The Judicial Process in Comparative Perspective

MAURO CAPPELLETTI

Foreword by

SIR JACK JACOB

Edited with the collaboration of

PAUL J. KOLLMER AND JOANNE M. OLSON

CLARENDON PRESS · OXFORD
1989

Oxford University Press, Walton Street, Oxford OX2 6DP
Oxford New York Toronto
Delhi Bombay Calcutta Madras Karachi
Petaling Jaya Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland
and associated companies in
Berlin Ibadan

Oxford is a trade mark of Oxford University Press

British Library Cataloguing in Publication Data
Cappelletti, Mauro
The judical process in comparative perspective.
1. Judiciary
I. Title II. Kollmer, Paul J III. Olson,
Joanne M
342.7'14
ISBN 0–19–825634–5

Library of Congress Cataloguing in Publication Data
Cappelletti, Mauro.
The judicial process in comparative perspective / Mauro Cappelletti: foreword by Jack Jacob: edited with the collaboration of Paul J. Kollmer and Joanne M. Olson.
Includes index.
1. Judicial process. 2. Judicial review. 3. Courts.
I. Kollmer, Paul J. II. Olson, Joanne M. III. Title.
K2110.C36 1989 347'.01—dc19 [342.71] 88–38347
ISBN 0–825634–5

Set by Footnote Graphics
Warminster, Wilts
Printed and bound
in Great Britain by
Biddles Ltd
Guildford and King's Lynn

Foreword

by SIR JACK JACOB

In every generation, a precious few tower over their fellows in the specialist areas of their endeavour. They transcend their compeers in being immensely more active and articulate as well as more imaginative, more creative as well as more critical, more innovative as well as more inspiriting. Their works vastly enrich their subject and greatly enhance their significance and influence. They are readily and rightfully held in pre-eminent regard and esteem.

In our age, one of those precious few in the field of comparative civil procedural law and evidence and constitutional law is Professor Mauro Cappelletti. He served his apprenticeship, as it were, with one of the most famous procedural scholars, Piero Calamandrei. He was a Professor of Law in the University of Florence, where he was the founder and Director of the Institute of Comparative Law, and he later became a Professor of Law at the European University Institute in Fiesole, Italy, where he was the head of the Law Department. Since 1970, he has been a Law Professor in the University of Stanford, California. He has been a Visiting Professor of several Universities, including Harvard and Berkeley and he is now the Visiting Goodhart Professor in Legal Science in Cambridge. With indefatigable energy and enthusiasm, he has lectured in a number of universities and other educational institutes in many countries throughout the world.

For over 30 years, Mauro Cappelletti has been ceaselessly pouring salient and striking studies into the mainstream of the judicial process, and more particularly into civil procedural law and constitutional law in their comparative contexts. He has produced some twenty books and innumerable monographs, articles, lectures and other occasional papers, which have appeared in numerous journals and law reviews in various countries. He was the fountain head and director of the seminal project on *Access to Justice*, the results of which were published in four volumes of which he was the editor, and which spawned another publication *Access to Justice and the Welfare State* which he also edited. He was in the forefront and director of the important and topical

project 'Integration through Law: Europe and the American Federal Experience', the results of which were published in six volumes, of which he was one of the joint general editors and co-author of part.

With such a track record, it comes as no surprise, but on the contrary it is most fitting that Mauro Cappelletti should have received widespread recognition and admiration from many quarters throughout the world. He is a Corresponding Member of the British Academy and its counterparts in France, Italy, Belgium and elsewhere. He has received many honorary degrees and awards. He has been the President of the International Association of Legal Science, and he is the current President of the International Association of Procedural Law.

I think I can say without exaggeration that Mauro Cappelletti has risen to occupy a commanding position as one of the most, perhaps *the* most, outstanding scholar in the field of the judicial process in general and comparative procedural law in particular. He bestrides the comparative proceduralists the world over. By nature and talent, he is a comparativist, an eloquent linguist, equally at home in several languages as he is in his mother tongue. He has a complete mastery of English, which he writes with great fluency and facility, and in which, with a touch of genius, he expounds his abounding and absorbing ideas with unmistakable clarity of thought and a fascinating felicity of expression. The studies in this work afford ample testimony of his powers in this direction. They also bear testimony to the barely concealed passion, which is an article of faith with him, that in the study of the judicial process, as in the realm of thought in general, there should be no frontiers, neither geographical nor national nor political.

It was a happy concordance between the author and the publishers to produce an edited collection of nine studies by Mauro Cappelletti. These had appeared in several journals in different countries at various times between 1970 and 1988. Individually, they cannot easily be found nor are they readily available. Their publication in one volume gives them all a fresh and enduring life and greatly increases their impact and importance. This is all the more so because, although the titles of the studies may suggest that they are dealing with different topics, in fact they constitute an integral whole, an organic collection of studies about the judicial process. They are not a loose assemblage of disparate aspects of procedural law, but on the contrary, they are in essence a unitary and logical co-ordination of some fundamental and topical issues in the judicial process.

These studies have been selected by Mauro Cappelletti to deal with

four strands in the judicial process, namely the Role and Responsibility of the Judge, Judicial Review, Integration through the Courts and Social Justice. Each of these strands, of course, stands as a separate subject in its own right and each is fully examined and analysed, but as I have said, they complement each other, since they raise common, complex problems in the judicial, procedural process, which are dealt with in the comparative context. Whether they are read separately or as a whole, no one can fail to be fascinated and impressed by these profound and penetrating studies, written into such consummate scholarship, deep insight, a great deal of good sense and much sensitivity, and not a little passion. In these studies, Mauro Cappelletti has greatly increased the interest and importance of the study of comparative law, not only in the area of procedural law, but in all areas of jurisprudence.

In my judgment, this work, which marks a scholarly event of outstanding importance, constitutes the first comprehensive analysis in English of the judicial process. It should command an audience of comparative lawyers and proceduralists as well as scholars in other disciplines drawn from all over the world, crossing all frontiers of language, legal systems and social orders. I earnestly and heartily commend this work, for no one can turn over any of its pages without profit.

Jack Jacob

London,
November 1988

Preface

WHY yet another book on the judicial process? Libraries, of course, have been filled for centuries with studies on the process of adjudication. Every major philosophical approach—and I mean not only legal philosophy but also political, moral, and gnoseological—has found its expression in the area of adjudication. This fact should not surprise anyone, if one considers that adjudication brings about an encounter between individuals 'holding' claims, rights and responsibilities, and the 'might' of public authority—an encounter between the citizen and the judicial branch of government. It is the forum for a struggle between conflicting interests and values—their attempt to obtain recognition through that subtle, gradual, rule-of-law-based and yet to some extent inevitably discretionary and therefore policy-orientated, law-making process: the judicial process. Adjudication also gives rise to a conflict between the ideal of judicial independence and that of the democratic accountability of all those who exercise a public function; indeed, especially at the level of judicial review, it even reveals a clash between the majoritarian principle and the idea of curbing majoritarian will. Moreover, the judicial process often constitutes the arena for a powerful game of myths and fictions, such as the myth or fiction of the merely cognitive nature of adjudication. It also involves one of the most challenging, perhaps the most challenging, of all processes of factual truth-finding, the search for 'judicial truth'; while every truth-finding process implies a struggle between subjectivity and objectivity, this is most apparent in a process which operates within the constraints of legal and judicial rules of evidence. Individual versus state; pre-established 'rule of law' versus discretionary 'rule of man'; cognitive versus normative; subjective versus objective: all of these opposites are involved in the judicial process. Thus, it is no wonder that so much writing has been dedicated to the theme of adjudication.

Why, then, another book on this subject? I have several answers to this question. First, this book is intended to reaffirm a social-liberal approach to the political and philosophical issues mentioned above. This reaffirmation might be a timely one in order to face a dangerous regurgitation of anti-liberal thinking and writing that is *à la mode* these days, be it from the conservative right or from a self-proclaimed leftist

wing of the political spectrum. Second, such reaffirmation is based not on a priori, abstract speculation, but on analysis of actual phenomena, facts and events—on a 'phenomenological' approach. Third, and closely intertwined with the second answer, such facts and events are drawn from as large an observatory of experiences as possible, cutting across the boundaries of countries and groups of countries, and trying to detect, wherever possible, transnational, even world-wide developments and trends—adopting, that is, a comparative approach.

The social-liberal approach. Throughout this book a social-liberal philosophy is affirmed not merely as the predilection of the author, but as an actual phenomenon and a major trend of our epoch. While each chapter supports this point, Part III does so most explicitly. In that part the world-wide 'access-to-justice' movement is seen as the most genuine juridical expression of the basic goal of the modern 'social state'—to make the legal and political system, its rights, benefits, and protections, effectively accessible to all.

Of course, equality before the law already characterized the political philosophy of the liberal-bourgeois state from the moment of its emergence with the French/European and the American Revolutions. (However, let us not forget two major exceptions to the equality principle: the slaves in America, and women everywhere.) This 'rule-of-law state', or *Rechtsstaat*, was intended as a form of government in which state action was not arbitrary, but rather based on pre-established rules enacted by the people called on to participate in the rule-making process. There was a serious problem inherent in this approach, however. The kind of equality and democratic participation envisaged, although very important because it meant abolition of the *ancien régime*'s distinctions of social status, turned out to support a merely formal, largely ineffective and mystifying equality for those individuals and groups who encounter *de facto* obstacles in obtaining access to the system.

There have been, essentially, three basic responses to this problem. The first could be called the 'philosophy of catastrophe' response. It sees every power and law as force, domination, and oppression, *imperium ac dominium*. Its motto could be 'power is bad'—'*le pouvoir c'est le mal*'—maintaining that every form of state, be it the *capitalisme oppresseur* or the *socialisme concentrationnaire* (Gulag socialism), is totalitarian machinery used by the strong to oppress the weak. Only a final catastrophe might destroy the state and redeem society. In a more

moderate form, a similar approach can be detected in some vaguely defined—indeed, hardly definable—visions of certain modern critics of liberalism. Their 'bright future' demands a drastic rejection of liberalism, a repudiation which, by the grace of some mysterious combination of events, should lead to a harmonious, beautifully unified community.

A second response—for which, alas, the first has often laid the foundation—has simply been a total denial and contemptuous derision of those values of individual freedom, separation of powers, rule of law, and democratic accountability of those in power, which are the cherished ideals of liberals. Tragic implementations, past and present, of this approach need not be recounted to anyone who is not blind and deaf to the lessons of history.

The third response is that of liberal socialism, or social liberalism. This is the truly revolutionary response that has been generated by the awareness, on the one hand, of the devastating results of the other responses, and on the other hand, of the insufficiency of the individualistic answer of traditional liberalism. While social liberalism recognizes the insufficiency of traditional individual and political rights and freedoms, it does not however condemn them as a 'bourgeois deception', for such condemnation has proved to be the forerunner of new oppression and tyranny. Rather, 'social' rights are added to—not substituted for—the civil-libertarian rights and freedoms of the individual; they are intended to make liberty and equality effective. These social rights attack the economic, social, cultural, linguistic, age, and sexual obstacles that make the legal system, its 'values', its 'justice', non-accessible to many, indeed to most. Thus, a newer and more sophisticated generation of 'liberals' has been emerging, and the more advanced legal and political systems have been moving toward the 'social' and 'welfare' *Rechtsstaat* which, beyond all its crises and controversies, remains the ideal goal of our time. Even a partial realization of this goal, it has been said, can be seen as a major political achievement in human history.

There are, of course, many problems with this third solution: real problems and imaginary ones.

The real problems are very serious indeed. They are discussed in several parts of the book. Not only is total accessibility merely an ideal never to be fully achieved—similar to the ideal of 'Total Justice', poetically described by Aristotle as 'the greatest of all virtues, and neither evening nor morning star is so wonderful'. But there are also

problems inherent in what has been called *l'Etat Providence*. While representing historic progress, which must be recognized as such whatever the current political mood might be, the social state faces the problems of 'big government'—the heaviness, the costs, the potential oppressiveness of the bureaucracy necessary to implement its welfare goals. It also faces the problems of the overload of legislatures, administrations, and courts, as well as problems of alienation and potential oppression of the individual in a state which reaches out into more and more spheres of societal and individual life. My perception, however, based on comparative analysis, is that the crisis of the welfare state is merely a *crise de croissance*; remedies can be found short of the abandonment of the social-state philosophy. An illustration is provided by the topic discussed in Chapter 7 concerning the developments intended to ensure adequate protection for 'collective' or 'diffuse' interests, such as consumer or environmental interests. The modern solutions, in both civil law and common law countries, reflect most ingenious attempts to provide public incentives to private initiative and zeal, rather than pretending to deal with new demands and growing needs exclusively through an enlarged machinery of government.

To be sure, we must be aware that the solution to every human problem implies a choice; that there is no perfect and definitive solution; that for every choice made, something else must be sacrificed, hence new needs and problems are generated that have to be addressed. This is also true for the social welfare state, which, of course, has its own very heavy costs. However, these costs are obviously less traumatic than those of either the 'Gulag' or the 'catastrophe' solution. As for the 'harmonious community' solution, far from being, as is often postulated, 'progressive' ('leftist'?) in nature, it goes hand in hand with the solution which would leave us with or lead us back to an outdated *laissez-faire* individualism, if not to anarchic nihilism. Like any exercise in futility, it discourages constructive thought and social action, progress and reform—let alone revolution. It is status quo legitimation in disguise.

This leads me to the imaginary problems. The intellectual basis of such problems is quite simple. Critics of the social-liberal approach take the very real fact that the judicial process is in so many ways rooted in conflicting principles and values as evidence that the approach itself is inherently and incurably contradictory, and therefore to be dismissed. Consider, for instance, the theme of Chapter 2 of this book. No doubt a liberal theory of law affirms both the principle of

judicial independence and that of democratic accountability. And no doubt there is an inherent conflict, or contradiction, between the two. This does not mean, however, that either, or both, should be rejected. Much more serious and realistic is, of course, the actual human striving, illustrated by comparative research, to *combine* the two principles. It tries to reconcile these opposites so as to have *as much* independence as is compatible with *that degree* of accountability which is required by a reasonable balancing of both values. Or, consider the topic of Part II of this book. Surely the majoritarian principle, supported by liberal theory, might be in conflict with that expression of the checks-and-balances principle which is reflected in judicial review of state, and especially legislative, action. So what? A growing number of 'liberal' nations, even organizations of nations (as is discussed in Part IV), have come to embrace both principles, while repudiating the Montesquieuian myth of the value-free, mouth-of-the-law adjudicator. I shall return to this theme, but let me now emphasize that the real problem is not the existence or non-existence of an inherent contradiction. Of course such a contradiction exists. But the real, non-imaginary problem is, once again, to reconcile conflicting principles *as much as is possible* in the real world. For the real world is not made of purities, of neat 'either/ors'. It is made of the coexistence of conflicts and oppositions, and indeed the great legal minds throughout history have left their most enduring legacies not in abstract simplifications and deconstructions, but rather in dialectical reconstructions of what, in human nature and society, is inevitably complex, multiple, contradictory. Remember the immense achievements of the Glossators and Post-Glossators who, during the last centuries of the Middle Ages, undertook to build up a European Common Law (*jus commune*) by 'reconciling' such deeply conflicting bodies of law as the medieval customs, local legislation, and Roman law. Shall I also recall that humble twelfth-century monk, Gratian, and his gigantic work on *concordantia discordantium canonum*, or the *Summa* by Aquinas, or Hegel's dialectics? All were intended to start from conflicting positions, not in order to affirm an 'either/or' (or, even worse, to obscure anything within a cloudy sky of vagueness), but rather in order to reach a combination of the two—a 'synthesis' or *concordantia*. Is there a child who is not able to destroy the mechanism of a clock? The important part of the game, however, is to be able to reconstruct it, or to make a better one out of its parts. Let me emphasize, then, that the world of humans is not denied by, but rather is composed of, the

coexistence of contradictory values and principles, institutions and processes. The fact that none of these values and principles is absolute and categorical, and that each must be adapted to, and limited by, other principles and values, does not justify a sceptical denial. As Oliver Wendell Holmes wrote in his condemnation of natural law: 'If a man sees no reason for believing that significance, consciousness and ideals are more than marks of the finite, that does not justify what has been familiar in French sceptics: getting upon a pedestal and professing to look with haughty scorn upon a world in ruins.'

Hence, rational analysis cannot consist of a futile attempt to condemn existing contradictions, as though they were, as a conceited terminology often goes, incompatible 'schisms', nothingness-producing 'antinomies', or self-denying 'dichotomies'; nor can it consist of an even more futile attempt to submerge the contradictions into some fatuous vision of a vaguely contemplated harmony. Rather, it should consist of understanding reality as inevitably contradictory, made of, and indeed taking life from, those conflicts and struggles.

The phenomenological-comparative approach. The description of the approach adopted in the book as 'phenomenological' should not recall Kantian metaphysics or Hegelian *Geist*-evolutionism, even less Husserlian complexities or Heideggerian obscurities. Quite simply, it refers precisely to what the word 'phenomena' has historically been intended to mean, from the ancient Greeks down to our time: *observable facts and events*. Perhaps no one was able to put it more simply and incisively than Machiavelli when he said that what he wanted to do was to pursue 'la verità effettuale della cosa'—the factual truth of the real world—rather than abstract imaginations ('l'immaginazione di essa'). Only in this way, he said, can one 'scrivere cosa utile'—not lose oneself in futilities. It is, in a way, also the philosophy of yet another great, Giambattista Vico—his *verum ipsum factum* philosophy of history and historiography.

Serious comparative analysis, which in fact must always go together with historical research, ought to be based on such a lesson of phenomenological realism. Let me illustrate this point by returning to a theme hinted at above and elaborated in greater detail elsewhere in the book, especially in Part II: the theme of constitutional adjudication. Constitutional adjudication is, no doubt, an ambiguous institution in any democratic state, for it presents a perplexing encounter, and potentially a conflict, between legislator and judge, between law and adjudication. It

is easily understandable, therefore, that the recent major expansion of judicial review in so many countries throughout the Western world —including much of Europe, Canada, and Japan, and with a tentative infiltration since 1982 even in Poland—has caused the 'mighty problem' of its democratic legitimacy to become acute, raising serious questions, old and new, to which we are called to give an answer. Our answer, however, will be based on a realistic analysis of facts and events, not on abstract speculations or formalistic logic such as that embodied in Chief Justice Marshall's argument in *Marbury* v. *Madison*. Reading in the Constitution of the United States the provision that this document should be the supreme law of the land, Marshall argued that constitutional law must prevail over enactments contrary to it; judicial review was then seen as the logical consequence of the fact that it is the very function of judges to interpret the law. What Marshall's argument did not unveil, however, was that judicial review cannot be evaluated by simple criteria of formalistic hermeneutics. The attempt to reduce judicial review to 'mere' interpretation neglects the fact that every interpretation involves an element of choice and creativity—an element which is inevitably most accentuated whenever the interpreter is dealing with vague, value-laden, 'fundamental' norms, as is so frequently the case with constitutional and transnational law. Thus, when asking ourselves about the legitimacy of judicial review, our problem, far from being merely one of formal logic, involves our awareness of the inevitable *law-making* results of judicial review. Hence, we wonder whether such results are compatible with the democratic values we have been brought to accept as essential in our modern—liberal—societies.

One thing comparative phenomenological analysis can do is to bring to light the societal causes, or *raisons d'être*, of norms, processes, and institutions. Thus, it can discover the reasons for the tremendous expansion—a real explosion—of judicial review in our century, especially in the post-World War II era. Indeed, it is my conviction that only on the basis of historico-comparative enquiry can such controversial problems as that of the legitimacy of judicial review find an objective and realistic—hence a scientific, not a merely subjective and speculative—solution. While I refer the reader to the discussion in the following chapters for such an enquiry, I want to mention here some of the conclusions; for, although concerning only one of several topics in the volume, these conclusions might exemplify the overall spirit of the analysis undertaken in this book.

Such conclusions indicate that, if one envisages the constitution as a real 'higher law', not a mere political or philosophical proclamation, a machinery for its enforcement is needed. Many countries, including post-Revolutionary France and, more recently, a number of socialist countries, have adopted some system of 'political' (non-judicial) control of the constitutionality of legislation. This solution has regularly proved to be a failure. Quite understandably. No effective system of review can be entrusted to political organs which are part of the very branch they are intended to control. Moreover, once we accept the—again, liberal—idea that constitutions shall protect certain fundamental rights of individuals and groups even against majoritarian will, no effective system of review can be entrusted to the electorate or to persons and organs dependent upon, and strictly accountable to, the will of the majority. The only realistic alternative then is *judicial* review, which means review entrusted to the courts, or to one court; that is, to bodies relatively unaccountable to the political power.

Critics, of course, can here play an easy game again. How can it be legitimate for persons and bodies not accountable to the people to act as the controllers of those who, on the contrary, are assumed to be accountable? The answer, however, once again cannot be an absolute one, dictated, as it were, by the force of syllogistic argument. Unlike formal logic, reality is never free of contradictions. Our answer, derived from phenomenological-comparative study, is one which recognizes the difficulties and dangers, the weaknesses and contradictions, inherent in judicial review, and yet accepts judicial review as, in some circumstances—and such circumstances are present in a growing number of countries, at least in the Western world—a valid response to major societal needs. Our analysis also demonstrates that such needs have become most compelling because in our epoch there has been a tremendous growth of the political branches, and political power, if uncontrolled, is subject to perversion. This applies to the executive power; it also applies, however, to the legislative power, even though the risk of perversion might, of course, be greater in some countries than in others. Comparative study also demonstrates that only the 'third branch'—which, after all, historically has proven to be the 'least dangerous'—can effectively control the political branches, even though this implies, to some extent, an inevitable 'politicization' of the judicial branch itself.

Here, however, the contradictions inherent in history and reality emerge again. Indeed, we turn to the third branch *because* of its

independence from politics, but in doing so we inevitably immerse it in politics; and to affirm the necessity of judicial review we start from the premiss that uncontrolled power is subject to perversion, but then we entrust the power of review to non-accountable persons and bodies, that is, persons and bodies not subject to control. Juvenal's celebrated admonition emerges once again with its bimillenary force: 'Sed quis custodiet ipsos custodes'—Who watches the watchmen? In modern terms: How can one solve the theoretically insoluble contradiction that an 'undemocratic' institution is used to safeguard us and our liberties against the abuse of power, and thus against undemocratic perversions?

One beauty of the real world, however, is that it is much more complex and *nuancé* than abstract theoretical descriptions. A realistic approach leads us, I believe, to conclusions which can help us to view the 'mighty problem' in less dogmatic and dramatic, more conciliatory terms. True, the judicial nature of review is incompatible with a status of dependence of the judge upon the power he or she is called upon to control; and yet forms of judicial responsibility do exist which are compatible with judicial independence, as demonstrated in Chapter 2. Moreover, there are other, more subtle but not necessarily less effective elements in the judicial function which may be able to keep it in contact with, and responsive to, the people. Especially in a system of review exclusively or primarily based upon 'cases and controversies' —which applies not only to the decentralized or American model but also, to a large extent, to the centralized or European model, as we shall see in Chapter 3—constitutional judges are called on to decide issues raised by those very members of the community who are most directly interested and involved in them. Indeed, by its very nature, the judicial process is, or at least has the potential to be, a highly *participatory* one, and, in this sense, highly democratic, for it is put in motion by, and in principle must be kept within the framework of, the interested parties' complaints and demands. As elaborated in Chapter 1, there is a basic error in applying the same criteria that legitimize legislation —popular representation and the majoritarian principle—to a very different form of public action, the judicial process. This process has its own modes of accountability, an accountability which is not, and must not be, toward the majority or toward the ruler of the day. Rather, it is a more sophisticated form of accountability which, as Alexander Bickel said, combines in a unique manner two elements which are contradictory only in appearance: a degree of insulation of the judge and the judge's daily contact with real-life conflicts and controversies.

Thus, our answer to the 'mighty problem' is, I repeat, a relative and empirical one. It is not a clear-cut 'yes or no' answer. Judicial review has the potential for being, in its own way, democratic. Many circumstances, however, can throw their weight into the balance, and these circumstances may vary from time to time and from society to society. Here, I shall mention one most important variable: the type of judges to whom the review power is entrusted. Comparative analysis has made it clear, for instance, that for a number of reasons discussed in Chapter 3 the bureaucratic career judges of the civil law countries are ill equipped for the role; this helps to explain why in Continental Europe a centralized model of judicial review has usually been adopted, that is, one which entrusts the review power to a newly created constitutional court whose judges are not, or at least not exclusively, drawn from the career judiciary. The procedural techniques adopted in the review process ('abstract' or 'concrete' review, review upon request or 'ex officio', review 'a priori' or 'a posteriori', secrecy or publicity of dissenting opinions, etc.) and many other elements may also be significant in this context. These and other variables may or may not, in a given period and place, contribute to making judicial review more or less compatible with a liberal-democratic form of state and law.

The method. Some elaboration seems appropriate now regarding the conception of the comparative method adopted and the kind of comparative-phenomenological analysis pursued in this book.

The reader will not find in this book a purely technical or structural analysis of the judicial process, an anatomy of its several phases and its elements (parties, witnesses, documents and other types of evidence, and, of course, judges). Even when structural analysis is pursued, as is the case, for instance, with part of Chapter 3 on the centralized or decentralized systems of review, such analysis is always merged with a search for the *reasons* underlying the different structures: historical, ideological, sociological, and so forth. Furthermore, the principal purpose has always been to focus on those problems, needs, and trends which reflect the major challenges of our time. Thus, as mentioned, the unprecedented growth of the political branches in the modern social state has brought to the judiciary a new role (Chapter 1), a new social dimension (Chapters 6–7), but also a new need for accountability (Chapter 2); modern constitutionalism and what quite appropriately has been called the 'human rights revolution' of our Western societies have brought about the unprecedented expansion of constitu-

tional adjudication (Chapters 3–5); and the need for larger markets, as well as the grand desire to prevent the recurrence of such tyrannies and tragedies as those which in our century have plagued humankind through two world wars and many local conflicts, has encouraged the development of that transnational dimension of law and justice which is reflected in the developments examined in Chapters 8 and 9.

These phenomena of a multinational, often of a world-wide, dimension are always examined through the prism of the comparative method. Given a societal problem—the *tertium comparationis*—shared by various countries, the phenomenological enquiry proceeds to examine the methods—rules, processes, institutions, etc.—adopted by those countries to solve that problem, often with the end-result of designing 'models' of the various types of solution thus adopted. Differences and analogies in such solutions and model solutions are then examined in terms of their *raison d'être*, whether historical, sociological, cultural, or other; and movements or trends, which are often convergent but sometimes parallel or divergent, might eventually be discovered, making possible educated predictions about the probable future. Finally, the various solutions can be evaluated, not indeed in any absolute sense, but *in relation* to their efficacy or impact in solving the problem with which the entire research began. Value-judgments such as 'progressive' or 'backward', even 'just' or 'unjust', can then be used with a degree of objectivity—in relation, that is, to the demonstrated adequacy or inadequacy of a given solution to address the particular problem involved.

Thus, comparative-phenomenological research acts as a laboratory for empirical study in law and, more generally, in the social sciences. It is not, however, a method of pure empiricism, of unfocused data-collecting. On the contrary, facts and events are seen as answers to specific human problems—needs and aspirations—and, in turn, as causes of further problems that will again generate needs and aspirations in the continuous flux of life and history. On the other hand, comparative-phenomenological jurisprudence is not based on a priori, abstractly posited values; thus, its evaluations are unlike those which have been typical of the traditional natural-law approach. Nor, however, is this position like that which is typical of the legal positivists whose interest is limited to the 'is' of the particular law, no matter what its value. Once again, between the Scylla of an empyrean natural-law, a priori approach with its absurd attempt at an *adaequatio rei ad intellectum*, and the Charybdis of aseptic legal positivism whereby law and