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Judicial Review and Democratic Backsliding

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Overview

In the postwar period, judicial review and constitutional courts became the one of the primary hallmarks of well-functioning democracies. Courts are traditionally seen as the bulwarks against forces that might threaten liberty and democracy. However, in recent years, the global phenomenon of democratic backsliding, i.e. when established democracies experience an erosion in democratic governance, has challenged this notion. On the one hand, courts and judicial review have proved to be the focal mechanism for checking the overreach of the executive branch. Key cases from South America emerged recently that prove how judicial review may help stem the erosion of democracy. On the other hand, judicial review has often proved at best inadequate to stop the process of backsliding (like in Hungary and Poland), and at worst, it can be used as a tool to further dismantle democracy. In addition, in some cases, there is an even more complex problem of democratic backsliding linked with recent democratisation. In Central Eastern Europe for example, countries that democratised rapidly in the 1990s, building upon judicial review mechanisms now experience democratic backsliding. Thus, we will more generally look at the political philosophical question of the stability of democracy, and how judicial review might influence this.

The course will explore this complex global phenomenon in detail. Building on classic cases for and against judicial review in a democracy, we will examine how these lines of argument may be applied to cases of democratic backsliding, a distinct type of non-ideal scenario. The course builds on a robust empirical background and a wide array of global case studies, we will examine how judicial review and democratic backsliding interact in practice, as well as how this bears on normative arguments for or against judicial review. Case studies will range from recent US cases (an undoubtedly well-established democracy) to more fragile democratic regimes in Central Eastern Europe and the Global South.

Course Schedule and Readings

February 16.: *Introduction*

Basic course information, deadlines, coursework assignment.



February 23.: *Basics of Judicial Review*

The global rise of judicial review, its main variations. The role of judicial review in a modern political system built on the separation of powers.

Mandatory readings:

Stone Sweet, Alec. 'Constitutional Courts'. In *The Oxford Handbook of Comparative Constitutional Law*, 1st ed., edited by Michel Rosenfeld and András Sajó. Oxford University Press, 2012.

Tushnet, Mark V. *Advanced Introduction to Comparative Constitutional Law*. Elgar Advanced Introductions. Edward Elgar, 2014. Chpt. 3.

March 2: *Core of the Case for Judicial Review*

Key normative arguments for including judicial review in a constitutional system: protection of rights, countering the tyranny of the majority.

Mandatory reading:

Sajó, András, and Renáta Uitz. *The Constitution of Freedom: An Introduction to Legal Constitutionalism*. Oxford University Press, 2017. Chpt. 9.

March 9.: *Core of the Case against Judicial Review*

Majoritarian critiques of judicial review in well-ordered democracies. Waldron's core case, its methodological implications and scope.

Mandatory reading:

Waldron, Jeremy. 'The Core of the Case Against Judicial Review'. *Yale Law Journal* 115, no. 6 (2006): 1346.

March 16.: *Theorising and Measuring Democratisation and Democratic Backsliding*

The empirical and theoretical frameworks for qualifying and quantifying the ebb and flow of democracy in polities. Difficulties in defining and measuring democratization and democratic backsliding.

Mandatory reading:

Haggard, Stephan, and Robert Kaufman. *Backsliding: Democratic Regress in the Contemporary World*. 1st ed. Cambridge University Press, 2021. <https://doi.org/10.1017/9781108957809>.

March 23.: *Courts as Agents of Democratisation*

We examine the role courts and judicial review play in democratisation transition from an authoritarian system. Institutional optimism versus cultural pessimism, the limits of judicial review in nascent democracies. Normative considerations in non-core cases.



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Mandatory reading: Daly, Tom Gerald. *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*. 1st ed. Cambridge University Press, 2017.
<https://doi.org/10.1017/9781108283731>. Chpt. 7.

March 30.: *Courts against Backsliding*

Judicial strategies to counteract democratic backsliding. Case studies and different experiences from the third wave of democratisation.

Mandatory reading: Sadurski, Wojciech. 'Judicial Review Versus Populist Authoritarianism'. *Comparative Constitutional Studies* 3, no. 1 (2025): 81–105.
<https://doi.org/10.4337/ccs.2024.0026>.

April 13.: *Abusive Judicial Review*

How democratic institutions may be abused for non-democratic ends. Abusive constitutionalism broadly, and abusive judicial review specifically.

Mandatory reading: Landau, David, and Rosalind Dixon. 'Abusive Judicial Review: Courts Against Democracy'. *University of California, Davis Law Review* 53 (2020): 1313.

April 20.: *Case Study TBD*

April 27., May 4.: *Group Presentations*

Grading

Every student is required to complete *either*

A) a group **presentation** at the end of the semester on a relevant topic of their choosing. Topic choices must be submitted by email no later than November 1.

or

B) a five-page **essay** on a relevant topic of their choosing. Topic choices must be submitted by email no later than April 1.

The presentation or essay will count towards 80% of the final grade.

20% of the final grade will be assigned based on attendance and participation on at least 7 lectures. Failing to attend at least 7 lectures will mean forfeiting this component of the grading.

Grading scale:

80% or more: Grade 5 ('jeles')

70–80%: Grade 4 ('jó')

60–70%: Grade 3 ('közepes')

50–60% Grade 2 ('elégséges')

50% or less: fail ('elégtelen')