

# Michigan Law Review

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Volume 70 | Issue 5

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1972

## Cappellitti: Judicial Review in the Contemporary World

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### Recommended Citation

Paul G. Kauper, *Cappellitti: Judicial Review in the Contemporary World*, 70 MICH. L. REV. 987 (1972).

Available at: <https://repository.law.umich.edu/mlr/vol70/iss5/7>

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## RECENT BOOKS

### BOOK REVIEWS

JUDICIAL REVIEW IN THE CONTEMPORARY WORLD. By *Mauro Cappelletti*. Indianapolis: Bobbs-Merrill. 1971. Pp. xv, 117. \$8.50. Student edition \$4.50.

The period following World War II may well be recorded in history as one of the great epochs in the development of constitutionalism and the rule of law. Three phenomena may be singled out as central to this development: (1) an extraordinary ferment and productivity in the drafting and adoption of new written constitutions; (2) the recognition that a statement of fundamental rights is basic to the constitutional order; and (3) a growing acceptance of judicial review premised on the assumption that judicial control of the constitutional order is necessary in order to preserve the integrity of the order and assure protection of fundamental rights. This projection of judicial review into a new position of eminence and acceptability has ignited Professor Cappelletti's interest. In this slender but meaty and instructive volume, he gives us the distillate of his wide and thorough scholarship in this area.

It may be surprising that in a book of little more than a hundred pages of text an author would attempt the kind of synoptic survey of judicial review that Professor Cappelletti undertakes in this volume.<sup>1</sup> Only a person with the author's intellectual resources could do this. Professor Cappelletti, who is a professor of law both at Stanford University and at the University of Florence and also Director of the Institute of Comparative Law at the latter institution, has the linguistic facilities that have made him knowledgeable with respect to the constitutional systems of a number of countries. This store of knowledge includes a perceptive understanding of the constitutional system of the United States and the role of judicial review in the operation of that system.

The function of judicial review in maintaining constitutional control and the institutional forms and procedures by which review

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1. For an earlier treatment of judicial review in its comparative aspects, see the excellent, comprehensive article by Professor W.K. Geck of the Law Faculty of the University of the Saarland, *Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices*, 51 CORNELL L.Q. 250 (1966). This article drew for some of its sources on the compendious survey entitled VERFASSUNGSGERICHTSBARKEIT (CONSTITUTIONAL REVIEW IN THE WORLD TODAY) (Carl Heymanns Verlag K.G., Köln-Berlin 1962), published under the auspices of the Max Planck Institute for Foreign Public Law and International Law of Heidelberg and based on the national reports submitted to the Colloquium held on this subject at the Institute in 1961. See Professor Geck's review of this very useful and important volume in 13 AM. J. COMP. L. 644 (1964). See also E. McWHINNEY, JUDICIAL REVIEW (4th ed. 1969), which is a comparative treatment of the subject but is concerned principally with English-speaking countries.

is made effective furnish the focus of Professor Cappelletti's interest. His basic approach is well stated in the closing paragraph of his preface:

*Constitutions* express the "positivization" of higher values; *judicial review* is the method for rendering these values effective; and the *comparative method* is the instrument of the movement towards harmonization and of the search for internationally acceptable values. These three are essentially linked together and form an integral part of the new direction in modern jurisprudence. [P. x.]

In the first chapter, the author recognizes that judicial review is only one method of attaining what he calls "constitutional justice." Some countries depend upon political control, whether through the normal operation of a constitutional system or by explicit devices for review of legislation through political organs, as a means of constitutional control of laws. The review by the Constitutional Council, which was created by the French Constitution of 1958, of a legislative enactment or an international treaty is essentially a political control: the Council's assigned function and its behavior in exercising this function indicate that it does not function in a judicial capacity. Its control is one stage in the whole legislative process. In Italy, political control over constitutionality is exercised by the President although judicial control is also exercised by the Italian Constitutional Court. In the Soviet Union, the function of reviewing the constitutionality of laws and decrees is vested entirely in the major policy-determining organs that enact these measures.

Just as the possibilities and means of political control over state action are varied, so the possibility of judicial control is varied too. In countries where the courts do not presume to pass on the validity of legislation, they may achieve a form of control of constitutionality by interpreting statutes; by subjecting administrative acts to careful control; and by providing a special form of relief such as habeas corpus in England, the *juicio de amparo* in Mexico, and the constitutional complaint in Switzerland, Austria, and Germany for individuals who wish to complain of violation of "fundamental rights." One instance of such control is the Conseil d'État in France. This body has emerged as a court of constitutional review, at least with respect to all administrative actions, and employs rather broad norms to pass upon the validity of these actions.

Asking why some countries such as France and Soviet Russia have repudiated judicial control of constitutionality, the author points out that in the case of France this policy is a continuation of a long tradition based on a strict conception of separation of powers and an aversion to the exercise of any kind of authority by the courts that might seem to be legislative in character. In Russia, by contrast, the absence of judicial review stems from a complete

rejection of the separation of powers principle and a commitment to a philosophy of government that places the entire control of the state in the political organs.

In reviewing the historical antecedents of judicial review, particularly the stream of thinking that eventually found expression in the American conception of the Constitution as fundamental law and the authoritative role of the judiciary in interpreting that law, the author traces the evolution of the higher law concept from its roots in classical antiquity, through its formulation as "natural law" in medieval thinking, and as "the fundamental laws of the realm" asserted by French *Parlements* of the *ancien régime* as against the French sovereign, to the equating of the common law with fundamental law in the English judicial tradition. Although in the end parliamentary supremacy prevailed in England, the tradition of a body of principles superior even to statutory law and a profound regard for the judiciary and its independence, together with the experience during colonial days when judges disregarded local legislation not in conformity with the English law, contributed mightily to the formulation of constitutional ideas that eventually led to a doctrine of judicial review which found its classic expression in Chief Justice Marshall's opinion in *Marbury v. Madison*.<sup>2</sup> The author concludes then that judicial review is the result of an evolutionary pattern common to much of the West, in both civil- and common-law countries.

In concluding his review of historical antecedents, Professor Capelletti notes that our own times have seen the burgeoning of "constitutional justice," which combines the form of legal justice and the substance of natural justice, and that many modern states have asserted higher law principles through written constitutions, thus achieving a synthesis of three separate concepts: "the supremacy of certain higher principles, the need to put even the higher law in written form, and the employment of the judiciary as a tool for enforcing the constitution against ordinary legislation" (p. 42). Although this union of concepts first occurred in the United States, many now regard it as essential to the rule of law.

In the last three chapters, the author draws upon his intimate knowledge of contemporary developments to speak about modern systems of judicial review. He deals successively with the organs of judicial control, the process of control, and the effects of control. These chapters constitute probably the most instructive and illuminating parts of his book. In discussing the organs of control, he uses the term "centralized review" to refer to the system whereby special courts are set up—as in Austria, West Germany, Italy, Cyprus, and Yugoslavia—for the purpose of passing on constitutional

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2. 5 U.S. (1 Cranch) 137 (1803).

questions. Even though incidental or decentralized review by the regular courts in the ordinary course of litigation is not completely excluded in these systems, the emphasis is upon the unique function of the constitutional court. In contrast, the American pattern of judicial review followed in a number of other systems relies on "decentralized review" in the sense that ordinary courts have authority to deal with constitutional questions as a necessary incident to their power to decide concrete cases and controversies. The author succinctly and interestingly discusses the rationale behind the two different types of review. Decentralized review is the natural and inevitable product of the reasoning employed by Marshall in *Marbury* to justify a court's duty and authority to disregard statutory enactments found to be in conflict with the higher law embodied in the Constitution. Even though this system of review theoretically is limited to holding that a statute found unconstitutional is not relevant to the disposition of the case before the court and is therefore binding only on the parties to the case, the practical effect of such a decision when combined with the doctrine of stare decisis is to make the statute unenforceable generally. In a system of centralized review, the whole focus is on the statute and the effect of finding the statute invalid is to annul it completely.

Turning to the question why some civil-law countries have adopted a system of centralized judicial review as the primary means of constitutional control, the author points out that this kind of review rests on a totally different doctrine of separation of powers from that upon which decentralized review is founded. The act of reviewing legislation is viewed as a political rather than an ordinary judicial function: a tribunal created to discharge this function should be distinguished from an ordinary court. The manner prescribed by the various constitutions for appointment of the members of these special constitutional courts and the responsibility of such courts to decide questions that American courts would usually shy away from as "political questions" emphasize the recognition of the political character of this type of judicial review. Moreover, the centralized system, with its emphasis on the examination of the statute and its power to annul the statute, reflects the absence of the principle of stare decisis in civil-law jurisdictions and also reflects the unsuitability of traditional civil-law courts for judicial review. In this connection, the author makes the point that judges trained in the civil service to deal primarily with questions of private law do not adapt well to the function of passing on constitutional questions.<sup>3</sup>

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3. [T]he bulk of Europe's judiciary seems psychologically incapable of the value-oriented, quasi-political functions involved in judicial review. It should be borne in mind that continental judges usually are "career judges," who enter the judi-

The distinction between centralized and decentralized review is reflected not only in the kind of organ used as the vehicle for judicial review but also in the processes employed by the tribunal. Again decentralized review, centering on the jurisdiction of ordinary courts to deal with constitutional questions as incident to the disposition of a concrete case, gives a pre-eminent place to private parties as the initiators of constitutional issues. Who is a proper party in interest to raise the issue and whether a given proceeding before the court is a genuine case or controversy are questions that play a significant role in constitutional litigation in decentralized systems. The system of centralized review, on the other hand, since it views the constitutional court as essentially a quasi-political body, gives a much more prominent role to public organs as the appropriate parties for raising constitutional issues. Indeed, some types of proceedings authorized by constitution or statute to be brought before special constitutional courts would strike the American lawyer or judge as the equivalent of advisory opinion proceedings.

In the final chapter, the author discusses the effects of control and the differences again arising from the theory of centralized control on the one hand and what he calls decentralized control on the other. Under the centralized control theory, the court's decision upon finding a statute unconstitutional has the same effect as a legislative repeal of the statute. It is a decision directed against the statute itself, whereas under the theory of decentralized or incidental review the court's decision concerns only the parties before the court and technically does not affect the statute except to make it unenforceable, although as a result of the doctrine of *stare decisis* it may well have the effect of making the statute a dead letter. The two types of review also point to possibly different results on the question of the effect of a decision in terms of its retroactivity. Since a special constitutional court's annulment of a statute is in substance a super-legislative act, it operates like the repeal of a statute to deny it any future effect. On the other hand, the finding in a decentralized judicial review process that a statute is unenforceable theoretically denies the validity of the statute from its inception, although in practice courts have substantially limited the retroactive consequences of such a decision. Indeed, in recent years, the United States

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ciary at a very early age and are promoted to the higher courts largely on the basis of seniority. Their professional training develops skills in technical rather than policy-oriented application of statutes. The exercise of judicial review, however, is rather different from the usual judicial function of applying the law. Modern constitutions do not limit themselves to a fixed definition of what the law is, but contain broad programs for future action. Therefore the task of fulfilling the constitution often demands a higher sense of discretion than the task of interpreting ordinary statutes; that is certainly one reason why Kelsen, Calamandrei, and others have considered it to be a legislative rather than a purely judicial activity. [Pp. 62-63.]

Supreme Court has limited the retroactive consequences of decisions that announced new interpretations of the Constitution, particularly when their effect was to overrule prior decisions.

It is evident that each of the two systems of review has its advantages and disadvantages: Professor Cappelletti makes no attempt to make out a case for one or the other, although it is evident that he admires the American system of review and the contribution it has made to constitutionalism. It may well be too that the differences between the two systems of review are not really as great as they appear on paper and that forces are at work manifesting some convergence, both in basic conceptions and in the processes employed. These forces are particularly evident in the United States. Judging by the kinds of cases it elects to review, the United States Supreme Court regards itself in increasing measure as a central court of constitutional review. To suggest that the disposition of constitutional issues is simply incident to the determination of cases turning principally on other questions is something of a fiction, since a major part of litigation is instituted for the very purpose of raising constitutional issues. Moreover, the dilution of the case or controversy limitations by the common use of declaratory proceedings and, even more remarkably, by the wholesale erosion now taking place in the party-in-interest concept, by the free use of class suits, and by the relatively easy invocation of federal judicial authority to test the constitutionality not only of statutes and regulations but of threatened or prospective action suggest that the courts, with the blessing of the Supreme Court, are very hospitable to litigation directed wholly to constitutional ends and are ready to remove or bypass obstacles once thought to be associated with the decentralized or incidental type of review.

We are indebted to Professor Cappelletti for this highly illuminating and perceptive portrayal of judicial review in its contemporary aspects. A distinctive value of this book is that it reveals the many-faceted aspect of judicial review and the organs and processes for its implementation. An accurate appraisal of distinctions and differences is the beginning of wisdom in the use of terms and the evaluation of the institutions under review. Any comparative study is useful if for no other reason than that it forces critical analysis of accepted institutions and the procedures and assumptions underlying them. It may also suggest points of unity and convergence that promise a harmonization with mutually beneficial consequences. Professor Cappelletti's book is immensely useful in both respects. It is good that the publishers have issued the book in a less expensive student edition. This is a volume heartily recommended for teacher and students alike. While indispensable to those engaged in com-

parative study, it is the kind of book which if not prescribed should at least be highly recommended in any course in constitutional law.

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