



Constructing courts after communism: Reevaluating the effect of electoral uncertainty



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ABSTRACT

A prominent view in political science is that electoral uncertainty leads institutional designers to prefer independent and powerful courts. Yet few scholars have examined the design of constitutional courts systematically across Eastern Europe and those who have employed the results of elections held *after* constitutions were adopted to estimate the actors' perceptions of the balance of power *prior* to the court's design. This work reevaluates the effects of electoral uncertainty in post-communist Europe using more appropriate data and fuzzy-set qualitative comparative analysis to outline the different causal configurations linking electoral uncertainty to the initial judicial empowerment.

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With the collapse of the Soviet Union, historical shortcomings in the rule of law across the region have become apparent, including their ability to often impede economic and political developments. The absence of strong, autonomous judiciaries increased the prospects for political corruption, which has siphoned scarce resources away from public coffers and undermined public faith in democratic governance. These developments have spurred single case analyses of the origins of post-communist courts (Sabalius, 1996; Schiemann, 2005; Thorson, 2004). However, since the design of judiciaries across the post-communist states of Eastern Europe and the former Soviet Union vary considerably (Epstein and Shvetsova, 2001; Schwartz, 2000), the region represents potentially fertile ground for cross-national work on judicial design.

This work reconsiders the effects of regime transitions and the electoral marketplace on the design of constitutional courts across post-communist Europe. The question of *initial* court design is conventionally related to, but not treated the same as, the issue of judicial empowerment. Trochev (2008) examines how the latter, a dynamic and nonlinear process, evolves over time with both judges and politicians creating a court that behaves quite differently in practice than one might expect, given what exists on paper. So although constitutional provisions promoting judicial independence are common in transitioning states, their quality and effectiveness vary substantially. Judges may not operate independently even when the formal relationships that exist between the judiciary and other political institutions permit independent behavior. Likewise, judges may defy the odds and act independently where the formal structures enabling such autonomy are absent (Helmke, 2002, 2005).

Still, Russell (2001: 8) submits that emerging democracies are better off making constitutional provisions for judicial independence than not, since one has little influence over the minds of individual judges. Similarly, Dodson and Jackson (2001: 255) argue that the reforms that are most likely to make a difference are structural ones, particularly methods of selection that limit partisan intrusion into judicial appointments, relatively long tenures, and legal safeguards against retaliation for unpopular decisions (*ibid*: 256–7). From this perspective, then, questions of institutional design represent important first steps toward judicial empowerment. These decisions set the initial institutional parameters for judicial behavior. They influence such aspects as whether judges or other actors must spend their time and effort altering judicial

institutions and by what means—whether by lobbying politicians for change, developing distinct court customs and norms, or interpreting the constitution in ways that expand the court’s power and influence (Woods, 2008).

This work reconsiders the argument that the uncertainty associated with competitive elections represents a (if not, *the*) primary explanation for the adoption of institutional features commonly associated with judicial independence. Previous studies disagree about the effects of electoral uncertainty, particularly in Eastern Europe. At the same time, present empirical analyses insufficiently capture the level of electoral uncertainty that exists across these countries. Thus, while parsimonious, the electoral marketplace explanation rests on weak empirical foundations.

1. Judicial design and electoral uncertainty

According to Holmes (2003: 20), most governments, past and present, resist adopting institutions that promote the rule of law because: “they anticipate that the returns to making their behavior predictable are lower than the returns to making it unpredictable.” This perspective implies that few politicians have an interest in creating a constitutional court with enough independence and/or power to hold them accountable. Yet, such courts do emerge, which suggests that under certain conditions the rulers, or prospective rulers, believe that they can benefit from the predictability that Holmes identifies. But what are those conditions? Shapiro and Stone Sweet (2002: 142) offer an answer. They argue that when a constitution is designed, politicians cannot negotiate rules that govern all possible contingencies. Therefore, since the interests of the parties, and even the parties themselves, will evolve and change over time, mechanisms, like judicial review, ensure that constitutional bargains and commitments are made during the development of a constitution’s founding criteria. Yet, this explanation implies that institutions promoting judicial independence should be the norm rather than the exception.

Ramseyer (1994) tackles variation in the concepts of judicial institutions more directly. To shed light on why some constitutional designers in new democracies opt to create more independent courts when others do not, the author focuses on the varying predictability of elections in new democracies. He argues that where competitive or semi-competitive elections are expected to be held only once, players do not anticipate a large enough reward to adopt a “neutral” judiciary. Instead, the logical choice for any player is to defect and design courts that can be used to preserve or enhance their political positions. According to Ramseyer, judicial independence only emerges as a possibility when politicians designing the judiciary believe that 1) competitive elections will continue and 2) they will not be able to win these elections indefinitely. Where elections are perceived as part of an iterative game with uncertain outcomes, independent courts emerge as politicians seek to establish bulwarks capable of protecting prospective losers from victors who otherwise might infringe on their rights to oppose the government and compete for office down the road.

Like Ramseyer, Smithey and Ishiyama (2000) and Ginsburg (2003) hypothesize that higher levels of electoral uncertainty should yield more powerful, independent courts because more political actors will see these institutions as capable of protecting minority interests. In addition, Smithey and Ishiyama consider whether social and economic factors may shape the development of judicial power. In their empirical analysis, Smithey and Ishiyama find that the only variable to systematically influence judicial design across the post-communist space is the level of electoral uncertainty. The surprise, however, is that the relationship between the number of effective political parties in the legislature—their indicator of electoral uncertainty—and the power and independence of post-communist constitutional courts is *negative*. In other words, the formal institutions of the new constitutional courts were more indicative of weaker and less independent bodies where party fragmentation was higher. Ginsburg (2003) takes a more sweeping approach to the question, employing quantitative and qualitative evidence from electoral democracies in Asia, Eastern Europe and Latin America to support his “insurance policy” theory. While the theory corresponds to Smithey and Ishiyama’s original, but uncorroborated “bet hedging” expectation, his findings contradict Smithey and Ishiyama’s. That is, his results suggest that institutional designers did systematically create more independent and more powerful constitutional courts where electoral uncertainty was higher.

While the body of evidence that Ginsburg provides is impressive, the presence of rival findings in the literature should give scholars some pause before accepting the electoral uncertainty or insurance policy theory wholesale. Smithey and Ishiyama, in particular, suggest that constitutional designers in countries with highly fragmented party systems may be less inclined to adopt an additional veto point in the form of a strong judiciary than those in countries with less fragmented party systems.¹ More recently, Popova (2010) contends that differences in regime type may shape the relationship between political competition and judicial independence. According to Popova’s strategic pressure theory, the relationship between competition and judicial independence in transitional settings may be the opposite of what one would expect in consolidated democracies. In electoral democracies, in particular, “political competition (a) increases the benefits to incumbents of dependent courts, (b) fails to increase the costs of exerting pressure on the courts, and (c) increases the number of court cases which outcomes matter to incumbents” (*ibid*: 1203). In such contexts, then, incumbents who are electorally vulnerable are more likely to use the courts in a politicized manner. Although Popova focuses on judicial output rather than on the initial design of the constitutional court, lessons from the former seem relevant to the latter: The promise of continued elections may not always be sufficient motivation for the design of courts with the formal trappings of independence.

¹ They also note that perhaps the fluidity and uncertainty of electoral politics in Eastern Europe led party leaders to hedge against limiting their own power in the unlikely event of their own electoral victory.

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