a law to deliver *ex nunc* or *pro futuro* decisions or even to determine that the pronouncement of unconstitutionality will produce effects only after a deadline to be set by the Court. There are, however, some requirements for delivering such manipulative decisions: (i) there must be reasons of legal certainty or of (ii) exceptional social interest and, apart from that, (iii) the restriction or the exception to the retroactive efficacy of the decision must be established by a vote of at least two thirds of the members of the Court (in its plenary sitting)."[128]

B. The Possibility of Retroactive Effects for *Ex Nunc* Constitutive Decisions

In the concentrated system of judicial review, the initial principle adopted according to Kelsen's thoughts in the Austrian 1920 Constitution was the one of the constitutive effects of the constitutional courts decision annulling a statute, in the sense that its annulment, similar to the effects of the repeal, implied that the statute produced effects up to the moment in which its annulment was established.[129] According to this rule, the statute whose nullity is declared and established is considered, in principle, by the Court as having been valid up to that moment. That is why in these cases the decision of the Court has *ex nunc* and *pro futuro* or prospective effects, in the sense that, in principle, they do not go back to the moment of the enactment of the statute considered unconstitutional, and the effects produced by the annulled statute until annulment are considered valid. The legislative act declared unconstitutional by the Constitutional Court in concentrated systems of judicial review, therefore, are considered a valid act until its annulment by the court, having produced complete effects until the moment when the court annuls it. Only the interested party that initiated a concrete case of judicial review of a legislative act (*Anlassfall*) can benefit from an exemption to the *ex nunc* rule.[130] Nevertheless, only in Austria does the Court have powers to annul statutes or decrees already repealed, that consequently are without formal validity (Art. 139, 4; Art. 140, 4), which, in principle, supposes some retroactive effects of the judicial review and is an exception to the *ex nunc* effects.

Other countries that, though they follow the general principle of nonretroactive effects of annulments, have reached the same practical effects,[131] even when the contrary (nonretroactive effect) is expressly established in the Constitution, as is the case in Italy

---

Iberoamericano de Justicia Constitucional, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 174; Iván Escobar Fornos, *Estudios Jurídicos*, Vol. I, Ed. Hispamer, Managua 2007, p. 493; Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, pp. 6.

[128] See Law nº 9.882 of December 3, 1999: art. 11; and Law nº 9.868 of November 10, 1999: art. 27; in Thomas Bustamante and Evanlida de Godoi Bustamante, *Brazilian National Report*, p. 26.

[129] See Hans Kelsen, "El control de la constitucionalidad de las leyes. Estudio comparado de las constituciones austriaca y americana," in Revista Iberoamericana de Derecho procesal Constitucional, nº 12, Editorisl Porrúa, Mexico 2009, pp.7-8..

[130] See Konrad Lachmayer, *Austrian National Report*, pp. 7–8.

[131] See Gianpaolo Parodi, *Italian National Report*, p. 13.

with article 136 of the Constitution. The Constitutional Court has interpreted this provision in the sense that the declaration of unconstitutionality of a statute makes it inapplicable to all trials pending decision with *res judicata* force, in the same sense as if it were a *ius superveniens.*[132] Nonetheless, regarding cases already decided, particularly in criminal cases, the retroactive effects of the annulment are accepted when a judicial condemnation has been pronounced on the basis of a statute declared unconstitutional, in which case its execution and its criminal effects must cease (Art. 30, Statute No. 87, 1953). Another indirect exception of the *ex nunc* effects of the decision results from the possibility of annulment of statutes already repealed.

In Spain, according to the provisions of the Constitution, the Constitutional Tribunal's declaration of unconstitutionality or declaration of nullity of a statute means its annulment, and the declaration has *ex nunc, pro futuro* effects.[133] That is why the Constitution expressly establishes that "the decisions already adopted in judicial proceedings will not lose their *res judicata* value" (article 161.1.a). The Organic Law of the Tribunal also establishes, "The decisions which declare the unconstitutionality of statutes, dispositions or acts with force of law[,] will not allow the review of judicial proceedings ended by decisions with *res judicata* force in which the unconstitutional act would have been applied" (article 40.1). However, as is the general trend in the concentrated system in granting nonretroactive effects to judicial review decisions, the exception to the *ex nunc* effects is established regarding criminal cases, where a limited retroactive effect is allowed and is extended to administrative justice decisions in cases of administrative sanction cases.[134]

A similar situation can be found in Peru, where the general principle established in article 204 of the Constitution and article 89 of the Constitutional Procedural Code is that the decisions annulling statutes have *pro futuro* effects and are not retroactive. Nonetheless, the same provisions of the Code as applied by the Constitutional Tribunal establish that, in taxation cases, the nullity can produce retroactive effects, which can also be determined by the Constitutional Tribunal.[135] Regarding annulment of statutes in criminal matters, the same principle is also applied by interpretation of article 103 of the Constitution (principle of retroactivity of the law), which allows for the exceptional retroactive effects of the laws in criminal matters.[136]

---

[132] See Decision nº 3491, 1957. See the reference in F. Rubio Llorente, *La Corte Constitucional italiana*, Universidad Central de Venezuela, Caracas 1966, p. 30.

[133] See J. Arosemena Sierra, "El recurso de inconstitucionalidad," in *El Tribunal Constitucional*, Instituto de Estudios Fiscales, Madrid 1981, Vol. I, p. 171.

[134] See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Ed. Lex Nova, Valladolid 2001, pp. 104–105, 126–127; Francisco Fernández Segado, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas esterotipadas vinculadas a ellas," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, pp. 192–194.

[135] See Decision STC 0041-2004-AI/TC, FJ 70, in Domingo García Belaúnde and Gerardo Eto Cruz, "Efectos de las sentencias constitucionales en el Perú," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, pp. 281–282.

[136] See Decision STC 0019-2005-AI/TC, FJ 52, in Domingo García Belaúnde and Gerardo Eto Cruz, "Efectos de las sentencias constitucionales en el Perú," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, pp. 281–283.

In France, in the constitutional reform sanctioned on matters of judicial review in 2008 (Constitutional Law 2008-724, of July 23, 2008), it was established that the Constitutional Council's decisions declaring unconstitutional a provision according to article 61-1 of the Constitution are considered repealed since the publication of the decision, as the Constitutional Council is authorized to determine when and how the effects that the annulled provision has produced in the past can be affected.[137]

In the case of Croatia, where decisions of the Constitutional Court have *ex nunc* effect, the final judicial decisions for a criminal offense grounded on the legal provision that has been repealed due to its unconstitutionality do not produce legal effects from the day the Constitutional Court's decision takes effect, and the criminal judicial ruling may be changed by the appropriate application of the provisions in renewed criminal proceedings. Regarding noncriminal offence cases, since 2002, the right to demand the issuing of a new individual act or decision is conferred only to those individuals and legal persons who submitted to the Constitutional Court a proposal to review the constitutionality of the provision of a law. In such cases, the request for changing the individual act should be submitted within a term of six months from the publication of the Court's decision.[138] In Serbia, the general principle of the effects of the Constitutional Court decisions when annulling a law are *ex nunc*. Nonetheless, there are some exceptions to the *pro futuro* effects, as decisions can affect individual legal relationships retroactively. As referred to by Boško Tripković, the Court's decision can have retroactive consequences, although not *ex tunc*, in the sense that everyone whose right has been violated by a final or legally binding individual act adopted on the basis of a law determined unconstitutional by a decision of the Constitutional Court is entitled to demand from the competent authority a revision of that individual act. Nevertheless, this right to revision has certain restrictions: first, proposals for revision may be submitted within six months from the day of the publication of the Constitutional Court's decision in the Official Gazette; second, the revision is restricted to acts delivered within two years before the submission of the proposal or initiative for judicial review (Article 60 of the Law on Constitutional Court).[139]

In the Slovak Republic, article 41b of Act No. 38/1993 regulating the Proceedings before the Court states, as mentioned by Ján Svák and Lucia Berdisová, "if a judgment issued in a criminal proceeding based on the regulation that is in inconformity with the Constitution has not been executed, then the ruling of the Constitutional Court on inconformity is a reason for a retrial." The valid decisions issued in civil and administrative proceedings remains unaffected, but obligations imposed by such a decision cannot be subject to enforcement.[140]

The legislative provision does not clearly establish the *ex nunc* effects of the Constitutional Court's decision, as this is a matter in which the case law of the

---

137 See Francisco Fernández Segado, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas esterotipadas vinculadas a ellas," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 175.

138 See Sanja Barić and Petar Bačić, *Croatian National Report*, p. 8.

139 See Boško Tripković, *Serbian National Report*, p. 17.

140 See Ján Svák and Lucia Berdisová, *Slovak National Report*, p. 6. See also Decision III. ÚS 164/07. *Id.*, p. 8.

Constitutional Court has settled the rules to be applicable. In effect, in one case, the Constitutional Court had to decide whether it would protect legal certainty and thus not allow the retroactive effect of the ruling (decision on *ex nunc* effect) or would protect the principle of constitutionality and so not allow any application of the regulation that is known to be unconstitutional (decision on *ex tunc* effect); being both, the principle of legal certainty and the principle of constitutionality, fundamental principles of rule of law. Finally, the Constitutional Court decided that it would protect the principle of constitutionality because it was inadmissible to apply the principle of legal certainty absolutely, and it decided that the ruling had ex *tunc* substantive effect. This means that a judge of the ordinary court cannot apply a regulation that is in inconformity with the Constitution. The Constitutional Court thus *de facto* set up a doctrine on the substantial effects of the rulings on inconformity between legal regulation, which is not yet deeply developed.[141]

In other countries, the nonretroactive effects of annulment have been expressly established in the Constitutions, without the aforementioned exception, as in the case of Ecuador[142] and Chile.[143]

In Bolivia, the same principle of the *ex nunc* effects of the Constitutional Tribunal decisions annulling a statute applies but with the exception regarding cases of formal *res judicata* and on criminal matters if the retroactivity affects harms the legal situation of the condemned.[144] In Nicaragua, article 182 of the Constitution assigns retroactive effects to the annulment decisions of statutes by the Supreme Court, although on matters of amparo, the same Constitution produces only *pro futuro* effects.[145]

In many other cases, like in Venezuela, although the general rule in principle has been *ex nunc*, nonretroactive effects of the Constitutional Chamber's decisions annulling statutes, the Law on the Supreme Tribunal expressly leaves to the Constitutional Chamber the power to determine the temporal effects of its judicial review decisions, which depending on the

---

141 In the opinion of Ján Svák and Lucia Berdisová, the Constitutional Court of the Czech Republic advocates a bit more "sophisticated" doctrine. That is, the court prefers *ex tunc* substantive effects of the rulings on inconformity of legal regulation on the proceedings that are not validly decided only if the *ex nunc* effect would infringe the fundamental rights and freedoms of aggrieved persons. And so a judge of an ordinary court can apply unconstitutional regulation if the fundamental rights and freedoms will not be infringed. See, e.g., decision of the Constitutional Court of the Czech Republic nº IV.ÚS 1777/07 and other decisions mentioned there. See Ján Svák and Lucia Berdisová, *Slovak National Report*, p. 8 (footnote 11).

142 See Hernán Salgado Pesantes, "Los efectos de las sentencias del Tribunal Constitucional del Ecuador," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 362.

143 Art. 94.3. See Humberto Nogueira Alcalá, "La sentencia constitucional en Chile: Aspectos fundamentales sobre su fuerza vinculante," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 297.

144 See Decision S.C 1426/2005-R of November 8, 2005, in Pablo Dermisaky Peredo, "Efectos de las sentencias constitucionales en Bolivia," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 86.

145 See Iván Escobar Fornos, "Las sentencias constitucionales y sus efectos en Nicaragua," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 101.

case, can have retroactive effects or not.[146] The same occurs in Brazil, where the Constitution empowers the Federal Constitutional Tribunal to always decide the temporal effects of its decisions and to determine when they begin,[147] and in Costa Rica, where, to sustain legal security, the Law on the Constitutional Jurisdiction empowered the Constitutional Chamber of the Supreme Court to determine the temporal effects of the judicial review decision. In Mexico, the exception to the nonretroactive effects of Supreme Court decisions annulling statutes refers to criminal matters when it benefits the prosecuted.[148]

In Colombia, the Law regulating the Judicial Power (article 45) provided that the Constitutional Court decisions have *pro futuro* effects, except if the Court decided the contrary. In addition, article 51 of Law No. 1836 of the Constitutional Court prevented the Court from giving retroactive effects to its decisions, if they were to affect formal *res judicata*,[149]a provision that the Court declared unconstitutional because it limited its functions. The Court argued that, according to the Constitution, the Court is the sole arbiter to determine the effects of its own decisions.[150] Consequently, the Constitutional Court has the powers to determine the temporal effects of its own decisions and, for instance, to give retroactive effects to them, a matter that it has found that not even the Legislator can regulate.

3. The Power of Constitutional Courts to Revive Repealed Legislation

As a matter of principle, as Hans Kelsen wrote in 1928, judicial review decisions declaring null a statutory provision adopted by a Constitutional Court do not imply the revival of the former legislation that the annulled statute repeals; that is, they do not reestablish the legislation already repealed.[151] Nonetheless, the contrary principle is the one applied in Portugal, where the declaration of unconstitutionality with general binding force has negative force of law, as it directly annuls the unconstitutional rule, thus producing as a consequence that "the legal provisions which had been amended or repealed by the norm

---

146 See Allan R. Brewer-Carías, "Algunas consideraciones sobre el control jurisdiccional de la constitucionalidad de los actos estatales en el derecho venezolano," *Revista de Administración Pública*, nº 76, Madrid 1975, pp. 419–446; Brewer-Carías, *Justicia constitucional: Procesos y procedimientos constitucionales*, Universidad Nacional Autónoma de México, Mexico City 2007, pp. 343 ff.

147 See Jairo Gilberto Schäfer and Vânia Hack de Almeida, "O controle de constitucionalidade no dereito brasileiro e a possibilitade de modular os effeitos de decisão de inconstitucionalidade," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, pp. 383–384.

148 See Tesis Jurisprudencial P/J. 74/79, in Héctor Fix Zamudio and Eduardo Ferrer Mac-Gregor, *Las sentencias de los Tribunales Constitucionales*, Ed. Porrúa, Mexico City 2009, p. 69; and "Las sentencias de los Tribunales Constitucionales en el ordenamiento mexicano," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 248.

149 See Humberto Nogueira Alcalá, "La sentencia constitucional en Chile: Aspectos fundamentales sobre su fuerza vinculante," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 297.

150 See Decision C-113 of 1993, in Iván Escobar Fornos, "Las sentencias constitucionales y sus efectos en Nicaragua," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 112; and in *Estudios Jurídicos*, Vol. I, Ed. Hispamer, Managua 2007, p. 511.

151 See Hans Kelsen, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001, p. 84.

declared unconstitutional are revived from the date on which the decision of the Constitutional Court becomes effective, unless the Constitutional Court determines otherwise (article 282 (1 and 4) of the Constitution."[152] In Belgium, the revival of the repealed legal provisions as a consequence of the annulment of a statute is the general rule.[153] In Austria, the annulment of statutes by the Constitutional Court can have the consequence that other statutes previously repealed by the annulled one will restart their validity beginning on the day in which the annulment is effective, unless the Tribunal decides otherwise (Article 140.6).

This is a matter that in other countries has been decided by the Constitutional Tribunal. For instance, in Poland, in a decision concerning pension regulation, the Constitutional Tribunal directly ordered the restoration of the provision that had earlier been in force and did not contain elements considered unconstitutional.[154] In Mexico, the Supreme Tribunal has decided, particularly in electoral matters, that the nullity of a statute implies the revival of the legislation that was in force before the annulled statute was sanctioned. The decision was adopted to avoid a legislative vacuum, which could affect the legal security on the matter.[155] In Costa Rica, the Constitutional Chamber, when annulling statutes on forestry, tenancy, and monetary matters, decided to revive the legislation that the annulled statute had repealed.[156]

IV. THE DEFORMATION OF THE INTERPRETATIVE PRINCIPLE: CONSTITUTIONAL COURTS' REFORMING OF STATUTES AND INTERPRETING THEM WITHOUT INTERPRETING THE CONSTITUTION

Constitutional courts are interpreters of the Constitution, not interpreters of statutes, except when they do so in connection or in contrast with the Constitution. That is, constitutional courts can only interpret statutes when interpreting the Constitution, to declare a statute unconstitutional, to reject its alleged unconstitutionality, or to establish an interpretation of the statute according to or in harmony with the Constitution. That is, when interpreting statutes, the Constitutional Court is always obliged to do so by interpreting the

---

[152] See Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, pp. 6–7; and Jairo Gilberto Schäfer and Vânia Hack de Almeida, "O controle de constitucionalidade no dereito brasileiro e a possibilitade de modular os effeitos de decisão de inconstitucionalidade," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 377.

[153] See Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 280, 281, 436–437.

[154] Decision of 20 December 1999, K 4/99; Marek Safjan, *Polish National Report*, p. 5 (footnote 12).

[155] See Tesis Jurisprudencial P./J. 86/2007, SJFG, Vol. 26, December 2007, p. 778. See the reference in Héctor Fix Zamudio and Eduardo Ferrer Mac-Gregor, *Las sentencias de los Tribunales Constitucionales*, Ed. Porrúa, Mexico City 2009, pp. 63–64, 74; and "Las sentencias de los Tribunales Constituticonales en el ordenamiento mexicano," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 252.

[156] See Iván Escobar Fornos, *Estudios Jurídicos*, Vol. I, Ed. Hispamer, Managua 2007, p. 513; and in "Las sentencias constitucionales y sus efectos en Nicaragua," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 114.

Constitution, as their function is not to interpret statutes in isolation, without any interpretation of the Constitution, as this last task generally corresponds to ordinary courts.

As Iván Escobar Fornos has pointed out, "a constitutional judge cannot interpret or correct a statute unless it is done regarding its constitutionality; corresponding the task of interpreting the law to ordinary courts."[157] In such cases, constitutional ccourts interpret the Constitution and the law, but the sole interpretation of a statute when no interpretation of the Constitution is made is no more that a legislative reform of a statute by the Constitutional Court. As explained by Francisco Díaz Revorio:

> In order for an interpretative decision to be within the functions of the constitutional court, it is necessary that the interpretation, or the normative content that the constitutional court establishes in harmony with the Constitution, be really the consequence of the constitutional requirement, and the result of a "new" provision without constitutional foundation.[158]

In the same sense, it must be emphasized that constitutional courts are not allowed to create law *ex novo* or to reform statutes, even in matters of judicial review. As the Constitutional Tribunal of Bolivia said in 2005, constitutional courts

> only establish the sense and scope of legal provisions, without creating of modifying a new legal text. In this sense, the provision interpreted by the Courts does not constitute itself in a new legal provision, due to the fact that the judicial authority by mean of interpretation does not create different provisions.[159]

In the same sense, the Constitutional Tribunal of Peru has said:

> [I]n a different way as the Congress that can ex novo create law within the constitutional framework, the interpretative decisions [of the Constitutional Tribunal] can only determine a provision of law from a direct derivation of constitutional provisions as a *secundum constitutionem* interpretation.[160]

Nonetheless, despite these self-imposed limits, in many cases, a clear interference of the constitutional courts regarding legislative functions, surpassing the assistance or cooperative framework, has ended in extending the text of the interpreted statutes far beyond its literal meaning, modifying the intention or purpose of the original legislator, which are the two main limits of interpretative decisions.[161] Consequently, in many cases, interpretative decisions adopted by constitutional courts have hidden decisions of clear normative

---

[157] See Iván Escobar Fornos, *Estudios Jurídicos*, Vol. I, Ed. Hispamer, Managua 2007, p. 497; and "Las sentencias constitucionales y sus efectos en Nicaragua," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, pp. 104.

[158] See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, pp. 296–297.

[159] See Decision S.C 1426/2005-R. of November 8, 2005, in Pablo Dermizaky Peredo, "Efectos de las sentencias constitucionales en Bolivia," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 86.

[160] See Decision of February 2, 2006. STC 0030-2005; Fernán Altuve Febres, *Peruvian National Report II*, pp. 27–28.

[161] See Francisco Fernández Segado, *Spanish National Report*, p. 20.

content;[162] in them, the Constitutional Court assumes a clear role as positive legislator and even denaturalizes the will of the Legislator. This has been noticed, for instance, in Germany[163] and in Spain.

Referring to the Spanish Constitutional Tribunal's practice of interpreting statutes according to the Constitution, Francisco Fernández Segado has highlighted its "abusive and perverted use," as in decision STC101/2008 of July 24, 2008,[164] where the Tribunal decided an action of unconstitutionality of an article of the Regulation of the Senate, reformed in 2007, after the reform of the Organic Law 6/2007 of the Tribunal. In the latter, a new procedure was established for the appointment by the King of the Members of the Constitutional Tribunal (article 16.1), which stated: "The Magistrates proposed by the Senate will be selected among the candidates nominated by the Legislative Assemblies of the Autonomous Communities in the terms provided by the Regulation of the Chamber [Senate]." The statute's provision was binding in that the Senate, in such case, has no discretion in the selection of the four candidates it must select, which ought to be selected among those nominated by the Autonomous Communities. Nonetheless, an exception was introduced in the Senate's Regulation (article 184.b) allowing the Senate to choose the candidate only when the said Legislative Assemblies would not propose "enough candidates" (*candidatos suficientes*) in the prescribed term, a condition hardly to be applied because in Spain there are exist seventeen Legislative Assemblies, each of which can propose up to two candidates each (a total of thirty-four candidates).[165] Eventually, when deciding the action of unconstitutionality, the Tribunal dismissed it, changing the unequivocal will expressed by the Legislator, and established that the expression "enough candidates" referred not only to a numerical matter but also to a subjective matter regarding the suitability (*idoneidad*) of the candidates according to their evaluation by the Senate. This allowed the parliamentary groups of the Senate to propose candidates in a way contradicting the provision of article 26.1 of the Organic Law of the Tribunal. That is, through an interpretative decision, the Constitutional Court produced a new norm *contra legem*.[166]

A case of this sort – also a case of the pathology of judicial review – can also be identified in Venezuela. In effect, according to Articles 335 and 336 of the Constitution, the Supreme Tribunal is the "highest and final interpreter" of the Constitution, as its role is to ensure a "uniform interpretation and application" of the Constitution and "the supremacy and effectiveness of constitutional norms and principles." For such purpose, the 1999 Constitution created the Constitutional Chamber within the Supreme Tribunal,

---

[162] See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Lex Nova, Valladolid 2001, p. 97.

[163] See, e.g., Helmut Simón, "La jurisdicción constitucional," in Benda et al., *Manual de derecho constitucional*, Instituto Vasco de Administración Pública, Marcial Pons, Madrid 1996, pp. 853–854.

[164] See Francisco Fernández Segado, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas esterotipadas vinculadas a ellas," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 167.

[165] That is why Francisco Fernández Segado considers it a case of "science fiction," in Francisco Fernández Segado, *Spanish National Report*, p. 35.

[166] See the comments in Francisco Fernández Segado, *La justicia constitucional: Una visión de derecho comparado*, Ed. Dykingson, Madrid 2009, Vol. III, pp. 1031 ff.; F. Fernández Segado, *Spanish National Report*, pp. 35–38.

as constitutional jurisdiction (Articles 266,1 and 262), with the exclusive powers to annul statutes (Article 334). To implement the concentrated method of judicial review, the Constitution provides for different means or recourse to the courts, including the popular action for unconstitutionality of statutes, which any citizen can file directly before the Constitutional Division.

In addition, as argued herein, the Constitutional Chamber, without any constitutional or legal support, created in Decision 1077 of September 22, 2000,[167] a recourse for the abstract interpretation of the Constitution, through which any citizen, including public Officers and the Attorney General, can fill a petition to obtain from the Supreme Tribunal a declarative ruling to clarify the content of legal or constitutional provisions. In these cases, the Constitutional Chamber can establish binding interpretations of the Constitution and of a provision of a statute related to the interpretation of the Constitution, but it is not empowered to establish in isolation binding interpretations of statutory provisions without any parallel interpretation of a constitutional provision. That is, a petition of interpretation regarding a particular statute must be filed only before the Politico-Administrative Chamber of the Supreme Tribunal or the other Chambers; it cannot be filed before the Constitutional Chamber. Consequently, the latter cannot issue interpretations of a statute without interpreting the Constitution; if it does, it is illegitimately interpreting the Constitution.

Nonetheless, the latter occurred in Venezuela, with Decision No. 1541 of June 14, 2008 of the Constitutional Chamber.[168] In that case, a petition to interpret article 258 of the Constitution, filed by the Attorney General of the Republic, the Constitutional Chamber without interpreting such provision – which needed no interpretation at all – decided to interpret article 22 of the 1999 Protection and Promotion of the Investment Law, according to the sense that the Attorney General proposed and asked, that is, to deny that such article contained a general open offer of consent given by the Venezuelan State to submit disputes regarding investment to international arbitration. Article 258 of the Constitution, whose "interpretation" was requested, in fact and legally, required no interpretation at all. It states: "The law shall promote arbitration, conciliation, mediation and any other alternative means of dispute resolution." As there is nothing obscure, ambiguous, or inoperative in this provision, it is obvious that the real purpose of the official petition of constitutional interpretation filed by the representative of the Executive was not to obtain a clarifying interpretation of Article 258 of the Constitution, but to obtain an interpretation of Article 22 of the Investment Law so that it would not contain the State's unilateral consent for international arbitration. In particular, the Attorney General requested from the Constitutional Chamber a declaration that "Article 22 of the 'Investment Law' may not be interpreted in the sense that it constitutes the consent of the State to be subjected to international arbitration" and "that Article 22 of the Investment Law does not contain a unilateral arbitration offer, in other words, it does not overrule the absence of an express

[167] See Decision nº 1,077 of September 22, 2000, *Servio Tulio León Briceño* case, *Revista de Derecho Público*, nº 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 247 ff.

[168] See Decision 1541 of June 14, 2008, in *Official Gazette* nº 39055 of October 17, 2008.

declaration made in writing by the Venezuelan authorities to submit to international arbitration, nor has this declaration been made in any bilateral agreement expressly containing such a provision."[169] As was said in the Dissent Vote in the decision, the petition of interpretation eventually had the purpose of obtaining from the Constitutional Chamber a "legal opinion" by means of *a priori* judicial review, which does not exist in Venezuela, thus implying the exercise of a "legislative function" by the Constitutional Chamber.[170]

In another case decided by the same Constitutional Chamber, by means of Decision No. 511 of April 5, 2004,[171] the Court established *ex officio*, that is, without any relation with the particular case at hand, the rules of procedure applicable in the proceedings to be followed by any of the other Chambers of the Supreme Tribunal of Justice when they decide to assume or take over any judicial cause and process from lower courts for their decision (*avocamiento*) at the Supreme Tribunal. In this case, the Chamber did not interpret any constitutional provision, because this exceptional takeover proceeding (*avocamiento*) regarding cases from lower courts is not a constitutional institution and is regulated only in the Organic Law of the Supreme Tribunal. Thus, usurping legislative functions in this case, the Constitutional Court acted as a direct and *ex officio* positive legislator and created rules of procedure without interpreting the Constitution.

Nonetheless, the extreme case of the pathology of judicial review regarding the relation of constitutional courts with the Legislator and its existing legislation occurs when the former proceeds to "reform" pieces of legislation, openly acting as positive legislator. In effect, one of the most elemental principles in constitutional law is that statutes can be reformed only by other statutes, and consequently, only the Legislator's action can reform statutes. The contrary would be an action contrary to the Constitution, whether it is the Executive that pretends to reform acts of Parliament or any other organ of the State different from the Legislator itself.

In this regard, one of the most astonishing decisions issued by the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice to "reform" statutes was issued in 2007. Here, the Chamber, *ex officio* and in *obiter dictum*, regarding a provision of the Income Tax Law that in the particular case it was resolving and was not even challenged on unconstitutional grounds, decided to reform that law. In effect, in Decision No. 301 of February 27, 2007,[172] after rejecting a popular action of unconstitutionality filed in 2001 against articles 67, 68, 69, 72, 74, and 79 of the 1999 Income Tax Law,[173] because of the petitioners' lack of standing, instead of sending the file to the general court's Archives, the Chamber proceeded, after deciding the inadmissibility of the action, and without any

---

169 *Id.*

170 *Id.*

171 See Decision nº 511 of April 5, 2004, *Maira Rincón Lugo* case; http://www.tsj.gov.ve/decisiones/scon/Abril/511-050404-04-0418..%20.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, pp. 18–19.

172 See *Adriana Vigilanza y Carlos A. Vecchio* case, Exp. nº 01-2862; *Gaceta Oficial* nº 38.635 of March 1, 2007, at http://www.tsj.gov.ve/decisiones/scon/Febrero/301-270207-01-2862.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, pp. 22–23.

173 See Decree Law nº 307, *Gaceta Oficial* nº 5.390 Extra. of October 22, 1999.

judicial debate or discussion on the issue, to reform *ex officio* another article of the Law (article 31), which had not even been challenged by petitioners.

The decision provoked bitter protests in public opinion and in the National Assembly, which, in a unanimous resolution, "categorically rejected" the Constitutional Chamber's decision, considering it "unconstitutional, contrary to the social and collective fundamental rights and social ethics," and declared it "without any legal effects." In addition, the National Assembly publicly praised for the disobedience of the Chamber decision, and "exhorted the Venezuelan people and specifically, the tax payers, as well as the National Tax Service (*Seniat*) to continue with the process of tax returns as it is established in the statute."[174] The Vice President of the National Assembly qualified the Chamber decision reforming an article of the Income Tax Law as one in which the Constitutional Jurisdiction "usurped legislative powers."[175] In fact, in this case, the Constitutional Chamber usurped the legislative function by reforming an article of the Tax Law in an *obiter dictum* of a decision in which the Chamber declared inadmissible an action of unconstitutionality filed against other articles of the same Taxation Law.[176]

Many other decisions of the Constitutional Chamber reforming provisions of legislation have been issued during the past decade, for instance on matters of procedural terms applicable in civil procedure trials: the Chamber partially annulled a provision of the Civil Procedural Law and created new wording that establishes a different way of counting procedural terms.[177] On the same matters of procedural terms applicable in criminal procedure trials, the Court modified the Criminal Procedure Code to establish a new way of counting the terms but without annulling the provision.[178] On matters of judicial holidays established in the same Civil Procedural Code, the Court partially annulled the specific provision of the Code eliminating one of the two holiday terms established in it, thus usurping the discretional options to be established on the matter in legislation that is attributed to the National Assembly.[179] In other cases, also regarding procedural rules, when

---

174 See in *Gaceta Oficial* nº 38.651 March 26, 2007.

175 Resolution of March 22, 2007; *El Universal*, Caracas March 23, 2007, p. 1–1; *El Nacional*, Caracas, March 23, 2007, p. 4.

176 See the general comment on this decision in Allan R. Brewer-Carías, "El juez constitucional en Venezuela como legislador positivo de oficio en materia tributaria," *Revista de Derecho Público*, nº 109, Editorial Jurídica Venezolana, Caracas 2007, pp. 193–212.

177 See Decision nº 80 of February 1, 2001, case *Article 197 of the Civil Procedural Code*; *Revista de Derecho Público*, nº 85–89, Editorial Jurídica Venezolana, Caracas 2001, pp. 90 ff., at http://www.tsj.gov.ve/decisiones/scon/Febrero/80-010201-00-1435%20.htm. See the comments in Allan R. Brewer-Carías, "Los primeros pasos de la Jurisdicción Constitucional como 'legislador positivo' violando la Constitución, y el régimen legal de cómputo de los lapsos procesales," in *Crónica sobre la "in"justicia constitucional: La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público, Universidad Central de Venezuela, nº 2, Editorial Jurídica Venezolana, Caracas 2007, pp. 511 ff. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 24.

178 See Decision nº 2560 of August 5, 2005, *Article 172 of the Organic Civil Criminal Code* case; http://www.tsj.gov.ve/decisiones/scon/Agosto/2560-050805-03-1309.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, pp. 21–22.

179 See Decision nº 1264 of June 11, 2002, *Article 201 of the Civil Procedure Code* case; http://www.tsj.gov.ve/decisiones/scon/Junio/1264-110602-00-1281.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, pp. 24–25.

deciding a nullity action against provisions of the Rural Land Law, in which the notice to the interested parties to participate in the respective trial was established by a publication in newspapers, the Court reformed the provisions by adding that the notice was also to be delivered personally to interested parties.[180]

In other cases, the Constitutional Chamber of the Supreme Tribunal has "reformed" the Amparo Law, establishing a new procedure to be applied in the amparo proceedings, and the same Organic Law of the Supreme Tribunal establishes a new set of procedural rules to be applied in judicial review, assuming an active role as positive legislator. In effect, in the first two decisions the Constitutional Chamber adopted after its installment in 2000, the Chamber modified, *ex officio*, articles 7 and 8 of the Organic Law on Amparo, redistributing the competencies of the courts, including its own competencies on matter of amparo,[181] that is, to decide the specific action or complaint for the protection of fundamental rights. Since then, such competencies have been ruled by the Chamber's decision, not by what is provided for in the Organic Law. Another notorious case was Decision No. 7 of February 1, 2000,[182] where the Chamber, on the occasion of ruling in a particular case of amparo, also in an *obiter dictum* and *ex officio*, by means of interpreting articles 27 and 49 of the Constitution that establish the oral trial in the amparo proceeding for the protection of fundamental rights and the basic rules of due process, decided to "adapt" the 1988 Amparo Law to the new 1999 Constitution, completely "reforming" the law by establishing a completely new set of rules of procedure that since have been applied in all amparo cases. The ones established in the Amparo Law have not been applied, though that law remains "in effect" without having been annulled or repealed.[183] Without doubt, in this case, the Chamber exceeded its functions as the highest interpreter of the Constitution and openly proceeded as a positive legislator, "reforming" the text of a statute.[184] Consequently, since 2000, on matters of amparo procedure and of distribution of jurisdiction between the different courts, the applicable "law" in Venezuela is decision Nº 7 of 2000 of the Constitutional Chamber of the Supreme Tribunal that "reformed" the 1988 Amparo Law.[185]

---

[180] See Decision nº 2855 of November 20, 2002, *Articles 40 and 42 of the Rural Land Law* case; http://www.tsj.gov.ve/decisiones/scon/Noviembre/2855-201102-02-0311..htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 21.

[181] See Decision nº 1, *Emery Mata Millán* case, at http://www.tsj.gov.ve/ decisiones/scon/Enero/01-200100-00-002.htm; and Decision nº 2, of January 20, 2000, *Domingo Ramírez Monja* case, at http://www.tsj.gov.ve/decisiones/scon/Enero/02-200100-00-001.htm; *Revista de Derecho Público*, nº 84, Editorial Jurídica Venezolana, Caracas, 2000, pp. 225 ff. and 235 ff. See Daniela Urosa Maggi, *Venezuelan National Report*, p. 12.

[182] Case: *José A. Mejía y otros, Revista de Derecho Público*, nº 81, Editorial Jurídica Venezolana, Caracas 2000, pp. 349 ff. See also http://www.tsj.gov.ve/ decisiones/scon/Febrero/07-010200-00-0010.htm; Daniela Urosa Maggi, *Venezuelan National Report*, pp. 4–5.

[183] See Daniela Urosa Maggi, *Venezuelan National Report*, p. 5.

[184] See the general comment on this decision in Allan R. Brewer-Carías, "El juez constitucional como legislador positivo y la inconstitucional reforma de la Ley Orgánica de Amparo mediante sentencias interpretativas," in Eduardo Ferrer Mac-Gregor y Arturo Zaldívar Lelo de Larrea (coords.), *La ciencia del derecho procesal constitucional: Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Mexico City 2008, Vol. V, pp. 63–80.

[185] See Humberto Enrique Tercero Bello Tabares, "El procedimiento de Amparo Constitucional, según la sentencia nº 7 dictada por la Sala Constitucional del Tribunal Supremo de Justicia, de fecha 01 de febrero de 2000. Caso *José*

Another decision of the Constitutional Chamber reforming statutes has been issued regarding the rules of procedure concerning actions for judicial review of the constitutionality of statutes. The Organic Law on the Supreme Tribunal of Justice was sanctioned by the National Assembly in 2004, establishing the rules of procedure regarding actions filed before the Court claiming for the nullity of statutes (article 21.9 ff.). In Decision Nº 1645 of August 19, 2004, a few months after the publication of the Organic Law, the Constitutional Chamber, without declaring any statutory provision unconstitutional, in exercising its normative jurisdiction, proceeded to reform the new law and to establish a completely new judicial procedure.[186]

Amando Mejía Betancourt y José Sánchez Villavicencio," *Revista de Derecho del Tribunal Supremo de Justicia*, nº 8, Caracas 2003, pp. 139–176; María Elena Toro Dupuy, "El procedimiento de amparo en la jurisprudencia de la Sala Constitucional del Tribunal Supremo de Justicia (Años 2000–2002)," *Revista de Derecho Constitucional*, nº 6, Editorial Sherwood, Caracas 2003, pp. 241–256.

[186] See Decision 1645 of August 19, 2004, *Gregorio Pérez Vargas* case; http://www.tsj.gov.ve/decisiones/scon/Agosto/1645-190804-04-0824.htm. This decision was ratified and complemented with new procedural rules in Decision 1795 of July 19, 2005. *Promotora San Gabriel* case, http://www.tsj.gov.ve/decisiones/scon/Julio/1795-190705-05-0159.htm; Daniela Urosa Maggi, *Venezuelan National Report*, p. 10. See the comments in Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia*, Editorial Jurídica Venezolana, Caracas 2004.

Chapter 4

CONSTITUTIONAL COURTS' INTERFERENCE WITH THE LEGISLATOR REGARDING LEGISLATIVE OMISSIONS

As aforementioned, one of the most important contemporary trends in the transformation of judicial review of legislation, particularly in concentrated systems, has been the development of the possibility for constitutional courts to exercise their power to control the constitutionality of statutes, interpreting them according to the Constitution without being obliged to decide on the nullity of the unconstitutional provisions.

The same sort of control is also exercised regarding the constitutionality of the conduct of the Legislator, not related to statutes duly enacted, but regarding the absence of such statutes or the omissions the statutes contain when the Legislator does not comply with its constitutional obligation to legislate on specific matters or when the Legislator has passed legislation it in an incomplete or discriminatory way. It is important to highlight in all these cases that judicial review decisions adopted by constitutional courts are issued completely separate from the need to annul existing statues, as it is impossible in these cases to characterize the constitutional courts as negative legislators. On the contrary, in many of these cases, constitutional courts act openly as positive legislators, often with the possibility to issue declarations of unconstitutionality of certain legal provisions without annulling them. In some ways, this is similar to what occurs in diffuse systems of judicial review, where the courts have no power at all to annul statutes.

Two sorts of legislative omissions can generally be distinguished: absolute and relative omissions.[452] Absolute omissions exist in cases of the absence of any legislative provision adopted with the purpose of applying the Constitution or executing a constitutional provision, in which case a situation contrary to the Constitution is created. Relative omissions exist when legislation has been enacted but in a partial, incomplete, or defective way from the constitutional point of view. As pointed out by Luís Fernández Revorio, absolute omissions are related to the "silences of the legislator" that create situations

[452] See José Julio Fernández Rodríguez, *La inconstitucionalidad por omisión: Teoría general. Derecho comparado. El caso español*, Civitas, Madrid 1998, pp. 33, 114 ff. According to Thomas Bustamante, "While a complete omission takes place when the legislator does not produce any law although there is a genuine constitutional obligation of regulating some constitutional issue, a partial omission occurs when the legislative authority regulates a situation in an unconstitutional way because it does not cover situations that should have been included in the statute." See Thomas Bustamante and Evanlida de Godoi Bustamante, *Brazilian National Report*, p. 11.

contrary to the Constitution; relative omissions are related to the "silences of the statutes," which also create the same unconstitutional situation.[453]

Both sorts of legislative omissions have been subjected to judicial review by constitutional courts, though not uniformly.

I. CONSTITUTIONAL COURTS' FILLING THE GAP OF ABSOLUTE LEGISLATIVE OMISSIONS

Regarding judicial review of absolute legislative omissions, the matter can be decided by the constitutional courts through two judicial means: when deciding a direct action for the unconstitutionality of an omission by the Legislator and when deciding a particular action or complaint for the protection of fundamental rights filed against an omission of the Legislator that prevents the possibility of enforcing such right.

1. Direct Action against Absolute Legislative Omissions

The origin of the direct action seeking judicial review of unconstitutional absolute legislative omissions is found in the 1974 Constitution of the former Yugoslavia, which assigned the Constitutional Guaranties Tribunal the power to decide on cases of lack of legislative development of constitutional provisions that impeded the complete execution of the Constitution (article 377).[454]

Two years later, and influenced by the former Yugoslavian institution,[455] the direct action against absolute legislative omissions was incorporated in the 1976 Constitution of Portugal. It assigned the Council of the Revolution, as a political organ assisting the President of the Republic, the necessary powers to verify failures of the Legislator to comply with the Constitution by enacting the necessary statutes to implement the provisions of the new Constitution (article 279, Constitution),[456] and particularly in view of changing prerevolutionary legislation and implementing legislative provisions of the Constitution than banned organizations with fascist ideology.[457]

Up to the sanctioning of the 1982 First Revision of the Constitution, which definitively established this "constitutional control of omission," control of absolute omissions was exercised by the then Council of the Revolution in two occasions and basically as a political

---

[453] See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Ed. Lex Nova, Valladolid 2001, p. 171.

[454] See José Julio Fernández Rodríguez, *La inconstitucionalidad por omisión: Teoría general. Derecho comparado. El caso español*, Civitas, Madrid 1998, pp. 244–246.

[455] See Jorge Campinos, "Brevísimas notas sobre a fiscalizacão da constitucionalidade des leis em Portugal," in Giorgo Lombardi (coord.), *Constituzione e giustizia constitutionale nel diritto comparato*, Maggioli, Rimini 1985; and *La Constitution portugaise de 1976 et sa garantie*, Universidad Nacional Autónoma de México, Congreso sobre La Constitución y su Defensa (mimeo), Mexico City, August 1982, p. 42.

[456] See generally Jorge Miranda, "L'inconstitutionalité par omisión dans le droit portugais," in *Revue Européene de Droit Public*, Vol. 4, nº 1, 1992, pp. 39 ff.; José Julio Fernández Rodríguez, *La inconstitucionalidad por omisión: Teoría general. Derecho comparado. El caso español*, Civitas, Madrid 1998, pp. 249 ff.

[457] See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Ed. Lex Nova, Valladolid 2001, pp. 257–260.

means of control.[458] In 1977, through *Parecer* 8/1977 of March 3, 1977, the Council "recommended" that the Assembly of the Republic adopt legislative measures to enforce Article 46.4 of the 1976 Constitution regarding organizations with fascist ideology, establishing as the main condition for the exercise of such control, first, that the constitutional norm could not be self-executing (i.e., it could not require implementation to be applied), and second, that the competent body to adopt the legislative measures must have violated its obligation of issuing legislative provisions to a degree that it obstructed the observance of the Constitution by the very party for whom the constitutional obligation was intended.[459]

In a second case, in *Parecer* 11/1977, April 14, 1978, the Council of the Revolution recommended that the competent legislative bodies adopt legislative measures to guarantee the applicability of Article 53 of the Constitution to domestic servants, conferring to those workers the right to rest and to recreation by limiting the length of the workday and establishing the weekly rest period as well as periodic paid holidays. On this second occasion, the essential contribution of the decision was the extensive interpretation of the Constitutional Commission regarding the initiative to request control of the omission.[460]

Following these previous experiences on judicial review, the 1982 Constitution created the Constitutional Tribunal and established its power to exercise judicial review of legislative omissions regarding the enactment of provisions necessary to make enforceable constitutional mandates (article 283). The standing to sue in these cases was given to the President of the Republic or the Ombudsman at the national level, and to the Presidents of the Regional Assemblies in cases of violation of the rights of the autonomous regions. The decisions of the Tribunal in these cases are only of declarative character and with nonbinding effects, so the Court "cannot substitute itself for the legislator by creating the missing rules nor can it urge them to act by indicating the timing for or the content of such action."[461] In these cases of judicial decisions on legislative omissions, the Tribunal can only inform the competent legislative organ of its findings.

The Portuguese Constitutional Tribunal issued only seven important decisions exercising this judicial review mean of control of legislative omissions.[462] Its first decision was Decision No. 182/1989 of February 1, 1989, on the noncompliance of article 35.4 of the Constitution on the use of computers and the prohibition of third-party access to files containing personal data, given the lack of a legislative measure defining personal data.[463]

---

458 See M. Gonzalo, "Portugal; El Consejo de la Revolución, su Comisión Constitucional y los Tribunales ordinarios como órganos de control de la constitucionalidad," in *Boletín de Jurisprudencia Constitucional*, Cortes Generales, 8, Madrid 1981, pp. 630, 640.

459 See José Julio Fernández Rodríguez, *La inconstitucionalidad por omisión: Teoría general. Derecho comparado. El caso español*, Civitas, Madrid 1998, pp. 265–266.

460 See José Julio Fernández Rodríguez, *La inconstitucionalidad por omisión: Teoría general. Derecho comparado. El caso español*, Civitas, Madrid 1998, pp. 265–266.

461 See Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, pp. 10–11.

462 See Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, p. 10.

463 See José Julio Fernández Rodríguez, *La inconstitucionalidad por omisión: Teoría general. Derecho comparado. El caso español*, Civitas, Madrid 1998, pp. 268–269; Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, p. 10.

Another case was Decision No. 474/2002, on the noncompliance of article 59.1-e of the Constitution, given the omission of legislative measures needed to provide social benefits for Public Administration workers who involuntarily found themselves unemployed.[464] In both cases, although the Legislator is not constitutionally obliged to initiate any legislative procedure, the result of the Tribunal's decision was the sanctioning of the needed legislation (Law 10/91 and Law 11/2008).[465]

After the Portuguese constitutional experience, the direct action for judicial review of absolute unconstitutional legislative omissions has been established in only some other countries, mainly in Latin America, including Brazil, Ecuador, and Venezuela.

The first country to follow the Portuguese trends on the matter was Brazil, where judicial review of absolute legislative omissions through a direct action was incorporated in the 1988 Constitution (Articles 102.I.a and 103), which gave power to the Federal Supreme Tribunal to decide the actions filed against the unconstitutionality of legislative omissions, thus impeding the enforcement of a constitutional provision. In this case, also, the action can be filed only by a limited number of State officials or organs, namely the President of the Republic, the Board of the Federal Senate, and the Board of the House of Representatives, and the Board of a Legislative Assembly of a State.

The ruling of the Tribunal declaring unconstitutional a legislative omission to enforce a provision of the Constitution does so without annulling any act and without issuing a direct order to Congress. The Tribunal only must inform the competent organ for it to adopt the necessary measures. In this sense, in a case of an action intended to establish that the value of the minimum wage was unconstitutional because it could not meet the basic needs of a person, the Supreme Federal Tribunal held that, while deciding on these omissive actions, "the Supreme Court can do no more than notify the competent legislative body which should have enacted a normative act, in order to make this body of the Republic aware of the unconstitutionality and to enable it to regulate the matter required by the Constitution, without the interference of the Judiciary."[466] Consequently, the judicial decision in these cases is also declarative, without *erga omnes* and binding effects.[467]

In contrast, in many cases, the Federal Supreme Court has stipulated a deadline for the omission to be filled and has established the self-applicability of the constitutional rule in the event the deadline expired.[468] For instance, in the action filed by the Mato Grosso State Legislature against the unconstitutionality of the omission by the National Congress in drafting the federal supplementary law referred to by Section 4 of Article 18 of the

---

464 See Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, p. 10.

465 See Joaquim de Sousa Ribeiro and Esperança Mealha, *Portuguese National Report*, pp. 10–11.

466 See STF, ADI 1439-MC, Rel. Min. Celso de Mello, DJ de 30-5-2003, in Thomas Bustamante and Evanlida de Godoi Bustamante, *Brazilian National Report*, p. 12.

467 See Marcia Rodrígues Machado, "Inconstitutionalidade por omissão," *Revista da Procuradoria Greal de São Paulo*, nº 30, 1988, pp. 41 ff.; Héctor Fix Zamudio and Eduardo Ferrer Mac-Gregor, *Las sentencias de los Tribunales Constitucionales*, Ed. Porrúa, Mexico City 2009, pp. 38–39; José Julio Fernández Rodríguez, *La inconstitucionalidad por omisión: Teoría general. Derecho comparado. El caso español*, Civitas, Madrid 1998, pp. 285; Marcelo Figuereido, *Brazilian National Report II*, p. 3.

468 See Marcelo Figuereido, *Brazilian National Report II*, p. 4.

Constitution –related to the creation, merger, consolidation, and subdivision of Municipalities– the Tribunal stipulated a deadline of eighteen months for it to take all the legislative steps necessary to comply with the constitutional provision.[469]

Another Latin American country that has adopted the system of judicial review of absolute legislative omissions is Venezuela, which, in article 336.7 of the 1999 Constitution has empowered the Constitutional Chamber of the Supreme Tribunal of Justice to declare the unconstitutionality of municipal, state, or national legislative organ omissions, when they failed to issue indispensable rules or measures to guarantee the enforcement of the Constitution, or when they issued them in an incomplete way; and to establish the terms, and if necessary, the guidelines for their correction.

This provision gave extended judicial power to the Constitutional Chamber of the Supreme Tribunal, as Constitutional Jurisdiction, to control "legislative silence and legislative abnormal functioning,"[470] surpassing the trends of the Portuguese and Brazilian antecedents, first, by not limiting the standing to file the action to high public officials but configuring it as an *actio popularis*, and second, by granting express powers to the Court to establish the terms and, if necessary, the guidelines for the correction of the omission.

In many cases, the Constitutional Chamber has been asked to rule on omissions of the National Assembly in sanctioning statutes that it is obliged to enact within a fixed term established in the 1999 Constitution – for instance, the Organic Law on Municipal Power was due to be sanctioned within two years following the approval of the Constitution. Even though the Chamber issued two decisions in the case,[471] the National Assembly failed to adjust the statute until 2005.[472] In these cases, as it is the general situation regarding constitutional control of legislative omissions, the Constitutional Chamber had not itself became a positive legislator and abstained from deciding in place of the legislative body, that is, it had not legislated itself. Nonetheless, according to the Constitution, the Constitutional Chamber always has the power when declaring the unconstitutionality of a legislative omission "to establish the terms" of the statute to be sanctioned "and[,] if necessary, the guidelines" for the correction of the legislative omissions. That is why, in other cases, the Constitutional Chamber has issued provisional legislation filling the existing vacuum on, for instance, tax matters related to the distribution of competencies between the National and the State level of governments. It occurred when deciding a conflict between the national Law on Tax Stamps and the Ordinance on Tax Stamps of the Metropolitan District of Caracas, by resolving in Decision No. 978 of April 2003[473] to

---

469 See ADI 3682/MT, May 9, 2007, in Thomas Bustamante and Evanlida de Godoi Bustamante, *Brazilian National Report*, p. 12; Marcelo Figuereido, *Brazilian National Report II*, p. 7.

470 See decision of the Political-Administrative Chamber nº 1819 of August 8, 2000, case: *Rene Molina v. Comisión Legislativa Nacional*.

471 See decisions of the Constitutional Chamber nº 1347 of May 27, 2003; nº 3118 of October 6, 2003 *Revista de Derecho Público*, nº 93–96, Editorial Jurídica Venezolana, Caracas 2003, pp. 108 ff. and 527 ff.; and nº 1043 of May 31, 2004, *Revista de Derecho Público*, nº 97–98, Editorial Jurídica Venezolana, Caracas 2004, pp. 270 ff. and 409 ff.

472 The Organic Law was published in *Official Gazette* nº 38327 of December 2, 2005. See the reference in Allan R. Brewer-Carías et al., *Ley Orgánica del Poder Público Municipal*, Editorial Jurídica Venezolana, Caracas 2005, p. 17.

473 Decision nº 978 of April 30, 2003, *Banco Bolívar* case; http://www.tsj.gov.ve/ decisiones/scon/Abril/978-300403-01-1535%20.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, pp. 17–18.

establish the legal regime as strictly applicable on the matter pending the issue of the national legislation on the coordination of tax competencies (article 164.4 of the Constitution).

In addition, in Venezuela, the Constitutional Chamber has been asked to decide not only cases of absolute omissions of the National Assembly to enact statutes that it had the constitutional obligation to sanction, but also other nonnormative acts that the National Assembly must adopt. This was the case, for instance, of the appointment of the members of the National Electoral Council, which the National Assembly must do by a majority of two-thirds of the representatives following a complex procedure involving civil society and citizen participation.[474] In 2004, the National Assembly, after completing almost all the steps of the procedure, failed to appoint the Members of the National Electoral Council, because the official party did not have the necessary votes to appoint its candidates (two-thirds) without any compromise with the opposition parties. In the face of the omission of the National Assembly, a citizen requested that the Constitutional Chamber control the unconstitutionality of the omission and sought a decision of the Constitutional Chamber compelling the National Assembly to accomplish its constitutional duty, which no other organ of the State could assume. Instead, what the petitioner obtained from a Constitutional Chamber of the Supreme Tribunal, packed with Magistrates completely controlled by the Executive, was the direct appointment of the members of the National Electoral Council by the Constitutional Court itself, without complying with the requirements and conditions established in the Constitution. Without doubt, in this case, the Constitutional Court usurped the National Assembly's exclusive powers; acted as positive Legislator and in violation of the Constitution; and through its decision, guaranteed the complete control of the Electoral branch of government by the National Executive.[475]

In other countries, like Costa Rica, the Law on Constitutional Jurisdiction assigns the Constitutional Chamber of the Supreme Court the power to decide actions of unconstitutionality "against the inertia, the omissions and the abstentions of public authorities" (article 73.f).[476]

More recently, in the 2008 Constitution of Ecuador, the direct action for judicial review of legislative omissions was expressly established (article 436.10), assigning the Constitutional Court the power to "declare the unconstitutionality in which the institutions of the State or public authorities incurred because of omissions in complying total or partially the mandates contained in constitutional provisions, within the terms established in the Constitution or in the term considered reasonable by the Constitutional Court." The same

---

474 See Allan R. Brewer-Carías, "La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas," *Revista Iberoamericana de Derecho Público y Administrativo*, Vol. 5, nº 5,2005, San José, Costa Rica 2005, pp. 76–95.

475 See Decisions Nos. 2073 of August 4, 2003 (case: *Hermánn Escarrá Malaver y oros*) and 2341 of August 25, 2003 (case: *Hermánn Escarrá M. y otros*), in Allan R. Brewer-Carías, "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000–2004," in *Boletín Mexicano de Derecho Comparado*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, nº 112. Mexico City, January–April 2005, pp. 11–73.

476 See José Julio Fernández Rodríguez, *La inconstitucionalidad por omisión: Teoría general. Derecho comparado. El caso español*, Civitas, Madrid 1998, pp. 300–302.

provision empowers the Constitutional Court provisionally to "issue the omitted provision or to execute the omitted act according to the law," once the term has elapsed and the omission persists. It is unique in comparative law that constitutional power, even provisional, is given to the Constitutional Court to substitute for the Legislator.

In Hungary, article 49 of the 1989 Amendment of the Constitution establishes that the Constitutional Court *ex officio* or on anyone's petition can decide on the unconstitutionality of legislative omissions when a legislative organ has failed to fulfill its legislative tasks, instructing the organ that committed the omission to set a deadline to fulfill its task. The Hungarian Constitutional Court has interpreted this competence expansively and has practiced it not only in the cases of unconstitutional failures of fulfillment of legislative obligations resulting from particular legal authorization, but also when the Legislator failed to establish a statute necessary for the emergence of a fundamental right, designated in the Constitution.[477] As mentioned by Lóránt Csink, József Petrétei, and Péter Tilk, in exercising this attribution, the Constitutional Court establishes not only the unconstitutionality of the omission of legislation – for instance, by making it impossible for the exercise of a fundamental right – but also the contents of the rules to be sanctioned, which the Legislator must respect.[478]

Regarding Croatia, where the Constitutional Court has powers to proceed *ex officio* on matters of control of constitutionality, the 2002 constitutional reform empowered the Court to adopt reports about any kind of unconstitutionality (and illegality) it has observed and to send them to the Croatian Parliament. Until November 2009, it had adopted six reports addressing important issues that emerged in practice, such as the right to reasonable duration of a trial and the unconstitutionality of regulations on parking fees.[479]

In Bolivia, even in the absence of constitutional or legal provisions, the Constitutional Tribunal created its own power to exercise judicial review control on Legislative omissions. In Decision S.C. 0066/2005 of September 22, 2005, the Court, after verifying its own powers of judicial review, argued that, "when the Legislator does not develop a constitutional provision in a particular and precise way, or it develops the provision in a deficient or incomplete way turning the constitutional mandate inefficient, or impossible to be applied because of such omission or deficiency, the Constitutional Tribunal has the attribution to judge the constitutionality of such acts, providing for the Legislator to develop

---

[477] An example of such a case is Decision 37/1992 (VI.10). Under Article 61, section (4), of the Constitution, a majority of two-thirds of the votes by the members of Parliament present is required to pass an Act on the supervision of public radio, television, and the public news agency, as well as on the appointment of the directors thereof, on the licensing of commercial radio and television, and on the prevention of monopolies in the media sector. However, until 1996, Parliament failed to adopt a comprehensive Act on radio and television. Likewise, under Article 68, section (5), of the Constitution, a majority of two-thirds of the votes by members of Parliament present is required to pass an Act on the rights of national and ethnic minorities. Decision 35/1992 (VI.10) established an unconstitutional omission as the representation of national and ethnic minorities had not been regulated to the extent and in the manner required by the Constitution; Lóránt Csink, József Petrétei, and Péter Tilk, *Hungarian National Report*, p. 5 (footnote 18).

[478] See Lóránt Csink, József Petrétei, and Péter Tilk, *Hungarian National Report*, pp. 5–6.

[479] See Sanja Barić and Petar Bačić, *Croatian National Report*, pp. 12–13.

the constitutional provision as imposed by the Constitution."[480] In the case of the National Congress's failure to appoint the members of the Supreme Court of Justice, the Constitutional Tribunal of Bolivia issued a decision in 2004 ruling on the unconstitutionality of the Executive's provisional appointment of the magistrates. To avoid creating a more severe situation of unconstitutionality, the Tribunal postponed the effects of its decision for a term of sixty days, exhorting the Legislator to perform its duties but without usurping its functions.[481]

In other cases, also without a specific means of judicial review to control absolute legislative omissions, the constitutional courts have developed judicial control through other general means of judicial review, as in the case of Mexico, but only by means of the recourse for the solution of constitutional controversies between constitutional organs of the State. Nonetheless, this thesis was abandoned in 2006, in a decision resolving a constitutional controversy in which the Court considered inappropriate such judicial review to control legislative omissions.[482]

2. The Protection of Fundamental Rights against Absolute Legislative Omissions by Means of Actions or Complaints for Their Protection

The other means for controlling unconstitutional legislative omissions are specific actions or complaints for the protection of fundamental rights that can be filed against the harms or threats that such omissions can cause. This is the case, for example, in many Latin American countries, where amparo actions are filed against omissions of the Legislator or for specific actions for the protection of fundamental rights that have been established.[483] Therefore, in some countries, at least theoretically, it is possible to file amparo actions to protect fundamental rights against legislative omission when such omissions prevent the effective enforcement of a fundamental right.[484]

In particular, mention must be made of the important writ of injunction (*mandado de injunção*) in Brazil, established in Article 5.LXXI, of the Constitution, which is to be "granted whenever the lack of regulatory provision makes the exercise of constitutional

---

480 See Pablo Dermizaky Peredo, "Efectos de las sentencias constitucionales en Bolivia," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 79.

481 See Decision S.C. 0129/2004-R, of November 10, 2004, in Pablo Dermizary Peredo, "Efectos de las sentencias constitucionales en Bolivia," in *Anuario Iberoamericano de Justicia Constitucional*, nº 12, 2008, Centro de Estudios Políticos y Constitucionales, Madrid 2008, p. 78.

482 See Decision 56/2006, in Héctor Fix Zamudio and Eduardo Ferrer Mac-Gregor, *Las sentencias de los Tribunales Constitucionales*, Ed. Porrúa, Mexico City 2009, pp. 71, 72; and "Las sentencias de los tribunales constitucionales en el ordenamiento mexicano," in *Anuario Iberoamericano de Justicia Constitucional*, nº 12, 2008, Centro de Estudios Políticos y Constitucionales, Madrid 2008, pp. 252. See also Eduardo Ferrer Mac-Gregor, "La Corte Suprema di Giustizia del Messico quale Tribunale constituzionale," in Luca Mezetti (coord.), *Sistemi e modelli di giustizia costitutionale*, Cedam, Padua 2009, p. 618.

483 On the amparo proceedings against authorities' omissions in Latin American countries, see particularly Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceeding*, Cambridge University Press, New York 2009, pp. 324 ff.

484 In Venezuela, amparo actions have been filed against omissions of the Legislator regarding certain administrative acts. See Allan R. Brewer-Carías, *La justicia constitucional: Procesos y procedimientos constitucionales*, Universidad Nacional Autónoma de México, Mexico City 2007, pp. 153 ff.

rights and liberties, as well as rights inherent in nationality, sovereign status and citizenship, unfeasible." According to the Federal Supreme Tribunal, the writ of injunction does not authorize the Tribunal to fill the gap left by the legislative omission, so the Tribunal cannot enact a normative rule;[485] its function is limited to declaring the delay to develop the normative rule and to notify the Legislator, and the decision has only *inter partes* effects.

In the first writ of injunction decided in 1989, the Tribunal considered that the action attempts to obtain from the Judiciary a declaration of unconstitutionality of an omission in regulating a right, with a view to notify the entity responsible for that regulation to take action.[486] However, there are cases in which the Tribunal has given a broader scope to this procedural remedy. In Case 283 of 1991, the Tribunal recognized a state of negligence of Congress in regulating provisions established by the Temporary Provisions of the Constitution related to compensation for the victims of abuses committed by the military dictatorship via Secret Acts of the Ministry of Defense, which banned a large number of people from exercising certain economic activities. Because the Temporary Provisions required the passing of a federal statute to regulate such compensation, the victims could not exert their constitutional rights. In the face of this specific situation, the Supreme Federal Tribunal not only ruled that there was an unconstitutional omission but also established a deadline of forty-five days for Congress to pass the statute. The Tribunal determined, moreover, that if parliamentary negligence remained after that deadline, the applicant would be automatically entitled to claim compensation according to the general rules of the Civil Code.[487]

In another relevant case, the Constitution guaranteed a tax privilege to certain social institutions, excluding them from taxation by contributions to the social security, "as long as these entities complied with the conditions established in law" (article 197.5). The Constitution left to the ordinary legislator the task to establish the conditions to be complied to claim immunity from the contributions. Accordingly, the Federal Government understood that such entities could claim no fiscal immunity until Congress passed a law listing such conditions. The Supreme Federal Tribunal, after holding that there was an unjustifiable legislative omission, fixed a deadline of six months for Congress to pass a law eliminating that omission. Furthermore, it determined that, if no law was passed before that deadline, the claimant would be automatically entitled to claim the fiscal benefit.[488]

It must also be mentioned that, in some cases, the Brazilian Federal Supreme Tribunal has supplied the missing rule through analogy until the Legislator can enact legislation. This was the case in the application of social security rules regarding special pension in the private sector to civil servants working at the Health Department of the public sector (MI

---

[485] See Decision STF 168/RS, Reporting Justice J. Ministro Pertence, DJU, on April 20 1990, in Marcelo Figuereido, *Brazilian National Report II*, p. 4.

[486] STF, MI 107-QO, Rel. Min. Moreira Alves, DJ de 21-09-1990; Thomas Bustamante and Evanlida de Godoi Bustamante, *Brazilian National Report*, p. 17.

[487] STF, MI 283, Rel. Min. Sepúlveda Pertence, DJ de 14-11-1991; Thomas Bustamante and Evanlida de Godoi Bustamante, *Brazilian National Report*, p. 17.

[488] STF, MI 232, Rel. Min. Moreira Alves, DJ de 27-03-1992; Thomas Bustamante and Evanlida de Godoi Bustamante, *Brazilian National Report*, pp. 17–18.

721/DF, March 8, 2007) and in the application to the provisions of a statute (Law 7.783/1989) that governs the right to strike in the private sector (MI 670/ES, October 25, 2007) to civil servants of a State.[489]

The same general approach of the constitutional court complementing the Legislator, particularly on matters of protecting fundamental rights, can be found in other countries. For example, in Argentina, the Supreme Court's ruling in the *Badaro* cases concerned automatic adjustment of pensions. In effect, because the Constitution provides for "mobile" pensions (article 14 *bis*), in *Badaro I*,[490] the Supreme Court considered that Congress's inaction with respect to the increase of pensions, which had been seriously reduced as a result of high inflation, violated the constitutional mandate. Therefore, the Court urged Congress to pass legislation within a reasonable time to solve that problem. The Court emphasized that it is not only a power but also a duty of Congress to give effect to the constitutional guarantee of pension mobility, for which it must legislate and adopt measures to guarantee the full enjoyment of the right. Eventually, in view of the lack of action by Congress, in *Badaro II*,[491] the Court, in reurging Congress to enact legislation, resolved to grant the petitioner's request and adopted criteria for readjusting pensions until Congress decided to act.[492]

In another important case, regarding the environment, the Supreme Court in *Mendoza*,[493] decided a complaint filed by a group of neighbors of a settlement known as Villa Inflamable – located on the outskirts of Buenos Aires – against the National Government, the province of Buenos Aires, the government of the City of Buenos Aires, and forty-four private companies, alleging damages caused by multiple diseases that their children and themselves had suffered as a result of the pollution of the water basin Matanza-Riachuelo." In two landmark rulings, the first in 2006 and the other in 2008, the Court ordered the defendants to present an environmental recovery program, entrusted the Matanza-Riachuelo Basin Authority in its implementation, and established detailed court-monitored guidelines on compliance to avoid interprovincial conflicts, all of them matters traditionally within the realm of legislatures and the executive of both federal and provincial levels.[494]

In Germany, with respect to a complaint for constitutional protection of fundamental rights (*Verfassungsbeschwerde*),[495] the decision of the Constitutional Federal Tribunal No. 26/1969 of January 29, 1969, regarding article 6.5 of the Constitution, which establishes

---

489 See Marcelo Figuereido, *Brazilian National Report II*, p. 6–7; Thomas Bustamante and Evanlida de Godoi Bustamante, *Brazilian National Report*, p. 19; Luis Roberto Barroso et al., "Notas sobre a questão do legislador positivo," *Brazilian National Report III*, pp. 28 ff., 32.

490 Fallos 329:3089 (2006); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 16 (footnote 68).

491 Fallos 330:4866 (2007); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 17 (footnote 69).

492 See also Néstor Pedro Sagües, *Argentinean National Report II*, pp. 12–13.

493 Fallos 329:2316 (2006) and Fallos 331:1622 (2008); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 17 (footnote 72).

494 See Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 17.

495 See generally Francisco Fernández Segado, "El control de las omisiones legislativas por el Bundesverfassungsgericht," *Revista de Derecho*, nº 4, Universidad Católica del Uruguay, Konrad Adenauer Stiftung, Montevideo 2009, pp. 137–186.

that the law must ensure for children born outside of marriage the same conditions of children born to married parents, in their physical, spiritual, and social development. The Federal Constitutional Tribunal considered that article 1712 of the Civil Code was insufficient regarding the constitutional provision and exhorted the Legislator to reform it according to the conditions set forth in article 6.5 of the Constitution before the end of the legislative term (Autumn 1969), which in fact occurred on August 19, 1969, with the promulgation of the reform.[496] Regarding this decision, Ines Härtel has reported the following:

> The BVerfG has already admonished the Legislator several times to fulfill explicit constitutional obligations through law. The constitutional obligations mentioned are oftentimes those which can only rely on weak forces in society in their realization; an example would be the task of the Legislator to create equal conditions between illegitimate and legitimate children in their physical and emotional development and consequently in their social standing (BVerfGE 8, 210 (216); 17, 148 (155); 25, 167 (173-188)) The respective decision states: "If the Legislator does not accomplish the order assigned to him by Constitution in Art. 6 Sec. 5 GG to reform Illegitimacy Law . . . until the ending of the current (fifth) legislative period of the Bundestag, it is the will of the Constitution to realize as much as possible of the Legislation.[497]

In India, an important case regarding ragging (bullying) at universities must be mentioned. In the exercise of its power under Articles 32 and 142 of the Constitution, in 2001, the Supreme Court decided on public interest litigation initiated in 1998 by Vishwa Jagriti Mission, a spiritual organization, seeking to curb the menace of ragging in educational institutions.[498] The Court, deciding in favor of the protection of fundamental rights, issued several guidelines, not only defining ragging but also contemplating possible causes of ragging, prescribing detailed steps to curb this practice, and outlining diverse modes of punishment that educational authorities could take. The Court also ruled that "failure to prevent ragging shall be construed as an act of negligence in maintaining discipline in the institution," and said, if "an institution fails to curb ragging, the UGC/Funding Agency may consider stoppage of financial assistance to such an institution till such time as it achieves the same." Because ragging continued to be reported in the media, the Indian Supreme Court engaged in its fight to curb ragging, directly appointing, in November 2006, a Committee to suggest remedial measures to tackle the problem of ragging in educational institutions. In May 2007, the Supreme Court ordered that several recommendations of the Committee be implemented without any further lapse of time, establishing, among other things, that "punishment to be meted out has to be exemplary and justifiably harsh to act as a deterrent against recurrence of such incidents."[499] The Court did

---

[496] See José Julio Fernández Rodríguez, *La inconstitucionalidad por omisión: Teoría general. Derecho comparado. El caso español*, Civitas, Madrid 1998, pp. 313–315.

[497] See I. Härtel, *German National Report*, p. 19.

[498] *Vishwa Jagriti Mission v. Central Government* AIR 2001 SC 2793; Surya Deva, *Indian National Report*, p. 9 (footnote 58).

[499] See *University of Kerala v. Council of Principals of Colleges of Kerala*, order dated 16 May 2007; Surya Deva, *Indian National Report*, p. 10 (footnote 61).

not leave the task of monitoring the guidelines to the executive branch of the government, ruling that the "Committee constituted pursuant to the order of this Court shall continue to monitor the functioning of the anti-ragging committees and the squads to be formed. They shall also monitor the implementation of the recommendations to which reference has been made above." In 2007, the Supreme Court gave further directions while dealing with specific instances of ragging in two colleges that were investigated by the Raghavan Committee;[500] and in 2009, in *University of Kerala v. Council of Principals of Colleges of Kerala*,[501] it directed all state governments as well as universities to act in accordance with the guidelines formulated by the Committee, considering ragging as a human rights abuse and thus expressly justifying the Court's exercise of power under Article 32 of the Constitution.[502]

In a similar trend, and through judicial means progressively developed for the protection of fundamental rights, the U.S. Supreme Court has filled the gap of legislative omissions, particularly in issuing equitable remedies, like injunctions,[503] through which a court of equity can adjudicate extraordinary relief to an aggrieved party, consisting of an order by the court commanding the defendant or injuring party to do something or to refrain from doing something.[504] These are called coercive remedies because they are backed by the contempt power, or the power of the court to directly sanction a disobedient defendant. Although they are not conceived of as only for the protection of constitutional rights, but for the protection of any right, they have been specifically effective for the protection constitutional rights, particularly preventive injunctions, which are designed to avoid future harm to a party by prohibiting or mandating certain behavior by another party (mandatory injunctions or prohibitory injunctions), and structural injunctions. The latter were developed by the courts after *Brown v. Board of Education* (347 U.S. 483 (1954); 349 U.S. 294 (1955)), in which the Supreme Court declared the dual school system discriminatory, using injunction as an instrument of reform, by means of which the courts in certain cases undertake the supervision over institutional State policies and practices to prevent discrimination. As described by Owen S. Fiss:

> Brown gave the injunction a special prominence. School desegregation became one of the prime litigative chores of courts in the period of 1954–1955, and in these cases the typical remedy was the injunction. School desegregation not only gave the injunction a greater currency, it also presented the injunction with new challenges, in terms of both the enormity and the kinds of tasks it was assigned. The injunction was to be used to restructure the educational systems throughout the nation. The impact of Brown on our remedial jurisprudence – giving primacy to the injunction – was not confined to schools

---

[500] See J. Venkatesan, "SC Issues Guidelines to Check Ragging," *The Hindu*, May 9, 2009, http://www.thehindu.com/2009/05/09/stories/200905095740100.htm; Surya Deva, *Indian National Report*, p. 10 (footnote 62).

[501] See *University of Kerala v. Council of Principals of Colleges of Kerala*, order dated 11 February 2009, para. 2; Surya Deva, *Indian National Report*, p. 10 (footnote 63).

[502] See Surya Deva, *Indian National Report*, p. 10.

[503] See Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America*, Cambridge University Press, New York 2009, pp. 69 ff.

[504] See William Tabb and Elaine W. Shoben, *Remedies*, Thomson West, St. Paul MN 2005, p. 13.

> desegregation. It also extended to civil rights cases in general, and beyond civil rights to litigation involving electoral reappointments, mental hospitals, prisons, trade practices, and the environment. Having desegregated the schools of Alabama, it was only natural for Judge Johnson to try to reform the mental hospitals and then the prisons of the state in the name of human rights – the right to treatment or to be free from cruel and unusual punishment – and to attempt this Herculean feat through injunction. And he was not alone. The same logic was manifest in actions of other judges, North and South.[505]

In effect, deciding these equitable remedies for the protection of fundamental rights, the Supreme Court in the United States has also created complementary judicial legislation, for instance invoking the Fourth, Fifth, and Sixth Amendments to the Constitution, regarding the conditions for lawful search and arrest in connection with investigation and prosecution of crime. The Court's decisions have resulted in a substantial and relatively complex body of law controlling police behavior, which allows courts to reverse the convictions of defendants who have not been treated in accordance with the judicially produced rules. In contrast, law enforcement agencies interested in securing convictions have an interest in compliance, so police departments have adopted procedures and trained their personnel to follow the rules.[506]

On matters of racial segregation in public education, declared contrary to the equal protection clause set forth in the Fourteenth Amendment, the Supreme Court rulings in *Brown v. Board of Education* required the courts to be involved in the process of administering desegregation plans, which became clear three years later in *Swann v. Charlotte-Mecklenburg Board of Education*,[507] where the Supreme Court approved a detailed decree issued by a district court, based on the recommendation of an expert in educational administration, containing measures like "the design of oddly shaped attendance zones, the pairing or clustering of black and white schools to permit a more reasonable racial balance, compulsory transportation of students to schools outside their neighborhoods, reassignment of teachers and other personnel to reduce the racial character of individual schools and requiring that new schools be constructed in locations that would not contribute to the persistence of segregation."[508] As mentioned by Laurence Claus and Richard S. Kay, the following twenty years witnessed numerous instances of federal judges attempting to reconcile the constitutional imperative with the practical realities of operating a school system, a task often made more difficult by passive or active resistance from local authorities. The practical and political questions associated with managing a desegregation regime returned regularly to the Supreme Court, whose judgments, from that point on, were largely concerned with defining limits to the broad judicial mandate sketched out in *Brown*

---

505 See Owen M. Fiss, *The Civil Rights Injunctions*, Indiana University Press, Bloomington 1978, pp. 4–5; Owen M. Fiss and Doug Rendelman, *Injunctions*, Foundation Press, Mineola – New York 1984, pp. 33–34. Thus, structural injunctions can be considered a modern constitutional law instrument specifically developed for the protection of human rights, particularly in state institutions; an instrument that has been considered "an implicit part of the Constitutional guarantee of protecting individual rights from inappropriate government action." See William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West, St. Paul MN 2005, pp. 87–88.

506 See also Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 23.

507 See *Swann v. Charlotte-Mecklenburg Bd. of Educ*., 402 U.S. 1 (1971); Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 30 (footnote 101).

508 *Id.* at 19–25. See Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 30 (footnote 102).

and other decisions. The kinds of issues involved were illustrated by the Supreme Court's 1995 judgment in *Missouri v. Jenkins*,[509] one of its last significant statements on the remedial authority of federal courts in desegregation cases. The district court, in that case, had found that unconstitutional segregation had reduced the quality of the education offered in the affected schools. Over a ten-year period, the district court judge had, consequently, ordered that class size be reduced, that full-time kindergarten be instituted, that summer programs be expanded, that before- and after-school tutoring be provided, and that an early childhood development program be established. The district court also ordered a major capital improvement program and salary increases for teachers and other school employees.[510]

A similar situation occurred in the United States on matters related to the operation of prisons, based on the provision of the Eighth Amendment's prohibition of cruel and unusual punishment, and resulted in long-term supervision of numerous institutions. In litigation challenging the constitutionality of aspects of the Arkansas correctional institutions, federal judges ordered through structural injunctions, among other things, the closing of institutions, the maximum number of inmates in a particular facility and in individual cells, detailed procedures for determining disciplinary violations, and limits on the punishments administered. They required the employment of full-time psychiatrists or psychologists, affirmative action to recruit more minority personnel, and mandatory training of employees to improve race relations in the prisons. The practice of using armed inmates as "trusty" guards was prohibited. Inmates were to be provided with educational opportunities and a fair procedure for filing grievances. The courts retained jurisdiction for more than ten years.[511] Mental hospitals have been the subject of similar decrees,[512] and in somewhat more contained proceedings, so has the process of apportioning legislative representation.[513]

In Canada, similar to the Latin American amparo proceeding for the protection of constitutional rights, article 24.1 of the Charter establishes the right of anyone, when the rights or freedoms guaranteed by the Charter have been infringed or denied, "to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just." According to that provision, the courts have the power to issue a wide variety of remedies where they find that the rights of individuals have been violated, including declarations and injunctions requiring the government to take positive actions to comply with the Constitution and to remedy the effects of past constitutional violations. In a leading case related to minority language, the court also issued structural injunctions or interdicts requiring the government, in particular, to provide instruction and facilities. In Canada, the Constitution Act of 1867 provided that both French and English be used in the legislatures

---

509 See *Missouri v. Jenkins*, 515 U.S. 70 (1995). See Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 31 (footnote 104).

510 *Id.* at 74–80. Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 31.

511 See *Hutto v. Finney*, 437 U.S. 678 (1978); Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 32 (footnote 107).

512 See *Wyatt v. Stickney*, 344 F. Supp. 373 (1972). See Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 32 (footnote 108).

513 See *Branch v. Smith*, 538 U.S. 254 (2003); Laurence Claus and Richard S. Kay, *U.S. National Report*, p. 32 (footnote 109).

and courts of Canada and Quebec, and the provincial constitutions, such as the Manitoba Act of 1870, provided similar rights. In 1985, the Supreme Court confronted a law that purported to abolish the bilingualism obligations of Manitoba, where the French-speaking population had become a minority. Nonetheless, the Court decided that the unilingual laws were unconstitutional but held that immediate invalidation of most of Manitoba's laws was not appropriate because it would produce a legal vacuum that would threaten the rule of law. The Court then decided that it would give the unilingual laws temporary validity for the period of time that was necessary to translate them into French; it retained jurisdiction over the case for a number of years and, during that time, heard various motions concerning the extent of the constitutional obligations for bilingualism.[514] The Court's actions in this regard have been considered a form of remedial activism, somewhat similar to the American and Indian experience of courts maintaining jurisdiction over public institutions such as schools and prisons in the 1970s and 1980s to ensure that they satisfied constitutional standards.[515]

However, legislative omissions have also given rise in Canada to important acts of judicial activism on matters of criminal justice, given the absence of legislative response to enact statutory standards for speedy trials and the prosecutor's disclosure of evidence to the accused. In 1993, however, the Court acted decisively by holding that the Charter requires pretrial disclosure to the accused of all relevant evidence held by the prosecutor,[516] and it held that the right to a trial in a reasonable time would be violated by pretrial delays of more than a year.[517] Another example would be the Supreme Court's decision that holds that it will generally violate the Charter to extradite a person to face the death penalty.[518] Although framed in negative terms that would potentially prevent extradition, the practical effect of the decision is to require the government to take positive steps to seek assurances from states that they will not seek or impose the death penalty on a person extradited from Canada.[519]

In a certain way, in the United Kingdom, where the basic principle is that the court does not substitute itself for the legislature, it is also possible to identify important activities developed by the courts on matters of constitutional review regarding the protection of human rights, by issuing decisions with guidelines that supplement the jurisdiction of the Legislator or the administration. For example, referring to cases of the judges making the law in areas where there was inadequate previous precedent or statute, John Bell mentioned the case regarding the sterilization of intellectually handicapped adults, in which the House of Lords laid down principles that would govern the approval of such cases;[520] and the case

---

514 *Reference re Manitoba Language Rights* [1985] 1 S.C.R. 721; [1985] 2 S.C.R. 347; [1990] 3 S.C.R. 1417n; [1992] 1 S.C.R. 212. See Kent Roach, *Canadian National Report*, p. 18 (footnote 48).

515 See Kent Roach, *Canadian National Report*, p. 18.

516 See *R. v. Stinchcombe* [1991] 3 S.C.R. 326; Kent Roach, *Canadian National Report*, p. 11 (footnote 18).

517 See *R. v. Askov* [1990] 2 S.C.R. 1199; Kent Roach, *Canadian National Report*, p. 12 (footnote 19).

518 See *United States v. Burns and Rafay* [2001] 1 S.C.R; Kent Roach, *Canadian National Report*, p. 12 (footnote 21).

519 See Kent Roach, *Canadian National Report*, p. 12.

520 See *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 173; John Bell, *British National Report*, p. 7 (footnote 33).

decided in *Airedale NHS Trust v. Bland*[521] regarding the situation of a man who was in a permanent vegetative state and being fed through a tube. In the latter case, the House of Lords decided the circumstances, establishing policies on medical treatment for doctors could lawfully accede to the wishes of the man's parents that the feeding stop and that he be allowed to die. That is, in such cases, judicial decisions have provided rules for future application in the absence of any authoritative pronouncement by government.

In the Czech Republic, the Constitutional Court has filled the gap resulting from the Legislator's omission. The best and most controversial example mentioned by Zdenek Kühn is the one provided by the rent-control saga. In effect, in 2000, the Constitutional Court found unconstitutional rent control as practiced by Czech law, and it annulled the decree of the Ministry of Finance that regulated rent increases in apartment houses. The Court delayed the annulment to offer the legislature time to enact a new law with a mechanism to put rents to just terms, but the legislature declined to deal with the issue. The Court continued to annul decrees that dealt with the issue, and it used more and more compelling arguments to urge the legislature to enact a proper law.[522] In 2006, finally, the Court again criticized the legislative "activity, or rather, inactivity," which resulted in "freezing of controlled rent, which further deepens the violation of property rights of the owners of those apartments to which rent control applied. . . . By not passing them, the legislative assembly evoked an unconstitutional situation."[523] That is why the Constitutional Court rejected the petition but at the same time gave a rather unique verdict No. 1, according to which "[t]he long-term inactivity of the Parliament of the Czech Republic, consisting of failure to pass a special legal regulation defining cases in which a landlord is entitled to unilaterally increase rent, payment for services relating to use of an apartment, and to change other conditions of a lease agreement, is unconstitutional and violates" a number of constitutional rights.[524] The unique verdict was accompanied by a similarly unique reasoning in which the Court directed general courts to increase rents themselves, instead of entirely passive legislature; that is, the Court ordered general courts to make the law instead of the legislature. In this regard, the Court openly held that it must deviate from its role of negative legislator, expressing the following:

> Based on these facts [legislative inactivity], the Constitutional Court, in its role of protector of constitutionality, cannot limit its function to the mere position of a "negative" legislator, and must, in the framework of a balance of the individual branches of power characteristic of a law-based state founded on respect for the rights and freedoms of man and of citizens . . . , create space for the preservation of the fundamental rights and freedoms. Therefore, the general courts, even despite the absence of the envisaged specific regulations, must decide to increase rent, depending on local conditions, so as to prevent the abovementioned discrimination. In view of the fact that such cases will involve the finding and application

---

[521] See [1993] 1 All ER 821; John Bell, *British National Report*, p. 7.

[522] See decision of November 20, 2002, Pl. ÚS 8/02, *Rent Control II*, published as nº 528/2002 Sb.; and see decision of March 19, 2003, Pl. ÚS 2/03, *Rent Control III*, published as nº 84/2003 Sb; Zdenek Kühn, *Czech National Report*, p. 14 (footnote 58).

[523] See decision of February 28, 2006, Pl. ÚS 20/05, *Rent Control IV*, at http://angl.concourt.cz/angl_verze/doc/p-20-05.php; Zdenek Kühn, *Czech National Report*, p. 13 (footnote 59).

[524] *Id.*

> of simple law, which is not a matter for the Constitutional Court, . . . the Constitutional Court refrains from offering a specific decision-making procedure and thereby replacing the mission of the general courts. It merely states that it is necessary to refrain from arbitrariness; a decision must be based on rational arguments and thorough weighing of all the circumstances of a case, the application of natural principles and the customs of civic life, the conclusions of legal learning and settled, constitutionally consistent court practice.[525]

The Constitutional Court, in addition, clearly explained in its decision its role in cases of absolute omissions by the Legislator, expressing the following:

> As a consequence of the inactivity of the legislative assembly it can evoke an unconstitutional situation, if the legislature is required to pass certain regulations, does not do so, and thereby interferes in a right protected by the law and by the constitution. . . . [W]e can conclude that under certain conditions the consequences of a gap (a missing legal regulation) are unconstitutional, in particular when the legislature decides that it will regulate a particular area, states that intention in law, but does not pass the envisaged regulations. The same conclusion applies to the case where Parliament passed the declared regulations, but they were annulled because they did not meet constitutional criteria, and the legislature did not pass a constitutional replacement, although the Constitutional Court gave it a sufficient period of time to do so.
>
> The relationship between the legislative and judicial branches arises from the separation of powers in the state, as established in the Constitution. A material analysis necessarily leads us to conclude that this separation is not a purpose in and of itself, but pursues a higher purpose. From its very beginnings it was subjected by the constitutional framers to an idea based above all on service to the citizen and to society. Every power has a tendency to concentration, growth and corruption; absolute power to an uncontrollable corruption. If one of the branches of power exceeds its constitutional framework, its authority, or, on the contrary, does not fulfill its tasks and thus prevents the proper functioning of another branch (in the adjudicated case, of the judicial branch), the control mechanism of checks and balances, which is built into the system of separation of powers, must come into play. . . . [G]eneral courts err if they refuse to provide protection to the rights of those who have turned to them with a demand for justice, if they deny their complaints merely with a formalistic reasoning and reference to the inactivity of the legislature (the non-existence of the relevant legal regulations), after the Constitutional Court, as protector of constitutionality and review thereof, opened the way for them through its decisions. The Constitutional Court has repeatedly declared the unequal position of one group of owners of rental apartments and buildings to be discriminatory and unconstitutional, and the long-term inactivity of the Parliament of the CR to be incompatible with the requirements of a law-based state. The Constitutional Court, by the will of the constitutional framers, is responsible for the maintenance of the constitutional order in the Czech Republic, and therefore it does not intend to abandon this obligation, it calls on the general courts to fulfill their obligations.[526]

Finally, the case of the Constitutional Court of Colombia must be mentioned, particularly regarding a new constitutional situation that the Court has created to decide specific actions

---

[525] *Id.*

[526] See Zdenek Kühn, *Czech National Report*, p. 14.

of *tutela* (*amparo*) for the protection of fundamental rights filed by displaced persons within Colombia due to the situation of violence suffered for years, particularly in rural areas and specifically on the occasion of deciding on the factual lack of enforcement of the *tutela* rulings. In such cases of massive violations of human rights, the Court has created what it has called an *estado de cosas inconstitucionales* (factual state of unconstitutionality), which it has used to substitute itself for the ordinary judges, the Legislator, and the Administration in the definition and coordination of public policies, a power that the Constitutional Court has exercised *ex officio*. This was referred to, among other decisions, in Decision No. 007 of January 26, 2009, where the Court ruled on the "[c]oordination with the territorial entities of public policies of attention to the displaced population" and ordered a series of public actions to be executed by a variety of public administration entities.[527] In Decision No. T-025/04, the Court specified the conditions required to declared a factual state of unconstitutionality, such as "(i) the massive and widespread infringement of various constitutional rights affecting a significant number of people; (ii) the prolonged omission of the authorities in the fulfillment of its obligation to guarantee the rights; the adoption of unconstitutional practices, such as incorporating the action of *tutela* as part of the procedure to ensure the violated right; … (iv) the failure to issue legislative, administrative, or budgetary measures to avoid infringement of Rights; (v) the existence of a social problem whose solution compromises the involvement of several entities, requires the adoption of complex and coordinated actions[,] and demands level of resources requiring important additional budgetary effort; (vi) if all people affected by the same problem would resort to the *tutela* for the protection of their rights, there would be greater judicial congestion."[528]

With these sorts of decisions, as mentioned by Sandra Morelli, the Constitutional Court has "abandoned its role as guarantor of fundamental constitutional rights of an individual in a particular case, to assume another role, that of formulating or contributing to formulate public policies, adding its implementation, and monitoring its implementation to guarantee the satisfaction of needs of displaced populations according to available resources and subject to compliance of procedural requirements that the same Court assumed the role to regulate."[529] This, of course, has nothing to do with the role of the constitutional judge in taking over responsibilities of the legislature and the public administration and in ordering specific actions to public entities and public officials. Sandra Morelli has considered this a "historical betrayal that the Colombian Constitutional Court undertakes, when instead of protecting each displaced individual that had filed action of *tutela* regarding their fundamental rights, even by way of guarantee of the right to equality, ventures into the strange category of the factual state of unconstitutionality and via the general way, without any need to bring an action of *tutela*, assumes the role of supreme administrative authority."[530]

---

527 See Sandra Morelli, *Colombian National Report II*, p. 5.

528 *Id*., p. 8.

529 *Id*., p. 10.

530 *Id*., p. 11.

II. CONSTITUTIONAL COURTS' FILLING THE GAP OF RELATIVE LEGISLATIVE OMISSIONS

Apart from the aforementioned cases of specific judicial review to ensure judicial review of *absolute* legislative omissions, judicial review of relative legislative omissions has been extensively developed in the past decades in all democratic countries, particularly in cases in which the matter is not the absence of legislation but the existence of poor, deficient, or inadequate regulation according to the constitutional provisions.[531] This can lead to the evaluation of the omission and the declaration of the unconstitutionality of the provision containing the omission, as commonly happens in countries with a diffuse system of judicial review.

But in countries with a concentrated system of judicial review, although constitutional courts have the power to annul statutes considered unconstitutional, including those that omit fundamental aspects imposed by the Constitution, in cases of relative legislative omissions being considered unconstitutional, the constitutional courts have also developed the practice of declaring the omission unconstitutional without annulling the provision. In the decisions, the courts send to the Legislator guidelines or instructions to correct the unconstitutionality, thus orienting the Legislator's future activities.[532]

Of course, in all these cases, the purpose of the constitutional courts' controlling the unconstitutionality of relative legislative omissions is not to allow the courts to create new legislative provision; that is, the purpose is not to usurp the Legislator's functions.[533] Nonetheless, in many cases, the result of these judicial decisions has been the encroachment of legislative attributions when orienting or instructing the Legislative body as to how it must fill the omission to make it conform with the Constitution.[534]

1. Constitutional Courts and Equality Rights: Deciding on the Unconstitutionality of Statutes without Declaring Their Nullity

As in countries with a diffuse system of judicial review, in countries with a concentrated system of judicial review, constitutional courts have also declared statutory provisions unconstitutional but without annulling them. Instead, in these cases, constitutional courts have limited their activity to declaring unconstitutional the challenged provision only regarding the part that is not in accord with the Constitution. Instead of annulling the provision, in some cases, the courts referred to the Legislator for it to produce the needed

---

[531] See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Ed. Lex Nova, Valladolid 2001, pp. 293, 294; Héctor Fix Zamudio and Eduardo Ferrer Mac-Gregor, *Las sentencias de los Tribunales Constitucionales*, Ed. Porrúa, Mexico City 2009, pp. 34, 37, 71; Víctor Bazan, "Jurisdicción constitucional local y corrección de las omisiones inconstitucionales relativas," *Revista Iberoamericana de Derecho Procesal Constitucional*, nº 2, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2004, pp. 189 ff.

[532] See José Julio Fernández Rodríguez, *La inconstitucionalidad por omisión: Teoría general. Derecho comparado. El caso español*, Civitas, Madrid 1998, pp. 227 ff.

[533] See Héctor Fix Zamudio and Eduardo Ferrer Mac-Gregor, *Las sentencias de los Tribunales Constitucionales*, Ed. Porrúa, Mexico City 2009, p. 34.

[534] *Id.*, pp. 36–37; 75, 88.

legislation,[535] and in others cases, the constitutional court issued directives, guidelines, recommendations, and even orders to the Legislator to correct the unconstitutional legislative omissions. In all these cases, the constitutional court assists and collaborates with the Legislator.

An important note is that, in almost all the cases of relative legislative omissions that are declared unconstitutional but not annulled, the protection of fundamental constitutional rights have always been involved, particularly the right to equality and nondiscrimination.[536]

In concentrated systems of judicial review, the ability of constitutional courts to declare a legal provision unconstitutional without annulling it has been expressly established in the legislation governing the constitutional court's functions, as in Germany, where in 1970 the reform of the Law related to the Federal Constitutional Tribunal (BVerfG) established a specific function of the Tribunal in specific cases: to give preference to the constitutional interpretation of a statute and to "declare a law to be compatible or *incompatible* with the Basic Law," without the need to declare the provision "to be null and void" (article 31.2).[537] A similar reform was proposed in 2005 in Spain in relation to the Organic Law of the Constitutional Tribunal that established the contrary principle: "when a [Constitutional Tribunal's] decision declares the unconstitutionality of a provision, it must in addition declare the nullity of the challenged provisions."[538] The reform of the Law was not approved in Spain,[539] which did not prevent the Constitutional Tribunal from overcoming the rigidity of the dichotomy and issuing decisions of unconstitutionality without nullity.

An important case resolved by the Spanish Constitutional Tribunal was Decision No. 116/1987, regarding Law 37/1984 of October 22, 1984, which established social rights and benefits to military and police officers for services accomplished during the Civil War, excluding professional military who enrolled in the Armed Forces after 1936. Because of that exclusion, the Constitutional Tribunal considered the Law contrary to the principle of equality, annulled the exclusion, and extended the application of the provision to those who had been excluded.[540] Another important decision was Decision No. 45/1989, where the Constitutional Tribunal found unconstitutional a provision of Law 48/1985 on Income Tax that made the joint tax return for family members compulsory, which implied heavier tax obligations for a person integrated in a family group than for a person with the same income but not part of a family group.[541] The Constitutional Tribunal in this case considered the

---

[535] See Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, p. 124.

[536] See F. Fernández Segado, *Spanish National Report*, pp. 9, 25, 39–42. P. Popelier has pointed out that, in Belgium, "the principle of equality and non discrimination constitutes the reference norm in more than 85% of the decisions adopted by the Constitutional Courts." See P. Popelier, *Belgian National Report*, p. 3.

[537] See Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, p. 93; See I. Härtel, *German National Report*, pp. 7–9; Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Ed. Lex Nova, Valladolid 2001, p. 260; F. Fernandez Segado, *Spanish National Report*, p. 6.

[538] See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Ed. Lex Nova, Valladolid 2001, p. 301.

[539] See F. Fernández Segado, *Spanish National Report*, p. 6

[540] See F. Fernández Segado, *Spanish National Report*, p. 10.

[541] See STC 45/1989, of February 20, 1989, para. 11.; F. Fernández Segado, *Spanish National Report*, p. 12.

issue of the dichotomy unconstitutionality-nullity, arguing that, although the text of article 40.1 of the Tribunal's Law was contradictory, it was not necessary for that dichotomy to be applied, particularly in cases of judicial review of an omission, in which case "the nullity as an strictly negative measure[] is manifestly incapable of reordering the Income Tax regime in a way compatible with the Constitution." The Tribunal concluded that it was for the Legislator, "according to the decision, to make the needed modifications or adaptations of the legal regime, according to its normative powers."[542] As Francisco Fernández Segado has pointed out:

> with the decision 45/1989, the Tribunal not only moved away from the legal text, giving birth to decisions of unconstitutionality without nullity, situating itself in the wake of the BVerfG [German Federal Constitutional Tribunal], but in addition categorically breached the binomial unconstitutionality/ nullity characteristic of the vision of the constitutional judge as "negative legislator."[543]

The same technique has been applied in Nicaragua, where the Supreme Court, in a decision recognizing the unconstitutionality of articles 225 and 228 of the Civil Code prohibiting and restricting cases of paternity inquiry, decided not to annul the articles and maintained them with effects pending new legislation to be approved by Congress, in order to avoid graver problems that a legal vacuum could produce.[544]

In Switzerland, where judicial review of cantonal laws is allowed, the Federal Court has also decided cases in relative legislative omissions but has refused to assume the role of legislator. In the *Hegetschweiler* case,[545] on the appeal of a married couple, the Supreme Court concluded that a cantonal regulation related to income and property taxes for married couples was unconstitutional because married couples owed higher taxes than unmarried couples who lived together in the same household and had similar financial means; this was considered a breach of the equal treatment precept (Article 8.1, Constitution). The subject matter of the appeal for an abstract control of norms was a new rule that represented an improvement over the previous legal situation. As mentioned by Tobias Jaag, if the Supreme Court had annulled the contested rule, the former rule would have again entered into effect, unless the Court had established a substitute rule. The Supreme Court rejected the appeal and limited itself to stating that the contested rule was not in full conformity with the Constitution; in this manner, the cantonal legislator was asked to remedy the unconstitutional situation. For the couple who appealed, the outcome was most dissatisfactory.[546]

---

[542] *Id.* See also STC 13/1992, February 6, 1992, fund. jur. 17; STC 16/1996, February 1, 1996 fund. jur. 8; and STC 68/1996, April 18, 1996, fund. jur. 14, in F. Fernandez Segado, *Spanish National Report*, pp. 12–13.

[543] See F. Fernández Segado, *Spanish National Report*, p. 12.

[544] See decisions of November 22, 1957, B.J. p. 18730 (1873?), and of June 16, 1986, B.J. p. 105; Iván Escobar Fornos, "Las sentencias constitucionales y sus efectos en Nicaragua," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 102.

[545] See BGE 110 Ia 7; Tobias Jaag, *Swiss National Report*, p. 8 (footnote 37).

[546] See Tobias Jaag, *Swiss National Report*, p. 8.

In another case issued in 1986, the Supreme Court found that a cantonal regulation imposing a lower retirement age for women than for men was in breach of the constitutional right to equal treatment of women and men. The Supreme Court, however, left it at that, reasoning that the cantonal legislator needed time to establish the constitutional status.[547] In the same sense, the Supreme Court protected the complaint of a federal official that a rule permitting only women, not men, to take early retirement after thirty-five years of service violated the right to equal treatment of women and men. The Court did not view itself as having competence, however, to issue a correct rule; the petition of the federal official for permission to take early retirement was therefore rejected.[548] In a similar case relating to the equal treatment of boys and girls during school lessons, the Court explicitly held: "it would, however, be out of the question for the Supreme Court, on its own initiative, to create a rule in lieu of the cantonal legislator."[549]

In general terms, the main result of constitutional courts exercising judicial review powers regarding statutes with unconstitutional provisions has been the assumption by constitutional courts of a new role as aides to the Legislator; they direct requests, recommendations, and instructions for the legislative organ to issue additional legislation to surpass the constitutional doubts that result from the relative legislative omission.[550]

Even in countries like Switzerland, where there is no judicial review of federal legislation but only regarding cantonal legislation, this does not preclude the Federal Supreme Court from criticizing a federal legislative rule, thereby signaling to the legislators that an amendment of the law is required.[551] For instance, during the past years, several cantonal voting systems have been held unconstitutional because they did not guarantee equal treatment of the voters (equal right to vote). In these cases, the Supreme Court contented itself with declaring that the voting systems were unconstitutional and asking the cantonal legislators to amend the rule that was objected to.[552]

These instruction or directives sent by constitutional courts to the Legislator are in some cases nonbinding recommendations and in other cases obligatory.[553]

a. *2.* Constitutional Courts' Issuing Nonbinding Directives to the Legislator

In general terms, regarding noncompulsory judicial recommendations – known as exhortative decisions, delegate decisions, or *sentenze indiritzzo* in Italy[554]– the

---

[547] See Supreme Court in ZBl 87/1986, 482 ff.; Tobias Jaag, *Swiss National Report*, p. 9 (footnote 40).

[548] See BGE 109 Ib 86, 88 ff.; Tobias Jaag, *Swiss National Report*, p. 9 (footnote 41).

[549] See Supreme Court, in ZBl 86/1985, 492, 495; Tobias Jaag, *Swiss National Report*, p. 9 (footnote 42).

[550] See Héctor Fix Zamudio and Eduardo Ferrer Mac-Gregor, *Las sentencias de los Tribunales Constitucionales*, Ed. Porrúa, Mexico City 2009, pp. 39, 89.

[551] See BGE 103 Ia 53, 55; Tobias Jaag, *Swiss National Report*, p. 7 (footnote 29).

[552] See BGE 131 I 74, p. 84 ff.; 129 I p. 185, 205 ff.; Tobias Jaag, *Swiss National Report*, p. 7 (footnote 44, 45).

[553] In this sense, Christian Behrendt, in analyzing the situation in Germany, Belgium, and France, distinguishes between what he calls permissive, not binding interferences or *lignes directives*, and the enabling obligatory interferences, or injunctions. See Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 253 ff.

Constitutional Court declares the unconstitutionality of a provision but does not introduce the norm to be applied through interpretation, leaving this task to the Legislator. In Italy, these decisions are also called "principles' additive decisions,"[555] such as Decision No. 171 of 1996, issued by the Constitutional Court to declare unconstitutional a provision of the Law regulating the right to strike in public services. The provision did not provide for previous notice and a reasonable term in strikes of lawyers and advocates.[556]

In other cases, the instruction directed to the Legislator can be conditional with respect to the constitutional court. In Italy, for instance, when dealing with an unconstitutional statute, the Constitutional Court can recommend that the Legislator introduce legislation to eliminate the constitutional doubts. Through the *doppia pronuncia* formula, if the Legislator fails to execute the recommendations of the Court, in a second decision, the Court can declare unconstitutional the impugned statute.[557]

This sort of exhortative judicial review is also accepted in Germany, where it is called "appellate decisions."[558] Here, the Federal Constitutional Tribunal in cases of unconstitutional statutes can issue "an admonition to the Legislator," which contains legislative directives "addressed to the Legislator which can be of norm-requesting as well as norm-demanding nature still considered constitutional, in its impacts and effects, to improve or alternatively replace it,"[559] for which purpose it must give the Legislator a term to do so. Once the term is exhausted, the provision becomes unconstitutional, and the Tribunal must rule on the matter. An example of this type of decision is one issued by the Federal Constitutional Tribunal regarding a survivor's pension. A statute provided that a widow would always obtain the pension of her late husband, but the widower would obtain his wife's pension in case of her death only if she had primarily provided for the family and earned the family income before or if she had been a public official. The Federal Constitutional Court found that the provision was in process of becoming unconstitutional because of social changes that have taken place particularly on the role of women in the family, asking the Legislator to issue according to its powers to legislate the necessary provisions to prevent the unconstitutionality.[560]

In other cases, the Federal Constitutional Tribunal has limited itself to issue directives to the Legislator but leaving the Legislator to make the political decision. This was the case of

---

554 See L. Pegoraro, *La Corte e il Parlamento. Sentenze-indirizzo e attivitá legislativa*, Cedam, Padua 1987, pp. 3 ff.; Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Ed. Lex Nova, Valladolid 2001, p. 268; Néstor Pedro Sagües, *Argentinean National Report II*, pp. 4–7.

555 Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Ed. Lex Nova, Valladolid 2001, pp. 279–284, 305.

556 See A. Vespaziani, "Una sentenza additiva di principio reguardo allo 'sciopero' degli avvocati," in *Giurisprudenza costitutionalle*, 1996, Vol. IV, pp. 2718 ff. Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Ed. Lex Nova, Valladolid 2001, pp. 281–282 (footnote 164).

557 See Iván Escobar Fornos, *Estudios Jurídicos*, Vol. I, Ed. Hispamer, Managua 2007, p. 504.

558 See Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Ed. Lex Nova, Valladolid 2001, pp. 264; Iván Escobar Fornos, *Estudios Jurídicos*, Vol. I, Ed. Hispamer, Managua 2007, p. 505.

559 See I. Härtel, *German National Report*, pp. 17–18.

560 See BVerfGE 39, 169 ff.; I. Härtel, *German National Report*, pp. 18; Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional*, Ed. Lex Nova, Valladolid 2001, pp. 265 (footnote 115).

the decision issued regarding a statute of March 18, 1965, on the reimbursement of electoral expenses of political parties. The Tribunal also developed some conditions to be followed only if the Legislator decided to implement the reimbursement system.[561]

In France, the Constitutional Council has also issued directives to the Legislator, which even without normative direct effects can establish a framework for future legislative action.[562] They have persuasive effect only because the Constitutional Council always is able to exercise review of the constitutionality of a subsequent law.

A similar technique, called signalizations, has been applied in Poland, through which the Constitutional Tribunal directs the Legislator's attention to problems of general nature.[563]

In Belgium,[564] the Constitutional Court has also applied this technique. In particular, in a 1982 case referring to regional taxation legislation on environmental matters, as to the definition of *pollutant payer*, the former Court of Arbitration issued directives to the regional Legislators establishing the conditions under which *pollutant payer* was not in conformity with the Constitution's principle of equality.[565] Also in an interesting decision issued by the same former Court of Arbitration in 2004, on the taxation regime for donations to nonprofit associations established in a federal law, the Court sent directives to a regional Legislator that was different from the one that had incurred in an unconstitutionality, that is, to the regional legislator that the Court considered competent to issue legislation on the matter.[566]

In Serbia, Article 105 of the Law on the Constitutional Court empowers the Constitutional Court to give its opinion or to point out the need to adopt or revise laws, or to implement other measures relevant for the protection of constitutionality and legality, which are used to put some pressure on the National Assembly to bring laws for implementation of constitutional provisions or to correct existing unconstitutional rules. In these cases, the court can act *ex officio*, but the opinions do not have binding force. The most important notifications and opinions issued by the Court were connected to noncompliance with deadlines stipulated in constitutional laws for the enforcement of the Constitution.[567]

In the Czech Republic, the Constitutional Court in some cases has also provided a detailed analysis of the law that will fit the constitutional test of the Court after the original law has

---

561 See BVerfG, decision of July 19, 1966, BVerfGE 20, 56 (114–115), in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 176–179, 185 ff.

562 See Decision 83-164 DC; Bertrand Mathieu, *French National Report*, p. 10.

563 See, e.g., signalization concerning protection of tenants of June 29, 2005, OTK ZU 2005/6A/77; Marek Safjan, *Polish National Report*, p. 16 (footnote 45).

564 See P. Popelier, *Belgian National Report*, p. 8.

565 See CA arrêt 79/93 of November 9, 1993, in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 175–176, 191 ff.

566 See CA arrêt 45/2004 of March 17, 2004, in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 175–176, 230–237.

567 See Boško Tripković, *Serbian National Report*, pp. 9–10.

been annulled.[568] Nonetheless, those guidelines are not binding, and practice shows that the Legislator frequently does not follow the Court's reasoning.[569]

In France, the Constitutional Council – which until 2009 could only review statutes' constitutionality before they were promulgated by the National Assembly – has necessarily issued decisions that have interfered with the legislative function.[570] Consequently, on many occasions, the Council has issued decisions containing nonobligatory directives to the Legislator to sufficiently correct the draft legislation submitted. One example of such a decision on economic matters is the one adopted in 1982 on the occasion of the control exercised by the Constitutional Council regarding the Nationalization Law, particularly referring to the provisions on compensation regarding the nationalized enterprise stocks. The Council argued that it was necessary for the Legislation to be approved to take into account the corresponding compensation and the phenomenon of monetary depreciation.[571]

On institutional matters, in another decision in 2000, the Constitutional Council issued directives to the Legislator when reviewing a statute on election age. The statute lowered the age to be elected in European elections for non-French candidates to eighteen years but kept the age of twenty-three years for French citizens. The Council expressed that if the Legislator was to reduce the age to be elected, it must do so for all candidates.[572]

In Mexico, in the first decision the Supreme Court adopted to resolve a direct action of a statute's unconstitutionality (37/2001), in addition to declaring the provision unconstitutional, the Court exhorted the Legislator to legislate on the matter, fixing a term of ninety days to do so.[573]

In countries with diffuse systems of judicial review, exhortative rulings have also been issued by Supreme Courts. This is the case in Argentina, in the *Verbitsky* case, where the Supreme Court decided a collective *habeas corpus* petition, without declaring unconstitutional any legal provision of the Province of Buenos Aires. It then exhorted authorities to sanction new legal provisions to take care of the overcrowding and dreadful situation in the penitentiary system.[574] Another important case was *Rosza*, where the Supreme Court, after declaring unconstitutional a decision of the Judiciary Council of the Nation regarding the provisional appointment of judges, exhorted the Congress and the

---

568 See Decision *Anonymous Witness* of October 12, 1994, Pl. ÚS 4/94, at http://angl.concourt.cz/angl_verze/doc/p-4-94.php; Zdenek Kühn, *Czech National Report*, p. 12 (footnote 53).

569 See Zdenek Kühn, *Czech National Report*, p. 12.

570 See Bertrand Mathieu, *French National Report*, p. 6.

571 See Decision 132 DC of January 16, 1982 (*GD.* nº 31. Loi de nationalization), in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 173–175.

572 See CC, Decision 426 DC of March 30, 2000, in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 176.

573 See Héctor Fix Zamudio and Eduardo Ferrer Mac-Gregor, "Las sentencias de los tribunales constitucionales en el ordenamiento mexicano," in *Anuario Iberoamericano de Justicia Constitucional*, nº 12, 2008, Centro de Estudios Políticos y Constitucionales, Madrid 2008, p. 252.

574 See CSIJ, Fallos 328:1146, in Néstor P. Sagües, "Los efectos de las sentencias constitucionales en el derecho argentino," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 340; Néstor Pedro Sagües, *Argentinean National Report II*, pp. 7–11.

executive to enact a new "constitutionally valid" regime, provided guidelines for the new regime to follow, and granted Congress one year to implement the new system.[575]

In other cases, the Argentinean Supreme Tribunal, after declaring the unconstitutionality of some statutory provisions, has issued guidelines to Congress for future legislation that indicate the constitutional path that Congress should take on certain affairs. Moreover, in some decisions, it has changed the clear legislative intent – through judicial interpretation – to make the law adequate with the Court's interpretation of the Constitution. These actions show the Court's increasing involvement in realms previously left to the political branches of government. For instance, in the cases *Castillo*[576] and *Aquino* (2004),[577] the Supreme Court declared unconstitutional the Labor Risks Law (Law 24.557), particularly its procedural contents (a matter constitutionally reserved to provincial legislation) and the limits of compensation for labor injuries. The Court found that its provisions denied workers their right to complete restitution. In addition, the Court's rulings demanded congressional action to modify the system in accordance with Court-established guidelines.

In *Vizzoti*, the Supreme Court ruled that the limits to the base salary used to calculate termination compensation provided for in the Employment Law were unreasonable, in light of the constitutional obligation to protect workers against unjustified firings. The Court then provided Congress with guidelines for valid limits, indicating that "the Court's decision does not entail undue interference with congressional powers, nor a violation of the separation of powers, being only the duly exercise of the constitutionally-mandated judicial review over laws and governmental action."[578] In other cases of judicial review of conventionality, regarding the American Convention of Human Rights, as in the *Cantos* case (2003),[579] the Argentinean Supreme Court demanded that Congress pass legislation to comply with the binding rulings of the Inter-American Court of Human Rights.

In Colombia, the Constitutional Court has also assumed similar exhortative powers with respect to Congress. After declaring unconstitutional a few articles of Law 600 of 2000 (Articles 382–389) on *habeas corpus*, the Court exhorted Congress to legislate on the matter according to the criteria established in the ruling, and it gave Congress a term in which it needed to legislate.[580]

---

[575] Decision of May 23, 2007, *Jurisprudencia Argentina*, 2007-III-414, in Néstor P. Sagües, "Los efectos de las sentencias constitucionales en el derecho argentino," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 341. See also Néstor Pedro Sagües, *Argentinean National Report II*, pp. 11–12. See also Fallos 330:2361 (2007), in Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 13.

[576] See Fallos 327:3610 (2004); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 13.

[577] See Fallos 327:3753 (2004); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 13.

[578] See Fallos 327:3677 (2004); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 13; Néstor Pedro Sagües, *Argentinean National Report II*, p. 20.

[579] See Fallos 326:2968 (2003); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 15 (footnote 60).

[580] See Germán Alfonso López Daza, *Colombian National Report I*, p. 11.

A similar position has been adopted by the Supreme Court of the Netherlands, despite the ban on judicial review of statutes' constitutionality established in Article 120 of the Constitution. In the 1989 *Harmonization Act* case, the Supreme Court, though maintaining that it was clearly not entitled to review whether an Act of Parliament was compatible with legal principles, made it clear that – had it been allowed to do so – it would have ruled that the 1988 Harmonization Act violated the principle of legal certainty. The Court thus gave the legislature some "expert advice," and the latter, taking the hint, eventually changed the law. As mentioned by J. Uzman, T. Barkhuysen, and M. L. van Emmerik, "the ban on judicial review of legislation then does not prevent the judiciary to engage in a dialogue with the legislature, be it that such occasions remain rare."[581]

In some cases, this dialogue has led the Supreme Court, as in the *Labour Expenses Deduction* case,[582] to rule that it would not – for the time being – intervene because doing so would entail choosing from different policy options. The Court made clear that it might think otherwise if the legislature knowingly persisted in its unlawful course.[583] But in no case can these judicial decisions consist of the Supreme Court giving orders to Parliament to produce legislation by means of injunctions, even if the legislative omission renders the legislation incompatible with the European Union law.[584]

b. *3.* Constitutional Courts' Issuing Binding Orders and Directives to the Legislator

In contrast, in many other cases of judicial review, particularly those referring to relative legislative omissions, constitutional courts have progressively assumed a more positive role regarding the Legislator, issuing not only directives, but also orders or instructions, for the Legislator to reform or correct pieces of legislation in the sense indicated by the Court. This has transformed constitutional courts into a sort of auxiliary Legislator, imposing on the Legislator certain tasks and establishing a precise term for their performance.

This judicial review technique has been used in Germany, where the Federal Constitutional Tribunal, in many cases, after having determined the incompatibility of a legal provision with the Constitution, without declaring its nullity, declares the obligation of the Legislator to resolve the unconstitutional condition and to improve or abolish the law.[585] An early example of this sort of injunctive decision regarding the Legislator was adopted in 1981 with respect to a provision of the Civil Code (Article 1579) that established the regime of alimony, specifically the possibility of it reduction or suppression for equitable reasons and in particular, the exceptions to the reduction based on the impossibility for the holder of the pension to carry on remunerative work due to the attention to be given to the child the former spouse had. This exception was challenged in a particular judicial case that reached

---

581 See J. Uzman, T. Barkhuysen, and M. L. van Emmerik, *Dutch National Report*, p. 6.

582 See Supreme Court judgment of 12 May 1999, *NJ* 2000/170 (*Labour Expenses Deduction)*. See J. Uzman, T. Barkhuysen, and M. L. van Emmerik, *Dutch National Report*, p. 26 (footnote 79).

583 See J. Uzman, T. Barkhuysen, and M. L. van Emmerik, *Dutch National Report*, p. 42.

584 See Supreme Court judgment of 21 March 2003, *NJ* 2003/691 (*State v. Waterpakt*); J. Uzman, T. Barkhuysen, and M. L. van Emmerik, *Dutch National Report*, p. 38.

585 See I. Härtel, *German National Report*, p. 9.

the Tribunal, which found that, though motivated by educational and family reasons, the rigidity of the provision prevented the courts from adjusting it to individual circumstances, violating article 2.1 of the Constitution (individual freedom). Consequently, the Tribunal decided that "the Legislator must establish a new regime taking into account the principle of proportionality. The Legislator is free to decide whether to adopt an additional provision or to modify the second part of article 1579."[586]

In another case, on professional conflicts of interest as contrary to the fundamental right of everyone to choose his or her profession, the Tribunal also issued orders to the Legislator but without leaving it any alternative. The Tribunal found a specific legal conflict of interest (preventing tax counsels from exercising commercial activities) unconstitutional in certain situations, concluding that, "[f]ollowing the principle of proportionality, the Legislator must establish transitory dispositions for the cases in which to immediately end commercial activities could signify a heavy burden. It is for the Legislator to fix the content of these transitory provisions."[587] Another classic example is the Federal Constitutional Tribunal decision in a case of reimbursement for electoral expenses in the electoral campaign of 1969, in which article 18 of the Political Parties Law was considered contrary to article 38 of the Constitution, which guaranteed the equality of candidates in elections. The Constitutional Tribunal ordered the Legislator to substitute the provision declared unconstitutional by issuing another according to the Constitution; it even indicated to the Legislator what not to do to avoid aggravating the unconstitutional inequalities.[588]

Other important cases in which the Federal Constitutional Tribunal has established "legislative programmes" in certain decisions include the *Numerus-Clausus* decision,[589] the decision concerning professors,[590] the decision on abortion, and the decision on alternative civilian service.[591] For instance, in the *Numerus-Clausus* decision and the decision concerning professors, the Tribunal structured the basic rights as participation rights, which guarantee state services, and deducted from this a limitation of university places, and instruction to the Legislator on how to arrange the *Numerus-Clausus*.[592]

A similar sort of decision of the Constitutional Court can be found in Belgium, one of the most illustrative cases being the one related to the electoral constituency of Bruxelles-Hal-Vilvorde Province, in which in a decision issued in 2003, after finding that the enlargement of the constituency coincided with the one of the Province, the Constitutional Court urged

---

[586] See BVerfG, decision of July 14, 1981, BVerfGE 57, 381, in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 263–268.

[587] See BVerfG, decision of February 15, 1967, BVerfGE 21, 183, in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 259–262.

[588] See BVerfG, decision of March 9, 1976, BVerfGE 41, 414, in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 275–278.

[589] See BVerfGE 33, 303; I. Härtel, *German National Report*, p. 14 (footnote 89).

[590] See BVerfGE 35, 79; I. Härtel, *German National Report*, p. 14 (footnote 90).

[591] See BVerfGE 48, 127; I. Härtel, *German National Report*, p. 14 (footnote 91).

[592] See I. Härtel, *German National Report*, p. 15.

the Legislator to put an end to the unconstitutionality found, establishing in the case a term for the Legislature to do so.[593]

This last technique of issuing orders to the Legislator that impose a term or deadline for it to take the necessary legislative action has been developed in many countries, reinforcing the character of constitutional courts as direct collaborators of the Legislators. In Germany, this technique is considered the general rule in the Federal Constitutional Tribunal's decisions containing injunctions to the Legislator, whether those injunctions establish a fixed date, or the occurrence of a fact not yet determined, a reasonable term, or in the near future.[594] The power of the Tribunal has been deducted from article 35 of the Law regulating its functions (BVerfG),[595] which states that "in its decision the Federal Constitutional Tribunal may state by whom it is to be executed; in individual instances it may also specify the method of execution." According to I. Härtel, "the setting of a deadline is meant to provide a form of pressure against the Legislator and thereby serve the enactment of justice found by the BVerfG."[596] In a recent case on inheritance tax, the Federal Constitutional Court declared unconstitutional the current capital-transfer tax and fixed a deadline of December 31, 2008, for the Legislator to restore a legal condition in conformity with the Constitution.[597] The unconstitutional statute, which had been considered valid until said resolution, therefore maintained validity for more than another year, which was justified by the Tribunal, which pointed out that, in the case of a violation of the principle of equity (Art. 3.1 Constitution) several possibilities for correcting the unconstitutional condition are available to the Legislator, so that the regulation under review is not annulled but simply declared incompatible with the Constitution.[598] Another classical example of these decisions is one issued by the Federal Constitutional Tribunal in 1998 on an individual's freedom to exercise a particular profession, where it considered a provision of a statute contrary to article 12.1 of the Constitution. The Tribunal argued, "Nonetheless, the violation of the Constitution does not lead to the annulment of the provision due to the fact that the Legislator has various possibilities to put an end to the declared unconstitutionality," thus limiting the Tribunal "only to verify[ing] the incompatibility of the unconstitutional provision with article 12,1 of the Constitution." The Tribunal also indicated, "The Legislator is oblige[d] to replace the questioned provision with a regulation in harmony with the Constitution before January 1, 2001."[599]

In a similar sense, in Austria, the Constitutional Court has the power to issue such guidelines for the Legislator that establish the rules to be applied in future legislation. One

---

593 See CA nº 73/2003 du 26 mai 2003, in P. Popelier, *Belgian National Report*, p. 4.

594 See I. Härtel, *German National Report*, pp. 7–8; Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 288 ff.

595 See I. Härtel, *German National Report*, p. 9.

596 *Id.*, p. 9.

597 BVerfG, court order from 2006-11-7, reference number: 1 BvL 10/02. I. Härtel, *German National Report*, p. 7.

598 I. Härtel, *German National Report*, p. 8.

599 BVerfG, decision of November 10, 1998, BVerfGE 99, 202, in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, p. 295.

of the most important decisions of the Constitutional Court, as summarized by Ulrich Zellenberg[600] and referred to by Konrad Lachmayer, relates to the creation of self-governing corporations that exist besides local, municipal self-government, playing an important role in Austrian administration. In a series of decisions, the Constitutional Court established the conditions that the Legislator must meet to create such self-governing bodies, particularly in the field of social insurance. In decision VfSlg 8215/1977, the *Salzburger Jägerschaft* (Salzburg Hunting Association) case, the Court ruled on the requirements with which the Legislator must comply to establish self-governing corporations; it provided rules ensuring state-supervision over administrative affairs and within the autonomous sphere of competencies. In decision VfSlg 8644/1979, the Constitutional Court added the need to provide for a democratic way of nominating the officials of the self-governing corporation. In VfSlg 17.023/2003, the Constitutional Court subjected the action of the self-governing corporation to the principle of efficiency. In decision VfSlg 17.869/2006, the Austrian Constitutional Court restricted the self-governing bodies to enact regulations only with regard to persons within their sphere of competence; that is, they must not address persons who are not its members.[601]

In Croatia, the Constitutional Court also instructed the Legislator in general terms as to how to enact legislation, particularly on matters of the restriction of human rights. This was the case in Decision No. U-I-673/1996, of April 21, 1999, which repealed several provisions of the Law on Compensation for Property Expropriated during the Yugoslav Communist Rule.[602] In that case, as mentioned by Sanja Barić and Petar Bačić, the Court found that some restrictions to the right to dispose of property were disproportionate to the goal the Law attempted to achieve and contradicted the constitutional provisions on the restriction of human rights and freedoms. The Court seized the opportunity to instruct the legislators on future practice by emphasizing that any limitation of human rights and freedoms, be it necessary and Constitution based, represented "an exceptional state, because it does not abide by the general rules regarding constitutional rights and freedoms." The Constitutional Court decided: "Because of this, not only must these restrictions be based on the Constitution, but they also have to be proportional to the target goal and purpose of the law. In other words, this goal and purpose must be achieved with as little interference in the constitutional rights of citizens as possible (if the restrictions can be gradated, of course)."[603]

In France, given the traditional *a priori* judicial review of legislation exercised by the Constitutional Council, one of the most important means to ensure the enforcement of the Council's decisions are the directives called *réserves d'interprétation* or *réserves d'application*. By means of these directives, the Council establishes the conditions for the

---

[600] Ulrich Zellenberg, "Self-Government and Democratic Legitimacy," Vol. 3, *ICL-Journal* 2/2009, 123 (http://www.icl-journal.com); Konrad Lachmayer, *Austrian National Report*, p. 10 (footnote 28).

[601] See Konrad Lachmayer, *Austrian National Report*, p. 10.

[602] See Decision and Resolution of the Constitutional Court, nº U-I-673/1996, dated April 21, 1999, Official Gazette "*Narodne novine*," 39/1999; Decision U-I-902/1999, of January 25, 2000, Official Gazette "*Narodne novine*," 14/2000; Sanja Barić and Petar Bačić, *Croatian National Report*, p. 24 (footnote 65).

[603] See Sanja Barić and Petar Bačić, *Croatian National Report*, p. 25.

law to be enforced and applied, and the directives are aimed at the administrative authorities who must issue the regulations of the law and to the judges who must apply the law.[604]

Finally, in Colombia, the Constitutional Court has also ruled on the unconstitutionality of relative omissions by the Legislator and has exhorted Congress to sanction the corresponding statute. This was, for example, the case of the decision of the Constitutional Court issued when reviewing article 430 of the Labor Code, which prohibits strikes in public services. The Court in Decision No. C-473/94 reviewed the omission of the Legislator regarding the sanctioning of the legislation concerning the right to strike in essential public services, and "exhort[ed] Congress to legislate in a reasonable term" the corresponding legislation on the matter in accordance with the Constitution.[605]

III. CONSTITUTIONAL COURTS AS PROVISIONAL LEGISLATORS

In many other cases, in addition to constitutional courts issuing orders for the Legislator to enact legislation in a specific way and on a fixed or determined date, which occurs particularly on matters of legislative omissions, constitutional courts have also assumed the role of being provisional Legislators by including in their decisions provisional measures or regulations to be applied in the specific matter considered unconstitutional, until the Legislator sanctions the statute it is obliged to produce. In these cases, the court immediately stops the application of the unconstitutional provision, but to avoid the vacuum that annulment can create, the court temporarily establishes certain rules to be applied until new legislation is enacted.[606] Constitutional courts, in these cases, in some way act as "substitute legislators," not to usurp their functions but to preserve their legislative freedom.[607]

This technique has also been applied in Germany, on the basis of an extensive interpretation of the same article 35 of the Federal Constitutional Tribunal's Law, from which the Tribunal deducted that it has the power to enact general rules to be applied pending the sanctioning by the Legislator of the legislation on the matter in harmony with the Constitution. In these cases, the Tribunal has assumed an "auxiliary" legislative power, acting as a "parliamentary reparation enterprise" and "eroding the separation of powers."[608]

The most important and interesting case ruled by the Federal Constitutional Tribunal in this regard has been the one rendered in 1975, referring to the reform of the Criminal Code

---

604 See Bertrand Mathieu, *French National Report*, p. 10.

605 See Germán Alfonso López Daza, *Colombian National Report I*, p. 10; Mónica Liliana Ibagón, "Control jurisdiccional de las omisiones legislativas en Colombia," in Juan Vega Gómez and Edgar Corzo Sosa, *Instrumentos de tutela y justicia constitucional: Memoria del VII Congreso Iberoamericano de Derecho Constitucional*, Universidad Nacional Autónoma de México, Mexico City 2002, pp. 322–323.

606 See Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 333 ff.

607 See Otto Bachof, "Nuevas reflexiones sobre la jurisdicción constitucional entre derecho y política," in *Boletín Mexicano de Derecho Comparado*, XIX, nº 57, Mexico City 1986, pp. 848–849.

608 See the references to the opinions of W. Abendroth, H.-P. Scheider, and R. Lamprech works in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, p. 341 (footnotes 309 and 310).

regarding the partial decriminalization of abortion.[609] The Tribunal found unconstitutional the provision (Article 218a of the Criminal Code) requiring the Legislator to establish more precise rules; it further found that, "[i]n the interest of the clarity of law (*Rechtsklareit*), it seems suitable, according to article 35 of the Federal Constitutional Tribunal Law, to establish a provisory regulation that must be applicable until the new provisions would be enacted by the Legislator." The result was the inclusion in the Tribunal's decision of a detailed "provisional legislation" on the matter, which was immediately applicable and did not fix any precise date for the Legislator to act.[610] Fifteen years later, in 1992, a new statute was approved regarding help to pregnant women and to families, which was challenged because it was contrary to article 1 of the Constitution, which guarantees human dignity. In 1993, the Federal Constitutional Tribunal issued a new decision on the matter of abortion,[611] finding much of the reform contrary to the Constitution and establishing itself, in an extremely detailed way, as "real legislator" on all the rules applicable to abortion in the country.[612] Of course, the Tribunal based its decision on article 35 of the Law, which has been considered insufficient to support this sort of detailed substitutive legislation.[613]

In Switzerland, the Supreme Court has also provided for rules to fill the gap due to legislative omissions concerning enforcement of constitutional rights. For instance, regarding the proceedings on the detention of foreigners, the Supreme Court concluded that the Swiss legal system did not sufficiently protect the right of asylum seekers to protection of their freedom. After mentioning that the Legislator must act immediately, it ruled that it was "not prevented from establishing principles, for a transitional period until the effective date of a new rule of law, such that at least . . . the right to freedom pursuant to Article 5 clause 1 of the EHRC will be guaranteed to a sufficient extent."[614] On matters of expropriation, because the respective Law was tailored to the classic case of the compulsory deprivation of property, it does not establish the rules regarding limitations on property that are tantamount to an expropriation (quasi expropriation), and it has developed the conditions and modalities of these forms of expropriation.[615] Even today, the Supreme Court case law in these areas continues to play the role of legislative rules.[616]

---

609 BVerfG, decision of February 25, 1975, BVerfGE 39, 1, (68), in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 342 ff.; I. Härtel, *German National Report*, p. 14.

610 *Id.*

611 BVerfG, decision of May 28, 1993 (*Schwangerrschaftsabbruch II*), February 25, 1975, BVerfGE 88, 203, in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 346 ff.

612 See the whole text of the regulation in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 348–351 ff.

613 See the references in Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, p. 352.

614 See BGE 123 II 193, 201 ff.; Tobias Jaag, *Swiss National Report*, p. 1 (footnote 57).

615 See BGE 91 I 329 ff. (substantive expropriation); BGE 94 I 286 ff. (appropriation of rights of neighbors); Tobias Jaag, *Swiss National Report*, p. 16 (footnote 89).

616 For instance, a decision issued in 2008, on compensation based on aircraft noise: BGE 134 II 49 ff. and 145 ff.; Tobias Jaag, *Swiss National Report*, p. 16 (footnote 90).

In other cases, also mentioned by Tobias Jaag, the Supreme Court has also filled the gap produced by other relative legislative omissions. For instance, in deviation from the Planning and Construction Law of the Canton of Zurich, the Federal Supreme Court approved a zone for public buildings outside of the construction zone to enable sports facilities to be erected. The Court held the legislative rule to be manifestly incomplete to the extent that, contrary to its meaning, it failed to make distinctions that "according to all reason . . . were to be drawn."[617] For the introduction of the *numerus clausus* at universities, the Supreme Court, in the absence of a legislative rule, formulated strict requirements.[618] For telephone monitoring within the scope of criminal investigations, the Supreme Court likewise developed rules by requiring that affected persons be notified and providing for exceptions from this requirement.[619]

In India, and as a consequence of deciding direct actions for the protection of fundamental rights established in article 32 of the Constitution, the Supreme Court has assumed the role of provisional legislator on matters related to police arrest and detention. Surya Deva summarized the case as follows. In August 1986, a nongovernmental organization (NGO) addressed a letter to the Chief Justice of India drawing his attention to certain deaths reported in police lockups and custody. The letter, along with some other similar letters, was treated as a writ petition under Article 32 of the Constitution, for which purpose the Supreme Court issued notices to all state governments and to the Law Commission, with a request to make suitable suggestions. After making reference to constitutional and statutory provisions and international conventions, the Supreme Court, in *D K Basu v. State of West Bengal*,[620] issued eleven requirements, as follows:

> We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:
>
> 1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such personnel who handle interrogation of the arrestee must be recorded in a register.
> 2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall be countersigned by the arrestee and shall contain the time and date of arrest.
> 3. A person who has been arrested or detained . . . shall be entitled to have one friend or relative or other person known to him or having an interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place. . . .

---

617 See BGE 108 Ia 295, 297; Tobias Jaag, *Swiss National Report*, p. 17 (footnote 91).

618 See BGE 121 I 22 ff.; Tobias Jaag, *Swiss National Report*, p. 17 (footnote 92).

619 See BGE 109 Ia 273, 298 ff.; Tobias Jaag, *Swiss National Report*, p. 17 (footnote 92).

620 See (1997) 1 SCC 416; Surya Deva, *Indian National Report*, pp. 6–7.

4. The time, place of arrest, and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organization in the district, and the police station of the area concerned, telegraphically, within a period of 8 to 12 hours after arrest.
5. The person arrested must be made of aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained. . . .
8. The arrestee should be subject to medical examination by a trained doctor every 48 hours during his detention in custody. . . .
9. Copies of all the documents . . . should be sent to the Magistrate for his record.
10. The arrestee must be permitted to meet his lawyer during interrogation, though not throughout the interrogation.[621]

The Court observed that these requirements, which flow from Articles 21 and 22 of the Constitution, must be complied with by all government agencies and that any breach will render the concerned official liable for departmental action, as well as for contempt of court. Even though the requirements were seemingly intended to be a temporary stop-gap arrangement, they continue to be the main rules applicable to dealing with details of arrest and detention.

Another important decision in this same line regarding the protection of human rights was the one adopted in the *Vishaka v. State of Rajasthan* case,[622] on matters of sexual harassment of women at the workplace. The Supreme Court decided on petitions filed before it by social activists and nongovernmental organizations for the enforcement of the rights of working women under Articles 14, 19, and 21 of the Constitution (the right to equality, the right to carry on any profession or trade, and the right to life and liberty, respectively). The Supreme Court, though acknowledging that the primary responsibility for protecting these rights of working women lies with the legislature and executive, in cases of sexual harassment that resulted in the violation of fundamental rights of women workers, found that "an effective redressal requires that some guidelines should be laid down for the protection of these rights *to fill the legislative vacuum*" and consequently, it not only laid down a detailed definition of sexual harassment but also imposed a duty on the employer or other responsible persons in workplaces or other institutions "to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required." The Court also issued guidelines covering several different aspects, including taking preventive steps, initiating criminal proceedings under the criminal law, taking disciplinary action, establishing a complaint mechanism, and spreading awareness of the guidelines. The Supreme Court concluded by directing that "the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable

621 *Id.*

622 See AIR 1997 SC 3011; Surya Deva, *Indian National Report*, p. 8 (footnote 49).

in law until suitable legislation is enacted to occupy the field," having been extended to be applied in nonstate entities such as private companies.[623]

In these sorts of judicial review decisions, where the constitutional courts issue provisional regulations by interpreting the Constitution, it is possible to mention one decision issued by the Federal Supreme Tribunal of Brazil, through a *súmula vinculante* in which the Tribunal, after adopting a few decisions regarding the prohibition of nepotism in the Judiciary, concluded that, for the implementation of such practice, no formal law needed to be sanctioned because it can be deducted from the principles contained in article 37 of the Constitution. The Tribunal declared that the practice of nepotism (i.e., the appointment of a spouse, partner, or parent of the director or chief executive) in any of the branches of government of the Union, the States, the federal District, and the Municipalities violates the Constitution.[624] Another important case for the Brazilian Federal Supreme Tribunal was the decision adopted when analyzing the constitutionality of the demarcation of indigenous people's land in the area of Raposa Serra do Sol, in Roraima State. After many discussions and political conflicts, the Tribunal decided to sustain the constitutionality of the demarcation made by the Federal Union, but it determined for the demarcation of indigenous peoples' land a detailed set of rules establishing the conditions to always be met in all future demarcation process; this resulted in a decision with *erga omnes* effects.[625]

In Venezuela, it is possible to find cases where the Constitutional Chamber of the Supreme Tribunal of Justice, in the absence of corresponding statutes, has issued decisions containing legislation. In Decision No. 1682 of August 15, 2005, answering a recourse of interpretation of article 77 of the Constitution, the Constitutional Chamber, in exercising its normative jurisdiction, established that the *de facto* stable relations between men and women have the same effects as marriage. The Constitutional Chambers established that the decision applied to all of the legal regime regarding such *de facto* stable relations and determined the civil effects of marriage applicable to them, including matters of pensions, use of partner's name, economic regime, and succession rights, thereby completely substituting itself for the Legislator.[626]

In another case, the Constitutional Chamber has also legislated, this time *ex officio*, and in a decision issued in an amparo proceeding regarding the process of in vitro fertilization. In Decision No. 1456 of July 27, 2006, in effect, the Chamber also exercised its normative jurisdiction to determine *ex officio* the legislative provisions on the matter, including rules on parenthood, assisted reproduction, nonconsensual fertilization, retributive donation,

---

623 *Id.*, p. 9.

624 See *Súmula Vinculante* nº 13, STF, *DJ* 1º.set.2006, ADC 12 MC/DF, Rel. Min. Carlos Britto; Luis Roberto Barroso et al., "Notas sobre a questão do legislador positivo," *Brazilian National Report III*, pp. 33–37.

625 See STF, *DJ* 25.set.2009, Pet 3388/RR, Rel. Min. Carlos Britto; Luis Roberto Barroso et al., "Notas sobre a questão do Legislador Positivo," *Brazilian National Report III*, pp. 43–46.

626 See Decision 1682 of July 15, 2005, *Carmela Manpieri, Interpretation of article 77 of the Constitution* case; http://www.tsj.gov.ve/decisiones/scon/Julio/1682-150705-04-3301.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 19.

surrogate mothers, and rules on succession.[627] In this case, the Chamber not only acted as positive legislator in establishing all the provisions applicable in case of in vitro fertilization or assisted reproduction, but also ordered the application of the new rules to the particular case involved in the decision, thus giving retroactive effects to the legislative provisions it created, in violation of article 24 of the Constitution, which prohibits the retroactivity of laws.

In all these cases of judicial means established or developed for controlling legislative omissions, it is always important to have in mind the warning given by Justice Cardozo about this problem: "[L]egislative inaction – or the inability of groups to win the necessary votes to pass desired legislation – may lead to attempts to have the judiciary accomplish by judicial review what the legislature has refused to do."[628]

[627] See Decision nº 1456 of July 27, 2006, *Yamilex Núñez de Godoy* case; http://www.tsj.gov.ve/decisiones/scon/Julio/1456-270706-05-1471.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, pp. 19–20.

[628] See Christopher Wolfe, *The Rise of Modern Judicial Review. From Constitutional Interpretation to Judge-Made Law*, Basic Books, New York 1986, p. 238; *La transformación de la interpretación constitucional*, Civitas, Madrid 1991, p. 325.

Chapter 5

CONSTITUTIONAL COURTS AS LEGISLATORS ON MATTERS OF JUDICIAL REVIEW

One particular aspect in which it is possible to identify interferences of constitutional courts in the legislative function is precisely in matters of legislation on judicial review, particularly in countries with concentrated systems of judicial review, in which not only constitutional courts have created rules of procedure in spite of the existence of a special statute establishing them, but also they have assumed new powers of judicial review and created new actions that can be filed before the courts.

I. CONSTITUTIONAL COURTS CREATING THEIR OWN JUDICIAL REVIEW POWERS

1. The Judge-Made Law Regarding the Diffuse System of Judicial Review

In the diffuse, or decentralized, system of judicial review, being a power attributed to all courts, judicial review has always been deduced from the principle of the supremacy of the Constitution and of the duty of the courts to discard statutes contrary to the Constitution, always preferring the latter. Such power of the courts, consequently, does not need an express provision in the Constitution that instructs courts to give preference to the Constitution. As Chief Justice Marshall definitively stated in *Marbury v. Madison* (1 Cranch 137 (1803)):

> Those who apply the rule to particular cases, must of necessity expound and interpret that rule . . . so, if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case: This is the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Consequently, because of this essential link between supremacy of the Constitution and judicial review, in the United States, judicial review was a creation of the courts – this was also the case in Norway (1820);[629] in Greece (1897);[630] and in Argentina, a few decades later, where judicial review was also a creation of the respective Supreme of High Court,

[629] Eivind Smith, *Norway National Report*, p. 1.

[630] See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, p. 2.

based on the principles of supremacy of the Constitution and judicial duty in applying the law.

In Argentina, the first case in which judicial review was exercised for a federal statute was the *Sojo* case (1887), concerning the unconstitutionality of a law that tried to extend the original jurisdiction of the Supreme Court,[631] similar to *Marbury v. Madison*. In Argentina, the Supreme Court has also developed in case law the contours of its judicial review powers, including binding effects –what has been called an "Argentinean *stare decisis*" effect[632] – and in some cases of protection of collective rights, *erga omnes* effects.[633]

2. The Extension of Judicial Review Powers to Ensure the Protection of Fundamental Rights

But most important, particularly regarding the protection of fundamental rights and liberties, constitutional courts in many Latin American countries, in their character of supreme interpreter of the Constitution, in the absence of legislation, have created the action of amparo as a special judicial means for the protection of fundamental rights. This was the case also in Argentina, where, in the 1950s, when constitutional rights, other than physical and personal freedom protected by the *habeas corpus* action, were protected only through ordinary judicial means, the courts found that *habeas corpus* could not be used for such purpose. That is why, for instance, in 1933, the Supreme Court of the Nation in the *Bertotto* case[634] rejected the application of the *habeas corpus* proceeding to obtain judicial protection of other constitutional rights. This situation radically changed in 1957 as a result of the decision of the *Angel Siri* case, where the petitioner requested amparo for the protection of his freedom of press and his right to work (because of the closing of the newspaper, *Mercedes*, which he directed in the province of Buenos Aires). This case eventually led the Supreme Court, in a decision of December 27, 1957, to admit the action of amparo, because it found that the courts needed to protect all constitutional rights, even in the absence of a statutory regulation on such action.[635] This important decision was followed by another, the *Samuel Kot* case, of October 5, 1958, where the Supreme Court extended the scope of the amparo proceeding to include the protection of constitutional rights against individuals, not only against authorities.[636] In 1958, the amparo action was regulated in a federal statute, and

---

631 See H. Quiroga Lavié, *Derecho constitucional*, Buenos Aires 1978, p. 481. Before 1863, the first Supreme Court decisions were adopted in constitutional matters but referred to provincial and executive acts.

632 See Néstor P. Sagües, "Los efectos de las sentencias constitucionales en el derecho argentino," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 347.

633 See *Halabi* case, Fallos 332: (2009); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 12.

634 See the references to the *Bertotto* case in Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos)*, Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, Mexico City 2005, p. 66.

635 See the reference to the *Siri* case in José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 26 ff., 373 ff.; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Ed. Astrea, Buenos Aires, 1987, p. 5; Néstor Pedro Sagües, *Derecho procesal constitucional: Acción de amparo*, Vol. 3, 2nd ed., Editorial Astrea, Buenos Aires, 1988, pp. 9 ff. See also Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 7; Néstor Pedro Sagües, *Argentinean National Report II*, pp. 13–14.

636 See the references to the *Samuel Kot Ltd*. case of September 5, 1958, in S. V. Linares Quintana, *Acción de amparo*, Buenos Aires, 1960, p. 25; José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 243 ff.; Alí

in the 1994 constitutional reform, it was incorporated in the Constitution (article 43). Nonetheless, before the constitutional reform took place recognizing collective rights like the right to a clean environment and consumers' rights, the Supreme Courts in *Verbitsky* (2005) and *Halabi* (2009) introduced another important reform to the *habeas corpus* and amparo proceeding by recognizing collective protection and class actions.[637] In particular, for class actions, the Supreme Court developed the main rules concerning new class actions, explaining how the courts must act in face of legislative silence on the matter and defining their character, standing conditions, and requirements for representation.[638]

In India, the most important remedy used for judicial review is that established in articles 32 and 226 of the Constitution to enforce fundamental rights, which provides that the Supreme Court shall have the power for such purpose to issue directions or orders or writs, including writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto*, and certiorari, whichever may be appropriate. The Court has interpreted this remedial provision widely so as to liberalize the standing requirements,[639] thus enabling the courts to entertain voices (including in the form of judicial review petitions) from a larger populace, and on occasion even from civil society organizations, which has approached the Court for the enforcement of collective or diffused rights. This has given rise to what is called public interest litigation (PIL) in India, which has led to the Court's expansive interpretation of fundamental rights and matters related to them; thus, it has led to the courts acting as legislators.[640]

In 1999, the Dominican Republic was still the only Latin American country without a constitutional provision establishing the amparo, a situation that did not impede the Supreme Court of Justice from allowing it, applying for that purpose the American Convention on Human Rights. That occurred in a decision of February 24, 1999, in the *Productos Avon S.A.* case, when the Supreme Court, on the basis of the American Convention on Human Rights, admitted the amparo recourse for the protection of constitutional rights, assigned the power to decide on amparo matters to the courts of first instance,[641] and established the general procedural rules for the proceeding. Later, the amparo action was regulated in a statute (2006), and in the constitutional reform of 2009, it was incorporated in the Constitution (article 72). In these cases, the principle of prevalence

---

Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Ed. Astrea, Buenos Aires, 1987, p. 6.; Susana Albanese, *Garantías judiciales: Algunos requisitos del debido proceso legal en el derecho internacional de los derechos humanos*, Ediar S. A. Editora, Comercial, Industrial y Financiera, Buenos Aires, 2000; Augusto M. Morillo et al., *El amparo: Régimen procesal*, 3rd ed., Librería Editora Platense SRL, La Plata 1998, 430 pp.; Néstor Pedro Sagües, *Derecho procesal constitucional*, Vol. 3, *Acción de amparo*, 2nd ed., Editorial Astrea, Buenos Aires, 1988.

637 See *Verbitsky* case, Fallos 328:1146 (2005); and *Halabi* case, Fallos 332:(2009); Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Argentinean National Report I*, p. 9.

638 See Néstor Pedro Sagües, *Argentinean National Report II*, pp. 14–19.

639 See *S P Gupta v. Union of India* AIR 1982 SC 149; *PUDR v. Union of India* AIR 1982 SC 1473; *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161; Surya Deva, *Indian National Report*, p. 2.

640 See Surya Deva, *Indian National Report*, pp. 2, 4–5.

641 See Samuel Arias Arzeno, "El amparo en la República Dominicana: Su evolución jurisprudencial," *Revista Estudios Jurídicos*, Vol. XI, nº 3, Ediciones Capeldom, 2002.

of human rights declared in the Constitution led the Supreme Courts to create this specific judicial mean of protection, so it was extended in all Latin America.[642]

The Courts, nonetheless, can interpret the judicial review powers attributed to them in the Constitution and adapt their implementation or expand their scope, as has occurred in Brazil with the *mandado de injunçào*, to effectively control the relative omissions of the Legislator. In Brazil this can be found in a leading case deciding on the application to civil servants of the rules of strike in the private sector.[643] This has led Luís Roberto Barroso to say that, because of this change in its jurisprudence, the Federal Supreme Tribunal, with constitutional authorization, "has given a step, a long step, in the sense of acting as positive legislator."[644]

In the Slovak Republic, the constitutional complaint for the protection for fundamental rights, given the delay established for the entry in force of the constitutional amendment of article 127 establishing the complaint (December 31, 201), was "created" by the Court despite the previous means of protection repealed as of July 1, 2001. As it has been summarized by Ján Svák and Lucia Berdisová, from July 1, 2001, until December 31, 2001, there did not exist a national means by which natural or legal persons could have pleaded the infringement of their fundamental rights and freedoms before the Constitutional Court. The Constitutional Court filled this vacuum of protection with extensive interpretation of article 124 of the Constitution, which states that "the Constitutional Court shall be an independent judicial authority vested with the mandate to protect constitutionality." The Court deduced from this article that it does have the competence to deal with individual motions by natural persons and legal persons that are pleading infringement of their constitutional rights (no matter how they were called – petition or complaint) even in the period of time from July 1, 2001, until December 31, 2001.[645] The Constitutional Court argued:

> The Constitutional Court is according to art. 124 of the Constitution the judicial authority for protection of constitutionality. This article constitutes the competence of the Constitutional Court to protect mainly fundamental rights and freedoms guaranteed by the Constitution. The Constitutional Court is led by this imperative even after the nullification of the paragraphs about petition (from July 1, 2001) until the entry into force of art. 127 of the Constitution (January 1, 2002) and so it is entitled and obliged to provide individual protection of fundamental rights and freedoms while the court also relies on art. 1 of the Constitution, which states that Slovak Republic is the state governed by the rule of law. That is why fundamental rights and freedoms cannot be even temporarily deprived of

642 See Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study on Amparo Proceeding*, Cambridge University Press, New York 2009, p. 68.

643 See STF, DJ 31.out.2008, MI 708/DF, Rel. Min. Gilmar Mendes; Luis Roberto Barroso et al., "Notas sobre a questão do legislador positivo," *Brazilian National Report III*, pp. 28–33.

644 See Luis Roberto Barroso et al., "Notas sobre a questão do Legislador Positivo," *Brazilian National Report III*, p. 33.

645 See Ján Svák and Lucia Berdisová, *Slovak National Report*, p. 9.

judicial protection as to art. 124 of the Constitution in connection with other articles that guarantee fundamental rights and freedoms. [646]

The Constitutional Court thus acted as if the institute of petition had been repealed not from July 1, 2001, but from January 1, 2002.

In Venezuela, the Constitutional Chamber, in Decision No. 656 of June 30, 2000, admitted the direct amparo action for the protection of diffuse and collective rights and interests established in the Constitution[647] and established the standing conditions for the filing of the action in Decision No. 1395 of November 21, 2000.[648] It ruled a year later on the rules of procedure to be applicable in such cases in Decision No. 1571 of August 22, 2001.[649]

3. The Need for the Express Provision in the Constitution of Judicial Review Powers of the Constitutional Jurisdiction and Its Deviation

Particularly in concentrated systems of judicial review, the idea of the supremacy of the constitution and the duty of the courts to say which law is applicable in a particular case[650] has a limitation: the power to judge the unconstitutionality of legislative acts and other state acts of similar rank or value is reserved to a supreme court of justice or to a constitutional court or tribunal. Thus, in the concentrated system of judicial review, all courts have the power only to act as a constitutional judge and to decide on the constitutionality of other norms applicable to the case, regarding acts other than statutes or acts adopted in direct execution of the Constitution.[651] Consequently, the concentrated system of judicial review, based also on the supremacy of the Constitution, when reserving constitutional justice functions regarding certain state acts to a constitutional jurisdiction, cannot be developed by deduction through the work of the supreme court decisions, as happened in many countries with the diffuse system of judicial review.

---

[646] Decision of the Constitutional Court nº III. ÚS 117/01. The Court similarly justifies its decision in III. ÚS 124/01: In the period of time from July 1, 2001, to December 31, 2001, the competence of the Constitutional Court was founded on the art. 124 in connection with art. 1 of the Constitution and it was so "in order to provide protection of constitutionality including protection of guaranteed fundamental rights and freedoms of natural persons and legal persons." See also II. ÚS 80/01, III. ÚS 100/01, III. ÚS 116/01; Ján Svák and Lucia Berdisová, *Slovak National Report*, p. 9 (footnote 14).

[647] See Decision nº 656 of June 30, 2000, *Dilia Parra Guillen (Peoples' Defender)* case, at http://www.tsj.gov.ve/decisiones/scon/Junio/656-300600-00-1728%20.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 11.

[648] See Decision nº 1395 of November 21, 2000, *William Dávila* case, *Revista de Derecho Público*, nº 84, Editorial Jurídica Venezolana, Caracas, 2000, pp. 330 ff.; Daniela Urosa Maggi, *Venezuelan National Report*, p. 12.

[649] See Decision nº 1571 of August 22, 2001, *Asodeviprilara* case; http://www.tsj.gov.ve/decisiones/scon/Agosto/1571-220801-01-1274%20.htm; Daniela Urosa Maggi, *Venezuelan National Report*, p. 12.

[650] See W. K. Geck, "Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices," *Cornell Law Quarterly*, 51, 1966, p. 278.

[651] See Manuel García Pelayo, "El 'Status' del Tribunal Constitucional," *Revista Española de Derecho Constitucional*, 1, Madrid 1981, p. 19; Eduardo García de Enterría, *La Constitución como norma y el Tribunal Constitucional*, Madrid 1981, p. 65. In particular, in concentrated systems, the tribunals or courts empowered with administrative justice functions can always act as constitutional judge regarding administrative acts. See C. Frank, *Les fonctions juridictionnelles du Conseil d'Etat dans 1'ordre constitutionnel*, Paris 1974.

On the contrary, of course, because of the limits that the system imposes on the duty and power of all judges to say which law is applicable in the cases they are to decide, only when prescribed *expressis verbis* through constitutional regulations is it possible to establish the concentrated system of judicial review. The Constitution, as the supreme law of the land, is the only text that can establish limits on the general power and duty of all courts to say which is the law applicable in a particular case and to assign that power and duty in certain cases regarding certain state acts to a specific constitutional body, whether the supreme court of justice or a constitutional court or tribunal.

Therefore, the concentrated system of judicial review must be established and regulated expressly in the Constitution,[652] as constitutional courts are always constitutional bodies, that is, state organs expressly created and regulated in the Constitution, whether they be the supreme court of justice of a given country or a specially created constitutional court, tribunal, or council.

The consequence of the express character of the system of judicial review is that, in principle, on the one hand, only the Constitution can determine the judicial review powers of constitutional courts not being allowed to create without constitutional support different means of judicial review; and on the other hand, only the legislation issued by the Legislator can develop the rules of procedure and the way constitutional courts can exercise their powers of judicial review.

The practice in many countries, nonetheless, has been different – sometimes they adapt their own judicial review powers, and other times they create them.

As aforementioned, one of the main characteristics of the concentrated judicial review system is that the constitutional court exclusively can make constitutional attributions on matters of judicial review of legislation. Such power can only be given to specific constitutional organs by means of a constitutional provision. Consequently, contrary to the diffuse method of judicial review, the concentrated judicial review powers of the constitutional courts cannot be created by the courts themselves, that is, they cannot be the product of judge-made law. That is why in all constitutional systems where a concentrated system of judicial review has been established, it is the Constitution that creates or regulates the constitutional jurisdiction attributing to a specific constitutional court the power of judicial review regarding legislation; the courts are not allowed themselves to create new judicial review powers not attributed to them in the Constitution.

But constitutional courts, in some cases, have extended or adapted their constitutional powers. For instance, they created the technique of exercising judicial review in declaring statutes unconstitutional but without annulling them, as well as the technique of extending the application of the unconstitutional statute for a term and issuing directives to the Legislator for it to legislate in harmony with the Constitution. This technique was developed in Germany, as mentioned by I. Härtel, "without statutory authorization, in fact *contra legem*, as the BVerfG assumed until 1970 the compelling connection between the

[652] See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989, pp. 185 ff.; Jorge Carpizo, *El Tribunal Constitucional y sus límites*, Grijley Ed., Lima 2009, p. 41.

unconstitutionality and the invalidity of a norm."[653] In the reform of the Federal Constitutional Tribunal Law sanctioned in 1970, the Legislator officially recognized the judge-made law (Articles 31, 79), thereby allowing the Tribunal to declare a provision unconstitutional without annulling it, a matter that still is discussed.[654] That is why – referring to the decision of the Federal Constitutional Tribunal on the inheritance tax case,[655] where the Tribunal declared unconstitutional the current capital-transfer tax and fixed a deadline of December 31, 2008, for the Legislator to restore a legal condition in conformity with the Constitution – Härtel also pointed out, "The BVerfG has therefore as a kind of 'emergency Legislator' created a law-like condition; it has 'invented' a new decision type."[656] The same can be said regarding the powers that the Federal Constitutional Tribunal has assumed, for example, issuing provisional legislative rules and measures with substitute legislation as a consequence of the declaration of unconstitutionality of certain provisions. The Constitutional Court in these cases, through judge-made law, has assumed a role that principally corresponds to the Legislator.[657]

In Spain, the same process of judge-made law has been developed by the Constitutional Tribunal, which can declare provisions unconstitutional without annulling them, despite a provision to the contrary in the Organic Law of the Constitutional Tribunal, which states: "[W]hen the decision declares the unconstitutionality, it will also declare the nullity of the challenged provisions" (article 39.1). Spain's Constitutional Tribunal also tried to legitimate this *contra legem* procedural technique in the draft reform of its Organic Law in 2005, which was not sanctioned as drafted.[658]

But in other cases, constitutional courts have created their own judicial review powers not established in the Constitution. As aforementioned, in concentrated systems of judicial review, constitutional courts as Constitutional Jurisdiction cannot exist and cannot exercise their functions of judicial review of legislation without an express constitutional provision that establishes them. That is, as a matter of principle, in democratic regimes governed by the rule of law and the principle of separation of powers, all the powers of constitutional courts must be expressly provided for in the Constitution or in the law as prescribed in the Constitution. Therefore, within the concentrated system of judicial review, it is not possible for the constitutional court to create its own judicial review powers or to expand those

---

653 See I. Härtel, *German National Report*, p. 8; Francisco Fernández Segado, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas esterotipadas vinculadas a ellas," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 12, 2008, Madrid 2008, p. 162.

654 See Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, pp. 93, 94; F. Fernández Segado, *Spanish National Report*, p. 6.

655 BVerfG, court order from 2006-11-7, reference number: 1 BvL 10/02. See I. Härtel, *German National Report*, p. 8.

656 See I. Härtel, quoting Steiner, *ZEV* 2007, 120 (121) and Schlaich/Korioth, *Das Bundesverfassungsgericht*, 7th ed. 2007, margin number 395, *German National Report*, p. 9.

657 See Christian Behrendt, *Le judge constitutionnel, un législateur-cadre positif. Un analyse comparative en droit francais, belge et allemande*, Bruylant, Brussels 2006, p. 354.

658 See F. Fernández Segado, *Spanish National Report*, p. 6, 11.

established in the Constitution.[659] Constitutional courts are an exception regarding the general power of the courts to apply and guarantee the supremacy of the Constitution, being the Constituent Power the one that in order to preserve the Constitution, can exclude or restrict ordinary courts from that task. Being then an exception, and because of the assignment to a constitutional court of the monopoly of Constitutional Jurisdiction, it must be expressly created in the Constitution with expressly established powers.

Nonetheless, in some countries, it is possible to find a deformation of this principle, as in Venezuela,[660] where the Constitutional Chamber of the Supreme Tribunal of Justice, despite the powers established in article 336 of the Constitution, has created new powers of judicial review not envisaged in the Constitution. In particular, without any constitutional or legal support, the Constitutional Chamber of the Supreme Tribunal created in 2000 a recourse for the abstract interpretation of the Constitution, based on the interpretation of its Article 335, which grants the Supreme Tribunal the character of "superior and final interpreter of the Constitution."[661] Although in the Constitution the only recourse of interpretation established is the recourse of interpretation of statutes that can be filed before the various Chambers of the Supreme Tribunal, and only in cases expressly provided for in each statute (Article 266.6), the Constitutional Chamber created this recourse, providing as the only condition for standing that the petitioner must invoke an actual, legitimate, and juridical interest in the interpretation that is needed regarding his or her particular and specific situation. For such purpose, the Constitutional Chamber has held that the petition must always point to "the obscurity, the ambiguity or contradiction between constitutional provisions," and the decisions of the Chamber have *erga omnes* and *ex nunc* effects.[662] This sort of recourse seeking the abstract interpretation of statutes gives the Constitutional Court powers to issue bindings "opinions," which generally are not related to a specific case or controversy, which in general terms is considered a function outside the scope of constitutional courts.

To create this recourse, the Chamber based its decision on Article 26 of the Constitution, which establishes the people's right to have access to justice, considering therefore that

---

659 See, e.g., Francisco Eguiguren and Liliana Salomé, *Peruvian National Report I*, p. 17; Sanja Barić and Petar Bačić, *Croatian National Report*, p. 3.

660 See Allan R. Brewer-Carías, "La ilegítima mutación de la constitución por el juez constitucional: La inconstitucional ampliación y modificación de su propia competencia en materia de control de constitucionalidad," in *Libro Homenaje a Josefina Calcaño de Temeltas*, Fundación de Estudios de Derecho Administrativo (FUNEDA), Caracas 2009, pp. 319–362.

661 The recourse was created by Decision nº 1077 of September 22, 2000, *Servio Tulio León* case; *Revista de Derecho Público*, nº 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 247 ff. The procedural rules regarding the recourse were established in decision of the same Constitutional Chamber, nº 1415 of November 22, 2000, *Freddy Rangel Rojas* case. See the comments to these decisions in Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación," in *VIII Congreso Nacional de derecho Constitucional, Perú*, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, September 2005, pp. 463–489; *Revista de Derecho Público*, nº 105, Editorial Jurídica Venezolana, Caracas 2006, pp. 7–27; Allan R. Brewer-Carías, "Le recours d'interprétation abstrait de la Constitution au Vénézuéla," in *Renouvau du droit constitutionnel: Mélanges en l'honneur de Louis Favoreu*, Dalloz, Paris 2007, pp. 61–70.

662 Of the Constitutional Chamber, see Decision nº 1309 of June 19, 2001, case: *Hermann Escarráa*, and Decision nº 1684 November 4, 2008, case: *Carlos Eduardo Giménez Colmenárez*, *Revista de Derecho Público*, nº 116, Editorial Jurídica Venezolana, Caracas 2008, pp. 66 ff

"citizens do not require a statutory provision establishing the recourse for constitutional interpretation, to file it." On the basis of that argument, the Chamber found that no constitutional or legal provision was necessary to allow the development of such recourse.[663] Three years later, the National Assembly sanctioned the Organic Law of the Supreme Tribunal, which regulated the general means for judicial review, as it was the will of the Legislator to exclude from the powers of the Constitutional Chamber the ability to decide on recourses of abstract interpretation of the Constitution. Nonetheless, the Constitutional Chamber has continued to develop the regulation of the recourse in subsequent decisions, for the purpose of issuing declarative ruling of mere certainty on the scope and content of a constitutional provision.[664]

This extraordinary interpretive power, though theoretically an excellent judicial means for the interpretation of the Constitution, unfortunately has been extensively abused by the Constitutional Chamber to distort important constitutional provisions, to interpret them in a way contrary to the text, or to justify constitutional solutions according to the will of the Executive, because the initiative to file many recourses has been in the hands of the Attorney General. This was the case, for instance, with the various Constitutional Chamber's decisions regarding the consultative and repeal referenda between 2002 and 2004, where the Chamber confiscated and distorted the people's constitutional right to political participation.[665] One of the last notoriously politically motivated decisions of the Constitutional Chamber that has been issued using these powers was in answering a petition filed by the Attorney General, not for the purpose of interpreting the Constitution but for the purpose of interpreting a decision of the Inter-American Court of Human Rights that condemned the Venezuelan State for violations of due process rights and judicial guarantees of various superior judges who were illegally dismissed.[666] The result of this process before the Supreme Court was that by means of Decision No. 1.939 of December 18, 2008, the Constitutional Chamber did not "interpret" anything, particularly because judicial decisions are not to be interpreted but to be applied, but just considered the international Court

---

663 See Decision nº 1077 of the Constitutional Chamber of September 22, 2000, case: *Servio Tulio León Briceño*, *Revista de Derecho Público*, nº 83, Caracas, 2000, pp. 247 ff. This criterion was ratified later in decision nº 1347, dated September 11, 2000, *Revista de Derecho Público*, nº 84, Editorial Jurídica Venezolana, Caracas 2000, pp. 264 ff.

664 See, e.g., Decision nº 1347 of the Constitutional Chamber, dated November 9, 2000, *Revista de Derecho Público*, nº 84, Editorial Jurídica Venezolana, Caracas 2000, pp. 264 ff.; Decision nº 2651 of October 2003 (case: *Ricardo Delgado (Interpretación artículo 174 de la Constitución))*, *Revista de Derecho Público*, nº 93-96, Editorial Jurídica Venezolana, Caracas 2003, pp. 327 ff.

665 See Decision Nos. 1139 of June 5, 2002, *Sergio Omar Calderón Duque y William Dávila Barrios* case; nº 137 of February 13, 2003, *Freddy Lepage y otros* case; nº 2750 of October 21, 2003, *Carlos E. Herrera Mendoza* case; nº 2432 of August 29, 2003, *Luis Franceschi y otros* case; and nº 2404 of August 28, 2003, *Exssel Alí Betancourt Orozco, Interpretación del artículo 72 de la Constitución* case. See the comments on these decisions in Allan R. Brewer-Carías, *La Sala Constitucional versus el estado democrático de derecho: El secuestro del poder electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política*, Los Libros de El Nacional, Colección Ares, Caracas 2004.

666 See decision of the Inter-American Court of Human Rights of August 5, 2008, *Apitz Barbera y otros ("Corte Primera de lo Contencioso Administrativo") vs. Venezuela* case, at http://www.corteidh.or.cr. Excepción Preliminar, Fondo, Reparaciones y Costas, Serie C nº 182.

decision was unenforceable in Venezuela, recommending the Executive to denounce the American Convention on Human Rights.[667]

In another case, the Constitutional Chamber created a judicial review power expanding the scope of an existing provision of the Constitution, as it has happened regarding the general power of review the Constitution grants the Constitutional Chamber regarding final decisions adopted by the courts on matters of amparo proceedings and in cases when the diffuse method of judicial review is applied (article 336.10). Even though the express scope of this discretional power of review regarding judicial decisions issued by inferior courts granted to the Constitutional Chamber is precise, the Chamber has modified the Constitution and has assumed, first, powers of review regarding any judicial decision in which a court departs from the interpretation given to a constitutional provision by the same Constitutional Chamber or regarding which the Chamber considers that constitutional principles have been violated by the judicial decision; and second, powers of review on the same grounds of decisions issued by other Chambers of the Supreme Tribunal, consequently assuming a *de facto* superior hierarchy in the Judiciary that the Constitution has not conferred on it.[668] Three years later, the Organic Law of the Supreme Tribunal was sanctioned (2004), and this modification of the Constitution was not included by the National Assembly, a fact that did not prevent the Constitutional Chamber, through a new decision issued the same year, 2004,[669] to insist that the rule it established in 2001, despite the provisions of the Organic Law, was to continue to apply.

Another judicial review power that the Constitutional Chamber has assumed without any constitutional support is the incidental concentrated means of judicial review, which is found in countries where a concentrated system of judicial review is established exclusively – this is nonexistent in countries adopting a mixed system of judicial review where the concentrated method is combined with the diffuse method, as happens in many Latin American countries. Nonetheless, despite Venezuela having a mixed system of judicial review, the Constitutional Chamber in a clearly contradictory way has created the possibility of this incidental means of judicial review for the Constitutional Chamber to decide on the annulment of an unconstitutional statute, which is completely contradictory with the diffuse judicial review powers of all courts.[670]

---

667 Decision nº 1.939 of December 18, 2008, *Attorney General Office* case, at http://www.tsj.gov.ve/decisiones/scon/Diciembre/1939-181208-2008-08-1572.html. See the comment on this decision in Allan R. Brewer-Carías, "La interrelación entre los Tribunales Constitucionales de América Latina y la Corte Interamericana de Derechos Humanos, y la cuestión de la inejecutabilidad de sus decisiones en Venezuela," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, nº 13, Madrid 2009, pp. 99–136. See also Daniela Urosa Maggi, *Venezuelan National Report*, pp. 7–8.

668 See Decision nº 93 of February 6, 2001, *Corpoturismo* case, *Revista de Derecho Público*, nº 85–88, Editorial Jurídica Venezolana, Caracas 2001, pp. 406 ff., at http://www.tsj.gov.ve/decisiones/scon/Febrero/93-060201-00-1529%20.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 6.

669 See Decision nº 1992 of September 8, 2004, *Peter Hofle* case; http://www.tsj.gov.ve/decisiones/scon/Septiembre/1992-080904-03-2332%20.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 7.

670 See Decision 2588 of December 11, 2001, *Yrene Martínez* case, in http://www.tsj.gov.ve/decisiones/scon/Diciembre/2588-111201-01-1096.htm; Decision 806 of April 24, 2002, *Sintracemento* case (annulment of article 43 of the Organic Law of the Supreme Tribunal), at

II. CONSTITUTIONAL COURTS CREATING PROCEDURAL RULES ON JUDICIAL REVIEW PROCESSES

One of the specific matters in which judicial review of legislative omissions has taken place has been in the cases where constitutional courts have created rules of procedures for the exercise of their constitutional attributions when those have not been established in the legislation regulating their functions. For such purpose, constitutional courts, such as the Constitutional Tribunal of Peru, have claimed to have procedural autonomy in exercising their extended powers to develop and complement their decisions, but the procedural rules applicable in the judicial review process are not expressly regulated in statutes.[671] Nonetheless, the Constitutional Tribunal of Peru has established some limits to its procedural autonomy; its exercise cannot expand judicial review powers of the Tribunal that are not expressly established in the Constitution.[672]

In Germany, the same principle of procedural autonomy (*Verfahrensautonomie*) has been used to explain the powers developed by the Federal Constitutional Tribunal to complement procedural rules of judicial review. This was the case, for instance, with the application of article 35 of the Law of the Federal Constitutional Tribunal, which establishes that the Court can establish how such execution will take place. On the basis of this provision, for instance, the Federal Constitutional Court established a term for its decision to be applied, which is fixed according to different rules, for instance, a precise date like the end of the legislative term.

In other cases, judicial interference on legislative matters related to rules of procedures on matters of judicial review has been more intense. For instance, in Colombia, the Constitutional Court has assumed the exclusive competency to establish the effects of its own decisions, considering unconstitutional and annulling the provisions of the Law (Decree 2,067 of 1991) regulating its organization an functions in which the Legislator established rules regarding such effects (Articles 21 and 22).[673]

In Venezuela, the Constitutional Chamber of the Supreme Tribunal of Justice, in the absence of legislative rules, has established procedural rules, according to the authorization provided in article 19 of its Organic Law to establish a more convenient procedure for accomplishing its constitutional justice functions, "provided that they have legal basis." Consequently, in these cases, it has invoked its normative jurisdiction to establish the procedural rules for judicial review when not regulated in statutes. This has happened, precisely, on matters of judicial review regarding absolute legislative omission and the *habeas data* proceeding.

---

http://www.tsj.gov.ve/decisiones/scon/Abril/806-240402-00-3049.htm; Daniela Urosa Maggi, *Venezuelan National Report*, p. 9.

671 See Resolution of the Constitutional Tribunal, Exp. nº 0020-2005-AI/TC, FJ 2; Francisco Eguiguren and Liliana Salomé, *Peruvian National Report I*, p. 14; Fernán Altuve-Febres, *Peruvian National Report II*, pp. 22–23.

672 See Francisco Eguiguren and Liliana Salomé, *Peruvian National Report I*, p. 17.

673 See Decision C-113/93; Germán Alfonso López Daza, *Colombian National Report I*, p. 9.

Regarding judicial review of absolute omissions, though established in the Constitution (article 336.7), its procedure was not regulated in the 2004 Organic Law of the Supreme Tribunal; consequently, the Constitutional Chamber in Decision No. 1556 of July 9, 2002, established the regulation on the matter to be applied until the National Assembly approved the statute establishing the procedural rules.[674]

Regarding the procedural rules on matters of *habeas data* – through which any person can have access to information about him- or herself gathered in official or private registries; has the right to know the use and purpose of such information; and has the right to ask for its updating, rectification, or destruction when erroneous or in cases where it illegitimately affects those rights[675] – in 2001, the Constitutional Chamber assumed exclusive jurisdiction to decide direct *habeas data* actions.[676] The Chamber ruled that it would establish the corresponding procedure for the exercise of its functions: in 2003, in Decision No. 2551 of November 24, 2003,[677] the Chamber based its ruling on the provision of Article 102 of the Law of the Supreme Court of Justice of 1976, which authorized the Supreme Court to establish the rules of procedure in all those cases not expressly regulated by the Legislator. In 2004, the new Organic Law of the Supreme Tribunal was sanctioned, repealing the former 1976 Organic Law of the Supreme Court without providing specific rules of procedure for the *habeas data* action. Thus, the Constitutional Chamber proceeded to modify its previous ruling and reformed the rules of procedure applicable to the *habeas data* actions in Decision No. 1511 of November 9, 2009.[678] The foundation for this decision was the immediate applicability of article 27 of the Constitution establishing the amparo proceeding and the attribution to the Chamber of guaranteeing and interpreting the Constitution. The Court reasoned that it had acted "in order to fill the existing vacuum existing in relation to this highly innovative constitutional action of habeas data."[679]

---

[674] See Decision nº 1556 of July 9, 2002, *Alfonzo Albornoz and Gloria de Vicentini* case, at http://www.tsj.gov.ve/decisiones/scon/Julio/1556-090702-01-2337%20.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, pp. 10–11.

[675] See Allan R. Brewer-Carías, *La Constitutición de 1999: Derecho constitucional venezolano*, Editorial Jurídica Venezolana, Caracas 2004, Vol. II, pp. 759 ff.

[676] See Decision nº 332 of March 14, 2001, *Insaca* case; http://www.tsj.gov.ve/decisiones/scon/Marzo/332-140301-00-1797%20.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 12.

[677] Case: *Jaime Ojeda Ortiz*; http://www.tsj.gov.ve/decisiones/scon/Septiembre/2551-240903-03-0980.htm. See also Daniela Urosa Maggi, *Venezuelan National Report*, p. 13.

[678] See *Mercedes Josefina Ramírez, Acción de Habeas Data* case; http://www.tsj.gov.ve/decisiones/scon/Noviembre/1511-91109-2009-09-0369.html See in Daniela Urosa Maggi, *Venezuelan National Report*, p. 13.

[679] See Allan R. Brewer-Carías, El proceso constitucional de las acciones de habeas data en Venezuela: las sentencias de la Sala Constitucional como fuente del Derecho Procesal Constitucional," in Eduardo Andrés Velandia Canosa (coord.), *Homenaje al Maestro Héctor Fix Zamudio. Derecho Procesal Constitucional. Memorias del Primer Congreso Colombiano de Derecho Procesal Constitucional* Mayo 26, 27 y 28 de 2010, Bogotá 2010, pp. 289–295.

FINAL REMARKS

From all of what I have said, and after analyzing the role of constitutional courts as positive legislators in comparative law – leaving aside the cases for the pathology of judicial review that are directed not to reinforcing democratic principles and evolution but to dismantling democracy using in an illegitimate way a democratic tool[1] – it is possible to deduce the following two conclusions.

First, as noted at the beginning of this study, there is no longer a sharp distinction between two models of judicial review. In the contemporary world there is the experience of judicial review systems in a transformation, convergence, and mixture that was not possible to envision one hundred years ago, when the confrontation between the diffuse and concentrated methods of judicial review began to be imagined.

Second, the clear and simple system of the concentrated judicial review model, based on the binomial unconstitutionality-invalidity, or unconstitutionality-nullity, exercised by a Constitutional Court as a negative legislator, is nowadays difficult to defend.[2]

In fact, contemporary constitutional comparative law shows the existence of constitutional courts that have progressively assumed roles that decades ago corresponded only to the Constituent Power or to the Legislator; in some cases, they have discovered and deduced constitutional rules, particularly on matters of human rights not expressively enshrined in the Constitution and that could not be considered to have been the intention of an ancient and original Constituent Power. In other cases, constitutional courts have progressively been performing legislative functions, complementing the Legislator in its role of lawmaker and, in many cases, filling the gaps resulting from legislative omissions, sending guidelines and orders to the Legislator, and even issuing provisional legislation.

---

1 On Venezuela, see Allan R. Brewer-Carías, *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment*, Cambridge University Press, New York, 2010.

2 The model, as defined by Judge Marek Safjan, in the *Polish National Report*, was characterized as follows: "It is not the competence of the constitutional court to make laws or to bring into the legal order any normative elements, which have not been established before under an appropriate legislative procedure; therefore, the constitutional court may not replace the legislator in this process. The constitutional review is based on a coherent structure of a hierarchical legal system and the constitutional court has to operate within this order, drawing its own competence from the constitutional legislator. Judgments passed by the constitutional court cannot contain anything that has not been already proclaimed by the supreme norm laid down in the Constitution whereas the role of the constitutional review will always be limited to the application of law – although placed at the highest level of the normative hierarchy – and cannot involve creation of norms." See Marek Safjan, *Polish National Report*, p. 1.

Nonetheless, the important results of a comparative law approach to the subject of constitutional courts as positive legislators are the common trends that can be found in all countries and in all legal systems; trends that are more numerous and important than the possible essential and exceptional differences, which confirms the importance of comparative law. That is why, in matters of judicial review, constitutional courts in many countries – to develop their own competencies and exercise their powers to control the constitutionality of statutes, to protect fundamental rights, and to ensure the supremacy of the Constitution – have progressively begun to study and analyze similar work developed in other Courts and in other countries, thus enriching their rulings.

Today, it is common to find in constitutional courts' decisions constant references to decisions issued on similar matters or cases by other constitutional courts. So it can be said that, in general, there is no aversion to using foreign law to interpret, when applicable, the Constitution. On matters of fundamental rights, for instance, the process of the internationalization of the constitutionalization of such rights in the way it has occurred during the past sixty years has resulted in a globalization process regarding the general applicable regime, which is indistinctively used to control the constitutionality or the conventionality of statutes, producing uniform principles of constitutional law never seen before.

Consequently, on the matter of judicial review, it is simply incomprehensible to pretend that the judicial solutions in a given country – on matters of the right to equality and nondiscrimination, or the right to privacy or due process, or the right not to be subject to torture – could be considered an endemic matter exclusively to a particular country, and that in the interpretation of the Constitution of the country, it is impossible to rely on judicial solutions to the same problems in other countries. This is at least a general trend that, with the exception of some judges and scholars in the United States, is possible to identify in comparative law, as a subject like the one studied in this General Report demonstrates. Consequently, in general terms, for a public comparative law scholar, it is incomprehensible that nominees to the U.S. Supreme Court have the almost-inevitable duty to express in their confirmation hearings before the Senate, for example, that "American Law does not permit the use of foreign law or international law to interpret the Constitution," and this a "given" question regarding which "[t]here is no debate."[3] A different matter is the possible use of foreign law in the U.S. universities for academic purposes. Regarding this assertion, Justice Ruth Bader Ginsburg has said that she "frankly [doesn't] understand all the brouhaha lately from Congress and even from some of my colleagues about referring to foreign law," explaining that the controversy was based in the misunderstanding that citing a foreign precedent means the court considers itself bound by foreign law as opposed to merely being influenced by such power as its reasoning holds. That is why she formulated the following question: "Why shouldn't we look to the wisdom of a judge from abroad with at least as much ease as we would read a law review article written by a professor?"[4]

---

[3] Judge Sonia Sotomayor, at the confirmation hearing before the Senate, on July 15, 2009. See "Sotomayor on the Issues," *New York Times*, July 16, 2009, p. A18.

[4] See Adam Liptak, "Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa," in *New York Times*, April 12, 2009, p. 14.

And this is precisely what is now common in all constitutional jurisdictions all over the world: constitutional courts commonly consider that, with respect to foreign law, when they have to decide on the same matter and on the basis of the same principles, in the same way that they would study the matter through others authors' opinions and analysis from books and articles, they can also rely on courts' decisions from other countries, which can be useful because those courts dealt not only with a theoretical proposition, but also with a specific solution already applied to resolve a particular case.