9 Constitutions and judicial power

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Reader's guide

This chapter compares the evolution of different national systems of constitutional justice since 1787. After introducing and defining key terms, it surveys different kinds of constitutions, rights, models of constitutional review, and the main precepts of 'the new constitutionalism'. The chapter then presents a simple theory of delegation and judicial power, focusing on why political elites would delegate power to constitutional judges, and how to measure the extent of power, or discretion, delegated. The evolution of constitutional forms is then presented comparatively. Beginning in the 1980s, the new constitutionalism took off, and today has no rival as a model of democratic state legitimacy. As constitutional rights and review have diffused around the world, so has the capacity of constitutional judges to control policy outcomes.

Introduction

This chapter provides an overview of the emergence, diffusion, and political impact of systems of constitutional justice. By system of constitutional justice, I mean the institutions and procedures, established by a constitution, for the judicial (third-party) protection of fundamental rights. In 1787, when the fully codified, written constitution was just emerging as a form, no such system existed anywhere in the world. At the dawn of the twenty-first century, one finds that virtually all new written constitutions include a charter of rights that is enforceable by a constitutional or supreme court, even against legislation. With very few exceptions, legislative sovereignty has formally disappeared. The new constitutionalism killed it, paradoxically perhaps, in the name of democracy.

Before we begin, some preliminary remarks on the comparative politics of our topic are in order. Until recently, comparative political scientists paid almost no attention to law, courts, and constitutions. The two major American journals in the field—*Comparative Politics* and *Comparative Political Studies* (both founded in 1968)—failed to publish a single article relating to courts or constitutions in their first twenty-five years of existence. In American political science, one finds a domain of inquiry devoted to 'judicial politics', but it is virtually a subfield of American politics. Outside the US, no equivalent field exists. Around the globe, academic discourse on law and courts is dominated by law professors. In this discourse, the fact that courts are political actors, and that they interact with other state institutions to make policy, is ignored or even actively resisted.

We can account for the indifference to 'things legal' by political scientists in several ways. As noted in Section 1 of this book, in the 1950s comparative politics began to turn away from approaches that Roy Macridis (1955) derided as 'formal-legal', in favour of research into how actors actually behaved or took decisions. Courts and constitutions are arguably the most 'formal' and 'legal', of state institutions. To take seriously what courts actually do—they produce a 'jurisprudence' or 'case law'—one has little choice but to immerse oneself in the formalism of legal reasoning and the rhetoric of justification. The neglect of judicial institutions may also be a consequence of the inherent difficulties of doing comparative research (language problems, for example), compounded by the professional-technical nature of legal discourse, and the sparseness or non-existence of native, politically relevant, scholarship.

All of this is to say that we have slight comparative understanding of judicial politics. There are, however, important indicators of change. Over the past twenty years, political scientists have gradually rediscovered law, courts, and constitutions, for various reasons. First, the new institutionalism—a broad interest in how rule systems and organizations structure political life—took hold across the social sciences (Hall and Taylor 1996; see also the Introduction to this volume, as well as Chapters 1 and 2). New institutionalists studied the state and so they could not help but encounter law and courts. Second, the concern for rules and organizations intersects with the emergence of rational choice and game theoretic approaches to politics, which emphasize how the 'rules of the game' shape the strategies of the actors playing the game and thus help to determine outcomes. When game theorists seek to explain how parts of political systems operate, it is almost always legal rules (constitutions, standing orders, electoral laws, and so on) that constitute the 'rules of the game'. Thus, many political scientists began to deal with law routinely, though they did not adopt traditional methods of legal scholarship.

Third, the salience to comparative politics of constitutions and rights exploded, especially after 1989. The huge wave of constitution-making in Central and Eastern Europe following the collapse of the Soviet Empire drew the attention of a field that had also become interested in democratization (see Chapters 5 and 25). New systems of constitutional justice began to emerge outside of North America and Europe, spurring interest even more. Law and courts have also become a significant component of international politics (Volcansek 1997), led by courts of the European Union (EU) and the World Trade Organization (WTO). Today, a growing field devoted to comparative judicial politics can be identified.

The chapter proceeds as follows. In the first section, I present basic concepts and define key terms. I then present a simple theory of judicial power, focusing on

the potential for judges of the constitution to build and to exercise authority over all other state actors. I chart the diffusion of institutional forms associated with contemporary constitutionalism—the written constitution, the charter of rights, and constitutional (judicial) review—from 1787 to the present. Finally, I discuss some of the research findings of those who have studied the impact of rights adjudication on the greater political system.

Concepts and types

Definitions

There is no consensus on how to define concepts such as constitution, constitutionalism, and rights. My aim is to provide useful definitions of these and other terms to readers of this book (students of comparative politics), not to fix authoritative meanings. Students should note the discussion of alternative views and debate them; and they should remember that, in this field at least, virtually any attempt to carefully define concepts will be controversial.

Let us start with the word **constitution**. I prefer a broad, generic definition: a constitution is a body of meta-norms, those higher order legal rules and principles that specify how all other legal norms are to be produced, applied, enforced, and interpreted (Stone Sweet 2000: ch. 1). Meta-norms constitute political systems, as written constitutions do for the modern nation-state. In England (later the United Kingdom), whose constitution has evolved over centuries, meta-norms provide a simplified representation, or model, of how the political system has been institutionalized, and is expected to function.

In today's world, written constitutions are the ultimate, formal source of state authority: they establish governmental institutions (legislatures, executives, courts), and grant them the power to make, apply, enforce, and interpret laws. Constitutions tell us how lower order legal norms are to be made, especially statutes. They lay down legislative procedures; and they tell us how legislative authority is constituted (through elections, for example), and what the legislature can do (through enumerating powers). Constitutions also indicate how the various institutions are expected, if only ideally, to interact with one another (through separation of powers doctrines). New constitutions written over the last sixty years typically contain a catalogue of rights, which are, by definition, substantive constraints on government. These constitutions also establish an institutional means of protecting rights against governmental incursion, typically in the form of a supreme or constitutional court.

I use **constitutionalism** in two ways. First, the word refers to the commitment, on the part of any given political community, to accept the legitimacy of, and to be governed by, constitutional rules and principles. Constitutionalism is therefore a variable. The commitment to live under a constitution varies across countries. In any specific country, it can be strong or weak, and its character can change over time. Second, the word refers to those practices and understandings of government that are derivable from, or inhere in, any constitutional order. An American would focus on federalism and checks and balances between the branches of government, for example, while a Canadian would add an emphasis on the value of multi-culturalism.

It is worth noting other definitions. For the political scientist Carl Friedrich (1950: 25–8, 123), constitutionalism refers to 'limited government', situations wherein the constitution 'effectively restrains' those who control the coercive instruments of the state. Koen Lenaerts (1990: 205), a legal scholar and an EU judge, defines it as 'limited government operating under the rule of law'. Michel Rosenfeld (1994: 3), editor of the *International Journal of Constitutional Law*, notes that 'there appears to be no accepted definition of constitutionalism', and then states that 'modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights'. I will return to the 'limited government' formulation shortly, but for now it is enough to note that constitutions do not just limit state power, they constitute and enable it.

Others conceive of constitutionalism in wider terms (my second definition above), that is, as the whole of a community's practices and understandings about the nature of law, politics, citizenship,

and the state. 'Constitutionalism is the set of beliefs associated with constitutional practice', Neil Walker (1996: 267) suggests; another constitutional theorist, Ulrich Preuß (1996: 11–13), defines it as 'the basic ideas, principles, and values of a polity [that] aspires to give its members a share in government'. In this view, constitutionalism encapsulates the fundamental notions of how, 'in our political system', 'we' organize the state (federal or unitary, republican or monarchical), constitute our government (separation of powers, checks and balances), provide for representation and participation (elections, referenda), protect minorities (rights and judicial review), promote equality (social welfare regimes), and so on. Here again, constitutionalism will vary. Institutional arrangements and public policies that are viewed as legitimate, and even required, in country X, for example, may be considered unacceptable in country Y.

Still others take an even broader cultural view,[1] conceiving it as an overarching ideology of politics, community, citizenship, and the state. In this tradition, constitutions are analysed in terms of their capacity to express the collective identity of the people—their values, aspirations, and idealized essence (Post 2000; Shaw 1999; Wolin 1989). A robust constitutionalism is a well-spring of legitimizing resources for the *demos*, the body politic, helping it to evolve as circumstances change. In contrast, a weak constitutionalism fails to represent collective identity, and fails to reconstruct the legitimacy of the state in times of crisis.

A typology of constitutional forms and the 'new constitutionalism'

Many notions of constitutionalism emphasize the good or proper functions that a constitution is supposed to perform: to limit government, to embody political ideals, to express collective identity. Where we see meta-norms, we observe a constitution.[2] Constitutionalism refers to the commitment of a polity to govern itself in conformity with the meta-norms, but this commitment may be absent in some places, at some times. A constitution can be 'bad' for democracy. Meta-norms could establish dictatorship and deny the people any say in their own governance; and a polity's 'constitutionalism' could help to legitimize authoritarianism. In world history, there are far more examples of constitutional regimes that have failed to sustain limited government and participatory democracy than there are examples of success.

Empirically, constitutions have differed a great deal, not least, in their capacity to constrain legislative power. Consider the following simple typology of constitutional models.

Type 1: the absolutist constitution

In this model, the authority to produce and change legal norms, including the constitution, is centralized and absolute. The controlling meta-norm is the fact that the rulers are 'above the law'. In such systems, the meta-norms reflect, rather than restrict, the absolute power of those who govern. The type 1 constitution typically rejects popular sovereignty, rights, and separation of powers. The archetype of the type 1 constitution in Europe is the French Charter of 1814, which other monarchies, especially in the Germanic regions, widely imitated (Dippel 2005: 162). In the twentieth century, many constitutions read as if they were full-scale constitutional democracies, when they in fact functioned as single-party or one-man dictatorships. Examples include the USSR and many Central European states under Communist Party control, and situations resulting after military coups in Asia, Africa, Central and South America. Although less prevalent in recent decades, there have been a few constitutions since 1980 that expressly enshrined one-person or one-party rule (Sri Lanka, Togo, Niger, among others).

Type 2: the legislative supremacy constitution

In this form, the constitution provides for (1) a stable set of governmental institutions and (2) elections to the legislature. Elections legitimize legislative authority, and legislative majorities legitimize statutory authority. Once adopted by the legislature, statutes are commands, until abrogated by subsequent legislative commands. The crucial meta-norm is the rule of legislative sovereignty, which has a number of important consequences. The first is that the constitution is not entrenched, that is, there are no special (non-legislative) procedures for revising it. Instead, the constitution can be changed through a majority vote of the parliament. In 1912, for example, the British House of Commons abolished the veto of the

House of Lords, removing the last important constraint on its own law-making powers. The second is that any act that conflicts with a statute is itself invalid. Judicial acts, too, are subject to this rule, so the judicial review of statutes is prohibited. The third is that there is no layer of substantive constraints—rights—in the constitution. Rights are, in effect, granted by parliament, in statutes. The British and New Zealand parliamentary systems, and the French Third (1875–1940) and Fourth Republics (1946–58), are almost pure examples of type 2 systems.

Type 3: the 'higher law' constitution

Type 2 and 3 constitutions share a common attribute: the constitution establishes (or recognizes the status of) state institutions and links these institutions to society, via elections. The type 3 form, however, adds substantive constraints on the exercise of public authority—in the form of constitutional rights—and establishes an independent, judicial means of enforcing rights, even against the legislature. Legislative sovereignty is expressly rejected. Type 3 constitutions are entrenched: they specify amendment procedures.

The type 1 constitution no longer exists as a viable model in the world today (Caenegem 1995), though constitutionalism may be non-existent in many authoritarian regimes. More controversially, one might argue that the type 2 constitution is all but extinct. One of the most remarkable developments in global politics over the past fifty years has been the consolidation of the type 3 constitution as a standard without rival. The point is not that all type 3 constitutions are the same; it is a fact that no two constitutions are exactly alike. What is important is the *broad global convergence around beliefs that only type 3 constitutions are considered to be 'good' constitutions*. This convergence has been called the **new constitutionalism** (Shapiro and Stone Sweet 1994).

The precepts of this new constitutionalism include the following:

- Institutions of the state are established by, and derive their authority exclusively from, a written constitution.
- This constitution assigns ultimate power to the people by way of elections or referenda.
- The use of public authority, including legislative authority, is lawful only in so far as it conforms with the constitutional law.
- The constitution provides for a catalogue of rights, and a system of constitutional justice to defend those rights.
- The constitution itself specifies how it may be revised.

Rights

Constitutions establish the procedures to be followed for producing various forms of law. These are procedural constraints: if the procedure is not followed, then the legal norm produced (statute, administrative determination, judicial decision) is not constitutionally valid. Rights are a different type of meta-norm, in that **they impose substantive constraints on the exercise of public authority**. When state officials make, interpret, and enforce law, they must respect rights, or their acts may be invalidated as law.

It is not enough to define rights simply as 'substantive constraints on law-making'. The nature of rights varies along a number of dimensions, two of which deserve special attention.

1. The first concerns the **hierarchical relationship** between a rights provision, on one hand, and the purposes for which public authority is exercised, on the other. A right might be conceived as more or less absolute: when an act of government violates the right, that act is unconstitutional. The right, being hierarchically superior, trumps any norm in conflict with it. Rights might also be conceived as relative values, to be balanced against other constitutional values, including state purposes. Because the constitution grants powers to state institutions to do certain things—to provide for the country's defence, roads and utilities, social security and welfare, for example—these purposes rise to constitutional status. In this conception, such purposes are not, *a priori*, hierarchically inferior to rights. Balancing is a basic technique that judges use to resolve tensions between a right and a state purpose, once judges have determined that a right is not absolute. The balancing judge weighs the cost of infringement of the right against the social benefits of the state action in

question, and then decides which value will prevail, in light of the facts of the case. When the state decides to build a new airport on existing farmland, for example, the property rights of the farmers whose land is to be expropriated may be outweighed by the 'public' or 'general' interest in the project.

2. The second dimension of variation concerns the **scope of the obligation** imposed on public authority by rights provisions. A right may impose a negative obligation: (1) the state may not infringe upon the right (an absolute version of rights), or (2) the state may not infringe upon the right more than is necessary to achieve a legitimate public purpose (a balancing version of rights). In some countries, rights provisions may impose a duty on the part of government, for example, to take measures to facilitate the enjoyment of a particular right. Or a right might entitle citizens to certain benefits—such as adequate health care, employment, and housing. One classic typology categorizes *rights as negative or positive*: the former constrains government not to do certain things; the latter encourages (or requires) government to act to accomplish certain goals. Older constitutions rarely contain positive rights; newer constitutions all do (see Chapter 4 for a description of the increasing numerous activities of states and bureaucracies over time).

Constitutional review

Once a polity decides to live under a type 3 constitution, the problem of how to guarantee the constitution's normative supremacy over other law arises. The type 3 constitution solves this problem by establishing a system of 'constitutional review': a 'judicialized' (third-party) mechanism for assessing the constitutional legality of all other legal norms.

Two modes of constitutional review are dominant in the world today.

1. The first is **judicial review**, the archetype of which is found in the US. American review is 'judicial' in that it is performed by the judiciary, in the course of resolving litigation.
2. The second mode has its origins in Austria and Germany: the powers of constitutional review are exercised by a special court—a **constitutional court**—while the ordinary (non-constitutional) courts are denied the authority to void legal norms, like statutes, when they conflict with the constitution.

BOX 9.1 The American vs. the European models of judicial review

American judicial review	European constitutional review
Constitutional judicial review authority is decentralized: all judges possess the power to void or refuse to apply a statute on the grounds that it violates the constitution law.	Constitutional review authority is centralized: only the constitutional court may annul a statute as unconstitutional. Judicial review of statute is prohibited.
The Supreme Court is a court of general jurisdiction: it is the highest court of appeal in the legal order, for all issues of law, not just constitutional issues.	The constitutional court's jurisdiction is restricted to resolving constitutional disputes. The ordinary courts handle civil suits and criminal matters.
Judicial review is defensible under prevailing separation of powers doctrines to the extent that it is 'case or controversy' review. Judges possess review authority because their legal duty is to resolve legal 'cases', some of which will have a constitutional dimension.	Review powers are defensible under separation of powers doctrines to the extent that it is not exercised by the judiciary, but by a specialized 'constitutional' organ, the constitutional court.
Judicial review is understood to be 'concrete', in that it is exercised pursuant to ordinary litigation. Abstract review decisions look suspiciously like 'advisory opinions', which are prohibited under American separation of powers.	Constitutional review is typically 'abstract': the review court does not resolve concrete cases between two litigating parties, but answers constitutional questions referred to it by judges or elected officials.

At this point, we confront radically different notions of separation of powers, which are constitutional conceptions of how the various state institutions, or branches of government, should function and interact with one another. Simplifying, in judicial review systems, the courts are understood to comprise a separate but co-equal branch of government, within a system of 'checks and balances'. The duty of American courts (their judicial function) is to resolve legal disputes: cases or controversies that arise under the laws of the US. The constitution is one of the laws. If litigants can plead the constitutional law before the courts, American judges will need to possess the power of judicial review in order to resolve the dispute, that is, in order to do their jobs. Such is the logic of *Marbury* v. *Madison* (1803), the Supreme Court decision that established constitutional review authority in the US.[3] The American model of judicial review is also called the 'decentralized model', since review powers are held by all courts, not just the Supreme Court.

As we will soon see, giving review powers to all courts is not as popular as concentrating review authority in a specialized jurisdiction. Constitutional courts are favoured in countries where judicial review has traditionally been prohibited. Those who wrote new constitutions wished to enable rights protection while, at the same time, preserving legislative sovereignty as much as possible. In such polities (most of Europe and Latin America, for example), separation of powers doctrines take great pains to distinguish the **political function** (to legislate, to make law) from the **judicial function** (to resolve legal disputes according to legislation). The American checks and balances system appears to create a 'confusion of powers', since it permits the courts to participate in

Table 9.1 Regional distribution of models of constitutional review

Region	Constitutional judicial review (American model)	Constitutional court (European model)	Mixed[a]	Other[b]	None
Europe	5	31	3 (1)	1	2
Africa	12	29	1	6	3
Middle East	2	5	0	3	1
Asia and South East Asia	18	13	2	11	0
North America	2	0	0	0	0
Central America	3	3	3 (1)	0	0
South America	3	4	5 (3)	0	0
Caribbean	8	0	0	1	0
Total	53	85	14	22	6

[a] The number in parentheses refers to systems with European model constitutional courts, such as Portugal, but which also give review authority to ordinary judges. I have deferred to Dr Mavčič's classification, though I would normally count these states under the constitutional court column.

[b] Review mechanisms, often unique, that are unclassifiable.

Source: Data compiled by Dr Arne Mavčič, available on the web at www.concourts.net/, last updated in October 2005. French council-based systems were counted under the 'EM-CC' column, and Saudi Arabia, which is not included the Mavčič dataset, was counted under the 'None' column.

the work of the legislature. Because this system or review emerged in Europe and later spread globally, it is often called the 'European' or the 'centralized model'.

We can break down the centralized model of constitutional review into four constituent components.

1. Constitutional courts enjoy **exclusive and final constitutional jurisdiction.** Constitutional judges alone may invalidate a law or an act of public authority as unconstitutional, while the 'ordinary' courts (i.e. the judiciary, the non-constitutional courts) remain prohibited from doing so. In the US, review authority inheres in judicial power, and thus all judges possess it.
2. Constitutional courts **only settle constitutional disputes.** The US Supreme Court is a court of 'general jurisdiction'—it is the highest court of appeal for almost all disputes about rights in the American legal order. In contrast, constitutional courts do not preside over litigation, which remains the function of the ordinary judges. Instead, constitutional courts answer constitutional questions that are referred to them.
3. Constitutional courts are **formally detached from the judiciary and legislature** although they have links with these institutions. They occupy their own constitutional space, a space neither clearly judicial nor political in traditional separation of powers terms.
4. Some constitutional courts are empowered to **review legislation before it has been enforced,** that is, before it has actually affected any person negatively, as a means of eliminating unconstitutional legislation and practices before they can do harm. Thus, in the centralized model of review, the judges that staff the ordinary courts remain bound by the supremacy of statute, while constitutional judges are charged with preserving the supremacy of the constitution.

Modes of review: abstract and concrete

The American and the European models of review differ with respect to the pathways through which cases come to the judges. In the US, rights review is activated when a litigant pleads a right before a judge—any judge. In countries with constitutional courts, there are three main procedures that activate review, although not all constitutions establish all three procedures.

1. Abstract review is the pre-enforcement review of statutes. Some systems enable the statute to be reviewed before it enters into force (*a priori* review), others after promulgation but before application (*a posteriori* review). Abstract review is also called 'preventive review', since its purpose is to filter out unconstitutional laws before they can harm anyone. Abstract review is politically initiated. Typically, executives, parliamentary minorities, and regions or federated entities in federal states, possess the power to refer laws to the court.
2. Concrete review is initiated by the judiciary in the course of litigation in the courts. Ordinary judges activate review by sending a constitutional question—is a given law, legal rule, judicial decision, or administrative act constitutional?—to the constitutional court. The general rule is that a presiding judge will go to the constitutional court if two conditions are met: (1) that the constitutional question is material to litigation at bar (who wins or loses will depend on the answer to the question); and (2) there is reasonable doubt in the judge's mind about the constitutionality of the act or rule in question. Referrals suspend proceedings pending a review by the constitutional court. Once rendered, the constitutional court's judgment is sent back to the referring judge, who then decides the case on the basis of the ruling. In such systems, ordinary judges are not permitted to determine the constitutionality of statutes on their own. Instead, aided by private litigants, they help to detect unconstitutional laws and send them to the constitutional court for review.
3. The **constitutional complaint** brings individuals into the mix. Individuals or an ombudsman are authorized to appeal directly to the constitutional court when they believe that their rights have been violated, usually after judicial remedies have been exhausted.

Abstract review is 'abstract' because the review of legislation takes place in the absence of litigation, in American parlance, in the absence of a concrete 'case or controversy'. Concrete review is 'concrete' because the review of legislation, or other public act, constitutes a stage in ongoing litigation in the ordinary courts. In individual complaints, a private individual alleges the violation of a constitutional right by a public act or governmental official, and requests redress from the court for this violation. In American judicial review, all review is (at least formally) 'concrete', in that it is embedded in a concrete 'case'.

KEY POINTS

- A constitution is a body of legal norms—meta-norms—that governs the production and application of all other legal norms. Constitutionalism refers to a polity's commitment to abide by the constitution, and to the main principles found in any polity's constitution.
- A system of constitutional justice is a central component of the type 3 constitution and of the new constitutionalism. Such systems combine a written, entrenched constitutional text, rights, and a third-party mechanism—constitutional review—for the protection of rights.
- There are two main models of constitutional review today: the American model of judicial review, and the European model of review performed by a constitutional court. The models rest on different notions of separation of powers. American judicial review is expected to be fundamentally concrete, whereas European constitutional review is often abstract.

BOX 9.2 A normative debate: is rights review democratic?

Con	Pro
Rights review subverts majority rule, by allowing constitutional judges to substitute their policy choices for those of legislators.	Democracy does not simply mean the domination of the majority over everyone else. It also means basic standards of good governance which must include the protection of rights.
Rights provisions are vague and ill-defined. In a good democracy, elected officials will determine how rights should be protected in law.	It is precisely because rights provisions are not expressed as clear rules that we need judges to interpret them. Good constitutional rulings will lead legislators to care more about rights.
Judges can interpret rights in any way they wish, without being held democratically accountable for their decisions. We can expect an effective system of constitutional review to subvert, routinely, the will of the elected representatives of the people.	Rights are too important to be left to the protection of elected politicians. Judges are relatively more insulated from short-term political calculation, and are thus more likely to protect rights better than elected politicians.
The judicialization of politics through rights adjudication reduces the centrality of legislative debate, and therefore reduces the political responsibility of legislative majorities for their policy decisions. Such responsibility is basic to democratic legitimacy.	Judicialization means that legislatures govern, in dialogue with judges, in order to make rights protection effective. The legitimacy of the regime depends, in part, on how legislators and judges interact with one another to protect rights.

Delegation and judicial power

The power of constitutional judges is delegated power (Stone Sweet and Thatcher 2002): a written constitution expressly confers upon the judges review authority and indicates how it may be used. Why would political elites, those who draft a constitution and will live under it, choose to grant review authority to constitutional judges? Why should they choose to constrain themselves? This section discusses some of the consequences of this choice from the perspective of delegation theory, focusing on issues of agency and control. In doing so, it responds to a further question: to what extent can we expect political elites to remain 'in charge' of the evolution of the polity after delegating review powers?

The constitution as incomplete contract

People contract with each other in order to achieve benefits that they could not expect to realize on their own. Modern democratic constitutions can be conceived as contracts. They are typically negotiated by political elites—representatives of political parties—seeking to establish rules, procedures, and institutions that will enable them to govern under the cloak of political legitimacy, which reduces to constitutional legitimacy. In establishing a democracy, each contracting party knows that it will be competing with others for political power, through elections. Constitutional contracting also yields another crucial benefit: to constrain one's opponents when they are in power. The constitution thus produces two important common goods for the parties, in the form of a set of enabling institutions and a set of constraints.

Constitutional contracting, like all contracting, generates a demand for third-party dispute resolution and enforcement. Indeed, the social logic of contracts provides a logic of courts, more generally. Third-party enforcement of contracts is an institutional solution to a classic commitment problem (the prisoner's dilemma of game theory), which is one reason why we find it everywhere, at all times, in one form or another. The move to constitutional review is one way to deal with commitment problems associated with constitutional contracting. If the polity is federal, review will provide a means of resolving disputes between the federal government and the federated states, and among the federated states themselves. It is an old truism that federalism needs an umpire, which helps to explain why all federal constitutions provide for review. Contracting rights, too, heavily favours the delegation of review authority to a constitutional judge.

Take the following scenario, which is a simplified version of what in fact has occurred in many places since 1945. Once the contracting parties (political elites) decide to include a charter of rights in their constitution, not least to constrain their future opponents when the latter are in power, they face two tough problems. First, they disagree about the nature and content of rights, which threatens to paralyse the drafting process. The left-wing parties favour positive, social rights, and limits on the rights to property. The right-wing parties prefer to privilege negative rights, and do not want to restrict strong property rights. They compromise, drafting an extensive charter of rights that (1) lists most of the rights that each side wants, (2) implies that no right is absolute or more important than another, and (3) is vague about how any future conflict between two rights, or a right and a legitimate governmental purpose, will be resolved. Second, they have to decide how rights will be enforced. Delegating rights review authority to a constitutional court helps them deal with both problems. In agreeing to allow constitutional judges to decide how rights will be interpreted and enforced, they are able to move forward.

In this account, courts are (at least partly) an institutional response to the fact that most contracts are 'incomplete', and the new constitution, too, is an incomplete contract. Contracts can be said to be 'incomplete' to the extent that there exists meaningful uncertainty as to the precise nature of the commitments made (the rights and obligations of the parties under the contract), over time. Due to the impossibility of negotiating specific rules for all possible contingencies, and given that, as time passes, conditions will change and the interests of the parties to the agreement will evolve, all contracts are incomplete in some significant way.[4] Most agreements of any complexity are generated by what organizational economists call 'relational contracting'. The parties

to an agreement seek to broadly 'frame' their relationship, by agreeing on a set of basic 'goals and objectives', fixing outer limits on acceptable behaviour, and establishing procedures for 'completing' the contract over time (Milgrom and Roberts 1992: 127–33).

Type 3 constitutions—complex instruments of governance designed to last indefinitely, if not forever—are paradigmatic examples of relational contracts. Much is left general, even ill-defined and vague, as in the case of rights. Generalities and vagueness may facilitate agreement at the bargaining stage. But vagueness, by definition, is legal uncertainty, which threatens to undermine the reason for contracting in the first place. The establishment of constitutional review is an institutional response to the problems of uncertainty and enforcement. Each party has an interest in seeing that the other parties obey their obligations, and that they will be punished for non-compliance. An important review function is to clarify the meaning of the constitution over time, and to adapt it to changing circumstances.

Principals, agents, trustees

Across the social sciences, as well as in the law and economics tradition, scholars use the 'principal–agent' framework to depict or model authority relations constituted by delegation (see, in particular, Chapter 7). The framework focuses on the relationship between those who delegate, who are called 'principals', and those to whom power is delegated, called 'agents'. For our purposes, let us assume that the principals are those who govern a political system, and that they will create institutions—agents—when they believe that doing so will help them govern more efficiently and effectively. Assume now that the political system is one of legislative sovereignty. The principals are therefore the legislators who produce the statutes that are meant to govern the polity. They decide, for good reasons, that it is too difficult to perform two governance functions at once, both making the laws, and enforcing and resolving disputes under the laws.[5] They therefore decide to delegate to agents—in this case, courts—to help them with the second set of governance functions.

Here is a stylized account of the ordinary courts as agents of the legislature in a system of parliamentary sovereignty, a type 2 constitutional system. Judges are bound to enforce parliamentary statutes because they express the sovereign's will. The judge's principal is the parliament, and the norm the principal controls—the statute—constitutes the substantive terms of the judge's mandate to govern. The judge's formal governance function is to enforce the parliament's law. However, statutes can only be enforced—or 'applied' to resolve a legal dispute—once they have been interpreted; and, because statutory interpretation is a form of law-making, the law often comes to mean, in practice, what the courts have said they mean. Even where this is true, the principal still remains in charge. If the legislators notice that a judge has applied a statutory provision in a way that they did not intend and do not like, the law can be changed. Thus, so long as such agency 'errors' can be identified, they can be corrected. The principals may overturn judicial decisions by amending the statute to preclude the offending judicial interpretation. The decision rule governing the principal–agent relationship—a majority vote of the parliament—favours the principal's control. In type 2 systems, this rule is constitutionally frozen in place.

The traditional principal–agent framework loses much of its relevance when it comes to systems of constitutional justice. It is more appropriate to apply a model of 'constitutional trusteeship' to situations wherein the founders of new constitutions confer expansive, open-ended 'fiduciary' powers on a review court (Stone Sweet 2002). A trustee is a particular kind of agent, one that possesses the power to govern those who have delegated in the first place. Note that the ordinary courts do not govern the legislators, but are agents of the legislator's will. The constitutional court exercises fiduciary responsibilities with respect to the constitution. In most settings, they do so in the name of a fictitious entity: the sovereign people.

In systems of constitutional trusteeship, political elites—the political parties, the executive, members of parliament—are never principals in their relationship to constitutional judges. Depending upon the relevant decision rules in place, these officials may seek to overturn constitutional decisions or restrict the constitutional court's powers, but they can do so only by amending the constitution. But, as we have seen, the decision rules governing constitutional revision processes are typically more restrictive than those governing the revision of legislation; in many

countries, amendment is a practical impossibility, especially when it comes to rights provisions.

Elected officials typically perform some of the functions usually associated with principals, as when they appoint members of the supreme or constitutional courts. Politicians can and do influence constitutional and supreme courts through appointments.[6] Nonetheless, by establishing (1) the normative superiority of the constitution, (2) a review organ, and (3) specific procedures for constitutional revision, they shifted the power to control constitutional development away from themselves, and to constitutional judges. In most situations, they are mere players within the rule structures provided by the constitution. They compete with each other in order to be in the position to govern and, once in power, they legislate—but under the control of the constitutional judge.

The zone of discretion

The points just made can be formalized in terms of a theoretical zone of discretion—the strategic environment—in which any court operates (see Stone Sweet 2002). This zone is determined by (1) the sum of powers delegated to the court and possessed by the court as a result of its own accreted rule-making minus (2) the sum of control instruments available for use by non-judicial authorities to shape (constrain) or annul (reverse) outcomes that emerge as the result of the court's performance of its delegated tasks. In situations of trusteeship, wherein the agent exercises fiduciary responsibilities, the zone of discretion is, by definition, unusually large. In some places and in some domains, the discretionary powers enjoyed by constitutional courts are close to unlimited.

We can compare the zone of discretion across courts and countries. The ordinary judge operating in a system of legislative sovereignty is an agent whose zone is relatively small compared to a trustee court of the constitution. The ordinary judge has delegated powers, to enable her to interpret and enforce statutes. But these powers must be understood in light of control instruments available to her principals—parliament—which reduce the agent's capacity to control outcomes considerably. Virtually all constitutional courts operate in larger zones of discretion than our ordinary judge. The authority to review legislation, in general, is a vast power, but it varies in its particulars. In Europe, where the 'centralized' model of protecting rights reigns supreme, the widest zone of discretion will be found in a country where (1) the constitutional court has been delegated abstract and concrete review powers, as well as the authority to process individual complaints, and where (2) it is relatively difficult or impossible to amend rights provisions. This is the case of Germany and Spain. It is relatively easy for students of comparative constitutional politics, first, to read new constitutions, and then construct an account of a review court's zone of discretion, and to compare zones across countries.

Mapping a zone of discretion cannot tell us what constitutional courts will actually do with their powers. The best we can do is to predict that, given a steady case load, constitutional judges operating in a relatively large zone will come to exercise more influence over the evolution of the polity than those operating in relatively small zones. The prediction, of course, can be tested in comparative case studies. We should not expect our predictions to always be accurate, for the obvious reason that a zone of discretion does not take into account many factors that will be important in particular contexts. That said, research of this kind would be able to tell us a great deal about constitutional politics comparatively, such as why some systems are more effective than others. The last section of this chapter is devoted to the issue of effectiveness.

Other logics

To this point, the discussion in this section helps to explain why elites delegate to constitutional judges, but it presupposes that the elites want to establish constitutional democracy in the first place, and that they have decided that a mechanism of third-party rights protection is a good thing for them, in the future. Such an explanation does not work very well at helping us to understand why, in today's world, autocrats, dictators, and generals, too, write constitutions with rights and review, precisely because such rulers do not assume a peaceful, democratic competition for power with their opponents (see Ginsburg 2003). In general, courts can be useful to

BOX 9.3 The structural determinants of judicial power

The zone of discretion

The zone of discretion is a theoretical understanding of the strategic environment in which any court operates. The size of the zone is determined by (1) the sum of powers delegated to the court, and possessed by the court as a result of its past rulings, minus (2) the sum of control instruments available to overrule of otherwise constrain the court, by political elites who do not like the court's decisions, for example. The zone varies across countries, and it will vary across time in the same country, depending upon how the court interprets the constitution and its role in enforcing it.

France and Germany

The German Federal Constitutional Court enjoys one of the largest zones of discretion of any court. It possesses wide jurisdiction over all constitutional issues, defends both rights and federal arrangements, exercises abstract and concrete review, and receives constitutional complaints. In its case law, the court has made it clear that the German legislative authority must be exercised to enhance rights protection, wherever possible, given other constitutional values. Control instruments are extraordinarily weak. The German constitution does not allow an amendment to weaken rights provisions which, in practice, means that the court's decisions on rights are irreversible, except by the court itself. Because most important political issues make it to the court through one procedure or another, and since the court has adopted the posture of an aggressive defender of rights, German politics have become highly judicialized.

The French Constitutional Council exercises the abstract review of statutes adopted by parliament, prior to their entry into force. The council radically expanded its own zone of discretion in the 1970s, when it incorporated, against the founder's wishes, a charter of rights into the constitution. Compared with the German case, however, the council's zone is quite restricted. It does not handle referrals from the courts or individuals, thus reducing its capacity to control policy outcomes beyond legislative space. As important, the decision rules governing constitutional revision are more permissive than in the German situation: the constitution can be revised by a 3/5 vote of Assembly deputies and senators assembled in a special session. No important German decision on rights has, or can be, overruled, whereas two council decisions have been overruled in order: (1) to permit the right-wing majority to tighten immigration policy (amendment of 1993), and (2) to allow the left-wing majority to develop affirmative action policies for women (amendment of 1999). The French Council reviews about one third of all laws adopted by parliament and has struck down at least one provision in half of all laws reviewed.

European countries with Kelsenian courts operate in large zones of discretion, given that (1) the courts possess broad powers to protect charters of rights, most of which are more extensive than the German, and (2) it is almost impossible to amend constitutional rights provisions.

The US and Canada

In the US and Canada, all courts may exercise the judicial review of statutes.

The US Federal Constitution provides for a short list of negative rights, although the Supreme Court has 'discovered' a longer list of unenumerated rights, such as privacy, thereby expanding its own zone of discretion. It is difficult to amend the US Constitution—readers should check out Article V! In practice, this means that the Court's case law on constitutional rights can only be changed if the Supreme Court changes its mind.

In 1982, Canada became fully independent from the United Kingdom, when it 'repatriated' its constitution and supplemented it with an extensive Charter of Rights and Freedoms. Repatriation radically expanded the judiciary's zone of discretion. The system of rights protection established by the Charter of Rights and Freedoms is an unusual one. The 'Notwithstanding Clause' of the charter permits the federal and provincial parliaments to 'override' a right, for a period of five years, renewable thereafter. Thus, there is no *de facto* judicial supremacy when it comes to rights, as there is in much of Europe and the United States. Canadian legislators can choose to violate a right, but their responsibility for doing so is complete. The Canadian Parliament has never chosen to do so, although some provincial legislatures have voted overrides.

Students should consider this question, to which there may not be a clear answer: is the zone of discretion of the US Supreme Court greater or smaller than that of the Canadian Supreme Court? On the one hand, the Canadian Constitution gives a privileged place for the Charter of Rights and Freedoms, which is a richer text than is the American Bill of Rights. On the other hand, a Canadian Supreme Court's ruling on rights can be more easily set aside, at least for five-year periods. But as this chapter emphasizes, the zone of discretion does not tell us what a court will actually do with its discretionary authority. Might a 'Notwithstanding Clause' encourage a court to be a more aggressive rights protector if it knows that it does not have the last word on a statute's constitutional legality?

those who run authoritarian states. Litigation, for example, may comprise a relatively cheap means of monitoring what is going on in the country, especially what the lower echelons of the bureaucracy are actually doing (Moustafa 2007: ch. 2). Courts may also help the ruler enforce new national policies in the face of regional resistance, thereby weakening challenges to the ruler's power. But logics such as these do not apply to constitutional courts and rights review, which can directly challenge the ruler's power at its source. It is likely that rulers institute review for other reasons—to achieve a measure of international respectability, for example—never doubting their capacity to control the review courts.

KEY POINTS

- Constitutions are, among other things, incomplete, relational contracts. Delegating authority to constitutional judges is a means of dealing with various commitment problems, including interpretation and enforcement.
- Constitutional courts are a special kind of agent, called a trustee. A trustee court exercises fiduciary (caretaker) responsibilities over the constitution and is relatively insulated from the direct control of political elites.
- All courts operate in a strategic environment called a zone of discretion, which is determined by the authority given to the court minus the control instruments—in particular, the decision rules governing constitutional amendment—available for constraining the court. The bigger the zone, the less likely it is that political elites or the people will be able to reverse the court's rulings.

The evolution of constitutional review

In 1789, no system of constitutional justice existed anywhere on earth. After 1950, what I have called 'the new constitutionalism' emerged and then, in the 1990s, exploded into prominence. Between 1789 and 1950, the institutional materials that would solidify into the current 'models' of review were beginning to take shape, in the US, France, Austria–Germany, and in Scandinavia. I will briefly examine each of these cases in turn.

1789–1950

In America, the Federal Constitution of the US (1787) replaced the Articles of Confederation (1781), one of the first written constitutions of any modern nation-state. The new constitution established a Supreme Court and the judiciary as a separate branch of government, but the document neither contained a charter of rights nor expressly provided for the judicial review of statutes. The court's main purpose was to manage federalism, in particular, to secure national supremacy with regard to interstate commerce and finance. In 1791, the Bill of Rights was added to the text, as amendments, and constitutional review was added in 1803 through the Marbury decision. Only in the 1880s did rights review begin to emerge. In its most important decisions during this period, the court defended the property rights of merchants and firms against state laws designed to regulate their commercial activities. During the First World War, the court began to deal with civil and political rights, but it did very little to protect them. In 1937, the court abandoned its opposition to market regulation of economic rights, after successive elections had cemented the power of New Deal Democrats, and in the face of President Roosevelt's threat to 'pack the Court' (Balkin 2005).

By the end of the Second World War, it would have been difficult to argue that constitutional experience in the US provided a respectable example of an effective 'system of constitutional justice', at least by today's standards. The constitution, after all, had formally sanctioned slavery. The Civil War led to slavery's abolition, and to the adoption of the 13th, 14th, and 15th Amendments (1865–70). Prior to 1950, the court made little of the 14th Amendment, which guarantees 'equal protection under the laws', for the purposes for which it was designed: to combat institutionalized racism and other forms of discrimination. Instead, the court, and therefore

the constitution, was complicit in systematic rights abuses of the worst kind. In 1883, the court struck down as unconstitutional a Congressional statute banning discrimination against former slaves in hotels, the railroads, theatres, and so on; and in 1896, it bestowed constitutional legitimacy on the official apartheid that many Southern states had instituted after Reconstruction.[7] Apartheid would remain an important element of American constitutional law until well after the Second World War.

Although the American experience is increasingly irrelevant to global constitutionalism, it has had an impact. The US produced a model of judicial review that has been adopted by other polities. Further, the Supreme Court demonstrated to the world that constitutional review could survive and even prosper, not only through supervising federalism, but through protecting rights. In the 1950s, the court gradually moved to protect civil rights, especially freedom of speech and assembly, voting rights, 14th Amendment protections, and the rights of defendants in criminal cases. Indeed, by the end of the 1960s, the court had transformed itself into a formidable rights protector. This posture helped to create and sustain a rights-based, litigation-oriented politics in the US (Epp 1998), a politics that remains vibrant today. As important, Americans occupied post-Second World War Germany and Italy, and they insisted that these countries write constitutions that included a charter of rights and a review mechanism, thus helping to provoke the move to the 'new constitutionalism' in Europe.

In 1803, when *Marbury* v. *Madison* was rendered, the French were completing the destruction of independent judicial authority. That process began with the Great Revolution of 1789. In 1790, the legislature prohibited judicial review of legislation, and that statute remains in force today. By 1804, a new legal system had emerged. It was constructed on the principle—a corollary of legislative sovereignty—that courts must not participate in the law-making function. The judge was cast as a 'slave' of the legislature, more precisely, of the code system. The codes are statutes which, in their idealized form, purport to regulate society in a comprehensive way, not least, in order to reduce judicial discretion to nil. Through imitation, revolution, and war, the code system and the prohibition of judicial review spread across Europe during the nineteenth century (the British Isles and the Nordic region being the most important exceptions). Although the nineteenth century witnessed momentous regime change, a relatively stable constitutional orthodoxy nonetheless prevailed. In this orthodoxy, constitutions could be revised at the discretion of the law-maker; separation of powers doctrines subjugated judicial to legislative authority; and constraints on the law-maker's authority, such as rights, either did not exist or could not be enforced by courts.

BOX 9.4 Modes of constitutional review

The American model and judicial review

A legal 'case'—defined as a legal dispute brought to a court as litigation between two parties who have opposed interests—activates review, once one of the parties pleads the constitution, such as a right. Any court can, at the behest of either party, void a law as unconstitutional if that court determines that the statute violates the constitution.

The European model and abstract review

Abstract review is initiated when elected officials—typically the parliamentary opposition, the executive, or the government of a regional of federated state—refer a law for review after the law has been adopted by the legislature, but before it has been enforced. This mode of review is called 'abstract' because it proceeds in the absence of a concrete judicial case, since the law has yet to be applied. The review court compares the constitutional text and the statute, in the abstract, to determine if the latter conforms to the former. Abstract review is also called 'preventive review', since it allows the system to filter out unconstitutional laws before they can harm people.

The European model and concrete review

Concrete review is initiated when an ordinary judge, presiding over litigation in the courts, refers a constitutional question—for example, is law X, which is normally applicable to the dispute at bar, unconstitutional?—that the constitutional court must answer. The referring judge then resolves the dispute with reference to the constitutional court's ruling. This mode of review is called 'concrete' since it is related to a concrete case already under way in the ordinary courts. In comparison with American judicial review, however, concrete review still

(continued)

BOX 9.4 (continued)

looks more 'abstract', in that the constitutional court does not preside over or settle the case, which remains the responsibility of the referring judge.

The European model and the constitutional complaint

Individuals may activate the constitutional court directly by sending to the judges a constitutional complaint, which alleges that their rights have been violated by a public authority, after judicial remedies have been exhausted or are not available. Most constitutional complaints are, in effect, appeals of judicial decisions.

Curiously, the French Revolution did produce the first modern charter of rights. In 1789, the Constituent Assembly adopted the Declaration of the Rights of Man and of the Citizen before it completed its task of drafting the constitution of 1791. Since 1791, the French have lived under fifteen different written constitutions, but none provided for rights review, and none made the Declaration judicially enforceable. Constitutional review powers were periodically conferred on specialized state organs (never courts) in order to police the boundaries between executive and legislative authority, not to protect rights from legislative infringement. In the 1970s, the Constitutional Council incorporated the Declaration into the Constitution of the Fifth Republic (1959–present), against the express wishes of the founders (Stone 1990: chs. 3, 4).

The founders of the Fifth Republic established the Constitutional Council to help ensure the dominance of the executive (the government, named by the president) over the parliament (Chamber of Deputies and Senate) in legislative processes. Its role was transformed by two constitutional changes. First, as mentioned, the council incorporated a bill of rights into the constitution, where none previously existed, a process completed by 1979. The decision expanded the council's zone of discretion considerably. Second, in 1974 the power to refer statutes adopted by parliament before their entry into force was given to any sixty National Assembly deputies or sixty senators—that is, to opposition parties. The council exercises only politically initiated, pre-enforcement, abstract review of statutes. Once a statute has entered into force, it is no longer subject to constitutional review of any kind: legislative sovereignty thus remains formally intact.

The French experience is important for two main reasons. First, its code system and its conception of legislative sovereignty and separation of powers spread across Europe and would later take hold in Africa and Latin America, through the influence of French and Spanish colonialism. Second, like the Germans, the French experimented with models of non-judicial, politically activated, constitutional review in the form of specialized state organs. These experiments are cousins of the modern constitutional court, and a number of states use the 'constitutional council' model today.

In the area now comprised of Austria, Germany, and Switzerland, specialized state organs became a common feature of government in various federal polities during the nineteenth century. These bodies dealt primarily with jurisdictional disputes between state institutions, or among levels of government. The modern constitutional court is the invention of the Austrian legal theorist, Hans Kelsen, who developed the European model of constitutional review partly from these experiences. Kelsen drafted the constitution of the Austrian First Republic (1920–34), and he included a constitutional court among its most important state institutions. He was also a legal theorist whose writings and teachings turned out to be extraordinarily influential after the Second World War. As discussed below, the Kelsenian court, which is at the heart of the European model, is now the most popular institutional form of review in the world.

Some scholars speak of a Scandinavian model of review, and note that it is one of the world's oldest (Husa 2000). In Norway, the power of the judiciary to invalidate law as unconstitutional has been asserted since at least the 1860s, although the question of whether this power extended to judicial review of statutes was not definitively resolved until a Supreme Court decision of 1976 suggested that the answer was yes. Simplifying, the Danish Constitution of 1849

expressly provides for rights but not for review, and the Swedish Constitution (elements of which have been in place since 1809) provided for review but not for rights (until 1974). None of the courts in the region ever used review authority to any noticeable effect. Indeed, even today, these courts do almost no constitutional judicial review of any political consequence, and deference to the legislature is the rule (Husa 2000; Scheinin 2001).

The diffusion of higher law constitutionalism

During the inter-war period (roughly 1918–38), constitutional review was established in Czechoslovakia (1920), Liechtenstein (1925), Greece (1927), Spain (1931), and Ireland (1937); further, the German Supreme Court of the Weimar Republic also flirted with review (Stolleis 2003). Of these, only the Irish Supreme Court actually did much review, and only the Irish Court survived the Second World War. It is today one of the world's most effective review courts.

Review courts were established in Europe in successive waves of constitution-making, following the war, the end of fascism in Greece, Spain, and Portugal in the 1970s, and the fall of communism in Central and Eastern Europe after 1989. Apart from the Greek mixed system, every country adopted the Kelsenian constitutional court. The American model was rejected. Kelsenian courts were established in Austria (1945), Italy (1948), the Federal Republic of Germany (1949), France (1958), Portugal (1976), Spain (1978), Belgium (1985), and, after 1989, in the post-communist Czech Republic, Hungary, Poland, Romania, Russia, and other post-Soviet states, Slovakia, the Baltics, and in the states of the former Yugoslavia. The exception is Estonia, whose system mixes elements from the two models.

The American model is found in Africa, Asia, and the Caribbean, especially in those countries that had been colonized by Great Britain, or are part of the Commonwealth. In moving to rights and review, these systems, in effect, 'constitutionalize' the basic common law legal order. Judicial review is also found in countries that were under American occupation or influence after 1950, such as Japan and parts of Central and South America.

With decolonization, the number of states in the world expanded steadily throughout the 1950s and 1960s. Many of these new states were not very stable. Beginning in the 1970s, many post-colonial states in the developing world began to experiment with different constitutional forms. Written constitutions proliferated, most of which did not last, but they were almost always replaced with new written constitutions. By the 1990s, the basic formula of the new constitutionalism—(1) a written, entrenched constitution, (2) a charter of rights, and (3) a review mechanism to protect rights—had become standard, even in what most of us would consider non-democratic, authoritarian states.

Systems of constitutional justice in the twenty-first century

I will now survey the state of systems of constitutional justice worldwide.

1. The written constitution is the norm. There are 194 states in a recent data set compiled on constitutional forms,[8] 190 of which have written constitutions. Bhutan, Israel, New Zealand, and the United Kingdom do not have fully codified, entrenched constitutions. Israel nonetheless possesses a powerful Supreme Court that protects rights as part of the higher law (Gross 1998), and the Kingdom of Bhutan has drafted a constitution, which includes both rights and review (it awaits ratification). New Zealand (1990) and the UK (1998) adopted charters of rights in the form of statutes, but courts may not enforce these rights against the will of Parliament (Gardbaum 2001). Constitutions are currently suspended in four states: Thailand, Myanmar (Burma), Pakistan, and Somalia.
2. Out of the 194 states in the dataset 183 contain a charter of rights. Most constitutions written in the past three decades contain an extensive catalogue of rights that includes not only traditional civil and political rights, but positive or social rights. At present, few new constitutions omit rights. There have been 114 constitutions written since 1985 (not all of which have lasted), and we have reliable information on 106 of these. All 106 of these constitutions contain a catalogue of rights. It seems that the last constitution to leave rights out

was the racist 1983 South African constitution, hardly a model to emulate.

3. Of the 106 constitutions written since 1985 on which we can reliably report, all but five established constitutional review: those of North Korea, Vietnam, Saudi Arabia, Laos, and Iraq (in its 1990 constitution).

Table 9.1 presents data on the regional distribution of the various review mechanisms. The European model is clearly ascendant. Moreover, with few exceptions, the most powerful review courts in the world are Kelsenian courts. The spread of the European model has also meant the diffusion of abstract review. Mavčič (www.concourts.net) examined modes of review in 125 constitutions currently in force, and determined that 70 of them conferred abstract review authority on judges. Most of these also provide for individual, constitutional complaints. The American 'case or controversy' model is moribund, with little chance of being revived.

KEY POINTS

- Prior to 1950, there was little effective constitutional review outside of the United States, where it functioned more in favour of powerful economic interests and institutionalized racism than it did to protect minority rights.
- After 1950, the European model of review spreads from Austria and Germany throughout Europe and beyond.
- Today, nearly every country has a written constitution that provides for rights and rights review. The American model is found primarily in Commonwealth countries and in areas that have been under American influence. The European model, however, is far more popular.

Effectiveness

Many political scientists will not be interested in these developments if systems of constitutional justice do not influence broader political processes: the development of the constitution, the making of public policy, the competition among political elites. To the extent that constitutional review is effective, it will be central to these and other processes.

Constitutional review can be said to be effective to the extent that important constitutional disputes arising in the polity are brought to the review authority on a regular basis, that the judges who resolve these disputes give reasons for their rulings, and that those who are governed by the constitutional law accept that the court's rulings have some effect as precedents. Effectiveness varies across countries and across time in the same country.

Most review systems throughout world history have been relatively ineffective, even irrelevant. In weak systems, important political disputes may not be sent to constitutional judges for resolution, and decisions that constitutional judges do render may be ignored. Political actors may seek to settle their disputes by force, rather than through the courts, sometimes with fatal consequences for the constitutional regime. Put simply, elites may care much more about staying in power at any cost, or enriching themselves, or rewarding their friends and punishing their foes, or achieving ethnic dominance, than they care about building constitutional democracy. Constitutional regimes may also be overthrown by force. Since 1950, in Africa, Central and South America, and Asia, one finds over 100 examples. In some countries, the military *coup d'état* remains a constant threat. In the most recent decade (1997–2006), at least twenty-five coups were attempted in these areas, and at least fourteen were successful, including in Ecuador, Fiji, Guinée-Bissau, the Ivory Coast, Mauritania, Pakistan, Thailand, and Turkey. None of these proceeded with respect to constitutional principles. Nonetheless, despite the odds, some courts and constitutions have operated as constraints even on military dictatorship, as in Pinochet's Chile (Barros 2002).

Where constitutional review systems are relatively effective, constitutional judges manage the evolution

of the polity through their decisions. There are several necessary conditions for the emergence of effective review systems; each is related to the court's 'zone of discretion'. First, constitutional judges must have a case load. If actors, private and public, conspire not to activate review, judges will accrete no influence over the polity. Second, once activated, judges must resolve these disputes and give defensible reasons in justification of their decisions. If they do, one output of constitutional adjudication will be the production of a constitutional case law, or jurisprudence, which is a record of how the judges have interpreted the constitution. Third, those who are governed by the constitutional law must accept that constitutional meaning is (at least partly) constructed through the judges' interpretation and rule-making, and use or refer to relevant case law in future disputes.

Why only some countries are able to fulfil these conditions is an important question that scholars have not been able to answer. The achievement of stable type 3 constitutionalism depends heavily on the same macro-political factors related to the achievement of stable democracy, and we know that democracy is difficult to create and sustain. Among other factors, the new constitutionalism rests on a polity's commitment to: elections; a competitive party system; protecting rights, including those of minorities; practices associated with the 'rule of law'; a system of advanced legal education. Each of these factors is also associated with other important socio-cultural phenomena, including attributes of political culture, which may be fragmented. Constitutional judges can contribute to the building of practices related to higher law constitutionalism, but there are limits to what they can do if they find themselves continuously in opposition to powerful elites, institutions, and cultural biases in the citizenry.

It is therefore unsurprising that one finds relatively effective review mechanisms in areas where one finds relatively stable democracy, which now includes the post-communist countries of Central Europe. Ranked in terms of effectiveness, I would place the systems of (1) Canada and the US in the Americas, (2) Germany, Ireland, and Spain in Western Europe, and (3) the Czech Republic, Hungary, Poland, and Slovenia in Central Europe at the top of the list. Outside these regions, there are probably only three courts that would make this list, those of India (Verma and Kumar 2003), Israel (Hirschl 2001), and South Africa (Klug 2000). The review courts of Colombia and Egypt (Moustafa 2007) are building effectiveness quite rapidly, despite operating in extremely difficult contexts.

The impact of constitutional review

There has been no systematic research or data collection on constitutions, rights, and rights protection, or on the politics of constitutional review. However, since 1990, scholars have produced a pile of single case studies, and a handful of small-N comparative treatments of these topics. I will not summarize all of this work here. Instead, I will focus on the impact of new review systems on politics in the two areas that have attracted the most attention.

Transitions to constitutional democracy

Since 1950, type 3 constitutions, rights, and review have been crucial to nearly all successful transitions from authoritarian regimes to constitutional democracy. Indeed, it appears that the more successful any transition has been, the more one is likely to find an effective constitutional or supreme court at the heart of it (Japan may be the most important exception). Review performs several functions that facilitate the transition to democracy. It provides a system of peaceful dispute resolution, under the constitution, for those who have contracted a new beginning, in light of illiberal or violent pasts. It provides a mechanism for purging the laws of authoritarian elements that have built up over many years, given that the new legislature may be overloaded with work. And a review court can provide a focal point for a new rhetoric of state legitimacy, one based on respect for rights and other values of the new constitution, and on the rejection of old rhetorics (fascism, one-party rule, legislative sovereignty, the cult of personality, and so on).

Today, constitutional democracy is defined in terms of the new constitutionalism, which assumes that constraining majority rule with rights and review is a good thing. Thus, it is hardly shocking that a new generation of scholars claim that constitutional courts have been—or simply are—more democratic than parliaments, and that they have cajoled or persuaded political elites to be more democratic

than they would otherwise have been (e.g. Scheppele 2005). Moreover, many of today's newer and more successful review courts do not conceive of constitutionalism in restricted national terms, but in terms of an emerging 'global constitutionalism' with human rights at its core. The courts of Hungary, Poland, Slovenia, and South Africa do not hesitate to cite sources of law outside of their constitutions, including the decisions of other constitutional courts (Klug 2000).

The 'judicialization' of politics

A second important strain of research focuses on the impact of review on policy processes and outcomes. Most studies of judicialization proceed by conceptualizing constitutional review and rights adjudication as an extension of the policy process, and then observing and evaluating the impact of review on final outcomes and subsequent policy-making in the same area. The classic work is Martin Shapiro's *Law and Politics in the Supreme Court* (1964), but the basic approach has been applied to Europe (Shapiro and Stone 1994), and Latin America (Sieder, Schjolden, and Angell 2005), as well as many other specific countries.

Charles Epp (1998) has analysed the 'rights revolution' in four countries whose review systems would be classified under the American judicial review model. He shows that effective rights review does not just emerge spontaneously or naturally, but is the product of a constellation of structures and agency. Effective rights review depends on the building of a network of 'rights advocates' who are able to mobilize the resources necessary to litigate in the courts, often for causes that will benefit people who do not have such resources. The success of such litigation also rests on the shoulders of a critical mass of judges who are willing to embrace the roles of creative rights protector in the system. Epp argues that the rights revolution has gone furthest in the US and Canada, but his book also helps to explain development in India, and more recent changes in the UK and other Commonwealth countries. In every case he examines, the capacity of the judge to participate in policy processes, and often enough to control policy outcomes, has been enhanced.

It is easier to study the impact of rights review on legislative activity in centralized review systems than in decentralized systems, because constitutional judges and legislators interact with one another directly, through abstract review referrals and decisions. I have developed a theory of the constitutional judicialization of politics in Western Europe (Stone Sweet 2000), showing, among other things, that the impact of rights and the court on legislative activity will vary as a function of three factors: (1) the existence of abstract review, (2) the number of veto points in the policy process, and (3) the content of the court's case law. The more centralized the

BOX 9.5 The judicialization of politics through rights adjudication

The phrase 'judicialization of politics' refers to the process through which the influence of courts on legislative and administrative power develops, over time. In some places, in some sectors, policy is highly judicialized; in others, it may not be judicialized at all.

Rights review leads to the judicialization of legislative politics to the extent that (1) constitutional rights provisions have a legal status superior to statutes, (2) the review court receives important cases in which statutes are alleged to have violated rights, (3) the court sometimes annuls statutes on the basis of rights, and gives reasons for doing so. In judicialized settings, legislators worry about and debate the constitutionality of bills during the legislative process, and they will draft and amend their bills in order to insulate them from constitutional censure. In judicialized settings, constitutional courts routinely take decisions that serve both to construct the constitutional law and to amend legislation under review.

Some of the more controversial examples of highly judicialized politics around the world concern attempt to combat racial and gender discrimination, to liberalize and regulate abortion, and to criminalize 'hate speech', obscenity, and pornography.

In policy domains that are highly judicialized, courts and judicial process are part of the greater policy process. If political scientists do not pay close attention to courts, they will miss a big part of the action.

COUNTRY PROFILE Egypt

Arab Republic of Egypt (*Jumhuriyat Misr al-Arabiya*)

State formation

The modernization of Egypt started early in the 19th century after a brief invasion by Napoleon and a period of civil wars. An Ottoman viceroyalty since 1805, the country was informally controlled by Great Britain from 1882 and became a British protectorate in 1914. Following a revolution in 1919 and constant insurgency, Egypt was declared independent by Great Britain in 1922 but largely remained under British control until Colonel Gamal Abdul Nasser seized power in 1956, following a military *coup d'état* and the establishment of the Republic in 1953.
Constitution 1971, amended most recently in 2005 and 2007.

Form of government

Semi-presidential republic.
Head of state President, directly elected (since the 2005 reforms); term of 6 years (no term limit). Vice President appointed by the President.
Head of government Prime Minister; the leader of the majority party in Parliament, formally appointed by the President.
Cabinet Appointed by the President.
Administrative subdivisions 26 governorates.

Legal system

Based on European models, especially the French civil code, and Sharia law; familiy law corresponds with Islamic or Christian norms depending on the individual concerned.

Legislature

Bicameral Parliament.
Lower house People's Assembly (*Majilis Ash-Sha'ab*): 454 seats, half of which are reserved for farmers and workers; three-phase voting; term of 5 years if not dissolved earlier.
Upper house Advisory Council (*Majilis Ash-Shura*): 264 members (two-thirds directly elected, half of which must be farmers or workers; the remaining third appointed by the President); staggered elections (half of the elected members renewed every three years); term of 6 years.

Electoral system (lower house)

Mixed system of proportional representation and single candidate lists (since 2007 reforms).
Formula Since the 2007 reforms, 400 members are chosen by proportional representation while the remaining 44 are elected in local majority votes. (Prior to the reforms, 444 members were directly elected in 222 two-seat constituencies with one seat reserved for farmers and workers; the remaining 10 members were appointed by the President.)
Constituencies Both multi-member and 44 single-member constituencies since the 2007 reforms (222 two-member constituencies prior to the reforms).
Suffrage Universal and compulsory, 18 years.

Direct democracy

None.

Party system Results of the 2005 legislative elections (People's Assembly):

Electorate	31,253,417	100.0%
Voters	8,790,708	28.1%

	Party	Valid votes	%	Seats
	National Democratic Party (NDP)	n.a.	n.a.	320
NFC	Independents backed by the Muslim Brotherhood	n.a.	n.a.	88
NFC	New Wafd Party (NWP)	n.a.	n.a.	6
NFC	National Progressive Unionist Grouping (Tagammu)	n.a.	n.a.	2
NFC	**Total 'National Front for Change'**	**n.a.**	**n.a.**	**96**
	Independents	n.a.	n.a.	26
	Total	8,488,358	100.0	442

Note: The candidates of the Muslim Brotherhood, which is illegal for its religious approach to politics, run as independents and made strong gains in the 2005 elections.
12 seats were vacant. Of nine members in all, four were directly elected and five others were appointed.
Source: *IPU*.

policy process—the greater the parliamentary majority, the more that majority is under the control of a unified executive, and the fewer veto points there are in legislative procedures—the more the opposition will go to the constitutional court to block important policy initiatives. Abstract review referrals are the most straightforward means of doing so. In many policy domains, legislative politics have become highly 'judicialized'. The web of constitutional constraints facing legislators has grown and become denser, as constitutional courts have processed a steady stream of cases, and built a policy-relevant jurisprudence. This orientation is also applicable to Central Europe (Sadurski 2005).

KEY POINTS

- ❑ Systems of constitutional review are effective in so far as constitutional judges are able to influence the development of the constitutional law and public policy through their interpretations of rights and other constitutional provisions. We do not find much effectiveness in countries that are not relatively stable democracies.
- ❑ In some places, including South Africa and Central and Eastern Europe, constitutional courts have been important to processes of democratization.
- ❑ In countries where review is highly effective, constitutional judges have become powerful policy-makers. Examples are mainly found in North America and Western Europe, although the courts of Colombia, Israel, and South Africa deserve mention.

Conclusion

Constitutional law is political law: it is the law that constitutes the state and governs acts of authority made in the name of the polity. Since the 1950s, the new constitutionalism—which combines (1) written, entrenched constitutions, (2) rights, and (3) constitutional review—has been consolidated as an unrivalled standard. Though we find provision for rights review virtually everywhere today, not all systems of constitutional justice are equally effective. Indeed, in many places they are irrelevant.

Where such systems are effective, constitutional judges govern. They do so through two linked processes. First, given a steady case load, they will adapt the constitution to changing circumstances, on an ongoing basis, through interpretation. Second, in applying their constitutional interpretations to resolve rights disputes, the judges will make policy, including legislative policy. The more effective any system of review is, the more judges will, inevitably, become powerful policy-makers. Both outcomes inhere in a simple legal fact, made real through effective review: the constitution is higher law and therefore binds the exercise of all public authority.

Questions

1. In what ways does a constitution constitute the state and the political system?
2. What are the main differences between a type 2 and a type 3 constitution?
3. What is 'the new constitutionalism' and what does it have to do with politics?
4. What is the difference between a court that is 'an agent of the legislature' and a court that is a 'trustee of the constitution'?
5. How does the American model of review differ from the European model?
6. Why is the zone of discretion, in part, determined by constitutional provisions that specify how the constitution is to be revised?
7. Do you think it is good for a country to have a big catalogue of rights and an effective system of review?

8. Would you rather live in a country whose politics are relatively more, or relatively less, constitutionally 'judicialized'?
9. Why do you think an authoritarian dictator might draft a constitution with rights and review?
10. Which are the most effective courts?

Further reading

Recent comparative treatments of judicial politics and constitutional review

Epp, Charles (1998) *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press).

Ginsburg, Tom (2003) *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press).

Hirschl, Ran (2004) *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press).

Schwartz, Herman (2000) *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: University of Chicago Press).

Sieder, Rachel, Schjolden, Line, and Angell, Alan (2005) *The Judicialization of Politics in Latin America* (New York: Palgrave Macmillan).

Stone Sweet, Alec (2000) *Governing with Judges: Constitutional Politics in Western Europe* (Oxford: Oxford University Press).

Tate, C. Neal, and Vallinder, T. (eds.) (1995) *The Global Expansion of Judicial Power* (New York: New York University Press).

See also the works cited throughout this chapter. *The International Journal of Constitutional Law* is the leading journal devoted to research on constitutional law and courts, though it only rarely publishes articles written by social scientists.

Web links

www.venice.coe.int/site/dynamics/N_court_links_ef.asp?L=E
Hyperlinks to the constitutional and supreme courts of the world, maintained by the Venice Commission of the Council of Europe.

http://www2.lib.uchicago.edu/~llou/conlaw.html
University of Chicago's 'Research Constitutional Law on the Internet'.

www.concourts.net
Data, data analysis, and commentary on constitutional courts and review around the world.

www.jurist.law.pitt.edu/countries/
University of Pittsburgh School of Law's website for 'legal news and research', country by country.

www.glin.gov/
Global Legal Information Network, maintained by the US Library of Congress.

http://confinder.richmond.edu/
'Constitution Finder', the University of Richmond.

www.findlaw.com/01topics/06constitutional/03forconst/index.html
Find Law, constitutions.

Visit the Online Resource Centre that accompanies this book for more information:
www.oxfordtextbooks.co.uk/orc/caramani/