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# The features of the constitutional jurisdiction in North America

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*Az Egyesült Államok és Kanada alkotmánybíráskodása a decentralizált modell kategóriájába sorolható be, mivel mindkét országban a Legfelsőbb Bíróság látja el az alkotmánybíráskodás jellegű feladatokat. Ebben a tanulmányban egyrészt azt ismertetem, hogy milyen történeti előzményei, elméleti hátterei vannak az amerikai, illetve a kanadai alkotmánybíráskodásnak. Előbbi tekintetében a természetjogi hagyományok és a Marbury v. Madison ügy, utóbbi vonatkozásában pedig a sajátos közjogi helyzet, és az úgynevezett „élő fa"–doktrína játszottak szerepet. Másrészt a bíróságok szervezeti felépítése, valamint a testületek hatáskörei kerülnek bemutatásra.*

## Introduction

The prerequisites of the constitutional jurisdiction are the adoption and the acceptance of the primacy of the Constitution over laws and other norms, as well as to establishing that compliance with the Constitution is checked by judges. These prerequisites were met with less effort in the United States of America, and were more difficult to achieve in Europe.

## The United States of America

The fact that the almost final form of the constitutional jurisdiction emerged in the United States, can be explained by the liberated colonies which were frightened of the possible return of absolutism in any form. Consequently, they tried to put the theory of Montesquieu into practice. During the creation of the Constitution, the division of the powers: the competencies of the government and the Congress were drafted in detail.[1] Although the constitution, which observed strictly the system of checks and balances,[2] did not regulate accurately the judicial organization.

1 Gerald John Baier (1999): In Defence of Doctrine: The Judicial Review of Canadian Federalism in Comparative Perspective. PhD. 49.

2 The system of checks and balances means that the legislative, the executive and the judicial power influence each other: the executive power (the President of the United States and his state secretaries) is bounded to the laws adopted by the Legislature, but the President has once the right of veto. The President appoints the judges of the Supreme Court, for a lifelong term. The powers control each other, but not in the same way as described the theory of Montesquieu: these powers have to be separate.

Therefore, it was necessary to take some measures to pass the federal constitution and the Judiciary Act in 1789. The Supreme Court of the United States could be established in view of these rules. These two laws stressed the importance of the Supreme Court's role, but none of them declared *expressis verbis* that the Supreme Court had the power to revise federal laws from a constitutional perspective. These laws did not give rise to the development of the constitutional jurisdiction automatically.

These factors led to the fact that the Federal Supreme Court had to explain promptly its legal status in the system of checks and balances.

The turning point in the Supreme Court's self-interpretation was the judgement in the Marbury v. Madison case (in 1803). In order to reveal the history of the case, we must go back in time, all the way back to the spring of 1800. By that time, the Federalist Party, which had the majority, lost its support. So the Democratic-Republican Party won the elections in the year 1800, with the leadership of Thomas Jefferson. The party acquired two-third majority in the Congress. This result was called *cab revolution* at that time. John Adams was not re-elected in the presidential election in 1800. Therefore he and his colleagues decided to preserve their power as federal judges. As a consequence, the Congress adopted a judicial act, which created new courts and sixteen new positions for judges.

William Marbury applied for the position of justice of peace, however, he did not receive the position before the inauguration of the newly elected president, Thomas Jefferson. Therefore he applied for a *mandamus*—a special judicial order—from the Supreme Court. Mandamus means "we command": it is a writ by which the court orders somebody to do something. According to Louis H. Pollak, *mandamus* is similar to the terms *habeas corpus* and *res ipsa loquitur*, which come from the ancient Rome.[3] This writ was meant to order James Madison—he was the competent executive in the concrete case—to deliver the document to William Marbury. This legal dispute constituted the marrow of the case.

After a long line of reasoning, the proceeding court came to the following legal conclusion: the Judiciary Act of 1789, which rendered possible for Marbury to appeal to the Supreme Court with his action, expanded the competence of the Court with some first-instance jurisdiction, which the Constitution did not contain.

The Chief Justice proceeding in the case, John Marshall delivered the opinion of the Supreme Court: "If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the Supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power and the tribunals in which it should be vested."[4] After stating this, the most important question was whether the Supreme Court has the competence to declare the laws unconstitutional. The judgement answered this question as follows: "The powers of the Legislature are defined and limited; and that

3 Louis H. Pollak (2004): Marbury v. Madison: What Did John Marshall Decide and Why? *Proceedings of the American Philosophical Society.* Vol. 148. No. 1. 5–6.

4 Marbury v. Madison, 5 U. S. (1 Cranch) at 174.

those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? [...] It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. [...] So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, 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."[5]

The decision in the Marbury v. Madison case established a precedent, which became the basis of the constitutional revision of legislation.[6]

However, a heated debate followed the decision, and because of the long-term resistance, the Supreme Court did not exercise that power, although a similar decision in 1819 gave reasons for the right to review laws. The protective function of the Constitution was adopted only at time of consolidation after the civil war—when the tension between the federation and the member-states was decreased. The courts (and mostly the Supreme Court) became almost automatically the guards of the constitution.[7]

Based on this, the American type of constitutional jurisdiction developed in the 1820's. This can be called judicial review, which presumed the chartal constitution, which stands above the other laws, and it can be changed only by special instruments. In contrast, the flexible constitution can be changed easily by legislation. In this case we cannot speak about constitutional jurisdiction. It follows from the rigid constitution that an act which is contrary to the Constitution is not a law.[8]

There are nine judges in the judicial body. The congress can specify the number of judges. Since the 1870's, this ordinance has not been changed. The president nomi-

5 Marbury v. Madison, 5 U. S. (1 Cranch) at 176–178

6 Hanák András et. al. (2011): Az alkotmánybíráskodás jövője. *Fundamentum,* Vol. 15. No. 4. 73.

7 Robert G. McCloskey (1960): *The American Supreme Court.* Chicago. The University of Chicago Press. 13.

8 Paczolay Péter eds. (2003): *Alkotmánybíráskodás – alkotmányértelmezés.* Budapest, Rejtjel Kiadó. 12.

nates the judges, and they may come into office with the confirmation of the majority of the Senate. The appointed judges have to take an oath to come into office.[9] Judges get their mandate during good behaviour (so for a lifetime), and they can be removed from their office only by the impeachment procedure.[10] The Senate has the sole power to propose all the impeachments. When it holds a sitting for that purpose, the members shall be on oath or in affirmation.[11]

The Supreme Court of the United States has a unique competence and practical experience throughout the world in relation to the judicial protection of the constitution. This fact could be observed earlier: Tocqueville's study from 1840 pointed out that a lot of European countries had already adopted the confederation and the representative system. However, in his opinion, these European countries did not develop the judiciary in the same way as the USA.[12]

The adoption of the natural law concept based on religion, serves as the basis of the constitutional jurisdiction of the United States. This fact appears in the constitutional documents and court judgements, which decide whether laws comply with the constitution.

By way of the natural law concept, American constitutional regulations—*inter alia* control of constitutionality—are determined by many kinds of general, flexible principles. These principles create positive legal basis to judge the cases. Such principles are fairness, rationality, freedom, the rule of law, and the principle of due process. Beyond these principles the judge in his judgement can refer back to the structure and ideas of the constitution.

However, in addition to the prevailing natural law concept we can also find the positivist approach, according to during the constitutional examination judges are bounded by the constitution, which is the main law of the people, and they must apply the laws made under the constitution (*in pursuance thereof*).

After World War I, the protection of human rights became more and more important in the Supreme Court's constitutional protection practice. This led to the birth of the prefered freedoms's doctrine. These rights are: human dignity, freedom of opinion, freedom of the press, right to vote, right to complain, right to unite, right to assemble, the prohibition on discrimination, and the protection of minorities. According to the theory of prefered freedoms the values set forth in the constitution are putted into

9 The form of the oath is the following: „I, A. B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich,and that I will faithfully and impartially discharge and perform all the duties incumbent on me as, according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States. So help me God."

10 Constitution of the United States Art. III., Section 1.

11 Constitution of the United States Art. I., Section 3.

12 Paczolay 2003 12.

different categories, although these are neither rigid nor final. The hierarchy is flexible and it can be changed. The characteristic method of the control is the adoption of the moral interpretation of the constitution and putting it into practice. This is based on the concept that human rights were difficult to comprehend in the Constitution of the United States. Therefore they must be regarded as the guarantees for the restriction of the state authority. So we can experience a tight connection with the law of nature and the emphasis on human rights. On the strength of this, the judges plant moral contents in their judgements, in the framework of the constitution.[13]

The Supreme Court of the United States has exclusive jurisdiction in all controversies of a civil nature, where a state is the one party. The Court also has exclusive competence to judge suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations. The Supreme Court has original jurisdiction in legal disputes between a state and its citizens, and between a state and citizens of other states, or aliens. As well as in all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul shall be the one party.[14]

The American model is decentralized. It follows from this that all judges have to adopt and protect the constitution independently from the judicial organization. Consequently, they can rule the validity of a norm. If a lower-instance court passed a judgement under the constitution, and an appeal has been filed against that judgement, the case could arrive at the Supreme Court. Then the judicial body examines or dismisses the appeal. The decision of the Supreme Court on the merits of the case is binding for all the courts. Therefore in the United States we cannot find a separated constitutional court. The judicial organization is unified, in contrast with Europe where it is divided according to the different case types.

Consequently, the constitutional jurisdiction is performed by professional judges, because the necessary element of the judicial job is the interpretation of the constitution in specific cases. Although all the judicial bodies have the power to determine the constitutionality of legislation,[15] (because of the decentralized system of review), the Supreme Court has the competence to do the final interpretation, which will be binding for everyone. In any case, where the validity of a treaty or statute is drawn in question, or an authority exercised under the United States, and the decision against their validity; or where the question is the validity of a statute of, or an authority exercised under any state, on theground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of

13 Chronowski Nóra (2001): Az alkotmánybíráskodás. *Jura*, Vol. 7. No. 2. 100–101.
14 Judiciary Act of the United States, Section 13.
15 Danielle E. Finck (1997): Judicial Review: The United States Supreme Court versus the German Constitutional Court. *Boston College International and Comparative Law Review*, Vol. 20, Issue 1, Article 5, 126.

a treaty, or statute of, or commission held under the United States, and the decision against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the Constitution, treaty, statute or commission, can be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing a judgement or decree complained of, or by a justice of the Supreme Court of the United States.[16]

Starting out from the premise that a judge who decides a case where an applicable law is contrary to the Constitution must disregard the former and apply the latter, this would lead to inconsistent decisions on close questions because of the different interpretations; the doctrine of stare decisis dissolves all the possible controversies. This doctrine means that courts are bound to follow their own previous decisions and the precedents of higher courts in the same jurisdiction.[17]

An additional characteristic feature of the American model is that the constitutional jurisdiction is always linked to a specific case (*cases and controversies*). The constitutional problems occur before courts of general competence. So judicial decisions address the parties themselves. Therefore the precedent system is prevailing. That means that there is no abstract constitutional review in the United States, which is a procedure where the constitutional review of a law can be initiated independently from the specific case.

It is important to determine the legal consequences of unconstitutionality: in the United States, the court simply ignores the unconstitutional rule (the court does not apply the law). As a consequence, there is no need to lead the unconstitutional law out from the legal system (as for example in Europe by the abrogation or annulment). The model of constitutional jurisdiction developed in the United States of America is adopted mostly in common law countries—in Canada, Australia, or India—, but we can also find this model in Europe (especially in Scandinavia: in Denmark, Sweden, Norway). However, in these countries it is the competence of the Supreme Court.[18]

## Canada

Nowadays, there are more and more people against constitutional jurisdiction, and fewer people who support the concept of a body being able to interpret fundamental human rights. However, the main approach in Canada tries to realize a transition. Consequently the constitutitonal jurisdiction is an art which is defined with the metaphor of a "living tree" and extends the meaning of the constitution, but also accepts that legislation can challenge the decision of the Supreme Court with the *not-*

16 Judiciary Act of the United States, Section 25.

17 Finck 1997 132.

18 Trócsányi László – Schanda Balázs (2012): *Bevezetés az alkotmányjogba*. Budapest, HVG-ORAC Lap-és Könyvkiadó Kft., 347–349.

*withstanding* clause:[19] the Parliament of Canada may, notwithstanding anything in the Constitutional Act, from time to time provide the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the Canada's laws.[20]

The Canadian constitutional jurisdiction is somewhere between the American and the New Zealand control mechanism within the common law system. This characteristic originates from the particular legal history and legal culture of Canada.

The British North America Act [BNA] of 1867 (this act is called Constitution Act since 1982), which served a basis for the development of the federal system of Canada, was not a constitution in terms of law, nevertheless it was an imperial act. The British historical constitution stood at the top of the law and order. This reflected the judicial organization: Canada's court of final resort was the Judicial Committee of Privy Council until 1949, which had a profound effect on the shape of Canadian federalism in the early years of federation. Its impact led the observers to the reasonable belief that judicial review was critical to understand the Canadian federalism.[21]

In 1931, the country became an internationally recognized, independent state. However, Canada was not independent in a legal sense at that time, because the sovereignty was founded in the United Kingdom.

The British parliament also passed the BNA, and that body had the right to modify it. In compliance with this, Canada did not follow the US model, because it was unacceptable due to legal and political reasons. The American constitution was too rigid, moreover the political conflicts led to a civil war. So the historical constitution of Great Britain was more permissible, and the most suitable to establish the stability.

The Canadian Supreme Court was established in 1949, on the grounds of an act of 1875. The judicial review seemed to be of less immediate impact in establishing the tone of federalism.[22] The rules authorized the Court with federal competences, but the British capital had the final word. The people who formulated the BNA accepted this, and they did neither expect that the guard of the constitution shall be Canadian. However, reference to U. S. precedent began increasing.[23]

In the common law system the adopted theories in the terms of law-interpretation were those, that emphasized that the task of the judges is limited to the determining the intention of the legislation and implemening it. This is called the theory of plain meaning, which means that the text of a rule perfectly defines the intention of the Legislation.

19 Paksy Máté (2012): Az alkotmányértelmezés művészete Kanadában. *Iustum Aequum Salutare*, Vol. 8. No. 1. 71.

20 Constitution of Canada Section 101.

21 Gerald John Baier (1999)*:* In Defence of Doctrine: The Judicial Review of Canadian Federalism in Comparative Perspective. PhD. 3.

22 Ibid. 3.

23 Aaron B. Aft (2011): Respect My Authority: Analyzing Claims of Diminished U. S. Supreme Court Influence Abroad. *Indiana Journal of Global Legal Studies*, Vol. 18. Winter, 433.

At the beginning of the 20th century Great Britain gave up the concept of the narrow interpretation of the text. In Canada, it seemed necessary to use the documents of the legislation more frequently. Thus they probably applied the method prohibited in the United Kingdom, in order to withdraw from the theory of plain meaning. After giving up this theory, the legislation decided to follow the policy of interpreting the law extensively. Consequently, a concept was born, according to which the constitution is a "living tree", which has an interpretor in charge of it, and this comparison fits precisely in the theory of the historical constitution of Great Britain.[24]

A specific case contributed to develop the "living tree" doctrine: the Edwards v. Canada case.[25] Otherwise known as "Persons Case", Edwards was a decision in 1929 passed by Canada's Supreme Court at that time, which was appealed before the Judicial Committee of the Privy Council in Great Britain. After analyzing the use of the term "person" in the Constitution, which had always referred to men, the British Privy Council decided that men and women are "persons", and therefore everybody is eligible to sit in the Canadian Senate[26]. In Justice Hankey's opinion, the Constitution "also planted in Canada a living tree capable of growth and expansion within its natural limits."[27] Women were not entitled to vote or hold office in 1867—when the BNA was passed—, but times had changed and so the constitutional interpretation too. Consequently, this decision helped women gain a measure of equality to men in politics.[28]

The reintroduction of the fundamental law to Canada, and thereby the creation of the Canadian constitution, which is still effective at present, happened in 1982. This constitution involved the Charter of Rights and Freedoms. The constitution, which once had been flexible, became rigid by that time. With the Constitutional Act and the Charter of Rights and Freedoms, the era of the constitutional review was inaugurated in Canada, in the domain of human rights protection.[29] The Charter is very similar to the Bill of Rights of United States, and both became fundamental documents in Canada and in the United States. Therefore, both Supreme Courts may be called the guards of the constitution and the basic rights.[30] Despite this evidence, in the opinion of Peter McCormick, the precedent of the U. S. courts had little direct effect on the evolution of Canadian jurisprudence.[31]

24 Paksy Máté (2012): Az alkotmányértelmezés művészete Kanadában. *Iustum Aequum Salutare*, Vol. 8. No. 1. 75.

25 Edwards v Canada (Attorney General) [1930] AC 124 at 124, 1929 UKPC 86 [*Edwards* cited to AC]

26 Ibid.

27 Ibid.

28 https://ualawccsprod.srv.ualberta.ca/ccs/index.php/i-o/795-living-tree-doctrine

29 Albert H. Y. Chen (2013): *The Global Expension of Constitutional Review: Some historical and comparative perspectives.*

30 Paweł Laidler (2005): *The Significant Role of the Supreme Court in the United States and Canada*. 212.

31 Aaron B. Aft (2011): Respect My Authority: Analyzing Claims of Diminished U. S. Supreme Court Influence Abroad. *Indiana Journal of Global Legal Studies*, Vol. 18. Winter, 438.

The Charter of Human Rights and Freedoms had been in force for not more than four years when the Canadian Supreme Court interpreted the Charter's limitation clause. The answer was short: legality and proportionality was declared in the R. v. Oakes case.[32] This declaration was called Oakes test, which had been applied by the Supreme Court for two decades, although later its components were clarified and modified.[33]

The extensive interpretation of the constitution does not mean that the judges impose their intention on legislation and on the people. The Canadian constitutional jurisdiction is dialogical.

The thesis that the constitutional control has a function of veto over national politics is not true in Canada. The decision of the Supreme Court is only the beginning of the dialogue with the legislation. This dialogue is about a comparison between the freedoms declared in the Charter and the aims of social and economic policy. Due to the fact that the legislation can always reply, it is not true that the competence of the Supreme Court in constitutional control, which the judicial body developed by way of appointment and is responsible politically, is illegitimate.[34]

With reference to the judicial organization in Canada, the Governor General appoints the judges of the Superior, District and County Courts in each Province. The Governor General shall select the judges from the respective Bars of the Provinces.[35]

The general court of appeal is the Supreme Court of Canada. This court consists of a chief justice—the Chief Justice of Canada—and eight puisne judges, who are appointed by the Governor of Council by letters patent under the Great Seal.[36] Any person can be appointed a judge, who has worked as a judge of a superior court of a province or a barrister or advocate at the bar of a province for at least ten years. At least three of the judges shall be appointed from Quebec.[37] The appointed judges must take an oath to come into office.[38] The judges of the superior court could hold their office during their good behaviour. But the constitution of Canada relieves: on the address of the legislative branch (the Senate and the House of Commons), the Governor General can discharge the judges. A judge of a superior court ceases to hold his office upon attaining the age of seventy-five years.[39] So the judges of Canada can hold their office until they reach the retirement age. The constitution guarantees,

32 [1986] 1 S.C.R.103 [Oakes]

33 Dieter Grimm (2007): Proportionality in Canadian and German Constitutional Jurisprudence. *University of Toronto Law Journal*, 383.

34 Paksy Máté (2012): Az alkotmányértelmezés művészete Kanadában. *Iustum Aequum Salutare*, Vol. 8. No. 1. 84.

35 Constitution of Canada, Section 96–98.

36 Supreme Court Act of Canada, Section 4, subsection (1)–(2)

37 Supreme Court Act of Canada, Section 5 and 6

38 The form of the oath is the following: „I, ..., do solemnly and sincerely promise and swear that I will duly and faithfully,and tothe best of skill and knowledge, execute the powers and trusts reposed in me as Chief Justice (or as one of the judges) of the Supreme Court of Canada. So help me God." Constitution of Canada, Section 10.

39 Constitution of Canada, Section 99, subsection 1–2.

that the Parliament of Canada determines and provides the judges' salaries, within the framework of the duty of protection of the judges' payment.[40] There are very strict rules concerning the incompatibility in Canada, because no judge shall hold any other office during his assignment. The Supreme Court sits in Ottawa for three sessions of a year: winter, spring, and fall.

In the following, the matter at issue will be the competences and the procedures of the Supreme Court.

The Governor in Council can refer to the Supreme Court for hearing and consideration important questions of law or fact concerning the interpretation of the Constitution Act, the constitutionality or interpretation of federal or provincial legislation, the appellate jurisdiction concerning educational matters, and competence disputes. The court shall certify its opinion on each question, giving reasons for each answer to the Governor in Council. Any judge, who differs from the opinion of the majority, shall in like manner certify their opinions and their reasons.[41]

The legislation—the Senate or the House of Commons—may also turn to the Supreme Court. The Court or any two of the judges shall examine and report on any private bill presented to the Senate or House of Commons and referred to the Supreme Court under any rules or orders passed by the legislation.[42]

Generally, when an appeal arrives at the Supreme Court: the appellant can also appeal against the whole or part of any judgement or order and, if the appellant intends to limit the appeal, the notice of appeal shall so specify. In the case of appeal, the following time periods are relevant:

1. In the case of an appeal for which leave to appeal is required, the notice of application for leave to appeal and all materials necessary for the application shall be served on all other parties to the case and filed with the Registrar of the Supreme Court within sixty days after the date of the judgement appealed from;
2. In the case of an appeal for which leave to appeal is not required or in the case of an appeal for which leave to appeal is required and has been granted, a notice of appeal shall be served on all parties to the case and filed with the Registrar of the Supreme Court within thirty days after the date of judgement appealed from or the date of the judgement granting leave, as the case may be.

These time periods can be extended under special circumstances. The extension can be initiated by any judge of the Supreme Court or a judge, either before or after the expiration of a time period. This regulation cannot be applied to election cases.[43]

40 Constitution of Canada Section 100.
41 Supreme Court Act of Canada Section 53, subsection (1) and (4)
42 Supreme Court Act of Canada Section 54
43 Supreme Court Act of Canada Section 56–59.

In accordance with the Judicial Review Procedure Act, an application for judicial review must be brought by way of a petition proceeding. In this case, the court can grant some relief that the applicant would be entitled to in any proceeding: relief in the nature of mandamus, prohibition or certiorari; and a declaration or injunction or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

When an application arrives at the Supreme Court challenging a decision on the grounds of error of law, the Court is not limited or precluded by the enactment conferring the power of decision. However, if the applicant is limited or prohibited by law from starting proceedings, they cannot apply for judicial review. If an applicant is entitled to declare that the decision made in the specific case is unauthorized or invalid, the Court may set aside the decision instead of making a declaration.

There are no time limits to submit the request for judicial review unless an enactment otherwise provides, and the Court will consider if substantial prejudice or hardship may result in any other person being affected by reason of delay. The application for judicial review is satisfactory if it sets out the ground on which relief sought and the nature of the relief sought. The Court refuses the application for judicial review, if sole ground for relief established is a defect in form or a technical irregularity, and the court finds that no substantial wrong or miscarriage of justice has occured. If the decision has already been made, the Court can make an order validating the decision despite the defect, to have effect from a time and on terms the court considers appropriate.

The Attorney General must be served with notice of the application for judicial review. He is entitled to be heard in person or by counsel at the hearing of the application. The record of the proceeding, or any part of it, has to be filed in the Court. During the judicial review, the Court can take an interim order until the final determination of the application.

Upon an application for judicial review, the court can instruct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in a specified matter, the whole or any part of a matter to which the application relates. In this case, the Court must advise the tribunal of its reasons, and give directions for reconsideration. In reconsidering the matter, the tribunal must have regard to the Court's reasons for giving the direction and to the instructions given by the Court.

## Conclusion

In North America, the constitutional jurisdiction developed considering the traditions of common law. This fact determined its subsequent features: the priority of the case law is a determining factor - in contrast with Europe - in the countries examined in the present paper. The interpretation of the constitution always happens

in a specific case. The latter competence is very similar to the judicial review in individual cases in European countries.

However, the present paper also found that there are differences between the United States and Canada. The Supreme Courts in these countries interpretate the law with different method: originalism prevails in the USA, *a contrario* in Canada where the legal practice elaborated the doctrine of a "living tree". Despite the differences, both North American countries have developed an efficient constitutional jurisdiction.

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Constitution of the United States
Judiciary Act of the United States
Constitution of Canada
Supreme Court Act of Canada
Judicial Review Procedure Act