

Chapter 12

Social Justice and the Judiciary:
A Comparative Point of View

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Constitutional review by the judiciary¹ is gaining ground.² While in the middle of the 19th century constitutional review had only been institutionalised in the United States (since 1803), Greece (since 1847) and Norway (since 1866), today more than 80 countries have established some form of it. Add to that the increasing tendency among international and supranational courts to act as constitutional courts³ and the picture is complete: constitutional review has gathered momentum and is en vogue.

The question with which this article deals is the conditions under which constitutional review is *in fact* introduced in a particular jurisdiction. When and why are politicians prepared to accept and introduce constitutional review by the judiciary? These are politico-sociological questions, the extent of whose underexposure in the wealth of research on constitutional review is striking.⁴

1 Hereafter: constitutional review.

2 Recent examples include Eastern Europe, Asia and South America. See, for example, Sadurski W, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, Dordrecht, 2005); Ginsburg T, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge, 2003); and Gloppen S et al (eds), *Democratization and the Judiciary. The Accountability Function of Courts in New Democracies* (Frank Cass, London, 2004). In long-standing democracies, too, things are afoot. In the United Kingdom, for instance, the European Convention on Human Rights became directly enforceable with the passing of the *Human Rights Act 1998*. New Zealand acted similarly in 1990. This development is in line with a general trend towards ever more intrusive interventions by the judiciary in society and politics. See Tate CN and Vallinder T (eds), *The Global Expansion of Judicial Power* (New York University Press, New York, 1995), and Guarneri C and Pederzoli P, *The Power of Judges. A Comparative Study of Courts and Democracy* (Oxford University Press, Oxford, 2002).

3 Consider, for example, the European Court of Justice, the European Court of Human Rights and the Dispute Settlement Body of the World Trade Organization.

4 Usually, the desirability of constitutional review is almost exclusively looked at from the normative point of view of the democratic legitimacy of such a system.

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