CHAPTER – III

CONSTITUTIONAL REVIEW
IN THE UNITED STATES OF AMERICA AND FRANCE
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Introduction

The historical origination, bases, and motives that helped the idea of constitutional review and formation of an institution as “Constitutional Court” to appear differ from one country to another. Therefore, expectations from, and inclinations towards the role and functions of this institution are affected by the historical, political, and social atmosphere of that country. Nevertheless, in practice, the designing and establishing of such an institution like other legal and political institutions in many countries rely on the models that have already been practiced in some leading countries.

As discussed in the previous chapters, some countries such as America, Austria, and France are the pioneers of constitutional review and the models they have presented have been welcomed and adopted throughout the world. This never implies that ‘the other countries’ have exactly copied the models and applied them to their legal system; rather it suggests that relying on those models, they have designed their own constitutional review system by focusing on their own experiences, and historical, political, and social conditions. In the present Chapter, the constitutional review models of two pioneer countries, the United States of America and France, are discussed.

Why the American and French models of constitutional review have been selected to be scrutinized in this comparative study follows very clear-cut reasons because these two countries were the first that devised written Constitutions that spread all over the world. Secondly, the political regimes derived from the Constitutions of these countries have brought about the expansion of teachings and political and legal values such as separation of powers, popular sovereignty, individual rights and freedoms etc. so that today, these regimes have secured a special position in the studies on law and politics. More importantly, the two countries studied in the present research work -India and Iran- are both influenced by the Common Law on which America has relied and the Civil Law to which France belongs respectively. Moreover, it is now vivid that the Indian judicial review is derived from the American system
of judicial review\textsuperscript{130} and that of Iran from the French one.\textsuperscript{131} Therefore, by investigating the features, role, and functions of the constitutional review bodies of these two countries, the two constitutional review systems of India and Iran will enjoy a better explanation and discussion.

Part One

Constitutional Review in the United States of America

1. Background of Constitutional Review in the United States
The Constitution of the United States of America is an active, living instrument in which is found the source and limits of power among the three governmental branches. The supremacy of the written Constitution has been recognized in the American legal system.\textsuperscript{132} However, in this regard the main question is, “Which part of government would have the ultimate responsibility to guard the Constitution?” This question was first debated at length in the Philadelphia Constitutional Convention of 1787.\textsuperscript{133} There were some doubts among the framers of the American Constitution as to the precise role the Supreme Court was to play in the political system.\textsuperscript{134} Although the Framers made it clear some sort of review of legislation needed to be established, the exact nature of the review was left undefined. In \textit{Federalist Paper No. 78}, written by Alexander Hamilton (1757–1804) in 1788, the judiciary (courts) was described as the “least dangerous to the political rights of the Constitution.” Hamilton saw the executive branch, the President, as carrying the “sword” and the legislative branch (Congress) carrying the “purse” which could be opened or closed at the political whim of the day. However, he noted the Supreme Court held neither

\textsuperscript{132} The Constitution of the United States of America, 1788, Art. 6.
and likely would be the fairest defender of liberty. It does seem that a majority of the framers agreed with the position stated by Alexander Hamilton that the Supreme Court would have the power “to declare all Acts contrary to the manifest tenor of the Constitution void.” Judicial review, then, is an implied rather than a substantive power; “it is implied from and incidental to, the Court’s judicial power—the power to interpret and decide cases.”

The establishment of the power of judicial review was due, in large part, to the able leadership of Chief Justice John Marshall, who served on the Court for thirty-four years. In 1801, when John Marshall became Chief Justice, the Supreme Court was considered weak and unimportant. The dramatic and often quoted decision of the Court in *Marbury v. Madison* made by John Marshall began its transformation into a significantly powerful part of the American governmental system. The ruling is considered by many the most important decision in American legal history. The Court, in this decision, established the guiding principles of judicial review which recognized the federal courts’ role in reviewing Acts of Congress and states regarding their constitutionality.

In February of 1801 Thomas Jefferson, the candidate of Anti-Federalist’s or Democratic-Republican Party, emerged as the presidential victor. President John Adams and his party, the Federalists, feared Jefferson would undo everything the Federalists had accomplished the past twelve years. He decided to pack the federal courts with as many new Federalist judges as possible before the Jefferson administration took power in March. Adams appointed his Secretary of State John Marshall to be Chief Justice of the U.S. Supreme Court. However, Marshall would remain Secretary of State through the last day of Adams’ term. Adams proceeded to nominate more than two hundred loyal

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137 Ibid., p. 15.
138 5 U.S. (1 Cranch) 137 (1803).
139 Brannen and Hanes, *supra* note 133, p. 867.
140 In 1800, two political parties dominated America, the Federalists and the anti-Federalists, who were called the Democratic-Republicans at the time. The Federalists, in power at the time with John Adams (1797–1801) as president, believed in a strong national government to expand the country’s economic and geographic interests and protect U.S. citizens. The anti-Federalists, a leading member being Thomas Jefferson, believed a strong central government would weaken the power of the states, and, therefore, the people. The anti-Federalists sought to halt further growth of the national government. See Brannen and Hanes, *supra* note 133, p. 869.
Federalists to new judgeships including forty-two justices of the peace in the District of Columbia. The Senate confirmed the nominations of the justices of the peace on March 3, Adams’ last day in office. Working late into the night, Adams signed the commissions and Secretary of State Marshall placed the official seal of the U.S. government on them then supervised their delivery. The new judges became appropriately known as the “midnight judges.” During these moments of confusion, several of the commissions were not delivered, including one to William Marbury.\footnote{Ibid., pp. 869-70.}

Jefferson became President the next day, March 4, and ordered the new Secretary of State, James Madison, not to deliver the remaining commissions. Marbury and several others who similarly did not receive their commission petitioned the Supreme Court, whose Chief Justice was now John Marshall, for a \textit{writ of mandamus}, ordering Madison to deliver their commissions. It was an amusing twist to Marbury’s petition to the Court that Chief Justice Marshall had failed to deliver the commission at the night of March 3. In the Judiciary Act of 1789, Congress had authorized the Supreme Court to issue \textit{writs of mandamus} to federal officials.\footnote{Ibid., p. 870.}

Chief Justice Marshall wrote the opinion for a unanimous Court. Marshall managed to create a skillful opinion amid a highly charged political atmosphere. Marshall hoped to avoid a direct conflict with Jefferson, Madison, and the anti-Federalist whom he feared would simply say no if he ordered them to deliver the commissions. At the time, the American Supreme Court in fact had little recognized power to force other branches of the government to comply with its decisions. In an attempt to aid the growth of the young governmental system by deciding who would be the ultimate interpreter of the Constitution, Marshall established the principle of judicial review.\footnote{Ibid.}

In the historic decision, Marshall declared the Section 13 of the Judiciary Act of 1789 giving Marbury the right to directly petition the Supreme Court unconstitutional. Marshall ruled that this legislation violated the intent of the
Constitution by giving the Supreme Court original jurisdiction in matters not mentioned in Article III.\textsuperscript{144} He held that if the Constitution is a paramount law,\textsuperscript{145} unchangeable by ordinary means, a legislative Act contrary to the Constitution is not law.

Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each\textsuperscript{146}… If both the law and the Constitution apply to a particular case … the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the Constitution; and the Constitution is superior to any ordinary Act of the legislature; the Constitution, and not such ordinary Act, must govern the case to which they both apply.\textsuperscript{147}

Marshall expressed, “[A] law repugnant to the Constitution is void.”\textsuperscript{148} He, as well, considered whether the judiciary was indeed the proper branch of government, as opposed to the executive (President) or legislative (Congress) to have the final authority to overturn unconstitutional legislation. Describing for the first time the doctrine of judicial review, Marshall stated that the federal courts, above all the Supreme Court, have the power to declare laws unenforceable if they violate the Constitution. Marshall wrote, “This is the very essence of judicial duty.”\textsuperscript{149}

Anyhow, there are three principles that constitute the basis of the American doctrine of judicial review: 1) the idea that the constitution is the embodiment of fundamental law, 2) acceptance of the belief that the legislature and other

\textsuperscript{144} Article 3 of the U.S. Constitution gave the Supreme Court original jurisdiction over politically sensitive issues such as those involving “ambassadors” or when one of the states was named as a party, while Marbury was neither an ambassador nor a state government.

\textsuperscript{145} In his judgment, Marshall enumerates reasons why the United States Constitution should be considered to be a superior law by the courts. \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803), pp. 178-80.

\textsuperscript{146} Ibid., p. 177.

\textsuperscript{147} Ibid., p. 178.

\textsuperscript{148} Ibid., p. 180.

\textsuperscript{149} Brannen and Hanes, \textit{supra} note 133, pp. 871-73.
agencies of government are inferior to the provisions of the constitution, and 3) the idea that judges are to enforce the constitution.\textsuperscript{150}

2. Structure of Constitutional Review Body in the United States

Since the body that controls the constitutionality of laws in the United States is in practice the very judiciary of that country, to explain the structure of the constitutional review body in the country, inevitably the very federal judiciary system must be investigated.\textsuperscript{151} Section 1 of Article 3 of the American Constitution says, “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” Accordingly, the Congress exercised its authority to create a three level judicial system with the Supreme Court at the top, courts of appeal in the middle, and district courts at the bottom.

2.1. Federal District Courts

Trial courts, called federal district courts, are at the lowest level of the American federal judicial system. These courts are taken into account as the competent courts of the first instance. There are ninety-four federal district courts covering different areas of the country. Their number in any state is between one and four. Each federal district court handles trials for cases in its area.\textsuperscript{152} These courts hold trials in both criminal and civil cases based on the American Constitution, as well as, the laws and regulations made by the Congress.\textsuperscript{153}


\textsuperscript{151} It should be noted that most states have, also, a judicial system that resembles the federal system. Trial courts hold trials in both criminal and civil cases. Most states also have special courts that hear only certain kinds of cases. Family, juvenile, and traffic courts are typical examples. There also are state courts, such as justices of the peace and small claims courts that handle minor matters. Appeals from all lower courts usually go to a court of appeals. The losing party there may take her case to the state’s highest court, often called the state supreme court. When a case involves the American Constitution or federal law, the losing party sometimes may take the case from the state supreme court to the American Supreme Court. See Brannen, Daniel E. and Richard Clay Hanes. \textit{Supreme Court Drama: Cases That Changed America}, vol. 1. Canada: U.X.L. (The Gale Group), 2001, p. iiii.

\textsuperscript{152} Ibid., p. iii.

\textsuperscript{153} The Constitution of the United States, Art. 3, Sec. 2.
2.2. Federal Courts of Appeals

The federal courts of appeals are the second level in the federal judicial system. These courts are in fact the appellate courts of the judgments issued by the federal district courts, that is, when a party loses a case in district court, he/she usually may appeal the decision to a U.S. court of appeals. Most of the cases are announced adjudicated in this stage.\(^{154}\)

There are twelve courts of appeals covering twelve areas, or circuits, of the country. For example, the district courts in Connecticut, New York, and Vermont are part of the Second Circuit. Appeals from district courts in those states go to the United States’ Court of Appeals for the second circuit. During an appeal, the losing party asks the court of appeals to reverse or modify the trial court’s decision. In essence, he/she argues that the trial court made an error when it ruled against his/her.\(^{155}\) Courts of appeals frequently decide cases in panels of three judges with appeal to the court *en banc*.\(^{156}\) The judgments of the courts can be appealed directly in the federal Supreme Court.\(^{157}\)

2.3. The Supreme Court

The Supreme Court is the highest court in the judicial branch of the American federal government.\(^{158}\)

2.3.1. Composition of the Supreme Court

The Supreme Court is composed of nine members including the Chief Justice and eight judges. There are no qualifications stipulated in the laws for the judges to have for being appointed in the Supreme Court. However, the usage demands that the judges of the Supreme Court be among the greatest legal minds in the country.\(^{159}\) Appointment to the job is usually the high point of a

\(^{154}\) Brannen and Hanes, *supra* note 151, p. lli.
\(^{155}\) Ibid.
\(^{157}\) Brannen and Hanes, *supra* note 151, p. lli.
\(^{158}\) The Supreme Court of the United States was born in 1789.
career that involved some combination of trial work as a lawyer, teaching as a professor, or service as a judge on a lower court.\textsuperscript{160}

Under the American Constitution, the President appoints Supreme Court justices with the advice and consent of the Senate.\textsuperscript{161} The process of appointing a new justice usually begins when one of the justices retires or dies. The president begins the process by nominating someone to fill the empty seat on the Court. The President usually names someone who he thinks will interpret the Constitution favorably to his political party’s wishes. In other words, democratic presidents typically nominate liberal justices, while republican Presidents nominate conservative justices. The next step in the process is for the Senate Judiciary Committee to review the President’s recommendation. If the Senate is controlled by the President’s political party, the review process usually results in Senate approval of the President’s selection. If the President’s political opposition controls the Senate, the review process can be fierce and lengthy. The Judiciary Committee calls the nominee before it to answer questions. The Committee’s goal is to determine whether the nominee is qualified to be a Supreme Court justice. The Committee also uses the investigation to try to figure out how the nominee will decide controversial cases, such as cases involving abortion. After its investigation, the Committee recommends whether the Senate should confirm or reject the President’s nomination. Two-thirds of the senators must vote for the nominee to confirm him as a new Supreme Court justice.\textsuperscript{162}

The judges of the Court are non-dismissable. They serve in office for life. Neither the President nor the Congress can make the judges resign. They shall be removed from office for a lack of “good behavior”\textsuperscript{163} through a special procedure known as ‘Impeachment.’ However, none of the judges have ever

\textsuperscript{160} Brannen and Hanes, \textit{supra} note 151, p. l\textit{iv}.
\textsuperscript{161} The Constitution of the United States, Art. 2, Sec. 2.
\textsuperscript{162} Brannen and Hanes, \textit{supra} note 151, p. l\textit{iv}.
\textsuperscript{163} The Constitution of the United States, Art. 3, Sec. 1.
been removed in this manner.\textsuperscript{164} Therefore, the special position of the judges grants them a very vast independence against the President and the Congress.\textsuperscript{165}

2.3.2. Jurisdiction of the Supreme Court

According to the American Constitution, the judicial power shall extend to all cases involving constitutional questions, the federal laws, and treaties; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime (activities on the oceans) jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects. Only the cases involving ambassadors, other public ministers and consuls, and when a state is a party may come directly to the Supreme Court without first going through the lower courts (original jurisdiction of the Supreme Court). In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction.\textsuperscript{166}

As mentioned earlier, according to the \textit{Marbury} decision\textsuperscript{167} the Supreme Court also is competent to review the constitutionality of federal and state laws. The Court does this to make sure that all federal and state governments are obeying the Constitution. For example, if Congress passes a law that violates the First Amendment, freedom of speech, the Court can strike the law down as unconstitutional.

As the highest court in the United States, the Supreme Court also has the job of interpreting federal laws. In this role, the Supreme Court makes the final decision about what a federal law means. The Supreme Court as well as the other federal courts may also issue \textit{writs of habeas corpus} when questions about the legality of an individual’s detention by authorities are raised and

\begin{footnotesize}
\textsuperscript{165} Hamon and Wiener, \textit{supra} note 159, p. 119.
\textsuperscript{166} The Constitution of the United States, Art. 3, Sec. 2.
\textsuperscript{167} 5 U.S. (1 Cranch) 137 (1803).
\end{footnotesize}
writs of mandamus, which force government officials to carry out their public duties. The federal courts can issue arrest and search warrants and hear both criminal and civil cases.\textsuperscript{168}

3. Domain of Judicial Review Power in the United States

3.1. Organizational Domain

There is a question raised “Which Courts of the United States possess judicial review jurisdiction? Are all courts, the lowest courts to the highest court, \textit{i.e.}, the Supreme Court, competent enough to discharge this big responsibility?” In reply, it must be stated that according the \textit{Marbury} the reviewing of the constitutionality of laws is an inherent responsibility of the judges in all types of courts. In fact, the judges are always required to impose the supremacy of the high rules over the lower rules, and in case of any contradiction between them, they must avoid enforcing the lower unconstitutional rules. The state courts, too, in their geographical and political domains are responsible to review the conformity of the state laws with the state Constitution. Even in cases whose solution is not in the monopoly of the federal courts, the state courts have the right to examine them. It is in this case that these courts may mount onto the position where they can review the federal laws or state laws for their conformity with the federal Constitution, and by virtue of a propounded claim, they may declare an Act unconstitutional.\textsuperscript{169} Here, the definite and final judgments issued by the state courts may be referred to the Supreme Court and the Court may start the appellate examination, and thus form a precedent. This solid and essential competency escalated the Supreme Court of America beyond a judicial body as a superior political body in the policymaking and general affairs of America. Perhaps, it is this high master review of the Supreme Court that has caused the subject of American judicial

\textsuperscript{168} Brannen and Hanes, \textit{supra} note 133, p. 864.

\textsuperscript{169} Hamon and Wiener, \textit{supra} note 159, pp. 119-20.
review to be studied under the name of the ‘Supreme Court’, and consequently the lower courts’ role forgotten.170

3.2. Inclusion Domain
Another question is, “What do the courts review? Are all laws, judgments issued by the subordinate courts, administrative decisions, and the Presidential orders included in their review domain?” The answer is that all actions resulting from the public authority either as a law or as an administrative decision and Presidential orders or decisions made by the subordinate Courts are under the judicial review, and judges can review each of such actions for their constitutionality.171

4. Constitutional Adjudication Procedure in the United States
Judicial review in America is always of a posteriori type. Therefore, to use the means of judicial review, one must always wait for the Act to be enforceable.172 Moreover, the federal courts have no authority to hear abstract questions, or questions not presented by actual litigation.173

Each party of a case, either the plaintiff or the defendant, can challenge the constitutionality of an Act in the following three main ways:

4.1. Exceptional Unconstitutionality
Sometimes it happens that an individual or the public prosecutor sues another individual claiming that he/she (the defendant) has violated the provisions of an Act. Here, the defendant can, to exonerate himself/herself, exceptionally claim that the Act is not constitutional, and if the court finds the Act unconstitutional, it can avoid issuing the judgment based on the same. In this manner, the Act is

171 Hamon and Wiener, supra note 159, p. 118.
172 Over the years, politicians could use a posteriori review as an instrument to claim credit from their supporters. They could pass the unconstitutional legislation and shift blame to the court for striking it. For example, members of Congress often proposed antia abortion legislation of dubious constitutionality in the aftermath of Roe v. Wade, 410 U.S. 113 (1973). See Devins, Neal. Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate. Baltimore, MD: Johns Hopkins University Press, 1996.
not annulled, but exceptionally it will be unenforceable for that case though it might be documented in some other cases.\textsuperscript{174}

The advantage of this method is that the validity of the Act and its enacting authority, usually the Congress, are not impaired. Albeit, if the claim were brought up in the Supreme Court, its judgment would be enforceable by all the Courts; thus, the Act that is unconstitutional will not be enforceable, and in practice, it is naturally void.\textsuperscript{175}

\textbf{4.2. Injunction}

In this method, if individuals or public authorities find an Act harming their interests unconstitutional, they can challenge it before it is enforced. If the Court, too, having examined the issue, opines on its unconstitutionality, the Court, through the injunction framework, can give a special order to the executive authorities to avoid enforcing it. As a result, no enforcer will have the right to document on or enforce it.\textsuperscript{176} It was on the basis of injunction that in 1954 the Supreme Court banned the segregation of black and white student schools.\textsuperscript{177}

\textbf{4.3. Declaratory Judgment}

Another important instrument of constitutional review in the United States is the declaratory judgment, according to which parties can ask courts to determine the scope of legal rights and duties growing out of a particular transaction without awaiting an action for damages, or even for harm to be done. By the 1960s, this kind of procedure had “markedly affected constitutional litigation.”\textsuperscript{178} Through this method, no longer need a party wishing to challenge a statute or administrative practice await governmental

\textsuperscript{174} Hamon and Wiener, \textit{supra} note 159, pp. 120-21.
\textsuperscript{176} Hamon and Wiener, \textit{supra} note 159, p. 121.
\textsuperscript{177} \textit{Brown v. Board of Education}, 347 U.S. 483 (1954). By virtue of this judgment, the doctrine “Separate but Equal” was abolished. The doctrine first accepted by the U.S. Supreme Court in \textit{Plessy v. Ferguson}, 163 U. S. 537 (1896), establishing that different facilities for blacks and whites was valid under the Equal Protection Clause of the Fourteenth Amendment as long as they were equal.
action -or at least an explicit threat of immediate action- against him/her.\textsuperscript{179} The party no longer needs show that he/she is entitled to some remedy beyond a declaration on the constitutional question.\textsuperscript{180} In sum, in this method, no suit is brought, but the disagreement between the parties results in a judicial consultation to solve the issue.\textsuperscript{181}

In 1937, the Court upheld the validity of the federal Declaratory Judgment Act. In \textit{Aetna Life Ins. Co. v. Haworth}\textsuperscript{182} a unanimous Court found that the Act was procedural in nature and restricted in application to “controversies which are such in the constitutional sense.”\textsuperscript{183}

5. Supreme Court’s Judgments and their Effects

In the United States, annually about 7000 complaints are referred to the Supreme Court. In many rare cases that are referred to it through appealing, the court has to make decisions. However, in the ordinary mode, the Court has the authority to check if the issue is worth enough to be reviewed. This will take place only when at least four judges of the Court agree with the necessity of the review. In this way, 95\% of the complaints are turned down. Therefore, the Supreme Court issues only 150-200 judgments every year.\textsuperscript{184}

The judgments of the Court are too long, not only because it investigates the issue very carefully and discusses its different aspects profoundly, but because in addition to the view of the majority that forms the basis of the judgment, it includes the opposing views of the minority. In other words, one or some judges’ opposing views who object to the entirety or a portion of the suggested

\textsuperscript{179} \textit{Steffle v. Thompson}, 415 U.S. 452 (1974). The petitioner, who had twice been warned to stop distributing handbills on an exterior sidewalk of a shopping center against American involvement in Vietnam and threatened with arrest by police if he failed to do so, brought an action for injunctive and declaratory relief. He claimed that the application to him of Georgia’s Criminal Trespass Law would violate his First and Fourteenth Amendment rights. It was held that the threats of prosecution in the circumstances alleged were not imaginary or speculative, and it was unnecessary for the petitioner to expose himself to actual arrest or prosecution before making his constitutional challenge.

\textsuperscript{180} \textit{Powell v. McCormac}, 395 U.S. 486 (1969), p. 499. In this judgment, the Court stated, “A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus … A declaratory judgment can then be used as a predicate to further relief, including an injunction.”


\textsuperscript{182} 300 U.S. 227 (1937).

\textsuperscript{183} Ibid., p. 240.

\textsuperscript{184} Hamon and Wiener, \textit{supra} note 159, p. 121.
solution, as well as, the views that admit the solution, but oppose the reasoning which supports it. It has so happened that these views have been so much longer and larger in number that they have even exceeded the judgment itself.\textsuperscript{185}

The Supreme Court’s review is \textit{incidenter}; that is, it does not produce comprehensive effects applicable to all people because in all assumptions, the constitutionality of an Act is investigated only because of the effects it has on the personal situation of the claim parties. However, the injunction and declaratory judgment allow individuals the chance of requesting the review of constitutionality without waiting for any action to happen to them. Thus, the judgments of the Supreme Court possess some preventive effects, too.\textsuperscript{186}

The Court’s judgment is the final word in a case. It enjoys \textit{res judicata} (a matter adjudicated) feature. Therefore, parties who are unhappy with the result have no place to go to get a different ruling. The only way to change the effect of a Supreme Court decision is to have Congress change the law, have the entire nation changed, amend the Constitution, or have the President appoint a different justice to the Court when one retires or dies. This is part of the federal government’s system of checks and balances, which prevents one branch from becoming too strong.\textsuperscript{187}

The laws that are declared unconstitutional are not in reality annulled. The laws are not excluded from the official codes, and if their unconstitutionality is declared by some subordinate courts, the other courts are free to enforce them or not. Reversely, if the judgment is given by the Supreme Court and if later it does not change its judgment later on, the respective law will in practice, be void. In fact, the Anglo-Saxon countries are familiar with the “\textit{stare decisis}”, a rule that requires the courts to make decisions according to their previous judgments or those of their higher courts. The Supreme Court, too, obeys this rule only in some special directions.\textsuperscript{188}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{185} Ibid., p. 122.
\item \textsuperscript{186} Ibid.
\item \textsuperscript{187} Brannen and Hanes, \textit{supra} note 151, p. \textit{liv}.
\item \textsuperscript{188} Hamon and Wiener, \textit{supra} note 159, p. 122.
\end{enumerate}
\end{footnotesize}
The judgments of the American Supreme Court like other Anglo-Saxon countries enjoy much significance because in these countries the law relies more on the precedent than on laws; for example, when a political individual such as a Presidential candidate takes stance for abortion, he/she announces that he/she is for or against the Roe v. Wade judgment. That is, opposing or agreeing with the precedent enjoys a superficial exemplary value. Therefore, the precedent of the Supreme Court has always been of political effects, but these effects have always been different in terms of time. At times, by declaring the Acts that disturb the established order of the society unconstitutional, the Court has been able to maintain the status quo as solid and sound. However, at times the reverse has been true; by offering a new interpretation of the Constitution some of which might have been against the previous ones and/or have produced nearly similar effects with the legislation reformations, it has exposed the status quo to criticism and questions. Finally, at times it has revoked some of its decisions to take account the resistance resulting from the effects of its decisions in many states such as opposition and objections to death penalty and the abortion.190

6. Some Main Principles of Judicial Review in the United States
Some of the existing principles in the Constitution of the United States have caused huge cases. These principles are as follows:

6.1. Freedom of Speech
According to the First Amendment of the American Constitution, “Congress shall make no law abridging the freedom of speech.” Some examples of decisions handed down by the Supreme Court regarding the freedom of speech include: Buckley v. Valeo, United States v. Grace, Regan v. Time, Inc.,

189 410 U.S. 113 (1973).
190 Hamon and Wiener, supra note 159, pp. 126-27.
6.2. Due Process of Law

The principle of “due process of law” that is originated from the theory of rule of law is related to the individual rights and liberties. According to this principle, “no person shall be deprived of life, liberty, or property, without due process of law.”200 As well, “no state shall deprive any person of life, liberty, or property, without due process of law.”201

This principle was originally devised to protect the rights of the black and at present serves as a very important principle to control the constitutionality of laws. Therefore, a law passed by the Congress must conform to some of the accepted and common legal principles even if it is not stipulated in the Constitution.202 Some decisions of the Supreme Court by relying on this principle include Kennedy v. Mendoza Martinez,203 Aptheker v. Secretary of State,204 Schemeider v. Rusk,205 Leary v. United States,206 Turner v. United States,207 Chief of Capitol Police et al v. Jeannette Rankin Brigade et al,208 Dept. of Agriculture v. Moreno,209 and Califano v. Sibowitz.210
6.3. Equal Protection

Based on the principle that is stipulated in the Fourteenth Amendment of the American Constitution, “No state can deny to any person within its jurisdiction the equal protection of the laws.” In this manner, all the citizens of a state can enjoy an equal legal support, and no discrimination is acceptable. Today, this Amendment applies to ban any discriminatory measures with racial or political intentions. Some decisions handed down by the Supreme Court regarding the equal protection include *Richardson v. Davis*, *Frontier v. Richardson*, *Dept. of Agriculture v. Murry*, *Jimenez v. Weinberger*, *Weinberger v. Weisenfeld*, *Railroad Retirement Board v. Kalina*, and *Califano v. Westcott*.

6.4. Contract Clause

According to the principle that is derived from the Section 10 of Article 1 of the American Constitution, “No State shall … pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.” In *Fletcher v. Peck*, the Court recognized the Contract Clause as a key tool to limit state regulation of economic matters involving contracts and property rights. Federal protection of property rights, often using the Contract clause, led to overturning numerous state laws through the next century.

The main goal of this clause was to guarantee and protect the big land proprietorship rights against any measures of a state Legislative; it intended to facilitate the debtors’ commitment like the agriculturists. This clause was later applied by the Supreme Court to fight the government’s interferences in the economic issues during the New Deal, though today it enjoys a secondary

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211 Hamon and Wiener, supra note 159, p. 124.
212 409 U.S. 1069 (1972).
219 10 U.S. (6 Cranch) 87 (1810).
220 The New Deal is the name that United States President Franklin D. Roosevelt gave to a series of economic programs he initiated between 1933 and 1936 with the goal of giving work (relief) to the unemployed, reform of
rank of use.\textsuperscript{221} Some other main cases regarding the contract clause include \textit{Dartmouth College v. Woodward},\textsuperscript{222} \textit{Charles River Bridge v. Warren Bridge},\textsuperscript{223} \textit{Allgeyer v. Louisiana},\textsuperscript{224} and \textit{Adkins v. Children’s Hospital}.\textsuperscript{225}

6.5. Commerce Clause

Section 8 of Article 1 of the American Constitution says, “The Congress shall have power … to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” In \textit{Gibbons v. Ogden},\textsuperscript{226} the Supreme Court for the first time used the commerce clause. Some other decisions of the Court regarding this clause include \textit{United States v. Brown},\textsuperscript{227} \textit{Nat’l League of Cities v. Usery},\textsuperscript{228} \textit{United States v. Lopez},\textsuperscript{229} \textit{Seminole Tribe of Florida v. Florida},\textsuperscript{230} and \textit{Printz v. United States}.\textsuperscript{231}

7. A Glance at the Performance of the Supreme Court of the United States

The Supreme Court of the United States has changed greatly over the years. It has played a significant role in the gradual changes that have taken place in American government and politics and has had a significant influence on Congress.

The provisions of the American Constitution have entered the legal system of this country through the precedent and the interpretation that the Supreme Court of this country has given of the Constitution. This has caused the examining and evaluating of the Supreme Court’s performance in interpreting the Constitution and safeguarding it to enjoy much more importance than that of other countries. This results from the fact that in America, many important

\textsuperscript{221} Hamon and Wiener, \textit{supra} note 159, p. 123.
\textsuperscript{222} 17 U.S. (4 Wheat.) 518 (1819).
\textsuperscript{223} 11 Pet. 420 (1837).
\textsuperscript{224} 165 U.S. 578 (1896).
\textsuperscript{225} 261 U.S. 525 (1923).
\textsuperscript{226} 9 Wheat. 1, 187 (1824).
\textsuperscript{227} 381 U.S. 437 (1965).
\textsuperscript{228} 426 U.S. 833 (1976).
\textsuperscript{229} 514 U.S. 549 (1995).
\textsuperscript{230} 517 U.S. 44 (1996).
\textsuperscript{231} 521 U.S. 898 (1997).
political and legal issues and the great political and social changes are somehow related to the position-taking and judgments of the Supreme Court. As Alexis de Tocqueville says, in America a judge is one of the first rank political powers. Peace, advancement, and even existence of the union is managed by nine federal judges without whom the Constitution would be a dead body.232

In the early years of its formation, the Supreme Court very cautiously and conservatively made use of its authorities. In this period, very few of the laws were declared unconstitutional.233 However, the Court gradually started acquiring an activist and liberal stance through constitutional interpretation. One of the Court’s greatest liberal periods was when Chief Justice Earl Warren headed the Court from 1953 to 1969. In 1954, the Warren Court decided one of its most famous cases, Brown v. Board of Education,234 in which it forced public schools to end the practice of separating black and white students in different schools. The Warren Court was followed by one of the Court’s greatest conservative periods, under Chief Justice Warren E. Burger from 1969 to 1986, followed by Chief Justice William H. Rehnquist from 1986 onwards.235

In this section, the performance of the Supreme Court in some controversial areas during the past two centuries will be discussed.

7.1. Reinforcement of the Federal System Supremacy
After the approving of the American Constitution, the political leaders’ main concern was that perhaps the union composed of some states, due to some events, would render uncertain and then collapse. Therefore, their all efforts were to maintain the union that had formed in federalism framework. The main focus of the American Constitution was on the same point, as well. Particularly, Article 4 of the Constitution was allocated to the regulating of the

233 Hamon and Wiener, supra note 159, p. 124.
235 Brannen and Hanes, supra note 151, p. lv.
relationship between the Union and the States, as well as, the inter-state relationship. Accordingly, when the Supreme Court started to interpret and protect the Constitution, it tried to safeguard and reinforce the federalism and to develop the competencies of the federal government.236

In the early 19th century, after John Marshall accepted the power of judicial review for the Supreme Court, the case of *McCulloch v. Maryland*237 was propounded in the Court. It followed the story that in 1816, the Congress passed an Act related to the establishment of the National Bank, but some of the states objected to this, claiming that the federal government was going to interfere with the internal affairs of the states and tried to find a legal loophole to stop the Act by placing some limitations. In this way, when a branch of the National Bank was established in the state of Maryland, this state lodged a complaint before the State Supreme Court. This case finally was referred to the Supreme Court of the United States in 1819. Chief Justice John Marshal who was more favored the federal government announced that Maryland State’s reaction was unlawful. The basic axis of all his reasoning in this decision was that by virtue of Article 1 of the American Constitution, the congress could enact laws that were felt necessary and that the federal laws were superior to the state laws. The National Bank of America was a federal institution and needed to continue its job without any state’s creating problems in its way. If the State Legislature of Maryland could stop the National Bank’s activities, it would for sure try to stop in other federal institutions’ affairs. This judgment consolidated and empowered the main message and spirit of the American Constitution: the federal system.238 Therefore, the efforts of the Supreme Courts’ judges, till the late 19th century, were to consolidate the principles of federalism, but they cautiously and conservatively tried to respect the tendencies and feelings at local people of the States.239

236 Motallebi, *supra* note 170, pp. 228-29.
237 17 U.S. 316 (1819).
238 See Brannen and Hanes, *supra* note 133, pp. 874-79; also see Motallebi, *supra* note 170, p. 229.
The Rehnquist Court was active throughout the 1990s using its power of judicial review to limit the scope of federal power by striking down Acts of Congress for violating federalism principles in the Constitution. The Rehnquist Court’s decisions alarmed some commentators, who were afraid of the Court’s attempt to return constitutional doctrine and federal power to a pre-New Deal status. The Supreme Court decisions in this period had important implications not only for constitutional law, but also for Congress’s power to legislate, the balance of power between the state and federal governments, and the lawmaking process itself. An illustrative example in this regard is the *United States v. Lopez* case and the Gun Free School Zones Act.

Alfonso Lopez, Jr., was a twelfth-grade student at Edison High School in San Antonio, Texas. On March 10, 1992, he was caught with a 38-caliber handgun on school grounds. Although the gun was unloaded, he had five bullets in his possession. According to Lopez, he was being paid to deliver the gun after school to someone else who was planning to use the gun in a “gang war.” Lopez was originally charged under Texas law but later was prosecuted for violating a federal law known as the Gun-Free School Zones Act, 18 U.S.C. Section 922(q) (the GFSZA). The GFSZA was passed by a Democratic Congress and signed by George Bush, a Republican President, in 1990. It defined school zones as the “grounds” of any public, private or parochial school, or as all area within “a distance of 1000 feet from the grounds of a ... school.” Under the Act it was illegal” for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” Uncontroversial in all respects, the GFSZA was introduced on the floor of the Senate, incorporated into the Crime Control Act of 1990 by voice vote, passed both houses of Congress easily, and signed into law by the President. The bill was never formally debated on the floor of either House, and there is no evidence of opposition to it in the public record. Lopez was convicted under the GFSZA, which he then challenged as unconstitutional for falling outside Congress’s enumerated powers in Article I of the United States

Constitution. The Federal District Court allowed the conviction to stand, declaring that the GFSZA was constitutional because Congress had the power under the Commerce Clause to regulate this activity. The federal Fifth Circuit Court of Appeals reversed the decision, however, and ultimately, the Supreme Court agreed and affirmed the Fifth Circuit, declaring the GFSZA unconstitutional in *United States v. Lopez.*

7.2. Socio-economic Issues

One of the dimensions of performance of the American Judiciary as to safeguard the Constitution that has remarkably affected the social changes in this country is the decisions the Supreme Court of America made in socio-economic grounds, some of which have been the chronological origination of some transitions and processes. Some of these issues that are more important are discussed in the following section.

7.2.1. Rights of the Black

In general, in the first half of the 19th century, the Supreme Court cautiously and conservatively looked at the issue of slavery. In Mid 19th century, the Court regarding the well-known case of *Dred Scott v. Sandford* made a decision that badly impaired its grace, and in some individuals’ opinion, the decision paved the way for Civil War (1861–1865) in America. This judgment that originated from racialist inclination considered the black as a property of the owners. In this decision, the Court also ruled that the Missouri Compromise, which had been passed by Congress to ease the tension between the North and South, was unconstitutional. However, the Court did suffer greatly at the hands of Congress for this decision. This was evidenced by the fact that Congress changed the number of justices three times within the span

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242 60 U.S. 393 (1857).
of six years from 1863 to 1869. These changes allowed Congress to control the policies and decisions of the Court.\textsuperscript{243}

Civil War in the United States ended up in 1865. The most fruitive consequence of this war was the abolition of slavery. Abraham Lincoln (1809-1865) who became the President in March 1861 and was highly favored and supported issued the order of the abolition of slavery (the Emancipation Proclamation)\textsuperscript{244} in January 1863. Then in 1865, to legally guarantee this order, he got the Thirteenth Amendment of the American Constitution enacted whereby slavery was banned throughout the country. The Fourteenth Amendment passed in 1868 and the Fifteenth Amendment passed in 1870 emphasized the principle of equality and removing all kinds of discrimination. When it seemed that the Supreme Court might rule some of these Acts, known as the Civil Rights or Reconstruction Acts, unconstitutional,\textsuperscript{245} Congress limited the appellate jurisdiction of the Supreme Court so it could not announce a decision in the case, even though the case had already been heard by the Court.\textsuperscript{246} Thus, the Court was removed from an active role in this very important period in the history of the United States. However, these measures did not last long and did not bring about equality between the black and the white and when the racialists gradually mounted on power in the political squares, the Supreme Court too, surrendered to their propaganda that the white were a superior race. The decision of the Supreme Court in the \textit{Civil Rights Cases} greatly undermined the laws passed by Congress during the Reconstruction that were designed to grant equal rights to the newly freed African American slaves.\textsuperscript{247}

Before World War II started, the legal status of the black was still indiscrimination. In this period, the formula of ‘separate but equal’ ruled in


\textsuperscript{244} The Emancipation Proclamation consists of two executive orders issued by the United States President, Abraham Lincoln, during the American Civil War. The first one, issued on September 22, 1862, declared the freedom of all slaves in any state that did not return to Union control by January 1, 1863. The second order, issued on January 1, 1863, named the specific states where it applied. Available at: http://en.wikipedia.org/wiki/Emancipation_Proclamation, visited on Nov. 19, 2008.

\textsuperscript{245} \textsuperscript{245} \textit{EX Parte McCordie}, 7 Wallace 700 (1869).

\textsuperscript{246} Abraham, supra note 243.

\textsuperscript{247} \textit{Civil Rights Cases}, 109 U.S. 3 (1883).
Plessy v. Ferguson\textsuperscript{248} was prevailed. In 1932, Franklin Roosevelt acceded to power. His first measures were to eliminate the discrimination in the Army and fight with it in the employment. The Supreme Court of the country unlike its previous policy where it cautiously avoided supporting the black, started to support the President’s programs. From 1944, the Court accelerated its decision making process in this way\textsuperscript{249} and, in 1954, announced its most famous judgment known as Brown v. Board of Education.\textsuperscript{250} As mentioned earlier, this judgment ruling that separate is not equal ended the prohibition of the black students in the white’s schools and universities, and brought about a great positive social change in the American society.

7.2.2. Individual Rights and Freedoms

One of the most significant responsibilities of the American Supreme Court that resulted in its issuing many important judgments is the highly ambiguous and most challenging square of individual rights and freedoms. This has practically turned the Supreme Court into a powerful instrument for the social changes.

The first supplement [the Ten Amendments] to the American Constitution was passed in 1791. These Amendments extensively and with general and unconditional clauses have presented various individual rights and freedoms. The Clause of these Amendments while express and simple, after some times and different social transitions, needed new interpretations so that they would have their effectiveness properly. In all the cases where a particular legal concept or a special kind of rights and freedoms has been admitted in the American legal system, the foundation of the admittance has been the decision which the Supreme Court as to interpret the constitutional provisions specially the provisions relating to the individual rights and freedoms has made.\textsuperscript{251}

\textsuperscript{248} 163 U. S. 537 (1896).
\textsuperscript{249} Motallebi, \textit{supra} note 170, p. 234.
\textsuperscript{250} 347 U.S. 483 (1954).
\textsuperscript{251} Motallebi, \textit{supra} note 170, pp. 234-5.
In the past few decades, the provisions of Ten Amendments have been exposed to different interpretations that have resulted in the creation of modern and excessive liberalism. For example, the First Amendment that presents the freedom of speech reflects something grossly different from what it classically did. This freedom is interpreted as individual satisfaction and excessive support of individual behaviors. One recent example is the Supreme Court’s decision in United States v. Eichman, involving the federal “flag burning” statute. Members of Congress passed the flag burning statute soon after the Court invalidated a Texas law against burning the United States flag. The Court invalidated the statute reasoning that enforcing the Acts of prohibition of burning of the American flag are contrary to the foundation of the First Amendment of the Constitution, which stipulates freedom of speech, while 48 states as well as the federal state by passing Acts had prohibited the burning of the flag.

The legislative activity in the area of ‘investigation’ and ‘right to privacy’, too, caused some tension between the Congress and the Supreme Court. This was particularly true during the era of Senator Joseph McCarthy’s “witch hunts”. In Watkins v. United States, the Supreme Court put a limit on the powers of Congress to investigate a person’s private life. In this case, the Court evaluated the actions of a Congressional committee by asking whether the committee was engaged in a “legitimate task” of Congress. In Braden v. United States, the Court tended to use the concept of “valid legislative purpose” to

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254 Albeit, it might be argued that judicial review can protect Congress from having to seriously address constitutional issues. Most of the time, the Court’s decision forces Congress to more carefully craft the law if it is a policy Congress wishes to continue to pursue.
255 In 1950, Joseph Raymond McCarthy (1908–1957), a Republican U.S. Senator, became the most visible public face of a period of intense anti-communist suspicion inspired by the tensions of the Cold War. He was noted for making claims that there were large numbers of Communists and Soviet spies and sympathizers inside the federal government and elsewhere. McCarthy was never able to substantiate his sensational charges. In succeeding years, McCarthy made accusations of Communist infiltration, communist sympathies, or disloyalty to attack a number of politicians and other individuals inside and outside of government. With the highly publicized Army-McCarthy hearings of 1954, McCarthy’s support and popularity began to fade. Later in 1954, the Senate voted to censure Senator McCarthy. Today the term “McCarthyism,” is used more generally to describe demagogic, reckless, and unsubstantiated accusations, as well as public attacks on the character or patriotism of political opponents. Available at: http://en.wikipedia.org/wiki/Joseph_Raymond_McCarthy, visited on Dec. 5, 2008.
evaluate the actions of Congressional committees. Martin Shapiro maintains that the “valid legislative purpose” test could be a direct threat to Congress, since many of the investigations by Congress might be interpreted as something other than pursuit of a “valid legislative purpose”. He further asserts the “legitimate task” test of the Watkins Case would afford more flexibility to the Court, allow it to be more effective in protecting civil liberties, and make conflict between the Court and Congress less likely.258

The Fourteenth Amendment of the American Constitution (1868) declaring the equal protection served as a basis for numerous interpretations in the courts in the second half of the 20th century. Since 1960s, the Supreme Court has been actively involved in the social issues to develop absolute individualism and equalitarianism. In Baker v. Carr,259 the Court by relying on the principle of equal protection invalidated the Acts that separated the electoral constituencies in different states where the citizens’ equality in electing their representatives were violated. The concept of “one man, one vote” was specifically applied to the Congress in 1964 in the case of Wesberry v. Sanders.260 Many congressmen had a vested interest in preventing redistricting, and there was intense opposition in some quarters in response to this action by the Court.

On the reproductive rights and rights of gays and lesbians, some decisions have been made by the Supreme Court of the United States. For example, in 1973, in the landmark decision of Roe v. Wade,261 the Supreme Court declared a state law, which had regulated criminal penalty for a woman who had aborted, unconstitutional and officially recognized the women’s right to legal, safe abortions. Admitting abortion as a right in America was based on the interpretation of the concept of individual’s life and human freedom presented by the judges of the courts. They relied on the assumption that individual existence and independence requires that he/she be able to decide on his/her

duty and its limits in his/her life and that the human be kept away from the determinism of the government.\textsuperscript{262} In another case on May 20, 1996, the Supreme Court ruled that the Colorado State Amendment prohibiting protections of gay and lesbian rights was unconstitutional. The Court, for the first time, gave homosexuals constitutional protection against government or private discrimination.\textsuperscript{263}

In this manner, the Supreme Court, filled with extreme happiness and enthusiasm about the civil liberties and equalitarianism, interprets the Constitution as something beyond the intent and objective of the framers of the American Constitution.

\textbf{7.2.3. Economic Interpretations}

The question of economic regulation, from 1880 to 1937, also brought the Court and Congress into conflict. The Court strongly resisted the regulation of economic matters by the Congress. The judgments of the Courts in this area, too, are highly important because they serve as determiners of the principles of American economic system.

In this period, the Supreme Court lay between the conflicts of traditional economic liberalism and interfering tendencies resulting from the public authority.\textsuperscript{264} After 1890, some very significant federal laws were enacted. The main objective of these laws was to control big trusts that as powerful economic blocks tried to impose their conditions (antitrust laws). The Supreme Court invalidated the federal laws that guaranteed the interfering into the special domain of the member states and the state laws that impaired the freedom of contract; thus, it opposed all forms of such interference.\textsuperscript{265}

In 1918, the Court ruled that Congress did not have the right to regulate child labor\textsuperscript{266} and in 1923, it ruled similarly concerning the establishment of a

\textsuperscript{262} Motallebi, \textit{supra} note 170, p. 237.
\textsuperscript{263} \textit{Romer v. Evans} (1996). This decision was the first victory of gay and lesbian civil rights in the U.S. Supreme Court. See Brannen and Hanes, \textit{supra} note 263, pp. 753-59.
\textsuperscript{264} Hamon and Wiener, \textit{supra} note 159, p. 125.
\textsuperscript{265} Motallebi, \textit{supra} note 170, p. 239.
\textsuperscript{266} \textit{Hammer v. Dagenhart}, 247 U.S. 271 (1918).
minimum wage for women.\textsuperscript{267} This controversy reached its greatest intensity during the New Deal.\textsuperscript{268}

The main question regarding the economy was, “Can the public authorities interfere in the economic activities?” Franklin Roosevelt (1882-1945), who was elected President of America in 1932, agreed with such interference. Announcing an interfering plan including the increasing of people’s purchasing power, and the regulating of the production and extensive programs to fight unemployment, he practically campaigned against the current traditional policy and took bold action in order to deal with the problems that resulted from the 1929 Great Depression. In his electoral campaign, Roosevelt had promised his government would interfere in the economic affairs with all possible means; therefore, after being elected by the people, he could enthusiastically get all his plans approved through the Congress.\textsuperscript{269} However, the Court’s “nine old men” with their conservative economic philosophies, in some of the most significant cases, repeatedly declared laws approved by both the President and Congress unconstitutional and invalid. The first federal case was decided in 1935. In this year, the Court declared the National Industrial Recovery Act unconstitutional.\textsuperscript{270} This decision was followed by similar decisions in the cases of \textit{Railroad Retirement Board v. Alton Railroad Company},\textsuperscript{271} \textit{Schechter Poultry Corporation v. United States},\textsuperscript{272} \textit{United States v. Butler},\textsuperscript{273} and \textit{Carter v. Carter Coal Company}.\textsuperscript{274} Consequently, the Supreme Court was known as a shield for the capitalist system.\textsuperscript{275}

This matter led Roosevelt to propose a “reform” of the Court that would have brought the Court into line with the thinking of the New Dealers (the “Court Packing” plan of the President). This proposal ran into great opposition

\textsuperscript{267} \textit{Adkins v. Children’s Hospital}, 261 U.S. 525 (1923).

\textsuperscript{268} See Murphy, Walter. \textit{Congress and the Court: A Case Study in the American Political Process}. Chicago: University of Chicago press, 1962, pp. 48-53; also see Brannen and Hanes, \textit{supra} note 133, pp. 821-29.

\textsuperscript{269} Motallebi, \textit{supra} note 170, pp. 239-40.

\textsuperscript{270} \textit{Panama Refining Company v. Ryan}, 293 U.S. 388 (1935).

\textsuperscript{271} 295 U.S. 330 (1935).

\textsuperscript{272} \textit{Sick Chicken Case}, 295 U.S. 495 (1935).

\textsuperscript{273} 297 U.S. 312 (1936).


\textsuperscript{275} Motallebi, \textit{supra} note 170, p. 239.
in Congress and in the country, therefore, it never passed. However, subsequent
events caused a change in Court decisions, and the deadlock disappeared.276

Challenges and disputes between Roosevelt and the Supreme Court on the
economic policies and the President’s reformations spread to the extent that the
Presidential elections in 1936 were in fact turned into a battlefield between
them. However, the results of the elections served as a good lesson for the
Court to take steps in line with the public opinions and the government’s will.
Therefore, the Court approved of all economic programs of President
Roosevelt.277 Moreover, he had a chance that two judges of the Supreme Court
resigned and two more passed away in the same year. Appointing the
succeeding judges, Roosevelt emphatically urged that the jurisprudence in the
issue of the economic interference of the government such as determining the
minimum wage of the labors be followed.278

Since 1937, the Court has become more liberal, and thus has opened itself to
attack by the more conservative elements. In *Helvering v. Davis*,279 the Court
stating that the Congress has constitutional powers to establish a social security
program for the aged upheld the Social Security Act of 1935. In upholding the
constitutionality of the Social Security Act, the Supreme Court signaled a
major shift by supporting President Franklin D. Roosevelt’s New Deal
programs. The Act introduced a new era in American history by establishing a
responsibility of society to care for the aged, unemployed, impoverished, and
disabled.280

8. Criticisms of the Supreme Court’s Performance

The American Supreme Court has been usually under attack from many
different quarters. There are a reasonably large number of people who have less
than the highest regard for the Supreme Court and the decisions it has been
making, primarily in the field of civil liberties and criminal rights. This is not

276 For an interesting discussion of this attempt with the focus on President Roosevelt, see McGregor Burns, James.
277 *Motallebi, supra* note 170, p. 240.
278 *Hamon and Wiener, supra* note 159, p. 126.
280 See Brannen and Hanes, *supra* note 133, pp. 1114-19.
new. The Supreme Court was held in even lower regard when it was declaring Franklin Roosevelt’s New Deal programs unconstitutional, and when it made the *Dred Scott* decision just prior to the Civil War.

The conservative behavior of the Court, at times, caused it and even the idea of judicial review to lose their reliability and validity. It was considered as ‘government by the judges’ by the French legal doctrine. Edward Lambert, in 1921 by writing a book entitled “Government by the Judges” seriously revealed the danger of this kind of government. This expression was used to refer to the fact that the Court was considered as a super power, which in fact blocked the social initiatives of the authorities, elected by the public in the name of the interpretation of the Constitution and interpreted the circumstances in accordance with the mercantile class and great companies. Therefore, judicial review concurrently was subject to two kinds of criticisms: firstly, it was stated that the Court blocked all reformatons while it offered no alternative solutions; and secondly, it was said that the judges were never elected by the public and they were exempted from any responsibilities for their behaviors.

By virtue of what was discussed above, some American legal theorists advocate the judicial restraint. They maintain that in interpreting the Constitution, the justices must bind themselves to the specific intentions of the Constitution makers. One of these advocates is Raoul Berger. He argues that the touchstone of judicial activism is a failure to interpret the Constitution based on the intent of the framers. Another American scholar, R. Y. Funston, states that the American Supreme Court exerts a sobering amount of power in American life and that “Nine men, elected by nobody, qualified by nothing but … a law decree and a friendship with the president, exercise the power to

283 *Hamon and Wiener*, supra note 159, p. 125.
284 Ibid., p. 126.
nullify and void the pronouncements and actions of the peoples elected representatives.”

It is interesting that in the history of the American Supreme Court, four justices, namely Oliver Wendell Holmes, Louis Brandies, Harlan F. Stone, and Felix Frankfurter also stand out as leading advocates of judicial restraint. Through their various judgments, they argued that the Court justices must provide the utmost respect to legislative Acts and their power to invalidate the Acts should be used sparingly. They repetitively stated that it was a paradox in democracy for unelected Court to place against the popularly elected legislature or to act in its position. Among these justices, Justice Holmes summed up the essence of judicial self-restraint in propounding his legal theory known as “reasonable man”. In one of his early dissents, he reflected the philosophy of judicial self-restraint. He declared, “The Court should nullify legislative Acts, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our laws.”

Part Two
Constitutional Review in France

1. Background of the Constitutional Review in France
Although France is one of the first countries of the world which possessed written Constitution, in practice it did not exercise Constitutional review for over one century, and ever after accepting and adopting it rarely applied it to its legal system for some long time. This is due to some historical and political reasons.

As discussed in Chapter one, during the French Revolution (1789), political groups and the public opinions did not trust the judiciary. In fact, the courts of the former Regime called ‘the parlements’ objected to the suggested reformations offered by the kingdom and the royal power. That is why, when the parlements of the former regime were captured, the revolutionary Assemblies started to prevent and resist against any kind of the judiciary power’s measures to impede the pulses of the Legislative.289

According to Act 16-24, enacted in Aug. 1790, judges were banned from taking any measures to control the regulations passed by the Parliament. In this manner, although the Constitution was the highest authority and had supremacy over ordinary laws, there was no essential effective mechanism to guarantee the constitutionality of the laws. Neither the courts belonging to the criminal and civil courts nor the administrative court system could opine on this regard.290

On the other hand, most of the French lawyers emphasizing that the three powers of the Legislative, the Executive, and the Judiciary are equal, maintained that the authority reviewing the constitutionality of the ordinary laws must be a head and shoulders above the Legislative while the judges are themselves the strict obedient and enforcers of the law. The intervention of the courts would cause the Judiciary to be superior to the Legislative and to violate the authority of the body elected by the people.291 In fact, in the opinion of the French Constitution drafters, ‘law’ was sacred which no one must harm it.292

Turning the American judicial review model down through the French legal doctrine paved the ground for Emmanuel Joseph Sieyes (1748-1836), an upstanding political man, while writing the Aug. 22, 1795 Constitution, to suggest that a political body entitled “The Constitutional Jury” (Juris Constitutionnaire) be established to review the constitutionality or

unconstitutionality of the ordinary laws. However, Sieyes’ plan was not approved due to another political leader’s, Thibaudeau (1765-1854), objection. Thibaudeau’s most important reasoning was that by establishing an institution to safeguard the Constitution, a huge and more powerful body will get on power over the other powers and it will take their power away incapacitating them. On passing the Constitution of Dec. 13, 1799, Sieyes proposed another new plan through which a new institution called ‘the Senate’ appeared which was assigned to help the constitutional Acts to survive and the unconstitutional ones to be annulled. These Acts would be referred to this body by the courts or the Government. From then on and in the First Empire, the Senate was to discharge this responsibility. However, on the one hand, the Senate possessed no independence before the Empire, and on the other, the courts, the Senate, and the Government each had their own specific limitations in such a way that the reviewing mechanism would never be carried out properly. The Senate was conservatively waiting for the fall of the Napoleon Bonaparte Reign to reveal all the unconstitutional actions that he had done during his ruling period.

The Fourth Republic Constitution (1946) created a committee called ‘the Constitutional Committee’ with defined and limited competencies. The President of the Republic was the president of the Committee. The other members were the president of the National Assembly, the president of the Council of the Republic, seven members elected by the National Assembly equally from all the Parliamentary groups and elected outside the Parliament, and three members elected by the Council of the Republic with the same conditions. The composition of this Committee was absolutely political because, on the one hand, all the members were appointed by the political authorities particularly by the legislature, and, on the other, no technical knowledge of law was required of them.

293 Ghazi, supra note 291, p. 110.
294 Maddex, supra note 292.
295 Elliott and Vernon, supra note 290, p. 167.
297 Maddex, supra note 292.
This body was supposed to intervene where there was only a disagreement or challenge between the two chambers of the Parliament; that is, when an Act was passed by the National Assembly but rejected by the Council of the Republic. When the Committee found an Act or regulation unconstitutional, it could only keep it suspending until the government decided to revise the Constitution. In other words, the Committee was given a very limited constitutional role and thus was of little consequence. It did not really have the power to rule laws unconstitutional. It was even ineffectual at performing the limited duties it was given. During the Fourth Republic, the Committee was only once called in 1948 for a secondary issue when it could successfully make the two chambers’ views compromise. Nevertheless, never was it called to decide the constitutionality of an Act.

All in all, safeguarding the Constitution in the twelve Constitutions of France, until the end of the Fourth Republic (1958), was always attended. Nevertheless, instability of the political conditions and the advent of numerous events caused either the Constitution to frequently change and have no chance to be safeguarded, or the entirety of the Constitution to be forgotten with the establishment of the absolute monarchy. As well, in some cases, the constitutional review was a superficial demo: some of the texts had predicted a sort of review and had opened a space for it, but it was just an imagination. For example, the drafters of the 1791 Constitution had convinced themselves that Constitution was just subject to “faithfulness” of the ruling powers and citizens’ protecting it.

The Fifth Republic (1958) was a good turning point in the transition of the constitutional review system of France. In the Oct. 4, 1958 Constitution, an institution named ‘the Constitutional Council’ (Conseil Constitutionnel) was created to discharge the constitutional review power. Charles de Gaulle

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298 Ibid.
299 Elliott and Vernon, supra note 290, p. 167.
301 Maddex, supra note 292.
302 Motallebi, supra note 170, p. 251.
303 Hamon and Wiener, supra note 159, p. 98.
introduced the Council in the Constitution. It was created to serve as a guarantor for the new distribution of power—as was the much more powerful executive branch as well.304

Articles 56-63 of the Constitution were allocated to this Council. The Nov. 7, 1958 Institutional Act (Organic Law) relating to the Constitutional Council has in details presented all the regulations and provisions concerning this Council.

2. Organization of the Constitutional Council

2.1. Appointment of the Council’s Members

Relying on Article 56 of the Fifth Republic Constitution, the Constitutional Council is composed of two groups: the first group consists of nine members three of whom are appointed by the President of the Republic, three by the president of the National Assembly, and the last three by the president of the Senate. The second group is composed of the former Presidents of Republic who are de facto members of the Constitutional Council for life.

In the first five years after the approval of the 1958 Constitution when it was imagined that the functions of the new institution had been carefully limited, it was believed that the former Presidents would have a constructive and frutive role in the Council. Therefore, two ex Presidents305 of the Fourth Republic joined the Council; however, later no other President participated in the Council. Accordingly, the revision in the Constitution was claimed to abolish this right, but it still has not been excluded.306 Nevertheless, the important and required members of the Council are nine who are appointed for a non-renewable nine-year term. According to Article 2 of the Act passed in Nov. 7, 1958, in the first term, each of the appointing authorities would appoint one member for a period of three years, the second member for a period of 6 years, and the third one for 9 years. Therefore, every three years, one third of the

305 These two Presidents were Rene Coty and Vincent Auriol.
306 See Elliott and Vernon, supra note 290, p. 168.
members of the Council would be replaced and the appointing authorities would appoint the new members for nine years.\textsuperscript{307}

\subsection*{2.2. Qualifications of the Members: Independence of the Council}

Membership of the Constitutional Council requires no specific diploma or professional qualification.\textsuperscript{308} In other words, the members of the Council are not required to have higher education in law.\textsuperscript{309} Thus, in the appointment of the members, the political appointing authorities are almost absolutely free. This attributes the Council a political sensation and differentiates it from the constitutional courts of other countries. However, in practice, the members are from among the eminent lawyers, prominent professors of law and/or experienced judges.\textsuperscript{310} Besides, although the members are appointed by the political authorities and leaders, the composition and mechanism of appointing them, and the impossibility of renewal of their membership help the members not to be influenced by individuals or political groups. This matter in turn guarantees their independence to a large extent.\textsuperscript{311}

Nevertheless, the important issue that impairs the independence of the Council is that they cannot choose the president of the Council but he/she is appointed by the President of the Republic from among the members. This issue proves its significance when the votes cast in the Council are equal in number, according to Article 56 of French Constitution, the president of the Council will authoritatively decide. This has been criticized and its revision, too, discussed for several times, but in vain so far.\textsuperscript{312} Therefore, it can be claimed that the President of the Republic is in fact the president of the Council. This grants the President of the Republic a notable power before the

\begin{itemize}
\item\textsuperscript{309} Elliott and Vernon, \textit{supra} note 290, p. 168.
\item\textsuperscript{310} Hamon and Wiener, \textit{supra} note 159, p. 101.
\item\textsuperscript{311} Elliott and Vernon, \textit{supra} note 290, p. 168.
\item\textsuperscript{312} Ibid., p. 169.
\end{itemize}
Constitutional Council.\textsuperscript{313} The role the President plays is very significant, as by virtue of Article 5 of French Constitution, the President shall safeguard the Constitution. Albeit, he is never allowed to directly interfere in the authorities of the Council. He just has the right to return an Act\textsuperscript{314} or an international commitment\textsuperscript{315} to the Constitutional Council.

The office of member of the Constitutional Council is incompatible with that of Minister or Member of Parliament. Other incompatibilities are determined by the Institutional Acts.\textsuperscript{316} For example, based on Article 4 of the Act passed in Nov. 7, 1958, membership in the socio-economic Council is incompatible with that of the Constitutional Council, as it is the same with the membership in the local electoral institutions and the management in a political group or party.\textsuperscript{317}

Many of the specializations are incompatible with membership in the Council, but they do not include the professorship in law, a profession which some of the members of the Council were leading while in the Council. Many of the Council members were appointed after they retired.\textsuperscript{318}

After an individual joins the Council as a member, he/she enjoys the immunities as judges of the judiciary courts do.\textsuperscript{319} In other words, once appointed, it is not possible for anyone to influence the councilors. Furthermore, its status gives to the Council an administrative and financial autonomy.\textsuperscript{320} Moreover, in his/her tenure, except for death or voluntary resignation, no member can be dismissed from the Council unless:

- He/She gets a job as an appointee or as a representative that is inconsistent with his/her position.
- He/She loses his civil and political rights.

\footnotesize{\textsuperscript{313} Ibid., p. 47.\textsuperscript{314} The Constitution of the French Fifth Republic, Oct. 4, 1958, Art. 61.\textsuperscript{315} Ibid., Art. 54.\textsuperscript{316} Ibid., Art. 57.\textsuperscript{317} See Jafari Nodoushan, supra note 307, p. 102.\textsuperscript{318} Elliott and Vernon, supra note 290, p. 170.\textsuperscript{319} Ibid.\textsuperscript{320} Tawill, supra note 308.}
➢ He/She gets a serious health problem such as permanent physical loss or handicap.

In the three cases mentioned, the official resignation will be announced just by the Council.321 Such an indissmissability in their membership guarantees their independence and impartiality.322 Accordingly, French lawyers say that the Constitutional Council is a court because its status gives its members absolute independence from political authorities.323

3. Power of the Constitutional Council to Review the Laws
By virtue of the French Constitution and the Institutional Acts, the Constitutional Council has a great deal of power. The Council leads two major judicial functions:

➢ Supervising the elections and referendum and judging the claims resulting from them324
➢ Judging the Acts, the Rules of Procedure of the Parliament, and the international contracts for their constitutionality325

Moreover, the Council is required to give a counsel to the President of Republic in ‘emergency periods’ concerning the Presidential authorities stipulated in Article 16 of the Constitution. Besides, the Council is required to

321 Although there has been no official resignation in the Council so far, it should be reminded that in early March 2000, Ronald Dumas, the then the president of the Constitutional Council, resigned in such a situation that his retention was seriously under question. The story was that in 1998, Roland Dumas was accused of being involved in a financial scandal of illegally withdrawing money from the accounts and assets of the ELF Oil Company. Nevertheless, he asserted that his commitment had been before he was elected Head of the Council. At that time, thanks to the privileges that had been considered for the Council’s members, he was supported. When it got clear that he had really committed the scandal, Dumas stepped down temporarily on March 6, 1998, but he regained his position as the head of the Council in May 1998. His presidency was subject to more threat everyday and his status was getting worse and worse. Moreover, the Council’s work was disordered and its reliability and credit were seriously impaired declining. Finally, after a lot of pressure on him through the mass media, Dumas went on an official leave on March 24, 1999 and resigned in Feb. 2000 because he was really vulnerable and defenseless and the other members of the Council, too, put pressure on him. See Elliott and Vernon, supra note 290, p. 169.
322 Hamon and Wiener, supra note 159, p. 102.
324 The Constitution of the French Fifth Republic, Arts. 58, 59, & 60.
325 Ibid., Arts. 41, 37-2, 61-2, & 54.
comment on the affairs in the case of a vacancy of the Presidency of the Republic or in case of a barrier in the implementation of the President’s functions.326

Anyhow, supervising the laws for their constitutionality is the main responsibility of the Council. The respective cases in which the Council can exercise its constitutional review power are enumerated in the Constitution. This review is different depending on the importance of the laws.

3.1. Institutional Acts and Rules of Procedure of the Parliamentary Assemblies

Clause 1 of Article 61 of the French 1958 Constitution says, “The Institutional Acts, before their promulgation, and the Rules of Procedure of the Parliamentary Assemblies, before their coming into force, must be referred to the Constitutional Council, which shall rule on their conformity with the Constitution.” Institutional Acts apply to the position, organization, and functions of the most important authorities of public power, individual rights, proprietorship system, status of the judges etc., and are a kind of supplementary Constitution. Since these laws are highly important, they are enacted through some intricate and elaborate formalities.327 For example, in the absence of agreement between the National Assembly and the Senate, they must be approved by the absolute majority of the members of the National Assembly.328 In the French Constitution, in twenty cases, the enactment of such laws is assigned to the Parliament. For example, Article 6 of the Constitution states, “The President of the Republic shall be elected for seven years by direct universal suffrage. The manner of implementation of this Article shall be determined by an Institutional Act …”

Of the decisions that the Council has so far issued on examining the Institutional Acts, the Jan. 26, 1967 decision can serve as a good example. In this decision, the Council turned down the provisions of an Institutional Act

326 Ibid., Art. 7.
327 Motallebi, supra note 170, p. 269.
328 The Constitution of the French Fifth Republic, Art. 46.
concerning the judges’ status. These provisions had not guaranteed the retainment of the sitting judges.329

Concerning the Rules of Procedure of the two Parliamentary Assemblies, the first clause of Article 61 of the French Constitution has required the sending of the rules to the Council before they are enforced. The Rules of Procedure of the Parliamentary Assemblies -the National Assembly and the Senate- determine the internal organization and the manner of each Assembly’s action. Since the two Assemblies may desire to extend their authorities through the enactment of the Rules of their procedure, the framers of the French 1958 Constitution required them to send these rules to the Council.330

3.2. Ordinary Laws
Unlike the Council’s review regarding the Institutional Acts and the Rules of Procedure of the Parliamentary Assemblies, its review concerning the ordinary laws is not compulsory. Here, three assumptions must be identified:

3.2.1. First Assumption
The first assumption concerns the separation of the domain of statute and regulation. Article 34 of the French Constitution has identified the domain where the Parliament can enact statute, and Article 37 has identified the domain where the Government can regulate regulation. The Constitutional Council has a wide range of powers relating both to the executive and legislative branches, and most importantly, to the relations between the two (deciding whether laws are executive or legislative in nature).

Article 41 of the French Constitution states that if it is found in the course of the legislative process that a member’s bill or amendment is not a matter for statute or is contrary to a delegation granted by virtue of Article 38, the government may object that it is inadmissible. If the government and president of the Assembly concerned (the National Assembly or the Senate) do not come

329 See Hamon and Wiener, supra note 159, p. 103.
330 Motallebi, supra note 170, p. 270.
to an agreeable decision, one of the two authorities can refer the issue to the Constitutional Council. The Council must settle the issue within eight days.

Primarily, it was expected that such issues would be a main part of the Constitutional Council’s work, but in reality, most of them were settled without the Council’s intervention. Moreover, according to the Council’s view, if the Parliament would like to enact a statute outside the domain of Article 34, such a statute is not automatically void, and in fact, the Council can intervene only when the government requests it to review the statute. The old claim of Nov. 27, 1959, in the form of a governmental decree concerning the selling of the agricultural leasehold serves as a good example in the early enforcement of Article 41. The governmental decree enjoyed no supports among the agriculturists, and two impartial representatives of the Parliament proposed a bill to amend the decree. They opined that the governmental decree to limit ‘the basic right to dispose of property’ contradicted the main principles of the property law, and thus, it is the issue that must be, based on Article 34 of the Constitution, handled by the Legislative (the Parliament). However, the Constitutional Council declared that the governmental decree had properly observed the points mentioned in calculation of properties, and therefore it is beyond the domain of Article 34. That is to say, according to Article 37, the government could legislate. In this way, the decree was confirmed and the Parliament’s proposed bill could not stretch further.\footnote{331}{See Elliott and Vernon, \textit{supra} note 290, pp. 172 -73.}

As well, according to the Clause 2 of Article 37 of the Constitution, if it is found a parliamentary Act, which passed after the 1958 Constitution and has already been promulgated, has stretched the domain of Article 34 and entered the special domain of the governmental regulations, the government can amend the Act by issuing a decree, provided that the government refers the case to the Constitutional Council and obtains an order showing that the amendment of the Act is out of the domain of statute.\footnote{332}{It should be noted that the Acts passed before the 1958 Constitution may be amended by the governmental decree after consultation with the \textit{Conseil d’État}. The Constitution of the French Fifth Republic, Art. 37, Clause 2.} For example, in 1959, the government decided to pass an order through which it could change the composition of
Paris Public Transportation Organization Managerial Board. On Nov. 27 of the same year, the Constitutional Council made a decision that although for the establishment of a new board of the Paris Public Transportation an Act was needed because it was a governmental organization and inclusive of Article 34, the changing of the board composition is also allowed by passing a governmental decree.\(^{333}\)

### 3.2.2. Second Assumption

The second assumption is provided in clause 2 of Article 61 of the French Constitution. This assumption is more general and includes all the cases of unconformity of an Act with the provisions of the Constitution. Unlike the first assumption, the reviewing in this assumption is after the Act is enacted but before it is promulgated.\(^{334}\) Until 1971, most of the activities of the Council concerning the constitutionality of Acts passed by the Parliament were focusing on the separation of the authorities of law making between the Parliament and the Government. In the early 1970s, there were two very important developments where the Constitutional Council played a great role in developing the French constitutional law. The first development concerned the definition of the “Constitutional Stature (*Bloc de Constitutionalite*)” on Jul. 16, 1971. By expanding the defined limits of the Constitution and including the other elements such as 1789 Declaration of Human and Civil Rights, the Council could extend its activity domain. The second development was the Oct. 29, 1974 Act: \(^{335}\) from 1965 on, both the majority and the opposition (minority) of the Parliament equally felt the necessity of the right to refer the Acts to the Constitutional Council. In fact, although since 1962 the Executive enjoyed an obedient majority in the National Assembly, it would like to establish a balance in favor of the minorities in the French legislative system. The respective and required reformation was slightly achieved through the Act

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\(^{333}\) See Elliott and Vernon, *supra* note 290, p. 173.

\(^{334}\) Clause 2 of Article 61 of the French Constitution says: “… Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, or sixty deputies or sixty senators.”

\(^{335}\) See Stone, *supra* note 304.
of Revising the Constitution on Oct. 29, 1974. This Act increased the ways through which an issue can be referred to the Constitutional Council to review its constitutionality. Before this, according to Article 61 of French Constitution, only the President of Republic, the Prime Minister, the presidents of the National Assembly and the Senate could refer an Act to the Council, but since the 1974 Amendment, sixty members of the National Assembly (deputies) or sixty Senators have been able to do so. In other words, previously, the authorities or bodies close to the ruling government could refer an Act to the Council, but now a relatively small number of members of the Parliament opposing the Act can refer the same to the Council.336

An old example of the effect of these two significant developments can be observed in the Jan. 15, 1975 decision of the Constitutional Council regarding the suggested bill of amending the regulations of abortion. By virtue of one of the Acts passed in 1920, wherever the pregnancy of a woman endangered her life, or the fetus was immaturesly defective, the mother could abort it. Then it was suggested that another item be added to the legitimacy of abortion where a mother could abort in the first ten weeks of her pregnancy if she felt her pregnancy and giving a birth to a baby would be difficult or dangerous. The Constitutional Council held that this suggested bill did not contradict Article 2 of the 1789 Declaration regarding ‘the Life Right Support’; nor did it violate the fundamental principles accepted by the laws and regulations of French Republic. Moreover, it did not violate the declared principle in paragraph 11 in the introduction of the 1946 Constitution through which the Government was to support child health care.337

This indicates how the Constitutional Council intends to establish a balance between the potentially contradictory principles mentioned in different legal sources, and it is a good example of the Constitutional Council’s independence, which could little demonstrate. Since then, the opposing groups in the

336 See Elliott and Vernon, supra note 290, p. 174.
337 Ibid.
Parliament could have referred many cases to the Council and it has successfully made many highly significant decisions.\textsuperscript{338}

The Council must opine on the issue for its constitutionality within one month. This deadline can be reduced to eight days at the request of the government, if the matter is urgent. In these same cases, reference to the Constitutional Council shall suspend the time limit for promulgation.\textsuperscript{339}

3.2.3. Third Assumption

The Council can review the ordinary laws in a third assumption, too. By virtue of Article 54 of the French Constitution, an international commitment contrary to the Constitution can be referred to the Constitutional Council by the President, the Prime Minister, the presidents of the two Parliamentary Assemblies, or by the sixty deputies or sixty senators. Here, the Council will investigate to see whether there is an inconsistency in the international commitment with the Constitution. If the Council finds out that there is an inconsistency in the commitment with the Constitution, authorization to ratify or approve the international commitment in question may be given only after amendment of the Constitution.\textsuperscript{340}

Article 54 of the Constitution of France has allowed the Constitutional Council chances during recent years to make some of the most important decisions in its activity period, such as,

- The April 9, 1992 decision through which several clauses of the treaty concerning the European Union known as Maastricht Treaty were declared unconstitutional.\textsuperscript{341}
- The Aug. 13, 1993 decision through which the Act passed in 1991 concerning the immigration intending to validate the conditions and

\textsuperscript{338} Ibid., p. 175.
\textsuperscript{339} The Constitution of the French Fifth Republic, Art. 61.
\textsuperscript{340} Ibid., Art. 54.
\textsuperscript{341} See Hamon and Wiener, \textit{supra} note 159, p. 106.
provisions of Schengen Convention (June 19, 1990) in the national law was declared unconstitutional.\textsuperscript{342}

In both cases, the Constitution had to be amended. For example, regarding the Schengen Convention, the Constitution was amended on Nov. 25, 1993 where Article 53-1 was added to it.\textsuperscript{343} This clause states,

\begin{quote}
The Republic may conclude, with European States that are bound by commitments identical with its own in the matter of asylum and the protection of human rights and fundamental freedoms, agreements determining their respective jurisdiction in regard to the consideration of requests for asylum submitted to them. However, even if the request does not fall within their jurisdiction under the terms of these agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France for some other reason.\textsuperscript{344}
\end{quote}

In another case in June 15, 1999, the Council by virtue of President Jacques Chirac’s request, relying on Article 54 of the Constitution, declared the European Charter regarding the ‘Regional Languages’ unconstitutional. This charter granted special privileges to those French people who spoke regional languages such as Corsican or Breton. The Constitutional Council held that any measures or programs such as teaching regional languages in addition to French is not unconstitutional; however, the main objective of this charter was that the cultural privileges of the minorities particularly their own regional languages should be recognized; therefore, it was unconstitutional. Here, the Council obviously relied on Article 2 of the French Constitution that clearly stipulates, “The language of the Republic shall be French.” In addition, Article 1 states, “France shall be an indivisible Republic.” It was also reasoned that the aforementioned charter granted some extra cultural privileges to the special

\begin{footnotesize}
\textsuperscript{342} See Elliott and Vernon, \textit{supra} note 290, pp. 76 -7.
\textsuperscript{343} Ibid., p. 77.
\textsuperscript{344} The Constitution of the French Fifth Republic, Art. 53-1.
\end{footnotesize}
groups while these rights, unlike Article 1, are not available to all the French people. Moreover, Article 2 strongly supports the use of French language as the only language in everyday life, particularly in the government and the judiciary courts. It plays a great and essential role in the identity and equality of French people.345

A more recent case is the Nov. 19, 2004 decision through which the Constitutional Council, at the initiative of the President of the Republic, ruled on the Treaty “Establishing a Constitution for Europe”. The Constitutional Council in this decision claimed that this treaty remained simply a treaty: for the Constitutional Council it is not a Constitution. It is only an international agreement, even if it bears the name of “Constitution for Europe”. Therefore, like any other international agreement, this treaty cannot contradict the French Constitution. The treaty can be ratified only after the revision of the French Constitution. Accordingly, by the constitutional Act of March 1, 2005, the French Parliament changed some provisions of the French Constitution, in order to make possible the ratification of the treaty. Nevertheless, the French in the Referendum of May 29, 2005 refused to authorize the ratification.346

4. Limitations of the Constitutional Council’s Review Power

There are some significant limitations for the powers of the Constitutional Council that relate to the review of the constitutionality of some laws.

4.1. Acts that Have Been Promulgated

The most important limitation of the constitutional review in France that relates to French legal doctrine to control the laws is that the review type in France is of a priori. In other words, the Council is allowed to intervene just before promulgation of an Act. As soon as the Act passed by the Parliament is promulgated, no one, even the Constitutional Council, has the right to challenge it. As a result, the Constitutional Council cannot hear cases involving

345 See Elliott and Vernon, supra note 290, pp. 77-8.
346 See Tawill, supra note 308.
individuals’ rights, while the protection of these rights is a key aspect of viable judicial review, especially in the modern day.

Nevertheless, today, in France, people can hardly admit that the right of referring an Act to the Council is allocated just for the political leaders. To treat this tough situation, many efforts have been made, particularly in one of the two projects of revising the Constitution that took place on March 10, 1993 by the Council of Ministers. It was intended to add the following provisions to Article 61-1, “If it seems that provisions of an Act bring about violations to the fundamental rights identified by the Constitution for the individuals, the issue can be referred to the Constitutional Council by the Council of the State, the Supreme Court, or any other court.” However, this reformation that exposed the promulgated Acts to *a posteriori* review and in fact impaired the immunity of such Acts was not approved of by the members of the Parliament. Therefore, in the July 1993 revision of the Constitution and the succeeding revisions, such a reformation was not recognized urgent and necessary.

4.2. Acts Approved by Referendums

Based on the decision made on Nov. 6, 1962, that will be discussed later, the Constitutional Council regulated that the Acts, which was approved by referendum, could not be reviewed by the Council for their constitutionality. The Council opined that the duty it had according to the Constitution was related to the domain of public authorities and it did not include the Acts passed by the French public votes. However, it should be mentioned that the number of such Acts is rare.

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347 See the Constitution of the French Fifth Republic, Art. 61.
348 Nevertheless, it is worth mentioning that the French Constitutional Council since 1970s through recognizing the 1789 Declaration of Human and Civil Rights and conferring on the parliamentary opposition the right of referring a law to the Council has shown a great interest in protecting the citizens’ and political minorities’ rights.
351 Elliott and Vernon, *supra* note 290, p. 175.
4.3. Lack of Compulsion for Reviewing the Ordinary Laws

Although through the Amendment of Article 61 of the French Constitution, which allowed 60 deputies or 60 senators to refer any Act that they felt necessary to the Constitutional Council, the number of cases referred to the Council has increased, such a reference is not yet compulsory. The number of Acts that are annually referred to the Council comprises 15-30% of all the Acts passed by the Parliament. Therefore, most of the Acts are not reviewed by the Council, and after their promulgation, as mentioned earlier, no objection on their unconstitutionality is allowed.\footnote{Ibid., p. 176.}

4.4. International Commitments and European Laws

Although, according to the French Constitution, the Constitutional Council is allowed to review the constitutionality of an international commitment with the Constitution,\footnote{The Constitution of the French Republic, Art. 54.} this Council, through its July 15, 1975 decision, announced that it was not in its competency to opine on whether an Act conformed to the international commitments or not. An Act concerning the abortion had been referred to the Constitutional Council by sixty deputies. One of the bases of this requisition was that the respective Act had violated Article 2 of the European Convention of Human Rights and thus Article 55 of the Constitution. Although the Council did not consider itself competent enough to review the same, it opined, “Any Act contrary to a treaty does not necessarily contradict the Constitution.”\footnote{See Elliott and Vernon, \textit{supra} note 290, p. 75.} Hence, since the Council did not undertake the responsibility of reviewing the conformity of Acts with the international commitments, the ordinary courts were assigned to discharge it. Regarding the contradiction of national laws with the European laws, the ordinary courts and the European Court of Justice expressly declared that European laws were superior to the national laws.\footnote{Ibid, p. 176.}
5. Decisions of the Constitutional Council

5.1. Norms Used by the Council

On issuing and announcing its decisions, the Constitutional Council relies on some norms and sources which are referred to as the “Constitutional Stature (Bloc de Constitutionalite).” This stature, in addition to the Oct. 4, 1958 Constitution, includes the following elements:

(a) The Declaration of Human and Civil Rights of 1789 which basically propounds the traditional and classic principles such as individual freedoms, equality before law, or non-retroactivity of criminal laws.

(b) The 1946 Constitution’s Preamble that has, as the principles resulting from the requirements of time, recognized some public socio-economic rights such as the ‘Right to strike’ and the ‘Syndicate Right’.

(c) The Fundamental Principles recognized by the Republic laws that were passed in the Third Republic through the ordinary laws. These principles, nowadays, are tantamount to the Constitution since they compose a part of the foundation of a Republic regime. The principles are not enumerated anywhere and the Council prepares a list of them during its judicial proceedings.

(d) The objectives that possess the same value as the Constitution does: These objectives include a group of values that have recently been revealed, but they are not so clearly defined. As an example, it can be referred to the preserving of public order through which the limitations imposed on the ‘Right to Strike’ are allowed.\footnote{See Motallebi, \textit{supra} note 170, pp. 274 -76; Hamon and Wiener, \textit{supra} note 159, pp. 108-9.}

Such a broad interpretation of the constitutional stature has been so extensive that the critics of the Constitutional Council have criticized the Council that it essentially relies more on general principles that mostly carry philosophical and political weight than on the legal norms and principles. In reply to the criticisms, the then president of the Council through an article in
one of the newspapers in 1993 reminded that in the very touchy and hot domain of observing the freedoms and respecting the fundamental rights, an independent judge should select the most appropriate interpretation among the different interpretations. Otherwise, it must be accepted that the minority never have the right before the majority because politically they are from the lesser group, something that is undoubtedly illogical, unfair, and unjust.\textsuperscript{357}

5.2. Effects and Results of the Council’s Review

After the Constitutional Council discharges the review of an Act, the following results are expected:

(a) If the Council reaches the conclusion that the respective Act is Constitutional, it is vivid that the Act is immediately promulgated.

(b) If the Council concludes that the entire Act is unconstitutional, the Act is completely annulled and it is not enforceable, though in practice a complete annulment has rarely occurred.\textsuperscript{358} Between 1959 and 1986, only seven Acts have completely been annulled.\textsuperscript{359}

(c) If the Council concludes that only a part of the respective Act is unconstitutional, it must identify whether that part is severable from the entire Act or not. If it can be severed, there remains no problem and the rest of the Act is promulgated. For example, in Aug. 18, 1982 decision, regarding the “Decentralization Act” approved in March 1982, the Council stated, “When an Act is not declared unconstitutional in its entirety, it can be promulgated provided that the provisions that are unconstitutional are left out or eliminated, or the unconstitutional provisions are replaced by new and constitutional ones.” If that part is not severable, practically the entire text of the Act is invalidated and it must be reconsidered in the Parliament, for example, the Council’s Jan.

\textsuperscript{357} See Hamon and Wiener, \textit{supra} note 159, p. 110.
\textsuperscript{358} Jafari Nodoushan, \textit{supra} note 307, p. 69.
\textsuperscript{359} Motallebi, \textit{supra} note 170, p. 277.
16, 1982 decision concerning the nationalization.\footnote{See Jafari Nodoushan, \textit{supra} note 307, pp. 69-70.} Albeit, a third way has also been developed indicating “the Conditional Conformity Announcement,” that is to say, the conformity of an Act with the Constitution is accepted provided that it must be clear how the Act should be interpreted, or what limitations result from the Constitution. For example, the Constitutional Council’s decision on privatization made in 1986 stated that the public sector enterprises must not be ceded to non-French multinational groups.\footnote{See Hamon and Wiener, \textit{supra} note 159, pp. 111-12.} In fact, the Council tries to enjoy the techniques where while controlling the legislation it does not directly face the legislator. The judge of the Council prefers to announce the conditional conformity of the Act instead of simply annulling them.\footnote{The Constitutional Courts of Austria, Germany, and Italy follow such a result relying on their own formula and approaches. See Favoreu, Louis. “The Constitutional Courts,” translated in Persian by Ali Akbar Gorji. \textit{Constitutional Law Journal}, year 4, nos. 6 & 7, winter 2007 (original edition, 1996), p. 377.} Therefore, in case the government desires, it can think of some arrangements to revise the Constitution so that through the results obtained the rejected Act can be approved. As well, it can interpret the Act in a specific way, or it can do some amendments or reformations in the Act to convince the Council that the Act is constitutional.\footnote{Elliott and Vernon, \textit{supra} note 290, p. 171.}

Article 62 of the French Constitution stipulates, “A provision declared unconstitutional shall be neither promulgated nor implemented.” Clause 2 of the same Article says, “No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.” In other words, the Council’s decisions enjoy \textit{res judicata} (a matter adjudicated) feature.

6. \textit{A Glance at the Performance of the Constitutional Council}

Throughout her modern history, France has been characterized by two strong and polar political traditions. In a very real sense, the Revolution which took place in the latter part of the eighteenth century continues unsettled to the
present day. There remains a fundamental cleavage between the so-called Left and Right political traditions. The Left believes that a strong parliament is necessary in order to have a democratic expression of the will of the people. The Right, on the other hand, sees the necessity for a strong executive who can represent the “soul” of the nation and provide effective leadership and order.\(^{364}\)

The Constitution of the Fifth Republic was against the supremacy of the parliament, and it would seem that under Charles de Gaulle (1958-1969) the power of government had indeed swung to the opposite extreme. The Constitutional Council was an instrument of de Gaulle in keeping the executive supreme over the legislature. This trend was evident from the beginning of the Fifth Republic. In 1959, the legislature drew up its standing orders, but they were opposed by the Government. The case went to the Constitutional Council and it ruled that the orders of the legislature were in violation of the Constitution.\(^{365}\) In the same year, some members of the legislature tried to pass bills that were amendments to decrees of the Government. Again, the Council ruled for de Gaulle and the Government, and against the power of the legislature to pass such amendments. The Council also ruled on a case of alleged Government railroading of legislation through the National Assembly. Debre, who then was Prime Minister, forced the budget through in one day. The Assembly was forced to vote on the whole bill rather than section by section. It was not even allowed to debate some of the sections. The case went to the Constitutional Council and it ruled against the Parliament. The members of the Council saw nothing wrong with the tactics used by the Government.\(^{366}\)

The Constitutional Council also backed de Gaulle in refusing to allow Parliament to introduce and vote on any type of policy resolution. Thus, the


legislative branch was confined to the consideration of program bills, but was not able to formulate policy; this was left to de Gaulle and the Government.\textsuperscript{367}

Equally revealing is an incident that took place in 1961. De Gaulle assumed emergency powers, under Article 16, as a result of a military insurrection in Algeria. Although the revolt failed and the danger was over in five days, de Gaulle continued to exercise extraordinary power for five months. In the meantime, an agricultural crisis had developed and Parliament wanted to meet to deal with the problem. De Gaulle opposed such a session, declaring there was no emergency and thus no need to meet, but he still retained powers under Article 16 to cope with the emergency. Parliament did finally meet and passed legislation to relieve the farm situation. The Government maintained the legislature had exceeded its powers and the Constitutional Council agreed.\textsuperscript{368}

The members of the Socialist Party in the Parliament retaliated by introducing a censure motion against the Government. There was some question as to whether this was legal while the President was exercising emergency powers. This was a very “hot” issue and the Council decided it had no jurisdiction in the matter. As a result, the censure motion was ruled out of order and the confrontation between the Parliament and de Gaulle over this issue came to an end.\textsuperscript{369}

In 1962, de Gaulle proposed that the Constitution be amended to provide for direct, rather than indirect, election of the President. He proposed that this amendment be submitted to the people for a vote. The Constitution, however, stipulates, in Article 89, that the referendum on amendments is to take place only after it has been approved by a majority in each house of the legislature. De Gaulle did not submit this amendment to the legislature, for he feared it would not be approved. However, the Cabinet did submit this proposal to the Constitutional Council for approval. The Council in its decision on Nov. 6, 1962, held that this was a political question, and outside its jurisdiction, while


\textsuperscript{369} Ibid.
the proposal was a clear violation of the Constitution. The Council reasoned that this law had been passed through the referendum not through the Parliament.\textsuperscript{370} At last, the referendum was held and the amendment approved. The direct elections for the presidency were held three weeks later and de Gaulle was elected.\textsuperscript{371} De Gaulle was the embodiment of the will of the people; he was above the Constitution. The proposal, without the approval of the Parliament, was a direct violation of the Constitution, and yet there was no outcry from the people, and they approved the amendment he had proposed.

All in all, the Council in its early years of existence was strongly influenced by the personality of Charles de Gaulle. In the controversies arisen between the Government and the Parliament concerning the legislative and decree powers, the Council ruled in favor of the decree powers of the Government.\textsuperscript{372}

In addition, since the Council reviews legislation before it is enforced, it can stop the forward movement of any bill if it does not comply with its own dictates. According to Louis Favoreu, the number of such interpretations specifying how constitutionality can be achieved has increased greatly over time in France.\textsuperscript{373} This has especially been the case since 1971 when the Council immensely increased its own powers. As discussed earlier, in the Jul. 16, 1971 decision, which has appropriately come to be known as France’s Marbury v. Madison,\textsuperscript{374} the Constitutional Council granted to itself the right, essentially, to determine whether legislation forwarded to it conformed with the texts mentioned in the 1946 Constitution’s Preamble, such as the 1789 the Declaration of Human and Civil Rights.\textsuperscript{375} The Council has chosen to specify how legislation on material it has ruled on should be framed. A notable example was the Council’s 1982 decision on the socialists’ Nationalization Bill. The Council vetoed the Bill arguing that it did not include fair compensation to business owners. Then, the Council went on to elaborate its

\begin{footnotesize}
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\item Hoffman, supra note 350, p. 113.
\item Ibid., pp. 37 & 84.
\item Williams and Harrison, supra note 366, pp. 145; Brown, supra note 364, p. 142.
\item 5 U.S. (1 Cranch) 137 (1803).
\item Stone, supra note 304, pp. 66-7.
\end{enumerate}
\end{footnotesize}
own detailed compensation formula, and that formula was ultimately accepted by the government and incorporated into the revised law.\footnote{Stone, Alec. “Complex Coordinate Construction in France and Germany.” In The Global Expansion of Judicial Power, edited by C. Neal Tate and Torbjorn Vallinder. New York: New York University Press, 1995, p. 214} To conclude, it is clear that the Council as a constitutional court directly affects the results of policy-making and alters the capability of lawmakers to control the outcome of their own legislative efforts. Indeed, by essentially authoring legislation, the members of the Council as the constitutional judges have become policy-makers in their own right, sending “approved” Bills back to the legislature for passage. In doing so, the Council is leaving its own imprints upon political outcomes. Alec Stone has come up with a term to denote these relations between constitutional court and policy-maker in France, “complex coordinate construction.” The term means “a condition in which both public policy and constitutional law are the products of sustained and intimate judicial-political interaction.”\footnote{Ibid, p. 206.}

Anyhow, the advantage of this kind of policy-making was that a policy of individual rights has evolved over time in the French constitutional review system. Through the Council assigning to itself the right to review legislation in accordance with the 1789 the Declaration of Human and Civil Rights, French constitutional jurisprudence now includes an equivalent of a bill of rights. Although the French public cannot directly question government actions on the basis of a violation of their individual rights, members of Parliament and other government officials can send legislation for constitutional review if they feel that it is not protective of those same rights. Accordingly, in the name of the ‘Principle of Freedom of Associations,’ the Council opposed the bill that regulated the license system for the establishment of associations. Similarly, in 1973, the Council announced that even for the minor offences, only through the statute in the authority domain of the legislative can a judge issue jail sentence, not through the regulations and circulars issued by the Executive and the Government.\footnote{See Hamon and Wiener, supra note 159, p. 113.}
The Council can also reject any bill that has been referred to it for inviting rights violations, regardless of the reason for its having been sent. Overall, rights have received enhanced protections by the reviews of legislation that have been undertaken by the Constitutional Council. According to Alec Stone, the Council is,

an effective guarantor that a whole panoply of civil rights and democratic procedures will be essential terms of legislative debate … drafters of Council petitions have not been given the credit they deserve for their role in protecting Fundamental rights and developing constitutional principles. In addition to transmitting issues to the Council and to formulating constitutional arguments, much of the juridicized debate is consciously undertaken to improve legislation with respect to constitutionality (true of reforms in penal and judicial procedures, for example).379

Thus, through the addition of abstract review to the Fifth Republic’s Constitution, a policy of rights has evolved in France.

After the 1974 Amendment of the French Constitution, the Council was more referred to and many more various issues and questions were propounded to it. Before this, as mentioned earlier, only relatively technical and professional issues such as the demarcation between statute and regulation were referred to it. From that time on, making decisions on numerous issues was assigned for it, such as Condemning the violent actions, determination of identity, new labor rights in companies, abortion, status of the press and mass visual and audio media, nationalization, privatization, public and private Education, citizenship, immigration, French Bank legal status, free marriage agreements, etc. The list that is not so complete is indicative of the fact that the Council is attending to nearly all great issues and problems of the society. This increase of the Councils’ activity can be illustrated through statistics and figures, as well: in the framework of clause 2 of Article 61, the Council made at least one decision annually during the years of 1959-1974, while during the

years 1975-1981 more than seven decisions were annually made by the Council. Between 1982 and 2000, more than 10 decisions were made every year.\(^{380}\)

There were two reasons for this increase. The first reason, as mentioned earlier, is the 1974 Amendment of the ways of referring the cases to the Council. The second reason comes from the changing of the ruling majority from 1981 onwards.\(^{381}\) After the political stabilization of Charles de Gaulle period, in the later decades there were constantly challenges in the economic and social issues between socialistic and liberal attitudes in the Parliament and the government.\(^{382}\) In the seventh term of legislation (1981-1986), the rightist opposition of the Parliament frequently resorted to the weapon of “constitutional review” to ban the Acts carrying socialistic and leftist weight that were not in their favor. This debate went on during the following legislation terms, even when the rightists composed the majority, and the leftists accounted for the minority. It seems that it is a part of French political custom, where most of the important Acts are so regularly referred to the Council that some groups consider the Council as the third legislative assembly.\(^{383}\)

Some of the Council’s decisions have brought about very strong objections among the majority and at times in the heart of the Government such as the Council’s decisions regarding the 1981 Political Decentralization Bill and the 1982 Nationalization Bill both of which were prepared and presented in the period of Fransoa Miteran.\(^{384}\) Some other controversial decisions of the Council are as follows:

- The press in 1984
- The asylum rights in 1993
- Judicial immunity of the President in 1999

\(^{380}\) Hamon and Wiener, supra note 159, p. 114.
\(^{381}\) Ibid.
\(^{382}\) Motallebi, supra note 170, p. 280.
\(^{383}\) Hamon and Wiener, supra note 159, p. 114
\(^{384}\) Motallebi, supra note 170, p. 280.
Nevertheless, it should not be concluded that the Council has always been objecting to big reformations. In most of its decisions, the Council rejected the Acts due to the technical reasons or regarding some trivial points. Therefore, the decisions have never stopped the existence and continuance of the original provisions of the Acts; it has only put much pressure on the Government so that the parliamentary representatives’ role can be more effective. However, sometimes the Council’s decisions on the constitutionality of an Act focus on main and required elements for the reformations and contradict it. In such cases, the Government and its parliamentary majority can take measures to revise the Constitution so that they can achieve their objectives, the thing that has occurred for several times, the most recent one of which was the quota grouping based on sex (males and females) in the electoral lists in 1999.386

With due attention to the aforementioned facts, it must be stated that compared to the constitutional review bodies in the former French Republics, the Constitutional Council of the Fifth Republic enjoys a higher position, especially after the Amendment in the Constitution done in 1974. Nevertheless, the latest development in the Council’s constitutional review domain must not inspire the ignorance of limitations that apply to the Council’s performance. As mentioned earlier, still many Acts are not referred to the Council. For example, the Religious Signs in Public Schools Act (March 15, 2004) was not controlled.387 Moreover, the Council does not consider itself competent enough to review some Acts such as the ones passed through referendums.

385 See Hamon and Wiener, supra note 159, p. 114.
386 Ibid., p. 115.
387 Tawill, supra note 308.
Conclusion

In the United States, the body to control the constitutionality of laws is the very federal judiciary of that country with the Supreme Court at the top, courts of appeal in the middle, and district courts at the bottom. However, because of the high master review of the Supreme Court, American judicial review is normally studied under the name of the ‘Supreme Court.’

Under the American Constitution, the President appoints the judges with the advice and consent of the Senate. The judges of the Court serve in office for life. They are removed from office only for a lack of “good behavior.” Therefore, the special position of the judges grants them a very vast independence against the President and the Congress.

Constitutional review in America is of a posteriori and concrete type. Each party of a case, either the plaintiff or the defendant, can challenge the constitutionality of an Act. The Supreme Court’s judgment in the constitutionality of a law is the final word in a case.

In the early years of its formation, the Supreme Court of the United States very cautiously and conservatively made use of its authorities. Its decisions in some areas like the black rights especially in Dred Scott badly impaired its grace. However, the Court gradually started acquiring an activist and liberal stance through constitutional interpretation. It has played a significant role in the gradual changes that have taken place in America. The freedom of speech is now interpreted as individual satisfaction and excessive support of individual behaviors.

Decisions of the Court have always been of political effects, but these effects have been different in terms of time. In the matter of economic regulation, especially during the New Deal, the conservative behavior of the Court caused it and even the idea of judicial review to lose their reliability and validity. It was considered as ‘government by the judges’ by the French legal doctrine. Furthermore, it was said that the Court blocked all reformations while it offered no alternative solutions.
In France, a political institution named ‘the Constitutional Council’ discharges the constitutional review power. A third of this nine-member Council is appointed by the President of the Republic, a third by the president of the Senate, and a third by the president of National Assembly. Therefore, because only one-third of the members are appointed by any one body, each can be assured that it will be unable to dictate the outcomes. Moreover, administrative and financial autonomy of the Council, a non-renewable nine-year tenure of the Council’s members, the difficult procedure for dismissing the members from the Council guarantee their independence and impartiality. However, an important issue that can impair the independence of the Council members is that they cannot choose the president of the Council but he is appointed by the President of the Republic from among the members.

Constitutional review in France is of a priori and abstract type. The Council controls the constitutionality of laws before their promulgation or before their coming into force. It has no right to hear actual or concrete litigations.

The Constitutional Council’s decisions about the constitutionality or unconstitutionality of laws enjoy res judicata feature. They are binding on public authorities and on all administrative authorities and all courts.

The Constitutional Council in its early years of existence was strongly influenced by the personality of Charles de Gaulle. In the disputes arisen between the government and the Parliament in regard to the legislative and decree powers, the Council ruled in favor of the decree powers of the government. However, after the political stabilization of Charles de Gaulle period, there were two very important developments through which the Constitutional Council could play a great role in developing the French constitutional law. The first development concerned the definition of the “Constitutional Stature” in 1971 where by expanding the defined limits of the Constitution and including the other elements such as 1789 Declaration of Human and Civil Rights, the Council could expand its activity domain. The second development was the 1974 Act. Previously, the authorities or bodies close to the ruling government could refer an Act to the Council, but after 1974
a relatively small number of members of the Parliamentary oppositions were allowed to challenge the Acts passed by the majority. After these developments, the Council was more referred to and made some significant decisions concerning some controversial issues. These decisions, at times, have brought about very strong objections among the majority and even in the heart of the Government. It indicates the independence of the Council from the ruling political party’s pressures in its decision-making.