**Judicial Review and the Strength of the Courts to Affect Policy in Europe**
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**Abstract**
This article is based on the notion that judicial review is an integral institution in any country. The ability of the courts to exercise judicial review is thought to be influenced by the political culture of the country. To theoretically reinforce perceptions on judicial review the theory of institutionalism is employed. Specifically, this paper mentions two approaches to institutionalism: rational choice institutionalism and historical institutionalism. Ultimately, the tenets of historical institutionalism are the backbone of this article.

This essay argues that judicial review in European states is an institution that enforces the stability of society. Rational choice institutionalism argues that institutions are empirical, likening them to a script with prescribed processes and outcomes. This paper will consider the significance of rational choice institutionalism but will also present the theory of historical institutionalism, which values the entire nature of the existence of institutions. Why does the nature of the existence of judicial review surpass the prescriptions of its script? Reason being, the tenets of institutionalism are paramount in understanding the practices of judicial review. This essay will deconstruct the theory of institutionalism into rational choice and historical approaches. The rational choice approach will be introduced during the discussion of institutional approaches. The historical approach to institutionalism will then be discussed and used throughout the rest of this paper with regards to its application to judicial review and the strengths of the courts as policy makers. The theory of historical institutionalism will then be applied to three distinctive countries in their implementation of judicial review: Germany, Sweden and the United Kingdom. This paper will finally assess how historical institutionalism and political culture has affected the process of judicial review in the countries.

According to March and Olsen an institution is a collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover (2006: 3). At the core of the institutional perspective is the belief that institutions create elements of order and predictability (March and Olsen, 1984: 4). They fashion, enable, and constrain political actors as they act to remain within appropriate limitations. These institutions serve to create bonds that will tie citizens together. They will also carry the roles that will define the characteristics of a polity's character and vision.

Shepsle states that, through rational choice theory individuals now think more sophisticatedly about optimizing political actors, the organizations of which they are a part and most recently, the role of information in retrospective assessment, systematic foresight, and strategic calculations (2006: 23). Thoughts about political purposes, beliefs, opinions, and behaviour are more elaborate and refined. With this advancement of political thought the rational actor, according to Laver is motivated by the urge to fulfill his own desires (1997: 18),

Rational choice institutionalism is composed of two interpretations. The first posits that institutions are engaged in political games. These games are influenced by external forces. Downs presents an example of one such game (1957). He presents an election with two candidates and an ample amount of voters. In accordance with a two-dimensional spatial model, the candidates will align themselves along a policy spectrum, present their policy positions to the voters and then

voting will take place. The candidate with the most votes will win the election. This is a game influenced by external circumstances in that the institutional script provides the process of this game. The voter will choose a policy they agree with and either the candidate will be declared the winner; the loser or there will be a tie. Because there are exogenous circumstances that define the institution, it is considered a game.

The second dimension of the rational approach is that institutions are not exogenous. They are made up of players who inform the rules of the games. Deciding exactly how it should be played. This ad hoc structure should create disorder, but Shepsle presents an example of a childhood game of bat and ball (2006: 25). This example states the child who is in charge of the bat and ball will create the rules of the game and not be dependent upon exogenous circumstances. Rationally, he will alter the rules to better suit his individual strengths and weaknesses. In this category of rational choice institutionalism, there are no exogenous circumstances; instead the rules of this particular game are governed by the players who are engaging in it. Shepsle also states that patterns of procedure will be formed and this will be the constant manner in which interaction will take place (2006: 25).

While the tenets assumed by rational choice institutionalism are vital to the understanding of the process of judicial review in Europe, those tenets are incapable of accounting for the importance of political culture. Historical institutionalism will now be discussed and will serve as the principal theoretical approach for the remainder of this paper. According to Elizabeth Sanders historical institutionalism assumes that institutional development over time is marked by path dependence (2006: 39). Peters describes path dependency as the idea that choices made early in the life of an institution, system or policy (historical legacies) will routinely determine subsequent choices unless sufficiently strong political force counteracts these choices (1999: 19). However to understand the actions of judicial review as a political institution, one must be conscious of the historical development of the institution, and the original, and the distinct culture and problems that surrounded its creation. These tenets are why the consideration of the political culture of each country is important to understand the application of judicial review. As a result of this Thelen notes that rational choice theorists have often argued that historical institutionalists are engaged in something less than theory building; they are stringing details together, merely telling stories (1999: 372). This dichotomy between historical institutionalism and rational choice institutionalism is often exaggerated since both view points on institutionalism are equally empirical in their formation of theories and use analysis of critical cases to illuminate important general issues.

In Hall's "Governing the Economy", he refers to historical institutionalism as the first new version of institutionalism to emerge within political science for about five decades. In 1986 Hall's article commented on the development of economic policies in France and Britain. He argued that in order to understand from the economic development of Britain and France, knowledge of the political history and culture is necessary. Peters states that while he may not have mentioned historical institutionalism, institutions shape policies over time (2005: 72). The rest of his analysis also contained references to the concepts of the historical institutional approach.

Political culture is country specific. A country's political culture should be considered unique to that particular country since it is shaped by the norms that influence how people think about and react to politics (Almond et al., 2009: 45). According to the same source, the way political institutions function is partially a reflection of the public's attitudes, norms and expectations to their government. To understand the political tendencies in a country, the citizen's attitude toward politics and role within the political system must be examined. Strom outlines

three levels of political culture: the political system, the political and policymaking process and policy outcomes and outputs. The political system is concerned with how people view the values and organizations that exist and whether or not they accept the legitimacy of their government. The process level of political culture deals with the individual's relationship with the political process along with the expectations that citizens have about how policy should function. The policy level is focused upon expectations and policy goals of citizens.

The strength and formation of judicial review is influenced by political culture. Lijphart argues that even if a country has a written and rigid constitution it is not enough of a restraint on the legislative system (1999: 223). He believes that there needs to be an independent body that decides whether or not laws are in conformity with the constitution. Hence judicial review is considered as the ability of an uninfluenced body to review laws and make sure they are in accordance with the constitution of the state. For countries that do not have a written constitution stipulating the practice of judicial review ought to enforce it as a political service to their citizens and not to allow parliaments to be the ultimate guarantors of the law of the land (Lijphart 1999: 224). Making politicians guarantors of the law of the land is based on the flawed notion of democratic logic principles. This logic insinuates that vital decisions as the conformity of law to the constitution should be made by the elected representatives of the people rather than by an appointed and often unrepresentative judicial body.

Constitutional courts are a form of centralized judicial review. They are considered political agents. According to Fligstein et al., in "Constitutional Courts and Parliamentary Democracy", these courts are a conferring constitutional review authority on a specialized court, rather than on the judiciary as a whole. Constitutional review is the authority to evaluate the constitutionality of public acts, including legislation, and to annul those acts as unlawful when found to be in conflict with the constitutional law (2001: 77). Germany practices centralized judicial review by way of the Federal Constitutional Court (FCC).

This introduction of Germany will begin the comparative aspect of this research paper. As historical institutionalism dictates a brief discussion of the political culture of Germany is necessary for one to fully understand why the FCC plays such a strong role in the formation of policies. Baker et al discuss the political history of Germany that makes the country somewhat disposed to be accepting of policy changes made by the constitutional courts (1981: 21). They state that this is because of the turbulent political history of the country. Namely so, the failure of three regimes: the Wilhelmine Empire, the Weimar Republic, and the Third Reich which led into World War II. After World War II the government in Bonn began reeducating the German people (Baker et al, 1981: 21). They began a reduction campaign, they performed an active 'denazification' of government, punished individuals for war crimes, antidemocratic and extremist groups were prohibited and the mass media, public education and major campaigns were used to spread the legitimacy of the new Federal Republic.[i] However in 1963 a study by Almond and Verba deemed the German public to still be lacking in democratic attitudes after a year with the Federal Republic. However a study of data proved that attitudes and support towards old regimes and rules had declined. They are in fact currently very little as the majority of the electorate has been socialized in the Federal Republic political culture. This entire political system and the utilization of judicial review is cemented into the system. It is strong enough that Kommers (2006: 133) argues that the constitutional court structure is so entrenched in Germany's legal culture so much so that if any political attack on the courts is seen as an assault on the rule of law itself.

According to Blankenburg, the German constitutional court is a separate institution emphasizing autonomy from politics at the same time that it has gained considerable political

power, including the ability to strongly affect policy (1996: 249). He makes reference to the "tight control" that the constitutional courts have in support of the fact that the courts play a direct role in the making and breaking of policies. Kommers however wonders if this judicial autonomy in Germany has been maintained at the cost of democracy since decisions are being made my career judges who are drawn from a narrow slice of society and not representative of the entire nation (2006: 131). The FCC however enjoys equal rank with the Federal Parliament, Federal Council, federal president, and the federal government – made up of the President, Bundestg, Bundesrat and a Chancellor (Kommers, 2006: 142) and over the past fifty years, the court has evolved into one of the most powerful and authoritative institutions in Germany's governmental system (Kommers, 1994: 111).

A policy example that the FCC has been responsible for changing in Germany is the law stating that an alien who wishes to marry in Germany is required to produce a certificate, issued by the authorities of his home country, to the effect that no impediments exist according to that country's law (Juenger, 1972: 290). To amend this policy the constitutional court resolved not only this particular problem but all others similarly situated, and seems to ensure legitimate matrimony. Moreover, the Constitutional Court's decision obviated the immediate need for correcting judicial precedent through legislation (Kegel: 1970). Since case law dictates that once a ruling is made it cannot be overturned by legislature, this is a perfect example of how the constitutional courts are strong policy makers in Germany.

Sweden is a social democratic country with a strong emphasis on the creation of a strong welfare state. Sweden combines a tremendously successful social democratic party, powerful unions and one of the world s most extensive and redistributive welfare states (Pierson, 1996: 170). In this type of social democratic society it is no surprise that the political culture of Sweden features citizens with high participation rates in politics and citizens that are aware and informed on issues regarding government policy and development (Anton, 1969: 97). This type of political culture does not bode well for the successful practice of judicial review. Sweden possesses the mechanisms to execute judicial review like: the Parliamentary Ombudsman, Council on Legislation, and a Supreme Court and a Supreme Administrative Court with the constitutional power of judicial review (Board, 1991: 177). However, Lindblom states that the democratic ideals that are instilled within the Swedish people cause a negative connotation towards judicial review (1997: 807). This causes the role of the courts as policy makers to be weaker and therefore act as weak agents of policy making or amending.

As path dependency in historical institutionalism dictates, Sweden will continue to build on the decisions of the past unless there is a significant disturbance that will result in a change of direction. In 1963, the Swedish Supreme Court declared that the courts possessed the power of judicial review but it should only be used with great restraint. This declaration, however, was not added into the 1974 Instrument of Government. It was proposed by the parliamentary Commission in 1975 but was also rejected by the Government and by the Riksdag – Swedish Parliament (Board, 1991: 179). The disruption of path dependency may be accredited to the change in Swedish government. After forty four years in power, the Social Democrats lost the elections and resigned. The new coalition government that was formed initiated constitutional reform in line with the parties' ambitions to strengthen the protection of fundamental rights and freedoms. Because the coalition government defended its majority in the elections of 1979, thereby forming the new Commission, they were successful in approving the constitutional amendment in favour of a very restrained form of judicial review (Holmstrom, 1995: 357). It was declared as an article of government in 1979 in the form of Instrument of Government, Chapter 11, Article 14.[ii]

Judicial review in Sweden may then be described as a system of potential judicial competence but a reality of judicial inactivism. Article 14 presents many restraints to judicial review in Sweden two of which being that due procedure must be violated in any important respect to justify court action. Legislative norms decided by the Riksdag or the government about violations or inaccuracies of due process must be "obvious and apparent" to justify court exception from the norm (Holmstron 1995: 358). Court judgments are thus narrowly confined to special cases and do not invalidate the provisions as such. Board speaks of social conditions that also restrict judicial review like the people of Sweden consider judges as administrators rather than legislators (1991: 175). Board goes on to say that the political culture of Sweden is such as to inhibit any efforts to transform courts into independent policy makers; even in the field of civil rights (1991: 180). Due to ideas of devotion to parliamentary supremacy, democracy, popular sovereignty, and legal positivism; a distinctly non-liberal notion of the state; a deeply rooted political paternalism; and an ingrained deference to a European style of separation of powers that receives added reinforcement from wider social norms are limiting cultural conditions that weaken and even inhibit the practice of judicial review.

The political culture of Britain is embedded within the strong historical content of the nation. The history of the British Empire shows a process of democratic evolution. Unlike Eastern Europe, Latin America and Asia, Britain had an established rule of law from the seventeenth century. The accountability of the executive to Parliament was established b*y* the eighteenth century and national political parties in the nineteenth century (Almond et al., 2009: 192). British people have lived under the same constitution all their lives. Because of this the British people have been socialized[iii] to accept the institutions and rules from their predecessors.

The United Kingdom has an unwritten constitution that is essentially political (Griffith, 1979: 31). This unwritten constitution is composed of laws imposed by parliament with no formal statement of fundamental rights (Sunkin, 1995: 67). Due to the notion of parliamentary sovereignty[iv] there is an absence of judicial review of primary legislation which means the courts and law have traditionally played a marginal role in political life compared to the strength of the cabinet that has the ability to "correct" the judicial "misinterpretation" (Shapiro, 2002:71). As historical institutionalism stipulates in regards to building on the past, such a constitution does not lend itself to an expansion of judicial power, however due to an impact of European community law; some judicialization of politics is beginning to take place. With pressure from the European community there has been a dramatic growth in the use of the courts to challenge decisions of local and central government (Sunkin, 1995: 69). A general liberalization in the standing requirements, an extension of the scope of judicial review, and improvements in the grounds upon which challenges may be mounted has seen the courts being drawn into areas of government that would normally be considered as beyond judicial competence. An example of judicial review taking place involves decisions affecting educational syllabi (Secretary of State of Education and Science v. Tameside MBC, 1977).

While the courts are now shaping policy in the United Kingdom, it is still arguable that there is weak judicial review. The European Convention of Human Rights is exerting fundamental pressures on the constitution of the United Kingdom and upon its legal culture. Sunkin states that coherent pressures to perform judicial review stems from Europe but this will increase and the courts will be further immersed into political and economic life (1995: 75). The concepts of parliamentary sovereignty, privity clause[v] and the subjectivity clause[vi] are being refashioned as the courts are finding themselves obliged to adjudicate upon the compatibility of primary legislation with European community law.

As seen in the examples, the tenets of historical institutionalism hold true. All three nations continued to build on the actions of the past as path dependency had dictated. In each country however we noticed that a significant, exogenous type change had taken place, like the fall of the Nazis in Germany or the emergence of a European Community that caused the institution of judicial review to either be established or invigorated. The rational choice approach to institutionalism would have predicted the outcome of the implementation and practice of judicial review in these countries. However, the historical approach to institutionalism was needed so that the culture that surrounded the existence of judicial review could be studied so as to inform the reader of why the courts were strong or weak affecters of policy in Germany, Sweden and the United Kingdom.

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[i] Under this Federal Republic, there is an extensive catalogue of fundamental rights, which has been held to include a general freedom to do whatever one pleases. Many of these rights are made subject to restriction, but only in accordance with a stringent proportionality test that has been found implicit in the rule of law. Moreover, partly under the influence of a novel provision declaring the Federal Republic to be a "social state" so a number of fundamental rights have been held to have a positive dimension. (Kommers, 1997: ix)

[ii] The article reads as follows: If any court, or any public organ, considers that a provision is in conflict with a provision of a fundamental law or with a provision of any other superior statute, or that the procedure prescribed has been set aside in any important respect when the provision was inaugurated, then such provision may not be applied. However, if the provision has been decided by the Riksdag or by the Government, the provision may be set aside only if the inaccuracy is obvious and apparent.

[iii] Political Socialization: the process through which an individual is immersed in a particular political atmosphere or frame of mind.

[iv] Parliamentary sovereignty is a principle of the United Kingdom government policies. It makes Parliament the supreme legal authority in the UK, which can create or end any law.

[v] Privity clause then excludes judicial review and can be linked Sovereignty in that it is the forced lack of autonomy that is enforced on the courts as to their inability to carry out judicial review (Shapiro. 2002).

[vi] Under subjectivity clause the ministries were given the right to do as they see fit in terms of abiding by law (Shapiro, 2002).

**References**

Almond, Gabriel, A, Russell J. Dalton, G. Bingham Powell Jr., Kaare Strom. 2009. *Comparative Politics Today*. New York: Pearson Custom Publication.

Anton, T.J. 1969. "Policy-making and political culture in Sweden." *Scandinavian Political Studies.*

Baker, Kendell, Russell J. Dalton, and Kai Hildebrandt. 1990. *Germany Transformed: Political Culture and New Politics*. Massachusetts: Harvard University Press.

Board, Joseph. 1991. "Judicial Activism in Sweden." In *Judicial Activism in Comparative Perspective* ed Kenneth M. Holland. New York: St. Martin's Press.

Blankenburg, Erhard. 1996. "Changes in Political Regimes and Continuity of the Rule of Law in Germany." *Courts, Law, and Politics in Comparative Perspective*

Downs, Anthony. 1957. *An Economic Theory of Development.* New York: Harper.

Fligstein, N. Wayne Sandholtz and Alec Stone Sweet. 2001. *The Institutionalization of Europe.* Oxford New York: Oxford University Press.

Griffith, J. A. G. 1979. "The Political Constitution." *Modern Law Review* 42: 1-23

Hall, Peter. 1986. *Governing the Economy: The Politics of State Intervention in Britain and France.* Oxford New York: Oxford University Press.

Holmstron, Bengt. 1995. "Sweden." In *The Global Expansion of Judicial Power ed* C. Neal Tate and Torbjorn Vallinder. New York: New York University Press.

Juenger, F. K. 1972. "The German Constitutional Court and the Conflict of Laws"*American Journal of Comparative Law* 20: 290-298.

Kegel, G. 7 Soergel-Siebert, Bilrgerliches Gesetzbuch annots. 23-24 to art. 13 of the Introductory Law to the German Civil Code, at 378 (10th ed. 1970).

Kommers, D. P. 1994. "The Federal Constitutional Court in the German Political System". *Comparative Political Studies* 26: 470-91.

Kommers, D. P. 2006. "Autonomy versus Accountability: The German Judiciary." In *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World,* ed, Peter H. Russell and David M. O'Brien.

Laver, Michael. 1997. *Private Desires Political Action: An Introduction to the Politics of Rational Choice.* California: Sage Publications.

Lijphart, Arend. 1999. Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries, New Haven: Yale University Press.

Lindblom, P. H. 1997. "Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure." *The American Journal of Comparative Law* 45: 805-831.

March, J. G. and J. P. Olsen. 1984. "The New Institutionalism: Organizational Factors in Political Life." *American Political Science Review* 78: 734-49.

March, J. G. and J. P. Olsen. 2006. "Elaborating the New Institutionalism." In *The Oxford Pocketbook of Political Institutions,* ed. R.A.W. Rhodes, Sarah A. Binder and Bert A. Rockman. Oxford New York: Oxford University Press.

Peters, B. G. 1999. "The Politics of Path Dependency: Political Conflict in Historical Institutionalism." *Journal of Politics* 67: 1275-1300.

Peters, B.G. 2005. *Institutional Theory in Political Science.* London: Continuum.

Pierson, Paul. 1996. "The New Politics of the Welfare State." *World Politics* 48: 143-179.

Sanders, E. 2006. "Rational Choice Institutionalism." In *The Oxford Pocketbook of Political Institutions,* ed. R.A.W. Rhodes, Sarah A. Binder and Bert A. Rockman. Oxford New York: Oxford University Press.

Secretary of State of Education and Science v. Tameside MBC (1977) A.C. 1014.

Shapiro Martin. (2002) "Judicial Delegation Doctrines: The US, Britain, and France." *West European Politics* 25: 69-84.

Shepsle, Kenneth. A. 2006. "Rational Choice Institutionalism." In *The Oxford Pocketbook of Political Institutions,* ed. R.A.W. Rhodes, Sarah A. Binder and Bert A. Rockman. Oxford New York: Oxford University Press.

Sunkin, Maurice. 1995. "The United Kingdom." In *The Global Expansion of Judicial Power.* C. Neal Tate and Torbjorn Vallinder, eds. New York: New York University Press.

Thelen, Kathleen. 1999. "Historical Institutionalism in Comparative Politics". *Annual Reviews* 2: 369-404.