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# Judicial Review: Fostering Judicial Independence and Rule of Law

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## **JUDICIAL REVIEW: FOSTERING JUDICIAL INDEPENDENCE AND RULE OF LAW**

This paper investigates the relationship between judicial review and the rule of law. I begin with the assumption that rule of law constitutes an integral aspect of a sustainable and robust government designed to serve the people of a nation. By rule of law, I mean that society is governed by rule-based decision making rather than arbitrary deference to judges or administrative agencies.<sup>1</sup> Thus “every application of public power must follow the legal rules accepted by the people who are destined to be affected by the exercise of that power.”<sup>2</sup> Working from that assumption, it would seem that to have rule of law, judges must be allowed to independently interpret and apply laws in accordance with society’s values. Working from this foundation I explore how countries have developed judicial review and what circumstances foster its growth and development.

### **I. JUDICIAL REVIEW IN CIVIL AND COMMON LAW SYSTEMS**

Judicial review entails “review of an inferior legal norm for conformity with a higher one.”<sup>3</sup> That higher norm is often embodied in a constitution. In *Marbury v. Madison*, Justice Marshall describes a hierarchy of laws, the U.S. Constitution being the supreme law of the land, which the Supreme Court is required to interpret and apply.<sup>4</sup> With his opinion in *Marbury*, Justice Marshall set the foundation for one of the most robust systems of judicial review in the modern world.

Judicial review, however, has been much slower to develop in civil law countries. This difference in evolution is largely attributable to the civil law system’s distrust of the judiciary,

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<sup>1</sup> See José María Maravall & Adam Przeworski, *Introduction*, in *DEMOCRACY AND THE RULE OF LAW* 1 (José María Maravall & Adam Przeworski eds., 2003).

<sup>2</sup> Rainer Arnold, *Constitutional Courts of Central and Eastern European Countries as a Dynamic Source of Modern Legal Ideas*, 18 TUL. EUR. & CIV. L.F. 99, 100 (2003).

<sup>3</sup> See Edith Z. Friedler, *Judicial Review in Chile*, 7 SW. J.L. & TRADE AM. 321, 323 (2000).

<sup>4</sup> See 5 U.S. (1 Cranch) 137 (1803); see also Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 OHIO ST. L.J. 559, 579 (1993) (describing hierarchy of laws).

particularly in France following the French Revolution.<sup>5</sup> Historically, French courts vigorously exercised judicial review to ensure all laws were in conformity with the “fundamental laws of the realm.”<sup>6</sup> This essentially ensured continued monarchical control of all legal matters and developments.<sup>7</sup> Following the Revolution, however, judicial power to review and alter decisions of the democratically elected legislature was seen as perversely conservative and countermajoritarian.<sup>8</sup> Thus, the civil law tradition emerged as one in which comprehensive codes enacted by the legislature represent the ultimate source and authority of law, law which a judge is required to technically apply rather than interpret. If ever the judiciary was doubtful as to statutory interpretation, the question would be certified to the legislature (*référé législatif*) rather than risk undemocratic judicial interpretation. Such parliamentary supremacy renders it unlikely that judicial review similar to that exercised in common law systems will develop.

The robust judicial review found in common law systems is attributable to the great deference traditionally afforded judges within a context of strict separation of powers.<sup>9</sup> The defining aspect of common law systems is the role judges play in shaping and reforming the law; it has long been acceptable for judges to redefine common law crimes and civil norms. It is thus unsurprising that society readily accepts an independent judiciary situated to review legislative acts and ensure their conformity with higher legal principles. The fact that any principle can be “higher” as compared to another implies that some hierarchy of laws persists within the system.

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<sup>5</sup> See Utter & Lundsgaard, *supra* note 4, at 563-71.

<sup>6</sup> See *id.* at 565-66.

<sup>7</sup> See MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 2-6 (1971).

<sup>8</sup> This is not a debate endemic to civil law systems, however, and prevails even in common law literature within the United States. See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH, 16-26 (1962) (arguing judicial review is necessary, but also countermajoritarian); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998) (arguing in response to Bickel that judicial review is not countermajoritarian, but is rather particularly democratic in serving the end of individual liberty); see also TIM KOOPMANS, COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW 104-08 (2003).

<sup>9</sup> Of interesting note, judicial review is essentially nonexistent in Great Britain, the mother of all common law systems. This, coupled with a lack of strong constitutional demands separates Great Britain as an anomaly. See Utter & Lundsgaard, *supra* note 4, at 577-78 (noting Glorious Revolution of 1688 and parliamentary supremacy must be seen in light of a strong “rule of law” tradition).

Unlike in civil law systems, such legal hierarchies have long existed in common law systems, thus necessitating some form of review to ensure compliance with those principles.<sup>10</sup>

Recently, the civil and common law systems have begun to converge. Following World War II, many civil law countries realized the fallibility of legislatures and the dangers inherent in granting any one branch supreme power.<sup>11</sup> The European experience with fascism led to renewed reform efforts in favor of principled rule by the people. The ensuing atmosphere of transformation led to changes such as Germany's establishment of a Constitutional Court, expanded jurisdiction for the French Council of State, and the waning influence of legal positivism within Europe. In common law systems, however, the general trend is toward a more extensively codified legal system.<sup>12</sup> Although still permitting judicial interpretation, codification significantly restrains judicial discretion. Given the increasing relevance and importance of judicial review in civil law countries and its role in rule of law, I explore what circumstances will foment and encourage the development of sustainable judicial review in civil law systems.

## II. LATIN AMERICAN CONTEXT

While Latin American civil law systems retain notions of legislative supremacy, the notion of *Cuadillo* leadership, or presidentialism, is a concept unique to Latin America. Many countries are organized through political pyramids from which patronage, wealth, power and programs flow.<sup>13</sup> At the apex of that pyramid is the national government, controlled by the president. This legal and political culture has resulted in substantial investment of power with the executive. While immediately suspect to an American observer believing in strict separation of powers and equal balance between them, presidentialism stems from an alternative notion of the

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<sup>10</sup> See *id.* at 579.

<sup>11</sup> See *id.* at 570; JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 707 (1994).

<sup>12</sup> See Utter & Lundsgaard, *supra* note 4, at 581.

<sup>13</sup> See Merryman, *supra* note 11, at 604.

State's role in society, termed "paternalism." The State's role is to care and provide for its people, and as the head of the State, the executive controls that endeavor. Because executives are seen as providers—heads of the national family—society is more deferential to executive power.

The judicial branch, as in most civil law systems, simply applies and enforces the law rather than acting as an independent branch. In Latin America, the tension over judicial review exists between courts and the executive, rather than courts and legislature, as in most other civil law systems.<sup>14</sup> The expansive power granted the executive has often included that to declare a "state of emergency" during which legislative rules and their judicial application can be suspended indefinitely.<sup>15</sup> Thus, even though Latin American constitutions contain extensive human rights provisions and U.S. influence has led to the creation of judicial systems with the theoretical power to review legislative and executive actions, the centralized presidentialism predominant in much of Latin America has, until recently, led to a muted role for most judiciaries.

### III. HYPOTHESIS

Given the parliamentary supremacy in civil law systems, I began with the assumption that judicial review would be more effective and better accepted if it entailed review of those actions that society felt less need to vest in representative branches. In traditional civil law systems, this would be administrative actions. Once judicial review proves effective and innocuous in that context, it will find less resistance in expanding to review of legislative actions as well. Because of the added notion of *Cuadillo* leadership in Latin American civil law systems, however, judicial review in such systems would lag behind that in European civil law systems because it would not only be difficult for judiciaries to assert review over legislative actions, but also administrative actions.

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<sup>14</sup> See Richard J. Wilson, *Reflections on Judicial Review in Latin America*, 7 SW. J.L. & TRADE AM. 435, 441 (2000).

<sup>15</sup> See *id.*

In exploring this idea I compare Chile and Poland, which are both similar in many respects: both embody a civil law system; both endured oppressive rule under autocratic governments; both have experienced renewed economic growth through neo-liberal, market-driven economic policies; and both have recently emerged as democratic states. Their similarities make them apt for comparison in their experience with judicial review. This project analyzes their constitutions, jurisprudence, and commentary in scholarly literature in order to ascertain the nature of judicial review in each respective state.

#### IV. JUDICIAL REVIEW IN CHILE

Chile's 1925 Constitution contained provisions granting the Supreme Court the power to conduct judicial review. The previous constitution embodied the French notion of absolute legislative supremacy and required Congress, rather than courts, to resolve doubts as to the meaning of constitutional provisions. Unlike the majority of civil law countries, Chile refused to adopt an Austrian model of judicial review.<sup>16</sup> Admittedly, U.S. influence in Latin America played a substantial role in this departure. The drafters of the Constitution also felt the Austrian model of centralized review would grant the judiciary power above that of the legislature and executive, thus transforming it into a super-legislature able to assume substantial power.<sup>17</sup> Yet Chile was unwilling to adopt the more diffuse system of judicial review as found in many common law systems, in which the constituent pieces of the ordinary judicial system conduct judicial review.<sup>18</sup> Rather, Chile vested the power in a single court, but one within the ordinary judicial infrastructure.<sup>19</sup>

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<sup>16</sup> The Austrian model is characterized by a centralized system of judicial review in which a single court, separate from the ordinary judicial infrastructure, is granted the power to conduct judicial review. *See Utter & Lundsgaard, supra* note 4, at 584.

<sup>17</sup> *See Friedler, supra* note 3, at 328.

<sup>18</sup> *See Utter & Lundsgaard, supra* note 4, at 583.

<sup>19</sup> To clarify, the same result would be reached if the United States vested judicial review only in the Supreme Court and withheld that power from the lower courts. While the Supreme Court would remain an appellate court for the

The power of the court was constrained in that its decisions were only binding *inter partes*, as opposed to *erga omnes*. Thus the court had to address identical constitutional issues multiple times because its holding was only binding on those parties involved in the particular suit rather than all those within its jurisdiction. Because the court refrained from exercising its new-found power, however, the legislature became increasingly powerful, eventually assuming the legislative supremacy common to civil law systems.<sup>20</sup> In 1970, Chile further increased the role of the judiciary by creating an additional and separate Constitutional Court with the power to review compliance of legislation, prior to promulgation, with the Constitution.

The new court, however, was unable to secure solid footing before Augusto Pinochet's military junta dissolved it after assuming power in 1973. During Pinochet's tenure as president, the Supreme Court remained the sole body entrusted with judicial review. That power was only theoretical, as the court refused to intervene in the proceedings of military tribunals and essentially proclaimed its adherence to the new regime.<sup>21</sup> In 1980, the regime once again altered the structure of the judiciary through a new constitution approved by plebiscite. The 1980 Constitution revived the Constitutional Court and expanded the power of the Supreme Court. In 1990 Pinochet left office and Chile began the process of re-democratization.

Modern judicial review in Chile is split between the two courts. The Constitutional Court controls review of "organic" and interpretive constitutional laws prior to promulgation as well as ordinary laws and bills to amend the constitution.<sup>22</sup> Article 82 of the constitution mandates review of the former while review of the latter is optional and can only ensue on request of the

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ordinary judicial system, it would have the additional and sole responsibility of interpreting and applying constitutional law.

<sup>20</sup> See Friedler, *supra* note 3, at 321.

<sup>21</sup> See *id.* at 331.

<sup>22</sup> Organic laws being "those specific subjects, not delegable by Congress, the approval, modification, or repeal of which requires the vote of four-sevenths of the representatives and senators in office." *Id.* at 335. Interpretative laws interpret the constitution to clarify ambiguity, but cannot amend the constitution. *Id.* at 336.

President or a Chamber of Congress. To review laws during the legislative process, the court may act only at the request of Congress, or another body granted standing to bring the issue before the court. In all of its review, the Constitutional Court acts *a priori*, that is, in the abstract without reference to any particular set of facts to guide the analysis. Per Article 83 of the constitution, all decisions concerning the constitutionality of a matter before the court are final and those laws may not be promulgated.

The Supreme Court shares with the Constitutional Court the ability to rule on the constitutionality of a law, but with some differences.<sup>23</sup> Review by the Supreme Court is *a posteriori* (after promulgation) and occurs only within the context of specific cases pending before a lower tribunal. The Supreme Court can act either at the request of a party or *sua sponte*, but the ruling is only binding *inter partes*, as apposed to the Constitutional Court's power to stop promulgation of laws. The combined system has led to confusion and overlap in several areas, which has ultimately diluted the effect of judicial review. Although the judicial infrastructure appears robust on paper, it continues to face the constraints Pinochet's regime put in place as well as the confusion and overlap of the dual system.<sup>24</sup>

## V. JUDICIAL REVIEW IN POLAND

Following World War II, the Soviets instituted a communist government in Poland and, in 1952, drafted a new constitution officially proclaiming the People's Republic of Poland. The constitution reflected the traditional civil law notion of vesting superintendence of the constitutionality of state actions in Parliament, as opposed to courts.<sup>25</sup> Directly following World War II, constitutional review in Poland continued until the communist leadership abolished the

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<sup>23</sup> See *id.* at 343-44.

<sup>24</sup> See *id.* at 346; see also Tom Farer, *Consolidating Democracy in Latin America: Law, Legal Institutions and Constitutional Structure*, 10 AM. U.J. INT'L L. & POL'Y 1295, 1303 (1995) (arguing inability of Chilean courts to prosecute officers of old regime inhibits transformation and faith in judiciary).

<sup>25</sup> See Mark F. Brzezinski & Leszek Garlicki, *Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?*, 31 STAN. J. INT'L L. 13, 16 (1995).



practice. During the 1960s and 70s, however, public support for judicial review grew in light of reformations taking place throughout Europe.

The Communist Party felt it had no choice but to create some form of judicial review to placate the public, and created the Council of State. After it became apparent that the newly-created Council would not use its *a priori* power to review laws, there were renewed calls for creation of an independent body.<sup>26</sup> In 1980, the Party again succumbed to public pressure and created the High Administrative Court. The Court played an active role in protecting individual rights against arbitrary administrative actions.<sup>27</sup> After only a year of existence, the multitude of violations made clear the need for a more sophisticated system of judicial review, and so began the creation of the Constitutional Tribunal (Tribunal).

In 1986 the Tribunal began operation with the Communist Party maintaining it was a logical extension of communist rule. Although the Tribunal was unique in its nature throughout the entire Soviet Bloc, the it ensured its continued operation by avoiding ruling on any politically contentious cases, thus depriving the Communist Party of any impetus to intervene. In 1989, Poland ratified a new constitution, eliminating the dominant role of the Communist Party.<sup>28</sup> Soon after, the Tribunal expanded its jurisdiction to allow so called “universal interpretation of laws” and review of Parliamentary actions before Presidential ratification. The Tribunal has continued to expand its jurisdiction and assume a more active and aggressive role in statutory review, including statutes within previously proscribed areas of judicial review.

Chapter I, Article 2 of the 1989 Constitution provides that “the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.” The court used this Rechtsstaat (state ruled by law) Clause to significantly expand its jurisdiction and

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<sup>26</sup> In ten years of existence, the Council issued only one instruction on the constitutionality of a law. *See id.* at 20.

<sup>27</sup> *See id.* at 21.

<sup>28</sup> *See* Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. Chi. L Rev. 447, 463 (1991).

ability to conduct judicial review.<sup>29</sup> The court has recognized vested rights of private citizens while refusing to recognize such rights for the Communist Party. It has interpreted the Clause to imply a principle of equality, expanding that principle to include “social status.” Perhaps most notably, in a case invalidating legislation allowing the dismissal of judges, the court read the Clause to grant citizens the right to a fair judicial hearing before an independent judiciary.<sup>30</sup> Although judicial review has become far more robust than that within traditional civil law systems, some restraints remain, such as the ability of Parliament to overturn Tribunal decisions by a two-thirds vote as well as a susceptibility to popular and political pressures.<sup>31</sup>

## VI. EXPLANATION

Why has judicial review thrived in Poland yet failed to flourish in Chile? The explanation lies in the ‘failure’ of the Communist Party to effectively reign in the judiciary and maintain autocratic control of the governmental process. In Chile, Pinochet effectively decapitated the judiciary and hamstrung any effort at judicial review. The Supreme Court and Constitutional Court met resistance in review of administrative actions because the military regime refused to succumb to external examination of its conduct. There was little point in reviewing legislative actions as it too was a diminutive actor in light of Pinochet’s grip on the government. It was not until 1990 that Chile could even begin transforming its judiciary, and even now it works within the confines of a constitution drafted by the military regime designed to retain a form of “protected democracy.”

Poland’s Constitutional Tribunal, on the other hand, was able to avoid Communist Party interference by reviewing administrative actions in which the Party had no political stake. Once

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<sup>29</sup> It is thus similar to the United States Supreme Court’s use of substantive due process jurisprudence.

<sup>30</sup> The independence of the judiciary has since been provided for in the 1997 Constitution, Chapter VIII, Article 173 of which states: the courts and tribunals shall constitute a separate power and shall be independent of other branches.

<sup>31</sup> The court has refused, for example, to confront the Catholic Church and does not consistently challenge Parliament. *See* Brzezinski & Garlicki, *supra* note 25, at 46-53.

it had its foot in the door, the Tribunal was able to expand its role after the downfall of the Soviet Bloc. To some extent, however, the divergence is the practical result of bifurcated judicial review in Chile. Much of the abstention from judicial action in Chile results from confusion and overlapping jurisdiction, which Poland avoids by vesting judicial review in a single court.

There are also external factors influencing Polish judicial reform absent in Chile. One of the most celebrated ends of judicial review is the protection of human rights.<sup>32</sup> In 2004, Poland joined the European Union. As part of its membership, Poland must comply with certain minimal assurances of protection for individual rights. Poland's judiciary is thus able to apply more vigorous judicial review and justify its use by citing the need to comply with external requirements, thereby reducing criticism that it is attempting to assert super-legislative authority for its own political ends. To some extent, Chile is also constrained by an external court, the Inter-American Court of Human Rights. That court, however, does not have the same extensive power as the European Union to interfere with domestic matters, but rather serves as a body to expose corruption and abuses within states. Consequently, it can do little to foment change within Latin American states.

The countermajoritarian nature of judicial review is inevitable. Both Bickel and Brown note, however, that review by an independent judiciary, whether or not you term it countermajoritarian, is the most effective means of ensuring conformity with a higher norm, thus protecting individual rights and encouraging rule of law.<sup>33</sup> Poland's Tribunal has successfully established a robust review after first demonstrating the absence of insalubrious effects on democratic rule by reviewing politically obsolete administrative actions. Although Chile is progressing, until a single court is vested with the power to exercise uncontested, *erga omnes*

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<sup>32</sup> See Adarsh Sein Anand, *Protection of Human Rights Through Judicial Review in India*, in 2 JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE 381 (Mads Andenas ed., 2000).

<sup>33</sup> See BICKEL, *supra* note 8; Brown, *supra* note 8.

review over some portion of governmental action, be it administrative or legislative, courts will continue to beat the drums of judicial review while the country marches to a different beat.

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