

Constitutional Courts Come at a Price

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WOJCIECH SADURSKI, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht, Springer 2005) 377 p., ISBN 1402030061

Systems of unlimited parliamentary supremacy are now the exception rather than the rule in the West. The growth of constitutional review has had a favourable effect on the fortunes of academic constitutional lawyers. In Germany, constitutional scholarship has even adopted the Federal Constitutional Court as a sort of junior partner. Sadurski dismisses as sheer speculation the claim that the European Union expected the candidate countries to set-up a system of constitutional courts that would be in a very strong position *vis-à-vis* the legislatures (42). However, the fact is that the 'importation' of constitutional review in Central and Eastern Europe was not accompanied by any serious reflection upon the implications of such a system. For that reason, the development of constitutional courts in this region is a fascinating subject for constitutionalists. After the eastward enlargement of the European Union, the new 'constitutional traditions' can influence the constitutional rights of all the citizens of the European Union.

In this book, Sadurski addresses important questions: Why has the democratic legitimacy of constitutional courts in Central and Eastern Europe been taken for granted? What effects have the former communist regimes had on the constitutions and constitutional courts in Central and Eastern Europe? Has this led to the widespread cynical conviction that politics is a dirty business? How have these countries come to terms with their communist leaders and deeds of the past? How political is the power of constitutional interpretation? In addition, is there any truth to the claim that the judiciary is ill equipped to evaluate opinions and choices regarding socio-economic policies with financial implications? To deal with all of these questions, Sadurski presents a wealth of case studies.

Rights before Courts is a highly informative and very rich book. Sadurski's main focus is on Poland and Hungary; however, his analysis also encompasses the systems in Albania, Belarus, Bosnia, Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Macedonia, Moldova, Romania, Russia, Serbia-Montenegro,

Slovakia, Slovenia and Ukraine. It is apparent that some of their constitutional courts, for instance the Hungarian Constitutional Court, function more like an upper house of parliament or 'chamber of reflection'. Constitutional courts are able to escape the social criticism endured by other political and legislative institutions thanks to their ability to draw upon the appearance of neutrality enjoyed by courts in general. Sadurski concentrates his attention on the institutional relations between the legislative, executive and judicial branches and the role these constitutional courts play in clarifying the meaning of the principles of the separation of powers and the electoral system. Sadurski correctly stresses that if the role of constitutional courts is to be maintained, their legitimacy must be established by means of argument. His reflections on constitutionalism and legal theory are always to the point. In this book, he pays particular attention to the question of how effectively constitutional courts articulate and protect citizens' rights. He also addresses those cases in which legislative articulations of constitutional rights have been set aside and invalidated as unconstitutional.

In Part I of the book, Chapters 1-4, the author concentrates on the 'legitimacy dilemma' of the constitutional courts. Under Communism, there was a universal rejection of constitutional review, which was seen as inconsistent with the principle of the supremacy of parliament and, of course, incompatible with the total political control exercised by the Communist Party. Sadurski offers an overview of the structure, the functions and the composition of constitutional courts. The type of review established by the courts in most countries is that of a 'concentrated' or 'centralized' constitutional review, conducted by a court composed of judges appointed for a limited tenure by the political branches of government. These judges conduct an abstract, *ex post* and final review of the constitutionality of statutes and other 'infra-constitutional' acts. Accordingly, there is no right of appeal with regard to the constitutional court's decision. Abstract judicial review is the method of considering the textual dimension of the statutory rule rather than its effect in application to real people and actual legal controversies. Most of the constitutional courts in the region also exercise the power of concrete review initiated by other courts. The other courts are obliged to suspend proceedings and address their query to the constitutional court when faced with doubts as to the constitutionality of a law about to be applied in the case before them.

In Central and Eastern Europe, the relationship between the constitutional courts and the legislature can become strained on occasion when these courts act not only as a 'negative legislature' but also as a 'co-legislature' or even a major player in the law-making process, by rewriting the laws themselves (this applies in particular to Poland, Hungary, the Czech Republic and Slovenia) (104). However, in general, the constitutional courts in Central and Eastern Europe do not suffer

from substantial legitimacy problems. Since the fall of Communism, a *communis opinio* among constitutional lawyers in Central and Eastern Europe seems to be that, were it not for the constitutional court, the tyranny of the majority would be the norm. By approaching the study of courts from a political science perspective, one can only conclude that this vision of the constitutional courts as some kind of bulwark against the tyranny of majority rule does not prove right in many cases (61). For instance, in Estonia and Latvia, with their large Russian-speaking minorities, the constitutional courts played a minimal role in imposing a regime designed to accommodate the Russians. In Poland, the Constitutional Tribunal caved in to pressure from the Catholic Church by invalidating the country's liberal abortion law, upholding the introduction of religious teaching in public schools and the Broadcasting Act's ban on expressions offensive to Christian values.

Discussions about judicial review usually focus on the question of legitimacy: is it legitimate for non-elected judges to frustrate the will of the democratically accountable representatives of the people and overturn their legislative choices? A conceptually and politically distinct question is whether judicial review helps to protect individual rights. There are some prudential reasons to support judicial review if the institutional particularities of judicial institutions, compared with those of the political branches, render courts more sensitive to individual rights. However, the author stresses that this view cannot be validated in abstraction from the particular circumstances in a particular country. In Part II, Chapters 5–10, Sadurski gives a presentation of basic rights as interpreted by constitutional courts in the region. To establish whether the gains of judicial review exceed the losses from a rights-protection perspective, the author presents a 'score card' of rights-enhancing decisions (gains) versus rights-weakening decisions (losses) brought about either by invalidating or upholding legislation (116). He examines key constitutional court cases dealing with personal, civil and political rights, socio-economic rights and equality and minority rights, and consistently relates these cases to the constitution and political system of the state in question while providing illuminating links to examples in other countries in the region.

In the end, Sadurski does not convincingly prove, as he sets out to do, that a system of strong judicial review of statutes has a negative effect on the public; that it bolsters the perception of rights discourse as an obscure activity reserved for lawyers.

While failing to give the reader a clear account of the methods used for data collection and interviews with judges, Sadurski still argues compellingly that the record of constitutional courts in the region is far from unambiguously positive (289). Of course, political systems should be structured in such a way as to prevent the abuse of power by those whose duty it is to enact and execute laws. The

objective is a government of laws, and not of men. However, separating powers by separating persons is not the end of the problem. Sadurski shows that opportunities to strike down objectionable laws have been missed, and there have even been cases where rights-protection laws have been invalidated, and the legal regime pushed into a less liberal direction. There have also been cases where the courts substituted their own choices and preferences for those of the political branches of government.

Judicial review seems necessary to check the operation of the majority principle, without invalidating its ultimate authority. Because of the relation between the principle of separation of powers and the concept of government by law, the judiciary should not exercise legislative and executive powers. When the branches of government are independent from each other, there is always the risk of their standing aloof from the people. In fact, all three powers need a degree of popular control. Sadurski is very convincing when he concludes that the existence of judicial review comes at a price. To him, therefore, it is only proper that the constitutional courts be subject to stricter scrutiny than has been the case thus far, both from within their constitutional context and from society at large. For constitutional law scholars, the eastward enlargement of the European Union should be a good start in this respect.

