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Global Governance Programme

COURTS, SOCIAL CHANGE AND JUDICIAL INDEPENDENCE

Organized by Adriana Silvia Dreyzin de Klor, Miguel Poiares Maduro, and  
Antoine Vauchez



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES**  
**GLOBAL GOVERNANCE PROGRAMME**

*Courts, Social Change and Judicial Independence*

**ORGANIZED BY ADRIANA SILVIA DREYZIN DE KLOR, MIGUEL POIARES MADURO,  
ANTOINE VAUCHEZ**

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## Introductory Remarks

Antoine Vauchez\*

On 16-17 March 2012, the Global Governance Programme at the EUI organized a High-Level Policy Seminar (HLPS). Current and former judges from international, regional and constitutional courts and leading academics in the field of judicial politics, legal theory and international law critically debated over the complex relations between “Courts, social change and judicial independence”<sup>1</sup>.

The discussion was organized around two panels, each of them being introduced by short memoranda from academic participants and followed by lively discussions with the judges. The first panel, dedicated to “Civil Society and Social Change through Courts”, was an opportunity to question the opportunities, constraints, limits, unintended effects and possible backlashes deriving from the increasing recourse to tribunals in order to settle social and political conflicts. Discussions were particularly intense on the issues of legal standing and non-legal barriers to justice. Unsurprisingly, recent events such as Hungary’s controversial new Constitution or the prospects of change in the European Convention of Human Rights were particularly debated. The second panel centered on the possible consequences of such courts’ saliency with a particular emphasis on the difficult articulation between “Representativeness and Independence in Courts”. The participants questioned the extent to which courts could be thought of as ‘representative institutions’ and on the institutional levers that could be acted upon to address such issues (from judicial nomination to legal writing or courts’ deliberation, etc.).

The diversity and quality of the nine policy papers presented hereafter give an idea of both the broadness and richness of the seminar. Its great originality lies in the wide range of disciplinary and geographical views from which the topic has been considered, including doctrinal, historical, sociological, law-in-context or political science perspectives. The paper by Frédéric Mégret provides a critical assessment of civil society participation in supranational courts indicating a number of possible alternatives in judicial reform. He is followed by Daniel Kelemen’s contribution that questions the extent to which American adversarial legalism’ has been transplanted to the European countries. Loretta Ortiz Ahif then brings a more law-and-society approach to tackle the issue of (social and legal) conditions limiting access to justice in Latin America. Mikael Madsen then turns the attention to the broad historical and social processes in which delegation to courts takes place. Alec Stone Sweet points at the related ‘fiduciary responsibilities’ that weigh upon judges as a consequence of such delegation. Relatedly, Kim Scheppele presents reflections on the “fragility of courts” in contexts of strong populist challenges such as in Hungary. With Mattias Kumm’s contribution, the discussion moves on to the issue of ‘representativeness’ suggesting a useful typology to think thereabout. In this framework, Mark Pollack addresses the question of judicial nomination and how dissent can be organized within international courts. Iyiola Solanke closes the discussion with reflections on possible ways to reconcile representativeness and impartiality in contemporary courts. All along the seminar, a large variety of views have been discussed and many suggestions or recommendations have been put forward. Rather than shaping an unlikely consensus, this joint Policy Paper aims to clarify both conceptually and empirically the wide range of issues at stake in the emerging and evolving role of judges and courts<sup>2</sup>.

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<sup>1</sup> This High Level Policy Seminar stands in the continuation of two academic workshops that have been organized by the Global Governance Programme on related themes : ‘The Disputed Field of Transnational Justice : A Renewed Research Agenda’, 13-14 May 2011, and ‘The Fabric of International Jurisprudence. An Interdisciplinary Outlook’, 15-16 March 2012 : cf. Antoine Vauchez (ed), *The Fabric of International Jurisprudence*, EUI, GGP Working Papers Series, 2012.

<sup>2</sup> See the related GGP Policy Brief : Cristina Dallara, Antoine Vauchez, *Courts, Social Change and Judicial Independence*, EUI, Issue 2012/2 June 2012.



# Private Actor Litigation and the Evolving Legitimacy of Supranational Adjudication

Frédéric Mégret\*

This paper will focus on supranational courts, even though these cannot be studied independently of a number of trends that are apparent at the domestic and transnational levels. Non-state litigation before supranational courts is a growing phenomenon that must be fitted within a broader analysis of the phenomenon of civil society litigation and the nature of international adjudication. This paper will begin by giving an overview of the very uneven access to international courts of private actors (I). It will then assess some broad determinants of the phenomenon of private litigation before such courts (II) as well as its ends (III). This then leads to an assessment of how the analysis of civil society participation can help reassess arguments critiquing (IV) and upholding (V) the legitimacy of international adjudication. The paper finishes by suggesting some ways in which civil society participation in international adjudication raises a number of concrete questions for institutional reform of international adjudication mechanisms (VI).

## I. Access to International Courts by Non-State Actors: A Very Uneven Panorama

Access to international courts remains very uneven, which may in some cases limit their role as fora for transnational litigation. Its forms vary from occasional consideration, to formal status as *amicus curiae* or “quasi-party”, to full access with standing. Even in the latter case, it is not exclusive of state participation which remains the one common feature of most international adjudicatory bodies. One may speculate that the more “global” or “social” the subject matter of a given international body, the more accessible it will tend to be to non-state actors. So for example a classic inter-state court such as the ICJ is easily the least receptive to non-state actor access. At the opposite end of the spectrum, international human rights bodies seem almost naturally destined to welcome individuals a fully-fledged parties, be it with some important safeguards. Often, formal civil society participation in proceedings is also a function of how much civil society was involved in the creation of the corresponding international jurisdiction or the governance of the corresponding regime. So for example civil society access to the ICC is much greater than to the ad hoc international criminal tribunals (Rwanda and Former-Yugoslavia), and this almost certainly has something to do with the fact that NGOs were so active at the Rome conference that led to the creation of the ICC. Similarly, strong civil society interest in the global trade regime partly accounts for the fact that its lobbying efforts to secure some standing before WTO panels were successful.

- The International Court of Justice remains largely out of reach for non-state actors, including civil society groups. Above all, they do not have standing to bring a claim before the Court,<sup>2</sup> despite the odd suggestion in that direction.<sup>3</sup> At best, their interests will have to be taken up by their state qua state interests under the mechanism of diplomatic protection. Strategies are increasingly put in place by non-state groups to circumvent the inter-state limits of the Court, most notably through advisory opinions asked via a body such as the General Assembly, which may be more sensitive to civil society lobbying (although not to actual appearance before the Court).<sup>4</sup> In certain very specific circumstances, the Court may also receive written statements

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<sup>2</sup> Article 34(1) of the ICJ Statute.

<sup>3</sup> W. Paul Gormley, *Procedural Status of the Individual Before Supranational Judicial Tribunals, The*, 41 U. DET. L.J. 282 (1963).

<sup>4</sup> I. Brownlie, *Place of the Individual in International Law, The*, 50 VA. L. REV. 435 (1964).

and hear certain non-state actors, as was the case of the Kosovar authorities in the run-up to the advisory opinion on the legality of Kosovo's unilateral declaration of independence.<sup>5</sup>

- International criminal tribunals were for a long time notorious for not allowing access by non-state actors. Victims were heard at best as witnesses. They did not have and still do not have within the ICC context, the power to formally complain. NGOs can forward evidence concerning international crimes, but this has no strong formal status with the prosecutor. This neglect of non-state actors is beginning to change in the context of the ICC.<sup>6</sup> First, civil society groups are increasingly seen as partners in international criminal justice, whether symbolically or concretely. From the beginning they were strong proponents of international criminal justice, a stance which they may have succeeded in transforming into an at least informal collaborative relationship with the Court, for example when it comes to investigations. Second, victim participation is one of the most significant developments in ICC proceedings and a landmark development in terms of non-state actor access. Although victims are not quite parties (in the sense, for examples, of parties civiles) their views must be heard by the Court and they are represented in proceedings. This has the potential to fundamentally change the dynamics of international criminal justice, although it is still too early to say how far that movement will go. Moreover, reparations to victims are increasingly presented as one of the key goals of international criminal justice, which necessarily implicates victim groups from the earliest stage and makes the entire goal of the international criminal trial one more oriented towards restorative justice.
- WTO dispute panels are notorious for having allowed civil society participation as amicus curiae.<sup>7</sup> Here is a case where the international activity at stake seems naturally suited to attract civil society interest given its impact beyond strictly interstate relations, and where NGOs have already had a broader role in challenging/supporting the global trade regime.<sup>8</sup> Moreover, it is also a case where significant interest exists within the international community to enlist civil society support to “grease the wheels” of the system as it were.<sup>9</sup> In some cases this has led to the instillation of a strong international public interest element in WTO litigation,<sup>10</sup> even though such litigation will have been launched by states and remains, for all formal intents and purposes, largely circumscribed by a sovereign paradigm.<sup>11</sup>

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<sup>5</sup> In that case, however, the «Provisional Institutions of Self-Government of Kosovo» could not ipso facto be considered a state since that would have partly presumed the question which the Court was seeking to answer.

<sup>6</sup> M. Cohen, *Victims' Participation Rights Within the International Criminal Court: A Critical Overview*, 37 DENV. J. INT'L L. & POL'Y 351–681 (2009); M. Glasius, “*We Ourselves, We Are Part of the Functioning*”: *The ICC, Victims, and Civil Society in the Central African Republic*, 108 AFRICAN AFFAIRS 49 (2009); INTERNATIONAL CRIMINAL COURT, ICC STRATEGY IN RELATION TO VICTIMS (DRAFT) (2008).

<sup>7</sup> A. Reinisch & C. Irgel, *Participation of Non-Governmental Organisations (NGOs) in the WTO Dispute Settlement System, The*, 1 NON-ST. ACTORS & INT'L L. 127 (2001).

<sup>8</sup> J. L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 JOURNAL OF INTERNATIONAL ECONOMIC LAW 433–456 (1998); S. Sapra, *WTO System of Trade Governance: The Stale NGO Debate and the Appropriate Role for Non-State Actors, The*, 11 OR. REV. INT'L L. 71 (2009).

<sup>9</sup> M. B. Jeffords, *Turning the Protestor into a Partner for Development: The Need for Effective Consultation Between the WTO and NGOs*, 28 BROOK. J. INT'L L. 937 (2002).

<sup>10</sup> C. Tietje & K. Nowrot, *Forming the Centre of a Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-State Actors in WTO Law*, 5 EUR. BUS. ORG. L. REV. 321 (2004); Michael Mason Lecturer in Environmental Geography, *Representing Transnational Environmental Interests: New Opportunities for Non-Governmental Organisation Access Within the World Trade Organisation?*, 13 ENVIRONMENTAL POLITICS 566 (2004); R. Eckersley, *A Green Public Sphere in the WTO?: The Amicus Curiae Interventions in the Transatlantic Biotech Dispute*, 13 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 329 (2007).

<sup>11</sup> J. L. Dunoff, *Civil Society at the WTO: The Illusion of Inclusion*, 7 ILSA J. INT'L & COMP. L. 275 (2000); D. B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 BC INT'L COMP. L. REV. 235 (2002); M. Laidhold, *Private Party Access to the WTO: Do Recent Developments in*

- Regional integration courts have long granted access to non-state actors, although that does not mean that civil society concerns more generally have a voice. The ECJ for example allows actors who can show that they have a direct and individual concern to introduce a case but not civil society actors who more diffusely adopt a role in protecting the general public interest.<sup>12</sup> In other words, these organizations' role in working towards EU public governance and with other EU institutions has not been matched by corresponding access to the Court, despite scholarly proposals in that direction, notably in the environmental law and consumer protection sectors.<sup>13</sup>
- Individual petitions before international authorities on human rights grounds first originated in the trusteeship system. Individual petitions before other UN human rights mechanisms were long a thorny issue that was only addressed imperfectly.<sup>14</sup> In the old European human rights system, individuals did not have locus standi as such but their interests were broadly represented by the European Commission on Human Rights. The element of civil society participation is a priori inherent in international human rights courts or commissions, which are the only ones to recognize non-state actors as fully parties to disputes.<sup>15</sup> This phenomenon is most accomplished in the European context which allows direct access to the European Court of Human Rights, but is also evident to a lesser extent in the Inter-American and African contexts. However, even in this context, there are also powerful countervailing pressures. Before the UN's human rights bodies<sup>16</sup> and even some regional human rights courts, the right of individual petition is dependent on a specific recognition by the state concerned, where access to these bodies by states parties is as of right.<sup>17</sup> The right of individual petition can also be withdrawn.<sup>18</sup>

## II. Some Determinants of Civil Society Participation

Civil society participation in international adjudication will depend on a range of factors, among which the following:

- Type of court: it will come as no surprise that the more state oriented the court the less prominent the role of civil society. Even if the ICJ's decisions may affect all kinds of non-state actors, the Hague Court is still very much embedded in a Westphalian paradigm that sees this as accidental rather than essential. At the opposite end of the spectrum, the long term logic of regional human rights courts has been that courts designed to protect individuals ultimately cannot avoid the issue of individual agency, or run into deep contradictions (hence arguably the

(Contd.) \_\_\_\_\_

*International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO*, 12 TRANSNAT'L LAW. 427 (1999).

<sup>12</sup> RACHEL A. CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE* (2007); C. Kombos, *LocusStandi of Representative Groups in the Shadow of Plaumann: Limitations and Possible Solutions*, 47 ACTA JURIDICA HUNGARICA 373 (2006).

<sup>13</sup> Adam Cygan, *Protecting the Interests of Civil Society in Community Decision-Making: The Limits of Article 230 EC*, 52 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 995 (2003); O. De Schutter, *Group Litigation Before the European Court of Justice*, CIVIL SOCIETY AND LEGITIMATE EUROPEAN GOVERNANCE. CHELTENHAM: EDWARD ELGAR 89 (2006).

<sup>14</sup> J. W. Bruegel, *The Right to Petition an International Authority*, 2 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 542 (1953).

<sup>15</sup> Liz Heffernan, *Comparative View of Individual Petition Procedures Under the Human Convention on Human Rights and the International Covenant on Civil Political Rights*, A, 19 HUM. RTS. Q. 78 (1997).

<sup>16</sup> M. G Schmidt, *Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform*, 41 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 645 (1992).

<sup>17</sup> D. Juma, *Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper*, 4 ESSEX HUMAN RIGHTS REVIEW (2007).

<sup>18</sup> N. Schiffrin, *Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights*, AMERICAN JOURNAL OF INTERNATIONAL LAW 563 (1998).

abolition of the European Commission). Dispute settlement mechanisms that focus on global governance issues such as the WTO panels are also more likely to be sensitive to the ways in which their normative output may affect stakeholders beyond the parties to a case.

- Existence and type of formalized procedures allowing participation: all other things being equal, the more formalized the procedures and the clearer the conditions of participation, the more civil society actors are likely to participate in supranational litigation. In cases where individual participation is the norm, as before the ECHR, it has become exceedingly popular; where it is positively excluded it still arises but through uncertain and indirect political routes (e.g.: ICJ); where the exact scope of participation is unclear potential litigants may adopt a “wait and see” approach before actively joining international proceedings. It goes without saying that some forms of participation are more conducive to non-state actors’ concerns being taken into account: full participation as a party, albeit the exception internationally, ensures that non-state actors are entirely in control of what arguments get aired and that the full range of their concerns are heard (e.g.: human rights courts); presence in the courtroom as a constituency whose interests must be heard is a close second best (e.g.: victims before the ICC); amicus curiae procedures ensure that non-state actors can at least intervene indirectly in proceedings and emphasize elements of the public interest that are dear to them (e.g.: WTO, but also ICJ, ECHR/IACHR, ECJ, or international criminal tribunals<sup>19</sup>).
- Absence of extra-legal obstacles to participation: even in cases where some form of participation is technically allowed, it may amount to little in practice where such participation is de facto discouraged by political, social or financial factors. It has long been a concern of international human rights bodies, for example, that states will discourage individuals from addressing individual petitions, sometimes by resorting to intimidation and threats. At the very least, participation requires conditions in which petitions can be made in conditions of tranquility about one’s safety, something which may be difficult in cases where threats to one’s integrity are precisely the topic of the petition. Another highly significant factor limiting participation is its cost, even when the potential benefits of participation are relatively high. International litigation can be costly. Some courts anticipate the possibility of legal aid (e.g.: to pay for victims’ lawyers before the ICC) but much international litigation must essentially be financed by the litigants themselves, which can in practice be a strongly discouraging factor.<sup>20</sup> Procedures such as amicus curiae do minimize costs, as they allow those engaging in them to make an input without actually having to incur the risks of litigation.
- Existence of principled or material stake for civil society groups: participation that is merely in the “international public interest” (e.g.: amicus curiae before the WTO) may remain isolated and relatively elitist, associated with specialized organizations and certain professional bodies; conversely, the prospect of significant legal or even political change (e.g. human rights courts, the ECJ) and/or reparation (of any kind, material, but also psychological or symbolic) will significantly increase the popularity of participation in supranational proceedings (e.g. ICC, human rights courts). Participation is probably path driven: the more a court develops a reputation, through its decisions, of being receptive to civil society concerns, the more attention it will attract from such actors.
- Litigation culture: one variable that is worth taking into account is the domestic litigation culture of states over which any given international court has jurisdiction. For example, lack of public interest litigation before the ECJ has sometimes been explained by the relative lack of such litigation within EU member states compared to the US.<sup>21</sup>

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<sup>19</sup> Sarah Williams & Hannah Woolaver, *Role of the Amicus Curiae Before International Criminal Tribunals*, *The*, 6 INT’L CRIM. L. REV. 154 (2006).

<sup>20</sup> A. S. Butler, *Legal Aid Before Human Rights Treaty Monitoring Bodies*, 49 INT’L & COMP. LQ 360 (2000).

<sup>21</sup> CICHOWSKI, *supra* note 11.

### **III. Social and Legal Change as an End of Civil Society Participation?**

Participation before international bodies by civil society actors can have many motivations. Obtaining a remedy for a particular violation obviously stands foremost. However, litigation is also often inevitably about redefining international rules or domestic ones or both:

- ICJ litigation and advisory opinions increasingly have a domestic impact that is sought after by private actors. The Lagrand and Avena cases, the opinions on the Wall in the occupied territories and on the declaration of independence of Kosovo all dealt with matters that were not strictly inter-state, even though they did so through a nominally interstate medium. What is sought is the modification or recognition of practices under international law that are constitutive of domestic legal reality.
- Participation in WTO litigation is triggered by a desire to affect global trade rules with both international and domestic implications, where private groups understand the ramifications that certain normative outcomes may have on their position in the global market place and/or global public sphere.
- Participation in human rights bodies is often domestic law changing litigation *par excellence*, or at least aspires to be.<sup>22</sup> Not all judgments of regional human rights courts translate into legislative or regulatory changes,<sup>23</sup> but an increasing number do. The Strasbourg Court is increasingly asked to get involved in constitutional, administrative, criminal, civil and even corporate law matters. It is perhaps in this context that the link between the supranational and the domestic is the most pronounced. Going through Strasbourg may be a way of circumventing domestic limitations including the inertia or conservatism of the domestic judiciary.
- Participation as victim before international criminal tribunals has a strong transitional justice focus. The hope is in part that the Court's jurisprudence will catalyze domestic judicial processes and serve as a blueprint for domestic justice efforts.
- Participation before regional integration courts such as the ECJ is a way of making sure that civil society interests are taken into account throughout the policy cycle.

### **IV. The Critique of Supra-National Adjudication: The View from Civil Society Participation**

Increased non-state and civil society participation in international may contribute to deepen the ongoing debate about their legitimacy as institutions, particularly when civil society participants feel that their concerns are being insufficiently heard. However, concerns about international adjudication's legitimacy may take a subtly different form than the critique typically heard from states. It can take different forms:

- Perhaps the most oft-heard stream of critique when it comes to international tribunals is essentially a critique of judicialism and liberal legalism generally, only radicalized by a perception that international judges are even less legitimate than domestic ones in deciding complex societal issues that should rightly belong to democratic debate. The critique is of course magnified in cases where there is a perception of undue judicial activism. This critique of legalization is often based on a perception of the law's indeterminacy combined with an attention to adjudicators' biases. It is likely to increase the more international courts enter a

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<sup>22</sup> Cindy A. Cohn, *Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights*, *The*, 13 HUMAN RIGHTS Q. 295 (1991); B. Cali & A. Koch, *Lessons Learnt from the Implementation of Civil and Political Rights Judgments* (2011).

<sup>23</sup> D. Anagnostou, *Does European Human Rights Law Matter? Implementation and Domestic Impact of Strasbourg Court Judgments on Minority-related Policies*, 14 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 721 (2010); L. Helfer & E. Voeten, *Do European Court of Human Rights Judgments Promote Legal and Policy Change?* (2011).

terrain that is traditionally seen as falling within the sphere of states' sovereignty and/or sensitive social issues. Civil society participation may serve to reshape these concerns. The worry may in fact be that courts are too conservative, too bound to their statutes to ever fully make sense of non-state issues. Whilst civil society participants in international litigation may deplore the democratic deficit, they may be more inclined to think that, in some cases, international courts should act as bulwarks of law against the politics of states and international organizations. Nonetheless, a critique of judicial activism may of course result from engagement by civil society actors with international courts and a perception that the latter are unduly bowing to sovereigns or market forces (see, for example, the very negative reaction of European trade unions to the ECJ Viking ruling on the right to strike).<sup>24</sup>

- Another familiar stream of critique is more classically international in that it challenges the legitimacy of international courts and judges on the basis of sovereignty-based arguments. This strand goes from “international law is not really law” arguments, to skepticism about the validity of international pronouncements made from afar, and more individualized doubts about the idea of “international judges” and their ability to dissociate themselves from their national/domestic backgrounds. On that last count, the critique is rarely one of independence (in that few international judges are actually accused of doing their state's bidding), and more often one of lack of impartiality (judges can never abstract themselves entirely from their national moorings). Again, civil society participation may help reframe some of these concerns. Civil society participants are probably less likely, for example, to be fundamentally critical of international law on dogmatic grounds if it is seen to be an ally in various types of social struggles. The concern about international judges remoteness is likely to be shared in part, but may be tempered by a feeling that remoteness is precisely what is needed when domestic judges fail to rise above domestic constraints. The concern about international judges' potential lack of independence and impartiality, for its part, may be magnified, as civil society litigators find on benches judges of their nationality that they see as merely standing in for their states' national interest.
- Finally a more loosely “post-modern” strand of critique takes issue with certain biases of judges or courts *other* than national bias. These today include first and foremost issues of gender (the ICJ did not have a female judge until the 1990s),<sup>25</sup> but issues of race, class and religious background also surface regularly. The concern with having benches that do not merely avoid national bias but more generally are representative of some of the major categories of population likely to be affected by their judgments is one that is likely to feature particularly prominently among civil society participants in international justice. For example, leading NGOs at the Rome Conference insisted that the interests of victims of war time sexual violence would insufficiently be taken into account if international criminal tribunals were, as had long been the case, exclusively composed of men.<sup>26</sup>

## V. The Legitimacy of Supra-National Adjudication: The View from Private Litigation

Civil society participation may also reinforce the legitimacy of supranational adjudication. There are all kinds of reasons why one might want to encourage civil society participation, not all of which have to do with reinforcing the legitimacy of supranational adjudication. For example, the idea might be

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<sup>24</sup> European Trade Union Confederation, The right to strike is a human right – ECJ must change its case law? 14/05/2009 <http://www.etuc.org/a/6174>

<sup>25</sup> N. Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*.

<sup>26</sup> A. M. Hoefgen, *There Will Be No Justice Unless Women Are Part of That Justice: Rape in Bosnia, the ICTY and Gender Sensitive Prosecution*, 14 WIS. WOMEN'S LJ 155 (1999); P. Spees, *Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power*, 28 SIGNS 1233 (2003); R. Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. PUB. L. 317 (2001).

that reinforcing civil society participation before adjudicatory bodies might be an indirect way of reinforcing civil society participation in supra-national governance generally, a goal that is only loosely related to the legitimacy of such bodies as such. However, the argument can be made that civil society participation has a direct impact on the legitimacy of supra national adjudication:

- First, civil society participation of some sort may be a functional way of ensuring that violations of international law are not left unsanctioned and unremedied. The hypothesis here is that states left to their own devices would probably not bring a range of cases which they should have brought, or bring them under markedly different terms. Hence it is unclear that there would have been an Advisory Opinion on Nuclear Weapons were it not for the lobbying of NGOs at the UN General Assembly; it is abundantly clear, given the quasi-desuetude of human rights inter-state complaint procedures,<sup>27</sup> that very few of the cases heard by regional and universal human rights bodies would have reached them were it not for the standing of rights violations; the possibility of individuals formally complaining to international criminal tribunals would have probably greatly enhanced their ability to deal with a variety of cases; WTO panels' jurisprudence would be noticeably different were it not for the possibility of *amicus curiae*; suggestions have been made for the setting up of an international body to receive individual complaints about violations of the laws of war given the great hiatus in that law's enforcement,<sup>28</sup> etc. In other words, non-state actors serve as catalysts for the case law of international bodies, whose jurisdictional reach and substance is thus considerably enriched.
- Second, it is probable that civil society participation goes further and in fact subtly modifies the *nature* of the legitimacy of international adjudication. In line with a evolution in understandings about the nature of judicial and quasi-judicial activity, the latter is seen less as a function of good deduction from authoritative sources and increasingly more as "procedural", in the sense of involving and being informed by all those concerned. In other words, decisions by supranational bodies are not simply more likely to be accepted by civil society constituencies as a result of having allowed them to participate (a purely utilitarian approach to civil society participation), they are also more likely to be "right" or "just" as result of having done so. Again, the idea is that the Advisory opinion on Kosovo would be much more contestable had it not been based partly on views expressed by the representative organizations of the Kosovars itself; that the legitimacy of ICC judgments will be enhanced by the fact that the proceedings gave ample opportunity for victims to have their views heard; etc.

## **VI. Conclusion: Related Problems of Institutional and Judicial Reform**

The role of private litigation before supranational court and the questions its raises about the limits and legitimacy of international adjudication pose a number of more concrete problems of institutional and judicial reform:

- What principle of subsidiarity/complementarity should be in place to correctly articulate the *rapport* between the domestic and the international judicial spheres? A certain deference to domestic judges seems inbuilt into the system when it comes, for example to human rights courts or cases before the ICJ involving diplomatic protection. This translates into a strong rule of exhaustion of local remedies. However, the pressure to internationalize certain cases can be

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<sup>27</sup> S. Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*, 10 HUMAN RIGHTS QUARTERLY 249 (1988); M. T. KAMMINGA, *INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS* (1992).

<sup>28</sup> J. K. Kleffner & L. Zegveld, *Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law*, 3 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 384 (2000); J. K. Kleffner, *Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 237 (2002); M. T. Kamminga, *Towards a Permanent International Claims Commission for Victims of Violations of International Humanitarian Law*, 25 WINDSOR YB ACCESS JUST. 23 (2007).

strong, as can be seen in the ICC Prosecutor's practice. Arguments foregrounding the exemplarity and structural impact of international litigation militate in favor of more rather than less internationalization. In some cases (interstate disputes, global governance disputes) internationalization is *de rigueur*. It seems that private actors will argue for exceptions and limitations to the rule of exhaustion when that requirement is unrealistic.

- Whether judgments are binding, directly enforceable or leave a large measure of discretion as to their implementation will make a difference for private actor litigation strategies. The less thorough domestic changes anticipated or the more reduced to the circumstances of a particular case, the least public interest litigation may be appealing; yet this is also an opportunity to think about creative ways in which civil society can enhance the implementation of judgments by carefully choosing litigation strategies and complementing litigation by various forms of political and social lobbying.<sup>29</sup>
- Whether national judges should be able to sit in cases where their country is a party or has an interest. Various tendencies are at work, including neutralizing national judges by making sure that each party has "one of his own" on the bench, be it through recourse to ad hoc judges (e.g.: ICJ, ITLOS); not particularly taking into account coincidence of nationality between judges and parties (e.g.: ECHR); an a priori rule against participation of nationals of states parties to a dispute (WTO Panels); or an obligation of recusal when one's country is involved (African Court on Peoples' and Human Rights). Private litigators may be neutral on the issue but may also resent an institution that was primarily devised with the need to take into account inter-state sensitivities in mind.

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<sup>29</sup> James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 218 (2004); Tara J. Melish, *Rethinking the Less as More Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 171 (2006).

## The Rise - and the limits - of Eurolegalism\*

R. Daniel Kelemen\*\*

The process of European integration is transforming traditional patterns of law and regulation across the European Union (EU). A rich literature on comparative regulatory styles going back more than three decades highlights how the regulatory styles that long prevailed in western European democracies differed from the American regulatory style. As Professor Robert Kagan of the University of California, Berkeley put it, the US is the land of “adversarial legalism,” where regulation relies on detailed, transparent legal norms, adversarial approaches to enforcement and dispute resolution, active judicial review, and costly legal contestation often involving private actors empowered to enforce regulation.<sup>1</sup> By comparison, the modes of regulation that predominated across western Europe were more cooperative, informal, opaque, and less reliant on the involvement of lawyers and courts. Regulation through litigation was mostly unheard of in European democracies. Instead, across the variety of European national regulatory systems – from the corporatist to the *dirigiste* - closed networks of bureaucrats and regulated interests developed regulatory policy in concert, with little interference from courts and private litigants.

Today, this is changing. While European regulatory regimes are not converging directly on the American system, patterns of law and regulation in the European Union are shifting toward a distinctive European variant of American adversarial legalism, a variant I call Eurolegalism. Eurolegalism shares the defining characteristics of American-style adversarial legalism: an emphasis on transparent, judicially enforceable legal norms (often framed as “rights”), adversarial enforcement by public authorities, and empowerment of private actors to enforce legal norms. However, due to the moderating influence of entrenched national legal institutions in Europe, Eurolegalism is a more restrained and sedate form of adversarial legalism than that found in the US.

The rise of Eurolegalism is affecting a broad spectrum of policy fields, from competition, to securities regulation, employment discrimination, consumer protection, health care and environmental policy. It can be seen in the EU’s persistent tendency across these and other fields to enact detailed, justiciable rules (often framed as rights) and to back these with a combination of active public enforcement and enhanced opportunities (aka ‘access to justice’) for private enforcement by civil society actors. In my 2011 book, *Eurolegalism: The Transformation of Law and Regulation in the European Union*, I present a range of evidence of the growth of this style of governance – including quantitative indicators of changes in the size and structure of the legal services industry in Europe, the volume of litigation and insurance against litigation risks and qualitative evidence of the EU’s tendency to promote detailed justiciable rules, coercive centralized enforcement and access to justice initiatives to promote decentralized enforcement by private parties. Through process-tracing I demonstrate how one can observe the EU’s role in encouraging the spread of Eurolegalism at the EU level and within member states across policy areas including securities regulation, competition policy and disability rights.

Why have EU lawmakers repeatedly empowered judicial authorities, relying on Eurolegalism as a mode of governance? In part, the rise of Eurolegalism is related to the post-WWII global trend toward the judicialization of politics. Rich literatures in sociology, law and political science identify a number of factors that have contributed to this trend, including the increasing heterogeneity of modern societies, increasing salience of human rights, decreasing support for the doctrine of parliamentary

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\* This memorandum draws heavily on my recent book *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011) and on a forthcoming article, “Eurolegalism and Democracy,” *Journal of Common Market Studies* 50, Annual Review, 55-71 (2012).

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<sup>1</sup> Kagan, Robert A. 2001. *Adversarial Legalism: The American Way of Law*. Cambridge, MA: Harvard University Press.

supremacy, the expanding role of the welfare state and the process of institutionalization unleashed with the establishment of national constitutional courts. These broader trends have encouraged the judicialization of politics around the world, and helped established conditions conducive to the emergence of Eurolegalism.<sup>2</sup>

While such background factors have certainly been significant, two interlinked causal mechanisms associated directly with the process of European integration – economic liberalization and political fragmentation – are the most important drivers of the spread of Eurolegalism. Economic liberalization and political fragmentation are generating political incentives and functional pressures that encourage EU policymakers to rely on Eurolegalism as a mode of governance. The drive to establish the EU's single market has undermined traditional regulatory regimes that relied on cooperation, informality, and relationships between a small circle of regulators and repeat market players. It has proved impossible to maintain these sort of informal arrangements as markets have been opened to new market players – both domestic and foreign. Moreover, foreign market entrants and their governments often rightly perceive such informal governance arrangements as prone to being biased against them. They demand a level regulatory playing field, which often translates into demands for greater formalization and legal certainty. As more flexible, informal national regulatory regimes break down in this liberalized environment, policymakers find it necessary to reregulate at the EU level. When policymakers do so, they turn to more formal, transparent and juridical approaches to deal with the greater variety of economic players in an open, pan-European market. As Steven Vogel put it in a different context, freer markets are built with more rules.<sup>3</sup>

When regulation shifts to the EU level, it takes place within the EU's institutional structure, in which political power is highly fragmented, the administration is weak, and the judiciary is quite powerful and independent. Political power in the EU is fragmented both horizontally – between the Council, Parliament, and Commission – and vertically – between the EU and its member states. Also, the EU has an extremely limited administrative capacity. While critics complain about the Commission's supposedly huge bureaucracy and budget, the truth is different. The EU's bureaucracy is tiny (with 32,949 staff members in 2011) and its budget modest (capped at just over 1% of GDP). These weak and fragmented political structures encourage lawmakers to “judicialize” governance. Given that they cannot pursue policy objectives with the strong arm of a large public administration or through extensive redistributive programs, EU law makers adopt laws with judicially enforceable goals, procedural requirements, and rights, and enlist private parties – including firms, NGOs and individuals - to supplement the EU's limited capacity by enforcing EU legal norms before national courts.

In other words, Eurolegalism is emerging in the EU for much the same reason that adversarial legalism emerged in the US, where Kagan emphasized that the combination of “fragmented governmental authority” and “fragmented economic power” were crucial for the creation of the American legal style. Similarly, the EU's weak, fragmented institutional structure and its ongoing market integration have unleashed causal processes that encourage policy makers to enact strict, transparent regulations backed by the threat of enforcement litigation by public authorities or private actors.

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<sup>2</sup> See for instance Teubner, Gunther, ed. 1987. *Juridification of Social Spheres*. Berlin: Walter de Gruyter; Hirschl, Ran. 2008. “The Judicialization of Politics.” In *The Oxford Handbook of Law and Politics*, pp.119-141, ed. K. Whittington, R.D. Kelemen and G. Caldeira; Henkin, Louis. 1990 *the Age of Rights*. New York: Columbia University Press; Stone Sweet, Alec. 2000. *Governing with Judges*. Oxford: Oxford University Press; Tate, C. Neal and Torbjorn Vallinder. 1995. *The Global Expansion of Judicial Power*. New York: NYU Press; Guarnieri, Carlo and Patrizia Pederzoli. 2001. *The Power of Judges*. New York: Oxford University Press; Shapiro, Martin and Alec Stone Sweet. 2002. *On Law, Politics and Judicialization*. Oxford: Oxford University Press.

<sup>3</sup> Vogel, Steven. 1996. *Freer Markets, More Rules: Regulatory Reform in Advanced Industrialized Countries*. Ithaca: Cornell University Press.

This account is at odds with much of the literature on “new modes of governance” in the EU. In short, this literature which suggests that the EU is encouraging the proliferation of modes of governance that rely on flexibility, deliberation and voluntary cooperation amongst stakeholders.<sup>4</sup> In contrast, the findings presented in *Eurolegalism* suggest that while the EU’s experiments with such “new modes of governance” can be found at the margins of its policymaking, its predominant mode of governance is based on judicial enforcement of detailed legal norms by both public authorities and private actors.<sup>5</sup>

Should we welcome the rise of Eurolegalism? Critics might view Eurolegalism as a kind of American disease. The concern is that the growing role of law, lawyers, and litigation in the EU will bring with it many of the pathologies seen in the US, such as high legal expenses, slow, conflictual regulatory procedures, and adversarial relationships between stakeholders in the policy process. But Eurolegalism also has virtues: it tends to increase the transparency of regulatory processes, enhance access to justice, and ultimately may make public officials more accountable for their policy decisions.

The rise of Eurolegalism will affect not just legal and regulatory regimes, but democracy itself. Critics argue that judicialization undermines democracy by substituting the will of unelected judges for that of elected representatives.<sup>6</sup> In the EU context, any shift in governance that empowers judges could be seen as contributing to the EU’s democratic deficit.

From a different perspective, judicialization can be seen as an important bulwark of democracy. Powerful, independent courts can stand up for individual rights and constitutional checks and balances in the face of powerful parliamentary majorities. Judicialization may also improve the quality of democracy by pressuring states to enhance transparency and access to justice. Some leaders even hope that by promoting a “Europe of rights,” the EU legal system can help win greater public support for the EU, substituting a kind of constitutional patriotism based on European rights for the EU’s lack of a strong sense of common identity.

Whether the positives of Eurolegalism outweigh the negatives remains disputed. It is clear, however, that democracy in Europe will be affected by these processes of judicialization. Judicialization and the tendency to frame policies as rights will likely make it more difficult for European democracies to pursue policies formulated to serve broad public interests where these conflict with individual rights. The increasing focus on individual rights that accompanies this mode of governance may undermine the culture of compromise that is vital to the consensual, republican models of democracy in many European countries and push them to more liberal models of democracy.

In any case, while some may lament the shifts in legal style and democracy that Eurolegalism brings, we might conclude that this is a relatively small price to be pay to maintain European unity. For it is clear that given the EU’s fragmented institutional structure, its weak administrative capacity, and the growing body of law it seeks to enforce (now including the Charter of Fundamental rights), the EU is likely to rely heavily on Eurolegalism in the years to come. With the Charter of Fundamental Rights gaining enforceable legal status under the Lisbon Treaty, the scope of EU rights has expanded

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<sup>4</sup> See for instance, Héritier, Adrienne. 2001. *New Modes of Governance in Europe*. Bonn: Max-Planck Project Group; Scott, Joan and David Trubek. 2002. “Mind the Gap: Law and New Approaches to Governance in the European Union”. *European Law Journal* 8(1): 1-18; Kohler-Koch, Beate and Rainer Eising, eds. 1999. *The Transformation of Governance in the European Union*. London: Routledge; Zeitlin, Jonathan and Philippe Pochet. 2005. *The Open Method of Coordination in Action*. Brussels: P.I.E.- Peter Lang.

<sup>5</sup> Also see Idema, Timo and R. Daniel Kelemen. 2006. “New Modes of Governance, the Open Method of Coordination and other Fashionable Red Herring.” *Perspectives on European Politics and Society* 7(1):108-123.

<sup>6</sup> See for instance Waldron, Jeremy. 2006. “The Core of the Case against Judicial Review.” *Yale Law Journal* 115:1344-1406; Hirsch, Ran. 2004. *Towards Juristocracy*. Cambridge, MA: Harvard University Press; Bellamy, Richard. 2008. “The Democratic Constitution: Why Europeans Should Avoid American Style Constitutional Judicial Review.” *European Political Science*, 7: 9-20.

significantly. The range of matters that will be brought before national and European courts – and the shadow cast by that potential litigation – will expand significantly. Perhaps the question we should ask is not whether Eurolegalism is good or bad, but whether this judicialized mode of governance can bear all the weight being placed on it. Eurolegalism has taken the EU far down the path of integration, but is it possible that we are running up against the limits of this approach?

Two recent developments illustrate how policy makers are asking European courts to handle new, politically controversial responsibilities. With regard to the Eurozone debt crisis, the ‘six pack’ of economic governance reforms adopted in November 2011 and the Fiscal Compact Treaty (formally the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) signed in March 2012 seek to shift enforcement of deficit and debt limits out of the hands of politicians and into the dockets of EU and national courts. Under the Maastricht Treaty’s Stability and Growth Pact, the Excessive Deficit Procedure (EDP) had provided for a judicial role in enforcing EU deficit limits. However, in the early 2000s, member states were able to block the Commission from pursuing legal action under the EDP, leading the system to lose credibility and encouraging member states to run up unsustainable debts.

Politicians are now trying to make a credible commitment to sustainable fiscal policy - tying their own hands by empowering national and EU courts to enforce debt and deficit limits. They first strengthened the system for centralized enforcement of deficit and debt limits by the European Commission: under the ‘six-pack’ legislation, sanctions will be applied earlier and the threshold for member states to block a Commission recommendation on sanctions has been raised. Recognizing that centralized enforcement by the Commission by itself may be inadequate, EU leaders agreed in the Fiscal Compact Treaty to enshrine in their constitutions or in domestic secondary legislation a rule limiting their annual “structural deficit” to no more than 0.5% of GDP, along with an automatic correction mechanism that would activate if deficit limits are reached.<sup>7</sup> The idea here is to apply the Eurolegalism mode of governance to the field of fiscal policy: the EU seeks to harness national courts to enforce policy (in this case balanced budget rules) within the member states.

Meanwhile, in another arena, EU leaders are relying on the legal system to preserve democracy in Hungary. As the Orbán regime attempts to consolidate one-party rule, the European Commission has launched a series of infringement proceedings against Hungary. While the cases focus on ostensibly technical issues of compliance with EU law, at a deeper level, the EU is asking the Court of Justice of the European Union (CJEU, formerly known as CJEU) to take a lead role in helping to prevent an EU member state from sliding into authoritarianism. Since coming to office in 2010 with a parliamentary majority of over two-thirds, the Fidesz government has transformed Hungary’s legal order, passing hundreds of new laws and introducing a new Constitution on 1 January 2012. The effect of these reforms has been to remove checks and balances and to consolidate Fidesz hold on power.

In January 2012, the European Commission launched three accelerated infringement proceedings against Hungary, focusing on potential violations of EU law concerning the independence of Hungary’s central bank, the independence of the judiciary and the independence of the data protection authority. Those proceedings are ongoing, and the Commission has already referred Hungary to the Court of Justice on cases concerning the independence of data protection authority and changes to the

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<sup>7</sup> If any state fails to do so, it is subject to litigation before the ECJ and would be subject to a penalty of 0.1% of GDP. We should note, however, that member states did not structure the Fiscal Compact Treaty in a way that is likely to see it strictly enforced. If Member States had been committed to seeing the Fiscal Compact Treaty strictly enforced before the ECJ, they might have empowered the European Commission to take the lead role in enforcement – as it does other areas of EU law. Instead, Member States excluded the European Commission from enforcing the Treaty and concocted an approach in which the trio of governments holding successive rotating EU Presidencies (currently it would be Poland, Denmark and Cyprus) are expected to take enforcement action against any member state that fails to enshrine the required deficit and debt limits in national law. The history of the EU legal system suggests that this approach will not work. Experience shows that member states almost never bring enforcement action against one another, preferring to leave enforcement to the Commission.

retirement age of judges (a move designed to push out existing judges so the judiciary can be stacked with Fidesz approved judges). The EU's battle with Hungary concerning independence of the Hungarian judiciary is especially sensitive. As noted above, given its lack of a large central administration, the EU relies heavily on national courts to ensure that EU law is enforced within the member states. Obviously, a system of decentralized enforcement via national courts depends on the existence of an independent national judiciary willing to enforce European law in the face of pressure from their government. The Commission highlighted this in its March 2012 administrative letter concerning the independence of the judiciary in Hungary, when it reminded the Hungarian government that whenever national courts apply EU law, they act as "Union courts" and need to meet EU minimum standards concerning judicial independence and effective judicial redress. In other words, to some extent Brussels is fighting Budapest for control of Hungary's courts.

The Commission's pursuit of infringement procedures against the Orbán government provides a useful reminder that the EU is a community based on the rule of law, and EU legal pressure may succeed in preventing Hungary from sliding into a soft authoritarianism. Yet, the highly legalistic nature of the EU's confrontation with Hungary serves to underline the EU's inability or unwillingness to put real political pressure to bear on Hungary. There has been some talk amongst socialists, greens and liberals in the European Parliament about invoking Article 7 (concerning breaches of the EU's fundamental values) and suspending Hungary's voting rights. Commission President Barroso has also spoken critically about trends in Hungary. Most importantly, the EU has withheld EU structural funds from Hungary (ostensibly for other reasons) and blocked Hungarian efforts to secure an IMF bailout, pending the Hungarian action on the issues raised in the infringement procedures. For now EU leaders have left it to the CJEU to preserve democracy in Hungary. In a community under the rule of law, certainly that is the first route that should be taken. But it remains to be seen whether EU leaders can muster the political will to take further action to preserve liberal democracy and the independence of the judiciary in Hungary should legal pressure fail to rein in the Orbán government.

The EU is a community built on the rule of law. Formal law, courts, lawyers and litigation have played central roles in the process of European integration.<sup>8</sup> But today, the CJEU and the network of national courts that comprise the EU's legal system are being asked to bear ever increasing burdens and to make up for the weaknesses of the EU's political system. The body of EU law continues to grow and is expanding to cover ever more sensitive policy areas, including fundamental rights, fiscal policy, and industrial relations (as in the controversial 'Laval quartet' cases).<sup>9</sup> At the same time, the EU's legal system, which includes the Courts in Luxembourg and the network of thousands of national courts that enforce (or are at least supposed to enforce) European law has become more diverse with EU enlargement, incorporating inexperienced – and in cases such as Bulgaria, Romania and now Hungary politically compromised courts.

In its communication with Hungary, the European Commission reminded the Hungarian government that national courts serve also as "Union courts". But in an enlarged EU, with an ever expanding body of EU law and declining support for European integration, it remains to be seen whether the Commission and Court of Justice can maintain the coherence of the community legal order.

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<sup>8</sup> Weiler, Joseph. 1991. "The Transformation of Europe" *Yale Law Journal* 100:2403-83; Cappelletti, Mauro, Monica Secombe and Joseph Weiler. 1985. *Integration through Law*. Vol 1. Berlin: New York: de Gruyter; Alter, Karen. 2001. *Establishing the Supremacy of European Law*. Oxford: Oxford University Press; Stone Sweet, Alec. 2004. *The Judicial Construction of Europe*. Oxford: Oxford University Press; Burley, Anne Marie and Walter Mattli. 1993. "Europe Before the Court." *International Organization* 47:41-76. Cichowski, Rachel. 2007. *The European Court and Civil Society*. New York: Cambridge University Press.

<sup>9</sup> See Blauberger, Michael. 2012. With Luxembourg in mind... the remaking of national policies in the face of ECJ jurisprudence. *Journal of European Public Policy*, Special Issue: Perpetual Momentum? Reconsidering the power of the European Court of Justice, S. Schmidt and R. D. Kelemen, eds, 19(1) :109-126.



## Right of access to free justice and legal assistance

Loretta Ortiz Ahlf\*

The right of access to justice transformed from a right of general enunciation and lacking effectiveness into a fundamental right of first order, whose regulation requires very thorough details to effectively guarantee its exercise. In this way, a judicial concept as broad as that of the Universal Declaration of Human Rights, which provides that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"<sup>1</sup>, has reached in recent instruments a detail and sophistication that the drafters of the Universal Declaration did not imagine.

Within the international instruments that are beginning to be defined, the right of access to justice and with it the expansion of its field of protection and guarantee, we find the International Covenant on Civil and Political Rights (ICCPR), whose article 14 broadly details the contents of the right of access to justice, and at its heart, indicates "all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."<sup>2</sup>

In its sixth article, the European Convention for the Protection of Human Rights and Fundamental Liberties regulates the right of access to justice, whose substantial contents address the right of all accused persons to be informed in the shortest period possible in a language they understand of any complaint made against them, to have adequate time and facilities for the preparation of their defense, to be assisted by the defender of their choice, to examine witnesses against them and obtain the attendance and examination of those on behalf of them, and to exercise their right without suffering discrimination whatsoever on the grounds of sex, race, color, language, religion or political opinions.<sup>3</sup>

For its part, the American Convention on Human Rights, or the "Pact of San José", regulates the right of access to justice in articles 7, 8 and 25.<sup>4</sup> In different Judgments, the Inter-American Court of Human Rights has emphasized the importance of article 25, specifying that said provision demands not only adequate regulation on the topic, but also guarantee of effective and speedy access to a judicial remedy. In the words of International Court of Justice Judge Antônio Augusto Cançado Trindade, the obligation of article 25 "is not reduced to formal access, *stricto sensu*, to the judicial instance (at both domestic and international levels); the right of effective recourse to a competent court or tribunal means, *lato sensu*, the right to obtain justice, i.e., an autonomous right to the very realization of justice."<sup>5</sup>

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<sup>1</sup> Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations Assembly in Resolution 217 A (III), on December 10, 1948.

<sup>2</sup> International Covenant on Civil and Political Rights, adopted in New York on December 16, 1966, approved by the Senate on December 18, 1980, signed by Mexico on March 23, 1981, international entry into force on March 23, 1976, entry into force in Mexico on June 23, 1981, published in the Federal Official Gazette on June 22, 1981.

<sup>3</sup> Garberí Llobregat, José y Morenilla Allard, Pablo, *Convenio Europeo de Derechos Humanos y Jurisprudencia del Tribunal Europeo Relativa a España*, Barcelona, Ed. Bosch, 1999. p.13 and ff.

<sup>4</sup> American Convention on Human Rights, or the "Pact of San José," adopted in San José, Costa Rica, on November 22, 1969, approved by the Senate on December 18, 1980, signed by Mexico on March 24, 1981, international entry into force on July 18, 1978, entry into force in Mexico on March 24, 1981, Federal Official Gazette publication on May 7, 1981.

<sup>5</sup> Cançado Trindade, Antônio Augusto, *Derecho Internacional de los Derechos Humanos. Esencia y Trascendencia, México*, Ed. Porrúa, 2006, p.755.

In the determination of the contents of the right of access to justice, the Second Optional Protocol of the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty must be considered<sup>6</sup> and Additional Protocols 12 and 13 of the European Convention on Human Rights regarding the prohibition of discrimination and abolition of the death penalty.<sup>7</sup> We must also mention the different United Nations Resolutions on the topic, which include, among others, that regarding the Basic Principles on the Independence of the Judiciary,<sup>8</sup> the Guidelines on the Role of Prosecutors,<sup>9</sup> the Basic Principles on the Role of Lawyers<sup>10</sup>, the Code of Conduct for Law Enforcement Officials<sup>11</sup>, Standard Minimum Rules for Non-custodial Measures (Tokyo Rules),<sup>12</sup> Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,<sup>13</sup> Standard Minimum Rules for the Administration of Juvenile Justice<sup>14</sup>, Rules for the Protection of Juveniles Deprived of their Liberty<sup>15</sup>, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>16</sup> Standard Minimum Rules for the Treatment of Prisoners,<sup>17</sup> Basic Principles for the Treatment of Prisoners<sup>18</sup> and the Code of Conduct for Law Enforcement Officials<sup>19</sup>.

The above Resolutions were formulated as instruments to achieve the due application and incorporation of international standards of human rights on the fundamental right of access to justice. Some of them, despite detailing the contents of the right, use difficult-to-implement concepts because they suffer from a lack of precision. For example, the standard establishing the State's duty to guarantee that the proceedings be heard fairly and in a reasonable period by an independent court incorporates concepts that require determination of their meaning to shape them into domestic legislation and thereby achieve due enforcement of the treaty on human rights.

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<sup>6</sup> Second Optional Protocol of the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty, UNO, New York, December 15, 1989, approved by the Senate on April 24, 2007, signed by Mexico on September 26, 2007, international entry into force on July 11, 1991, entry into force for Mexico on December 26, 2007, Federal Official Gazette publication on October 26, 2007.

<sup>7</sup> Additional Protocol 12 of November 4, 2000, which took effect on April 1, 2005. Additional Protocol 13, adopted on May 3, 2002, entry into force on July 1, 2003.

<sup>8</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan on August 26 to September 6, 1985, and confirmed by the General Assembly in Resolutions 40/32 of November 29, 1985, and 40/46, of December 13, 1985.

<sup>9</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from August 27 to September 7, 1990.

<sup>10</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from August 27 to September 7, 1990.

<sup>11</sup> Adopted by the General Assembly in its Resolution 34/169 of December 17, 1979.

<sup>12</sup> Adopted by the General Assembly in its Resolution 45/110 of December 14, 1990.

<sup>13</sup> Economic and Social Council Resolution 1989/65 of May 24, 1989.

<sup>14</sup> Adopted by the General Assembly in its Resolution 40/33, of November 28, 1985.

<sup>15</sup> Adopted by the General Assembly in its Resolution 45/113 of December 14, 1990.

<sup>16</sup> Adopted by the General Assembly in its Resolution 43/173 of December 9, 1988.

<sup>17</sup> Adopted during the First United Nations Congress on Crime Prevention and Treatment of Criminals, held in Geneva in 1955, approved by the Economic and Social Council in its resolutions 663 (XXIV) of July 31, 1957, and 2076 (LXII) of May 13, 1977.

<sup>18</sup> Adopted and proclaimed by the General Assembly in its Resolution 45/111 of December 14, 1990.

<sup>19</sup> Adopted by the General Assembly in its Resolution 34/169 of December 17, 1979.

Based on the above-mentioned treaties, resolutions, rules and codes of conduct, international law of human rights determines as a minimum substantive content of the right of access to justice the following:

- access to jurisdiction;
- to a competent, impartial judge predetermined by law;
- to effective judicial protection;
- to a fair trial;
- to equality before the law and courts of justice;
- to non-discrimination on the grounds of race, nationality, social status, sex, political ideology or religion;
- to the presumption of innocence;
- non-retroactivity of criminal law;
- individual criminal responsibility;
- the right to defense and legal assistance;
- to communicate with his or her defender confidentially, without delay and censorship;
- to have the necessary time and appropriate means for his or her defense;
- to be informed immediately and in a comprehensible matter of his or her rights;
- to know the reasons for detention and the authority who orders them;
- to be judged within a reasonable period;
- to not be judged twice for the same crime;
- to not be incarcerated for failure to pay debts or contractual obligations;
- to not be obliged to testify or to confess oneself guilty;
- to an interpreter or translator;
- to protection against all types of illegal detention,
- to habeas corpus or injunction;
- to an effective remedy before competent, independent and impartial superior courts;
- in criminal proceedings, he or she is ensured the freedom that will be recognized and respected by general rule and preventative prison constitutes an exceptional measure;
- to the non-application of the death penalty;
- compensation for judicial error.
- Prohibition and effective protection against torture and other cruel, inhuman or degrading treatment or punishment;
- Prohibition and effective protection against forced and involuntary disappearances;
- Prohibition and effective protection against summary or arbitrary executions and
- In case an alien is detained, the right to immediate consular notification.

It must be considered that each of these rights may be defined by resolutions of quasi-judicial and international jurisdiction, as in this Judgment, where the meaning of access to an effective judicial remedy is defined in the following terms:

... the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective

in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.<sup>20</sup>

A study of compared law, as to the right of access to justice, sets out that Latin American countries fail to include free legal assistance in the minimum contents of said right, despite of obligations set out for the Countries which are Part of the 1969 American Convention on Human Rights. This results in an uneven guarantee of enjoyment of that essential right, in addition to which there are other types of discrimination suffered by millions of people for being poor, homeless, farmers or immigrants, as stated by Boaventura Souza:

Studies show that gap between citizens is higher, referring to justice enforcement, the lower the social status the belong to is and that gap originates not only from economic factors, but from social and cultural ones, even when one and the other may be more or less remotely related to economic inequality. First of all, poorest citizens are often scantily aware of their rights and consequently, they face more obstacles to acknowledge a problem which affect them as a legal one. They may ignore the rights which are at stake or legal settlement chances; data show that lowest class individuals take much longer to appear in court, even when they know they are facing a legal problem.<sup>21</sup>

The Inter American Court of Human Rights evidences the relevance of legal assistance by stating the following:

In this context, it is worth highlighting the relevance of knowledgeable assistance in cases as this one, which deals with a foreigner, who might not be aware of the legal system of the country and who is in a seriously vulnerable situation when imprisoned, which requires that the receiving Country takes into consideration the details of his/her situation, and he/she may have an effective access to justice as to equal opportunities. Thus, the Court considers that assistance must be provided by a law expert in order to be able to comply with the technical defense requisites whereby the individual involved in any proceeding may be advised of, *inter alia*, the possibility to file proceedings against any act impairing his/her rights.<sup>22</sup>

In this situation, an action that may not be postponed is that countries which are Part of the American Convention must duly comply with article 8 of the American Convention on Human Rights, preparing any necessary legal amendment to include the effective right to free legal assistance in absence of resources to enjoy said right, as part of the right to access to justice in the Constitutions of Latin American countries.

To achieve effective access to justice, problems stated by Mauro Cappelletti and Bryant<sup>23</sup> must be solved, e.i. to transform the right to access to justice in Latin America into a basic social right. The following are within the problems to be dealt with, to assure an effective access to justice:

- a) That in minor lawsuits an appropriate legal assistance be guaranteed, as such cases are considered economically unattractive for most lawyers.

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<sup>20</sup> Advisory Opinion 11/90. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a and 46.2.b, American Convention on Human Rights.

<sup>21</sup> Sousa Santos, Boaventura, De la mano de Alicia. Social and political affairs in post modernity, Bogotá, Siglo del Hombre Editores, 1998, pages 204 and 205.

<sup>22</sup> Inter American Court of Human Rights, Vélez Looz Vs. Panamá, November 23, 2010 Judgment, Series C, No. 218, par. 132.

<sup>23</sup> Cappelletti Mauro and Bryant Grath, Access to Justice. Trend in Movement to Enforce Rights, Mexico, Fondo de Cultura Económica, 1996. p. 13.

- b) To avoid extension of proceedings and unreasonable delays that give rise to an excessive economic burden for the parties to the litigation.
- c) To avoid asymmetry between the parties, which causes that any of them takes advantage. For instance, individuals and organizations with important or relatively high financial resources may use them in litigation and obviously take advantage when defending their claims.
- d) To solve lack of basic legal knowledge of lawyers not only when practicing an examination, but to understand what may be contested.
- e) To assure appropriate legal assistance when claiming confusing or collective interest as those related to environment and consumers' rights, since they typically result in very expensive and complicated proceedings; therefore those cases are very unattractive for most lawyers.

In order to solve said problem, actions to be taken, among other, are the following:

- 1) To include, as part of the fundamental right of Access to justice, the right to a knowledgeable lawyer for low-income individuals. Likewise, there must be a legal system in place to file claims in order to guarantee that right effectively.
- 2) To guarantee control on litigating lawyers, to assure they are duly educated.
- 3) To charge a lawyers' tariff, so fees they earn are not determined as to the amount of the case.
- 4) To set as any acting lawyer's obligation, to serve one case per annum on a *pro bono* basis.
- 5) To create a system whereby Faculties of Law must obtain a certification and to do so, they must take professional practice workshops, where law students, under the supervision of lawyers complying with their duty to advise one case per annum on a *pro bono* basis, serve low income population unable to pay a lawyer.
- 6) To make any necessary amendment to avoid unreasonable delays in proceedings and make them simpler; to assure a due justice enforcement, aimed to the justice value enforcement more than to a strict compliance with legality.
- 7) That those countries still regulating, in an appropriate manner, alternate means to settle controversies regulate them and be certain of a final settlement of conflicts submitted to those means.



## **Explaining the Power of International Courts in their Contexts: From Legitimacy to Legitimization**

Mikael Rask Madsen\*

A very significant part of the literature on the legitimacy of international courts (ICs) tends to focus on the democratic foundation of ICs and, most often, their alleged democratic deficit (for a critique, see e.g. Follesdal 2009). Generally, this literature has been concerned with the normative challenges to liberal democracy implied by ICs in terms of the juridification and denationalization of politics (e.g. Kissinger 2002; Posner 2009). This, of course, is closely linked to the critique of judicial review and constitutionalism raised in national contexts (e.g. Bellamy 2007; Hirschl 2004) in terms of a criticism of the transfer of power away from the national parliaments and towards an (international) 'juristocracy'. This debate is however neither new (e.g. Condé 2012; Morgenthau 1948) nor is it only academic (e.g. Bork 2003). It has to a large extent concerned normative issues related to the general role of the judiciary in (liberal) political systems – the so-called counter majoritarian difficulty (Bickel 1961). Moreover, it is fuelled by a century-old fear of 'government by judges' first pronounced by French comparatist Eduard Lambert in 1921 in his study of the US legal system (Davis 1987) but now turned into the chosen rhetorical weapon against the rising power of international courts and their fellow travellers, the progressive 'tribunalists' (Skouteris 2006). The recent British campaigns against the European Court of Human Rights (ECtHR), the now famous 'Strasbourg bashing', provides the perhaps most striking example of this growing conflict over the role and place of ICs in contemporary globalizing society. It does however not follow from these rhetorical hostilities that the ECtHR as such is illegitimate, as some observers tend to conclude. As a matter of fact, such crises might very well further legitimize the ECtHR in the long run as it for example did when the Thatcher government in the 1980s launched a similarly scorching critique of the Strasbourg Court (Madsen 2004).

Generally, the cited critical literature remains for the most part a normative political theoretical critique. In regard to the political philosophy of ICs, it has obvious merits and raises important questions on a more principal and abstract level. It has, however, little to offer in terms of explaining the deeper global processes against which governments delegate power to ICs in the first place and, not least, how ICs transform delegated authority into legal practices and institutional power. But most importantly, as I will argue, this literature overall fails to account for the flip-side of the question at stake, namely how ICs develop means of legitimization in their interface with democratic politics and other environments key to their practices. While some scholars have addressed this question by setting up more or less formalistic criteria for the legitimacy of ICs, for example by focusing on questions of representativeness or notions of transparency and accountability (cf. Kumm 2004), I would argue that this only formally – and partially – contributes to the solving of the key question in this regard. The real puzzle, when seen in the larger context of international law and politics, is how ICs remain in the game at all. They have almost by definition a fairly fragile institutional set-up, legally as well as politically, and they have been the object of a continual critique of not only their practices but also even their existences. Yet 20<sup>th</sup> century international legal history suggests that most of these courts continue to exist regardless of institutional fragility and criticism. Thus the question is how they manage to remain powerful in what often appears to be hostile environments. Or, more specifically, what explains the successes and failures among the various ICs established since the beginning of the 20<sup>th</sup> century in terms of legitimacy?

My contention is that they develop ways of legitimization which are contingent on historical developments and particularly geopolitical developments (Madsen 2011a), the actual cases brought before them (cf. Alter 2009a; Madsen 2011b; Vauchez 2010), as well as the forms of support they

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enjoy or do not enjoy (Alter 2009a). Importantly, my argument presupposes that temporary crises and controversies are not as such interpreted as signs of defeat but indicative of evolution following, broadly speaking, the ideas of punctuational bursts and punctuated equilibria found in neo-Darwinist theories of evolution (cf. Gould 1978). In other words, such controversies might very well serve as moments of crystallisation and legitimization in which ICs develop a certain institutional robustness vis-à-vis their critics and even transform their originally more fragile roles into new, more powerful ones. Both the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) provide examples of such an evolution (Alter 2001; Madsen 2011b; c; Sweet 2010). However, the question of the legitimization of ICs cannot simply be reduced to their responses to government pressures, as some variants of principal-agent theory tend to suggest. As I will argue below, ICs legitimize themselves in relation to other key environments, including most notably the legal field and civil society. It is these combined legitimating strategies that overall ensure the existence and evolution of ICs in the long run. To make this argument, this article proceeds in the following way: I begin with a discussion of the proposed shift in perspective from the *legitimacy* to the *legitimization* of international courts. I then provide empirical evidence of the ways in which the approach can be deployed, exemplified primarily by the case of the ECtHR. In conclusion, I very briefly restate the argument and relate it to study of ICs more generally.

### **The Problem of Legitimacy**

Not unlike other key notions of modern social science such as e.g. differentiation thesis, legitimacy is both absolutely central to social science and probably the most misused term within the discipline. Max Weber demonstrated how legitimacy can take many forms – from traditional over charismatic to legally-rational (Weber 1980). According to Weber, what makes a certain practice of power legitimate at the end of the day is the process in which the authority justifies its exercise of power and gains social acceptance. If we apply this to ICs, it follows that their legitimacy is not due to them being representative of society; it is due to them being reflexive of society (cf. Madsen 2011c). A little-representative court – e.g. the US Supreme Court – might very well reflect society and, thus, legitimate its practices. In other words, the legitimacy of a given IC cannot simply be statistically deduced from the judges' representativeness of society and politics at large. This also means that even the best and most carefully thought out procedures of elections of judges, in the most extreme cases seeking to make courts representative as a sort of quasi democratic political institution, might ultimately fail if the court's practices are not reflexive of society. Yet, the profiles of a specific set of judges might very well help them gain legitimacy in specific environments, ranging from law to politics and civil society.

The latter relates directly to Weber's analysis. Above all, his famous essay on authority emphasizes that the legitimacy of any given institution can be derived from a number of different practices aiming at different environments. Although often overlooked in the study of ICs, which have mostly explored their interface with government practices, this is perhaps particularly true for ICs. As a matter of fact, the interaction of ICs with governments in a more politicized manner is the exception rather than the norm. ICs interact instead most often and most directly with highly differentiated legal fields where their interplay is legitimized in shared epistemologies of professional legal knowledge. For the most part, this comes across as unproblematic and part of an everyday legal practice not all that different from what happens at the level of national courts. Nevertheless, it is precisely this on-going, and in recent years expanding (Romano 1999), juridification and judicialization of international law which for the most part, via reference to the lack of democratic legitimacy of transnational legal elite networks, is the backdrop of the critique of juristocracy. According to this critique, international judges have basically become a 'transnational power elite' (Kauppi & Madsen forthcoming 2012) that, to borrow from Huntington's analysis, denationalizes and basically acts as the legal variant of the 'Davos men' (cf. Huntington 2005).

As shown by a number of scholars, global elites play an increasingly important role in a number of fields, ranging from business (Sklair 2001) to development work (Jackson 2005). A closer look at international legal elites, however, suggests that they neither act only on an international level nor are constrained to single institutional arrangements (Dezalay 2004; Dezalay & Garth 2002; Dezalay & Garth 1996). In this light, the critique of juristocracy generally fails due to its one-sided focus on the rather artificial dichotomy between an essentialist view of politics as the institutionalized expression of a democratic will and what might be described as international legal self-reference. This overlooks the in practice much more blurred boundary between international law and politics. Closely linked, it presupposes an increasingly inadequate notion of international law as an inter-state contract law which very clearly defines ICs' framework and legal playing field vis-à-vis national levels of law and politics. Considering the fact that ICs have now existed for close to a century (if one uses the establishment of the Permanent Court of International Justice in 1922 as a benchmark) and in many cases have transformed themselves into something that hardly resembles their original set-up and mandate (e.g. Alter 2009b; Christoffersen & Madsen 2011; Vauchez 2010), it might of course be tempting to cry foul play and argue for the return to a sovereign national ordering of the international. Yet, that argument overlooks entirely that the very evolution of ICs is perhaps where the answer to the question of the legitimacy of ICs can be found; that is, rather than continuing the quest for a normative, and ultimately essentialist, notion of politics vs. law that on a principal level sets the boundaries, it might be more rewarding to inquire into what I above introduced as the real puzzle in this regard, namely how ICs remain not only in the game but are actually proliferating (Romano 2011).

It is my contention that this requires a refocusing from an essentialist idea of the *legitimacy* of ICs to a more dynamic notion of ICs' *legitimization* and thereby a profound change of perspective. This, however, allows for exploring how the idea and institutionalization of ICs has evolved over the last hundred or so years. Drawing on existing empirical studies (e.g. Alter 2001; 2009a; Cohen 2010; Madsen 2007; 2011b; c; Vauchez 2010; Weiler 1991), I would argue that ICs develop legitimating measures vis-à-vis their environments on at least three levels of external interface: the *legal* level (i.e. their interface with other courts in terms of e.g. jurisdiction and comity); the *political* level (i.e. their interface with national and international forms of governance in terms of e.g. accountability and 'boundary disputes'); and the *societal* level (i.e. their interface with civil society in terms of outreach, access and legal entitlements). It is further my contention that these practices of legitimization are often most clearly observable in the relative clashes that ICs continuously experience at all three levels. This highlights that ICs' legitimacy is not once for all consolidated but the product of continuous reinvestment and maintenance. This does, of course, not exclude that some courts develop what Alec Stone Sweet has termed 'structural supremacy' (Sweet & Mathews 2008: 87) but rather points to the ways in which such power, as any other symbolic power, has to be maintained and reproduced over time.

At the legal level, these relative clashes are generally found in the interface between national and international courts (for instance as illustrated by the numerous disputes over the Maastricht Treaty, e.g. *Brunner* (1992)) and now also in the form of 'jurisdictional turf wars' between ICs, as exemplified in such cases as *Kadi* (2005) and *Bosphorus v Ireland* (2005). Underlining a much-increased awareness of ICs, recent years have seen a number of controversies with regard to ICs at the political and societal levels. On the political level, these have translated into debates over the future of democracy with regard to the balance to be struck between national legislative branches and ICs – a striking example is the Danish debate over the ECJ ruling in *Metock* (2008), but many others could be mentioned; at the societal level, the picture is more blurred due to the fact that ICs offer gateways for bypassing the inertia of national politics of law and, thus, are under certain conditions greatly favoured (cf. Dezalay & Madsen forthcoming 2012), and are at other moments less interesting options, the latter exemplified by the ambiguous relationship of European trade unions with respect to European inter- and supranational courts. In all cases, these clashes underline that the place of ICs is hardly a settled one, but remains not only under scrutiny but also calls for perpetual (re)legitimization.

Hence, whereas most existing research has tended to argue that these various controversies – legal, political and societal – are generally indicative of the weak legitimacy of ICs, I will, against the actual historical evolution of ICs, on the contrary argue that they are key to understanding the legitimization of ICs. On the legal level, they provide the ‘hard cases’ necessary for legal innovation and jurisprudential refinement; on the political and societal levels, they provide the continuous legitimacy tests of ICs that are crucial for further institutional and legal development. In other words, instead of insisting on the essentialist idea of ICs as autonomous legal institutions operating in a self-referential system of law and, thus, decoupling law from society and politics, it is my claim that comprehending the legitimization of ICs requires an understanding of not only the response of, for example, politics and society to ICs, but also, and perhaps more crucially, how ICs themselves respond to law, politics and society in terms of legitimating strategies. This approach allows for both understanding under what circumstances and at what times ICs are legitimized or delegitimized *and* for empirically detecting how the law and institutional design of ICs is altered over time by these critical interfaces.

### **The Evolution of International Courts: The Case of the ECtHR**

The initial institutionalization and autonomization of the ECtHR provides an emblematic case for understanding these multiple dynamics of legitimization. I have analyzed the evolution and transformation of the ECtHR elsewhere (e.g. Madsen 2007; 2011b; c) and I will here mainly illustrate my arguments by drawing on these empirical studies.

The drafting of the European Convention on Human Rights (ECHR) in the late 1940s was brought forward by a double socio-political legitimation: it was by many perceived as a continuation of the post-WWII institutional build-up where particularly the 1948 Universal Declaration of Human Rights (UDHR) was a crowning moment, although brief, of the international community’s effort at coming to terms with the immediate parts. This overriding *illusion* (Bourdieu 1980) of the period in terms of finding international legal solutions to international political problems certainly also fuelled the initial drafting of the ECHR in the late 1940s, yet the main driver of the Convention was in practice more geopolitical; as argued elsewhere, the European Convention was above all drafted as a Cold War instrument (e.g. Madsen 2011a; Madsen 2012). During the actual negotiation of the ECHR, the utopian visions of universal human rights, which in the aftermath of Allied victory had enjoyed momentum at the UN and among intellectuals, were almost unequivocally substituted with a deeply Westernized vocabulary of “liberty and democracy”. In fact, the rapid drafting of the Convention reflected above all a growing fear of, on the one hand, the rising power of the national Communist Parties, and, on the other, Soviet imperial expansionism into the Western Europe.

Andrew Moravcsik has rightly called it “the puzzle of the European Convention” that European States opted to sign a document which so clearly removed national sovereignty in a key area of statehood and left it in the hands of international judges (Moravcsik 2000). Clearly, neither delegation theory nor more general principal-agent theorizing provides a convincing answer to this. It requires instead looking at not only the process in which the Strasbourg institutions gained legitimacy but also how they turned the Convention into something of a legal nature. A look at the actual document with a view to the *travaux préparatoires* suggests that the negotiating parties were not of afraid of using the high prose of democracy and liberty, yet the document lacked a dimension of legal obligation for the Member States. It was a “Convention à la carte” (Madsen 2011b): All the most central clauses, particularly the jurisdiction of the court and individual petition, were made optional in the original Convention. Thus, signing the document did in fact not necessarily imply a handing over of sovereignty to an uncertain supranational legal body, but rather subscribing to a political agenda of mounting importance: ensuring a free and democratic Europe. The original objective of the European Convention of 1950 was, therefore, not the development of a detailed European jurisprudence that should substantially alter national traditions of human rights, but instead to produce a document that confined the area of the Free Europe; that is, the European Convention was an early form of containment politics.

Yet, for the very same reasons, the institutional development of the European system was somehow reversed and did not initially concern the carving out of a detailed jurisprudence; it concerned convincing the Member States to accept the central optional clauses. This developed into to ‘a game of cat and mouse’ according to Lord Lester of Herne Hill (Lester 2011). I would claim it went even further, as it developed into a question of legal diplomacy in the strong sense that the jurisprudential developments were clearly balanced with diplomatic considerations. This was above all due to the way in which the European Convention put the system in a position of having to persuade the Member States of accepting its powers. Formally, for the Convention itself to be effective, ten Member States had to ratify. While this was achieved by 1952 with the ratification by Britain, the Federal Republic of Germany and a series of smaller states, the real challenge, namely to make individual petition and the court operational, remained. The clause on individual petition stipulated that six states had to accept before it was made effective. This was achieved by 1955, which meant that the procedure was made effective to the Federal Republic of Germany and a number of series of smaller countries. However, for the Court to start operating, eight countries had to accept, which only happened by 1958 when 7 smaller states and the Federal Republic of Germany had accepted its jurisdiction. What is striking is the absence of the three major European powers of France, the UK and Italy. Conversely, this meant that both the Commission and the Court not only had to develop European human rights but also, and as their main objectives, had to seek to convince these crucial states of the relevance and reasonableness of its workings and jurisprudence, thus ensuring checks-and-balances of a very real nature.

The very first jurisprudence of the Strasbourg institutions provides in many ways a highly illustrative case of the gradual legitimization of European human rights. The *Cyprus case* before the Commission, an inter-state complaint filed by Greece against the UK, imported into the system all the complexities of late colonial practices. The outcome of this case was, if anything, telling of the early Strasbourg system. As it became more and more evident during the proceedings that the UK had indeed breached the Convention, the matter was eventually solved by recourse to diplomacy. The case was closed with a friendly settlement – the 1959 Zurich and London agreements settlement on Cyprus – which also meant the end of the British Empire in Cyprus. From the point of view of Strasbourg, however, this was a convenient solution as it thereby evaded having to pronounce violations, as well as conveying the message that it was diplomatically sound. Another key case, the *Lawless-case*, was in the meantime making it to the Court as its first case. It concerned the use of detention without trial in Ireland as a response to IRA insurgency. Again, Strasbourg found a way out. According to the Court, the practice was not in compliance with article 5 of the Convention. Yet, the case did not ultimately lead to a judgment against the Irish government as the court interpreted article 15 with respect to emergency situations in such a way that the Irish Government was entitled to apply these measures since the “life of the nation” was threatened. Hence, once again a conclusion that calmed the Member States and underlined that the ECtHR was receptive to the complexities of interior politics and even allowed a rather large national margin of appreciation.

It was against this background of very measured legal development that the UK in 1966 chose to accept the optional clauses on individual petition and the jurisdiction of Court. In the following years the other key member states followed, including France and Italy, and by 1975 the Court was finally fully operational. And it did not waste much time in turning this opportunity into progressive law by a series of landslide decisions of the late 1970s, which clearly signaled a shift in human rights law and discourse. In 1978, the Court came to the conclusion that the emergency interrogation measures used in Northern Ireland by the British security forces could not be justified by evoking emergency arguments (*Irish Case*); Soon after it pronounced that the ECHR is ‘[...] a living instrument . . . [which] must be interpreted in the light of present-day conditions . . . standards in the . . . members states’ (para 31, *Tyrer Case*). And to cement its position, in 1979, the Court established in the *Airey Case* that ‘[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’ (para 24).

This sudden change of legal course can not be explained as simply the fruit of the legitimization of the Court in the eyes of the Member States of the first decades; nor can it be explained as the outcome of new judges being appointed to the bench (Madsen 2011a). While these factors are necessary conditions for the change, the transformation of the Court is perhaps particularly linked to the considerable changes in geo-political context of human rights. To make a long story short, the ECtHR generally benefited from the fact that the Cold War of human rights was ebbing out and that the major European powers had succumbed to the idea of 'Empire lost'. Due to these two closely related processes, European imperial societies were no longer the direct object of human rights activism. In Western Europe, throughout the 1970s, most human rights activism was directed at non-democratic regimes outside the jurisdiction of European human rights: the Greek Colonels, Franco Spain and Portugal under Salazar.<sup>1</sup> In fact, for human rights activism in the 1970s, the real perpetrators of human rights were geographically found outside Western Europe: in Latin America, South Africa, as well as Eastern Europe. These combined circumstances also meant that by the mid-1970s, human rights once again became an interesting tool for the international politics of Western powers.

These geopolitical changes were clearly important for the overall acceptance of the Court on the governmental level. This should, however, not overshadow that the actual jurisprudence of the ECtHR was also deeply reflective of other crucial social processes of the period. As a matter of fact, many of the key decisions concerned progressive social issues, e.g. the cases *Tyrer* and *Airey* on respectively corporal punishment and the access to divorce. In other words, the ECtHR issued some of its most important decisions by placing the question of human rights at the forefront of the evolving societal fabric of Europe; that is, dynamic interpretation was not simply teleological interpretation in respect to the *telos* of the ECHR, but in respect to European society and its evolution. While taking advantage of the geopolitical transformations of international human rights in the context of the Cold War détente to improve its overall institutional position, the ECtHR distilled its notion of 'present-day [social] conditions' to legitimise progressive European human rights law. This strategy had important ramifications in terms of legitimacy. It challenged the former hegemony of the 'principals' on the Court by legitimizing the undertaking in social issues and thereby sentiments beyond the control of governments. This reorientation also meant that the initial dominance of diplomacy and public international law perceptions of the Convention were contested by a new social political interest in European human rights law as a tool for reforming national democracies (for details, see Madsen 2004; 2005). The Court's subsequent development throughout the 1980s only confirmed the importance of this diversification of legitimacy as the ECtHR effectively constructed itself a role as the quasi-Supreme Court of human rights in Europe.

## Conclusion

This very brief outline of the transformation of ECtHR, from a Cold War enterprise of the 1950s and 1960s to becoming a bridgehead in the social reform of European societies of the late 1970s, illustrate my main point that understanding ICs legitimacy requires a more dynamic model of interpretation. Above all, it requires an approach that takes seriously the importance of the different and changing contexts for the legitimacy of the ECtHR. Thus, I argue for the importance of not only a temporal dimension, but also a broadening of the relevant fields of interaction. Most studies of ICs have been solidly situated at the crossroads of law and politics. Thereby they have most often downplayed – or sometimes simply ignored – the importance of society to the legitimization of ICs and their institutional and legal developments. It is my contention that the outlined approach applies not only to the ECtHR but also to other ICs, including the Court of Justice of the EU (CJEU) and its forerunners. To come back to Weber, the legitimization of power is a process of both justification and acceptance, and one that is perpetually played out and with different registers. Therefore, it is also crucial that the

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<sup>1</sup> Greece had withdrawn from the European system from 1970-1975, whilst Portugal and Spain only joined the system in respectively 1977 and 1978 after their transitions to democracy.

comprehension of ICs is based on detailed empirical studies of the relevant processes and not a decontextualised testing of hypothesis drawn from the same small sample of ICs.

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## Courts, Social Change and Judicial Independence

Alec Stone Sweet\*

The purpose of the Seminar, as the organizers state, is to provide us with “an opportunity to question the limits, costs and advantages” of the “transformation” of courts from mere dispute resolvers, applying pre-existing law, to important lawmakers in their own right. In particular, the Seminar will “focus on its transnational dimension, and the challenges it poses to national, supranational and international courts.” In many national systems and in some treaty-based regimes, judges are today powerful policymakers and judicial processes are often substitutes for, or extensions of, legislative processes.

In this memo, I develop two main points. First, judicial power is a paradigmatic example of delegated authority and, thus, we should assess the role of courts, at least in part, with reference to the logics and dynamics of delegation. The most powerful courts, at both the national-constitutional and international levels, operate in an institutional environment that I will call “structural judicial supremacy,” a fact that must bear heavily on our evaluation. Second, these courts generally do not exploit supremacy to bludgeon legislators and states into legal submission. Instead, they have sought to draw those they govern into dialogue, and developed other strategies to help bolster their political legitimacy. These points are illustrated with reference to the three most powerful courts created by international treaty: the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), and the Appellate Body of the World Trade Organization (WTO-AB).

This memo does not attempt to develop a normative argument about whether extensive judicial lawmaking is good or bad. Rather, I proceed on the strong presumption that normative evaluations must take into account both the logics of delegation, and how these courts actually make law.

### I. Delegation and Judicial Supremacy

Rulers delegate to courts for a number of (interrelated) reasons, including:

- a) to establish a system for monitoring compliance with law and to punish non-compliance;
- b) to adapt the law to changing circumstances (legislative provisions and treaty norms are always “incomplete” to some important degree, and judges help to “complete” the norms by clarifying their content and scope through application);
- c) to achieve purposes – e.g., protecting rights and building new markets – in situations in which rulers find it difficult to credibly commit to those objectives on their own (courts are commitment devices).

Monitoring of compliance, interpreting and making law, and helping rulers overcoming their collective action problems are three basic governance functions of courts.

The more independent courts are, with respect to those whom they govern, the more likely it is that judges will fulfill their governance functions. Put differently, the more important is the objective being pursued by the rulers, the more incentive there will be for rulers to delegate extensive governance authority to judges, and to ensure judicial independence. Most important for present purposes, they will be led to insulate judicial decisions from override, in effect, pre-submitting themselves to the authority of the court.

As a practical matter, it is virtually impossible to override important rulings of (a) national constitutional courts, or (b) courts like the ECJ, ECHR, and the WTO-AB. Overturning the decisions

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of the former entails amending the constitution, but the rules governing amendment are typically highly restrictive; in the latter case, one must revise the treaty, which requires the unanimous consent of states. These courts thus operate in an environment of *structural judicial supremacy*. Note that states have delegated authority to the ECJ, the ECHR, and the WTO-AB in order to give them the capability to govern the states themselves. States conferred compulsory jurisdiction on the courts in state non-compliance cases, while effectively insulating judicial rulings from reversal. In national contexts, most supreme and constitutional courts in the world now have the power to invalidate the law produced by legislators and governments (today, legislative sovereignty is all but extinct, having once been the norm).

Under conditions of judicial supremacy, we can predict that a court will come to dominate the evolution of the constitutional or treaty system, in so far as three conditions are met. First, the court must have a steady case load. If potential litigants refuse to activate the court, judges will accrete no influence over the evolution of the system. Second, the court must give reasons to justify its rulings. If it does, one output of judging will be the production of a *jurisprudence*: a case law recording how the law has been interpreted and applied. The third condition is that a minimally robust conception of precedent must develop. Those governed must accept that legal meanings are (at least partly) constructed through judicial rulings, and use or refer to relevant rulings in future litigation and policy-making.

If override is off the table, and if the three conditions just listed are met, then political rulers and states who are unhappy with judicial governance may well try to find other ways to constrain the courts. They may publicly complain about judicial “activism,” threaten budget cuts or court-curbing measures, and appoint judges that more attuned to their positions. As other participants in the Seminar will surely discuss, such moves are related to the wider topic of judicial independence

## II. Fiduciary Responsibilities and Majoritarian Activism

Courts whose rulings are effectively insulated from override can be conceptualized “trustees” whose overarching “fiduciary” responsibility is to pursue the values placed in “trust” by those who founded the system. Because those who established the trust are unable to control directly the trustee’s decision-making, the trustee – in this case, the court – is understood to be bound by a set of robust obligations. The most important fiduciary duties are “loyalty,” “accountability,” and “deliberative engagement.”

In most systems, these duties are articulated through codified rules governing the court’s procedures, as well as in practices that the courts themselves have developed in the course of performing their tasks. For present purposes, *loyalty* refers to the court’s obligation to pursue the values placed in trust, while maintaining “judicial impartiality” with respect to those they govern. The linked duties of *accountability* require judges to give reasons for their decisions, in the service of values associated with the rule of law. Judges constrain future lawmaking by treating their past lawmaking as precedent; and they seek jurisprudential coherence, by reasoning through analogy and treating like cases similarly. The obligation of *deliberative engagement*, as Ethan Leib puts it, comprises an *affirmative* duty to engage in dialogue with those whose interests the ... fiduciary holds in trust, which entails “an authentic effort to uncover preferences rather than a mere hypothetical projection of what beneficiaries might want.” In practice, courts use dialogic materials and procedures, including written briefs, oral arguments, and expert testimony, to gauge political preferences and the probable effects of potential rulings.

To the extent that a court performs these functions in good faith, challenges to the court’s political legitimacy will be difficult to mount or sustain. Arguably, the legitimacy of a court’s rulings can be presumed unless it is shown that one or more fiduciary duty has been violated.

I now turn to judicial lawmaking in international regimes, focusing on just one strategy that courts have developed to bolster the legitimacy of their lawmaking: majoritarian activism. Majoritarian activism refers to the disposition, on the part of judges, to produce rulings that reflect outcomes that states might adopt under majoritarian, but not unanimity or super-majority, decision-rules. Judges use various methods to assess aggregate state practice, in order to arrive at some measure of the extent of overall regime consensus on a relevant policy issue; the degree of policy consensus is then treated as a relevant fact bearing on the case at hand. Majoritarian activism helps these courts develop the law in a progressive manner, to mitigate the “counter-majoritarian” charge that has traditionally been leveled against judicial review, and to render efforts at curbing the expansion of judicial authority improbable.

In the EU, Miguel Maduro (who coined the phrase, “majoritarian activism”) analyzed the ECJ’s most important stream of case law, concerning what kinds of national market regulations comprised unlawful non-tariff barriers to intra-EU trade. He found that once the ECJ had determined that the national measure in question was more unlike than like equivalent measures in place in a majority of states, the ECJ would strike it down as a violation of the treaty. (On its own initiative, the ECJ had begun, in the early-1980s, to ask the Commission to provide such information.) Strikingly, he found no exception to this rule. In contrast, the Court tended to uphold national measures in areas where no dominant type of regulation existed. Stone Sweet showed that, in a variety of policy domains, the Court has enacted, through judicial decision, legislation proposed by the Commission and supported by a majority of member state governments in the Council of Ministers, but blocked by a minority of governments under unanimity procedures. Controversial examples involve efforts to combat sex discrimination in the workplace and national social welfare policies.

The ECHR engages in its own version of majoritarian activism. The Court will typically recognize a new right, or extend the scope of an existing right, when a sufficient number of states have withdrawn “public interest” justifications for restricting the right. The ECHR has stated hundreds of times that the deference the Court gives to states to regulate the enjoyment of a right shrinks as (a) social mores and attitudes change and (b) state consensus on higher standards of rights protection emerges. The move will always put some states out of compliance; and states may complain that the ECHR has usurped the authority of elected officials and therefore the will of its people. Yet the Court and its supporters can claim that monitoring social change and state consensus comprises an external, “objective” means of determining how rights should evolve, and that’s its bias is both transnational and pro-rights, leaving the losing state to defend a lower standard of rights protection on seemingly idiosyncratic grounds. The dynamic also applies to negative cases. If the Court finds that social change has not yet resulted in a change in consensus, it will balk at extending the scope of a right.

Compared with the ECJ and the ECHR, the WTO-AB engages in majoritarian activism less systematically and intensively. Nonetheless, it is common for WTO judges to compare state measures that are attack for being in violation of the GATT with “the usual,” “normal,” or “commonly-used” practices of states or global business. If the state measure restricts trade more than the latter practices, then the defendant state will lose. The judges also reference and analyze relevant multi-lateral treaties and the positions taken by international organizations as indicators of wider state consensus.

Finally, note that the various techniques associated with majoritarian activism also help judges fulfill their fiduciary duties. Trustee courts have an obligation to pursue the values place in trust by states upon the establishment of the system (loyalty). Majoritarian activism builds into the reason-giving requirement (accountability) a concern for collective, multi-lateral solutions, which enables judges to make use of non-compliance disputes to develop the law for the regime as a whole. If their decisions are to be based, at least in part, on an assessment of state preferences and relevant social beliefs and practices as they evolve, then courts must build capacity to engage in dialogue with the regime’s beneficiaries (deliberative engagement), which is precisely what has happened. Judicial review has a bias, but that bias is majoritarian, from the standpoint of the transnational community.



## **Courts under Political Pressure: Minimum Criteria for Judicial Independence in Europe**

Kim Lane Scheppele<sup>\*1</sup>

Judicial independence is a crucial feature of any constitutional democracy, but it is notoriously difficult to define. That said, Europe must figure out the minimal criteria for judicial independence as it sorts out what to do about Hungary. This memo reviews the Venice Commission's<sup>2</sup> recent evaluations of Hungarian judicial reform, with an eye toward understanding what judicial independence might mean in contemporary Europe. The Venice Commission's evaluation will no doubt be important in Hungary's upcoming negotiations with the International Monetary Fund as well as in the infringement proceeding that the European Commission has launched against Hungary for suddenly lowering the retirement age for judges. Among other things, Hungary cannot properly enforce EU law if the independence of its domestic judges is compromised. But the Venice Commission's analysis also reveals that a muscular conception of judicial independence is far from a European norm.

Why is Hungary in the spotlight now? A new Hungarian revolutionary constitution went into effect on 1 January 2012. It represented the culmination of a long drive for power by Fidesz, a political party headed by Viktor Orbán who has remained the party's only leader since it was founded in 1988. The new constitutional order has reorganized the judiciary within a new set of supervisory institutions and policies. Critics claim that the independence of the judiciary has been compromised.

I will first review what has happened in Hungary before proceeding to the Venice Commission's critique -- and my critique of their critique.

### **Hungary's Constitutional Revolution**

By spring 2010, Hungary was functionally a two-party state. Most of the smaller parties that existed in the 1990s and 2000s had disappeared or been incorporated into their larger former rivals. The election in 2010 pitted the discredited and exhausted Socialists, who had been in power for eight difficult years, against Fidesz, a lean and mean party that was ready to capitalize both on the many Socialist scandals (some of which Fidesz had fanned) and on the economic crisis that had already swept Hungary into the embrace of the IMF.<sup>3</sup> The results of the election weren't close: Fidesz got 53% of the popular vote in the party-list election, which Hungary's disproportionate election law turned into 68% of the seats in the Parliament. The Socialists only barely edged out the neo-fascist Jobbik party to become the second largest party in the Parliament with a mere 12% of the seats. The opposition to Fidesz was therefore split between the center-left<sup>4</sup> and the extremist right which cannot unite to block anything. Fidesz, therefore, had free rein.

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<sup>1</sup> Information in memo is time sensitive and subject to rapid change. It is updated to late May 2012.

<sup>2</sup> The "Venice Commission" is more properly called the European Commission for Democracy through Law and it is an expert body operating under the Council of Europe. [http://www.venice.coe.int/site/main/Presentation\\_E.asp](http://www.venice.coe.int/site/main/Presentation_E.asp).

<sup>3</sup> Hungary has the dubious distinction of being the first country in Europe to be bailed out by international financial institutions, having gotten their loans and associated austerity program in spring 2009.

<sup>4</sup> The Socialists, despite their name and the fact that they are the successor party of the old Hungarian Socialist Workers' (i.e. communist) Party, are actually more in favor of neo-liberal economic programs than are their "center-right" opponents Fidesz.

Hungary's post-communist 1989-90 constitution had been drafted as a lightly entrenched provisional text that for 20 years was widely deemed a success in providing the clear operating rules for a constitutional and democratic state. But those rules were written in pencil, with few defenses if a large-enough political party wanted to erase much of it. A single two-thirds vote of the parliament could change anything.<sup>5</sup> With its two-thirds majority, Fidesz could take out its erasers and return to blank parchment.

After its electoral victory, Fidesz immediately proclaimed a “revolution of the ballot box” and launched a program of legal change that – in a mere 20 months – produced 365 new laws, including 12 major amendments to the old constitution altering nearly 60 provisions. This wave of constitutional change disabled all potential blocking moves that could have stopped Fidesz from doing what it did next, which was to push its own new single-party constitution through the Parliament in April 2011 with virtually no political or social consultation. New constitution in hand, the governing party then enacted more than two dozen “cardinal laws” that elaborated important parts of the constitutional order before, on 30 December 2001, topping off a year of frenetic activity by enacting an omnibus constitutional addendum<sup>6</sup> to the new constitution that made the new constitution substantially worse from a constitutional-liberal point of view. For example, this constitutional addendum gives the power to two key political officials to assign specific court cases – civil or criminal – to a court of their own choosing anywhere in the country.

This tsumani of laws has created a legal mess.<sup>7</sup> In the immediate aftermath of this wave of legislation, many ministries had no ideas what their operating rules because administrative regulations were not passed to bring these new laws into practical force. Courts could not figure out which rules were valid and which were not given a confusing set of transitional provisions that (among other things) deemed that ongoing cases should immediately follow the new rules. The personnel changes that accompanied these huge legal transformations installed close allies of the governing party in nearly every key accountability institution, which created a sense among the political opposition and many outside observers that the governing party controlled the entire political field. On my trip to Budapest in early 2012, one constitutional law professor told me that, during the round-the-clock sessions of the Parliament in November and December, he would wake up each morning and check what the Parliament had done overnight in order to figure out what he had to teach that day. Hungary is, to put it politely, legally unsettled at the moment.

There is just simply too much new law for anyone – lawyers, judges, bureaucrats, citizens – to properly process. Legal certainty is often the first casualty of revolutions. The rule of law is designed to provide clear and certain frameworks so that one knows where one stands and how to plan. But

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<sup>5</sup> There was one major exception to this statement. In 1995, the then two-thirds government of the Socialists and Free Democrats amended the constitution to require a four-fifths vote of the Parliament to agree to any procedure that would produce a new constitution. The statute amending the post-communist constitution included a sunset clause which somehow never made it into the constitution itself, so when Fidesz came to power in 2010, it faced a constitution that still said that a four-fifths vote was needed for a new constitutional process to begin. So, with its two-thirds vote, Fidesz amended the constitution to remove the four-fifths rule, thereby removing the last constitutional obstacle that stood in their way.

<sup>6</sup> I call this a “constitutional addendum” because the governing party said it was a constitutional amendment but some constitutional lawyers pointed out that it had not been passed with the parliamentary procedure necessary for a constitutional amendment. As a result, Gábor Halmai, a former chief counselor to the president of the Constitutional Court during the 1990s, challenged the addendum before the Constitutional Court for violating the constitution. Halmai's petition, which could not be directly filed with the Court under the new rules, had to be first vetted by the ombudsman's office, which reframed the petition and then submitted it to the Court. Before the Constitutional Court decided the case, the governing party then re-passed the constitutional addendum as a proper constitutional amendment. The Constitutional Court had recently said in another case that it had no capacity to find a constitutional amendment unconstitutional, so this re-passage of the law effectively ended the constitutional challenge.

<sup>7</sup> The information that follows in this paragraph comes from interviews with state officials and opposition leaders that I did in a trip to Budapest in January-February 2012.

revolutions have as a side-effect the destruction of even the thinnest conception of legal order. With everything changing at once, courts can barely defend themselves. They are, after all, creatures of the rules set down by the political branches. And when the constitution itself has been reduced to a party platform bolstered by a Greek chorus of supporting statutes, courts have no defense against the political program that is embedded in the law. Courts are supposed to support the law against assaults from daily politics, which is hard to do when the subject of daily politics is the revolutionary change of law. This defenselessness of courts is made far worse when the system of selecting, promoting and disciplining judges becomes a highly politicized process.

One of the Hungarian government's key targets has been the Constitutional Court which, in Hungary's unicameral parliamentary system, has been the main check on the power of parliamentary majorities since the democratic transformation in 1990. In constitutional amendments added in 2010 and 2011 – carried over as permanent provisions in the new constitution of 2012 --- the government weakened the Constitutional Court to the point where it can no longer be a check on the power of the supermajority in the unicameral parliamentary system that Hungary still has under the new constitution.

First, in 2010, the government changed the procedures for electing judges to the Court. This new system replaced one in which a majority of parliamentary parties had to approve new constitutional judges before they went before the Parliament where a two-thirds vote was required for election. By dropping the first stage of that process, the governing party eliminated any possibility for any other party to have a say in naming the judges. Now a constitutional judge can be elected with the two-thirds vote of Parliament alone, which the current governing party has and has used. Fidesz judges have been elected to the Court without needing – and without having – the support of other parties.

Once it brought the process for selecting new constitutional judges directly under its own control, the governing party then, in 2011, increased the number of judgeships from 11 to 15. Given that rotation and retirement had already created three vacancies on the Court after Fidesz came to power, the creation of these new judgeships permitted the governing party to choose seven of the 15 judges within its first year and a half in office, without needing the cooperation or agreement of any other parliamentary party. The governing party already had a few sympathetic judges on the Court in addition to the seven new judges, given that the prior process for electing judges assured that all major parties would have judges supported by their political fractions on the bench. The court-packing plan therefore guaranteed a substantial majority of sympathetic votes on the Court. Given that several of the new judges did not have the required legal credentials or experience before they went onto the bench, the governing party clearly anticipated that the work of the Court would become more political than legal.<sup>8</sup>

Even while it was packing the Court with its own judges, the governing party amended the constitution to restrict the jurisdiction of the Constitutional Court so that the Court could no longer

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<sup>8</sup> The Constitutional Court Act, at the time these judges were elected to the Court, required judges to have a doctorate in law from the Hungarian Academy of Sciences or 20 years of practical experience as a lawyer or judge before being eligible to be a constitutional judge. Two of the newly elected judges had doctorates and academic appointments in political science rather than law. Since they were elected, the law has been changed to permit doctorates in any field, but their appointments were not technically compliant with the law at the time they were made. Two others had spent their working careers in politics, as either MPs or government ministers for Fidesz, and therefore did not have the requisite 20 years of legal practice following on their legal training. In addition to not meeting the minimum qualifying criteria for constitutional judges, one of the new judges, while an MP, had introduced the law that gutted the jurisdiction of the Constitutional Court over fiscal matters and another had introduced a law (not passed) that would have nullified all of the prior decisions of the Constitutional Court when the new constitution took effect. So it was quite clear to those who opposed these judicial appointments that the new judges would have agendas for the Court that carried out the Fidesz plan for the Court. Since the judges have gone onto the bench, sources close to the Court have told me that some of the new judges are incapable of writing judicial opinions since they know so little law and even less about how opinions should be constructed.

review any law in the area of fiscal policy, including laws about either budgets or taxes.<sup>9</sup> The governing party has had quite an aggressive and unusual fiscal policy, because it has been desperately trying to plug gaping budget holes, so this carve-out of constitutional jurisdiction has been quite important in giving the government a free hand in an area where it has been particularly active. With the Court disabled in the area of fiscal policy, the government instituted a 98% retroactive tax on bonuses paid to state employees during the preceding five years,<sup>10</sup> slapped “crisis taxes” on foreign-owned businesses,<sup>11</sup> and nationalized private pensions.<sup>12</sup> The limitation on constitutional jurisdiction put out of the Court’s reach review these key policies because they affected budgets and taxes. As a result, petitions have flooded the European Court of Human Rights challenging the nationalization of private pensions.<sup>13</sup> The creation of sector-specific “crisis taxes” has been sent by European Commission to the ECJ for review as a potential violation of EU law.<sup>14</sup> There is no longer a domestic route to challenge these policies within Hungarian constitutional law, so European courts will see a flood of these cases.

The court-packing and jurisdictional restrictions on the Constitutional Court have been received by the Court itself without a fight. Its decision-making became so slow in 2011 that it never got through the final 1600 petitions that had been validly submitted to the Court while it still could review them before the new constitution took effect. In the end, the Court decided only a few cases that showed it still had the power to check constitutionally abusive laws. As it turns out, the show of strength was largely illusory, as the most of the legal provisions that the Court found unconstitutional were either

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<sup>9</sup> The Court may review tax and budget laws if they infringe rights that are hard to infringe with budget measures (rights to life, dignity, data privacy, thought, conscience, religion and citizenship). Conspicuously, the Constitutional Court is *not* allowed to review budget or tax laws if they infringe other rights that are much easier to limit with fiscal measures, like the right to property, equality under the law, the prohibition against retroactive legislation or the guarantee of fair judicial procedure.

<sup>10</sup> Hungarian state policy since the transition awarded departing state employees a retirement “bonus” of one month’s salary as a sort of severance pay. The Fidesz government retroactively taxed this bonus at 98% for the preceding five years, when their party was not in power. The tax hit not only garden-variety state employees like teachers and police, but also all political officials from the prior government. At the time that this law retroactively taxing state severance payments was passed, the Court still had its jurisdiction to review all laws still intact. The Court reviewed the law and struck it down for being retroactive. The governing party then changed the Court’s jurisdiction and re-passed the law. The Court, though disabled, struck down the part of the law that affected bonuses paid while the Court at the time had jurisdiction even though it did not have such jurisdiction at the time of its new decision. But the Court found the retroactive taxation of bonuses paid after its jurisdiction had lapsed to be constitutional.

<sup>11</sup> The new and substantial one-off “crisis taxes” targeted the banking, retail, telecom and energy sectors, where foreign-owned businesses are dominant.

<sup>12</sup> For some time, Hungarians had been able to invest half of their state-required pension contribution in private pension funds. After the 2010 election, the Fidesz government announced that people who retained these private pension plans would lose the ability to claim the state-provided public pensions when they retired, even though they had already paid and would continue to pay into that fund. The governing party’s decision clearly violated a 1995 decision of the Constitutional Court which held that people had property rights in their pensions through the state retirement fund because they had paid into the system. This sudden change of policy effectively renationalized private pensions in one giant sweep because the vast majority of Hungarians moved their pensions to the public system again in order not to lose the part of their pensions that remained in that system. After most people moved their pension funds from the private to the public sector, the government then changed the policy again so that no one now will lose their public pensions if they keep their private pension accounts. But the damage was done, and the legal point was potentially mooted out by the fact that people can resume having private pension funds again.

<sup>13</sup> There are now more than 8,000 cases at the European Court of Human Rights on this issue alone.

<sup>14</sup> The European Commission referred Hungary to the ECJ for violating EU law with the special taxes on the telecom sector. See Press Release, 22 March 2012, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/286&format=HTML&aged=0&language=EN&guiLanguage=en>.

reenacted by the government without alteration after the Court lost its power to easily review them<sup>15</sup> or they were just added to the new constitution where they could escape future judicial review entirely.<sup>16</sup> The Court decided that it could not review any constitutional amendments for constitutionality, which meant that the Court did not even challenge the amendments restricting its jurisdiction.

When the new constitution went into effect on 1 January 2012, the Court's capacity to hear *actio popularis* petitions from anyone for abstract review of the constitutionality of laws disappeared. This is why many structural provisions of the new laws have become markedly harder to challenge before the Constitutional Court under the new constitution. Instead, the Court now has the jurisdiction to review primarily "constitutional complaints" on the German model, a capacity the Court had long wanted to have, but not a substitution for the broad abstract review powers the Court had had since its founding. In a constitutional complaint, individuals may seek redress for the violation of their personal rights before the Court, challenging either unconstitutional laws or concrete decisions of judges or other state officials that produce unconstitutional results. Abstract review, which had been the basis for the more structural and sweeping challenges to laws, has practically vanished in the new constitutional order. Only a few state officials, mostly members of the governing party itself, may bring an abstract challenge any more. The only independent official with the legal right to initiate abstract review, the Parliamentary Commissioner for Human Rights, has actually brought some serious challenges to the Court under the new system, but the number of such challenges is far smaller than used to come to the Court when anyone could bring such a case. In the first half year since the new restricted jurisdiction of the Court has come into effect, it has issued no notable decisions challenging the government and in fact few decisions at all.

Once the Constitutional Court was muscled out of the way, the ordinary judiciary was the next target. First, the government suddenly *lowered* the retirement age for judges, which had been set at 70, to the *general* retirement age, which had been set at 62. The government claimed that it was simply rationalizing the system and opening up new jobs for a youthful population of baby judges-in-training who had nowhere to go.<sup>17</sup> But the effect of changing the retirement age was to force into sudden retirement eight of the 20 court presidents at the county level, two of the five appeals court presidents and 20 of the 80 Supreme Court judges. With so much of the national court leadership pushed aside at once, the ruling party got an unprecedented chance to install its own people in those key roles. Since the court presidents assign cases within their courts, these jobs are particularly crucial, and of course the Supreme Court is the legal last word for all controversial cases.

The early retirement program provided only one of the opportunities for the government to hand-pick judges. In addition to these judgeships, there were even more open positions in the judiciary piling up because judges were retiring or leaving office for other reasons apart from the sudden

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<sup>15</sup> The Law on the Status of Churches, which removed special legal status from more than 300 registered churches, was found by the Constitutional Court to be unconstitutional because it breached parliamentary procedure in its enactment. So the government made only tiny modifications and then reenacted the law the day before the Constitutional Court lost its jurisdiction to easily review the law again. A decision that nullified parts of the controversial system of media laws as they applied to the print and online media gave the press a new lease on life. But the Court, in fact, left the offending provisions of the media law in force, giving the Parliament six months to change the law. The Court's deadline lapsed in May 2012 without parliamentary action, which means that the media laws as applied to the press no longer have any force. That has been a small victory for the Constitutional Court. But there is nothing to stop the government from reenacting the same law once international attention fades because the Constitutional Court can no longer review laws like this so easily.

<sup>16</sup> The Court found unconstitutional provisions of the new Law on the Public Prosecutor that permitted the prosecutor to select which judge should hear each criminal case. So the government just added this provision to the constitutional addendum passed on 30 December 2011 and re-passed it again in spring 2012 to forestall objections that the addendum had not properly passed as a constitutional amendment. The prosecutor's ability to assign cases to specific courts outside the usual rules of criminal law jurisdiction is now entrenched in the constitution itself.

<sup>17</sup> This rationale was provided by Róbert Répassy, Minister of State for Justice, in an interview with me in his office on 31 January 2012.

lowering of the retirement age. But the usual procedure for appointing judges had been suspended for the six months before the new constitution came into effect, allowing these vacant judgeships to pile up pending the introduction of a new system for filling them. In an act adopted in June 2011, the Parliament suspended until 1 January 2012 all judicial appointments (including ones that were almost completed). This moratorium revoked the authority of the then-President of the Supreme Court, András Baka, to appoint anyone, reserving the power to name these judges for a new judicial administration. Baka had protested the early retirement program, after which his powers were clipped. So even before the Fidesz government was able to get rid of him on 1 January 2012 by changing the requirements for his job,<sup>18</sup> they removed the main powers of his office, which involved supervising the appointment of new judges.

The open judgeships made possible by the new mandatory retirement age plus the backlog of delayed appointments were filled on an accelerated schedule with new judges. The new judges were appointed with a substantially eased procedure that includes a shortened period of application and a potential waiver of the results of the judicial suitability examination. Most crucially, though, the way the judges are now appointed was made much more political in the new constitutional order.

Under the new constitution and with its two-thirds parliamentary majority, the government created a completely new system for the administration of the judiciary, without any serious consultation with the judiciary as the new system was being designed. Given that the prior decisive role of the judiciary in selecting its own members was to be replaced by a new political office that would have the final say instead, the governing party might have guessed that the opinion of the judiciary would not have been positive. Under the new system, judges are reduced to being mere advisors in the process of naming judges. The final say resets with political officials.

The new cardinal law on the judiciary created a new National Judicial Office (NJO) and put the head of that office in charge of selecting all of the judges. The president of the NJO now nominates all new judges to the bench, which are then formally appointed by the President of the Republic.<sup>19</sup> But if someone is already a judge in the system, then the president of the NJO can move that person anywhere she wants that judge to be – including promotions, demotions, moves to the countryside, moves to the Supreme Court, moves out of the Supreme Court. Moreover, in changes to the constitution made at the last minute before the constitution took effect, this very same person has the power to assign any particular case to any particular court in the country, overriding the normal legal rules that specify where cases should go.

The governing party chose for this job a close personal friend of the Prime Minister and his wife, someone who is herself the wife of the lead author of the new constitution. Tünde Handó, the new head of the NJO, had had a long career as a labor court judge, so she has both legal training and judicial experience. But what worries critics is the close association she has with the governing party and the fact that she now has the whole judiciary in her hands.<sup>20</sup> Handó was elected, as the new Law on the Judiciary requires, by a two-thirds vote of the Parliament for a term of nine years – a term that

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<sup>18</sup> The new Law on the Judiciary requires that the Supreme Court president serve for five years as a *Hungarian* judge before being eligible for the post. Baka had served for 17 years as the Hungarian judge on the European Court of Human Rights, but only three years as President of the Hungarian Supreme Court, and so he became disqualified when the new law took effect on 1 January 2012.

<sup>19</sup> The former President of the Republic, Pál Schmitt, was a former Olympic fencer who had to resign after it was discovered that his doctoral thesis had been plagiarized. See <http://esbalogh.typepad.com/hungarianspectrum/2012/01/hungarian-presidents-alleged-plagiarism-quite-a-piece-of-detective-work.html?cid=6a00e009865ae588330168e56eca92970c> . More crucially, he was a close ally of the governing party and never once refused to sign any law or appointment that was put before him. The new President, a life-long party loyalist, János Áder, has not had enough time in office yet for us to see how he will interpret his role. But the fact that he has had a career consisting entirely of Fidesz political posts is not a good sign for his potential independence.

<sup>20</sup> For a profile of Handó see, Joshua Rosenberg, Meet Tünde Handó, Guardian, 20 March 2012 available at <http://www.guardian.co.uk/law/2012/mar/20/tunde-hando-hungarian-judges> .

will extend through at least two more election cycles. Therefore, she will be picking judges and assigning cases to those judges well into the term of the next government and the one after that. In fact, the law also states that if a future Parliament cannot agree on her successor by the requisite two-thirds vote, then she may stay on in that office until they select her replacement.

The public prosecutor, Péter Polt, also a close ally of the ruling party, has also been given the power to select the specific court that will hear criminal cases, bypassing the normal rules for assigning cases to courts. He, too, was elected for nine years by the same two-thirds vote of the Fidesz-dominated Parliament and with the same entrenchment clause – which says that his term is not over until a future two-thirds parliamentary supermajority replaces him.

There is much, much more to worry about in the new Hungarian constitutional order. Virtually all of the formerly independent institutions of state – the electoral commission, the media board, the former ombudsmen's offices, the state audit office, the local governments, the regional governments, the budget council, the monetary council, the management of public schools and administration of hospitals and more – have come under centralized control. In virtually all instances, the institutions have been restructured to remove anyone who was put into a high-level position by a previous government. In their places, occupants of the new offices are appointed for extraordinary long terms by supermajority votes of this particular supermajority Parliament and they can stay in those offices until they are replaced by subsequent supermajorities. All of the occupants of the new positions turn out to have long histories of affiliation with the ruling party, and many have political-only credentials (as MPs, local mayors, party officials and the like) rather than the expert credentials and experience that had been normal in Hungarian government before now (like higher degrees in the subject or experience performing as a professional in the field in question). Critics complain that this complete domination of all offices of state by party loyalists has turned a government within the European into party state.

### **Judicial Independence and the Values of Europe according to the Venice Commission**

Is Hungary the first state within the European Union to engage in such radical changes in the jurisdiction and appointment procedures for both the constitutional and the ordinary judiciary? Some of the Fidesz government tactics recall those of the Italian Prime Minister Silvio Berlusconi. But, despite trying very hard, Berlusconi was never able to control the judiciary, neutralize the Constitutional Court and rewrite the constitution. The Hungarian governing party managed to do all three in their first year and a half in office. How have European institutions responded?

The front line of evaluation of changes in constitutional orders is provided by the Venice Commission, an expert body that examines new laws for their compliance with basic principles of European law and good governance. The Venice Commission's work has been hampered, however, by the fact that the Hungarian government clearly did not want to be reviewed too closely. As the constitution was going together, the Hungarian government did not submit the whole constitution for review, as has become customary among Council of Europe member states. Instead, the government submitted only three questions for review by the Venice Commission, all taken out of context of the constitutional drafting process as a whole. The Venice Commission clearly was not pleased by being asked to review these provisions in isolation, but did so anyway.<sup>21</sup> Later, when the Venice Commission reviewed the new constitution and a number of other cardinal (2/3rds) laws, it did so upon referral from the European Parliamentary assembly and not through a request of the Hungarian

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<sup>21</sup> The European Commission For Democracy Through Law (Venice Commission), Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), available at <http://www.venice.coe.int/docs/2011/cdl-ad%282011%29001-e.pdf>.

government. In each of its reviews to date, the Venice Commission has been very critical, particularly of what has happened to the judiciary.

In its opinion dated March 2011 covering three preliminary questions that the Hungarian government asked, prepared as the government was finalizing its constitutional draft, the Venice Commission addressed two questions that involved the constitutional judiciary. One asked whether the initiation of *ex ante* review of laws for constitutionality could be limited to the President of the Republic. A second asked whether the institution of *actio popularis* jurisdiction could be substituted by the creation of a constitutional complaint jurisdiction for individuals to bring cases before the Court. Clearly, the government was contemplating reining in the Constitutional Court's previously existing extensive powers.

The Venice Commission responded by guardedly approving both proposals but with a number of cautions. Given their standards of review, there was little else that they could do. Not all European countries have judicial review in the first place; certainly not all have separate constitutional courts with powers as far-reaching as the Hungarian Constitutional Court's once were. As a result, instead of evaluating the proposals primarily against the baseline of constitutional review that had already been established in Hungary, the Venice Commission evaluated the proposals against the baseline of European consensus.

While noting that many European constitutions permitted *ex ante* review by their constitutional courts, the Venice Commission had to conclude that "there is no common European standard as regards the initiators and the concrete modalities of this review."<sup>22</sup> That said, the Venice Commission nonetheless urged "that in Hungary, the competence of a priori review should be retained and included by the new Hungarian Constitution in the prerogatives of Constitutional Court," particularly as it was contemplated to be a power of the President of the Republic who was supposed to stand above party politics.<sup>23</sup>

With respect to the *actio popularis* petitions, the Venice Commission also had to conclude that there was no European norm requiring such jurisdiction. As they noted:

most countries did not choose to introduce this mechanism as a valid means to challenge statutory Acts before the Constitutional Court. As a consequence, *actio popularis* is at present rather an exception in Europe and among the Member States of the Venice Commission. . . . The Venice Commission is therefore of the opinion that regulations in the future Hungarian Constitution removing the *actio popularis* should not be regarded as an infringement of the European constitutional heritage.<sup>24</sup>

While welcoming the introduction of a constitutional complaint mechanism, the Venice Commission also suggested that Hungary adopt at least an indirect mechanism for initiating abstract review of laws, such as permitting the ombudsman to forward such challenges to the Court.<sup>25</sup>

The Hungarian constitution, when it emerged from the secretive drafting process, in fact abolished the initiation of *ex ante* review by all but the President of the Republic and substituted the constitutional complaint for the *actio popularis* petition. Also, as the Venice Commission suggested, the Hungarian government permitted indirect popular access to the Court for abstract review by permitting the Ombudsman to forward such petitions to the Court after screening them first. The new constitution appeared to comply with the first Venice Commission report.

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<sup>22</sup> Id. at 8.

<sup>23</sup> Id.

<sup>24</sup> Id. at 12.

<sup>25</sup> Id.

The new constitution sparked a multitude of new concerns when the Venice Commission finally reviewed the whole document.<sup>26</sup> I will only review their criticisms of the constitutional and ordinary judiciaries here, though the Venice Commission's worries were not limited to those fields. In fact, the Venice Commission sounded the clarion call of alarm with respect to many aspects of the new constitution. Noting that a number of the rights provisions did not seem compliant with the current state of and developing tendencies of European human rights law, the Venice Commission pronounced a number of the rights provisions "regrettable." In addition, aspects of the overall state structure caused concerns as well. As the Venice Commission noted, "The weakening of the parliamentary majority's powers and of the position of the Constitutional Court in the Hungarian system of checks and balances, as it results from the new Constitution, is for the Venice Commission a reason of concern."<sup>27</sup> Because the constitution required so many supermajority laws, making it impossible for subsequent parliamentary majorities to change policy in a number of key areas, the Venice Commission concluded that the constitutional order put "the principle of democracy itself . . . at risk."<sup>28</sup>

With respect to the Constitutional Court specifically, the Venice Commission noted that prior guarantees of the Court's independence had been weakened. In particular, the President of the Court, formerly elected by his fellow judges, was now to be elected by the Parliament. Though stopping short of finding this a violation of European norms, the Venice Commission noted that this was a worrisome step backwards.<sup>29</sup>

The Venice Commission's most sustained criticism of the position of the Constitutional Court in the new order came from an evaluation of its diminished jurisdiction. The fact that the Court could no longer review laws pertaining to taxes and budgets unless certain listed rights were threatened,<sup>30</sup> and the fact that the Court was charged with considering principles of good budgetary management in its operation<sup>31</sup> caused concern. Moreover, as the Venice Commission noted, most of the details of the Constitutional Court's operation were not given in the constitution itself, but were to be filled in through a separate "cardinal" (that is, 2/3rds) laws.<sup>32</sup> The Venice Commission found that the position of the Constitutional Court had been substantially weakened under the new constitution and was not heartened by the fact that new Court regulation would come later in a supplemental Act on the Constitutional Court.<sup>33</sup>

But the Venice Commission's most biting criticisms in their opinion on the new constitution came in their evaluation of the ordinary judiciary and its independence. In particular, the Venice Commission noted that Hungarian government had said it was restructuring the judiciary as the constitution was being rewritten but it had not yet completed the task. The constitution was therefore not very detailed on what the judiciary would look like in the new constitutional order. The Venice Commission found this omission disturbing:

This part of the Constitution [about the ordinary judiciary] . . . contains rather vague and general provisions. This entails a significant degree of uncertainty with regard to the content of the

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<sup>26</sup> The European Commission For Democracy Through Law (Venice Commission), *Opinion on the New Constitution of Hungary*, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), available at <http://www.venice.coe.int/docs/2011/CDL-AD%282011%29016-e.pdf>.

<sup>27</sup> *Id.* at 19.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.* at 20.

<sup>30</sup> *Id.* at 25-26.

<sup>31</sup> *Id.* at 21.

<sup>32</sup> *Id.* at 19-20.

<sup>33</sup> That act is currently being reviewed by the Venice Commission, which expects to vote on its opinion in the Commission's June 2012 meeting.

planned reform and gives reason [for] concern as it leaves scope for any radical changes. The Hungarian authorities are strongly encouraged to ensure that any future changes in the area of the judiciary and the envisaged reform as a whole are fully in line with the requirements of the separation of powers and the rule of law, and that effective guarantees are available for the independence, impartiality and stability of judges.<sup>34</sup>

The Venice Commission spotted that the National Council on the Judiciary, which had been the institution responsible for the administration of the judiciary, was not mentioned in the constitution, which raised questions about whether the institution would continue or what would take its place.<sup>35</sup> The change in the name of the Supreme Court, to be called the Curia, raised questions about what would happen to the president of that institution, whose job did not seem to be protected in the transition.<sup>36</sup>

The lowering of the judicial retirement age to 62, institutionalized in the new constitution, also came in for criticism in the Venice Commission opinion, not least because such a large number of judicial vacancies at once threatened the stability of the institution.<sup>37</sup> The Venice Commission was also concerned with the provision that court secretaries could perform some judicial functions.<sup>38</sup> Diplomatically, but firmly, the Venice Commission raised serious concerns with respect to the protection of the independence of the judiciary in Hungary.

The Venice Commission's opinion on the constitution, coming as it did after the constitution had already been adopted, did not have an immediate effect on the Hungarian government. In fact, not only did the government fail to make any changes that would have addressed the concerns of the Venice Commission, but key members of the governing party even represented to the Hungarian public that the Venice Commission had actually praised the new constitution.<sup>39</sup> Even though the Venice Commission specifically urged the Hungarian government to consult more widely in drafting the subsequent cardinal laws and to take its criticisms of the constitution into account in specifying the detailed regulation of constitutional institutions, the government also did not do that either.

The Venice Commission's next opportunity to review what the Hungarian government had done came in its review of a number of the cardinal laws passed to fill in the details of the constitutional order. As of this writing, two of the Venice Commission reports have been published, one on freedom of religion and the status of churches<sup>40</sup> and the other on two laws regulating the judiciary.<sup>41</sup> The June 2012 meeting of the Venice Commission is expected to produce opinions on the new cardinal laws on

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<sup>34</sup> Id. at 21.

<sup>35</sup> Id. at 22.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> A group of Hungarian human rights organizations assessed the reaction of the Hungarian government in a report in August 2011 that documented multiple instances in which members of the governing party asserted that the Venice Commission had approved elements of the constitution that the Commission had in fact criticized. See *The Case of the Hungarian Government with the Venice Commission: Assessment of Government Reactions concerning the Venice Commission's Opinion on the new Constitution of Hungary*, available at [http://helsinki.hu/wp-content/uploads/Assessment\\_of\\_HUN\\_Gov\\_reactions\\_to\\_Venice-Commission\\_opinion\\_201108.pdf](http://helsinki.hu/wp-content/uploads/Assessment_of_HUN_Gov_reactions_to_Venice-Commission_opinion_201108.pdf).

<sup>40</sup> The European Commission for Democracy through Law (Venice Commission), *Opinion on Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities of Hungary*. Adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), available at <http://www.venice.coe.int/docs/2012/CDL-AD%282012%29004-e.pdf>.

<sup>41</sup> The European Commission for Democracy through Law (Venice Commission), *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI Of 2011 on the Organisation and Administration of Courts of Hungary*, Adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), available at <http://www.venice.coe.int/docs/2012/CDL-AD%282012%29001-e.pdf>.

the constitutional court, the public prosecutor, nationalities and elections.<sup>42</sup> Subsequent reports will no doubt follow.

The Venice Commission's opinion on the new laws on the judiciary<sup>43</sup> was about as scathing as the Venice Commission could be within the usual limits of its diplomatic language. Instead of the commenting that certain provisions are regrettable or would be improved with revision, the Venice Commission just stated bluntly, "some issues in the cardinal laws examined in the present Opinion do not meet European standards."<sup>44</sup>

The list is long.

The Venice Commission found that the detailed regulation of the judiciary was too entrenched but that the most important guarantees of judicial independence were still not ensured by the constitution.<sup>45</sup> As a result:

The Venice Commission concludes that the level of regulation of judicial issues in Hungary seems to be unsatisfactory. While some principles, as well as the general structure, composition and main powers of the National Council of Judges and National Judicial Office, should have been developed in the Constitution itself, most of the details could have been left to ordinary laws that do not require a qualified majority in Parliament.<sup>46</sup>

In addition, the Venice Commission was very critical of the institutional reorganization of the administration of the judiciary, in particular the huge powers granted to the National Judicial Office (NJO). As the opinion noted: "the Commission has serious doubts about the reform model chosen, which concentrates these very large competences in the hand of one individual person, the President of the newly established National Judicial Office (NJO). . . . [I]n none of the member states of the Council of Europe have such important powers been vested in a single person, lacking sufficient democratic accountability."<sup>47</sup>

The opinion illustrated its criticism of the centralization of power in the hands of this one individual by providing a bullet list of the competencies of the president of the NJO, a bullet list that extended to more than three full pages of the document. The worries about the concentration of so much power in one office were accentuated by the merger of administrative, judicial and supervisory roles in one office, while so many new judgeships had to be filled:

The President of the NJO is not only a strong court "administrator", he or she also intervenes very closely in judicial decision making through the right of transferring cases to another court, his or her influence on individual judges and on the internal structure of the judiciary. The strong role of the President of the NJO with respect to judicial appointments is of particular importance in the present context since, due to the lowering of the retirement age of judges, many important positions in the judicial system must be filled in a short period of time and taking into account that a moratorium on new judicial appointments pending the introduction of the new system has been in place since 2011.<sup>48</sup>

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<sup>42</sup> The agenda of the Venice Commission for its plenary meeting in June 2012 is at <http://www.venice.coe.int/DOCS/2012/CDL-OJ%282012%29002ANN-E.ASP>.

<sup>43</sup> The European Commission for Democracy through Law (Venice Commission), Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI Of 2011 on the Organisation and Administration of Courts of Hungary, Adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), available at <http://www.venice.coe.int/docs/2012/CDL-AD%282012%29001-e.pdf>.

<sup>44</sup> Id. at 4.

<sup>45</sup> Id. at 6.

<sup>46</sup> Id.

<sup>47</sup> Id. at 7.

<sup>48</sup> Id. at 12.

Noting that the president of the NJO must have substantial democratic accountability that is consistent with the responsibilities exercised by the office, the opinion went on to observe that the detailed regulation of the office did not include clear standards that had to be met in the performance of these responsibilities. As a result, the office was created with too few standards for the exercise of the substantial decision-making power that came with the job, and as a result too much discretion was given to the personal judgment of the occupant of the office.<sup>49</sup> While the office of the president of the NJO was subject to some oversight by the National Judicial Council (NJC), composed of life-tenured judges, the opinion also pointed out that the president of the NJO exercised supervisory authority over the very judges who were to provide some review of her, and this circular process did not, in the end, result in any substantial constraint on the president of the NJO.<sup>50</sup>

The opinion therefore concluded that “the new system must be modified.”<sup>51</sup> It required (in boldface letters, lest the Hungarian government be tempted to miss the point) that the laws should be revised to

prescribe that the decisions of the President of the NJO should be reasoned explicitly, referring to legally established criteria, and that binding decisions should be subject to judicial review. A means of increasing accountability might be to strengthen a reformed NCJ (with a pluralistic structure) or to find new ways - established in models used in other democratic states - to provide for accountability to Parliament or to increase the responsibility of the Minister for Justice, of course in a manner that does not jeopardize the independence of the judiciary. In addition, it would be important to reduce the powers of the President of the NJO.<sup>52</sup>

Reviewing the powers of the National Judicial Council, which consists entirely of judges, the opinion noted that it had to operate almost exclusively through the “soft power of persuasion” with few, if any, actual enforceable powers. Instead, the body had been reduced from the central administrative organ of the judiciary to a merely consultative organization: **“it has scarcely any significant powers and its role in the administration of the judiciary can be regarded as negligible.”**<sup>53</sup> As a result, the opinion continued, “As a result, **the cardinal acts appear to contradict the rather feebly formulated right of the judiciary to “participate” in the administration of the courts in Article 25.5 Fundamental Law.**”<sup>54</sup> In short, the cardinal laws regulating the judiciary conflicted with the Hungarian constitution itself.

Turning to consideration of the system for appointing judges, the opinion took note of the fact that, while judges are involved in vetting judicial candidates, the ultimate decision is made by the president of the NJO who does not need to give reasons for deviating from the rankings made by the judges who did the vetting. Moreover, since there are no criteria in the law for determining which candidate should get the position, there is no basis for a principled review of these decisions, a problem that is compounded by the fact that there is no provision for judicial or other review of these decisions in any event. Emphasizing that the system of judicial selection can result in a person being rejected by the president of the NJO for no publicly stated reason, the Venice Commission found that the system of judicial appointments established in the new Hungarian constitutional order **“results in a reduction of the guarantees for an objective candidate selection.”**<sup>55</sup>

With respect to the appointment of court leadership, here too, the Venice Commission found fault with the Hungarian approach. Using boldface again, the opinion concluded that **“The [law on the judiciary] gives the President of the NJO excessive weight in the appointment of court**

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<sup>49</sup> Id.

<sup>50</sup> Id. at 13.

<sup>51</sup> Id. at 14.

<sup>52</sup> Id. at 13 (boldface in the original).

<sup>53</sup> Id. at 15 (boldface in the original).

<sup>54</sup> Id. at 15 (boldface in the original).

<sup>55</sup> Id. at 18 (boldface in the original).

**presidents. He or she can go ahead with such appointments, even if the NJC disagrees.”**<sup>56</sup> In a highly unusual statement for a Venice Commission opinion which usually steers clear of political insinuations, the body noted that “One cannot exclude the risk that the President of the NJO could appoint certain court presidents mainly because they are in line with his or her position.”<sup>57</sup> As a result, the Venice Commission recommended changing the law with respect to the power of the president of the NJO over the determination of court leaders.

Reviewing the system of assigning cases to courts and then to particular judges, the Venice Commission observed that the new system of judicial administration in Hungary permitted the president of the NJO to assign cases to any court to speed the flow of decisions. But since these powers were given without specific rules for determining which cases should be reassigned, and under which circumstances, the opinion found that “Solutions [to the problem of slow adjudication] by means of arbitrary designation of another court cannot be justified at all.”<sup>58</sup> The problems with this system were aggravated by the fact that there were no criteria in the law for determining when a case might be withdrawn from one judge and handed to another, nor were there neutral and transparent criteria for determining how to assign cases across the system in the first place. As the Venice Commission concluded, again in boldface, “**court presidents and the President of the NJO should not have the discretion to decide which cases should be transferred or to select the ‘sending’ or ‘receiving’ courts.**”<sup>59</sup>

The Venice Commission opinion criticized a number of other elements of the administration of justice in Hungary:

- the unwise use of extended probationary periods for new judges that might result in their attempting to please those who control their permanent appointment,<sup>60</sup>
- the use of mandatory interpretive guidance developed by higher courts for use by lower courts and the use of the number of overruled judgments as a factor in judicial promotion,<sup>61</sup> along with the ability of the president of the NJO to initiate a procedure that would result in the issuance of this mandatory interpretive guidance by the newly renamed Supreme Court,<sup>62</sup>
- the possibility for reassignment of judges to other courts without their consent and harsh automatic sanctions if they refused to move,<sup>63</sup>
- a new system for evaluating judges that gave a formal hearing to a judge only if s/he was asked to resign and refused,<sup>64</sup>
- disciplinary procedures that put too much discretion in the hands of those who run the system.<sup>65</sup>

Finally, the Venice Commission opinion noted that there were a number of troubling transitional issues that, in its view, had not been properly handled. The sudden and mandatory new, lower retirement age had the effect of being retroactively applied to those who could not have possibly anticipated it,<sup>66</sup> and open prospects of subsequent retroactive legislation affecting judicial terms of

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<sup>56</sup> Id. (boldface in the original).

<sup>57</sup> Id.

<sup>58</sup> Id. at 24.

<sup>59</sup> Id. at 25 (boldface in the original).

<sup>60</sup> Id. at 19.

<sup>61</sup> Id. at 20.

<sup>62</sup> Id. at 21.

<sup>63</sup> Id. at 22.

<sup>64</sup> Id.

<sup>65</sup> Id. at 22-23.

<sup>66</sup> Id. at 27-28.

office could not have a good effect on the independence of judges. The firing of the President of the Supreme Court because new qualifications were developed for his position also was met with firm disapproval in the opinion. Here, too, the Venice Commission was unusually blunt in conveying the suspicion that the dismissal had been politically motivated:

Many believe that the new criterion was aimed at preventing an individual person – the actual president of the Supreme Court - from being eligible for the post of the President of the *Curia*. Although the Law was formulated in a general way, its effect was directed against a specific person. Laws of this type are contrary to the rule of law.<sup>67</sup>

Because other judges of the Supreme Court were not also removed in the transition to the newly named “Curia,” the Venice Commission opinion let the allegation of political motivation hang in the air.

In the end, the Venice Commission found that the new laws on the judiciary constituted a “radical change of the judicial system.”<sup>68</sup> As such,

the Commission concludes that the essential elements of the reform – if they remained unchanged – not only contradict European standards for the organisation of the judiciary, especially its independence, but are also problematic as concerns the right to a fair trial under Article 6 ECHR.<sup>69</sup>

Strong language. The Commission even recommended that the new constitution be amended to further ensure the independence of the judiciary.

The Hungarian government responded on the same day that the opinion was issued with a list of adjustments it was willing to make to meet the Venice Commission’s criticisms.<sup>70</sup> The appearance of the government’s response alongside the issuance of the Commission’s opinion had the effect of appearing to make the Venice Commission’s opinion moot because it no longer reflected the Hungarian government’s current views on the organization of the judiciary. As I write two and a half months later, however, the government has not yet acted on these proposals, despite possessing the overwhelming supermajority in the Parliament that would enable quick amendments to both the constitution and the cardinal laws on the judiciary should the government wish to do so. It is unclear if the government intends to follow through with its proposed changes. In any event, even if the government does enact its proposed changes, they are too minor to really address the deep and broad criticisms of the Venice Commission. While the proposed amendments now require that the president of the National Judicial Office give reasons for her decisions if she fails to appoint the judicial candidate ranked most highly by the judge’s vetting councils, they do not fundamentally change the overwhelming power that this one person has nor do they establish clear guidelines for what the Venice Commission identified as the troublingly large number of places in the law where discretion was exercised without meaningful standards.

## Judicial Independence and European Values

The Hungarian case is the most serious challenge posed to principles of judicial independence within the European Union to date. The Venice Commission’s scathing review of Hungarian judicial reform is unprecedented, in my knowledge, for an EU member state. The Venice Commission found so many violations of basic principles of judicial independence in their review of the Hungarian judicial reform that Hungary appears to provide almost a textbook case of how courts can be abused.

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<sup>67</sup> Id. at 28-29.

<sup>68</sup> Id. at 29.

<sup>69</sup> Id. at 30.

<sup>70</sup> Legislative Solutions Proposed by the Government of Hungary in relation to the Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, Available at <http://www.venice.coe.int/docs/2012/CDL%282012%29034-e.pdf>.

The Venice Commission opinions are thoughtful, well-reasoned, carefully documented and diplomatically expressed. They could not be mistaken for political criticism, even when they make strong judgments about the politics of the issue under review. The Venice Commission performs a valuable service by offering expert advice on important laws. Those who support its values could only wish that the Venice Commission opinions could be made binding.

That said, the Venice Commission approach could be even more helpful than it is. The Venice Commission acts like the rescue squad, called in when there has been some accident in order to patch up the victims. It appears when called upon, acts to assess the damage caused by the particular incident in question and responds only to the matter directly under review. It is, in short, focused and modest in its goals. Though the principles that the Venice Commission applies are grounded in European law, European human rights law and good government practices, the Venice Commission aims to be tailored and specific rather than more broadly normative.

In fact, the Venice Commission has its origins in the constitutional revolutions that followed the end of the Cold War in Eastern Europe. Governments then *wanted* to comply with democratic and rule of law values; they wanted technical assistance in doing so. The Venice Commission was founded with the idea that this is the sort of consultation it would always be doing. In the Hungarian case, however, the Hungarian government did not initiate the reviews of its laws at the Commission. Instead, other bodies referred the laws for evaluation, most likely with the thought that these evaluations might be used in some future disciplinary procedure against Hungary within the institutions of the European Union or the Council of Europe. That new mission put the Venice Commission in a bit of a bind. Experienced at and designed to provide advice to countries that want to hear it, the Venice Commission structure is not necessarily well suited to provide a push for change for countries that have no intention of doing more than they need to do. Under those circumstances, the polite, give-the-benefit-of-the-doubt, we-all-share-the-same-values tone that the Venice Commission normally strikes seems quite out of place in a procedure that is less about helping a government that has sought assistance and more about teeing it up for punishment.

The Hungarian government, after all, didn't want any Euro-attention at all. It didn't seek guidance. And since it has had to confront Venice Commission reviews, the Hungarian government has made a habit of responding to outside criticism in a minimalist way, doing only what it needs to do to get the outside world off its back. A checklist like the one that the Venice Commission has given Hungary makes its specific desiderata clear, but it doesn't necessarily encourage compliance in spirit if the spirit isn't there to begin with. When a judicial reform effort gets as much wrong as the Hungarian one does, one suspects that the problem is not at the level that the Venice Commission targets – which is the level of minor tweaks to a system that is otherwise attempting to honor the basic values of the rule of law and democratic governance. When the checklist of items that have offended against basic European principles gets this long, it does not appear that a well-meaning government has just missed the mark.

What can the Venice Commission do if a government does not share the same values as the Venice Commission does? Then, providing a checklist of items that a government should address provides instead a blueprint for how to satisfy foreign critics formally without doing one bit more than absolutely necessary. In fact, the Hungarian government has already proposed some modifications of its judicial reform precisely along these lines – reducing the sheer number of powers that the president of the National Judicial Office has, for example, but cutting only the *number* of competencies rather than the president's overall power. When one sees what the government was willing to concede, it still did not give up the most crucial powers of that office. The Hungarian government made a similar move with its proposal that the president of the NJO now give reasons for her decisions. Under the Hungarian government's proposed changes, however, the president of the NJO could say practically anything at all, given that there is no avenue through which to contest any of the reasons given or even subject them to a plausibility review. And so on. A detailed checklist invites a detailed list of

compliant-in-name-only responses, which do not necessarily require the spirit and values underlying judicial independence to be part of the enterprise.

Judicial independence requires a complex set of overlapping institutional arrangements that buffer judges from political pressure. It also requires that judges take a certain approach to the enterprise of judging, not only as individuals but also as an institution. Judicial independence requires that the political branches give up their power (and desires) to force judges into compliant political judgments and it requires governments to accept judicial defeats gracefully without seeking revenge.

When a government does as much as the Hungarian government has done to undermine the independence of the judiciary, a body like the Venice Commission should be able and willing to say judicial independence no longer exists in Hungary. When the Venice Commission is doing what it normally does, giving advice to countries that want to comply, a “to do” list is probably most appreciated. But when the Venice Commission is evaluating Hungary’s commitment to rule of law values, as it does when the review is at the request of other bodies, it should be able to name what it sees. Systematic and systemic violation of the principle of judicial independence should be one of the most important signals that Hungary is on a perilous course away from Europe. And the Venice Commission has provided all of the evidence that this is true, but it just hasn’t drawn the associated harsh conclusions. Perhaps it should.

## Representativeness and Independence of Courts

Mattias Kumm\*

If judges are not elected, in virtue of what are they representative? What are the variables that one might focus on to raise their level of representativeness, without unduly undermining judicial independence? These questions become relevant once it is understood that courts do not only resolve concrete disputes on the basis of narrowly drafted specific rules, but have an independent role to play as jurisgenerative junior partners in the process of concretizing and specifying the abstract provisions of constitutions and human rights instruments, at times becoming an independent force for social change.

In the following I distinguish between four complementary dimensions of representativeness - volitional, identitarian, argumentative and vicarious - to analyze claims about the representativeness of courts and ways of enhancing it. I argue that it is not desirable to increase courts volitional representativeness (strengthening the electoral link between judges and the people), nor should identitarian representativeness be a central concern (ensuring that various groups defined in terms of race, ethnicity, gender, religion, nationality etc. are represented on the court). Instead the most normatively salient variables – the variables that should be the focus of constitutional designers - are argumentative representativeness, implicating questions of methodology, style and structure of judicial opinions and vicarious representativeness, that concerns the constitutional embeddedness of judicial institutions in the political system and, more specifically, the mechanisms that allow political branches to challenge decisions of courts.

**I.** Courts, unlike legislatures, are generally not elected. But courts, too, are *volitionally representative* in the following sense: They derive their authority from a chain of legitimation that is ultimately anchored in “the people”. No court could plausibly claim to be a representative institution, if it was appointed by way of divine intervention (*deus ex machina*) or by way of an occult practice of philosopher kings who select those worthy for highest judicial office among themselves (think of cardinals selecting their pope in the Catholic Church). But judges are generally appointed by elected representatives. The electoral link is indirect and attenuated, but it still exists and its relevant for the representativeness of courts. In this way judges are no different from the President and Senators under the original US constitution. They, too, were considered to be representatives, even though their selection was the result of choices made by intermediaries (the Electoral College and state legislatures, respectively). *Volitional representativeness is a question of degree and not a categorical feature that legislatures have and courts lack.*

Even though the degree of volitional representativeness of courts could be increased in a number of ways, none of these ways are suited to increase the representativeness of judges without disproportionately sacrificing countervailing concerns. We have good reasons to live with judicial institutions, whose degree of volitional representativeness remains as low as it has traditionally been.

1. It is not desirable to have judges elected, because elected judges, even if elected for only one term, is likely to have sacrificed their independence or at least their appearance of independence as part of the competitive electoral process. *Public hearings* as part of the appointment process might give greater weight to the link between judges and the people. But the US experience suggests that it is not easy to design hearings that might fulfil a useful function (but: see Bruce Ackerman proposals for reform in the US).

2. Shorter rather than longer *tenure terms* might be useful to ensure that judges are sufficiently attuned to contemporary sensibilities. But notwithstanding the *prima facie* plausibility of such a claim

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as a statistical matter, the empirics may be complicated. It might make a difference whether judges are appointed for 9 or 12 years or if they receive life tenure (which, in the US leads to an average tenure of over 23 yrs for judges born in the 20<sup>th</sup> century). A shorter term is more likely to ensure that judges will be attuned to contemporary sensibilities than a long term (in particular life tenure). But these correlations might be difficult to establish and it is perfectly plausible that some judges on the court for a quarter of a century are more empathetically gifted and discursively engaged than a young ideologically blindsided judge.

3. The possibility to be *re-elected* might increase the representativeness of a judge, given that she could be evaluated on the basis of her record and thus be held accountable. But this is exactly the kind of accountability that is in direct conflict with the independence of judges and not desirable: To play their particular role, it is central that judges do not think about their re-election when making decisions in politically disputed cases.

**II.** *Identitarian representation* refers to basic salient social traits in virtue of which judges claim to represent the those to whom their decisions are addressed. Candidates for relevant traits are race, gender, religion, ethnicity, nationality (in particular in the international context). There is only a very attenuated link between identitarian representation and any plausible conception of representation relevant to judicial legitimacy. Personal representation matters only to the extent that the make-up of the court should not symbolically-expressively reflect patterns of exclusion that are otherwise part of the community. It is misguided to link the attractive idea of having a wide range of experiences reflected on the court to traits such as race, ethnicity etc., given the radical differences of experiences even within the group defined with reference to the relevant trait and given also the significance of empathetic reconstruction as a desirable judicial virtue not likely to be linked to such traits in a strong way.

**III.** Even if courts are less volitionally representative than legislatures, and identitarian representation is of only peripheral significance, courts can claim representativeness also in virtue of the arguments they justify their decisions with. There is also *argumentative representation* (the term is taken from Robert Alexy). Argumentative representation exists, if and to the extent the courts, trying to find the correct answer to the legal question brought before them, engage in a practice of public reasoning, that is attuned to – even if not necessarily deferential to – arguments that played a central role in the political process and that connect to beliefs actually held. Argumentative representation can be realized to a higher or lower degree, depending on 1. interpretative methodology adopted and 2. style of opinion writing and 3. role of plural (concurring, dissenting) opinions

1. Interpretative methodology: *Originalist* methodologies often leading to arcane and disputed historical accounts based on law office historiography, tend to be less representative than methodologies which place the proportionality test at the heart of the judicial process. The *proportionality* test provides an analytical framework, within which arguments can be made and assessed in a way that is responsive to publically articulated concerns of all relevant parties.

2. Style of opinion writing: Terse, formal judgments in the tradition of the Conseil Constitutionnel are less representative, than the discursive, engaged style of the German Bundesverfassungsgericht (contra Mitch Lasser).

3. A court required to speak only in one voice tends to lead to less representative argumentation than decisions which allow for concurring and dissenting decisions (but: are seriatim opinions more or less representative than opinions of the court, supplemented perhaps by concurring and dissenting opinions?).

**IV.** *Vicarious representativeness* is a function of the constitutional embeddedness of judicial institutions in the political system and, more specifically, the mechanisms that allow political branches to challenge decisions of courts. Vicarious representativeness of courts exists to the extent a judicial decision can be regarded as endorsed by the legislature by default. The easier it is for the legislature to

overturn the decision by the court, the more the decision of the court can be regarded as vicariously representing the considered judgment of the legislature, if the legislature does not actually overturn it. Vicarious representativeness is thus a function of the rules that govern the interaction between courts and legislatures. It is very high, if legislatures are complicit in the act of revising their previous decision by implementing the courts decision (as in the UK, where courts can only issue a declaration of incompatibility), it is still high, if the legislature can override the decision of the court using an ordinary majoritarian procedure or a procedure only minimally more demanding (like in Canada, Israel or New Zealand), it is lower, if a qualified majority is necessary and such overrule must take the form of a formal constitutional amendment (such as in Germany) and it is negligibly low in a country where the requirements relating to constitutional amendment are more cumbersome still (like the US).



## Research Frontiers in International Judicial Independence: Judicial Appointment and Dissent

Mark A. Pollack\*

With the increasing legalization and judicialization of global politics has come a debate over the independence of international courts and tribunals, and a series of *vives polémiques* about the proper designation of international judges (agents or trustees) and about the optimal (high or low) level of independence for courts that seek to be effective and legitimate.<sup>1</sup> By and large, however, these grand debates have distracted attention from our growing, detailed knowledge about the extent and the specific determinants of international judicial independence.<sup>2</sup> This brief memo identifies two issues at the frontier of research on international judicial independence: judicial appointments and dissenting opinions. Both questions have been the subject of preliminary theorizing and empirical research with respect to individual courts, but existing scholarship has been plagued by overgeneralization from single cases, and comparative research is clearly called for in both areas.

### International Judicial Appointments: Understanding the Nomination Game

On the first issue of judicial appointments, a view has arisen, primarily in the EU context, that judicial appointments, because they are decentralized among many nominating states, are an ineffective means of influencing international judges.<sup>3</sup> In a recent paper, however, Manfred Elsig and I have put forward a theoretical model which suggests that under certain conditions judicial appointments can serve as a means for states to influence the *ex ante* preferences of international judges.<sup>4</sup> Drawing from the study of domestic judicial appointments, we informally model a two-stage “nomination game” in which individual states nominate judicial candidates, who are then subject to appointment by a plenary of member governments. Although a full statement of the model is beyond the scope of this short memo, its broad outlines can be summarized in terms of the “four I’s” – interests, interactions, institutions, and information.

First, with respect to the *interests* or preferences of states, it is clear that states have complex motives in making judicial nominations, yet we adopt the simple assumption, common to nearly all analyses of domestic judicial appointments, that political principals will tend, *ceteris paribus*, to nominate and support candidates with substantive preferences similar to their own.

Second, in terms of the core strategic *interactions* among the players, international judicial appointment procedures vary considerably across the various courts, but nearly all of them follow the same basic two-stage model in which individual member states nominate one or more candidates in the first stage, with confirmation or election of judges, typically by a plenary of all member states, in the second stage. Our expectation, in light of our first assumption, is that states will use their roles in

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<sup>1</sup> For the agent/trustee debate, see e.g. Alter 2008, and Pollack 2007; on the optimal level of judicial independence, see e.g. Posner and Yoo 2005a, 2005b, and Helfer and Slaughter 2005.

<sup>2</sup> For an excellent review, see Voeten 2012.

<sup>3</sup> Alter 2008: 46.

<sup>4</sup> The rest of this section draws extensively on Elsig and Pollack 2012. For other recent work on international judicial appointments, see e.g. Mackenzie et al., 2010; Terris et al., 2007; Voeten, 2007, 2008, 2009; and Wood 2007.

both stages of the game to press for the appointment of judges whose substantive preferences are close to their own.

Third, however, the agenda-setting power of any given nominating state depends fundamentally on *institutions*, i.e. the formal and informal rules of the international court in question. Here, we can distinguish three fundamental institutional rules that shape the power of nominating states. Following Mackenzie et al., we distinguish first between “full representation courts, where each state has a judge of its own nationality on the court permanently, and ‘selective representation’ courts, where there are fewer seats than the number of states that are parties to the court’s statute.”<sup>5</sup> In full representation courts, such as the ECJ, each member state is guaranteed a seat on the court, and the various members typically rubber-stamp each other’s nominees, giving the nominating states near-total agenda-setting power and making the confirmation stage a formality. By contrast, in selective representation courts, which are more common internationally, the nomination of candidates by the member states is only the first stage in a longer process in which nominees are weighed and a selection made from a potentially large number of candidates.

In such cases, judicial appointments will be shaped by a second institutional rule, namely the voting rule governing the election of judges from among the various nominees. *Ceteris paribus*, a demanding voting rule – such as the two-thirds threshold for ITLOS and the consensus rule for the WTO Appellate Body – strengthens states at the second, selection stage, and undermines the agenda-setting power of nominating states. Not all states will enjoy equal influence in this process, however, and a third institutional rule can strengthen certain states’ agenda-setting power by guaranteeing them a seat on the court, while other states without that privilege must nominate strategically in the hopes of securing support of the selectorate.

Fourth and finally, *information* plays a significant role in the judicial appointment process at the international level, in two ways. First, as at the domestic level, judicial candidates will attempt to reveal only favorable information, while their member-state principals will attempt to determine the true preferences of candidates. Second, information about the court and the stakes of judicial nominations is likely to be sparse at the founding of a new court, but will become clear with the passage of time, resulting in a progressive politicization of judicial appointments over time.

In our article, Elsig and I seek to test each of these four hypotheses in the case of the WTO Appellate Body. Briefly, we find that states do use their nomination and approval powers to secure the nomination of like-minded judges (interests); that they strategically anticipate the likely reception of their nominees and critically examine the nominees of other states at the selection stage (interactions); that the WTO’s consensus rule tends to empower the plenary selectorate vis-à-vis nominating countries (institutions); and that judicial appointments have grown more politicized over time as the stakes of AB decisions have become clear (information).

We should, of course, be cautious about declaring support for our hypotheses based on a relatively brief experience of judicial nomination to a single international court. Indeed, previous scholarship on this question appears to have suffered by overgeneralizing from a single case (mostly the EU), underlining the need for comparative analysis and testing. We have not yet sought to test our hypotheses beyond the WTO, yet we expect our basic model to “travel” to the vast majority of international courts for which member states serve to nominate and appoint judges. Put simply, we would expect hypotheses 1 (state interests in securing nominees with preferences similar to their own), 2 (strategic behavior by states in seeking the appointment of such nominees), and 4 (the strategic use of information and increasing politicization over time) to apply across the full range of international courts and tribunals.

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<sup>5</sup> Mackenzie et al. 2010: 7.

Hypothesis 3 and its corollaries, by contrast, generate specific predictions about *variation* across international courts, as a function of each court's institutional rules and especially the distinction between full-representation and selective-representation courts. In this context, it is striking that a significant number of other international courts have selective-representation schemes, including several global courts (ICJ, ITLOS), all international criminal courts (ICC, ICTY, ICTR), most regional human rights courts (the Inter-American, African and ECOWAS courts), and several economic courts (OHADA, COMESA, ECOWAS, and ASEAN). Based on our theory and our WTO findings, we expect states in these regimes to use their nomination and selection powers to shape the views of the judges they appoint – although it is possible that the lower numbers and/or the lower stakes of cases before many other courts provide states with less incentive to invest time and effort in the politics of judicial appointment. Systematic, comparative research into these and other cases would allow us to determine how common, or uncommon, are the politicized appointment procedures we have uncovered in the WTO case.

### **Dissent: Explaining the Diversity of International Judicial Practices**

A second, and even more poorly understood, potential determinant of international judicial independence is the use, or non-use, of dissenting or concurring opinions by international judges. It is a striking feature of international courts and tribunals that some make extensive use of dissenting opinions (e.g., the ICJ, ITLOS, ECtHR), while others deliberate in secret and issue rulings as a court with no, or very few, concurring or dissenting opinions (e.g., the ECJ and the WTO AB). Yet we know very little about the reasons why courts have taken different approaches to this central question, or about the effects of judicial dissent on the independence of international judges. Thus far, political scientists have largely ignored this question, while legal scholars have pursued primarily normative analyses of individual courts and tribunals.

If one begins, like an EU scholar such as myself, with the literature on the ECJ, one encounters a court that has, from the beginning, opted to deliberate and vote in strict secrecy, issue collective decisions on behalf of the court, and suppress individual dissenting or concurring opinions.<sup>6</sup> Scholars of the ECJ have been nearly unanimous in their interpretation of this behavior, attributing it to the judges' desire to protect their independence vis-à-vis nominating states that might otherwise pressure judges to toe the national line to secure renomination at the end of their six-year, renewable terms. In addition, the issuing of collective decisions is often seen to increase the legitimacy of the judgments of a court whose initial position was quite precarious.<sup>7</sup>

Here again, however, we need to beware of overgeneralizing from a single case. For indeed, at the other end of the spectrum, we find the ICJ (and its predecessor the PCIJ), whose members have for nearly a century engaged in the practice of issuing frequent, lengthy and signed dissents and concurring opinions. We find this practice widely defended on principled grounds, moreover, by UN member governments, by legal commentators, and by the judges themselves, who often argue that dissenting and concurring opinions can serve to limit nationally biased behavior on the part of judges (who must provide public reasoning for their dissents), to improve the quality of majority decisions (which are forced to engage publicly with the reasoning of dissenters), and to make the law and legal

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<sup>6</sup> The institution of the Advocate-General may act as a functional, but imperfect, substitute for judicial dissents, insofar as the Court breaks with the outcome or the reasoning proposed by the Advocate-General in a given case. Laffranque 2004: 18-19; Ritter 2005-2006: 763; Miguel Poiars Maduro, personal communication.

<sup>7</sup> See e.g. Mattli and Slaughter 1998: 181-82; Ritter 2005-2006: 763; and Terris, Romano, and Swiggart 2007: 125. Laffranque (2004: 16-17) offers a compelling tripartite explanation for the absence of dissent, noting historical (i.e., the absence of dissent in the legal traditions of the original Six), organizational (short, renewable terms of office create concerns that judges will feel pressure to rule in favor of governments to secure renomination), and ideological (concern for the unity of European law and the legitimacy of a united court) factors to explain the practice.

questions more intelligible to present and future analysts of the Court.<sup>8</sup> This is not to argue that the ICJ has indeed been strengthened by the practice of issuing dissents,<sup>9</sup> but it serves to make the point that dissents are not obviously and unequivocally destructive of international judges' independence or legitimacy.

The case for dissents is further strengthened by the practice of another European court, the ECtHR, whose widespread use of concurring and dissenting opinions is widely seen as consistent with both judicial independence and a high level of legitimacy – although here it is striking that the members of the ECtHR have reformed the court to provide for a nine-year, non-renewable terms of office for ECtHR judges, who had previously served renewable six-year terms like their ECJ counterparts.<sup>10</sup>

An intermediate case is the WTO, where the Dispute Settlement Understanding neither expressly prohibits nor authorizes dissents, but where both panelists and AB Members have in almost all cases resisted issuing dissenting or concurring opinions, which are also discouraged under the AB's rules of procedure. Available evidence suggests that WTO jurists have been guided by a logic similar to ECJ judges, believing that consensus decision-making increases both the independence of judges and the legitimacy of the fledgling AB.<sup>11</sup> This view is increasingly contested, however, by scholars like Meredith Kolsky Lewis who claim that increased use of dissenting views would improve WTO jurisprudence without significantly compromising judicial independence.<sup>12</sup>

My point here is a simple one: Largely because of the lack of comparative analysis, we have at best a partial understanding of why some courts engage in vigorous and regular dissent, while in other cases the jurists themselves choose to refrain from dissent.<sup>13</sup> Why do have judges from different courts, allowed in principle to issue dissenting opinions with all their purported virtues and vices<sup>14</sup>, made such different choices and engaged in such different practices? And what difference has that choice, to dissent or not to dissent, made to either the independence of individual judges or the effectiveness and legitimacy of international courts and tribunals?

Here again, single case studies are likely to be unrevealing, and comparative analysis is clearly called for. Such studies will no doubt be difficult, not only because of the challenges of mastering multiple international legal systems, but also because courts like the ECJ and (thus far) the WTO that resist dissents are, quite literally, a closed book to external analysts. Nevertheless, the puzzle remains, waiting to be explored.

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<sup>8</sup> The classical statement of this position can be found in Anand 1965.

<sup>9</sup> Indeed, Posner and de Figueiredo (2005) have argued that the pattern of ICJ voting and dissents points to systematic bias among its members.

<sup>10</sup> Voeten 2007, 2008.

<sup>11</sup> Lewis 2006: 903-916. A similar debate has taken place in the realm of international commercial arbitration, and especially in investor-state arbitration, where observers have been divided about the desirability of dissenting opinions; see e.g. Di Pietro 2011.

<sup>12</sup> Lewis 2006: 916-931; see also Elsig and Pollack 2012.

<sup>13</sup> Hence, EU scholars generally take it as a given that the lack of dissents increases judicial independence (Laffranque 2004 is an exception), while ICJ scholars argue vehemently that dissent improves the quality of judicial decisions as well as judicial independence (Anand 1965), but with little empirical evidence for either set of claims and with little evidence of engagement between the two camps. Lewis (2006: 901-902) engages in an exceptional, if brief, comparative analysis, comparing the WTO to three other courts (ICJ, ITLOS, and NAFTA Chapter 19 and 20 arbitrations) and concluding that the WTO is an outlier in rejecting dissents, but this analysis engages in clear selection bias as it leaves out the primary counter-example of the ECJ.

<sup>14</sup> I know of no instance in which the statute of an international court either requires, or prohibits, judicial dissents. In most if not all cases, therefore, the decision to dissent or not appears to rest with international judges themselves. In principal-agent terms, therefore, the use or non-use of dissent is primarily a question of agents' behavior, rather than one of principals' design choices.

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# Embedding ‘Uncommon Sense’ in Judicial Independence

Iyiola Solanke \*

## The Legal Profession in the 21<sup>st</sup> Century

The legal profession is changing.<sup>1</sup> Lawyers and in particular judges are working under different conditions, facing different expectations, performing different functions and ruling on different and more complex questions. As courts are created<sup>2</sup> and grow<sup>3</sup>, there are more judges and more is expected of them: where alternative dispute resolution is promoted as a pre-cursor to litigation,<sup>4</sup> they are expected to be both decision makers and conflict managers.<sup>5</sup> In addition, due to more frequent judicial review of majoritarian acts under human rights legislation, judges are both more visible and more audible - they say more and, with the discrediting of politics and the clergy as the language of power, what they say has more importance: legal opinions are arguably a ‘normalising force.’<sup>6</sup> This is perhaps a mixed blessing: greater power of review has led to demands that the judiciary itself be more open to public scrutiny. The consideration in England of televised sentencing<sup>7</sup> is a response to such calls for more ‘open justice.’<sup>8</sup>

As courts emerge from the corner of government, they are expected to uphold standards of public management typically seen in other democratic institutions, such as transparency, accountability, efficiency and diversity. However traditional expectations of the judiciary, such as independence and impartiality, remain important.<sup>9</sup> As Mak suggests, these goals may not be compatible: promotion, for example, to diversity might undermine efficiency – it could be argued that ‘... agreeing on and enforcing ethics, core values, was much easier when there were far fewer barristers, and with similar backgrounds, and when there were far fewer and less diverse opinion-makers.’<sup>10</sup> Whilst it may have been easier, it is questionable whether homogeneity is preferable in the judiciary - in the 21<sup>st</sup> century delivery of justice might call for the opposite, a plurality of perspectives and experiences or ‘uncommon sense’, in a court.

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<sup>1</sup> The Legal Services Act 2007 has introduced new regulatory framework for the legal profession in England and Wales.

<sup>2</sup> It is debated whether the UK Supreme Court, which replaced the House of Lords, is a ‘new court’. <http://news.sky.com/home/uk-news/article/15396373>

<sup>3</sup> The Court of Justice of the European Union has grown from 7 judges in one court in 1957 to 61 judges in three courts in 2012. See [www.curia.eu](http://www.curia.eu)

<sup>4</sup> Hazel Genn *Judging Civil Justice*

<sup>5</sup> On judicial conflict management see Machteld de Hoon and Suzan Verberk ‘The New Judge: The Judge as Conflict Manager’ *TISCO Working Paper No. 002-2011*. Also K. Malleon and P.Russell *Appointing Judges in an Age of Judicial Power*. Toront, University of Toronto Press 2006

<sup>6</sup> M. Todd Henderson (2007) ‘From Seriatim to consensus and Back Again: A Theory of Dissent’ *John M Olin Law and Economics Working Paper No. 363*, 5-7.

<sup>7</sup> ‘Televised sentencing in English courts ‘considered’ <http://www.bbc.co.uk/news/uk-14798203>. This is already allowed in Scotland: s. Brocklehurst ‘Filming in court ‘not precedent’ 18 April 2012 <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-17745584>. For comment see: <http://www.telegraph.co.uk/comment/telegraph-view/9211668/Justice-on-camera.html>

<sup>8</sup> The Supreme Court already uses Twitter (Twitter Policy at: <http://www.supremecourt.gov.uk/twitter-policy.html>) and televises its proceedings (<http://news.sky.com/home/supreme-court>).

<sup>9</sup> Elaine Mak, ‘The European Judicial Organisation in a New Paradigm: The Influence of Principles of ‘New Public Management’ on the Organisation of the European Courts’, (2008) 14 *European Law Journal* 6, 718

<sup>10</sup> Lord Neuberger Of Abbotsbury, 25th Annual Bar Conference ‘The Tyranny Of The Consumer Or The Rule Of Law’ 6 November 2010, para 3

The value of professional experience in a court is clear - judges must achieve expertise in a particular field – but general life experience has been under-valued in court composition and practice, despite the heterogeneity of the spaces in which judicial decisions will be implemented. As the reach of judicial decision making extends further into society, it is less tenable to exclude social experiences from deliberation chambers and judicial reasoning. The process of considering a wide variety of viewpoints in the pursuit of an answer to what are increasingly complex legal questions will strengthen judicial decision-making - just as the strongest rope is made by plaiting multiple twines, the strongest rules are likely to be those arising from the interaction of multiple perspectives; just as all polishing is done by friction, un-common sense will improve the luster and sheen of judicial reasoning, and thus the quality of justice.

Below I will consider the symbolic and substantive ways in which debate over diverse ways of seeing in a court improves the quality and value of judicial decisions. Before this, however, bearing in mind the challenge raised by Mak, I will suggest that this respect for uncommon sense can bolster rather than conflict with judicial independence. This is possible if the eighteenth century notion of judicial independence is modernized so that diversity is integral to judicial independence rather than complementary to it.

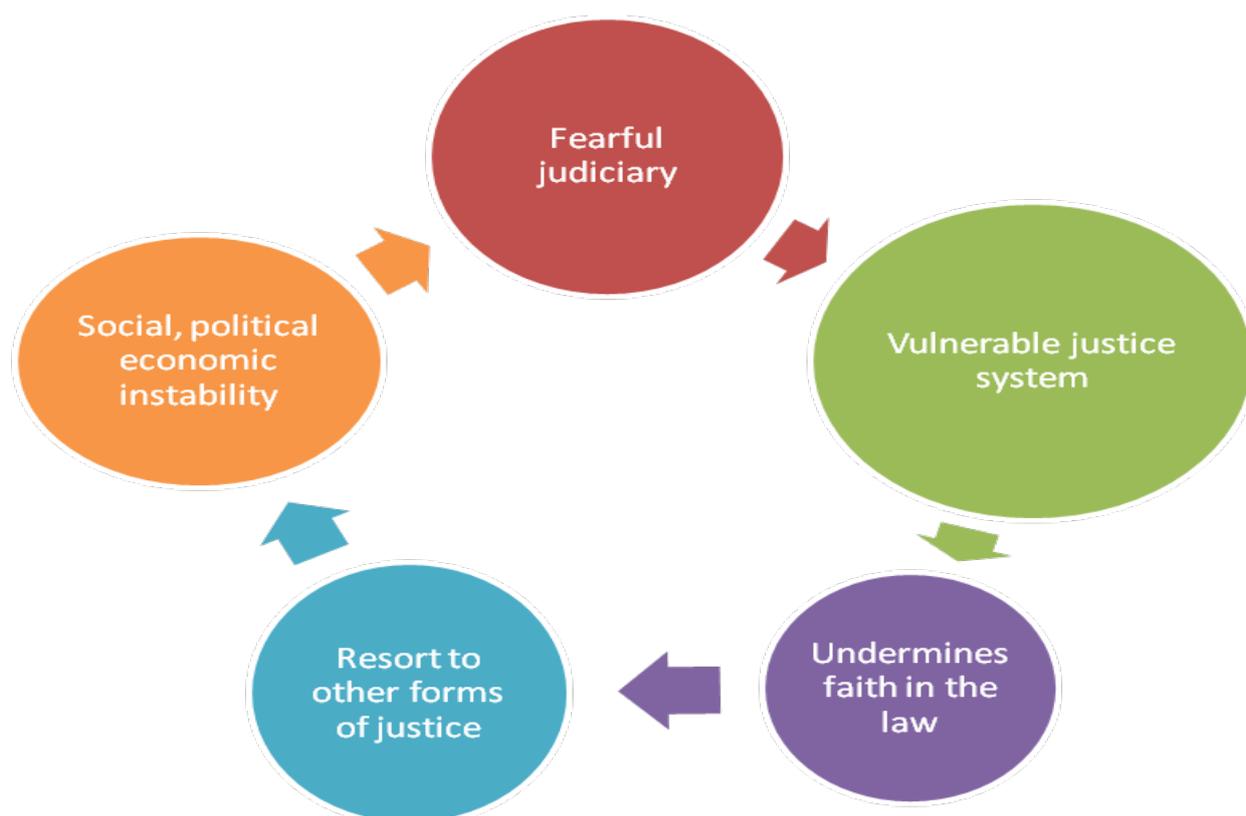
### **The Continuing Importance of Judicial Independence**

What is judicial independence? The idea dates back to England in 1701 and the Act of Settlement. It is popularly understood as the ability of a judicial officer to conduct his or her work free from improper pressure by executive government, litigants and pressure groups.<sup>11</sup> Judicial independence is therefore not just about the autonomy of judges, allowing them to act as they please: it is a means to an end - protecting the power of judges to deliver justice and maintain stability of society, the polity and the economy. An open, liberal, democratic society is underpinned by an independent judiciary and a system of justice readily accessible to all...and run for the interest of society as a whole....' Their independence is valued because a vulnerable judiciary, where judges work in an atmosphere of fear of reprisal, retribution or removal, is compromised in its ability to provide an impartial public service. As the judiciary is the central actor in the justice system, vulnerable judges result in a vulnerable justice system. The negative social, political and economic consequences of vulnerable systems of justice can be seen in many parts of the world.<sup>12</sup>

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<sup>11</sup> <http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbbrook.htm>

<sup>12</sup> Linn Hammergren 'Fifteen Years Of Judicial Reform In Latin America: Where We Are And Why We Haven't Made More Progress' USAID Global Center for Democracy and Governance,



The idea of judicial independence is also a core reason why the public trust the judiciary, even when its decisions do not pursue their interests. Whilst majoritarian politics is

‘about compromise, deals and tradeoffs...law is about justice and courts and judicial decisions seem to offer a morally superior path...law has a lustre, a power, an appeal, an allure. The presumed clarity and neutrality of law, and of the judges who declare and interpret that law, elevates the courts in the minds of many Americans, suggesting the moral superiority of a legal route to policy goals, even if it is not the most effective or efficient approach.’<sup>13</sup>

Judges are regarded as superior arbiters because they ostensibly depend upon nobody – lifelong tenure is assumed to fend off political pressure.<sup>14</sup> An independent judiciary has been identified as an ‘important element in attracting clients to any jurisdiction’<sup>15</sup> However, it remains the fact that courts are staffed by judges and other personnel appointed, rewarded and disciplined by governments, albeit to differing degrees.<sup>16</sup> Independence is therefore relative: it may elevate law but does not totally insulate it from politics.<sup>17</sup>

Given the role of courts in the protection and promotion of democracy - the judiciary is the last branch of government precisely because it is the first defence of the citizen - judicial independence

<sup>13</sup> Silverstein, G (2009) *Laws Allure: How law shapes, constrains, saves, and kills politics*. CUP, 25

<sup>14</sup> This can also arguably have negative consequences – it makes judges unaccountable and protected from sanction for poor performance. Pannick, D *Judges*. (1987) Oxford: OUP, p99

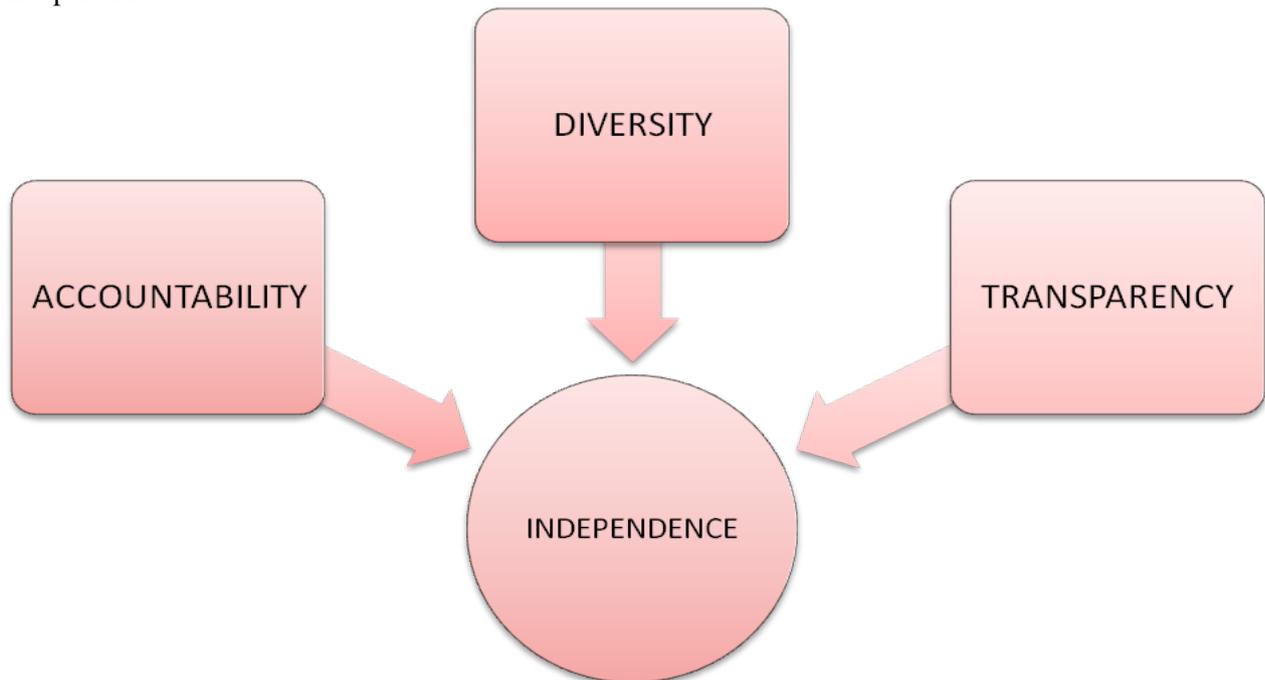
<sup>15</sup> Lodder, 2011 (Bar Council 2 November 2011)

<sup>16</sup> Jacob, H., Blankenburg, E., Kritzer, H. M., Provine, D. M., Sanders, J. (eds) 1996) *Courts, Law and Politics in comparative perspective*. New Haven: Yale U.P, p7

<sup>17</sup> For example, independence can be undermined via subtle pressures, such rules for career progression or the use of judges for non-judicial work like special inquiries: Lord Justice Widgery, who conducted the Inquiry into Bloody Sunday and became Lord Chief Justice of England wrote a Report that was described as ‘so blatantly biased in its findings that it brought British justice into contempt in many parts of the world.’ Stevens, R (1993) *The Independence of the Judiciary: The View from the Lord Chancellors Office*. Oxford: OUP, p169

remains a fundamental pillar of the rule of law, despite being over 300 years old. As stated in the Bangalore Principles of Judicial Conduct, ‘judicial independence is a prerequisite to the rule of law and fundamental guarantee of a fair trial. A judge should therefore uphold and exemplify judicial independence in both its individual and institutional aspects.’<sup>18</sup> Yet this idea, a product of the 18<sup>th</sup> century, has not been updated even though as mentioned above the role of the judiciary and the expectations of the public have changed significantly. Peabody is therefore correct to argue for a revised understanding of judicial independence which recognizes that the current role of courts in the political order and government may be different to that suggested by the ‘traditional account of the judicial role.’<sup>19</sup>

Given the current context, what would a modern understanding of judicial independence include? One way to answer this is to integrate 21<sup>st</sup> century expectations into 18<sup>th</sup> century notions of judicial independence:



Judicial independence would remain focused on the objective of protecting the power of judges to deliver justice but this expanded notion would recognise the new role of courts in an era of high judicial visibility and audibility. It would also apply both to appointments and the operation of the judiciary - both elements are vital to the integrity of a justice system.<sup>20</sup> This modernisation may contribute to protecting the power of law as the new language of power. Work has commenced on developing the ideas of judicial accountability and transparency.<sup>21</sup> Below I will focus on the approach that needs to be taken to the idea of diversity in order to incorporate ‘uncommon sense’.

<sup>18</sup> Bangalore Principles of Judicial Conduct at [http://www.ajs.org/ethics/pdfs/Bangalore\\_principles.pdf](http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf)

<sup>19</sup> Bruce Peabody (2011) *THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC*, John Hopkins University Press; also J. Ramseyer and E. Rasmussen (2003) *Measuring Judicial Independence* Chicago: University of Chicago Press;

<sup>20</sup> ‘Bar chairman promotes value of an independent judiciary’ at [www.barcouncil.org.uk/news/press/907.html](http://www.barcouncil.org.uk/news/press/907.html) (2. November 2011)

<sup>21</sup> Andrew Le Sueur ‘Developing Mechanisms for Judicial Accountability in the UK’ *Legal Studies* (2004) 73; H. O. Yusuf *Transitional Justice, Judicial Accountability and the Rule of Law* (Abingdon: Routledge, 2010) and D. Piana, *Judicial Accountabilities in New Europe: from rule of law to quality of justice* (Farnham, UK: Ashgate, 2010).

## **Configuring Diversity as a Component of Judicial Independence**

What is the role of diversity in relation to judicial independence? How can it contribute to protecting the power of judges to deliver justice? One option is to configure diversity around notions of representation. The vice-Chair of the Bar Council, Maureen McGowan recently stated that:

"The judiciary should be representative of the society it serves. We should always strive towards that aim. No candidate should face impediments based on their profession, gender, ethnicity or socio-economic background. The selection procedures for judicial appointments must be open, fair and accessible to all suitably qualified candidates. Appointments must be based on merit.<sup>22</sup>

This idea of representational diversity would mirror majoritarian institutions, where representation serves to ensure consideration of the interests of communities identified as being vulnerable.<sup>23</sup> Uncommon sense as representative diversity might require a prior decision on what aspects of diversity are to be pursued: would this map onto equality law or be independent of it? If mapped onto it, diversity in the judiciary may fall victim to the same 'blind spots' as equality law.<sup>24</sup> A representative approach to diversity would, for example, prioritize the use of merit for appointments<sup>25</sup> and the introduction of flexible working arrangements and career breaks to improve the diversity of the judiciary.

An alternative approach could prioritise reflection. In a reflective court diversity would not be limited to particular groups but would take a holistic approach<sup>26</sup> to the question of experience and exposure. It would start with the assumption that 'none of us can ever be sure we fully understand the concerns and expectations of those with very different backgrounds or life experiences of our own.'<sup>27</sup> It would recognize that judges are citizens, like everyone else<sup>28</sup>, 'live in the real world just like the rest of us'<sup>29</sup> and may have specific background or life experience that is pertinent to answering legal questions. Such an acknowledgement would not undermine judicial impartiality and neutrality: a reflective approach to diversity would broaden the idea of merit to include exposure to certain experiences as well as exposure to types of work.

It is questionable whether the commitment to neutrality should require the pretence that judges inhabit ivory towers.<sup>30</sup> This was indeed recognised by the Canadian Supreme Court. In 1997, it stated that:

'the requirement for neutrality does not require judges to discount their life experiences. Whether the use of references to social context is appropriate in the circumstances and whether a reasonable

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<sup>22</sup> The Bar Council represents barristers in England and Wales. Maura McGowan QC, 'Bar Welcomes Lords Constitutione Committee Report on Judicial Appointments' <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2012/march/bar-council-welcomes-lords-constitution-committee-report-on-judicial-appointments/>. Merit is not defined: this can mean many things depending upon the objective sought.

<sup>23</sup> For example s.149 of the UK Equality Act 2010 places a general duty on public authorities and providers of public services to consider the impact of their policies and practices on groups protected from discrimination under the Act.

<sup>24</sup> K. Crenshaw, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracial Politics' [1989] University of Chicago Legal Forum 139, 150.

<sup>25</sup> As stressed by the Judicial Appointments Commission in its response to the consultation on judicial appointments, 'Appointments and Diversity: A judiciary for the 21<sup>st</sup> century' February 2012

<sup>26</sup> S. Fredman and E. Szyszczak, 'The Interaction of Race and Gender' in B. Hepple and E. Szyszczak(eds), *Discrimination: The Limits of the Law* (London: Mansell, 1992). See also D.W. Carbado and M. Gulati, 'The Fifth Black Woman' (2001) 11 *Journal of Contemporary Legal Issues* 701; I. Solanke 'Putting Race and Gender Together: A New Approach to Intersectionality' (2009) 72 *MLR* 5, 723

<sup>27</sup> G. Kamil 'The Role of the judge in a diverse community.' Paper delivered at ERA Conference, Trier, 11 March 2008

<sup>28</sup> Day O Connor 2004, 74

<sup>29</sup> Lord MacDonald, Interview, Today Programme BBC Radio 4, 18 August 2011, 8.

<sup>30</sup> This may no longer even be tenable in an age of high transparency.

apprehension of bias arises from particular statements depends on the facts. A very significant difference exists between cases in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility.’

These comments were made as part of its decision to uphold a judgement by Judge Corrine Sparks<sup>31</sup> to acquit a Black youth (R.D.S.)<sup>32</sup> of assault charges against a white police officer during the arrest of another youth. The case had been referred to the Supreme Court because after making her judgement, Judge Sparks had made general comments about strained relations between police and black groups, and the tendency for police to overreact when dealing with those groups. Her comments lead to accusations that she was biased and a petition for her decision to be reversed.<sup>33</sup> A majority of 6-3<sup>34</sup> rejected the accusations and the request to overturn the decision. The Supreme Court held that a reasonable person would not think that Judge Sparks was biased and further, that Judge Sparks had used her experience and knowledge of the community to understand the social context behind the case.

Justices in the USA have talked about the experience of gender in judicial decision-making. Sandra Day O Connor, the first female Justice on the US Supreme Court, has spoken out to support the inclusion of more women in the judiciary, especially in relation to economic development. She argues that: ‘women judges can play a critical function in strengthening the rule of law both through their contributions to an impartial judiciary as well as through their role in the implementation and enforcement of laws, particularly those that provide access to justice for women and girls. Without access to justice, investments in women and girls will likely fail to yield maximum impact or have lasting results. As a result, women judges are likely to emerge as important agents of poverty reduction, sustainable development, and global economic growth.’ Both she and Ruth Bader Ginsburg have invoked the question of whether a wise old man and wise old woman would reach the same conclusion.

Justice Sonia Sotomayor put these ideas on the experience of race and gender together when she said “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life... Whether born from experience or inherent physiological or cultural differences, our gender and national origins may and will make a difference in our judging.”<sup>35</sup> She made these remarks whilst sharing reflections on her life experiences as a Hispanic female judge and on how the increasing diversity on the federal bench “will have an effect on the development of the law and on judging.” However Justice Sotomayor recognised two crucial caveats: that there is no uniform perspective shared by all women or members of a minority group; and secondly that when the Supreme Court delivered its historic desegregation and sex equality decisions, it was all white and all male.

It is promising that judges themselves recognize the value and limits of life experience in their work. It should reassure policy-makers that removing the myth of neutrality will not undermine their independence and impartiality - on the contrary, blind perpetuation of this idea in the current transparent<sup>36</sup> age might have a negative impact on public confidence in the judiciary. It is also reassuring to see that these judges do not seek to replace one homogeneity for another.

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<sup>31</sup> At that time the only Black judge in Nova Scotia, Canada.

<sup>32</sup> *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.

<sup>33</sup> Sonia Sotomayor was likewise accused of bias and subjected to similar treatment when she discussed the value of her experience as a Latina in her role as judge. The text of her speech has been republished in the NY Times. Available at <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html> [accessed: 25 September 2009].

<sup>34</sup> Lamer C.J. and Sopinka and Major JJ. dissenting.

<sup>35</sup> <http://www.nytimes.com/2009/05/15/us/15judge.html>

<sup>36</sup> W. Bennis, D. Goleman and J. O’Toole, P. Ward Biederman *Transparency: How leaders create a culture of candor* (San Francisco, Jossey-Bass, 2008)

## **The Symbolic and Substantive Value of Uncommon Sense on the Bench**

There are symbolic and substantive reasons to promote uncommon sense. At a symbolic level, broader perspectives are necessary not to promote tokenism or populism but to protect public faith in courts. It is a truism that justice needs to be seen to be done: the way in which those outside of the legal system perceive those inside is an important component of an impartial legal system. Creating a sense of fairness, respect, and impartiality goes beyond the verdict and sentence to the appearance of the court. People are more likely to trust decision-making bodies that contain persons that look like them, hence the focus on eliminating racial bias in jury selection.<sup>37</sup> From a representative perspective, diversity is therefore important to preserve the appearance of fairness and maintenance of public confidence, which is crucial to all courts. When judicial thinking is overtly not dominated by a single, privileged perspective, when it is actually impartial, faith in the courts can be expected and can grow. Conversely, an absence of heterogeneity amongst those playing key roles in the justice system can result in a deficit of confidence in that system as a whole.

Beyond this, diverse courts improve the substance and quality of decision-making. The presence of plural perspectives, whatever aspect of diversity they contribute, is likely to improve the judiciary's institutional capacity for openness to alternative views—not because judges will “represent” a monolithic viewpoint, but because of the likelihood that judges with particular exposure will be better positioned to understand and take seriously views linked to marginalized life experiences. Their exposure will strengthen both individual and institutional judicial independence: decisions produced by the friction of un-common sense will allow for fuller answers and a richer evolution of the law. A consideration of a broad range of views is likely to lead to better answers for at least four reasons:

‘Openness to alternative legal resolutions prevents us from discarding meritorious resolutions out of hand, provides us with new information about the contours of the legal problem, and potentially produces new and better compromise answers. Most significantly, the collective experience of living with alternative moral solutions may be the surest way for us to agree on which solutions are the correct ones.’<sup>38</sup>

Furthermore, given the power of the law, judicial dialogue taking place within panels, tribunals and courts will via the media help to disseminate marginalised viewpoints more broadly across society, which in itself will serve to bring these ideas into the mainstream.

## **Conclusion**

The role of courts and position of judges in society has changed: now more than ever the way in which they resolve disputes and manage cases shapes ideas and society. In the early 21<sup>st</sup> century, law has arguably displaced politics as the language of power: as politicians and the clergy have become discredited, legal opinions are looked upon as a ‘normalising force.’<sup>39</sup> If the judicial role continues to develop in this way ‘diversity among judges becomes important for the same reasons that diversity within the legislature is important.’<sup>40</sup> Yet as a non-majoritarian institution, the bench will need this social capital to retain its legitimacy, especially given its lack of alternative sources. Thus it is worth thinking about how to refresh the notion of judicial independence to incorporate public expectations such as diversity.

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<sup>37</sup> Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (EJI, Montgomery, Alabama, 2010) at [www.eji.org](http://www.eji.org)

<sup>38</sup> Milligan

<sup>39</sup> M Todd Henderson, *From Seriatim to consensus and Back Again: A Theory of Dissent*, John M Olin Law and Economics Working Paper No. 363, October 2007, 5-7

<sup>40</sup> Milligan, 2006, 1209

I suggested that diversity be configured as integral to judicial independence rather than alternative to it – these do not have to be conflicting concepts. Diversity in judicial independence could promote representation or reflection but I proposed the latter as preferable given its potential to encompass the broader idea of ‘uncommon sense.’ By bringing to the fore of judicial consciousness a range of views, especially those voices of the invisible and vulnerable, un-common sense promotes and strengthens individual and institutional judicial independence, as understood in the 21<sup>st</sup> century.

For symbolic reasons, citizens are more likely to respect and trust courts whose personnel include people like themselves. Arguably, the judicial function cannot be discharged unless the task is imbued with ‘an understanding of cultural or any other factors which may have had an important influence upon the way individuals behave in particular situations.’<sup>41</sup> Even courts need carriers of new ideas – these ‘do not circulate and take hold by themselves. However powerful an idea, like any new invention or technology, it still requires carriers to promote it in a new context.’<sup>42</sup> Thus merit in relation to judicial appointments should include consideration of both professional and life experiences – both invariably have a bearing on how judges approach the problems coming before them. A critical mass in courts will contribute to their authority in society - what better way to demonstrate mindfulness of the interests of all and not just the economically or politically powerful?

I also highlighted a substantive value: un-common sense will cause judges to debate upon experiences which will enrich their decision making capacity. Given their current role, the absence of un-common sense and limited judicial capacity for broad reflection may ultimately ‘raise serious questions about the judiciary’s ability to deal sensitively with issues touching matters of vital concern to underrepresented groups.’<sup>43</sup> Systems which know ‘the anguish of the silenced’ and give them a voice are stronger than those that do not.<sup>44</sup> In order to guarantee the quality of justice and thereby maintain its legitimacy amongst the public at large, the judiciary should demonstrate capacity for deep reflection upon social relations. Needless to say, such capacity for reflection will not appear without focused and committed interventions: as Goldberg writes, ‘levels of diversity are only as high as the appointer allows.’<sup>45</sup>

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<sup>41</sup> G. Kamil ‘The Role of the judge in a diverse community.’ Paper delivered at ERA Conference, Trier, 11 March 2008

<sup>42</sup> Dezalay, Yves and Garth, Bryant G. (1996) Dealing in virtue: International Commercial Arbitration and the construction of a transnational legal order’ p3

<sup>43</sup> Malleson and Russell (2006, 434)

<sup>44</sup> Day O’ Connor on Thurgood Marshall: 133: on Thurgood Marshall ‘His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.’ Majesty of the Law, 2003: 133

<sup>45</sup> Goldberg, *supra* note 181, at 2.

