Schriften zur Rechtsgeschichte

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Control of Supreme Courts in Early Modern Europe

Edited by

Ignacio Czeguhn, José Antonio López Nevot and Antonio Sánchez Aranda

Duncker & Humblot · Berlin

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Bibliographic information of the German national library

The German national library registers this publication in
the German national bibliography; specified bibliographic data
are retrievable on the Internet about http://dnb.d-nb.de.

Typesetting: Konrad Triltsch GmbH, Ochsenfurt
Printing: Meta Systems Publishing & Printservices GmbH, Berlin
Printed in Germany
ISSN 0720-7379
ISBN 978-3-428-14808-0 (Print)
ISBN 978-3-428-54808-8 (E-Book)
ISBN 978-3-428-84808-9 (Print & E-Book)

Printed on no aging resistant (non-acid) paper
according to ISO 9706 ♾

Internet: http://www.duncker-humblot.de

Preface

When the editors first contemplated a meeting in Berlin and Granada on the subject of the control of the high courts in the early modern period, we realized that even the terminology may include a multitude of terms and instruments as control. For this reason, the meetings – originally planned as a congress – turned into workshops. This shall serve as a broad exchange of views on what control is and could be. This endeavor was supported by the talks given by the participants, to whom I would like to offer my gratitude for attending.

In other words these meetings shall prepare a future project that will deal with the control of the courts in the early modern period and shall do so in a European comparative way. Please notice that the term European in this case also refers to the colonies of European countries.

The following thoughts are intended as ideas, without claiming to be complete. They shall only provide a first introduction to the matter. Concerning the term control which is defined as the supervision or review of a case, affair or person and so a means of power or authority over someone or something. At the time, the control of the highest courts in Germany concerning ordinary courts and administrative courts is ultimately exercised by the Constitutional Court (*Verfassungsgericht*). According to public opinion, this system is working relatively well, as the result of a survey shows: 69 % of Germans trust their courts. This is the result presented by the European Commission.[1] The high regard of the courts is clearly illustrated by a comparison: only the police (74 %) enjoy a better reputation, whereas the federal government (37 %) and the administration departments are far behind (41 %).

But in what way is control related to judicial independence? The principle in Germany is that disciplinary and criminal law measures are sufficient. There exists no control by an ombudsman. Certain states of the EU use the method of an Ombudsman, who can intervene in special cases (Slovenia), but is mostly restricted to disciplinary actions against the judge, cases of undue delay or evident abuse of authority. Another model of the Ombudsman is the Swedish and Finnish with the authority to review the actions of the judicial authorities. The Polish Reviewer for Civil Rights as far as cassation or review in cases of obvious mistakes.

Ultimately this concept is a result of court constitution orders from the 19th century. Those declared the system of judicial independence, strongly influenced by the French Revolution. In Germany it has been made into law in form of the GVG in 1879.

[1] Standard Eurobarometer 87 – Welle EB87.3 – TNS opinion & social, Mai 2017.

In addition, how was the situation in the early modern period? There were various control mechanisms. In the German Holy Empire the so called "Visitation" was control by recourse to the Reichstag, by *vota ad imperatorem*, by the president of the court, by the *Geheimrat*, by the reigning ruler, by legal means, forbidden supplications by the parties or in strategies relating to the composition of the bench with questions of religious parity. The visitations were part of an external control. Visit from a superior with the authority to supervise to review the situation or check the legal postition. In the early modern period, in the Holy Roman Empire, known as the Reichskammergericht/Reichshofrat and in Spain at the Audiencias y Chancillerias. At the *RKG*, the estates had the possibility to review the court; this was discontinued in 1588 due to religious disputes. The extraordinary visitations took place in 1707 – 1713 and 1767 – 1776.

Another form of external control was the Veedor in the Chancilleria in Spain. His job was to control the compliance with ordinances. He was a member of the Royal Court, which used the Veedor to exercise control over the Chancilleria. In France, we know the enregistrement and the lit de justice as instruments of control.

Examples of an internal control system is the so called Multador in the Chancilleria: he was tasked with the compliance of the ordinances and to assist the president in control related duties. A member of the Chancilleria itself is called a multador, so there was no external individual.

But there is also the way of exercising control by procedural law. Those included exercising control by law through rules and laws of procedures or court constitutional order. Legal means could be the Segunda suplicación in Castile, depend by paying of 1500 gold wins. The "privilegia de non appelando" and the "privilegia de non evocando" are also ways of control without exercising control.

Lastly there is Political control. It is possible to exercise control by exploiting various institutions and benefit from their inter-institutional competition founded in the ambiguity of their political/social competences. In this volume we present the results of the two meetings in Berlin and Granada. We hope, that the investigation on this field will continue in the future.

Berlin/Granada, December 2017

Ignacio Czeguhn,
José Antonio López Nevot and
Antonio Sánchez Aranda

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I. Meeting Berlin

Watching the Watchmen

Power Analyses of Democratic Judicial Systems

By *Bertram Lomfeld*

Court control is the opposite of judicial independence. From a historical perspective it seems clear, that the less directly controlled they are by any other power, the more independent courts prove to be. And the less controlled and more independent courts are, the more democratic is the legal system. The first aim of this text is to provide a structural typology of court control that might even serve to classify historical steps in the evolution of judicial independence.

Yet also from a modern democratic perspective the question of court control is in no way a mere historical phenomenon that could be left behind today. The democratic idea of a separation of political powers with mutual checks and balances amongst them is not an institutional *perpetuum mobile*. The setup of judicial independence has to be checked regularly with institutional realities of court control. Thus the second aim of this text is a critical analysis of the power relations between courts and other political institutions. Mapping this institutional influence may aid in adapting legal mechanisms safeguarding judicial independence. Analyses focus on recent German law,[1] but also include US, French, English and international legal regulations.

The power analyses of recent court control mechanisms lead to a third level, the normative question of court control within a democratic legal system. Notwithstanding the independence of courts, some feedback loop with the will of the people is indispensable. Without some form of democratic court control judicial independence could turn into judicial tyranny. In this instance, procedural law plays an eminent role in mediating the courts' substantial independence with legitimate democratic control.

The question of court control reveals a democratic paradox of judicial independence. Modern democratic constitutions guarantee judicial independence as an ele-

[1] German codes and statutes will be quoted in the following abbreviated forms (in brakkets): *Arbeitsgerichtsgesetz (ArbGG), Berliner Juristenausbildungsgesetz (Berliner JAG), Bundesverfassungsgerichtsgesetz (BVerfGG), Bürgerliches Gesetzbuch (BGB), Deutsches Richtergesetz (DRiG), Finanzgerichtsordnung (FGO), Gerichtskostengesetz (GKG), Gerichtsverfassungsgesetz (GVG), Grundgesetz (GG), Insolvenzordnung (InsO), Patentgerichtsgesetz (PatGG), Richterwahlgesetz (RiWahlG), Sozialgerichtsgesetz (SGG), Strafprozessordnung (StPO), Verwaltungsverfahrensgesetz (VwVfG), Verwaltungsgerichtsordnung (VwGO), Zivilprozessordnung (ZPO).*

ment of the separation of power idea.[2] Courts are the backbones of any democratic legal system safeguarding the observance of rules by citizens and state institutions. At the same time democracy is regularly connected with the supremacy of the parliament, which most immediately represents the will of the people. In the words of Montesquieu, the role of the courts is one wherein judges are the mouths only pronounce the word of the law.[3] Given the open texture of (at least) modern law, however, these judicial voices necessarily speak with multiple languages, i. e. legal interpretation is not ultimately determinable.[4]

Furthermore, modern democracies limit parliamentary supremacy with a constitutional frame. To fulfil its function as 'guardian of the constitution'[5] most constitutional or other supreme courts build up as political institutions of the ultimate word.[6] If courts use this power to actively reshape the socio-legal order, this political intervention is called 'judicial activism'.[7] The US Supreme court is often accused to establish even a 'judicial tyranny'.[8] Already one of the founding fathers of the US constitution warned in this respect that to consider judges as 'ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy'.[9]

The theoretical paradox is much older than these debates. Juvenal famously expressed this idea succinctly in the words *'Quis custodiet ipsos custodes?'*[10] which has been regularly employed throughout history right through to today, even touching the

[2] Cf. Art. 20(3), 97, 98 *GG*; Art. III of the US Constitution; Art. 64 of the French Constitution.

[3] *C. Montesquieu*, De l'ésprit des lois, Geneva 1748, at I.11.6.

[4] *H. L. A. Hart*, The Concept of Law, Oxford 1961, at 124–135; *L. Wittgenstein*, Philosophical Investigations, Oxford 1953, at §§ 198–206; cf. also *B. Lomfeld*, 'Methoden soziologischer Jurisprudenz', in: Lomfeld (ed.), Die Fälle der Gesellschaft, Tübingen 2017.

[5] Cf. BVerfG 20 March 1952, BVerfGE 1, 184 (at 195) and 10 June 1975, BVerfGE 40, 88 (at 93): *'Hüter der Verfassung'*.

[6] *P. Graf Kielmansegg*, Die Instanz des letzten Wortes, Stuttgart 2005; *M. Jestaedt/C. Möllers/O. Lepsius/C. Schönberger*, Das entgrenzte Gericht, Berlin 2011.

[7] For the discussion around the US Supreme Court cf. *K. D. Kmiec*, 'The Origin and Current Meanings of "Judicial Activism"', 92 California Law Review 1441 (2004); *K. Roosevelt*, The Myth of Judicial Activism: Making Sense of Supreme Court Decisions, New Haven 2006. But cf. also *S. P. Sathe*, Judicial Activism in India, Oxford 2003.

[8] *C. D. Kilgore*, Judicial Tyranny: An Inquiry into the Integrity of the Federal Judiciary, Nashville 1977; *M. Sutherland* (ed.), Judicial Tyranny: The New Kings of America?, St. Louis 2005; *P. Schlafly*, The Supremacists: The Tyranny Of Judges And How To Stop It, Dallas 2004; *M. R. Levin*, Men In Black: How the Supreme Court Is Destroying America, Washington 2005.

[9] *T. Jefferson*, Letter to W.C. Jarvis, 28 September 1820, http://founders.archives.gov/documents/Jefferson/98-01-02-1540.

[10] *Juvenal*, Satire VI, line 347. One established English translation by *G. Ramsay* (Loeb Classic Library, London 1918) is: 'I hear all this time the advice of my old friends: keep your women at home, and put them under lock and key. – Yes, but who will watch the warders? Wives are crafty and will begin with them'.

pop culture in Alan Moore's cult comic 'Watchmen'.[11] In recent academic debates the question of 'who will guard the guardians?' was taken up by economic Nobel laureate Leon Hurwicz.[12] His game theoretical analysis framed the question as a problem of implementation. Given the potential of corrupt guards, an infinite number of guardians will always be needed and so implementation is impossible. If we understand the courts to be watchmen of laws and even the democratic constitutions, then this begs the question: who watches them and how? Who controls the courts?

I. Typology of Power and Court Control

What does 'control' mean? Control is closely aligned with the idea of power. The concept of 'power' has been extensively investigated in academic debates, but is no less ambivalent.[13] Power denotes some form of social influence, i. e. forces creating social facts. Power is often associated with the use of force in concrete interactions between individual persons. Yet social structures and institutions also have the potential to wield power. Power can be exercised by causing direct physical or psychological effects on other people. In the long run, however, even more power often lies in influencing modalities of interaction, structures or social attitudes. For analytical clarity, the following typology tries to differentiate four distinct varieties or modes of power.[14]

	Causal	Modal
Structure	**(b) Social institutions** [Machiavelli]	**(d) Social dispositive** [Foucault]
Interaction	**(a) Personal domination** [Weber]	**(c) Sphere of action** [Luhmann]

1. Personal Domination (Causal Interaction)

The classical concept of power as causal interaction denotes in the words of Max Weber: 'Power is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests'.[15] Or to put it in a more analytical reformulation: '*A* has power

[11] *A. Moore/D. Gibbons*, Watchmen, Graphic Novel, New York 1986 and its popular movie adaption by *Z. Snyder* (US/Canada/UK 2009).

[12] *L. Hurwicz*, 'But Who Will Guard the Guardians?' (Nobel Prize Lecture 2007), 98 American Economic Review 577 (2008).

[13] Cf. for instance the plural conceptions in *M. Haugaard* (ed.), Power: A Reader, Manchester 2002.

[14] The typology takes up structural categories from *M. Renner*, Private Macht zwischen Privatrecht und Gesellschaftstheorie, in: F. Möslein (ed.), Private Macht und Privatrechtliche Gestaltungsfreiheit, Tübingen 2016 at 505.

[15] *M. Weber*, Economy and Society, Berkley 1978 [1922] at 53 (I.16).