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Judicial Power and Democracy¹

1. Introduction

Every year new books and articles appear on democracy and constitutional judicial review. The stream is not going to stop because many people who like democracy also like judicial review, and try as many of them might, it is not possible to render the two compatible. Constitutional judicial review inevitably involves a small number of unelected men and women making public policy or blocking public policy made by the people or their elected representatives. Democracy means public policy made by the people or their representatives. By some word magic, rendering review and democracy compatible or at least friendly coresidents of the polity may be a worthy task for those who are trying to make particular polities work well. For those seeking a scientific understanding of politics, the question of democracy and review is an uninteresting one because it is so easily answered. The interesting question is: How do they get away with it? How do a few people without the purse or the sword make public policy pronouncements that people and powerful political institutions are willing to obey?

The total number of successful judicial review polities is too small, and they present such a variety of political features that no single answer to the question is likely to emerge from straightforward comparative analysis seeking to reveal a common set of causes for the success of review in all the places where judges do get away with it. The answer that review works where the citizenry sees it as legitimate is too tautological to be satisfying. There is a tendency to state matters by saying that courts endowed – sometimes self-endowed – with the power of review get away with it by building up popular credit through doing things people like and then can occasionally draw

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on that credit by doing something they don't like. It is not really clear, however, that politics is a kind of savings account.

2. Building blocks of successful constitutional judicial review

I shall attack the problem of how they get away with it by constructing several building blocks of success and arguing that each successful review court is constructed of some of them but not necessarily all of them and not all of them necessarily of the same ones. Each of these blocks is oversimple. Each is offered as an exploratory hypothesis to be tested comparatively against all the stories presented at this and other comparative projects. Each block contains a not clearly specified time dimension. Each assumes that a court has been doing something for some time. Finally, each block assumes that the court is part of a roughly democratic polity. This last element leads me to a brief aside.

On the one hand, all successful constitutional judicial review may be seen as depending on democracy. Why should any authoritarian regime allow a small group of persons, not themselves, to make public policy decisions contrary to, or at least independent of, their preferences. In this sense a precondition of successful judicial review is democracy, and so any attempt to answer the question "Why successful review?" must begin with the question "How, where, when, and why democracy?" It is that big question that I seek to avoid here by simply assuming or only looking at review in more or less democracies.

On the other hand, it is necessary to point out that judicial review, even relatively independent judicial review, may exist in some nondemocratic states. An authoritarian regime, anxious for foreign investment and some level of international recognition as legitimate, may stick both a guarantee of private property rights and judicial review by a relatively independent court into its constitution. It may then even allow its reviewing court to sometimes make public-policy decisions contrary to its wishes as an acceptable cost of attracting foreign investment. It can relatively easily control those costs by appointing the right sort of judges to the reviewing court. Perhaps Egypt and Singapore provide examples.

I am not dealing here with authoritarian review, but I will be speaking in terms of costs and benefits. In the approach I am taking, judicial review is always a cost to democracy, that is it is public policy making by other than the demos, that is the people. Under what conditions, and to achieve what benefits, will the demos accept that cost?

I am well aware that judicial review may appear, in some of its aspects at least, to be a benefit to, not a cost to, democracy. It may well be, for instance, that freedom of speech is essential to democracy. A constitutional court decision protecting freedom of speech from censoring legislation may well be a long-term benefit to democracy even if, in the short term, it blocks the immediate will of the demos as expressed by its

representatives. Here, however, to simplify, I deal only in short-term costs and benefits with every public-policy decision made by judicial review a cost to the demos or its representatives.

You will no doubt have noticed that I have been blithely assuming the constitutional judicial review is conducted by courts. Even when, following the Kelsenian model, they are courts quite separated from other courts, or because of French circumlocution they bear another name, courts they are. (Of course, other kinds of bodies also may have the power to find proposed or enacted laws unconstitutional. In the United States, the president may do so by asserting constitutional grounds in veto messages or signing statements. I once suggested that Congress could establish constitutional committees on the model of the House Rules Committee, which would have the power to report to the floor for debate only those laws proposed by other committees that it considered constitutional.)

Because constitutional courts are courts, they share the basic characteristics of all courts. I shall not belabor for you the whole of my arguments on what courts fundamentally are and do. Part of that argument is, however, that, for courts to succeed in getting their decisions accepted, they must be seen as deriving those decisions from preexisting legal rules. Because when preexisting rules exist, when they do so as statements – that is, usually as written texts composed by constitution writers or legislators or even by judges in earlier opinions – the instant court must interpret the language of the preexisting legal rule to apply it to the instant case. The interpretation of text always involves some element of discretion in choosing what meaning to attribute to that text. Thus, unavoidably, and often deliberately and with relish, courts make new law, that is new public policy, in the course of conducting their absolutely necessary task of interpreting the language of the preexisting legal rule that they pretend has decided the case before them. To perform their basic function of conflict resolution, courts must pretend to be applying preexisting legal rules. In reality they must interpret those rules. Interpretation involves choices among alternative, plausible, textual meanings. Such discretionary choices necessarily entail at least limited discretion to make law.

Of course, the broader, vaguer, or more ambiguous the language of the preexisting legal text is, the greater the discretion of the instant court. By their nature, constitutions tend to be written in very general language. Thus, courts applying preexisting constitutional texts to instant cases necessarily exercise relatively broad law-making discretion. Like all courts, constitutional courts deny this discretion to elicit obedience to their decisions. I'm sorry to bore you with the obvious, but later you will see that the institutional characteristics that constitutional courts share with other courts are central to some of my blocks.

The first of these blocks is federalism. Again, remember that I am not arguing that any one of these building blocks necessarily will alone serve to construct successful constitutional review. In some instances, two or more such blocks, either simultaneously or present in succession, may build review. Federalisms, I will argue, are essentially free trade zones or military alliances. Judicial review is of little military

import but is key to free trade zones. Many political, more or less, entities may join in a federal polity to create a free trade cartel. Each agrees to accept economic endeavors from other members without raising border barriers and on terms the same as those applied to domestic endeavorers, maintaining more or less uniform barriers to entry against nonmembers.

In such a cartel, the ideal position for each member would be that it disobey the free trade rules, advantaging its own exports to other members and disadvantaging the entry of goods and services from other members. So free trade endeavors an inherent motivation on the part of each member to cheat. Thus, to maintain themselves, such cartels will seek out some device to identify and punish cheaters. By embodying the basic free trade rules in its constitution and providing for a constitutional court to enforce those rules by invalidating member-state actions in violation of them, the cartel provides such a device. Economic enterprises of any member state seeking to do business in others will act as spotters of cheating by other states by bringing litigation to the constitutional court. In such litigation, the court can strike down the complained of member-state cheating. The defection reined in, the cartel continues.

What is central here is the "How do they get away with it?" question. Each litigation is a private economic endeavor versus a member state. Why, when one state loses in court, don't the other states say, "There but for the grace of God go I," and side with each other against the court? Obviously because it is in the interest of each state that the other states don't cheat. Judicial review does not provide for the best outcome; I cheat, and the other states don't. It does, however, provide for the second-best solution for all states, even the state that loses in court. For the second-best outcome for all states is that each state be forced by judicial review to follow the free trade rules. While collectively over time a mass of decisions against the states may amount to a massive cumulative decision in favor of the central government over all the states, at any moment a given decision will look like the court is protecting all the states against the defection by one.

From this reasoning, however, a number of the weaknesses or at least problems of the federalism building block emerge. Federalism judicial review will work only if all members of the free trade cartel wish to continue. The court will be ignored by any of the member states who wish to leave it or see it dissolved. The situation of the Russian court illustrates the point. It was not initially successful at federalism review because a number of the new post-Soviet states cared little or nothing for the federation. (Paradoxically, its record is likely to be better in the future because as a non-independent agent of an authoritarian regime, member states will obey its judgments for the same reasons they obey other instructions from Mr. Putin.) The very paragon of constitutional review success, the US Supreme Court, was, along with the rest of its central government, once unsuccessful in getting members to obey who were willing to end the federation.

Another American point is somewhat more obscure but important in gauging the chance of success of review in various places in the world. Federalism review is very likely to work when bringing one errant state after another back into the fold,

one case at a time. However, what if actions, not of a member state but of the central government, are challenged as threats to the continued autonomy of the member states. There appears to be something fundamentally unfair – and outside the basic logic of courts – in asking a court to decide a case between two parties, one of which it is a part. How can the US Supreme Court fairly decide a case that involves, on one side, a state interest and, on the other, an interest of the US government of which the Supreme Court is a part?

There indeed have been sporadic rumblings about the problem in the United States. They have been quieted in part by invocations of the independence of the judiciary and in part by separation-of-powers visions. The US Supreme Court is not really a part of the US government because as a court it is independent of the “political” branches. Even if, in some sense, it is a part of the US government, it is an independent branch of that government, wholly neutral as between other branches and the states. Indeed, most cases brought to the Supreme Court that pit state interests versus national ones do involve states’ or their surrogates’ challenge to Congress-President, that is to federal statutes, not to the Supreme Court.

Federalisms may begin as mere free trade zones, but almost inevitably they will over time become centralized regulatory regimes. The constitutional free trade provisions initially will be used by the constitutional court to strike down open and obvious state barriers to interstate trade such as state tariffs on outside products or outright prohibitions. Next, however, through litigation pressure the central constitutional court will turn to a state health, safety, environmental, labor, and other regulations that, intentionally or unintentionally, serve as barriers to imports or advantage local production or services. If French law requires two inches of insulation in refrigerator doors and Belgian only one inch, no Belgian refrigerators can be sold in France and French refrigerators will be disadvantaged in price competition with Belgium ones because of their high prices to compensate for the higher insulation. The obvious response to this problem is uniform regulation at the federal rather than state level. The push for such regulation will be even greater because large enterprises, which would prefer no regulation at all, will prefer single, national uniform regulations to multiple, conflicting state ones. It might then be anticipated that anti-regulatory forces would challenge federal regulations on every ground they could think of including invasion of reserved state prerogatives. That now goes on in the United States. In the long term, however, the US Supreme Court has gotten away with approving national regulations against federalism-based attacks because the movement from local economies to a national one has been so strong, and so driven by overwhelming technological and economic forces, that the Court has been moving with the compelling forces of history on its side. Indeed it has done little more than tag along.

The US Supreme Court and the European Court of Justice are probably the most successful judicial review courts in the world. Both were virtually necessitated by federalism. For both, their obvious benefits in policing free trade have appeared to far outweigh any costs to democracy. Both have ridden with, and been forces behind, the transition from only free trade to free trade plus regulation regimes in their

respective federalism. The German, Canadian, and Swiss constitutional courts also show a conjunction of successful judicial review with federalism. As I think, so does the Australian court and perhaps arguably the Indian court. And with all these names we have come close to running the whole list of successful judicial review courts. Federalism would seem to be a very probable building block of successful judicial review, indeed perhaps a necessary if not sufficient block. (We might add the Italian court to the list given that it appears to have been created in part at least to defend the autonomy of the northern provinces.)

The next possible building block to be examined is separation of powers in the national government. The United States is good, but misleading example. The argument is simple enough. If you, by constitution, divide the power to govern between two separate branches, the need arises to police the boundaries between the two. Courts are a longstanding, well-understood, triadic device for resolving disputes between two contracting parties, in this instance Congress and the president. As with a dispute between two contracting parties over their rights and obligations under a contract, a court is the very model of dispute resolution. Under the constitutional contract, a constitutional court is the obvious device for resolving disputes between the two interested parties: Congress and the president.

Simple, compelling, but quite untrue. For a small set of nonelected judges, with neither the purse nor the sword to step into a fight between the two really powerful, elected governing bodies (both with staff resources, which the judges do not have, and the responsibility to maintain the military, economic, and political safety of the country, which the judges do not have) would be utterly foolish. In reality, while the separation of powers clauses and minor quibbles about them take up a great deal of time in American constitutional law classes, the US Supreme Court has never really intervened in a major clash between Congress and the president.

Before World War II, few working democracies had presidential systems. Most nations under the eyes of most scholars employed parliamentary systems that, in theory at least, concentrated rather than divided governing power. With no boundary disputes to occur between government divisions, there was no need of a policeman and dispute resolver. Most parliamentary states did not have judicial review. Given the misunderstood American example plus the European situation, it might well have appeared that separation of powers was a necessary and perhaps sufficient building block of judicial review. But that was because it was not clear that the US Supreme Court didn't really engage in successful judicial review of separation of powers.

Then World War II and a certain situation in France changed things. The experience of Hitler, Stalin, and Mussolini led to a taste for divided government. What you fear, you divide up. Then the French, who believed in democracy, decided they needed De Gaulle no matter what and wrote a new constitution to accommodate him in which both legislative and executive powers were divided between, or perhaps shared by, a parliament-cabinet-prime minister, on the one hand, and a president, on the other: a quasi- or semi-presidential system. So now that separation or division of powers has come in, and following the simple – oversimple – logic outlined previously, there comes

a court to resolve boundary disputes between the two big players. Because of a French cultural fear of courts, or perhaps their clear knowledge that courts are undemocratic, or perhaps just to signal that this court had more to do with politics than most people think courts should, the French called it a council, not a court. Some would now say that it is not a court or a council but a third chamber of the French legislature. Whether it is an example of a supremely successful constitutional review court, has stepped beyond review straight into legislation, or is *sui generis*, I leave to you.

Whatever has happened in France, countries around the world – many in transition from authoritarian to something close to democratic or full democratic regimes – have adopted semi-presidential constitutions, most of them providing for judicial review. Most of these nations have new constitutions: Some are moving away from democracy, some toward it, and some are stuck in between. The details of the “semi” or “quasi” differ a great deal from state to state. We need large comparative studies of quasi-presidential systems. I do not have enough to conclude whether in them the division of central power is a building block of successful judicial review. I doubt it because of the American experience that these kinds of central government disputes are just too hot for a court to handle.

My next building block is judicial independence. One might well argue that independence is not a building block of successful constitutional judicial review but its *sine qua non*. Review by a nonindependent court is not review at all but only a disguised mode of rule by whoever is ruling. Judicial independence may be a necessary condition of successful review, but it is a reflexive condition. Independence may be necessary to review, but one or more episodes of successful review may lead to either the reinforcement or the destruction of that independence. When a constitutional court institutes or blocks a public-policy initiative, it may win the battle but lose the war. Its policy success may let loose forces that destroy its independence and thus its exercise of future successful review. This is where all the talk of judicial prudence and safety “zones” starts.

The history of the US Supreme Court offers numerous examples of both positive and negative reflexivity. Best known is the narrow escape the Court experienced when President Roosevelt attempted his “court packing” proposal. Here a history of successful review had built up sufficient public support over time to protect the Court’s independence at a particular crisis moment. What tends to be forgotten or never known is that through most of its history the court acted to assist the most powerful political forces in its jurisdiction, those building a national, capitalist economy.

The independence of the US Supreme Court has been somewhat misleading. Here a court pulls itself up by its own bootstraps, so to speak, inventing constitutional judicial review powers for itself and then successfully exercising those powers forever more.

All this leads directly to considering another rather complex, perhaps problematic, building block. Particularly in former segments of the British empire such as South Africa and India, it may well be that a quite artificially injected but long-standing allegiance to common law traditions is a major factor in achieving successful judicial review. This

is all the more mysterious because, of course, that tradition does not itself contain a constitutional judicial review practice or indeed even a written constitution. What seems to occur is a melding of the “home” country’s tradition of judicial independence and the US tradition of judicial review. Because of the confidence inspired by British wigs and gowns, the new countries’ judges are trusted to act like John Marshall, a rebel against British rule.

Less poetically, and less tied to former British colonial status, we may be dealing here with the legal profession as a building block of successful review. Training for the bar indoctrinates future lawyers with the values of the rule of law and the essential role of judicial independence in such rule. The crassest economic self-interest impels the legal profession of any country to champion the powers of the courts of whom it is the paid gatekeeper. At one end, we may see a genuine dedication to the values of the rule of law insured by judicial independence and, at the other, the understanding that constitutional judicial review means more legal business at high fees and more general prestige for the profession. Pakistan and India provide interesting examples of the relationship between an organized legal profession and a potential for successful constitutional judicial review combined with the inheritance of a British rule-of-law tradition.

Now, finally, I come to the building block that undoubtedly is of most concern to the majority of us: individual or human or constitutional rights. Starting with the US constitutions, most constitutions contain a bill of rights. When they don’t, or even when there is no written constitution, courts tend to invent bills of rights and endow them with something like constitutional status. The French Constitutional Council simply inserted a bill of rights into the current French constitution. The European Court of Justice worked away at building up a rights jurisdiction for itself until the Union as a whole finally stuck a charter of rights into its treaty-constitution. The European Convention on Human Rights created a sort of judicially enforced constitutional bill of rights while the European Union was getting its rights act together. So European judicial review to protect, foster, or invent rights is now a complex but enthusiastic endeavor. The Israeli high court manages somehow to deal in individual, constitutional rights even though Israel has not managed to write a constitution. The English courts manage to squeeze out something like judicially protected rights using notions of “natural justice” and the like.

Not a subject for this project, perhaps, but rights very like constitutional rights are enforced by administrative law rather than, and sometimes in addition to, constitutional rights by courts, some of which enjoy both constitutional and administrative law jurisdiction and some only administrative law jurisdiction. A great deal of rights protection in many countries is done through administrative law judicial review. Of course, in some countries administrative law kinds of rights are incorporated directly into the constitution as in the United States due process clause and the EU “giving reasons” requirement. And, in many courts, constitutional and statutory rights and, therefore, constitutional and statutory or administrative review are inextricably intermingled as in the US civil rights and in antidiscrimination and

voting rights statutes and their enforcement. It may be that, in many parts of the world, administrative review serves as an effective surrogate for constitutional review, although that is the subject for another conference.

Rights are not a necessary condition for review. Following Hans Kelsen and Learned Hand, one can visualize a court that does only constitutional boundary policing. The European Court of Justice (ECJ) could have been such a court had it wished to be, doing only federalism review and review of the boundaries between the Council and the Commission, although I have argued that a constitutional court that devoted itself entirely to the policing of the boundaries between the parts of the central government would find itself with nothing to do or in over its head. The movement of the ECJ into individual rights suggests that perhaps I am wrong and any court exercising boundary policing review will also be drawn into rights review. But the ECJ's rights jurisdiction arose out of its federalism boundary not out of its Council-Commission doctrines.

What is clear is that the late twentieth century experienced a kind of religious awakening about rights. Just as every new country had to have a flag, it had to have a constitution and that constitution had to have a bill of rights. As the frequently used term *human rights* suggests, there was a natural law basis to the rights movement. In natural law, rights are all benefits and no costs. In the real world, however, rights are actually the assignment of preferences for governmental protection or support assigned to particular social, economic, or political interests. They assign benefits to those interests and so, necessarily, costs to others because government protections and supports are in limited supply. If some get more, others get less. Moreover, rights are sometimes in conflict with one another, creating an open and often dramatic "more for some less for others" situation. Aggravating the problem was the tendency over time for each and every interest in society learning to dress its naked preferences in the rhetoric of rights, hoping to get on the band wagon and succeeding enough to teach itself and others to keep trying the rights palaver.

One of the most consequential elements in this movement was a new "positive" rights talk. Traditionally, rights, particularly constitutional rights, had been seen as largely negative, as prohibitions of government doing bad things to particular individuals. That negative view of rights eventually was extended from individual to whole groups who were to be protected from government mistreatment. Next came further extension to not only governments but also nongovernments being prohibited from treading on rights and to a positive obligation of government to enforce those prohibitions on private parties. Then, came positive rights, claims that government was required to provide goods and services.

Coupled with this great rights movement was an age-old association of rights with courts. If rights were to be expanded, then so must be the powers of courts because courts are a proven instrument for effectuating rights. Thus the globalization of constitutional judicial review is a natural outcome of the global human rights awakening.

So the story ought to be a simple one. Everyone loves rights. Everyone sees courts as a good mode of achieving rights. Everyone loves constitutional judicial review. The

story is only that simple, however, if we cling to the natural law, no cost, view of rights. Indeed, courts stick to that natural law view whenever they can. Who would not love any institution that did nothing but hand out goodies. Once courts get to positive rights, however, the natural law, all benefits, no costs story becomes impossible because everyone knows that providing positive government goods and services at the very least costs money. And as every interest clothes itself in rights, it becomes unavoidably clear that where interests are at odds, one rights winner means another rights loser.

Today the central language of all constitutional courts everywhere in rights cases is that of "balancing" and proportionality. All of us believe in rights but not in absolute rights for some even at an unlimited cost to others. Rights, like everything else, are matters of who get how much benefits and who bears how much costs.

There's the rub or rather multiple rubs. Once courts not only do but also have to talk about balancing interests, that is, assigning costs and benefits, they have admitted they exercise discretion rather than merely applying preexisting legal rules. So they lose their judicial kudos. Politics is about "who gets what" or the "authoritative allocation of values." Rights courts now must admit that they authoritatively decide who gets what, that they are political. And in a democracy, it is the elected representatives of the people, the legislatures, that are supposed to balance interests. So a court that admits it is balancing admits it is out of its assigned territory in a democracy.

Here is "How do they get away with it?" with a vengeance. Courts that do constitutional rights review simply shouldn't be able to get away with it. But some of them do, sometimes, thus the endless stream of denunciations and more often excuses that I began this talk by noting.

Elsewhere I have written about the "junkyard dog" theory of judicial review. Others speak more politely of zones of tolerance, prudence, and the like. The junkyard dog is a fierce animal let loose to protect what its owner loves, his junk. By giving the dog a home in his yard, the owner assures himself that what he wants will be protected, but every once in a while he will be bitten by the dog. Otherwise he gets rid of it. The demos know or the authoritarian ruler knows that a constitutional rights judicial review court will bite the hand that feeds it sometimes, will thwart the democratic or authoritarian rule sometimes. It will keep on feeding the dog if the bites are worth it, if the court gives the democratic or authoritarian ruler a sufficient level of the security it wants.

The authoritarian ruler may allow independent judicial rights review if the level of unwanted judicial protection of his subjects does not get so high as to outweigh whatever international legitimacy, attraction of foreign investment, or strategic support it yields him. The demos will support review as long as its immediate thwarting of majority will not outweigh the long-term rights benefits that the majority also values.

Another well-known version of this latter point is the noted "insurance" theory of constitutional building. Where a democracy is being founded or being maintained, the political party in control at the moment fears that it may lose sometime in the future. Thus it will foster constitutional provisions that will assure that if it loses the

next election it will still get a fair chance of winning the one after that. Rights review can be part of that insurance policy that every of the demos will support as some assurance that it will remain politically viable even if it is not enjoying the majority of the moment.

All this comes down to the not at all satisfactory answer to the “How do they get away with it?” question in the rights review area that they can get away with as much as they can get away with. Constitutional courts that try to do too much will lose their independence, but how much is too much varies from day to day and place to place. The junkyard dog is never sure that he will still be roaming the yard tomorrow.

Two other brief notes are in order here. It may be that rights are so integral to law and courts, at least in the Western tradition, that even if a constitutional court is limited by its constitution to boundary review à la Kelsen and Hand, it will inevitably stray into rights review. Or rights review may be so associated in the public mind with courts that constitutional courts textually not authorized to do rights review will be pressed into doing so. Sometimes, rights bites may be tolerated because of the value of the federal boundary policing the constitutional court does.

Here there may be a crucial distinction between separate constitutional review courts and general highest appellate courts that enjoy constitutional along with criminal and civil law jurisdiction. General highest courts may be able to get away with more rights bites than specialized courts because those opposed to their rights decisions see sufficient advantage in maintaining the independence and prestige of the whole regular court system that they are disinclined to attack its highest component over rights matters. Here again the legal profession is important. It will tend to rally to the defense of the highest regular court even if it hates some of its constitutional decisions because it has such a strong interest in defending the courts as a whole.

Put most bluntly, a separate court can be abolished or its independence undermined without excessively damaging the whole regular court system so it is a tempting target that needs to walk carefully. A high court that is the highest not only on constitutional questions but also for appeals in all matters of law can be fairly adventurous in its rights decisions because attacking its constitutional decisions will undermine its general prestige. Such an undermining might involve a high cost to all the interests in the society advantaged by the existence of a stable, independent judicial system effectively handling very useful, if routine, conflict-resolution chores.

The other note involves “leadership.” If constitutional rights review courts can get away with what they can get away with, then having someone on that court who is good at figuring out what it can get away with and good at convincing her or his fellow justices not to try to do more than that can be an important building block in establishing and maintaining successful rights review.

3. Conclusion

Although some authoritarian regimes may maintain constitutional judicial review, our basic concern is why successful judicial review occurs in some democracies and not others. Because judicial review entails public policy making by a small group of nonelected persons, it is incompatible with democracy. So our question becomes: How can review flourish in democracies? I have offered a number of building blocks for successful review. I believe successful review will always be built from one or more of them, but that none is necessary except independence and none is sufficient.

Of these I view federalisms in which all members wish to remain the surest building block and constitutions of divided or separated central government powers an illusory one. If someone can show me a polity in which a reviewing court successfully resolves central government boundary disputes over time, I shall cheerfully admit my error. I view rule-of-law traditions and strong legal professions as essentially secondary building blocks. Independence is a *sine qua non*, and rights have been the most prominent building block in recent years. Indeed it may be that rights are so central to any and all courts that constitutional courts established solely to do boundary review will end up doing rights review. Both independence and rights review, however, lead right back to the basic contradiction between review and democracy and leave us with the quite unsatisfactory answer that reviewing judges can get away with what they get away with – that a fundamental building block of review is the capacity of reviewing judges to bite sometimes but not so often that the junkyard dog will be sent away. Leadership, a capacity on the part of one or more of the judges to marshal the court to act prudently, may, therefore, be an important building block.

Now, finally, my grand confession. If we view successful review in authoritarian regimes as an occasional, almost random, and typically short-lived mutation, then we directly encounter democracy as the grand building block of review even though the two are at odds. Here, I have avoided the grand question of why some polities are democratic and others are not and addressed only the secondary question of why, if a polity is democratic, review might flourish there.

The crucial problem of successful judicial review is, of course, judicial independence. Aside from some special authoritarian situations noted earlier, the crucial problem of judicial independence is democracy, that is a political system in which there are reasonable expectations of a relatively long-term political system of competitive elections, with participation by two parties, or multiple parties capable of forming winning coalitions, that expect to sometimes win and sometimes lose future elections. Thus, the inquiry about successful judicial review ultimately becomes an inquiry about successful democracy, a daunting inquiry indeed. Even if we could resolve that inquiry, it would still be true that constitutional judicial review would survive, if initiated, only if the constitutional court acted with sufficient prudence or strategic sense not to offend majoritarianism too deeply. I have no idea how we could specify when judges would or would not act with that level of political skill.

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Summary*

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Judicial Power and Democracy

The analysis asks how the courts endowed with the power of judicial review get away with it by building up popular credit through doing things people like and then can occasionally draw on that credit by doing something they don't like. The Author attacks the problem of how they get away with it by constructing several building blocks of success (federalism – separation of powers – judicial independence – legal profession – constitutional rights). He argues that even though each successful review court is constructed of some of them but not necessarily all of them and not all of them necessarily of the same ones, successful review will always be built from and rooted in the judicial independence. The analysis opines that ultimately the judicial review will survive only if the court wielding that power acts with sufficient prudence or strategic sense not to offend the majoritarian rule too deeply. This is a question though of political skill and as such impossible to calibrate and calculate in advance.

Keywords: courts, judicial review, incrementalism, rights, balancing, proportionality.

* Summary prepared by Prof. Tomasz Tadeusz Koncewicz.

Streszczenie

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Władza sądownicza i demokracja

W artykule postawiono pytanie, w jaki sposób sądy sprawujące kontrolę konstytucyjności prawa (*judicial review*) utrzymują legitymację swojej władzy. Punktem wyjścia jest założenie, że budują one kapitał zaufania społecznego poprzez wydawanie orzeczeń społecznie aprobowanych, którzy następnie mogą okazjonalnie wykorzystywać do uzasadniania orzeczeń mniej popularnych. Autor zastanawia się, jak sądom wyposażonym w *judicial review* udaje się ta sztuka przetrwania. W tym celu wyróżnia kilka fundamentów sukcesu tych sądów: federalizm, trójpodział władzy, niezależność sądownictwa, zawody prawnicze i konstytucyjne prawa podmiotowe. Ponadto argumentuje, że nawet jeśli każdy sąd wyposażony w kompetencje *judicial review* nie zawsze opiera swój sukces na koniecznej obecności wszystkich tych fundamentów, a ich konfiguracja może się różnić w zależności od konkretnego przypadku, to sukces kontroli konstytucyjności prawa zawsze jest zakorzeniony i budowany w sądowej niezależności jako warunku koniecznym. Na koniec postawiono tezę, że w ostateczności *judicial review* ma szansę przetrwać jedynie wtedy, gdy sąd sprawujący tę kontrolę będzie potrafił wykazać się wystarczającą mądrością i strategicznym zrozumieniem wagi niepodważania w sposób zbyt daleko idący wyborów większościowego ustawodawcy. Umiejętność ta ma jednak charakter polityczny, a zatem nie poddaje się wcześniejszemu skalibrowaniu ani precyzyjnemu obliczeniu.

Słowa kluczowe: sądy, kontrola konstytucyjności prawa, inkrementalizm, prawa podmiotowe, ważenie, proporcjonalność.