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A COMMON LAW PERSPECTIVE ON THE SUPREME COURT AND ITS FUNCTIONS

The University of Warsaw is to be commended for focusing attention on the role of a supreme court, for that can be a critical component of a court system and, more generally, critical also to the fair functioning of a democratic government (and to others, no doubt). It makes sense to start out such a conference considering the roles a Supreme Court can play in a judicial system, and also to approach that question with an eye to the somewhat divergent attitudes toward the judicial role of common law and civil law systems. Those differences may mean a lot for the role of such a court and for the organization of the Court, a topic to be taken up by the next panel. I hope I will not trespass too much on topics to be addressed by others in my presentation.

I will argue that questions of design and function – while important – probably are not more important than more elusive questions about institutional status and evolution, something one could refer to as "legal culture." So we must approach our analysis with considerable humility. Particularly here in the countries of the former Warsaw Pact, where constitutional and democratic institutions have taken root over the last quarter century, it is important to appreciate the permutations of that sort of development.

I am here as the representative of the common law approach to the function of a Supreme Court, and will begin by cautioning that in some ways the common law v. civil divide is not entirely informative in regard to procedure, but that it is highly important in terms of the role of judges in "declaring" law. I will also speak mainly about the Supreme Court of my country, for it is a distinctive institution. That said, the US situation offers an example of functions a court may have that differs from the function of courts in many other judicial systems, and those differences can importantly be said to relate to its role in a common law system. At the same time, I will regard such questions as whether the Supreme Court should have the power of judicial review of legislation as somewhat background. In the US, as is well known, we have had such review since *Marbury v. Madi-*

son,[1] but that 1803 decision did not immediately place a stamp on our Court that remained unchanged for the ensuing 200 years.

I. DIVIDING THE WORLD INTO "COMMON LAW" AND "CIVIL LAW" SPHERES

Below I will emphasize that a common law tradition says a lot about the function of a Supreme Court as it says a lot about the function of courts in general. But as I've emphasized before,[2] that divide does not stand up to close scrutiny as a compelling clue to procedural arrangements. So I start with a caution – not all common law countries are alike in terms of the function of their Supreme Court – but end up affirming that there seems a significant divide in terms of the role of judges in making law, which can be at its most important in relation to the functioning of the supreme court in such a system.

One approach to the function of a supreme court is to recognize a different division among national judicial systems. Many report that there are two main prototypes – the US version with diffused constitutional review, and the centralized constitutional court with an "abstract" authority to pronounce on constitutional matters but no other role in the judicial system. That oracular alternative vision of a Supreme Court is most associated with Hans Kelsen,[3] and that vision has been cited as the model used by many European constitutional courts, not just Austria's. The distinction remains an organizing technique for scholars.[4] To some measure, it may correspond to the common law/civil law divide.

But neither the common law camp nor the civil law camp is monolithic. The US has had a Supreme Court almost from the outset. The UK, on the other hand, has formally had such a court only since 2005, less than a decade, and at least some notable observers were quite cool to its creation.[5] And the UK court is not equipped with the powers the US Supreme Court announced in *Marbury* because it cannot invalidate an Act of Parliament.[6] Australia, on the other hand, has had

[1] 5 US 137 (1803).

[2] See R. Marcus, *Exceptionalism and Convergence: Form versus Content and Categorical Views of Procedure*, (in:) J. Walker, O. G. Chase (eds.), *Common Law, Civil Law, and the Future of Categories* (2010), at 521.

[3] See generally M. Cappelletti, *Judicial Review in the Contemporary World* (1971).

[4] See, e.g., A. Gamper, F. Palermo, *The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review in Comparative Perspective*, (in:) A. Harding, P. Leyland (eds.), *Constitutional Courts: A Comparative Study* (2009), at 31.

[5] See, e.g., N. Andrews, *The United Kingdom's Supreme Court: Three Skeptical Reflections Concerning the New Court*, 9 "Utah Law Review" (2011).

[6] Id. at 10 ("The Supreme Court lacks the power to invalidate an Act of Parliament").

a Supreme Court since the beginning of the 20th century, although not in a system with separation of powers comparable to the US version.[7] But the Australian court does function in a legal setup that involves somewhat independent judiciaries of various Australian states, more akin to the US situation. In short, being a "common law" jurisdiction does not magically answer important questions addressed in this conference.

The "civil law" jurisdictions seem, from a distance, not to be entirely uniform either. Some, such as Austria, evidently adopted the pristine version of a constitutional court of the sort Professor Kelsen advocated. Speaking in the civil law context, however, scholars have observed that "French constitutional review is quite unique."[8] A majority of the members of the distinctive French court have political backgrounds, including all former presidents of the Republic, and some have no formal professional legal training.[9] Moreover, this court "is not situated at the summit of a hierarchy of judicial or administrative courts. In that sense it is not a supreme court in the meaning of the Supreme Court of the US."[10]

But another difference needs mention here. In many civil law jurisdictions, it seems that the customary path to judicial office, and to rising in the judiciary, is a careerist one separate from the path of the practising bar. The route to promotion involves satisfying and hopefully impressing those in higher positions in the judicial hierarchy. American lawyers come to the bench in a very different way: "Because American judges sit on courts of widely varying types and come from a variety of backgrounds and experiences, it is difficult to generalize about them. Two generalizations, however, are possible. First, judges in the United States initially come to the bench from other lines of legal work and after a substantial number of years of professional experience. Second, once on the bench they do not, generally, follow a promotional pattern through the ranks of the judiciary. In these respects, American judges differ from judges in the common-law and civil-law systems in other parts of the world."[11]

Again, the US experience is distinct from that of common law systems elsewhere and civil law systems. In this instance, that distinctiveness might erode the power over American judges wielded by *any* appellate court, including a Supreme Court. Indeed, Professor Dalton suggested 30 years ago that the typical American trial court judge might not care much about whether she was affirmed or reversed.[12]

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[7] See T. Stevens, G. Williams, *A Supreme Court for the United Kingdom? A View from the High Court of Australia*, 24 Legal Studies 188 (2004).

[8] M-C Ponthoreau, F. Hourquebie, *The French Conseil Constitutionnel: An Evolving Form of Constitutional Justice*, (in:) Harding & Leyland, supra note 4, at 81, 82.

[9] Id. at 86-87.

[10] Id. at 95.

[11] D. Meador, American Courts 49 (2000).

[12] H. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 "The Yale Law Journal" 62 (1985). See generally, R. L. Marcus, *Appellate Review in the Reactive Model: The Example of the*

But an overarching distinction between the common law and the civil law versions of the judicial role seems to outweigh all the messiness of the distinction noted above. In civil law systems, "the role and function of the judiciary . . . were rigidly circumscribed. The judge's role was a subservient and bureaucratic one: he was required to verify the existence and applicability of statutory norms to a case at hand . . . To recognize a judge-made law in this system was to diagnose pathology."[13]

This is a key point Professor Cappelletti emphasized in his analysis of diverging attitudes toward judicial review, tracing the civil law view to the French Revolution. He pointed to "the revolutionary legislators' profound distrust of the judges," which led to an effort "to prevent the judicial organs from interfering in the legislative sphere and to ensure that they apply only the letter of the law. This was a phase in the development of the concept which soon resulted in the great French codification, and concept that the entire body of law could and should be contained in written instruments."[14]

Things were markedly different in England, Professor Cappelletti explained, because "the English judiciary . . . generally enjoyed the respect of all as a protector of individuals," with the result that "the English legal tradition had often tended to assign a subordinate role to the legislative function of King and Parliament, holding that the law was not created but ascertained or declared. Common law was fundamental law, and, although it could be complemented by the legislator, it could not be violated by him."[15] As we shall see in Part III, this difference means that being a **court** in a common law system carries with it much broader authority. A **supreme** court in such a system is, as a result, much more supreme.

II. THE DISTINCTIVE HISTORY OF THE US SUPREME COURT AND THE US FEDERAL SYSTEM

It may be true, as Lord Bingham of Cornhill said in 2002, that the US Supreme Court is "the world's best-known supreme court."[16] But that does not mean it was inevitable it would attain that status from the outset, or that the basic

American Federal Courts, (in:) A. Uzelac, C. H. van Rhee (eds.), *Nobody's Perfect: Comparative Essays in Appeals and Other Means of Recourse Against Judicial Decisions in Civil Matters* (2014) at 105.

[13] A. Stone, *Abstract Constitutional Review and Policy Making*, (in:) D. W. Jackson, C. Neal Tate (eds.), Comparative Judicial Review and Public Policy (1992) at 41, 42.

[14] Cappelletti, supra note 3, at 13.

[15] Id. at 36–37.

[16] Lord Bingham of Cornhill, A New Supreme Court for the United Kingdom, The Constitution Unit 12–13 (May 1, 2002), quoted in M. Fennell, *Emergent Identity. A Comparative Analysis of the*