A NEW PERSPECTIVE ON CONSTITUTIONAL REVIEW

INTRODUCTION

Although it is a matter for the political process to decide who should be empowered to adjudicate constitutional issues, the subject has been a source of controversy among politicians and constitutional lawyers. Should this power be granted to the courts? If so, to an ordinary court or a special constitutional court? Or should it be left to the legislature, a political body? Or perhaps should the people be directly empowered to determine the scope and parameters of the constitution?

Another area of controversy relates to the scope and meaning of constitutional review. Are there any principles that guide the body that interprets the constitution or should that body be left free to develop its own interpretive culture? Depending on the answer to the question WHO, should the constitution be interpreted narrowly so as to give greater scope for the expression of the winning majority or “should it contain certain core moral values which serve as a permanent yardstick against majority tyranny and which thereby convert the moral values into legal rights”?  

These issues are often sources of debate among eminent jurists and political scientists. This is perhaps so because decisions involving constitutional interpretation, unlike ordinary law cases, tend to attract the attention of not only jurists but also other social and political actors. It is true that the constitution is a legal document, but a constitution goes far beyond that. In addition to serving as

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a legal document, the constitution is a symbol that “reflects and aspires”. Furthermore, the impact of constitutional interpretation is far reaching as it also raises the issue of adapting the old values of the constitution with the present and future and this reveals the true nature of the document called the constitution.\(^2\)

The thesis of this article is that owing to the lack of theoretically sound basis for the institutions that interpret the constitution in many jurisdictions and taking into account that many countries, especially in eastern Europe and in Africa, are in transition: they have a very young judiciary and that establishing deep rooted institutions for democracy to operate may take time, they need to establish a tribunal that is based on constitutional democracy, an institution that is the result of the marriage of two competing values. This will be more suitable for the nature and context of constitutional interpretation. To reach this conclusion, the author has reviewed (briefly) the justifications for judicial review and political review and then the article considers the argument that suggests that constitutional interpretation is everybody’s enterprise.

1 THE CASE FOR JUDICIAL REVIEW

Despite some variations among those who argue for judicial review, it is usually defended as an offshoot institution founded on constitutionalism. The overall argument boils down to suggest that the power to review the constitution should be the ordinary function of the judicial organs because there are certain essential institutional limitations on powers of the majority, one of which is judicial review. The underlying premises of those who hold this view is that there is “such a distinction between elected representatives and the People”, when “we” the people have a constitutional choice, it [the constitution] binds the authority of government, however constituted or democratic the government authority may be.\(^3\) The idea is that, however democratic a government may be, the government is not at all equivalent to the people, and the latter, not the former, are the source of constitutional values.\(^4\)

\(^2\) Ibid., p. 79.


\(^4\) It is worth noting that many constitutions often start by saying “We the People”. For instance, the preamble of the Federal Democratic Republic of Ethiopia’s Constitution states: “We, the Nations, Nationalities and Peoples of Ethiopia ...” and does not associate itself with the political majority. The tension between government and people is of course a purely political question and has been discussed for ages. The discourse here is however restricted to indicate that institution like courts are there to minimize the tension between the two.