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Visions of Judicial Review

A Comparative Examination of Courts and Policy in Democracies

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Chapter One

Introduction: Constitutional Review in Democratic Government

When Lech Kaczynski, mayor of Warsaw, received the application for a permit to allow a gay rights demonstration, the Equality Parade, through the city in 2005, he denied the request – just as he had the year before. Homosexuality, he reasoned, goes against the moral order in Poland, a Catholic nation of traditional values. To allow such a gathering would be tantamount to promoting a 'homosexual lifestyle' in the city (BBC 2005a).

In the traditional model of parliamentary democracy dominant in Europe for much of the nineteenth and twentieth centuries, the parade organisers may have had limited options to contest such decisions. They could appeal to their local member of parliament, or perhaps their local legislators, to try to get the city to reconsider. Options would have been even more limited in the old communist regime that ruled Poland for much of the latter half of the twentieth century. An executive order from the mayor of Warsaw, the capital city, would only be subject to repeal by even more powerful leaders at the highest levels of government.

Yet Poland's post-communist democratic constitution was created in a different mould. The constitution not only created positive rights for its citizens, it also established judicial review of legislation and executive acts to ensure that government would not intrude on the new individual rights within the constitution. The ability to take a social conflict to court – to judicialise conflicts over public policy – has fundamentally transformed the European political landscape, reshaping the way citizens view and interact with governments, legislatures and, perhaps most important, the judiciary (Stone Sweet 2000). The establishment of judicial review certainly guided the actions of the parade's organisers. They filed a complaint with the Polish Ombudsman, who then filed a referral to the Constitutional Tribunal requesting the law the mayor used to make his decision be overturned. In early 2006, the Tribunal's judges overturned the decision of (then) Mayor Kaczynski, finding that any ostensible traffic problems the parade might have caused were not sufficient to limit the fundamental rights of these citizens to freely and peaceably assemble, particularly given that the mayor granted gay rights opponents a permit to demonstrate just days later. Warsaw's Equality Parade has subsequently become a widely attended, and widely covered, annual event in Poland (Kulish 2010).

This use of judicial review described above is emblematic of a larger change: that courts and judicial review are increasingly fundamental to democracy, and to considerations of how well democracies perform. A basic tenet of democratic rule, from Plato to Rousseau and Madison, has been some form of majority decision-making process, either to make decisions directly or to elect leaders to

make decisions. Yet modern constitutional democracies are, almost by definition, limited governments – with these governments limited in their permissible actions by the very constitutions that establish the democratic order. Around the modern world, constitutions not only establish the functions of government, they also set up important protections for individuals living within those societies.

In the United States, courts have long been perceived to protect, in the words of Justice Harlan Fiske Stone, the rights of 'discrete and insular minorities' from harm by government actions (*US v Carolene Products Co.* (1938)). Yet, the idea that courts could sit in judgment of legislation passed by parliament was for many years anathema in Europe, where parliamentary supremacy stood as a 'constitutive principle of European politics' and courts were a subservient branch of government (Stone Sweet 2000: 1). As seen in the example above, these days are now gone. Parliaments of the people's elected representatives, as well as local and national executive leaders, now must ensure their actions conform to the constitution, as interpreted by the constitutional courts. Judicial decisions by these courts, then, provide binding legal interpretations of the constitution's text that shape the parameters of legitimate social behaviour. Yet the constitutional court is not simply a legal institution. These courts also have the capacity to shape public policy – to define which policies can be implemented, which policies must be changed, and increasingly how they must be changed. In this sense, they have become true policy makers in the democratic system.

The role of judges as policy makers brings up questions of how courts fit into democratic government, and how the institution of judicial review affects the performance of modern democracies. We expect well-performing democracies to provide for representation of citizen interests, but to do so within an atmosphere that also provides for accountability, equality, and participation (Lijphart 1991). Judges are unelected actors, yet through judicial review they are able to examine and potentially overturn the work of the popularly-elected legislative and executive branches. This distinctly 'counter-majoritarian' function of courts has led some to question the legitimacy of judicial review in a democratic system of government (Waldron 2006; Sunstein 1999; Tushnet 1999).

There are many arguments to be made in favour of judicial review in democratic society. To some, judicial review serves to protect important democratic principles – the rule of law, equality, separation of powers – from majority overreach (Guarnieri and Pederzoli 2002; Scalia 1989a). Others focus on the ability of judicial review by courts to enforce ongoing political bargains, both constitutional and legislative (Landes and Posner 1975). Increasingly, judicial review is thought to protect important liberal democratic principles – notably, the protection of individual and minority rights against majority overreach (Ely 1980). Finally, an increasing number of scholars question whether judicial review truly is 'counter-majoritarian', instead focusing on the potential majority-enhancing aspects of judicial review (Dahl 1957; Whittington 2007). All of these rationales ultimately invoke a critical, perhaps the critical, question for modern democracies: does judicial review by courts improve the performance of modern democratic

governance – that is, does the institution of judicial review advance key normative goals of democracy?

In this work, I develop a comprehensive examination of the use of judicial review in democratic government. Building from existing theory on judicial motivations, jurisprudence, and strategic court interactions, I develop several larger 'visions' for judicial review in democratic government. These visions for how judicial review should operate are then tested using cross-national empirical evidence from court opinions from democracies in Central and Eastern Europe. Some hypotheses test general relationships between courts and the elected branches, while others relate to broader judicial behaviour in democracies. Overall, this study examines the motivations for the practice of judicial review, how democratic actors can limit court powers, and how judicial review can be used to develop judicial power and shape law and policy.

The rise of the constitutional courts

The fall of parliamentary sovereignty is perhaps the most significant political trend of the twentieth century (Ginsburg 2003; Hirschl 2004). In both England and France, countries whose respective legal systems became models around the world for the common law and civil law traditions, judges long lacked the ability to overturn acts of parliament. In England, this limitation existed even after the increased independence from the king given to common law courts following the Glorious Revolution of 1688 (North and Weingast 1989). Shapiro (1981: 100) remarks that the Glorious Revolution simply 'transfer[ed] the courts from one master to another, from the king to the Parliament'. Though free from arbitrary dismissal by the king, and with increased authority to develop the common law, English judges could not question the correctness of the parliament's legislation. Final judicial appeals were held in the House of Lords, the upper house of parliament.[1]

By the eighteenth century, French judges had developed great power in France. They presided over court cases, but their office also held power over government administration and even law making (Mahoney 2001). But great power over outcomes often fed great corruption within the French legal system (Cappelletti and Adams 1966). Following the French Revolution of 1789, the role of judges in France, and later all of continental European government, became increasingly limited and circumscribed.

The post-Revolution Napoleonic Code was in many ways a response to this past history of judicial corruption and avarice. After the Revolution a parliament of popularly elected legislators stood as the ultimate embodiment of the public will. Judges would no longer have discretion to create, interpret, or modify existing law. Instead, judges were constrained to follow the legislatively established civil code (the Napoleonic Code), with no ability to interpret, modify, or develop unique strands of law (Cappelletti and Adams 1966).

1. As of 2009, the new UK Supreme Court hears final appeals. It does not have judicial review power over legislation.

Though this codification of law initially began in France, Napoleonic conquests gradually spread the French-inspired civil code to most of continental Europe, which brought increased legislative control and a concomitant decrease in judicial discretion throughout much of the continent. Thus, for many years the idea of parliamentary sovereignty prevailed throughout much of continental Europe, with parliaments holding an absolute monopoly on the legitimate law-making power within society.

In fact, during much of nineteenth and twentieth century Europe the idea of a 'separation of powers' meant, along the lines of Montesquieu, that the parliament held the power to create laws, the executive held the power to enforce the law, while the judiciary was responsible for applying the laws to resolve any potential legal conflicts (Stone 1992). Judicial decisions only applied to the parties in the case; unlike the English common law system, civil law judicial opinions could not establish precedent (Lasser 2004). This practice, of course, only served to reinforce the subordination of the judiciary to the legislative branch. In fact, during this time the judiciary became part of a larger career-based government civil service, with initial employment determined by a series of tests, often run by the government justice ministry. Advancement up the ranks of the judicial bureaucracy was (and generally still is) determined either by the justice ministry or by a senior judicial panel, which in many cases is appointed by the justice ministry (Piana 2010; Guarnieri and Pederzoli 2002).

As parliaments were both the voice and the expressed will of the people, the predominant political view held that parliament's legislative enactments should not be called into question, much less overturned, by judges. Instead, judges were to be simply 'the mouth of the law', applying a formalist and scientific method of 'legal science' to create discrete solutions within the Code's strictures (Cappelletti 1981: 21). Within this framework, legislatures ultimately controlled the maintenance and revision of democratic constitutions. Legislative supremacy entailed that 'conflicts between a statute and a constitutional norm were either ignored by judges, or resolved in favor of the former' (Stone Sweet 2000: 31).[2]

However, in the 1920s and 1930s the breakdown of democratic governments in Germany, Austria, Spain, Portugal, and Italy and the subsequent rise of authoritarian regimes throughout Europe challenged the idea that the legislature is the best guarantor of democratic principles. Parliamentary sovereignty and majority rule had been formulated as democratic devices, yet the European experience in the first half of the twentieth century showed that both could be used to limit or deny basic social and political rights to citizens. The robust constitutional rights created in post-war constitutions thus required some type of institution to protect them from

2. Judicial review was not totally absent in nineteenth century Europe. Greece adopted judicial review in its 1864 constitution (Spilitopolous 1983), the Dutch had some form of judicial review in the early nineteenth century (Ginsburg and Versteeg 2014), and Denmark's Supreme Court claimed for itself the right of judicial review in 1921. The Danish court has reviewed statues for constitutional conformity on only a handful of occasions, and only once (in 1999) used that power to overturn a statute (Rytter and Wind 2011: 474).

legislative or executive encroachment. Yet, the civil code system was designed to prevent the ability of judges to impede the general will as expressed through the legislature – to avoid the creation of a 'government of judges'. In post-World War II Western Europe, this problem led to the gradual adoption of Austrian jurist Hans Kelsen's constitutional court, an idea that was later replicated in Spain and Portugal during the 1970s and in Eastern Europe in the early 1990s after the fall of the Communist governments and subsequent establishment of constitutional democracies.

As they operate today, constitutional courts are essentially single, centralised bodies designed to perform constitutional judicial review. Table 1.1 provides an overview of standing and jurisdiction in European constitutional courts. Nearly all European countries now allow individuals the right to petition the constitutional court directly. Additionally, nearly all provide the ordinary courts the ability to directly refer concrete constitutional questions to the constitutional courts, though several countries limit court access to the supreme courts (both civil and administrative). Perhaps the most notable difference between the constitutional court system and the decentralised judicial review system seen in many common law countries is the ability of institutional actors to directly challenge the constitutionality of laws. Members of parliament (MPs), presidents, ombudsmen, audit agencies, and even unions in various countries have the capacity to refer laws directly to the court for judicial review.

Though constitutional courts engage in judicial review in the same manner as the US Supreme Court, constitutional courts are different, socially and institutionally, from US-style courts in important ways. For one, constitutional courts have limited jurisdictional mandates. They only review questions of constitutional law. Many courts review only the constitutionality of statutes, legislative acts, and treaties. Some courts, notably the Czech Constitutional Court, can also review the procedures followed in lower court cases for potential constitutional violations. A few other courts also are empowered to consider the validity of elections and the operation of political parties, yet even this jurisdictional grant is based on the need to ensure that elections have been held in conformity with the constitution[3] and that political parties conform to the mandates of the constitution.[4]

Yet in other ways constitutional court procedures allow for a much more expansive institutional role than that given to US courts. Notably, constitutional courts are not limited by a 'case or controversy' requirement: as noted above, specified actors are able to challenge the constitutionality of laws without a requirement that the law harm them directly. Instead, most courts operate based on three different types of review. The first is 'abstract review', in which specified institutional (generally governmental) actors are given the authority to challenge the constitutionality of laws without the need to establish a concrete

3. See Slovakia Constitution, Article 129; Czech Republic Constitution, Article 87.

4. German Federal Constitutional Court Act, Article 43.

Table 1.1: European constitutional court jurisdiction

Country	Individual complaint	Court referral	Legislative access	Other institutional actors	Local government
Albania	Yes	Yes	Yes	Yes (Omb, Audit, PM, Religious)	Yes
Armenia	Yes	Yes	Yes	Yes (Omb, PG, Govt)	Yes
Belgium	Yes	Yes	Yes (2/3 MPs)	Yes (Fed Govt)	Yes
Bulgaria	No	Yes (Sup. Ct. and Sup. Admin Ct.)	Yes (1/5 MPs)	Yes (Pres, PG)	Yes
Croatia	Yes	Yes (Sup. Ct.)	Yes (1/5 MPs)	Yes (Pres, Omb, Govt)	Yes
Czech Republic	Yes	Yes	Yes (25 MPs)	Yes (Omb, Interior Minister)	Yes
France	No	Yes (Sup. Ct.)	Yes (60 MPs)	Yes (Pres)	No
Georgia	Yes	No	Yes	Yes (Omb)	Yes*
Germany	Yes	Yes	Yes (1/4 Parl.)	Yes (Fed Govt)	Yes
Hungary	Yes	Yes	Yes (1/4 MPs)	Yes (Omb)	No
Italy	No	Yes	Yes	Yes	Yes
Latvia	Yes	Yes	Yes (20 MPs)	Yes (Cabinet, Pres, Omb)	No
Lithuania	No	Yes	Yes (1/5 MPs)	Yes (Pres)	No
Macedonia	Yes	Yes	Yes	Yes (Parties; Unions)	n/a
Moldova	No	Yes (Sup. Ct.)	Yes	Yes (Pres, Omb, AG, Justice Min)	No
Montenegro	Yes	Yes	Yes (5 MPs)	Yes (Pres)	Yes
Poland	Yes	Yes	Yes (60 MPs)	Yes (Omb, Pres, Audit, Unions, Religious)	Yes
Portugal	Yes	Yes	Yes	Yes (Omb)	Yes
Romania	No	Yes (Sup. Ct.)	Yes (50 MPs)	Yes (Pres, Omb, Parties)	Yes
Russia	Yes	Yes	Yes (1/5 MPs)	Yes (Pres)	Yes
Slovakia	Yes	Yes	Yes (1/5 MPs)	Yes (Pres, PG)	No
Slovenia	Yes	Yes	Yes (1/3 MPs)	Yes (Omb, Pres, Audit, Union)	Yes
Spain	Yes	Yes	Yes (50 MPs)	Yes (Pres, Omb)	Yes

* Two autonomous republics can submit claims to the court.
Note: Omb = Ombudsman; Pres = President; Parties = Political Parties; Audit = Audit Agency; PG = Prosecutor General; Sup. Ct. = Supreme Court

Chapter Two

Majoritarian or Counter-Majoritarian? Visions for Judicial Review

The spread of judicial review was perhaps the most transformative institutional development of the twentieth century. At the beginning of the century, only the United States, Norway, Greece, and Switzerland (to a limited extent) allowed for the judicial review of government acts, yet by the end of the century, most democratic regimes had adopted some form of judicial review.[1]

Judicial review gives courts the power to examine and potentially overturn legislative and executive acts – a power that provides judges a crucial role in determining policy outcomes. Questions that formerly were decided by the legislature or the government are now decided within the judge's chambers. Providing judges these forums to determine policy questions establishes an important 'judicialisation' of government and policy – a judicialisation that, potentially, takes the views of political majorities out of the policy equation (Hirschl 2008; Stone Sweet 2000). For this reason, overturning an act of the legislature has been called 'the gravest and most delicate duty' that courts are called on to perform.[2]

The judicialisation of politics allows courts of constitutional review the potential to significantly shape the processes and outcomes of government. The ability to review and ultimately strike legislation also means that the court can direct the outcomes of the policy process. Moreover, the potential impact of constitutional review seems to induce legislatures – and even interest groups and voters – to behave differently (Stone Sweet 2000; Epp 1998). For example, through autolimitation, in which parliamentary majorities self-limit the content of the bills they produce to avoid a judicial veto, constitutional courts have been thought to directly alter the output of legislative majorities. These effects touch on central components of our normative goals and justifications for democracy. In particular, representative democracy is commonly espoused because it is expected to produce policy outcomes that reflect the will of the people – or at least get closer to that ideal than other institutional forms of governance (Dahl 1989). But, without a serious consideration of the role of judicial review in the policy process, we cannot

1. The Netherlands and the United Kingdom are two notable exceptions, though Ginsburg and Versteeg (2014) note a brief experiment with judicial review in the Netherlands from 1802 to 1805. In Switzerland, only cantonal laws can be overturned by the judiciary. Portugal adopted judicial review in 1911. Romania's courts adopted judicial review in 1912, which was ratified in the short-lived inter-war constitution (Sadurski 2005: 2).

2. *Blodgett v Holden*, 275 US 142, 142 (1927).

provide a comprehensive account of democracy in modern settings. The concern over judicial review is all the more important because, as many observers have noted, endowing typically unelected judges with policy making authority through judicial review has the appearance of undermining representative democracy (Waldron 2006). If this is the case, why have the institution of judicial review in modern democracy?

In this chapter, I set out an agenda to answer this question. I first provide several desirable normative goals of modern representative democracy and discuss how different 'visions' – or arguments – for judicial review could influence, and potentially enhance, representative democracy. Much like the comparative framework created by Damaska (1986), these visions represent stylised, ideal types of behaviour for judges exercising judicial review. Many existing theories of judicial review and judicial decision-making fit into these three visions, and I discuss these theories within whenever applicable. Second, I distinguish these rationales in terms of their empirical implications for the conduct of judicial review. These distinctions are critical to learning which (if any) of these rationales better describes outcomes in democratic society. Subsequent chapters will test these claims empirically to determine whether there is empirical support for any vision on a broad scale.

Vision 1: The majoritarian vision for judicial review

A primary goal of democracy focuses on the desirability of democratic institutions to produce policies that reflect the will of the people. This majoritarian goal of democracy fits well with a large and still developing literature that can be called the 'majoritarian vision' for judicial review. Encapsulated by President Abraham Lincoln's statement that democratic government is government 'for the people, by the people', majoritarian arguments for democracy focus on the inherent legitimacy of government based on the sovereignty of the people – specifically, the power of the majority of the people to produce, either directly or indirectly through elected representatives, policies and laws that guide society (Tocqueville [1838] 1966: 254). Legislatures elected by citizens through majority voting processes embody this democratic ideal, and their actions are imbued with democratic legitimacy precisely because they are the product of majority will. At first glance, judicial review of legislation and executive acts fits rather poorly into a majoritarian conception of democracy, as judicial review provides unelected judges the power to overturn the decisions of lawmaking majorities (Bickel 1962). Without constraints, the practice of judicial review may become, in the words of Justice Antonin Scalia, an 'assertion of judicial supremacy over *the people's Representatives* in Congress and the Executive'.[3] Or, in Edouard Lambert's classic phrase, judicial review raises the danger of a 'government of judges' unaccountable to the public.[4]

3. *US v Windsor*, 570 US __, 21 (2013) (J. Scalia dissent, italics added).

4. In fact, Lambert's 'government of judges' phrase was used to describe the behaviour of the US Supreme Court in the early 1900s.

Scalia and Lambert's concern illustrates the counter-majoritarian difficulty–the practical democratic problem that arises when judges review popularly created laws. The counter-majoritarian difficulty has motivated a large body of theory that examines whether judicial review can be normatively desirable from a democratic perspective (see, e.g., Bickel 1962; Cappelletti 1989: 117–149). Even with the influence in the early 1900s of the American and Scandinavian legal realists and the German free law theorists, who sought to legitimate judicial decision-making as an instrument for resolving social problems, this counter-majoritarian concern is all the more true in continental Europe, which, as mentioned in Chapter One, has a deep tradition of political power maintaining accountability to the popular will through parliamentary government. Even in the Nordic countries of Denmark and Norway, which have had judicial review for nearly a century, judges are strongly guided by a norm of judicial self-restraint, which provides wide latitude to the majoritarian and democratically legitimate parliament to create policy (Rytter and Wind 2011).

Despite the prevalence of the counter-majoritarian dilemma in popular thinking, many judicial scholars have begun confronting the notion that judicial review is, by definition, anti-majoritarian (see Hall 2012). Instead, driven by an empirical literature that has often failed to confirm the counter-majoritarian nature of judicial decision-making, an increasingly prevalent view – at least among American judicial politics scholars – holds that judicial review has the capacity to increase the correspondence between government policy and the preferences of the majority, and thus can be majoritarian or majority-enhancing in practice.

There are good reasons to question the validity of the counter-majoritarian difficulty. Some scholars take issue with the notion that legislative policy always realises the majority will. Instead, institutional features of the democratic system can inhibit the realisation of popular preferences. In presidential systems, executives can veto legislation, and bicameral legislatures can create blockages or veto points for majority-backed legislation to clear. These institutions can create policy discongruity, in which actual policy ends up far from the median citizen's (or legislator's) preferred location. When policy becomes sufficiently extreme, judicial review can impose a new solution that moves policy from a relatively extreme location to a position closer to the median (Klarman 1997). Acting in this majoritarian fashion, judges can still exercise discretion, deferring to the will of representative institutions when legislation represents the popular will and striking down laws only when they fall outside the majority interests (Guarnieri and Pederzoli 2002). Thus, judicial review may actually be able to advance majority interests in practice. Judicial review also can serve majority citizen interests by serving as a focal point for public grievances, allowing citizens and groups to coalesce outside of the normal political channels to directly challenge government actions (Weingast 1997).

Thus, judicial review could, in theory, allow for majority outcomes to be expressed. Assuming the theoretical ability and desirability of judicial review to operate in a pro-majoritarian fashion, why would we also expect judges to perform majority-enhancing judicial review in practice? A number of competing, partially overlapping, answers have been offered.

a. The ruling regime thesis

It was Dahl (1957) who first noted the majoritarian aspect of the US Supreme Court's judicial review powers. Dahl's 'ruling regime' thesis begins with the observation that, despite the fundamentally legal nature of court cases, Supreme Court decisions rarely are out of step with majority political preferences. To Dahl, this is largely because justices are appointed to office by political actors who themselves are selected through majority voting procedures. The power political actors hold over appointments should result in inherently policy-based judicial review by the Court. But, the ideological connection between the justices and the ruling regime makes it 'unrealistic to suppose that … Supreme Court justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite' (Dahl 1957: 291; Funston 1975). With the guardians of the constitution chosen by those whom they guard, we should not expect serious disagreement between the court and its electors. Instead, judicial review by courts largely acts to legitimise the policies created by the dominant political coalition. Judicial review serves as a necessary part of this legitimating function. As the eminent American law professor Charles Black noted back in 1960, the Supreme Court's primary role in society has been to validate policy, but without the power to overturn legislation the legitimating aspect for majority policy would be meaningless. By reinforcing the sense that the political leadership is acting in accordance with a common set of social and political norms, judicial review thus becomes critical to well-performing democracies.

Dahl's analysis focused (by necessity) on the US Supreme Court from the early 1900s through the early 1950s. During that time period, new spots on the bench opened up on average every twenty-two months. Over a two-term presidency, then, the ideological shape of the Supreme Court could be completely re-formed. This is no longer the case: from 1975 to 2004 (a period of thirty years), only eight new justices were appointed to the Court. And of the seven US presidents since 1975, only one – Reagan – was able to appoint more than two justices to the bench. Current work examining the outcomes of the Supreme Court finds little support for the 'ruling regime' thesis (Keck 2007).[5] Hall (2012), for example, finds the Court frequently invalidates statutes adopted by the current ruling regime. Similarly, Owens (2010) concludes that the preferences of the current legislature and executive are not strong influences in Supreme Court voting.

Few works have tested this concept outside of the United States. Examining the Portuguese Constitutional Court, Amaral Garcia *et al*. (2009) found party politics did influence some judges on the Portuguese Court. Specifically, judges appointed by left-wing parties adhered to this type of majoritarianism, ratifying left-wing legislative policy at a much higher rate when the parties of the left were in power. No effect of this kind was found for right-appointed judges, however. Thus, based on current US evidence and the small amount of existing comparative evidence,

5. The 'ruling regime' thesis can also be termed the 'regime politics' thesis, as in Keck (2007) and Pickerill and Clayton (2004: 236).

there appears to be some limited support, but not substantial support, for Dahl's theory of legitimating judicial review. With Dahl's proposed temporal mechanism linking court rulings to democratic legitimacy now uncertain, in what other ways might judicial review still be majoritarian, or majority-enhancing?

b. Cooperative (allied) judicial review

A variation of the majority-enhancing theory focuses on the idea that judicial review of legislation does not need to be inherently conflictual. Instead, it can be a cooperative venture of mutual benefit to the court and the legislature. In this cooperative effort, some scholars have posited that courts and legislatures can, in practice, coordinate actions, whether altruistically to obtain better policy outcomes for society, or more cynically to obtain more ideologically desirable outcomes.

In one iteration of what I term 'cooperative' review, judicial review improves democratic processes by providing informational benefits to legislative majorities, which could allow for the creation of better policy outcomes (Rogers 2001). Legislators create legislation under conditions of high uncertainty. Legislators seek to create laws that will achieve certain policy ends, but they are not able to look into the future and see the actual outcome of their legislation (Bickel 1962; Vermeule 2010). Laws passed today may have unintended consequences tomorrow; alternatively, social circumstances may change over time. When courts review legislation, they are able to examine not only the text of the act, but also the actual impact the law has had since it was adopted. Thus, courts have an information advantage over legislatures in terms of how laws are working in practice. They can, in Justice Harlan Fiske Stone's (1936) description, exercise a 'sober second thought' regarding the wisdom of laws made under pressures to obtain immediate results, removing altruistically both bad legislation and legislation that does not account for new or changed social circumstances. Examples of such behaviour can be seen in the real world of judging, including a 2000 sex discrimination case in which the Polish Constitutional Tribunal overturned a law amended in 1998 that set different retirement ages for male and female teachers. Women were given mandatory retirement at age 60, while men could work until 65. When challenged in the court by the Polish Ombudsman, the court overturned the act, but in doing so was aided by a brief from the parliament – the same parliamentary majority that passed the amended law – admitting that portion of the law was unconstitutional and should be overturned.[6]

Judges may adopt this altruistic 'error correction' mode of decision-making, though a second variation of the cooperative judicial review – what can be called the 'allied court' thesis – downplays the altruistic function of judicial review in favour of a judicial review model that systematically favours the policies of allied majorities. Whittington (2005; 2007) argues that political majorities can use friendly judicial review from ideologically 'allied' courts to strike down

6. Case K 27/99, 28 March 2000.

legislation that is mutually disfavoured. In this view, political leaders are able to use the finality of judicial review and the relative political insulation of high courts to remove old policies that are, for various reasons, difficult to change through the legislative policy process. For example, federal systems often have dispersed power arrangements, such as bicameral legislative chambers, or a president elected separately from parliament. These arrangements are designed, in part, to serve as veto points that prevent majority tyranny. Yet Whittington explains that friendly judicial review can be used to bypass these roadblocks, as the Warren Court did to remove segregationist laws in the US South (2005: 592).

Similarly, when Harvey and Friedman (2006) examined the lifespan of all US laws passed between 1987 and 2000, they found the Supreme Court does exercise some type of 'allied' review. Specifically, the conservative Rehnquist Court was more likely to strike down laws after the Republican takeover of Congress in 1994. In subsequent work, Harvey (2013: 15) confirms this point, finding federal laws enacted by the Republican congresses of 1995 to 2004 much less likely to be struck down by the conservative Supreme Court than laws passed by previous liberal-Democratic congresses.

The allied court thesis provides an avenue for the realisation of majority policy outcomes, yet the parties the court chooses to ally with could result in a failure to promote the majority will. For example, the Supreme Court's Eleventh amendment state sovereign immunity doctrine from the late 1990s and 2000s follows the allied court thesis, yet arguably fails to meet majoritarian criteria. In these cases the Court allied with local attorneys general who were seeking to avoid federal regulations mandating that states provide overtime and minimum wages to state employees.[7] These decisions fed the growing conservative demand for greater state's rights, yet they also allowed states to avoid punishment for violating federal gambling, disability, and worker overtime laws – laws duly enacted by different coalitions of nationally elected leaders.

Similar to Dahl's earlier theory, the allied thesis assumes that judges exercising review both have identifiable policy preferences and should generally act to further those policies. Yet, rather than legitimating the current majority policy, judicial review will be used instead to actively strike down old legislation passed by former political majorities. Arguably, the mechanism behind the allied review model would work well in the streamlined parliamentary systems that dominate most of Europe. However, the nature of abstract judicial review, in which specific actors like presidents, local governments, and groups of legislators can directly challenge the constitutionality of legislation, could present possibilities for the allied model to undermine majoritarian outcomes. President Walesa's – or President Kaczynski's – frequent use of abstract review procedure in the Polish Constitutional Tribunal could be seen as a way to circumvent parliamentary opponents in the legislative majority. Similarly, minority party MPs can use the abstract review procedure to continue legislative battles in the courts, potentially using the constitutional courts

7. *Alden v Maine*, 527 US 706 (1999); *Seminole Tribe of Florida v Florida*, 517 US 44 (1996).

Chapter Three

Background: Constitutional Courts in Eastern Europe

The march of democracy in the twentieth century, and now the twenty-first, generally has been accompanied by the development of strong rights for citizens, and strengthened courts to both guarantee those rights and ensure the proper functioning of democracy. From the rubble of World War II there arose a heightened realisation that the future progress of Europe necessitated the development of liberal democracies based on equality and individual rights, governed by the rule of law (*Rechtsstaat*) and monitored by strong judicial actors (Stone Sweet 2000). Similarly, the gradual progress of democracy in East Asia during the 1970s and 1980s was consolidated in part through the development of strong judicial review powers to protect the democratic bargain (Ginsburg 2003), a pattern that was repeated in Latin America, as well (Helmke and Rios-Figueroa 2011). When this global wave of democratisation reached Eastern Europe, major actors there similarly sought to consolidate the process of democratisation through the creation of strong constitutions with an increased role for courts. In Inga Markovits' (1996: 2272) words, leaders of the new governments sought to move from a legal system based on 'criminal law, ensuring citizens' compliance, to constitutional law, protecting their rights; from Party rule to the rule of law'.

The performance and endurance of modern liberal democracy, then, is of central importance to the new democracies of Central and Eastern Europe (Schwartz 2000). The importance of liberal democracy to the region has been paradoxically highlighted by current questions over the viability of democracy in Hungary, once the most promising of the new Central and Eastern European transitional democracies (e.g., Piana 2010). Hungarian Prime Minister Viktor Orban has consolidated government power around his Fidesz party after its strong showing in the 2010 election, changing the rules to allow closer party control over elections, the central bank, and ultimately the jurisdiction of the Hungarian Constitutional Court (Scheppele 2013). In a December 2014 speech, Orban noted that Hungarians have rejected liberal democratic principles and freedoms over past years, instead embracing 'illiberal democracy' through his party's rule (Keszthelyi 2014). Questions over the Hungarian government's crackdown on civil society organisations has led to criticism from the *New York Times*, Human Rights Watch, the Norwegian and German governments, and the European Commission, among others (HRW 2013). Questions over rising official corruption also prompted the US Department of State to cancel visas for several Hungarian government officials (Galyas 2014). Though democratisation seemed an inexorable path by the mid-2000s, the example of Hungary today shows the future of liberal democracy in Central and Eastern Europe is no longer a forgone conclusion. This chapter examines the development of courts and judicial power

over the twentieth century – a path that converges with the development of liberal democracy, as well. I then turn to the development of constitutional courts in Eastern Europe, with particular emphasis on the four countries studied in this work: Poland, the Czech Republic, Latvia, and Slovenia.

The development of constitutional judicial review in Europe

Liberal democracy was not always the norm. Boix (2003), Acemoglu and Robinson (2005), Lipset and Rokkan (1967), and others describe the gradual path towards democracy taken in many European countries. In the United Kingdom, for example, it was not until the end of World War I that property requirements for voting were removed, finally clearing the path for nearly all adult citizens in the UK to obtain the right to vote.[1] The end of the Great War in continental Europe also saw the first halting moves towards the widespread adoption of judicial review. Denmark's Supreme Court, for example, claimed for the Danish courts the power of judicial review in 1921, while Romania also briefly adopted judicial review in the 1920s (Rytter and Wind 2011; Sadurski 2014). Austrian jurist and political philosopher Hans Kelsen saw a potential difficulty with the adoption of rights-based constitutions in continental Europe: how to ensure the continued protection of constitutional rights and constitutional order? The continental civil law systems were largely built on the notion of 'parliamentary supremacy' – the idea that popularly elected parliaments are the legitimate holders of the general will, and are best able to advance the interests of the whole community (Levine 1993: 18–35; Stone 1992). Kelsen recognised the civil law court system, in which ordinary judges applied the law but could not make or develop law, stood as an obstacle to the realisation of higher order constitutional rights. How could courts and judges enforce the constitution if parliamentary supremacy dictated that they had no power to overrule the will of the parliament?

Kelsen's solution was the constitutional court, a stand-alone body of judges created specifically to exercise judicial review. Kelsen believed that the constitutional interpretation done by these courts made them, by necessity, a law-making body. However, unlike the forward-looking, creative lawmaking role of parliament, the constitutional court only stood as a 'negative' lawmaking body, with the ability to strike down legislation for violating the constitution but not the ability to positively create new rights (Kelsen 1945: 269). Kelsen's court was implemented for a time in the newly independent states of Austria and Czechoslovakia in the 1920s and 1930s. Yet rising authoritarianism in Europe led first to the dissolution of democratic rule in those states before ultimately triggering the end of Austria and Czechoslovakia as independent states.[2]

1. The Representation of the People Act of 1918. Females under 30 who did not meet minimum property qualifications still did not receive the right to vote until 1928.

2. The 1938 Anschluss, whether considered unification or an annexation, did effectively eliminate the political independence of Austria. The 1939 German invasion into Czechoslovakia also eliminated Czechoslovak independence.

Austria's Constitutional Court was dissolved in 1934 with the new authoritarian constitution; its successor court was dissolved again in 1938 after the annexation of Austria by Germany.[3] The Czechoslovak Constitutional Court was effectively dissolved in 1931, when no judges were appointed to fill expiring terms. The court met again briefly in 1938 and 1939, but never resolved a case during that time (Sadurski 2014).

The end of World War II saw the re-establishment of democratic constitutional order in Western Europe, a democratic consolidation that was aided by economic redevelopment assistance from the United States government's Marshall Plan. The US influence in the constitutional drafting process helped prod West Germany and Italy, particularly, towards legal systems guided by rule of law (or *Rechtsstaat*) principles, with strong individual rights for citizens and strong courts to enforce those rights (Stone Sweet 2000). As Ginsburg (2003) notes, this choice – to provide rights and courts as venues to enforce those rights – provided the first nail in the coffin of parliamentary supremacy in Europe and elsewhere. Hans Kelsen's idea of the constitutional court to adjudicate constitutional law ultimately was included within the German, Italian, and Austrian constitutional systems, where it has flourished and expanded its influence over time.

Countries in Central and Eastern Europe, however, fell under Soviet influence post-World War II. These countries did not (or could not) accept the US economic aid or other post-war political and economic reconstruction assistance. By the late 1940s, communist coups throughout Central and Eastern Europe allowed the region to fall directly under the Soviet sphere of control, with dramatic results for the region's political future (Roberts 1996; Applebaum 2013). While Western Europe re-developed strong multi-party systems with open debate on policy choices and a real possibility that parties in power could be voted out of office, the communist-controlled governments of Eastern Europe implemented strong central governments, with little to no room for policy debate or even for the existence of opposition groups or parties.[4]

In Czechoslovakia, Poland, Hungary, and elsewhere, communist governments created constitutions with strong individual rights for citizens, though these rights often were meaningless in practice. Communist-inspired constitutions all allowed for the communist-controlled parliaments to override any constitutional provision, thus bringing individual constitutional rights dependent under the control of authoritarian government (Elster 1993). Constitutional freedoms like expression and speech rights were guaranteed only 'if consistent with the interests of the working people'.[5] The result, as Markovits (1982: 522) explains, was an explicit

3. Constitutional Court of Austria. Available from: https://www.vfgh.gv.at (Accessed: 8 April 2015).

4. There are examples of government sanctioned opposition parties. In the 1980s, Poland's leadership allowed for the formation of several parties other than the Polish United Workers Party (Communist Party) [PZPR], notably the United Peasant Party and the Democratic Party, though both parties were still to be led by the 'guiding political force' of the PZPR (Brzezinski 1992: 101).

5. Czechoslovakia Constitution, article 28.

attempt *not* to develop a constitutional order built on 'bourgeois *Rechtsstaat* ("rule of law") notions', but rather to create an orderly, controlled society through legalism and law.

Thus, legal development was at once overly complete yet abstract. Scheppele (2002: 241) writes that despite the presence of 'telephone justice', the main problem in the socialist legal systems was not too little law, but rather *too much*. Communist governments established complex and often contradictory sets of legal codes, full of traps for the unwary or even well intentioned citizen (Boros 2003: 201). Completing the circle, huge state security apparatuses regularly intruded on the lives of citizens, demonstrating along the way the power of the state to control the destinies – the future prospects, hopes, and dreams – of its citizens (Glaeser 2011).

Given the perceived power of the communist state over its citizens, the fall of these governments from power seemed unthinkable to many on both sides of the Iron Curtain. Yet, cracks had formed over time in the social and political structures that the communist regimes had created. In 1980, the Solidarity movement in Poland was born in the Gdansk Lenin Shipyards and quickly took hold, gaining popularity and strength throughout the country. By 1981, nearly 10 million people, one-third of all Polish workers, were members of the Solidarity Trade Union. The rapid rise of the organisation ultimately led to a government crackdown and the imposition of martial law in December 1981, yet the strength of Solidarity as a non-governmental opposition force remained throughout the 1980s. An election in June 1989 thought by many in the Communist *nomenklatura* to legitimate their power instead showed the political power of Solidarity and the bankruptcy of communist rule (Ash 1993). By September 1989, Solidarity was in charge of government.

A similar crack emerged in Hungary, where during the summer of 1989 the government removed an electrified fence separating Hungary from Austria. Waves of Hungarians and East Germans fled into Austria during the summer of 1989, despite a temporary re-imposition of the border in the early autumn of 1989 (Rothschild and Wingfield 2000). In East Germany, demonstrations that began in Leipzig in September 1989 gradually grew in size before spreading to East Berlin and other large East German cities, culminating in the resignation of Erich Honecker and the opening of the Berlin Wall. Czechoslovak, Bulgarian, and Romanian regimes soon toppled, as well. Thus, in an extraordinary series of months during the late summer and fall of 1989, all of the major communist regimes in Eastern Europe had vanished, overtaken by the sudden 'power of the powerless' (Havel 1992; Ash 1993).

The legacy of communism and the redevelopment of legal culture

The legacy of communism presented unique difficulties for the development of the rule of law and judicial authority in Central and Eastern Europe. Of most pressing immediate concern, these formerly communist countries had to navigate a seemingly 'impossible' simultaneous dual transition from command economy to market economy while also moving from authoritarian to liberal democratic

government (Elster 1993: 267). Compounding these concerns, years of communist rule left many citizens with inherent distrust for the formal institutions of government, including an under-resourced and increasingly illegitimate court system. Many new court systems also had to contend with an under-developed civil society, as well as a poorly developed legal culture – both of which served as impediments to the establishment and consolidation of the rule of law (Febbrajo 2010; Moffet 1998). In most communist societies the state prohibited the formation of independent groups outside of party control, from unions to reading groups. In East Germany, Poland, Czechoslovakia, and elsewhere, '[t]he party state aimed to be civil society, as well' (Glaeser 2011: 143). With the legacy of state monopolisation of group formation, post-communist societies faced challenges in generating outside groups that could bring claims to the courts.

Novak (2003: 94) describes the communist era in Slovenia as a time of 'extreme politicization' of the courts, with judges serving as 'a tool in the hands of the governing communist autocrats, rather than […] a shield used to safeguard individual freedom'. Boros (2003), Kuhn (2004), and others emphasise the deleterious influence the communist system had on the prestige and reputation of the judiciary. Few resources were given to the judiciary or the legal system as a whole, and low wages were provided to those in the judiciary. A complex web of often-conflicting regulations left most who were forced to live within the communist-authoritarian system distrustful of it (Scheppele 2002). At the same time, literal readings of the law prevalent in socialist jurisprudence allowed many judges to avoid facing the complexities of real world problems (Kuhn 2004: 553).

The loss of prestige in the judiciary at that time was apparent.[6] Far from holding positions of independence and status, judges during the communist era instead operated in a subservient role to the ruling class that demonstrated 'the political power of the state over the judges' (Wagnerova 2003: 168). Part of this lack of prestige can be seen in the salaries paid to communist-era judges and prosecutors. Judges in East Germany earned approximately DM 1,400 per month in 1980, less than the wage paid to plumbers and electricians (Markovits 1996: 2277). Judges in communist Czechoslovakia earned less than state prosecutors, but also less than bus drivers and mine workers (Wagnerova 2003: 170; Kuhn 2011: 53).[7]

The first step for many countries during the transition period was the lustration or de-communisation of the ordinary courts. Czech judges had to go through a lustration process, in which any individuals found to have collaborated with the secret police or to have been agents of communist officials were barred from continuing in office (Open Society 2001). The results were dramatic, with more than one-third of Czech judges on the bench in 1990 out of the judiciary by 1993 (Kuhn 2011: 165; Wagnerova 2003). The Czech lustration law thus placed

6. Though perhaps not in all societies. Iglicar (2003: 181) notes that the Slovenian (Yugoslavian) judiciary increased in respectability from the 1950s to the 1980s.

7. Wagnerova and Markovits both claim the high number of women in the judiciary contributed to the low salaries paid to judges.

government officials – specifically Ministry of Justice officials – in a strong position to control the future composition of the ordinary courts (Piana 2010).

Similarly, upon reunification in 1990 the German government initiated investigations into all East German prosecutors and judges, dismissing nearly 50 per cent of each group in the first year alone. By 1994, over 90 per cent of judges and prosecutors no longer worked in their former positions (Markovits 1996). In the new German capital, the Berlin's new Ministry of Justice fired all East Berlin prosecutors and judges, rehiring 15 per cent through a competitive application process (Borneman 1997: 60). Other countries, notably Poland, did not purge their judiciaries in the post-communist transition, though Poland did require judges to submit declarations on their cooperation with state security during the communist period (Open Society 2001). Still, Poland has gone through its own transformation within the judicial branch during the 1990s and 2000s, one in which career judges left the country's highest courts to be replaced by legal academics relatively untouched by the communist legacy (Kuhn 2011: 173).

In the post-communist transition, then, re-establishing trust and legitimacy in the judiciary was of paramount concern to those actors involved in orchestrating the turnaround (Piana 2010: 93).[8] To a large extent, the re-development of the Eastern European judiciaries occurred with the aid and support of outside actors, including the US Agency for International Development (USAID), the American Bar Association (ABA), both through its Rule of Law Initiative and the recruitment of top US law professors,[9] and the European Union (EU), most notably through the PHARE program.

On a structural level, the EU's main strategy to bring about legal reform was the larger program of *conditionality* – a policy in which candidate countries must adhere to democratic standards and conditions before gaining admission to the EU as a Member State (Mendelski 2012). One primary condition placed on all candidate countries was the development of the rule of law (Sadurski 2004: 374). Developing the rule of law, in turn, required developing judicial capacity and reforming the role of the judiciary within society. To increase judicial capacity, the EU's major assistance program, the PHARE program, directed major outlays of funds towards civil society, public administration, and legal reform. PHARE originally was established to provide support to Hungary and Poland, though the program gradually expanded to include nearly all of the formerly communist Eastern European transition states (Europa 2007).[10] PHARE's 'twinning' program allowed judges and legal officials in the newly democratic East to be paired with

8. Kuhn (2011: 164) notes, however, that some modernising economists during the early transitional phase attempted to limit the role of legal reforms as a point of emphasis in the transition, instead focusing on reducing the role of government regulation, and thus the centrality law, and presumably increasing market-based factors in the new governments.

9. Erwin Chemerinsky, Cass Sunstein, and Peter Maggs were some of the many law professors who contributed to constitutional development in these countries.

10. Countries benefiting from the PHARE program include: Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia.