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Wojciech Sadurski

Constitutional Justice, East and West

Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective

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Acknowledgments

Constitutional judicial review poses intractable problems for constitutional lawyers and legal theorists alike. Notwithstanding the conventional wisdom that higher courts armed with justiciable bills of rights are a desirable, if not necessary, feature of democratic rule, lively debates continue to probe this assumption. How can the judicial assessment, and occasional invalidation, of laws passed by elected legislatures be reconciled with our intuitions of a democratic society?

Such issues are brought into particularly sharp focus in the practices of contemporary Central and Eastern Europe where activist constitutional courts have assumed a prominent role in public governance. By evaluating various aspects and interpretations of judicial review in the context of both the jurisdictions where this practice has been developing for a long time, in North America and several Western European states, and in those which are relatively new to this phenomenon, in postcommunist states of Central and Eastern Europe, this book attempts to provide material for a new assessment of the functions and rationales of a robust constitutional adjudication.

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Constitutional Justice, East and West: Introduction

Wojciech Sadurski

A distinguished constitutional scholar recently remarked:

> Given the vitality of both constitutional and statutory review in Western Europe and a few other assorted foreign places, it has gotten harder and harder for constitutional law scholars, both lawyers and political scientists, to take a completely American view. So long as judicial review was a peculiarly American phenomenon, it seemed sensible to try to explain it in peculiarly American terms. Why did Americans let their judges get away with a level of policymaking that no other people in the world would tolerate? Now we have to ask, why do so many people in so many parts of the world entrust so much of their governance to judges?[1]

Why indeed? Today, the question posed by Martin Shapiro is nowhere as valid and urgent as in the new, post-communist democracies of Central and Eastern Europe (CEE). One of the most striking features of the ongoing transitions to democracy in these societies is the spectacular growth in the role and prominence of constitutional courts and tribunals in shaping the new constitutional order.

Before the fall of communism there existed only two constitutional tribunals in CEE: in Yugoslavia since 1963 and in Poland since 1985.[2] While they were not exactly sham institutions, their position was far from one that allowed the exercise of a robust constitutional review. Quite apart from legal definitions of their competence, the genuine powers of both were inevitably subject to the restrictions stemming from the Communist party rule. The position today is that all the post-communist countries of Central and Eastern Europe have

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[1] Martin Shapiro, "The Success of Judicial Review", in Sally J. Kenney, William M. Reisinger & John C. Reitz (eds), *Constitutional Dialogues In Comparative Perspective* (London: Macmillan 1999), pp. 193–219 at p. 218.

[2] It was actually in 1982 that the constitutional amendment creating the Polish Constitutional Tribunal was passed but not until 1985 that the statute on the Constitutional Tribunal, which established a specific basis for that body, was enacted. The Tribunal began its operations in January 1986. For the sake of completeness, mention should also be made of the Czechoslovakian Constitutional Court of the interwar period, although it was a rather feeble affair, see Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: University of Chicago Press 2000), pp. 29–30.

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constitutional courts,[3] and while the effectiveness of these tribunals varies, they have everywhere made a strong mark on the process of constitutional transition. Many of them have performed a wide range of constitutionally prescribed roles, including overseeing elections and referendums, deciding upon the prohibition of political parties and adjudicating on the conflicts of competences between state institutions. The most significant impact of constitutional tribunals however has been in that area which is the central focus of this book: the review of enacted law. Evaluating statutes for their consistency with the constitution is probably the most significant – and undoubtedly the most controversial – function that constitutional courts perform in CEE, and elsewhere in the world.

At least some of the constitutional courts of the region have dealt with national legislation in a manner contrary to the wish of the parliamentary majorities and governments of the day. Important aspects of laws on abortion,[4] the death penalty,[5] "lustration" (the screening of officials suspected of improprieties under the auspices of the *ancien regime*),[6] criminal prosecution of former communist

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[3] A partial exception is Estonia where, rather than setting up a conventional Constitutional Court, a separate chamber of the Supreme Court (the National Court) has been established, called the Chamber of Constitutional Control.

[4] See, e.g., Decision of the Polish Constitutional Tribunal of 28 May 1997, no. K. 26/96, in *Orzecznictwo Trybunału Konstytucyjnego, Rok 1997 [Case Law of the Constitutional Tribunal, 1997]*, (Warszawa: C.H. Beck 1998), pp. 173–246. This decision was reprinted in *East European Case Reporter of Constitutional Law* 6 (1999), pp. 38–129. The decision invalidated certain amendments of June 1994 to the Penal Code which liberalized abortion rights. See also the decision of Hungarian Constitutional Court of 17 December 1991, no. 64/1991, reprinted in László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: University of Michigan Press 2000), pp. 178–203.

[5] The abolition of the death penalty was decided by the constitutional courts in Lithuania, Albania, Ukraine and Hungary. For the text of the Hungarian Court's decision declaring capital punishment unconstitutional (decision 23/1990 of 31 October 1990) see Sólyom & Brunner, *op. cit.*, at pp. 118–38; the decision was also reprinted in *East European Case Reporter of Constitutional Law* 1 (no. 2) (1994) at pp. 177–205.

[6] For example, in Hungary the Constitutional Court found a number of constitutional problems with the law on lustration passed by the Parliament early in 1994 (decision no. 60/1994, of 22 December 1994, reprinted in *East European Case Reporter of Constitutional Law* 2 (1995) pp. 159–193). In order to comply with the Court's decision, the Parliament had to rewrite the law which it did by July 1996. The new law (passed by the Parliament dominated by a different majority from that in 1994) greatly reduced the scope of lustration. For a discussion, see Gábor Halmai & Kim Lane Scheppele, "Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past", in A. James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press 1997), pp. 155–84 at pp. 177–8. Lustration laws were also struck down, or substantially weakened, by Constitutional Courts in Albania and Bulgaria, see Ruti Teitel, "Post-Communist Constitutionalism: A Transitional Perspective", *Columbia Human Rights Law Review* 26 (1994), pp. 167–90 at pp. 180–82.

officials responsible for crimes against the people during the communist period,[7] economic austerity measures,[8] fiscal policy,[9] citizenship requirements,[10] personal identification numbers for citizens,[11] indexation of pensions,[12] have all been struck down. It is no coincidence that the Hungarian Constitutional Court figures so prominently in this list of examples. It is perhaps the most activist constitutional court not only in CEE but also in the world.[13] More importantly for present purposes, according to one of its leading commentators, "[i]t serves

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7 In a Decision 11/1992 of 5 March 1992 the Hungarian Constitutional Court struck down *An Act Concerning the Right to Prosecute Serious Criminal Offences committed between 21 December 1944 and 2 May 1990 that Had Not Been Prosecuted for Political Reasons* of 4 November 1991. The effect of the statute would have been to extend retrospectively the statutory period of limitation during which offences occurring in the 1956 massacres could be prosecuted. The decision is reprinted in László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: University of Michigan Press 2000), pp. 214–28.

8 For example, the Hungarian Constitutional Court struck down important aspects of a number of laws which were meant to constitute a package of austerity measures introduced by the Government in 1995; see e.g. decision 43/1995 of 30 June 1995 on social security benefits, reprinted in Sólyom & Brunner *op. cit.* at pp. 323–32.

9 See, e.g., the decision of the Polish Constitutional Tribunal; no. K 8/97 of 16 December 1997 striking down a number of provisions of the tax statute of 26 July 1991, reprinted in *Orzecznictwo Trybunału Konstytucyjnego, Rok 1997 [Case Law of the Constitutional Tribunal, 1997]*, (Warszawa: C.H. Beck 1998), pp. 545–59.

10 In Slovenia, the Constitutional Court decided Case No. U-I-206/97, annulling on 17 June 1998 part of a law on the amendments to the Law on Foreigners. The amendments would change the required period before an immigrant could apply for permanent resident status from three to eight years. See Constitution Watch, *East European Constitutional Review* 7 no. 3 (1998) pp. 36–37.

11 On 13 April 1991, the Hungarian Constitutional Court declared the use of uniform personal identification numbers unconstitutional, decision 15/1991, reprinted in Sólyom & Brunner *op. cit.* at pp. 139–50.

12 The Croatian Constitutional Court invalidated in 1998 a provision of the 1993 Code on Equating Retirement Incomes on the basis that the code demanded that pensions increase relative to changes in the cost of living rather than relative to the increase of average incomes, see "Constitution Watch", *East European Constitutional Review* 7 no. 3 (1998), p. 9. The Polish Constitutional Tribunal ruled on 17 July 1996 that a 1995 law which would suspend the indexation of pensions in the forth quarter of 1996 was unconstitutional, Decision K. 8/96 in *Orzecznictwo Trybunału Konstytucyjnego, Rok 1996 [Case Law of the Constitutional Tribunal, 1996]*, vol. 2 (Warszawa: C.H. Beck 1998), pp. 46–65.

13 This is the view of Wiktor Osiatynski, "Rights in New Constitutions of East Central Europe", *Columbia Human Rights Law Review* 26 (1994), pp. 111–166 at p. 151; see also Jon Elster, "Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea", *Public Administration* 71 (1993) pp. 169–217 at p. 199.

as the exemplar for every new Constitutional Court in Central Europe".[14] Some of these decisions have had enormous financial and budgetary implications; some transgressed clear and strong majority feelings and others rode roughshod over delicately crafted political compromises. There have been decisions taken on the basis of perceived irregularities in law-making procedures and in the constitutional divisions of powers among the lawmaking bodies, but far-reaching decisions have also been based on the constitutional justices' interpretations of vague and unclear constitutional substantive provisions on which reasonable people may disagree.

Constitutional discourses in and about CEE – that is, accounts and analyses of constitutional developments, produced by scholars, observers, lawyers and politicians – have not failed to recognize the momentous importance of constitutional tribunals. Indeed, in much of the scholarly discussion those courts have been credited with playing *the* central role in the constitutional transition from authoritarianism to democracy. They have been described as the promoters and defenders (often, nearly the only promoters and defenders) of the values of constitutionalism, the rule of law and human rights in political and legal environments contaminated by legal nihilism and marked by a disregard for individual rights and the lack of a tradition of *Rechtsstaat*. The following observation by Herman Schwartz, a distinguished American scholar and a perceptive student of post-communist constitutionalism, is fairly typical of the literature:

> The performance of some of [the East European Constitutional] courts so far shows that despite the lack of a constitutional court tradition, men and women who don the robe of constitutional court judges can become courageous and vigorous defenders of constitutional principles and human rights, continuing the pattern shown elsewhere in the world.[15]

This is a heart-warming, feel-good story. It is a story about the courageous, principled, enlightened men and women of integrity who, notwithstanding the risks, take on the corrupt, ignorant, populist politicians. This is a story of the court as a noble "forum of principle" to be contrasted with the elected branches and their practices of horse-trading, political bargains and opportunistic deals. This is a story about impartiality against bias, selflessness versus self-interest. This is a story about respect for paramount values, announced in a Constitution, but which are not to be seen by every mortal, as they often

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[14] Spencer Zifcak, "Hungary's Remarkable, Radical, Constitutional Court", *Journal of Constitutional Law in Eastern and Central Europe* 3 (1996), pp. 1–56 at p. 26.

[15] Herman Schwartz, "The New East European Constitutional Courts", in A. E. Dick Howard (ed.), *Constitution Making in Eastern Europe* (Washington, D.C.: Woodrow Wilson Center Press 1993), pp. 163–208 at p. 194.

remain "invisible".[16] The story is all the better since it is linked – as in the passage from Professor Schwartz – with a global story. The men and women who don the judicial robes in Central and Eastern Europe are not alone. They belong to a small but distinguished community of constitutional judges around the world. And, consistently with "the pattern shown elsewhere in the world", they will see to it that noble Constitutionalism will prevail over dirty politics.

It is a nice story but is it the whole story and is it an entirely accurate story? To be sure, among some of the most vocal opponents of constitutional tribunals in CEE were people like President Lukashenka of Belarus or ex-Prime Minister of Slovakia Meciar – not exactly paragons of democracy. But the nastiness of your opponents does not necessarily render you beyond any criticism. For all the importance of the emergence and growth of post-communist constitutional courts, the phenomenon has remained strangely under-theorized. Constitutional review has been applauded, celebrated and embraced with enthusiasm by constitutional observers and actors, within and without the region, but rarely have the difficult question of democratic legitimacy of those tribunals been raised.

And yet, one would think that these questions must arise whenever an unelected body exercises the power of annulling the decisions of electorally accountable bodies in a democracy, and that the best strategy for the courts themselves would be to face the problems of legitimacy squarely and openly. After all, as Alec Stone Sweet proclaims in his recent book on four powerful constitutional courts in western Europe: "When the court annuls a bill on rights grounds, it substitutes its own reading of rights, and its own policy goals, for those of the parliamentary majority".[17] This applies to Western *and* to Central/Eastern European courts alike, and not just to annulments on "rights grounds" but also on the grounds of inconsistency with such general constitutional clauses as "social justice" or "democratic state based on law". However, the implications of this statement for the democratic theory and practice of post-communist polities have rarely been articulated in the discourse on constitutional tribunals.

In particular, rarely have the intransigent issues of political legitimacy, institutional competence, and possible infringements of the political rights of citizens been discussed. These three dimensions are, however, obviously invoked whenever the last word on the issue of rights protection or policy-setting are placed in the hands of a body which is not accountable to the electorate in the way

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[16] The concept of "invisible constitution" was coined by the (then) Chief Justice of the Hungarian Court, László Sólyom, see Sólyom & Brunner *op. cit.* at p. 41, see also Zifcak, *op. cit.* at pp. 5–6.

[17] Alec Stone Sweet, *Governing with Judges* (Oxford University Press 2000), at p. 105. Note that the phrase by Stone Sweet is not made in a critical context, and is not accompanied by an attempt to question the legitimacy of the "annulment" which is referred to in the quoted passage.

parliaments (and governments controlled by parliaments) are. Electorally accountable bodies presumptively enjoy the paramount legitimate authority to decide on issues of policy on which members of society disagree. The judiciary – including constitutional courts – is notoriously ill-equipped to evaluate options and choices on some issues, such as socio-economic policies with important financial implications. Finally, placing the protection of certain rights and other political values (such as "social justice") in the hands of constitutional courts simultaneously removes these spheres from the agenda of the elected bodies, and consequently restricts the capacity of citizens to participate in political decisions which affect the contours of such rights or political values. While, in itself, this is not a conclusive argument against such an institutional transfer of competence, a reduction in the enjoyment of political rights of citizens calls for a strong defense for such an institutional arrangement.

No such defenses have been forthcoming from constitutional discourse in CEE, and the unproblematic character of the constitutional review of laws as exercised by constitutional courts has been, more or less, taken for granted.[18] It has been assumed that if there is an interpretative clash concerning constitutional rights between the parliament and the constitutional court, the parliament must be wrong and the court must be right. Somehow it has become conventional wisdom that a majority of judges of the constitutional court (which may be as few as five)[19] necessarily knows the "true" meaning of a constitutional right better than a majority of the parliamentary chamber. Consequently, the only significant critical voices about the institutional position of constitutional courts in post-communist systems have argued that they are not powerful enough, not independent enough, not secure enough in the finality and enforceability of their judgments.

Why has the legitimacy of constitutional courts been taken for granted? Why have so few dissenting voices[20] arisen in the constitutional discourse of CEE?

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[18] E.g., with respect to the Constitutional Court of the Czech Republic, Pavel Holländer reports: "The scope of the Constitutional Court's powers, as defined by the Constitution, is not subject of a discussion in legal theory", "The Role of the Czech Constitutional Court: Application of the Constitution in Case Decisions of Ordinary Courts", *Parker Sch. J.E.Eur. L.* 4 (1997), pp. 445–65 at p. 447.

[19] Constitutional Courts in Albania, Bosnia-Herzegovina, Lithuania, Macedonia, Romania and Slovenia have nine judges. Even smaller Courts exist in Moldova (6 judges) and Yugoslavia (7 judges).

[20] These exceptions include Stephen Holmes, "Back to the Drawing Board", *East European Constitutional Review* 2 no. 1 (1993) pp. 21–25 ("To overlegitimate the [constitutional] court is to diminish the [parliamentary] assembly in the public's eyes and to help discredit the nascent idea of representation through periodic elections", *id.* at 23) and Andras Sajo, "Reading the Invisible Constitution: Judicial Review in Hungary", *Oxford Journal of Legal Studies* 15 (1995) 253–67 and "How the Rule of Law Killed Hungarian Welfare Reform", *East European Constitutional Review* 5 no. 1 (1993) pp. 31–41.

One could perhaps be forgiven for offering simple answers formulated in terms of vested interests and self-aggrandizement. After all, the constitutional discourses have been primarily produced by those who stand to gain the most from the theories supporting a strong role for constitutional courts: academic constitutional lawyers and constitutional judges themselves (the latter being largely drawn from the former). Self-congratulatory rhetoric supports both the position of the constitutional judiciary and law professors owing to their symbiotic relationship. Strong constitutional review strengthens the status of academic constitutional lawyers (they get more material to work on – not just the text of constitutional acts but also the case law, and also may hope to be cited in the judgments and – the ultimate reward – find themselves one day on the bench), while the supportive doctrines produced by constitutional lawyers elevate the position of constitutional judges *vis-à-vis* political branches. Both phenomena are mutually sustaining.

Nothing in the preceding paragraph is restricted to CEE. Martin Shapiro has noted how the emergence and growth of constitutional review in Western Europe has affected favorably the fortunes of academic constitutional lawyers: "European constitutional law teachers went from the bottom of the pecking order of teachers of something like Freshman civics, to near the top of the order as constitutional judicial review came to flourish on the Continent. And just as that particular body of law made more of them, they made more of it".[21]

This shift has been recognized – though rarely – by Western Europeans academic constitutional lawyers and judges, too. Bernhard Schlink, who combines both these professional roles, has caustically noted the relationship between the German Constitutional Court and the constitutional academia in his country: "*Karlsruhe locuta, causa finita* – this remark creates an image of this new situation, in which the *Bundesverfassungsgericht* speaks ex cathedra and representatives of dethroned constitutional scholarship stand at its feet".[22] He further remarked that constitutional scholarship has adapted to the BVG "as a sort of junior partner", and that many constitutional law professors have behaved "as loyal compilers and systematizers of [BVG's] decisions, even as possible candidates for future positions on the Court ... Constitutional scholarship would like to participate in power, and it realizes that the courtiers are rewarded for their service to the royal court by being allowed to influence it".[23] And Schlink himself is scarcely an anti-establishment revolutionary. It is significant that this mutually reinforcing relationship between the academic (mainly constitutional) community and the courts exercising constitutional review is a quasi-universal phenomenon,

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[21] Shapiro, *op. cit.* at p. 214. See also, similarly, Stone Sweet, *op. cit.* at pp. 146–9.

[22] Bernhard Schlinck, "German Constitutional Culture in Transition", in Michel Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham: Duke University Press, 1994), pp. 197–222 at p. 219.

[23] *Id.* p. 220.