

## **CONSTITUTIONS, RIGHTS AND COURTS**

The basic function of most modern constitutions is to constrain political power. A constitution is a body of normative legal rules also known as meta-norms which are norms about their formulation and application. The constitution determines how legal norms are created, interpreted, administered, and altered. Constitutionalism refers to the commitment of a polity to function within the bounded rules established by the constitution. The extent to which constitutionalism exists varies over time, across countries, and within a political community. Constitutionalism can also refer to a government that is limited by the constraints placed upon it by the constitution.

### **Types of Constitutions**

#### **Type 1: Absolutist**

The operative meta-norm of this type of constitution is that the ruler stands above the law. As such, the prerogative to create and alter legal norms, which includes the constitution, is absolute and consolidated by centralised rule. In such systems, constitutions demonstrate, rather than constrain, the absolute power of the ruler. These constitutions are becoming rarer.

#### **Type 2: Legislative Supremacy**

This type of constitution allows for the establishment of government institutions and elections to the legislature, the idea being that elections lend legitimacy to legislative power and legislative majorities in turn validate statutes. The three defining meta-norms of this type of parliamentary sovereignty model are: (i) the constitution is unentrenched in that it can be changed by regular legislative processes and a simple majority; (ii) through the criterion of validity, if any legal norm contradicts a parliament's legislation, it is deemed void; (iii) there are no substantial restraints on the authority of the legislature.

#### **Type 3: Higher Law**

While no two Type 3 constitutions are entirely alike, they do have commonalities and are now considered to be the 'good' kind of constitution to have. These constitutions make the protection of rights a priority, repudiate legislative primacy, and make overruling constitutional decisions of high courts rather tenuous. This form of 'new constitutionalism' makes a constitutional justice system a key element of its makeup.

The tenets of 'new constitutionalism' are as follows: (i) a written constitution establishes the institutions of the state and vests in them their authority; (ii) the People are entrusted as the ultimate arbiters of power through elections or referenda; (iii) all forms of public authority including that of the legislature is legal only to the extent that it corresponds and abides by

constitutional law; (iv) the constitution comprises of a bill of rights and constitutional mechanisms to defend those rights; (v) the constitution itself states how it can be amended.

## **Judicial Review**

Once under type 3 new constitutionalism, the matter of how to ensure a constitution's normative primacy is solved by the establishment of a system of 'constitutional review' by a third-party judiciary mechanism which evaluates the legitimacy of other legal norms. The two main models of constitutional review available today are *the American diffuse judicial method* and *the European model of concentrated review* conducted by a constitutional court. These models are grounded on different conceptions of the separation of powers.

### **American Judicial Review**

In this system, in which the constitutional judicial review authority is diffuse or decentralised, any judge is endowed with the power to invalidate or withhold application of a statute that is considered contrary to the constitution. As the highest appellate court in the legal hierarchy, the Supreme Court is a court with 'general jurisdiction' for all issues of law, not merely constitutional ones. Judicial review is defensible under prevailing separation of powers precepts insofar as it is 'case or controversy' review. As it is the judges' legal obligation in general to resolve legal cases, sometimes of a constitutional nature, they are invested with the power to review. As such, judicial review is considered 'concrete', which is to say it is practised similarly to ordinary litigation. A private person can allege the breach of a constitutional right and request remedy from the court for this violation. All American judicial review is concrete.

### **European Constitutional Review**

In this system, the authority to review is centralised or concentrated. With judicial review of statutes proscribed, only a constitutional court can deem a statute unconstitutional while being restricted to matters of constitutional review only. Civil and criminal suits meanwhile are adjudicated by ordinary courts. Review powers, in these systems, are justifiable under the doctrine of separation of powers to the extent that the judiciary is not involved, but a special, distinct institution, the constitutional court carries out review. This form of review is considered to be abstract in that no concrete case is litigated between two parties and resolved with a judgement. Instead, the constitutional court answers questions regarding the constitution put to it by judges and officials. Therefore, judicial review does look like a 'confusion of powers' as judges partake in legislative function. Compared to judicial review, abstract review appears rather like 'advisory opinions' that are non-binding which the US separation of powers doctrine does not permit.

## Effectiveness of Constitutional Review

Constitutional review will be effective (i) if constitutional discord is consistently brought before review authorities; (ii) if judges who adjudicate are able to rationalise their decisions, give defensible reasons; and (iii) if people governed by constitutional law understand the precedence-setting nature of the rulings and the importance of accumulated jurisprudence.

Adapted from Alec Stone Sweet, 'Constitutions, rights, and judicial power' in Daniele Caramani (ed), *Comparative Politics* (OUP 2020)

## Further Reading

Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press 2017)

Michel Rosenfeld and Andras Sajó, *Oxford Handbook of Comparative Constitutional Law* (OUP 2012)

Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance* (OUP 2019)

Radhika Coomaraswamy and Charmaine de los Reyes C, 'Rule by emergency: Sri Lanka's postcolonial constitutional experience' (2004) 2 *International Journal of Constitutional Law* 272

'Constitutional History of Sri Lanka' (*Constitutionnet.org.*)

<<https://constitutionnet.org/country/constitutional-history-sri-lanka>> accessed 18 December 2023