

## Constitutional Review and Government Accountability

Courts hold governments accountable through their power to review the actions of the legislature and the executive. This power is at its zenith when a court can declare a law passed by parliament or an action taken by the executive null because it conflicts with the nation's constitution. When a court declares an action unconstitutional, the only way its decision can be overturned is through an amendment to the constitution, a process that by design is usually difficult and time-consuming.

The U.S. Supreme Court was the first to assert the power of constitutional review, in the 1803 case of *Marbury v. Madison*. European courts were not accorded a similar power until the twentieth century, and although a few nations experimented with the idea earlier, it was not until after the Second World War that the concept of constitutional review was firmly entrenched in European law (Schwartz 2000; Favoreu 1992). While the Scandinavian countries adopted the U.S. model, France, Germany, Italy, and the other Continental states opted for a very different one. Unlike the American case, where every court can rule on the constitutionality of a law or executive action, these countries concentrated the power of constitutional review in a specialized court.

The principal reason for creating a separate constitutional court was the recognition that constitutional review differs from the day-to-day work of ordinary criminal and civil courts. It often requires judges to decide value-laden, quasi-political matters, such as whether a particular law or executive action treats all citizens "equally" or is in accord with the "rule of law." Much greater discretion is exercised when deciding these cases than in the usual criminal or commercial ones, and it was believed that the career judges of the Continental system, recruited to resolve these latter kinds of disputes, were unlikely to have the policy and political skills needed for constitutional review (Capelletti 1971).

Constitutional review has now spread to most developing and transition countries. Those with legal systems based on civil law generally follow the Continental model while those with a common law heritage have tended to follow the American one. Thus most Latin American countries, the Francophone states of Africa, and most recently the nations of Central and Eastern Europe have established a separate court to review the constitutionality of acts of the legislature or executive. In the English-speaking Caribbean, Africa, and most of South Asia, by contrast, courts at every level typically enjoy the power of constitutional review.

Besides the question of whether constitutional review is diffused among all courts or concentrated in a single tribunal, the conditions under which a court will entertain a constitutional review varies across countries. At one extreme are those courts that will examine the constitutionality of an act only if it is necessary to decide a case between two litigants. At the other are those, frequently found among Continental-style constitutional tribunals, that can decide the constitutionality of a law in the abstract. Abstract review usually occurs before a law takes effect, and this practice thus avoids the costs associated with implementing a law later judged to be unconstitutional. But this benefit comes at a price. Courts are denied information about the actual effect and administration of the law, information that can help them decide its constitutionality (Posner 1998).

Abstract review can sometimes be initiated by a public official or one or more legislators. In some nations, constitutional courts are consulted, either formally or informally, when a proposed law or executive action is under consideration to ensure that it will meet constitutional muster. Some observers argue that when abstract review is coupled with provisions permitting government officials or legislators to bring cases, the court is playing a role more akin to that of an additional chamber of the legislature than to that of a court (Shapiro and Stone 1994).

The way in which constitutional review is initiated also varies. While some courts set out highly formal procedures that must be observed before they will undertake constitutional review, others demand much less formality. The German constitutional court will act upon a letter from a citizen if a preliminary determination suggests the complaint is well-founded (Kommers 1997). Such a policy can make for a very large caseload, and the German court has recently taken steps to speed the processing of these letters. The Indian judiciary may require the least formality of any court. When violations of fundamental rights are alleged, the courts will treat a letter or even a newspaper article as a request for constitutional review (Sorabjee 1997). While its critics assert that this practice has injected the courts too far into the policymaking process, defenders of the Indian judiciary cite in its defense the courts' duty to hold government accountable and the lack of alternative accountability mechanisms (Ahmed 1999).

The impact of constitutional review is extremely hard to measure. To what extent are governments deterred from undertaking actions that the courts would strike down as unconstitutional? How much of an impact does a ruling have, particularly when governments often have alternative ways of achieving the same objective? One study of the consequences of U.S. Supreme Court decisions concludes that only when the court's decisions enjoy a measure of political support are they likely to have any significant impact (Rosenberg 1991).

Cross-national research shows that it takes time for courts of final review to earn the legitimacy required for their decisions to be obeyed, but that the process can apparently be accelerated by skillful public information campaigns that explain a court's role and the reasons for its decisions (Gibson, Caldeira, and Baird 1998). The American experience suggests that judicial statesmanship can be an indispensable ingredient in nurturing that legitimacy. In its decision in *Marbury v. Madison*, the then newly-created Supreme Court recognized that, were it to find the action being challenged unconstitutional, its ruling would likely be ignored and the Court's future as an institution thrown into doubt. While it used the opportunity presented by the case to assert the right of constitutional review, the Court was careful to do so in a way that did not challenge the power of the other branches of government (McCloskey 1994).

Many observers have been surprised by how quickly constitutional review has been accepted in several transition countries in Eastern Europe (Schwartz 2000). Nonetheless, concerns remain that here, as well as in developing countries where constitutional review is a relatively recent innovation, courts may be moving too quickly, at least in some areas, to assert their power of constitutional review (Schwartz 2000; Wilson and Handberg 1998). The tension is likely to be the greatest when constitutional review requires a court to referee a dispute between parliament and the executive or between the central government and a state or province. There is a worry too that provisions permitting citizens or a parliamentary minority to

contest a law in the abstract may be exacerbating the situation by drawing the courts into policy disputes better left to the political branches to resolve.

Constitutional review inevitably pits the decisions of unelected judges against the policy choices made by popularly chosen officials, most clearly when a law with broad public support is invalidated by a constitutional court at the behest of a political minority. One defense offered is that a constitution reflects the views of citizens over many generations, as opposed to what may be a short-lived majority. Another is that constitutional courts protect the democratic basis of government by protecting the democratic process itself, or by ensuring decisions are made within the framework of the law (Habermas 1996). Some countries have tried to minimize the tension between constitutional review and popular government by adopting special procedures for selecting the judges of the constitutional court, naming former political leaders, or requiring that the court reflect a balance among political forces in the country (McWhinney 1986). But as two students of American courts have observed, if the U.S. experience offers any lesson, it is that the debate over constitutional review is likely to be "both permanent and irresolvable" (Shapiro and Stone 1994: 406).

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