JUDICIAL REVIEW, SEPARATION OF POWERS AND DEMOCRACY: THE PROBLEM OF ACTIVIST CONSTITUTIONAL TRIBUNALS IN POSTCOMMUNIST CENTRAL EUROPE

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Introduction

Constitutional rights, it is correctly thought, strengthen the position of the individual vis-a-vis the legislative, executive and judiciary branches of government. In a sense, constitutionalization of rights affects a “division of powers” between an individual and the state: The status of the individual is robustly protected against governmental decisions which affect his or her interests, and which might be otherwise justified, in the absence of constitutional rights. Those rights exclude, therefore, certain routinely accepted reasons for actions, or demand that these reasons be of particular urgency.

Whether constitutional rights also affect the relationship of particular branches of government toward each other is a different matter. It has become a commonplace belief that the constitutionalization of rights implies the introduction of strongly counter-majoritarian devices into the political system. Conventional wisdom in the current constitutional discourse in the post-communist countries of Eastern and Central Europe has it that constitutional rights, in order to be meaningful, require a system of constitutional review of political branches performed by non-elected branches of the government, and in particular, by the judiciary. The rise of constitutional tribunals in almost all the countries of the region — though in some countries they achieve higher prominence, independence, and power than in others — is a testimony to the force of this conventional wisdom.

This trend has major significance for the shifts in the division of power. Any decision of one branch of government which declares invalid a decision of another branch affects separation of powers. When the judicial branch invalidates a decision of the legislature or of the executive, the decision affects the allocation of institutional responsibility. Such a jurisdictional effect is a serious matter because “whenever a political decision is declared invalid, the judgment of the judicial branch has been substituted for that of other branch-
es of government” (Komesar, 1984, p. 366). But the significance of this “substitution” varies, depending upon the type of constitutional ground which serves as a basis for the review. When the constitutionality of an act is evaluated from the point of view of the principles of separation of powers itself, the court merely assesses whether a given body had a right to issue the decision, and whether it was issued in the right procedure. But when the court assesses the act from the point of view of its consistency with such open-textured formulas as “social justice,” “Rechtsstaat” or “social state,” then, in effect, it is substituting its own value judgments or policy choices for those taken by an elected body. The tension between constitutional review and the principles of democratic legitimacy is then evident.

While the borderline between the former type of constitutional review (“separation-of-powers”-based review) and the latter type (“substantive” review) may be unclear (Neuborne 1982), it is obvious that evaluation of legislation and governmental acts from the point of view of consistency with constitutional rights belongs to the second category of review. Since constitutional rights, by their very nature, cannot be given a precise and canonical interpretation in the text of the Constitution itself, and lend themselves to interpretations about which reasonable people may disagree, a challenge to an act on the basis of its inconsistency with rights can be seen as a clash of competing values, and not necessarily as a clash of a “right” with something else. This is all the more evident when the rights which serve as a basis to displace a policy of an elected government regulate social, economic, or cultural interests of individuals. Constitutionalization of this sphere, coupled with the power of judicial review, produces a dramatic change in the classical system of division of powers.

The momentous character of this shift has not gone unnoticed in the East and Central European post-communist countries, though there has been no consensus about whether it is good or bad. Perhaps the most eloquent criticism of this transfer of powers from the legislative and the executive to the judiciary has been raised recently by Andras Sajo in his article about the impact of the Hungarian Constitutional Court’s decisions upon the governmental attempts to restructure the welfare system (Sajo 1996: 31). Characteristically, Sajo’s article has been provided with a subtitle: “Welfare rights + constitutional court = state socialism redivivus.” Also in Poland, the prospect of review exercised by the Constitutional Tribunal under a new Constitution, which contains a broad array of “programmatic” socioeconomic rights, led some commentators to express fears that the Tribunal will get
embroiled in policy-making. As leading Polish constitutionalist Jerzy Ciemniewski warned, if the Constitutional Tribunal wields the power of review under certain socioeconomic constitutional norms, “we will embark upon a very dangerous path by combining the roles and functions of different categories of branches of state and by confusing the scope and nature of the responsibilities carried by these bodies” (Ciemniewski 1996: 41).

Whether it has happened, whether it will happen, and whether it should happen in post-communist countries, is the central theme of this paper. I will reflect here upon the shifts of powers, affected by constitutionalization of socioeconomic rights, from a general institutional perspective. This institutional perspective allows us, among other things, to cut through ideological beliefs, self-serving rationalizations, and self-congratulatory theories. This is done by asking direct questions about the relative levels of competence of different participants in the complex decision-making process, controlled by constitutional rules.

For purposes of this paper, I will take it that the reasons for supporting specific countermajoritarian devices of rights-protection (such as the power of the courts to strike down legislation enacted by elected bodies) must appeal to such context-dependent factors as the differing capacities of different institutions, the level of political culture of society, and the age of the constitution (which may or may not necessitate adjusting an old text to changed circumstances). This assumption, while likely to meet with the approval of many political scientists, is not widely accepted among constitutional lawyers whose influence on the constitutional discourse in post-Communist countries is dominant. As a matter of fact, this assumption goes against the current widespread enthusiasm for the argument that constitutional rights, in order to be meaningful, must necessarily, and as a matter of principle, be supported by a strong, substantive power of judicial review (Halmai 1993; Paczolay 1993).

The central problem identified in the theme of this paper — the impact of constitutionalization of socioeconomic rights upon the shift in the division of power — arises out of the combination of two independent factors: constitutional entrenchment of socioeconomic rights on one hand, and acceptance of institutional authority of constitutional courts to review legislation on the other. Neither of these two factors, taken alone, needs to transform the pattern of division of powers, but the combination of the two virtually assures a shift. This recognition informs the structure of this paper. I will first consider the role of socioeconomic rights in post-communist constitutions (part 2 of
Next, I will turn to the second ingredient of the combination mentioned at the beginning of this paragraph, namely the question of judicial review of constitutionality. In part 3, I will reflect upon the connection, in general, between constitutional rights and judicial review. In the subsequent three sections I will discuss various institutional modalities of judicial review, and how they affect the changes in division of power: the choice of abstract versus concrete judicial review (part 4), of an a priori as opposed to a posteriori review (part 5), and of the degree of “finality” of various systems of judicial review (part 6). I will then consider (in part 7) the viability of non-judicial methods of constitutional control of legislation. Finally, in part 8, I will bring the various threads of my analysis together, suggesting both the promises and the threats stemming from the discussed shifts in the division of powers, as seen from the standpoint of the main rationales for having separation of powers in the first place. Whether as a result of the constitutionalization of socio-economic rights there have also been significant shifts between the two non-judicial branches themselves — namely, as some suggested, from the legislative to the executive (Preuss 1993b: 138-45) — will remain beyond my analysis in this paper.

**Constitutional Rights and Judicial Review**

Determining the wisdom, or the lack thereof, of granting a judicial body the power to invalidate legislative and executive decisions, on the basis of constitutional rights, is a complex matter which cannot be determined by a simple reference to the idea of rights protection versus majority rule. Contrary to a conventional wisdom in constitutional discourse, the issue is a matter of pragmatic judgment about relative institutional competence rather than a matter of principle. This is for three main reasons: (a) a rights-based distrust of majoritarian institutions — which is usually cited as the reason for counter-majoritarian review — cannot be absolute because, if it were, we would lack the bases for the constitution-making process in the first place; (b) the opposition of rights versus consequentialist policy-considerations is not equivalent to the opposition of rights determination versus majority rule; (c) even if we have good reasons to distrust the legislature in its task of properly protecting rights, it is a non sequitur to claim that judicial review necessarily follows; it is conceivable that, in particular contexts, even if the legislature is not very good at protecting constitutional rights, the judiciary may be worse.
Let me briefly explicate these three points.

(A) If we thought that the majority was inherently unable to respect and honor the legitimate interests of minorities and individuals, and that is why we need a countermajoritarian body to ensure the legislative respect for constitutional rights, then we would be incapable of understanding how constitution-making (including the adoption of a bill of rights) is possible at all. After all, it is the majority which ultimately decides about the constitution—a qualified majority, and a majority acting in special way, but a majority nonetheless (Elster 1993b: 179-80, 192-93). And if we never trusted the majority to be able to consider, in good faith, the legitimate interests of the minority, then we could never have a genuine bill of rights in the first place.

But if there are some circumstances in which we can trust the majority in rights determination (partly because we have no other choice), then it opens the way to trusting the majority in other circumstances as well—as long as these circumstances resemble significantly the circumstances which supported the trust in the first place (i.e., the circumstances of constitution-making). Now there are important differences between constitution-making and ordinary lawmaking (this is the whole point of the dualist theory), but the differences are of degree. To draw a sharp contrast between the majority deliberating on the constitution and the majority deliberating on the statutes (including those which would restrict the constitutional rules) would be in essence to rely on the fiction that the same group can act, in different circumstances, on the basis of totally different motives. While it may sometimes apply to an individual agent, it is much less plausible with regard to the community.

(B) It is not the case (either as a matter of description, or as a normative theory) that members of the majority in a democracy are always guided by their own (or their constituency’s) interests. Rather, the motives for supporting or rejecting a particular proposal (whether a legal bill or a policy proposal) derive from a number of considerations, which occupy a broad continuum, between narrow self-interest on one end, and ideals about the common good on the other.

The relative importance of these two types of considerations varies from case to case (compare voting on a budget with voting on an abortion law), but it would be deeply unrealistic to believe that people are never moved in their political decisions (either as voters or as legislative representatives) by their views regarding “the common good”—the ideals which do not collapse into these people’s sectarian interests. Obviously people strongly disagree about what constitutes a “common good”—but this is another matter. What mat-
ters is that very often people are moved by considerations other than the expected utility of a given law to them, or to their group. If this is the case (again, both as a matter of realistic description, and of a normative theory), then the identification of the majority rule with the application of utility in lawmaking and policy-decisions, and the consequent demand for a rights-based judicial review, is not justified (Waldron 1993: 407-16).

(C) The decision about allocating authority is always based on a comparison of the relative virtues and vices of different institutions, rather than on looking at various institutions one at a time. Even if we are skeptical about the competence of the legislative process in the rights context, this is not enough to support a shift to the judiciary. We first must be satisfied that the judiciary will provide a superior alternative to the legislature (Komesar 1984: 376).

Such a judgment will hinge on a great number of variables, and on their relevance to an institutional ability to discern the meaning of rights. These variables include, among other things, such matters as the procedures of selection and recruitment of members for a given body, the conditions of job security of the decision makers, the flexibility in determining one’s agenda, the access to information and empirical studies on matters affected by a decision, requirements for giving reasons for one’s decisions and defending them against the critics, patterns of responsibility for unpopular decisions, etc.

Take, for example, the requirement of giving reasons for, and the responsibility for defending, one’s decisions. These are two separate requirements, which need not coincide. Courts (including constitutional courts) are usually expected to articulate their principled grounds for decisions (“a forum of principle”) (Dworkin 1985: ch. 2). This function is enhanced when constitutional courts may publish dissenting opinions as well; in those systems where constitutional courts are prohibited from making dissenting views known (such as in France, or in pre-1970’s Germany), the function of giving the reasons is not as well performed. On the other hand, courts are usually silent once the decision has been made. This affects the nature of their reasoning, and reduces their impact upon public discourse. Significantly, Professor Sajo once described the Hungarian Constitutional Court’s argument as “sterile, self-oriented, and not responsive to external challenge” (Sajo 1995: 266).

Any of these variables may be considered relevant to the relative institutional competence in the area of rights protection. But these considerations cannot be substituted by easy and simple pronouncements that judicial review automatically follows from constitutionalism’s restricting role vis-à-
vis majority rule. It may be that parliaments, in specific countries and at a certain time, are defective instruments for respecting the rights enshrined in constitutions — but there is nothing self-evident about it. It is question-begging to declare a priori that the judiciary is better qualified to determine the best interpretation of general, textually indeterminate provisions of constitutional bills of rights. When the court and the parliament disagree about the proper meaning of a constitutional right, and the court strikes down legislation enacted by the parliament, then it simply would be wrong to infer from the fact of disagreement that only one body could be truly alert to the issue of rights.

One rather plausible ground for judicial rather than political intervention seems to be the case of legislatively inflicted damage to the political process, as a result of which the functioning of majority rule itself is distorted. The strength of the legitimacy of judicial intervention is that it appeals to the values of democracy itself and is ostensibly addressed to the process of majoritarian decision-making.

But this theory (made famous in the United States by John Hart Ely) (Ely 1980) is not without its problems. First, the values of process are often indistinguishable from the values of substance. For example, freedom of speech is a procedural device necessary for the functioning of democracy, but it is also a substantive interest of individuals protected by the Constitution. When the legislature compels broadcasting stations to respect Christian values, is it imposing constraints upon the channels of political communication or, rather, upon the individuals’ rights to express themselves publicly as they wish? A natural answer would be “Both,” but the process-oriented theory of judicial review would have us disregard the latter effect and focus on the former. The danger of the former interpretation is, however, that virtually any speech may be seen as related — directly or indirectly — to political mechanisms of democracy. If this is the case, then the process-based argument collapses into a substance-based argument, and one is indistinguishable from the other.

Second, we need an explanation of why legislators are typically less concerned about the process of democracy than the courts are. After all, a clash of interpretations — when the court is about to invalidate a legislative decision — concerns contested values, when it is not obvious which interpretation of a constitutional right is clearly more “correct.” One such explanation may appeal to the idea that legislators are more prone to be motivated by wrongful prejudices and stereotypes. But is the judiciary inherently more immune to such motivations? An American legal scholar observed, for
example, that in the United States "[r]emedies for gender discrimination have come as often from the political process as from the judiciary. . . . Similarly, both after the Civil War and during the past two decades, Congress intervened to curtail discrimination against blacks that affected state political processes" (Komesar 1984: 404). England provides another example where the absence of judicial review of the constitutionality of procedural rules (or any other legislative norms for that matter) has not brought about any drastic malfunctioning of the political system which leads to a distortion of the democratic process. Consider various anti-discrimination laws (Race Relations Act 1965, amended in 1968 and 1976; Equal Pay Act 1970; Sex Discrimination Act 1975) which are examples of legislative rather than judicial activism oriented toward accommodation of minorities within the system.

Judicial Review: Abstract or Concrete?

The main distinction has to be drawn between those systems in which the courts exercise judicial review of an act in the process of deciding a particular case to which this legal act applies (a concrete review), and those in which courts review an act in abstracto, regardless of any particular litigation (abstract review). Of course, there are constitutional courts which possess both these powers, but for a general discussion it is useful to make a distinction between the pure systems.

This dichotomy has to be distinguished from a classification of systems of judicial review into centralized and decentralized; the former exists when there is a single body endowed with the power of constitutional review (as in continental European constitutional tribunals); the latter, when every court has the power to decide about the constitutionality of an act applicable to a case before it (as, e.g., in the United States, Canada, Australia, Sweden, Japan and India). Decentralized review is always concrete, but centralized systems can be abstract or concrete (or mixed). An interesting case of a hybrid of a centralized and decentralized system is provided by Estonia where, apart from the National Court’s normal functions of abstract constitutional review, any regular court can petition the National Court with regard to the constitutionality of a law applicable to a case before it. In itself there is nothing surprising about it, as most European constitutional tribunals can be activated in this way. What is peculiar is that if a regular court, in the trial of a case, concludes
that the applicable law contradicts the Constitution, the court not only petitions the National Court to determine constitutionality, but also "shall declare it to be in contradiction with the Constitution" (Article 5 of the Law on Constitutional Review Court Procedure of 5 May 1993). It follows that every Estonian court has the power to declare any law unconstitutional (a decentralized and concrete review), and only subsequently will such a declaration trigger proceedings before the National Court.

But let us consider here a distinction between "abstract" and "concrete" review in their pure forms. What are the implications of this distinction for the division of powers? As a general hypothesis, one may argue that the concrete review affects the shifting of power from the legislative to the judiciary to a lesser extent than in an abstract system. This is because of a different rationale, and the related availability of precautions against excessive judicial activism.

Consider the original rationale for the system of judicial review as established in the United States in 1803, under Marbury v. Madison. Contrary to the popular opinion, Chief Justice John Marshall did not base the Supreme Court's power to invalidate the acts of Congress on his understanding of the Court's role as a watchdog of the constitutionality of legislative acts. The conventional argument that the existence of constitutional constraints necessitates the power of the Court to declare when Congress has overstepped these constrains, does not figure in Marshall's reasoning — not explicitly, anyway. If one reads Marshall's opinion in Marbury v. Madison carefully, one realizes that the whole construction of an implicit power of the Court is based on one, rather simple argument: the court (any court, not just the Supreme Court) has to apply the law in order to decide a specific case; if there is a conflict of two laws which control the case at hand, the Court has to decide which law should be given precedence; if the Constitution and a lower act clash on the same issue, the Constitution must prevail.

The declaration that an act of Congress is invalid is merely a practical necessity of having to decide a particular case: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each," explains Justice Marshall. And since the Constitution is addressed to the legislatures as well as to the courts, the latter have no choice but to declare invalid an act inconsistent with the Constitution.

This, on its face, is an argument which is qualitatively different from an argument that the Court has to be a watchdog of the Constitution, and to
oversee congressional behavior under the Constitution. There is hardly any
place for the idea of judicial supremacy in Marshall’s view: the Court has no
choice but to discard the act in order to apply the Constitution, but Congress
or the government may insist on its own interpretation of the Constitution,
different from that of the Court’s.

This rationale for judicial review informs the institutional precautions
against judicial activism. If the argument about judicial review is made along
Marshall’s lines, and it makes sense only with respect to concrete judicial
review, then it also makes good sense to erect precautions against judicial
transgressions beyond the role justified by the rationale for a concrete judicial
review. In the United States Supreme Court’s jurisprudence, it has meant that
the federal courts have jurisdiction only if a number of conditions are met:
they cannot decide lawsuits that are “moot,” or “unripe,” or where parties
cannot establish their “standing,” or when the subject-matter is essentially
“political,” etc. These conditions all follow from the constitutional descrip­
tion, in Article III, of the role of federal courts in deciding “cases” and “con­
troversies,” and the power of judicial review of legislative and executive acts
is subject to constraints stemming directly from this role.

In contrast, “abstract” judicial review need not be subjected to any such
constraints; the rationale for abstract judicial review relies more directly upon
the watchdog role of the constitutional court, and the constraints mentioned
in the preceding paragraph do not apply here. Of course, in practice, a con­
stitutional tribunal which exercises an abstract review may manifest a great
deal of restraint, while a supreme court which strikes down an act in the
process of concrete adjudication may be very activist and non-deferential in
its treatment of the legislative branch. However, all things being equal, the
concrete review lends itself better, in my view, to a restrained review, and,
therefore, has a lesser impact upon a shift in the allocation of powers to artic­
ulate constitutional norms.

Judicial Review: A Priori or A Posteriori?

A great majority of contemporary constitutional courts have only an a pos­
teriori power of review of acts, that is, they cannot consider them before the
acts enter into force. There are only a very few exceptions: notably Conseil
Constitutionnel in France which can only consider (and, if it so decides, inval­
idate) the lois before their promulgation. In the post-communist world, the
Romanian Constitutional Court has the power to adjudicate the constitutionality of laws before their promulgation (alongside the ex post power, but the latter can be triggered only by the courts) (Article 144(a) of the 1991 Constitution). The Spanish constitutional court, from 1980 until 1985, possessed both the a priori and a posteriori powers, but after 1985, the a priori power was rescinded, as an illegitimate affront to the principle of parliamentary sovereignty. There are also examples of bodies which can review in a nonbinding fashion the constitutionality of proposed legislation, such as the Law Council in Sweden, where the convention developed that the government would shelve criminal or civil legislation ruled unconstitutional by this body.

What is the significance (if any) of this distinction for the purposes of the constitutional division of power? It is useful to consider the illustrious example of the a priori model — namely the French Council. The first thing to note is that the Council was not intended to be a protector of constitutional rights; indeed, the 1958 French Constitution does not even contain a bill of rights, and the Council was meant to operate merely as a guarantor of a separation of powers. The extension of its role, including the protection of constitutional rights (under the preambles to the 1946 and 1958 Constitutions, the 1789 Declaration of Rights, as well as “fundamental principles recognized by the laws of the Republic”) was due to its own judicial activism, beginning with the landmark decision of 16 July 1971 when, for the first time, a loi was struck down for breach of fundamental rights (Decision No. 71-44 DC). Further, and following from the limitation of its power to that of an a priori review only, the Constitutional Council stands out, in comparison with other European courts, in that it does not possess a power of “concrete” review; that is, it cannot review the question of constitutionality arising out of an application of a challenged law to a specific legal case.

In these two respects, the Conseil is much closer to being a system of lawmaking than of judicial power. Indeed, a classical study of the Conseil by Alec Stone makes a convincing case for considering the Conseil as a “third chamber” of the legislature, rather than as a judicial or even a quasi-judicial body. The Conseil can invalidate a decision of the parliament in abstract terms rather than in the process of litigation; it can suggest positive solutions which would remove the defect from the law, and therefore is not merely “negative” (Stone 1992: 209-10); it decides on matters in which disagreement boils down to different policy choices and where constitutional norms are highly indeterminate (Stone 1992: 241); it defines policy objectives and goals for the Parliament
to pursue (Bell 1992: 327-30), its deliberations are activated by a political action — usually by a group of opposition senators or deputies unhappy about the law etc. (Stone 1992: 58). All of these are characteristics of a legislative body, and Stone is very effective in showing that a number of characteristics which may seem to deny the “third chamber” characterization, in fact are shared by a number of bodies whose “legislative” nature is undeniable.

But how different, from this point of view, are the cases of these Constitutional Courts which possess the *a posteriori* power of review only? Contrary to the expectation, the difference seems to be formal rather than substantive. The German Constitutional Court, or Hungarian Constitutional Court, can do all the things that the French Conseil can do — plus possess all the powers related to the concrete review. The only difference between an *a priori* and an *a posteriori* review is the absence of promulgation by the President in the case of the *a priori* review. But if this promulgation is compulsory, as it is in the case of laws certified as constitutional by the Conseil, then the difference is technical: in both cases a body may displace a decision which enjoys majority support in an elected branch of the government.

The difference is perhaps that the *a priori* system brings about more stability to the system: while the law has been promulgated, no future challenge can be effective. The *a posteriori* system introduces more uncertainty and instability to the law. Although this, in itself, does not affect the separation of powers, certainty is an important matter. In turn, an *a priori* system seems to create an incentive for frivolous or obstructive uses of constitutional review by the opposition. It is instructive to note that this was the main reason why Spain decided to abandon the *a priori* review. The bills referred to the Court before they became effective caused delays in the introduction of reforms devised by the Spanish government in 1983-85. As Stone says, “these referrals delayed the reforms for ludicrous periods of time” (Stone 1992: 244). But this is a matter which can be remedied by, for example, strict time limits imposed upon the constitutional court (as in France, where the Conseil is required to rule within one month).

A more interesting question is, perhaps, whether there would be a major impact upon separation of powers if the constitutional courts were permitted, or required, to express their views regarding the constitutionality of proposed bills, before the vote in the legislative chamber(s) was taken. This would engage them, as advisory bodies, in the early stages of the legislative process. Some constitutional rules expressly prohibit such an involvement (e.g., in Slovakia and in Estonia), and some courts, despite the absence of an express
prohibition, declined such invitations (Hungary). The reasons given usually cited the principle of separation of powers. But one wonders whether it would make such a great difference, once the constitutional courts have been given (or have usurped) a strong power to displace legislative judgment after the act has been enacted? Perhaps a system of “early warning” might help avoid a subsequent invalidation? Perhaps an advisory role of the court would de-dramatize the process of distorting the policy designed by the representative branch? It is likely (as Stone suggests in his comparative analysis of Western European constitutional tribunals) that even an ex post review strongly affects the lawmakers’ choices (by encouraging them to anticipate, and avoid, grounds for future invalidation of their acts). If that is the case, then an open and explicit opinion expressed by the court at an early stage would have the effect of bringing more transparency to the process. It would also help save resources consumed in legislative decision-making (considering that the costs of decision-making by the constitutional court are lower than the costs of parliamentary decision-making) and provide vital information to lawmakers. And, contrary to some concerns, it is hard to see why the power to give advisory opinions ex ante would compromise the independence of the court and turn it into “an organ loyal to the Parliament.” The power to give expert advice is not contrary to, but, indeed, presupposes, a degree of independence. As a matter of fact, some (non-constitutional) Supreme Courts (e.g., in Poland) have the express power to issue advisory opinions about proposed laws — and it has not been seen as compromising separation of powers, or judicial independence, in any way.

It is worth adding that in a system of decentralized and “concrete” judicial review, not all courts resist the idea of advisory opinions to legislators. Such resistance might seem unsurprising, as the very nature of a concrete review system presupposes that a court may decide concrete cases only. The legislative proposals are even more removed from concrete cases and controversies than abstract, valid laws; they may or may not develop into real cases in the future. But while the Supreme Court of the United States has, from the very beginning, rejected such a possibility on separation-of-powers grounds (Pushaw 1996: 442-44), some state constitutions in the United States permit their highest courts to issue advisory opinions (Landes and Posner 1994: 443). In any event, it seems that the principle of separation of powers argues with greater force against the availability of advisory opinions in a system of concrete judicial review than in an abstract system. This is because one might argue that “the ideal of an independent, apolitical judiciary would be under-
cut if judges expressed an opinion about a law that might later come before them in a lawsuit" (Pushaw 1996: 443). But no such concern applies to a system where judges are called upon to review the law in *abstracto*.

**Finality of Judicial Review**

The degree to which power is transferred from the legislature to the judiciary is a function of, among other things, the degree of finality by constitutional decisions of courts and tribunals. In the post-communist world, only the Romanian tribunal has a less-than-final power of review, in the sense that its decisions about unconstitutionality can be overridden by a parliamentary supermajority (also in Poland it was the case under the regime of so-called Little Constitution, now superseded by a new fully-fledged Constitution of April 1997). This is considered a sign of its institutional disadvantage. But for those who deplore the anti-democratic consequences of judicial power, the non-finality offers a way of reconciling democratic decision-making with constitutional review. The power of constitutional tribunals to review acts, but only tentatively, means that legislators — and the general public — are asked to have a second look at proposed legislation, and consider the constitutional aspects which perhaps had not been considered sufficiently in the first approach. It is the power that slows, but does not derail, the operation of majority rule.

From the perspective of the institutional allocation of authority, the power of constitutional review should not be seen as a matter of a dichotomy — either the constitutional tribunal’s decisions are final, or they are only tentative — but rather as part of a continuum. At one end of the spectrum, the tribunal’s decision adds only an insignificant cost to the legislative process and the will of the legislators is subverted only to a minimal degree; at the other end of the spectrum, the cost of overriding the non-majoritarian body is very high. But the court’s decision is never “final” in the literal sense: in lawmaking, there is no such thing as having “the last word.” For one thing, it always can be overridden by constitutional amendment. This may be costly and burdensome, but not necessarily much more costly than the supermajority needed to override (through a non-constitutional procedure) a tribunal’s decision in, for example, Poland until 1997 and Romania. As a matter of fact, in Poland until 1997 the requirements for a constitutional amendment were exactly the same as those for a decision overriding
the Constitutional Tribunal’s decision, and this fact served as the basis for one commentator’s remark that “the override [was] tantamount to [a constitutional] amendment” (Schwartz 1993: 176). In Romania, the difference is that, while both the override and the constitutional amendment require the same parliamentary majority, the amendment also requires a referendum (Article 147).

Even short of a constitutional amendment, the “finality” of the Court’s invalidating decision can be qualified by various institutional strategies. These may be written into a constitution, and therefore openly acknowledged as a way of injecting a degree of democratic deliberation into the essentially non-democratic process of judicial review. One example of such a strategy is the so-called “notwithstanding” provision of the Canadian Charter of Rights and Freedoms. This provision, in s. 33 of the Charter, states that “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature . . . that the Act or the provision thereof shall operate notwithstanding a provision included in” the Charter’s catalogue of freedoms and rights. These declarations can be in effect for up to five years, which is the longest period of time for which a government stays in power without going to the polls, but they can be renewed indefinitely. Section 33, admittedly inserted into the 1982 Charter as a matter of political compromise and used sparingly, may be seen, as an American enthusiast of the provision described it, as “an effort to have the best of two worlds: an opportunity for a deliberative judicial consideration of a difficult and perhaps divisive constitutional issue and as an opportunity for electorally accountable officials to respond, in the course of ordinary politics, in an effective way” (Perry 1993: 158). The benefits of this approach seem significant: it allows the court to register its constitutional protest, puts the burden upon the legislature to face the constitutional issue explicitly, symbolically identifies the problem in a matter highly visible to the electorate, but does not distort the legislative will as a requirement of having supermajority in order to override the court’s decision necessarily does. It seems like a good compromise between ordinary politics and constitutional concerns, which enhances popular deliberation over constitutional norms without distorting the democratic will. If we believe that the articulation of constitutional norms is a matter of concern not only for the constitutional courts but also for the legislatures, executive branches, and the general public, then the s. 33 compromise may be seen as an attempt “to make ordinary politics and constitutional law penetrate each other” (Tushnet 1995: 299) in a way that benefits society overall.
The United States Constitution provides for a mechanism of majoritarian constraint on judicial review, in the form of the Article III power of Congress to regulate the jurisdiction of the federal courts. Theoretically at least, the Congress might use this power to foreclose judicial consideration of constitutional challenges to legislation but in fact, although some constitutional lawyers have no doubts about the constitutionality of such a power of foreclosure (Redish 1982: 907), this has never served as a significant limit upon judicial review. There are various reasons, both political and legal, why the Article III power never served an analogous role to the Canadian Charter's section 33 in insulating controversial legislation from judicial review (Tushnet 1995: 287).

But the very fact that such power exists suggests that, even in a system which is seen as the model for strong judicial review, "finality" of the Court's decisions, which invalidate legislative acts, is qualified. Some writers believe that the Supreme Court's decisions are never really the "last word" on the matter. Rather, they serve to initiate a complex dialogue between the courts and the elected branches of government, in which the latter may attempt to counter the effects of the decision. In a recent study of such interaction between the Supreme Court, the legislative and the executive, Neal Devins has shown that the legislative and executive branches have successfully restricted the impact of the Supreme Court's landmark decision on abortion (Devins 1996), and in consequence, have made the Court reexamine and qualify its own, earlier decision. As Devins concludes, "once a Supreme Court has decided a case, a constitutional dialogue takes place between the Court and elected government, often resulting in a later decision more to the liking of political actors" (Devins 1996: 7).

Devins is correct in saying that, on issues where constitutional interpretation is at stake, "the last word is never spoken" (Devins 1996: 55), and that the articulation of a true meaning of constitutional norms is as much a task of the legislature, the executive, and the general public, as it is of the Supreme Court. It is also the case that the legislative and the executive branch have numerous methods of prevailing over the Court in its interpretation of constitutional rights (Ratner 1981: 930-32), although sometimes it may take a lot of time, as for example, the protracted resolution of the child labor issue in the United States indicates.

Then, too, there is always the last resort option of amending the Constitution. But this is often politically unrealistic, or prohibitively costly, as seen in the example of the United States where, in its long constitutional his-
tory, only four attempts at constitutional amendment were successfully made to override Supreme Court decisions disfavored by the legislature (11th, 14th, 16th and 26th Amendments). Still, in those legal systems where the process of legislative amendment is less cumbersome, this avenue of restricting the “finality” of a constitutional court’s decisions is a more readily available and practical option.

Finally, one should add that the finality of tribunals’ decisions may be seen by the legislators sometimes as an advantage rather than as a countervailing, antagonistic power. The fact that legislators work in the shadow of judicial review may give them a good excuse for not making the decisions which the electorate demands — by anticipating the tribunal’s objections or by shifting the responsibility for an unpopular decision to the tribunal. It may provide a convenient excuse: “We wanted to adopt this law, or this policy, but the tribunal would not let us do it.” Or, conversely, the tribunal’s strong authority may free the parliament to behave irresponsibly. Individual members of a parliament can signal their “right” attitudes (valued by the majority of their constituency) by voting for proposals which they know will not actually become law because the tribunal will strike them down as unconstitutional (Macey 1993: 235). Ironically, the tribunal’s power to prevail over the legislature may serve the legislature’s interests quite well, although perhaps not for the right reasons.

Non-Judicial Review

It is important to remember that judicial review (by which I mean the power of review which includes invalidating statutes due to unconstitutionality) is not the only possible institutional device of separation of powers and for eliminating legislative production which threatens the respect for rights. Rather, it is one of a range of possible institutional devices which may or may not, when part of a larger system of institutions and political culture, have a tendency to exert pressure upon the legislature to respect rights. A decision about the use of any of these devices must consider not only its ability to exert such pressure (that is, its benefits, from the point of view of a system of protection of rights), but also its costs. The costs of judicial review mainly include the consequences of injecting countermajoritarianism into lawmaking and policymaking. For one thing, decisions are made which would not have been made but for the system of judicial review; for another thing, public discourse
about the proposed law or policy is thwarted by “juridification” of the policymaking and lawmaking, as a consequence of withdrawing the matter from the realm of ordinary politics.

The loss of the benefits of judicial review (such as the heightened concern for individual rights and for unpopular minorities) may be offset by other institutional devices. They may include bicameralism (especially if the two chambers are composed according to different principles and their coexistence is seen as a guarantee of a high quality of legislative production), executive veto and a possibility of refusal to promulgate the law by the president (Elster 1993b: 196-204), special legislative procedures for laws implicating constitutional rights, independence and robustness of the press, subjecting a legal domestic system to supranational scrutiny (exercised, for example, under the European system of protection of rights), and an effective pressure by non-governmental organizations concerned with individual and minority rights. Non-institutional devices such as the quality of political culture, the sense of noblesse oblige by the members of legislatures, public opprobrium for expressions of prejudice and bigotry, rules of party discipline by the members of parliament (especially in a proportional system of representation) which make members dependent upon the decision of their party leaders rather than on specific pressure by their local constituencies — all these factors may affect the character of legislation, from the point of view of respect for individual and minority interests.

Great Britain is an interesting case in point. While in some respects the system of protection of rights seems to be inferior compared to the American system based on judicial review, it would be hard to say that British citizens (including those belonging to disadvantaged, unpopular, and powerless minorities) are evidently less free than the beneficiaries of rights- protection in the United States or in the continental European models of judicial review. With respect to a special case of socioeconomic rights, there is certainly no correlation between a strong protection of the welfare interests of individuals and the availability of judicial review under a constitutional bill of rights. This observation suggests that judicial review is not a variable which makes all the difference between protection and non-protection of constitutional rights. In countries such as Great Britain, Finland, the Netherlands or Greece, protection of rights generally, and of socioeconomic rights in particular, has been a product of legislative action, and not of judicial constraints imposed upon legislation.
Conclusions: Constitutional Rights and the Division of Power

One can, it seems to me, identify three main rationales for a system of division of powers, and for specific arguments about allocating certain powers to one rather than to another branch of government. These are, first, a libertarian rationale (preventing the tyranny and despotism which result from a concentration of powers in one body) (Holmes 1995: 164), an efficiency rationale (tasks should be assigned to the body which is best qualified to perform them), and a legitimacy rationale (tasks should be performed by the body which has a mandate to do so, under whatever theory of legitimation we accept).

There may be other rationales, not reducible to any of the three mentioned above. For my purposes, it is important to note that the three above rationales are distinct, though in particular cases they may overlap. Examples of such an overlap include those situations in which legitimacy may be based on qualifications alone, in which case the third rationale collapses into the second one (such as when one argues that the army should have the authority to decide about launching military actions because it knows best the facts about an external threat). But we may sometimes hold legitimacy to be separate, and superior, to qualifications (such as when an impartial umpire in an arbitration dispute has derived legitimacy from the mutual consent of the parties, even though another body might have greater expertise in the matter in controversy), and these two rationales can still be separate from a libertarian argument. It is commonplace that liberty-based arguments for checks and balances may be counterproductive from the point of view of efficiency. As one of the greatest judges in American history, Louis Brandeis noted: "The doctrine of separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but . . . to save the people from autocracy" (Myers v. United States, 272 U.S. 52, 293 (1926)). A modern writer characterizes this view as "the eighteenth-century hope that freedom could be secured by calculated inefficiency in government" (Mendelson 1992: 779).

It is useful to undertake a scrutiny of constitutional review (based on socioeconomic rights) from the point of view of these three rationales of separation of powers. The results of the scrutiny will be, largely, context dependent. They will depend on a number of factors such as the relative power of parliaments and executive bodies in a given country, the prestige and authority of constitutional judges, their backgrounds and patterns of accountability,
the persistence of authoritarian tendencies among the executive, the dominance of charismatic political figures, the popularity of non-liberal and populist policies, etc.

However, putting these context-dependent variables aside, one may suggest the following working hypotheses, as a starting point for a discussion of circumstances in particular countries:

First, from the point of view of a libertarian rationale, the shift of decision-making authority from the legislative and executive to the constitutional-judicial bodies seems to be a neutral matter. In principle, it neither prevents nor favors various potentially autocratic tendencies within the system of government. To be sure, one may argue that by denying the executive the power of final say on socioeconomic policy, the shift prevents these branches from using socioeconomic policy as an instrument of rent-seeking behavior, clientelism, and the buying off of various interest groups with privileges in exchange for their support. But, on the other hand, constitutional review of socioeconomic policy may prevent a government from running economic reforms and modernization programs, force it to adopt more populist policies, and, as a result, undermine the bases for the robust protection of individual liberties. This is the case when a court is under the ideological influence of populist ideas and, in particular, when it undertakes scrutiny of legislative acts using such yardsticks as “social justice” or “vested rights.” The incentive structure which shapes the court’s activity is such that it is more likely to be receptive to claims based on traditional structures of dependency: it has very little to lose (because it does not decide on the budget) and a lot to gain (in terms of social popularity, self-satisfaction and an overall sense of moral self-righteousness) by erring on the side of “generosity” in mandating governmental welfare expenses.

Second, from the point of view of an efficiency rationale, the qualifications of the constitutional courts to decide about the matters of socioeconomic policy seem to be inferior to those possessed by two other branches of the government. Constitutional judges usually do not have the knowledge, information, background, and skills necessary to analyze complex issues of socioeconomic policy. The question is, to what extent such complex issues indeed arise in the process of judicial review under socioeconomic constitutional rights. No doubt, in some cases these issues boil down to fairly simple and obvious value choices. The question of “qualifications,” then, is really more a matter of legitimacy (because the “capacity” to properly discern fundamental values is a matter of institutional authority) — our third rationale. But to the
extent to which the access to information and the possession of skills in the field of economics and social policy is indeed required for an evaluation of a governmental policy, the constitutional courts seem to be ill suited to fulfill this role.

Third, from the point of view of the legitimacy rationale, the response to the phenomenal rise of the constitutional courts must be ambiguous. If we view these courts as judicial bodies, then their legitimacy in this area is in serious doubt. Courts derive their legitimacy from the ideal of an impartial umpire adjudicating between competing claims (Shapiro 1980; Cappelletti 1989: 31-45). But constitutional courts in Europe do not decide specific cases and controversies, where this form of legitimacy applies. In abstract policy-making or policy-evaluation, legitimacy is most typically based on political accountability and not on the impartial umpire model. And constitutional courts are tainted by an important accountability deficit. As Burt Neuborne says (though not in a context confined to socioeconomic rights): "When substantive-review judges identify values and totally insulate them from majority will, the troublesome question of why judges are better than other officials in identifying and weighing fundamental values cannot be avoided" (Neuborne 1982: 368).

On the other hand, if we view constitutional courts as "third chambers," and abandon altogether a judicial paradigm, then their accountability may be less of a problem. For one thing, constitutional courts are accountable in a way that ordinary judges are not: the process of appointing constitutional judges is much more political (with constitutional guarantees which usually ensure that the courts' membership reflects all major political groupings) (Cappelletti 1989: 138), political sympathies of the judges are sometimes reasonably well known, and the system of tenure may make them potentially more sensitive to the political trends of the day. For another thing, their location in the model of legislative powers, as a third chamber, may render us less inclined to insist upon the accountability requirement. This is because they can be seen as a "chamber of reflection": a forum of dispassionate evaluation of a given policy, removed from day-to-day political pressures.

In a recent article, an American critical constitutional scholar identified two main negative consequences of a "more than minimal" judicial review: "policy distortion" and "democratic debilitation." The former consists of the fact that, in a system of judicial review, "legislators choose policies that are less effective but more easily defensible than other constitutionally acceptable alternatives" (Tushnet 1995: 250). The latter means that "the public and their
democratically elected representatives cease to formulate and discuss constitutional norms, instead relying on the courts to address constitutional problems” (Tushnet 1995: 275). These are very serious consequences. “Policy distortion” may, in the extreme, mean that the government will be disabled from pursuing the policy which is endorsed by the legislature and which has the political support of the electorate; it may lead to the undermining of reforms in the crucial period of transition. “Democratic debilitation” may lead to depoliticization, apathy and withdrawal of the public from a public discourse about policy proposals and law reform (Lazare 1996; Tushnet 1995; Mandel 1989; West 1993; Perry 1993). This would be one of the sins for which the tradition of “negative constitutionalism” (Holmes 1993: 24) can be blamed.

Of course, both of these effects can still be recognized by a proponent of strong judicial review, and yet assessed in opposite terms. “Policy distortion” may be seen as a modification of policy by considering those important values which have been given a constitutional status more seriously than the legislature and government usually do. “Democratic debilitation” may be seen as a much needed way to insulate the protection of those fundamental interests from the realm of everyday politics, dominated as it often is, by populism, demagogy and intolerance for the most vulnerable.

The upshot of this paper may be that the reality is more complex than either a radical-democratic or a liberal countermajoritarian answers suggest. Whatever decision about the structure of constitutional articulation of norms is taken — whether there should be constitutional socioeconomic rights or not, whether a judicial or quasi-judicial body should have the power of reviewing legislative and executive acts or not, whether this review should be abstract or specific, a priori or a posteriori, final or tentative, etc. — it will affect the allocation of authority among the institutions which all have their individual strengths and weaknesses. These strengths and weaknesses vary from country to country and from one period to another. An institutional approach may help view the problem as ultimately a matter of pragmatism rather than of principle.

REFERENCES


