2 Legal-Philosophical Background

For legal philosophers, these debates on judicial review are very relevant because they are intimately linked to the constitutional-democratic character of our societies. To understand the core of these discussions, it is important to realize that the term 'constitutional democracy' does not refer to one single tradition. It is a composite term that refers to two distinct and sometimes conflicting strands of thought: constitutionalism and democracy. 'Democracy' is linked to the republican tradition, which is historically associated with the work of Jean-Jacques Rousseau. 'Constitutionalism' refers to the liberal tradition, which has its historical roots in the work of John Locke. Constitutional democracy is a permanent balancing exercise between its two foundational ideals: on the one hand, a democratic method of self-governance, and on the other hand, the protection of fundamental rights through a constitution. And this dichotomy dovetails very nicely with the two main views on judicial review.

2.1 The Republican Position

Let us first look at the republican tradition. Republicans are fervent critics of strong judicial review. Jeremy Waldron, for example, argues that strong judicial review is politically *illegitimate* and a violation of democratic values. This is because it leaves important decisions in society to a small number of unelected and unaccountable judges. Waldron argues that this undermines cherished principles of democratic-representation and political equality.[5]

Another critic is Richard Bellamy, who contends that a political community should be governed by 'democratic mechanisms through which the people authorize their political and legal representatives and hold them to account'. He prioritizes 'a parliamentary model of rights review and a "weak" form of rights-based judicial review, in which a declaration of incompatibility by the appropriate court is either advisory or can be overridden or put to one side by the legislature'.[6] In short, these republicans lean heavily towards democratically-regulated politics. They emphasize political equality and argue that the majority rule in democracy should always prevail. In the republican tradition, the role of the constitution and the constitutional protection of fundamental rights has faded into the background.

5 Jeremy Waldron, 'The Core of the Case Against Judicial Review', (2006) 115 *The Yale Law Journal* at 1353.

6 Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights', (2014) 25 *The European Journal of International Law* at 1021.

2.2 The Liberal Position

This brings us to those who lean more towards the constitutional side. Liberals seek to balance the 'democratic' and the 'constitutional'. They move away from the view that political governance only revolves around democratic decision-making and emphasize the principle of legality. This implies that the exercise of democratic political authority should always remain within the boundaries of the constitution. As such the constitution provides a stable anchor for constitutional democracies over time.[7] The constitution determines the rules of the game of legitimate democratic decision-making. Thus, the *executive* branch only has those powers that are expressly conferred on it by the constitution. And it is the task of the *judicial* branch, through the process of judicial review, to evaluate democratic outcomes against constitutional norms.

Philip Pettit proposes to supplement the electoral system with a system of individualized contestation that parallels the collective challenge that elections make possible:

> There ought to be openings for particular individuals and subgroups to test the laws or proposals for how far the process in which they are generated respects the value of equal access to influence and, more generally, the value of equal status. And those openings ought to hold out the prospect of an impartial judgement on the question and, if the judgement goes in favour of the challenges, the prospect of an adjustment that satisfies them.[8]

This protection-mechanism presupposes constitutional courts and judicial review to determine how, sometimes quite abstractly formulated constitutional values must be interpreted in specific cases: fundamental freedoms, individual dignity, or rule of law.[9]

One does not have to be convinced that democratic majorities are unduly partisan to acknowledge that the majoritarian democratic process is sometimes less attentive to minorities and their fundamental rights. The law-making process is under constant time pressure because there are always too many complex pieces of legislation to deal with. This will sometimes preclude legislators from making a thorough analysis of potential negative fundamental rights implications, especially when they need to legislate hastily in response to a crisis. And even if legislators gave these fundamental rights their full attention, they would only have limited foresight about the full range of circumstances in which a law will have an impact on the enjoyment of individual rights in the future.

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7 Alexander Somek, 'Cosmopolitan constitutionalism: The case of the European Convention', (2020) 9 *Global Constitutionalism* at 469; Nicholas Bamforth, 'Social Sensitivity, Consensus and the Margin of Appreciation', in *Human Rights between Law and Politics. The Margin of Appreciation in Post-National Contexts*, ed. Petr Ahgha (Oxford and Portland: Hart, 2017), 130. Massimo Fichera, *The EU and Constitutional Time* (Cheltenham: Edward Elgar, 2023).

8 Philip Pettit, *On the People's Terms* (Cambridge: Cambridge University Press, 2012), 213-214.

9 Indeed, anti-judicial review republicans argue that courts and judges are not legitimized to make court decisions on the basis of such open sources. See: Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford: Oxford University Press, 2023), 5.

This means that Parliament can make laws which impose limitations on rights that they neither intended nor anticipated.[10]

In other cases, however, the human rights of minorities are explicitly disregarded. A telling example is the Orban administration in Hungary, which for years has knowingly violated the fundamental rights of the LGTBQ community.

Sometimes minority rights are curbed unintentionally. Sometimes they are violated deliberately. But Aileen Kavanagh is right when she writes that 'Elected politicians typically view rights as "side constraints" on their policy goals, rather than as "navigational lights" for the entire policy endeavour'.[11]

Rights-based judicial review can repair such legislative blind spots. We can think of the constitutional-democratic system as a two-step strategy that can remedy democratic deficiencies. The main bulk of law-making and implementation of law is done democratically. The recursive second step of judicial review is the smoking out and removal of those decisions that, in hindsight, violate fundamental rights.

Of course, judicial review does not allow a claimant to restart the full discussion from the very beginning. That would be an offence to the democratic process, and an offence to the entitlement to equal respect and concern of the decisional majority.[12] But the institutionally acknowledged access to judicial review if a citizen suspects that a certain policy decision violated a constitutionally protected fundamental right is an important feature of a constitutional democracy. It acknowledges the equal status of citizens as worthy of being given reasons and as capable of making relevant arguments and, as such, the claimant's entitlement to equal respect and concern.[13]

Moreover, it is also important to note that those in favour of strong judicial review do not dispute the central role of representative democracy. But they believe that the democratic decision-making process alone does not represent a complete picture of what democratic governance implies. Strong and independent constitutional review has a supplementary but indispensable role. It provides an additional layer of governmental accountability in the process of checks and balances. As Tom Hickey says: a defence of judicial review 'would not rest on the capacity of the institution to bring about right answers to rights questions but rather on its capacity to counteract particularly bad answers'.[14] Taking out evidently bad decisions or decisions with an unfortunate bad impact not only repairs unfortunate rights violations, but also provides an important signal of what the constitutional-democratic system stands for. After all, the worst decisions might have a disproportionate negative effect on the legitimacy of the system as a whole.

10 Rosalind Dixon, 'The Core Case for Weak Form Judicial Review', (2017) 38 *Cardozo Law Review* at 2209.

11 Aileen Kavanagh, *The Collaborative Constitution* (Cambridge: Cambridge University Press, 2023), 143.

12 Pettit, *On the People's Terms*, 217.

13 Alon Harel and Adam Shinar, 'Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review', (2012) 10 *International Journal of Constitutional Law* at 952.

14 Tom Hickey, 'The Republican Core of the Case for Judicial Review', (2019) 17 *International Journal of Constitutional Law* at 305.

In this way, we can link the discussion on judicial review back to the balancing act between the constitutional and the democratic elements in constitutional-democratic systems. We can see a clear difference between the two traditions and two different views on judicial review. On the one hand, republicans are confident that the democratic process provides sufficient protection for fundamental rights. They do not want unaccountable judges to interfere with the outcomes of democratic decision-making processes. They are therefore in favour of weak judicial review.

I find myself in agreement with liberals who are in favour of strong judicial review. They see it as an additional layer of governmental accountability. Strong judicial review provides an impartial check to make sure that executive measures do not violate fundamental rights.[15] For liberals, this recursive two-step strategy embodies the essence of checks and balances and the system of the separation of powers to prevent a state administration from abusing its power.

2.3 Republicans and Liberals: A Conclusion

Let me conclude this first part of the lecture by emphasizing two things. First, the distinction between strong and weak judicial review is not like an on-off light switch. It is more like a dimmer: judicial review can be strong, weak, or something in between. Second, it should also be clear that the form of judicial review in a particular system is not set in stone. It can, and actually does, change over time. Think back to the example of judicial overhaul in Israel. If the Netanyahu administration is successful that will generate a significant change from strong to weak judicial review. On the other hand, as we will see in the next section, we can also observe the process of competence creep in which courts, verdict by verdict, seek to strengthen their power as judicial reviewers.

This brings me to the second part of my lecture: how can we characterize judicial review in the Netherlands and in Europe?

15 Pettit, *On the People's Terms*, 208; Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge UP, 2015), 171.