

# Review

## Judicial Review: Old and New

Keith Rosenn†

*Judicial Review in the Contemporary World.* By Mauro Cappelletti. Indianapolis: Bobbs-Merrill Company, Inc. 1971. Pp. xv, 117. \$8.50.

Professor Cappelletti, one of Italy's most distinguished procedural law scholars, has completed an important comparative study of the practice of judicial review in many nations, focusing primarily on Western Europe and the United States.<sup>1</sup> His point of view is highly theoretical; his perspective, broad and provocative. Compressed into 100 pages of text and detailed footnotes is a wealth of information on a variety of legal systems and techniques.

### I

In the first part of his book, Professor Cappelletti deftly traces the development of judicial review from the ancient Athenians to John Marshall. This historical analysis is presented in terms of the classic Hegelian dialectic, complete with thesis, antithesis, and synthesis.<sup>2</sup> The first stage, or thesis, was "natural justice," essentially the "right reason" of Greco-Roman law, generously infused with Christian theology, and epitomized by the Thomistic doctrine that an unjust law is not law at all.<sup>3</sup> The necessity for positive law's conformance with

† Professor of Law, Ohio State University College of Law.

1. M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* vii-x (1971) [hereinafter cited as CAPPELLETTI]. See also Cappelletti, *The Significance of Judicial Review of Legislation in the Contemporary World*, in *IUS PRIVATUM GENTIUM* 147, 155-57 (E. von Caemmerer, S. Mentshikoff & K. Zweigert eds. 1969).

For other comparative studies of judicial review see MAX PLANCK INSTITUT FÜR AUSLANDISCHES OFFENTLICHES RECHT UND VOLKERRECHT, *VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART* (H. Mosler ed. 1962); E. McWHINNEY, *JUDICIAL REVIEW* (4th ed. 1969); J. OTHON SIDOU, *DO MANDADO DE SEGURANCA* 101-223 (3d ed. 1969); E. VESCOVI, *EL PROCESO DE INCONSTITUCIONALIDAD DE LA LEY* (1967); H. ZAMUDIO, *VEINTICINCO AÑOS DE EVOLUCIÓN DE LA JUSTICIA CONSTITUCIONAL 1940-1965* (1968); Geck, *Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices*, 51 *CORNELL L.Q.* 250 (1966).

2. CAPPELLETTI viii-ix.

3. II BASIC WRITINGS OF ST. THOMAS AQUINAS 784 (A. Pegis ed. 1945).

"natural law" was asserted by philosopher-jurists during this stage. But there existed no enforcement mechanism, except for an occasional judicial pronouncement or rebellion.<sup>4</sup> The second stage, or antithesis, was "legal justice," the legal positivism which continues to dominate French and English constitutional practice. This view was embodied in England's Glorious Revolution of 1688 and the French Revolution of 1789, when the populace rejected any judicial restraint on legislative sovereignty. "Legal justice" was

characterized by the primacy of the written statute and the popular legislature, and the relative powerlessness of both judges and natural law theory to control this primacy.<sup>5</sup>

Finally, in the third stage, "constitutional justice" synthesized the two preceding stages by "positivizing" natural law precepts in written, "rigid" constitutions, and by entrusting the judiciary with the task of determining whether laws violated constitutional provisions.<sup>6</sup> This last stage began in 1803 with *Marbury v. Madison*,<sup>7</sup> although as Professor Cappelletti carefully notes:

[M]ore than a century of American history and a strong line of precedents—to say nothing of contemporary writings—stood behind Chief Justice Marshall in 1803 when . . . he enunciated "the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that Courts, as well as other departments, are bound by that instrument."<sup>8</sup>

Cappelletti contends that this pattern of articulating "higher law" in a written constitution enforced by the judiciary is a world-wide trend, a development which the author later labels the "judicial review explosion."<sup>9</sup>

4. The most famous English example of such pronouncement appeared in Coke's dictum in *Bonham's Case* in 1610: "that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge it to be void." 8 Coke's Reports 107, 118, 77 Eng. Rep. 646, 652 (1610).

5. CAPPELLETTI 42.

6. Although Cappelletti does not define "positivization," his use of the term seems to imply not only the written articulation of a principle, but also its enactment by some legally competent authority. The distinction between "rigid" and "flexible" constitutions is between constitutions which are not subject to change or revision through the ordinary laws (but are changeable, if at all, only by a special amending procedure) and those which can be changed through ordinary legislative processes. *Id.* at 25-26.

7. 5 U.S. (1 Cranch) 137 (1803).

8. CAPPELLETTI 41.

9. *Id.* at 42-43.

## Judicial Review: Old and New

Professor Cappelletti argues that systems of judicial review may be classified as either "decentralized" or "centralized." The decentralized system, whose archetype is the United States, gives the power to determine constitutional issues to the entire judiciary. The centralized system, whose archetype is the system established by the Austrian Constitution of 1920, restricts exercise of this power to a special constitutional court. The first is associated primarily with common law countries, the second with civil law nations. Cappelletti places the United States, Australia, Canada, Denmark, Japan, and Norway in the decentralized camp. He includes Austria, Cyprus, Germany, Italy, and Turkey in the centralized camp. A few countries, such as Mexico, Switzerland, Ireland and India, fall somewhere between the two.<sup>10</sup>

The difference between the two systems goes beyond *which judicial organs*, special or ordinary, perform the function of judicial review. The *effect* of a judicial determination of unconstitutionality, according to Cappelletti, is very different in centralized and decentralized systems.<sup>11</sup> In a centralized system, such a decision has an *erga omnes* effect, invalidating the law for everyone, just as if it had been abrogated by the legislature. The effect in a decentralized system is more complex. Strictly speaking, a decision in a decentralized system generally has binding effect only upon the parties in the specific case, or *inter partes*.<sup>12</sup> However, since such systems are usually found in common law nations, the doctrine of *stare decisis* may widen the practical effect of judicial review.<sup>13</sup>

10. Swiss judges, whether cantonal or federal, have a general power and duty to disregard cantonal laws which violate the Federal Constitution, but they have no power to determine the constitutionality of federal laws. There also exists in Switzerland a direct action to challenge the constitutionality of cantonal legislation (*staatsrechtliche Beschwerde* or *recours de droit public*) which will lie only before the Federal Tribunal. J. ROUSSY, *LE CONTROLE JUDICIAIRE DE LA CONSTITUTIONNALITE DES LOIS FEDERALES AUX ETATS-UNIS ET EN SUISSE* 126, 128-47 (1969). The power of judicial review in Mexico is confined to the federal judiciary, which has authority to suspend the effects of an unconstitutional statute in a particular case via the remedy of *amparo*. The state judges have no power to issue writs of *amparo*. CONSTITUCIÓN POLÍTICA arts. 103, 107 (Mexico 1917). In Ireland the power of judicial review is restricted to two courts: the High Court and the Supreme Court; the lower courts have no such power. J.M. KELLY, *FUNDAMENTAL RIGHTS IN THE IRISH LAW AND CONSTITUTION* 15, 16, 26 (2d ed. 1967). Indian lower courts may decide constitutional questions only if there has been a prior interpretation by their High Courts or the Supreme Court of India. If no such prior interpretation exists, the inferior courts must submit the constitutional question to the High Court. Geck, *supra* note 1, at 256.

11. CAPPELLETTI 85.

12. *Id.* at 86.

13. To some extent, this latter effect will depend on whether a law is held to be unconstitutional as applied or on its face; in the latter case, the law is normally inapplicable to anyone. Kauper, *Judicial Review of Constitutional Issues in the United States*, in 36 MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, *supra* note 1, at 568, 611.

The two systems also have developed different *techniques* for raising constitutional questions. In the decentralized system, constitutional issues are presented by private parties in connection with actual litigation, a type of review which Professor Cappelletti labels *incidenter*.<sup>14</sup> The centralized system, as it first developed in Austria in 1920, totally divorced judicial review from normal litigation. Under this type of review, which Cappelletti labels *principaliter*, constitutional issues could be raised only by the federal executive or state governments in abstract ad hoc proceedings brought directly before the Constitutional Court.<sup>15</sup>

Professor Cappelletti argues that three aspects of the civil law tradition account for its development of a distinct pattern of judicial review. First, civil law countries have adhered to a more rigid doctrine of separation of powers, in which judicial review is regarded as a political function for which the ordinary courts are unsuited. Second, civil law nations have not developed a doctrine of stare decisis and therefore have no doctrinal assurance against conflicting opinions. Finally, the traditional civil law judiciary is less suited to judicial review as it consists of career judges unaccustomed to policy-making decisions. For these reasons, according to Cappelletti, decentralized review in civil law countries has generally failed.<sup>16</sup>

## II

Although Professor Cappelletti uses this framework skillfully to discuss a variety of legal institutions and techniques, the theory contains some fundamental ambiguities. Cappelletti, for example, never defines "natural law" or "higher law"—terms used interchangeably, and somewhat confusingly, throughout the work. Nor does he justify his contention that constitutionalism is merely the "positivization" of common law. Not even "judicial review" is clearly defined, and Cappelletti's use of the term seems to exclude some of the important techniques and practices which courts apply in constitutional interpretation.<sup>17</sup> These terms have developed complex connotations over

14. CAPPELLETTI 73-74.

15. *Id.* at 69-71, 75.

16. *Id.* at 59, 63-64.

17. The author seems to restrict his use of the term "judicial review" to judicial determinations of the constitutionality of *legislation on its face*. It is not clear whether this concept would encompass a decision like *Yick Wo v. Hopkins*, 118 U.S. 356 (1866), where the Supreme Court held that a statute was unconstitutional *as applied*, or a decision like *Lynch v. Overholser*, 369 U.S. 705 (1962), where the Court in effect rewrote a federal statute to avoid constitutional doubts. Nor is it clear whether judicial

the years, and Cappelletti might have dealt with them more precisely and clearly. He also might have explained how the historical development of judicial review in common law countries differed from that in civil law nations.<sup>18</sup> Moreover, his entire set of classifications seems to exaggerate the differences between the two systems. Indeed, the *principaliter* pattern of judicial review in its pure form (as described by Professor Cappelletti) existed in only one country, Austria, from 1920 to 1929.<sup>19</sup> Weren't the two systems more like each other—from the beginnings of judicial review—than Cappelletti's analysis would indicate?

But perhaps the major defect of Cappelletti's analysis is his failure to look beyond the form and outward appearances of institutions to their actual power and functioning. Abstract discussion of institutional arrangements without consideration of the political and social contexts in which they operate cannot justify conclusions about the actual effectiveness of judicial review in particular societies. Nowhere does Cappelletti discuss the distinctive cultural or political forces of the national systems which he analyzes. He cites, for example, Weimar Germany and post-World War II Italy and Japan as failures in judicial review. But these failures can hardly be attributed solely to the use of civil law and the conditions associated therewith. All three nations were undergoing postwar dislocations, and all three were experimenting with essentially novel internal orders established largely by victorious nations. Cappelletti also cites the relative insignificance of judicial review in certain Scandinavian civil law countries—Norway, Denmark and Sweden.<sup>20</sup> But again, Scandinavian nations have other

review would encompass *Mapp v. Ohio*, 367 U.S. 643, *reh. denied*, 368 U.S. 871 (1961), where the Supreme Court held that exclusionary rule against admission of illegally obtained evidence applicable to the states; or *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where the Court decided that the President had exceeded his constitutional authority by assuming managerial powers over the steel industry.

18. In Europe, for example, the Austrian constitution of 1920, written principally by Hans Kelsen, was the first civil law provision (outside the separate and rather special development of the Swiss *richterliches Prüfungsrecht*) to establish a system of judicial review. What was the background for this novel development in Austria and other countries? Cappelletti might have discussed antecedents of judicial review in jurisprudential theories and in Austrian court practices. He provides a full discussion of *Marbury*, but virtually ignores the historical antecedents of judicial review in civil law countries, except for a catalogue of technical devices and developments in the Austrian system after 1920. See CAPPELLETTI 53-63.

19. A constitutional amendment was adopted in Austria in 1929 providing for review of constitutional issues upon application from the highest ordinary and administrative court whenever a pending case involved a statute of doubtful constitutionality. Germany and Italy have expanded this *incidenter* aspect of the Austrian system to permit all ordinary courts to stay cases involving constitutional issues and seek their resolution from the constitutional courts.

20. CAPPELLETTI 59.

characteristics that undercut Cappelletti's conclusions: First, they are remarkable for their political and social stability; second, they have effective non-judicial institutions to resolve social disputes.<sup>21</sup>

Cappelletti also fails to analyze the practical problem of vindicating constitutional rights under various systems and procedures. There is only a rather abbreviated treatment of three specialized procedures—*habeas corpus*,<sup>22</sup> *amparo*,<sup>23</sup> and *Verfassungsbeschwerde*<sup>24</sup>—by which citizens may challenge abridgements of constitutional rights. There is no assessment of either their effectiveness in obtaining rapid judicial determination or the efficacy of judicial remedies in correcting particular injuries and discouraging arbitrary government action. Dealing with such issues requires an inquiry into the actual use of the procedures.

A particularly important political factor which Cappelletti fails to consider is the existence of semi-autonomous governmental subdivisions within a federal system. Arguably, one reason for judicial review under such a federalist system is to insure that the actions of state or regional legislatures conform to the federal constitution.<sup>25</sup> Unchecked unconstitutional action by state or regional governments may pose a real threat to the very existence of the federal state. The American and Swiss experiences both bear out Justice Holmes' oft-quoted observation:

I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.<sup>26</sup>

21. The most important nonjudicial institution operating in Scandinavian countries is the ombudsman. For a general discussion of the operation of Scandinavian ombudsmen see W. GELLHORN, *OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* (1966). Gellhorn discusses the systems of Denmark, *id.* at 1-47; Finland, *id.* at 48-90; Norway, *id.* at 154-93; Sweden, *id.* at 194-255. In these countries, the ombudsman can intervene to protect citizens' interests in cases of abuse of discretion by courts, as well as by administrative agencies. *Id.* at 12, 59, 164, 216, 237-39. In Sweden, where the ombudsman's powers over the courts seem broadest, review sometimes may cover the merits of the judgment, as well as the judge's decisions of procedure. *Id.* at 238.

22. CAPPELLETTI 19-20.

23. *Id.* at 20-22.

24. *Id.* at 22-23.

25. Professor Freund strongly suggests that this is so. Freund, *Review and Federalism*, in *SUPREME COURT AND SUPREME LAW* 86, 87-89 (E. Cahn ed. 1954).

26. Holmes, *Law and the Court* in *THE MIND AND FAITH OF JUSTICE HOLMES* 387, 390 (M. Lerner ed. 1943). For a comparative discussion of some of the special problems of federalism and judicial review see W. WAGNER, *THE FEDERAL STATES AND THEIR JUDICIARY* 73-130 (1959).

III

Cappelletti's categories and theories—despite their general analytical value—fail to fit the experience of judicial review in many Latin American nations. Indeed, except for a brief discussion of the Mexican *amparo*, he ignores Latin America entirely. In most of these countries an American model of judicial review has been grafted on to a civil law base; they are thus civil law systems with decentralized review. Cappelletti argues that such systems in general will be short-lived and inconsequential. But the experience of certain Latin American nations would seem to suggest the contrary.<sup>27</sup> Judicial review has existed in some of them for nearly a century and has played a significant role in protecting individual rights.

Judicial review in most Latin American countries could be classified as decentralized; only one has a system that could be classified as purely centralized.<sup>28</sup> Eight, however, have systems that are neither truly centralized nor decentralized under Cappelletti's analysis. Seven are hybrids, restricting the power of judicial review to the highest regular court instead of entrusting it to a special constitutional court.<sup>29</sup> Mexico represents a different kind of hybrid, restricting the power of judicial review to the federal judiciary.<sup>30</sup>

Similarly, in terms of techniques of presenting constitutional questions, many Latin American countries defy Cappelletti's categories. Colombia, for example, has a decentralized system coupled with a review procedure known as an *accion popular* which permits any citizen, irrespective of a personal stake or exhaustion of administrative remedies, to challenge the constitutionality of any law by filing with the Colombian Supreme Court a simple written statement of the

27. See generally J. GRANT, *EL CONTROL JURISDICCIONAL DE LA CONSTITUCIONALIDAD DE LAS LEYES* (1963); Camargo, *The Right to Judicial Protection: "Amparo" and Other Latin American Remedies for the Protection of Human Rights*, 3 *LAWYER OF THE AMERICAS* 191, 195-97 (1971); Elder, *Judicial Review in Latin America*, 21 *OHIO ST. L.J.* 570 (1960).

28. The Court of Constitutionality in Guatemala consists of twelve judges; five are drawn from the Supreme Court and seven from two lower courts. Thus, despite a centralized system, the ordinary judiciary actually decides constitutional questions while wearing different hats. Actions to annul a statute may be brought by the Council of State, the Bar Association, the Public Ministry, or a person aggrieved by the statute (provided he is represented by at least ten practicing lawyers). *CONSTITUCION* arts. 262-65 (Guatemala 1965).

29. *CONSTITUCION POLITICA* art. 86 (1925, amended 1943, 1957, 1959, 1967) (Chile); *CONSTITUCION POLITICA* art. 10 (1949, amended 1963) (Costa Rica); *CONSTITUCION POLITICA* art. 96 (El Salvador 1962); *CONSTITUCION POLITICA* arts. 234 & 235 (Honduras 1965); *CONSTITUCION POLITICA* art. 167 (1946 Panama 1946); *CONSTITUCION POLITICA* arts. 239, 256 (Uruguay 1967); *CONSTITUCION POLITICA* art. 215(3) (Venezuela 1961).

30. *CONSTITUCION POLITICA* arts. 103, 107 (Mexico 1917).

asserted conflict between the law and the constitution.<sup>31</sup> If the statute is declared unconstitutional, the decision has an *erga omnes* effect. The law is not technically annulled, but it cannot be enforced thereafter.<sup>32</sup> The Colombian system thus has characteristics of both the centralized and decentralized forms.

Several Latin American nations have another form of judicial control under which a bill passed over a presidential veto based on constitutional grounds is sent directly to the nation's Supreme Court for an opinion.<sup>33</sup> The Supreme Court, performing a role similar to that of the French non-judicial *Conseil Constitutionnel*, must approve the bill as constitutional before it may be promulgated as law. This anticipatory function in a decentralized system seems inconsistent with Cappelletti's analysis.

A decision of unconstitutionality in a decentralized system, according to Cappelletti, operates only *inter partes*.<sup>34</sup> In Latin America, however, a wider range of legal effects is frequently associated with such a decision. In Argentina, for example, a declaration of unconstitutionality by the Supreme Court of Justice technically binds only the parties to the case,<sup>35</sup> but as in the United States, the operation of *stare decisis* (albeit slightly diluted) tends to give the court's decision an *erga omnes* effect.<sup>36</sup> In Mexican *amparo* litigation five consecutive decisions of the Mexican Supreme Court will establish a case law rule (*jurisprudencia*), which is binding upon the entire Mexican judiciary.<sup>37</sup> In Brazil a declaration of unconstitutionality also operates

31. CONSTITUCIÓN POLÍTICA art. 214(2) (1886, amended 1969) (Colombia). See generally Grant, *Judicial Control of the Constitutionality of Statutes and Administrative Legislation in Colombia: Nature and Evolution of the Present System*, 23 So. CALIF. L. REV. 484, 496-504 (1950).

32. L. SACHICA, CONSTITUCIONALISMO COLOMBIANO 124-30 (2d ed. 1966).

33. CONSTITUCIÓN POLÍTICA art. 90 (1886, amended 1969) (Colombia); CONSTITUCIÓN POLÍTICA art. 151 (Ecuador 1967); CONSTITUCIÓN POLÍTICA art. 53 (El Salvador 1962); CONSTITUCIÓN POLÍTICA art. 243 (Honduras 1965); CONSTITUCIÓN POLÍTICA art. 229 (18) (1950, amended 1955, 1959, 1962) (Nicaragua); CONSTITUCIÓN POLÍTICA art. 131 (1946, amended 1956) (Panama); CONSTITUCIÓN POLÍTICA art. 173 (Venezuela 1961). A similar procedure is employed in Costa Rica, but a two-thirds vote of the Supreme Court is necessary to reject the bill on constitutional grounds. CONSTITUCIÓN POLÍTICA art. 128 (1949, amended 1963) (Costa Rica).

34. CAPPELLETTI 86.

35. Anibal Abalos v. Provincia de Mendoza, 255 Fallos 262, 263 [1963-IV] J.A. 22 (1963).

36. S. V. Linares Quintana, 1 DERECHO CONSTITUCIONAL E INSTITUCIONES POLITICAS 666-68 (1968); CONSTITUCIÓN POLÍTICA art. 9 (Provincia de Chaco 1937); CONSTITUCIÓN POLÍTICA art. 126 (10)c (Provincia de Santiago del Estero 1939).

37. LEY DE AMPARO arts. 192-94 (as amended in 1968) (Mexico). A case law rule established by the Supreme Court sitting en banc binds the entire judiciary; a rule established by a chamber of the Supreme Court binds that chamber and the lower courts; and a rule established by a Collegiate Circuit Court binds that court and the inferior courts within its territorial jurisdiction.



*inter partes*, but since 1934 the Senate has been constitutionally obligated to suspend, either in whole or in part, statutes which have been declared unconstitutional by final decision of the Supreme Federal Tribunal.<sup>38</sup>

The experience of four Latin American countries in particular—Colombia, Mexico, Argentina, and Brazil—indicates that civil law judges are sometimes capable of carrying out the complex role of judicial review with considerable courage and substantial effect. In these countries, the ordinary judiciary has provided a useful and important check on arbitrary government action.<sup>39</sup> Indeed, Argentine and Brazilian judges have occasionally utilized their power of judicial review to oppose major executive policies, producing serious clashes. The judiciary has sometimes been purged as a result of these battles with overbearing executives. For example, a Peron-dominated Congress impeached the entire Argentine Supreme Court of Justice in 1946 after it invalidated several statutes and released numerous political prisoners.<sup>40</sup> Since Brazil's military takeover in 1964, the Supreme Federal Tribunal has sought to preserve constitutional guarantees by invalidating portions of the National Security Law and by releasing political prisoners on writs of habeas corpus. A number of these decisions have aroused the ire of military hard-liners in the government, who have retaliated by packing and unpacking the Tribunal's membership. First, in 1965, they increased the Tribunal's membership

38. Constituição art. 42 (VII) (Brazil, 1969). Constituição art. 64 provides that it is incumbent upon the Federal Senate to suspend the execution, wholly or in part, of any law or decree declared unconstitutional by final decision of the Supreme Federal Tribunal. This measure, which originated in the 1934 Constitution, gives the Senate the task of rendering inoperative, *erga omnes*, the laws and norms which the Judiciary refrains from applying, *in casu*, because of the defect of unconstitutionality.

39. Examination of the en banc constitutional decisions of the Colombian Supreme Court from 1910 through 1962 reveals that the Court invalidated, in whole or in part, the challenged legislation in 100 out of the 225 popular actions which it decided on the merits. See I & 2 N. PINEDA, JURISPRUDENCIA CONSTITUCIONAL DE LA CORTE SUPREME DE JUSTICIA (1963). According to this study, there were only 329 cases from 1910 to 1962 involving en banc constitutional decisions of the Colombia Supreme Court. Three dealt with permission of the executive to leave the country, and twenty-five concerned legislation vetoed on constitutional grounds. In seventy-six of the remaining popular actions, the Supreme Court avoided the merits.

While there have been many exaggerated claims about the efficacy of the Mexican *amparo*, a recent examination of 3700 *amparo* decisions in which the President of the Republic was a party found that only a little more than 1200 (34 per cent) granted the requested relief. P. GONZALEZ CASANOVA, DEMOCRACY IN MEXICO 21-24 (1970). The value of the underlying data is rather suspect in view of the Mexican practice of naming the President as a purely formal party in some actions (*amparo contra leyes*).

40. See Leonhard, *The 1946 Purge of the Argentine Supreme Court of Justice*, 4 INTER-AMER. ECON. AFFAIRS 73 (1964). In 1957, after Perón's ouster, the Lonardi provisional government fired the entire Supreme Court, this time without benefit of the impeachment process. The process was repeated in 1966 after the revolution that brought the military government of General Juan Carlos Onganía to power. See generally INSTITUTO DE CIENCIA POLITICA, LA REVOLUCIÓN ARGENTINA (1966).

from 11 to 16. Then, as the Tribunal remained defiantly independent, they forced three members into retirement in 1968.<sup>41</sup>

The Argentine and Brazilian experiences suggest not only that such institutions are exceedingly fragile, but also that they may survive on paper long after they lose all practical effect. They demonstrate, moreover, that the real success of the courts depends on an uncompromising societal commitment to the constitutions they seek to enforce. When a nation lacks such commitment—or is forced to give it up—no court can long exercise effective judicial review. Learned Hand counseled:

[A] society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.<sup>42</sup>

Fortunately, many societies are not so riven that they lack internal moderating forces. Judicial review can be a significant part of the checking and balancing process, in addition to nudging societies (through its educational impact) toward greater respect for fundamental constitutional principles. Hand's warning nonetheless suggests the need for study of the social and economic conditions conducive to judicial review—an empirical inquiry into what makes judicial review succeed and what makes it fail. Professor Cappelletti does not provide such a study; nor does he promise it. But his work will be of immense value in providing a theoretical framework for further thought and research. He has given us a remarkably lucid and incisive picture of the many forms judicial review has taken, and may take.

41. R. SCHNEIDER, *THE POLITICAL SYSTEM OF BRAZIL* 172, 275 (1971).

42. Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 172, 181 (L. Dilliard ed. 1952).