Comparative Judicial Review and Public Policy

Edited by Donald W. Jackson
and C. Neal Tate

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To John Marshall,
who certainly wrought far more than he knew
at the creation of Judicial Review

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Part I

Comparative Judicial Review and Public Policy

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Comparative Judicial Review and Public Policy: Concepts and Overview

C. Neal Tate

> The authority of a court to declare laws and official acts unconstitutional is a practice which sheds a strong light on the interplay of law and politics. It is a judicial act which gives to judges so obvious a share in policy-making that where it prevails there is little room left for the pretense that judges only apply the law.
>
> (Ehrmann, 1976: 138)

That judicial review is relevant to public policy making should be no surprise. For example, at this writing, the legislature in my home state of Texas has recently completed its fourth straight session (one regular, three special) dedicated completely or heavily to an effort to alter state policy to fund public education more equitably. Clearly, legislators have done so not because they wish to; their behavior has consistently suggested that they would very much prefer to avoid the issue, and they face budgetary strictures that make the task extraordinarily unpalatable. Rather, they are doing so because they have been ordered to by state courts that have held existing funding arrangements unconstitutional. All along, legislators have done so under the threat that if they fail to come up with a new, satisfactory funding policy, a reallocation of state funds from richer to poorer school districts will be ordered by a special master already appointed by the district judge supervising their work. That judge has already once found wanting a statute they passed to solve the problem, and many knowledgeable legislative observers expect that the same fate awaits the law resulting from their latest effort.

This involvement of the state's judiciary in Texas' education funding policy through the exercise of judicial review is by no means unique. Currently, various

of the state's governing authorities are also under state or federal judicial mandates to alter existing public policy concerning prisons, the election of state judges, and the districting of city council seats in Dallas. What is true for Texas is also true for many other American states and localities, and for the nation as a whole.

What is less widely recognized by political scientists and policy analysts, journalists, politicians, and others concerned with the making and content of public policy, is that equally dramatic examples of the public consequences of the exercise of judicial review are easy to find outside the United States, a nation that is frequently thought to be unique because of the strong policy role played by its courts through judicial review. This symposium provides perspectives that should help students of judicial review and public policy revise their assumption of its exceptional and American character, and establish a more accurate picture of its worldwide significance. Before turning to a review of some of the evidence relevant to that purpose, however, the subject of this book needs some clarification.

TYPES OF JUDICIAL REVIEW

From the U.S.-centered perspective, the meaning of judicial review is well-understood: It refers to the ability of a court to determine the acceptability of a given law or other official action on grounds of compatibility with *constitutional* forms. This form of judicial review is the primary focus of most of the chapters in this book, as it probably is for the public law field as a whole. But in fact there are more shades of meaning to "judicial review," if one considers its use around the world. To comprehend how the authors in this symposium have used the term it is important to spell out the variety of practices that can be labeled judicial review. Several aspects of judicial review are relevant when one examines judicial review in comparative perspective. I will discuss the differences between the constitutional and administrative, direct and indirect, *a priori* and *a posteriori*, abstract and concrete, and all courts and constitutional court review. In addition, I will introduce the concept of the coerciveness of judicial review.

Constitutional and Administrative Review

One of the first necessary clarifications concerns the identification of judicial review with constitutional review. It is this identification that, above all, contributes to the tendency to see judicial review as a policy device of most relevance in the United States. It is certainly true, as David Danelski, Peter Russell, and Mary Volcansek all document in their chapters in this volume, that the nineteenth-century United States Supreme Court should receive credit for the modern formulation of the practice that assigns to courts the power to declare laws and other government actions unconstitutional. But, as Russell notes in the case of

Canada and the Commonwealth, the judicial review of administrative actions has been in existence for much longer.[1]

Administrative judicial review occurs when the courts consider whether the actions of government agencies (other than the courts) are legally appropriate and proper or represent an abuse of discretion beyond what the law allows. Relevant laws, including constitutions, may provide a definition of what is appropriate exercise of bureaucratic discretion. For example, the Philippine Constitution of 1987 speaks of the courts' ability to correct "grave" abuses of discretion. Whether constitutional or not, such definitions would need to be interpreted in the context of other statutes or rules specifying the duties of agencies. But, as written, they provide few limits on what judges may choose to regard as an appropriate or inappropriate exercise of discretion.

What I understand to be the conventional judgment sees constitutional review as the more important, more dramatic means through which judges make policy. But, as Maurice Sunkin demonstrates in analyzing requests for leave to appeal the decisions of administrative agencies in Great Britain, one could certainly argue that administrative judicial review is the more significant policy institution, from the point of view of the ordinary citizen trying to navigate the government bureaucracy in search of a service, a benefit, or redress for a complaint.

Direct and Indirect Review

One classic work on judicial review (McWhinney, 1969: 13) distinguishes between direct and indirect judicial review. Direct review is identical to constitutional review as defined above. E. McWhinney defines indirect review as occurring

> where a court, either not having the power to annul or override enactments of the legislature as "unconstitutional" or else simply choosing not to exert that power in the instant case, says, in effect, in the process of interpretation of a statute, that the legislature may or may not have the claimed legislative power, but it has not, in the language it has used in the enactment in question, employed that power.

One might be hard-pressed to draw a sharp boundary line between indirect and administrative judicial review, since legislative enactments depend inevitably on administration. But the distinction McWhinney makes is important to one wishing to view the policy significance of judicial review from a comparative perspective because it draws attention to the fact that courts need not exercise constitutional review to alter even the formal enactments of other policy-making institutions. When courts are exercising indirect judicial review they conclude typically that "Parliament could not have intended" the result that is being rejected because that result would be inconsistent with some other clear intention of Parliament, common law principles, or the provisions of well-accepted legal principles. Such judicial pronouncements go well beyond the typical adminis-

trative review finding that an agency official has committed a grave abuse of discretion that must be overturned.[2]

As McWhinney notes, the fact that a nation has formal constitutional judicial review does not prevent its judges from exercising indirect judicial review. In fact, both the canons of legal construction as well as political realities impress upon courts the desirability of avoiding constitutional review unless absolutely necessary. This means that in practice the differences in the exercise of judicial review between courts possessing and those not possessing constitutional review should depend upon its existence less than is sometimes assumed by analysts who place great emphasis on constitutional review,[3] and more upon other factors, perhaps legal or political cultures and traditions and the personal characteristics and preferences of judges.

Martin Edelman's chapter on the Israeli Supreme Court describes its search for a formula to protect rights and affect regime policies in the absence of constitutional judicial review or, indeed, of a written constitution. It suggests both the possibilities for the exercise of indirect judicial review and the importance of self-imposed views of what it is proper or possible for judges to do in challenging legislative supremacy through judicial review.

A Priori/A Posteriori and Abstract/Concrete Review

Two further basic distinctions that are important in the comparative context stress whether the constitutionality of a law or official action is determined before or after it takes effect, and whether a declaration of unconstitutionality can be made only in the context of a specific legal dispute. In the American federal context, judicial review occurs exclusively after the law or action has been promulgated or taken effect (*a posteriori*) and only as a result of the involvement of litigants in a concrete case or controversy. But in many nations, especially those of Western Europe, judicial review may take place also or even exclusively in advance of the promulgation or effectivity of the law or action (*a priori*) and may also be exercised in the abstract, in the absence of an actual case or controversy stimulating its exercise.[4]

A court that can engage in *a priori* and abstract review would appear to have maximum potential for policy influence using constitutional review. After all, such a court could outlaw a statute or regulation before it ever began to be implemented, and on the basis of a hypothetical constitutional argument about its effect. Alec Stone's analysis of the development of abstract review in Western Europe confirms that the combination is a powerful one. On the other hand, one must remember that the most restrictive combination, *a posteriori* concrete review, has hardly relegated the U.S. Supreme Court to a minor policy role. As usual, it is apparent that other factors also must influence how courts use judicial review to develop their policy roles. One of these surely is whether judicial review is in principle available for exercise by all courts or only by a designated constitutional court.

All Courts and Constitutional Court Review

Another distinction important to understanding judicial review, at least in its constitutional form, has to do with the extensiveness of the practice. The United States employs what one might call an all courts model. Any court may exercise judicial review, and a declaration of unconstitutionality on the part of a lower court judge need not be approved by any higher authority to be effective. But in many nations, judicial review may be exercised only by a specially designated court. This may be referred to as the constitutional court model.

The policy influence of the judiciary must surely be maximized when a nation employs the all courts model. The example of the current policy situation in Texas used to introduce this chapter illustrates how important the policy making of lower courts can be when the all courts model is in place. Restricting the power to declare legislation and regulations unconstitutional to a constitutional court might increase the breadth of the typical constitutional questions posed to the courts, but it also sharply reduces the number of occasions and range of policy issues on which courts can be invited (or can invite themselves) to exercise judicial review.

On the other hand, one should remember that constitutional review is not the only form of judicial review available to courts. Indirect and administrative review are always available to all courts in the hierarchy. The extent to which they are actually exercised by courts across the judicial structure probably will be increased where all courts constitutional review does exist. But we do not know what other factors may influence nonconstitutional courts to more or less assertiveness in their exercise of judicial review.

Coerciveness of Review

William Kitchin's chapter (also see Kitchin, 1990) suggests that nations differ in what he calls the coerciveness of judicial review. His point is an important one even if events in the (former) Soviet Union have now overtaken his particular analysis. At one extreme, courts exercising judicial review have the authority to require other litigants and, more importantly, government officials to act constitutionally or to cease acting unconstitutionally.[5] Kitchin calls this coercive judicial review. At the other extreme, the ability of courts to declare official laws or actions void on grounds of unconstitutionality may be very limited or restricted. In between, the opinions of the courts regarding constitutionality may be advisory, but not mandatory or coercive in their effects.

To some extent, Kitchin's conceptualization overlaps with the categories already introduced: judiciaries lacking constitutional judicial review are "restricted," while those having constitutionally based judicial review are "coercive" or "advisory," at least in principle. But by calling our attention to whether judicial review as exercised is only advisory or in fact mandatory, Kitchin expands our ability to understand the policy significance of judicial review around

the world. Thus, coerciveness of review may be one more useful addition to our cornucopia of concepts.

The contemporary world of judicial review contains examples of political systems illustrating the types of judicial review just outlined. The American model requires that judicial review be concrete and *a posteriori*, but it is exercised via a mandatory or coercive order by all judges. Abstract, *a priori*, coercive review by a constitutional court occurs in France. Indirect and administrative judicial review occur wherever judicial systems are independent enough to exercise any policy role.

ORIGINS OF JUDICIAL REVIEW

The origins of constitutional judicial review are varied. The chapters in this volume illustrate this variety with examples of judicial review systems that are indigenously developed and externally imposed, ancient and very modern, still largely imminent (as was the case in the "reforming" Soviet Union), and debatably under development (in Israel). In reviewing the well-documented case of the inclusion of judicial review into the postwar Japanese constitution and comparing that case with the more obscure American adoption, Danelski has demonstrated how closely connected judicial review is with the development and, indeed, the manufacture of democratic government. Volcansek shows how the Italian institution was crafted with both American and European experiences in mind to acknowledge the realities of postwar Italian politics, including especially the continued domination of the judicial hierarchy by career judges with fascist backgrounds.

Russell's account of the origins of Canadian judicial review paints a picture of a judiciary initially diffident toward its exercise as a result of its British origins, colonial practice and objectives, and the requirements of a precarious federalism. Despite those origins, judicial review now has been pushed to the center of the policy process because of the inability of other political decision-makers to cope with the most contentious of the issues arising from that very federalism—constitutional developments that both deliberately and as a matter of functional necessity magnify its use in determining crucial policy issues, and the influence of the model prevailing below its southern border.

Stone's analysis describes the origins and spread of abstract judicial review in Europe. Significantly, a perceived need to provide a mechanism to protect the fundamental rights of citizens, a reaction to fascism or militaristic authoritarianism, was a prime factor leading to the (re)creation of constitutional courts in Austria, Germany, Spain, and, by inference, Greece, Italy, Portugal, and, perhaps, the European Community. My research indicates that faith in the efficacy of judicial review as a bulwark against authoritarianism also underlay the inclusion in the 1987 Philippine constitution of what must be one of the world's most expansive grants of judicial review authority.

Kitchin analyzes the bases for and the early experience with judicial review

in the Soviet Union, in effect being "present at the creation" (before events so overtook reforms that the Union entirely collapsed). Edelman recounts the struggle of Israel to establish a written constitution with judicial review and explains the political and religious factors promoting and opposing its establishment. He shows us a political system "before the creation," and helps us understand why the institution of judicial review can be resisted in an otherwise largely liberal state.

JUDICIAL REVIEW AROUND THE WORLD

The use of constitutional judicial review to make sometimes very dramatic public policy is not an American monopoly, but is increasingly characteristic of judiciaries around the world. In Canada, the Supreme Court has been thrown, probably initially unwillingly, into the thick of the thorniest disputes about the nature and future of the Canadian Confederation as a result of the adoption of the Charter of Rights of 1982. By deciding against the cultural sovereignty of Quebec and in favor of minority (in this case, English) language rights in several cases, it is being given credit, at least by some critics, for driving one more nail into the coffin of Canadian national unity.[6] The nature of the growth of judicial review in Canada leads Russell to conclude his chapter by arguing that

> with the addition of Charter [of Rights] review to federalism review and with a reasonably activist judiciary sustained by a public still relatively naive and unrealistic about judicial power, . . . the importance of judicial review in Canada at the present time equals if it does not exceed its importance in the United States.

Volcansek's chapter echoes Russell's conclusion when she begins by noting that "in practice, European courts have been noticeably more aggressive in asserting their authority of judicial review than have their brethren in the United States." Further, her review of the development and use of judicial review in Italy concludes that the practice has become "stable," and that, in adapting judicial review to the Italian context, the Constitutional Court has achieved a legitimacy that shapes the actions of other political actors and "the potential to use it to profoundly influence the nation's life." This is so even though Italy arguably lacks most of the preconditions sometimes assumed to be necessary for the effective exercise of judicial review.

Also focusing on the European context, Stone's analysis makes clear the tremendous policy impact and still greater potential inhering in abstract judicial review, a practice that has spread across Europe since 1950 precisely in those nations that traditionally abhorred American-style judicial review. Stone argues that much public policy in France, Germany, Austria, and Spain has become "juridicized" as a result of the work of the constitutional courts in those countries, and that, when exercising their powers of abstract review, these courts can usefully be thought of as "third legislative chambers."

That judicial review might have become newly relevant as a result of the legal/constitutional changes occurring in the then reforming (and by now, former) Soviet Union is the clear implication of Kitchin's analysis. Following a useful conceptual scheme for classifying the practice of judicial review by national judiciaries, Kitchin suggests that judicial review in the Soviet Union (as it was then) had already become the "independent-advisory" type. While this kind of judicial review is not likely to be associated with the most dramatic and intrusive judicial policy initiatives, Kitchin notes that it would nevertheless have been a significant change from the USSR's previous "dependent-restricted" model. He also demonstrates that there were already (at the time of his writing) some impressive instances of the exercise of judicial review by the then recently established Committee on Constitutional Oversight. In its first finding of unconstitutionality, the Committee overturned a politically sensitive public order decree of President Gorbachev. Later, the Committee's agreement even to consider the constitutionality of the USSR's system of residency permits led to the immediate abolition by the Council of Ministers of many of the most restrictive and burdensome rules that were then a part of the system, before the Committee had an opportunity to rule against them.

While it is certainly far too early to be sanguine about the progress of political reform in the "Commonwealth of Independent States" that has largely replaced the Soviet Union, much less about the future of the leaders promoting change, it does appear that constitutional democracy and judicial review have a chance of becoming more powerful tools in the hands of a new set of important "Commonwealth" or "State" policymakers, possibly to include constitutional judges.

The discussion so far has shown that the relevance of judicial review to public policy making extends well beyond the boundaries of the United States to Canada and the European continent, even to so previously unlikely a political system as that of the (former) Soviet Union. Given that, it should hardly be surprising to find that judicial review also has been an important public policy influence outside the industrialized West.

In the Philippines, as Tate's chapter shows, the Supreme Court has had a long history of involvement in important policy questions through the mechanism of judicial review. Indeed, one might conclude that the Court had on more than one occasion the opportunity to shape the very nature of the constitutional regime. Thus in the early 1970s, the Supreme Court validated 14 years of subsequent dictatorship by Ferdinand Marcos when it could not bring itself to declare ineffective a new constitution guaranteeing one-person rule by the incumbent president, even though it invalidated the ratification procedures Marcos had concocted to adopt the constitution. Later, the same court helped ease the dictator from power when it refused to invalidate his calling of the "snap" presidential election that led to his downfall, after he had realized that calling the election was a strategic mistake.[7]

It is difficult to imagine how a court might assert more dramatic control over the policy process than that asserted by the Supreme Court of India, the keystone