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Chapter 4
To Be, or Not to Be, That Is the Question. The Process of Unconstitutionality like an Abstract Judicial Review at the Peruvian Constitution

Carlos Hakansson

Abstract The object of this paper is to present a general view of the "process of unconstitutionality", a way to declare the judicial review at the Peruvian constitutional system. This paper contains an explanation of the Peruvian judicial review, and a description of the origin and the main characteristics of the process of unconstitutionality.

The real importance of the Constitution in a democratic society makes sense when there are mechanisms and guarantees dedicated to controlling the actions or policies that violate the content of its provisions. In this paper, we will discuss the constitutional jurisdiction systems which includes the Charter of 1993. The first of these was the American model, also known as judicial review of the constitutionality of laws, was not expressly provided by the parents of the Charter of 1787 but a product of the judicial interpretation. The second system was born in continental Europe and was marked by the emergence of specialized courts to hear and decide the constitutionality control processes. As mentioned, the Peruvian Constitutional Law includes both systems from the Charter of 1979 (García Belaunde 1997, 837).

Since the nineteenth century Latin American constitutions received US influence providing interesting innovations. Some of these examples are Mexico, Brazil, Colombia, Venezuela and Argentina. The Peruvian government, however, waited until the twentieth century to establish a control system of constitutional jurisdiction, collected the Civil Code of 1936, but it was the Constitution of 1979 which included both judicial review of the constitutionality of laws and the control by a Constitutional Court (Maddex 1995, 215–218).

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4.1 The Judicial Review like a Contribution of the United States Judiciary

The historical foundations of judicial review of the constitutionality of laws came from England, by Judge Coke in Dr. Bonham's case (1610). American jurists of the late eighteenth century, led by Hamilton, Madison and Jay, were present the proposals of the Judge Coke and conceived the notion of Constitution as a right of a higher nature.

The judicial review is an important doctrine to control the government powers. If British or American citizens are thrown into prison without cause, they can appeal to the courts of their respective countries for protection; but a British judge may not declare a law duly enacted by Parliament null and void because the judge believes it violates the British constitution spirit; Parliament is the guardian of the British constitution by the historic sovereignty of the parliament since the Glorious Revolution (1688). In the other hand, in the United States it is the courts, ultimately the Supreme Court, that are the real keepers of the constitutional conscience. The top institution to understand and interpret the real meaning in any judicial case, it's not Congress, even not the Federal President.

To this day, the text of the American Constitution of 1787 still says nothing about who should have the final word in disputes that might arise over its interpretation (Burns et al. 1998, 28). The judges won the right to make the judicial review about legal norms.

The Federalist—those who wrote the Constitution and controlled the national government until 1801—generally supported a strong role for federal courts and favored the judicial review; but their opponents, the Jeffersonian Republicans,[1] were less enthusiastic about that strong competence to the courts. In 1798 and 1799 Jefferson and Madison, with the Virginia and Kentucky Resolutions, came close to the position that the state legislature—and not the Supreme Court—had the ultimate power to interpret the Constitution. This resolution seemed to question whether the Supreme Court even had the final authority to review state legislation.

When the Jeffersonians won the Federalists in the election of 1800, it was still undecided whether the Supreme Court would actually exercise the power of judicial review; but we know that the life of the Law has not logic, always has been experience (Holmes and Oliver 2011, 5), then appeared Marbury versus Madison (1803), one of the best Supreme Court decisions of all time, known in all law schools worldwide.

The case Marbury versus Madison (1803) is a masterpiece of judicial strategy. Marshall went out of his way to declare Section 13 unconstitutional (Judiciary act of 1789). He could have interpreted the section to mean that the Supreme Court could issue writs of mandamus in those cases in which it did have jurisdiction. He could have interpreted article III to mean that Congress could add to the original

[1]Called democrats after 1801.

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4.1.1 *About the Importance of*

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jurisdiction the Constitution gives to the Supreme Court. He could have dismissed the case for want of jurisdiction without discussing Marbury's right to his commission. But none of these would have suited his purpose. Marshall was fearful for the Supreme Court's future; unless the Court spoke out, he reasoned, it would become subordinate to the Federal president and Congress (Burns et al. 1998, 30).

The article III of the American constitution does not explicitly give the courts the power of judicial review, the authority to invalidate congressional or presidential actions. That power has been inferred from the logic, structure, and theory of the Constitution of 1787 (Janda et al. 1992, 88). The Judge Marshall expanded the potential power of the Supreme Court to equal or exceed that of the other branches of government. Should a congressional act or, by implication, a presidential act conflict with the Constitution, the Supreme Court claimed the power to declare the act void. In consequence, the judiciary would be a check on the legislative and executive branches, consistent with the principle of checks and balances embedded in the Constitution. Although Congress and the Federal president may wrestle with the constitutionality of their actions, judicial review gave the Supreme Court the final word on the meaning of the Constitution.

The exercise of judicial review appears to run counter to democratic theory. In more than two hundred years of practice, however, the Supreme Court has invalidated fewer than 140 provisions of Federal law, and only a small number have had great significance for the political system. Moreover, there are mechanisms to override judicial review (constitutional amendment) and to control the action of the justices—impeachment—if they use this competence with some excess (Janda et al. 1992, 492).

The modern constitutions in the European continent and Latin America, like the Peruvian of 1979, antecedent of the Charter of 1993, was the first to recognize the judicial review in two ways; the first one with a constitutional guarantee of protection (called Amparo) at the courts, and the second with the process of unconstitutionality at the Constitutional court.

4.1.1 About the Importance of the Supremacy Clause

An important component of the American Constitution is the article VI: the supremacy clause. The Charter of 1787 asserts that the Constitution, national laws, and treaties take precedence over state and local laws. This stipulation is vital to the operation of the federal system. In keeping with the supremacy clause, the same article VI also requires that all national and state officials elected or appointed, take an oath to support the Constitution. The article also mandates that religion cannot be qualification for holding government office (Janda et al. 1992, 89). Today, the European and Latin American constitutions declare the supremacy clause but under a positivist understanding, like a charter with a position on the top of the national legislation in order to statist conception about Law and around the sovereignty concept.

The sovereignty became the distinctive stamp and essential purpose of every State, and it came to constitute an entire system of plenary powers within States' respective territories, enclosed by borders, and with a political constitution as a birth certificate. In sum, sovereignty is maximal concentration of power; it is the inherent quality of a state that confers supreme authority within its territory as well as control of its legal system, and makes it a subject of international law.

The concept of sovereignty does not belong to constitutional theory but to the State.[2] Its classical and original meaning, 'maximal concentration of power,' is not identified with the original postulates of constitutionalism: limitation of power, as well as respect for rights and freedoms, in spite of the fact that constitutions in the European continental and Kelsenian moulds assume this without discussion, by attributing it to the people rather than the state. From a realist point of view, this may be a fallacy if we consider that in practise we citizens do not have effective absolute power to make government decisions once new authorities are elected (Hakansson 2009, 239–240).

4.2 The Judicial Review at the Peruvian Constitution

The texts of the earlier Peruvian constitutions (nineteenth and twentieth centuries) were principally influenced by French and Spanish models, while the current constitution enhances the authority of the Executive. The antecedents of the Peruvian constitution starts in 1992, when President Alberto Fujimori seized extra constitutional power in self coup d'etat; later in the year a democratic constituent congress was elected to draft a new constitution, which was approved by referendum on October 31, 1993. Fifty-three percent of the voters approved it, but the narrow margin of the vote—Lima voters, who historically represent an elite class, voted sixty to forty percent for the new constitution while fourteen of the nation's twenty-four provinces opposed it—casts doubts on any consensus for the new plan of government.

The general characteristics of the Constitution of 1993 are these: a presidencialism form of government with parlamentarism institutions of parliamentary control, direct enforceability, rigid constitution, constitutional guarantees and a constitutional court with the judicial review.

[2]Today, in an era of globalisation, the sovereignty principle has come into question as a viable concept in a period of change in which communication, commerce, and daily life are becoming more and more interdependent. In other words, the exclusivism of a nation-state now confronts the social and cultural pluralism that an increasingly global world demands. The second half of the twentieth century was also distinguished by the various declarations of human rights and, among other events, by the birth of the European Union, which questioned the classical arguments of sovereignty, because the law of integration does not permit the hegemony of any one State but rather demands institutional and collective decision-making.

The Peruvian constitution creates resort, but the decisions of the nat those of the Council of Magistracy not be reviewed. The article 144 of of the Supreme Court is head of the highest organ of deliberation.[3]

On Constitutional Guarantees, th specific rights, including the right o the article 201 establishes a Consti tion", inspired in the Spanish Con Peruvian Constitutional court consi vote of the legislation for five years the "right of unconstitutionality", de and conflicts over powers assigned

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(a) The courts or constitutional co Ecuador, Spain, Guatemala, Pe
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(c) The specialized courts on cons judiciary (El Salvador, Costa R
(d) The ordinary courts or supre Constitutional Court, but no Mexico, Panama and Uruguay)

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4.2.1 *The Process of Unco*

The constitutional process is not a effect and that may be affecting the 45–71). On the other hand, it is a p for example, the President of the R Attorney General against the Legis and the last but don't least, citizens

[3]The article 149 provides that "authorities of the peasant patrols, may exercise jur with common law, provided they do not

resort, but the decisions of the national election board concerning elections and those of the Council of Magistracy on evaluation and confirmation of judges may not be reviewed. The article 144 of the Constitution provides that the chief justice of the Supreme Court is head of the judicial branch and that Supreme Court is the highest organ of deliberation.[3]

On Constitutional Guarantees, the article 200, Section 5, sets forth a number of specific rights, including the right of habeas corpus and of unconstitutionality, and the article 201 establishes a Constitutional court "that watches over the constitution", inspired in the Spanish Constitutional Court at the Charter of 1978. The Peruvian Constitutional court consists of seven members elected by a two-thirds vote of the legislation for five years term. It hears cases, without appeal, involving the "right of unconstitutionality", decisions denying habeas corpus and other rights, and conflicts over powers assigned by the Peruvian constitution of 1993.

The Peruvian Constitutional Court is located in one of the four types of bodies responsible for monitoring the constitutionality of rules (Ferrer 2002, 27–28).

(a) The courts or constitutional courts located outside the ordinary court (Chile, Ecuador, Spain, Guatemala, Peru and Portugal).
(b) The courts or autonomous but located in the same structure of the judiciary (Bolivia and Colombia).
(c) The specialized courts on constitutional matters of the supreme courts of the judiciary (El Salvador, Costa Rica, Nicaragua, Paraguay and Venezuela).
(d) The ordinary courts or supreme courts that perform the functions of the Constitutional Court, but not exclusively (Argentina, Brazil, Honduras, Mexico, Panama and Uruguay).

After finding the location of the Peruvian Constitutional Court in this classification, it should be added that this is the second attempt to establish an institution concentrated control of constitutionality.

4.2.1 The Process of Unconstitutionality

The constitutional process is not abstract. First, we have enacted law which takes effect and that may be affecting the fundamental rights of citizens (Eguiguren 2002, 45–71). On the other hand, it is a process with very specific and powerful litigants; for example, the President of the Republic against the Congress, or vice versa, the Attorney General against the Legislature, the Ombudsman versus the government; and the last but don't least, citizens against the Regional Government. Therefore, in

[3]The article 149 provides that "authorities of the peasant and native communities, with the support of the peasant patrols, may exercise jurisdictional functions within their territory in accordance with common law, provided they do not violate the fundamental rights of the individual".

order to consider a process of abstract nature it must be an exercise of prior control of constitutionality, something more like what happens to the Colombian Constitutional Court, in the context of the separation of functions, promote effective collaboration between powers.[4]

4.2.2 An Open List by a Constitutional Interpretation

The jurisprudence of the Constitutional Court says that the process of unconstitutionality is not limited to the list in Article 200, Section 4, of the Constitution (laws, legislative decrees, emergency decrees, treaties, Congress regulations, Regional rules and Mayor rules). The Court understands that they can perform control of the pre-constitutional laws, the constitutional reform laws, the coup governments decrets and others, like an open list (Carpio 2005, 127–131).

4.2.3 Who Are the Entitled to the Process of Unconstitutionality?

The article 203 provides that the President of the Republic, Prosecutor general, *Ombudman*, twenty-five percent of the legislature, five thousand citizens, regional governors and professional associations, in their sphere of activity, are entitled to "file for the process of unconstitutionality".

The theory of separation of powers is clear in stating that the functions of power are not divided as watertight compartments; in fact, we can distinguish a more or less clear separation between the legislative and executive functions. Power functions can cooperate and avoid crash each other when there is no agreement.

[4]The Colombian Constitutional Court explains the features of your control claiming that "(...) is a judicial review, the Court because it is forbidden to study the advisability and the appropriateness of a legal rule. Its judgments are right from the confrontation of a bill with all of the Constitution; is an automatic control, because not required to start filing a claim of unconstitutionality, as well as expressly stated in the Constitution in Articles 153 and 241-8; it is integral, since in accordance with paragraph 8 of Article 241 of the Superior Court must consider the draft statutory law" both for their substantive content as for errors of procedure in their form. "In such a way that the constitutional court must confront the materiality of the bill with all of the Constitution; and also analyze whether it was submitted or a vice of a procedural nature in their training; It is definitive, because according to the provisions of Article 241-8 Superior Court corresponds to the final decision on the constitutionality of proposed statutory bills; It is also participatory, inasmuch as Articles 153 paragraph 2 and 242 paragraph 1, any citizen may intervene in the constitutional process in order to defend or challenge the constitutionality of the bill; is a prior constitutional control, by virtue of Article 153 of the Constitution, which states that the procedure will include the prior review by the Constitutional Court, the constitutionality of the project"; cfr. Judicial decision of the Colombian Constitutional Court No. C-523/05.

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In the presidential system, when the executive vetoes a bill it must return to Congress for further discussion; if a majority of MPs do not give into the remarks of the President of the Republic shall approve, and be enacted by the Speaker of Congress, by an absolute majority of legislators; however, the President is entitled to bring an process of unconstitutionality at the Constitutional court. This competence has no precedent in comparative constitutional law.

Unlike the dispositions of the Peruvian Constitution of 1979, the Supreme Court of Justice it's the main absentee from the list of institutions which enjoy legitimacy to start a process of unconstitutionality, The absence of the Judiciary calls attention because it's the best institution for start a process of unconstitutionality; in fact, the Supreme Court could do a great service between the constitutional bodies participating in a constitutional review process, especially on rules affecting fundamental rights.

4.2.4 The Institutions of Direct Democracy and Its Ideological

The texts of modern constitutions, especially in Latin America, tend to incorporate institutions of direct democracy as a way to indicate democratic and inclusive vocation of citizens in political decisions, which should not be limited only to electoral processes. The underlying idea makes sense if we are referring to political communities with a past which no democratic tradition and effective enjoyment of human rights; However, despite the constituent will convert citizens in an active and watchful of constitutionality element is an institution which in practice ends up becoming a tool to pressure groups (*lobbies*), the MPs without a majority or politicians outside Congress.

The requirement of five thousand signatures of citizens in the current Constitution is the result of a substantial reduction of fifty thousand demanded the Charter of 1979, but its use in practice is far from a real and voluntary participation, but rather an opportunity initiate a constitutional process through a media presentation, which involves a whole mobilization and provision of human and financial resources, which contradicts its initial popular and inclusive vocation.[5]

[5]This is a trend of contemporary constituent assemblies institutions including exercise of direct democracy, but if they're not careful they could compromise the governance and political stability of a chosen under the rules of representative democracy authority.

4.2.5 *A Prescription for Defending Human Rights?*

The question is whether there may be time limits on the constitutional process when it comes to affecting fundamental rights. Besides the legal arguments to assert that it is not possible, we believe that it is itself a contradiction when it could stand a constitutional appeal for protection (known as Amparo in the Peruvian Constitution) against the same standard without fear of a limitation period; moreover, stopping only in the prescribed time, it seems that six years is too long for a standard that may be affecting fundamental rights.

The limitation period of six months provided for treaties is not without observations because we believe that a mechanism for prior review of constitutionality could save time and be more orderly compared with the position of the Peruvian government before the international community. The Constitution and human rights treaties form a unit. Therefore, any violation of international agreements or the waiver of supranational bodies for the protection of human rights, are a direct attack to the Constitution. From an international perspective, the treaties on human rights are *jus cogens* norms. That is, of mandatory compliance by states. The Constitution and international human rights treaties share the same purpose: to serve as a check on the states to ensure the dignity and all the rights resulting from it.

4.3 The Right of Unconstitutional at the Judicial Practice

The theory and application of constitutional jurisdiction is a guarantee to enforce the principle of supremacy. The Constitutional Court, as the highest interpreter of the Constitution, the body charged with determining the constitutionality of a law and its decision has direct enforceability. Moreover, the resolutions of the Constitutional Court's become to be observed like a Peruvian Judicial precedent.

The right of unconstitutionality is guaranteed with the figure of *amicus curiae* and the participant. The last one is an institution recognized by the Court, has a jurisprudential origin. The Court arguing that the purpose of the constitutional process is an act of interpretation of the Constitution. The plurality of interpreters of the Constitution helps the Court to do its task of supreme interpreter. The justification for the intervention of the participants is to provide an interpretive thesis on the constitutional controversy.

Constitutional rulings are binding on all public authorities and are composed of two elements; first the *ratio decidendi,* the decisive consideration that the Constitutional Court has to decide a case of a constitutional nature; it is the key rule or principle to resolve the dispute; and secondly the *obiter dicta,* subsidiary or accidental reason, that is the part of the sentence that gives us a marginal legal rationales that are not necessary to the decision of the Constitutional Court, but their presence is justified by guiding the work of judicial officials.

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authorities and are composed of decisive consideration that the itutional nature; it is the key rule the *obiter dicta*, subsidiary or that gives us a marginal legal the Constitutional Court, but their officials.

Finally, the process unconstitutional isn't an abstract exercise of the judges of the Constitutional Court, because is in the hands of very influential litigants and, in practice, is not an institution of direct and inclusive democratic citizenship. In Judicial practice is not impossible but very difficult to conquer one of the select institutions to have the access with the process of unconstitutionality, because is an elitist constitutional guarantee, only the most influential in the country can exclaim it to the most important and politic institutions. Actually, if it were possible to qualify for one of the institutions with legitimacy start a constitutional conquer, we think that a proper legal advice should always propose, at the same time, the filing of a constitutional guarantee for protection (Amparo) at the courts to request a suspension of the effects of an unconstitutional law affecting fundamental rights.

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