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THE JUDICIAL REVIEW OF STATUTES IN CONTINENTAL EUROPE

MAX RADIN\(^0\)

Greece and Rome

The theory that courts may review statutes and determine their validity is not quite as new as it sounds. In ancient Athens there was a *graphe paranomon*, an "indictment for proposing unconstitutional measures".\(^1\) Athens had no written constitution, but it did have what was believed to be a fundamental organization or structure. The crime in this case lay not in the mere proposal but in securing the passage of an "illegal" law. That is to say, the law was a duly enacted measure, a _nomos_ or _psephisma_,\(^2\) properly and regularly passed by a majority of the legislative popular assembly, but it was none the less "unconstitutional" because it ran counter to the basic principles of the state. More than that, since there could be no more basic principle than that statutes must conduce to the welfare of the state, a case for unconstitutionality might be made out if the statute were harmful, in fact or in tendency.\(^3\) Accordingly, the most extreme type of argument in our constitutional discussion, that which attacks the constitutionality of the statute on the basis of an alleged violation of the foundations of the state, or the spirit of its institutions —

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\(^1\) Cf. J. H. Lipsius, _Das Attische Recht und Rechtsverfahren_ (1905) 36, 283, 396. The various theories concerning its origin are collected on p. 36, n. 115. Nearly all the earlier discussions on this point are cited in the notes in Lipsius' work. Later examination is to be found in Egon Weiss, _Griechisches Privatrecht_ (1923) 105-107, n. 115 The discussion in 2 Vinogradoff, _Historical Jurisprudence_, 138 et seq., is not quite accurate. But a very full and reliable account is given in Bonner and Smith, _The Administration of Justice from Homer to Aristotle_ (1930) 264-268.

\(^2\) The difference is often said to be this: that the _nomos_ is a general and the _psephisma_ a particular or a temporary statute. The difference is not always maintained and in the course of an argument Demosthenes declares that for all practical purposes they are the same. (In Leptinem, 485, 3) Most of our extant speeches in such cases are directed against _nomoi_, but by no means all. Cf. Egon Weiss, _op. cit. supra_ n. 1, at 86-93. Cf. Demosthenes De Corona (Goodwin's ed.) 381.

\(^3\) Inadvisability of the measure is one of the special points urged in Demosthenes' speech against Timocrates (§§ 68-107). In piling up objections to a law, formal defects, contradiction with long-established laws and harmfulness were not always distinguished. However, there seems to have been a special action if the inutility of the bill was the only ground on which it was attacked. (Aristotle, _On the Constitution of Athens_, § 93, 13. Cf. Sandys' note _ad loc._ Lipsius, _op. cit. supra_ n. 1, at 383. The Demosthenic oration against Leptines seems to have been delivered under this special action. Cf. Egon Weiss, _op. cit. supra_ n. 1, at 107.
arguments which have never been successfully maintained in American courts — was quite transcended at Athens. The proposer of any measure had at any time within a year afterward\(^4\) to justify not merely the formal validity of his bill, its conformity to the spirit of the Athenian polity, but also its utility, and had to do so at his high peril, because the penalty might well be capital.\(^5\)

This was in part derived from the strong prejudice against "new" statutes found in many parts of Greece of which the apparently authentic stories of Locri and Thurii are examples.\(^6\)

Evidently a proceeding of this sort lends itself readily enough to political manipulation and in the period of Demosthenes an indictment for unconstitutionality became the favorite weapon of politicians, sometimes on trivial enough occasions as in the famous controversy in which Demosthenes and his rival, Aeschines, delivered their greatest oratorical masterpieces.\(^7\) But in any case, the *graphe paranomon* bears only an external resemblance to our cases involving constitutionality. The court which was passed on it was the Heliaea, which was in theory and in fact merely another aspect of the sovereign people, whose *nomos* was being attacked. To declare a duly passed law to be unconstitutional was simply a declaration of the *demos* that it had been deceived. In fact, "deception of the people" is the gravamen of the charge, a very serious matter in ancient society.\(^8\)

Review of legislation by the court was not readily feasible at Roman law. A Roman court was properly the jurisdiction of a Roman magistrate with *imperium*. These magistrates in theory formed a single *collegium*. Legislation was not their function but the legislative assembly was convened by any one of them and could act only on measures presented by them. When the consul

\(^4\) After a year the bill could still be attacked, but the proposer was no longer subject to punishment.

\(^5\) The penalty was "assessable", i.e., the accuser might propose any penalty after conviction and would be met by a counter-proposition. The death penalty was rarely, if ever, inflicted. If a person was three times convicted under an indictment for unconstitutional proposal, he suffered partial loss of civil rights. *Lipsius, op. cit. supra* n. 1, at 396, n. 81.

\(^6\) The proposer of a new statute did so with a rope about his neck and was hanged, if his measure failed to pass. *Demosthenes in Timocrates, § 139*. *Cf. Bonner and Smith, op. cit. supra* n. 1, at 75.

\(^7\) The orations on the Crown. The occasion was the bill of Ctesiphon to award a crown to Demosthenes for his public services.

\(^8\) *Demosthenes, In Lepidem*, 458. *Cf. Many Biblical passages such as Jeremiah, 2, 10; Ezek., 31, 23. I have attempted to show that the charge on which Jesus was tried was rather "deception of the people" than blasphemy. *The Trial of Jesus of Nazareth*, 248.
or praetor asked "Is this your will and command, citizens of Rome?" and they answered "Yes," he could not very well later reject as a judicial magistrate what he had either himself proposed or had not prevented.

In Imperial times, the superior *imperium* of the *princeps* reduced legislation to enactments which he permitted. And as ultimately in all cases appeal ran directly to the Emperor in Council, no review of legislation was possible without engaging his responsibility.

None the less, the right to reject statutes was actually — and, for a time, successfully — asserted by the Senate during the Republic. They claimed the power to declare that a law was not binding, *ea lege non videri populum teneri* — expressed, be it noted, as an opinion — either for defects of form or because it was passed by force or against a magisterial veto, or even because it was not a proper law. It seems highly likely that this was a usurpation like the Senate's claim to suspend the Constitution and its claim to require laws to be submitted to them before presentation. In all three cases, the claim was hotly contested and was ultimately abandoned.

Cicero made a special point that the law which condemned him in 58 B.C. was wholly void because beyond the competence of that particular legislative body, the *comitia tributa*, to pass. In this view he claims to have been supported by the leading men of the state — and doubtless of the bar. This sounds modern enough, especially as he goes on to say that, since it was no law *ab initio*, he would have been justified in ignoring it and acting as though no such law had ever been passed. He preferred, however, he declares, to have the law duly and regularly repealed.¹⁰

These ancient examples are separated by a huge gap from modern practice as far as the actual events are concerned. But we may recall that the Renaissance made these texts and this background familiar to all educated men — at any rate in Europe up to the close of the last century — and that we cannot arbitrarily assume that they did not influence or confirm legal theories and opinions, even in those who called themselves radicals. Indeed,

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¹⁰ CICERO, De LEGIBUS, II, 6, 13; PRO CORN. AP. ASCON., 67. The senate voted in one case that if a proposed law were actually submitted, it would be regarded as an act against the public interest, 1 AUCT. AD HERENNIIUM, 12, 21. Cf. also G. ROTONDI, LEGES PUBLICAE POPULI ROMANI (1912) 163 et seq. MOMMSEN, TH. STAATSGR. (2d ed.) 111 et seq. 

²⁰ CICERO, De LEGIBUS, III, 19, 45.
Greek and Roman examples had a particular vogue during and after the French Revolution.

It is scarcely necessary to point out that the differences between these ancient illustrations and those of today are as marked as their resemblances. In one case an all powerful popular assembly chose in indirection to rescind its own act and to punish those whose persuasion it had followed. In the Roman case, a purely conciliatory body (the Senate) succeeds sporadically and incompletely in checking or paralyzing the action of the legislative assembly. In neither case is there any trace of a theory of separation of powers.

France

In pre-Revolutionary France, in which the distinction between statute (loi) and royal decree (ordonnance) was scarcely of moment, the various parlements, both individually and sometimes while purporting to act as one large body, claimed a right of review that might have made a wholly different thing out of French constitutional history if it had maintained itself. Especially the Parlement of Paris claimed that laws received their validity from the registration of these laws with them, and that the Parlement was authorized to refuse registration to an obviously harmful and evil measure.11

This claim had little historical foundation. The Crown, of course, bitterly opposed it. It was admitted by some, if not by all, Parlementarists that if the king in a lit de justice should in his own person solemnly and specifically order the assembled and kneeling Parlement to register the law,12 they had no choice but to do so. But even that was denied by the extreme supporters of the Parlement. As for the Crown, even the need of holding a lit de justice was regarded as an impudent and unwarranted obstacle imposed by arrogant lawyers. "I ask you gentlemen," said Mme. de Pompadour to the recoletrant Parlement, "who you think you are that you venture to dispute the orders of your master." At any rate the dispute had never been effective enough to prevent the king from exercising in full the legislative power which he claimed as his alone.13

11 Olivier-Martin, PRECIS D'HISTOIRE DU DROIT FRANCAIS (2d ed. 1934) § 893 et seq.
12 This was especially provided for in Louis XIV's Ordonnance Civile of 1667, which is, in effect, a complete Code of Civil Procedure.
13 The texts involved in the 18th century struggle between the Crown and the Parlements are collected by J. Flammermont, REMONTRANCES DU PARLEMENT DE PARIS AU XVIIe SIECLE (3 vols. 1888-1898). Cf. in general Viollet, HISTOIRE DES INST. POL. ET ADM. FR., III, 323 et seq.
It was, however, while the assertion of this right of the Parlement was being vigorously made, that Montesquieu's *Esprit des Lois* was published and the doctrine of the separation of powers received its classical embodiment.\(^{14}\) There were many of the newer publicists to whom this theory — soon to be declared the foundation of all liberty — was a far better guaranty against tyranny than the uncertain and dubious intervention of a Parlement. None the less, until the Revolution the claim of the Parlement to exercise a control over statute by means of registering or refusing to register royal decrees, was accepted as a real measure of protection against improper legislation. At any rate it was so accepted by that portion of the public — chiefly the lawyers themselves — who championed the validity of the claim.

With the Revolution, however, a wholly new aspect was put on the matter by the enthusiastic and unqualified acceptance of the doctrine of the separation of powers. The new allotment of powers gave legislation to the representatives of the people and rendered the control by Parlement unnecessary, even for bitter anti-monarchists. Accordingly, the first Revolutionary Constitution, that of August 16, 1790 (Art. II, 11, 12) expressly provides: "The courts may take no part either directly or indirectly in the exercise of legislative power, nor prevent nor suspend the decrees of the legislative body." While this is almost certainly directed in fact against the pre-Revolutionary claims of the Parlement, it is phrased so generally that it could become, as in fact it has become, the basis of the modern theory which in terms repudiates the American doctrine of judicial review.

France has frequently had occasion to revise its constitution in whole or in part. Of the many constitutions and constitutional laws that have been passed since, only two have made special provision for a review of the constitutionality of laws, that of the Year III (Art. 21) and that of January 14, 1852 (Articles 25, 26, 29). But in both these cases the determination was to be left not to the courts, but to the Senate.

Except for these provisions, however, Continental publicists before the war were fairly unanimous in declaring that there was no power in the courts of declaring laws unconstitutional. There had been contrary decisions in the courts, in Norway, February 2, 1893; in Greece (*Journ. de Dr. Pub.* 1905, 181); in Rumania, May

\(^{14}\) It is the special subject of Book XI of this famous treatise.
16, 1912.\textsuperscript{15} In Switzerland, although the Federal Tribunal was
denied the power, the courts of the cantons were permitted to pass
on the constitutionality of cantonal laws.\textsuperscript{16} Outside of these
sporadic and much criticized instances, statute, doctrine and juris-
prudence on the Continent were pretty well at one that there
ought be no repetition in Europe of that special American prac-
tice which is often taken — inaccurately enough — to have begun
with \textit{Marbury v. Madison} and which is likely to have so many im-
portant exemplifications within the next year.

The intensity of this opposition is not easily intelligible on
the basis of the theoretical objections advanced against it. These
are largely derived from the unassailable dogma of the separation
of powers, which in the Declaration of the Rights of Men and Cit-
izens became the only guaranty of freedom. But it is clear that
on the basis of this separation, the acts of the executive should be
as much immune from judicial review as those of the legislature.
In this case, however, judicial review has been freely exercised.
Any act of any public official, whether \textit{virtute officii} or merely
\textit{colore officii}, may come within judicial scrutiny and if it seems to
be beyond the constitutional limits of that office, may be declared
void.

Since there is no injunctive remedy in France, the court can
only act in these matters by indirection — at any rate, by the type
of indirection with which we are familiar in common law countries.
They may support citizens in refusing to obey the invalid order
and deny property rights directly or indirectly based on them.
But there has rarely been any question that executive acts or pro-
nouncements are subject to court scrutiny, or any appeal to the
separation of powers to prevent it.

The fact is that it is not the separation of powers, but the
inerradicable belief that legislation is somehow a special and
peculiar function, which has roused antagonism to court review.
In spite of the sanctity attached to the doctrine of separation, the
three "coordinate" functions have not in fact been regarded as
coordinate, but the legislative function has always seemed far more
definitely and authentically the act of the sovereign people. The
background of French political history during the nineteenth cen-

\textsuperscript{15} Politis, (1915) \textit{REVUE DU DROIT PUBLIC} 181; Berthelemy et Jeze, (1912)
\textit{ibid.} 138 \textit{et seq.}, 305 \textit{et seq.}
\textsuperscript{16} G. Werner, \textit{LE CONTROLE JUDICIAIRE A GENEVE} (1917) (cited in Esmein,
\textit{ELEM. DE DROIT CONST.} (8th ed.) \textit{I, 634, n. 104.) WESTERKAMP, STAATENBUND
UND BUNDESSTAAT, 350,
tury was one in which executive encroachment was always a real danger and the courts, manned by executive nominees, and for all their permanence of tenure dependent on the executive for promotion, would scarcely seem appropriate bodies to entrust with a power which might strengthen the executive against the more immediate representatives of the people.

We shall see, I think, in discussing the German experience in this matter, that the overvaluation of the legislative function carries within it seeds of constitutional weakness which except under the conditions created by the whole course of English history and by the temper of the English people, are likely enough to produce a complete breakdown.

While, therefore, the general tone of discussion in French public law during the nineteenth century has rejected judicial review, there was a marked increase in the interest and importance of the problem during the first decades of the twentieth century. One of the most vigorous of these discussions raised a point which has never engaged the attention of American lawyers.

Continental writers have distinguished between two kinds of court action. There is the formal annulling of a statute by the court — its cassation — that is, the announcement in set terms that the law was unconstitutional, void and no law erga omnes, and that it, therefore, need not — in fact should not — be obeyed. The other is the decision in a specific case involving the rights of A and B, that a claim or duty asserted by either on the basis of a statute, did not exist, because the statute was unconstitutional. All American discussion is, of course, concerned with the latter type, which as a matter of fact, we take to be the only way in which a court could act. It is not too much to say, however, that a large part, perhaps the major part, of Continental discussion envisages the former type, and that there are men of first-rate eminence as publicists and lawyers who would reject the court's power if it is of the first type but accept it if it is of the second. When I say that among these men are such persons as M. Hauriou, Duguit and Berthelemy it will be evident this is not the crotchet of a few venturesome spirits, but the considered opinion of some of the finest of French legal minds.

17 Droit Constitutionnel (1923) 313 et seq.
There is one type of unconstitutionality which is of minor importance in the United States but on which there is no inconsiderable group of cases. Suppose the statute "promulgated"—that is, from our point of view, officially enrolled—has not been properly passed—i.e., has not been read three times or has not been signed by the proper authorities, or has a text differing from that which actually was passed by the legislature. On these matters the majority of our jurisdictions take it as a matter of course that such a statute will be rejected. There are some, to be sure, that do not permit a comparison between the enrolled text and that which appears on the journals of the legislative chamber. Others again will not go behind the formal declaration that appears at the head of the "official" text to the effect that the constitutional forms had been followed in passing it. In all these jurisdictions, however, there would never be a doubt that the validity of a statute could be questioned on matters of substance, a diversity which would surprise and shock French courts.20

In French courts, the matter of rejecting a statute for defect of form has received a great deal of discussion. The extreme view is, as has been said, the Italian—pre-Fascist—view that the promulgated text is binding and is not subject to question by the court. That has found defenders in France as well.

It is extremely surprising to find that M. Duguit, who goes much farther than most Frenchmen in permitting judicial review, is of the opinion that official promulgation covers all defects of form, so that the law of August 5, 1914 amending a law of 1879, is obligatory even though it was passed only by the Chamber and not by the Senate, but was in fact officially promulgated by the President of the Republic. The majority of French jurists, including M. Jeze,21 who represents a thorough conservatism on the question of judicial review, are of the contrary opinion, and have maintained that failure to observe the constitutional forms makes an alleged statute wholly inexistant as such and no law at all. They go so far as to put into this category a statute improperly promulgated, even though otherwise correct in form and substance, or one in which the title differs from the title voted on by the legislature, even though the question of whether the title is part


21 (1915) REV. DU DROIT PUBLIC 576.
of the law is still a moot point in France. They will, however, not go so far as to include laws which have been passed in violation of a Parliamentary procedure established by the legislature itself.  

On one point there is greater diversity in France than on others. Two laws, one of March 22, 1924, and one of August 3, 1926, authorized the government to modify existing laws under certain conditions by administrative decrees. This has brought into existence a new type of statute or quasi-statute, called *decret-loi*, "decree-statute," "administrative enactment" or what you will. May these be tested as to their constitutionality? An influential opinion asserts that they may, although there is a strong opposition.  

But is the very law which authorized the issuance of "decree-laws" constitutional? M. Duguit and others with him—a larger number than those who hold with him on judicial review in general—are of the opinion that the laws in question are clearly void, on the basis of the non-delegability of the legislative power, or better perhaps on the basis of the doctrine that the constitutional assignment of powers is exclusive, so that only the bodies specifically named as legislative possess the power to legislate.

We might note a point which has received considerable discussion in France but which has not been, so far as I know, raised in our constitutional cases. The court is frequently presented with statutes that apparently—and generally partially—contradict each other. In such a case a rule must be established, and it is the historical and common sense rule that the later law—the *lex posterior*—prevails. But this rule is a common sense rule only because it can be reasonably supposed that the law-making body has in fact changed its mind and means actually to repeal the prior statute. It often says so in a general repealing clause at the end.

Now, if we were to take—as publicists in their country and in France have done—the legislative enactment as an expression of the sovereign will, differing only in the form of its preparation from that expressed in the constitution, we should in the case of unconstitutionality have before us merely two contradicting enactments. Which is to prevail? Our Constitution may be said to

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22 *Rouaux* (1904) *REV. DU DROIT PUBLIC* 211 *et seq.*
23 *Cf. Esmenin, ELEM. DE DROIT CONST. II, 67 *et seq.*
24 *TRAITE DE DROIT CONST. (2d ed.) III, 660 *et seq.*
have specifically declared that the Constitution is to prevail, and if it is so interpreted, the power of declaring laws unconstitutional could be, and has been, claimed to be expressly provided for. But even without such a provision — there is none in France — it is clear the rule of lex posterior loses a great deal of its common sense character since one can hardly infer an intention to change a prior law by a later enactment from the contradiction between a statute and a constitution. The rule of assigning superior validity to one of two contrary statutes was after all made by the courts and, one would imagine, is subject to modification by them.

In this way, the courts would be at liberty to deal with an "unconstitutional" statute, much as it deals with a contradiction between two statutes, an unresolved antinomia and since it must refuse full force to one or to the other, i. e., either to the constitution or to the law, it would make a colorable argument to refuse it, on general principles of statutory construction, to the law and not to the constitution. The point has been made the basis of a special theory in Germany.\footnote{The theory of Notstand. Cf. KARL SCHMITT, FESTGATE FUR DAS REICHSGRIFHT, I, 170 et seq.}

It will be seen that discussion of constitutionality of this sort is conducted on a slightly different plane from that which has aroused such bitter feeling in the United States. If it were only to correct formal errors of a statute or to require a stringent adherence to the mechanics of enactment, it is hardly likely that the American practice would ever have loomed particularly large in our minds. It may even be that the subject of constitutional law would never have appeared in the curriculums of our law schools, although the rejection of judicial review has not prevented formidable manuals on constitutional law from being published in France.

The question became a serious one in the United States for the same reason that has recently shaken the faith of conservative French lawyers in their logically unimpeachable position on the inadmissibility of judicial review. They have been "aroused", as M. Esmein says, "by the frequency of unwarranted and arbitrary laws issued in defiance of every consideration of right and justice."\footnote{ESMEIN, ELEM. DE DROIT CONST. I, 641.} It is the misfortune of conservatives generally that they tend to create for existing institutions a value which become something of a nuisance when they no longer control these institutions. It is, therefore, hardly surprising that the question of
julid review has become a doctrinal issue of first magnitude in France when the matter in controversy did not relate to the regularity of promulgation of a statute, but to the question of control of economic resources, to distribution of economic burdens and to alignment of forces in economic conflicts.

The Constitution of 1875 is so brief and succinct that any limitation or restriction of legislative powers in these things can scarcely be derived from it. It is for that reason that the movement has grown and become continually stronger to incorporate into the constitution the Declaration of the Rights of Men and Citizens of September 3, 1791 and to take this document as underlying all French constitutions which derive their moral sanction from the French Revolution.

M. Duguit, as is well known, goes even further. He states that a law is unconstitutional when it conflicts with a principle of right,27 whether or not this principle is actually expressed in a written constitution or a written Declaration of Rights. This would sound perilously like "higher-law" rhetoric, if these "principles" of M. Duguit were not as a matter of fact the reasonably familiar doctrines of liberty and equality. Nor does he merely announce his views in general. He declares, for example, that a specific tax which contained liberal exemptions was a violation of the principle of equality. Again, contrary to the policy of his party (M. Duguit was a vigorous anti-clerical) he declared that the law of July 1, 1901 which forbids religious congregations to teach was unconstitutional because it offended liberty.28 M. Hauriou maintained the unconstitutionality of the law of July 9, 1914, and of July 31, 1917, because it made tax returns secret; on the ground that publicity of tax returns is implied in the rule of equality of the tax burden.29

In other words, the question of unconstitutionality is conceived of as a struggle between an economic group in control of the courts and another group in control of the legislature. In France this is given a special color by the fact that the judiciary consists of career-judges who have selected that form of preferment early in their professional careers and who depend for promotion entirely on the executive. From that it has been argued that the judiciary will become the pliant instruments of the executive in

27 Traité de Droit Const. (2d ed.) III, 660.
28 Ibid., III, 317, 589.
a struggle with Parliament. We must remember, none the less, that the highest French court can receive no further preferment and that there is no real evidence that ministerial control can be or has been exercised in a struggle between the executive and the legislature. There can be no doubt, however, that when a divergence of a serious sort arises, the demand already voiced in France by anticipation for a recall or a referendum, will assume a new complexion and is likely to be effective.

Those who deny to the courts the power to review legislation admit that they do so in reliance on a dubious alternative. The legislature must be guided by a moral sanction, that is, the sense of its responsibility. If a legislature will deliberately disregard it, that is unfortunate. The question is whether the likelihood of its doing so is greater or less than the likelihood of a court deliberately declaring unconstitutional what ought not to be so characterized. Evidently the question is not free from difficulties and it is the opinion of an important and influential group of jurists, that which has gathered around M. Edouard Lambert at Lyon, that American experience has not solved all the doubts that this dilemma presents.30

Germany To 193331

The Constitution of the German Empire before the Revolution of 1918 was not based on the doctrine of the separation of powers. Legislation was not the function merely of the Reichstag, the body which represented the entire people and which was elected by universal manhood suffrage. A much larger share in the legislative process was assigned to the Reichsrat which represented the various states of the Empire and to the imperial government, consisting primarily of the Chancellor who was responsible only to the Emperor. There was no suggestion that the judiciary, either in any of its branches or in its collective entirety was a co-ordinate branch of the government. The judiciary, as in France, was a professional career, entered into by men shortly af-

31 The question of judicial review of constitutionality in Germany between 1919 and 1933 has aroused a great deal of discussion. In English one may refer to the book of Dr. Johannes Matter, The Constitutional Jurisprudence of the German Republic (1928) 562-647. In German, the matter has been chiefly discussed in articles, particularly in the Deutsche Juristen-Zeitung and in the Juristische Wochenschrift. A much discussed book by Morstein-Marx, Variationen Uber die Richterliche Zustandigkeit zur Prüfung der Rechtmässigkeit des Gesetzes (1927), was not available to me.
ter admission to the bar, organized on bureaucratic lines and involving a series of steps that culminated in the Supreme Court of the Empire, the Reichsgericht, a large body of over one hundred, which normally acted in departments and not in banc. By spirit and tradition it is hardly likely that such a group of men would arrogate to themselves a power which would be certain to bring them into conflict, not with a legislative body of popular representatives, but with the government itself in which they felt themselves as somewhat subordinate functionaries.

The question rarely came up and in the few instances was almost uniformly resolved in the negative. The courts asserted that they had no power to examine the constitutionality of laws, that is, they were without jurisdiction to inquire whether a statute of any particular state conformed to the constitution of that state, or whether a federal law conformed to the federal constitution.

But the courts did assert that they had jurisdiction to determine whether a local law was or was not in conflict with a federal law. They could hardly do otherwise in view of the explicit statement in the federal constitution that a federal law excluded pro tanto a local law on the same subject.32 And again the courts felt competent to examine an executive ordinance which was issued by virtue of a law and to set it aside both for formal defects and for substantial ones. Substance was involved when the ordinance was declared to be unauthorized by the statute on which it was based.33

Obviously the technique involved in examining these questions is the same as that ordinarily involved in determining the constitutionality of a statute. The competence declined was entirely jurisdictional, not technical or logical. The courts found nowhere in the statute or in the constitution any justification for exercising a right of review.34 But besides this argument from the silence of the constitution and the statutes, the courts in one or two occasions took special note of several theoretical difficulties which had been made much of in doctrinal discussion.

For, if the courts had busied themselves very little with the problem, “doctrine”, i.e., books and articles in reviews and periodicals, had been very active. The net result was the same.

32 REICHVERFASSUNG (Imperial) Art. 2, § 1. Cf. also ENTSCHEIDUNGEN DES REICHSGERICHTS FUR STRAFSACHEN (R. G. STRE) 34, 130, and ENTSCHEIDUNGEN DES REICHSGERICHTS FUR Zivilsachen (R. G. Z.) 48, 205; 64, 201.
33 R. G. Z. 24, 5; 43, 420; 45, 570.
The doctrinal discussion was on this point almost completely in accord with "jurisprudence" both as to what the courts were competent to examine and as to what they were incompetent. But in this doctrinal discussion, logical and theoretical justifications were announced with which the courts ordinarily could dispense.\textsuperscript{35}

The leading theory was that of Laband\textsuperscript{36} and of George Jellinek.\textsuperscript{37} It was most elaborately set forth by the former Laband's \textit{STAATSRECHT} (Public Law) which was to some extent the Bible of most conservative jurists, who found in it a clarity and completeness they could find nowhere else. Laband's theory is that of "Ausfertigung", \textit{i.e.}, "formal preparation." The court is competent to examine only one thing about a statute, and that is its formal correctness. Has it actually been promulgated by the proper authorities under the proper form? If it has been so promulgated, it is a valid statute, and the courts have nothing to do with it except to enforce its provisions.

Laband's theory is based on the contention that the promulgating power, \textit{i.e.}, the Emperor, must be assumed to have examined the question of constitutionality, and that it is only the promulgating authority that has this power of examination. In other words, the right of review exists, but it rests with the executive and not with the courts.

Laband's theory explicitly and by implication was made the \textit{ratio decidendi} in several of the few cases on this question before 1918.\textsuperscript{38} One, however, used the somewhat startling doctrine — one which later was to have unfortunate results — that a law which was in contradiction with the constitution was to be treated as amendment to the constitution, since it proceeded from the same public bodies that had prepared and established the constitution. For this, also, there was doctrinal justification, but it can hardly be said to have had behind it the weight of theoretical authority.\textsuperscript{39}

One further point may be noted. There was in the pre-1919 Constitution a clause somewhat like our "due process" clause. It proclaimed the inviolability of \textit{wohlerworbene Rechte}, "rights

\textsuperscript{35} Cf. for a review of the problem, \textsc{Schack}, \textit{Die Prüfung der Recht-massigkeit von Gesetz und Verordnung} (1918).

\textsuperscript{36} \textit{STAATSRECHT}, II, 44 et seq.

\textsuperscript{37} \textit{ALLGEMEINE STAATSLICHE} (3rd ed. 1921); \textit{GESETZ UND VERORDNUNG}, 395 et seq. Both these books are known to me only by citation in other discussions. Cf. \textsc{Walter Jellinek}, \textit{DEUTSCHE JURISTEN-ZEITUNG} (1921) 753 et seq.; and (1925) \textit{JURISTISCHE WOCHENSCHRIFT}, 454, where the right of review is characterized as a \textit{Machen}, \textit{i.e.}, fairy-tale, as far as it is based on previous decisions.

\textsuperscript{38} \textit{R. G. Z.}, 43, 420; 77, 229; The latter decision specifically quotes Laband.

\textsuperscript{39} (1916) \textit{JURISTISCHE WOCHENSCHRIFT}, 596 et seq.
properly acquired". Suppose a statute in the court's judgment seemed to disregard such rights. Even then, in a specific instance, the courts denied their competence. The provision, declared the court, was a limit addressed to the legislature. It was to be assumed that it had duly considered whether such rights had been disregarded or not, and had decided that they had not been. By implication, of course, the question of constitutionality could not arise except during a parliamentary debate and was finally concluded by the passage of the bill after such debate.

Laband's theory was not the only one known to the doctrinal discussions before 1919 nor was it unqualifiedly accepted. It is highly significant to note that the strongest opposition to judicial review came from those who directly or indirectly supported Laband, the jurists that is, of pronounced conservative tendency in governmental theory, and above all, those who favored a strong and vigorous executive power. In this they were supported by the judges themselves, who also in the main were conservatives in politics and supporters of a strong executive.

The Revolution of 1918 and the Weimar Constitution of 1919 made a complete change in the allotment of political control. The Socialists were in power at first in both the legislature and in the Government, and in Prussia remained in power, until the Nazi success in 1933. But to a very large extent the judiciary continued to be manned by those who held judicial office before 1919, men conservative in politics and anti-republican in sympathy. The situation was not unlike that of the United States in 1801, when after the Republican (Jeffersonian) sweep had ousted the Federalists from both Congress and the Presidency, the Supreme Court continued to be Federalist under the dominance of John Marshall.

The German courts found themselves, therefore, to some extent the last refuge of the party in opposition, and their attitude toward the sacrosanctity of statutes, duly promulgated by competent authority, correspondingly changed. It became more pronouncedly changed after the inflation crisis of 1923 in which the

40 R. G. Z., 9, 235 et seq.
41 Besides Laband and G. Jellinek, one may put in this group, HATSCHEK, ENGLISCHES STAATSRECHT, I, 139; Waldecker (1916) JURISTISCHE WOCHENSCHRIFT, 596 et seq; OTTO MAYER, VERWALTUNGSRECHT I, 281 (in BINDER'S HAND. VI, 1st ed.); ZORN, STAATSRECHT, I, 416; and HELLWIG, LEHRBUCH DES PROZESSECREHT, II, 152. The last two books are known to me only by citation. Support for the doctrine of judicial review was given chiefly by such liberal jurists as HANS KELSEN, ALLGEMEINE STAATSLEHRE, 248 et seq; and ADOLF MERED, ZENTRALBLATT FUR DIE JURIST, PRAXIS, vol. 40, 38 et seq.
chief sufferers were the propertied middle class to which most of the judges belonged.

On the doctrinal side, it is not surprising to see a fairly complete change. Heinrich Triepel of Berlin, an active member of the extremely conservative German-National party,42 was a strong advocate of the right of judicial review, while one of the ablest of German jurists, Gustav Radbruch of Heidelberg, who was Minister of Justice in the first (Socialist) cabinet, was vigorously opposed to it.43 The discussion was conducted on a different plane to be sure, but the complete change in attitude was none the less apparent.

As far as the courts were concerned, their attitude was at first manifested in a more insistent and detailed exercise of their rights — unchallenged at all times — to examine the authority under which ordinances were issued and to examine the extent to which state laws were in conflict with superior federal law.44 In justifying their decisions, they often assumed a general right of maintaining constitutional and fundamental rights against encroachments by political authority. But the issue of constitutionality of a statute was for a long time not squarely presented.

The constitutionality of specific laws, however, was often an issue deliberately raised by persons who deemed themselves injured by the rapidly multiplying regulations caused by Germany’s economic and financial crisis. In several decisions the issue was directly met. In many of them, the court expressly asserted its competence to examine the question. On November 4, 1925, the constitutionality of the Aufwertungsgesetz of July 16, 1925, came before the Fifth Civil Senate of the Reichsgericht. It explicitly announced its power to hear the question, and decided in favor of the constitutionality of the law.45

A number of other decisions in inferior and higher courts followed. In almost all the cases the law was held to be constitutional. In two matters of a very special character, however, a statute was expressly declared void. A decision of a special court

42 Archiv. Fur Offentliches Recht, 39, 456 et seq. If I may add a personal reminiscence, Professor Triepel’s position on this question as communicated to me at the 34th Juristentag in Cologne in September, 1926, was strongly influenced by American constitutional theory with which he was then familiarizing himself.
43 "Justiz", 1925, pp. 15 seq. Cf. also Thoma, Archiv. Fur Offentliches Recht, 43, 267 et seq. Radbruch’s views were based chiefly on the obvious danger of turning the court into an agency of a political program.
44 R. G. Str. 56, 181; (1921) Juristische Wochenschrift, 587.
45 R. G. Z., 111, 320.
(the Reichsversorgungsgericht of October 21, 1924) declared that an amendment to the military pensions law to be unconstitutional because it deprived officers of the imperial army of pension claims acquired under a regulation of 1906. Similarly on April 19, 1929, the Reichsgericht declared a law of August 17, 1922 unconstitutional because it permitted an appeal in claims for relief to an administrative court instead of to the ordinary court.46

In almost every instance in which the constitutionality of laws is discussed at all, the competence of the courts is assumed without much argument. While there was no specific provision in the Weimar Constitution that the constitution was the supreme law of the land, it is tacitly assumed that it is, and the doctrines that the legislature must be conclusively assumed to have acted constitutionally or that every statute as a lex posterior pro tanto amends the constitution are not specifically refuted, or deemed deserving of refutation.

There is, however, an obvious reason why this latter doctrine could scarcely have been accepted. Article 76 of the Weimar Constitution provides that the constitution could be amended by a vote of two-thirds, provided two-thirds of the members of the Reichstag were present. This, in effect, made of the Reichstag a permanent constitutional convention. It was accordingly obvious that a statute passed with a ‘smaller majority’ could not be an amendment to the constitution. It is not quite so obvious but it is taken for granted, that any statute passed under these terms, even if not presented as a constitutional amendment, would have the effect of one.

The decisions of the Reichsgericht lay great stress on Article 76, and admit that any statute passed with the requisite two-thirds could not possibly be questioned, since its conflict with existing

46 R. G. Z., 124, p. 172. A much more farreaching decision had been reached earlier. In this case, however, the parties were not ordinary litigants, but the State of Prussia on one side, and the Reich — together with Bavaria, Wurtemberg, and Baden — on the other. The court further was the Staatsgerichtshof — a specially constituted tribunal out of the Reichsgericht. The case determined that the Federal law of April 9, 1927, which determined the conditions under which the last named three states might enter the Beerconsortium established by Federal law, was unconstitutional. My attention was called to this case by Professor Carl Lowenstein of Yale University, who had prepared the argument on behalf of Prussia.

Other and more recent cases involved questions arising out of the political crisis that preceded the National-Socialist revolution. In these cases the constitutionality of certain measures — one concerning the Parliament of Brunswick and the other involving the appointment of a Federal Commissioner for Prussia — was affirmed. R. G. Z., 130, 201 and 137, 65.
constitutional provisions would be cured by treating it as an amendment.

This facility of amendment had a deleterious effect. The heaping up of constitutional changes by simple votes of the Reichstag destroyed what Professor Lowenstein of Yale aptly calls the "constitutional conscience"\(^{47}\) of the nation, and rendered far-reaching and revolutionary changes by ordinance and coup d'etat less shocking. Certainly the least than can be demanded of the amending machinery is that it should not be set in motion casually, but only with full consciousness that a constitutional change is being effected.

None of the actual decisions raise the question whether there is any law superior to the written constitution which impliedly restricts or limits it.\(^{48}\) It is taken as a matter of course that a properly passed constitutional amendment overrides any constitutional guaranties expressed in the same document.\(^{49}\) The point, however, was raised relatively early in the history of the German republic in connection with the adjustment involved in the inflation of 1923. It was raised in argument before the courts and in an extraordinary pronouncement of the Richterverein, the association of members of the Reichsgericht, which in 1924 solemnly declared, "Good-faith is a matter beyond the reach of a law to alter. No legal regulation that deserves the name can be said to exist, if it disregards this principle."\(^{50}\) This was nothing more than a declaration of a natural law superior to positive law, which renders a contravening statute void. The declaration was made in connection with a decision in which this principle had been expressly asserted by the plaintiff, but without success.\(^ {51}\)

The declaration of the Richterverein found no support in the cases. A decision of the Reichsgericht in a criminal case went so far as to declare a treaty which denied a country the right of self-defense to be void as a violation of natural law, but this was, we

\(^{47}\) The point was made in a discussion in the Round Table for Comparative Law of the meeting of the Association of American Law Schools, held December 28, 1934. The German experience was discussed with great fulness and clarity both by Professor Lowenstein of Yale and Professor Bienstein of Chicago, whom I must thank for many valuable suggestions.

\(^{48}\) In a case decided November 24, 1932, it was decided that a law which compelled an acceptance of a new bond in place of an old one was not a violation either of the constitutional powers of the Reichstag nor of the principle of equality declared in Art. 109, 1 of the Constitution. It was suggested there, however, that equality of application is a fundamental principle of all law.

\(^{49}\) R. G. Z. 124, 177; (1928) DEUTSCHE JURISTEN ZEITUNG 1020.

\(^{50}\) (1924) JURISTISCHE WOCHENSCHRIFT 90.

\(^{51}\) R. G. Z. 107, 78 et seq.
may note, in regard to a matter of international law where the natural law basis is still frequently insisted upon."

The German experience was on the whole brief and the extreme economic and political pressure of the last years of the Republic was such that the judicial right of review received less than its share of attention on the part of publicists. It affords none the less a valuable basis of comparison in a discussion that can never fail to be of first-rate importance and significance.