

## THE DORMANCY OF PARLIAMENTS: THE INVISIBLE CAUSE OF JUDICIARY EMPOWERMENT IN CENTRAL AND EASTERN EUROPE

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*The exceptional empowerment of the judiciary lately transpiring across post-Communist Central and Eastern Europe (CEE) exhibits an institutional design uniformity that reflects a common origin in a networked, transnational legal professional epistemic community-cum-community of interest. Their template's success, however, heretofore inadequately explained, is traceable to an equally important but less observable causal factor: the dormancy of CEE parliaments. This article explores the phenomenon in its three modes: dormancy in originating norms; in overseeing designers; and in vetoing one's own disempowerment.*

### **Introduction**

The worldwide trend toward the judicialisation of politics has come to post-Communist Central and Eastern Europe (CEE). Ever since the 1989 fall of Communism this trend has entailed a remarkable empowerment of the judiciary, arguably an over-empowerment. This result stems from the predominance nearly everywhere in CEE of a certain institutional-design 'template' of transnational origin, which has shaped the domestic judiciaries of CEE in ways bidding fair to transform deeply the power relations between judges and popularly elected representatives. Like all template it is designed to allow variation at the margin; however, three core features of this one are uncompromisingly advocated across CEE: a majority-magistrate Constitutional Court (CC)<sup>i</sup> comprising a majority of jurists with final authority over the meaning of the Constitution, a Judiciary Council autonomously governing the judiciary branch, and a specialist Training Academy monopolising the education of magistrates (Schwartz 2000; Sadurski 2008; Piana 2007; Piana 2010; Seibert-Fohr 2012; Parau 2013). The template is promoted by transnationally networked legal professionals who constitute an epistemic community as well as a community of interest (Piana 2010, Parau 2013). That this network community has integrated into itself a significant fraction of the political elites of CEE who have legal training (Parau 2014) only partly explains the success of its template. Equally important but less visible is the 'dormancy' of the rest of the political elite and indeed ordinary backbenchers. Here then is the puzzle: that almost never during the several series of judiciary institutional redesigns since 1989 have parliaments in CEE offered serious resistance to their own correlative disempowerment.

Dormancy is the non-use of opportunities furnished to political actors by the opportunity structure they are embedded in. Unlike judicial activism, which parliaments must find difficult to counteract, the institutional design of judiciary institutions lies squarely within the purview of parliaments. It is embodied both in the text of the constitution and in organic legislation, and the drafting of these legal instruments is subject to the full range of parliamentary processes, *viz.* norm origination, oversight and veto. It is at these points of constitutional and institutional redesign that backbenchers' behaviour is most critical; they are collectively the ultimate 'veto player' (Tsebelis 2002) who hold in the palm of their hands the transfer of power from themselves to courts (*cf.* Thatcher and Stone Sweet 2003). As the template has been imposed externally from the top down, rather than evolving from the bottom up internally as in the West, one should expect parliaments to resist it *ex ante* (*cf.* Stone Sweet 2000: 53). In rational terms parliamentary dormancy is counterintuitive; self-interested power-maximisers resist their own disempowerment.

In addition to counterintuitive, dormancy is causally ‘invisible’ as a non-event. It has been essentially overlooked by the scholarship in this field. One notable exception is the ‘legislative inaction ... whether irresponsibility or apathy’ that was recently identified as resulting from the activism of CCs (Sadurski 2008: 291). Even so, no research to date has theorised ‘dormancy’ as such, or identified it as a causal factor – especially one preconditional to transnational influence on the institutional design of the ‘ordinary’ judiciary. Indeed, theorists of the political dynamics of judiciary institutional design assume that parliaments are actively engaged (Magalhães 1999; Smithey and Ishiyama 2000; Ginsburg 2002). The idea that they might be disengaged never seems to arise. This is the case in CEE, however, and that justifies inquiry into the way CEE parliaments have approached judiciary institutional revisions since the fall of Communism.

A few words about methodology are in order at this point. Only formal judiciary institutions have been considered for analysis. This is partly because the transnational legal community itself has invested so many expectations as well as resources in their purely formal institutional template, believing that this may suffice to bring the rule of law to the non-Western world (Open Society Institute 2001; Central and East European Law Initiative 2002; Rekosh 2002). The analysis is qualitative and generally follows the actor-centred institutionalism (Scharpf 1997). The (re)design of judiciary institutions in CEE after the fall of Communism has been effected and affected by surprisingly few actors, the majority of whom the author was able to interview.<sup>ii</sup> The key actors were based not only in CEE but all over Europe. Interview data were supplemented and cross-examined by archival research of parliamentary records especially. Evidence was drawn from four CEE countries which vary in their degree of integration with the European Union (EU) and the West (where judicialisation of politics originated): the Czech Republic, a first-wave EU candidate; Romania, a second-wave candidate; Croatia, a current candidate; and Moldova, an aspirant. With the exception of the Czech Republic, which lacks only one of the judiciary institutions discussed herein – a Judiciary Council<sup>iii</sup> – the template has been adopted in all of these countries in toto. It is striking that notwithstanding the varied relationship with the West, the outcome of judiciary revisions is everywhere uniform. The timing of integration with the West has differed widely in every case, yet every country has exhibited the same “double-wave” pattern – a burst of revisionism directly after the fall of Communism and then a second burst under the impetus of the EU (*cf.* Piana 2009). The timings of the waves do not exactly coincide, but the overall pattern is essentially the same.

Because the outcomes of judiciary revisions have been so uniform despite so many country differences, the author has freely compared evidence across all four cases without regard to comparative formalism. All countries were researched on the principle of ‘theory saturation’, whereby data gathering ceases when it adds no further theoretical value (Glaser and Strauss 1967; Alexander and Bennett 2005). This obviates the need to process-trace all judiciary revisions in all countries studied (Collier, Brady et al. 2004). The evidence was triangulated with relevant findings in the literature on law and politics. The applicability of the conclusions to the whole CEE is, like all inductive reasoning, contestable. The author has tried to be transparent in drawing inferences to set the stage for hypothetical falsification (King, Keohane et al. 1994).

The rest of the article is structured as follows. The first section introduces the reader to the transnational community of legal professionals promoting the template and their characteristics. It points out their relationship with certain domestic political elites who are better networked-in than the rest of the domestic political class. This will be followed by a discussion of what Parliament has done or failed to do when actually confronted with the template and its demands.

## **The transnational legal professional community and its judiciary template**

Judiciary reforms in CEE have been driven by “norm entrepreneurs” (Keck and Sikkink 1998), who, arising from the legal professional community, span law, politics and academia (Delazay and Garth 2002; Alter 2009; Vauchez 2008). In some sense all legal professionals are social elites, but the norm entrepreneurs who spearheaded and influenced the content of judiciary reform in CEE constitute an elite within the elite, wielding power resources even most legal professionals lack. They often hold commanding offices in State institutions and international organisations and have privileged access to media and network resources (if not also finance) (Parau 2013). This community is a manifold of professional networks interlocked with the supranational organs of the Council of Europe (CoE) in particular, and increasingly joins up legal elites in CEE not just the senior member-States (Cohen 2010; Sadurski 2012; Parau 2014). Typically networked-in are High Court judges; top academic jurists; legally trained politicians; and officers of philanthropic foundations, transnational think tanks, and civil society organisations active in the field of human rights (Hirschl 2004; Sacriste and Vauchez 2007; Parau 2014). The EU supranational institutions themselves such as the European Commission and the European Court of Justice have depended on this community for legal expertise and legitimation at critical junctures in the European integration process (Alter 2009; Vauchez 2010). The academicians constitute the brain trust and perpetuate their consensus of values and ideas through teaching (Delazay and Garth 2002; Shapiro 2002; Ingram 2011; Parau 2014).

Little noted in the literature is the community’s elitism: it includes only a small fraction of politicians, for example, who are nonetheless heavily relied on by the community’s entrepreneurs to actuate their domestic interventions:

When we [experts from the CoE] were dealing with question of judiciary reform in CEE we met with either the Minister of Justice or the Director of the Department in charge of drafting the laws ... this is the most optimal path ... because they are drafting the law and everything passes through their hands (Oberto 2010).

Peers are ideologically diverse, but disproportionately occupy high office in CEE, especially as Prime Ministers, Justice Ministers, Presidents of Chambers of Parliament (Parau 2013, 2014). Legally untrained backbenchers lack access to the network and its resources and may be deliberately marginalised during negotiations implicating the power relations between the branches of governments:

Generally speaking they [MPs] are less interested [in judiciary reform] ... in one case we managed also to have some contact with MPs but the problem was that at every meeting there was a different person. [...] On the side of the Minister of Justice we saw more or less the same individuals – that was better for us – whom we knew (Oberto 2010).

Or, in the words of a European Commission expert advising CEE countries on judiciary reform, ‘I never met members of Parliament. I never asked to and I never met them’ (Perilli 2011).

Enough empirical evidence from CEE and other contexts has been found to justify the conclusion that a transnational legal community exists, which shares a paradigmatic consensus on the role of courts in democracy (Cohen 2007; Sacriste and Vauchez 2007; Parau 2013). Out of this paradigm its entrepreneurs have forged an institutional template designed to redistribute political power to judges, super-ordinating them in contests over

public policy. This explains why so many judiciary revisions in CEE since 1989 have sought to transfer more rather than less power to courts and to restrict rather than expand political representation in Judiciary Councils and CCs. The template is justified as necessary to the rule of law, ignoring that the rule of law emerged in the first place amidst judicial subordination to the Crown and Parliament (Dicey 1897). The net effect is to erect a ‘state within the state’ (Stanoiu 2009).

### **The dormancy of parliaments**

The literature on law and politics has identified the behaviour of elected representatives as a cause of judicial empowerment and judicialisation of politics (Hirschl 2008). Theorists of judicialisation in a Western context postulate that rational self-interest moves politicians to delegate policy-making power to courts either to shift responsibility for unpopular decisions away from themselves (Voigt and Salzberger 2002; Thatcher and Stone Sweet 2003), or to achieve goals otherwise unattainable by democratic means (Graber 1993; Whittington 2005). A classic example of the latter claims that ruling parties who foresee risky losses of power to electoral competition will empower courts to grant or withhold judicial concurrence to the abrogation of their policy bargains by their rivals (Ramseyer 1994; Ginsburg 2003). Finally, the ‘hegemonic preservation’ theory claims that politicians delegate power to courts because their constituents, the socio-economically and politically most influential groups, fear losing their grip on political power and believe delegation will shore up their legitimacy (Hirschl 2004). These causes and mechanisms may well be in play; however, there are other factors which the literature overlooks.

Politicians in CEE have admittedly played a role in judiciary redesigns. To date, however, identifying precisely which are the actors who have been transferring power to courts has been neglected. Reference instead is made to amorphous ‘policy makers’ and ‘political actors’, or ‘dominant political parties’ and ‘constitution makers’ (Magalhães 1999; Smithey and Ishiyama 2000; Ginsburg 2002).

However, the power relations between politicians themselves are fundamentally important. Those atop the party hierarchies also hold key positions of power in Parliament and the Executive and, in the East at least, they come disproportionately from a legal background and are networked into the transnational legal community. They alone have been collaborating in judicial empowerment, while the representative majority of ordinary politicians have by and large lain dormant (Parau 2014). This dormancy will be addressed next; leaving the conflict of interest between elite politicians and ordinary backbenchers for a future study.

Dormancy is a simple but recondite concept that is probably best understood in a new institutionalist framework. It is a condition of agency facing an ‘opportunity structure’. An opportunity being a course of action open to a (political) actor, the limited set of them is a structure. This concept originated in the context of civil society actors (McAdam 1996), and has been applied to national parliaments and MPs mostly in relation to supranational structures like the EU (cf. Goetz and Hix 2011); however, it could be applied to the historical development of powers or branches of government in opposition to the core executive, if the latter is considered the origin of government. The historical accumulation of limits on core executive discretion (e.g. the Magna Carta) has correlatively created opportunity structures for other political actors, especially parliament; which in time became formalised (Finer 2011). Parliaments may wield these formalised opportunities or ‘powers’ *inter alia* to prevent their own ‘disempowerment’ at the hands of the core executive. The opportunities dealt with herein are parliament’s powers of veto, oversight, and norm origination.

Dormancy is the non-use of an opportunity structure (whether formalised or not) under the influence of informal political dynamics. Three dynamic states may be identified: nescience, apathy, and suppression. One surmises that dormancy is a broader phenomenon than the ‘apathy’ noted by Sadurski (2008:291). Nescience includes (but is not limited to) incompetence, and means not knowing that you do not know that an opportunity is available (cf. Nicol 1999). Apathy, including indifference and contentment, is a positive preference for and rational choice of non-use. Suppression means the contingent closing-down of an opportunity (not necessarily by deliberate veto) through informal institutions like party organisation and leadership, or technocratic ‘priestcraft’. Elaborating this theorisation of ideal types of dormancy, however, or tracing their causes must await a future publication. Because of space limitations the focus will be on descriptive as opposed to causal inference (King, Keohane et al. 1994).

Parliamentary dormancy in CEE manifests itself first and foremost in non-use of veto. Excepting the Czech Parliament, which in 1999 vetoed creation of a Judiciary Council, all other parliaments researched herein never vetoed their own disempowerment. The representative majority of MPs lay dormant precisely at those moments when they might have wielded their veto most decisively. The only resistance so far observed in CEE has been ex post, when occasionally parliaments try, many years down the line, to recall some of the powers ceded to the judiciary. Yet it is rare to see even the kind of ‘morning-after’ resistance to judicialisation that Hungary and Romania have recently been undergoing.

Dormancy may also consist of omitting to exercise oversight – in the case of judiciary redesign, oversight of which experts were to be delegated the drafting of the organic law of the judiciary and of how they carried out this mandate, – or of the neglect or incapacity by ordinary MPs to originate norms or initiate legislation, especially pertaining to judiciary design. The facts of political life in CEE are such that the Executive have full discretion both to delegate powers to experts and to draft legislative proposals. In the case of judiciary redesigns, this discretion is typically exercised by the Ministry of Justice. These Ministries are easily ‘acted through’ by external influences, like EU and CoE institutions and transnational legal professional networks, especially during the EU accession process (Parau 2010; Parau 2013). And, whatever one may think of the late attempts in Hungary and Romania at revising the revisions imposed from the West, the unexpected yet far from aberrant development is that these countries’ respective parliaments actually became engaged in judiciary governance. It remains to be discovered whether these initiatives came exclusively from the party elite, or whether any initiative from below (viz. backbenchers) happened.

### Veto dormancy

Regardless who may set the policy agenda or actually draft the legal text of judiciary revisions, parliament must still ratify the final output and can veto it. This, however, has hardly ever happened in CEE.

In Romania the first major disempowerment of Parliament in favour of the judiciary after the 1989 Revolution met no resistance. The majority of MPs in the new Constituent Assembly overwhelmingly ratified the transnational template which barred their participation in constitutional interpretation or judiciary governance (Parau 2014). They were easily outvoted who argued,

Parliament must be the one who has the final word, who expresses the will of the people by means of legislation, and not the Constitutional [Court], which is what the current provisions [the legal professionals’ draft constitution] foresee ... This ought to be decided

by the people (Marian Enache, Vice-president of the Chamber of Deputies, quoted in Iorgovan 1998: 100)

or who remonstrated that MPs should serve on the Judiciary Council lest it becomes a ‘closed body’ raised above ‘the sovereign power of the people’ (Ion Predescu, Senator, quoted in Iorgovan 1998: 302). Thirteen years later, during the second major stage of revisions in 2003-2004, the Romanian Parliament again slept on its veto respecting constitutional and organic law revisions that disempowered MPs all the more by consolidating the supremacy of the CC and the autonomy of the Judiciary Council. These revisions too were dominated overwhelmingly by elite lawyer-politicians and high court judicial peers (Parau 2014).

Similar revisions were undertaken in Croatia in 2010 and they evidence the same pattern: ‘Parliament passed the 2010 Act on the Judiciary Council by acclamation. Nobody opposed it’ (Marinović Antičević 2011). This Act conformed to the same template, disempowering Parliament to appoint or to even vet either judges or Judiciary Council members – who now monopolise judiciary governance (Marinović Antičević 2011). And in Moldova after the Soviet breakup, Parliament offered no resistance to similar institutions drafted by a Commission of legal professionals (Ionița 2012). It was again entrepreneurs of the transnational legal community who took advantage of EU conditionality to advance the empowerment of the judiciary a step further in Moldova in 2012 under a Strategy for Judiciary Reform that the European Commission made preconditional to ‘Association’ (the next stage of integration after Neighbourhood Partnership). In particular, the Judiciary Council’s composition went from majority-layman to majority-judge (Art. IV.3 Law 153/2012). Yet the Parliamentary plenary enacted this self-disempowering package 55 to 0. The only dissent came from a lone Communist MP who complained not about its substance but about the parliamentary procedure by which it was adopted without considering the Communist Party’s objections (Parlamentul Republicii Moldova 2012: 57-8).

In all of countries studied only the Czech Parliament showed any willingness to veto the template. While it did rubberstamp a Constitutional Court in the 1992 Constitution, a document drafted ‘in a rush ... in only one or two months’ after the surprise secession of Slovakia (Komarek 2010), nevertheless Parliament stood firm eight years later by rejecting the template’s Judiciary Council, the desirability of which ‘had been a topic of discussion for many years after 1998 ... judges wanted it’ (Korbel 2010). Otakar Motejl, the Justice Minister and ex-Supreme Court Chief Justice, resigned in protest as a result (Bobek 2008). Both main parties, the Social Democrats and the centre-right Civic Democratic Party ‘came out strongly against a Judiciary Council’, which they perceived as ‘a loss of power to the judiciary’ (Korbel 2010). Why the Czech MPs resisted the template (*ex ante*) while all other CEE Parliaments did not is a puzzle that needs further investigation (but see Piana 2009; Kühn 2012). Even for the Czech Republic this episode might have been rather the exception than the norm.

### Oversight dormancy

John Stuart Mill remarked in Considerations of Representative Government that

... the proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them ... to censure them if found condemnable, and, if men who compose the government abuse their trust, or fulfil it in a manner which conflict with the deliberate sense of the nation, to expel them from office, and either expressly or virtually appoint their successors (Mill 1975 [1861]: 226).

Mechanisms for holding Executive officials accountable include investigations, inquiries and interpellations. Parliament may exercise oversight over whomever is delegated the power to set an agenda or draft a law (McCubbins and Schwartz 1984). This also applies to the parliament's own committees when these have been delegated the function of carrying out constitutional revisionary mandates.

CEE Parliaments have the same formal powers of oversight (Linek and Mansfeldová 2007), yet, at least in the first decade of transition, even the most active CEE parliaments, such as the Hungarian, were dormant in exercising what in the West is regarded as a critical function (Olson and Crowther 2002). And the farther east they are, the less oversight they even attempt (Khmelko and Beers 2011).

The evidence suggests that oversight of judiciary design revisions rarely happens in CEE. CEE parliaments typically delegate drafting to committees dominated by legal professionals. And yet, even when the MPs become discontent with their delegates' output, this rarely spills over into action (*viz.* replacing them with other appointees). For example, the Parliamentary record of the debates over the 2003 constitutional reforms in Romania which further disempowered Parliament relative to the judiciary contains no evidence that backbenchers were ever discontent. Only one (independent) MP ventured to complain:

It would be good for MPs who are not jurists to intervene in the debates, argumentations and clarifications of the Constitutional text. The Constitution is not only the Constitution of lawyers; they do not have monopoly over the fundamental truth, although they might play an essential role in drafting the text (Parlamentul Romaniei 2003).

No other MPs dissented or endeavoured to mobilise.

The MP's complaint suggests that oversight dormancy in this case did not stem from nescience; MPs seemed to understand what the lawyer-politicians were doing, yet they still did nothing. Their inaction might be due to general apathy but since Parliament was so seriously disempowered in 2003 (Parau 2012) one must wonder what role apathy or nescience may have been playing, and what role informal suppression. Although it is not the purpose of this article to test the causes of dormancy, it might be remarked parenthetically that legal professionals seem to have been using methods of suppression. Asked by the author why Moldovan MPs are never part of the working groups revising the judiciary institutions, a highly placed jurist in Moldova replied:

Their business is to work on ... draft bills ... but there is no place for them [in the expert groups created by the Justice Ministry] ... I do not desire MPs to take part. They should only receive the [experts' draft bill] in the second stage of work ... when it has already been conceived. If they conserve the existing arrangements [less empowering of the judiciary] and promote those ideas, it is not going to work (Corochii 2012).

Or, in the words of the Speaker of the Croatian Parliament:

We have convinced our colleagues that it is very dangerous to parliamentary democracy if non-experts try to play a leading role in the crafting of laws. We typically say to them 'you are not competent to think in this way', and so we create for ourselves a certain kind of authority. Of course we tell them this in a gentle way – 'don't interfere with things that you only think you know'. Legal sciences are not just politics; they are sciences ... in our system, as in all systems of parliamentary sovereignty, the focus of legislative activity is on the Executive; although any MP may submit a legislative draft, it happens very rarely (Šeks 2011).

Further evidence from Romania as early as 1990 suggests that oversight dormancy over experts has been the norm. In 1990, bitter disputes ensued between the legal experts and the politicians on the Constitutional Drafting Committee (Iorgovan 1998). A handful of constitutional law professors, some not even members of the Committee, presumed to form a ‘shock team’ to re-draft, over a weekend in the offices of the Law Faculty in Bucharest, provisions on ‘judiciary power’ already adopted by the Committee, which they decided were ‘too prudent and minimal’ for allowing *inter alia* more involvement by representatives in judiciary governance than the academics preferred (Iorgovan 1998:74). A few MPs protested the result for introducing ‘new elements’ in the draft Constitution, and for the usurpatory manner in which this had been done. In the words of the President of the Committee: ‘When we [the academics] went back [to the Committee] a discharge of egos took place ... the politicians ... accused us of evading the Committee ...’ (Iorgovan 1998:74). The minutes of the Committee contain no evidence that at any point any of the MPs moved formally to hold anyone to account.

Cross-country evidence suggests oversight dormancy may be the norm everywhere. Once the basic template is in place, proposals for refinements have tended to come from the Ministry of Justice (Korbel 2010; Mimica 2010; Ministry of Justice of the Republic of Moldova 2012; Parau 2014). Civil servants in the CEE Ministries of Justice, however, rarely consider themselves qualified to draft laws; they too delegate to legal experts both domestic and foreign. Parliament’s oversight dormancy empowers the executive with discretion to choose the experts, and therewith the probable result, which can range from the Norwegian model to the Italian. Given that the judiciary template follows the Italian model (Parau 2012), which disempowers Parliament the most, it is a puzzle why MPs never exert oversight on the Justice Ministry’s choice of experts.

### Norm origination dormancy

Agenda-setting dormancy has become the norm across the CEE region, where most initiatives come from the Executive (Zubek 2011). This phenomenon is hardly peculiar to CEE, however, though its degree may be exceptional. It appears to have become a global norm, particularly in parliamentary systems (Rasch and Tsebelis 2011). Yet this was not always the case; in Britain both the Bill of Rights of 1689 and the Act of Settlement of 1701 originated with Parliament rather than with experts, and have proven their quality over time (Tarkow 1943; Lock 1989). Generally speaking the British parliament of the 17<sup>th</sup> century may be considered the *locus classicus* and ‘activist’ benchmark against which not only origination but also veto and oversight dormancy is to be gauged not only in CEE but elsewhere too. This shall remain beyond the scope of the present article.

In CEE parliaments have played a very limited role in fashioning the organic law of the judiciary in particular. Legislative initiatives concerning judiciary institutions rarely or never originate from the bottom-up with ordinary MPs. Indeed, in all the countries studied legislation originated with the Executive – nearly always the Ministry of Justice – and the transnational legal community. For example, the 2012 redesign that gave the preponderance within the Moldovan Judiciary Council over to judges came, typically, from the Ministry of Justice: ‘The government has the right to legislative initiative, and the Leader of Parliament, and evidently every MP, and political faction. In principle, however, the majority of the draft bills are proposed by the Executive. This is a simpler formula ...’ (Corochii 2012).

A similar pattern was observed in Romania (Parau 2012), and in Croatia. A Croatian lawyer-politician describes how legal norms actually originate:



We have elections ... [and] a majority party or coalition does win [and] form a government, but the Ministries' workup of all political decisions, great or small, is resolved ... outside the institutional framework. This means that ... a coterie of top party leaders at talks on party premises or on junkets or in genteel clubs ... make all the decisions. Then this political will ... is transposed by [the relevant] Ministries which draft legislation and the government ... will formally propose it, but the practical decision was actually made in a closed party forum. Then the draft legislation will reach the Parliament and Parliament will 'decide' [...] So what we have here [in Parliament] is a grand stage but ... the real decision was taken perhaps in a small chalet on a mountain-top. This is not peculiar to Croatia (Šeks 2011).

Scholars have already shown the dominance of party leaders of the governing coalition in CEE parliaments (Olson and Crowther 2002). Generally lawyers themselves, party leaders in CEE are the main subjects of transnational influence. The effectiveness of this influence is reflected in the words of the Speaker of the Croatian Parliament and party leader of the Croatian Democratic Union: 'I became acquainted with the Italian model when we first discussed the setting up of a Judiciary Council, but it was not just my idea, but the opinion of the entire circle of people who were fashioning the law' (Šeks 2011). Indeed, ultimately, these redesigns originate with the transnational norm entrepreneurs:

We respect ... this demand that at least half of the Judiciary Council members are judges elected by judges ... [which comes from] the European Charter on the Status of Judges and the Recommendations of the CoE. The Venice Commission recommends likewise ... yes I do understand that these are mere recommendations, but every single time we are told [by the CoE advisors], 'you have to comply with this, and this, and this'; and then when we are monitored [by them] we are told, 'you have not taken this recommendation into account; and this one, and this one'. The [transnational] experts who provided their expertise for [the recent redesign] have commented that it is not admissible for the Judiciary Council to be made of less than half of judges ... We did what they recommended us (author's interview with senior civil servant, Ministry of Justice in Moldova, Chişinău, 2 November 2012).

Most importantly, the transnational entrepreneurs are so influential because they are able to leverage the power of EU funding:

The EU has said to us recently that they will not give us money if Moldova does not produce a 'Strategy for the Reform of the Judiciary' ... we did craft it, and then they said, 'We will give you money to fund this strategy to reform the judiciary'. This must be the problem of small and poor countries ... which are desperate ... in addition to what is written in the Strategy, there are also all kinds of matrixes with certain conditions that we must meet ... which have not been implemented or ratified by the great states in Europe, yet they impose it ... on the small countries who aspire [to EU membership] ... this is the situation (author's interview with senior civil servant, Ministry of Justice in Moldova, Chişinău, 2 November 2012).

The foregoing evidences the chain (of command) through which norms of judiciary design actually originate in practice. Clearly, they do not originate with the domestic parliament or even Executive. This finding might be triangulated by quantitative studies that counted how many bills concerning judiciary governance originated domestically. Why exactly parliaments seem to avoid these issues needs further investigation.

## Conclusions

The template of judiciary institutions exported to CEE by transnational norm entrepreneurs has effected a redistribution of power, which is formally now complete. Ample scope to remake public policy has been conferred on Eastern courts which, however, lie still dormant to their own unexploited opportunities. Thus, the practical consequences of the template have yet to emerge, especially touching the judiciary below the final appellate level (but see Matczak, Bencze et al. 2010; Parau 2012).

The entrepreneurs might never have succeeded without parliamentary dormancy. Although some are less dormant than others, the puzzle remains why any parliament would be dormant at all. The Western literature on judicialization posits certain strategic motives as sufficiently explanatory; however, strategic motives may be found that weigh both for and against judicial empowerment. The puzzle is thus posed as to why those parliamentary veto points are dormant which embody the latter motives, and the mere fact that some politicians may have reasons to empower judges is insufficiently explanatory. Strategic motives surely animate politicians in CEE, but the strategies seem to differ radically from those in the West, being far more externally oriented. The normative question of whether dormant parliaments are truly representative of their constituents also needs to be addressed.

Having mapped out the various types of parliamentary dormancy in relation to judiciary governance design, it becomes clear that we need more research into both its causes and effects. The evidence already suggests several causes, amongst which are the high transaction costs of mobilising MPs and the steeply hierarchical party organisation in the East, by which the leaders can suppress the activity of ordinary backbenchers. Future research might enquire whether party leaders inside the Cabinet suppress both veto and oversight of judiciary matters. Perhaps the least explored cause is the domination of the party leadership itself by legal professionals deeply networked-in with their transnational community. These are questions to be taken up in the future.

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## References

- ALEXANDER, GEORGE and ANDREW BENNETT. 2005. *Case Studies and Theory Development in the Social Sciences*. Cambridge, MA: MIT Press.
- ALTER, KAREN J. 2009. *The European Court's Political Power: Selected Essays*. Oxford: Oxford University Press.
- BOBEK, MICHAL. 2008. The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries. *European Public Law* 14(1): 99-123.
- CENTRAL AND EAST EUROPEAN LAW INITIATIVE. 2002. Judicial Reform Index for Moldova. Retrieved 12 February 2008 from [www.abanet.org/ceeli](http://www.abanet.org/ceeli).

- COHEN, ANTONIN and MIKAEL R. MADSEN. 2007. Cold War Law: Legal Entrepreneurs and the Emergence of a European Legal Field (1945-1965), in Volkmar Gessner and David Nelken (eds), *European Ways of Law: Towards a European Sociology of Law*. Oxford: Hart Publishing, pp. 175-203.
- COHEN, ANTONIN. 2010. Legal Professionals or Political Entrepreneurs? Constitution Making as a Process of Social Construction and Political Mobilization. *International Political Sociology* 4(2): 107-123.
- COLLIER, DAVID, HENRY E. BRADY and JASON SEAWRIGHT. 2004. Sources of Leverage in Causal Inference: Toward an Alternative View of Methodology, in BRADY HENRY E. and DAVID COLLIER (eds), *Rethinking Social Inquiry*. London: Rowman and Littlefield Publishers Inc., pp. 161-199.
- COROCHII, NICHIFOR. 2012. President, Judiciary Council in Moldova. Author interview. Chisinau. 31 October.
- DELAZAY, YVES and BRYANT G. GARTH. 2002. *The Internationalization of Palace Wars. Lawyers, Economics, and the Contest to Transform Latin American States*. Chicago and London: The University of Chicago Press.
- DICEY, ALBERT VENN. 1897. *Introduction to the Study of the Law of the Constitution*. London ; New York: Macmillan.
- FINER, S. E. . 2011. The History of Government from the Earliest Times: Volume II: The Intermediate Ages. Retrieved 10 October 2012 from DOI: 10.1093/acprof:oso/9780198207900.001.0001.
- GINSBURG, TOM. 2002. Economic Analysis and the Design of Constitutional Courts. *Theoretical Inquiries in Law* 3(1): 1-38.
- GINSBURG, TOM. 2003. *Judicial Review in New Democracies*. Cambridge: Cambridge University Press.
- GLASER, BARNEY G. and AMSELM L. STRAUSS. 1967. *The Discovery of Grounded Theory: Strategies for Qualitative Research*. New Brunswick and London: Aldine Transaction.
- GOETZ, KLAUS H. and SIMON HIX, (eds). 2011. *Europeanised politics?: European integration and national political systems*. Ilford: Cass.
- GRABER, MARK A. 1993. The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary. *Studies in American Political Development* 7(01): 35-73.
- HIRSCHL, RAN. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, Mass. ; London Harvard University Press.
- HIRSCHL, RAN. 2008. The Judicialization of Politics, in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds), *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, pp. 119-142.
- INGRAM, MATTHEW C. 2011. Crafting Courts in New Democracies: Ideology and Judicial Council Reforms in Three Mexican States. *Comparative Politics*, 4(4): 439-458.
- IORGOVAN, ANTONIE. 1998. *Odiseea elaborării Constituției*. Târgu Mureș: Vatra Românească.
- KECK, MARGARET E. and KATHRYN SIKKINK. 1998. *Activists Beyond Borders: Advocacy Networks in International Politics*. Ithaca: Cornell University Press.
- KHMELKO, IRINA S. and DANIEL J. BEERS. 2011. Legislative Oversight in the Ukrainian Rada: Assessing the Effectiveness of Parliamentary Committees *The Journal of Legislative Studies* 17(4): 501-524.
- KING, GARY, ROBERT O. KEOHANE and SIDNEY VERBA. 1994. *Designing Social Inquiry. Scientific Inference in Qualitative Research*. Princeton: Princeton University Press.

- KOMAREK, JAN 2010. Former legal secretary to the President of the Czech Constitutional Court (2009-2010). Author interview. Prague. 13 April.
- KORBEL, FRANTIŠEK 2010. Deputy to Minister of Justice (2007-9). Author interview. Prague. 12 April.
- KÜHN, ZDENĚK. 2012. Judicial Administration Reforms in Central-Eastern Europe, in Anja Seibert-Fohr (eds), *Judicial Independence in Transition*. Heidelberg: Springer, pp. 603-619.
- LINEK, LUKÁŠ and ZDENKA MANSFELDOVÁ. 2007. The Parliament of the Czech Republic, 1993-2004. *The Journal of Legislative Studies* 13(1): 12-37.
- LOCK, GEOFFREY. 1989. The 1689 Bill of Rights. *Political Studies* 37(4): 540-561.
- MAGALHÃES, PEDRO C. 1999. The Politics of Judicial Reform in Eastern Europe. *Comparative Politics* 32(1): 43-62.
- MARINOVIĆ ANTIČEVIĆ, INGRID. 2011. Vice-President of the Social Democratic Party (2004 - 2006); Minister of Justice (2001 - 2003). Author interview. Zagreb. 26 January.
- MATCZAK, MARCIN, MATYAS BENCZE, et al. 2010. Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland. *Journal of Public Policy* 30(1): 81-99.
- MCADAM, DOUG, MCCARTHY, JOHN D. and ZALD, MAYER N. 1996. *Comparative perspectives on social movements: political opportunities, mobilizing structures, and cultural framings*. Cambridge: Cambridge University Press.
- MCCUBBINS, MATHEW D. and THOMAS SCHWARTZ. 1984. Congressional Oversight Overlooked: Police Patrols versus Fire Alarms. *American Journal of Political Science* 28(1): 165-179.
- MILL, JOHN STUART. 1975 [1861]. *Considerations on Representative Government*. Oxford: Oxford University Press.
- MIMICA, NEVEN. 2010. MP, Social Democratic Party, and Chairman of the Committee for European Integration. Author interview. Zagreb. 13 May.
- MINISTRY OF JUSTICE OF THE REPUBLIC OF MOLDOVA. 2012. Reform of the Judiciary System. Retrieved 10 October 2012 from <http://www.justice.gov.md/category.php?l=ro&idc=155&nod=1&>.
- NICOL, DANNY (1999). The legal constitution: United Kingdom parliament and European court of justice. *The Journal of Legislative Studies* 5(1): 135-151.
- OBERTO, GIACOMO 2010. Judge, Court of Appeal Turin; expert of the Council of Europe in the field of legal co-operation with and advice to CEE; Deputy Secretary General of the International Association of Judges Author interview. Turin. 4 October.
- OLSON, DAVID M. and W. CROWTHER. 2002. *Committees in Post-Communist Parliaments*. Columbus, Ohio: The Ohio University Press.
- OPEN SOCIETY INSTITUTE. 2001. Monitoring the EU Accession Process: Judicial Independence in Romania. Retrieved 12 March 2008 from [http://www.eumap.org/reports/2002/judicial/international/sections/overview/2002\\_j\\_05\\_overview.pdf](http://www.eumap.org/reports/2002/judicial/international/sections/overview/2002_j_05_overview.pdf).
- PARAU, CRISTINA E. 2010. East Side Story: How Transnational Networks Contested EU Accession Conditionality. *Europe-Asia Studies* 62(9): 1527-1554.
- PARAU, CRISTINA E. 2012. The Drive for Judicial Supremacy in Central and Eastern Europe, in Anja Seibert-Fohr (eds), *Judicial Independence in Transition*. Heidelberg: Springer, pp. 619-667.
- PARAU, CRISTINA E. 2013. Romania's Transnational Constitution: A Tradition of Elite Learning and Self-empowerment in Denis Galligan and Mila Versteeg (eds), *The*

- Social and Political Foundations of Constitutions*. Cambridge: Cambridge University Press, pp. 497-531.
- PARAU, CRISTINA E. 2014. Explaining Judiciary Governance in Central and Eastern Europe: External Incentives, Transnational Elites and Parliament Inaction, *Europe-Asia Studies* (forthcoming).
- PARLAMENTUL REPUBLICII MOLDOVA. 2012. Dezbateri parlamentare. Sesiunea a iv-a ordinară - iulie 2012. Ședința din ziua de 5 iulie 2012. Chisinau, Parlamentul Republicii Moldova.
- PARLAMENTUL ROMÂNIEI. 2003. *Dezbateri generale asupra Propunerii legislative de revizuire a Constituției. Ședința Camerei Deputaților din 18 iunie 2003*. București: Parlamentul României.
- PERILLI, LUCA 2011. Judge, Court of Verona; and European Commission TAIEX expert on judiciary reform. Author interview. Verona. 16 April.
- PIANA, DANIELA. 2007. Unpacking Policy Transfer, Discovering Actors: The French Model of Judicial Education Between Enlargement and Judicial Cooperation in the EU. *French Politics* 5, 33-65.
- PIANA, DANIELA. 2009. The Power Knocks at the Court's Back Door: Two Waves of Postcommunist Judicial Reform. *Comparative Political Studies* 42(6): 816-840.
- PIANA, DANIELA. 2010. *Judicial Accountabilities in New Europe*. Farnham: Ashgate.
- RAMSEYER, MARK J. 1994. The Puzzling (In)Dependence of Courts: A Comparative Approach. *The Journal of Legal Studies* 23(2): 721-747.
- RASCH, BJØRN E. and GEORGE TSEBELIS. 2011. *The Role of Governments in Legislative Agenda-Setting*. London and New York: Routledge.
- REKOSH, EDWIN. 2002. *Emerging Lessons from Reform Efforts in Eastern Europe*. Washington DC: Office for Democracy and Governance, U.S. Agency for International Development.
- SACRISTE, GUILLAUME and ANTOINE VAUCHEZ. 2007. The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s. *Law & Social Inquiry* 32(1): 83-107.
- SADURSKI, WOJCIECH. 2008. *Rights before Courts. A Study of Constitutional Courts of Post-Communist States of Central and Eastern Europe*. Dordrecht: Springer.
- SADURSKI, WOJCIECH. 2012. *Constitutionalism and the Enlargement of Europe*. Oxford: Oxford University Press.
- SCHARPF, FRITZ WILHELM. 1997. *Actor-Centered Institutionalism in Policy Research*. Boulder, Colo: Westview Press.
- SCHWARTZ, HERMAN 2000. *The Struggle for Constitutional Justice in Post-Communist Europe*. Chicago: University of Chicago Press.
- SEIBERT-FOHR, ANJA, (ed.). 2012. *Judicial Independence in Transition*. Heidelberg: Springer.
- ŠEKS, VLADIMIR. 2011. Attorney (1972-1981); main drafter of the 1991 Constitution of Croatia; Deputy Speaker, Croatian Parliament (2003-8). Author interview. Zagreb. 26 January.
- SHAPIRO, MARTIN. 2002. Political Jurisprudence, in Martin Shapiro and Alec Stone Sweet (eds), *On Law, Politics & Judicialization*. Oxford: Oxford University Press, pp. 1-39.
- SMITHEY, SHANNON ISHIYAMA and JOHN ISHIYAMA. 2000. Judicious Choices: Designing Courts in Post-Communist Politics. *Communist and Post-Communist Studies* 33, 163-182.
- STANOIU, RODICA. 2009. Romanian Justice Minister (2001-2004). Author interview. Bucharest. 10 October.
- STONE SWEET, ALEC 2000. *Governing with Judges*. Oxford: Oxford University Press.

- TARKOW, I. NAAMANI. 1943. The Significance of the Act of Settlement in the Evolution of English Democracy. *Political Science Quarterly* 58(4): 537-561.
- THATCHER, MARK and ALEC STONE SWEET. 2003. Theory and Practice of Delegation to Non-Majoritarian Institutions, in Mark Thatcher and Alec Stone Sweet (eds), *The Politics of Delegation*. Portland, London: Frank Cass, pp. 1-23.
- TSEBELIS, GEORGE. 2002. *Veto Players: How Political Institutions Work*. Princeton: NJ: Princeton University Press.
- VAUCHEZ, ANTOINE. 2008. The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda). *International Political Sociology* 2, 128-144.
- VAUCHEZ, ANTOINE. 2010. The Making of the European Union's Constitutional Foundations: The Brokering Role of Legal Entrepreneurs and Networks, in Wolfram Kaiser, Brigitte Leucht and Michael Gehler (eds), *Transnational Networks in Regional Integration. Governing Europe 1945-1983*. Basingstoke: Palgrave Macmillan, pp. 108-129.
- VOIGT, STEFAN and ELI M. SALZBERGER. 2002. Choosing Not To Choose: When Politicians Choose To Delegate Powers. *Kyklos* 55(2): 289-310.
- WHITTINGTON, KEITH E. 2005. "Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court. *The American Political Science Review* 99(4): 583-596.
- ZUBEK, RADOSLAW. 2011. Negative Agenda Control and Executive-Legislative Relations in East Central Europe, 1997-2008. *The Journal of Legislative Studies* 17(2): 172-192.

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## NOTES

<sup>i</sup> If magistrates do not hold the majority of seats on a CC then arguably such a court is not properly counted as part of the judiciary. In CEE the politicians continue to dominate CCs but the drive is on to change that in accordance with the template (Parau 2014).

<sup>ii</sup> More than one hundred such interviews were conducted between 2008 and 2012, yielding a wealth of original data. For reason of space only a few of these interviews could be cited in sufficient length. Interview transcripts are available upon request.

<sup>iii</sup> in practice the governance of the judiciary operates as if a Judiciary Council actually exists (Kühn 2011).

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