

Comparative View of the Rule of Law and Democracy in Europe

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An independent judiciary is usually seen as essential to the protection of the rule of law. Rule of law means that all public authority derives its power from legal norms and is constrained by legal norms in exercising these powers. Judges are charged with upholding the law as against unlawful government action. Yet the relations between the judiciary and the other branches of government, notably the legislature, can also give rise to debate.

Indeed, the most controversial institution in this context is *constitution review of legislation*: the power of judges to check whether laws which are voted by the parliament comply with the constitution. The two arguments typically brought forward to justify the right for judges to review the constitutionality of legislation are, first, that judicial review guarantees the supremacy of the Constitution and, second, that judicial review provides a check on the lawmaker for the protection of minorities. But in other systems, as British or Dutch system, constitutional review is fiercely contested. The protest is also growing within population and among American scholars, especially those claiming « popular constitutionalism » (Larry Kramer or Mark Tushnet for example). What is the nature of these criticisms?

In the US, this very « counter-majoritarian » character of judicial review is often perceived as problematic, especially where judges are suspected of pursuing their own political agenda against the preferences of the elected institutions. Indeed, in their daily activity, judges have to reconcile rights stemming from different ideological currents, sometimes contradictory, rights formulated generally and imprecisely. So their power of interpretation is therefore to make choices. Eventually, the most pertinent issue that arises is why a small number of judges (nine judges in the US Supreme Court) would be right in their choices, while the majority of parliamentarians would be wrong ?

Jeremy Waldron asks the question differently: « *why would a judgment by a majority of judges be less open to criticism than a majority vote in the parliament?* » Before trying to answer these questions, in a ultima chapter of this course, it will be necessary, during 9-10 hours, to make an analysis of different constitutional systems, which represent generic models of the constitutional solutions across the world (the US system, the system United Kingdom, Germany and French).

A matter often associated with judicial review as regards constitutionality is judicial review as regards compliance of statutes with international treaty provisions, especially when human rights are to be derived from them in a domestic setting. The question should also be the subject of all our attention.