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**The Role of Judicial Review in Upholding Constitutional Democracy**

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**Abstract**

This paper examines the critical role of judicial review in upholding constitutional democracy, highlighting its necessity in protecting fundamental rights and maintaining checks on legislative and executive powers. Judicial review serves as a safeguard against majoritarian excesses, ensuring that the rights of minorities are not overridden by the majority's will. The study traces the historical development of judicial review, from its origins in landmark court cases to its evolution as a fundamental legal mechanism across different democracies. Theoretical justifications for judicial review are explored, emphasizing its connection to the rule of law, democracy, and the separation of powers. A comparative analysis of judicial review mechanisms in various jurisdictions reveals diverse approaches and highlights challenges such as the tension between judicial independence and democratic accountability. Critics of judicial review raise concerns about judicial overreach and the legitimacy of unelected judges influencing democratic processes. The paper concludes by affirming that a robust judicial review system is essential for safeguarding constitutional values and promoting a fair and just society. Understanding the complexities and implications of judicial review is vital for legal scholars, policymakers, and citizens engaged in the ongoing dialogue about democracy and governance.

**Keywords**

Judicial review, constitutional democracy, fundamental rights, separation of powers, rule of law, democratic accountability, historical development, legal mechanisms

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#### **1. Introduction**

When constitutions are adopted or rewritten to fit contemporary socio-political contexts, it is not unfathomable that institutions – primarily courts – are tasked with enforcing benchmarks for governance, setting aside legislative or executive actions at odds with these. Judicial review has become the pivotal feature of such attempts at constitutional democracies changing over time. It allows for the defense of fundamental rights and liberties, enshrined in constitutions, against majoritarian assaults and checks the powers of the executive and the legislature alike through precise and concrete standards enshrined in the legal text (Moroga et al.2021).

The purpose of this study is to argue that judicial review is necessary and fundamentally linked with constitutional democracy. It will rely on a mixture of history and theory to provide a coherent view of what judicial review is. The second and third parts consist of the examination of judicial review in two of the oldest and most important democracies in the world today. The paper concludes with an argument surrounding judicial review's relation to democracy, primarily wrapping up the arguments presented in the first part of the paper.

This article will argue that this conflict between the exercise of majoritarian will and the safeguard of democratic spirit is adjudged and resolved democratically through an effectively independent judiciary. The demand for revisiting these issues arises from the portrayal of the judiciary in general and the Supreme Court in particular. The legitimacy of the judiciary is integral to the workings of constitutional democracy. It also becomes a required guarantee against what Montesquieu described as the spirit of equality – the illimitable urge of the majority and the government in democracy to curtail the rights and freedoms of the minorities. Understanding this necessity of a politically independent and intellectually non-partisan judiciary is important in light of its role in upholding the constitutional, moral, and ethical values of a society (Gebeye, 2020).

#### **2. Historical Development of Judicial Review**

The origins of the judicial review mechanism can be traced through various theoretical ideas, historical developments, and court cases. It has evolved over time in

relation to the key guiding principles of its foundational doctrine. For both Tushnet and The Hon. Michael Kirby, shifts in interpretations of the key guiding principles of the state continuously redefine the judge's role over time. Since its initial establishment in a landmark case in the United States, in the case of a formerly unsuccessful judicial appointment, the mechanism of judicial review has developed into a tool aimed at balancing the interests that can be protected through a constitution when these are threatened by the state's power.

Predominant constitutionalists argue that its foundations were also established earlier, particularly the expansion of the judicial protection of claims concerning human rights. The uptake of the legal doctrine has led to several corollaries: shifting the focus of the disciplining of the emerging state to the development of legal and governmental institutions as formal protectors, stewards, and guarantors of human interests (Tyler, 2022). This article positions itself within this historical framework to clearly demarcate the changes in the judiciary's role as the natural development of legal doctrine, drawing comparisons locally and abroad. By examining the contours of judicial review, we can arrive at a better understanding of how the judiciary is situated within the constitutional framework and their responsibility in overseeing the limitation of government powers established therein.

### **3. Theoretical Justifications for Judicial Review**

The theoretical foundations for judicial review justify the power to declare laws inconsistent with a constitution. Such theoretical justifications draw upon the rule of law, democracy, and separation of powers concepts, which are connected to and resonate with each other. Constitutional theory accordingly justifies an independent judiciary, independent from the legislature and the executive, in effectively keeping these other powers "within the Constitution" and, more precisely, in keeping them from violating basic rights and freedoms. This judicial role of confining legislative and executive powers is particularly important when speaking of democracy which, in today's terms, cannot be limited to a procedural level.

The doctrine of judicial review raises fundamental philosophical questions about law, the function of judges, and the nature of legal reasoning. Thus, different philosophers

can justify individual and constitutional rights through positivistic or natural law theory. Arguments can also be raised for and against judicial restraint in human rights protection. Moreover, the role of judges in our societies, as well as the institutional designs that might contribute to a democratic legitimacy of judicial review, are part of a broader debate. Although judges are neither elected nor politically accountable persons, philosophical and political theory necessarily implies that they too must have a role in democracy. Indeed, most theories supporting judicial review recognize the need for the judiciary to serve a functional and substantive role within the democratic state. The philosophical theories presented thus confirm the necessity of judicial review in a government based on constitutional fleshing out and guaranteeing basic human rights (Green, 2021).

#### **4. Comparative Analysis of Judicial Review Mechanisms**

The chapter contains a detailed comparative analysis of the operation of various constitutional courts and their judicial review mechanisms. When looking at different judiciary models operating across the world, also in relation to countries where a new, consolidated, or emerging democracy is in place, it is worth noting that, in some cases, the main characteristic of this model can be the predominance of structures close to descent (Kaikobad, 2021). The best example of that is the United States, where the Supreme Court follows its firm adherence to the notion that the constitutional order and all the values it stands for should primarily reflect the will of the people whose votes bring constitutional amendments and, indirectly, federal and state laws into effect. As for liberal democracies in Europe, with this strong preference for having the people's will saved and reflected in law and constitutions, democratic elites from those countries are very careful in allocating some sort of 'last word' capacity to judges, who would generally be unelected and therefore less legitimate than parliaments. This highlights, as presented further in this chapter, those institutional and structural characteristics of constitutional courts in Eastern European countries or countries on the path to democratization, which derive directly from their historical and political backgrounds. Indeed, the rise of new democracies has brought a few 'common' features to constitutional review practiced by the courts of countries of this

type. One of them is presidential review, an idea that was expected to prevalently influence the way the Court communicates and decides cases, by Constitutional Courts that are not independent regarding constitutional principles but are devoted to unconditionally supporting the political choices of the president. As the analysis of the performance of constitutional review in different countries, strengthened by empirical studies, suggests, these institutions significantly vary in their capacity and effectiveness or in the outcomes they yield while putting these decisions into practice. What makes the difference? Although there can be many factors, the main one results from the historical, social, economic, legal, and political context in which the courts operate.

#### **5. Challenges and Criticisms of Judicial Review**

One of the most common contemporary criticisms of judicial review is that the judiciary is overreaching into the realm of elected and politically responsible institutions. Critics claim that allowing judges to declare statutes unconstitutional contradicts the democratic principle of majority rule and, in some periods of history, has led to efforts to "politicize" or make the judiciary more "accountable," so that elected officials will have the final say. In fact, there are apparent weaknesses and criticisms for each of the benefits of judicial review. The tension between judicial independence and democratic accountability, for example, has been the subject of scholarly and popular debate for many years (Hurrelmann, 2020).

As mentioned in the previous section, for instance, a judge has questioned the idea of judicial review itself as democratic, agreeing that judicial review is an "unresolved constitutional problem and unknown political quantity." A historical figure functions as a foil for this judge, because he has been quoted in major Supreme Court opinions throughout this era of the "Counter-Revolution" to the "Rights Revolution" as a "classic proponent of judicial review." Some critics, on the other hand, doubt the Court's legitimacy. Another figure has used this historical figure to support his proposal for a hybrid body of sorts—a People's Court with no authority to strike down statutes or declare them unconstitutional, but possessing no precedent or interpretive weight, in contrast to the U.S. Supreme Court (Cafaggi & Iamiceli, 2021) Another

example of a judiciary's potential straying from democratic values or moving in politically contentious territory is the relative independence of federal judges who are not accountable to the states in which they serve and must be constitutionally ratified. Social mores or majority opinion can operate as correspondents; when "there are no big issues on the table," judges can allow the people to govern themselves. For this figure, these factors support an argument for the case-based legitimacy of judicial review (Stellios, 2022)

#### References

- Cafaggi, F. & Iamiceli, P. (2021). Uncertainty, administrative decision-making and judicial review: The courts' perspectives. *European Journal of Risk Regulation*. [cambridge.org](http://cambridge.org)
- Gebeye, B. A. (2022). *Judicial Review and Presidential Elections in Africa*. *Judicial Review and Electoral Law in a Global Perspective* (Hart Publishing), Faculty of Laws University College London Law Research Paper, (17). [ssrn.com](http://ssrn.com)
- Green, C. (2021). Deconstructing the administrative state: Chevron debates and the transformation of constitutional politics. *BUL Rev.* [ssrn.com](http://ssrn.com)
- Hurrelmann, A. (2022). Constitutional abeyances: Reflecting on EU treaty development in light of the Canadian experience. *Politics and Governance*. [cogitatiopress.com](http://cogitatiopress.com)
- Kaikobad, K. H. (2021). *The International Court of Justice and Judicial Review: A Study of the Court's Powers with Respect to Judgements of the ILO and UN Administrative Tribunals*. [HTML]
- Moroga, D. W. (n.d.). *DEFINING THE SCOPE OF THE POLITICAL QUESTIONS DOCTRINE IN A CONSTITUTIONAL DEMOCRACY: DOES IT HAVE LIFE IN KENYA?*. [researchgate.net](http://researchgate.net). [researchgate.net](http://researchgate.net)
- Stellios, J. (2022). *The High Court on Constitutional Law: The 2021 Term Marking out the Limits of Judicial Review*. ANU College of Law Research Paper. [ssrn.com](http://ssrn.com)
- Tyler, A. L. (2022). *Judicial Review in Times of Emergency: From the Founding Through the COVID-19 Pandemic*. *Va. L. Rev.* [ssrn.com](http://ssrn.com)
- ul Abidin, M. Z., Khan, M. A., & Ameer, F. (2022). *Pakistan's Judicial Odyssey (1947-2020): Maneuvering Political Pressures amidst Rule of Law Challenges*. *Journal of Humanities, Health and Social Sciences*, 1(1), 14-34. [jhhss.com](http://jhhss.com)

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