JOHN H. ELY’S FORMULATION OF “REPRESENTATION-REINFORCEMENT” AS AN APPROACH FOR CONSTITUTIONAL INTERPRETATION

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John Hart Ely’s theory of “Representation-Reinforcement” is a pioneering theory of judicial review. Ely proposed this theory in the late ’70s as a tool to regulate actions of political process in a democratic manner. Judiciary can exercise judicial review only to repair the breakdown of the political process (such as infringement of rights of discrete and insular minorities) so as to reinforce the representational principles of the Constitution and maintain a representative democracy.

Almost four decades have passed since the theory was proposed by Ely but the theory still continues to attract attention of legal theory scholars and critics all across the globe. The paper is an attempt to understand what Ely’s theory entails and what significance it has for the theory of judicial review in a democratic setup. It further evaluates the contrasting positions which democracy and judicial review supposedly occupy, and explores if Ely’s theory harmonises the two concepts. The final understanding is that Ely’s theory is still relevant and can be successfully used to exercise judicial review in spite of its apparent shortfalls and inconsistencies.

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I. INTRODUCTION

"Modern democracy invites us to replace the notion of a regime founded upon laws, of a legitimate power, by the notion of a regime founded upon the legitimacy of a debate as to what is legitimate and what is illegitimate – a debate which is necessarily without any guarantor and without any end."

- Claude Lefort

Democracy and constitutionalism are not always in harmony and face an “irresolvable tension.” Judicial interpretation of constitutional rights needs to be justified in order to reconcile it with democratic governance. The American Constitution does not explicitly provide for judicial review but its need and importance are undisputed. Hamilton famously called the judiciary “the least dangerous” branch of Governance to “the political rights of the Constitution.” The courts were assigned a role of intermediary between the people and the legislature, with the courts checking the exercise of powers by the legislature. He envisaged judicial review of the Constitution by the courts wherein the judges were to ascertain its meaning and also decide whether the Constitution will prevail if it is at an “irreconcilable variance” with legislative text. Varying interpretive mechanisms can be employed for judicial review ranging from originalist to textualist to intentionalist to pragmatist to a natural law theorist reading and understanding of the Constitution. The search for a proper theory of constitutional interpretation is still alive. It is in this series that

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4 Id.

The paper is an attempt to evaluate and explain the significance of Ely’s approach to constitutional interpretation. It starts with a brief description of Ely’s theory of representation-reinforcement. It then proceeds to examine the critique which his theory has received in academic circle. Next the paper locates Ely’s theory amidst the claim of incompatibility of democracy and judicial review. The paper concludes with the understanding that even with all the shortcomings of Ely’s theory, it has been and might be successfully used by courts in future to exercise judicial review.

II. ELY’S THEORY OF “REPRESENTATION-REINFORCEMENT”

Ely through his “participation-oriented” and “representation-reinforcement” theory of judicial review proposed a new process-based approach to constitutional interpretation that he believed was consistent with “the American system of representative democracy.” Put simply, what Ely proposed was that when the judiciary finds that the political process is defective such that the republican goal of representative democracy is out of some people’s reach, it should intervene with the democratic exercise of law and exercise judicial review of such unconstitutional measures.

Ely was a thorough critic of both interpretivism and non-interpretivism and believed that value imposition is not needed to fill-in the Constitution’s open texture. He drew inspiration for his theory from footnote four of the

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7 Interpretivism is largely restrictive of judicial discretion for it claims that Constitutional text has a discoverable meaning and judges should remain within the four walls of this traceable meaning. Dworkin’s claim is also interpretivist in the sense it claims that interpretation of a text involves assigning it a meaning which best fits and justifies. See Ronald Dworkin, LAW’S EMPIRE (1986). Interpretivism thus aims at deriving the meaning of Constitution in accordance with the clearly stated or implicit values and norms. See John Hart Ely, Constitutional Interpretivism: Its Allure and Impossibility, 53 INDIANA LAW JOURNAL 399 (1978) [hereinafter Ely, Interpretivism].

8 Non-Interpretivism aims at looking beyond the references in the Constitutional text and enforcing values or norms not implicit within the boundaries of the Constitution. See Ely, Interpretivism, supra note 7. It looks for extra-constitutional fundamental values to fill in the open-textured provisions. (It is often perceived as being an anti-democratic theory for it vests in non-elected judges the power to invalidate executive and legislative action as unconstitutional against the will of majority.)

9 Ely, Judicial Review, supra note 6, at 451.

10 “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or racial minorities...whether prejudice against discrete and insular
Carolene Products case. His theory anticipates a form of judicial review where judges will intervene only when the “political market is malfunctioning.” The malfunctioning referred to here which warrants the judges to set aside decisions of elected representatives is when their “value determinations” cannot be trusted. Ely identified two kinds of malfunctions which should pull the trigger of judicial review in action:

(1) the in’s are choking off the channels of political change to ensure they will stay in and the out’s will stay out, or (2) though no one is actually denied a voice or a vote, an effective majority, with the necessary and understandable cooperation of its representatives, is systematically advantaging itself at the expense of one or more minorities whose reciprocal support it does not need and thereby effectively denying them the protection afforded to other groups by a representative system.

This characterization resonates with paragraphs two and three of footnote four of the Carolene Products judgement by Justice Stone. Ely’s insistence on value-free constitutional adjudication can be seen from his painting of Carolene Products in a participational light.

He sees it as being concerned not with a particular “substantive value” which is extremely important and fundamental (and hence needs judicial protection) but on ensuring smooth and unhindered participation in the political process by which value identification and accommodation takes place or the settlement these reach.

Ely’s focus therefore, is on “rights through process” where the Court ought to step in when the legislation either directly contains the ‘process of change’ or the groups which the legislation targets are incapable of making effective use of the process. The obstruction Ely contemplates is not just of a formal barrier to participation. He gives a broadened interpretation to Justice Stone’s “discrete and insular minorities” by outlining a theory of suspect classification. Ely covers even those “groups we know to be the object of

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12 Ely, Judicial Review, supra note 6, at 486.
13 Id.
14 Id. at 487.
16 Ely, Judicial Review, supra note 6, at 456.
18 Judiciary must be suspicious of the unconstitutional motive of the legislation not only when the group in question is disadvantaged by obstructing its political participation but also where there is serious prejudice against its interests even when it is formally represented. Suspicious classification is a useful “handmaiden of motivational analysis” for Ely. For him the
widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure.”19

In his theorisation, Ely makes three specific claims, the success or otherwise of which will be evaluated in the next section. His first argument is targeted at establishing that the Constitution is “primarily concerned with structure and process,”20 that is, it is principally dealing with procedural fairness in process writ small and with ensuring broadened participation in “processes and benefits of Government.”21 He makes this claim by way of an ejusdem generis argument seeking to show most of the Constitution is about values of process and not substance.22 His second claim is that his approach is in line with the American concept of Representative Democracy.23 Third, he makes the “competence argument”24 claiming that judges being “experts on process” and as political outsiders are better suited to perform a participation-oriented, representation-reinforcing review of the disputed matter than the elected political officials.25

III. CRITIQUE OF ELY’S MODEL AS AN APPROACH TO CONSTITUTIONAL INTERPRETATION

Ely’s theorisation set in motion debates in constitutional interpretation and received positive as well as negative response.26 His camp of supporters either endorsed his theory completely or broadened its ambit by increasing the scope of its application. His critics on the other hand, mostly attacked the fundamental premises of his theory and pointed out the missing links or faulty assumptions in his theorisation.

One of the biggest critiques levelled against Ely’s theory is the falseness of the claim about its value-neutrality. In defining democracy Ely himself engaged in a value-laden exercise in some ways.27 A connected problem is his equation of the concepts of majoritarianism and democracy. Ely gives no basis

benchmark of analysis is not just the numerical numbers or the insularity of the minority alone but also the prejudice the group faces in terms of either “outright hostility” or “unconscious generalization.” See John Hart Ely, DEMOCRACY AND DISTRUST 145, 153-154; 157 (1980).

19 Id. at 153.


21 Ely, Judicial Review, supra note 6, at 470.

22 Id.

23 Id. at 471.

24 Grano, supra note 20, at 178.

25 Ely, Judicial Review, supra note 6, at.


27 Schachter, supra note 15, at754.
for his version of democracy which is comprised of the substantive principles of ‘non entrenchment’ and ‘fair representation’.

Estbeicher hits Ely’s theory by questioning its preference for one set of values over others since the idea of democracy envisaged by Ely is also a created value. He further elaborates Ely’s hollow attempts at outlining “participational values” as value-neutral even though they embody substantive choices. Estbeicher also attacks Ely’s three claims which give more importance to process-based values over substantive values. First, his *ejusdem generis* argument to prove that the major part of the Constitution is concerned with process fails on its clause by clause analysis which proves it to be a fair balance between substance and procedure. Second, his theory also involves value creation and one cannot evaluate the court’s action unless we grant a substantive meaning to what democracy entails. Third, his justification for making judges “appropriate decision-makers” for being outsiders, having adjudicative skills, etc. can be equally used to justify their role in adjudicating on fundamental values.

Another critique is to the basic premise itself – Brest questions how courts are competent to engage in a representation-reinforcing review when they lack the ability to do a fundamental values review. This links back to the falsity of Ely’s apparent value-neutrality since Brest claims that, one, representation-reinforcing review necessitates value judgments which touch upon fundamental values, and two, claims made by parties in fundamental value cases can be converted into representation-reinforcing claims. Brest also attacks Ely’s theory’s inability to come to the rescue of homosexuals by exempting discriminatory legislation based on ‘sincerely held moral beliefs’. Tushnet questions Ely’s assertion of participation being compatible with the ‘American system of Representative Democracy’ of which Ely offers no evidence.

Tribe similarly strikes pointing at the substantive roots of procedural norms:

“The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values – the very sort of theory the process-perfecters are at such pains to avoid.”

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28 Id. at 753.
29 Id. at 552.
30 Id. at 565.
31 Id. at 570-571.
32 Id. at 572-573.
33 Id. at 577.
34 Brest, *supra* note 26, at 131.
35 Id.
36 Id. at 135.
37 Tushnet, *supra* note 26, at 1047.
38 Tribe, *supra* note 26, at 1064.
He even attacks the premise that a discriminatory legislation against a group is the result of a “flawed” political process and imposes a burden which affects an “independently fundamental right.” He is of the opinion that the approach here needs to look beyond process and proclaim fundamental substantive rights for the affected group.39

IV. JUDICIAL REVIEW VIS-À-VIS DEMOCRACY AND ELY’S THEORY

The tussle between proponents of democratic governance and supporters of judicial review is well known. Waldron, for instance, is a major opponent of judicial review. His twofold argument states that one, rights are better protected by democratic legislatures, and two, judicial review is democratically illegitimate. He seeks to explain that what judicial review proponents call ‘tyranny of the majority’ and thereby warrant a rights based review, is merely a disagreement about rights which can be sorted by ordinary legislative processes.40 Waldron does agree that in certain circumstances – “peculiar pathologies, dysfunctional legislative institutions, corrupt political cultures, legacies of racism and other forms of endemic prejudice”41 – judicial review can be accepted although he wants its defenders to make the claim on these grounds rather than couching it as “the epitome of respect for rights and as a normal and normatively desirable element of modern constitutional democracy.”42 Tushnet, yet another opponent, argues that judicial review disrupts self-governance and choices about fundamental values are better left to people.43 On the other hand, we have Brett Schneider and Eisgruber arguing that judicial review is not necessarily undemocratic, and in fact by overriding majoritarian decision-making it protects core democratic values and promotes non-majoritarian representative democracy, and acts as a guardian of democratic political systems.44 The main question, however, which we seek an answer is: Where does Ely’s participation-oriented and representation-reinforcing theory feature in this long standing tiff?

Ely proposed a justification of the theory of judicial review by casting it in purely proceduralist terms. He being an opponent of value-imposing constitutional interpretation devised a theory whose fundamental premise is representative democracy. Ely’s approach ensures that the courts keep a watch over the processes required for a healthy majoritarian democracy and oversee whether there is actual representation of all the groups by the elected

39 Id. at 1077.
41 Id. at 1406.
42 Ibid.
44 Annabelle Lever, Democracy and Judicial Review: Are they really Incompatible?, 7 PERSPECTIVES ON POLITICS 806 (2009). (Lever further builds this and after contrasting the leading scholarship on the issue concludes that it is possible to defend judicial review on democratic arguments though she doesn’t engage much with Ely’s theory).
representatives.\textsuperscript{45} If we see democracy as Ely defines it – inclusive and participatory: broad access to political processes and an equal, fair and a non-discriminating access of such processes to minorities- review of the same by an independent judiciary assumes heightened importance and judicial review becomes a sine qua non of democratic procedures.\textsuperscript{46} Ely’s theory also successfully avoids the general claim levelled against judicial review in terms of competence of judges to pronounce on substantive values in a democratic setup by vesting only procedural review powers in judges. Ely’s conception of judicial review is compatible with a certain view of democracy. After all, “\textit{majoritarian democracy is best when it is structured and limited by minoritarian constitutionalism.”}\textsuperscript{47}

V. CONCLUSION

Ely’s approach has had a fair amount of influence on the Supreme Court’s approach to constitutional interpretation since the 1990s. Boynton argues that Ely and the Court’s approach resembles in many areas.\textsuperscript{48} The Court has not completely adopted Ely’s approach but it is leaning towards it, in its reading of privileges and immunities clause for instance.\textsuperscript{49} Ely’s approach also serves to explain the Warren Court’s decisions but he did not agree with all of Warren Court decisions.\textsuperscript{50} No one theory can fully explain the decision making of the Court in a comprehensive manner. Insofar as Ely’s theory has given us a limited justification of judicial review in tandem with democratic ideals of the American polity, it has made its mark.

\textsuperscript{45} Ely, \textit{supra} note 6, at 485.
\textsuperscript{47} Id. at 48.
\textsuperscript{49} Id. at 422.
\textsuperscript{50} Strauss, \textit{supra} note 26, at 762.