Chapter 4: The Ethiopian constitutional review system and the counter-majoritarian difficulty

1. Introduction

The drafters of the Ethiopian Constitution clearly believed in the importance of a constitutional review system to reinforce the supremacy of the Constitution. However, the institutional design for constitutional review is atypical of most other systems where such power is vested in either ordinary courts or in a constitutional court or council established specifically to exercise the power of constitutional review.[1] It is, therefore, necessary to unravel the reasons that prompted the drafters of the Constitution to exclude the regular courts from exercising constitutional review and explore whether the underlying policy justifications are normatively and practically defensible. It can be gathered from the minutes of the drafting committee and discussions during the ratification process of the Constitution that the issue of which particular organ should be granted the power of constitutional review had attracted lively debates.[2]

One of the main reasons that justified the granting of the power of constitutional review to the HoF was the desire to keep the final say on what the Constitution says to ethnic groups. However, it was argued in Chapter 3 that the current constitutional review system cannot ensure the effective protection of the rights of ethnic groups. In any case, there is only one provision in the Bill of Rights, article 39, which deals with the rights of ethnic groups. Another reason that prompted the drafters of the Ethiopian Constitution to insulate the Constitution from the judiciary was to preclude potential 'judicial activism or adventurism', the fear that courts might substitute their own judgments, preferences and philosophies for that of the drafters under the guise of interpreting the constitution, a document made short, broad and vague by design. It was believed that judicial review would result in the judiciary 'hijacking' the great 'compact' between the ethnic groups.[3] It was also argued that granting the power of constitutional review to the courts will militate against the principle of separation of powers and undermine the public

[1] For an analysis of the institutional and procedural mosaic of constitutional review around the world, see M Sachor 'Mapping comparative judicial review' (2008) 7 *Washington University Global Studies Law Review* 257; P Navia and J Ríos-Figueroa 'The constitutional adjudication mosaic of Latin America' (2005) 38 *Comparative Political Studies* 189; N Tate and T Vallinder *The global expansion of judicial power* (1995).
[2] See *Ye Ethiopia Hige Mengist Gubae, Kale Gubae* [Minutes of the Constitutional Commission] (1994) vol. 4, 21 – 27, discussions on articles 59, 61 and 62.
[3] A Fiseha 'Federalism and the adjudication of constitutional issues: The Ethiopian experience' (2005) *Netherlands International Law Review* 1, 16.

will as expressed in grand terms in the Constitution.[4] The observations of the Secretary of the Constitutional Commission, the body which drafted the Constitution, demonstrate the dilemma and the final resolve to keep the Constitution away from courts which are constituted of unelected judges:[5]

> How can a constitution that has been ratified by the people's assembly be allowed to be changed by professionals who have not been elected by the people? To allow the Courts to do the interpretation is to invite subversion of the democratization process. Since the Constitution is eventually a political contract of peoples, nations and nationalities, it would be inappropriate to subject it to the interpretation of judges. It is the direct representatives of the contracting parties that should do the work of interpreting the constitution.

Assefa observes that it was

> ... persuasively argued by the vocal members of the [Constituent] Assembly (and it appears to have swayed the decision finally made) that if courts (ordinary or constitutional) are made to interpret the Constitution, they may through interpretation fundamentally change the Constitution … According to them, such 'rewriting' of the Constitution by the Courts may result in dire consequences for Ethiopia if group rights fall prey to such a judicial activism by our courts.[6]

Idris similarly notes that the Constituent Assembly, which finally endorsed the Constitution, believed that 'constitutional issues were more than just judicial matters that can be left to judicial interpretation'.[7] Granting the final power of interpretation to a political organ, the HoF, with the support of the Council was considered the best institutional design in line with constitutional and democratic theories.

Essentially, the principal objection was ideological: if the judiciary is given the final say on constitutional issues, the wishes of ethnic groups, the populace and the political majority will be trumped. The fear that unelected and unaccountable, and, therefore, undemocratic, judges might 'rewrite' the Constitution, a political as much as a legal document, provided one of the main reasons for granting the power of constitutional review to the HoF.[8] The allegedly undemocratic nature of judicial review

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[4] A Meaza 'Ethiopia: Process of democratization and development' in A An-Na' im (ed) *Human rights under African constitutions* (2003) 30.

[5] Transitional Government of Ethiopia, Constitutional Commission, Newsletter no 3 (1994). Newsletters were used to inform the public about the constitutional drafting process.

[6] G Assefa 'All about words: Discovering the intention of the makers of the Ethiopian Constitution on the scope and meaning of constitutional interpretation' (2010) 24 *Journal of Ethiopian Law* 139, 161.

[7] I Idris 'Constitutional adjudication under the 1994 FDRE (Federal Democratic Republic of Ethiopia) Constitution' (2002) 1 *Ethiopian Law Review* 62, 67 – 68.

[8] Meaza (n 4 above) 30. The HoF was preferred to the HPR as the former represents the ethnic groups in whom sovereign power, as expressed in the Constitution, resides. Whether or not the arrangement actually addresses the counter-majoritarian challenge is, however, debatable and will be discussed in further detail. Fessha observes that the system does not 'represent an adequate response to the counter-majoritarian dilemma' – Y Fessha 'Judicial review and democracy: A normative discourse on the (novel) Ethiopian approach to constitutional review' (2006) 14 *African Journal of International and Comparative Law* 53, 72 – 73.

justified the decision of the drafters of the Constitution to keep the judiciary at arm's length with constitutional review.

This Chapter argues that the Ethiopian constitutional review system can be challenged on democratic grounds. Despite the fact that the constitutional review system was intended to elude the counter-majoritarian difficulty, the system has not been really absolved from challenges based on democratic theory. In addition, and most importantly, this Chapter argues from a theoretical perspective that constitutional review by independent adjudicators does not undermine democracy. Constitutional review rather reinforces democracy. With this view, section two presents the arguments to the effect that the Ethiopian constitutional review system suffers from counter-majoritarian charges. Section three states the counter-majoritarian problem at the theoretical level. Section four outlines the various theoretical and practical justifications of rights-based constitutional review. It argues that rights-based constitutional review does not undermine democracy. This section further argues that rights-based constitutional review is instrumental in ensuring the realisation of human rights, which are essential components of any plausible democratic theory. To that extent, rights-based constitutional review is compatible with democracy. Nevertheless, the article recognises that there is an apparent tension between constitutional review and democracy. Therefore, section five explores the interpretative tools and structural designs crafted by courts and legislatures – in recognition of both the counter-majoritarian implications of constitutional review and the opportunities it presents in ensuring the effective protection of rights – in an attempt to reconcile the tension. Section six concludes the chapter.

It should be noted that this chapter does not delve into the normative and empirical tussle surrounding the constitutionalisation of human rights, or whether human rights should be given a constitutional or higher-law status. Most countries around the world have chosen to constitutionalise rights, while some states guarantee rights in legislative statutes. Moreover, this Chapter assumes that the constitutionalisation of rights inherently requires some sort of constitutional review to ascertain the constitutional validity of laws and other measures.[9] The absence of a constitutional review system reduces constitutional restraints on government power to mere moral standards of behaviour. The purpose of this Chapter is to present arguments to the effect that the exercise of constitutional review by independent adjudicators does not undermine democracy.

[9] See, however, J Waldron 'The core of the case against judicial review' (2005-2006) 115 *Yale Law Journal* 1346. Waldron argues that a commitment to rights does not necessarily demand commitment to constitutional rights and much less judicial review. Waldron further argues that legislatures are better placed to resolve rights issues, which are often riddled with disagreement, as legislatures are more representative and, hence, more participatory than the judiciary.

2. Democratic challenges to the current constitutional review system in Ethiopia

Despite the fact that the Ethiopian Constitution empowers the HoF, and not courts, with the power of constitutional review mainly with a view to address the counter-majoritarian difficulty, it has not been successful in establishing a system free from democratic challenges. Fessha has argued that the HoF suffers from democratic deficiency as its members have never been directly elected and are, therefore, not directly accountable to the people.[10] Similarly, Twibell observes that the HoF 'exists less democratically' than the House of Peoples' Representatives (HPR).[11] According to the Ethiopian Constitution, members of the HoF are nominated by state legislative councils. Rather than nominating the members of the HoF, the regional legislative councils have the option to organise elections to select the members.[12] In practice, all the members of the HoF have since its establishment been nominated by the regional legislative councils without organising elections. Federal judges are similarly appointed by the HPR upon nomination by the Prime Minister with the advice of the Federal Judicial Administration Council.[13]

Therefore, the HoF is composed of appointed members and is, consequently, vulnerable to democratic objections that haunt the courts. Moreover, there is no constitutional duty on the HoF or its members to account to any other organ or the people or even ethnic groups. Members of the HoF are, just like members of the judiciary, neither elected by nor directly accountable to the people. In addition, members of the HoF are not representatives of individuals as such. They represent ethnic groups. If democracy is defined in terms of the equal status of individuals secured through electoral accountability, the HoF falls short of the requirements of democratic legitimacy. Given that the members of the HoF are not directly elected, it is not a classical majoritarian organ. Hence, it does not escape democratic objections. Empowering the HPR with the power of constitutional review would have been more appropriate from the perspective of the counter-majoritarian difficulty.

This failure to absolve the HoF of democratic deficiency is a paradox that turns the theoretical foundations of constitutional review in Ethiopia on its head. The drafters of the Constitution simply traded, in a manner that appears to be a desperate experimentation, one unelected body for another.

[10] See Y Fessha *Ethnic diversity and federalism: Constitutional making in South Africa and Ethiopia* (2010) 218.
[11] T Twibell 'Ethiopian constitutional law: The structure of the Ethiopian government and the new Constitution's ability to overcome Ethiopia's problems' (1999) 21 *Loyola of Los Angeles International and Comparative Law Review* 399, 447.
[12] FDRE Constitution, article 61(3).
[13] FDRE Constitution, articles 81(1 & 2).

Eshete observes in this regard that the source of legitimacy of the HoF lies in the fact that it represents ethnic groups which, the Constitution proclaims, are supreme.[14] According to this argument the source of legitimacy of the power of the HoF is the Constitution. The HoF cannot, therefore, claim any inherent democratic legitimacy that justified the original constitutional choice to grant it the power of constitutional review. The legitimacy of the HoF does not emanate from democratic theory. The fact that the Constitution declares the supremacy of ethnic groups does not change the fact that the members of the HoF are unelected and, therefore, democratically unaccountable.

Even if one assumes that the drafters of the Ethiopian Constitution have actually designed a system of constitutional review that is democratically legitimate, at least democratically more legitimate than the judiciary, the weight given to the counter-majoritarian dilemma by the drafters of the Ethiopian Constitution was unjustified.[15] It is argued in section 4 below that rights-based constitutional review does not undermine democracy; it rather reinforces democracy. The fact that independent constitutional adjudicators are not directly accountable to the people does not justify the complete rejection of constitutional review, at least in the context of human rights as constitutional review offers additional protection to human rights. The instrumentality of constitutional review to keep the legislature and the executive within the pathway set by constitutional human rights explains and justifies its worldwide recognition.

The Ethiopian Constitution guarantees electoral winners the right to govern, but it also outlines restrictions or prohibitions, such as those embodied in the human rights guarantees, on those who govern. Given that the Constitution establishes a parliamentary form of government, which naturally blends the legislative and executive branch precluding potential checks and balances between the two organs,[16] the exclusion of judicial review undermines any possibility of inter-institutional control within the state structure. The HoF is designed to be part of and work in harmony with the political group that is in power. The absence of an independent organ in charge of preventing and remedying unconstitutional measures gives the political organs a free-ride to unknot through ordinary legislation any constitutional constraint, thereby undermining the very constitutional and democratic nature of the Ethiopian State.

[14] Comments by A Eshete on the Draft Constitution (22 November 1994) 5 cited in Fessha (n 8 above) 35.
[15] Bulto observes that 'while judicial review seeks to judicialise politics, subjecting political processes to constitutional procedures, in Ethiopia the Constitution seems to have been overly politicized' – T Bulto 'Judicial referral of constitutional disputes in Ethiopia: From practice to theory' (2011) 19 *African Journal of International and Comparative Law* 99, 123.
[16] See in this regard Assefa (n 6 above).

Moreover, even if one assumes that democratic theory justifies the exclusion of courts from quashing laws made by popularly elected bodies, the relevance of the objection should not be overstated especially in countries that do not have established and reliable democratic culture, institutions and procedures to effectively protect human rights. The democratic objection to judicial review cannot be insensitive to context. Indeed, the democratic legitimacy objection has almost always been discussed in the context of established democracies in North America and Europe. Many of the scholars who have actively argued against the institution of judicial review do so conditionally. These scholars often assume the existence of democratic institutions that are in reasonably good working order and a serious political and social commitment to individual and minority rights.[17] Waldron, the most prominent critic of judicial review, concludes that 'rights-based judicial review is inappropriate for *reasonably democratic societies* whose main problem is not that *their legislative institutions are dysfunctional* but that their members disagree about rights' (emphasis added).[18] For Waldron, therefore, judicial review is not justified except when 'other channels of political change are blocked'.[19] Freeman similarly observes that 'in the absence of widespread public agreement on these fundamental requirements of democracy [maintaining equal rights of democratic sovereignty], there is no assurance that majority rule will not be used, as it often has, to subvert the public interest in justice and to deprive classes of individuals of the conditions of democratic equality. … It is in these circumstances that there is a place for judicial review'.[20]

Hence, in countries with a questionable democratic pedigree and that lack a social and political culture of rights, the democratic objection to judicial review is less tenable. Governments that lack the prerequisite democratic pedigree do not have the moral legitimacy to play the anti-majoritarian card against the institution of judicial review. Quite simply, the counter-majoritarian objection has been raised in countries with significant claims to democracy and a firm commitment to fundamental rights. A democratic and rights culture is still in its infancy in Ethiopia. The counter-majoritarian dilemma cannot, therefore, provide the sole or primary justification for the exclusion of judicial review in Ethiopia.

In addition, the democratic legitimacy deficit has been propounded to justify the exclusion of the judiciary from reviewing the constitutionality of laws made by elected representatives – primary

[17] Waldron notes that the argument against judicial review is 'conditional' on, among others, the existence of a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; and (2) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights' – Waldron (n 9 above) 1360 *et seq*.
[18] Waldron (n 9 above) 1406.
[19] Waldron (n 9 above) 1395.
[20] S Freeman 'Constitutional democracy and the legitimacy of judicial review' (1990/1991) 9 *Law and Philosophy* 327, 355.

statutes. The relative democratic deficit involved in judicial review of regulations, directives and other executive measures is obviously less than that involved in the judicial review of primary statutes made by elected representatives.[21] Indeed, even in countries with a strong tradition of parliamentary supremacy with no constitutional review, such as the Netherlands, courts can annul secondary legislation and other executive measures if contradictory to the Constitution.[22] However, in the Ethiopian context, the judiciary is excluded from invalidating not only primary statutes but also regulations, directives and other executive or administrative measures and practices. The counter-majoritarian dilemma cannot justify the complete exclusion of the judiciary in controlling the constitutionality of secondary legislation and other executive measures.

Moreover, international judicial and quasi-judicial bodies which Ethiopia has subscribed to, namely, the African Commission on Human and Peoples' Rights, the African Committee on the Rights and Welfare of Children and the Common Market for Eastern and Southern Africa (COMESA) Court of Justice, have the power to invalidate Ethiopian laws for inconsistency with the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the COMESA Common Market Law, respectively.[23] Excluding Ethiopian courts from determining the constitutionality of laws while allowing international bodies, which enjoy lesser democratic legitimacy,[24] to invalidate Ethiopian laws is a paradox. These new international developments may not have been considered during the drafting of the Constitution. There is, therefore, need to reform the constitutional system to accommodate these developments. The international developments necessarily 'blow a hole' through the middle of the original understandings of constitutional review in Ethiopia.[25]

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[21] In Germany, for instance, ordinary courts are only excluded from questioning the constitutionality of primary legislation. Questions on the constitutionality of primary legislation must be referred to the Constitutional Court. In relation to cases not involving the constitutionality of primary legislation, however, courts have to resolve the issue themselves and cannot refer the constitutional issue to the Constitutional Court.

[22] Article 120 of the 1983 Constitution of the Netherlands explicitly forbids courts from reviewing on the constitutionality of 'Acts of Parliament and treaties'.

[23] Ethiopia ratified the African Charter on Human and Peoples' Rights on 15 June 1998, and the African Charter on the Rights and Welfare of the Child on 2 October 2002. Ethiopia has also ratified the COMESA Treaty. Article 6 of the Treaty recognizes the promotion and protection of human rights in accordance with the African Charter on Human and Peoples' Rights as one of its fundamental principles. This provision can potentially provide a basis to challenge domestic laws.

[24] J Mayerfeld 'The democratic legitimacy of international human rights law' (2009) 19 *Indiana International and Comparative Law Review* 49; J McGinnis and I Somin 'Should international law be part of our law?' (2007) 59 *Stanford Law Review* 1175 noting that most international law is made through highly undemocratic procedures.

[25] It should be noted that recent changes in the constitutional review systems of many countries in the European Union such as France, the UK, Finland and other Scandinavian countries, which have led to relative empowerment of courts, are directly related to the prominence of the European Court of Human Rights and European Court of Justice which review decisions taken by domestic systems. For discussions on how the European Court of Human Rights has impacted the constitutional reform in France, see – P Pasquino 'The new constitutional adjudication in France: The reform of the referral to the French Constitutional Council in light of the Italian model' 18 http://www.astrid-online.it/Dossier--R2/Studi--ric/Pasquino_New-Constitutional-

3. Stating the counter-majoritarian problem

Perhaps one of the main theoretical challenges to constitutional review by independent adjudicators is the counter-majoritarian difficulty, an objection that entrusting unelected judges with the power of constitutional review undermines democracy. Although constitutional review has become an accepted means of controlling the constitutionality of legislative and executive action around the world,[26] the theoretical debate concerning the extent to which courts may quash decisions of democratically elected and accountable bodies continues. With growing levels of judicial activism worldwide, discussions concerning the counter-majoritarian dilemma – an objection to the institution of constitutional review from the vantage point of majoritarian or pluralistic democratic theories – have routinely surfaced particularly in instances where constitutional adjudicators make public value choices and invalidate primary statutes enacted by elected bodies.

The 'democratic objection' continues to be one of the main theoretical challenges to the institution of judicial review.[27] Hook observes that 'those who defend the theory of judicial supremacy cannot easily square their position with any reasonable interpretation of democracy'.[28] The major challenge to constitutional adjudication, it has been indicated, is the need to 'reconcile protection of fundamental rights [leading to judicial review] with democracy'.[29] Judicial review generates the formidable problem of 'the role and democratic legitimacy of relatively unaccountable individuals (the judges) and groups (the judiciary) pouring their own hierarchies of values or "personal predilections" into the relatively

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adjudication-France.pdf (accessed 6 December 2011); in England, N Bamforth 'Current issues in United Kingdom constitutionalism: An introduction' (2011) 9 *International Journal of Constitutional Law* 79 observing that 'the United Kingdom's membership of the European Union has also had continuing deep-level significance for debate about the ongoing viability of Parliamentary sovereignty as the bedrock constitutional rule or principle of the domestic constitution'; in Finland, J Lavapuro *et al* 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' (2011) 9 *International Journal of Constitutional Law* 505. See also R Hirschl 'The Nordic counternarrative: Democracy, human development, and judicial review' (2011) 9 *International Journal of Constitutional Law* 449, 451 observing that the emergence of a pan-European rights regime enforced by the European Court of Human Rights has influenced the changes in the judicial review systems in the Scandinavian region.

[26] Tushnet, an uncompromising critic of the institution of judicial review, observes that even if the US Supreme Court was to say it did not want to exercise judicial review, there would be a legislative response requiring the Court to exercise judicial review – M Tushnet *Taking the Constitution away from the courts* (1999) 154. This, Tushnet notes, reflects the commitment of America to judicial review.

[27] Domingo observes that the 'democratic objection' may reasonably be considered to be the main objection against constitutional review – P Domingo 'Introduction' in R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 2.

[28] S Hook *The paradoxes of freedom* (1952) 95.

[29] G Mendes 'New challenges of constitutional adjudication in Brazil' (2008) 5, Woodrow Wilson International Centre for Scholars, Brazil Institute, Special Report http://www.wilsoncenter.org/topics/pubs/brazil.gilmarmendes.constitution.pdf (accessed 2 February 2011).

empty boxes of such vague concepts as liberty, equality, reasonableness, fairness, and due process'.[30] Some democratic theorists, therefore, suspect and challenge the institution of judicial review especially when courts or other unelected bodies invalidate legislation enacted through a presumptively legitimate democratic process.[31]

Bickel famously coined the 'counter-majoritarian difficulty',[32] which has since become one of the most controversial 'academic obsessions' in constitutional law.[33] Because it is counter-majoritarian, judicial review is, Bickel notes, a 'deviant institution in American democracy'.[34] He observes that

> [t]he root difficulty is that judicial review is a counter-majoritarian force. ... When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.[35]

Kairys similarly observes that since courts, as non-majoritarian entities, are not expected to express or implement popular whims, they have trouble justifying their power and legitimacy in societies that value democracy.[36] The fear is that judicial review can lead to the 'judicialization of politics'.[37]

The kernel of the argument is that courts should not be allowed to thwart the will of the democratic majority representing the people – 'the will of the majority ought to prevail in the fashioning of law and policy',[38] particularly in cases that involve value determinations.[39] According to Ely, the central problem, and at the same time the central function, of judicial review is that 'a body that is not elected or otherwise politically responsible in any significant way is telling the people's representatives that they

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[30] M Cappelletti 'The "mighty problem" of judicial review and the contribution of comparative analysis' (1980) 53 *Southern California Law Review* 409, 409 – 410.
[31] R Cover 'The origins of judicial activism in the protection of minorities' (1981-1982) 91 *Yale Law Journal* 1287, 1287.
[32] A Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1986) 16.
[33] B Friedman 'The birth of an academic obsession: The history of the counter-majoritarian difficulty, part five' (2002) 112 *Yale Law Journal* 153.
[34] Bickel (n 32 above) 18.
[35] Bickel (n 32 above) ivi.
[36] D Kairys 'Introduction' in D Kairys (ed) *The politics of law: A progressive critique* (1998) 1.
[37] J Ferejohn 'Judicializing politics, politicizing law' (2002) 65 *Law and Contemporary Problems* 41; M Tushnet 'Policy distortions and democratic debilitation: Comparative illumination of the counter-majoritarian difficulty' (1995-1996) 94 *Michigan Law Review* 245, 247 observing that '[n]ot only would judicial review *displace* majoritarian decisionmaking; it might also *distort* and *debilitate* it. First, judicial review might distort decisionmaking by injecting *too many* constitutional norms into the lawmaking process, supplanting legislative consideration of other arguably more important matters. Second, judicial review might debilitate decisionmaking by leading legislatures to enact laws without regard to constitutional considerations, counting on the courts to strike from the statute books those laws that violate the Constitution, leading to the problem of debilitation'.
[38] One of the main proponents of this argument against judicial review has been Jeremy Waldron – see J Waldron *Law and Disagreement* (1999) Part III.
[39] Zurn classified the democratic objections to judicial review into two related but different concepts: 'counter-majoritarian' and 'anti-paternalistic' – C Zurn *Deliberative democracy and the institutions of judicial review* (2007) 2 – 8.

cannot govern as they'd like'.[40] Judicial review, it is argued, creates a system where a court usurps legislative and policy making powers and allows judges to paternalistically determine political and moral values as 'philosopher king[s], sitting in judgment on the wisdom and morality of all society's social policy choices'.[41] Judicial review is said to lead to 'government by judges'.[42] The objection is closely linked to the requirements of judicial independence: judges should be independent, and 'the more independent they are, the less accountable they are to the people or to the majority of the people and their representatives'.[43]

The democratic legitimacy deficit is invoked not just in relation to socio-economic rights litigation but also equally concerning judicial challenges against legislative or executive measures for incongruence with traditional civil and political rights.[44] The objection is particularly acute in states where the judicial power to declare laws unconstitutional does not have a clear constitutional mast. In the context of the US, for instance, Tushnet, described judicial review as a 'false god' that 'stands in the way of self-government'.[45] In States that have constitutional rights and where the constitution unequivocally grants the power of constitutional review to courts, the question of legitimacy of judicial review is less contested. The Canadian Supreme Court observed as follows:[46]

> It ought not be forgotten that the historic decision to entrench the *Charter* in our Constitution was not taken by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.

It is of no wonder that the debate has profound ground in the US, where the power of judicial review is an arrogation by the judiciary itself,[47] than in most other countries of the world where constitutions explicitly grant the power of judicial review of legislation to the judiciary.

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[40] J Ely *Democracy and distrust: A theory of judicial review* (1980) 4 – 5.
[41] M Redish *The Constitution as political structure* (1995) 8.
[42] L Aucoin 'Judicial review in France: Access of the individual under French and European law in the aftermath of France's rejection of bicentennial reform' (1992) 15 *Boston College International and Comparative Law* 443, 446 – 448.
[43] M Cappelletti *The judicial process in comparative perspective* (1989) 40.
[44] The objection based on democratic theory is, however, particularly acute in relation to social rights litigation – see, for instance, Domingo (n 27 above). Some consider the judicial determination of socio-economic rights as a massive expansion of judicial review – C Starch 'Europe's fundamental rights in their newest garb' (1982) *Human Rights Law Journal* 116 arguing that making socio-economic rights justiciable amounts to a necessary breach of the principle of separation of powers.
[45] M Tushnet 'Democracy and judicial review' (2005) *Dissent Magazine* http://www.dissentmagazine.org/article/?article=248 (accessed 7 December 2010).
[46] *Motor Vehicle Act (B.C.) Reference* [1985] 2 SCR 486, 497.
[47] See *Marbury v Madison* 5 US (1 Cranch) 137 (1803) where the Supreme Court established its power to review laws for constitutionality based on the inherent power of courts to interpret every law, including the Constitution, and the need to choose the applicable law when two or more laws with different status contradict.

Another closely related argument is that judicial review of legislation undermines the principle of separation of powers. According to this argument, judicial review erodes legislative and executive powers leading, *inter alia*, to unacceptable 'blending of judicial with legislative power'.[48] All organs of the state are somehow involved in the determination of the constitutionality of their measures. When enacting a law, the legislature is implying a judgment that the law is in line with the constitution. This flows from 'the prevailing notion that government institutions act rationally to achieve their goals', an assumption that 'their actions correspond to the common good' as these institutions are accountable to the populace.[49] Hence, it is argued, there is nothing inherent in the judiciary that gives it the final say on constitutional issues.[50] According to Waldron, perhaps the most opponent of judicial review, given that there is always to be a reasonable and good faith disagreement on the content of rights, only a representative and majoritarian entity in which 'everyone affected by a problem has a right to a say in its solution' should be allowed to settle issues of rights – 'action-in-concert in the face of disagreement'.[51] Waldron provided a succinct summary of the democratic objections to judicial review:[52]

> Judicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for society to focus clearly on the real issues at stake when citizens disagree about rights….And it is politically illegitimate, so far as democratic values are concerned: by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality.

In summary, Waldron, and other critics of judicial review, argue that the judiciary is not electorally accountable. As such, judicial review is democratically illegitimate and violates the right to democratic participation of individuals. They further argue that judicial review cannot be justified as it is impossible to determine whether the judiciary is better than the legislature in protecting rights. In fact, according to the Condorcet Jury Theorem,[53] 'majority rule is more likely to result in better decisionmaking than are insular institutions isolated from democratic control when determining what rights are actually in the

[48] P Lenta 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 544, 546.
[49] E Rubin 'The new legal process, the synthesis of discourse, and the microanalysis of institutions' (1995) 109 *Harvard Law Review* 1393, 1397.
[50] L Alexander 'Is judicial review democratic? A comment on Harel' (2003) 22 *Law and Philosophy* 277, 278.
[51] Waldron (n 9 above) 108 – 110. Waldron and other anti-judicial review political theorists support some form of 'popular/majoritarian constitutionalism'. For Waldron, given the inherent and persistent diversity and plurality of opinion (reasonable disagreement), majoritarianism is the only decision-making procedure that can ensure the full respect of the equal autonomy and worth of each citizen and each individual's right to fair and equal political participation. For a summary of Waldron's views, see Waldron (n 9 above).
[52] Waldron (n 9 above) 1353.
[53] The theorem assumes that any two alternatives from which voters choose have an equal *a priori* chance of being true. It then holds that when individuals in a group make decisions independently of one another about the correctness of propositions and each has a greater than 50% chance of accuracy, the decision reached by the majority is likely to assess the truth of the proposition more correctly.

public interest'.[54] The legislature is argued to be the most appropriate body to determine the content of rights because of its overwhelming procedural superiority, emanating from its democratic character, to courts. Therefore, critics of judicial review call for the abolishing or drastic limitation of the power of judicial review and a move towards 'popular constitutionalism' where elected political organs and the people, rather than the courts, define the meaning of and enforce constitutional provisions.[55]

4. Justifications for rights-based judicial review

It was argued in section 2 above that, although the Ethiopian system of constitutional review was designed in response to the counter-majoritarian difficulty, the system has not been completely absolved from similar criticisms. It was also pointed out that, even assuming that constitutional review by independent adjudicators undermines democracy, the extent of exclusion of courts from constitutional review in Ethiopia is unacceptably pervasive. This section argues that constitutional review does not undermine democracy. Constitutional review rather reinforces democracy by protecting rights that are essential components of any acceptable democratic theory. As such, the failure to establish an independent constitutional review system in Ethiopia cannot be justified based the counter-majoritarian difficulty.

Justifications for judicial review take different forms. The first form of justifications criticise the fact that counter-majoritarian challenge on judicial review is founded in pure majoritarian conceptions of democracy. It is argued that a pure majoritarian or procedural conception of democracy that does not recognise human rights as one of its essential elements has lost ground. A majoritarian conception of democracy is inherently contradictory to the idea of constitutionalisation and constitutional democracy. Secondly, judicial review can be in line with deliberative conceptions of democracy. Thirdly, judicial review provides a neutral and independent forum to adjudicate constitutional rights which are designed to bind democratic majorities. Judicial review is in line with the idea of constitutionalisation, which is counter-majoritarian by design. Even if judicial review can be said to be undemocratic, it is legitimised by its instrumental role in protecting individual and minority rights. Fourthly, it is argued that the democratic objection to judicial review is based on unwarranted assumptions that legislatures always represent popular views while judicial review always annuls the popular view. Legislatures can be democratically more unrepresentative and judiciaries more representative than it is often assumed. It is

[54] J McGinnis and I Somin 'Democracy and international human rights law' (2009) 84 *Notre Dame Law Review* 1739, 1754.
[55] See generally L Kramer *The people themselves: Popular constitutionalism and judicial review* (2004); C Sunstein *One case at a time: Judicial minimalism on the Supreme Court* (1999) (talking about 'judicial minimalism'); Tushnet (n 26 above); Waldron (n 9 above).

also noted that the recognition of the institution of judicial review worldwide indicates the rejection of the democratic objection.

4.1. Democratic objections to judicial review are based on majoritarian conceptions of democracy

Tamanaha observes that '[majoritarian] democracy is a blunt and unwieldy mechanism that offers no assurances of producing morally good laws'.[56] The counter-majoritarian challenge is founded on a reductionist procedural understanding of democracy, which is, as Fuller critically pointed out, an 'impoverished conception of democracy'.[57] Democracy does not simply mean, as Nietzsche believed, an 'easily exploitable populism'.[58] Majoritarianism is not 'a shorthand description for democracy'.[59] The idea of democracy cannot, therefore, be reduced to a simple majoritarian idea.[60] Lemieux and Watkins observe that virtually all modern approaches to democratic theory 'do not simply equal democracy with majoritarianism'.[61] Democracy has evolved from the limited idea of representative government for the majority to 'one in which human dignity and the rights which have evolved therefrom are effectively protected from majority tyranny'.[62] The democratic challenge to judicial review is, therefore, based on 'unwarranted theoretical assumptions about the relationship between democracy and majoritarianism'.[63]

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[56] B Tamanaha *On the rule of law: History, politics and theory* (2004) 101. Bedner similarly observes a procedural understanding of democracy 'can never guarantee a substantially just outcome' – A Bedner 'An elementary approach to the rule of law' (2010) 2 *Hague Journal on the Rule of Law* 48, 62.

[57] L Fuller 'The forms and limits of adjudication' (1978/1979) 92 *Harvard Law Review* 353, 367.

[58] T Shaw *Nietzsche's political skepticism* (2007) 135. Nietzsche believed that 'since collectivities are even less epistemically reliable than individuals, the collective power of the people is unlikely to be a good guarantor of legitimacy'; hence, democracy cannot be a sufficient condition for legitimacy. He believed that 'unless the people could not be relied on to be an infallible source of truth, or were reliably guided by some genuine normative authority, they could not systematically impose valid normative constraints on state power'.

[59] S Macedo 'Against majoritarianism: Democratic values and institutional design' (2010) 90 *Boston University Law Review* 1029, 1037.

[60] Cappelletti (n 43 above) 46.

[61] S Lemieux and D Watkins 'Beyond the counter-majoritarian difficulty: Lessons from democratic theory' (2009) 41 *Polity* 30. Zurn similarly observes that 'no sensible theory [of democracy] will claim that the legitimacy of any and every state decision or action hangs entirely or exclusively on a matter of either substance or procedure' – Zurn (n 39 above) 80.

[62] J Klaaren (ed) *A delicate balance: The place of the judiciary in a constitutional democracy: Proceedings of a symposium to mark the retirement of Arthur Chaskalson* (2006) 8; D Beatty 'The forms and limits of constitutional interpretation' (2001) 49 *American Journal of Comparative Law* 79, 79 observing that in Africa and everywhere, democracy is 'understood as something more than mere majority rule'.

[63] Lemieux and Watkins (n 61 above) 30.

The concept of constitutionalisation,[64] with its emphasis on pre-existing limits – among others in the form of human rights guarantees – on the range of choices available to democratic majorities, is in inherent tension with any form of democracy committed to unqualified simple majoritarian rule.[65] The constitutionalisation of rights implies an understanding of democracy 'as something more than majority rule'.[66] No modern constitution, and the constitutional democracies such constitutions constitute, accepts unfettered majoritarianism as the only governing constitutional mantra. Nor does constitutional democracy always insist that all decisions be made by elected representatives directly accountable to the people in periodic elections. A form of democracy that propagates that the majority should always win and the minority should always lose cannot provide the basis for a constitutional democratic state. In a constitutional democracy, majoritarian elected representatives have the right to determine those values that have not been pre-empted by counter-majoritarian constitutional prescriptions.[67] However, very few critics who question the legitimacy of judicial review of majoritarian decisions doubt the appropriateness and legitimacy of constitutionalisation and constitutional limits on democratic majorities. There is nothing intrinsic to constitutional democracy that precludes judicial review.[68] Quite to the contrary, the existence of judicial review is 'logically dictated by the concept of a constitutional democracy'.[69] Therefore, judicial review is compatible with constitutional democracy.

A majoritarian conception of democracy is particularly deficient with respect to the protection of the rights of minorities and the underprivileged segments of society who do not often have proper and equal access to and influence on decisions of political actors. The fallibility of any form of democratic organisation that relies on majority rule poses a real threat to the rights and interests of minorities. Cover observes that 'a discrete and insular minority cannot expect majoritarian politics to protect its members as it protects others'.[70] Also Chemerinsky concludes that '[f]undamental human rights, the rights of minorities, and the rights of those unpopular in society should not depend on the wishes of the

[64] Indeed, historically constitutionalism has provided the main justification for constitutional review. Cappelletti observes that constitutionalism especially in the form of limits on government through guarantees of human rights 'has demanded a body, or a group, sufficiently independent from the "political" power, both legislative and executive, to protect a higher and relatively permanent rule of law against the temptations which are inherent in power' – Cappelletti (n 30 above) 430.
[65] S Issachnaroff 'Constitutionalizing democracy in fractured societies' (2003/2004) 82 *Texas Law Review* 1861, 1861.
[66] Beatty (n 62 above) 79.
[67] M Redish 'Judicial review and the 'political question'' (1984-1985) 79 *Northwestern University Law Review* 1031, 1059 – 1060.
[68] Cappelletti (n 43 above) 46.
[69] M Redish *The constitution as political structure* (1995) 8.
[70] Cover (n 31 above) 1297; Cortner similarly argues that litigation is particularly attractive to politically disadvantaged interest groups – those whose small numbers, disenfranchised constituencies, or unpopular causes militate against their exercising much influence in the legislative or executive arenas – see R Cortner 'Strategies and tactics of litigants in constitutional cases' (1968) 17 *Journal of Public Law* 287.

majority'.[71] The history of Black Americans and of Jews in Nazi Germany offer sufficient evidence. Reliance on a purely procedural conception of democracy can lead to the 'tyranny of the majority' whereby those in power abuse their powers, violate rights and entrench themselves, endangering democracy itself.[72] As seductive as majoritarian democratic theory can be, in real life, experience shows that legislative majorities do enact laws, out of convenience or otherwise, that violate rights. Judicial review plays a desirable role in mitigating the impacts of this deficit in relation to minority rights.[73]

Tocqueville identified as one of the basic tools that can minimise the threat of majority tyranny in the US context 'the role of the courts in restraining exaggerated movements of public opinion'.[74] In justifying the institutional of judicial review, Cover posits that

> [i]f all or most substantive interests were to be subordinated to the process principle of popular government, to majoritarianism, the [Supreme] Court would have to explain how the virtues of popular government were to triumph in the age that had seen the rise of bolshevism and fascism, the orchestration of mass oppression of minorities, the cynical manipulations of elections, and the ascendancy of apparatus and party over state and society.[75]

The fear of minority exclusion is particularly legitimate in relation to sensitive issues such as controversial minority religious practices.[76] The purpose of constitutional protection of rights and judicial review is to protect the interest of those minorities 'who could not be expected to prevail through the orthodox democratic procedures'.[77] The US Supreme Court, in exclaiming the role of constitutional litigation and pointing out the deficiencies of a majoritarian democratic system, held that

> [g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. ... [A]nd under the condition of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.[78]

Judicial review provides the powerless and excluded entry points into politically and legally contested public issues.[79] Holmes, therefore, concludes that '[c]onstitutional limits on majoritarian rule do not

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[71] E Chemerinsky 'In defense of judicial review: A reply to Professor Kramer' (2004) 92 *California Law Review* 1013, 1025.
[72] Tocqueville believed that 'the greatest danger attending a democratic form of government was not instability but the tyranny of the majority' – L Siedentop Tocqueville (1994) 61. See also R Heffner (ed) Alexis de Tocqueville: Democracy in America (2001) 111 et seq.
[73] See generally Cover (n 31 above).
[74] Tocqueville identifies three major general features of the US political system that help minimise the threat of majority tyranny: the federal form of government, the strength of social institutions, and the role of courts – Siedentop (n 72 above) 63.
[75] Cover (n 31 above) 1289.
[76] For instance, in a 2009 referendum, voters in Switzerland banned the building of minarets on mosques – see N Erangler 'Swiss ban building of minarets on mosques' *The New York Times*, 29 November 2009 http://www.nytimes.com/2009/11/30/world/europe/30swiss.html (accessed 1 June 2012).
[77] J Choper *Judicial review and the national political process* (1980) 64 – 65.
[78] *NAACP v Button*, 371 US 415, 429-30 (1963).

undermine democracy but bolster it by protecting minority rights. In other words, the protection of minority rights by limiting majority rule has the net effect of broadening inclusiveness and autonomy within the democratic process'.[80] To the extent it broadens the inclusiveness of the democratic process judicial review becomes 'representation-reinforcing'.[81] Independent constitutional adjudicators should, therefore, be empowered to when necessary reverse the malfunctioning of the democratic process, particularly when the latter systematically impairs the interest of marginalised groups and distorts the democratic process to exclude those outside government.[82]

In sum, democratic theories should 'look beyond majoritarianism to definition of democracy that recognizes the fundamental value or point of democracy'.[83] In this regard, the European Court of Human Rights has held that 'although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.[84] Since democracy is not exhaustible in mere procedural terms, there is nothing inherently undemocratic about judicial review: '[d]emocracy does not insist on judges having the last word, but it does not insist that they must not have it'.[85] Macedo likewise observes that 'there is no insult or affront – either to the voters or to the democratic principle of political equality – if, in designing and adopting popular constitutions, additional mechanisms are adopted to further improve the quality of collective deliberation'.[86] Judges need not have a monopoly of giving meaning to the constitutional values, 'but neither is there reason for them to be silent'.[87] A constitutional conception of democracy does not, therefore, necessarily reject judicial review.

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[79] A Kavanagh 'Participation and judicial review: A reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451 arguing that judicial review can itself become a valuable channel of political participation, especially for those who are marginalised and disempowered who are often shut out of considerations in the normal political process.

[80] Cited in W Piotrowski 'Democracy and constitutions: One without the other?' (2005) 37 *Connecticut Law Review* 854, 856. Ackerman similarly observes that '[t]he first rationale for fundamental rights derives from the concept of democracy itself' – B Ackerman 'The new separation of powers' (2000) 113 *Harvard Law Review* 633, 712.

[81] J Ely *Democracy and distrust: A theory of judicial review* (1980); J Ely 'Foreword: On discovering fundamental value' (1978) 92 *Harvard Law Review* 5; J Ely 'Toward a representation-reinforcing mode of judicial review' (1978) 37 *Maryland Law Review* 451.

[82] Ely (1980) (n 81 above) 39.

[83] D Blichitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 108.

[84] *Bączkowski and Others v Poland*, application no 1543/06, ECHR 2007-VI para 63.

[85] R Dworkin *Freedom's law: The moral reading of the American Constitution* (1996) 7.

[86] Macedo (n 59 above) 1037.

[87] O Fiss 'The Supreme Court 1978 term: Foreword: The forms of justice' (1979) 93 *Harvard Law Review* 1, 2.

4.2. Judicial review can be in line with deliberative democracy

Although electoral accountability is at the core of any democratic theory,[88] judicial review can be in line with the legitimacy requirements of deliberative conceptions of democracy.[89] A deliberative conception of democracy is argued to be 'normatively and conceptually superior' to traditional pluralistic or majoritarian conceptions.[90] Judicial proceedings represent paradigmatic deliberative decision-making as they are often, if not always, accompanied by supporting reasons.[91] Habermas argues that juridical discourse can claim a 'comparatively high presumption of rationality'.[92] Adjudication 'assumes a burden of rationality not borne by any other form of social ordering'.[93] We expect, from judicial decisions, 'a kind of rationality we do not expect of the results of contract or of voting'.[94] Of the different kinds of law-making, 'adjudication is, or supposed to be, the most reflective and self-conscious, the most grounded in reasoned arguments and justification, and most constrained and structured by text, rule, and principle'.[95] As such the judicial ascertainment of rights serves the value of democratic deliberation.[96] Given that the judiciary has the institutional advantage to articulate abstract values to a unified and coherent public morality, judicial review and reasoning 'does not detract from but rather adds to the scope and intensity of democratic deliberation'.[97]

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[88] Choper (n 77 above) 4 observing that majority rule is conceived as the 'keystone of a democratic political system in both theory and practice'.

[89] The basic theme of deliberative democracy is that democratic legitimacy does not depend solely on votes (electoral accountability) but also on effective deliberation ('reason-responsiveness'). Thus deliberative democratic theories 'deemphasise voting as the paradigmatic democratic action, while celebrating deliberative reason-responsive cooperation as the ideal of democratic citizenship'. It endorses 'a legitimacy criterion that combines an ideal of the equal political influence of each with an ideal of the reasons-responsiveness of government institutions' – Zurn (n 39 above) 163 & 165. Sunstein similarly observes that 'a constitution should promote deliberative democracy, an idea that is meant to combine political accountability with a high degree of reflectiveness and a general commitment to reason giving' – C Sunstein *Designing democracy: What constitutions do?* (2001) 6 – 7. See also R Forst 'Rule of reasons: Three models of deliberative democracy' (2001) 14 *Ration Juris* 345. Theories of deliberative democracy generally accommodate judicial review – see D Estlund 'Introduction' in D Estlund (ed) *Democracy* (2002) 5; J Dryzek *Deliberative democracy and beyond: Liberals, critics, contestations* (2000) Chapter 1.

[90] C Zurn 'Deliberative democracy and constitutional review' (2002) 21 *Law and Philosophy* 467, 473.

[91] For an excellent examination of the justifications of judicial review based on deliberative conceptions of democracy, see Zurn (n 39 above) Chapter 6.

[92] J Habermas *Between facts and norms: Contributions to a discourse theory of law and democracy* (trans William Rehg) (1996) 266. See also R Bellamy *Political constitutionalism: A republican defence of the constitutionality of democracy* (2007) 84 observing that, unlike judicial decisions, legislative decisions are uninformative and the grounds of legislation are notoriously hard to determine.

[93] Fuller (n 57 above) 366.

[94] Fuller (n 57 above) 367.

[95] K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 147.

[96] H Spector 'Judicial review, rights and democracy' (2003) 22 *Law and Philosophy* 285, 286. Spector justifies judicial review based on conceptions of deliberative democracy arguing that 'representative democracy does not deliver a robust conception of political equality; in particular, it does not realize equality of influence or equality of chances to take political decisions'; he concludes that 'judicial review is a reasonable interpretation of the moral powers of people to contest the exercise of force in an impartial deliberative setting. Such powers do not offend democracy'.

[97] Spector (n 96 above) 320.

Since society is built on fundamental political issues over which 'overlapping consensus' is imperative, an organ subject to reason and principle, and not mere head-counting, should be empowered to see their ultimate interpretation and enforcement.[98] Rawls observes that the ideals of public reason apply

> ... in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review. This is because the justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents. Since acts of the legislative and the executive need not be justified in this way, the court's special role makes it the exemplar of public reason.[99]

For Rawls, therefore, constitutional review provides an impartial deliberative forum. The rationalisation and juristic discourse involved in judicial review reflects the principled moral and political debate that underlies the legitimacy requirements of deliberative democracy.[100] By making democracy more deliberative particularly on matters of principle and fundamental values, the counter-majoritarian nature of judicial review becomes an 'opportunity', and not a 'difficulty'.[101] Judicial discourse and deliberation enriches, rather than undermines, public and legislative deliberation. Deliberative conceptions of democracy, therefore, accommodate the institution of judicial review.[102] Judicial review is compatible with deliberative democracy.[103]

4.3. Judicial review is instrumental in protecting rights

The main justification of judicial review lies in its potential role in protecting rights. There are two main scholarly approaches to justifying rights-based judicial review. One group composed of Ely, Dahl, Habermas, and Dworkin, argues that rights are integral to the definition of democracy and judicial review protects these rights.[104] To that extent, judicial review does not hinder democracy; rather it

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[98] J Rawls *Political liberalism* (1996) 235. For Rawls, the basis of democratic legitimacy is the use of public reason.

[99] Rawls (n 98 above) 216. However, Rawls did not indicate that judicial review is a necessary element of his theory of 'justice as fairness'. He only believed that judicial review is one of the preferable strategies for securing what he referred to as the 'constitutional essentials' – at 233. He certainly believed that his theory of justice does not reject judicial review.

[100] Zurn, however, argues that juristic discourse should not be equated with the ideal deliberation required by deliberative conceptions of democracy. He contended that 'juristic discourse is well tailored to arguments concerning legal rules, but not those concerning the principles, ideals, and values that underwrite and justify the laws we give to ourselves as democratic citizens' – Zurn (n 39 above) 163 *et seq*.

[101] J Ferejohn and P Pasquino 'The counter-majoritarian opportunity' (2010) http://www.law.uchicago.edu/files/file/Ferejohn.pdf (accessed 31 October 2011).

[102] Spector (n 96 above) 323 concluding that '[w]hen democracy is justified on this [its contribution to a robust public deliberation] ground, the charge that constitutional restrictions and judicial review are undemocratic is very weak. Since constitutional restrictions and judicial review could well be justified on the same grounds as democracy, there would be no deep tension to dissolve or dispel'.

[103] A Harel 'Rights-based judicial review: A democratic justification' (2003) 22 *Law and Philosophy* 247 positing that judicial review provides an alternative form of democratic participation.

[104] Almost all democratic theorists including those considered 'minimalist' such as Joseph Schumpeter, Robert Dahl, and Samuel Huntington include some human rights such as freedom of expression, association and assembly as part of the definition of democracy – for a summary of democratic theories and the extent to which these theories recognise or imply substantive elements in democracy, see G O'Donnell 'Democracy, law, and comparative politics' (June 2000) IDS Working Paper 118, *Law, Democracy and Development Series* http://www.ids.ac.uk/files/Wp118.pdf (accessed 12 January 2011).

maintains and reinforces democracy. The other group, consisting of Bickel and Choper, understands rights not as integral to democracy but as limits to it. From this perspective, judicial review is justified because of its instrumentality in protecting rights which are counter-majoritarian by design.

Defending a reductionist procedural theory of judicial review, Ely and Dahl argue that judicial review can be democratically legitimate only if it concerns the enforcement of rights that are integral to majoritarian or pluralist democracy.[105] According to Ely, the judiciary should intervene only to protect those rights that are absolutely necessary for a fair political process − those rights the violation of which compromises the fairness of the democratic process. In other words, judicial review serves to 'clear the channels' of political change to ensure the open and proper functioning democratic systems.[106] Dahl similarly argues that judicial review is legitimate only to the extent that it protects rights integral to or necessary for the proper functioning of democracy:

> A supreme court should ... have the authority to overturn federal laws and administrative decrees that seriously impinge on any of the fundamental rights that are necessary to the existence of a democratic political system: rights to express one's views freely, to assemble, to vote, to form and to participate in political organisations, and so on. ... But the more it [a court] moves outside this realm – a vast realm in itself – the more dubious its authority becomes. For then it becomes an unelected legislative body.[107]

By protecting rights that are integral to democracy, judicial review ensures that temporary majorities behave according to constitutional rules of the game.[108] To that extent, judicial review becomes democratically legitimate, or at least democratically unobjectionable. Ely and Dahl justify rights-based judicial review in the context of pluralist or majoritarian conceptions of democracy.

Habermas's theory of deliberative procedural democracy also identifies a wide range of rights that are inherent in democracy.[109] In describing the relationship between democracy and rights, he observes that '[o]ne is not possible without the other, but neither sets limits on the other'; substantive rights and democratic procedures are 'cooriginal'.[110] Democracy and human rights are closely connected and the

[105] Ely (1980) (n 56 above).
[106] Ely (1980) (n 56 above) 105.
[107] R Dahl *How democratic is the American Constitution?* (2001) 153 − 154.
[108] Cover observes that strong judicial review should be justified when 'representatives enjoying office, its power, and its perquisites … conspire to entrench themselves and to defeat the very majoritarian [democratic] processes' – Cover (n 31 above) 1292 − 1294.
[109] Habermas (n 92 above) arguing that human rights are key ingredients of true democracy. For a summary of the views of Habermas on the relationship between human rights and democracy, see J Flynn 'Habermas on human rights: Law, morality, and intercultural dialogue' (2003) 29 *Social Theory and Practice* 431.
[110] J Habermas 'Constitutional democracy: A paradoxical union of contradictory principles? (2001) 29 *Political Theory* 766, 767.

'protection of one at the expense of the other ... always runs the risk of being counter-productive'.[111] Like Ely and Dahl, Habermas's conception of democracy recognises rights as necessary to secure the procedural fairness of democracy. Hence, arrangements designed to ensure the effective and efficient protection of human rights, of which judicial review is one, may not become incongruent with the ideals of deliberative democracy. Simply stated, judicial review assures adherence to the conditions that confer legitimacy on procedural democracy. Following Habermas, Zurn concludes that

> ... constitutional review discharges the function of procedurally protecting the political structures and the system of rights that make deliberative democracy possible, that is, protecting constitutional structures that ultimately ground the supposition that the decisional outcomes of democratic processes are legitimate.[112]

Ely, Dahl and Habermas base their justification of judicial review within a procedural conception of democracy. Judicial review is considered legitimate because it is important in protecting rights that are necessary for the effective and efficient refereeing of procedural democracy. It should be noted that Habermas's theory of deliberative democracy recognises a more extensive array of rights, including social rights, as integral to democracy than Dahl and Ely's. Because of this, and the deliberative orientation of democracy, judicial review will be more extensive in Habermas's theory than in Ely and Dahl's.

Dworkin builds his theory of judicial review on a substantive conception of democracy. According to substantive democratic theories, the legitimacy of any political procedure, including democracy, depends on the extent to which it promotes morally defensible outcomes. Dworkin defines democracy as

> ... government subject to conditions – we might call these the "democratic conditions" – of equal status for all citizens. When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to procedures that protect and respect them better.[113]

Given that a constitutional conception of democracy is concerned with ensuring the equal status of citizens, there is no reason that 'some nonmajoritarian procedure should not be employed on special occasions when this would better protect or enhance the equal status that it declares to be the essence

[111] T Koopmans 'Legislature and judiciary: Present trends' in M Cappelletti (ed) *New perspectives for a common law of Europe* (1978) 337.
[112] Zurn (n 39 above) 254. Zurn shows why a normative theory of deliberative democratic constitutionalism yields the best understanding of the legitimacy of constitutional review. He argues that constitutional review is justified by its 'function of ensuring the procedural requirements for legitimate democratic self-rule through deliberative cooperation'.
[113] Dworkin (n 85 above) 17 – 18.

of democracy, and ... these exceptions are [not] a cause of moral regret'.[114] Judicial review is justified because of its superior competence, compared to the political organs, in pursuing a principled approach, undistorted by political pressure, to the substantive conditions democracy is designed to achieve. Judicial review, it is argued, better protects human rights and other fundamental moral principles which constitute the democratic conditions.[115] Because legislatures are subject to political influence and compromise, they are unsuitable for a principled approach that fundamental rights demand.[116] Courts serve as 'forums of principle' while legislatures serve as 'forums of policy'. Dworkin concludes that

> [i]ndividual citizens can in fact exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence.[117]

The centre of the argument is that the fact that the majority is not always trustworthy when it comes to matters of fundamental principles necessitates placing the ultimate decision-making power concerning fundamental rights in the hands of independent, neutral and experienced constitutional adjudicators.[118] Since rights are matters of principle, not policy, judicial review is argued to be better at protecting them.

The range of rights considered inherent in democracy in Dworkin's theory is wider than the theories of Ely and Dahl. It compares to the rights that inhere in Habermas's conception of deliberative democracy. The main difference between Ely, Dahl, Habermas on one side, and Dworkin, on the other is that the first three anchor their theories on a minimalist procedural understanding of democracy which considers democracy as intrinsically good, whereas Dworkin bases his theory in a substantive conception

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[114] Dworkin (n 85 above) 17.

[115] Eisgruber similarly argues that insulation from the vicissitudes of political pressure gives courts the institutional advantage to serve as paradigmatic locations for principled moral argument about nonnegotiable and fundamental public issues – C Eisgruber *Constitutional self-government* (2001) 3 & 4. Esigruber concludes that the US Supreme Court is 'a kind of representative institution well-shaped to speak on behalf of the people about questions of moral and political principle'. The fact that courts are insulated from political pressure enables them to 'pursue politics in a fashion that is principled than partisan'. See also F Michelman *Brennan and democracy* (1999) 22 – 23.

[116] Bickel observes that 'courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government' – Bickel (n 32 above) 25 – 26. Wellington similarly observes that judges 'discern, better than others with narrow jurisdiction and, therefore, limited vision, the enduring principles and longer range concerns that tend to be forgotten where either the interests of factions collide or the perspectives of bureaucrats prevail' – H Wellington 'The nature of judicial review' (1981/1982) 91 *Yale Law Journal* 486, 493.

[117] Dworkin (n 85 above) 344. See also R Dworkin 'The forum of principle' (1981) 56 *New York University Law Review* 469, 516 observing that courts 'should make decisions of principle rather than policy'.

[118] Blichitz (n 83 above) 102. See also Heffner (n 72 above) identifying the role of lawyers in counterpoising democratic majorities and describing the judicial review function of American courts as the 'most favourable to liberty and to public order providing the most powerful barriers which has ever been devised against the tyranny of the political assemblies'.

of democracy which considers democracy as a means to achieving the ultimate good, that is to say equal status and participation.[119]

For some proponents of judicial review, rights are considered, not inherent to democracy, but as limits to democratic government. Rights are understood as inherently counter-majoritarian. Constitutional rights are designed to limit the vices and imperfections of potentially tyrannical majoritarianism.[120] They are considered as deontological trumps to democratic policy and politics – 'one of the primary functions of the Constitution is to protect individual rights from majoritarian encroachment'.[121] Bellamy observes that rights, upheld by judicial review, comprise 'the prime component of constitutionalism'.[122] Given that human rights transcend majority choices, their interpretation and enforcement should not depend on the outcomes of elections or the wishes of the legislative majority.[123] Therefore, despite being counter-majoritarian, judicial review is justified by its instrumentality in ensuring that decisions of democratic institutions are effectively constrained by rights. Judicial review is, therefore, in line with the commitment toward a limited legislative and political authority.[124]

The constitutional protection of rights requires the existence of an independent entity which patrols their proper realisation and enforcement.[125] One of the main purposes of judicial review is to protect rights against decisions of the majority.[126] Choper argues that 'the overriding virtue of and justification for vesting the [US Supreme] Court with this awesome power is to guard against government infringement of individual liberties secured by the constitution'.[127] Bickel and Choper argue that rights-based judicial review should be justified primarily because of, not despite, its counter-majoritarian

[119] For a discussion of the difference between 'substantive' and 'procedural' conceptions of democracy, see C Brettschneider 'Balancing procedures and outcomes within democratic theory' (2005) 53 *Political Studies* 423.
[120] R Dworkin 'Constitutionalism and democracy' (1996) 3 *European Journal of Political Studies* 2. Dworkin defines constitutionalism in terms of human rights: 'constitutionalism' means 'a system that establishes individual legal rights that the dominant legislature does not have the power to override or compromise'.
[121] E Braman (Book Review) 'The judiciary and American democracy: Alexander Bickel the counter-majoritarian difficulty and contemporary constitutional theory' (2005) by K Ward and C Castillo (State University of New York Press) http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/ward-castillo0206.htm (accessed 11 September 2011).
[122] R Bellamy 'The political form of the constitution: The separation of powers, rights and representative democracy' (1996) 44 P*olitical Studies* 436, 436.
[123] Cover (n 31 above) 1289; Spector (n 96 above).
[124] M Bilder 'Why we have judicial review' (2007) 116 *Yale Law Journal Pocket Part* 215.
[125] Mildenberger argues in favour of the constitutional entrenchment of rights due to the 'near-paramount value' human agents attach to individual rights – J Mildenberger 'Waldron, Waluchow and the merits of constitutionalism' (2009) 29 *Oxford Journal of Legal Studies* 71, 72.
[126] R Share *et al* 'Human rights: A new standard of civilization' (1998) 74 *International Affairs* 1, 1.
[127] Choper (n 77 above) 64.

character.[128] In that sense, judicial review ensures that 'politics is not the last word' and poignantly establishes the superiority of constitutional rights to politics.[129] Bickel and Choper support judicial review based on a wide range of human rights and not just those rights that are integral to the democratic process. Their justification of judicial review covers a wider array of human rights than those anticipated by Ely and Dahl.[130]

In sum, whether or not rights are considered as inherent elements of democracy, and although scholars might disagree on the list of rights that are considered inherent in democracy, the value and essence of rights-based judicial review lies in its insulation from democratic electoral pressure – the fact that it is detached from majoritarian politics. Insulation from political pressure gives courts the epistemic advantage to be able to contain not only the imperfections and failures of the democratic process but also its perversion and manipulation to systematically violate the rights of individuals or groups.

4.4. The need for an independent and neutral constitutional adjudicator

The main thrust of the arguments for judicial review is that the power of judicial review should reside in an entity that is independent, disinterested and sufficiently isolated from the political arena in a way that bolsters the confidence of even the vulnerable political minority.[131] The organ in charge of constitutional review should be bound to render judgments based on reasons rather than mere hand-voting, political bargaining, compromise and trade-offs. The need for neutrality in constitutional adjudication provides the main justification for judicial review. The power to determine the constitutionality of laws should not be conflated with the powers of the same entities a constitution aims to limit.[132] Redish observes that

> [i]f the majoritarian branches could act as final arbiters of the limits of their own power, there would have been little purpose in imposing super-majoritarian constitutional limitations in the first place.[133]

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[128] Bickel (n 32 above); Choper (n 77 above).
[129] P Pasquino 'Constitutional adjudication and democracy. Comparative perspectives: USA, France, Italy' (1998) 11 *Ratio Juris* 38, 48.
[130] Choper (n 77 above) 7. Choper observes that constitutional democratic theory must recognise the normative value 'of certain inalienable minimums of personal freedom (beyond the political rights of the ballot and free expression) that guard the dignity and integrity of the individual'.
[131] A Lever 'Democracy and judicial review: Are they really incompatible' (2009) 7 *Perspectives on Politics* 805, 811; C Eisgruber 'Democracy and disagreement: A comment on Jeremy Waldron's *Law and disagreement*' (2002) 6 *Legislation and Public Policy* 35, 44 arguing that judges are 'capable of making decisions in a disinterested fashion. Judges' personal interests are not at stake in the way that is true for both legislators, who have to worry about losing their office, or voters, who are invited to vote for whatever candidate will make them better off (in terms of income, career, or what have you)'; Spector (n 96 above); Harel (n 103 above).
[132] J King *An activist manual on the International Covenant on Economic, Social and Cultural Rights* (2003) Chapter XV.
[133] Redish (n 67 above) 1045 – 1046.

An independent judiciary should have the final say on the constitutionality of the activities of the government 'primarily for the reason that the political branches should not be permitted to sit in final judgment on the constitutionality of their own actions'.[134] Tamanaha similarly notes that 'being anti-majoritarian by design, it appears logically required that rights not be entrusted to a democratically accountable body, for that would defeat their purpose'.[135] Hence, the determination of the content of rights, often initially done by the legislature and executive, may not be completely left to the democratic process. Judicial review ensures that the political branches do not become judges in their own cases.

Any legal system founded on constitutional values should be characterised by an independent constitutional adjudicator 'responsible for constitutional norms and solicitous of minority rights'.[136] The institution charged with ensuring the enforcement of constitutional limits should be located outside and beyond the political tussle. Independence is particularly important as far as human rights adjudication is concerned. Independence and disinterest can only be guaranteed in a judiciary or a judicial like structure, not in purely political institutions − legislatures or executives − which are unavoidably parties to any constitutional rights dispute. Legislative and executive organs of government are more susceptible to pressure from either political or other special interest groups than independent judiciaries.[137] 'Detachment from those it passes judgment upon' is the greatest strength of the judiciary.[138] Indeed, judges and the judiciary are 'deliberately removed from the pressures to which many other governmental actors are deliberately exposed'.[139] It is precisely this detachment that makes courts the most appropriate bodies to adjudicate constitutional rights issues. Courts are the best candidates for constitutional adjudication precisely because they are

> insulated from political responsibility and unbeholden to self-absorbed and excited majoritarianism. The Court's aloofness from the political system and the Justices' lack of dependence for maintenance in office on the popularity of a particular ruling promise an objectivity that elected representatives are not − and should not be – as capable of achieving. And the more deliberative, contemplative quality of the judicial process further lends itself to dispassionate decisionmaking.[140]

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[134] Redish (n 67 above) 1047.
[135] Tamanaha (n 56 above) 105.
[136] A Sarat 'Going to courts: Access, autonomy, and the contradictions of liberal legality' in Kairys (n 36 above) 97. Zurn similarly observes that a constitutional adjudicator and its members must be 'institutionally independent of political accountability' − Zurn (n 39 above) 276.
[137] Chemerinsky (n 71 above) 1019. Chemerinsky observes that, unlike the legislative process, 'judicial review is not the product of lobbying or direct pressure from special interest'.
[138] N Barber 'Prelude to separation of powers' (2001) 60 *The Cambridge Law Journal* 59, 75.
[139] For instance, as regards judicial tenure – see H Wellington 'Common law rules and constitutional double standards: Some notes on adjudication (1973) 83 *Yale Law Journal* 221, 248 − 249.
[140] Choper (n 77 above) 68. Wellington similarly posits that judicial insulation from the direct claims of special interest constituencies protects judges from the partisan views of other political actors − Wellington (n 116 above) 493.

It is submitted that democracy and separation of powers are not ends themselves.[141] They are accepted not just for their appealing vocabulary but for their potential instrumentality to achieving the wider goal of ensuring freedom from fear and want. However, majoritarian conceptions of democracy excessively overstate the intrinsic value of process regardless of its outcomes to substantive rights. So long as judicial review has the potential to limit violations of substantive rights compatible with equality and autonomy, it is not undemocratic. Besides, democracy is not the only 'beautiful' principle or value – Pasquino asked why should we 'deduce the totality of the institutions of a constitutional State and their legitimacy from a single principle and not from more than one?'[142] Huntington similarly observes that 'democracy is one public virtue, not the only one'.[143] Human rights have an intrinsic value in addition to the 'instrumental function they can have for the exercise of the political rights of citizens [thus making democracy possible]'.[144] The propriety of decisions should not rest entirely on the process through which they are made and the accountability of the decision-maker to the electorate. Theories of democratic legitimacy cannot be oblivious to the ends decisions promote. Hence, when upholding pure democratic theory and separation of powers might constrain the achievement of the ultimate democratic goals of equality and autonomy, deviations from pure majoritarian democratic conceptions, such as in the form of judicial review, should be justified or at least unobjectionable.[145]

The basis of legitimacy of judicial review lies in its formal independence and impartiality.[146] Moreover, judicial review is not entirely unrepresentative. Adjudication ensures constructive participation through

[141] D Estlund 'Beyond fairness in deliberation: The epistemic dimension of democratic authority' in W Rehg and J Bohman (eds) *Deliberative democracy* (1997) 173 – 204.
[142] Pasquino (n 129 above) 50.
[143] S Huntington *The third wave: Democratisation in the twentieth century* (1991) 10.
[144] Habermas (n 110 above) 770 – 771.
[145] Brettschneider (n 119 above) 425 observing that 'a good theory of democracy will embrace a commitment to democratic procedures while recognizing their limits'. Concerning judicial review, however, Brettschneider argues that 'even when a democratic procedure results in an undemocratic outcome, judicial review is not automatically justifiable; the loss that would result from overturning a democratic procedure should never be greater than the gain to democracy that would result from ensuring against an undemocratic outcome'.
[146] M Shapiro and A Stone Sweet *On law, politics and judicialization* (2002) 3 & 6 observing that in democratic states, judges 'claim their legitimacy by asserting that they are non-political, independent, neutral servants of 'the law'' and comparing it with government officials who achieve their legitimacy 'by acknowledging their political rule and claiming subordination to the people through elections or responsibility to those elected'. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities also highlighted that '[t]he principles of impartiality and independence are the hallmarks of the rationale and the legitimacy of the judicial function in every State' – L Singhvi 'The administration of justice and the human rights of detainees: Study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers' (E/CN.4/Sub.2/1985/18 and Add.1-6) (Geneva, United Nations, 1985) para 75.

interest group representation and, therefore, is not inherently undemocratic.[147] Michelman observes that the exposure of courts to a wide variety of actors contributes to their democratic legitimacy:[148]

> It [legitimacy] is a condition of the interpreter's greater or lesser reliability and of what we can do to bolster it. And one condition that you think contributes greatly to reliability is the constant exposure of the interpreter - the moral reader – to the full blast of the sundry opinions on the questions of rightness of one or another interpretation, freely and uninhibitedly produced by assorted members of society listening to what the others have to say out of their diverse life stories, current situations, and perceptions of interest and need.

From a different perspective, Fallon distinguished between 'overall political legitimacy', which is the ultimate concern of democratic political theory, and 'democratic legitimacy'.[149] Judicial review contributes to the overall political legitimacy of a constitutional regime 'insofar as it helps to minimize fundamental rights violations, even if it lacks democratic legitimacy'.[150] Fallon concludes that '[w]hen other sources of political legitimacy enter the calculus, the possibility emerges that judicial review might actually promote, not detract from, the overall legitimacy of a governmental regime'.[151]

Judicial review is also justified because enables individuals the opportunity to voice their personal grievances against government decisions. Judicial review enables each person to demand a personalised justification as to why his or her distinctive claim based on a right is accepted or rejected. It addresses 'individual grievances with the degree of concreteness dictated by liberal and humanistic principles'.[152] In contrast, legislative procedures can only provide general and abstract justifications to individual grievances. Judicial review is, therefore, more conducive to addressing grievances in a personal and contextualised manner.[153] Because it enables individuals to vindicate their rights against government in ways that parallel those they commonly use against each other, judicial review embodies and fosters 'democratic forms of representation, accountability, and participation'.[154]

Besides, generally accepted principles of constitutional interpretation help confine judges within acceptable tracks. Although courts are not electorally accountable, they account because they explain

[147] C Peters 'Adjudication as representation' (1997) 97 *Columbia Law Review* 312.
[148] Michelman (n 115 above) 59.
[149] R Fallon 'The core of an uneasy case for judicial review' (2008) 121 *Harvard Law Review* 1693, 1716.
[150] Fallon (n 149 above) 1716 concluding that '[i]f judicial review makes a contribution to the overall moral quality of a society's political decisions, then judicial review might actually enhance the overall political legitimacy of an otherwise reasonably democratic constitutional regime' – 1727 – 1728.
[151] Fallon (n 149 above) 1718.
[152] A Harel 'Notes on Waldron's *Law and disagreement*: Defending judicial review' (2006) 39 *Israel Law Review* 13, 21.
[153] Y Eylon and A Harel 'The right to judicial review' (2006) 92 *Virginia Law Review* 991 arguing that judicial review is justified based on its ability to provide each individual the opportunity to voice their grievances and demand a personalized justification. The authors argue that the justification of judicial review rests on the 'right to voice a grievance' or 'right to a hearing'.
[154] Lever (n 131 above) 807.

'their decisions and make these explanations available to the litigants, the public, the academy, fellow judges, and the media'.[155] Klaaren observes that the judiciary is indeed accountable for its actions and inactions but its accountability is different in nature, form and execution from the accountability of the other branches of the state, one which does not undermine the independence of the judiciary.[156] It should also not be forgotten that judges are actually appointed by elected political actors. To this extent, the judiciary is not absolutely devoid of 'democratic pedigree'.[157]

4.5. Democratic objections are based on unwarranted assumptions

The legitimacy challenge to judicial review assumes that elected representatives represent the views of the electorate and that courts always paternalistically annul the choice of the people.[158] However, this assumption is not entirely true. Representative decisions may not always embody the consent of the governed, or at least the majority of the people, in any meaningful sense.[159] Legislative and executive leadership 'is never a perfect paradigm of representative democracy'.[160] As much as there are instances in which policy decisions reflect and or result from majority sentiment, 'there are many instances in which they do not'.[161] Koopmans observes that, nowadays, 'the thread between a vote cast for a member of parliament and the many decisions by public authorities affecting the voter has become very long and thin'.[162] Pasquino similarly notes that regular elections – and connected mechanisms of accountability – do not necessarily produce 'conformity of collective decisions to majority preferences'.[163]

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[155] S Abrahamson 'Keynote Address: Thorny issues and slippery slopes: Perspectives on judicial independence' (2003) 64 *Ohio State Law Journal* 3, 4.

[156] Klaaren (n 62 above) 9. See also S Noveck 'Is judicial review compatible with democracy?' (2008) 6 *Cardozo Public Law, Policy and Ethics Journal* 401; Lever (n 131 above).

[157] Eisgruber (n 115 above) 4 observing that judges 'owe their appointments to their political views and their political connections as much as (or more than) to their legal skills' which contributes to their democratic pedigree; Eisgruber (n 131 above) 45 claiming that democratic pedigree ensures that 'judges will not be idiosyncratic political radicals, but rather will express moral judgments more or less consistent with some current of mainstream... political thought'.

[158] Waldron, for instance, criticises judicial review on the ground that it 'do[es] not allow a voice and a vote in a final decision-procedure to every citizen of the society' – Waldron (n 38 above) 299.

[159] Zurn observes that 'legislatures can be said to effect the same paternalistic substitution under certain well-known conditions distorting representative processes' – Zurn (n 39 above) 157; Cappelletti (n 43 above) 21 noting that the democratic legitimacy deficit is very much present in modern legislation and more so in administrative action.

[160] Cappelletti (n 43 above) 41.

[161] M Shapiro *Freedom of speech: The Supreme Court and judicial review* (1966) 24 – 25.

[162] T Koopmans 'Legislature and judiciary: Present trends' in M Cappelletti (ed) *New perspectives for a common law of Europe* (1978) 321.

[163] Pasquino (n 129 above) 41 arguing that law does not represent the popular will but rather the will of the temporary political majority in parliament.

Representative democracy does not always and effectively ensure the implementation of the principle of equal political participation that underpins conceptions of democratic theories. It is for these reasons that some scholars believe that elected representatives are aristocratic elites.[164] Representatives make different, inconsistent and at times conflicting choices *vis-à-vis* the expressed wishes of the electorate.[165] Therefore, they can to a degree become unrepresentative or counter-majoritarian.[166] Laws and executive decisions do not, and should not, always represent capricious populist views.[167] Representatives do not, and should not, only consider the opinions but also the interests of their constituencies. The making of decisions 'in derogation of the immediate or apparent wishes of the majority is peculiar neither to constitutional adjudication nor, more generally, to the courts'.[168]

In contrast, although judges are not directly elected, by ensuring the extensive participation of individuals and various stakeholders, judicial review can serve to 'maintain and promote the same ends that justify equal political rights and majority rule'.[169] Judicial review grants each person the right to challenge government decisions. In addition, public interest litigation and amicus curiae procedures ensure that a wide range of views and interests are represented before courts make final decisions. The counter-majoritarian objection is, therefore, based on unwarranted empirical assumptions about 'the "majoritarianism" of legislative action and the "counter-majoritarianism" of courts'.[170] The objection 'overstates at the same time the counter-majoritarian nature of courts and the majoritarian nature of legislatures'.[171]

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[164] B Manin *Principles of representative government* (1997) 140 observing that elections are elitist and aristocratic tools. Lever similarly argues that voting, lotteries, and appointments are alternative devices that democracies can use to select people for positions of power and responsibility. Lever concludes that 'the fact that legislatures are elected ... whereas judges are generally not is insufficient to show that the former are more democratic than the latter' – Lever (n 131 above) 810.

[165] See generally J Schumpeter *Capitalism, socialism and democracy* (1942) observing that in reality, states are governed not only by the elected majority but also the unelected political party and bureaucratic attendants. See also F Cunningham *Theories of democracy: A critical reflection* (2002) 9 – 10.

[166] Cappelletti (n 43 above) 21; T Keck 'Beyond backlash: Assessing the impact of judicial decisions on LGBT rights' (2009) 43 *Law and Society Review* 151, 175 – 182.

[167] Harel (n 103 above) 259 observing that 'representatives need not necessarily vote in the same way that their constituencies would have voted and designing an election system is not simply a mechanical process aimed at realising what public opinion dictates on any particular issues'.

[168] Wellington (n 116 above) 487. For similar arguments see Eisgruber (n 131 above) 40 – 41.

[169] S Freeman 'Constitutional democracy and the legitimacy of judicial review' (1990/1991) 9 *Law and Philosophy* 327, 328.

[170] Lemieux and Watkins (n 61 above) 30.

[171] L Pierdominici 'Constitutional adjudication and the 'dimensions' of judicial activism: Legal and institutional heuristics' (2011) 3 *Sant'Anna Legal Studies, STALS Research Paper* 1, 12. Choper similarly argues, in the US context, that 'Congress and the executive, the so-called political branches of our government, are by no means as democratic as standard belief would hold and... the Court is much more subject to the popular will than conventional wisdom would grant' – Choper (n 77 above) 25.

Courts may even ensure that legislative organs adequately involve and consult the people and other stakeholders before enacting laws whenever participatory or inclusive law-making is a constitutional requirement.[172] Individuals do not exercise effective control over their elected representatives in the period between elections. There should, therefore, be additional ways of controlling representatives in the intervening time. Vertical accountability through periodic elections should be complemented with continuous horizontal accountability in the form of checks and balances.[173] Constitutional review provides an opportunity for continuous, uninterrupted dialogue with government. Hamilton observes that '[i]t is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority'.[174] The South African Constitutional Court also held that litigation, more specifically socio-economic rights litigation, 'fosters a form of participatory democracy that holds government accountable and requires it to account between elections over specific aspects of government policy'.[175]

Moreover, state institutions and decision-making procedures are replete with examples of institutions that do not necessarily overlap with majoritarian democratic and electoral accountability conceptions.[176] In almost all democratic states, 'value determinations are made, and are meant to be made, by many actors who cannot possibly be described as "our elected representatives"'.[177] Even if one concedes that judicial cannot be reconciled with democracy, it is only one of the many 'undemocratic' institutional designs.[178] There is nothing peculiar to judicial review that makes it particularly undemocratic distinct from several other procedures that do not equally fit in majoritarian or electoral democratic

[172] See, for instance, *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 212. The Constitutional Court of South Africa invalidated two statutes because the legislature did not ensure the participation of the people. It held that if the conditions for public participation for law-making processes have not been complied with by the legislature, it has the duty to say so and declare the resulting statute invalid − para 211. Similarly, the Communal Land Rights Act was declared invalid for failure to consult the people during the enactment of the law – *Tongoane v Minister of Agriculture and Land Affairs* 2010 SA 214 (CC) para 104 − 110.

[173] Pasquino (n 129 above), 41. It should be noted that Pasquino recognises the value of elections. Elections matter; they 'are one among major technologies which produce both political obligation (for the citizens) and *limited power* concerning the elites in power '.

[174] A Hamilton 'The Federalist No 78: The judiciary department' *Independent Journal* (June 1788).

[175] *Lindiwe Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 160.

[176] Eisgruber (n 131 above) 43 observing that there are, in the US context, 'many institutions that are insulated from directed electoral control'. Eisgruber believes that the insulation of these institutions and constitutional adjudicators from electoral politics is, although nondemocratic, instrumental as these institutions complement democratic decision-making: 'consequently there is reason to ask whether our government becomes more representative, and more democratic, if the judgment of legislators is supplemented by the judgment of other institutions less sensitive to electoral pressure' – 44.

[177] Wellington (n 116 above) 500; see also Pasquino (n 129 above) 40 observing that there are many independent authorities, such as heads of central banks, which are not elected and whose officials are not politically accountable to the citizens.

[178] N Komesar *Imperfect alternatives: Choosing institutions in law, economics, and public policy* (1994) 266.

conceptions.[179] Even in relation to directly elected organs, interest group theory has demonstrated that organised interest groups may 'capture' the democratic process to advance their own interests, at times at the expense of the interest of the general public.[180] Tamanaha observes that 'the influence of special interests in securing favourable legislation is notorious'.[181] There is, therefore, no guarantee that decisions of elected bodies always reflect the views of the electorate.

In conclusion, to be in line with constitutional democracy, electoral accountability mechanisms should be complemented through continuous inter-institutional accountability mechanisms. '[I]f democracy requires self-government, which is government by the people, then, since sometimes the legislature does not express the will of the people, sometimes the legislature needs to be restrained for the sake of democracy'.[182] The mere fact that a particular procedure is not purely majoritarian and does not ensure direct electoral accountability does not necessarily make it illegitimate and inappropriate. The tension between majoritarian democracy and judicial review is as inherent as the tension between constitutionalisation and majoritarian democracy. This tension is part of the paradox in constitutional democracy. Of course, the legislature and executive enjoy relatively 'superior [electoral] democratic credentials' than courts with the tradition of judicial independence and insulation from direct popular vote;[183] and indeed, the judiciary is not infallible just as legislative supremacy involves risks and dangers;[184] yet constitutional adjudicators provide us with the only 'imperfect alternative' to put a brake on popular will.[185]

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[179] Wellington (n 116 above) 498.

[180] E Elhauge 'Does interest group theory justify more intrusive judicial review?' (1991) 101 *Yale Law Journal* 32, 35. Interest group theory rejects 'the presumption that the government endeavors to further the public interest'; Wellington (n 116 above) 490 observing that 'it is common for individuals who are neither elected nor recently appointed by elected officials to direct or influence significantly the course of government'. Zurn similarly observes that 'substantial differences in the effective capacity of differently situated social groups to have their voices heard and opinions understood in formal parliamentary or congressional processes often lead to statute law that cannot be fairly considered as a result of a collection of the preponderance of opinion amongst the full citizenry concerning the proper scope and limits of rights − Zurn (n 39 above) 128. For a detailed discussion of the arguments on this point, see W Mitchell and R Simons *Beyond politics*: *Markets, welfare and the failure of bureaucracy* (1994) 102 − 75.

[181] Tamanaha (n 56 above) 103.

[182] W Sinnott-Armstrong 'Weak and strong judicial review' (2003) 22 *Law and Philosophy* 381, 387. Armstrong argues that '[d]emocracy is impossible if democracy requires that legislatures always get what they want'.

[183] Waldron (n 9 above) 1391 observing that 'the system of legislative elections is not perfect either, but it is evidently superior as a matter of democracy and democratic values to the indirect and limited basis of democratic legitimacy for the judiciary'; and Cappelletti (n 43 above) 21.

[184] Kairys (n 36 above) 13 noting that to the extent that legislative supremacy can involve risks and dangers, rights-based judicial review furthers democracy.

[185] Komesar (n 178 above) 204. Sarat similarly notes that litigation can be the best of a series of not very good alternatives − A Sarat 'Going to courts: Access, autonomy, and the contradictions of liberal legality' in Kairys (n 36 above) 99.

Critics of constitutional review should 'pay sufficient attention to the losses involved in an unrestricted majoritarianism'.[186] If democracy is not carefully designed to avoid undue concentration of power in any political branch through checks and balances, then the powerful branch accumulates power and entrenches itself, harming the free and fair competition for power – the core of democracy.[187] Judicial review helps to ensure that the majority does not, through violating rights, become too powerful and entrench itself, and that electoral victory does not become an 'all or nothing', 'winner-takes-all', 'now or never' game.[188]

In any case, instances whereby courts invalidate legislation as unconstitutional are rare and exceptional.[189] In most instances, courts uphold legislation as constitutional thereby adding legitimacy to the democratic process.[190] Courts may also provide a legitimising shield to legislative or executive decisions that do not abrogate the Constitution but are nonetheless unpopular. Moreover, most decisions of independent constitutional adjudicators are often preceded by evolving changes in political and public perception over the issue in contention – 'public opinion and judicial review are connected'.[191] Also often times, the views on constitutional issues of constitutional adjudicators, elected representatives and the public tend to converge through time.[192]

In connection with growing levels of constitutionalisation, with the consequent substitution of the notion of parliamentary sovereignty with constitutional supremacy, judicial review has proliferated since

[186] Blichitz (n 83 above) 102.
[187] U Preuss 'Perspectives of democracy and the rule of law' (1991) 18 *Journal of Law and Society* 353.
[188] See, for instance, F Morton 'Judicial review in France: A comparative analysis' (1988) 36 *American Journal of Comparative Law* 69.
[189] K Whittington 'Legislative sanctions and the strategic environment of judicial review' (2003) 3 *International Journal of Constitutional law* 446, 461 – 462 observing that the judiciary is unlikely to diverge from the preferences of the legislatures on every issue and that the judiciary converges with the preferences of democratic institutions more often than it deviates. See also A Stone Sweet *Governing with judges: Constitutional politics in Europe* (2000) 64 observing that the German Constitutional Court, which had reviewed almost 20% of all federal laws only invalidated 4.6% of them.
[190] See R Dahl 'Decision-making in a democracy: The Supreme Court as a national policy maker (1957) 6 *Journal of Public Law* 279, 294 arguing that the US Supreme Court is often supportive of the policy decisions of ruling majorities. Fallon similarly argues that 'judicial review can actually contribute to the political legitimacy of a scheme of otherwise democratic government when the demands of political legitimacy are understood correctly' – R Fallon 'The core of an uneasy case for judicial review' (2008) 121 *Harvard Law Review* 1693, 1715 *et seq*. In the South African context, as well, Roux argues that judicial scrutiny of certain political issues, political resource allocation in this case, further legitimises the policy choices of the government – see generally T Roux 'Legitimating transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratization* 92.
[191] B Friedman 'Mediated popular constitutionalism' (2003) 101 *Michigan Law Review* 2595, 2632.
[192] Friedman (n 191 above) 2597 observing, in the US context, that 'judicial interpretations of the Constitution reflect popular will over time'. Tushnet similarly concludes in the US context that 'looking at judicial review over the course of US history, we see the courts regularly being more or less in line with what the dominant national coalition wants' – Tushnet (n 26 above) 15.

the Second World War and particularly after the end of the Cold War.[193] This expansion of judicial review, particularly on grounds of human rights guarantees, of the constitutionality of legislative and executive measures reflects the general consensus on the instrumentality of judicial review to guaranteeing fundamental rights and building, maintaining and reinforcing constitutional democracy.[194] Shapiro and Stone Sweet observe that '[t]oday, the rights and [constitutional] review tandem is an essential, even obligatory, component of any move toward constitutional democracy'.[195] Hirschl similarly notes that the incorporation of a bill of rights and some form of active judicial review characterise contemporary constitutions,[196] particularly in federal states and in states where the protection of human rights has been constitutionally entrenched.[197] Within the African context, the AU Assembly has expressed its satisfaction with the fact that African states have progressively provided for judicial mechanisms of control of the constitutionality of laws.[198] Similarly, the basic principles on the independence of the judiciary provide that the judiciary should have 'jurisdiction over all issues of a judicial nature'.[199]

As such, it can fairly be concluded that a counter-majoritarian challenge which propounds an absolute rejection of the institution of constitutional review by politically independent arbiters has largely been

[193] For a comparative tabular presentation of the systems of constitutional review around the world, see A Mavcic 'Constitutional/judicial review around the world' http://www.concourts.net/comparison.php (accessed 9 February 2012). The constitutions of most democratic states empower either the ordinary judiciary or establish independent constitutional courts or councils to review constitutionality of legislation, particularly as far as compliance with the human rights guarantees is concerned.

[194] Hirschl observes that the empowerment of the judiciary is an integral component of contemporary liberal constitutionalism – R Hirschl *Towards juristocracy: The origins and consequence of the new constitutionalism* (2004). Hirschl also notes that the sweeping trend in favour of constitutionalism stems from the notion that judiciaries are the most effective bodies for the protection of minority rights; Pasquino (n 129 above) 38 noting that constitutional control of laws is an essential character of the constitutional state. Dakolias also observes that 'a strong, more transparent, and independent judiciary is seen as a key factor in securing the rule of law, improving rights protection and encouraging investment, thereby facilitating democratic consolidation and development' – M Dakolias *Court performance around the world: A comparative perspective* (1999) (World Bank Technical Paper 430 (Washington DC); G de Andrade 'Comparative constitutional law: Judicial review' (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 977; J Utter and D Lundsgaard 'Judicial review in the new nations of Central and Eastern Europe: Some thoughts from a comparative perspective' (1993) 54 *Ohio State Law Journal* 559.

[195] Shapiro and Stone Sweet (n 146 above) 136.

[196] R Hirschl 'The new constitutionalism and the judicialisation of pure politics worldwide' (2006) 75 *Fordham Law Review* 721; R Hirschl '"Negative" rights vs. "Positive" entitlements: A comparative study of judicial interpretations of rights in an emerging neo-liberal economic order' (2000) 22 *Human Rights Quarterly* 1060, 1060; Cappelletti (n 43 above) 4. Cappelletti notes that 'one of the forceful reasons for the expansion of the scope of judicial review is the trend towards the adoption and judicial enforcement of declarations of fundamental rights'.

[197] W Newman 'Standing to raise constitutional issues in Canada' in S Kay (ed) *Standing to raise constitutional issues: Comparative perspectives* (2005) 195 noting that the capacity to challenge the validity of state action before the courts of the land is one of the cornerstones of modern constitutionalism.

[198] Decision on the Establishment of an African Framework for Constitutional Justice, Doc. Assembly/AU/17(XVII) Add. 5, (2010) para 4.

[199] Principle III, Basic Principles on the Independence of the Judiciary, UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. The Principles were originally adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan (August 1985) – see A/CONF.121/22/Rev.1 (1986) page 53.

rejected. This observation is further supported by the wide and growing recognition accorded at the international level to judicial and quasi-judicial organs in charge of controlling state action and inaction, including domestic legislative measures. Besides, the fact that most countries in the world have express constitutional provisions that confer the power of checking the constitutionality of laws and executive measures on independent courts or councils clearly indicates that legislative and executive flaws should, *inter alia*, be countered through the judiciary. Constitutionalisation and the judicial power of constitutional interpretation are considered as legitimate checks on the unfettered powers of representative organs. The theoretical objections to judicial review based on majoritarian conceptions of democracy have not, therefore, impeded the constitutional recognition of judicial review worldwide.[200]

Nevertheless, to the extent unelected judges might invalidate decisions of elected organs, judicial review is in apparent tension with democratic decision-making. Courts and legislatures around the world are alive to the tension and have crafted different mechanisms to address the potential challenge judicial review poses to the democratic process while maintaining the institution of judicial review as part of the complex democratic institutional matrix.

5. Soothing the tension between democracy and judicial review

Practices around the world reveal an interesting variety of ways of overcoming the counter-majoritarian dilemma, ways through which courts and legislatures have designed mechanisms to determine the extent to which courts may quash the decisions of elected representatives. Some countries have chosen to completely abolish judicial review of legislation. In the Netherlands, for instance, courts are explicitly prohibited from declaring a law unconstitutional.[201] Dutch courts are bound to apply the law as an

[200] W Forbath and L Sager 'Comparative avenues in constitutional law: An introduction' (2004) 82 *Texas Law Review* 1653 observing that judicial review has flourished around the globe; Ferejohn (n 37 above) 41 observing that '[s]ince World War II, there has been a profound shift in power away from legislatures and toward courts and other legal institutions around the world'.

[201] Article 120 of the 1983 Constitution of the Netherlands explicitly forbids courts from reviewing on the constitutionality of 'Acts of Parliament and treaties'. Note, however, that article 94 allows courts to refuse to apply a law if the law is in conflict with treaty obligations of the Netherlands. It provides: Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions. Article 94 has ameliorated the impact of the exclusion of constitutional review on the realisation of human rights. For a discussion of the role of Dutch courts in ensuring the realisation of human rights see, J Uzman 'Netherlands: The Dutch Supreme Court: A reluctant positive legislator?' in A Brewer-Carias *Constitutional courts as positive legislators: A comparative law study* (2011) 645-692.

expression of the will of the majority, regardless of its constitutional implications. In the UK, as well, until recently, judicial review of primary legislation was not part of the functions of British courts.[202]

The theoretical justification behind excluding constitutional review of legislation in these countries lies in the concept of parliamentary supremacy. However, the European Court of Human Rights, which applies the European Convention on Human Rights, reviews laws and executive and judicial decisions of member states. The decisions are binding on states regardless of the domestic legislative or constitutional regime.[203] Considering generally that international law and tribunals enjoy less democratic legitimacy than domestic law and courts,[204] the justification behind the current exclusion of domestic judicial review of laws in these countries is ironic and historical and not based on democratic theory.

The following sections discuss the most common interpretative tools and structural designs through which courts and legislatures have attempted to assuage the tension between judicial review and the democratic process by making judicial review more responsive to democratic forces. The mechanisms are not mutually exclusive. As such, a combination of these mechanisms may be employed to achieve a fine balance. The political question doctrine and other interpretative tools and constitutional amendment procedures, for instance, are recognised in some way or another worldwide. Therefore, the mechanisms should not be seen as alternatives to each other but rather as alternatives in a range of choices between rejecting judicial review and establishing a form of judicial review where final judicial decisions are not reviewable.

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[202] This is partly influenced by the philosophies of Dicey who proclaimed the sovereignty of parliament – A Dicey *Introduction to the law of the constitution* (1902). After the adoption of the Human Rights Act in 1998, English courts have been granted the power to declare laws that contradict the European Human Rights Convention incompatible with the Convention – see section 5.5 below.

[203] See, for instance, D Amoroso 'A fresh look at the issue of non-justiciability of defence and foreign affairs' (2010) 23 *Leiden Journal of International Law* 933 arguing that the international and the European community legal orders are progressively eroding the scope of application of non-justiciability doctrines. Cappelletti observes that the growing recognition of judicial review in Europe is influenced by the power of the European Court of Human Rights to review the conformity of state action with the European Convention of Human Rights – Cappelletti (n 30 above) 432.

[204] McGinnis and Somin (n 24 above) noting that most international law is made through highly undemocratic procedures. McGinnis and Somin argue that since 'there is no global democratic process, international law lacks the structure to generate substantive rights more effectively than democracy' as much of international human rights law is 'made either by relatively unaccountable international elites or through processes in which the governments of oppressive dictatorships wield substantial influence'.[204] They conclude that 'the process for generating international human rights is currently inferior to the domestic process in well functioning democracies'. On the debates about the democratic legitimacy of international human rights law, see J Mayerfeld 'The democratic legitimacy of international human rights law (2009) 19 *Indiana International and Comparative Law Review* 49.

5.1. The political question doctrine

The political question doctrine, as developed by the US Supreme Court, is a mode of judicial self-restraint that tends to ameliorate the presumptively non-democratic nature of judicial review. It is tailored by the judiciary itself and represents a discretionary exercise to defer to co-ordinate branches decisions on certain issues.[205] This doctrine of judicial deference helps courts to avoid considering the merits of a particular case.[206] However, it does not reject completely the institution of judicial review. It rather calls for a cautious judicial approach to ensure that certain decisions are finally determined by the 'most appropriate' political institutions rather than judicial organs.[207] If an issue involves a 'political question', courts will not pronounce on it; instead courts will let the political process to take its course.[208] The doctrine essentially recognises limits to the capabilities and competence of courts.[209] Harris notes that decisions that require 'access to empirical information and the benefit of the views of a wide range of people may not often be appropriate for judicial determination'.[210]

The conditions that justify the invocation of the political question doctrine include cases where there is a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; a lack of judicially discoverable and manageable standards for resolving the matter at hand; it is impossible to decide without an initial policy determination of a kind clearly for non-judicial discretion; it is impossible for courts to undertake independent resolution without expressing lack of the respect due co-ordinate branches of government; there is an unusual need for unquestioning adherence to a political decision already made; or there is a potential of embarrassment from multifarious pronouncements by various departments on one question.[211]

Despite the established practice of invoking the doctrine in certain circumstances, the doctrine can hardly be grounded in any explicit constitutional provision; it is rather based in 'a conviction that certain problems by their intrinsic nature fall beyond the proper limits of adjudication'.[212] Several authors criticise the doctrine primarily for being grounded in purely pragmatic, result orientation and the lack of

[205] Redish (n 67 above) 1032
[206] P Daly 'Justiciability and the 'political question' doctrine' (January 2010) *Public Law* 160, 161.
[207] *Baker v Carr*, 369 US 186, 226 (1962).
[208] Redish (n 67 above) 1031.
[209] B Harris 'Judicial review, justiciability and the prerogative of mercy' (2003) 62 *Cambridge Law Journal* 631. Harris related the issue of justiciability with notions of the political question doctrine.
[210] Harris (n 209 above) 640
[211] *Baker v Carr*, 369 US 186, 226 (1962) at 217.
[212] Fuller (n 57 above) 355.

a principled and consistent approach in its application.[213] Since there is no verifiable principle or formula to accurately determine in which cases the doctrine would be invoked, different judges may and have differed on exactly where the line should be drawn.[214] It has been argued, as a result, that the doctrine should be discarded, particularly concerning human rights adjudication.[215] Nevertheless, the doctrine helps courts to insulate themselves from the controversies that surround pronouncement on certain value laden and politically sensitive issues which might have implications to the legitimacy and security of the judiciary.[216]

The relevance of the doctrine is very limited in countries with constitutions which expressly set out the power of independent courts to adjudicate all constitutional issues. The legitimacy of judicial review should not really be an issue in cases where the Constitution clearly grants the final say on constitutional matters to courts.[217] For instance, European constitutional courts, whose powers are constitutionally spelled out, are more involved in sensitive issues than the American Supreme Court, whose judicial review power over legislation was 'invented' by the Court itself in *Marbury v Madison*.[218] Moreover, any distinction between what is legal and political is often highly nebulous and the precise contours of the

[213] For criticisms of the doctrine, see Redish (n 67 above).
[214] Harris (n 209 above) 635.
[215] Redish (n 67 above) 1051. Redish argues that the political question doctrine 'richly deserves' 'total and complete repudiation' (1033). He further notes that 'the political question doctrine should play no role whatsoever in the exercise of the judicial review power'. According to Redish, the vagueness or the absence of objective standards cannot justify declining judicial review as 'ultimately, any constitutional provision can be supplied working standards of interpretation'. See also M Tigar 'Judicial power, the "political question doctrine" and foreign relations' (1970) 17 *UCLA Law Review* 1135, 1141 − 1152
[216] Bickel (n 32 above) 183 − 98. Bickel acknowledged the political question doctrine as prudential enabling the US Supreme Court to survive hostile political environments and to maintain its legitimacy.
[217] S Sathe 'Judicial review in India: Limits and policy' (1974) 35 *Ohio State Law Journal* 870.
[218] See, for instance, M Rosenfeld 'Constitutional adjudication in Europe and the United States: Paradoxes and contrasts' (2004) 2 *International Journal of Constitutional Law* 633, 634 & 652 − 653 – asking why charges of undue politicisation have been made 'much more vehemently' against the American practice of judicial review, when in fact the European constitutional courts exercise far more expansive and 'political' powers. Rosenfeld partly attributes this contrast to the lack of express textual authorisation for judicial review in the US Constitution; Ferejohn (n 37 above) 43 observing that European Constitutional Courts have avoided the kind of 'politicization' of judging that is characteristic of American courts; J Ferejohn 'Constitutional review in the global context (2002-2003) 6 *New York University Journal of Legislation and Public Policy* 49, 55 noting that the American model is easier to reject on democratic grounds than the concentrated European model and that the tensions between democracy and legality are much less sharply drawn in the European model; V Comella 'The consequences of centralizing constitutional review in a special court: Some thoughts on judicial activism' (2003-2004) 82 *Texas Law Review* 1705 arguing that, all other things being equal, special constitutional courts are likely to be more activist than decentralised systems; D Kommers 'German constitutionalism: A prolegomenon' (1991) 40 *Emory Law Journal* 837, 842 noting that the jurisdiction of the German Constitutional Court is mandatory and that the Court 'may not avoid decision in a case properly before it by invoking a "political question" doctrine or the "passive virtues" of Bickelian jurisprudence'; D Finck 'Judicial review: The United States Supreme Court versus the German Constitutional Court' (1997) 20 *Boston College International and Comparative Law Review* 123.

doctrine are blurred.[219] Very few share any precise sense of 'where the boundary between political and legal questions should be drawn'.[220]

Some also argue that the 'moral cost' in leaving legal disputes unresolved necessitates a complete repudiation of the political question doctrine.[221] The doctrine 'can cause the courts to fall short of upholding the ideal of the rule of law'.[222] The principle also runs the risk of compromising the right of access to justice.[223] The exclusion of certain 'category' of disputes as political has particularly been severely criticised.[224] The determination of whether an issue involves a political question should be made individually in each case and not generically based on whether a particular issue belongs to some ambiguous category.[225] Courts should identify some constitutional barrier to relief or remedy in each individual case rather than avoid judicial review simply based on the category to which the issue belongs. The mere involvement, for instance, of foreign affairs issues in a legal dispute, which often leads to the invocation of the political question doctrine, should not automatically preclude judicial review.[226]

Other closely related interpretative tools employed by courts to avoid undesirable intrusion into legislative and executive functions are the 'passive virtues'. Bickel coined the 'passive virtues' to describe the various strategies through which courts act by not acting, where judicial restraint is considered a virtue.[227] The principle of constitutional avoidance, one of the passive virtues, requires courts to avoid engaging in constitutional adjudication except when resolving the constitutional issue is absolutely necessary.[228] It is a self-imposed prudential principle whereby courts avoid engaging a

[219] P Lenta 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 544, 547 noting the difficulty of outlining a rigid dichotomy between law and politics.
[220] L Sossin *Boundaries of judicial review: The law of justiciability in Canada* (1999) 133.
[221] T Allan *Constitutional justice: A liberal theory of the rule of law* (2001) 161 – 199.
[222] Harris (n 209 above) 633.
[223] Amoroso (n 203 above) 934.
[224] Allan (n 221 above) arguing that the search for theory or doctrine of deference is misguided and that 'no coherent doctrine of deference is feasible'.
[225] Daly (n 206 above) 164.
[226] J Nzelibe 'The uniqueness of foreign affairs' (2004) 89 *Iowa Law Review* 941. Nzelide, however, observes that 'institutional competence considerations continue to warrant broad application of the doctrine in the foreign affairs context'.
[227] Bickel (n 32 above) 111 – 129. For a discussion of the prudence theory that Bickel advocated for, see A Kronman 'Alexander Bickel's philosophy of prudence' (1985) 94 *Yale Law Journal* 1567. In the US context, the passive virtues relate to the use of justiciability and standing doctrines to avoid judicial decisions that are considered too intrusive into the powers of the other branches. The principle of constitutional avoidance, avoidance of advisory or anticipatory opinions, and avoiding the formulation of constitutional principles broader than what is needed by the facts to which it is to be applied are some of them.
[228] Currie referred to this principle, in the context of South Africa, as 'judicious avoidance' which represents 'decisional minimalism' whereby the South African Constitutional Court avoids decisions that do not have to be made; avoids first-order reasoning when decisions can be made on a deductive or analogical basis; and avoids large-scale theorising when substantive

constitutional issue if there also exists another ground based on which the question can be disposed of.[229] The principle of constitutional avoidance restricts instances of judicial evaluation of the activities of democratically elected organs to the necessary minimum. The interpretive tools principles are, therefore, fundamental to the preservation of the legitimacy and credibility of unelected judges.[230]

5.2. Constitutional amendment procedures

Another possible procedure that can ameliorate the apparently non-democratic character of constitutional review is the power of political majorities to amend constitutions. Constitutional amendment procedures ensure that courts do not necessarily have the final word in determining constitutional issues and broadly public policy.[231] The existence of constitutional amendment procedures – even when amendments require super-majoritarian procedures – and their potential use to reverse judicial decisions ameliorates the overall democratic legitimacy deficit in the exercise of constitutional review by courts.[232] Decisions of independent constitutional adjudicators are ultimately subject to constitutional amendment. Constitutional amendment is 'a perfectly viable option for most constitutional democracies displeased with court rulings'.[233] As a result, constitutional review merely ensures the control of 'political super-majorities over legislative majorities'.[234] When courts invalidate laws as unconstitutional, they are merely telling legislatures that 'its ordinary legislative process is insufficient to adopt the law and that the required procedure is constitutional amendment'.[235] Constitutional amendments may even modify the power and competencies of a constitutional court or

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decision-making is unavoidable – I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138 drawing from the theories championed by Sunstein – see C Sunstein 'Leaving things undecided' (1996) 110 *Harvard Law Review* 6, 6 – 7 who describes decisional minimalism as the practice of 'saying no more than necessary to justify an outcome, and leaving as much as possible undecided'. Roux similarly observes that courts in new democracies act cautiously not to endanger their institutional security even if this sometimes means subtly compromising principled judicial approach – see generally T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106.

[229] For the application of the principle in the US Supreme Court, see the case of *Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936). For a discussion of the principle of constitutional avoidance, see E Chemerinsky *Constitutional law: Principles and policies* (2006) 49 – 53; L Kloppenberg 'Avoiding constitutional questions (1994) 35 *Boston College Law Review* 1003, 1033 – 1034 referring to the principle as the 'last resort' rule.

[230] For debates on whether courts should consistently follow the avoidance principle, see J Carter 'Passive virtues versus aggressive litigants: The prudence of avoiding a constitutional decision in *Snyder v Phelps*' (2010) 89 *North Carolina Law Review* 326, 339 – 345.

[231] Pasquino argues that constitutional control organs are not 'supreme or sovereign in any sense of that word' – Pasquino (n 129 above) 41.

[232] Fallon (n 190 above) 1723.

[233] G Silverstein 'Singapore: The exception that proves rules matter' in T Ginsburg and T Moustafa (eds) *Rule by law: The politics of courts in authoritarian regimes* (2008) 81.

[234] Pasquino (n 129 above) 38.

[235] M Troper 'The logic of justification of judicial review' (2003) 1 *International Journal of Constitutional Law* 99, 119.

any other organ in charge of constitutional interpretation.[236] To this extent, a constitution that can be amended more easily may serve as a constraining factor on judicial activism.[237] Armstrong, therefore, suggests that democratic objections against judicial review should be directed against stringent amendment procedures rather than on the institution of judicial review itself.[238]

However, constitutional or legislative amendments of the law that provided the basis for the judicial determination to counteract certain unfavourable judicial determinations might constitute an undesirable political backlash. Constitutional amendments have, for instance, been used in the US by legislative bodies to counter progressive judicial decisions on gay rights.[239] The main trouble with constitutional amendments is that in countries where there is no strong democratic culture and strong opposition, there is no real difference between legislative and constitutional amendment procedures, despite the fact that constitutional amendments have to pass through more stringent procedural hurdles. The problem in Zimbabwe and the frequent resort to constitutional amendments to reverse judicial decisions is rooted in the dominance of legislative organs by a single party. Even strict constitutional amendment procedures do not provide sufficient safeguards to ensure the effective functioning of the institution of judicial review, especially when powerful figures oppose the decisions.

With a view to counter regressive and reactionary constitutional amendments, the Indian Supreme Court developed the 'basic structures' doctrine whereby certain provisions of a constitution that outline the basic structure of the Indian state envisioned by the drafters of the Constitution may not be amended even following the procedure set out by the Indian Constitution.[240] The South African Constitution similarly empowers the Constitutional Court to 'decide on the constitutionality of any

[236] Pasquino (n 129 above) 41.
[237] D Solove 'Constitutionalism and legitimacy' http://www.concurringopinions.com/archives/2008/05/constitutionali.html (accessed 3 January 2011).
[238] Sinnott-Armstrong (n 182 above) 387. Shapiro similarly observes that interpretation involves some law making and the extent to which 'this law making interferes with democracy depends on how easy it is for the legislature to legislate' – M Shapiro 'The European Court of Justice: Of institutions and democracy' (1998) 32 *Israel Law Review* 3, 3.
[239] For such instances in the LGBIT rights litigation in the US, see Keck (n 166 above).
[240] *Keshavananda Bharati v State of Kerala*, 1973 A.I.R. 1461 (S.C.) where the Indian Supreme Court held that, although there are no express words in the Indian Constitution limiting the power conferred on Parliament to amend the Constitution, the power of constitutional amendment is not unlimited or unrestricted. The Court concluded that the Constitution does not entitle Parliament to amend constitutional provisions in such a way as to alter or affect the basic structure of the Constitution. Former Indian Chief Justice Bhagwati described this judgment as the 'most remarkable instance of judicial activism, for it has gone the farthest extent in limiting the constituent power of Parliament' – P Bhagwati 'Judicial activism and public interest litigation' (1984-1985) 23 *Columbian Journal of Transnational Law* 561, 562.

amendment to the Constitution'.[241] The application of the doctrine, however, begs several questions such as the standards to determine which provisions are basic and, therefore, cannot be amended. No wonder that this doctrine has not attracted the attention of courts around the world. For instance, the Tanzanian Court of Appeal has rejected the doctrine as inapplicable in Tanzania in a case that challenged the constitutionality of a constitutional amendment.[242]

5.3. A centralised system of constitutional review

In many European countries, the centralised or concentrated system of constitutional review, where only a constitutional court or council is granted the first and final power of constitutional review, is adopted with a view to ameliorate the counter-majoritarian difficulty emanating from constitutional review.[243] It is for this reason that the concentrated system is more common in countries with a traditional emphasis on the principle of parliamentary supremacy and separation of powers.[244] The concentrated form of judicial review is underpinned by the assumption that constitutional control is not merely a judicial but also a legislative and political function, which may not be conducted by every judge and every court.[245] It sends a nominal message that not every ordinary court and judge is superior to and can decide on the constitutionality of laws representing the views of elected majorities.[246] Moreover, in a concentrated system, it is not just legislative and executive action but also judicial decisions that can be the subject of constitutional review.

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[241] Constitution of the Republic of South Africa Act no 108 of 1996, section 167(4)(d). However, it is not clear whether the Constitutional Court will assess compliance with the procedural prescriptions for constitutional amendment, or whether the Court may also establish its own version of the basic structures doctrine to invalidate even amendments that are entered in accordance with established procedures. In other words, the substantive grounds based on which the Constitutional Court will decide on the constitutionality of constitutional amendments are not explicitly provided. Perhaps the Bill of Rights can provide the substantive standard. In that case, international human rights law will be relevant based on article 39(1)(b) of the Constitution which requires the Court to consider international law in interpreting the Bill of Rights.

[242] The Court refused to assess the constitutionality of the amendment as the amendment is itself part of the Constitution – *Honorable Attorney General v Reverend Christopher Mitikila*, civil appeal no 45 of 2009 (17 June 2010). In Brazil, however, the Federal Supreme Court has accepted the doctrine to invalidate amendments 'that imply an effective violation of its essential core' – Mendes (n 29 above). There may also be countries that explicitly prohibit the amendment of certain provisions of the Constitution in which case courts may invalidate amendments to such provisions as unconstitutional. For a discussion of the judicial review of constitutional amendments, see K Gozler *Judicial review of constitutional amendments: A comparative study* (2008).

[243] Shapiro and Stone Sweet (n 146 above) 147.

[244] Finck (n 218 above) 126 noting that countries that prefer the centralised system of judicial review 'tend to adhere more rigidly to the doctrine of separation of powers and the supremacy of statutory law'.

[245] Ferejohn (n 218 above) 52.

[246] H Rupp 'Judicial review in the Federal Republic of Germany' (1960) 9 *American Journal of Comparative Law* 29, 32 observing that the decision to centralise judicial review in Germany was born out of the 'thought that the dignity of the legislative department of government would be put in jeopardy if a lower court judge had the power eventually to pass with finality on the question whether a certain statute violated the Constitution or not'; Ferejohn (n 218 above) 55 noting that the American or diffused model of constitutional review is easier to reject on democratic grounds than the concentrated European model and that the tensions between democracy and legality are much less sharply drawn in the European mode

The centralised form of constitutional review, therefore, partly ameliorates the counter-majoritarian effect of constitutional review by limiting the power of review of decisions resulting out of democratic deliberations to a single eminent constitutional adjudicator, which exists outside the ordinary judicial structure, or to the highest court in the country.[247] Strong adherence to the principle of parliamentary supremacy and separation of powers ideologies, the absence of the principle of *stare decisis* coupled with the attending potential inconsistencies and even contradictions, and the traditional distrust of the judiciary have led to the prevalence of the concentrated system in civil law countries.[248] The centralised system of constitutional review is, therefore, part of the structural tools designed to soothe the tension between democracy and constitutional review.

5.4. The Canadian approach: Inclusion of overriding clause

In Canada, legislatures are allowed to preclude judicial review of legislation by explicitly or impliedly excluding judicial review, or by explicitly indicating in a primary statute − not subordinate legislation − that the legislatures intended to deviate from the Canadian Charter of Rights. The 'notwithstanding clause' under section 33 of the Charter grants the legislature the power to override rights in the Charter.[249] The clause offers the flexibility that is required to ensure that the last word is held by the elected representatives of the people rather than by the courts in the (unlikely) event of a decision of the courts that is clearly irreconcilable with profoundly embedded public values, or is otherwise absurd.[250] Also generally, judicial decisions in Canada 'usually left room for a legislative response, and usually received a legislative response'.[251] Canadian judges behave strategically in decision-making roles,

[247] Shapiro and Stone observe that constitutional courts 'occupy their own 'constitutional' space, a space neither 'judicial' nor 'political'' – Shapiro and Stone Sweet (n 146 above) 344.
[248] Cappelletti (n 43 above) 138.
[249] Canadian Charter of Human Rights and Freedoms (Part I of the Constitution Act, 1982). Section 33 reads as follows:
(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. Any notwithstanding clause limiting rights must be renewed every five years; otherwise it expires. See D Gibson *The law of the Charter: General principles* (1986) 125 noting that this is a uniquely Canadian development with no equivalent in either international human rights law or western democratic human rights declarations.
[250] Some describe statutes that include notwithstanding clauses as 'in your face' statutes − Sinnott-Armstrong (n 182 above) 381.
[251] P Hogg ''Discovering dialogue' (2004) 23 *Supreme Court Law Review* 3, 4&6; P Hogg and A Bushell 'The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights is not a bad thing after all)' (1997) 3 *Osgoode Hall Law Journal* 75. Hogg notes that the political unpopularity and opposition the inclusion of the overriding clause attracts − as opposed to the symbolic force of a very popular Charter of Rights − will presumably ensure that the clause is rarely invoked. The clause is, therefore, a safety valve to be used only on rare occasions − P Hogg 'A comparison of the Bill of Rights and the Charter' in W Tarnopolsky and G Beaudoin (eds) *The Canadian Charter of Rights and Freedoms: Commentary* (1982) 11. Indeed, the federal government has never invoked the notwithstanding clause.

'taking into account not only legal constraints (such as precedence and legal coherence) but also political circumstances'.[252]

The override clause appeases the trepidation that some have against judicial review − or rather judicial adventurism − and unacceptably 'political' judicial decisions. The Canadian approach is, however, a very loose mechanism that subjects human rights particularly of the minorities to simple majorities and essentially establishes pure parliamentary supremacy. The approach provides an easy and quick way of revising or repudiating judicial determinations by the legislature through ordinary legislative procedures.[253] Besides, the fact that the notwithstanding clause has generic effects on all future cases makes it inappropriate for individual analysis of and reaction to each case taking into account its own circumstances. An alternative to the Canadian approach could be to provide that the legislatures may overturn judicial decisions in each individual case but only after a decision has been taken by a court and through more rigorous procedures than simple majorities (such as a two-third majority requirement to reverse judicial determinations).[254] This can discourage instances of rejection of judicial determinations. The 'notwithstanding' clause, if and when exercised in advance, excludes any possibility of judicial assessment of compliance with the Charter of Rights − and the attendant possibility of political dialogue judicial decisions could trigger. A determination on a case, after it has been decided, as to whether or not to ignore such decision, ensures that conflicts between judicial and legislative views are not merely assumed but are resolved only when they arise and if necessary. Constitutional amendment procedures also provide an after-the-fact alternative solution to the Canadian futuristic and generic approach.

5.5. The British approach: Declaration of incompatibility

With the domestication of the European Convention on Human Rights,[255] British courts have been granted unprecedented power to declare a law − primary statutes and subordinate laws − incompatible with the Convention.[256] However, such declaration is not binding on the legislature as the validity of the

[252] Navia and Ríos-Figueroa (n 1 above) 196.
[253] M Tushnet 'Forms of judicial review as expressions of constitutional patriotism' (2003) 22 *Law and Philosophy* 353, 369.
[254] Under the 1937 Constitution of Brazil, for instance, a declaration of unconstitutionality by the Supreme Court could be abrogated if the Congress approved the abrogation by a two-thirds majority in each house – M Sato 'Judicial review in Brazil: Nominal and real' (2003) 3 *Global Jurist Advances* 1, 4.
[255] See UK Human Rights Act 1998.
[256] Section 4 of the Human Rights Act 1998 provides: (4) Declaration of incompatibility
(1)Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
(2)If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

law remains intact. The approach was cautiously designed to maintain 'democratic entrenchment', that is to say, to ensure that the Human Rights Act and its application by courts do not compromise the supremacy of Parliament.[257] To take effect, therefore, a declaration of incompatibility must be followed by an amendment to or repeal of the law which has been declared incompatible with the Convention. So far, a declaration of incompatibility has effectively meant a declaration of unconstitutionality as British law-makers have responded positively to declarations of incompatibility.[258]

The adoption of the principle of conventional incompatibility, and the consistency in compliance with declarations of incompatibility, is presumably developed to avoid appeals against decisions of incompatibility, which have not been complied with by British legislatures, to the European Court of Human Rights. There is nonetheless no guarantee that British legislatures will reform laws that have been declared incompatible in every single case. It should be noted that the British parliament is not required to take remedial action in cases of declaration of incompatibility. It can only do so of its own volition. If such a mandatory requirement − of consistent remedial action and, hence, compliance − had been anticipated, there would have been no need to limit the power of British courts to declaration of incompatibility and not of unconstitutionality.

While the British approach effectively dispels the dilemma by leaving the ultimate and final power to accept or reject judicial determinations of incompatibility to elected representatives, it leaves human rights and the institution of judicial review in a disadvantaged position as merely advisory or recommendatory. And although the system might work in the UK where the political costs of rejecting a

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(3)Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
(4) If the court is satisfied—
(a) that the provision is incompatible with a Convention right, and
(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.
(6)A declaration under this section ("a declaration of incompatibility")—
(a)does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
(b) is not binding on the parties to the proceedings in which it is made.

[257] The idea of 'democratic entrenchment' was initially suggested by *Liberty*, a prominent human rights NGO, with a view to convince British legislatures that domesticating the European Convention on Human Rights need not compromise parliamentary supremacy − see *Liberty* 'A People's Charter' (1991) 4, 86 − 87 (London). This was in rejection of 'the conventional wisdom that a written bill of rights must go hand-in-hand with the politically unpalatable notion of judicial supremacy over Parliament' − R Maiman '"We've had to raise our game": *Liberty's* litigation strategy under the Human Rights Act 1998' in S Halliday and P Schmidt (eds) *Human rights brought home: Socio-legal perspectives on human rights in the national context* (2004) 87 − 110. Liberty proposed that statutes found to be in breach of the bill of rights by the courts be scrutinised by a special parliamentary committee and voted on by Parliament itself to determine whether they should remain in effect.

[258] In *A and others v Secretary of State for the Home Department* (2004), for instance, the UK House of Lords declared the indefinite detention provision of the Anti-Terrorism Act 2001 incompatible with the right to liberty and security (article 5) and the prohibition of discrimination (article 14) of the European Convention.

declaration of incompatibility are relatively high, it is unlikely that it will work in countries where legislatures are often recalcitrant even towards binding decisions of their own highest courts, let alone mere declarations of incompatibility.

5.6. The New Zealand approach: Indirect application of human rights

New Zealand has devised its own system of rights-based judicial review. In New Zealand, courts are not allowed to invalidate laws even if contradictory to the 1990 New Zealand's Bill of Rights Act. They are also not expressly allowed to declare laws incompatible with the Bill of Rights Act as is the case in the UK. The Bill of Rights Act is an ordinary statute which may be amended or repealed like any other ordinary statute and the provisions do not, unlike the Canadian Charter of Rights, override provisions in other laws. Courts may not, therefore, invalidate any statute for inconsistency with the Act.[259] Nevertheless, the Act requires courts to interpret all other statutes consistently with the rights contained in the Act.[260] New Zealand courts should mainstream the provisions of the Act into the interpretation and application of all other laws. The approach does not fit in classical definitions of constitutional review which involves the evaluation of government laws and other decisions based on constitutional standards. It rather constitutes an 'indirect' application of human rights.[261] The approach in New Zealand emanates from and strongly maintains parliamentary sovereignty more than the case in Canada and the UK.

It should be noted that the principle of constitutional avoidance generally requires that courts should attempt to interpret a law in line with the Constitution before invalidating such law as unconstitutional. The approach in New Zealand is, therefore, a general principle of constitutional interpretation in almost all jurisdictions that recognise constitutional review. Similarly, in countries whose constitutions only recognise non-justiciable directive principles of state policies as opposed to enforceable rights, as is often the case in relation to socio-economic rights, courts cannot invalidate laws based on the

[259] 1990 New Zealand Bill of Rights, section 4. For a descriptive and analytical assessment of the system in New Zealand, see S Gardbaum 'Reassessing the new Commonwealth model of constitutionalism' (2010) 8 *International Journal of Constitutional Law* 167; S Gardbaum 'The new Commonwealth model of constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, 727 – 732.

[260] 1990 New Zealand Bill of Rights, section 6. It provides: Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[261] For a discussion of the direct and indirect application of human rights in the South African context, see I Currie and J de Waal *The Bill of Rights handbook* (2005) Chapter 3. Section 39(2) of the South African Constitution number 108 of 1996 requires courts to apply human rights indirectly when interpreting statutes, the common law and customary law.

principles. Nevertheless, courts are generally allowed, sometimes required, to interpret laws in line with the directive principles.[262]

The indirect application of human rights is limited to the concrete case under consideration and does not imply any invalidation of laws enacted by democratically elected governments and, therefore, does not induce serious counter-majoritarian charges. To this extent, the indirect application of human rights is more democratically acceptable than direct application with the attendant power to strike down legislation.

6. Conclusion

The counter-majoritarian difficulty provided one of the principal reasons that justified the decision of the drafters of the Ethiopian Constitution to empower a political organ, the HoF, with the final power of constitutional interpretation. However, a close look reveals that the HoF itself can be challenged based on democratic theories. The current system of constitutional review in Ethiopia is not completely absolved from counter-majoritarian challenges. In addition, as argued in Chapter 3, the HoF lacks the requisite independence, impartiality and competence in adjudicating constitutional rights. The lack of independence and impartiality undermines its legitimacy. Most importantly, even if we assume that the structure and composition of the HoF is in line with democratic theories, it is argued that constitutional review by independent adjudicators does not undermine democracy. The fact that courts are not electorally accountable does not justify the complete politicisation of constitutional review in Ethiopia. The counter-majoritarian dilemma does not justify the repudiation of judicial review. With this view this Chapter discusses in detail the theoretical justifications of rights-based constitutional review by independent courts.

The most interesting aspect of the theoretical controversy surrounding judicial review and democracy is that the contention that constitutional judges in most jurisdictions are not democratically accountable forms at the same time the basis of objections to and justifications for judicial review. For those supporting pluralist or majoritarian conceptions of democracy, judicial review by unelected judges is democratically illegitimate, and, therefore, unacceptable. In contrast, for those who support judicial review, its value lies exactly in the fact that constitutional judges are not subject to popular vote and

[262] In some countries, such as India, despite a clear indication of their non-justiciability, the directive principles have been used to read-in several socio-economic rights in the right to life guarantee. For a detailed discussion of the activism of the Indian Supreme Court, see Bhagwati (n 240 above); U Baxi 'Taking suffering seriously - Social action litigation in the Supreme Court of India' (1979/1980) *Delhi Law Review* 93 positing that '[t]he Supreme Court of India is at long last becoming … the Supreme Court of Indians'.

direct political influence. The core of the thesis in this Chapter is that, although it is objectionable based on majoritarian democratic theory, the exercise of constitutional review by politically independent constitutional adjudicators is normatively and practically justifiable and desirable. Rights-based constitutional review does not undermine democracy. It rather reinforces democracy. Quite simply, a country that recognises constitutional review by a politically independent body (whether judicial or non-judicial) is by no means less democratic than a country that does not.

Constitutional democracy does not insist that all decisions should only be made by directly elected bodies. It rather entails limits on the range of choices available to elected governments. Constitutional democracy is not merely about 'counting heads'. This Chapter argues that the theoretical objection that judicial review is counter-majoritarian is not well-founded. Constitutional democracy must be disentangled from obsolete majoritarian or populist understandings based merely on direct electoral accountability.[263] The objections to the institution of judicial review excessively overstate the value of voting and electoral accountability as the only determinant of democratic legitimacy.[264]

Even if one concedes that judicial review is actually non-democratic, it is still the only neutral and practical mechanism that can ensure the effective protection of human rights which are necessary to maintain a level playing field for the proper functioning of democracy. Independent constitutional adjudicators serve as the principal constituencies for human rights. Political organs often tend to systematically undermine human rights in pursuance of other competing policies, or out of political convenience and self-interest. Independent constitutional review has the institutional advantage of protecting rights better than political actors and processes. Electoral accountability is but one − certainly not the only − of the competing values that underpin a constitutional state. Neutrality, independence and competence certainly enhance the legitimacy of courts and their decisions.

Empirically, as well, constitutional adjudicators often agree with representatives on what the constitution requires in particular instances, thereby reinforcing and further legitimising decisions of majoritarian organs. Judicial review is not always counter-majoritarian. Moreover, there is little evidence to support the claim that legislators consistently represent the will of the majority. Legislative decisions can, just like judicial decisions, at times be counter-majoritarian when seen against the views

[263] Eisgruber (n 131 above) 47 observing that '[i]t is hard to believe that the only truly democratic form of government is an archaic version of parliamentary government that almost nobody wants and that may no longer exist anywhere in the world'.
[264] See Lever (n 131 above) arguing that even appointment is in line with democratic theory especially when special skill or relationship is needed, and that judges are accountable although not through elections.

of the people.[265] In practice, the proliferation of judicial review mechanisms which accompanied the emergence of constitutional democratic states has undermined the relevance of the theoretical objection to the institution of judicial review.[266] A constitutional state necessarily implies a limitation on the power of transient electoral majorities. In a constitutional state, judicial review not only protects constitutional rights but also ensures that the rules of the democratic game remain fair and that current majorities do not abuse their powers to entrench themselves.[267]

It is nonetheless clear that courts and legislatures around the world acknowledge the democratic legitimacy deficit in the exercise of the power of judicial review. There is, therefore, a judicial tendency to use different interpretative tools, such as the political question doctrine, to avoid excessive intrusion into the functions of the democratically elected organs. The interpretative tools, which generally help courts either to moderate their decisions or even avoid deciding the issue altogether, are the most widely recognised mechanisms crafted by the judiciary itself to mitigate the counter-majoritarian implications of judicial review and avoid potential political and social backlash. Legislators, particularly in countries that uphold a strong tradition of parliamentary supremacy, also have attempted to design a system that empowers independent constitutional adjudicators to protect rights while at the same time retains the final say on the constitutionality of primary statutes with democratically elected representatives.[268]

Contrary to popular belief that judicial review leads to judicial supremacy, constitutional amendment procedures enable the democratic majority to overturn judicial determinations – thereby ensuring that

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[265] E Chemerinsky 'The vanishing Constitution' (1989/1990) 103 *Harvard Law Review* 44, 83 observing that all state institutions are 'in some senses majoritarian, and in some senses not'.

[266] Brown observes that judicial review is now considered as a prerequisite to democratic development – see N Brown 'Judicial review and the Arab World (1998) 9 *Journal of Democracy* 85.

[267] Issachnaroff identifies two major justifications for the idea of constitutionalism in the form of constraints on majoritarian rule, and constitutional review: to protect individual and minority rights including against majoritarian will, and also to ensure that 'majorities can change, that the rules of the game remain fair, and that those elected remain accountable to the electorate' – S Issachnaroff 'Constitutionalizing democracy in fractured societies' (2003/2004) 82 *Texas Law Review* 1861, 1862 – 1863.

[268] In addition to the soothing mechanisms identified in this Chapter, many constitutions have adopted term limits on constitutional judges and supermajority appointment procedures with a view to enhance the continuous political accountability of judges – K Malleson and P Russell (eds) *Appointing judges in an age of power: Critical perspectives from around the world* (2006) 3. See also M Schor 'Squaring the circle: Democratizing judicial review and the counter-constitutional difficulty' (2006) *Suffolk University Law School Faculty Publications*, Paper 29 http://lsr.nellco.org/suffolk_fp/29/ (accessed 5 June 2012). In some states in the US, supermajority rules for judicial decisions have been introduced. In such cases, before a law can be invalidated as unconstitutional, the decision should be supported by a supermajority of the judges. The Nebraska Constitution, for instance, requires five out of seven judges to invalidate a state law. The North Dakota Constitution similarly requires five out of six judges to invalidate a state law – for a discussion of the history and practice of the supermajority rules in judicial systems in the US, see E Caminker 'Thayerian deference to Congress and Supreme Court supermajority rule: Lessons from the past' (2003) 78 *Indiana Law Journal* 73.

the democratic majority maintains the final say on constitutional issue. Super-majority constitutional amendment procedures provide the most effective procedural safeguard to ensure that judicial decisions on human rights issues transcend majority views and temporary political sentiment. In countries where democratic ideals have not taken root, however, even constitutional amendment procedures may merely camouflage authoritarianism and legitimise disregard to the judiciary. Constitutional amendments may not also provide the necessary brake against populism and demagoguery even in democratic states.[269] The unique review systems in the UK and Canada create formal opportunities for dialogue between the different branches of government than systems that grant the final say to courts.[270] The systems may be effective in ensuring the realisation of human rights in these countries given their context characterised by stiff electoral competitions and influential CSOs which make outright rejection of judicial determination of rights potentially politically costly.[271] However, the effectiveness of similar systems in countries with less democratic pedigree is questionable.

In the Ethiopian context, even if an independent constitutional adjudicator had been established, the constitutional amendment procedure could have provided a political mechanism to deal with instances of judicial adventurism. Similarly, as recommended in Chapter 3, the centralised constitutional review system provides another mechanism to mitigate the alleged undemocratic implications of judicial review. On top of this, the different interpretive tools could have been used by the constitutional adjudicator to avoid excessive intrusion into the legislative and policy sphere. A modified version of the Canadian system also provides an option. However, given the lack of a human rights culture in Ethiopia, the temptation to simply use laws to reverse judicial decisions is likely to be more rampant. In fact, as pointed out in Chapter five, the government has already enacted several laws with ouster clauses which have excluded courts from reviewing the legality of administrative agencies. As such, the Canadian system will likely fail to safeguard constitutional rights in Ethiopia. It is therefore recommended that

[269] In the US, for instance, conservative citizen initiatives which provide for the inclusion of constitutional or statutory proposals on the ballot at an election have been used to reverse judicial decisions protecting the rights of sexual minorities – see generally T Keck 'Beyond backlash: Assessing the impact of judicial decisions on LGBT rights' (2009) 43 *Law and Society Review* 151.

[270] Gardbaum (2001) (n 259 above). Gadbaum considered Canadian and British models of judicial review as 'acceptable to both those who defend and challenge judicial review' creating 'institutional balance, joint responsibility, and deliberative dialogue between courts and legislatures in the protection and enforcement of fundamental rights' – 710. See also J Hiebert 'New constitutional ideas: Can parliamentary models resist judicial dominance when interpreting rights?' (2003-2004) 82 *Texas Law Review* 1963 arguing that the new models of judicial review have the potential 'to encourage critical reflection on the merits of legislation from a broader spectrum of institutional actors than is normally associated with a bill of rights'. Tushnet (n 253 above) and Waldron (n 9 above) also observe that weak-form judicial review, such as the one in the UK and Canada, can spur better inter-institutional engagement and deliberation, ensure easy compliance and help avoid majoritarian backlash.

[271] Gardbaum (2001) (n 259 above) 724.

Ethiopia should establish an independent centralised system of constitutional review. The constitutional amendment procedure provides an exceptional political tool to reverse decisions that are clearly unacceptable. However, an easy resort to the constitutional amendment process may constitute a violation of the independence of the constitutional adjudicator.

It can be concluded that the theoretical opposition to the institution of constitutional review by independent adjudicators has largely been rejected, as can be witnessed in the proliferation of the institution worldwide. Courts are seen as guarantors of rights and neutral referees of constitutional democracy. Nevertheless, the democratic legitimacy deficit does often provide the theoretical basis for opposition to and criticism of the outcomes of judicial decisions. But these instances of criticism are often objections to 'judicial activism' or the expansive exercise of the power of judicial review, and not to the institution of judicial review as such. There is a need to distinguish objections targeted at judicial review from those targeted at judicial activism or lack thereof (judicial restraint). The debate should, therefore, focus not on the legitimacy of constitutional review but on how courts exercise judicial review, that is to say, on how activist or restrained constitutional adjudicators should be in reviewing decisions of political organs. The debate should be on the principles and practices of constitutional interpretation.