Judicial review of legislation : constitutionalism personified in the United Kingdom, the Netherlands and South Africa

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Summary

Although fast becoming the norm in constitutional democracies, the review of legislation is not without difficulty, as it hides two interrelated questions if not problems. The first relates to whether such review is justified. And, secondly, if the *principle* of review is acceptable, how may its *scope* be structured? Yet, the questions of judicial review's justification *and* its scope are seldom addressed in the same study, thereby making for an inconvenient divorce of these two related avenues of study. To narrow the divide, the object of this work is quite straightforward. Namely, is the idea of judicial review defensible, and what influences its design and scope? In view of the added value diversity brings to the topic of judicial review, three systems have been selected for this study, namely those of the United Kingdom, the Netherlands and South Africa. These systems provide fertile ground for comparison, as they present a spectrum of approaches to judicial review both in their history and present day situations.

The United Kingdom inhabits the one end of the spectrum, as it comes closest to full legislative supremacy over a law's ultimate fate. This is because although allowing courts to review acts of parliament in light of the Human Rights Act of 1998 (HRA), the Act does not allow the bench to nullify a law. In other words, the HRA only allows for weak judicial review. Clearly, a very measured approach to bipolar constitutionalism. South Africa inhabits the other end of the spectrum, as its emergent democracy, in contrast to the other two longstanding democracies, relies on particularly strong judicial review in upholding the Constitution of 1996 in the face of any threatened violation. The Netherlands has been chosen for its interesting brand of judicial review, which places it between the other two systems. On the one hand, Dutch courts may not apply acts of parliament that contradict binding international law, on the other hand they must apply acts of parliament regardless of whether they conflict with national higher law such as the Constitution. Moreover, 2002 saw the tabling of the Halsema Proposal, which aims to amend the Constitution by allowing courts to refuse to apply acts of parliament which are inconsistent with the Constitution. This development signals a possible shift in Dutch constitutional thought away from a relatively dominant majoritarian tradition to greater judicial activity in emulating treaty review.

Comparing the experience of the United Kingdom, the Netherlands and South Africa shows that there is a lot to be said for judicial review in each of the three systems. Only taking refuge in the will of a democratic majority is no longer good enough by itself. Modern states and societies are too complex to leave important matters to the sole discretion of legislatures. It is generally appreciated that majoritarian democracy goes a long way towards legitimising legislation, but in itself and unaided by some form of judicial review it proves to be insufficient to satisfy the ideal of constitutional governance. Majoritarianism must accept the principle of counter-majoritarian constraints. The essential question therefore to be addressed is not whether there must be judicial review and therefore middle ground between the legislature and judiciary, but centres instead on defining such middle ground. In reflecting on this question, democracy is to be used not as a weapon with which to deny the added value of judicial review, but instead as a guide in shaping its scope. Democracy is not a reason for refusing to introduce judicial review, but a motivation in shaping review one way or the other. Comparing the fora, modalities, content and consequences of review in the United Kingdom, the Netherlands and South Africa confirms this. The more a particular system can rely on a stable democratic tradition,

the less pressing the need will be to constrain its democratic process through judicial review. This knowledge should be expressed in denying judicial review altogether, but must be used as a guide in shaping review to fit a particular situation.

If the normative implications of this study were to be reduced to a single formula, it might arguably read as follows: The ideal of constitutional governance is to be achieved primarily, but not exclusively, through majoritarian decision-making structures, as checked through the judicial review of legislation, whose scope is to be determined relative to the ability of such majoritarian decision-making structures to reasonably achieve constitutional governance.