Constitutional Courts and Legislatures Institutional Terms of Engagement

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I. Authors and editors of the laws: On the normative point of rights-based judicial review

Constitutional or other rights adjudicating courts do not only resolve concrete disputes on the basis of narrowly drafted specific rules. Human or constitutional rights, to the extent they play a significant role in constitutional adjudication, are mostly relatively abstract principles, whose application requires the assessment of actions of public authority by reference to the proportionality test. In such a context courts and legislatures are effectively partners in the process of specifying and giving concrete meaning to abstract rights provisions. I have argued elsewhere (Kumm, 2010) that in this partnership each institution has *a distinctive role* to play. The legislative process is justice focused: It is a process in which electorally accountable institutions enact laws to settle disagreement about what justice requires through deliberations and negotiations. The legislative process structures *the authorial role* that citizens play. The judicial process is legitimacy focused and engages the *editorial role* of citizens (Pettit, 1999). It is a process in which norm-addressees can contest outcomes of the political process before judicial institutions claiming that their rights have been violated, requiring public authorities to show that the settlement reached is demonstrably susceptible to a reasonable justification. If an impartial and independent court determines that such justification is not possible, then that decision violates the rights of the burdened persons, lacks legitimate authority and should not be applied as law. In the editorial role citizens seek to ensure through the constitutional judiciary that the authority exercised in their name by the legislature is in fact exercised legitimately: Burdens imposed by the laws must be demonstrably justifiable to those burdened as a reasonable attempt to do justice also to them. If such a justification succeeds, the addressee can´t reasonably reject law´s claim to legitimate authority. Courts, under this conception, play an independent role as *jurisgenerative junior partners* to political branches of government. Under such a conception of contestatory democratic constitutionalism the *right to vote* and the *right to contest* are equally non-negotiable participatory features of the constitutionalist enterprise. Citizens are not just authors of the laws collectively; they are also editors of the laws individually.

A normatively attractive institutionalization of the relationship between constitutional courts and legislatures must meet three adequacy conditions. First the legislature *must retain overall effective control* not only over the legislative agenda, but also over outcomes. This is necessary to ensure a sufficiently close link between elections and the authorial function of legislation. Once judicial power becomes so strong that overall legislative effective control is lost, the step from contestatory democracy to *juristocracy* has been taken. Second, the judiciary

must be sufficiently *impartial and independent* from electorally accountable institutions and be able to provide an *effective remedy* against legislative encroachments of rights. Meaningful contestation is more than an advisory or consulting role that the other side, whose decisions are being contested, is in principle free to ignore. Once legislative power is not constrained by courts as an effective contestatory institution, the step from constitutional democracy to *electoral authoritarianism* has been taken. Third, the interaction between the legislature and judiciary must be structured in such a way, that meaningful discursive engagement is fostered. Rather than just a balance of power that organizes legally *structured institutional competition and standoffs*, the idea of a *deliberatively guided partnership* should inform institutionalization.

The following section (II) seeks to analyse three centrally relevant institutional variables and the range of their concrete specification for the design of institutional structures that are responsive to the first two normative concerns. A third section (III) will then connect the adequacy conditions for judicial review to the choices relating to these variables in two concrete contexts: rights-adjudicating courts in the US and the UK. I will argue that both are institutionalized in ways that are problematic, for opposing reasons: In the US the institutional position of the Supreme Court is too strong in its relationship the legislature, effectively enabling juristocracy. In the UK the position of the courts is too weak, effectively enabling electoral authoritarianism. What this suggests is that the somewhat tired debate about judicial review in an important sense misses the point. Even if judicial review can be justified in principle, the real issue is *how* it is institutionalized and, more specifically, how the relationship between judicial and legislative institutions is structured.

II. On the relationship between the judiciary and the legislative branches: Three institutional variables

1. Rules governing legislative displacement of judicial interpretations

As a starting point, let us assume that a court has concluded that a statute enacted by the legislature violates a human or constitutional right. Let us further assume that the legislature remains unconvinced. In its view the court has not properly assessed the reasons justifiying an infringement of the right and therefore came to the wrong conclusion. Even after the judicial decision, the rights reviewing court and the original rights-assessing legislature continue to disagree. One key variable defining the relationship between courts and legislatures concerns the conditions under which legislatures can displace the judicial interpreta-

tion and establish their own view of what the law should be as valid law. The fact that a court has the power to determine whether or not a piece of legislation violates a right, does not yet say very much about what the constitutional status of such a determination is. More specifically, if the legislature remains unconvinced by the courts' interpretation of rights and seeks to insist on its understanding of the limits of rights in light of countervailing concerns, what are the conditions under which the legislature´s views can be made to legally prevail even against a judicial judgment? Here there are considerable differences across liberal constitutional democracies.

In what Stephen Gardbaum has called the "Commonwealth Model" (Gardbaum, 2013), ordinary legislative majorities effectively continue to control what is to count as law in a jurisdiction, notwithstanding judicial involvement. Within the Commonwealth Model there are nevertheless significant variations.

In the United Kingdom under the 1998 Human Rights Act[1] the judgment made by the court is declaratory only. That means the court does not have the authority to invalidate the laws it has reviewed and deemed to be rights-violative, but merely makes a declaration determining that the law violates a human right. As a consequence of such a judicial holding the issue is reverted back to the legislature, which then has the opportunity to reassess the issue and amend the law in a fast track legislative procedure. If the legislature remains unconvinced by the judicial determination and holds that there is no cause for it to act, then legally the original legislative decision remains valid. The legislature prevails, even if it remains passive and does nothing. Only if it cooperates with the court and decides to amend or abolish the law held to be incompatible with human rights by the court does the law stop being valid law.

Canada also subscribes to what Gardbaum calls "the Commonwealth Model". But even though like in the UK legislative majorities also remain in control, the position of courts is somewhat stronger. The court effectively has the authority to declare invalid a piece of legislation[2]. To override the judicial decision a legislative majority must act: It must affirmatively declare that the act or provision shall operate notwithstanding a judicial holding that it violates certain constitutional rights[3].

In most jurisdictions judicial review is "stronger" than in the "Commonwealth Model". Normally ordinary legislative majorities cannot effectively overturn a judicial decision and therefore do not control outcomes. Interestingly there appears

1 Section 4 of the Human Rights Act 1998.

2 This follows from section 52 (the supremacy clause) and section 24 (the enforcement clause) of the Constitution Act of 1982.

3 See section 33 of the Constitution Act of 1982. Under section 33(3) and (4) such a declaration has effect for a period of five years but may be re-enacted indefinetly.

to be no constitutional jurisdiction that specifically authorizes the legislature to *overrule the court´s interpretation of a right by way of a qualified majority decision*. Instead, what many constitutions would effectively require for a legislature to override a judicial decision is to *amend* the constitution. What that requires depends on the provisions governing constitutional amendments. These provisions vary considerably across jurisdictions. Generally the amendment of a constitutional text requires qualified majorities, often 2/3 majorities in the main legislative body or bodies. In some federal constitutions, like the US or Canada, it is additionally required that a majority or a qualified majority of states also vote in favor of such an amendment.

Furthermore there are jurisdictions where courts will enforce limits to the power to amend the constitution. Often basic principles – mostly core basic rights or basic commitments to democracy, the rule of law or aspects of the federal structure – may not be abolished by way of constitutional amendment. The grounds for these limitations are either explicit constitutional norms limiting the amendment power[4] or jurisprudential arguments immunizing the basic structure of the constitution from the reach of the ordinary amendment power[5]. When a constitutional court insists that a certain understanding of a right is part of the entrenched constitutional guarantees that cannot be amended, this precludes the legislature from using the ordinary constitutional amendment power to overrule the court´s decision. Some constitutions, such as those of Spain[6] or Austria[7] have specifically qualified amendment procedures, requiring referenda or requiring sequential 2/3 majorities, with an intervening election[8] to overcome such limits of the ordinary amendment power. But other constitutions say nothing about how such limits can be overcome. In such jurisdictions the issue arises

4 See Art. 79 Sect. 3 German Basic Law.

5 In India the 'Doctrine of Basic Structure' is a judge-made doctrine which was propounded by the Indian Judiciary on 24th April 1973 in the Keshavananda Bharati Sripadagalvaru case. It stated that the constitutional amending powers of the Parliament was limited so that the 'basic structure of the basic law of the land' cannot be amended in exercise of its 'constituent power' under the Constitution.

6 Title X of the Spanish Constitution establishes that the approval of a new constitution or the approval of any constitutional amendment affecting the Preliminary Title, or Section I of Chapter II of Title I (on Fundamental Rights and Public Liberties) or Title II (on the Crown), the so-called "protected provisions", are subject to a special process that requires (1) that two-thirds of each House approve the amendment, (2) that elections are called immediately thereafter, (3) that two-thirds of each new House approves the amendment, and (4) that the amendment is approved by the people in a referendum.

7 See Art. 44 of the Austrian Constitution.

8 It is often said that an act of the constituent power could dislodge any entrenched commitment of principle. But that view presupposes that the constituent power of the people is not itself internally circumscribed by a set of basic principles. If the idea of constituent power is conceived as a the power to give concrete institutional and legal shape to the idea of self-government of free and equals, then constitutional provisions that are incompatible with that idea can´t be validated by reference to constituent power (Kumm, 2016).

whether an act of the constituent power – however it may operate procedurally in a given context – can legally change the court´s interpretation or whether even the constituent power is a power is internally limited by certain basic principles that preclude overturning a specific judicial decision.

2. Appointment, tenure and Impeachment (good behavior) rules: Rules ensuring general alignment of judges with majoritarian sensibilities, while ensuring impartiality and independance:

But decisions by courts can be overcome not only through re-endorsement of statutes by the legislature or acts of constitutional amendment. The court can also overrule its own judgments. One way the legislature might respond to a decision it remains unpersuaded by is to seek to persuade the court to change its mind. In principle all it takes to try this is to reenact a statute like the one declared unconstitutional and have the issue re-litigated. But in practice the probability of success of such an endeavor is low, since it is highly unlikely that the same court consisting of the same judges and adjudicating the same issues will reverse itself. The situation becomes more promising from the legislature´s point of view, however, if political actors have in the meantime had the possibility to appoint new judges more aligned with their general political orientations. So the question becomes how the link between the appointment of judges and politically accountable institutions is structured.

On the one hand judges are rarely themselves directly elected[9]. That is not surprising, given the importance of impartiality and independence of judges as a prerequisite for playing their distinctive justificatory role, when they review acts of the legislature on the ground of highly abstract constitutional provisions. Judges campaigning on the grounds that they would overturn this or that unpopular decision or judges thinking about their chances of reelection while seeking to resolve a contentious case undermines the very point of constitutional review.

On the other hand the idea that highest judges are appointed by their peers, without any political say, also tends to be deeply problematic. It may well be a good idea in most contexts to have a critical mass of members of a constitutional court drawn from the higher echelons of the judicial branch. And it is often a good idea for those appointing justices to be able to draw on assessments provided by high level judicial peers. But there are good reasons to insist on a mediating legitimating link between elections and judicial appointments. The idea that the judiciary is independent should not be misunderstood to mean that it is attractive that there is a separate judicial caste of persons sharing wide-ranging

9 Judges in some states in the United States have that authority.

sociological and ideological traits, as there may well be, if judges selected themselves. Political representatives should be in the driving seat, when it comes to the appointment of judges charged with constitutional adjudication. And those appointed should probably not all be drawn from the judicial branch, but reflect a wider range of perspectives and experiences, including the university, administration or politics. Here it is possible to discern a wide range of approaches: In some jurisdictions different political institutions, e.g. the President and the different chambers of Parliament, each get to appoint their own share of judges. In other jurisdictions qualified majorities are necessary to enable judicial appointments, generally fostering coalition building aimed at ensuring that only those candidates considered moderates stand a chance to get on the court.

But it is not only important that there is a mediated link between elections and judicial appointments, that put representatives in the driving seat for determining who is to become a constitutional justice. It is also fundamentally important for how long a justice is appointed. The duration of tenure is a crucial variable for determining the degree of representativeness of judges. Here one can discern a wide range of approaches. On the one hand tenure can be for life, as it is in the US. Or it can be until compulsory retirement age is reached, as it is in the UK. Or there can be defined term limits, which typically range between 9 and 12 years. In most cases – and for good reasons given the importance of the independence and impartiality of courts – reappointment is not possible and impeachment and salary cuts may be applied only under very stringent rules involving members of the judiciary. This means that the tenure rules are effectively the decisive variable for determining the options that political representatives have to shape the personnel on the court to encourage it to overrule itself and more generally develop a jurisprudence more sensitive to democratically dominant sensibilities.

3. Rules governing the displacement of legislative decisions:

Even if courts have the jurisdiction to declare acts of the legislature unconstitutional, there are a wide range of variables that determine whether a court will in fact be able to pronounce itself on a legislative decision. First, there are rules that determine what gets before a court in the first place. Beyond rules relating to costs and formalities, that can erect considerable barriers of entry, there is the issue of standing: Who has standing to actually bring a case? Only specific actors within the institutional power structure, like specified state organs, political parties or parliamentary groups? Or also those who are adversely affected by a concrete act of enforcement authorized by legislation? Or does the jurisdiction recognize an *actio popularis*, allowing anyone to bring a challenge? Second, there is the issue of the range of issues over which the court has jurisdiction. Are

there issue areas that are off limits? Should, for example, questions of peace and security, or of social and economic rights or relating to the internal structure of political institutions be excluded from the jurisdiction of courts? Here it must suffice to point out that in order for courts to be effective contestatory institutions, it is important that anyone who is burdenend by acts of public authorities must in principle be able to bring a case against public authorities to have them assess whether the imposition of that burden is justified. Even though different areas of the law might, depending on the specific forms of their institutionalization, justify different standards of review and larger or smaller degrees of deference to political actors, the outright exclusion of an area from judicial review is an unjustified denial of contestatory possibilities for those burdened by the decisions taken. Furthermore the idea of an *actio popularis* should not be dismissed too quickly. If laws impose unjust burdens of others, why should only those who are burdened be able to bring a complaint? Why should not those in whose name that unjust burden is imposed on others be able to challenge such an act? We should not be too quick to dismiss these ideas on pragmatic grounds relating to "crowded dockets" or "opening the floodgates to spurious litigation". There may well be other, more appropriate rules that function as filter devices for courts to maintain an adequate workload.

But notwithstanding considerable variance among constitutional courts relating to these kinds of issues, one of the most under-analyzed aspects of considerable relevance for the relationship between courts and legislatures concerns judicial voting rules. Here there is a background assumption that the views of a majority of judges are decisive for determining whether an act is constitutional or not. In the US, for example, five out of nine judges are necessary to strike down as unconstitutional acts of public authorities. But of course this should not simply be taken for granted. First, there is in fact some degree of variance on this issue. In Germany, for example, it generally takes a 5:3 decision to declare unconstitutional a statute. When there is a 4:4 decision, legislation will be upheld as constitutional. Furthermore some decisions, such as prohibiting parties with a program violating basic principles of liberal constitutional democracy, require a qualified majority of 6:2. In South Korea, a 6:3 majority is generally required to strike down legislation.

The empirical variance attracts normative interest. Is it really appropriate that when there is genuine disagreement among judges and there is only a bare majority in favor of declaring a legislative act unconstitutional, that such a bare majority should be able to overrule legislative majorities? Should the judgment that an act of legislation is a rights-infringement that can not be justified under the proportionality principle not be a judgment that should be endorsed by a qualified majority? On the one hand it may well be misguided to require judicial

consensus – along the lines, say, of a consensus of jury members that the accused is guilty in criminal trials in the US as a requirement for holding him guilty – to strike down a piece of legislation. Something close to a consensus requirement would make it too easy to manipulate and effectively neutralize the judiciary as an effective contestatory institution. All that would be necessary to effectively neutralize the judiciary would be to place one or two loyal party soldiers on the bench, who would effectively wield a veto on any decision the court makes. But even though consensus appears not to be the right voting rule, it is not at all clear why a simple majority ought to be sufficient to strike down legislation. This is an area where tinkering with institutional rules and imposing requirements that go beyond simple majorities appear to be plausible.

III. Applications: The problematic cases of the UK and the US

If we take the ideal of contestatory constitutionalism as sketched in part I, how should the relationship between the constitutional judiciary and the legislative branches be designed? Which of the possible choices outlined above provides the right mix? What should the terms of engagement be? There is, of course, no universally applicable single blueprint to be derived from the discussions above. The right mix of rules depends on a variety of factors, including highly contingent nationally variant questions of constitutional and political culture. But to illustrate the power of having a principled understanding of the point of rights adjudication as sketched in part I complemented by a set of central variables instrumentally relevant for the realization of that point as discussed in part II, the following will briefly discuss two deeply problematic cases: The case of the U.K. and the case of the U.S. The first, typically described in the literature as a paradigmatic example of "weak" judicial review is too weak. The second, typically described as a paradigmatic example of "strong" judicial review, is too strong.

An effectively institutionalized right to Socratic contestation requires that a person that contests an act of public authority as a violation of his rights can have an impartial and independent body assess, whether that is in fact the case. If there is a violation of the right, an effective remedy must be provided. These standards are not fulfilled in the case of the UK. In the UK the Human Rights Act of 1998 does authorize courts to assess whether laws enacted by Parliament are compatible with the European Convention on Human Rights. Courts are required to interpret Parliamentary laws in a way that makes them compatible with ECHR rights if possible. But if legislation by Westminster is not in good faith interpretable in such a way, because it is simply incompatible with a right, then

Courts still have to apply the rights-violating statute to the case before them. They may declare the statute to be incompatible with human rights, but the only consequence of such a declaration is that Parliament gets to consider whether or not to abolish or revise the law in a fast track procedure. If Parliament does nothing the law simply continues to apply. In the end courts are unable to even provide the minimal remedy: To declare the act illegal and not applicable to the person bringing the case. Here there is no qualified veto right of rights-bearers. And instead of courts playing a genuine editorial function, their authority is comparable to bodies with a consultative function, taking a position and urging the legislature to reconsider without the authority to decide. Note how that is different in another case often discussed as an instance of "weak" constitutional review: Canada. Here the judiciary is empowered to declare invalid laws that courts deem to violate constitutional rights. The legislature can in most cases re-authorize the law by an ordinary majority, notwithstanding the court´s decision. Of course one can be skeptical of this model also: Does it not effectively make the same majority the judge of an issue that concerns its own claimed wrongdoing, violating the basic principle of *nemo iudex in sua causa*? Does this not effectively undermine the contestatory function of courts? Does that function not at require at least that a qualified majority is necessary to override the determination made by a court that a statute violates rights? This is not an easy case. But whatever the case might be, the UK form of "weak" judicial review raises concerns that disqualifies it as an appropriate institutionalization of citizens contestatory rights, whereas the Canadian model presents a more complex case.

On the other side the U.S. has institutionalized a system of judicial review that is too strong. As outlined in Part I, electorally accountable institutions must retain overall effective control not only over the legislative agenda, but also over outcomes. This is necessary to ensure a sufficiently close link between elections and the authorial function of legislation. These standards are arguably not met in the U.S. The problem there is that three institutional features work together to ensure that decisions by the Supreme Court are extremely hard to overturn and judges have an inappropriately central role to play in the overall constitutional process. On the one hand, there are the rules relating to constitutional amendments. In the US Art. V U.S.C. requires not only that a qualified majority in both houses to pass an amendment, but also the ratification of ¾ of the 50 states. This makes passing constitutional amendments an extremely burdensome process and a rare historical event. The burdensome nature of the amendment process is then complemented by life tenure of Supreme Court judges in the U.S., compared to a term of 9-12 years in most jurisdictions. There is no time limit in terms of years, there is no compulsory retirement and some judges, like most popes, stay in office long into their seventies or even eighties, until they

die. The last nine Supreme Court Justices that have either died or retired – the predecessors of current Supreme Court Justices – have remained in office for 26 years on average. The power of Supreme Court Justices is further enhanced by the fact that an ordinary majority of five out of nine judges can overturn a legislative act and many highly controversial decisions are 5:4. A simple majority rule, although very widespread among constitutional courts, works together with the other institutional features to establish the Supreme Court as an institution with power arguably unbefitting for a judicial institution.

The interplay of these institutional rules is to a large extent why the appointment of judges is widely considered one of the most important things a President does, and why coverage of Supreme Court decision-making and the analysis of judicial opinions reaches staggering proportions. If the debates relating to the legitimacy of judicial review have been so central to US constitutional culture that might not only be because of the comparatively strong democratic commitments American share when compared to some of their European counterparts, whose thinking is informed by national legacies of popularly supported fascist and communist governments. It might also have something to do with the distinctively juristocratic institutionalization of judicial power in the U.S. Compare this with the institutionalization of judicial power, say, in Germany, also a country known for its influential constitutional court: The German constitution can be amended by a simple two thirds majority in the Bundestag and Bundesrat. Since its entry into force in 1949 the constitution has been amended 60 times, a little less than once a year on average – at a rate more than 10 times as frequent as the US constitution. Judges are appointed for 12 years, not for life, and decisions generally require a 5:3 majority and in some cases a 6:2 majority[10]. Not surprisingly, whereas first year students are highly likely to be able to recite the names of all nine Supreme Court Justices in the US, in Germany even a Professor of public law would typically struggle to name considerably more than half of the sixteen judges on the Constitutional Court.

Clearly the different perception of judicial power and the role of individual judges can not be reduced to the variables that have been the focus here. Other factors such as the way law is taught, the way opinions are written, the role of concurring and dissenting opinions also help account for these differences. Furthermore there is a problem of judicial power in Germany, too: The constitutional court can declare invalid even constitutional amendments, when it deems them to violate certain basic principles deemed unamendable. Even though this feature of the German constitution has not played a central role historically, it

10 See Art. 15(4) Bundesverfassungsgerichtsgesetz.

may do so in the future. A question that can´t be pursued here is under which circumstances, if any, such an empowerment of courts is defensible.

What these discussions have hopefully provided some evidence for, is that the conventional distinction between "weak" and "strong" forms of judicial review is not helpful. The unsatisfying nature of the debate that discusses the legitimacy of judicial review by contrasting, for example, the UK with the U.S. as competing paradigms may have at least in part something to do with the fact that both of them are deeply problematic. Imagine the US constitution could be amended by qualified majority in both houses of Congress. Or even, if we take current amendment rules as given and practically unalterable: What if judges had to commit themselves to serve only for a 12 year term, thus allowing each President to appoint three judges over four years? And what if additionally the Court could declare unconstitutional legislative acts only with a 6:3 majority? Would there still be the same kind of debate on the democratic legitimacy of judicial review? Maybe not, but that, of course, is a counterfactual empirical question. The real point here is a normative one: the introduction of such reforms would clearly be a step towards appropriately institutionalizing contestatory rights against legislative majorities, while avoiding the pitfalls of juristocracy. Once the debate on judicial review is informed by a better understanding of the moral point of judicial review and the wider range of variables that need to be considered for its appropriate institutionalization, the focus changes and the range of concerns and institutional options to address them becomes clearer. What also becomes clearer is the outlier status of both the UK and the US, with the great majority of liberal constitutional democracies ranging from Canada, Columbia, South Africa, Spain or South Korea having chosen paths that appear to avoid both the pitfalls of electoral authoritarianism and juristocracy.

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