Judicial Review of Statutes A Comparative Survey of Present Institutions and Practices

Wilhelm Karl Geck
JUDICIAL REVIEW OF STATUTES: A COMPARATIVE SURVEY OF PRESENT INSTITUTIONS AND PRACTICES

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Judicial review of statutes by independent courts is practiced in numerous states. The following survey presents in systematic order the greatly varying court systems and the vastly differing proceedings which serve the common goal of safeguarding the constitution against the legislature. The article includes Yugoslavia, which recently, as the only Communist state, instituted judicial review of statutes by specialized constitutional courts.

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I

PREREQUISITES

The role of courts as guardians of the Constitution is familiar in the United States. It was described with particular clarity in Marbury v. Madison,¹ but it antedates this well-known decision. Partly due to the example of the United States Supreme Court, constitutional jurisdiction—i.e., the competence of all or certain courts to guarantee the supremacy of the constitution by measuring governmental actions against it—spread over most of Latin America and parts of Europe. After World War II constitutional jurisdiction expanded greatly. Largely motivated by the experiences with totalitarian dictatorship, Italy, the Federal Republic of Germany,² and Austria created or reestablished constitutional jurisdiction

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² Germany for short. In the part of Germany now under communist rule judicial review of statutes is nonexistent.

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in specialized constitutional courts. Germany provided for the most extensive and at the same time most tightly-knit system. This was mainly done through a specialized constitutional court in the Federal Republic, as well as through those in its member states ("Länder"). France for the first time instituted judicial review or control (the terms are used interchangeably here) of statutes in the de Gaulle Constitution of 1958, and Turkey created a Constitutional Court on its return to more democratic procedures under the Constitution of 1961. In Cyprus the Supreme Constitutional Court was to guard the Constitution of 1960, and thereby preserve the precarious balance between the Greek majority and the Turkish minority. Many states upon achieving independence set up some kind of constitutional jurisdiction in their new constitutions; examples among the former French colonies in Africa are Madagascar, Mali, Mauretania and Chad. The constitution adopted in the Republic of Korea (South Korea) on December 26, 1962, after the revolution, makes the Supreme Court the final judge of the constitutionality of administrative orders, regulations and dispositions, and under certain conditions, laws. Surprisingly, enough provisions for the establishment of a Federal Constitutional Court with very wide powers, and for constitutional courts in the member republics of the Federation are found even in the Constitution of Yugoslavia of April 7, 1963.

3 With the exception of Berlin, all German states have specialized constitutional courts. In contrast to the Federal Constitutional Court, these state courts convene only occasionally; their judges do not serve on a full-time basis. Cf. Reck, "Die Organisation der Verfassungsgerichtsbarkeit in den deutschen Ländern," 4 Das Recht im Amt 369 (1957). As to Berlin, see Stern, "Probleme der Errichtung eines Verfassungsgerichts in Berlin," 78 Deutsches Verwaltungsblatt 696 (1963).


5 At the time of this writing the presence of British and United Nations troops is the main factor in preventing a full-scale civil war. Neither the elaborate and carefully-balanced Constitution nor the Supreme Constitutional Court could bridge the deep cleavage between the two ethnic groups. Although the Cyprus Constitution may never again become effective, the Constitutional Court has been included here as a pivotal institution for preserving a balance between two antagonistic peoples living in one state.


These examples not only show that the institution of constitutional review is "en vogue," but on closer scrutiny they also indicate the great divergence of form and content in different countries. The variety becomes apparent with regard to the courts covered; it involves differences in their composition, their status and that of their members, the extent of their jurisdiction, and their effectiveness in the power system. The divergencies extend down to the basic issues, namely, the true nature and the stability of the constitutions establishing judicial review. The scope of this paper neither requires nor permits going into all these questions; only some of them can be treated.

The supervision of the legislature through judicial review of statutes is only one aspect of constitutional jurisdiction. The other main aspects are the settlement of certain disputes between a federation and its member states and between member states, or between the supreme organs (authorities) of the state, the control of the constitutionality of executive acts, and the protection of individual rights granted under the constitution. Yet, with the constant expansion of legislation into almost all fields of life, and, on the other hand, widespread distrust of legislatures, review of statutes is probably the most important single part of constitutional jurisdiction. Of course the various judicial activities in constitutional law show some duplication: judicial review of statutes may serve the protection of individual or of state—as against federal—rights; the decision in controversies between the legislature and executive in the German constitutional provision just mentioned may in practice lead to the review of a statute and/or indirectly serve the protection of individual rights, etc. In spite of such overlapping, judicial review of statutes can be surveyed without touching on all these problems.

Any effective judicial examination of the constitutionality of statutes has some prerequisites. First, the constitution must outrank ordinary statute law and must be alterable only through special procedures. If the

Eckhardt, "Die Verfassung der Sozialistischen Foederativen Republik Jugoslawien," Berichte des Osteuropa-Instituts an der Freien Universität Berlin—Heft 59 (1964) (German); Die Verfassung der sozialistischen füderativen Republik Yugoslavien, Beograd (1963) (German); Informations constitutionnelles et parlementaires, 3 Série—N° 55-56 (1963) (French).


10 Cf. Loewenstein, Verfassungslehre 151 (1959) (English edition: Political Power and the Governmental Process (1957)).


12 Cf. Constitutional Review, passim; Marcic, supra note 1, at 93. In some states the competence of constitutional courts extends even further. In Germany, for example, the Federal Constitutional Court decides in certain impeachment proceedings and on the outlawing of unconstitutional political parties. Cf. Friesenhahn, Constitutional Review 89, 168, 175.
legislature could change the constitution in the same manner as it would change any statute, as in Italy under the Albertinian Statute (the Constitution of 1848), and, with only a minor exception, in South Africa now,\textsuperscript{13} \textit{i.e.}, without larger majorities, additional voting procedures, and the like, judicial review of the statutes would be useless.

Second, although it is theoretically possible to measure a statute against an unwritten or customary constitution, the constitution should be written in order to serve as a fairly reliable yardstick. Nevertheless, it is not decisive whether the constitution consists of a single or of several written instruments, so long as the latter rank higher than ordinary statutes and are subject to being changed only by more rigorous procedures.\textsuperscript{14} Today almost all independent states have a written constitution which meets these requirements.

Third, the constitution must provide for a separation of at least the three classic powers, not only under written law, but also in practice. In the numerous new African states where a one-party system centers around a charismatic leader,\textsuperscript{15} the separation of powers in the written constitution will not suffice to make statutory review effective. Constitutional review of statutes cannot be reconciled with any dictatorship, including the dictatorship of the proletariat. In Yugoslavia the principle of democratic centralism, \textit{i.e.}, the unity of state power, and the one-party system still remain under the new constitution and make the observer wonder about the effectiveness of judicial review of statutes provided for in that constitution.\textsuperscript{16} Only the future can tell whether the one communist state which thus far has accepted judicial review of statutes can have its benefits while still preserving the dominant features of a communist system.\textsuperscript{17} The fact that judicial review presupposes a democracy modeled largely on


\textsuperscript{14} E.g., Austria and Finland.


\textsuperscript{17} For a somewhat optimistic view, see Marcic, "Verfassungsgerichtsbarkeit in Jugoslawien," 85 Juristische Blätter 341 (1963). For a sceptical view, see Peselj, supra note 16, at 703. The Federal Yugoslavian Constitutional Court started functioning on February 15, 1964. Its first two judgments were handed down on October 5, 1964.
western lines does not imply that a democratic system requires the judicial control of statutes. Great Britain and France, during the longer period of her modern history, suffice as examples.

Fourth, the constitution must either prescribe judicial review *expressis verbis*, as do the recent constitutions setting up specialized constitutional courts, or at least leave the way open to court interpretation with the same effect. *Marbury v. Madison*\(^\text{18}\) and the decision of the German "Reichsgericht" of November 21, 1925,\(^\text{19}\) are examples of the courts establishing judicial review on the strength of constitutional interpretation and without additional statutory authorization. The jurisdiction of the German Federal Constitutional Court may illustrate two different bases for the control of statutes. Certain proceedings are set up explicitly by the Constitution, but the Constitution also permits additional tasks to be assigned to the Court by statute. This was done upon the introduction of the "Verfassungsbeschwerde," a special legal remedy for individuals against infringements of their basic constitutional rights.\(^\text{20}\) The "Verfassungsbeschwerde" may be directed not only against executive and court decisions, but also against legislative acts, including statutes. Its foundation is weaker than judicial control relying on an interpretation of the constitution as in *Marbury v. Madison*.\(^\text{21}\)

The content of the constitution is important but not necessarily decisive. The constitution of a federal state with a large number of basic rights will of course create greater opportunities for judicial review than the constitution of a unitary state without any basic rights. Yet, control of statutes is also possible in a state of the second category. In South Africa statutes may be measured only against the two entrenched sections of the constitution whose alteration requires a two-thirds majority of Parliament in a joint session of both houses. Such brief constitutions as that of the United States may, at least in the beginning, allow greater freedom of interpretation than a constitution as detailed as that of India or Cyprus. But again these differences are not crucial. The institution of judicial review also does not depend on the kind of courts involved, although there may be considerable influence on its scope and method depending on whether it falls to a specialized constitutional court, to any court, or to the highest court in the general court system.\(^\text{22}\)

The following survey is not concerned with substantive constitutional

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\(^{18}\) 5 U.S. (1 Cranch) 368 (1803).
\(^{19}\) 111 Entscheidungen des Reichsgerichts in Zivilsachen 320 (German) [hereinafter cited as R.G.Z.].
\(^{20}\) Geck, Book Review, 12 Am. J. Comp. L. 126 (1963); see Part VII of the text infra.
\(^{21}\) Cf. authorities cited note 1 supra.
\(^{22}\) See Part V(4) of the text infra.
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law, but with the courts reviewing the constitutionality of statutes, with the proceedings and their results, and, as far as possible, with an evaluation. It should be noted that judicial review in this survey centers around the "materielle Verfassungsmässigkeit," i.e., the question whether a statute's content is constitutional. The "formelle Verfassungsmässigkeit," namely the observance of the procedures prescribed by the constitution for the adoption of statutes, enters the picture only occasionally. The necessarily abstract analysis of institutions and proceedings precludes examining each constitutional court and its activities against its legal and political background. As it is obviously impossible to cover all the constitutions providing in some way for judicial control of statutes, the aim of this study is to describe the prevalent and typical institutions involved and their more important methods. By contrasting them with significant exceptions, a better position from which to gain a fairly balanced picture will be attained. Lack of space precludes any discussion of the review of statutes in member states of a federation. The wealth of material offered, for example, by the forms of judicial review in the states of the United States and in the German "Länder" would not considerably change the pattern of this survey. The examination is limited to judicial review of statutes because in a number of states differences exist between the judicial review of statutes on the one hand and that of lower-ranking law on the other. The inclusion of the latter would unduly widen the scope of this examination without compensating advantages.

II

THE INSTITUTIONS ENGAGED IN JUDICIAL REVIEW OF STATUTES

(1) The judicial authorities engaged in review of statutes may conveniently be classified into three categories: (a) courts of general jurisdiction which simply incorporate the review of statutes in the course of their ordinary proceedings (incidental or collateral review), (b) courts of specialized jurisdiction which deal exclusively or at least predominantly with constitutional questions, and (c) courts of general jurisdiction with special subdivisions for the determination of constitutional controversies. These differences do not touch only on the organization of the court

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23 For this purpose, see the reports on 18 states in Constitutional Review.
24 Since the purpose of this article is to give a bird's-eye view, it seems unnecessary or even inappropriate to burden the reader with the multitude of constitutional and statutory provisions, of court decisions and of scholastic opinions which are in some way relevant to constitutional review in all the countries surveyed. Fortunately the book, Constitutional Review, is a veritable mine for these materials. Therefore, it seems preferable to refer the reader to this book in general, and to limit the references in this article to exceptions, especially to material subsequent to Constitutional Review.
system, they have other—sometimes far-reaching—effects, as will be seen later.25

(a) The oldest and outstanding example of the first group is of course the judicial system in the United States. It has influenced a large number of Latin American countries, e.g., Argentina and Mexico,26 as well as Japan, the Philippines, and Liberia. In many countries of the Commonwealth the tradition of local appellate tribunals and of the former highest authority, the Judicial Committee of the Privy Council, virtually acting as the court of last resort, has led to a similar development.27 This has to varying degrees been promoted by the influx of American ideas and the prestige of the United States Supreme Court. Australia, Canada and India bear witness. Among the European countries, Denmark, Greece, Ireland, and Norway supply examples of incidental judicial review by the regular courts. In many states of this category the judicial authority to review the constitutionality of statutes is derived from, but not provided for expressis verbis in, the constitutions. In numerous Latin American countries28 and in Japan, however, the constitutions contain an explicit authorization. In some states the reviewing power is limited by certain stipulations. Thus, a lower Indian court may adjudicate a constitutional question only if its High Court or the Supreme Court of India has already given an interpretation; otherwise it must remit the case to the High Court for its decision on the constitutional point.29 In Colombia all courts are forbidden to apply a statute they consider unconstitutional so long as the Supreme Court has not yet decided on the constitutionality.30 If the Supreme Court has made its ruling it is binding on the lower courts.

(b) Where statutes are reviewed by specialized constitutional courts a different picture is presented. Austria, Cyprus, France (if we may here and later include the "Conseil Constitutionnel" among the courts),31 Germany, Italy, Turkey, and Yugoslavia belong to this group.32 With the exception of Austria, the constitutional courts of these states are of recent vintage. Their power to review statutes is provided for expressis

25 Cf. Part V(4) of the text infra.
26 A number of Latin American countries provided for judicial review of statutes expressis verbis in the constitution. Cf. Engelhardt, supra note 1, at 104-05.
28 Cf. note 26 supra.
31 This point is controversial. Cf. Buerstedde, supra note 4, at 149; Eisenmann & Hamon, Constitutional Review 231, 256. On the predecessor of this institution, see Buerstedde, "Le comité constitutionnel der französischen Verfassung von 1946," 7 J.O.R. 167 (1958).
32 Except for Yugoslavia, this group is examined in Constitutional Review.
verbis in the constitutions. They are all set apart from the ordinary courts; they do not serve as courts of appeal in general questions; yet, with the possible exception of the atypical "Conseil Constitutionnel," they are the highest judicial authorities of their countries. They are the only courts whose decisions may not merely settle the pending question but may have general applicability or, in Germany, even the force of a statute.33

(c) The best example of a court of general jurisdiction which resolves constitutional questions through a specialized division is the one federal court ("Bundesgericht") in Switzerland. It comprises several divisions; matters of constitutional law usually fall within the competence of the "Staatsrechtliche Kammer," generally composed of five, occasionally seven, judges. Its members are chosen from and by the plenum of the court for a two-year term. It may be mentioned at this point that the "Bundesgericht" examines only the constitutionality of the "kantonale Gesetze," i.e., statutes of the Federation's member states.

Still largely an unknown factor are the "chambres constitutionelles" of the supreme courts in some young African states, such as Dahomey and Upper Volta.

(2) The numerical composition of courts of general jurisdiction reviewing the constitutionality of statutes varies so widely that only two illustrations should be mentioned. In Norway one judge acting as a court of first instance can find a statute unconstitutional and refuse to apply it. On appeal, however, the final decision is handed down not by one of the usual five-judge benches of the Highest Court, but instead by its plenum. In India the Supreme Court usually decides cases with three judges, constitutional cases with five judges; yet the Chief Justice may convene a larger bench and has occasionally done so.34

We cannot go into the selection process of courts of general jurisdiction. We may, however, generalize that this task most frequently falls to the executive, acting either alone or with the consent of the partial or entire legislature. The number of states with judges elected directly by the people is diminishing.35 At least the lower of the ordinary courts devote

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33 Section 31 Des Gesetzes über das Bundesverfassungsgericht [herednafter cited as B. Verf. G.G.]. See also Statute on the Constitutional Court of Yugoslavia, Arts. 25, 29 (Dec. 24, 1963). The present writer has primarily used the German translation by Eckhardt in "Die Verfassungsgerichtsbarkeit in Jugoslawien," Berichte des Osteuropa-Instituts an der Freien Universitaet Berlin—Heft 66 (1965). This volume also contains German translations of the statutes on the constitutional courts of the member states, Serbia and Croatia, and of the rules of procedure of all three constitutional courts. Another German translation of the Statute on the Constitutional Court of Yugoslavia is printed in "Wiener Quellenhefte zur Ostkunde," Reihe Recht, Heft 3 Beilage (1964). The translations show certain differences as do the translations of the Constitution cited note 8 supra.

34 See Sharma, supra note 29, at 5.

35 Cf. Eichenberger, Die richterliche Unabhängigkeit als staatsrechtliches Problem 224
only a very small portion of their work to constitutional questions; hence
the designating process need not have so many political implications as
in the case of constitutional courts. The situation may be different at the
apex of the judicial pyramid. The fact that criminal and private law cases
usually predominate in the highest courts of the Commonwealth, while
the United States Supreme Court is chiefly engaged in questions of public
and largely of constitutional law, undoubtedly influences the differences
in the selecting process. Should the Commonwealth Supreme Courts
become as much constitutional courts as the United States Supreme Court
has been for a long time, the selection of judges by the executive alone,
a practice now prevailing in the Commonwealth, might not survive.

It is more interesting to note the number of judges on the specialized
court constitutional courts and the authorities designating them. The tremen-
dous political impact the decisions of these courts may have makes it
well-nigh impossible to choose the judges without any regard to their polit-
cal background and affiliation. On the other hand, a specialized constitu-
tional court can fulfill its task as guardian of the constitution only if it
is not the prolonged arm of some other state organ or of the political
parties. These considerations have usually had two effects: (1) the select-
ing agencies are prescribed in the constitution itself; (2) there is an
interplay of divergent constitutional and political forces to assure a cer-
tain balance in the courts.

Sometimes the necessity of decision by qualified majorities within the
selecting bodies secures this result. Of the fifteen members on the Italian
Constitutional Court, a third are chosen by representatives of the
judiciary, a third by the two chambers of Parliament in joint session, and
a third by the President of the Republic. The fifteen judges of the Consti-
tutional Court in Turkey are called in a similar manner, although the
representatives of the judiciary elect eight. Eight of the now sixteen
members of the German Constitutional Court, which is unique as a “Twin
(constitutional) Court” sitting in two benches, each called “Senat,” are
chosen by a special committee of the “Bundestag”; the other half, by the
plenum of the “Bundesrat.” In both cases a qualified majority is
needed; in contrast to the selecting organ this majority is not prescribed
in the Constitution, but only by statute. Of the fourteen judges on the
Austrian Constitutional Court, the Federal Cabinet selects eight, and the
two chambers of Parliament, three each. Of the nine elected members of
the “Conseil Constitutionnel” in France, the Presidents of the Republic

(1960); Loewenstein, supra note 10, at 236. Eichenberger underlines the close connection
between the selection procedures and the independence of the judges. Id. at 219.
36 Cf. the explanation of the terms at text following note 53 infra.
and of both chambers each select three. The former Presidents of the Republic are ex officio members. In Cyprus the Greek President and the Turkish Vice-President of the Republic must agree on one Greek and on one Turkish judge, as well as on the President of the Supreme Constitutional Court, who must come from an impartial state. Only to the most recent constitutional court, the Federal Yugoslavian, will the eleven judges be elected by one organ. This organ is the Federal Chamber, politically paramount among the five chambers of the Federal Assembly (the supreme political and legislative body of the Federation). Under articles 178 and 217 of the Constitution, the Federal Chamber acts after the President of the Republic has made his recommendations.

(3) The difference between courts of general jurisdiction, only occasionally involved in constitutional law, and specialized constitutional courts may considerably influence the choice of the individual judges. McWhinney has stated:

On the whole, those nominated to serve as judges on the Supreme Courts of the Commonwealth Countries tend to be the "complete," or allround, lawyer with a high level of competence in most branches of law, but without the especial intellectual distinction that tends very often to come from long specialisation [sic] in one particular field alone. Certainly . . . it is unusual to find more than one or two judges on any one [Commonwealth Supreme] court who have any special feeling for, or expertise in, public law. 37

One may probably assume that the situation is similar in many of the states without special constitutional courts, since the qualified all-round lawyer answers best to most needs in courts of general jurisdiction. A case in point is the contrast in the United States: although theoretically the Supreme Court is as much a court of general jurisdiction as the lower federal courts, in practice its work centers much more around constitutional law. This is probably largely due to limitations on the right of appeal and to the manner in which the other cases for review are selected by means of the writ of certiorari. This fact is certainly taken into account in the selection of Supreme Court judges. 38 On most specialized constitutional courts, the judges must be jurists. The notable exception is France; the atypical "Conseil Constitutionnel" may include members without any legal background, and in practice this has been the case. 39

37 Constitutional Review 81.
38 For the certiorari procedures and the applicability of their principles abroad, see Vollkommer, "Die Rechtsmittel zum U.S. Supreme Court—Beispiele für eine Grundsatzrevision?" 19 Juristenzeitung 152 (1964). For the selection of judges, see Murphy & Pritchett, Courts, Judges and Politics: An Introduction to the Judicial Process 67 (1961); Schmidhauser, The Supreme Court—Its Politics, Personalities and Procedures 6 (1961).
39 See Buerstedde, supra note 4, at 150. Perhaps the strong criticism of certain of the earliest appointments has later caused the selecting organs to choose some prominent jurists from among law professors, high-ranking judges, and former ministers of justice.
In some states the constitution or statutes limit eligibility to three or four groups of jurists, i.e., active or retired judges, attorneys with fifteen or twenty years of practice, and law professors (Italy and Turkey). Austria admits all three groups, as well as higher civil servants. In Germany the statute prescribes hardly any further qualifications beyond the eligibility to any judgeship. A provision requiring special knowledge in public law and experience in public life has been eliminated. In some states at least some of the constitutional court members have been professional (career) judges. On the German Constitutional Court six out of sixteen judges must be selected from among members of the highest courts in the various branches of the greatly specialized court system (the five federal courts of (1) civil and criminal, (2) administrative, (3) social security, (4) labor, and (5) tax law).

Similar results are reached at least in practice by the Italian and Turkish election methods, since the representatives of the judiciary participating in the selecting process are likely to take candidates from their own ranks.

It seems wise to guarantee a certain amount of general judicial proficiency on a special constitutional court, particularly in regard to procedural law. It is also useful to have at least some members accustomed through previous experience to exercise judicial objectivity, and who have remained at a considerable distance from active politics. In this respect the German, Italian, and Turkish election methods seem quite satisfactory, the last perhaps even going too far. It is equally important to have a certain expertise in constitutional law and considerable experience in public administration and/or political affairs represented on the court. However, it would not be particularly helpful to have these qualifications prescribed by the constitution or by statute, since it is probable that the electing organs will require even more in this direction than a vague description of qualifications could demand.

The Constitutional Court in Germany may demonstrate how the selecting process works. Of the three Presidents this Court has had so far, the first had for many years been a professional judge, later was a state minister of finance and member of Parliament, after World War II again was minister of finance, and was an honorary professor of law

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41 According to Telchini, "La Cour Constitutionnelle en Italie," 15 Revue Internationale de Droit Comparé 38 (1963) (Paris), the first Italian Constitutional Court included seven judges, six law professors, and two attorneys; one of the latter was elected the first president of the Court. It should be noted here that it took eight years until the Italian Parliament agreed on the judges it had to choose.
42 As to the membership of the "Conseil Constitutionnel," see note 39 supra. As to the United States Supreme Court, see Schmidhauser, supra note 38, at 30.
43 Two of the Presidents have died in office. The President of the Court always presides over the first "Senat."
and member of the council that drafted the Bonn Constitution. The second President had been a life-long professional judge and had before his appointment to the Constitutional Court presided over a court of appeal in his home state. The incumbent President was a professional judge until the end of World War II and was later Minister of Justice and Prime Minister in his home state. Both Vice-Presidents (who preside over the second “Senat” of the Court) have in turn been practicing attorneys and active in political life as parliamentarians for many years. One was a state minister as well. Both belonged to the council which drew up the Constitution. Each was chosen on the recommendation of the opposition party, while the Presidents have so far been recommended by the parties of the parliamentary majority. Of the other fourteen judges now on the Court, seven have served mainly as professional judges, two as attorneys (both with experience either as state minister and/or parliamentarian), three in the higher ranks of the civil service, and one (three until 1963) as a professor of law. One judge has been in academic life as well as in the administration and the judiciary. To the Anglo-American observer, the balance may look somewhat tipped against the jurists who obtained their legal experience outside any governmental branch; but in Germany the present composition of the courts has not been subject to any noteworthy public criticism in this regard.

As to political affiliation, only the minority of the judges has been active in political parties. One may state though that usually the judges are recommended by the representatives of different political parties in the electing organs. The need to secure a qualified majority in the selecting bodies automatically causes a balance of political forces and guarantees appointments from different directions. There is some contrast to the United States Supreme Court, where mainly the passage of time, in other words, the succession of Presidents, creates a balance. So far experience seems to prove that political associations of the judges existing before the appointment submerge in the new responsibility. In Germany early speculation about a “red” (Social Democratic) and a “black” (Christian Democratic) “Senat” of the Federal Constitutional Court soon proved unjustified.

It need not be stressed that the selection process in a one-party-system state like Yugoslavia can hardly guarantee a balance of varying political persuasions on the Constitutional Court.

(4) Specialized courts guarding the constitution are more likely than other courts to be drawn deeply into the power struggle. Therefore the

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44 For a comparison with Italy, see note 41 supra.
judges are even more in need of independence than their brethren on courts of general jurisdiction. While the latter in most states serve during their lifetimes or to a certain retirement age, this is not the case with all specialized constitutional courts. In Austria, Turkey, and Cyprus (in the latter, the President with a mere six-year term excepted) the judges remain in office up to a designated age; in France and Italy they are elected for nine- or twelve-year periods respectively; in Yugoslavia for eight years; Yugoslavia allows one reelection; Italy does not permit immediate reelection; France, none whatsoever. In Germany the six judges who must be taken from the professional judiciary serve to the age of sixty-eight. The remaining ten, the President and Vice-President included, hold office for eight years. Reelection was customary until the election of judges in 1963, which coincided with a legally-prescribed decrease of the court membership to the present sixteen judges (the final goal being a one-chamber court). In the states where judges are elected for a certain number of years, the terms are usually staggered.

The advantages of a limited term seem more than outweighed by the resulting jeopardy to the judges' independence. Even if, as in France, no second term is possible, this will not eliminate the dangers. To most Anglo-American observers, tenure during lifetime or until voluntary resignation might seem the wisest course, and European jurists accustomed to a professional judiciary would probably prefer tenure to a retirement age of sixty-eight or seventy.

III

PreviouS Judicial Review of Statutes by Means of Advisory Opinions or Binding Decisions

(1) At first sight previous review of statutes seems somewhat surprising, as it takes place before a statute's official publication—in other words, before the statute really exists. Previous review sounds particularly unfamiliar to those Anglo-American observers accustomed to judicial control only in the context of a concrete case or controversy, and only in regard to a statute with a direct legal bearing on the case which an unpublished statute cannot possibly have. The picture changes though if we (1) include the more familiar advisory opinions, and (2) remember that in some states proceedings before specialized constitutional courts may be initiated by certain government organs. These proceedings may lead to judicial review of statutes although they might have nothing to do with possible infringements on individual rights or interests or with other reasons for a case or controversy in the usual sense of the word. The
decisions rendered in these special proceedings may result in a binding declaration on the constitutionality of an adopted statute, thus preventing its publication. Here we have a full-fledged judicial review which can, from the constitutional and political point of view, be more important than a later subsequent control of the constitutionality (e.g., in Cyprus) or even be the only judicial review available (e.g., in France). Although we find judicial review in its narrow sense only in proceedings resulting in binding decisions, we cannot altogether overlook the mere advisory opinions. The latter may in practice lead to the same consequences as binding decisions, namely, prevention of the publication of a statute already adopted by the legislature. The advisory opinions may thus render judicial review in its subsequent form superfluous in the opinion of the constitution drafters and the courts. When we speak in this particular context of a statute, we mean—there being no indication to the contrary—a bill adopted by the legislature, but not yet officially published by the competent authority, and, therefore, not yet in force.

(2) We are concerned here neither with the examination of bills within the legislature, nor by the head of state entitled to investigate the constitutionality before sanctioning or vetoing a statute, although both may in practice be more important than any judicial review. Both authorities are involved in the legislative process themselves. The control the legislature may exercise is simply self-control. Even the position of the head of state is quite different from the one courts or outside advisory bodies have. We want, however, at least to note some examples of reviewing activities by nonjudicial authorities which are not per se integrated in the legislative process.

Sweden has the “Lagråd,” a council consisting of three judges of the highest general court and one judge of the highest administrative court, all elected by the membership of these courts. The cabinet may ask the “Lagråd” for an advisory opinion on any bill. In certain important fields (e.g., general criminal and private law) the submission of bills is obligatory. The review covers the entire bill under all legal aspects, including its constitutionality. The cabinet must submit the opinion of the “Lagråd”

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45 The subject of advisory opinions extends far beyond the scope of this article. We can only illustrate through some examples how advisory opinions serve as a substitute for, or a supplement to, judicial review of statutes in the usual sense. We must even exclude such states as Canada and India. The reader may gain an excellent picture from two articles which complement each other: Imboden, “Bedeutung und Problematik juristischer Gutachten,” Ius et Lex—Festgabe für M. Gutzwiller 503 (1959); Note, “Advisory Opinions on the Constitutionality of Statutes,” 69 Harv. L. Rev. 1302 (1956). See also the recent monograph, Wildhaber, Advisory opinions—Rechtsgutachten höchster Gerichte (1962).

to the legislature. Although not binding, this advice enjoys high prestige. It has, however, not been followed in all cases where the "Lagråd" has questioned the constitutionality of the proposed statute.\(^4\)

Switzerland offers a probably singular example of real preventive control by a political organ over the constitutionality of even a constitution. The "Kantone" (member states) of Switzerland are under constitutional obligation to ask the federation to guarantee their constitutions. Reasonably enough, the guarantee is given to new constitutional provisions only if they conform with federal law, in particular with the Federal Constitution. It is the task of the Federal Assembly, the highest constitutional and political organ of the federation, to review new state constitutions before they take effect. The decision is binding and precludes any later court review. The Federal Assembly may, however, later reverse itself.\(^4\)

These examples suffice to show that previous control of laws with statutory or even higher rank may fall to non-judicial bodies of divergent character and may lead to more or less effective results.

(3) For examples of previous judicial review of statutes through advisory opinions or binding court decisions, we might look at Austria, Colombia, Cyprus, Finland, France, Germany, Italy, and Norway.\(^4\) In all of these states the previous control is based directly on the constitution. As to Yugoslavia, it is still not possible to form an entirely clear picture. According to Article 241, Paragraph 1 of the Yugoslav Constitution, the Federal Constitutional Court is to review the constitutionality of statutes. Article 242 empowers it to follow events of interest for the realization of constitutionality and to make proposals, among other purposes, for the safeguarding of the Constitution. In regard to this question, Article 3 of the Statute on the Constitutional Court is a mere repetition of Article 242 of the Constitution. Neither do the Rules of Procedure of June 13, 1964, which the Court adopted under Article 16 of this statute, clarify whether any previous review of statutes exists.

(a) We may first note that previous review of statutes is entrusted only to the highest judicial organs. In Austria, Cyprus, and Germany, the task falls to the specialized constitutional courts; in France, to the "Conseil Constitutionnel"; in Colombia, to the Supreme Court; in Finland and

\(^{47}\) Cf. Herlitz, Constitutional Review 493.

\(^{48}\) See Imboden, Constitutional Review 506, 508; Cereghetti, Die Überprüfung der Kantonsverfassung durch die Bundesversammlung und das Bundesgericht (1956). In Yugoslavia under Art. 244 of the Constitution, the Federal Constitutional Court shall advise the Federal Assembly as to whether the constitution of a republic is at variance with the Constitution of Yugoslavia. Under Article 18 of the Statute on the Constitutional Court, the Court acts either upon the request of the Federal Assembly or of its own accord.

\(^{49}\) All these states are examined in Constitutional Review. In addition, for Norway, see Hiorthøy, "Høyesteretts betenkninger," Legal Essays—A Tribute to F. Castberg 458 (1963). For Finland, France and Italy, see the articles cited notes 4, 41 & 46 supra.
Norway, to the highest courts of general jurisdiction. This is not surprising. The question submitted is usually of great importance and merits an answer by a state organ of the highest authority. If the result of the examination is binding, there can, of course, be only one answer. Diverging opinions by different authorities might cause problems even if the opinions are not binding, as, for instance, in Finland and Norway. Yet in Finland the Highest Administrative Court may also be consulted. In other respects there are wide dissimilarities from state to state.

(b) The divergencies begin with the question of whether all or only certain statutes may or must be referred for previous judicial review.

In Austria, Colombia, Finland, France, and Norway previous review authorized by the constitution may extend as a matter of principle to all statutes; in France and Austria, to international treaties as well. With regard to the French "lois organiques," judicial review is obligatory. In Cyprus it is given wide scope, but is subject to some limitations too intricate to be explained here. In Italy previous review is restricted to the statutes of the autonomous local units with legislative powers (regions and two provinces). In Germany direct previous control is open only for statutes approving those treaties, which under the Constitution require legislative assent. This single exception to the German rule of exclusive subsequent review is due to the particular nature of these statutes under German law: They authorize the President to ratify the treaty and also transform its content into internal law. The annulling by the Constitutional Court of an unconstitutional statute in later (subsequent) proceedings would not eliminate the obligations under international law, but make it illegal internally to fulfill them. To avoid this dilemma the Constitutional Court has, despite the wording of Article 93, Paragraph 1, Number 2 of the Constitution, permitted judicial review at an earlier stage, namely after the adoption of the statute by the legislature.

The very extensive system of judicial review in Germany also makes an indirect previous control of statutes possible. Under Article 93, Paragraph 1, Number 1 of the Constitution, the highest organs of the state may challenge any infringement on their constitutional rights before the Constitutional Court. Thus the "Bundesrat" (the federal organ through which the "Länder" participate in the legislation and administration of
the Federal Republic, consisting of cabinet members of the "Länder") may attack the adoption of a statute by the "Bundestag" (the federal Parliament, elected in general, direct, secret, free and equal elections) for violating its right to approve or disapprove of the draft. Here the objection is directed not to the still unpublished statute, but to the mere fact of its adoption. Some attempts to expand previous review even further have failed in the Constitutional Court. Its statutory power to give advisory opinions at the request of the President of the Republic, and jointly of the "Bundestag," "Bundesrat," and the Federal Cabinet, which had been questioned by some on constitutional grounds, was upheld by the Court, but abrogated in 1955 by the legislature. The reason is rather interesting: the President of the Republic had asked the plenum of the Court for an advisory opinion; simultaneously almost the same question was pending before one "Senat" of the Court in adversary proceedings. To avoid diverging results, the plenum resolved that its advisory opinion would be binding, not on the President of the Republic, but internally on the "Senat" that had to decide the pending case. Hereupon the President, who had merely wanted advice, but nothing prejudicial, withdrew his request; this in turn led to the abolishment of the statutory provision permitting advisory opinions.

(c) Previous review of statutes may also be limited to specific constitutional issues. Thus, in Cyprus, the Constitution reserves the question of an alleged infringement by statutes on the rights of either the Greek population or the Turkish minority exclusively to subsequent judicial control. In Austria previous control of statutes is restricted to one issue: has the legislature of the republic or the legislature of a member state overstepped its competence at the expense of the other?

The question whether the state organ initiating previous review may limit it to certain parts of the statute hardly permits a general statement. The answer is likely to be affirmative in countries such as Finland and Norway, where reference of the question to the court is voluntary and the opinion not binding, i.e., in purely advisory opinions. In France the applicant may also limit review by the "Conseil Constitutionnel" with binding force except in the cases of the "lois organiques," the examination of which is made obligatory by the Constitution. In Germany the Federal Constitutional Court is generally confined to the application, but may void

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54 2 B. Verf. G.E. 79, 86 (1952). As to the basic problems of advisory opinions in general, see the articles cited note 45 supra.
56 For the political background of these events and the ensuing attacks against the Court, see Friesenbahn, Constitutional Review 89, 130.
other parts of the statute if they are unconstitutional for the same reason as those parts submitted for review.\(^{57}\)

(d) By far the most important limitation of previous review is caused by the constitutional rules circumscribing the right to institute these proceedings. Except in France, where the "Conseil Constitutionnel" is under a time limit, the proceedings are likely to consume some time. As they also have far-reaching effects, it seems natural that they should be initiated only by state organs which participate directly in the legislative process or have a particular responsibility for upholding the constitution. In Finland only the President of the Republic may request an advisory opinion; in Norway, only the "Storthing" (Parliament). In Austria the Federal Cabinet or the executive of the member states may go to the Constitutional Court; in Italy, only the Italian Cabinet may challenge the constitutionality of regional or provincial statutes. In France, the presidents of each legislative chamber and the Prime Minister may apply to the "Conseil Constitutionnel." As in other respects, the applicable constitutional rule in Cyprus reflects the deep cleavage between the two ethnic groups of the population. Depending on the constitutional issue at hand, either the (Greek) President or the (Turkish) Vice-President, or both, may institute proceedings. In Germany the statutes approving treaties may be challenged by the federal or a state cabinet or by one-third of the "Bundestag." The latter group has taken this opportunity a few times. In the cases of an indirect previous control of statutes,\(^{58}\) Article 93, Paragraph 1, Number 1 of the Constitution also limits the right to start these proceedings.

Wherever the expected court opinion is purely advisory, it seems to be implied that the right to request it should be optional. Reasons of political expediency and respect for the dignity of the highest state organs would lead to the same results in most other countries. There are nevertheless exceptions: In Colombia the President’s veto of a statute on constitutional grounds can, if the legislature insists on the statute without however obtaining a qualified majority to overcome the veto, be overruled only by resort to the Supreme Court.\(^{59}\) In France a certain group of high-ranking statutes, namely the "lois organiques," cannot become effective before having been reviewed by the "Conseil Constitutionnel.\(^{60}\)

\(^{57}\) Section 78 B. Verf. G.G.

\(^{58}\) See Part III(3)(b) of the text supra.

\(^{59}\) Similar procedures, provided there is no qualified majority to overcome the president's veto, exist for example in Ecuador, Panama, and Ireland. Cf. Engelhardt, "Das richterliche Prüfungsrecht im modernen Verfassungsstaat," 8 J.Ö.R. 101, 120 (1959).

As indicated by the term "previous review," the statute is to be examined before its official publication. Problems may nevertheless arise in view of the earliest possible date for its submission to the competent court. The laws and practice of the states under consideration differ somewhat. In Norway, where advisory opinions are not restricted to the constitutionality of statutes, and possibly also in Finland, drafts may be presented to the court before their final adoption by the legislature. The same rule applies to Austria, and in the case of Article 41 of the Constitution, to France. In Austria these proceedings serve to demarcate the legislative competences between the Federal Republic and its member states; in France, between Parliament and the executive, which has a legislative power of its own. Since the decisions in the last two states are binding, it would seem more practical to obtain a final ruling only on a finished legislative product. Everywhere else a statute's definite adoption by the legislature must precede submission to the courts. There may even be additional prerequisites, as in Colombia, where Parliament first has to decide against the veto of the President.

Under some constitutions there is a time limit for applications to the court, in order to prevent undue uncertainty and delays in the legislative process. In France, and with one exception in Italy, the time limit is fifteen days from the adoption of the statute.

The procedures before the courts depend largely on the effect of the opinion or decision. In Finland and Norway, where the courts render only advisory opinions in the traditional sense, contentious (adversary) procedures seem out of place. The situation may be different in states where a binding court decision will prevent a statute adopted by the legislature from coming into force. Here we may note two main categories of procedures. In contentious proceedings the applicants stand in the position of real parties in interest and are procedurally treated as such. On the other hand in the so-called objective proceedings, the decision is, at least theoretically, not concerned with the constitutional rights or powers of the applicant or of the legislature which has adopted the statute, but with the preservation of the constitution. Thus the applicant may offer opinions and make procedural suggestions, but he is not a party in the usual sense of the word. Italy is an example of contentious proceedings through suits of the Italian Cabinet against provinces or regions; France, of objective proceedings; Germany has both types: the direct previous control of statutes approving a treaty takes place in objective pro-

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61 Cf. arts. 10, 61, para. 4.
62 For the procedures in state courts of the United States, see Note, 69 Harv. L. Rev. 1302 (1956).
ceedings; the indirect previous control\(^63\) is actually a struggle between the highest state organs in contentious proceedings.

Although oral arguments are permitted in some states, decisions seem to be reached more frequently only on a written basis.

As long as the request leading to a binding decision is pending, the statute must remain unpublished and ineffective. In France the Constitution has set an unusual time limit for the deliberations of the "Conseil Constitutionnel," which must reach a decision either within eight days\(^64\) or within a month\(^65\). In the latter instances, the deadline will be shortened to eight days if the executive requires this in urgent cases. It is obvious that these constitutional regulations may render the previous review less thorough, and perhaps less effective.

(4) We have included the advisory opinions of the highest courts in Finland and Norway because they may in practice lead to almost the same results as previous review of statutes by means of binding court decisions. They may (1) have an inhibiting effect on the legislatures in general, and (2) in particular cases prevent them from adopting a draft (Norway) or prevent the President of the Republic from sanctioning the draft despite its adoption (Finland). In Norway it is considered unlikely that the "Storthing" will disregard an advisory opinion\(^66\). In Finland, where other important methods of examining the legislative drafts exist, advisory opinions seem to enjoy similar prestige and have caused the President to veto a statute at least twice\(^67\).

Nevertheless these results rely mainly on tradition, the prestige of the courts, and the expectation that they will not have to face violent opposition in matters of great political importance. Thus, one should hesitate to generalize. Besides, non-binding advisory opinions finding a statute constitutional and leading to its adoption can hardly preclude later subsequent review in a concrete case.

Only a control leading to a binding decision and hence preventing the publication of an unconstitutional statute is really on a par with subsequent review. In fact it is stronger than incidental (or collateral) subsequent review. We find examples in Austria, Cyprus, France, Italy, and also in Colombia, where the Constitution declares that the unconstitut-

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\(^63\) Cf. Part III(3)(b) of the text supra.

\(^64\) Article 41 of the Constitution.

\(^65\) Article 61 of the Constitution.

\(^66\) It should be noted however that the Supreme Court has only rarely been asked for an advisory opinion. Cf. Hiorthøy, supra note 49.

\(^67\) In Finland, where the courts are not entitled to exercise subsequent review, but are bound to apply any duly promulgated and published statute, they are authorized to make proposals to the President of the Republic for the abrogation of statutes they consider unconstitutional.
tional statute "will go to the archives." In France, however, the President may omit the unconstitutional norms and sanction and publish the remainder of the statute, provided both parts are not inextricably involved. In Germany one differentiates between the direct previous control of statutes approving a treaty and the indirect control in suits between the highest organs of the state ("Organstreitigkeiten") under Article 93, Paragraph 1, Number 1 of the Constitution. In the first case a statute is to be voided expressis verbis; in the second the court states the unconstitutionality of the "Bundestag" resolution which had adopted it. If in the second example the statute has not already been sanctioned and published, the effect will be the same: the statute will not enter the statute books. If, however, the statute is already on the books, the legislature must repeal it.

It is logical that a binding court decision declaring a statute constitutional in the course of previous review will preclude any later judicial control on the same point. This is, for instance, the case in France and Germany. In Austria, the examination is limited to delineating the legislative powers of the republic and its member states. In so far as the decision is considered the authoritative interpretation of the Constitution with the force of a "Verfassungsgesetz," i.e., a statute of the same rank as the Constitution, the decision must be published like a statute. But subsequent review concerning a possible violation of basic constitutional rights is not excluded.

(5) Although the different forms of legally-binding previous review sketched above all serve to safeguard the constitution, they have, at least in practice, rather specific, and more limited goals.

In Italy and Austria only certain federal aspects are to be decided. In Italy the interest of the nation as a whole requires some means to keep provincial and regional legislation within their constitutional limits. It might endanger local autonomy, however, if this task were left to the legislature or executive in Rome. The Constitutional Court therefore serves as the neutral arbiter. Mutatis mutandis the same considerations apply to Austria, although the republic and its member states are on an equal footing and both the federal and the state executives may institute proceedings.

In Colombia previous review serves primarily as a judicial means to solve a constitutional and political struggle between the executive and the legislature. In France previous judicial control seems to aim mainly at keeping Parliament in line. Although the French Constitution grants

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68 Cf. Part III(3)(b) of the text supra.
69 Cf. the very critical evaluation of the French system by Buerstedde, supra note 60, at 197.
the executive a wide law-making authority of its own, independent of parliamentary delegation, only the formal statutes of Parliament are subject to previous judicial review. The "Conseil Constitutionnel" has denied its competence to examine a statute adopted by means of a referendum, thus further strengthening the executive. The subsequent control by the "Conseil d'État" probably does not subject the legislative products of the executive to the same degree of supervision which the "Conseil Constitutionnel" exercises over the formal statutes passed by Parliament. The notion that the jurisdiction of the "Conseil Constitutionnel" is mainly tailored to protect the constitutional powers of the executive against Parliament seems affirmed by the fact that only the President of the Republic, the Prime Minister, and the presidents of each chamber may submit a statute to the "Conseil." As the president of at least one house is likely to have the same political affiliations as the executive, the balance rather swings to one side. Attempts to give a certain minority of each chamber the constitutional right of applying to the "Conseil Constitutionnel" were defeated.

In Germany, where the parliamentary minority (one-third of the members) and the "Länder" cabinets may directly challenge the constitutionality of a statute approving a treaty, and have—thus far unsuccessfully—done so, their motive is usually a special interest in the preservation of state (as against federal) power, or opposition to the policies of the federal executive and its parliamentary majority in Bonn. In indirect previous control based on Article 93, Paragraph 1, Number 1 of the Constitution the situation is not fundamentally different. Thus we may probably say that in the states mentioned here, Cyprus possibly excepted, previous judicial control of statutes with binding effect cannot sufficiently safeguard the constitution as a whole. The main gap left open is the protection of individual rights granted by the constitution. It should be noted, however, that the French Constitution does not contain a basic-rights section, and thus the main question open to judicial review, namely the distribution of legislative competence between Parliament and the executive, is covered by previous review.

The institution of previous judicial review of statutes has certain advantages and disadvantages. There is, on the positive side, the fact that a binding decision before publication may exclude any doubts on the constitutionality of the statutory provisions reviewed; no further challenges will be necessary or even possible in these cases. The awkward results of a later court decision finding the statute unconstitutional will be avoided; in particular the court engaged in previous review does not

\textsuperscript{70} Cf. Part III(3) (b) of the text supra.
need to fear the consequences of a decision voiding the statute \textit{ab initio}, a factor that might well weaken judicial determination. Furthermore, the prestige of parliament suffers less from a negative decision on an unpublished and thus far ineffective statute. We should be aware, however, that these advantages apply only so far as previous judicial investigation goes. In a federal system limiting it, for instance, to questions of legislative competence between the federation and the member states, subsequent review on other points could only be excluded at the cost of rendering judicial review incomplete.

The main disadvantages of previous control resulting in binding decisions seem to be the following. The procedures may be time-consuming. If, on the other hand, a time limit is set, it should not be so short as in France, where it might really impair the effectiveness of review. The examination of a statute on a purely abstract basis cannot rely on practical experiences. The executive authorities and the courts might later apply and interpret the statute in conformity with the constitution, thus salvaging it, although it would have seemed unconstitutional, viewed abstractly. A court exercising previous review will hardly be able to foresee all possibilities of application and interpretation in conformity with the constitution. The lack of executive and judicial experience with the statute in question might also prove a drawback under more general aspects. Without such experience, the court engaged in previous control will find it more difficult to assess the practical impact of the statute; it will lack the benefit of former judicial evaluation and of the reaction to decisions of lower courts. These circumstances might contribute to a premature decision, perhaps regrettable in the light of later events.

If one may venture such a general statement, previous judicial review resulting in binding decisions seems best suited to statutes approving international treaties or to the treaties themselves. Here it offers the only judicial way to prevent international obligations of unconstitutional, and therefore irredeemable character on the state. Further in its favor is the reluctance of courts to find an already effective treaty provision unconstitutional. Not only are they apt to resort to the (unobjectionable) "verfassungskonforme Vertragsauslegung" (a treaty interpretation conforming to the constitution), but also to the rather dubious "vertragskonforme Verfassungsauslegung," \textit{i.e.}, tailoring the constitution to the needs of the treaty. This latter would render judicial review practically useless.

\footnote{Cf. Part V(3)(c) of the text infra.}

\footnote{This opinion was forcefully expressed at the International Conference in Heidelberg. See Constitutional Review 767, 780, 782.}

\footnote{For this problem, see Geck, 23 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 557 (1963); Geck, supra note 52, at 216; Hauri, "Die Verfassungsamässigkeit
In delimitating legislative competences, previous judicial review may, depending on the form it takes, serve as a helpful tool. It seems of rather doubtful value, however, as a substitute for subsequent review in the wide and important field of securing individual constitutional rights. This is borne out by the additional provisions for subsequent control of statutes in most constitutions mentioned so far.

IV
SUBSEQUENT JUDICIAL REVIEW INCIDENTAL TO THE DECISION OF A CASE

(1) Most frequent among the different forms of subsequent judicial control of statutes is an examination incidental to the decision of a case. It takes place in the usual court jurisdiction without any special proceedings, and only if the result of a pending case depends on the constitutionality of a statute. As the constitutional issue is merely a preliminary for the decision, it cannot be raised before the publication of the statute. The oldest instance and probably the most interesting experiences are offered by the United States. The examination by the Privy Council of Dominion and colonial legislation has devolved upon the supreme courts of most Commonwealth countries; the influence of the American legal system and its Supreme Court's prestige have also contributed there to the development of incidental judicial review. Similar practices of judicial review prevail in most Latin American countries. Denmark, Norway, Japan, the Philippines, and Liberia are further illustrations. In Sweden judicial review of statutes is controversial; so far no statute has been found unconstitutional by a court. In so large a group of states there are naturally divergencies, e.g., regarding whether and how a state can be sued without its consent (state immunity; Shield-of-the-Crown doctrine). But as the common features predominate, it is possible to ascertain typical aspects.

(2) We should first remember that most of these countries have a court system with no considerable degree of specialization and with only one supreme court. In contrast for instance to the highly specialized court structure in Germany, courts of general jurisdiction decide most types of cases, from criminal and private law to attacks against governmental actions and claims for social security or other benefits. Some exceptions,
such as the Court of Patent and Custom Appeals in the United States, do not substantially alter this picture. In many states of this group judicial review of statutes is prescribed *expressis verbis* in the constitution, e.g., in numerous Latin American countries, Japan, and South Africa. In the majority, however, it is derived from the constitution by means of interpretation, as, for instance, in the United States, most Commonwealth countries, Argentina, Denmark, Liberia, Norway, and the Philippines.

The United States may again serve as a model for the underlying principles common to the latter group. Practice and theory predominant there hold that the Constitution is the fundamental law of the land, that it outranks ordinary statute law, that it is binding on all national and state authorities including the courts, and that the courts are legally obliged to consider the cases before them in the light of all law binding on them, measuring such law if necessary against the Constitution as the highest norm. As the Constitution does not exempt any tribunal, this task extends from the United States Supreme Court down to any municipal judge. In most other states as well, a court's position in the judicial pyramid has no bearing on its power to examine a statute. This does not necessarily mean that each court must always decide the issue itself. In the United States the federal courts of appeal may certify constitutional as well as other questions of law to the Supreme Court in order to receive instructions. Nevertheless this practice is neither obligatory nor very frequently followed.

In most states of this group the fact that the constitutionality of a statute is at stake does not affect the procedures or the composition of the court. We find an illustration of an exception in the United States: In proceedings to enjoin enforcement of a statute as unconstitutional, there is, instead of the one-judge federal district court, an especially convened court of three judges. The Norwegian Supreme Court presents another deviation from the rule; the plenum rather than one of the usual benches decides on the constitutionality of a statute. Furthermore, if in any case pending before a United States federal court the constitutionality of an act of Congress affecting the public interest is questioned, and

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78 Cf. note 26 supra.
79 Cf. the authorities cited note 1 supra. For Germany under the Constitution of 1919, cf. the authorities cited note 19 supra.
80 For these and other procedural questions, see Stern & Gressman, Supreme Court Practice (2d ed. 1954). In Australia and Canada, the question of a statute's constitutionality is under certain circumstances to be submitted to the supreme court. See Engelhardt, supra note 59, at 110. As to India, see Sharma, supra note 29, at 12. The procedures are somewhat related to the submission of the constitutional question to a specialized constitutional court. Cf. Part V of the text infra.
81 The question whether the statute itself is under attack or only its application in a specific case may raise some difficulties. See, e.g., Kauper, Constitutional Review 615, 617.
82 As to India, see Sharma, The Supreme Court in the Indian Constitution 5 (1959).
neither the United States nor one of its agencies is already a party, the court shall advise the United States Attorney General. He may then intervene in order to have the arguments in favor of the statute adequately presented.

A decision finding a statute unconstitutional will usually be appealed. Again, in most states of this category, no special rules exist. If, however, the three-judge court just mentioned considers a statute unconstitutional, there is a right to appeal directly to the United States Supreme Court. The situation is similar if the constitutionality of a federal statute is attacked in a criminal case before a federal court. Furthermore, if the highest court of a state holds a federal statute or treaty to be unconstitutional, the party adversely affected by the state court's decision is entitled to an appeal to the Supreme Court instead of being limited to a mere application for certiorari.\(^3\) The reason is obvious: the constitutionality of a statute is usually so important as to necessitate a final decision of the highest tribunal within the shortest possible time.

As a rule all statutes are subject to judicial examination. In some countries certain exceptions exist. Hence in Argentina, the admission of a religious order or the declaration of war by the President require legislative assent in the form of a statute, and statutes of this kind, being law only in a formal sense, are not open to judicial control. In some states of this grouping, as for instance in the United States, Argentina,\(^4\) and other Latin American countries, international treaties may be reviewed as to their constitutionality even though they need not be approved by or transformed into a formal statute. In Colombia, Denmark, Japan, and Norway the question of treaty review does not appear to be definitely settled.

(3) Judicial review of statutes incidental to the decision of a case is, as the name implies, less a goal in itself than a means to an end. The non-specialized courts we are dealing with here are to safeguard the constitution only insofar as it is necessary to mete out justice in individual controversies. Their responsibility as guardians of the constitution appears more limited than that of some recent specialized constitutional courts which have been given a wider jurisdiction through special proceedings. The development of judicial review of statutes under Article III of the United States Constitution and the parallels in many countries have not eliminated the basic concept of courts as interpreters of the law in a given case. Probably more important than traditions are the political ideas and

\(^3\) For the problems connected with appeal versus certiorari, cf. Stern & Gressman, supra note 80; Vollkommer, supra note 38.

\(^4\) There are certain exceptions. Cf. Barberis, Constitutional Review 45, 57.
realities determining the role of the judiciary in the various modern democratic societies with a separation of powers. These factors are to varying degrees reflected in the manner in which the courts of this group delimit judicial review of statutes in practice. It is impossible to treat the guiding principles in all countries; the jurisprudence of the United States Supreme Court will suffice. It has laid down some basic propositions which may demonstrate the main trends:

The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding: to decide such questions is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals.

The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. No one has the right to challenge a statute without being affected in his personal or property rights. If the case may be disposed of on some other ground, the Court will not decide the constitutional question; it will not anticipate it before the decision is necessary.

The Court will formulate a rule of constitutional law only so far as the precise facts of the case require it. Even if serious doubts against a statute passed by Congress are raised, the Court will first ascertain whether an interpretation of the statute is fairly possible which may avoid the question.

These statements naturally permit some exceptions. Thus, for example, the Supreme Court has relaxed the rule that only a person impaired in a valid right or personal interest has standing to challenge a statute; it has allowed persons to assert the rights of others provided they were nearly identical with their own rights.

The broad rules developed by the Supreme Court may sometimes need interpretation. Yet despite these reservations and certain divergencies within this category, the fundamentals are valid in most states. This is due to a common basic concept of the nature of the judicial process. Justice Rutledge, speaking for the Court in 1947 described the source of these principles approximately as follows:

[Their ultimate foundations lie in the delicacy of judicial review,] particularly in view of possible consequences for others stemming also from

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85 It may be noted here that legal persons organized on a public-law basis—e.g., municipal corporations, or even the member states of a federal state—may seek judicial redress against the legislature's violation of their property rights. See, e.g., Kauper, Constitutional Review 589; McWhinney, Constitutional Review 83. In the Commonwealth it is not entirely impossible that a member state will be granted access to the courts if the federal state is interfering with its constitutional competence, and vice versa. Cf., e.g., Art. 131 of the Indian Constitution; Sharma, supra note 82, at 21.

86 These principles are an abbreviated version of Justice Brandeis' concurring opinion in Ashwander v. TVA, 297 U.S. 288, 345 (1936).

87 Cf. Kauper, Constitutional Review 618.
constitutional roots; the comparative finality of these consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.  

One may assume that these considerations will suggest at least the same degree of judicial self-restraint under constitutions with parliamentary governments and a less clear-cut separation of powers than in the United States. This would particularly apply to most states of the Commonwealth.

(4) The primary concern of the courts with individual controversies is reflected in the effects of a judgment finding a statute unconstitutional. In contrast to judicial review by specialized constitutional courts as illustrated in Austria, Germany and Italy, there is no decree with general applicability striking down the statute. Instead it will remain on the statute books unless repealed through ordinary legislative process, being treated as non-existent only in the pending case. If the norm was the basis for a criminal indictment, this must be dismissed; if it was to justify a private-law claim, the claimant will lose his suit; if the enforcement of an administrative act depended on it, the court will deny the enforcement order. Although _stricto sensu_ the decision of a constitutional question is binding only on the parties, its impact may in practice extend much further. The principle of stare decisis would usually lead to an identical result in other suits under the same statute. Thus criminal sanctions or a grant of authority to an administrative agency might in practice be unenforceable, and therefore useless. In exceptional cases, however, the statute might, if not revoked by the legislature, be revived, should the courts in later proceedings consider the governing circumstances changed, or simply reverse themselves. The practical consequences of the decision will be more limited if the statute has not been found void on its face, _i.e._, under any conditions, but only in its operation in this particular instance. Somewhere between a general effect and the confinement merely to one case are judgments holding a statute unconstitutional in its application to certain classes or groups of people.

If a statute has been pronounced unconstitutional, questions may arise as to the validity of earlier acts by individuals or of administrative or judicial authorities based on this norm. This delicate problem does not permit a general answer. Even in the United States, with its long experi-

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89 But see Sharma, supra note 82, at 44, for the binding effect which the Indian Constitution accords the Supreme Court's decision on the lower courts.
ence in this matter, there is no clear-cut solution; the doctrine of res judi-
cata may play a certain role; otherwise practical considerations may
determine the possible retroactive consequences. The only conjecture one
might venture here is that most, if not all states in this category have
found methods to release prisoners held under a statute that has later
been judged unconstitutional, be this by a habeas corpus application, as
in the United States, or by other proceedings.

(5) The system of incidental judicial review in the course of the
ordinary proceedings has important advantages. The courts are drawn
into the political struggle only where this is inevitable for fulfilling their
primary function. They do not have to decide more than the pending
case requires. The fact that an unconstitutional statute is not annulled
with general effect helps to prevent a head-on clash with the legislature.
It also ensures a certain flexibility. This flexibility can, however, prove a
liability. Up to the judgment of the highest court the fate of a possibly
unconstitutional statute remains uncertain. The situation is particularly
awkward when several contradictory rulings on the constitutionality of
the statute exist. Even the final decision might not clarify all issues so
long as the law remains on the statute books. Another drawback is the
somewhat haphazard character of this type of review: It can take place
only if someone is in a position (legal standing) and willing to attack a
perhaps unconstitutional statute. Thus it appears that the advantages and
disadvantages are two sides of the same coin; the system's strength lies
in its weaknesses and vice versa. In any event this kind of review is
limited by one indispensable prerequisite: All courts must be organized
like a judicial pyramid or at least be headed by a single supreme court.
This type of incidental control would be unworkable in states with special-
ized branches of courts, each branch having an apex of its own.

V

INCIDENTAL REVIEW LEADING TO SUBMISSION OF THE CONSTITUTIONAL
ISSUE TO A SPECIALIZED CONSTITUTIONAL COURT

(1) Incidental judicial control is founded on the duty and right of
all courts to examine the constitutionality of a statute as far as this is
relevant for the decision in a pending case. Under some constitutions this
reviewing power is limited; the courts must—if they, or merely one of the
parties, consider the statute unconstitutional—refer this issue to a higher
judicial authority for a binding decision. Meanwhile the original case
rests. The difference between these and the certifying proceedings in the
United States already mentioned\(^{90}\) is twofold: here the submitting court

\(^{90}\) Cf. Part IV(2) of the text supra.
(1) must refer the question and (2) must confine its query to the constitutionality of the statute. The states which have made their specialized constitutional courts the sole arbiter in this constitutional issue are Austria, Cyprus, Germany, Italy, Turkey, and Yugoslavia. Only in Austria does this arrangement antedate World War II. This monopoly, usually prescribed expressis verbis in the constitution, is partly motivated by respect for the legislature: not every court should be allowed to disregard the will of parliament. Furthermore under these constitutions, that of Cyprus excepted, a finding that a statute is unconstitutional will usually void or annul it. This effect necessitates a decision by a single authority.

The (subsequent) proceedings now to be sketched are not the only forms of judicial review in the states of this group. Previous judicial control exists, as we have noted, by binding decisions on a limited scale in Austria, Germany, and Italy; and to a larger extent in Cyprus. All states of this category have an additional type of subsequent review, namely the (abstract) control of norms upon the application of certain public authorities. In some of these countries the same statute could be examined interchangeably in previous review or one of the two kinds of subsequent review.

(2) (a) In Austria only the “Oberste Gerichtshof” (the highest court in criminal cases and in private-law cases) and the “Verwaltungsgerichtshof” (the highest administrative law court) must refer the controversial statute to the Constitutional Court. All other Austrian courts are to review only lower-ranking laws, but apply a regularly published statute even if they consider it unconstitutional. Yugoslavia seems to follow principles similar to those in Austria. Under Article 249, Paragraph 1, Numbers 3 and 5 of the Yugoslavian Constitution, however, the highest courts and the constitutional courts of the member states, in addition to the highest federal courts, may submit statutes for review. In the four other states noted here each court examines the constitutionality of a statute independently, under certain conditions submitting it to the constitutional court.

91 With the exception of Yugoslavia, all these states are examined in Constitutional Review. Submission of this constitutional question to a nonspecialized supreme court is not included in this section. Cf. notes 29, 80 supra. Art. 100 of the German Constitution also has to be omitted insofar as it orders all courts to submit state statutes they consider incompatible with a state constitution to the appropriate state constitutional court.
92 Cf. Part III(3)(b) of the text supra.
93 Cf. Part VI of the text infra.
94 Under Art. 149, Para. 3 of the Constitution, each court which has to enforce a statute it deems unconstitutional shall propose to the competent highest court in its branch that the dubious statute be submitted for review to the Constitutional Court.
(b) In most states all formal statutes are to be submitted; in Germany and Cyprus statutes approving an international treaty are included; in Turkey, the standing rules of Parliament as well. Nevertheless there are a few exceptions: the Turkish Constitution omits some statutes expressis verbis; in Germany the Constitutional Court has interpreted Article 100, Paragraph 1 of the Constitution so as to exclude, besides all lower-ranking law, preconstitutional statutes. Even though not all applicable constitutional or statutory provisions explicitly prescribe it, the question of constitutionality is to be submitted to the constitutional court only if relevant for the decision in the original case. Problems may arise if the submitting court believes that its decision in the original case depends on the constitutionality of a statute, whereas the constitutional court is of the opposite opinion. Probably the most practical solution for this impasse, in which neither court can decide, has been found in Germany and Italy: the opinion of the submitting court as to the relevancy of the statute's constitutionality is binding on the constitutional court, if not obviously unreasonable. The qualification has had a restraining influence on the lower courts.

In some respects the prerequisites for the submission differ: In Germany the lower court is to submit the statute only on conviction of its unconstitutionality; if merely dubious, it must apply it. In most other countries mere doubts of the submitting court regarding the constitutionality suffice for referral to the constitutional court. In Cyprus the question of constitutionality must be passed on to the Constitutional Court even if only raised by a litigant against the opinion of the Court that the statute is not faulty. On the other hand, under the Cyprus Constitution, it is uncertain whether a court, even if it is sure that a statute is unconstitutional, may submit the question to the Constitutional Court of its own accord. The Constitutional Court has in part solved these difficulties through interpretation of Article 144 of the Constitution.

(c) The examination by the constitutional courts is limited to the parts of the statute referred to by the submitting court. The procedures before the constitutional courts are, in the terms already explained, not adversary, but objective. They do not primarily serve the rights of the parties in the original case, but are to safeguard the legal order regardless of individual interests. In Italy this principle has been extended to require a decision of the Constitutional Court, even if this decision has become superfluous for the original case through withdrawal by the claimant or on other grounds. At this point the "case and controversy theory" as the basis of incidental review is discarded. The continuation of these proceedings before the Constitutional Court, independent of any concrete case,
has made some Italian scholars question their judicial nature.\textsuperscript{95} Although no proceedings of this category are contentious, the parties in the original suit are entitled to submit briefs and/or to be heard. Due to their particular responsibility for upholding the legal order, certain highest organs of the state have the same right. In Germany, the legislature, as well as the federal cabinet, may participate; in Austria and Italy, the interests of the legislature whose statute is under attack will be represented by the cabinet, or, where applicable, by the Prime Minister.\textsuperscript{96}

(3) (a) As a rule the constitutional courts decide only on the portions of the statute submitted for examination. In Germany, however, the Federal Constitutional Court may void other parts of this statute if they are unconstitutional for the same reasons as those submitted.\textsuperscript{97} The Constitutional Court of Germany is not allowed, however, to extend an affirmative decision to additional sections of the statute. Under Article 23 of the Statute on the Constitutional Court of Yugoslavia, this court may examine an entire statute even though the applicant submitted only part of it for review.

In some states, the constitutional courts face a time limit for their ruling. In Austria, it is, wherever possible, a month; in Turkey, three months. If the Turkish Constitutional Court fails to meet this deadline, the decision on the constitutionality reverts to the submitting court. In contrast, for instance, to the United States Supreme Court rendering a final decision, the constitutional courts in this group do not settle the original case. This task falls to the submitting court on the basis of the constitutional court's judgment.

(b) The constitutional court's finding regarding the statute is usually more important in its general effect than in its bearing on the original case. Considering the reasons for the monopoly of constitutional courts in these questions, one would expect that a negative opinion on the constitutionality of the statute would inevitably annul it. This, however, is not always the case.

In Germany an affirmative decision states that the statute is, as far as the examination has gone, compatible with the Constitution. There is no pronouncement on its validity in general, and later judicial review for other reasons is not excluded. A negative judgment declares the statute or parts of it unconstitutional and void. Both declarations have the force of a statute and are published accordingly.


\textsuperscript{96} The Attorney General plays a somewhat similar role in the United States. Cf. Part IV(2) of the text supra.

\textsuperscript{97} Section 78 B. Verf. G.G.
If the Austrian Constitutional Court considers the questioned statute constitutional, it simply remands it to the submitting court; otherwise it will void it with the same outcome as in Germany.

Likewise in Italy an affirmative decision has no general effect, whereas a negative one annuls the statute.⁹⁸

The Yugoslavian Constitutional Court, upon finding a statute constitutional, may stipulate by binding declaration the interpretation which rendered the statute compatible with the Constitution.⁹⁹ If the Court holds a statute unconstitutional this decision also has general effect, but, as will be seen later, does not immediately void the statute.

In Turkey, where the rule for an unconstitutional statute is annulment, the Constitutional Court is empowered by Article 152, Paragraph 4 of the Constitution to confine the decision to the original case and its parties. This constitutional provision is rather questionable, since it can expose the Court to undue political pressure.

In Cyprus this problem has been dealt with in a rather curious manner. Under Article 148 of the Constitution any decision of the Constitutional Court is binding on all courts, organs, authorities and persons in the Republic; but Article 144, Paragraph 3 makes an exception for the very cases we are here concerned with: if the Constitutional Court finds the statute submitted unconstitutional, the ruling will be binding merely on the submitting court and the parties of the original case, making the statute inapplicable only in the original proceedings. This exception was probably prompted by the hope of avoiding the difficulties arising from ab initio voidances of statutes. As a result, however, the Court may be bothered repeatedly with the same question. The Constitutional Court has tried to avoid this dilemma where possible by means of interpretation.

(c) There is no general answer to the question whether a judgment finding a statute unconstitutional has retroactive effect, i.e., is void ab initio. The practice prevailing in the states with incidental judicial review by all courts appears to be a logical solution: if a statute is pronounced unconstitutional there, it was unconstitutional from its inception, and should therefore always have been disregarded. Yet the statute has usually been the legal basis for numerous transactions and events; frequently they cannot be reversed without great hardship to individuals and dangers to the legal and social fabric of the community. Therefore exceptions to the general principle of retroactivity are necessary.¹⁰⁰ The stability of the

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⁹⁸ See Telchini, supra note 95, at 50.
⁹⁹ Art. 250 of the Constitution. The corresponding Art. 28 of the Statute on the Constitutional Court appears through a somewhat different wording to add a new requirement for the application of art. 250.
¹⁰⁰ Cf. Part IV(4) of the text supra.
legal order and the faith of the people and public authorities therein are jeopardized to a greater extent when a judgment finding a statute unconstitutional does not merely disregard it in the particular case, but voids it with general effect. In Germany, the only state where an unconstitutional statute is annulled *ex tunc*, Section 79 B. Verf. G.G. tries to solve the problems stemming from retroactivity roughly as follows: any administrative or judicial act which can no longer be challenged by legal means will remain in force despite having been based on an unconstitutional statute. If, however, such a final decision has not yet been carried out, the voidance of the statute prevents its execution. These principles leave some questions open, but by and large their result is the protection of the *beati possidentes*, who had already acquired something on the strength of the statute. An example can demonstrate the ensuing inequality: not only the claimant, who in the original case had attacked a statute as an unconstitutional exercise of the taxing power, but all other persons who have for any reason whatsoever not yet paid their taxes will benefit from the voidance. Yet those who have faithfully made their payments have no right to a refund. This hardship in individual cases can be justified only by recourse to legal stability and the people's trust in it as values overriding individual justice under certain circumstances. In Germany the *status quo ante* will not be preserved in one important exception: a final criminal sentence based on a voided statute is always open to review. Here again we have a parallel to the United States and some other countries with mere incidental judicial review.

The retroactive effect may perhaps in certain cases even influence a constitutional court's decision. The consequences of voiding a statute *ex tunc* are sometimes difficult to assess. How, for instance, will the annulment of a tax statute affect the budget? How long will it take the legislature to fill the gap? In a multitude of cases in Germany, income tax assessment by the revenue authorities was postponed for about two years until Parliament was able to adjust the law to a judgment striking down an income tax provision. Eventualities such as these add to the already tremendous responsibility of the court and may occasionally be detrimental even to judicious decisions.

In Austria, Cyprus, Italy, and Turkey, a statute is voided *ex nunc*, i.e., on the publication of the decision in the official legal gazette. This solves some, but not all of the difficulties just mentioned. The problem of inequality appears here, too, but in a different setting. In Austria, for ex-

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101 For the effects of a statute's annulment on private-law transactions, see Dilcher, "Rechtsgeschäfte auf verfassungswidriger Grundlage," 163 Archiv für die civilistische Praxis 193 (1964).
ample, the unconstitutional statute will still be applied to all cases originating prior to the court's ruling. Only in the one case submitted to the Constitutional Court will the statute be treated as unconstitutional \textit{ex tunc}, \textit{i.e.}, will the decision have retroactive effect. Without this exception it would be futile for any submitting court to apply to the Constitutional Court. It does not seem just that the mere time factor, the somewhat accidental moment of the judgment, should thus determine rights and duties. It also seems unjust that a statute is still applied after having been declared unconstitutional by the competent authority. Here again the only justification is the stability of the legal order and the faith people place in it.\textsuperscript{102}

Another problem arising from the annulment of a statute is the effect of the judgment on the norms which the voided statute had superseded. Are they automatically revived? There is no rule common to all the states of this group. Article 140, Paragraph 4 of the Austrian Constitution gives a clear-cut solution: the annulment of a statute revives \textit{ipso iure} all statutory provisions which the voided norm had abrogated, if the Constitutional Court fails to rule otherwise. The publication of the statute's voidance must simultaneously list the statutory provisions which have regained validity. It is remarkable that the Constitution allows the Constitutional Court complete latitude in preventing the revival of abrogated statutes.

In Austria the Constitutional Court may suspend the annulling effect of its decision for a year; in Turkey, for six months. In the interim Parliament may conform the law to the ruling, thereby avoiding a legal vacuum. Constitutional provisions like these can insure a flexibility in timing of voidance, which may in certain cases be desirable. But perhaps these advantages are outweighed by the following factors: both the Austrian and the Turkish Constitutions leave the timing entirely to the discretion of the constitutional courts. Consequently their task is not the interpretation of a constitutional norm, but really a political decision. This evaluation would not be changed noticeably by an attempt to prescribe constitutional standards for the courts, since these criteria would have to be couched in the most general terms in order to serve their purpose, namely allowing latitude to the courts in timing the effects of their decision according to expediency. The courts might not be prepared for such a political responsibility; they might be exposed to undue pressure, and, if their clockwork proved inopportune politically, to severe criticism undermining their judicial prestige as well.\textsuperscript{103}

\textsuperscript{102} Cf. the discussion in Constitutional Review 785.

\textsuperscript{103} Azrak, "Verfassungsgerichtsbarkeit in der Türkei," 11 J.S.R. 89 (1962), criticizes on the
By comparison the corresponding provisions in the Yugoslav Constitution may be preferable, if really observed. If the Federal Constitutional Court finds a statute unconstitutional, the federal or respectively the member state legislature is to adjust its product to the Constitution within six months from the publication of the decision. Failing this, the statute or its unconstitutional provisions shall cease to be valid, and the Court shall declare them invalid by its decision. Pending this final voidance, the Court shall declare the unconstitutional provisions inoperative. In any event the Court cannot be pressed in regard to the time factor, and the political responsibility rests squarely with whichever legislature is competent in each case. Under Article 29 of the Statute on the Constitutional Court, the voidance of the unconstitutional statute takes effect on the day of publication in the Federal Gazette. According to Article 30 of the Statute on the Constitutional Court, subordinate legislation based on the voided statute becomes inoperative if the judgment of the Constitutional Court indicates that this legislation, too, is unconstitutional; the Court can, however, void it expressis verbis. As a matter of principle, those individual administrative or court decisions which are no longer open to appeal remain in force even though they are based on a statute which later is voided. Articles 31 and following of the Statute on the Constitutional Court enumerate several modifications of this general rule, however. They are too intricate to be surveyed here. It need only be mentioned that every person who has met with a legal punishment is entitled to its review when the statute on which the sanction is based has been voided.

(4) Incidental judicial review leading to submission of the constitutional issue to a specialized constitutional court, could, as above, be described on an institutional and procedural basis. A thorough evaluation, however, would only be possible within the entire legal and political framework of each particular state, an undertaking not feasible here. Yet a few general observations may be useful.

Very important is the fact that this reviewing system exists only in states with a great or at least considerable degree of specialization within the court structure. The creation of specialized constitutional courts here was largely motivated by the fear of disparate judicial interpretations of the constitution through separate highest courts in the fields of, for example, criminal and civil law, general administrative and tax law. Judicial review through all courts with the final responsibility for rulings on the ground that the unconstitutional statutes may remain in force six months more. He also fears abuses.

104 Cf. Arts. 245, 246 of the Constitution; Art. 25 of the Statute on the Constitutional Court.
constitutionality of statutes falling solely to a specialized constitutional court insures a uniform interpretation of the constitutional issue. It also makes possible the annulment of a statute through a negative finding. As several highest courts in the various fields of law are unlikely to enjoy the prestige of the one supreme court in an unspecialized court system, it seems wise to entrust final decisions on the constitutionality of statutes, not to one of them, but to a constitutional court composed of eminent jurists. They should be elected through special procedures appropriate to guarantee this court a rank above all others.  

This system may considerably influence the attitude of the court and its exercise of judicial review. The guiding principles of the United States Supreme Court mentioned as examples for other states with mere incidental judicial control of statutes apply here only in part. As a rule the constitutional court must answer the constitutional question of the submitting court unless the question is obviously unreasonable; its special assignment prevents it from disposing of the issue on other grounds, as can, for instance, the supreme courts in most common-law countries. So long as a constitutional provision appropriate as a yardstick exists, the constitutional court may not resort to the “political question doctrine” in order to avoid a decision, nor would it probably be inclined to do so. The outlook of a special court which the constitution has appointed expressis verbis sole arbiter on the constitutionality of statutes will probably differ from that of most nonspecialized supreme courts: The latters’ rights to exercise judicial control rest frequently on mere interpretation of the constitution; they review the constitutionality of statutes only occasionally and as a side line. On the other hand, a special constitutional court is more inclined to consider itself a “Verfassungsorgan,” one of the highest organs of the state, definitely on a par with the legislature and the

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106 Cf. Part II(2), (3) of the text supra.
107 Cf. Part IV(3) of the text supra.
108 For a discussion of the situations in Germany, Italy and Turkey, cf. the following sources and opinions: The most recent article, “Der Status des Bundesverfassungsgerichts,” by Prof. Leibholz, Judge of the Federal Constitutional Court, appeared in an official publication of this court, Das Bundesverfassungsgericht 61 (1965). 6 J.Ö.R. 110-221 (1957) contains the relevant material, especially the memorandum of the Federal Constitutional Court on its status. For Italy, see, e.g., Azzariti (the first president of the Italian Constitutional Court), “Die Stellung des Verfassungsgerichtshof in der italienischen Staatsordnung,” 8 J.Ö.R. 13 (1959); 7 J.Ö.R. 191 (1958); Leisner, “Die klassischen Freiheitsrechte in der italienischen Verfassungsrechtsprechung,” 10 J.Ö.R. 243, 246, 252 (1961); Sandulli, Constitutional Review 298; Telchini, supra note 95, at 51. For Turkey, cf. Azrak, supra note 103, at 76; Balta, Constitutional Review 559. These articles and materials clearly reveal that the qualification as “Verfassungsorgan” is not a question of semantics but one of considerable practical importance. From this point of view it is noteworthy that the very first article of the Statute on the Constitutional Court of Yugoslavia describes this court as an independent federal organ based on the Constitution (in the German translation: “selbständiges Bundesorgan auf Grund der Bundesverfassung”).
executive, than are the supreme courts in, say, some Commonwealth or Latin American countries, in Norway or Japan; although probably not more than is the United States Supreme Court with its great prestige and well-established tradition.

On a more technical scale, if even the lowest court may submit the question of a statute's constitutionality directly to the constitutional court, considerable time can be saved in obtaining a final decision. On the other hand, a filtering process through the usual channels may prevent an overcrowding of the constitutional court's docket which might later waste the time otherwise saved. The processing through the regular channels would also give the constitutional court a broader perspective and the benefit of more extensive judicial experience before the final judgment. If one might still favor direct submission to the constitutional court by any court, as is the rule in all states of this group except Austria and Yugoslavia, it would be for the following reasons. The protection of individuals against unconstitutional statutes might be weakened too much if the constitutional court's being called to action depends exclusively on the opinion of one single court. Furthermore in a legal order which permits judicial review at all, no judge of even the lowest court should be forced to apply a statute he holds unconstitutional, comforted merely by the hope that the highest court will later refer the statute to the constitutional court.

If such a sweeping statement is permissible, the observer might consider incidental judicial review of statutes leading through the ordinary channels to a single supreme court best suited to states with a well-established, non-specialized court system. However, if the supreme court is not bound to review every case, only a right of appeal in all controversies where the constitutionality of a statute is involved would make judicial review really effective. Again the United States may serve as an illustration. In countries with specialized court structures and with more than one supreme court one might, as already noted, prefer direct submission of the constitutional question to the constitutional court by any tribunal. Where individuals have, in addition to the procedures dealt with here, a special remedy for attacking a statute at the constitutional court, as for instance in Germany, it might suffice for the courts to submit statutes only when convinced of their unconstitutionality. Where this is not the case, it seems best to prescribe submission upon mere doubts of the constitutionality. This is actually the case in the other states of this category, with the possible exception of Yugoslavia.

108 Cf. Part VII of the text infra.
VI

SUBSEQUENT REVIEW BY CONSTITUTIONAL COURTS IN SPECIAL PROCEEDINGS UPON APPLICATION OF CERTAIN PUBLIC AUTHORITIES

(1) The types of previous review entitling certain highest organs of the state to obtain the binding decision of a special constitutional court on the constitutionality of an unpublished statute have parallels in subsequent control. A sketch of six different countries will afford a balanced picture. The states of this group, Austria, Cyprus, Germany, Italy, Turkey, and Yugoslavia, also have, as already noted, incidental judicial review leading to submission of the constitutional question to a special constitutional court.

The proceedings we are here concerned with are prescribed *expressis verbis* in the respective constitutions of all the countries except Italy, where they are based on a special statute of constitutional rank. Despite their common feature—namely, direct introduction to a constitutional court by a restricted group of public authorities—they serve somewhat varying purposes. This becomes apparent only in a combination of several factors, namely the statutes open to this kind of review, the extent to which they are reviewable, and the public bodies entitled to initiate these proceedings. As these elements are inextricably intermeshed, they are to be viewed together within the setting of each state.

In Germany the federal or a state cabinet can request the Constitutional Court to examine any statute, and the same right is given to a one-third minority of the "Bundestag." This application may serve one of two purposes: The applicant may want to have a statute voided as unconstitutional; or he may want it declared constitutional following the refusal by a court, by an administrative or other governmental agency or organ to apply it on grounds of unconstitutionality. Applications with the second aim, that of upholding a dubious statute, are a feature unique to Germany.

The motives for introducing these proceedings were the following: (1) all statutes should always conform to the Constitution; (2) all doubts in this regard should be resolved by the Federal Constitutional Court; (3) incidental judicial control alone, since it presupposes a case or controversy, would not guarantee the examination of each questionable statute; (4) the federal and state cabinets would feel a special responsibility for

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109 Cf. Part III(3) of the text supra.
110 All these states except Yugoslavia are examined in Constitutional Review.
111 Cf. Part IV(1) of the text supra.
112 Cf. Art. 93, Para. 1, No. 2 of the Constitution; § 76 B. Verf. G.G.
the constitutional order and utilize these additional proceedings if necessary. The parliamentary minority was included among the possible applicants just in case the executive organs would not live up to their responsibility.

In Austria the federal cabinet may attack all statutes of the "Länder," whose cabinets may in turn challenge all federal statutes. As under the German Constitution (but in contrast to previous review in Austria),\(^\text{113}\) this right is not restricted to safeguarding the respective spheres of competence. The federal cabinet may, for instance, assert that a state statute violates individual constitutional rights and the state cabinet may do the same with federal statutes.

In Italy the purpose of these proceedings is more narrow. In parallel to previous control of regional and provincial statutes initiated by the Italian cabinet,\(^\text{114}\) the regions may attack statutes passed by the Italian legislature, but only for invading their own fields of jurisdiction. Furthermore, any region may have a statute of another region examined for the same reasons.\(^\text{115}\) In contrast to Austria and Germany, there is a time limit for the application, and it is rather short.

Turkey has two types of these proceedings, but from both, certain statutes are excepted by the Constitution. The President of the Republic, political parties of a certain size and their parliamentary factions, as well as a one-sixth minority of Parliament may question the constitutionality of a statute or of the Standing Rules of Parliament. As in Austria and Germany, a possible infringement of the applicant’s constitutional rights or competences is not required, probably for reasons similar to those in Germany. Another group of applicants, however, may attack a statute only for an alleged interference with their own existence and functions. They are (a) the High Judicial Council, a committee of judges concerned with, among other things, choosing members of the judiciary,\(^{116}\) (b) the three highest courts in the field of criminal and private, administrative, and military criminal law, and (c) the universities.\(^{117}\) The fathers of the Constitution considered these institutions so important that they accorded them the constitutional right of defending their existence and independence directly before the Constitutional Court. The ninety-day time limit for applying to the Constitutional Court is somewhat longer than that in Italy.

\(^{113}\) See Part III(3)(c), (5) of the text supra.
\(^{114}\) Cf. Part III(5)(b), (5) of the text supra.
\(^{116}\) See Azrak, supra note 103, at 81, 87.
\(^{117}\) Cf. note 126 infra.
In Yugoslavia the picture resembles Turkey in one important respect: in the first category of cases (a), the applicants do not have to show a possible violation of their own constitutional rights; in the second group (b), they do have to show a possible violation. (a) Under Article 249 of the Constitution, the Federal Assembly, the assemblies of the member states, and the executive councils of the federation and of the states may all apply to the Constitutional Court. However, the Federal Executive Council may only question the constitutionality of state statutes and the executive councils of the member states may only question the constitutionality of federal statutes. The Federal Public Prosecutor may challenge any statute, provided the question of its constitutionality originated within his jurisdiction. (b) In contrast, the assemblies of certain self-governing communities and organizations may do the same only on the assertion that the statute interferes with their constitutional rights. Article 249 authorizes the legislature to broaden the category of applicants even further. The details of the corresponding articles of the Statute on the Constitutional Court, Articles 19 and following, cannot be described here. It is sufficient to note that the right to institute proceedings of this kind is more inclusive in Yugoslavia than in any other country. However, the practical significance of these provisions cannot be assessed yet.

In Cyprus one finds two types of these proceedings, only one of which merits mention here. The (Greek) President and the (Turkish) Vice-President may either alone or together bring any statute before the Constitutional Court, but only if they allege discrimination against either part of the population. The time limit is seventy-five days from publication. The mere application suspends the effect of the statute until the final judgment.

(2) Although in some states these proceedings presuppose an asserted violation of the applicant's constitutional rights or competences, they are as a rule objective, and not, as in Italy, adversary. Nowhere must the legislature appear as a defendant, although it is usually entitled to present its views.\(^{118}\)

The effect of the decision is generally the same as in incidental review leading to submission of the constitutional question to a constitutional court.\(^{119}\) Therefore only one major deviation should be noted. In Turkey the judgment finding a statute unconstitutional in incidental review upon the submission of a court may limit its effect to that particular case. This


\(^{119}\) Cf. Part V(3)(b) of the text supra.
cannot be done in the proceedings with which we are now concerned: if the Constitutional Court considers a statute or a part of it unconstitutional, it must annul it with general effect.

(3) These proceedings cannot be evaluated in a vacuum any more than the other methods of judicial control. But a few observations seem appropriate. It is not by mere accident that this review in abstracto is not a substitute for, but only a supplement to, incidental judicial control. In a free and democratic society adhering to judicial review in principle, individuals adversely affected by a perhaps unconstitutional statute should have a right themselves to initiate its examination. On the other hand, individuals are not always able to institute judicial review; they may, for instance, lack a genuine legal interest. Furthermore, persons legally entitled to go to court may not wish to spend the energy, time and money needed. Those drafters of constitutions, dissatisfied with the somewhat haphazard system of mere incidental control, devised proceedings on the application of a limited number of public authorities so as to make examination of all statutes possible. It would be unrealistic, however, to expect, even under those constitutions where an alleged violation of the applicant's own rights and competences is not required, that each doubtful statute would actually be reviewed.

The experiences with the "abstrakte Normenkontrolle," as these objective proceedings are called in Germany, may demonstrate this. During its first ten years the Federal Constitutional Court decided twenty such cases. In five cases the applicant wanted a statute questioned by some other authority declared constitutional. In nine cases a state cabinet challenged a federal statute; in two cases the federal cabinet attacked a state statute; and in two cases a parliamentary minority asked for annulment of a federal statute. The remaining cases are irrelevant here. From the proceedings which aimed at voiding a statute one may gather that, as a rule, the applicants will bring a statute before the Constitutional Court only if somehow adversely affected by it. Thus, for example, a state cabinet may consider a federal statute an intrusion on the state's competence, while the federal cabinet may believe the same of a state statute; or a federal statute may conflict with the political opinions of a state cabinet, or of a minority of the federal parliament. Unless the possible applicants have in some way been touched in their own interests—be they legal, political or other—they are unlikely to institute proceedings out of mere zeal for the constitutionality of statutes in abstracto. If these legal actions have still had a considerable impact—four state and four federal statutory provisions having been voided within ten years—it is for

120 Cf. Part IV(5) of the text supra.
the following reasons. Among the possible applicants the main political trends are usually represented. Furthermore, if a dubious statute is of some consequence, one of the possible applicants is likely to consider the way to the Constitutional Court politically expedient. This is all one might reasonably expect. It would probably overtax the federal or a state cabinet or the one-third parliamentary minority to act contrary to their own major political interests in these matters. If the framers of a constitution desire each dubious statute to be submitted to judicial review without exception, they would either have to require some public authority to refer the statute, or authorize the Court to examine all statutes ex officio. The first solution is used in France in the form of previous review, but only in respect to “lois organiques,” which comprise a very small percentage of all statutes.\footnote{Cf. Part III(3)(b) of the text supra.} The second solution is provided for in Yugoslavia. Under Article 249, Paragraph 2 of the Constitution, the Constitutional Court may examine the constitutionality of statutes on its own initiative. Article 61 of the Statute on the Constitutional Court contains some procedural details. The practical import remains to be seen.

The considerations which have been described in respect to Germany’s “abstrakte Normenkontrolle” will probably apply in the other states which permit proceedings without alleged violations of the applicant’s rights or powers. As for the states where an assertion of such intrusions is required, these proceedings are applicable to a still more limited degree. There it is even more desirable that the legal actions instituted by public authorities directly before the constitutional court merely serve as a supplement to, but not as a substitute for, the right of individuals to start judicial review.

(4) Belonging only partially in this group, and forming simultaneously a link with the proceedings to be dealt with next is the “Popularklage” in Colombia. Any citizen may challenge the constitutionality of any regular statute presently in effect, even if he is in no way injured or affected by it.

The function of upholding the Constitution, apart from any personal interest, is here entrusted to the individual citizen; he has at least the right to play the same role as some of the public authorities and bodies just noted. Judicial practice has opened this direct application to the Supreme Court for foreign residents and certain legal persons as well. The procedures are objective. The decision will find the statute constitutional or unconstitutional with general effect. In the latter case, the statute is not void \textit{ab initio}, but only \textit{ex nunc}. The far-reaching consequences of these decisions contrast with the result of cases on appeal in incidental
review; there the judgment has effect only *inter partes*. The direct approach to the Supreme Court must be useful, since it has been a part of the Constitution for over fifty years. The foreign observer, unfamiliar with the Colombian legal system in general and with the temperament of the population, may, however, marvel at the careful observance of the Constitution by the law-making authorities and/or at the self-restraint of the people, if these are the factors that prevent the Supreme Court from being swamped with such applications.

Perhaps Article 4, Paragraph 1 of the Statute on the Yugoslavian Constitutional Court also falls in this category: anyone may demand that the Constitutional Court initiate proceedings to review the constitutionality of a statute. If, as noted earlier, the application for the review of a statute is made by some public authority mentioned in the Constitution or in the Statute on the Constitutional Court, the Court must examine the constitutionality of the questioned statute. If, however, the application stems from an individual, the Constitutional Court first examines whether the application is justified and decides accordingly whether it will actually review the statute: article 4, paragraph 2. The statute does not indicate which conditions justify an individual application for review. It seems possible that the individual applicant must assert a violation of his own rights by the statute in question, although article 4, paragraph 1 does not stipulate this. This would alter the character of these proceedings as a "Popularklage," bringing them closer to the "Verfassungsbeschwerde" dealt with in the following section of this survey. On the other hand, in the "Verfassungsbeschwerde" the applicant has, under certain conditions, a right to review which the applicant in Yugoslavia seems to lack. It remains to be seen whether the Constitutional Court can clarify the meaning of article 4, paragraphs 1 and 2, and whether individual applications will be effective. The preliminary examination of each application by a single member of the Court (Articles 56 and following of the Statute on the Constitutional Court) will probably be of special importance in these cases.

VII

SUBSEQUENT REVIEW IN SPECIAL PROCEEDINGS FOR THE PROTECTION OF BASIC INDIVIDUAL RIGHTS GRANTED BY THE CONSTITUTION

(1) It is not possible to survey those few remaining methods of judicial review which, being atypical, do not fit into our main classifications. Thus the German "Wahlpriifungsverfahren," an inquiry by the Constitutional Court into complaints regarding the "Bundestag" elections, can only be mentioned at this point. These proceedings may also lead to incidental
review of the election statute; thus a decision of the Constitutional Court has recently caused the legislature to alter the election statute in regard to the apportionment of the election districts.\(^{122}\)

The last group of proceedings to be treated are those serving the protection of fundamental individual rights granted by a constitution. They are set apart from the types of review mentioned in the preceding section through the applicants, and, again, through the aims of the applications. Although some exceptions have developed,\(^ {123}\) the applicants are, as a rule, not public authorities or bodies, but private individuals; they may attack a statute only if it interferes with their own rights granted in or derived from the constitution.

The legal foundations for these proceedings vary in the three states serving here as examples for this group, namely Germany, Mexico, and Switzerland. In Germany the "Verfassungsbeschwerde" is based solely on statutory authority.\(^ {124}\) In Mexico, which may serve as an example for some other Latin American countries, the principles of "juicio de amparo" in Article 107 of the Constitution (abbreviated "Amparo") date back more than a hundred years. In Switzerland Article 113, Paragraph 1, Number 3 of the Constitution also has a long tradition.

There are certain differences regarding the competent courts. In Germany the Constitutional Court is to decide on the "Verfassungsbeschwerde;" the majority of cases falls to the first of the two "Senate." In Switzerland the one Federal Court ("Bundesgericht") acts through the "Staatsrechtliche Kammer."\(^ {125}\) In contrast "Amparo" is, as far as relevant here, entrusted to all federal courts.

(2) (a) In Germany and Mexico all statutes are open to attack through the "Verfassungsbeschwerde" or respectively "Amparo." In Switzerland judicial review is confined to the statutes of the "Kantone" (the member states of the federation). This limitation is due to two factors. First, in the "Referendumsdemokratie," i.e., a democratic system with direct participation of the citizenry in the legislative process by means of the referendum, judicial review of statutes would be tantamount to the courts' controlling the people. The second obstacle is the dominant position of the Federal Assembly, which, as the supreme authority of the federation, outranks all other powers.

Even if the application at first glance objects to an administrative or

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123 Cf. Part VII (2) (b) of the text infra.


125 Cf. Part II (1) (b), (c) of the text supra.
judicial act, the real target may be the allegedly unconstitutional statute on which this decision is based. The proceedings under review here can also open the way to a direct attack on the statute, provided it interferes with the applicant's constitutional rights ipso facto without the intermediary of administrative or judicial action. An example would be a statutory provision prohibiting certain economic activities. The difference between direct and indirect attacks on the statute has a legal bearing on, for instance, the need to exhaust previous legal remedies and on the effect of the judgment.

It should be stressed that the proceedings which are here examined, primarily in their use against statutes, may also serve in all three countries for attacking administrative and judicial acts independent of their statutory foundations. These aspects are no less important than review of statutes. In Switzerland again this applies merely to acts of the "Kantone."

(b) In comparison to the proceedings instituted by public authorities, here the right of application is extended very widely. In Germany under Section 90 B. Verf. G.G., anybody—meaning citizen or foreigner alike—who claims a violation of his fundamental rights and who meets certain procedural requirements may apply to the Constitutional Court. German legal persons are on the same footing if the allegedly violated basic right covers legal persons, as, for instance, the right to own property or to equal treatment by the legislature or by any other public authority. Foreign legal persons are on a par, at least in some respects. As a rule the "Verfassungsbeschwerde" extends as far as the material right it is supposed to protect. The circle of possible applicants in Mexico and Switzerland is also drawn widely, although there may be differences as to foreign natural and legal persons.

Although this legal device was created in all three states for the protection of the individual against public authorities, it may to a small extent also be used by public authorities themselves. Section 91 B. Verf. G.G. enables German municipalities to defend their constitutional right to self-government in this way. In all three states, municipalities and other public corporations may use these proceedings for preserving, for example, their property rights or resisting unequal treatment by a statute. In Germany even the "Länder" could probably defend their property rights against a federal expropriations statute. In Mexico,

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126 The "Verfassungsbeschwerde" is open to a state claiming a violation of basic procedural rights by a court which decided on the state's property rights. 6 B. Verf. G.E. 45 (1957). A recent decision of the Constitutional Court opened the "Verfassungsbeschwerde" to universities and their faculties against alleged violations by the Ministry of Cultural Affairs of their constitutional rights to free research and teaching, although the universities
(c) The aid of the competent court may be invoked only upon the applicant’s asserting a violation of his own constitutional rights. Mexico alone makes exceptions in certain cases for relatives or even third persons.

The legal positions which may thus be defended vary from state to state. In Germany Section 90 B. Verf. G.G. includes the basic rights in Chapter I of the Constitution and certain other enumerated constitutional rights, mainly of a procedural character. Through the “Verfassungsbeschwerde” the competence of the Constitutional Court is in practice considerably wider than the wording of the rights mentioned might suggest. The chief vehicles in this development have been Articles 3 and 2 of the Constitution. Article 3, granting legal equality, offers protection against any arbitrary judicial, administrative or legislative act. As the term arbitrary is rather vague, many applicants have asked the Court to review their cases in entirety as do many courts of last resort, instead of confining itself to the constitutional issue. Since the delimitation does not permit an answer for all cases, it will always raise problems. Article 2 grants everyone the right to free development of his personality (“allgemeine Handlungsfreiheit”) so long as he does not violate the rights of others, the constitutional order or the moral code. The Constitutional Court has opened the “Verfassungsbeschwerde” to every person claiming that a legal provision restricting his general freedom under Article 2 is not a proper part of the constitutional order. The decision has considerably widened the scope of this exceptional legal remedy. As one result an applicant, while admitting on principle the constitutionality of a statutory restriction of his freedom, may contest such a “Länder” statute on the ground that only the federal legislature is competent to legislate in this particular area, or vice versa if he is contesting a federal statute.

In Mexico “Amparo” was also created for the protection of individual constitutional rights. As in Germany, federal and state authorities alike may be taken to task for exceeding their constitutional limits at the expense of individual rights. The courts have established the principle that any governmental act not properly authorized by a statute interferes

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127 See Barberis, Constitutional Review 411.
with the guarantees of personal rights and freedoms. Hence "Amparo" serves to secure not only the constitutionality, but also the legality of all governmental actions.

In Switzerland the rights covered by the "staatsrechtliche Beschwerde" under Article 113, Paragraph 1, Number 3 of the Constitution include fundamental individual freedoms, legal equality, certain political rights—as for instance active and passive participation in elections—and some legal institutions connected with individual rights.

(d) In the three states these special proceedings are, if used for an attack against a judicial or administrative act, usually open only after exhaustion of the ordinary means of legal redress. Thus, as a rule, administrative acts must first be taken to court, and the judgments must be appealed. The same applies when these decisions are challenged for being based on an unconstitutional statute. Certain exceptions cannot be examined here. A petitioner may, however, attack a statute directly for interfering with his constitutional rights, if the statute does this without the intermediary of administrative or judicial decisions. Usually in such cases no other legal remedy exists.

If a statute is challenged directly, the time limit for application begins with its taking effect or, if retroactive, on its publication. This time limit ranges from thirty days in Switzerland to one year in Germany. When a statute is contested indirectly, the time limit usually dates from the applicant's receipt of the administrative or judicial decision which his application primarily attacks.

The circle of public authorities which may submit briefs or be heard in these proceedings is drawn most widely in Germany.131

(e) *A limine* decisions enable the courts in each country to dispose summarily of applications which are clearly inadmissible or obviously unfounded. In Switzerland a unanimous opinion of three judges may reject the application in this manner. The Swiss regulation has probably influenced its German counterpart, introduced in 1956 to lessen the load of the "Senat."132 In 1963 an additional measure became law: an application which has passed a preliminary examination by the committee of three judges may still be denied acceptance by the "Senat" to which the committee belongs. The application is admitted only if at least two judges believe that the decision on the material question will either clarify a constitutional issue or that its refusal will cause a grave and inevitable injury to the applicant. Hence if only one of the three committee members advocates examination of the application, by the whole "Senat," he must

131 See § 94 B. Verf. G.G.
132 Section 91(a) (now § 93(a)) B. Verf. G.G.
persuade one "Senat" member not on the committee to support this. Failing the a limine decisions the Constitutional Court would not have been able to cope at all with its work load; thus the overwhelming majority of the circa 8,100 "Verfassungsbeschwerden" introduced in the first ten years was disposed of by the committees of three judges. As a rule, these committees and the "Senat" refusing acceptance to an application now communicate the reasons for this decision in only one sentence. The formula somewhat resembles the United States Supreme Court's "certiorari denied."

In Mexico the summary procedures reveal certain differences, depending on which kind of federal court handles "Amparo."

The procedures are objective rather than adversary. Written arguments are the rule. In Germany the "Bundestag" and "Bundesrat," the federal cabinet, and, if a state statute is under attack, also the state cabinet and state parliament, are entitled to submit their views. In Mexico and Switzerland the circle of participants seems more restricted.

(f) In Germany a judgment finding a statute unconstitutional annuls it ex tunc with general effect. If the "Verfassungsbeschwerde" was primarily directed against a final administrative or judicial decision based on an unconstitutional statute, the decision will also fall. This does not mean that the Constitutional Court will settle the case in its entirety; it will usually refer the files back to the court whose judgment was at fault. This court must then act upon the new findings. As in all other proceedings before the Constitutional Court, but in contrast to the proceedings before all other German courts, the applicant does not have to pay court expenses. If, however, the three-judge committee finds an unsuccessful application an abuse of the legal remedy, it may impose a fine ranging from DM 20. to DM 1000. So far this power has been used rather sparingly.

In Mexico the judgment does not void an unconstitutional statute. It has immediate effect only inter partes, although it may have important indirect consequences for others. This result corresponds to the results in customary incidental review by non-specialized courts.

Switzerland distinguishes between two groups of cases. (a) If an unconstitutional statute is attacked directly, it will be voided with general effect. The consequences for legal acts based on the statute are not prescribed by federal law, but are left to the competent authorities of the "Kantone." (b) Challenges directed primarily against an administrative or judicial ruling based on an unconstitutional statute will not lead to

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133 Cf. Part V(3)(b), (c) of the text supra.
134 Cf. Part IV(4) of the text supra.
voidance of the statute; instead only that particular ruling will be affected.

(3) Each of the three proceedings surveyed in this section comprises attacks not only on statutes, but also on administrative and judicial acts. Even a brief evaluation cannot confine itself to a single one of these functions. Each institution, "Amparo," "Verfassungsbeschwerde," and "staatsrechtliche Beschwerde," is a legal unity, and to be viewed as such, within its constitutional and political setting.

(a) Of the three, "Amparo" is probably the most consequential within its legal system. In practice it is the judicial instrument for protection of the Constitution against unconstitutional acts of the three branches of government, especially as the courts of the member states have never effectively used their right to judicial review under Article 133 of the Constitution. "Amparo" covers the delimitation of federal and state competences as far as relevant for the protection of fundamental individual rights. Perhaps even more important is the role it plays in guaranteeing not only the constitutionality, but also the legality, of administrative and judicial actions. In "Amparo" proceedings the courts fulfill, among other things, the same tasks as, for example, specialized administrative courts in France, Germany, Italy and Turkey. Of "Amparo's" manifold functions the review of statutes is only one, though a very important, part.

(b) By comparison the "staatsrechtliche Beschwerde" in Switzerland is more limited, since it offers no protection against the federal legislature or executive. Judicial review of federal statutes would require an alteration of the constitutional provision prohibiting it. This change would probably be impossible without even more fundamental changes regarding the referendum in the legislative process and the position of the Federal Assembly. According to competent Swiss observers, the introduction of such full-scale judicial review remains unlikely for some time to come.185 The exclusion of federal administrative acts from the scope of judicial review rests mainly on tradition. The "staatsrechtliche Beschwerde" was introduced at a time when the overwhelming majority of governmental actions was entrusted to the "Kantone." As the executive powers of the federation continue to grow, thereby threatening the fundamental individual rights more than do executive acts of the "Kantone," an extension of federal judicial competence in this direction may, in the long run, be inevitable.

However, as far as the jurisdiction of the "Bundesgericht" goes, i.e., in

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regard to all governmental acts of the "Kantone," the activity of this court—mainly through the "staatsrechtliche Beschwerde"—is a cornerstone of the constitutional and legal system. In the judgment of so noted an expert as Z. Giacometti, this type of constitutional jurisdiction is a strong bulwark of the law and the Constitution—one main reason for the trust of the people in the legal order and stability of the Swiss member states. This impact cannot of course be ascertained by mere figures. One might, however, note that the "Bundesgericht" has had an annual average of over seven hundred "Staatsrechtliche Beschwerden" during the last fifty years.

(c) The "Verfassungsbeschwerde" does not have the same significance for the German constitutional and legal order as do "Amparo" in Mexico and, in regard to legal acts of the "Kantone," the "Staatsrechtliche Beschwerde" in Switzerland. This is because in Germany so many other legal remedies are available. Article 19, Paragraph 4, of the Constitution makes the courts accessible to everyone who feels injured in not only his constitutional, but also other legal rights by any public authority, in which cases the highly specialized judiciary must then examine the constitutionality and legality of governmental actions. Therefore, as against administrative measures interfering with basic rights, the "Verfassungsbeschwerde" is merely an additional safeguard. In respect to judicial decisions there is usually a right of appeal. The "Verfassungsbeschwerde" is, however, the only effective legal remedy in the rare cases where the legislature has failed to fulfill a legislative duty ("Gesetzgeberisches Unterlassen"). In all cases its special feature lies in entitling all individuals to have the only really supreme judicial authority decide, namely the Federal Constitutional Court. As already noted, judicial review of statutes is also entrusted to the judiciary at large. Any court must submit to the Constitutional Court only those statutes it considers unconstitutional. In addition, certain public authorities have the right to institute proceedings for clarifying a statute's constitutionality without having been affected by it. This makes possible judicial review even of those statutes which no one is willing to challenge or which, for lack of a proper legal interest, no one is entitled to attack. Yet the system is not altogether watertight so long as some statutes can escape review by the Constitu-

138 In Fleiner & Giacometti, Schweizerisches Bundesstaatsrecht 898 (1949).
137 Imboden, Constitutional Review 522.
140 Cf. Part V(2) of the text supra.
141 Art. 93, Para. 1, No. 2 of the Constitution: cf. Part VI of the text supra.
JUDICIAL REVIEW OF STATUTES

The "Verfassungsbeschwerde" serves as a means to close the gap in cases where an individual cannot convince a court of a statute's unconstitutionality, and therefore fails to achieve submission to the Constitutional Court, and where none of the possible applicants under Article 93, Paragraph 1, Number 2 of the Constitution cares to start proceedings.

The price paid for these endeavors at perfection of judicial review by the Constitutional Court is fairly high. Of the over 8,100 "Verfassungsbeschwerden" that flooded the Court during its first ten years, fewer than one per cent were successful. Many applicants, overlooking the "Verfassungsbeschwerdes" special function of protecting only basic rights, tried to use this extraordinary legal remedy as just another type of appeal. In a large number of cases inveterate malcontents were simply venting their feelings. Thus the Court had to spend a disproportionate amount of time and energy on work really beneath the dignity of the highest tribunal. This has of course caused delays in other cases and a backlog of work. The discussion on constitutional review during the International Heidelberg Conference revealed that most non-German observers saw no need for an institution similar to the "Verfassungsbeschwerde" in their own country.\(^\text{142}\)

The German legislature's firm decision against eliminating the "Verfassungsbeschwerde" at the last alteration of the statute on the Constitutional Court (B. Verf. G.G.) in the summer of 1963 was influenced largely by the following motives. This legal device has had a wholesome educating effect on all public powers, be they federal, state or local, legislative, executive or judicial. It has fostered a deeper appreciation of the importance of basic rights, not only in public authorities, but also in public opinion and individuals. If a considerable segment of the people has come to think of the Constitutional Court as a main bulwark of individual freedom, this is largely due to the "Verfassungsbeschwerde." None of the other proceedings leading to the Court could have had the same effect. The preservation of the fundamental freedoms certainly does not depend on the Court alone. Yet the image of the Constitution and of the Court as its guardian, which the institution of the "Verfassungsbeschwerde" has helped to create, is important in a state where democratic order had to be reconstructed after the Hitler dictatorship.

One should also not overlook the contribution of the "Verfassungsbeschwerde" to the solution of important constitutional issues.\(^\text{143}\) The

\(^{142}\) Cf. Constitutional Review 803, 809, 813.

\(^{143}\) Much depends, of course, on the Court's deciding in a consistent manner. Noteworthy in this respect are a Swiss observer's reservations regarding the United States Supreme Court's success in clarifying important constitutional issues. See Wolf, Verfas-
fundamental interpretation of the right to choose a trade or profession freely,\textsuperscript{144} the decision on the free development of one's personality,\textsuperscript{145} the two outstanding judgments on freedom of opinion,\textsuperscript{146} as well as some rulings on the principle of equal participation in elections\textsuperscript{147} owe their existence to the "Verfassungsbeschwerde." Some of the problems solved by these decisions would not have come to the Constitutional Court through other proceedings. Because the judiciary is divided into five independent branches, each with its own highest court, these issues might thus never have found a uniform solution. The same holds true for a number of judgments which have forced courts of various rank to observe the constitutional right to a fair hearing under Article 103 in the most painstaking manner.\textsuperscript{148} Not only the very few successful applications, but also some of the unsuccessful ones have contributed to the clarification and the development of constitutional law. These cases gave the Constitutional Court an opportunity to set the pattern for governmental activities conforming to the Constitution.

Under these circumstances the trend is not towards abolishing the "Verfassungsbeschwerde,"\textsuperscript{149} but towards improving it, if possible, by further streamlining the procedures. The price for preserving the "Verfassungsbeschwerde" in the future may consist in granting the Court full discretion to reject any application on any ground whatsoever and without giving any reasons—an obvious parallel to the basis for the formula of the United States Supreme Court "certiorari denied." Meanwhile the load of the overburdened Court may perhaps be lightened by two other factors. If the Court succeeds in reducing the number of unsettled constitutional problems, it might be called upon less frequently by individuals, lower courts and other public authorities. Furthermore, one can at least hope that a better understanding by the people of the limits of basic rights and of the special functions of the "Verfassungsbeschwerde" will diminish the misuses of this legal institution.\textsuperscript{150}
VIII
CONCLUDING REMARKS

The previous sketch could only touch on some problems connected with judicial review and not even mention others. One feature common to all or most states with judicial control of statutes should at least be referred to here. Generally the courts not only interpret a statute to be in conformity with the constitution whenever possible, but also salvage those parts which are separable from the unconstitutional portions. In this way they limit the negative effects of their findings on the legal order. They also decrease the number and intensity of clashes with the legislature and perhaps other political forces.

The problems of obiter dicta, of dissenting opinions, of stare decisis, and, more important, of the norms serving as a yardstick for the review of statutes, certainly deserve a thorough examination on a comparative basis. These questions exceed the limits of review of statutes and merge into the broader field of constitutional jurisdiction in general. They lead, for instance, into one of the really fundamental issues, the relationship between the judges and the constitution. To mention only the extremes, are the courts when exercising judicial review, in practice really the constitution, or are they mere interpreters and, at the same time, a "puissance... pour ainsi dire invisible et nulle" (Montesquieu)?

151 Cf., e.g., text preceding note 86 supra.
152 Cf., e.g., Kauper, Constitutional Review 612-13; Heck, id. at 873-74. For Germany, cf. Müller, "Unter welchen Voraussetzungen macht Nichtigkeit eines Gesetzesteiles das ganze Gesetz richtig?" 79 Deutsches Verwaltungsblatt 104 (1964). For a recent comparative monograph on this method of constitutional interpretation in Austria, Germany, Italy and Switzerland, see Haak, Normenkontrolle und verfassungskonforme Gesetzesauslegung des Richters (1963).
154 Cf. Engelhardt, supra note 118, at 135.
155 Of particular interest in this regard are the "verfassungswidrige Verfassungsnormen" and constitutional provisions disregarding basic principles of justice, especially of natural law. Can a court have the authority to measure one constitutional provision against another or, respectively, against principles of natural law? Cf., e.g., Constitutional Review 151-52, 306, 376, 431, 735, 843; Engelhardt, supra note 118, at 126; Marcic, Verfassung und Verfassungsgericht 126 (1963).
156 The problem has found particularly vivid expression in the title of Robert H. Jackson's—later Mr. Justice Jackson—book, The Struggle for Judicial Supremacy (1941). A somewhat contrasting title is that of Bickel, "The Least Dangerous Branch—The Supreme Court at the Bar of Politics," 64 Colum. L. Rev. 1 (1964). The literature on the subject in the United States seems boundless; the more important works are so well known that they need no mention here. For the Commonwealth, McWhinney, Judicial Review in the English Speaking World (2d ed. 1960), should be mentioned. In Germany this topic has aroused new interest, mainly because of the impact of the Federal Constitutional Court's decisions. As introductions and guides to additional literature and sources the following works may be mentioned: Fleischhauer, Die Grenzen der sachlichen Zuständigkeit des Bundesverfassungsgerichts bei der Kontrolle der gesetzgebenden Gewalt, der Staatsleitung und der politischen Parteien (1960) (Diss. jur. Heidelberg); Marcic, supra note 155, at 202; Roellecke, Politik und Verfassungsgerichtsbarkeit. Über immanente Grenzen der richterlichen Gewalt des Bundesverfassungsgerichts (1961). See also the literature on the status of
and some connected problems\textsuperscript{167} cannot be dealt with in a relatively short article attempting to cover judicial review of statutes in numerous states with greatly differing court systems and procedures. The book \textit{Constitutional Review in the World Today—National Reports and Comparative Studies} has achieved outstanding results in these respects as well.\textsuperscript{168} One may hope that this exemplary undertaking will stimulate further comparative inquiries in the field of constitutional jurisdiction.

\textsuperscript{167} Closely related is the quest for the proper principles of constitutional interpretation. The activities of the Federal Constitutional Court have caused a particularly strong interest of German scholars in this subject. The Association of University Teachers of Constitutional Law, which had devoted half of its meeting in 1950 to the legal and political limits of constitutional jurisdiction. See Verhandlungen des ersten österreichischen Juristentages (1961).

\textsuperscript{168} Cf. note 4 supra.