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Comparative Judicial Review

Allan Ides

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FOREWORD: COMPARATIVE JUDICIAL REVIEW

*Allan Ides**

Constitutionalism begins with a profound and universal commitment to the rule of law. Consistent with that commitment, all actors within any given constitutional system, governors and governed alike, are subject to and bound by the law of the constitution. The dilemma of constitutionalism is how one transforms this rule-of-law commitment into a sustainable practice. In fact, there is no fail-safe method since any approach to constitutional enforcement must necessarily be applied by ordinary human beings subject to the very vicissitudes constitutionalism is meant to curb. There is, however, a preferred methodology, one that has evolved through the Anglo-American system of justice, namely, the process of judicial review, by which I mean the enforceable constitutional review of government action by an independent judicial body.

Although judicial review is most often thought of as a structural check on the exercise of governmental power, it can also be characterized accurately as a fundamental right held by the constitutional constituency. Indeed, it is the most fundamental right, for without it (or some yet-to-be devised alternative) the rule-of-law promise of constitutionalism must remain nothing more than an analgesic illusion. This is as fully true of domestic constitutions as it is of transnational constitutions. In fact, it is now safe to say that a constitution without an effective method of judicial review is not a constitution at all. The extent to which the judiciary lacks independence from those who exercise political power is a direct measure of the frailty of the underlying constitution.

This collection of articles provides an opportunity to examine judicial review as it operates under a variety of constitutions, written

* James P. Bradley Professor of Constitutional Law, Loyola Law School, Los Angeles.

as well as unwritten, each freighted and blessed with its own unique cultural norms.

Professor Douglas Edlin[1] has contributed an excellent comparison of the exercise of judicial review in the context of two similar "detainee" cases, one arising in the United Kingdom and the other pending in United States. Both cases involve individuals who were arrested as part of the so-called war on terror and who then challenged their detentions as inconsistent with the principles underlying habeas corpus and the rule of law. Professor Edlin examines each case and explores the various methods adopted by the respective judges in either redressing or circumventing the underlying constitutional principles. Among other things, he demonstrates the richness of constitutional discourse in the Anglo-American tradition and the importance of situating judicial review as a core constitutional value.

We then turn to an example of judicial review as practiced within the continental system of Europe. Professor Enrique Guillén López[2] provides a fascinating guide through the complex process of judicial review as it operates under the Spanish Constitution of 1978. As the reader will see, that process differs significantly from the process most familiar to lawyers in the United States. And yet, despite a variety of technical differences, Professor Guillén López ably demonstrates that the Spanish system is ultimately premised on the universal rule-of-law principle found at the heart of constitutionalism. He also shows how the unique characteristics of the Spanish system are in significant measure a product of Spanish culture and politics. Our system of judicial review in the United States is, of course, similarly freighted with political and cultural norms, leaving one to wonder what might be gained if we focused more on the core value of judicial review and less on the politically freigtened technicalities of the underlying doctrine—a point Professor Edlin emphasizes in his article.

1. Douglas E. Edlin, *Institutional Identity and the Rule of Law:* Belmarsh, Boumediene, *and the Construction of Constitutional Meaning in England and the United States*, 41 LOY. L.A. L. REV. 481 (2008).

2. Enrique Guillén López, *Judicial Review in Spain: The Constitutional Court*, 41 LOY. L.A. L. REV. 529 (2008).

The next two articles pertain to the practice of judicial review in China and Japan respectively. Professor M. Ulric Killion[3] examines constitutionalism and judicial review as practiced within China. He too notes the necessary relationship between culture, politics, and constitutionalism, and he argues that the ideals of constitutionalism can not thrive within a judicial regime that is constrained by Marxist ideology. In Professor Killion's view, under such circumstances the judicial function simply replicates a political judgment. Thus, he argues that the current status of constitutionalism in China is problematic from a rule-of-law perspective since a particularized ideology and centralized political power remain key components of the constitutional order.

Professor Jun-ichi Satoh[4] provides a survey of the role judicial review has played under the Japanese Constitution. His article too reflects the principle that culture and politics play a significant role in defining the scope and nature of judicial review. The system described by Professor Satoh lacks the relatively aggressive character of judicial review as practiced under the American model. Rather, judicial review as exercised in Japan appears to be more constrained and circumspect as a matter of institutional function. Constitutional discourse is, at least in part, melded into the legislative process. The result is a relatively limited number of decisions invalidating legislation on constitutional grounds.

Finally, Professor Christopher Whytock[5] extends an enticing invitation to constitutional comparativists: enter the realm of social science and examine empirically the manner in which different constitutional models and configurations function. What are the consequences of choosing a particular constitutional model? And what is the causal relationship between the chosen constitutional structure or standard and various political and economic outcomes? For example, to what extent might a presidential model as opposed to a parliamentary model increase or decrease the amount of

3. M. Ulric Killion, *"Building Up" China's Constitution: Culture, Marxism, and the WTO Rules*, 41 LOY. L.A. L. REV. 563 (2008).

4. Jun-ichi Satoh, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight*, 41 LOY. L.A. L. REV. 603 (2008).

5. Christopher A. Whytock, *Taking Causality Seriously in Comparative Constitutional Law: Insights from Comparative Politics and Comparative Political Economy*, 41 LOY. L.A. L. REV. 629 (2008).

government spending? Following these lines of thought, Professor Whytock argues persuasively for the development of an interdisciplinary, real-world perspective on what one might call the functioning constitution. As part of his persuasive case, he offers an example of his own empirical work in which he uses the tools of social science to examine the economic consequences of the presidential and parliamentary models. In short, Professor Whytock invites us to move beyond descriptive comparisons and into the realm of constitutionalism as it functions in the real world.