Ius Gentium: Comparative Perspectives on Law and Justice 61

Rainer Arnold
José Ignacio Martínez-Estay *Editors*

Rule of Law, Human Rights and Judicial Control of Power

Some Reflections from National and International Law

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Editors

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Some Reflections from National and International Law

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Preface

Constitutional law was born in England as a response to absolutism, which implied power without juridical limits, and the monopolization of the law by the sovereign. Faced with absolutism, constitutionalism claimed the subjection of everyone to the law. This notion had been part of the political and legal culture of all medieval Europe. In that conception, the primacy of law was made effective by judges, and the law was not reduced to norms, but rather viewed as a set of criteria, rules, customs, and principles of justice.

For this reason, it can be affirmed that constitutional law rests on the same premises, and henceforth arise the concepts of rule of law, judicial review, and rights. Thus, the Rule of Law assumes the primacy of law over power, which implies that the instrument created for that purpose, the constitution, is in a position of supremacy over power. That is to say, power subordinated to the constitution, which makes the control of the former in accordance the latter necessary, affecting the submission of the power to the Rule of Law. Therefore it is common sense that the control lies in the judges, because its function is to resolve conflicts in applying the law, and the constitution is law, at least in part.

However, the idea of limiting the power by the law aims at the protection of the person and her rights. In this sense, constitutionalism is based on the idea that human beings are endowed with inherent and inalienable rights, which are conceived as specific liberties and immunities to power, enforceable before a court of law. In other words, the subjection of power to the law, and its control by judges is justified by the need to protect people from possible overreaching, and therefore, from possible violations of their rights.

Nevertheless, the development of constitutionalism has been uneven. England and the United States have lived under a constitutional system since the seventeenth and eighteenth centuries, respectively. Europe, Latin America, and most of the countries of the civil law tradition had to wait until the twentieth century to consolidate their constitutional experience. The trauma of the two world wars, the fall of totalitarianisms and dictatorships, and the phenomenon of decolonization paved the way for the adoption of constitutionalism practically in all of Europe, in most of Latin America, and in many countries in Africa and Asia. The development of

this process continues to this day, and since the Second World War has been accompanied by the creation of supranational systems for the protection of human rights.

In summary, there is a deep relationship between Rule of Law, human rights, and judicial control because the subjection of power to the law aims at the protection of human rights, and therefore the judicial control is indispensable not only at national level, but at international level too.

This book is related to this phenomenon. In this sense the contributions presented in this volume address some of the main problems and challenges faced by the rule of law, judicial control, and human rights in some countries of Europe, Latin America, and Africa, and the way in which the supranational protection of rights influences the states.

The aim of the book is to show the authors' perspectives on the main problems and challenges facing the Rule of Law, rights, and judicial control of power in their countries. In this regard, some contributions focus specifically on issues linked to the current problems of judicial control, while others address some current problems and challenges of the Rule of Law and human rights, in their respective constitutional systems.

The first part of the book deals with the judicial control of power. In this sense, the adoption of constitutional courts has not involved the disappearance of supreme courts, and in many cases it has been adopted a mixed model of constitutional control, in which constitutional courts and supreme courts coexist. *Emilio Garrote* describes the relationship between the constitutional courts and supreme courts in France, Germany, Italy, Portugal, and Spain.

Eugen Chelaru analyzes the control of the President and the Government in Rumania; and *Michal Jackowski* explains the fundaments of administrative justice in Poland. *Carlos Hakansson* describes the Peruvian judicial review, its origin, and development; and Luis Franceschi, Linet Muthoni, and Emmah Senge Wabuke develop the concept of judicial review in Kenya, considering how the Kenyan judiciary has adjudged four significant political cases.

This first part continues with the analysis of the new challenges of judicial control such as the interaction of judicial review with mechanisms of direct democracy (e.g., referendum); with civil society and with some independent institutions. The exercise of public power by the people through referenda and their judicial control in Croatia is the question addressed by *Biljana Kostadinov*. *Maria Pérez-Ugena* explains the relationship between civil society (influenced by the party system) and judicial power in Spain.

Other contributions focus on the main problems of judicial control in some new constitutional systems which have incorporated constitutional courts. The former President of the Constitutional Court of Kosovo, *Enver Hasani,* offers a detailed insight into the international orientation of the courts' jurisprudence. Likewise, the President of the Constitutional Court of Moldova, *Alexandru Tanase,* analyzes in particular from this viewpoint the court's activity, and the Ukrainian constitutional justice is assessed by *Viktor Muraviov* and *Natalya Mushak*, especially from the

perspective of fundamental rights and the usefulness of the instrument of an individual complaint to the Constitutional Court.

The second part contains contributions about the problem of the limits and effects of judicial control. *Santiago Legarre* analyzes the effects of judicial precedent under the form of stare decisis, and *Ignacio Covarrubias* uses a comparative scholarly framework to analyze the reception of the proportionality test by Chilean scholars.

Likewise, when challenging legislation, constitutional courts have to be careful not to overstep the limits of interpretation even where that the constitution is considered a "living instrument" and requires to be understood dynamically. However, judicial activism raises concerns, which are formulated by *Boguslaw Banaszak*, for a part of the Polish constitutional court's jurisprudence. *Arta Vorpsi* studies the margin of appreciation in the control of the executive emergency decrees in Albania.

Furthermore, constitutional reform always has a decisive influence on the judicial control system, the way in which it is shaped and how it can be adapted to emerging needs. *Heribert Köck* gives a detailed insight into the constitutional reform projects and processes in Austria. Constitutional courts are limited in their power to adapt the constitution to the social changes. Judicial control essentially depends on the text of the constitution. Therefore, the question of constitutional reform is of crucial importance for the extension, intensity, and effect of judicial control of public power.

Finally, the third part of the book relates to the relationship of human rights and judicial control. As mentioned before, one of the main challenges is how supranational human rights systems interact with national constitutional systems. In this regard, *Soledad Bertelsen* analyzes the consensus as a factor of the margin of appreciation and the intensity of judicial review in the European Court of Human Rights. *Valentina Colcelli* writes about the influence of the European Court of Human Rights in the judicial control of public power by civil courts with civil law instruments, which is particularly important in the field of social policy, and *Mariusz Muszynski* focuses his work in the juridical impact of the relativization of national sovereignty.

Péter Kovács, Judge at the International Criminal Court, examines the concept of complementarity, one of the core questions regarding the relationship between international and national judicial control, and *Joanna Osiejewicz* regards the interconnection of national and EU jurisdiction affecting the assimilation of legal norms within the European Union and by this contributing to the consistency of law. Likewise, *Francesca Pollachini* studies how obligations to legislate, derived from judgements of the European Court of Human Rights, are adopted into the internal national legal order, specifically into Italian Law, and *Selin Esen* describes the impact of the European Court of Human Rights's jurisprudence in Turkey, focusing on freedom of association.

This third part ends with a contribution about the judicial control of the horizontal effects of constitutional rights. The *Drittwirkung* has posed a major challenge to judicial control, because rights are not only enforceable against public power,

but also against individuals. *José Ignacio Martínez and Jaime Arancibia* analyze the horizontal effects of constitutional rights in Chile and how it has been recognized and applied by the Chilean jurisprudence.

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Part I
Rule of Law and Judicial Control of Power

Chapter 1
Constitution and Judicial Review: Comparative Analysis

Emilio Alfonso Garrote Campillay

Abstract This paper analyses the relationship between the Constitutional Courts and ordinary Courts in countries where both systems exist. The analysis is constructed on the basis of the Constitutional Courts of France, Germany, Italy, Portugal and Spain and its relationship with ordinary Courts. This paper contributes to determine the necessary factors for peaceful coexistence between Constitutional Courts and ordinary Courts.

1.1 Introduction

The dogma or principle of the separation of powers introduced by Montesquieu[1] is not absolute. However, this principle of separation of functions implies a necessary coordination, not only between those powers, but also amongst the various bodies that make up the State.[2] This situation is not outside of constitutional justice and ordinary justice. Within both judiciaries diverse relationships exist; some systems are more complex than others, especially in countries where there are two systems.

Whether the two judiciaries coexist peacefully depends on diverse factors; among them, the legal character of the Constitution—its direct and immediate efficacy, and understanding of fundamental rights. However, this also depends on the power of the common judge to disapply a law if there is precedence of a similar case. This, as well as the existence of a system of judicial conference if doubt arises in regard to the constitutionality of a legal provision. Lastly, the coexistence of the

[1] MONTESQUIEU, *Del Espíritu de las Leyes*, Edit. Altaya, Barcelona, 1996.
[2] Véase LOEWENSTEIN, KARL, *Teoría de la Constitución*, Edit. Ariel, Barcelona, 1979.

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two judiciaries also depends on the interpretative criteria applied by these controlling bodies.

In order to identify guidelines regarding the relationship that exists between the principal interpreter of the Constitutional Text and the Ordinary Courts, we will consider three aspects. The presence of these three components not only facilitates a peaceful coexistence between these bodies, but also a unified criterion with the vision to uphold the principle of equality.

Firstly, concepts of constitutional justice, constitutional jurisdiction and protection of the Constitution will be clarified, with the objective of defining terms used within this study. Secondly, there will be a review of the constitutional control model adopted in each constitution. Finally, there will be an explanation of the direct relationship between constitutional interpretation and judicial power; determining if there is a superposition of the jurisdictional entities, based on the regulatory control of constitutionality.

Lastly, there will be an analysis of competency, policy, composition, and impact of judgments, applied in the context of the Constitutional Courts of Italy, Germany, France, Portugal and Spain.

1.2 Defence of the Constitution—Constitutional Jurisdiction—Constitutional Justice

In Constitutional discipline, expressions are often used indiscriminately to maintain the supreme character of the Constitution, as if they were synonymous. Sometimes, "defence of the Constitution" is discussed, on other occasions, constitutional jurisdiction, constitutional guarantee or constitutional justice. In this section, analysis of these terms will determine the language to be used in accordance with the circumstances, characteristics and particularities of each constitutional system. Finally, the nomenclature for each of the control systems analysed will be applied and substantiated.

1.2.1 Defence of the Constitution

The expression "defence of the Constitution", introduced by Carl Schmitt,[3] is a very broad term; referring to any reaction, normal or exceptional, against an attack on the Constitution. In the words of Cappelletti, "Constitutional defence implies a generic safeguard concept, covering not only the aspect that we can declare disease of the Constitution, but that which includes political, economic, judicial and social

[3]SCHMITT, CARL, *La defensa de la Constitución*, Edit. Labor, Barcelona, España, 1931.

systems".[4] In this regard, it is possible to distinguish between established preventative methods of preserving fundamental regulations, and maintaining legitimacy and guarantees. This is of processual nature, destined to reintegrate unknown constitutional precepts, violated or uncertain, that would be restitutory or reparatory.[5]

Defence of the Constitution implies that the formal Constitution is material and effective.[6] It is realized through courts and constitutional jurisdiction, which means that "the power of the government is limited by constitutional policy, and procedures and institutions have been created to comply with this limitation".[7] It is solidified through an aggregate of juridical and processual instruments in order to keep State bodies within their competence.[8] In this manner, the power and supremacy of the Constitution is protected.[9]

1.2.2 Constitutional Jurisdiction

In the words of Fix Zamudio, constitutional jurisdiction is an expression of Constitutional defence that is institutionalized and juridical. It establishes a limitation of political power of objective character, and of control that is generally solicited.[10] This transforms a Legal State of Law into Constitutional State under the Rule of Law.[11] Rubio Llorente says that it is necessary to define in what sense this expression is applied. This is because it stems from a restrictive perspective, only to resolve the constitutionality of legal precepts to a protective jurisdiction over fundamental rights, although no such protection is provided under the Constitution.[12] For Nogueira Alcalá, there is constitutional jurisdiction when there exist courts that exercise the power to understand and resolve constitutional

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[4]CAPPELLETTI, MAURO, *La jurisdicción constitucional de la libertad, con referencia a los ordenamientos alemán, suizo y austriaco*, trad. Héctor Fix Zamudio, Edit. Imprenta Universitaria, México, 1961, pp. 140–141.

[5]ídem, p. 141.

[6]NOGUEIRA ALCALÁ, HUMBERTO, "Tópicos sobre jurisdicción constitucional y Tribunales constitucionales", en *Revista de Derecho*, Vol. 14, 2003, p. 45.

[7]CAPPELLETTI, MAURO "¿Renegar de Montesquieu, la expansión y la legitimidad de la justicia constitucional?", en *Revista Española de Derecho Constitucional*, Nº 17, pp. 12–13, 1986.

[8]*Cfr*. SCHMITT, CARL, ob. cit.

[9]NOGUEIRA ALCALÁ, H., "Tópicos sobre jurisdicción constitucional …", ob. cit. p. 45.

[10]FIX ZAMUDIO, HÉCTOR, "La Constitución y su defensa", en *Coloquio Internacional*, Instituto de Investigaciones Jurídicas. Universidad Autónoma de México, agosto de 1982.

[11]GARCÍA PELAYO, MANUEL, "Estado Legal y Estado Constitucional de Derecho", en *El Tribunal de Garantías de Debate*. Consejo Latinoamericano de Derecho y Desarrollo. Fundación Friedrich Naumann, Perú, 1982, p. 23.

[12]RUBIO LLORENTE, FRANCISCO, "Seis tesis sobre jurisdicción constitucional en Europa", en *Revista Española de Derecho Constitucional* Nº 35, 1992, p. 9 ss.

conflicts (which arise within the state) through pre-established procedure and with the force of res judicata. This procedural handling of conflicts guarantees the regulatory strength of the Constitution.[13]

This indicates a judicial control exercised by bodies that generally verify pre-established limitations. These bodies, according to Aragón Reyes "do not control, only brake".[14] In our country, the expression "constitutional jurisdiction" is used by diverse authors, but in its broadest sense, also comprises constitutional justice. The following section will clarify this distinction.

1.2.3 Constitutional Justice

In the words of Aragon Reyes, constitutional justice,[15] under a European model is understood as the judicial application of the Constitution. It is exercised by both the constitutional and ordinary jurisdictions, as both apply and interpret the Constitution and both continually interpret the law. At the same time, both the constitutional and ordinary jurisdictions can verify conformity within the Fundamental Norm when acts are submitted to their jurisdictional control.[16] In contrast, the denomination "constitutional jurisdiction" is normally limited to the Constitutional Court.[17] For Bardalí Salamanca, "it is about judicial bodies being able control the State's power to safeguard the liberty of the citizens and the respect of the rules of the democratic game constitutionally established".[18]

The denomination "constitutional justice" is the most appropriate term, if justice is considered synonymous with judicial power. However, the axiological character of these instruments has been considered to include other instruments or bodies that

[13]NOGUEIRA ALCALÁ, H., "Tópicos sobre jurisdicción constitucional…", ob. cit. p. 46.

[14]The declaration of unconstitutionality by omission must be set aside for Portugal, Venezuela and Brazil, where the Constitutional Court orders compliance with constitutional law. Aragón Reyes, Manuel, "La interpretación de la Constitución y el carácter objetivado del control jurisdiccional", en *Revista Española de Derecho Constitucional* Nº 17, 1986, pp. 89 ss.

[15]Traditionally, constitutional justice is understood as a formal concept. During much of the twentieth century, this was 'concentrated constitutional justice', designed, more or less, according to the Kelsen model of the 20s, originally embodied in Czech and especially in Austrian constitutions, and therefore residing in an ad hoc body, in contrast to other constitutional law models such as the diffuse North American judicial review models, sanctioned by judge Marshall since the Marbury v. Madison case in 1803, preceding from state law constitutional controls. Pérez Tremps, Pablo, "La justicia constitucional en la actualidad. Especial referencia a América Latina", en *Revista Justicia de Paz del Consejo Nacional de la Judicatura*, AÑO 6 Nº 15, Vol. 1, 2003, p. 2.

[16]CORZO SOSA, EDGAR, "Relaciones entre el Tribunal Constitucional y el Poder Judicial en España", en *Revista Jurídica. Boletín Mexicano de Derecho Comparado*, N° 78, 1993, p. 864.

[17]ARAGÓN REYES, NANUEL, "Relaciones entre Tribunal Constitucional y Tribunal Supremo", en *Revista Iberoamericana de Derecho Procesal Constitucional*, N° 8, 2007, pp. 31 ss.

[18]BORDALÍ SALAMANCA, ANDRÉS, "La Justicia Constitucional", en *Revista de Derecho Valdivia*, Vol. XIV, 2003, p. 285.

also participate in the interpretation and application of the Constitution. Such as the Scandinavian Ombudsman, the French Constitutional Congress, and the General Controller of the Republic and Ordinary Courts in Chile. From a procedural perspective, both jurisdictions know only the processes that have been ascribed to them. However, from a practical point of view, this is an exercise of constitutional justice,[19] both jurisdictions converge in their activity. However, it is important to note that in this respect, constitutional jurisdiction is considered supreme, with the monopoly to invalidate of laws, which symbolically questions the supreme character.[20]

1.2.4 Judicial Review

Constitutional control is a consequence of the juridical quality of the Constitution, namely its supralegal character. This implies the power of magistrates to compare regulation dictated by the political power—legislative or executive—to standards of a superior hierarchy.[21] In comparative law, there are various systems of application. Here, we encounter political control,[22] judicial control,[23] and in the latter, concentrated[24] and diffuse judicial control.[25]

In conclusion, it is noted that the concept of "constitutional justice" becomes more appropriate given the characteristics and particularities of the judiciary review analysed in this study. Also, within the interpretation and application of

[19]On constitutional justice, see, among others, MEZZETTI, LUCA, "Sistemas y modelos de justicia constitucional a los albores del siglo XXI", en *Estudios Constitucionales*, AÑO 7, Nº 2, 2009. P. 281 ss.; BORDALÍ SALAMANCA, A., ob. cit.; CAPELLETTI, MAURO, "La justicia constitucional en Italia", en *Revista de la Facultad de Derecho*, t. X, Nºs 37, 38, 39 y 40, México, 1960; CARTABIA, MARTA, "El diálogo entre tribunales a la hora del activismo constitucional del Tribunal de Justicia", en *Revista Española de Derecho Europeo*, Nº 22, 2007; CEA EGAÑA, JOSÉ LUIS, "La justicia Constitucional en las Facultades de derecho chilenas", en *Revista de Derecho*, Vol. XII, Chile, 2001; Del mismo autor "Misión cautelar de la justicia constitucional", en *Revista Chilena de Derecho*, Tomo I, Vol. XX, Nº 2–3, 1993, Santiago de Chile; "La justicia constitucional y el Tribunal de la Constitución en Chile", en *Revista de Derecho*, Vol. XX, Concepción, Chile, 2001; CELOTTO, ALFONSO, "Evolución de la justicia constitucional en Italia", en *Urbe et Ius. Revista de opinión jurídica*, Nº 5, Buenos Aires, Argentina, 2006.

[20]See SILVA IRARRÁZAVAL, LUIS ALEJANDRO, "¿Es el Tribunal Constitucional el supremo interprete de la Constitución?, en *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, N° 38, 2012, p. 573 ss. For opposite oppinions, see, among others ARAGÓN REYES, M., "Relaciones entre Tribunal Constitucional …". cit. p. 31.

[21]DE STEFANO, JUAN SEBASTIÁN, "El control de constitucionalidad", en *Urbe et Ius. Revista de opinión jurídica*, AÑO 1, Nº 7, 2005, p. 1.

[22]The control is carried out directly or indirectly by the Legislative or Executive Power.

[23]In this case attribution rests with the courts.

[24]Controls for constitutional issues are exercised by specialized courts, which may or may not belong to the judiciary branch.

[25]Here, control is generally given to the judiciary branch, regardless of venue or jurisdiction.

constitutional principles, there is no jurisdictional exclusivity. Contrastingly, in some cases there is a overlay of the jurisdictions, except in Germany, where the Federal Constitutional Court is the highest order of the Judicial Power, concentrating constitutional control of the law. At the same time, in Italy, France, Portugal and Spain, whose Constitutional Courts do not form part of the judicial branch of government, there is a permanent coexistence between the judiciaries. In the next section this last aspect will be analysed.

1.3 Models of Constitutional Control

With regard to judicial review of the constitutionality of laws, there are two main systems: the American and European. Within the latter, it is important to distinguish between the traditional Kelsenian court model, or Austrian model; and the current system applied principally in Spain, Germany and Italy.

1.3.1 American Model

This model is dubbed the American Model not only for its foundation in the United States Constitution of 1787, but also because it has been applied in the majority of judicial systems in Latin America and Canada.[26] It is built on the idea of a Constitution that permeated in the beginning of the 19th century, meaning a written and rigid rule that is superior to ordinary laws. The Constitution sets forth essential rights that the citizen can enforce against the constituted powers, amongst which legislative power. In cases where an act is based on a law contrary to the constitution, the judge must resolve the case in accordance with the Supreme Law, that is above the application of ordinary laws. In other words, magistrates generally prefer the Constitution over the law. This concept has its origin in the famous case Marbury versus Madison of 1803, presided over by the judge John Marshall.[27]

In this case, it was maintained that the judge must apply the Constitution and thereby disapply the law. Moreover, it was held that a law contrary to the Constitution, was not only not law, it was a nullity.

[26] *Cfr.* FIX-ZAMUDIO, HÉCTOR, "La aportación de Piero Calamandrei al derecho procesal constitucional", en *Revista de la Facultad de México*, Nº 24, 1956, p. 196.

[27] Sentencing in Spanish can be seen in *Revista Mexicana de Derecho Público*, Nº 3, 1947, p. 315 ss.

1.3.1.1 Characteristics

Among the principal characteristics of the American system, the following can be highlighted:

- It is a diffused system, meaning judicial review can be exercised by any judge or court that is trying a particular case.
- There does not exist a special court, neither a specific procedure.
- Each judge can apply the Constitution in his or her own manner, and disapply the law in favour of the constitution.
- The law does not apply in the particular case, nor in subsequent cases, but it is not expelled from the legal system, given that it maintains a *status quo*, while this does not change the criteria taken into consideration to declare its inapplicability.
- The decision of the judge produces *inter partes* effect only, given that there is no annulation of the general effects.

1.3.2 European Model

This model, in some sense, although not essentially, shares the American concept of Constitution. This has led some authors to question whether it is necessary to talk about different models of constitutional justice.[28] However, judges cannot stop the application of the law as can their American peers. This is the dogma of the rigid separation of powers, and the notion of sovereignty of the law, that still existed in the beginning of the 19th century. This model is at the same time divided into two: the traditional, or Austrian model, and the current European model.

1.3.3 Austrian Model

This model comes from the Federal Constitution of Austria of October 1920. It originated in Austria and was adopted and modified in other European countries, upholding the idea of creating a special jurisdictional body. This is the reason why Mauro Cappelletti named it the European system.[29] In order to protect the Constitution against the legislators, a special court was created, the Constitutional Court whose objective it is to interpret and apply the Constitution. This court does

[28]See, among others, RUBIO LLORENTE, FRANCISCO, "Sobre la relación entre Tribunal Constitucional y Poder Judicial en el ejercicio de la función jurisdiccional", en *Revista Española de Derecho Constitucional*, N° 4, Madrid, 1982, pp. 42–43.

[29]*Cfr.* CAPPELLETI, MAURO, *Il controllo giudiziario di constituzionalita delle leggi nel dritto comparado*, Milán, Dott. A. Giufré, 1979, p. 51.

not pertain to the judicial branch of government. The latter obeys the historical weight that makes judges afraid to apply the law over the constitution.

From its beginnings, this court also had competence in electoral, material and penal matters for senior officials. Judicial review of laws is carried out through an abstract control in virtue of a direct resource, being required for the federal government as well as for the federal states. The decision of the court overrides the law in a general manner, and with *erga omnes* effect which is why it is considered a negative legislature. But this model quickly underwent changes. For example, in 1925, a previous legal control was implemented, and in 1929 a specific control appeared. This means the question of unconstitutionality can only be answered by the Supreme Court.[30]

Given the latter circumstance, the first grand fissure occurred within the Kelsen model, generating an approach to the American model. Later, other changes would be introduced deriving from the current European model. For example, the Spanish Constitution of 1931 incorporates the power of the Constitutional Court "the Knowledge of Amparo".[31] In this same order of ideas, the Italian Constitution of 1947 introduces the exception of unconstitutionality and the resolution of conflicts between constitutional bodies. For its part, the German Constitution of 1949 introduces specific control or question of constitutionality, the *constitutional complaint* and conflict resolution between constitutional bodies.

1.3.3.1 Current European Model

Current constitutional justice in Europe is of Kelsenian origin, but adopts characteristics from each country where it is applied. It is mainly characterized by three aspects.

- The existence of a special court called Constitutional Court that has a monopoly on the rejection or expulsion of laws that are contrary to the Constitution.
- Ordinary judges and courts must apply the Constitution with preference, but through its tie with the law cannot disapply it, except for a few exceptions.[32]

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[30] *Cfr.* CRUZ VILLALÓN, PEDRO, *La formación del sistema europeo de control de constitucionalidad* (1918–1939), Edit. Centro de Estudios Constitucionales, Madrid, 1987.

[31] According to Fix Zamudio under Mexican refuge. FIX-ZAMUDIO, HÉCTOR, "El derecho de amparo en México y en España, su influencia recíproca", en *Revista de Estudios Políticos*, N° 7, Madrid, 1979, pp. 245–248. *Cfr.* RUBIO LLORENTE, F., "Sobre la relación entre …", cit., pp. 61–62.

[32] According to the Portuguese Constitution of 1982, Article 204, examination of unconstitutionality corresponds to ordinary courts, to indicate that "In matters brought to trial, courts can not apply standards that contravene the Constitution or the principles enshrined therein." In the case of Spain, this situation arises due to contradictions that may exist between the basic State legislation and autonomous region law, which could regulate other side matters, such as execution. An alternative is a state law and a regional law, which under certain conditions, only one would be applied.

The ordinary judge should refer his or her doubts on constitutionality to the Constitutional Court.

– In some cases, the Constitutional Court has the power to hear and decide a *constitutional complaint* against fundamental rights violations (Austria, Germany and Spain).

As can be seen, in this model there also exists a duality of functions between constitutional courts and ordinary judges.

The Italian Model of Judicial Review

In the opinion of Professor Blasi, the Italian model does not in its totality subscribe to the Constitutional Court model proposed by Kelsen, being more of a hybrid model. There exists a concentrated body—the Court—whose decisions can have *erga omnes* effect, but it is accessed principally through judges in the ordinary courts.[33] To establish a specialized entity was the only path to follow to make effective the primacy of constitutional norms.[34] This is justified in the necessity to safeguard constitutional supremacy against ordinary law.[35] The rigid character of the Constitution implied that its norms were protected against eventual violations by the ordinary legislature.[36]

The Constitutional Assembly of 1948 designated the Italian Constitutional Court as custodian of constitutional legality. Parliament at the same time was placed in charge of national interests, with a common objective: defence of the Constitution through "the court's legitimacy and the judgement of merit of competency of the Parliament." The procedure before the court is not a single-party procedure, meaning that no single person is able to challenge it. No judge is obligated to apply a law whose constitutionality generates doubts. However, only the Constitutional Court can approve this by declaring the unconstitutionality of the law in question.[37] In this manner, it consents to decide on the matter without taking those into account.[38]

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[33]BLASI, GASTÓN FEDERICO, "Corte Constitucional Italiana", en *Revista de investigación en Ciencias Jurídicas y Sociales: Ley, razón y justicia*, Vol. 6, Nº 9, 2005, p. 5.

[34]MARGIOTTA BROGLIO, COSTANZA, "La Corte Constituzionale Italiana e Il Modello Kelseniano", en *Quaderni Costituzionali*, Vol. 20 Nº 2, 2000, p. 338.

[35]*Cfr.* Comisión para estudios sobre Reorganización del Estado, Asamblea Constituyente, Problemas Constitucionales - Organización del Estado, Vol. 1, Roma, 1956, pp. 51–66.

[36]MARTÍNEZ, TEMISTOCLES, *Diritto Costituzionale*, Milano, Giuffre, 1997, p. 583.

[37]The Court deliberates in the Council Chamber with judges present at all trial hearings which are adopted by the absolute voter majority. In case of a tie, the President makes the final decision.

[38]The Constitutional Act No. 1 of February 9, 1948 excluded appeals to the Constitutional Court by those who denounce legal violations because they consider a law to be constitutionally illegitimate or by a public body with similar complaints. Appeals are only admitted if constitutional legitimacy controversy arises between the State and Regions or solely between Regions.

The Ordinary Judge as Constitutional Judge

Judicial review in Italy is characterized a notable diffuse character,[39] although it sees itself as a concentrated model. The ordinary judge, whether civil, penal or administrative, plays a determining role in the review of constitutional legitimacy by virtue of the exception of constitutionality or control by incidental means. In effect the presiding judge, the ex officio or ex parte, declares the doubt about constitutionality in before the Constitutional Court.[40] Thus, the first inquiry about the constitutional legitimacy of the law or act of force by the law is carried out by the ordinary judge,[41] the *a quo* judge.[42] In other words, the ordinary judge acts as a real constitutional judge,[43] even motivated by the Constitutional Court.[44]

In several instances, the Constitutional Court[45] has stated that (…) the judge has, above all, an obligation, to choose which of the possible interpretations to

[39]Along the same lines, see GROPPI, TANIA, "¿Hacia una justicia constitucional dúctil? Tendencias recientes de las relaciones entre la Corte Constitucional y los jueces en la experiencia italiana", trad. Miguel Carbonell, en *Cuadernos Const. de la Cátedra Fadrique Furió*, Nº 38–39, Valencia 2002, p. 69 ss.

[40]The Judge is the keeper of the Constitutional Court, in a system devoid of direct action for citizens, such as the system in Italy. Calamandrei, Piero, La inconstitucionalidad de las leyes en el proceso civil, CEDAM, Padua, 1950, p. 12.

[41]In cases where there is an absence of applicable norms to these sub lite cases, with constitutionality in question, the Court does not declare the a case is unconstitutional, even with principles to support such declaration. The Court invites the judge to find the principle in the constitutional system himself. Italian Constitutional Court case No. 347/1998. Thus, in case No. 347 of 1998, the Constitutional Court denied the possibility of applying standards for the lack of good parenting due to adultery, but, contrary to original indications, rejected an additional sentence. Before the lacking legislative branch, the Court invited the judge to look at the complex legal system and find ideal balance between the various constitutional goods involved. Along the same lines, in case No. 11 of 1998, the Court asked the judge that ¨through the full exercise of legal interpretation and in accordance with the Constitution, to resolve the problem posed by the cited normative gap.¨ The Court recognizes unconstitutional situations, and asks the judge to identify the legal solutions to the problem in order to avoid contested provisionary consequences. Judgments can be seen in case Nºs 349/1998; 283/1999; 436/1999 and 450/1998.

[42]The ordinary court judge, in addition to verifying the general proposals that question constitutionality, mandated by the proper Constitutional Court, has an obligation to try to find an interpretation of constitutionality, the possibility of a proper interpretation, that is to say, more in accordance with the Constitution, thus resolving constitutionality doubts.

[43]In this respect, the Court ruled, stating that "(…) judges cannot decide on the constitutionality of a law, asserting an interpretation of one law with respect to another." See, among others, Constitutional Italian Court case No. 101, 266, 405 and 436/1996; 258 and 360/1997; 280/1998.

[44]Common judges not only play an important role in the ascending phase in which the constitutional question arises, but also in the downturn, not only in the implementation of court decisions, but also the Constitution. The Court has called them to directly exercise control over law constitutionality, with the only limit being to directly disengage unconstitutional law. This is without resorting to GROPPI, T., op. cit. p. 82 ss.

[45]According to Constitutional Court jurisprudence, judges must use their interpretive powers to assess if it is possible to remove constitutionality doubts under a proper interpretation of regulatory requirements that are consistent with constitutional principles. "(…) law is unconstitutional not

follow,[46] unable to propose an alternative to the Court without previously having taking a position on them.[47] The Court considers that the interpretative premise on which the judge founds the exception of unconstitutionality is inexact or incorrect, observing that the judge attributes to the contested provision a significance and an effect that, however they cannot be referred to it.[48] The judge, in this sense, is obligated to make a correct interpretation,[49] and when possible, various interpretations, and offer at least one acceptable option.[50]

Judicial Review in Germany

The first antecedents of the model of judicial review in Germany are found in the Weimar Constitution of August, 1919, in accordance with Article 108. This article established the Court of Constitutional Justice, regulating its functions in the Law of June 9, 1921. This court had limited power to resolve conflicts that arose between the Federation and the *Lander*.[51] For its part, the German Federal Constitution of May 23, 1949 created the Federal Constitutional Court (henceforth TCFA) with wider functions than the Court of Constitutional Justice, regulated by Article 13 of the Law of March 12, 1951; reformed on July 21, 1956.[52]

(Footnote 45 continued)

because it is possible to give an unconstitutional interpretation, but because it is impossible to give it a constitutional interpretation." Italian Constitutional Court case No. 350/1997.

[46]Among the possible interpretations, ordinary judges should decide on one that is more conclusive with constitutional principles, thus avoiding objections. See among others, Italian Constitutional Court case Nºs 31, 44, 364, 389, 421 y 436/1996; 290, 299, 350, 354 y 361/1997; 7,39 y 147/1998.

[47]Italian Constitutional court case No. 426/1996—134 y 187/1998.

[48]ROMBOLI, ROBERTO, "El control de constitucionalidad de las leyes en Italia", trad. Enrique Expósito Gómez Universidad de Barcelona, en *Teoría y Realidad Constitucional*, UNED, Nº 4, 1999, p. 182.

[49]The ordinary judge plays a decisive role in the interpretation and direct application of the Constitution. In this regard, I share the words of Professor Roberto Romboli, "(…) The Court has rejected, in the absence of living law, the possibility of submitting a simple interpretative doubt or contest to a particular provisionary interpretation that is not shared. Legal interpretation is a question of ordinary court jurisdiction, oblivious to constitutionality, which, on the contrary, is aimed at eliminating legal flaws and not promoting uncertainty regarding applicability" Romboli, R., ob. cit. p. 182.

[50]Italian Constitutional Court Case Nº 237/1997.

[51]"The Weimar Constitutional Court was very active and contributed to adjusting conflicts of illegal cover-ups of a political nature." LOEWEINSTEIN, KARL, Teoría de la Constitución, trad. Alfredo Gallego Anabitarte, 2ª edic., Edit. Ariel, España, 1969, p. 322.

[52]Under this system, a constitutional complaint is brought before the Federal Constitutional Court by citizens for fundamental rights violations by public authorities. This approach involves a high percentage of German Constitutional Court resources. For a deeper amparo analysis before Federal Constitutional Courts, see Haberle, Peter, "El Recurso de Amparo en el Sistema Germano – Federal de Jurisdicción Constitucional", en D. García Belaunde y F. Fernández Segado (Coords.), La Jurisdicción Constitucional Iberoamericana, p. 231 ss.

An important first note about the German constitutional system is the fact that the TCFA pertains to the judiciary, being located in the same "cusp." As Germany is a Federal State, judicial power is expressed in federal courts, *Lander* courts and the Federal Constitutional Court.[53] Judicial review is carried out through Federal Courts in concordance with the normative of the *Lander* as well as the TCFA, with respect to federal law. The relationship between the constitutional judges and the ordinary judges is quite narrow, and well-articulated.[54] The *Lander* Courts must subject themselves to decisions by the Constitutional Court, referring to its jurisprudence or referring all doubtful cases to the TCFA.[55]

Ordinary and Constitutional Judges in Germany

By virtue of the procedure of "*constitutional complaint*" a review is effected on judicial decisions when solicited by a citizen or group of persons, such as an association or union. The TCFA examines if the court has violated or not taken into account fundamental rights. These procedures give origin to the "*constitutional complaint*".[56] As such, the sentences are revised from the five jurisdictional orders which are civil, penal, labour, financial and social.[57] It is important to note that the TCFA does not constitute a court of superior order over the others; it is not an instance of appeal. It is limited to examining the court's decisions as a last resource, but only with regard to special criteria established by the Constitution.[58] According to the Article 95.2 of the German Federal Constitutional Court Law, the Court whose decision has been overturned must try the case again.

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[53]The organization of the German judicial system is linked to the hierarchical model, both vertically and horizontally. Vertically for each subject it is distinguished by a trial judge, a court of appeals and a supreme court. Horizontally, in terms of powers, the judicial structure consists of ordinary courts, whether civil or criminal, administrative, finance, labor, and social security courts. Only Federal Courts are supreme, their respective decisions dealing with facts and law and having significant authority over other judges; however, it has not embraced the idea of precedent jurisprudence. Magnotta, María Rita, "La Organización del Poder Judicial y las relaciones entre jueces Ordinarios y Tribunal Constitucional en los Estados Miembros de la Unión Europea", trad. Francisco Javier Duran Ruiz, en Revista de Derecho Constitucional Europeo, N° 17, 2012, p. 261 ss.

[54]In relation to other judges, it must be remembered that the five Federal Supreme Courts pursue a common goal, namely, jurisdictional unity. In order to respect this unity on key issues of public interest, the existence of a team of Constitutional court judges is designed for preliminary rulings and appeals, in a different sense, on the same issue.

[55]Fundamental Law Article 100.

[56]The constitutional history of the Fundamental Law is, in large part, a history of fundamental rights, and the German Federal Constitutional Court has always found new areas for fundamental rights as to refine fundamental rights ideas. Without the possibilities offered by the "constitutinal complaint", constitutional protection would hardly lead to a productive dialogue-recognized by other European countries—including fundamental rights sciences and practice of these by German Federal Constitutional Courts. Alemán. Haberle, P., ob. cit. p. 256.

[57]Fundamental Law article 93 Nº 1.4 a y 19.3.

[58]HABERLE, P., ob. cit. pp. 251–252.

Judicial Review in France

The constitution of 1958 did not pretend to establish a review model like those already established, given that its intention was not to "consecrate" a model of general control from the acts of public power. Neither did it guarantee rights and liberties of the citizen.[59] In effect, what was proposed was to reinforce the Executive at the cost of the Parliament, and in particular the National Assembly.[60] What that meant was establishing an effective mechanism to obligate parliament to remain within the framework of the new institutions that were allocated to it, which more reduced than in the past.[61] Until this moment, there did not exist in France, a true judicial review of the law, and even less so, a constitutional judge. Given that the Constitutional Committee established by the IV Republic in 1946 could not be considered a constitutional judge.[62]

The lack of judicial review is principally owing to the fact that the law is considered to be the will of the people, and for this reason a judicial review would

[59]In France, constitutionality of bills, international treaties, parliamentary rules and certain issues concerning the operation of public authorities corresponds to the Constitutional Council. Considering the nature of judicial decisions and the procedure used to arrive at this decision, the French system is generally characterized by having objective and abstract proceedings. Mezzetti, L., ob. cit., pp. 288–289.

[60]It should be noted that, unlike many countries, in the French system, no judicial review is performed by a body that is located at the apex of the judicial system. In addition, the constitutionality of laws is evaluated before they come into force, except in the case of the new Article, 61.1, of the Constitution. Therefore, in judicial evaluation, conflicts arising between ordinary courts and the Constitutional Council (the apex Supreme Court of Cassation and administrative judges, where the State Council occupies a prevalent position) are analyzed. Currently the constitutional control model has undergone substantial changes after the constitutional reform of 2008. The main characteristic of the new French model, which distinguishes it from other European constitutional justice models, is that it is only take precedence over those laws that violate rights and freedoms guaranteed by the Constitution. In the words of Pierre Bon, constitutional priority issues are not a technique that ensures Constitutional supremacy as a whole, but only a technique for protecting the rights and freedoms guaranteed by the French Constitution. This model implies that the theory of law screen disappears for everything that concerns fundamental rights protection and remains for other reasons which is no minor issue. Bon, Pierre "La justicia constitucional en Francia", *Conferencia dictada ante el Tribunal Constitucional Chileno*, 10 de diciembre de 2012.

[61]ídem.

[62]Following Pierre Bon are four dates that mark the history of constitutional justice in France. 1958 with the creation of the Constitutional Council in Title VII of the Constitution of the V Republic. 1971 with the incorporation of fundamental rights within the constitutional corpus. 1974 with the extension of persons entitled to submit an abstract control case. Originally the only people authorized to request the Constitutional Council were the President of the Republic, the Prime Minister, the President of the National Assembly and the Senate President. For fifteen years, from 1959 to 1974, there were only seven requests by the Prime Minister and three by the Senate president. The reform enabled sixty congressmen or sixty senators to make requests. Also, for a period of fifteen years, 1975–1990, there were 166 requests. 2008 with the implementation of a concrete control by virtue of priority constitutional issues. However, only after the constitutional reform of July 23, 2008 could it be said that constitutional justice exists in France, with a real Constitutional Court that ensures Constitutional supremacy. idem.

be superfluous, given that this emanation of the sovereign people was considered as sovereign law.[63] However, the Constitutional Council for its system of naming its members, as well as its behaviour and techniques utilized, looked evermore like the Constitutional Court.[64] In 1990 and 1993, some legal reforms were effected with the view of establishing control mechanisms very similar to the Spanish question of unconstitutionality. These mechanisms did not prosper in the long-term.[65]

Ordinary Judge as Constitutional Judge

The French ordinary jurisdiction is comprised of numerous courts, in the first and second instance, which rule on the basis of their own power. This is cause which occupies the vertex of the ordinary jurisdiction, verifying legal questions and establishing the correct interpretation of the applicable laws. Given the power to identify errors and forward judges their subordinates, the ordinary courts are identified as the guardian. In France, it was not until the Constitution of 58, that the judicial branch of government is mentioned.[66] From this moment on, the status of the judge is defined and the Constitutional Council is instituted. De Gaulle is the principal actor that perceived the creation of a guardian that could monitor respect for constitutional principles by public powers.[67]

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[63]"(…) France has suffered, since 1789, great constitutional instability that has only been compensated by the existence of a professional civil service that has kept state observation above seizures occurring at the apex of the legal system, in government and for Head of state. French instability has been explained in many ways, but what is clear is that constitutions from the revolutionary period in a strict sense, the Napoleonic, monarchical and republican, came and went. Some of them have had great significance and not only in the history of constitutional law. In this regard, it should be noted that: a. the Constitution came into effect on September 3, 1791, led by the Declaration of Human rights in 1789. b. In 1793 a constitution was approved but because of war it did not take effect, it later went on to become the classic example of conventional constitutionalism assembly (or, if you will, ultra-democrátic). c. Year III Constitution or directorial, marked by conservatism and excessive preoccupation with principles of division of power, also coins a model that will become a classic form of government for a considerable part of the doctrine". Cfr.Tenorio SÁnchez, Pedro J., Introducción al Derecho Constitucional Comparado, Universidad Complutense, Madrid, 1998, p. 95.

[64]In France, judicial review is primarily abstract and*a priori*, and only after the constitutional reform of 2008 does it gain concrete control a posteriori.

[65]TENORIO SÁNCHEZ, PEDRO J., ob. cit., p. 107.

[66]The French judiciary has a temporal origin that dates back in history. The division of the Republic s in the first few years begins between administrative officials and the judiciary which later joins the top two institutions, which up to date are represented by the Supreme Court and the State Council, which in 1872 added a Tribunal court to settle conflicts, in order to settle disputes between ordinary and special judges.

[67]Constitutional Council jurisprudence has given constitutional status to principles of independence from administrative courts, from the time that the Council had concluded that neither Government nor legislators can censor their sentences, give indications or replace processes. Litigation judges constitute a separate order. Despite reforms, their status does not seem to coincide with ordinary courts, being more tied to the executive branch. Despite the creation of the Administrative Supreme Court Council and the Courts of Appeals in 1987. However, it is the State Council that by tradition and authority plays a more important role, both in jurisdiction and in advisory activity for the Government. However not having been established the principle of tenure for administrative judges, the French State Council shows a high degree of government autonomy.

With the implementation of a "concrete judicial review" of law through the primary ruling of constitutionality the possibility for coexistence between the judiciaries is opened. The ordinary judge[68] whatever his or her position within the hierarchy of the Court, can present doubts about constitutionality to the State Council or the Lower Court. At the same time it requires the Constitutional Council to rule with respect to the laws that affect rights and liberties guaranteed by the constitution.[69]

Judicial Review in Portugal

Constitutional justice in Portugal was born with the Constitution of 1976,[70] but would reach its true characteristics and profiles during the Constitutional Reform of 1982.[71] In light of this Reform, the Portuguese Constitutional Court[72] was formed.

[68]Determination of whether norms are Constitutional or not, because of how they affect rights and freedoms guaranteed by the Supreme Law of the land, acts as a true constitutional judge. Therefore, ordinary judges, the State Council and the Court of Cassation are bodies authorized to carry out constitutionality control processes. However, they cannot declare laws unconstitutional, since that is a sole and exclusive authority of the Constitutional Council.

[69]With regard to these rights, and regarding priority issues, coexistence between the two judiciaries can be seen as interaction between them. As with other control systems, such as Spain, Italy and Germany, this coexistence is anything but peaceful, rather it is controversial. While the constitutional reform of 2008 established a double filter for the priority issue of constitutionality (the pending judge, the State Council and the Court of Cassation), the two supreme ordinary judges could develop their own constitutional interpretation, which will not necessarily be in line with that of the Constitutional Council. This could certainly lead to tensions between ordinary courts and the constitutional judiciary. There would have to be a lot of vigilance regarding the jurisprudence on the subject, both by the State Council and the Court of Cassation, and of course to that established by the constitutional judiciary in the hands of the Constitutional Council, regarding priority constitutionality issues.

[70]However, the historical origin of the Constitutional Court dates back seventy years. Indeed, with the passage of constitutional monarchy to a republic, the principle of judicial review was for the first time in Portuguese Constitutional law established in Article 63 of the 1911 Constitution, which in effect stated: "The Judicial Branch, in the event that with motives and facts submitted to a case, any of the parties challenge the validity of laws, or diplomas issued by the executive branch or corporations with public authority, which have been invoked, will appreciate constitutional legitimacy according to the Constitution and principles set forth in it."

[71]As an antecedent to the Constitutional Court is the Constitutional Commission. This was composed of jurists who elaborated mandatory reports to the Revolutionary Council in all matters relating to constitutional issues. It played an important role in ensuring control, concentrated on constitutional norms in Portugal.

[72]The reason why a Constitutional Court was introduced in Portugal coincides with the reason that determined the same option in Italy in the late 40s. This was a new constitution based on traditional democratic constitutionalism principles, but incorporating various different ideological contributions, with even more contrasts, by venture, than the contributions that led to the 1948 Italian Constitution. The Constitution imposed the need for a body that would guarantee compliance and enforcement of its laws and principles. Moreira Cardoso da Costa, José Manuel,

Adopting a model of constitutional justice with particular[73] mixed character, this judicial model possesses elements of a concentrated model of Kelsenian type and of the diffused North American model.[74] In accordance with Article 221 of the Constitution, the Constitutional Court has the specific power to administer justice in legal and constitutional issues. It is responsible for preventive judicial review as well as abstract judicial review; and in some cases legality, either by action or omission. In "concrete control" the judges of the Constitutional Court review in constitutional matters the decisions of ordinary courts as a last resort.[75]

But in Portugal, all courts have constitutional power, given that they are competent to apply the Constitution in order to disapply unconstitutional laws.[76] This means that the last word is not always with the Constitutional Court. There are cases in which the last ruling of ordinary courts is distinct from the Supreme Court decisions.[77] It must be added that the fact that the power of the Court is only case-related, when deciding a question of unconstitutionality, in a manner different

(Footnote 72 continued)

"Tópicos sobre competencias e integración del Tribunal Constitucional de Portugal", en Ius et Praxis, Vol. 8 Nº 1, 2002, p. 327.

[73]A mixed system was opted for, basically for two main reasons of a historical character. The diffuse oversight system had a history in Portugal, as opposed to what is habitual in southern European countries. Portugal was the first country in Europe to integrate the diffuse oversight system in 1911 with the first republican constitution, influenced by the Brazilian Constitution of 1891, which had been influenced in turn by the US. The second reason for not removing this responsibility from judges is due to the fact that ordinary judges should reject the application of unconstitutional law. Nunes de Almeida, Luis Manuel Cesar, "Los ámbitos y formas de Control Constitucional por el Tribunal Constitucional en Portugal", en Ius et Praxis, Vol. 8 Nº 1, 2002, p. 334.

[74]RODRÍGUEZ CANOTLIHO, MARIANA, "El Sistema Constitucional de Portugal", en *Revista de Derecho Constitucional Europeo*, AÑO 7; Nº 14, 2010, p. 122.

[75]The Portuguese constitutional doctrine, since its inception, has clearly distinguished between constitutional law and ordinary law, and the supremacy of the former over the latter. However, such a distinction and corresponding constitutional norm primacy were not always clear to the legal thinking of early nineteenth century Europeans along the constitutional line. However, Portuguese literature of the period showed awareness, which can be seen in constitutional monarchist texts themselves, in particular the Constitutional Charter of 1826, which was the base text in the mid-nineteenth century from which the Parliamentary Monarchy was structured. Moreira Cardoso da Costa, José Manuel, "El Tribunal Constitucional Portugués: Origen Histórico", en Revista Estudios Políticos Nueva Época, Nºs 60–61, 1988, Centro Estudios Políticos y Constitucionales, Madrid, p. 832. pp. 831–840; Nunes de Almeida, L. M., ob. cit. pp. 333–336.

[76]See, among others, MOREIRA CARDOSO DA COSTA, J., "El Tribunal Constitucional…", cit. pp. 831 ss. Del mismo autor; "Tópicos sobre competencia e integración del Tribunal Constitucional de Portugal", en *Ius et Praxis*, Vol. 8 Nº 1, Talca, 2002. RODRÍGUEZ CANOTLIHO, M., ob. cit.; NUNES DE ALMEIDA, LUIS, "El Tribunal Constitucional y el contenido, vinculatoriedad y efectos de sus decisiones", en *Revista de Estudios Políticos, Nueva Época, Centro de Estudios Políticos y Constitucionales*, Nºs 60–61, Madrid, 1988.

[77]FERREIRA DA CUNHA, PAULO, *Direito Constitucional Anotado*, Quid Juris Sociedad Editora, Lisboa, 2008, p. 447 ss.

than that which has decided the Supreme Court. This process returns again to the latter, so that it reformulates its earlier decision, and in many cases this reformulation is purely formal, maintaining the previous ruling.[78]

Ordinary Judge as Constitutional Judge

Under the constitutional justice model designed by the Constitution of 1976, modified in 1982, in contrast to other systems, ordinary courts directly apply the Constitution. According to Article 204, "In the questions stated to courts of first instance, they cannot apply laws that contradict the Constitution or the principles contained within it." The Courts have full jurisdiction to rule and decide on cases that are related to the interpretation and application of constitutional norms.[79] In other words, questions of constitutionality posed in the case of *sub lite* are decided by ordinary judges, who act as real constitutional judges.[80] However, their decisions can be appealed in the Constitutional Court, in compliance with budgeting process.

Definitively, it is the Court that decides as a last recourse in cases of suppression of laws based on unconstitutionality or illegality.[81] Thus, in the category of "concrete control" constitutional judges ultimately decide the application of the ordinary courts in constitutional material.[82] Fundamentally, this system could qualify as "diffused", but concentrated on the "cusp".[83] The existence of a concentrated model would mean two different and separate judiciaries, with different parameters of applying the law. Ordinary courts would apply the legislative orders, and the Court would apply the Constitution.[84] Under this mixed model, the

[78]The case again returns to the Constitutional Court, since there is always the possibility of new appeals based on res judicata violations, given that the decision of the Court in constitutional matters produce res judicata effect.

[79]TONIATTI, ROBERTO Y MAGRASSI, MATTIA, *Magistratura, giurisdizione ed equilibri istituzionali. Dinamiche e Confronti Europei e Comparati*, Casa Editrice Dott. Antonio Milani, 2011.

[80]FERREIRA DA CUNHA, P., ob. cit. p. 521 ss.

[81]"(…) In the Portuguese system, the Constitutional Court appreciates the decisions taken by the ordinary courts concerning constitutionality issues. This can be explained because the institution of autonomous constitutional justice found that the principle of giving courts direct authority to matters related to the Constitution was sacred in Portuguese law, competing consequently and depriving them from setting new constitutionality standards and refusing the application of norms that deemed them unconstitutional. The creation of the Constitutional Court does not, break that tradition, but on the contrary, results in coronation". Moreira Cardoso da Costa, J., "El Tribunal Constitucional…", cit., p. 840.

[82]The appeal is decided by a Court Chamber, not by the House. Each room is composed of five judges. For this reason, decisions made in concrete control have inter partes effect and not erga omnes. However, if the Court declares a norm unconstitutional in three specific cases, the public prosecutor or representative thereof may request the Constitutional Court to declare the ruling unconstitutional, generally binding, with the erga omnes effect through an abstract control procedure and short called "generalization". Thereupon, when a question of constitutionality is raised in front of an ordinary court, it is always possible, and in some cases it is mandatory that an appeal be made to the Constitutional Court. Nunes de Almeida, L. M., ob. cit. p. 335.

[83]In this regard, see, NUNES DE ALMEIDA, L. M., ob. cit.; RODRÍGUEZ CANOTLIHO, M., ob. cit.; MOREIRA CARDOSO DA COSTA, J., ob. cit.

[84]NUNES DE ALMEIDA, L. M., ob. cit. p. 334.