UNITED STATES INSTITUTE OF PEACE

. . .

An independent institution established by Congress to strengthen the nation's capacity
to promote peaceful resolution to international conflicts

COMPARATIVE CONSTITUTIONAL REVIEW

Tom Ginsburg
University of Chicago Law School

Constitutional review is the power to examine statutes and government actions for conformity with the constitution. From its origins in the American experience, the institution has spread around the globe to become part of the standard institutional architecture of democracy. Some systems (such as those of the United States and India) give the function of constitutional review to ordinary courts; some give it to a unified Supreme Court (but perhaps not to lower courts); some countries in the French constitutional tradition have designated "constitutional councils" with more limited review authority. The trend in the past two decades has been to create special bodies called constitutional courts to carry out the function of constitutional review. This is the German model, adopted widely in new democracies.

Systems of constitutional review vary widely on a number of key questions of institutional design, including who can bring a claim, what the claim can be based on, when claims can be brought, and what the effect of such decisions is. These institutional details may be set out in the constitution itself, in statutes on the organization of the courts, and in subsequent interpretations by the court itself. This memo covers these issues.

1. Standing: Who can bring a claim?

Constitutional review systems differ widely on the question of who is allowed to bring a claim, a concept known as "standing." One can array access to the court on a spectrum from very limited access to very wide access. One model, associated first with Austria in the 1920s, allowed only state and federal governments to bring cases, so the constitutional court served mainly as a referee to protect federalism. The original design of the French Constitutional Council in 1958 only allowed designated politicians, namely the President, Prime Minister, leader of the Senate and leader of the National Assembly to challenge laws. 1974 Constitutional amendments in France extended the right of petition to any group of 20% of parliamentary deputies, allowing minority parties to challenge governmental action on constitutional grounds.

Some constitutions treat constitutional review as essentially legal in character, and so the key question is whether one can bring a lawsuit. This is the United States model. Anyone who satisfies general "standing" requirements for litigation can raise a constitutional issue in court. Such requirements typically include a concrete injury—one must have suffered actual or imminent harm from the application of the law in order to challenge it in court.

One variant is that in India, where the Constitution guarantees direct access to the Supreme Court on questions of fundamental rights. This was done in part to ensure that lower courts did not hinder rights protection by failing to exercise active review. It makes the Indian system a bit more open than the US to rights litigation because those who claim their rights have been injured can go immediately to the highest court, rather than having to potentially lose at the lower level and pay the costs of appeal.

The most open systems of constitutional litigation allow a direct petition to the constitutional court. This is exemplified by the German constitutional court, where not only political bodies but individuals may enjoy direct access through constitutional petitions. In addition, ordinary judges can refer constitutional questions to the Supreme Court as well. The present Hungarian Constitutional Court has perhaps the widest access of any such body in the world today, as the right of abstract constitutional petition is not even limited to citizens.

The figure below describes these features for some of the major systems of judicial review, again keeping in mind that hybrids are possible between these types.

Figure 1: Accessibility of Constitutional Adjudication

more open	ACCESS MECHANISM	EXAMPLES
↑	**Special bodies + any court + direct petition**	**Hungary; Germany; Mongolia**
↕	**Any litigant**	**United States, India**
↕	**Special bodies + any court**	**Taiwan, Poland before 1997**
↓	**Special bodies + Legislative Minorities**	**France 1974-2008, Bulgaria, Rumania**
less open	**Special bodies only**	**Austria 1920-29, France before 1974**

2. What kind of claims can be brought?

Another distinction is whether a constitutional interpretation body can hear constitutional questions only in the context of concrete legal cases (as in Japan for example), or whether it can consider constitutional issues in the abstract. Concrete review requires review in a particular case where the law has already been applied or is about to be applied. Abstract review determines the constitutionality of a statute or government practice without a specific case. The French *Conseil Constitutionnel* may only hear challenges to legislation in the abstract. . The U.S. Supreme Court may only hear concrete cases. The German and Spanish Constitutional Courts may practice both abstract and concrete review. In these systems, certain political institutions may challenge legislation as an abstract matter, while citizens who allege that their constitutional rights have been violated can approach the court for relief, either through a court or direct constitutional petition. This allowed, for example, the German Constitutional Court to

rule that it would be unconstitutional for the military to shoot down a hijacked plane. The case came to the court as an abstract matter, before any such situation had arisen.

An issue arises in some countries with a designated constitutional court as to what type of actions can be challenged. For example, in South Korea, the 1987 Constitution set up a constitutional court that was empowered to make decisions on constitutionality, but left the supreme court responsible for determining the constitutionality of administrative regulations and government actions. This led to conflicts between the two courts, in which the constitutional court seems to have had the last word, but it was a messy fight.

France features a separate administrative court, the *Conseil d'Etat*, staffed by bureaucrats and responsible for ensuring the legality (including the constitutionality) of administrative regulations and government action. In addition, the ordinary supreme court interprets the constitution in the context of ordinary litigation. This system has functioned but probably only because, as described below, the constitutional council has no jurisdiction over actual cases or laws once passed. When two institutions have concrete review power, trying to separate review of administrative action from review of legislation is difficult. Suppose there is a law that allows the Ministry of Finance to pass tax rules, and the Ministry does so in way that a citizen believes is unconstitutional. The citizen might have to file claims in two different courts: one claim challenging the application of the tax rules and another claim challenging the statute that empowered the Ministry to issue the rules. In real life, these questions can be closely related and it may create problems to have two different interpretive bodies.

3. Timing: When can claims be brought?

A related issue concerns the *timing* of review. In the French system before July 2008, review could only take place before promulgation of legislation. This meant that the law could be modified by the legislature to conform with the decision of the Council and so never needed to be formally struck after promulgation. This form of review made the Council more akin to a third house of the legislature than a court.

More commonly, claims are brought *after* the law is passed. Systems differ on when and how the cases can be brought. Typically there is some requirement of injury, leading to interesting questions when the injury is only a potential one, and has not yet occurred. Courts vary in the legal tests they employ to sort out issues like this—a typical requirement is that the potential injury be about to occur.

In the United States, the courts will not hear a case when there is no longer a basis for the dispute. Suppose for example someone challenges a government decision to take their property. Before the court hears the case, however, the government returns the property to the person. The courts might say that the case is moot because there is no reason for the court to act. (Alternatively, if the issue is capable of being repeated, the courts might allow it.)

In systems with a designated constitutional court, an issue arises as to how to treat constitutional questions that come up in the context of ordinary lawsuits. This is an issue because ordinary courts cannot interpret the constitution. A common solution developed in Germany is to allow the courts to pause the litigation temporarily while they send the constitutional question to the constitutional court. The constitutional court will then answer the question, instructing the other court to apply the rule.

4. Effect: *what is the impact of a decision of unconstitutionality?*

Systems of judicial review also vary in the effect of their pronouncement on legislation in concrete cases. American courts, as a technical matter, do not actually void laws that they find to be unconstitutional. Rather, since subsequent similar cases must follow the rule in previous cases, the voided law remains on the books, if dormant for all practical purposes because no court will ever enforce it. In systems with a designated constitutional court, in contrast, the court usually has the power to declare the laws unconstitutional and immediately void. The decision means the law cannot be applied.

Courts in Latin America make use of a device called *amparo*, wherein a successful constitutional complainant will be free from the application of the offending law or government act, but the law will continue to apply to others. An unconstitutional act that affects 1000 different people might require 1000 suits, requiring a lot of expense and time.. This device is desirable from the perspective or politicians who do not want much judicial constraint, a fair characterization of many governments in Latin America during the 20th century. The *amparo* may work well to deal with government actions that provide substantial burdens on small numbers of citizens, such as measures affecting property rights. But the device is less effective in protecting people from unconstitutional actions that affect larger populations or those less able to mobilize for legal action. One variation that seeks to have the benefits of *amparo* without the costs is the Mexican system, in which the Supreme Court can declare a law or practice unconstitutional after five *amparo* challenges are upheld. Similarly, the Brazilian Senate (Art. 52X of constitution) can choose to accept a decision rendered in a specific case as generally binding, allowing it to convert a finding of unconstitutionality in one case into a general rule.

Sometimes the constitutional court may wish to limit the act in question, interpreting it to be constitutional if applied in a particular way. The German Constitutional Court has two choices in rendering a finding of unconstitutionality. It can find legislation null and void (*nichtig*) or incompatible (*unvereinbar*) with the Basic Law. In the latter case, the Court declares the law unconstitutional but not void, and usually sets a deadline for the legislature to modify the legislation, during which period it might still be applied. Sometimes these decisions admonish the legislature to modify the legislation within particular guidelines. The court becomes deeply involved in "suggesting" to the legislature language that ultimately finds its way into the statute. For example, in its 1975 decision voiding a statute that allowed abortion, the German Constitutional Court engaged in extensive suggestions for rewriting of the statute. In other cases, the Court will sustain a challenged statute but warn the legislature that it is likely to void it in the future, or suggest conditions for the constitutional application of the statute. In addition, constitutional courts may strike only part of a law, and not the entire law. Usually, courts want to make sure that the law still makes sense as a whole without the challenged language. If it does not, the courts may strike the whole law and force the legislature to come up with a new comprehensive scheme.

In some systems with a legacy of parliamentary control of constitutionality, the decision of the constitutional court as to unconstitutionality is not binding, but rather is advisory to the legislature. The legislature retains some power to reject or accept the court's finding, either by majority or supermajority vote. A version of this model existed in Poland during the life of its first Constitutional Tribunal 1988-97, and remains intact in Mongolia, where the legislature can reject an initial finding by a panel of the constitutional court. Afterwards, the Court can rehear the case with its full membership and uphold its initial decision with a 2/3 vote.

Finally, a major innovation of the Canadian constitution allows provincial legislatures to pass legislation, even if it violates the national constitution and has been struck by the Supreme Court. Such legislation requires the provincial legislature to make an explicit declaration that it is passing the law, notwithstanding its unconstitutionality. Such laws last for only five years, but can be renewed. The logic is to allow provinces to enact popular but unconstitutional policies; in practice, however, such declarations have only been used by one province (Quebec) and are now very rare.