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Constitutional Review and Democratic Consolidation: A Literature Review

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Abstract

This paper reviews the literature on the prevalence of constitutional review across the world, and particularly in emerging democracies, during the last two decades. Two major questions should be addressed in this regard. First, why has the judiciary been empowered and what factors affect judicial activism? Second, does constitutional review ensure an effective self-enforcing function? In sum, the literature shows that constitutional review can make democracy self-enforcing if there is sufficient competition among political parties or between the legislature and the executive branch of government. In a more sophisticated case, political balance within the court can also ensure the observance of court decisions.

Keywords: judiciary, constitutional review, democracy

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Introduction

The growing influence of the judiciary in politics has been a recently burgeoning field of research in both developed and developing democracies. This phenomenon has been described among others as the judicialization of politics, which "should normally mean either (1) the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts, or at least, (2) the spread of judicial decision-making methods outside the judicial province proper" (Vallinder 1995, 13). The judicialization of politics is probably most evident in judicial review and particularly in constitutional review.

At present, more than 80 percent of the constitutions around the world have provisions for constitutional review (Ginsburg 2008, 81). Western democracies adopted constitutional review after World War II, and most Third Wave democracies followed suit. The spread of constitutional review has theoretical importance for democratic consolidation. The sustenance of democracy requires a self-enforcing mechanism that deters majoritarian tyranny and/or coordinates opposition against it (Weingast 1997; Weingast 2005). Constitutions are believed to ensure that mechanism by embodying a clear criterion of the violation of social consensus, or focal points, on which democracy is based (Weingast 2005). However, in practice, the legislative majority can pass a law that contradicts the constitution. Constitutional review aims to rectify such constitutional violations by the majority. Past research on constitutional review has centered on the United States, where the system of separation of powers makes the judiciary a natural actor in political processes. For other countries, there has been little

political analysis of constitutional review, except for descriptive studies (Volcansek 1992; Tate and Vallinder 1995). Only since the last ten years, political processes of judicial review have been scrutinized through empirical analysis for both developed and emerging democracies.

This paper addresses two questions. First, why did constitutional review become a norm in both established and new democracies, and what factors affect referrals to and the decisions of the constitutional/supreme court? Second, more theoretically, does constitutional review ensure an effective self-enforcing function, and what factors enhance the independence of the court? In this regard, of particular importance is abstract review in which new laws are examined for their constitutionality without any case in dispute. Abstract review can thus check the behavior of the incumbent. On the other hand, a concrete review arises from individual cases involving interested parties, and the laws in question have been passed by previous governments most of the time. This paper focuses on abstract review. Although the United States has no provision for this review, its cases are included here due to the theoretical importance of previous voluminous research on this topic. In the following sections, constitutional review refers to both abstract and concrete reviews, while abstract constitutional review is stated as such.

The remainder of this paper consists of three sections. The first section discusses the reasons for the spread of constitutional review across the world as well as factors that encourage recourse to constitutional review. The second section examines judicial independence with reference to their determinants. The last section summarizes the major findings and evaluates their implications for the theory of endogenous democracy.

The Spread and Frequency of Constitutional Review

The spread of constitutional review across the world has rested on normative belief as well as elite strategy. First, the initial belief that underlay the spread of constitutional review in Western Europe after World War II assumed that the legislature might make mistakes, which constitutional review could rectify. Constitutional review has come to be regarded as congruent with parliamentary systems (Sweet 2000, 31; 49–50). During the Third Wave of democratization, a large number of countries followed suit and adopted the (German) type of constitutional review with open access and centralized review (Ginsburg 2003, 34–64). Since there are few qualifications for litigants and court decisions are final and binding, this type of review generated a strong incentive for interested parties to resort to constitutional review.

Second, from the perspective of real politics, the former elite need constitutional review to prepare for loss of power during democratization or political uncertainty. Ginsburg's (2003, 34–64) cross-country analysis demonstrated that when party systems are competitive during democratic transitions, the incumbent elite chooses constitutional review that has more open access and whose judges are appointed for longer terms to insure against loss of political power. Even after transitions to democracy, minority elites might retain or exercise power against democratic majorities through the judiciary. Increasing activism of the U.S. Supreme Court after the Civil War emanated from the Republican Party's attempt to delegate greater power to the court by using its majority in the Senate and the Republican presidents' appointment powers, despite being the minority in the House (Gillman 2002). These examples constitute counter-majoritarian judicial review that strikes down "a legislative act or the action of an elected executive" (Whittington 2006, 283–284).

A more blatant form of counter-majoritarianism is hegemonic preservation. Hirschl (2004) argues that the empowering of the judiciary resulted from old ("hegemonic") elites' attempt in culturally divided societies to preserve their power, which had been threatened by the emergence of peripheral groups, most prominently in Israel, New Zealand, Canada, and South Africa. In these countries, major constitutional changes reinforced negative rather than positive freedom and curtailed state power. The net effect of this constitutionalization of bill of rights was not so much the improvement of socioeconomic conditions of the marginalized groups as the enhancement of neoliberalizm and "hegemonic preservation." The old elite, such as secular European Jews in the case of Israel, delegate politically central and socially divisive issues to the constitutional court, whose decisions reflect its views and interests It is doubtful, however, that counter-majoritarian review is self-sustainable in the long run under competitive political environments. Barak-Erez (2002) also demonstrated for Israel that supreme court decisions on non-ideological/secular issues did not effectively change political practice and power relations.

Third, not the opposition, but the current officeholders, especially in presidential systems, can occasionally find benefits in constitutional review. This is when presidents are constrained from carrying out their policy due to obstruction by powerful minorities. The current officeholders have thus taken advantage of constitutional review, for instance, to contain the demand for more federalism, to break the status quo of vested interests, and to annul the compromises offered for retaining the precarious coalitions. This "friendly judicial activism" (Whittington 2005) can be more accountable to the electorate and thus more sustainable than counter-majoritarian judicial review, which is more often the case.

Although constitutional review has become a worldwide phenomenon, there is

considerable variation in the frequency with which laws are reviewed in the highest court. The prevalence of constitutional review probably depends on the specificity/clarity of constitutional provisions and the number of veto points in the legislative process. First, in Latin America, despite low public confidence in the judiciary, the adoption of new and voluminous constitutions led to the judicialization of politics. The judiciary came to exert a stronger influence than before against the legislature and the executive (Sieder et al 2005). In Columbia, the annual number of abstract review decisions ranged from 200s to 300s during 1993–2002, and in 2002, 27 percent of the abstract reviews resulted in nullity decisions Every Columbian president since 1991 initiated constitutional amendment to overrule unconstitutionality decisions (Espinosa 2005, 76–77). In Argentina, during 1984–1995, on the annual average, more than one out of three constitutional reviews ended up with unconstitutionality decisions (Smulovitz 2005).

Second, the more centralized the legislative processes (the less veto points), the greater is the likelihood that the government will pass confrontational bills. This in turn raises the probability of opposition recourse to constitutional review (Sweet 2000, 54). For instance, in Germany, there are relatively few cases of abstract review (112 referrals and 62 decisions during 1951–1991) since controversial legislation can be blocked by the upper house and coalition parties before it comes to the constitutional court (Stone 2002, 191–192). A third, less important, factor is the political use of review by parliamentarians to augment their weak positions or low visibility in the parliament. In Israel, expanded public access to judicial review as well as the introduction of primaries for party nomination urged a greater number of parliamentarians, particularly coalition backbenchers, to resort to judicial review. They adopted this tactic to gain media exposure even if their chances for winning were low (Dotan and Hofnung

2005).

Judicial Independence and Nullity Decisions

Theoretically, whether the court can effectively exercise constitutional review must depend on judicial independence. In practice, however, judicial independence is usually defined as judicial autonomy to "overturn statutes or executive decisions," thus constraining "the exercise of political power by current officeholders" (Vanberg 2008,102). The prime focus of this section is, therefore, on factors that affect nullity decisions. These factors include the court position between the legislative and executive powers, the policy advocacy of the court, incumbent support for judicial independence, party competition, political balance, and public support for court positions/ideology.

First, court positioning and policy advocacy reflect the court's strategic behavior to make decisions based on its own preferences. This tendency is most apparent in the United States, where the court can take advantage of the middle position in policy preferences between the legislative and executive branches of government. Judicial review might well involve the court's calculation of possible overriding legislations by Congress and/or the president (Figueiredo et al. 2006, 207-212). Thus, "in a separation of powers system, the range of discretion and hence independence afforded the courts is a function of the differences between the elected branches" (Weingast 2002, 676). The court policy was not found to be influenced by judges' personal background or demographic factors, but by their ideology, understood from judge evaluation in the columns of major newspapers when they were nominated (Johnson and Reynolds 2008, 13; Segal and Cover 1989; Segal et al. 1995).

The abovementioned separation of powers model was found to be applicable to countries other than the United States. Among emerging presidential democracies, in Argentina, for instance, the judiciary enjoys greater independence when the country is ruled by a divided than unified government (Chavez 2004). In Russia, the constitutional court has tried to establish its authority by strategically positioning itself between the president and the legislature. It has also learned to avoid issues such as federalism and separation of powers, which test the toleration of the executive and legislature, and to concentrate instead on individual rights issues (Epstein et al 2001). Even in the parliamentary system, where the legislative majority is usually controlled by the executive branch, the court can advance its preferred policy. Steunenberg's (1997) case study of the Dutch Supreme Court's decision supported the view that courts have their own policy preferences rather than seeking preservation of the status quo. Considering the empirical positions of political parties in parliament on euthanasia, the court's decision on the issue was found not close to but much more liberal than the status quo, under which euthanasia constituted a criminal offence.

Second, political balancing within the judiciary can enhance judicial independence. In Germany, the legislature respects the decisions of the Constitutional Court and passes and amends laws accordingly. Political affiliation of the judges does not affect court decisions but secures coordination with the legislature (Landfried 1994). The relatively high judicial independence in Germany is secured by political balancing rather than the exclusion of partisanship from the institution. Judges are allowed to affiliate with political parties, and the appointment of higher court judges takes into consideration a fair representation of various political views. In particular, for the Constitutional Court, both the upper and lower houses are involved in the appointment of judges: each house appoints eight of the total 16 judges. Consequently, the legislature respects court

decisions and enacts or amends laws accordingly (Landfried 1994; Kommers 2001). Even in the United States, where Supreme Court judges are appointed by the president, there is an implicit rule that the president should choose judges of centrist ideology. Moreover, its competitive party system prevents the president from blatant interference in the matters of the judiciary—due to the prospect of retaliation after government change (Ramseyer and Rasmusen 2003, 127).

Third, the court also tries to attract public opinion on its decisions because high public support deters politicians' challenge to judicial independence (Vanberg 2008, 106–110). Dur et al. (2000) demonstrated with time-series data analysis that public support for the Supreme Court does not depend on court ideology (conservative/liberal) but on how close prevailing public opinion is to the ideology of court decisions. McGuire and Stimson's (2004) time series analysis found supportive evidence that the ideology of the Supreme Court's decisions reflect the prevailing public opinion. The researchers also criticized the conventional measurement of court ideology and adopted only reversal decisions as the measurement for the conservative/ liberal ideological direction of court decisions. This is because court decisions that affirm lower court decisions reflect not so much the ideological position of the court as the litigant's error in the estimation of the court's ideological position. Vanberg (2001) demonstrated that Germany's Constitutional Court was more likely to strike unconstitutionality decisions when cases under review were more transparent and thus easier to monitor by the public. This finding supported his hypothesis that the court prefers public oversight of the legislature in anticipation of its disobedience to court decisions. Mexcico's Supreme Court also used the media to promote its nullity decisions among the public (Staton 2006).

The above three conditions for judicial independence are more likely to be found in

consolidated than unconsolidated democracies. Yet, even emerging democracies can rely on a fourth factor, party competition, to buttress judicial independence. When party competition for the elected office of the government is high, the threat of immediate reprisal against the court by the incumbent is reduced. High party competition therefore induces the court to make decisions less deferent to the incumbent. This is also a corollary from the findings of Ginsburg (2003) cited earlier. In postcommunist countries, institutional guarantees for judicial independence, including finality of decisions, judge terms, and conditions for judge removal, did not encourage constitutional courts to strike down laws (Smithey and Ishiyama 2002; Herron and Randazzo 2003). However, party system fragmentation and federalism were associated with nullity decisions (Smithey and Ishiyama 2002). Herron and Randazzo (2003) also showed that higher economic growth and stronger presidents led to fewer nullity decisions, whereas individual litigants and economic issues were associated with more frequent nullity decisions than other litigants or issues. These findings indicate that lack of party/political competition leaves the judiciary susceptible to pressure from the incumbent.

Even if the executive has the authority to appoint and dismiss judges, elite competition and fragmentation can reduce political pressure of the incumbent for the judges. In both Malawi and Zambia, the judges of the High Court, which lies below the Supreme Court, are subject to removal by the president. The results of two regressions showed, however, that only in Zambia judges tended to decide in favor of the government. In Zambia, the governing party is stronger and thus stays in power longer, whereas in Malawi, political parties are more fragmented and government changes are more likely. In Malawi, therefore, judicial decisions were affected not by whether the president was a party to the case but by whether the judge belonged to the same ethnic

group as the president (VonDoepp 2006). A comparative assessment of constitutional review in three Asian countries after democratic transitions also underscored the definitive importance of party system competition/fragmentation particularly. The weak and fragmented party system in South Korea contributed to the high independence of its constitutional court, whereas dominant party systems in Taiwan and Mongolia enabled governing parties to concertedly use appointment authorities or legislative decisions to influence or override court decisions (Ginsburg 2003, 247–263). Moreover, even if there is a lack of political competition, alternative job opportunities for judges can contribute to judicial autonomy. In Namibia, despite the dominant one-party system and insufficient institutional guarantees for judicial independence, decisions of High and Supreme Court judges were largely unaffected by factors that might have induced deference to the government. Since the private sector offered higher salaries for lawyers than the judiciary, the judges had few reasons to stick to their posts by siding with the government (VonDoepp 2008).

Conclusions

The literature shows first that constitutional review spread in emerging democracies largely because elites of old regimes needed insurance to preserve their power under democratic regimes. This insurance effect of constitutional review contributes to democratic transitions and consolidation by reducing their sense of threat and making democratic regimes acceptable to them. Second, constitutional review can make democracy self-enforcing if there is sufficient competition among political parties or between the legislative and executive branches of government. In a more sophisticated

case, political balance within the court can also ensure the observance of court decisions. In addition, the court expects that public support for and media exposure of its decisions would deter overriding legislations.

More research is required, however, into judicial accountability since an increasing number of recent studies have revealed the practice of deliberate counter-majoritarian review. The court, then, can be regarded as independent of the officeholder but colluding with the minority elite. Counter-majoritarian review may not be politically sustainable in the long run. Another neglected aspect is public support for the constitution. The constitution may have been imposed by the then ruling elite on the politically weaker but numerically larger part of society. Without “constitutional moments” (Ackerman 1998) that arouse high popular mobilization and support, the constitution might well fail to bring about focal points built on social consensus. As the possibility of controversy and conflict over the constitution looms large, so the centrality of constitutional review in politics grows.

References

Ackerman, Bruce. 1998. *We the People: Transformations*. Cambridge: Belknap Press of Harvard University Press.

Barak-Erez, Daphne. 2002. "Judicial Review of Politics: The Israeli Case." *Journal of Law and Society* 29(4): 611-631.

Chavez, Rebecca Bill. 2004. *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina*. Stanford: Stanford University Press.

Dotan, Yoav, and Menachem Hofnung. 2005. "Legal Defeats--Political Wins: Why Do Elected Representatives Go to Court?" *Comparative Political Studies* 38(1): 75-103.

Durr, Robert H., Andrew D. Martin, and Christina Wolbrecht. 2000. "Ideological Divergence and Public Support for the Supreme Court." *American Journal of Political Science* 44(4): 768-776.

Epstein, Lee, Jack Knight, and Olga Shvetsova. 2001. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government." *Law & Society Review* 35(1): 117-64.

Espinosa, Manuel Jose Cepeda. 2005. "The Judicialization of Politics in Columbia: The Old and the New." In *The Judicialization of Politics in Latin America*, eds. Rachel Sieder, et al. New York: Palgrave.

Figueiredo, Rui J P De , Jr., Tonja Jacobi, and Barry R. Weingast. 2006. "The New Separation-of-Powers Approach to American Politics." In *The Oxford Handbook of Political Economy*, eds. Barry R. Weingast, and Donald A. Wittman. Oxford: Oxford University Press.

Gillman, Howard. 2002. “How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891.” *American Political Science Review* 96(3): 511-24.

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

_____. 2008. “The Global Spread of Constitutional Review.” In *The Oxford Handbook of Law and Politics*, eds. Keith E. Whittington, et al. Oxford: Oxford University Press.

Herron, Erik S., and Kirk A. Randazzo. 2003. “The Relationship between Independence and Judicial Review in Post-Communist Courts.” *Journal of Politics* 65(2): 422-38.

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

Johnson, Janet Buttolph, H.T. Reynolds, and with Jason D. Mycoff. 2008. *Political Science Research Methods, 6th ed.* Washington D.C.: CQ Press.

Kommers, Donald P. 2001. “Autonomy Versus Accountability: The German Judiciary.” In *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, eds. Peter H. Russell, and David M. O’Brien. Charlottesville: University Press of Virginia.

Landfried, Christine. 1994. “The Judicialization of Politics in Germany.” *International Political Science Review* 15(2): 113-24.

McGuire, Kevin T., and James A. Stimson. 2004. “The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences.” *Journal of Politics* 66(4): 1018-1035.

Ramseyer, J. Mark, and Eric B. Rasmusen. 2003. *Measuring Judicial Independence:*

The Political Economy of Judging in Japan. Chicago: University of Chicago Press.

Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83(2): 557-565.

Segal, Jeffrey A. et al. 1995. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *Journal of Politics* 57(3): 812-823.

Sieder, Rachel, Line Schjolden, and Alan Angell. 2005. "Introduction." In *The Judicialization of Politics in Latin America*, eds. Rachel Sieder, et al. New York: Palgrave.

Smithey, Shannon Ishiyama, and John Ishiyama. 2002. "Judicial Activism in Post-Communist Politics." *Law & Society Review* 36(4): 719-742.

Smulovitz, Catalina. 2005. "Petitioning and Creating Rights: Judicialization in Argentina." In *The Judicialization of Politics in Latin America*, eds. Rachel Sieder, et al. New York: : Palgrave.

Staton, Jeffrey K. 2006. "Constitutional Review and the Selective Promotion of Case Results." *American Journal of Political Science* 50(1): 98-112.

Steunenberg, Bernard. 1997. "Courts, Cabinet and Coalition Parties: The Politics of Euthanasia in a Parliamentary Setting." *British Journal of Political Science* 27(4): 551-571.

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

_____. 2002. "Constitutional Politics in France and Germany." In *On Law, Politics, & Judicialization*, eds. Martin Shapiro, and Alec Stone Sweet. Oxford: Oxford University Press.

Tate, C. Neal, and Torbjörn Vallinder, eds. 1995. *The Global Expansion of Judicial*

Power. New York: New York University Press.

Vallinder, Torbjorn. 1994. “The Judicialization of Politics. A World-Wide Phenomenon: Introduction.” *International Political Science Review* 15(2): 91-99.

Vallinder, Torbjorn. 1995. “When the Courts Go Marching In.” In *The Global Expansion of Judicial Power*, eds. C. Neal Tate, and Torbjorn Vallinder. New York: New York University Press.

Vanberg, Georg. 2001. “Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review.” *American Journal of Political Science* 45(2): 346-361.

_____. 2008. “Establishing and Maintaining Judicial Independence.” In *The Oxford Handbook of Law and Politics*, eds. Keith E. Whittington, et al. Oxford: Oxford University Press.

Volcansek, Mary L. 1992. *Judicial Politics and Policy-Making in Western Europe*. London: Frank Cass.

Vondoepp, Peter. 2006. “Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zambia.” *Political Research Quarterly* 59(3): 389-399.

_____. 2008. "Context-Sensitive Inquiry in Comparative Judicial Research: Lessons from the Namibian Judiciary." *Comparative Political Studies* 41(11): 1515-1540.

Weingast, Barry R. 1997. “The Political Foundations of Democracy and the Rule of Law.” *American Political Science Review* 91(2): 245-263.

_____. 2002. “Rational Choice Institutionalism.” In *Political Sicence: State of the Discipline*, eds. Ira Katznelson, and Helen V.l Milner. New York: W. W. Norton.

_____. 2005. “Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century.”

Whittington, Keith E. 2005. “‘Interpose Your Friendly Hand’: Political Supports for the

Exercise of Judicial Review by the United States Supreme Court." *American Political Science Review* 99(04): 583-596.

_____. 2006. "Preserving the 'Dignity and Influence of the Court': Political Supports for Judicial Review in the United States." In *Rethinking Political Institutions: The Art of the State*, eds. Jan Shapiro, et al. New York: New York University Press, 283-302.