6 Constitutional Review

Chapter 6 deals with the various forms for assessing the constitutionality of the actions and decisions of governments, parliaments, and other authorities, collectively referred to as constitutional review. It highlights that constitutions often put in place provisions to this end on whom should be entrusted with the responsibility of interpreting and enforcing the constitution, and how this responsibility should be allocated. The chapter provides an overview of the different forms and models of constitutional review, and offers several considerations for striking the right balance among different values, including the protection of democracy, upholding the rule of law and the superiority of the constitution, but also the insulation of the courts from political influences, the protection of minorities' representation and individual human rights.

Key issues

The experience of OECD member and partner countries can suggest and help inform several considerations for the design of a system of judicial constitutional review, especially one that involves the operation of a constitutional court. Establishing a model of constitutional review often involves balancing different values: democracy, majoritarian rule, upholding the rule of law and the supremacy of the constitution, protection of minorities' representation, and individual human rights – as well as affirming the constitutional court's independence from political parties while preventing excessive judicial activism through self-restraint. Constitutional courts' design involves political trade-offs among these values. Key issues and options may include:

- *Limiting and clearly demarcating the powers of constitutional courts,* in the constitution or in subsequent constitutional legislation, may facilitate a balance among conflicting values and reduce institutional disagreements in the future between constitutional and ordinary courts.
- *Three essential tenets for constitutional courts design include partisan independence, a balanced composition and self-restraint*. Constitutional courts tend to acquire legitimacy if they contribute to democracy and human rights protection, are perceived as politically independent, and practice a moderate activism or self-restraint, even if certain constitutional courts have been quite active in policy making (e.g. Colombia). *Due consideration of the form of judicial review (mild, strong, or a mixed system)* is also key.
- *The substantive scope of competencies assigned to the constitutional court varies across countries.* One option is for the constitutional court to deal mainly with the "organic" part of constitutional provisions, i.e. the vertical and horizontal allocation of powers and responsibilities to the various political actors in the country**.** In some countries, constitutional courts have also been entrusted with ancillary functions.
- *The protection of fundamental rights***.** A specific area of substantive competency that should be considered when designing a system of constitutional review is to decide whether the constitutional court will oversee fundamental rights protections, or whether that will be left for ordinary courts, including administrative and criminal courts. If ordinary courts are to enforce fundamental rights, some aspects of traditional judicial education would have to be modified by adding attention to matters linked to that rights protection, beyond the usual insistence on technical legal analysis. Another option is to entrust the protection of fundamental rights to the constitutional court. Assigning the constitutional court a last instance character in the national sphere does not preclude appealing to supranational courts, such as the ones outlined below.

Introduction

This chapter deals with the various forms of assessing the constitutionality of the actions and decisions of governments, parliaments and other authorities.[1] Reviewing the constitutional conformity of public authorities' behaviours and decisions is an almost universally accepted practice, one that has grown exponentially over the past few decades in most democracies in Europe and elsewhere (Ramos, 2006[1]).

Constitutions often put in place provisions detailing who should be entrusted with the responsibility of interpreting and enforcing the constitution, and how this responsibility should be allocated. Thus 158 out of 193 countries in the current membership of the United Nations, including 33 of 37 OECD member countries, include some sort of formal provision for constitutional review (Ginsburg, 2007[2]). With some exceptions (e.g. Denmark, Sweden, Finland, the Netherlands, the United Kingdom, New Zealand and Israel, with variations), the great majority of constitutional systems around the world today give judges the power to rule on the constitutionality of government action; the proportion of constitutions that explicitly provide for judicial review has increased from 38% in 1951 to 83% in 2011 (Ginsburg, 2007[2]). Seventy-nine written constitutions have designated constitutional courts or councils (including 14 OECD countries: Austria, Belgium, Colombia, the Czech Republic, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Portugal, Slovenia, Spain and Turkey). For example, constitutional review in continental Europe is usually entrusted to a constitutional court that centralises the constitutional interpretation and assessment of constitutionality. The constitutional courts are usually outside the ordinary judicial systems, although there is a wide range of different approaches. The French 1958 Constitution in turn created the *Conseil Constitutionnel* (Constitutional Council), a non-judicial, political body to establish political control of constitutionality. Another 60 constitutions have explicit provisions for judicial review by ordinary courts or the supreme court. Finally, a small number of constitutions provide for review of constitutionality by the legislature itself (Project Comparative Constitutions, n.d.[3]). There are no universal models. In Finland, Sweden and Switzerland, for example, assessment of the constitutionality of legislation is mainly parliamentarian and recently also judicial, though limited. In the British Commonwealth countries, the constitutionality assessment rests mainly with parliaments and, in a limited way, the high courts.

Moreover, institutions that can provide *ex ante advice* on the constitutional implications of potential legislation also exist, such as the Chancellor of Justice in Estonia, the Cabinet Legislation Bureau in Japan, the US Office of Legal Counsel in the Department of Justice, the Council of State in the Netherlands and the State Council in Spain. The sharing of interpretive responsibility across multiple institutions usually means that these institutions will need to exchange views and perhaps disagree with each other on matters of constitutional interpretation in the normal course of events. This dialogue is not limited to courts and legislatures (Ferreres Comella, 2009[4]). Not only do the executive and non-partisan bodies participate in constitutional dialogues, but their participation also may be formalised and mandatory.[2]

Several models of constitutional judicial review are designed to address questions of democratic legitimacy; these are known as the "*the anti-majoritarian difficulty*" (Waldron, 2008[5]). The essence of these is that when a judge or a constitutional court can review a piece of parliamentary legislation, it can pose a possible problem in relation to democratic principles (Cappelletti, n.d.[6]). Courts that exercise the power of constitutional review – that is, the power to set aside legislative and executive action on the basis of a conflict with constitutional norms – play a prominent and potent role in democracies. From defining the personal freedoms of individuals and regulating the financing of political competition to ending election disputes and even removing elected prime ministers from office, courts may significantly influence politics (Vanberg, 2015[7]). This political nature of constitutional courts is highlighted by the fact that the appointment of their members often fundamentally follows political criteria, not just merit-based principles (Commission, 1997[8]).

Brief overview of issues

At their origin in the 1920s, constitutional courts were designed to deal solely with conflicts between the other branches, and in federal nations between the national and subnational governments. By mid-century though, courts were given the power to resolve complaints brought by individuals that their constitutional rights – and sometimes the constitutional rights of others – had been violated. Procedures for resolving individual rights complaints vary widely. In contemporary democracies, what can be affirmed is that almost all contemporary constitutions provide that a constitutional challenge to legislation or executive action can be brought in court, no matter whether the complaint relates to individual rights or to provisions dealing with the allocation of power within the government. Most constitutional systems have exceptions for a small class of constitutional claims, labelled "political questions" or "non-justiciable" questions. The modern tendency is to define these exceptions rather narrowly.

There is often a distinction between challenging primary legislation (statutes) and secondary (executive) legislation. Particularly in systems with constitutional courts, challenging primary legislation usually can be possible only before the constitutional court, whereas regular courts can assess conformity of the secondary legislation with the primary legislation (often only *inter partes*, i.e. applicable for the specific individual case, by not applying the legislation they consider contrary to the statute – so-called *exceptio illegalis*). In such systems, when a regular court comes across a constitutionally doubtful provision of a statute, they can refer the case to the constitutional court.

Historically, the choices between a specialised constitutional court and a generalist one, and between concentrated and dispersed constitutional review, were thought to be consequential. Experience over the past century has shown that the differences in practice were relatively small. Contemporary constitutions tend to disperse constitutional review, though modern constitutions continue to choose between creating a specialised constitutional court and having a single apex supreme court with jurisdiction over claims arising under ordinary and constitutional law. In systems with two apex courts, conflicts between the courts occasionally arise – usually when the constitutional court says that a statute would be unconstitutional unless it is interpreted in a specific way – but overall these conflicts have been worked out harmoniously.

Given the great variety of ways and means of settling constitutional disputes and ensuring the prevalence of the constitution, the analysis below aims to systematise the multiple models of constitutional review that exist in OECD countries on a continuum from the absence of judicial review (e.g. the Netherlands) to constitutional courts that have supremacy in emitting authoritative (binding) interpretations of the constitution (e.g. Germany or Spain).

Core features of the main models and forms of constitutional review

A number of historical and institutional factors have influenced the design of constitutional review, including but not limited to decentralisation structure, institutional legacy, type of legal family, the degree of political fragmentation, authoritarian past, cross-fertilisation across countries, and undisrupted parliamentary sovereignty (Castillo-Ortiz, 2020[9]). A first categorisation should be put forward between mild (weak) and intense (strong) court intervention.

Forms of review: Mild and intense forms of judicial constitutional review

Looking at this dichotomy among OECD benchmark countries, variations occur from Finland, New Zealand, Australia and Switzerland, where the judicial intervention is comparatively mild, to Austria, Colombia, Germany and Spain, where it can be rather intense. France, Mexico and Portugal are countries in between, with varied forms of intensity. Thus there is a clear continuum of approaches to address this tension through different forms of judicial review in OECD countries.

With both mild- and weak-form judicial reviews, judges' rulings on constitutional questions are expressly open to legislative revision in the short run. Courts are first given the opportunity to explain why in their reading a challenged statute is unconstitutional. Having done so, they then step aside and let the legislature respond. The legislative deliberations are thus informed, but not bound, by the courts' arguments. In the end, if a majority of legislators disagree with the courts' constitutional interpretation, a mild-form review allows them to adopt their own vision (Mailey, 2018[10]) (Tushnet, 2006[11]). Nonetheless, in most cases, mild review enables the courts to invalidate legislation when it is patently inconsistent (or as the Finnish and Swedish Constitutions put it, "in evident conflict") with any reasonable interpretation of constitutional language. In terms of scope and timing, mild-form review could be employed for varying parts of a constitutional regime and tailored to the political situation. For example, it could apply to rights provisions (the dogmatic part of the constitution) and not to the structural components (the organic part of the constitution), such as federalism or separation of powers, or to certain rights but not others. It could apply to legislative action only but not executive, or include a legislative override of judicial decisions on executive power but not an executive override of judicial decisions.

Intense or strong-form review occurs when the courts have the last word (as opposed to parliament). In countries with strong-form review, the constitutional court is able to enforce its own interpretation of the constitution.

A question that may arise about strong-form review concerns what is known as the "counter-majoritarian difficulty" (Bickel, 1962[12]). This refers to the apparent democratic anomaly that non-elected judges may have the ability to strike down laws approved by elected representatives of the people. Mild-form review is seen by proponents as an effective remedy to overcome this tension, as it provides an institutional mechanism to ensure implementation of laws that correspond to the interpretation of constitutional rights held by the majority of citizens (through their representatives in parliament). However, legitimacy of strong-review mechanisms in the countries that have adopted them can be seen to rest on society's acceptance and recognition of such review through the constitution. The advantages and challenges generated by each model are the subject of debate.

Models of constitutionality assessment: Parliamentary, Kelsenian and Diffuse

Three broad models of constitutionality assessment may be identified that much depend on the political and constitutional history of each country. These three models hinge on the locus of the review (parliament or courts). While these categories are largely grounded in legal theory and regulations, and may not have a strong bearing on the different outcomes and effectiveness of constitutional review in practice, they can frame the discussion around the main options to establish constitutional review:

- parliamentary sovereignty model
- European continental (or Kelsenian-Austrian) concentrated and abstract model
- diffuse or dispersed judicial review model.

Parliamentary sovereignty model with limited or mild judicial review

In these models, judicial review of constitutionality is either forbidden (art. 120 of the constitution of the Netherlands) or limited (Finland, Sweden, New Zealand, Canada, the United Kingdom and Switzerland). In both Finland and Sweden there is an article in the constitution that allows courts to perform constitutional judicial review and to disapply a provision that is seen to be in *evident conflict* with the constitution (in Finland, the *Perustuslaki* [Finnish Constitution], art. 106; in Sweden the *Regeringsform* [Swedish Constitution], art. 14, chapter 11).[3] At present only one decision can be found where Article 106 has been applied by the Finnish Supreme Court with an outcome that left a provision of a law unapplied. Importantly,

the power to control constitutionality in Finland is still mainly concentrated in the Constitutional Law Committee of Parliament (*Perustuslakivaliokunta*) (Hautamäki, 2006[13]).

In some countries under this model, the legislature may stand on equal or even superior footing to the courts, as demonstrated by the "new Commonwealth model of constitutionalism" (Gardbaum, 2013[14]) found in Canada, the United Kingdom and New Zealand. According to this model, supreme authority over all matters in the legislature is vested in parliamentary sovereignty – including the articulation and enforcement of constitutional norms, as well as responsibility for implementing constitutional values.

In these countries, courts interpret and enforce the constitution, yet the legislature retains the final word on what will be law. All three countries plus Australia employ a mild type of judicial review. In Canada, parliament can pre-emptively immunise statutes from judicial scrutiny on fundamental rights grounds and override court decisions invalidating statutes deemed in breach of the 1982 Charter of Rights and Freedoms. In the United Kingdom, the courts may declare that a law violates the European Convention on Human Rights, but parliament has the power to leave the law in place. In New Zealand, the courts are obligated to interpret statutes in such a way as to avoid conflict with the Bill of Rights, although the parliament can override such an interpretation (De Visser, 2019[15]). Likewise, in Switzerland federal laws have immunity from judicial scrutiny (art. 190 of the Constitution).

The main idea that appears to unite the primary bills of rights of Canada, New Zealand and the United Kingdom ("New Commonwealth" Bills of Rights) is that while courts can and should play an important role in the protection of fundamental rights, they should not be the only institutions capable of interpreting those rights. In this context, Section 33 of the Canadian Constitution Act 1982 gives federal and provincial parliaments in Canada the power to "override" certain rights contained in the 1982 Canadian Charter of Rights and Freedoms for renewable five-year periods, while the Human Rights Act 1998 in the United Kingdom withholds from courts the power to invalidate acts of parliament, thereby enabling the UK central parliament to simply ignore human rights rulings with which it disagrees (Mailey, 2018[10]). In case of a declaration of incompatibility, a fast-track legislative procedure can be triggered pursuant to the Human Rights Act 1998.

In Sweden, if a court or any other public body considers that a legal provision conflicts with the provision of a fundamental law, the legal provision may not be applied. However, if the provision has been approved by the parliament or by the government, it may be set aside only if the *fault is manifest* ("evident conflict", Article 14, Section 11 of the Swedish Constitution).

The Kelsenian model of abstract, concentrated review by one specialised court

The Kelsenian model is named after Hans Kelsen, whose proposals served as the conceptual basis for the constitutional courts created after the First World War: the Austrian and Czechoslovakia Constitutional Courts established in 1920 and the Spanish Court of Constitutional Guarantees established in 1931. These types of courts for constitutional review are now found around the world. They exist in most EU countries within the civil law tradition, except in the Netherlands and the Scandinavian countries. France put in place a narrower judicial review of legislation in accordance with its traditions, although in 2008 this was expanded to include a form of concrete review (i.e. the *question prioritaire de constitutionalité,* or QPC).

The centralised Kelsenian system of constitutional judicial review is built on two pillars. First, it concentrates the power of constitutional review within a single judicial body, typically called a constitutional court; second, it situates that court outside the traditional structure of the judicial branch.

These pillars are based on several assumptions. First of all, ordinary judges are seen as mandated to apply law as legislated or decided by the parliament; consequently, there is subordination of the ordinary judges to the legislator. At the same time, due to a strict hierarchy of laws, constitutional judicial review is seen as incompatible with the work of an ordinary court. Hence, under this model only an extrajudicial organ can effectively restrain the legislature and act as the guarantor of the will of the constitutional

legislator. To this end, the Kelsenian model proposes a centralised body outside the judiciary to exercise constitutional review (Garoupa, 2016[16]).

Application of the Kelsenian model in each country has conformed to local conditions, and therefore the competencies and organisation of constitutional courts are usually much broader than that of a simple "negative legislator".[4]

Abstract review (as traditionally employed in France) involves political institutions asking the court to provide an authoritative interpretation of the constitutional text removed from a real, concrete dispute. Abstract constitutional review by its very nature limits the ability of a constitutional court to attempt to condition other courts, because there is no direct relation between the review of legislation in abstract and concrete adjudication – yet it can create a strong bulwark against political transformation. This type of review can make a constitutional court less judicial and more political-legislative in nature. It must be noted that where the question of constitutionality of a statute arises in a concrete review, the same can apply (see below for further discussion).

Abstract review has existed in tandem with *concrete review* (in Germany and Spain, for example). Concrete review requires that the court deal with "a specific case and controversy" in which the constitutional question is raised. There is also a heterogeneity of approaches in *concrete reviews* under this model. There are examples where in Kelsenian-type courts concrete review has blurred the separation between the constitutional court and the rest of the judiciary – either in the form of incidental referrals (*incidentaliter*) such as the QPC in France, or as direct constitutional complaints such as *amparo* in Spain[5] or *tutela* in Colombia (*principaliter*). It can induce the constitutional court to interfere with judicial decisions and participate in the resolution of individual cases, which can result in a less distinct delimitation of jurisdictions, and consequently in the occasional emergence of conflicts of competence between the constitutional court and other higher courts.

Some countries have only put in place abstract or concrete reviews, while others combine both. Thus the first version of the 1920 constitution of Austria granted to the Constitutional Court the powers to perform the abstract review of legislation and did not provide for any direct links between the judicial application of statutes and the jurisdiction of the Constitutional Court. In this procedure, the right to bring the case before the Constitutional Court is reserved for the highest state bodies and officials (the president of the republic, the cabinet, the ombudsman), groups of members of parliament (i.e. parliamentary opposition) and similar bodies. The constitutionality of a statute is examined *in abstracto*, not in the context of any actual case. Within a decade, Austria also introduced a procedure for the incidental review of statutes by the constitutional courts, which was based on referrals of constitutional questions by ordinary courts to the constitutional court. In most systems, if an ordinary court finds that a statutory provision that it must apply in a concrete case is unconstitutional, it must refer the question of constitutionality to the constitutional court. Since then, different combinations of abstract and incidental review of statutes have become a more common feature of all the constitutional courts gradually emerging in Europe – the French Constitutional Council being the last one in 2008, as mentioned.

The procedures for constitutional complaint (*Verfassungsbeschwerde* [Germany] or *amparo* [Spain]) were in turn first introduced in Austria and later adopted in Germany, Spain and several democracies of Central and Eastern Europe. Both procedures (incidental review and the constitutional complaint) tend to invite the constitutional courts to participate in the adjudication of individual cases by ordinary jurisdictions, either by resolving preliminary questions of the constitutionality of statutes or by reviewing the constitutionality of final ordinary judicial decisions (Garlicki, 2007[17]).

Ancillary powers

Some constitutional courts have expanded ancillary powers in different yet important areas such as verifying elections and regulating political parties (illegalising them or auditing their accounts), as in Colombia, Germany, Portugal and Turkey. Besides the core task of constitutional review of legislation and

administrative action, constitutional courts have been granted other powers, including such duties as proposing legislation (Colombia); certifying states of emergency; impeaching senior governmental officials; adjudicating election violations (France); and auditing political party financing (Portugal and Turkey). However, caution is needed in giving ancillary powers to constitutional courts: "the further the court gets away from its paradigm task of review based on interpretation of a fundamental text, the more it may find itself acting in a fashion that undermines its own legitimacy. Furthermore, the need to act strategically over a long series of cases that call on various powers of the court means that sometimes 'pure' dispute resolution will be compromised by political expediency. Ancillary powers, then, are some, but only some, of the tools the court must use to build up its political role over time" (Ginsburg and Elkins, 2009, p. 1461[18]).

The model of diffuse judicial constitutional review

The model of diffuse constitutional review is also often called the American model because it originated from case law of the US Supreme Court (Marbury v. Madison). According to this model, any American courts have the power to strike down laws, statutes and certain government actions that they find violates the constitution of the United States.

The model is a dispersed system, meaning that judicial constitutional review can be exercised by any judge or court that is trying a case. There is no special court or specific procedure. Each judge can apply the constitution in their own manner, and *disapply* the law in favour of the constitution. The questioned law will not apply in the particular case nor in subsequent cases, but it is not expelled from the legal system; it remains in place, even if this does not change the criteria taken into consideration to declare its inapplicability.

The decision of the judge produces *inter partes* effect only, given that there is no annulment of the general effects (Campillay, 2017[19]). Under this diffuse system of constitutional review, constitutional matters are dealt with by any ordinary court (a decentralised, diffuse) under ordinary court proceedings whereby the supreme (or high) court in the system provides for the uniformity of jurisdiction through the established appeals system. In Europe, Denmark, Estonia, Ireland, Norway, and Sweden have this system. Canada and the United States as well as many Latin American countries (except Colombia, Ecuador and Peru) also adopted this system or some of its variations. However, in Colombia the protection of constitutional rights can be invoked before any court in the land as well as in Mexico. Therefore, these countries enjoy a mixed system of concrete and diffuse constitutional review.

Selected procedural aspects of judicial constitutional review

This section focuses on key procedural aspects linked to constitutional judicial review: standing rights, contents and effects of the constitutional action, adjudication and dissenting opinions, while acknowledging that some of them may at times be more substantive than procedural.

Standing rights

Typically, three different actors can access a constitutional court (including in diffuse models such as in Mexico with *amparo*): a) institutional-political actors/officials; b) ordinary judges; and c) private litigants (Pasquino, 2013[20]).

Institutional-political actors/officials

The most common cases of referral by institutional-political actors involve 1) a selected number of public authorities (president, prime minister, parliamentary speaker, etc.); 2) representatives of the *Länder* (in general the political sub-units of a federal system: regions, provinces, states), as in Germany, Austria,

Spain, Switzerland and other countries with strong decentralisation; 3) a number of members of parliament, as in the French, German and Spanish constitutional review systems.

The French *saisine parlementaire (*parliamentary referral) of Article 61 of the constitution, as amended in 1974, means that the Constitutional Council functions as an *intermediary body* between the majority and the minority in parliament at the very moment statute laws are passed by the majority but not yet promulgated by the president of the Republic or published in the Official Gazette. In that case the Constitutional Council plays the role of a balancing mechanism between the party or coalition that wins the election and the loser(s), avoiding a case where the relationship among them becomes one of all or nothing: all the power to the majority, no power to the minorities. Important also in this first category of referrals is the situation where there is a conflict among the high state bodies. Constitutional democracy (*état de droit constitutionnel* in France*, verfassungsmässiger Rechtstaat* in Germany) is a system of shared/divided power, not only vertically as in federal regimes, but also horizontally among the different branches exercising political authority at the central level. In these cases, the constitutional court works as the organ that must arbitrate, maintain the balance among the different branches of political authority, and protect the polyarchic/pluralistic structure of the constitutional order.

Ordinary judges

When the referral comes from ordinary judges, as is the case with the Italian *questione incidentale*, the Spanish *cuestión de inconstitucionalidad*, the German *konkrete Normenkontrolle*, and since 2010 the French QPC, the role of the court is to be a counter-power in relation to the elected lawmakers both present and past, something that is not possible through control *ex ante* like the role performed by the *saisine parlementaire.* In the case of the diffuse control model, ordinary judges do not refer the issue to the constitutional court, but they adjudicate the legal controversy themselves and subsequently it may reach the constitutional court (e.g. in Colombia and Portugal) or the supreme court (e.g. in Mexico) through the ordinary appeal mechanisms or some variation of it (see next paragraph).

A special mention of administrative law

Public law combines constitutional, criminal and administrative concerns. In Germany administrative law is referred to as “concretised” constitutional law, and in the United States it is often called “applied” constitutional law. In the United Kingdom, given that there is no written constitution, it is sometimes referred to as “natural justice”.

Administrative law has a constitutional character in that its goals are the protection of rights, control of the administration and the setting of limits to government (Ginsburg, 2009[21]) (Ginsburg and Chen, 2009[22]). In the OECD benchmark countries, administrative justice is the ordinary/usual instrument to challenge government decisions and protect individual rights before the public powers of the state (e.g. in New Zealand, Australia, Colombia, Portugal, Mexico, Spain, France, Germany, Austria and Switzerland).

Constitutional courts, by the very nature of their exclusive and high jurisdiction, frequently become embroiled in high-profile politics that can sometimes undermine rather than enhance their ability to protect the fundamental rights of citizens. Administrative courts may in such circumstances be more effective on several levels. Routine matters like driver’s licences, taxation disputes and building permits make a great deal of difference to more people than the high principles of a constitutional text, although they do not always carry as much symbolic weight. Even if administrative law cannot avoid confrontations with politics (Rose-Ackerman and Lindseth, 2010[23]), in transitions from authoritative regimes to democracy administrative and criminal law, and especially administrative and criminal justice, may be more effective than constitutional law and constitutional courts in bringing about real transformation, through the mundane interaction that takes place between the public authorities and the citizens.

Private litigants or constitutional complaint

Referral by litigants and by private individuals exists in several countries, such as Germany *(Verfassungbeschwerde),* Spain *(recurso de amparo),* Colombia *(tutela),* Portugal *(appeal)* and Mexico *(amparo),* which allows a citizen to appeal to the supreme court or to the constitutional court. In this case the court acts as the guardian in the last instance of constitutionally protected rights after all appeals have been exhausted within the ordinary court system. The appeal for constitutional protection in Spain shall be available in accordance with the provisions of Organic Law 2/1979 on the Constitutional Court, against violations of freedoms resulting from provisions, legal enactments, omissions or flagrantly illegal actions (*via de hecho*) by public authorities of the state, the autonomous communities and other territorial, corporate or institutional public bodies, as well as by their officials or agents. The right to lodge an appeal for protection with the Constitutional Court requires that the individual seeking protection first exhaust all judicial remedies available, because the ordinary courts are considered the "first guarantors in the legal system". In practice, the Constitutional Court is a "special court of appeals" when ordinary legal means cannot repair the violated fundamental rights. In addition to the exhaustion requirement, petitioners must demonstrate the "special constitutional relevance" (*especial transcendencia constitucional*) of their complaint. The Portuguese constitutional appeal resembles the Spanish *amparo*, although in Portugal the litigant must follow an appeal system and does not need to demonstrate a special constitutional relevance, only that their fundamental rights have not been respected.

The German Constitutional Court exercises centralised review, which means that it is the only body that interprets the Basic Law (i.e. Constitution). The Basic Law did not include a constitutionally guaranteed right of direct access to the Constitutional Court (via the constitutional complaint or *Verfassungsbeschwerde*) until 1968. In fact, over 95% of the Court's proceedings are now hearings on constitutional complaints. Any natural or legal person may lodge a constitutional complaint at the Constitutional Court "stating that their fundamental rights or certain rights that are equivalent to fundamental rights have been violated by a German public authority". The constitutional complaint must also affect the complainant "individually, presently and directly with regard to his or her fundamental rights". Lastly, the constitutional complaint is only admissible before the Court once all other legal remedies are exhausted. To satisfy the exhaustion requirement, the petitioner must seek non-constitutional legal avenues in the ordinary courts and appeal unfavourable rulings within the ordinary courts, except in (rare) cases when a statute affects the petitioner individually and directly and no intervention in the form of administrative or court decision is needed.

The Colombian Constitution mixes a Constitutional Court, which is typical in centralised systems, with a diffuse form of judicial review, the *acción de tutela*. This is a preferential and summary procedure lodged by an individual with any court seeking immediate protection of their fundamental constitutional rights. In Mexico, the individual complaint, or *juicio de amparo* (writ of amparo) is a request for protection from laws or acts issued by the authority, or omissions committed by the authority, which infringe the fundamental rights recognised and protected by the Constitution. There are direct and indirect *amparo* actions. Indirect *amparos* begin in a district court with the option to appeal to a higher court, and are brought against non-judicial government agents (i.e. the police, the public administrators) to challenge, among other things, federal or local laws, international treaties, regulations and decrees. Direct *amparos* are initiated in the Collegiate Circuit Courts, but may be brought directly to the Supreme Court, and challenge final judgements in lower, labour and administrative courts. There are five types of specific amparo actions: amparo as a defence of individual rights, amparo against laws, amparo questioning the legality of judicial decisions, administrative amparo, and amparo for agrarian matters (Lalisan, 2020[24]).

Contents and consequences of the constitutional action

The differentiation between abstract and concrete constitutional review is perhaps the first important aspect to understanding the various modalities of judicial constitutional review adjudication (Ginsburg and

Garoupa, 2011[25]) (Garoupa and Ginsburg, 2015[26]). In abstract review, the main addressee of the constitutional court ruling is the political establishment, whereas in concrete review the main interested public in the constitutional ruling is judicial and the involved individuals:

- *Political audience in abstract review* – The main influence of the court is exercised through screening legislation and shaping policy making. Here, the political audience appears to be more directly relevant to this activity than the judicial audience, although in many cases the constitutional court may need the judicial courts to enforce its decisions, such as with the French "conforming interpretation" approach (particularly if other branches of government reject the constitutional court's decision to void legislation).
- *Judicial audience in concrete review* – The judicial audience plays an important role in concrete review cases because its implementation often (though not always) requires co-operation between the constitutional court and ordinary courts. In many cases, concrete review can blur the separation between the constitutional court and the rest of the judiciary, whether it is initiated by incidental referrals from ordinary judges or direct constitutional complaints by an interested litigant. It can induce the constitutional court to participate in the resolution of individual cases, either substituting for or complementing ordinary dispute resolution. The constitutional court substitutes for ordinary courts when it decides cases that would otherwise be within the judicial remit; it complements them when it serves to resolve constitutional questions that are then implemented by ordinary courts.

While concrete review is often not immune from politics, the capacity to advance a political agenda through concrete review tends to be more limited than through abstract review. Concrete review requires the constitutional court to develop specific legal reasoning for a decision that often makes it resemble the decision of an ordinary court.

Adjudication: The relationship between constitutional and ordinary courts

Constitutional adjudication needs to be distinguished from ordinary judicial adjudication: ordinary law is made by the public powers and applies to the people. If individuals do not obey, the government is entitled to use force. Constitutional law, on the contrary, is made by or at least attributed to the people as its ultimate source, and it is to constrain the public authorities. If the government does not comply with the requirements of constitutional law, there is no superior power to enforce it. For example, there is evidence that, regarding the constitutive function (i.e. the organic part of the constitution), the structure of public power will usually conform to the constitutional arrangement; while in the case of its function to regulate the exercise of political power (i.e. the firmly established part of the constitution), enforcement cannot always be taken for granted (Grimm, 2011[27]).

Systems of judicial review also vary in the *effect of their pronouncement on legislation in concrete cases*. For example, US, Finnish, Mexican and Portuguese courts[6] technically do not void laws that they find to be unconstitutional. Rather, since in the United States subsequent similar cases must follow the rule in previous cases (*stare decisis*), the voided law remains on the books (although dormant, as no court will enforce it). In Mexico and Portugal, successive similar decisions result in *erga omnes* effect[7]. A constitutional amendment in Mexico in 2020 confers erga omnes effects to the decisions of the Supreme Court, which have been adopted by a qualified majority. In systems with a Kelsenian-type constitutional court, in contrast, the court usually has the power to declare the laws unconstitutional and immediately void. That decision means the law cannot be applied. In some countries with a tradition of parliamentary sovereignty, courts are not allowed to declare laws unconstitutional (e.g. New Zealand and Australia). Instead, they make a recommendation to the parliament, which is the only body that can repeal or amend law.

In both cases, and despite the varying degrees of ability of ordinary judges to affect constitutional interpretation, it is especially important to achieve a constitutional design of the judiciary that guarantees its impartiality through its independence. The judiciary could be designed as a major guarantor of the

constitutional values (i.e., of the dogmatic part of the constitution) and apply the constitution as the fundamental law of the country to any legal controversy where those values appear to be at stake.

Dissenting opinions

Dissenting (judicial opinions that differ in the reasoning and in the outcome from the one adopted by the majority) or separate opinions (judicial opinions that differ in the reasoning, but not in the outcome, of the analysis from the one adopted) are those issued by one justice or a minority of justices in a court dissenting from the majoritarian understanding of the issue at stake. Dissenting or separate opinions usually tend to carry little authoritative legal force and generally have no precedential value. At the same time, in some countries dissenting opinions are regarded as significant for several reasons, including fostering the transparency of the judicial process since they enable individual judges to voice their disagreement with a majority opinion. Separate opinions are also seen as serving important functions in some countries. First, they provide reasons for expressing disagreement with a majority decision legitimising the decision. Their function is thus to persuade the reader that the dissent is justified. In this respect, separate opinions resemble other types of opinions in that they all seek social legitimacy stemming from the transparency of the judicial decision-making process, and consequently they increase credibility of courts in the eyes of the litigants and the public. An alternative view espoused in a separate opinion could encourage an appeal (in lower courts). Dissenting opinions also enrich the constitutional culture and the engagement with constitutional interpretation. A more dynamic constitutional culture follows, marked by greater levels of reasoned discourse. This fosters constitutional debate by showing the plurality of constitutional meanings. For the individual judge, such a culture can represent independence. It highlights underlying constitutional choices and does not conceal them.

Other functions of separate opinions may vary depending on the addressees or recipients. In general, justifications of separate opinions are often seen as contributing to the development of law because they provide alternative ways of interpreting legal provisions; they may become a useful point of reference in other cases heard by the court or for other courts, the legal doctrine, and legislation.

Some EU Member States disallow separate opinions or have no related provisions, and reject this practice (Austria, Belgium, France, Italy, Luxembourg and Malta). The European Court of Human Rights, the European Convention on Human Rights, and the Rules of the Court (i.e. of the European Court of Human Rights) expressly mention separate opinions. Moreover, these opinions play an important role in the European Court's jurisprudence. At the same time, at the Court of Justice of the European Union, separate opinions are not allowed (Venice Commission, 2018[28]). In Latin America, dissenting votes are allowed in constitutional or supreme courts of Mexico, Brazil, Argentina, Colombia, Ecuador, Uruguay and Peru (Verdugo, 2011[29]).

Selection of constitutional judges

The selection of constitutional judges can be a controversial area, given the importance of the constitutional court’s task and the politically sensitive cases it reviews. A key objective sought by the majority of countries in this regard is to ensure that no particular group controls the selection process and becomes able to dominate the outcome in their favour. It is also often the case that the decision making of constitutional judges (given the very abstract constitutional texts) could be significantly impacted by their worldview. It could therefore be worth investing efforts in finding a path to a balanced composition of the constitutional court. This section will focus on the appointment of constitutional judges only.

Tenure

One point unique to constitutional judges is that the system for their selection does not tend to resemble that for ordinary judges. Ordinary career judges are normally appointed under strict meritocratic procedures and are awarded independence through protection of their tenure, salary and pensions. Constitutional judges are appointed specifically for the task of serving in that specialised court, usually for a fixed period, or for an unlimited tenure (for example in Portugal, judges serve for 9 years and are irremovable. In Austria, judges are appointed for a lifetime until they reach the age of 70, and they are irremovable). The number of term years varies widely across countries, from three or six years-renewable, to longer, non-renewable terms of eight (Colombia), nine (France, Italy, Portugal and Spain) and fifteen years (Mexico). Limited terms aim to strengthen judges' independence from the different powers, as their reappointment is not subject to approval of their performance.

Required qualifications

Because of the political dimension of their functions, the required qualifications of constitutional judges vary widely across countries and generally differ from the required background for ordinary judges. Constitutional judges are often not career judges, but rather highly qualified and respected lawyers, legal academics or former officials with many years of experience. In some countries the required qualifications will depend on the appointing institution, or there will be a set minimum for the number of jurists that must be chosen; some will apply a minimum number of years of experience while others do not. For example, in Austria judges proposed by the parliament can belong to any professional category requiring a law degree and must have at least 10 years' experience; those acting as president and vice president of the court, proposed by the federal government, must be judges, civil servants or law professors. In Germany, each justice must have completed a legal education that qualifies them for judicial office pursuant to the German Judiciary Act, and must be over forty years old. In Portugal, six persons appointed by the Assembly of the Republic are required to hold a doctorate, a master's degree or a first degree in law, or to be judges from other courts. The three judges co-opted by the court plus the remaining must be judges (arts. 12-14 Law on the Constitutional Court). In Spain, a legal background with 15 years of experience is required. In Mexico, candidates must hold a law degree. In France, no particular professional background or age limits apply (art. 56 of the constitution).

Selection mechanisms

Selection by the executive and the legislature

An approach regularly adopted divides the task between the executive and legislative powers. In many cases this takes the form of an appointment by the president of the state followed by approval by the legislature, which may allow for a certain level of democratic scrutiny through hearings of the candidates before the chambers. For example, the judges of the Constitutional Court of Austria are appointed by the president of the Republic upon proposal by the federal government (six plus president and vice president) – three are proposed by the National Council (the parliamentary chamber directly elected by the electorate) and three by the Federal Council (parliamentary chamber elected by the *Länder*). In Mexico, the Supreme Court has 11 justices, called *ministros*, appointed by the president and confirmed by the senate. In France, the members of the Constitutional Council are all former presidents of the Republic (appointed if they wish) and are called *membres de droit*, plus 9 members (*membres nommés*), appointed for a 9-year non-renewable term by the Senate (3), the National Assembly (3) and the sitting President of the Republic (3).

Selection by the legislature

Another option is to award this capacity solely to the legislature. This enables significant democratic scrutiny. Several countries require reinforced majorities (i.e., more than a simple majority) for these appointments, such as two-thirds (Germany) or three-fifths (Spain). This ensures that opposition parties have some say in selections. On the other hand this solution, which tends to ensure the highest level of support for each of the judges from various parts of the political spectrum, can also lead to bargains and sometimes to deadlocks – as has been the case in Spain, where it has proved difficult to renew Constitutional Court members in the past decade. In Finland, constitutional review is entrusted mainly to the parliament (parliamentary committee on constitutional law). In Germany, the Federal Constitutional Court has 16 justices filling two Senates (chambers), 8 in each. Half the members of the Federal Constitutional Court shall be elected by the *Bundestag* (parliament) and half by the *Bundesrat* (representation of the German *Länder*). They may not be members of the Bundestag, the Bundesrat, the federal government, or any of the corresponding bodies of a *Länd*. In Spain, the Constitutional Court has 12 magistrates proposed by the Senate (4), the Congress of Deputies (4), the government (2) and the Judicial Council (2). In Portugal, the Constitutional Court has 13 justices 10 are appointed by the unicameral Assembly of the Republic and 3 are co-opted by the Court. In Colombia, the Constitutional Court has 9 magistrates appointed by the Senate upon proposal by the President (3), Supreme Court (3) and State Council (3) for an 8-year term. Magistrates are required to be lawyers with ten years' experience (art. 232 of the Constitution). The Constitutional Court is included among the judiciary under the rubric of constitutional jurisdiction (art. 239), but the election of its judges is political (art. 239), as the parliament or senate votes and appoints the majority of the constitutional court judges.

Selection by the executive, the legislature and the judiciary

A further option is to give to each of the three branches of power the ability to nominate a given number of judges (as happens for example in Italy and South Korea). A potential challenge here might be a divided panel, where judges may be sympathetic to the institutional interest that selected them.

Selection by a commission or dedicated selection committee

In a number of systems, a commission (as in South Africa or the United Kingdom) or especially dedicated selection committee (as in Thailand) makes an important contribution to the selection process before the candidates are finally endorsed. In these cases, a prior issue is to decide who should be chosen to be part of the committee/commission, which may have partisan interests or even comprise elected officials. One approach to ensure further neutrality has been to professionalise the membership through the appointment of legal practitioners and judges. The leader of the opposition is sometimes required to be a member.

Dismissal of constitutional judges

Rules on the dismissal (understood as putting an end to a judge's term in office) of a constitutional judge are generally very restrictive. Stringent rules on dismissal aim to protect the independence of judges from pressure that political actors disadvantaged by political decisions could try to exert (European Commission for Democracy Through Law (Venice Commission), 1997[30]). In a majority of OECD countries, constitutional judges cannot be dismissed by the authority that appointed them, and they can only be dismissed by the constitutional court itself. The possible reasons for the dismissal vary widely from one jurisdiction to another (European Commission for Democracy Through Law (Venice Commission), 1997[30]).

For example, no constitutional provision exists on removing members of the French Constitutional Council. Similarly, in Germany, there is no legal provision on the removal of constitutional court judges in the 1949 Constitution (Basic Law) nor in the Act of the Constitutional Court of 1951. The German Constitution (art.

92) considers the constitutional judges as being part of the judiciary, and relatedly, article 97 establishes that: “Judges appointed permanently to positions as their primary occupation may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiry of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws (…)”.

In Spain, per article 23 of the Organic Law 2/1979 on the Constitutional Court, the following can be grounds for dismissal of Judges of the Constitutional Court: i) resignation accepted by the President of the Court; ii) expiry of their term of office; iii) existence of any of the grounds of disability applicable to members of the Judiciary; iv) any incompatibility that may arise; v) failure to perform the duties of their office with the required diligence; vi) failure to maintain the reserve pertaining to their office; vii) being found responsible in court proceedings for malicious acts or being convicted of a malicious or a seriously negligent crime. The removal of a Judge of the Constitutional Court shall be decreed by the President in the first and second cases as well as in the event of decease. In the other cases, the full Court shall rule by a simple majority in the third and fourth cases and by a three-quarters majority of its members in all other cases. Art. 24 determines that Judges of the Constitutional Court may be suspended by the Court, as a preliminary measure, in cases of indictment or to allow the time indispensable to establish whether any of the grounds for termination defined in the previous article exists. Suspension must be approved by three quarters of the members composing the full Court. No constitutional magistrate has been removed since the creation of the Constitutional Court.

In Austria, an earlier removal from office is only possible by decision of the Court itself, for grounds specified in the Constitutional Court Act (occurrence of incompatibility, absence from deliberations without excuse, conduct - in office or otherwise - unworthy of the respect and confidence required by their office, gross disregard of the obligation of non-disclosure of confidential information, or physical or mental incapacity with regard to their office).[8] A decision to remove a constitutional judge (or a substitute judge) from office can be rendered only with a majority of at least two thirds of the judges. No removals have taken place to date. Similarly, in Belgium and Italy, judges may only be removed by the court itself and there have been no cases since the inauguration of the courts. In Italy, however, if a judge has not attended the Court's meetings for six months, he will lose his seat.

In Portugal, (arts. 22 and 23 of the 1982 Law on the Constitutional Court), judges of the Constitutional Court are independent and irremovable, and their duties may not cease before the term for which they were appointed has elapsed, except in the cases envisaged in the following article, which states that the duties of the judges of the Constitutional Court cease prior to the end of their term of office when any of the following situations is verified: a) Death or permanent physical incapacity; b) Renunciation; c) The acceptance of a position or practice of an act which is incompatible with the fulfilment of their duties as defined by the law; d) Dismissal or compulsory retirement as a result of a disciplinary or criminal procedure, as determined by the Court itself and published in the official gazette.

In the Czech Republic, Estonia and Iceland, in addition to removal by the Court itself, constitutional court judges may be dismissed by ordinary courts if they find a judge guilty of intentionally committing an indictable offence, whereupon the decision automatically results in the judge’s loss of office. In Slovenia, the National Assembly may dismiss a judge on the grounds of permanent incapacity, or if the judge is sentenced to imprisonment for a criminal offence. Impeachment proceedings may also form part of the dismissal process (as in Denmark, Finland, Japan and Lithuania). In Japan, the Impeachment Court is composed of members of Parliament (art. 64, Constitution of Japan).

Key options and questions to consider

Defining the institutionalisation of constitutional review draws attention to key issues related to the role and powers of the courts, the constitutional court and the protection of fundamental rights. The experience of

the benchmark countries and other OECD member countries can suggest and help inform several considerations for the design of a system of judicial constitutional review, especially one that involves a constitutional court (Castillo-Ortiz, 2020[31]):

1. *There is no perfect model of constitutional review.* Designing constitutional review, whether through the judiciary or by establishing a specialised constitutional court, often involves balancing different values: democracy, majoritarian rule, protection of minorities' representation, and individual human rights, as well as affirming the constitutional court's independence from political parties while preventing excessive judicial activism through self-restraint. Constitutional courts' design necessarily involves trade-offs among these values.
2. *Limiting and clearly demarcating the powers of constitutional courts in the constitution or in subsequent constitutional legislation may facilitate a good balance among those values and reduce institutional disagreements in the future* – This is especially true given that in some cases, constitutional courts have interpreted their own jurisdictional powers broadly and have extended the parameters of their control, as well as the object of that control. Institutional conflicts usually stem from the double legitimacy of constitutional and ordinary (especially supreme) courts. Conflicts have occurred where judicial intervention by the constitutional court is intense and strong (Mańko, 2014[32]) (Geisler, n.d.[33]) (Garlicki, 2007[17]).
3. *Three essential tenets for constitutional courts include partisan independence, a balanced composition and self-restraint* – Constitutional courts tend to acquire legitimacy if they contribute to democracy and human rights protection; are perceived as politically independent; achieve a balanced composition (politically and in terms of diversity); and practice self-restraint. Judicial independence is linked to the principle of the rule of law, as the ideal of rule of law can only be realised through an independent court. However, constitutional courts, in contrast to ordinary courts, are relatively new institutions (if compared to ordinary courts); they specialise in politically sensitive issues; their members are usually selected in a more political manner; and sometimes they decide challenges brought by political institutions. Constitutional restraint is linked to the democratic principle: exhibiting self-restraint in relation to the parliament, constitutional courts allow a democratically elected actor to make the most important policy decisions. And protection of democracy and human rights is linked to the general preservation of liberal constitutionalism, as liberal constitutionalism has political freedom at its core. Failure to uphold any of these tenets on the part of constitutional courts can result in important reputational costs (Castillo-Ortiz, 2020[31]).
4. *Due consideration should be given to the form of judicial review (mild, strong, or a mixed system)* **–** In reflecting on the options for designing constitutional review, the question is not only whether to have a constitutional court, but also what to have as a range of review powers available to it, and where to allocate the final authority.
5. *Umpiring role of constitutional courts* – When constitutional courts are not part of the judiciary (i.e. when they are set up as a court outside the judicial system), their main role can be to arbitrate, in a concentrated way, in political conflicts among the various governance institutions. In these cases, constitutional judges are often selected under the aegis of political actors (as Kelsen suggested). Some countries have also emphasised that the facilitation role of constitutional courts requires judicial restraint to appease tensions between the constitutional review function, the legislative and the executive (as reiterated by the French Constitutional Council on many occasions, e.g. pointing out that "the Constitution (article 61) does not confer on the *Conseil Constitutionnel* a general or particular discretion identical to that of Parliament".[9] In general terms, self-restraint refers to a judicial reluctance to declare legislative or executive action unconstitutional, generally based on an attitude of respect or in judicial deference to the elected branches of government (Posner, 2012[34]). An argument in favour of judicial restraint has to do with the sometimes tense relationship between constitutional judicial review and democracy (the "*mighty problem*" or the "*counter-majoritarian difficulty*"). Without self-restraint on the part of the

constitutional court, its role of political mediation among various governance institutions could become difficult. That role could also include protection of the rights of Indigenous minorities as collective human groupings (e.g. in Colombia and New Zealand).

6. *The organic part of the constitution* – The substantive scope of competencies assigned to the constitutional court varies across countries. One option is for the constitutional court to mainly deal with the "organic" part of constitutional provisions, i.e. the vertical and horizontal allocation of powers and responsibilities to the various political actors in the country, especially among the executive, the parliament and the judicial system, as well as with competency conflicts between lower levels of government (local and regional or federated governments) and the central government. Another option is for the constitutional court to also cover protection of fundamental rights provisions, either as a first or last instance. This is explored in the following point (7). In some countries, constitutional courts have also been entrusted with varied ancillary functions, besides the core task of constitutional review of legislation and administrative action. Ancillary powers can include proposing legislation; determining whether political parties are unconstitutional; certifying states of emergency; impeaching senior governmental officials; and adjudicating elections.
7. *Protection of fundamental rights* – A specific area of substantive competence that should be considered when designing a system of constitutional review is to decide whether the constitutional court will oversee fundamental rights protections, or whether that will be left to ordinary courts.
   - Fundamental rights protection in ordinary courts:
     - Protection of the fundamental rights of citizens could be entrusted to the ordinary courts in a somewhat diffused system. Citizens could seek further redress through the appeals system, and ultimately in the supreme courts and/or in supranational human rights courts (for instance the European Court of Human Rights, the Inter-American Court of Human Rights, or the African Court on Human and Peoples' Rights) (Gardbaum, 2008[35]). The abundant jurisprudence produced by supranational human rights courts could be important as a guide for rulings of domestic ordinary courts, including the supreme courts, as the case of Mexico among others shows.
     - Assigning this task to ordinary courts could prevent or take the edge off unnecessary conflicts of jurisdiction associated with "dual systems" (systems in which two jurisdictions – ordinary and constitutional – deal with the same field of law: protection of individuals in concrete cases). Judicial independent control by professional judges constitutes the strongest guarantee for individuals in their dealings with the public administration – and with any public powers in general – that their rights will be upheld, especially in the areas of administrative and criminal law, where violations of fundamental rights more often occur. This protection is entrusted to ordinary courts in Mexico (*amparo*), Australia, Austria (where individuals have limited access in practice to the constitutional court[10]), Colombia (*tutela*), Finland, New Zealand, Portugal (appeal system within ordinary courts), Spain (*amparo*), Germany (*incidentaliter*) France (*incidentaliter* through the QPC) and Switzerland.
   - Fundamental rights protection by the constitutional court:
     - Another option is to entrust protection of fundamental rights to the constitutional court. In this system, fundamental rights protection is more centralised (e.g. in Spain and Germany). Assigning the constitutional court a last instance character in the national sphere does not preclude appealing to supranational courts, such as the ones outlined above. Constitutional courts often refer to international human rights rulings. In addition, a significant amount of cross-fertilisation and "borrowing" exists among constitutional courts when deciding cases, suggesting that human rights protection is increasingly a transnational process and embedded in what has been called an "international judicial dialogue" (Ginsburg, 2008[36]).

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Notes

[1] Australia, Austria, Colombia, Finland, France, Germany, New Zealand, Mexico, Portugal, Spain, and Switzerland are the benchmark countries for this chapter.

[2] A recent review of the nature and merits of constitutional dialogues between the judicial, legislative and executive branches can be seen in Sigalet, Geoffrey, Grégoire Webber and Rosalind Dixon (eds.) (2019[37]), *Constitutional Dialogue: Rights, Democracy, Institutions*, Cambridge University Press.

[3] The main reason in Sweden for enacting the article was that judicial review was seen as a protection against the misuse of legislative power by political parties.

[4] *Ex ante* review of legislation (i.e. before promulgation) has been extended to *ex post* review (i.e. after promulgation) in many countries.

[5] In Spain, *amparo* is ordinarily a last resort and can only be accessed after going through the different stages of the ordinary courts' decisions.

[6] Generally there is a precedent effect; more specifically in Mexico and Portugal, successive similar decisions result in an *erga omnes* effect. A constitutional amendment increasing the *erga omnes* effect of the Mexican Supreme Court's decisions provided they are approved by a supermajority was adopted in December 2020.

[7] *Erga omnes* effect implies that the consequences of a ruling apply to all citizens of a community as a whole, even if they were not parties to the proceedings.

[8] See Brigitte Bierlein (2011): Speech at the Rio de Janeiro Conference on Constitutional Justice. Accessible at: https://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Bierlein_E.pdf https://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Bierlein_E.pdf

[9] *Décision* n° 74-54 DC of 15 janvier 1975, www.conseil-constitutionnel.fr/decision/1975/7454DC.htm.

[10] Pursuant to art. 144 C individuals have access to the Austrian constitutional court for constitutional complaints.