

Constitutional Rights, Democracy, and Representation

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Abstract The question of how the legal power of a constitutional court to overturn acts of parliament can be justified is the central theoretical issue in the field of constitutional review. The thesis of this paper is that constitutional review is justified on the basis of principles theory on the one hand and on the basis of the theory of “argumentative representation” on the other. The normative basis of principles theory is the distinction between rules and principles. If the form of application of the rules is subsumption, by contrast, the form of application of principles is balancing. Constitutional rights have essentially the character of principles, and Balancing presupposes scales, which in constitutional law are possible only as crude discrete scales. The legal reasoning implies a new concept of democracy. An adequate concept of democracy must comprise not only decision but also argument.

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1 The Problem of Constitutional Review

The question of how the legal power of a constitutional court to overturn acts of parliament can be justified is the central theoretical issue in the field of constitutional review. This issue addresses the perennial problem of the relation between constitutional review and democracy.

Hans Kelsen treats the question of constitutional review as a question of the legality of legislation. The parliament is empowered by the constitution *qua* higher law to enact statutes, and if these laws are not issued in accordance with the procedural rules of the constitution or do not comport with substantive constitutional constraints, in particular, constitutional rights, then these purported laws are unlawful¹. In this situation constitu-

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tional review is said to be indispensable in order to secure ‘complete legal bindingness’ (*volle Rechtsverbindlichkeit*)², required by the ‘principle of the greatest legality possible’ (*Prinzip möglicher Rechtsmäßigkeit*)³. This picture of constitutional review is correct but incomplete. It says nothing about how the unconstitutionality of a parliamentary law enactment is established. This is a serious problem, for in many cases the question of constitutionality will be contested. In these situations two questions arise: a methodological or argumentation-theoretic question and an institutional question. The methodological question is whether, in cases of disagreement, it makes sense to attempt to find the better answer – an answer that is better, for instance, than an answer arrived at by tossing a coin. The institutional question is whether it is compatible with democracy that a constitutional court be empowered to attempt to find this answer. My reflections on these questions will refer to constitutional rights, a field in which the problems of constitutional review are posed with special urgency. I will proceed in two steps. In a first step I will present principles theory as a model of constitutional argument. The second step will concern the idea of constitutional review as ‘argumentative representation’ of the people. My thesis is that constitutional review is justified on the basis of principles theory on the one hand and on the basis of the theory of argumentative representation on the other.

2 Principles Theory

2.1 Rules and Principles

The norm-theoretic basis of principles theory is the distinction between rules and principles. Rules are norms that require something definitively. They are *definitive commands*. Their form of application is subsumption. By contrast, principles are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities at hand. Thus, principles are *optimization requirements*⁴. Their form of application is balancing. This norm-theoretic distinction is connected with the interpretation of constitutional rights by way of the thesis that con-

1 H. Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 1929, 5, pp. 30-35.

2 Kelsen, *op. cit.*, p. 78.

3 H. Kelsen, *Wer soll der Hüter der Verfassung sein?*, Berlin-Grünwald: Rothschild, 1931, p. 5.

4 R. Alexy, *A Theory of Constitutional Rights* (first publ. 1985), trans. Julian Rivers, Oxford, Oxford University Press, 2002, pp. 47-48.

stitutional rights have essentially the character of principles⁵. This does not mean, however, that provisions giving expression to constitutional rights cannot also express rules or elements of rules. An example of a constitutional rights rule in the German Constitution is Article 102 of the Basic Law, which says: ‘The death penalty is abolished’. Another example of a decision taken by the constitutional framers that has the character of a rule is Article 104 (2) (3) of the Basic Law, which runs as follows: ‘The police are not permitted to hold anyone arrested on their own authority beyond the end of the day after the arrest’. Still another example stems from the details of the highly complex regulation on the adoption of technical means for the acoustic surveillance of an accommodation in which the suspect is thought to reside, found in Article 13 (3)-(6) of the Basic Law. In these cases, the constitutional framers have passed on questions of balancing by establishing rules, and the interpreter of the Constitution is bound to apply them⁶. There exist, however, a great many cases in which an authoritative decision taken by the constitutional framers to decide the case is not at hand. Here, the balancing of principles is indispensable. This is also the case where a constitutional court transcends the wording of the constitution, as, for instance, the German Federal Constitutional Court did when, in a decision from 9 February 2010, it created a social right to an existential minimum⁷.

2.2 Principles Character and Proportionality Analysis

The definition of principles as optimization requirements leads straightaway to a necessary connection between principles and proportionality. The principle of proportionality (*Verhältnismäßigkeitsgrundsatz*), which in the last decades has received ever greater international recognition in the theory and practice of constitutional review⁸, consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in the narrower sense. All three sub-principles express the idea of optimization. Principles *qua* optimization requirements require optimization relative both to what is factually possible and to what is legally possible. The principles of suitability and necessity refer to optimization relative to

5 See on this R. ALEXY, *Constitutional Rights and Proportionality*, ms.

6 ALEXY, *A theory...*, cit., p. 83.

7 Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*, hereafter: BVerfGE), 125, 175 (222).

8 See, for instance, D.M. BEATTY, *The Ultimate Rule of Law*, Oxford: Oxford University Press, 2004; A. STONE SWEET and J. MATHEWS, *Proportionality Balancing and Global Constitutionalism*, in *Columbia Journal of Transnational Law*, 2008, 47, pp. 72-164.

the factual possibilities. Optimization relative to the factual possibilities concerns the question of whether one position can be improved without detriment to the other. Thus, the first two sub-principles require Pareto-optimality.

Optimization relative to the factual possibilities consists in avoiding avoidable costs. Cost, however, are unavoidable when principles collide. Balancing then becomes necessary. Balancing is the subject of the third sub-principle of the principle of proportionality, the principle of proportionality in the narrower sense. This principle expresses what optimization relative to the legal possibilities means. This rule can be called ‘Law of Balancing’⁹. It states:

The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.

2.3 Law of Balancing

The Law of Balancing shows that balancing can be broken down into three stages. The first stage involves establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, in a third stage, it is determined whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former. This shows that balancing presupposes that it is possible to make rational judgments about, first, the intensity of interference, second, the degree of importance, and, third, their relation to each other.

Critics of balancing like Jürgen Habermas and Bernhard Schlink contest the rationality of such judgments¹⁰. The question of whether balancing is a form of rational argumentation cannot be discussed here in any detail¹¹. I will confine myself to a brief look at two cases illustrating that and how rational judgments about intensity of interference, degree of importance, and their relation to each other are possible. A rather simple case is the decision of the German Federal Constitutional Court on health warnings¹². The Court characterizes the duty of tobacco producers to place health warnings respecting the dangers of smoking on their products as

9 ALEXY, *op. ult. cit.*, p. 102.

10 J. HABERMAS, *Between Facts and Norms* (first publ. 1992), trans. William Rehg, Cambridge, Polity Press, 1996, p. 259; B. SCHLINK, *Der Grundsatz der Verhältnismäßigkeit*, in *Festschrift 50 Jahre Bundesverfassungsgericht*, 2 vols., ed. P. Badura and H. Dreier, Tübingen, Mohr Siebeck, 2001, vol. 2, p. 460.

11 See on this R. ALEXY, *The Construction of Constitutional Rights*, in *Law & Ethics of Human Rights*, 2010, 4, pp. 26-32.

12 BVerfGE 95, 173.

a relatively minor or light interference with the freedom to pursue one's profession. By contrast, a total ban on all tobacco products would count as serious interference. Between such minor and serious cases, others of moderate intensity of interference can be found. In this way, a scale can be developed with the stages 'light', 'moderate', and 'serious'. Our example shows that valid assignments following the scale are possible. The same is possible on the side of the competing reasons. The health risks resulting from smoking are great. Therefore, the reasons justifying the interference weigh heavily. If in this way the intensity of interference is established as minor, and the degree of importance of the reasons for the interference as high, then the outcome of examining proportionality in the narrower sense may well be described – as the German Federal Constitutional Court has in fact described it – as 'obvious'¹³.

The teachings of the tobacco judgment are corroborated by looking to other cases. A far more difficult case is presented by the decision of the Federal Constitutional Court on electronic data screening. A student with Moroccan citizenship and islamic faith brought a constitutional complaint against an order of the lower district court in Düsseldorf – upheld in the higher courts – that required residents' registration offices, the central aliens' registry, and universities to transmit data concerning male persons between 18 and 40 on, *inter alia*, their faith, native country, citizenship, and subject of study. These data were transmitted to automatic data processing for the purpose of identifying potential terrorists. The measure was held to be justified in light of the general danger of terrorism attempts after September 11¹⁴. The majority of the First Panel of the Federal Constitutional Court classified the measure as an interference of 'considerable weight'¹⁵ with the complainant's right to data self-determination, which – according to the Court – is a special case of the general right to personality (Art. 2 (1) in connection with Article 1 (1) of the Basic Law). The Court considers such a serious interference as justified in cases of a present danger¹⁶ and also in cases of a concrete danger, but not in cases of an abstract or general danger¹⁷. Now, our case is said to be merely a case of abstract danger¹⁸, characterized by a 'generally threatening situation'¹⁹. This implies that the interference with the right of the complainant is unconstitutional.

13 BVerfGE 95, 173 (187).

14 BVerfGE 115, 320 (331).

15 BVerfGE 115, 320 (347).

16 BVerfGE 115, 320 (363).

17 BVerfGE 115, 320 (360).

18 BVerfGE 115, 320 (369).

19 BVerfGE 115, 320 (364).

The reason for this – not very clearly elaborated in the decision, which is focused on the interference with the right and not on the reasons for this interference – is that in cases of abstract danger, the reasons for interference have only a moderate weight or at any rate a less serious²⁰ weight than the interference with the complainant's right. Therefore, the constitutional complaint was considered to be justified.

If one follows the classifications of the majority, the result is inevitable. The dissenting vote of Justice Haas, however, shows that different classifications or gradings are conceivable. According to Haas, the interference with the complainant's right has only a 'low weight'²¹, whereas the guarantee of security is of great importance. These classifications imply that the constitutional complaint is not justified. Here only two points are of interest. The first is that both sides presented numerous arguments for their classifications. The arguments of the majority for the assessment of the interference as serious run over eleven pages²², those of Justice Haas for her assessment as light run over four pages²³. This illustrates that balancing is not simply a matter of classification, grading or rating, but essentially a matter of argumentation. The second point is that the arguments can not only lead, as in the tobacco case, to an agreement, but also to disagreement. The question is what this means for the justification of constitutional review.

2.4 Discretion

It would be possible to engage in a far deeper and more precise analysis of the two cases by means of the Weight Formula²⁴, which is nothing other than a mathematical reconstruction of the Law of Balancing together with its link to a second Law of Balancing that refers to epistemic certainty²⁵. This, however, shall not be elaborated here. A sole point is of interest in the present context. It is the fact that the theory of balancing, as based on principles theory, is intrinsically bound up with a theory of discretion or deference. Two kinds of discretion are to be distinguished: structural and epistemic discretion.

20 This alternative presupposes the application of a double-triadic scale. See on this R. ALEXY, *On Balancing and Subsumption*, in *Ratio Juris*, 2003, 16, p. 445.

21 BVerfGE 115, 320 (379).

22 BVerfGE 115, 320 (347-57).

23 BVerfGE 115, 320 (371-4).

24 R. ALEXY, *The Weight Formula* (first publ. 2002), trans. B. Brożek and S.L. Paulson, in *Studies in the Philosophy of Law*, vol. 3, ed. J. Stelmach, B. Brożek, W. Załuski, Krakow, Jagiellonian Press, 2007, pp. 9-27.

25 ALEXY, *A Theory...*, cit. pp. 418-419.

The most important kind of structural discretion is discretion in balancing²⁶. Balancing presupposes, as the two cases illustrate, scales²⁷. In constitutional law only crude discrete scales are possible. The triadic scale, namely light, moderate, and serious, is an example. There are numerous possibilities for refining the scale. A double-triadic scale is of special interest. It works with nine steps or values that begin with light light, that is, very light, continue with moderate light, and terminate with serious serious, that is, very serious. It is of the utmost importance that the possibilities of refinement be limited. All classifications represent judgments, and they are, as the two cases illustrate, in need of justification. A justification can only be given for what one understands. Now it is easy enough to understand a statement such as ‘The interference is light’ or a statement such as ‘The interference is a serious moderate interference’. But how should the statement ‘The interference is a serious light interference of a moderate kind’ be understood?²⁸ For this reason, the scale cannot be an infinitesimal or continuous scale. It has to be crude and discrete. The cruder the scale, the more frequent the cases of stalemate, that is, if a triadic scale is used, the frequency of cases in which on both sides a ‘light’, a ‘moderate’, or a ‘serious’ may be found. In such cases of stalemate, the parliament, from the point of view of the constitution, is free to decide as it wishes.

Epistemic discretion is no less important. It occurs in cases of empirical and normative uncertainty. In such cases the formal principle of the decision-making competence of the legislature can justify an exercise of discretion by the legislature²⁹.

The existence of these two kinds of discretion shows that the reasoning of a constitutional court is different from what takes place in the parliament. The majority in parliament cannot issue a law that says no more than that it is possible to decide both for and against a certain regulation. A constitutional court can make such a decision, and it in effect has to do so in all cases of discretion. This implies that constitutional review is confined to controlling the limits of the competence of the legislature. This is an important point where the principle of democracy is concerned. It reduces the intensity with which constitutional review interferes with the principle of democracy.

26 ALEXY, *op. ult. cit.*, pp. 396-414.

27 A. BARAK, *The Judge in a Democracy*, Princeton, Princeton University Press, 2006, p. 166.

28 ALEXY, *The Construction...*, cit., pp. 30-31.

29 ALEXY, *A Theory...*, cit., pp. 422-425; R. ALEXY, *Comments and Responses*, in *Institutionalized Reason*, ed. M. Klatt, Oxford, Oxford University Press, 2012, pp. 330-331.

3 Constitutional Rights, Human Rights, and Representation

The concession represented by discretion or deference serves to mitigate the harshness of the problem posed by the democratic legitimacy of constitutional review. This concession does not, however, by itself place one in a position to resolve the problem, for it leaves open the institutional question of who ought to determine the limits of legislative competence. In cases of collision between constitutional rights as well as between constitutional rights and collective goods, this problem can only be resolved by means of balancing. One might call the limits established by balancing ‘balancing limits’. A balancing limit is transgressed by the legislature when the interference of a certain regulation with a constitutional right has greater weight than do the reasons justifying it. A parliament issuing this regulation will, however, regularly claim that the regulation is constitutional, which implies that it is proportional, and which implies, too, that the reasons justifying the interference have at least as much weight as the interference. A critic of constitutional review who accepts the thesis that balancing is a form of rational argumentation may nevertheless ask, in such cases, why the assessments of the constitutional court ought to take priority over the assessments of the legislature. The answer to this question stems from the connection of three arguments: a formal, a substantive, and a procedural argument.

3.1 Control or No Control?

The formal argument consists of the classical maxim *nemo iudex in sua causa*³⁰. Jeremy Waldron has argued that it ‘is hard to see the force of this argument’³¹. There must always be ‘some person or institution whose decision is final’³², and the person or institution having the last word is ‘ipso facto ruling on the acceptability of [his or its] own view’³³. One has to agree with Waldron on the point that the final instance cannot be controlled by a further instance, for if this were the case, the final instance would not be final. But the problem of the final instance has to be distinguished from the problem of control. If there is no constitutional review, there is no control of the legislature with respect to the question of whether – in following its own assessments of the requirements of constitutional rights – it has

30 See on this KELSEN, *Wer soll der Hüter...*, cit., p. 6.

31 J. WALDRON, *The Core of the Case Against Judicial Review*, in *Yale Law Journal*, 2006, 115, p. 1400.

32 WALDRON, *op. cit.*, p. 1400.

33 WALDRON, *op. cit.*, p. 1401.

violated these rights. That there exists no institutionalized control of the controlling instance is a separate point. The fact that the final instance is not controlled does not imply that it cannot control non-final instances. One is left, then, with the question of whether control by an instance that is not itself controlled is to be preferred to no control at all. I think constitutional rights fare better if we follow the first option. But why should they be better protected?

This question leads to the second argument, the substantive argument. The substantive argument is based on the importance of constitutional rights. The importance of constitutional rights stems from the fact that constitutional rights are rights that have been recorded in a constitution with the – subjective or objective³⁴ – intention of transforming human rights into positive law.

3.2 Argumentative Representation

The procedural argument is the argument of the argumentative representation.

3.2.1 Democracy and Representation

The legitimacy of constitutional review with respect to the principle of democracy has a negative and a positive aspect. The negative aspect refers to the question of how intensively constitutional review interferes with the democratically legitimized competence of the parliament. The lower the degree of interference, the greater the legitimacy. This is the theme of the theory of discretion or deference. The theory of discretion or deference establishes cases in which interference with the principle of democracy is precluded by the constitution. One might call these cases ‘non-interference cases’. The negative aspect consists of attributing to the principle of democracy a lower weight with respect to the principle of the protection of constitutional rights – a lower weight proportional to the degree of discretion accorded the legislature.

The positive aspect concerns the enhancement of the weight of the principle of protection by connecting it with the principle of democracy. Such a connection means that the principle of democracy is to be found on both sides of the collision. With this development, the case for constitutional review is considerably improved. Two versions of the positive argument are to be distinguished. The first is the well-known argument that constitutional

34 See on this ALEXY, *Constitutional Rights...*, cit., ms., p. 14.

review is legitimate because it serves to protect the conditions presupposed by a democracy. This, however, shall not be considered here. The second version of the positive argument is far more interesting, for it refers to all constitutional rights, not only to those that are relevant to the process of democratic will-formation. This is the argument of argumentative representation.

The starting point of the argument of argumentative representation is the fact that constitutional review is an exercise of state authority. In cases in which statutes are invalidated, it is, as Kelsen puts it, 'a negative act of legislation'³⁵. In more recent times, constitutional courts often issue directives to the parliament concerning positive state action in the field of protective rights as well as in the field of social rights. This is or at any rate comes close to a positive act of legislation. In a democratic state in which – as stated in Article 20 (1) (1) of the Basic Law of the Federal Republic of Germany – 'all state authority proceeds from the people', constitutional review *qua* negative or positive legislation can be legitimate only if it proceeds from the people. This means that it is legitimate only if it can be conceived as a representation of the people.

Representation is a two-place relation between a *repraesentandum* and a *representans*. In the case of parliamentary legislation the relation between the *repraesentandum* – the people – and the *representans* – the parliament – is essentially determined by free and general elections and the possibility of control by denying reelection. Now it is possible to draw a picture of democracy that contains nothing more than a system of decision-making centered around the concepts of election and majority rule. This would be a purely decisionistic model of democracy. An adequate concept of democracy must, however, comprise not only decision but also argument. The inclusion of argument in the concept of democracy renders democracy deliberative. Deliberative democracy is an attempt to institutionalize discourse as far as possible as a means of public decision-making. For this reason, the connection between the people and the parliament must be determined not only by decisions expressed in elections and votes but also by argument. In this way, the representation of the people by the parliament is, at one and the same time, volitional or decisionistic and argumentative or discursive.

35 H. KELSEN, *Judicial Review of Legislation*, in *The Journal of Politics*, 1942, 4, p. 187.

3.2.2 Essentially Argumentative Representation

The representation of the people by a constitutional court is quite different. The judges of the constitutional court have, as a rule, no direct democratic legitimation, and, what is more important, the people normally have no possibility of control by denying them reelection. For this reason, I have qualified the representation of the people by a constitutional court in an earlier article as ‘purely argumentative’³⁶. Mattias Kumm has pointed out that a purely argumentative representation would be compatible, for instance, with ‘a council of justice-seeking hereditary philosopher kings’, and, he insists, ‘a volitional/decisional link between the people and constitutional courts has to exist, if they are to qualify as genuinely representative institutions’³⁷. Kumm is right on this point. In a democracy, at least an indirect electoral link between the people and the constitutional court – as established, for instance, by appointment on the part of representatives who are directly elected – is necessary, and, over and above this, the decision-making that takes place inside the court must involve some kind of majoritarian procedure. But this does not affect the gist of my argument. The decisive point is that the independence of the judges of a constitutional court requires that the people have no possibility of control by voting them out of office or – in whatever way – denying them reelection. This is enough to characterize representation of the people by a constitutional court as *essentially* argumentative³⁸. To be sure, representation of the people both by parliament and by a constitutional court has a volitional or decisionistic as well as an argumentative or discursive dimension. In both cases the volitional or decisionistic dimension represents the real side of the enterprise, and the argumentative or discursive dimension its ideal side. The decisive difference is that the argumentative dimension in the case of constitutional review is not simply a second dimension alongside the decisionistic dimension. It is the essential dimension. This implies that the ideal dimension is dominant in constitutional review.

36 R. ALEXY, *Balancing, constitutional review, and representation*, in *International Journal of Constitutional Law*, 2005, 3, p. 579.

37 M. KUMM, *Alexy's Theory of Constitutional Rights and The Problem of Judicial Review*, in *Institutionalized Reason*, ed. M. Klatt, Oxford, Oxford University Press, 2012, pp. 206-207.

38 ALEXY, *Comments and Responses*, cit., 338.

3.2.3 Argumentative Representation, Correctness, and Acceptance

A critic of constitutional review might well object that this, in the end, counts as an overidealization. The critic will maintain that essentially argumentative representation is a chimera. Once the ideal dominates the real, the constitutional court is free to declare every argument as an argument representing the people. The path that begins with constitutional rights and continues with balancing, argumentation, and constitutional review ends with an illusion, in which the legitimation of everything is possible.

This objection can be rejected if it is possible to show, first, that constitutional review as argument or discourse does not allow for everything, and, second, that constitutional review as representation can be connected with what people really think. Constitutional review as argument does not allow for everything, for good from bad or better from worse constitutional arguments can be distinguished from one another in a considerable number of cases. This is an argumentation-theoretic question that I have attempted to answer by means of a theory of rational discourse. To be sure, the theory of rational discourse does not preclude ‘reasonable disagreement’³⁹. It does, however, preclude the notion that all disagreement is reasonable. If all disagreements over rights were reasonable, Waldron’s argument against judicial review, which is essentially based on the existence of disagreement⁴⁰, would, indeed, be quite strong. There are, however, cases in which only one answer is discursively possible⁴¹, and is in this sense right or correct. The tobacco case might well be an example. In the electronic data case, the situation is more complex. The dissenting vote shows that there exists a disagreement inside the court. Both sides raise a claim to correctness, and the majority decides. This connection of argument and decision is legitimate if one conceives constitutional review as a process of approximation towards correctness or truth. It is our best means for coming closer to what is discursively necessary.

The existence of good or correct arguments is enough for deliberation or reflection, but not for representation. For this reason, the ideal level of argument and correctness must be connected with the real level of actual acceptance. The court’s claiming that its arguments are the arguments of the people is not enough. A sufficient number of people, at least in the long run, must accept these arguments on the ground that they are correct. This shows that there are two fundamental conditions of true argumentative

39 J. RAWLS, *Political Liberalism*, New York, Columbia University Press, 1993, p. 55.

40 WALDRON, *The Core of the Case...*, cit., pp. 1366-9.

41 On the concepts of discursive possibility, necessity, and impossibility see R. ALEXY, *A Theory of Legal Argumentation* (first publ. 1978), trans. R. Adler and N. MacCormick, Oxford, Clarendon Press, 1982, p. 207.

representation: first, the existence of sound or correct arguments, and, second, the existence of a sufficient number of rational persons, that is, persons who are able and willing to accept sound or correct arguments for the reason that they are sound or correct. One might call these persons, by analogy to John Rawls' concept of the liberal person⁴², 'constitutional persons'. These two conditions show how demanding the presuppositions of constitutional review are. They express a trust in reason. But without reason the whole enterprise of democratic constitutionalism would be a feeble arrangement. This leads to the conclusion that if reason justifies democratic constitutionalism, and I think it does, then constitutional review is justified as one of its necessary elements.

42 RAWLS, *Political Liberalism*, cit., p. 290.

