# Comparative Constitutional Review

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# Comparative Constitutional Review

## Cases and Materials

**Michael Louis Corrado**
Arch T. Allen Professor of Law
and Professor of Philosophy
University of North Carolina
at Chapel Hill

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# Contents

# Preface

A casebook is a collection of bits and pieces of cases, statutes, constitutional provisions, articles, and books, assembled by an editor. The successful casebook tells the story of a certain body of law—or rather, it sets down material upon which the reader should be able to construct a story fitting a certain body of law.

This particular casebook is a result of a project I undertook some five or six years ago. At that time I had been teaching comparative law for some years, and I had come to the conclusion that what the field needed was more casebooks: not bigger and better, but smaller casebooks. The problem is that comparative law teachers have very different ideas of what ought to be taught, and how it ought to be taught, and none of the few large casebooks out there really answers the needs of the teacher trying to put her course together in her way.

My idea was to begin a collection of much smaller casebooks devoted to particular areas of comparative law. Each one would contain cases and materials, but would be small enough (and inexpensive enough) so that the comparative law teacher might, instead of having her students buy one large casebook, construct her course out of a number of these smaller "case-booklets." Happily Carolina Academic Press also thought such a series was a good idea, and we soon had five titles under contract. Two of the titles have already been published: one an introduction to comparative law, the other on comparative criminal procedure.

A book on comparative constitutional review was one that seemed especially appropriate for the series. It could be the basis for a unit on judicial review in any comparative law course; but it might also be useful as the basic text in a seminar on comparative judicial review. Outside the field of comparative law it could well fit into a general course on constitutional law, an advanced course on judicial review, or even an introduction to law course. I undertook that part of the project myself, and the present volume is the result.

If the book has a theme it is the moving nature of the subject matter. Chapter One begins in the French Revolution, with a rationale for parliamentary supremacy. It seems to me that a full understanding of constitutional review of legislation requires a background understanding of what the world would be like without it, and why some might prefer a world of that sort.

The book is intended not only for American students, but for students abroad as well, and consequently it contains, in Chapter Two, a brief survey of the American notion of constitutional review, starting out (again) from the late eighteenth century and the American Revolution. Chapter Three takes up the development of the independent constitutional court, starting with Kelsen and Austria between the two World Wars and tracing the development of such courts in Italy, Germany and France after the second of those wars. The difference between constitutional review in American courts and constitutional review in much of the rest of the world is that in the United States such review takes place in the ordinary courts, and elsewhere it is restricted to the specialized constitutional courts. The ordinary courts have no role whatever, except in some places to pass questions of constitutionality on to the constitutional courts.

The significance of the developments described in the final chapter can best be understood against the background of this traditional constitutional impotence of the ordinary courts. The development in the last half of the twentieth century of a supranational government in Europe with its own courts and legislature has brought to the ordinary courts of Europe the power of judicial review of legislation. Conversely the willingness of the ordinary courts to use that power has contributed to the formation of a genuine regional state in Europe. Whether this development will be replicated in other areas remains to be seen.

The materials I have used are standard materials. The various abortion decisions make a nice basis for comparison, and they have become an important part of the literature that any beginning student ought to know. Some of the translations of cases are my own, but I have also relied on translations from journal articles and from some of the classic texts, especially Cappelletti and Cohen's Comparative Constitutional Law (1979), and deVries' Civil Law and the Anglo-American Lawyer (1975).

Different parts of the book may be relevant for different courses. American teachers may not want to spend much time on *stare decisis*, and may want to skip Chapter Two entirely. Teachers elsewhere may want to stress those very parts and go easy on some others. But a teacher anywhere might be justified in treating all four chapters equally. It is one thing to be aware of our own tradition and another to see it in a comparative setting.

I am grateful to the Law School and the Institute for the Arts and Humanities at the University of North Carolina at Chapel Hill, and to the Suffolk University Law School, for support during the writing of the book. I am indebted to my colleagues Jack Boger, John Orth and Mark Weisburd for their comments, and to the assistants who have helped with the project: Lisa Brown, Katie Miltich, Brian Oten, Brenda Thissen, James Langston.

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# Introduction

It is tempting for Americans to identify constitutional law with the case law of judicial review. For us, constitutional law sets limits to government power, and from the American point of view there is no limit on government power unless there is a forum in which that limit can be enforced. To steal a phrase from the American pragmatist Peirce, a limit that makes no difference *is* no difference. In the United States every ordinary court is vested with the authority to evaluate government action under the Constitution: hence the identification of constitutional law with judicial review.

But if it is tempting to make that identification it is also a little parochial. In the first place, the assumption that constitutional law requires a forum for testing government action under the constitution ignores the existence of constitutional democracies, like Great Britain, for example, and France before 1959, where no such forum exists. In the second place, and more importantly, judicial review (strictly speaking) means review by the *judiciary*, in the ordinary courts of the land. The judiciary is one of the branches of government, and in many countries with constitutional review of government action the forum is not within the judicial branch. In Germany and in post-1958 France, to take just two instances, there is constitutional review but not in the ordinary courts, which are prohibited from passing on the constitutional status of government action. There are instead special constitutional courts, with members chosen by the political branches, or by the political branches together with the judicial branch. And so in those countries we might be willing to talk about *constitutional* review, but not about judicial review in the strict sense.

This isn't just a quibble about labels. The reason for the distinction between the judiciary and the personnel of the constitutional courts is deeply rooted, as we will see. After the French revolution the power to review legislative action was taken away from the judiciary, and the parliament was left the arbiter of its own actions. The French distrust of the judiciary has left its mark on many aspects of the law of the civil law nations, and nowhere more obviously than on the question of constitutional review. Even today, with the rise of constitutional courts around the world, the ordinary judiciary has nothing to say about the constitutionality of government action. Strictly speaking, there is no judicial review.

For the sake of simplicity I will say that there is judicial review of government behavior whenever the ordinary courts of a jurisdiction have the power to con-

sider the constitutional status of that behavior. So, in the United States and in Japan, where ordinary courts have that power, there is judicial review. In France and Germany the ordinary courts do not have that power, and there is no judicial review. Nevertheless there is *constitutional review* in all four jurisdictions. When I am trying to be precise, I will reserve "judicial review" for those instances of review that involve the ordinary courts, and speak more generally of constitutional review as including both sorts of jurisdiction. Where precision is not necessary I will follow the custom of referring to both as judicial review.

Before 1945 constitutional review was practically unknown outside the United States. In constitutional matters, parliaments were supreme. Hans Kelsen, it is true, had designed and helped to set up and man a constitutional court in Austria between the World Wars, and a similar court was set up in the neighboring German (Weimar) Republic. Neither court survived the tribulations of the times and the advance of National Socialism in the 1930s. And outside of those two courts there was practically nothing.

There was nothing, that is, until 1945. With the end of the Second World War the idea of constitutional control began to take hold, at least in part because of the excesses of the preceding period. It took hold first in Europe and Japan, and then in the newly developing countries, and finally in the former socialist republics of Eastern Europe. Today varieties of constitutional review have spread into every corner of the globe, and into every level of political association.

In fact, it is with the advance of constitutional review into the international and supranational arenas that the distinction between judicial review and constitutional review generally comes to be most important. Countries that have avoided judicial review-that is, constitutional review in the ordinary courts-have seen the emergence in the ordinary courts of a new power of review under instruments of international and supranational association. If we follow the history of constitutional review in the twentieth century in France, for example, we see first parliamentary supremacy and a complete lack of constitutional review under the Third and Fourth Republics; then constitutional review of parliamentary action in the politically appointed Constitutional Council after 1959; and finally judicial review of parliamentary action, not under the French constitution but under the law of the European Union. This reappearance in the ordinary courts of a power that the judiciary has been deprived of since the time of the Revolution is one of the important parts of our story.

* * *

The material in this book is intended to provide an introduction to comparative constitutional review, an introduction that is brief enough to be included in a general course on comparative law, or in a general course on constitutional law. The book develops in this way: it begins with the notion of legislative su-

premacy, in which the power of the legislature is unregulated except by its own notion of constitutionality, and goes on to discuss various sorts of limits that might be placed on that supremacy-that is, various sorts of external review under some sort of fundamental law. Because of the central role that France has played in legal history, and because so many civil law countries pattern their court systems on the French system, we begin with France. France had a long history of parliamentary supremacy, and Chapter I includes materials that illustrate the reasons for that, as well as the effect that parliamentary supremacy had upon the ordinary courts of France. Since the book is intended for students both in the United States and abroad, this chapter compares French courts with American courts, and the powers of French judges with the powers of American judges. Chapters II and III discuss the development of various sorts of control that might be placed upon the legislature, from executive veto and some early and ineffective sorts of constitutional panels (for example, in New York and in France) to the American system of judicial review and the Kelsenian constitutional court, and then on to the complex French system that developed following the adoption of the 1958 constitution. In the French system there is one Council, the Constitutional Council, that examines proposed legislation for constitutionality, and another Council, the Council of State, that has taken upon itself the authority to examine administrative action for constitutionality. Chapter IV contains material relevant to the historical development of the European Court of Justice and its effect upon the power of review in the ordinary courts of the member states.

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