

**Courts and the Making of Public Policy**

# The Role of Courts in a Democracy

Alternatives to Judicial Supremacy

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## Executive Summary

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- The proper relationship of courts to the elected branches matters when exporting fundamental institutions such as the rule of law to transitional and democratizing countries. The process might be likened to file-sharing over the Internet. Who would not take care to ensure that shared files do not contain viruses or other harmful material? By the same token, the West should ensure that the institutions it exports to nations and peoples in need are free of the kind of harmful defects that the West has, so far, managed, but which less robust polities may not be able to handle.
- If there is more than one way of structuring the power relations between the judiciary and the elected branches of government, constitution-makers ought to enquire if there is a best way, and if so, prefer that one. Alternatives do exist which mediate these relations for better or worse. Those striving for the rule of law ought to consider all of them lest a better option is overlooked. That would be the one that better mediates the fundamental struggle that every polity has to solve, the tension between democracy (popular sovereignty) and the rule of law (personal liberty).
- Better alternatives and even other possible designs may be getting overlooked. Research has revealed that in one region at least, central and Eastern Europe (CEE), a single paradigm has been everywhere promoted, one in which the judiciary is superordinate or supreme to the elected branches. Judicial supremacy now dominates efforts at reforming the judiciary in CEE. But this paradigm creates problems of its own that may do as much harm to newly emerging democracies as the harm it is purported to prevent. Power relations whereby judges are subordinate to or co-equal with parliament, Crown or the presidency in case of fundamental disagreements over the meaning of basic laws, are essentially never considered.

# The Role of Courts in a Democracy

## Alternatives to Judicial Supremacy

### *The drive towards judicial supremacy in CEE*

International organizations began to lend money and grant funds to CEE countries right after the Communist debacle in 1989. This support usually came with political conditions attached, a common one being the obligation to 'establish the rule of law'. The coercive effect of these conditions was boosted by the EU accession process, which had its own, much more elaborate 'conditionality' whereby accession is exchanged for compliance with certain political, economic, and administrative criteria, including the so-called Copenhagen Criteria which also enjoined (without defining) the rule of law. This is universally supposed to depend on the independence of the judiciary (Howard 2001, Larkins 1996, Rios-Figueroa & Staton 2009); thus, institutional designs that enhance judicial independence have sidelined all competition to become the cynosure of reform efforts in general.

What kind of judiciary has actually emerged in post-Communist CEE as a result of such a single-minded agenda? Reformers have indeed been caught up within a controlling paradigm of judicial supremacy, at the heart of which lie several core beliefs, namely, that judges ought to be and can be insulated from 'politics'; that laws and constitutions are 'living documents' whose meaning only judges can discover; that judge-made public policy is at least as legitimate as that of democratically elected representatives; and, in general, that judicial empowerment is equivalent to the rule of law (Bellamy 2007, Matczak, Bencze & Kühn 2010, Sadurski 2008, Whittington 2007).

Consequently, everywhere in CEE, formal institutional changes have empowered the judiciary to the point where it has supplanted the elected branches to become the supreme and perhaps predominant source of legally binding norms. The trend for judicial supremacy emerged

almost immediately after 1989, with the institution of constitutional courts and autonomous judicial councils (Piana 2010, Piana 2009, Sadurski 2008). Indeed, alternatives to these arrangements have never since been seriously considered by those involved in reform. This original trend was subsequently reinforced and consolidated, often spearheaded by supra- and transnational actors and institutions. Reformers abolished constitutional checks and balances on judicial decisions that may be unjust, improvident, or ultra vires, such as the right of parliament to nullify high courts (Magen & Morlino 2009, Parau 2010). Ample scope for policymaking discretion has been ceded to judges, certainly at the level of institutional formalism (Matczak, Bencze & Kühn 2010). Constitutional courts whose decisions may never be nullified are now the CEE norm. Judge-dominated judicial councils who govern nominations, discipline, and career paths have been insulated from accountability to the political branches. The evidence of Western nations such as Britain, with centuries-old traditions of the rule of law, suggest that the reformers have empowered CEE judiciaries far beyond what is necessary to establish judicial independence or the rule of law.

The net result is judicial empowerment underlain by a judicial supremacy paradigm that may be as problematic as the state of affairs it was intended to reform. Unelected judges have been (a) empowered to override virtually any policy decision reached by democratic deliberation or representation while (b) being exempted from any accountability except to each other.

Although East Europeans might simply be supposed to prefer this arrangement, and to have opted for constitutional courts and judicial councils accordingly, stereotypical rationalism does not reflect reality in CEE. Empirical research in Romania, the Czech Republic, and Moldova has revealed that these countries adopted their

post-1989 constitutions in haste, and that the drafters availed themselves of a narrow range of expertise on constitutional law. There was little input from the political elite, let alone society at large, about the relationship between the judiciary and the elected branches. Presuming any Western arrangement to be superior, East Europeans relied on models promoted by transnational norm entrepreneurs who faced essentially no competition.

Their paradigm dominates not only practical reform efforts but even the academic literature on CEE judiciaries. It is not uncommon, for example, for scholars (speaking of Poland, the Czech Republic, and Hungary) to bemoan judges' neglect of the enormous opportunities for policymaking discretion created by judicial supremacy, who 'continue to adopt the most-locally-applicable-rule approach and are reluctant to apply general principles of law or to rely on Dworkinian "policies" in deciding hard cases' (Matczak, Bencze & Kühn 2010). Why is it assumed desirable for judges to be Dworkinian activists rather than strict constructionists? Cases may be hard because the underlying principles are unsettled. If it must be settled at the constitutional level, why should the constitution be amended by unelected judges rather than by democratic deliberation and suffrage? It is an infallible sign of judicial supremacy when this most consequential power and fundamental right has been taken away from the people and their elected representatives. And yet scholarly writing is festooned with value-laden conclusions, such as that the lack of enforcement of judicial decisions by the elected branches in Poland is 'a sign of a lack of understanding by other branches of government of the position of the CC in the structure of power' (Bodnar 2010:31). At a minimum the normative assumptions embedded in literature purporting to be scientific ought to be subjected to rigorous cross-examination. A perspective so uncritically assumed might be one-sided; reasons quite different to incompetence might well explain why judicial decisions are not always enforced.

### **Alternatives to judicial supremacy: subordination and co-equality**

Two broad types of judiciary-democratic power relations stand as alternatives to the type of judicial superordination: subordination and coordination. Each will be discussed in turn and their implications

for the rule of law and democracy assessed. Of the two, co-equality may be the least understood, and yet deeper acquaintance may reveal it the superior means of balancing the claims of popular democracy and individual rights.

Subordinate judiciaries were typical features of democracy on the Westminster model, before the advent of the European Union (EU) (Stone Sweet 2000:20). The *locus classicus* is the English judges, who reached their decisions without undue influence, even though the judiciary as a branch was never equal to Parliament or the Crown, let alone superior. There was never a rule in the English constitutions enjoining the Crown or Parliament to obey judicial decisions, although inferior officers of both departments may be duty-bound to yield to prerogative writs like mandamus and habeas corpus, so long as the Crown kept up those writs (as it did for centuries on end and still does). Anything else would have been an absurdity, as judges have always been in both theory and practice officers (and therefore servants) of the Crown. Ever since the post-Second World War rise of constitutional courts and the EU, the Westminster model has been in decline such that some have gone so far as to declare it dead (Stone Sweet 2000:1). Albeit a discernible trend, it is probably exaggerated in the British case; for the most part, Parliament remains supreme and judges still defer to it, the only exception being in the interpretation of EU law.

The judicial subordination (or parliamentary supremacy) model is manifestly more compatible with democracy than judicial supremacy, as parliament is popularly elected. Moreover, despite the theoretical potential for parliament to become a 'tyranny of the majority', England has been the historical incubator of individual rights and the rule of law. It would seem that the contest between Parliament and an energetic Crown kept both sides 'in balance'; but now that the Crown has been reduced to a shadow, it may be wondered whether, in the long run, an unchecked Parliament may not become tyrannical (though so far there is little sign of it).

The *coordination or co-equality* of the judiciary with the elected branches of government is less often interrogated empirically and still imperfectly understood theoretically. The *locus classicus* is the original US Constitution order, and the original position of the Supreme Court therein, prior to the Civil War. Co-equality presupposes that the judiciary ought to be as much checked and balanced by the elected branches as checking and balancing them, not excluding instances of constitutional interpretation. None is to be supreme over the others, and the judiciary is to be obeyed in some things but not in everything. This does not preclude independence in the judiciary, but, equally, does not permit discretionary autonomy and limitless empowerment. Thus, such a judiciary will always reach its own decisions, but will not always be obeyed.

The Framers of the original US Constitution, when they created the first viable scheme of divided government, conceived the pivotal innovation of dividing up sovereignty itself. In lieu of unitary sovereignty of any kind, be it kingly or parliamentary (or, for that matter, that of a supremacist judiciary) was substituted the coordination – the equality of rank – of the departments into which sovereign power had been divided. The whole purpose of ‘separation of powers’ was to preclude government or any part thereof from wielding uncontrollable power over any other party, either the people or the other parts of government. This was to be the ‘essential precaution in favor of liberty’ (Madison 1788a). Contrary to contemporary US practice, none of the departments, not even the Supreme Court, was authorized to be permanently the arbiter over the other two.

Any idea that the Supreme Court should have power to settle all questions of constitutional meaning was in fact rejected with spontaneous unanimity by delegates to the convention (Madison 1840). They expressly withheld from the Court any general right to expound the Constitution, confining it instead to ‘cases of a judiciary nature’. This alone disempowered the Court to determine for itself the

boundaries of its jurisdiction, including its constitution-interpretive jurisdiction. For if the contrary is assumed *arguendo*, that the Court does have power to define and create its own jurisdiction, then it might define ‘cases of a judiciary nature’ however it pleased, expanding its interpretive jurisdiction at will. It follows that the definition of ‘cases of a judiciary nature’, and with it the limits of Supreme Court jurisdiction, rests with any branch but the judiciary. Besides this, common sense suggests that ‘cases of a judiciary nature’ would be those involving adjudication, that is, determination of the guilt or innocence of persons lacking sovereign immunity and thus subordinated to federal power (viz. ‘the States and the people’, as the Bill of Rights puts it). All other cases are outside the Court’s jurisdiction altogether, including political controversies over such matters as the respective limits of the several branches’ powers. This conclusion is supported by the overall constitutional context, which grants the Supreme Court a very narrowly drawn original jurisdiction over international law and inter-State disputes, further jurisdiction than that being at the discretion of Congress to define by statute (within the limits of adjudication).

A *co-equality* regime, thus, contrasts starkly with judicial supremacy, where ‘[n]othing falls beyond the purview of judicial review. The world is filled with law; anything and everything is justiciable’ (Aharon Barak cited in Hirschl 2004:169). According to the American Framers, justiciability and the boundaries of judicial power are to be decided exclusively by the elected powers; whereas a supremacist court sets its own boundaries, like a legislature pre-emptively settling issues that have not yet been regulated by the democratically elected legislature. Supremacist pre-emption can be distinguished in its universalist scope from the role of judges in clarifying the law where its meaning is unclear in a context unforeseen by the legislator. (Judges may of course abuse this role to expand their power toward supremacy.) Co-equality also differs from supremacy in that nothing would prevent the legislature from intervening to roll back unauthorized expansion of judicial power. In matters the legislature has never chosen to regulate,

a co-equal and coordinate judiciary is obligated to decline jurisdiction (Pop 1996); otherwise, it has usurped the legislature – an encroachment that ‘ought to be effectually restrained’ by the other branches of government (Madison 1788b). Under co-equality, the typical sequence of events is: first, parliament legislates to prohibit or command certain conduct; second, the executive discovers violations of the law and prosecutes them (or exercises discretion in prosecuting them sparingly or not at all); thirdly and ‘last in queue’, judges adjudicate those prosecuted.

Although being last in queue may imply ‘having the last word’, including in cases implicating the constitution, this is not necessarily so. The classical example of this – and of the mutuality of checks and balances – is US President Thomas Jefferson’s 1801 nullification of the Alien and Sedition Acts, which individual Supreme Court Justices, sitting in circuit, had previously upheld as constitutional, resulting in successful prosecutions. Jefferson pardoned not only his political allies but all who had ever been found guilty under the Acts (Tushnet 1999:15). Thus, the Presidential Pardon was used not simply as a vehicle of mercy to soften the rigour of the law, but in effect the power to interpret the Constitution. As Jefferson himself put it:

*... nothing in the Constitution has given [judges] a right to decide for the Executive, any more than to the Executive to decide for them ... The judges, believing the [Alien and Sedition Acts] constitutional, had a right to pass a sentence [on the defendants] ... because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution ... if judges could decide what laws are constitutional ... for the Legislature and Executive also, would make the judiciary a despotic branch. (Thomas Jefferson cited in Tushnet 1999:15)*

President Jackson, too, in vetoing Congress’s renewal of the National Bank charter in 1832, an institution the Marshall Court had held constitutional, re-asserted his co-equality in the following terms:

*It is maintained by the advocates of the bank, that its constitutionality, in all its features, ought to be considered as settled by precedent, and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress in 1791, decided in favor of a bank; another in 1811, decided against it. One Congress in 1815 decided against a bank; another in 1816 decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source [i.e. Congress] were equal. If we resort to the States, the expressions of legislative, judicial and executive opinions against the bank have been, probably, to those in its favor, as four to one [i.e. four opinions against it for each one in favour of it]. There is nothing in precedent, therefore, which, [even] if its authority were admitted, ought to weigh in favor of the act before me. [Even] if the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this Government. The Congress, the executive and the court, must each for itself be guided by its own opinion of the Constitution. Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others. (Jackson 1832)*

Co-equality implies a libertarian orientation which gives priority to individual liberty. It does this without prejudice to the rule of law, inasmuch as the meaning of the law does not become defined by any dominant body of men that is permanently supreme and can

impose its will on the rest of society. Co-equality is thus the most fragile and precarious of all the possible judiciary-elected branch relationships, because human nature thrives on its everlasting will to power, and that is likelier than not to end up in the dominance of one power of government in the long term.

Co-equality may also be the arrangement most compatible with democracy understood as popular sovereignty. This is because the elected branches and their constituent electors conserve inviolate their part of the divided sovereignty, including their power to negotiate and deliberate the limits of their constitutional powers in cases not of a judiciary nature, either immediately between the executive and Congress, or in case they cannot reach an agreement, deferring it to the States and the people. To the objection that politicians lack the necessary expertise to interpret the constitution, it may be answered that they might actually be superior at interpreting it in political cases, as they know their own powers better than anyone else. As for legal expertise as such, insofar as this is called for, the elected branches may avail themselves of the best legal minds of their generation – who may well not be serving on the courts – by calling them to testify at hearings and appointing them to head up special commissions. These are probably superior ways of bringing together expertise, inasmuch as appointees to the high courts need not have the best minds, and, being appointed for life, may preoccupy their posts long after better minds have come to light. Above all, the most important cases call for something more fundamental than technical expertise, hence persons without legal training appointed to high judicial office have often acquitted themselves well. A case in point is the inventor of judicial review, John Marshall himself, who before being appointed to the Court had been a politician.

Finally, the right of trial by jury implies trust in the competence of ordinary persons to say what the law means independently of judges. If juries could not nullify evil laws in defiance of judges, how should trial by jury avail to check and balance abuses of State

power? Indeed, who should have any use for a constitutional right to trial by jury? If laws were so esoteric, juries would never have been allowed the power to nullify acts of parliament or Congress, given that historically most jurymen have been illiterate. What is requisite above all in governmental processes is not intellectual ability but that sense of justice which is universal and may be innate.

Co-equal elected branches conserve the power to correct judicial decisions that work injustice, or are imprudent or taken *ultra vires*. One example from CEE may illuminate how co-equality works in practice. In the first, Romanian courts in the early 1990s acted unilaterally to reconstitute landed properties confiscated decades before by the defunct Communist regime. Parliament had enacted no law regulating the rights and obligations of the parties to this class of legal actions, yet the courts took jurisdiction anyway, claiming as the basis of their jurisdiction a general declaration of principle in the Constitution that states, 'The right of property, as well as the debts incurred by the State, are guaranteed' (Article 41-1). The same Article goes on, however, to state that 'the content and limitations of these rights shall be established by law'. There ensued a social drama that gripped the country: Romanians watched as tenants were evicted from the homes they had been born in, and elderly couples were turned out homeless into the streets; none of whom had any fault in the original confiscation. The judgments of the lower courts were affirmed on appeal to the Supreme Court (and in another context might equally have been affirmed by a Constitutional Court). The president of the time called upon the executive power to demur to enforce these decisions. Alternatively, he might have followed President Jefferson (above) and pardoned all tenants held in contempt of court for keeping their homes in defiance of judicial decrees. Either intervention may be seen as a co-equal check and balance; the former having emerged spontaneously (Parau 2010).

### **Conclusion**

Constitution-makers in CEE have boxed themselves into a narrow vision of judicial power and judicial independence. Having uncritically received only one of



many possible paradigms, reformers have elevated the judiciary to a privileged position beyond the reach of democratic accountability or checks and balances by the elected branches. None of this is necessary for consolidating the rule of law, or even for judicial independence. Moreover, it undermines the constitutional principles of separation of powers and popular sovereignty. The effect may become to delegitimize or at least stultify and vitiate the new and fragile democracies in CEE which have yet to be popularly owned. Alternatives remain uncomprehended or are too facetly dismissed. Co-equality in particular is little understood, yet ironically appears to reconcile popular sovereignty with individual liberty more effectively than either supremacy or subordination.

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