

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 fundamentals 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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