2. Some Conditions for the Success of Constitutional Courts: Lessons from the U.S. Experience

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In recent years we have been experiencing a global flourishing of constitutional courts wielding the legal authority to declare legislative and executive acts unconstitutional. Such judicial review has flourished even in nations whose legal culture was long thought to be antithetical to it such as France. It occurs even in a few non-Western nations such as Korea, India and Japan. It occurs in Israel which does not have a written constitution. It occurs in trans-national settings such as the European Union and the European Convention on Human Rights system. It has now appeared in states that have emerged from former Soviet domination.

Yet very clearly to encounter the legal forms of judicial review is not necessarily to encounter successful judicial review, granting that in this instance success is difficult to define or measure. My definition of success is a purely institutional one involving whether a constitutional court has achieved acquiescence in its judgments by other public and private institutions, organizations and individuals. I do not concern myself at all with issues of the goodness or justice of the policies pursued by such courts. At a minimum successful judicial review would require that constitutional judgments are routinely, if not always, obeyed by both governmental and private actors, and that relatively significant acts of government are judicially invalidated on constitutional grounds, at least occasionally. Measurement difficulties occur along a number of dimensions. Even constitutional courts that are usually considered highly successful have experienced extended periods of massive disobedience to some of their decisions even while being routinely obeyed as to others. The U.S. Supreme Court, for instance, encountered long resistance by autonomous local government authorities and even state governments to its school prayer and desegregation decisions. Its judicially pronounced national code of police conduct is frequently evaded by police perjury and other misconduct. Yet that code generally has been effective in changing police conduct; school prayers are not said in many places where they would be in the absence of Supreme Court decisions; legally sanctioned

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apartheid has disappeared even if many American schools have student populations consisting entirely of minority children.

Along another dimension it is possible at least in theory to imagine successful review systems in which only specific applications of law to particular individuals are constitutionally invalidated rather than statutes themselves. Few would argue, for instance that German administrative courts are less successful at administrative, as opposed to constitutional, review than are French administrative courts because one may only quash individual applications while the other can also quash entire administrative rules.³

Finally and most importantly is the problem of anticipated reaction. The French constitutional court now engages in abstract, pre-enactment review of virtually every important French statute. In that sense it would appear to be among the most successful judicial review courts in the world. Yet it has actually struck down very, very few French legislative acts. Should we conclude that its review powers largely are a sham? There is a substantial amount of evidence that so few statutes are struck down precisely because the French Assembly is so mindful of the Constitutional Council's pronouncements, and the Council so explicit in stating its future intentions, that French statutes are rigorously tested constitutionally before the Assembly approves them by what amounts to a constitutional dialogue between the Assembly and the Council.⁴ Similarly at the level of administrative judicial review, British judges today claim to be engaging in rigorous review. When it is pointed out to them that, except in immigration matters, there have been only a handful of instances in which they have invalidated decisions of central as opposed to local government authorities, their response is that the ministries are so mindful of and obedient to judicial decisions that they almost never make unlawful decisions.⁵ In these circumstances a certain amount of skepticism about the level of real judicial power necessarily arises.

The clearest example of the form of judicial review not necessarily corresponding with reality occurs not even in the old Soviet Union but in the continuing practice in nearly all of Latin America. In most Latin American states the writ of amparo or its equivalent provides every citizen direct access to the courts to complain of any unconstitutional act of government even minimally imposing injury on that individual, and courts have broad powers of constitutional review. Yet in reality constitutional judicial review is a dead letter in most of Latin America even in those countries where thousands of writs of amparo are filed

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every year. It remains very questionable whether even such highly esteemed constitutional courts as that of Japan ought to be regarded as successful.\footnote{See Lawrence Beer, \textit{Constitutional Case Law of Japan, 1970–90} (Seattle: University of Washington Press 1996).}

Along a final dimension even a constitutional court that manages to bring off major interventions in its polity's political system or public policies may be deemed substantively unsuccessful, that is to have moved its policy in wrong directions. Thus the Mongolian Supreme Court has fundamentally altered what had been intended to be a parliamentary system of government into one in which cabinet officers cannot serve in Parliament. This judicial incursion may have gravely reduced the chances for success of the whole Mongolian constitutional system.\footnote{Thomas Ginsberg, \textit{Growing Constitutions: Judicial Review in New Democracies} (Dissertation, University of California, Berkeley 1999).} Hungarian judicial interventions in the nation's international economic arrangements have been extremely popular, and indeed may be the basis for what is widely seen as the great success of constitutional judicial review in Hungary,\footnote{See László Solyom, 'The Hungarian Constitutional Court and Social Change', \textit{Yale Journal of International Law} 19 (1994), pp. 223–237.} but they may have to be almost entirely evaded if Hungary is to be admitted to the European Union. American scholars are in substantial agreement that the U.S. Supreme Court has been quite successful in fostering free trade among the American states\footnote{Vincent Blasi, 'Constitutional Limitations on the Power of State to Regulate Goods in Interstate Commerce', in Terrance Sandalow and Eric Stein, eds. \textit{Courts and Free Markets} (Oxford: Oxford, University Press 1982), pp. 247–281.} but are in bitter disagreement about whether other Supreme Court interventions or refusals to intervene in economic policy matters have been good or bad for the American economy.\footnote{See Martin Shapiro, 'The Supreme Court's "Return" to Economic Regulation', \textit{Studies in American Political Development} (New Haven: Yale University Press 1986) vol. 1, pp. 91–141.} Of course even a generally highly successful constitutional court may experience marked lack of success on a particular question at a particular time. Thus clearly the U.S. Supreme Court hoped to end political controversies over abortion by turning the issue into one of constitutional law and resolving it by a constitutional compromise, the famous trimester system in which pro-abortion forces win the first three months of pregnancy, anti-abortion forces the last three and the middle three remain indeterminate. Even such an exactly 50–50 judicial compromise served only to exacerbate rather than end political controversy. Clearly the Court as an institution would have been better off if it had stayed entirely out of the controversy.

Even with all this said, however, there clearly has been enough successful constitutional judicial review in enough places that we may begin to speculate on the causes and conditions of success. Before doing so in general, however, it
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