CHAPTER – II

THEORETICAL FRAMEWORK
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Introduction
The establishment of a body for the constitutional review, under any title -the Constitutional Court, the Constitutional Council, or the Supreme Court- thanks to the significance of consolidating the bases of democracy and political and legal structure of a political society, is highly respected by all the people, political parties, and statesmen. The attitudinal approach of each of these groups looking at this body is different. People usually consider it as a valuable and strong mechanism for the prevention and control of political leaders’ authoritarianism and believe that it guarantees or secures their fundamental rights and freedoms; however, statesmen are always striving to find a way to influence that body and/or neutralize and incapacitate it so that it does not threaten their totalitarianism.

Even in the beginning, the importance and sensitivity of the constitutional review caused a lot of disputes and challenges among the legal and political intellectuals and researchers who wrote numerous books and articles on this ground. They were all intended to more explain the various aspects of constitutional review and identify its strengths and weaknesses and eventually find a way that is perfect in its real sense and/or is the least defective to establish an effective constitutional review system, so that it is immunized from the future probable dangers. In this Chapter, some of the most important efforts and studies carried out and their findings on some of the significant issues concerning the constitutional review are presented as a theoretical framework for this research work.

1. Kelsen: Devising the Constitutional Court
Although the thought of constitutional review was emerged in France in the late eighteenth century and was practiced in the United States of America in the early nineteenth century, undoubtedly the first person who started to devise a specific theoretical model of constitutional review was Hans Kelsen, an Austrian legal theorist. Kelsen deserves credit for inventing the model of
constitutional adjudication that has become popular over the past few decades.54

The European model of constitutional review, a model that differs from the American one, would not have been possible without Hans Kelsen. As an eminent young legal scholar, Kelsen happened to be a staff member of a committee charged with framing a new constitution,55 and was asked to draft the section of it dealing with constitutional review.56 Thus, he created a special body entitled “Constitutional Court” for Austria’s Second Republic when he drafted its 1920 Constitution. The centralized system reflected Kelsen’s positivist jurisprudence, which incorporated a strict hierarchy of laws. Because ordinary judges are subordinate to the Parliamentary Acts, only an extrajudicial organ could restrain the legislature.57 This system after World War II, thanks to different historical and theoretical reasons, was victorious and successful in most of the European countries and even throughout the world.58

Today, Kelsen’s theoretical structure amazingly appears modern and intacty innovative. Hans Kelsen argued that a legal system needs a Constitution to serve as the supreme law enforceable only by a “court-like” body.59 With his faithful student, Charles Eisemann, Kelsen well established that the foundation of the constitutional court responsible to control the constitutionality of laws is completely compatible with the separation of powers. Therefore, his studies eradicated the existing theoretical barriers against the constitutional review.60

According to Kelsen, the most possible stability must be provided for the Constitution as a fundamental norm by making its amending more difficult. Essentially, the guaranteeing of the Constitution can be possible by providing the possibility of annulling the Acts that are against it. However, the permission of annulling the illegal and unlawful actions shall be assigned to an institution which itself has not committed violations. Therefore, supervising the parliament to follow the Constitution shall not be assigned for the parliament itself. The responsibility of annulling the unconstitutional Acts must be assigned for an institution or body independent of the parliament, namely for the constitutional court. Two faults can be found with this view: First, the foundation of such a court is against the parliamentary supremacy, and secondly, the foundation of such a court does not match the principle of separation of powers.61

Answering the first fault, Kelsen points out that ‘sovereignty’ is not limited to only one institution called the parliament, but it relates to the entire body of the State. He adds that as the Executive and the Judiciary must follow the Constitution, the Legislative must, too, be an absolute obedient of it.62

Kelsen, providing an answer to the second fault, recognized the need for an institution with power to control legislation. He recognized, too, that constitutional adjudication involves legislating as well as judging.63 In this manner, he presents his famous theory, namely the ‘negative legislation.’ Based on this theory, “the annulment of an Act means the enactment of a general rule.”64 He considered the constitutional court to be a negative legislator.65 The process by which constitutional adjudicators make or declare general rules are different from those employed in ordinary legislatures, and the considerations and arguments taken into account are different.66 Kelsen defines a “negative legislator” as one who cannot make law freely because the process

61 Ibid.
62 Ibid., pp. 346-47.
63 Ferejohn, supra note 54, p. 52.
64 Favoreu, supra note 60, p. 347.
65 Stone, supra note 59, p. 37.
66 Ferejohn, supra note 54, pp. 52-3.
of decision-making is “absolutely determined by the Constitution.” 67 In other words, the difference of this kind of legislation from the ordinary legislation is that the negative legislator does not enjoy the freedom of creating as the positive legislator does. It must act within the frameworks identified by the Constitution. 68

According to Kelsen, the constitutional court must be independent of any governmental institutions. He strongly suggested that professional lawyers have a suitable place in the composition of the Constitutional court, but he himself implied that the suitable place did not mean the exclusive standpoint. He admits that non-professionals should be with the professionals because ‘lawyers’ cooperation with the non-professional members who just consider the political interests helps them turn to the mere technical considerations. After reviewing the different possible modes of employing Constitutional judges (such as, electing them by the Parliament or by the President, or by merging the two ways), Kelsen prefers that instead of unfair and uncontrolled influence and penetration of political parties, political authorities legally participate in the formation of the constitutional court. 69

2. Cappelletti: Distinguishing Two Models of Constitutional Review

Mauro Cappelletti in “Judicial Review in the Contemporary World” distinguished and analyzed two models of constitutional review, which he called the American, and the Austrian model. The differences between these two paradigms are analyzed by Cappelletti from three angles: the organs exercising this control over legislation, the process of control and finally the effects of the decisions:

(a) Organs: According to Cappelletti, the first difference between these two types exists in the organs controlling the constitutionality of legislation. The

67 Stone, supra note 59, p. 35.
68 Favoreu, supra note 60, p. 347.
American model features a decentralized system of adjudication, with every court having the power to review legislation on its constitutional merits. The American type of decentralized judicial review is based on the rationale that it is a judge’s primary function to interpret the law. If through this interpretation two laws of equal force seem to be in conflict with one another, the judge must apply the prevailing one. If however the two laws have a different force, such as the constitution and an ordinary legislative norm, the judge will apply the Constitution rather than the ordinary statute.70

In the Austrian type of centralized constitutional review one single judicial body called ‘constitutional court’ is given the power to review legislation violating the Constitution.71 This centralized type of constitutional review is a consequence of three factors: the task of ordinary judges in these countries, the absence of stare decisis and the unsuitability of civil law courts for this task.

First of all, in view of the specific theory of the separation of powers in the civil law countries, the invalidation of laws is seen as a political act from which ordinary judges must be kept away. They can only apply the law as they find it because statutory law is considered superior.72 Only a constitutional court whose members reflect all major political groups can invalidate these laws.73 Ordinary judges, when confronted with a question of constitutional validity of the law to be applied in a specific case pending before them, must restrict themselves to referring this question to that court.74

The second factor contributing to this centralization is the absence of stare decisis and of a theory of precedent. If all judges were to decide upon the constitutionality in those countries, this would create problems in the light of the security of the law. Some judges might hold a statute valid, whereas others might find it invalid. In the United States, the principles of stare decisis and precedent make Supreme Court’s decisions final and definite decisions which turn the unconstitutional law into “dead law,” although formally the legislation

71 Ibid., p. 46.
72 Ibid., p. 54.
73 Ibid., p. 55.
74 Ibid., p. 54.
under attack remains on the books. These principles are not known however in civil law, so that decisions of even the highest courts in those countries are not binding. Only a special judicial body—a constitutional court— with the power to make binding decisions by invalidating unconstitutional legislation can work efficiently.

A third and final reason for the centralization of constitutional review is the unsuitability of civil law courts for this task. Whereas the United States Supreme Court, the ultimate decision maker on the constitutionality of legislation, is composed of justices with diverse backgrounds, a similar court is not available in the European countries. Even their highest courts consist of career judges whose skills are technical rather than policy-oriented. They cannot fulfill the task of constitutional review. Their role is more a judicial activity instead of a legislative one.

(b) Process of Control: The second aspect in which these types differ is the process of control. In the American system, judicial review will be exercised *incidenter*, mostly as a means of defense in a case pending before a court. Questions about the constitutional validity of legislation cannot be introduced as a principal issue. Austrian type of constitutional courts at the other hand will be confronted with these questions only after a special direct appeal to them. This is *principaliter* review.

(c) Effects of the Decisions: Finally, a third category of differences between these two types can be discovered after examination of the effects of the decisions invalidating a statute for being unconstitutional. The decisions of the Austrian type of constitutional courts are generally binding. They bind the parties to the case as well as all others in similar future situations. The
legislation is furthermore annulled for the future. In other words, the declaration of constitutional court to annul the same is given *erga omnes* effect. In the United States, however, the judges retain themselves to not applying the law in the particular case before them. As has been noted before, however, the principle of *stare decisis* turns the Supreme Court’s decisions into final ones.\(^8^2\)

Through the non-application of the law the judges recognize that the law has actually never been law, which gives their decision a retroactive effect.\(^8^3\)

### 3. Favoreu: Highlighting the European Constitutional Courts

In “*The Constitutional Courts,*” Louis Favoreu, the eminent French constitutional theorist, recognized two models of constitutional review, but, contrary to Cappeletti, he prefers to call them the American model and the European -not Austrian- model.\(^8^4\) In this book, Favoreu after investigating the concepts and contexts of the European model and its differences from the American one and the reasons of unacceptability of American model in Europe, he has scrutinized the constitutional courts of Austria, Italy, France, Portugal, Belgium, and some other European countries in different chapters.

Concerning the European initial tendencies to accept the American model of constitutional review, Favoreu says that many of the countries, which today possess Constitutional courts, were once thinking of accepting the American model, but they eventually rejected it. He presents the reasons why they did not accept the American model.\(^8^5\) The most important reason is the existence of an administrative system and the dual judiciary system in the European countries. That is to say, in Europe, courts are divided at least into two types: the administrative courts and the judicial courts,\(^8^6\) while in America there is a unitary judicial system and the courts investigate all the administrative,

\(^8^2\) Ibid., p. 86.

\(^8^3\) Ibid., p. 92.

\(^8^4\) The term ‘European model’ seems to be more comprehensive than the term ‘Austrian model’ because in the European legal system there are two sub-models of constitutional adjudication with their own characteristics, namely the Austrian model of constitutional court and the French model of constitutional Council.

\(^8^5\) Favoreu, *supra* note 60, p. 341.

\(^8^6\) In Germany five Supreme Courts have been established, each having special jurisdiction according to the issue of the case (civil, administrative, labor, social or taxation law).
judicial, and constitutional claims. In other words, the American model of constitutional review (judicial review) is efficient only in the countries that enjoy a unitary judicial system such as the countries with common law. In these countries, there is not the separation of adversarial proceedings, and the constitutional aspects can be considered in all the claims. This judicial unison helps to eradicate and prevent the danger of appearing contradictory views on the constitutionality of laws.

Favoreu maintains that if a constitutional court is placed in its defined framework, there will be no problem in saying that this or that court is officially entitled council, court or the constitutional Supreme Court. He further holds that to accept an institution as a constitutional court, it is required that it be a real court. To be real, a court must express the truth, its decisions must enjoy 'res judicata', and its issued declarations on the unconstitutionality of a law shall totally annul the law. However, when a court is not allowed to annul the law and it has to just return it to the Parliament, its being a court appears dubious. The way round is also true: when a court is officially allowed to rewrite a law or replace all the regulations felt necessary for the previous ones, then the court is not judiciary but legislative.

Regarding the independence of the constitutional courts, Favoreu states that the condition for the independence of the courts from all governmental institutions is the definition of the organizational status, functions, and competencies of the court in the Constitution so that the public powers under the control of the constitutional court may not impair the situation. It is required that necessary regulations concerning the constitutional court such as administrative and financial independence as well as conditions related to the independence of the members is predicted in the Constitution. No institution, which is vulnerable and exposed to the interference of the Legislative, or the Executive, can be a constitutional court.

87 Favoreu, supra note 60, p. 340.
88 Ibid., pp. 343-44.
89 Ibid., p. 339.
90 Favoreu, supra note 69, pp. 372-73.
91 Ibid., p. 370.
Regarding the conditions of the judges, Favoreu says that unlike the ordinary judicial courts, the constitutional courts do not possess professional judges who get their posts after burdensome procedures of employment and get promotion. That is to say, they are not merely selected among the judges who have judicial degrees, but they can be selected among law professors, lawyers, and even administrative staff. If the membership texture of different constitutional courts is compared, it will be clear that there are many similarities among them: political authorities have chosen the judges close to them or from the same school of thought. He further believes that the political authorities’ meddling (intervention) with the determining of members of the constitutional courts is not a defect, but an advantage because this method contributes to the increase of the legitimacy of the members.92

While investigating the Constitutional Court of Austria, Favoreu with reference to the Clause 3 of Article 147 of the Austrian Constitution says that the judges of the Court must complete their studies in law and political science and for at least ten years have to hold a professional appointment, which is prescribed for the completion of these studies.93 He further says that based on the Clause 4 of Article 147 of the Austrian Constitution, the membership of the Constitutional Court is incompatible with that of the Federal Government, a State Government, the House of Representatives, the Senate, or any other popular representative body. As well, persons who are under employment of or hold office in a political party cannot belong to the Constitutional Court. Membership of the Court is unlimited, and this is, in turn, a proper guarantee for the independence of the court’s judges and makes the Court safe from the external pressures, because the dismissal of the judges is impossible.94

Regarding the appointment of the judges of the Austrian Constitutional Court, he states that although the ruling political party initiates appointing the majority of the judges, based on an implicit agreement between the two main

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92 Ibid., pp. 371-72.
94 Ibid., p. 373.
parties of the country, usually there is a partial balance in the Court’s composition.95

Favoreu divides the jurisdiction of the Austrian Constitutional Court to review the laws in two groups: *a priori* and *a posteriori*.96 *A priori* review, by virtue of the Clause 2 of Article 138 of the Austrian Constitution, is initiated by the federal government or the state government when an act of legislation or execution falls into the competency of the federation or a state.97 *A posteriori* review, relying on the Article 140 of the Constitution, can be initiated in several cases by: 1) the federal government against the state laws and likewise the state government against the federal laws, 2) the Administrative Court and the Supreme Court for the laws which they have to implement, 3) one third of the members of the House of Representatives, 4) individuals, when their personal rights are directly violated, and 5) the Constitutional Court can also automatically review the constitutionality of an Act provided that the Act is the basis of one of the judgments of the Court.98

Favoreu notes that in Austria, the Constitutional Court protects the classic fundamental rights. Although a few number of these rights have been enumerated in the Austrian Constitution, the Court has redressed this shortage by relying on the practices relating to the principle of equality (rule of law) mentioned in the Clause 1 of Article 18 of the Constitution.99

Stating that the influence of the Constitutional Court in the political and legal order of Austria is unquestionable, Favoreu says, “The constitutional provisions specially the fundamental rights such as the provisions of the European Convention of Human Rights are directly imposed on the Federal and State Legislatures as well as the administrative authorities by the Court. So, they cannot act beyond the frameworks of the constitutional norms.”100

According to Favoreu, in the relations between the political parties and parliamentary majority and minority, the role of the Austrian Constitutional

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95 Ibid., p. 372.
96 Ibid., pp. 376-77.
97 Ibid., p. 376.
98 Ibid., pp. 377-78.
99 Ibid., pp. 381-82.
100 Ibid., p. 383.
Court proves so significant, because it must take position in the political issues under dispute.\textsuperscript{101} In this regard he states that today, the Court has three functions: firstly, it protects the rights of parliamentary minority by compelling the majority to observe the constitutional principles and by redressing the imbalance of powers between the two groups. Secondly, the Court supports the political and social minorities who are not represented adequately in the domain of political power. Thirdly, the Court with supervising the laws to be more precise and concrete corrects the faults resulting from the domination of the great parties over the political decision-making and makes the process of legislation rational.\textsuperscript{102}

Finally, Favoreu notes that in the recent years the Austrian Constitutional Court’s practice has become more political. This matter, in turn, has raised many controversies in the Austrian society because in spite of the discontent of the political parties, the Court interprets its own jurisdiction in relation to the fundamental rights as being so extensive.\textsuperscript{103}

4. Designing a Constitutional Court for New Democracies


Tom Ginsburg in “Judicial Review in New Democracies,” holds that there are five major dimensions of design choice on which systems of judicial review vary, namely access and timing, effect, appointment mechanisms, term length of justices, and size of the court.\textsuperscript{104}

(a) Access and Timing: Ginsburg says that constitutional review systems differ widely on the question of who has standing to bring a claim. Access to the court is perhaps the most important component in judicial review power, because a party seeking to utilize judicial review as political insurance will only be able to do so if it can bring a case to court. Establishing a designated

\textsuperscript{101} Ibid.
\textsuperscript{102} Ibid.
\textsuperscript{103} Ibid., p. 384.
constitutional court, accessible only to a narrow set of organs, has the effect of limiting the insurance function of the constitutional court.\textsuperscript{105}

The design choice on access has much to do with the prospective position of political forces in the constitutional system. The availability of constitutional review provides the minority with a forum to contest policies of the majority (dominant party). This may be achieved by extending access to the court to minority groups in the legislature or to ordinary citizens. The Constitutional Court of Hungary has perhaps the widest access in the world, because the right of abstract constitutional petition is not even limited to citizens.\textsuperscript{106}

Another difference is whether the court can hear constitutional questions only in the context of concrete legal cases (as in the United States), or whether it can consider constitutional issues in the abstract (as in France). Concrete review requires litigation of constitutionality in the context of a particular and actual case; however, abstract review determines the constitutionality of a statute without an actual and specific case. The German and Austrian Constitutional Courts exercise both abstract and concrete review.\textsuperscript{107}

An issue relating to the access to the court concerns the timing of review. In some systems, review can only take place \textit{ex ante} promulgation of legislation (\textit{a priori} review). This means that the law can be modified by the legislature to conform with the decision of the court; this form of review makes the court more akin to a third house of the legislature. \textit{Ex ante} constitutional review may increase the average quality of legislation; patently unconstitutional bills cannot be passed. On the other hand, in \textit{ex post} (\textit{a posteriori}) review a claimant can argue not only that a statute is unconstitutional on its face and its purpose, but also in its effects. To the extent that review after promulgation allows more information to be considered, there may be an advantage for \textit{ex post} monitoring.\textsuperscript{108}

\textsuperscript{105} Ibid., pp. 36-7.
\textsuperscript{106} Ibid., pp. 36-8.
\textsuperscript{107} Ibid., p. 38.
\textsuperscript{108} Ibid., pp. 38-9.
(b) Effect: Ginsburg states that judicial review systems also vary in the effect of their decisions on the constitutionality of a law. American courts, bound by the rule of *stare decisis*, do not actually declare the unconstitutional laws null and void. Rather, since subsequent similar cases must follow the rule in previous cases, the unconstitutional law remains on the books, if dormant for all practical purposes. In the German tradition, the constitutional court has two options in rendering a finding of unconstitutionality. It can declare either the concerned law invalid (*nichtig*) or incompatible (*unvereinbar*) with the Constitution. In the latter option, the court declares the law unconstitutional but not void. In this way, it usually sets a deadline for the legislature to modify the law. Sometimes these decisions admonish the legislature to modify the law within particular guidelines. In other cases, the court will sustain an impugned law, but warn the legislature that it is likely to void it in the future, or suggest conditions for the constitutional application of the law. In Latin America, Courts make use of a device called *amparo*, wherein a successful constitutional claimant will be free from the application of the offending law, but the law will continue to apply to others.\(^{109}\)

(c) Appointment Mechanisms: Ginsburg maintains that appointments are among the most crucial of design issues. The normative task in this regard is to select an appointment mechanism which will maximize the chances that the judge will interpret the text according to the intentions of the Constitution makers. Appointment mechanisms are designed to insulate judges from short-term political pressures, yet ensure some accountability.\(^{110}\)

Ginsburg divides appointment mechanisms into three broad types: professional appointing mechanisms, cooperative appointing mechanisms, and representative appointing mechanisms. Professional appointment is done by existing judges. It allows judiciary-nominated judges to take office barring legislative intervention by supermajority. This proposal combines

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\(^{109}\) Ibid., pp. 40-2.

\(^{110}\) Ibid., p. 42.
accountability and independence, because most appointments would be routine, but there is a mechanism for political intervention should judges nominate candidates who are far out of step with political opinion.111 Cooperative appointment mechanisms require the cooperation of two bodies in appointing constitutional justices. For example, in the United States of America, Russia, and Hungary, the President nominates the justices and the legislative branch confirms the nomination. These systems seem consistent with the objective of supermajoritarian requirements to ensuring broad support (institutional or political) for those who are to interpret the constitution. However, these systems risk deadlock because they require the agreement of different institutions to go forward. In representative appointment mechanisms, multiple appointing authorities are utilized. For example, in Italy a third of the nine-member court is nominated by the President, a third by the Parliament, and a third by the Supreme Court. In this system, each appointing body may seek to appoint persons sympathetic with its institutional interests. However, because only one-third of the members are appointed by any one body, none of them can be able to dictate outcomes if each justice acts as a pure agent.112

Comparing the two systems of cooperative and representative appointment, Ginsburg maintains that representative system has disadvantage. Decisions made by a court of pure agents are likely to be internally fragmented and of lower quality than those made by a more centrist, consensual deliberative body as appointed through cooperative mechanisms. He further notes that representative system creates some risks on the court. For example, if the chief executive is the head of the majority party in one or both houses of Parliament, this system will lead to a court that is allied with the chief executive.113

(d) Term Length of Justices: Ginsburg holds that term length is among the most crucial of design issues. It is typically considered as a key ingredient of the constitutional courts’ independence. Judges are at risk from excessive

111 Ibid., p. 43.
112 Ibid., p. 44.
113 Ibid., pp. 44-5.
pressure to advance short-term political interests rather than the long-term collective benefits. Therefore, the longer the appointment, the more independent a judge can be of prevailing political sentiments. Judges in some constitutional courts serve for life. However, many constitutional judges have limited terms. For example, judges on the German Constitutional Court serve a single twelve-year term.\textsuperscript{114}

Stating that judges of some constitutional courts, including that of Spain, are allowed to be reappointed, Ginsburg maintains that the possibility of reappointment has the potential to reduce judicial independence, as judges late in their term who seek to remain in office must be sensitive to the political interests of those bodies that will reappoint them. Nevertheless, he rightly notes that judges serving a single limited term also may act with an eye towards future employment possibilities, so to the extent political authorities have control over entry into the professorate, or other post-judicial positions, judges may be subject to political discipline in such systems as well.\textsuperscript{115}

\textbf{(e) Court Size:} Ginsburg states that the constitutional makers may stipulate in the Constitution the number of judges on the court. Here, the major tradeoff is between speed and accuracy. It seems that group decision making is of higher quality than individual decision making, at least in certain contexts. Although a single judge deciding all cases is a relatively inexpensive method of decision-making, the problem with this method is that the potential error costs of such a method are high.\textsuperscript{116}

To summarize the argument about the major dimensions of design choice, Ginsburg maintains that each dimension has certain effects on the capacity of the court to render accurate review. Because there are numerous dimensions upon which the institutional design of a system of judicial review may vary,

\textsuperscript{114} Ibid., pp. 46-7.  
\textsuperscript{115} Ibid., p. 47.  
\textsuperscript{116} Ibid.
there is an almost infinite array of configurations, and no two courts share exactly the same design and institutional environment.  

Regarding the strategy of case selection, Ginsburg divides the cases on which the court can concentrate attention into three different categories. The first category of case includes what can be called vertical separation of powers, that is, those concerning the division of power between regional governments and the central government mostly in a federal state. In these kinds of disputes, constitutional courts are usually national institutions with a policy-making role. The second category can be called horizontal separation-of-powers cases, and it concerns the relationship among bodies in the central government. In these kinds of disputes, the court’s role is mostly dispute resolver rather than policymaker. A third category of cases concerns constitutional rights. Like horizontal dispute resolution, these cases may sometimes involve challenging the powerful center on behalf of individuals. Such rights cases normally offer great legitimacy benefits to the court. Although the court will be deciding against a hypothetical majority represented by the government, it provides a victory to an interest group likely to have intensely held preferences. Populism can provide a bulwark against counterattack; a court can cultivate it by broadening standing and encouraging litigation by a range of rights-seeking interest groups.

To answer the question “Which kind of cases should courts concentrate on?” Ginsburg maintains that there is no uniform strategy that makes sense for all courts in all times and places. However, some generalizations are possible. For example, a centralizing approach to local-national relations might make sense for a young court subject to threats of attack or noncompliance. Ginsburg further states,

Judicial review does not exist in a political vacuum, but rather courts are constrained by the positions of other political actors. In new democracies, one

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117 Ibid., p. 48.
118 Ibid., pp. 86-8.
119 Ibid., p. 88.
of the key variables for the performance of judicial review is the power configuration of political forces. Other things being equal, a strong military or dominant party will hinder judicial review power. On the other hand, divided government, or equally balanced political forces, will expand the court’s room for interpretation of the Constitution and will help make it a natural arbiter to resolve political conflicts that arise. Political diffusion, either in the structure of the constitutional order or in the party system, allows courts the freedom to expand judicial power, build up legitimacy over time, and deepen the constitutional order.120

4.2. Horowitz: Suggesting a Carefully Designed Constitutional Court

Donald L. Horowitz in his thorough article entitled “Constitutional Courts: A Primer for Decision Makers,” while investigating two models of constitutional review, maintains that the constitutional court format may be more attractive than the ordinary Supreme Court format, because existing supreme courts may have sitting judges who are still attached to the old regime or are in other ways biased towards one or another of the major democratic antagonists. Another potent reason to create a new constitutional court is the common failure of the existing courts to develop the rule of law in ways that support democratic institutions. Moreover, sitting judges in some countries were frequently accused of corruption and incompetence.121

Horowitz believes that to create a constitutional court in new democracies the designers of the Constitutions should carefully observe some specific provisions. In this regard, he says,

There are a few specific issues that decision makers in new democracies might consider if they go about creating a constitutional court. Many new democracies need to get many things done in hurry: building infrastructure, reconstructing an educational system, creating a politically neutral army, reforming the legal system, and so on. The power to declare governmental

120 Ibid.
action unconstitutional is the power to block things, to prevent them from getting done. That power, therefore, needs to be exercised with restraint and with due respect to the political branches of government. Wide-ranging, vague powers confided to the courts risk thwarting that democratic voice. This makes it important to specify the jurisdiction of a constitutional court carefully. This is a delicate drafting job.\textsuperscript{122}

To guarantee the independence and impartiality of the constitutional court, and to avoid the problems specially the ones that can arise from politicians to influence the process of constitutional review, Horowitz maintains that in shaping the jurisdiction of the court, it might be wise to entrust it with \textit{a posteriori} adjudicative power. So it may not become a partisan in disputes between legislative factions, or between the executive and legislature.\textsuperscript{123} He further says,

Jurisdiction on the basis of individual complaints or referrals from other courts that certify the adjudication of constitutionality as essential to the decision of a pending case may be preferable to wide-ranging power to decide routinely on the constitutionality of every law that is passed or pending in Parliament. Likewise, jurisdiction to declare laws in conflict with specific provisions of the Constitution (such as a bill of rights or the enumerated powers of the central government) may avoid problems that can arise from a broad power to decide whether laws or government actions conform to the Constitution in general.\textsuperscript{124}

Horowitz, as well, holds that judicial review initiated by political authorities is more apt to insert a constitutional court in politics than judicial review that is initiated by litigants or by the ordinary courts when the constitutional question is crucial to the determination of individual cases.\textsuperscript{125} Thus, he believes,

\begin{itemize}
  \item \textsuperscript{122} Ibid., pp. 132-33.
  \item \textsuperscript{123} Ibid., p. 131.
  \item \textsuperscript{124} Ibid.
  \item \textsuperscript{125} Ibid., p. 129.
\end{itemize}
To the extent that constitutional adjudication becomes politicized, control of the constitutional court can itself become a political issue, just as the control of government or of a particular ministry may be a political issue. When this happens, and the court is seen as just another political actor rather than a neutral servant of constitutional norms, the moral weight of its decisions is likely to decline precipitously, and it will then be unable to perform its high function of helping to assure that the state is not just a democracy but a constitutional democracy that respects the rights of its citizens.\textsuperscript{126}

Regarding the qualifications and appointment of the constitutional judges, Horowitz holds that such judges should be learned in law, as evidenced by prior judicial experience or scholarly accomplishment. The appointment of judges on the most successful European constitutional courts is a function generally shared among the Executive the Legislature, and the Judiciary. If one body nominates judges, another might then have the power to confirm them, so that no branch may pack the court with its politically favored nominees. To preserve the independence of the Court, the terms of judges should be long and nonrenewable or renewable only once.\textsuperscript{127}

At the end of this article, Horowitz deals with the main issue regarding the creation of an efficient system of constitutional review in Islamic countries. He maintains that a special problem in these countries concerns the intersection of the Constitution with Shariah. Many Constitutions in the countries declare that no law in conflict with Islamic principles, or some specified version of them, may be enacted. Legislation is one common and sensible way in which Islamic principles have been infused into ongoing legal systems. The institution of judicial review provides another way through which Shariah can be incorporated into the legal system.\textsuperscript{128} However, the problem is that abrupt invalidation of existing legal institutions and doctrines that do not conform to a court’s conception of Shariah can disrupt the economy and unsettle societal expectations at a time when economic recovery and social stability are

\textsuperscript{126} Ibid., p. 133.
\textsuperscript{127} Ibid., p. 132.
\textsuperscript{128} Ibid., p. 134.
especially crucial. A great legal vacuum and great uncertainty would result from such decisions, with negative consequences for the administration of justice.¹²⁹

**Conclusion**

By relying on what was discussed in this Chapter, a theoretical framework can be concluded and highlighted as follows:

A legal system needs a Constitution to serve as the supreme law enforceable only by a “court-like” body. For new democracies, the constitutional court format is more attractive than the ordinary Supreme Court format because, for example, sitting judges in some existing Supreme Courts were frequently accused of corruption and incompetence.

To create a constitutional court in new democracies, decision makers ought to consider some significant issues:

The constitutional court must be independent of any governmental institutions. The required provisions concerning the independence of the constitutional court such as administrative and financial independence as well as conditions and manner of appointing the members ought to be predicted in the Constitution.

In the composition of the court, non-professionals lawyers should be with the professionals because ‘lawyers’ cooperation with the non-professional members helps them turn to the mere technical considerations. However, it is preferable that judges of the constitutional court are learned in the law.

The membership of the constitutional court should be incompatible with that of the government, the parliament, or any other popular representative body. As well, persons who are under employment of or hold office in a political party should not belong to the constitutional court.

In appointing the judges of the constitutional court, the normative task is to select an appointment mechanism that will maximize the chances that the judge will interpret the text in accordance with the intentions of the Constitution.

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¹²⁹ Ibid., p. 135.
makers and insulate judges from short-term political pressures, yet ensure some accountability. Appointment of the judges on the most successful European constitutional courts is a function generally shared among the Executive, the Legislature, and the Judiciary. If one body nominates judges, another might then have the power to confirm them, so that no branch may pack the court with its politically favored nominees.

To preserve the independence of the Court, the tenure of judges is usually long and nonrenewable. The possibility of reappointment of judges has the potential to reduce judicial independence, as judges late in their term who seek to remain in office must be sensitive to the political interests of those bodies that will reappoint them.

Access to the court is perhaps the most important ingredient in judicial review power. Jurisdiction on the basis of complaints of individuals or minority groups of the legislature or referrals from other courts is preferable to wide-ranging power to decide routinely on the constitutionality of every law that is passed or pending in parliament. Judicial review initiated by political authorities is more apt to insert a constitutional court in politics than judicial review that is initiated by litigants or by the ordinary courts.

* A posteriori and concrete review, as in the United States, requires litigation of constitutionality in the context of a particular case. It allows more information to be considered. On the other hand, *a priory* and abstract review, as in France, determines the constitutionality of a statute without a specific case. It increases the average quality of legislation. However, in *a priory* review the constitutional court may become a partisan in disputes between legislative factions, or between the executive and legislature. The Austrian Constitutional Court practices both abstract and concrete reviews.

Regarding the effect of the decisions, it can be said that the decisions of the courts in every leading model of constitutional review enjoy *res judicata* feature and are generally binding.

To accept an institution as a constitutional court, it is required that a court’s decisions on the unconstitutionality of a law totally annul the law. However,
when a court has not such a competency and it has just to return it to the parliament, its being a court appears dubious. Similarly, when a court is officially allowed to rewrite a law or replace all the regulations felt necessary for the previous ones, then the court is not judiciary but legislative. Furthermore, every institution that is vulnerable and exposed to the interference of the Legislative or the Executive cannot be a constitutional court. As a result, if a constitutional court is placed in its defined framework, there will be no problem in saying that this or that constitutional court is officially entitled council, court, or the constitutional Supreme Court.

On the other hand, when constitutional review becomes politicized and the constitutional court is seen as just a political actor rather than a neutral servant of constitutional norms, it will then be unable to perform its high function of protecting Constitution and citizens’ fundamental rights.

As an instance of a well-established constitutional court, it can be referred to the Austrian model. This model has integrated both the American and French notions of controlling the constitutionality of laws.