

Be Careful What You Wish For

A Cautionary Tale of Post-Communist Judicial Empowerment

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Abstract: This article aims to curb the enthusiasm for post-Communist judicial empowerment by showing that sometimes a powerful judiciary can threaten the rule of law. It argues that the powerful Bulgarian Constitutional Court promotes conflict between the executive and the ordinary judiciary. The “war of institutions” has made Bulgaria the poster child for failed judicial reforms among new European Union members. Bulgaria’s experience should serve as a cautionary tale for EU candidate countries and show that strengthening the judiciary is not a panacea.

Keywords: Bulgaria, judicial empowerment, judicial-executive conflict, judicial reform

Most of the literature on courts in the post-Communist region assumes that a powerful judiciary is indispensable in the establishment of the rule of law. This assumption stems from the claim that only assertive and independent courts can constrain incumbent politicians and prevent them from acting above the law to further their own interests. Scholars applauded the bravery of the first Russian Constitutional Court, which challenged Boris Yeltsin and bemoaned the reluctance of the second one to challenge Vladimir Putin.¹ They criticized the passivity of the Ukrainian Constitutional Court and praised the unparalleled activism of the Hungarian Constitutional Court as well as the unexpected activism of the Bulgarian Constitutional Court.²

This article seeks to allay the enthusiasm for post-Communist judicial empowerment by showing that sometimes a powerful judiciary can threaten the rule of law. More specifically, the article uses an analytic narrative approach to demonstrate that the powerful Bulgarian Constitutional Court has fanned the flames of a “war of attrition” between the executive and the ordinary judiciary. There are no winners in this “war of institutions” (as the conflict is often dubbed in the Bulgarian press), only the occasional Pyrrhic victory.

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In large part due to this inter-institutional conflict, Bulgaria has become a poster child for failed judicial reforms among the post-Communist members of the European Union.

Bulgaria's experience should serve as a cautionary tale for those post-Soviet states that are most advanced in their democratic transitions and also subject to EU pressure to advance the rule of law via the strengthening of their judiciary. This group, of course, includes the Baltics, Moldova, Georgia, and Ukraine. While a measure of judicial independence is always desirable, judicial empowerment should not be pursued as a panacea. The Bulgarian "war of institutions" demonstrates that a powerful judiciary can carry potential negative externalities.

Executive-Judicial Conflict and the Perils of Judicial Empowerment in Bulgaria

Courts are powerful when they have the jurisdiction to intervene in salient public issues, the discretion to deliver rulings of significant impact, and the authority to make powerful actors comply with their decisions.³ By all of these measures, Bulgarian courts (both the ordinary judiciary and the Constitutional Court) are powerful.⁴ However, Bulgaria is far from having consolidated the rule of law. On the contrary, the Bulgarian judiciary has not tackled corruption and organized crime. At best, is inefficient; at worst, corrupt. It is wildly unpopular with the public, which believes that the courts promote special private interests rather than justice. Annual reports, issued by the EU for the past decade, have criticized several Bulgarian cabinets for failing to push through the necessary judicial reforms. After the seeds of the EU enlargement policy failed to produce tangible results, in 2008 the EU resorted curtailed over 500 million euro in funding that Bulgaria was scheduled to receive.

Instead of working together to fix the obvious problem, the two branches of the Bulgarian government have been locked in a bitter conflict for most of the post-Communist period. The executive has made numerous attempts to reduce judicial unaccountability and inefficiency through institutional changes. Every time a new draft of the 2001 Judicial Power Act (the law on the institutional organization of the judiciary) enters parliament, however, the judiciary cries foul and denounces the executive for its purported assault on judicial independence. Often, the judiciary also responds with rulings that undermine the government's policy program. Many of the battles end up in the Constitutional Court, which has inspired a trend toward the judicialization of Bulgarian politics, as the Constitutional Court invariably sides with the ordinary judiciary. The EU, in the meantime, keeps complaining—and rightfully so—that judicial reform is not producing any tangible results.

This confrontation produces solely negative externalities for everyone involved. Executives bear the costs of losing important cases in the courts, and suffer reputational costs as a result of their failure to push through recommended judicial reforms. 2008's loss of 500 million euro in EU funding is only the latest quantifiable loss incurred by the executive. The judiciary also loses because its dismal reputation in society only decreases when judicial leaders denounce reforms, which are often promoted by the EU. And clearly, the country as a whole loses; two branches of government are involved in a bitter dispute rather than in a productive relationship. So why does this suboptimal situation persist? Why can't Bulgaria fix its rule of law problem?

This article presents one recent episode in the confrontation between the executive and the judiciary as an extensive-form game, with the government as the first mover and the judiciary and the Constitutional Court as the other principal players. The game helps us infer

some of the positions that motivate the seemingly irrational, self-destructive behavior by all the involved players. While the EU is not a participant in the game, its position significantly affects the payoffs for all domestic players, and, consequently, the outcome of the game. The analytical narrative approach to the puzzle suggests that the Constitutional Court and the EU are jointly responsible for pushing the executive and the judiciary into this costly war of institutions. The model suggests that instead of promoting the rule of law, the powerful Bulgarian Constitutional Court is ultimately undermining its consolidation.

The Judicial Power Act Battle

According to the Bulgarian Constitution, the judiciary is a branch of government that includes the ordinary court hierarchy and the prosecution.⁵ The Constitutional Court is a separate institution that does not belong to the judiciary hierarchy. The fundamentals of the institutional structure of the ordinary judiciary are laid out in the constitution, but the specifics are contained in ordinary legislation called the Judicial Power Act (JPA).

The government of former child king Simeon Saxe-Coburg-Gotha came to power in the summer of 2001 with a landslide election victory, which left it only one vote short of an absolute majority in parliament. Perhaps emboldened by its strong popular mandate, the cabinet decided to take on the ordinary judiciary, but stumbled badly in the first round of the confrontation. This section traces the chronology of the events that followed the government's first attempt at implementing its Strategy for Reforming the Bulgarian Judiciary, and shows that the ordinary judiciary won a resounding victory.

The Strategy for Reforming the Bulgarian Judiciary was the first major legislative initiative of the Saxe-Coburg-Gotha government. Since the cabinet's main priority was Bulgaria's accession to the EU and the EU repeatedly pointed out that the inefficient, corrupt and underfinanced judiciary was a giant hurdle on Bulgaria's path to membership, initiating the necessary judicial reform process was a sensible decision for the executive. The document, drafted by the Ministry of Justice and adopted in October 2001, contained a set of institutional and legislative proposals purportedly aimed at increasing the effectiveness, cementing the independence and ensuring the accountability of the judiciary.⁶ In March 2002, the cabinet started the implementation of the Strategy by submitting amendments to the JPA to parliament.⁷ Given that the JPA lays out the institutional structure of the judiciary, amending it to meet EU standards seemed like a natural first step—especially because preliminary consultations indicated that the JPA amendments would be the first bill in this parliament to get the support of all factions, including the left and the right opposition.⁸

The impetus behind the JPA changes was to reduce the institutional insulation of the judiciary from the executive. The goal, according to Justice Minister Anton Stankov, was to increase judicial accountability and reduce endemic corruption.⁹ The bill stipulated fixed mandates for court presidents and their administrative counterparts in the prosecution and the investigation who are also members of the judiciary; tests and competitions for hiring and promotion; and an easier mechanism for firing magistrates by the judiciary's cadre organ, the Supreme Judicial Council. The amendments would also do away with the magistrates' absolute immunity from prosecution and reduce it to immunity pertaining to their professional actions. Finally, the new bill increased the power of the Ministry of Justice vis-à-vis the judiciary. The Minister gained the exclusive prerogative of submitting the proposals to hire, promote, demote, transfer and fire magistrates to the Supreme Judicial Council. The Ministry Inspectorate would draft and submit to parliament analyses of the

functioning of the judiciary, and the Ministry would assume the responsibility of providing the security of the magistrates and the courthouses.¹⁰

While the political forces in parliament were becoming united in their support for the reform measures, the judiciary started coming together to oppose the infringement upon their structural independence from the executive. First, the leadership of the judiciary went public with its disapproval of the proposed amendments. The Chair of the Supreme Court of Cassation, Ivan Grigorov, told a meeting of the Supreme Judicial Council (SJC) that the proposal compromises judicial self-governance by expanding opportunities for executive interference and blurs the mandates of the Ministry of Justice and the SJC. The spokeswoman of the SJC, Neli Kutskova, also attacked the bill. She told journalists that the proposal to establish fixed mandates for magistrates in administrative positions may be explicitly unconstitutional, or at least against the spirit of Chapter 6 of the Constitution, which deals with the judiciary.¹¹ In early June of 2002, the Union of District Court Judges came out with a resolution, which called on the executive and parliament to stop interfering in internal judicial affairs, such as promotion. Instead, the judge's union proposed that judicial reform should further strengthen and insulate the judiciary vis-à-vis the other branches of government by introducing a law that would stabilize the judiciary's budget by fixing financing to a certain percentage of the GDP.¹²

The executive, however, did not budge and used its majority in parliament to adopt the bill at first reading.¹³ After it realized that the bill would likely become law, the judiciary escalated the conflict. Instead of lobbying attacks in the media, it started opening up investigations against prominent members of the executive. The first target was, predictably, the Justice Ministry, where the judicial reform proposal originated. The General Prosecutor's office (which, to reiterate, is not a fully independent or an executive institution, but part of the judicial branch) opened criminal investigations against two deputy justice ministers, Mario Dimitrov and Miglena Tacheva for alleged abuse of power during their tenures as district court judges in the 1990s.¹⁴ Prosecutors then questioned deputy Prime Minister Nikolai Vassilev following allegations in the media that his close friend Georgi Popov, the CEO of Bulgaria's state-owned tobacco monopoly, had demanded a US \$500,000 bribe from a potential buyer.

The adoption of the JPA law on July 17, 2002 caused further escalation of the conflict, and by the end of the year the executive was basically paralyzed.¹⁵ First, the centerpieces of the executive's privatization program were caught in a legal quagmire. The government had chosen buyers for the tobacco monopoly, the telecommunications monopoly, and the electric utility monopoly, but the judiciary invalidated all of those deals and ordered the privatization procedures to start anew.¹⁶ Second, the judiciary sabotaged the executive's Euro-Atlantic integration policy by overturning important administrative acts. For example, the Supreme Administrative Court blocked executive plans to establish a State Commission on Information Security, an institution Bulgaria needed to have in order to join NATO.¹⁷ In January 2003, the same court overturned the cabinet's decision to comply with EU demands and close down two blocks of the Kozludui nuclear power plant.¹⁸

But the strongest blows to the executive came from the Constitutional Court, which sided with the ordinary judiciary in all landmark decisions. First, on December 16, 2002, the Constitutional Court struck down nearly two-thirds of the JPA amendments.¹⁹ The Supreme Cassation Court (SCC) had filed the appeal and its chairman Ivan Grigorov, apparently

emboldened by his victory at the Constitutional Court, decided to challenge the constitutionality of the 2003 budget and demand that the budget reflect the judiciary's own budget estimate rather than that of the Ministry of Finance.²⁰ On April 15, 2003, the Constitutional Court concurred with the Supreme Cassation Court and struck down the part of the 2003 budget that dealt with the SCC's financing.²¹ Also in April, the Constitutional Court nullified the executive's attempt to break the judiciary's stranglehold through legislative means. The Constitutional justices quashed hastily adopted amendments to the Law on Privatization and Post-Privatization Control, which stipulated that privatization deals of significant importance to national security would no longer be subject to judicial review.²²

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Finally, the Constitutional Court all but closed the easier road to implementing sweeping judicial reforms through a constitutional amendment. In a 9-2 decision, delivered on April 10, 2003, the Court ruled that reforms of the institutional structure of the judiciary that alter the existing balance of power between the three branches of government would constitute a change in the “form of government,” and would thus require the convening of a special Grand National Assembly.²³ With this decision, the Constitutional Court signaled

unambiguously to the executive that if it wanted to punish the judiciary for its belligerence by adopting sweeping judicial reforms through a constitutional amendment, it would have to call new elections. It was public knowledge, though, that such a move would mean political suicide for the governing NDSV, because all polls indicated that the governing coalition's popularity had declined and the Socialist opposition seemed poised to win a pre-term election.²⁴

Thus, by the spring of 2003, the judiciary had scored a resounding victory in the “war of institutions.” Not only did the government fail to implement its judicial reform strategy, but it suffered some severe blows to its privatization program. Public opinion polls indicated that confidence in the cabinet dropped dramatically from a high of around 60 percent in October-November, 2001 (the first polls past the summer “honeymoon” period) to around 20 percent in May 2003.²⁵ In addition, the media widely proclaimed the judiciary the victor in the confrontation. Newspapers of diverse political leanings concurred that the government had lost, with headlines such as: “NDSV drowned in the judicial swamp: the magistrates took the state hostage in their struggle for survival”²⁶ and “The magistrates dug themselves in for good.”²⁷

Despite the serious setback, the government could not afford to abandon the judicial reform project because the EU had tied judicial reform to accession in its annual progress reports. In the continued confrontation between the government and the judiciary, the government came out on top. The parliamentary majority managed to push through some judicial reform measures through a constitutional amendment. It also got an NDSV member of parliament elected chair of the Supreme Administrative Court (SAC), and it appointed 11 new members to the Supreme Judicial Council (SJC).

Shortly after the failure of the first JPA amendments in the winter of 2003, Justice Minister Stankov proposed a new set of amendments, which included easier procedure for disciplinary cases against magistrates who had abused their power, criteria for lifting judicial immunity, and some explicit requirements for objectivity and impartiality. The opposition, the Union of Democratic Forces (UDF), also came out with a judicial reform proposal; this, however, could not be adopted by an ordinary parliament because it included structural changes. In addition to the imposition of limits on immunity and tenure and the introduction of mandates, the UDF reform concept advocated taking the prosecution and the investigation out of the judiciary, as well as choosing the parliamentary quota in the SJC with a qualified majority.²⁸ However, the right opposition was probably well aware that the majority would not support the structural reform part of the proposal. The Constitutional Court decision of April 2003 had prohibited the incumbent parliament from passing structural reforms, and clearly the NDSV government was not prepared to call pre-term elections it was sure to lose spectacularly.

In April 2003, all parliamentary factions reached consensus on the need to pursue limited judicial reform through a constitutional amendment. The media reported that the UDF dissenters, who had sided with the judiciary during the first phase of reforms, agreed to support judicial reform this time around because one of its leaders, Yordan Sokolov, was promised the chairmanship of the Supreme Administrative Court. The factions decided to set up a parliamentary Temporary Commission for Constitutional Amendments, in which all factions were equally represented. The thrust of the constitutional amendment was going to be the replacement of absolute immunity with functional immunity.²⁹ In May 2003, the Venice Commission issued its stamp of approval for the proposed reforms. While it suggested that more sweeping institutional reforms were desirable, such as taking the investigation out of the judicial branch and giving it to the executive, the Commission urged the government to respect the Constitutional Court decision and refrain from such radical reforms within the mandate of this ordinary parliament.³⁰ In July 2003, European Union Commissioner for Enlargement Gunther Verheugen explicitly admonished the Bulgarian political establishment, stating that without judicial reform, Bulgaria would not close negotiations with the Union by the end of 2004, as planned—which would have resulted in postponing its accession beyond 2007.³¹ This veiled threat was effective, because on September 24, 2003, parliament unanimously passed the constitutional amendments submitted by the Temporary Commission for Constitutional Amendments.³²

The constitutional changes represented some progress in the area of judicial reform and therefore were an ostensible victory for Saxe-Coburg-Gotha's cabinet. The real battle, however, that the government and the judiciary fought during the summer and fall of 2003 concerned the appointment of a new Supreme Administrative Court (SAC) chair and a new Supreme Judicial Council (SJC). The SAC chair is appointed to a seven-

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year term by the SJC in a secret vote and the sitting chair's mandate was to expire on December 1, 2003. As discussed previously, the SAC had been instrumental in sabotaging the government's privatization program during 2002 and 2003. Thus, as SAC chair Vladislav Slavov was getting ready to leave his position, NDSV was preparing a strategy to facilitate the appointment of a friendlier—or at least less hostile—chair of the court. The leadership of the judiciary, on the other hand, wanted to make sure it installed an internal figure to the important position.

The judiciary made the first move in June, when it elected Vladislav Slavov to the Constitutional Court. Since the term of Constitutional Court Justice Penka Tomcheva was about to expire on October 3, 2003, Slavov's election as her replacement meant that he would leave his position as chair of the SAC two months ahead of schedule.³³ This was convenient timing for the incumbent judicial leadership, because the SJC could replace Slavov before parliament would have a chance to elect 11 people to a new SJC. The nomination of the judicial leadership for SAC chair was outgoing Constitutional Court Justice Georgi Markov, and given the internal discipline within the judiciary, his imminent appointment was a foregone conclusion.

However, five days before the vote, which Markov was certain to win, the parliamentary majority quickly drafted and passed amendments to the Judicial Powers Act, clearly aimed at thwarting Markov's appointment. According to the new act, the chairs of the SAC and the Supreme Court of Cassation (SCC) and the Prosecutor General would no longer be appointed by a simple majority of the SJC, but by a qualified two-thirds majority. In addition, the amendments prohibited the election of replacements more than two months before the end of the incumbent's term. This swift maneuver bought the executive time, which it used to lobby against Markov's candidacy.

In the fall of 2003, Slavov officially resigned three weeks ahead of schedule; the SJC scheduled a new vote and again put forth Markov's candidacy.³⁴ This move led to a rather absurd, conflict-of-interest-ridden situation: the Justice Minister filed a suit in the Supreme Administrative Court against the Supreme Judicial Council for violating the recently amended Judicial Powers Act. Needless to say, the SAC refused to hear the Justice Minister's appeal against the SJC decision. However, the qualified majority amendment that parliament pushed through in the summer justified its rationale: Markov (as well as the other candidates) fell short of getting a qualified majority of the votes and the SJC could not elect a new SAC chair.³⁵ A month later, the judicial leadership dropped Markov's extremely controversial candidacy and nominated Svetla Petkova, the acting chair of SAC. While she was a more politically acceptable figure, she was also unequivocally an internal choice of the judiciary, and fell two votes short of a qualified majority because the government had lobbied for the nomination of an alternative "spoiler" candidate.³⁶ The stalemate continued throughout the fall, and five consecutive attempts to elect a SAC chair failed.

Early December 2003 finally saw the formation of a new SJC, in which the parliamentary majority appointed 11 of the 25 members.³⁷ With the votes of the parliamentary quota, procuracy and investigation quota members, on March 10, 2004 the SJC elected Konstantin Penchev, an NDSV member of parliament, to the coveted position of SAC chair.³⁸ Penchev was undoubtedly a political appointee, as he was a member of both the NDSV faction in parliament and a NDSV party functionary. Moreover, he was a clear outsider for the judiciary, because his background was as a lawyer rather than as a career judge. The executive

sought to downplay its victory through assurances by Penchev that he would not start any “revolutions” within the SAC.³⁹ The leadership of the judiciary, however, was livid. SCC chair Ivan Grigorov complained that the appointment as “a direct, unceremonious political intrusion in the Bulgarian judiciary, which did not take place even during Todor Zhivkov’s time.”⁴⁰ It appeared as though the executive had finally scored a victory in the “war of attrition” with the judiciary.

However, the war continued unabated even with the new, supposedly “friendlier” leadership at the judiciary’s helm. In April 2004, all eleven NDSV-appointed members of the SJC, plus Penchev in his capacity as SAC chair, bit the hand that, until recently, had fed them. They voted with the rest of the SJC members for a declaration that blasted the government’s plans to reform the investigation according to EU demands.⁴¹ In addition, the new SJC turned out to be even more demanding than the old one when it came to drafting the judiciary’s budget—it demanded a whopping 73 percent increase for 2005.⁴²

Penchev’s loyalty also appeared to shift almost overnight from the NDSV to the judiciary. Only several months after the appointment controversy, Penchev and his previous arch-enemy Supreme Cassation Court Chair Ivan Grigorov appeared to be on excellent terms. The two men had started working together to lobby for increased structural insulation of the judiciary from the executive. For example, at a meeting of the Temporary Parliamentary Commission for Constitutional Amendments, Penchev and Grigorov submitted joint proposals. In addition, rather than attempt to subordinate the SAC to the government that he used to represent in parliament, Penchev advocated a constitutional increase in the power of the SAC vis-à-vis the executive. He formally proposed that the Constitution allow the SAC to review all executive decisions.⁴³

Before turning to the analytic narrative exercise to attempt to explain the origins of the executive-judicial confrontation, it is worth noting that the conflict was hardly ideological. Both the ruling NDSV and the UDF-dominated leadership of the ordinary judiciary espoused right-of-center views on both social and economic issues. The Constitutional Court was also dominated by appointees of right-of-center parties. Only three of the twelve justices serving in 2002 were appointed by a parliamentary majority or a president from the leftist Socialist Party. The rest were appointed by right-of-center parliamentary majorities, the president, or the ordinary judiciary.⁴⁴

The absence of an ideological root to the conflict is important, because it makes the confrontation between the two branches of government all the more detrimental to the rule of law. It suggests that arbitrary and incoherent (in the Dworkinian sense) corporate or personal interests, rather than principled opposition, motivated the judiciary to pounce on the new executive with such vigor. Therefore, the situation in Bulgaria appears to be qualitatively different from other executive-judicial conflicts where a powerful and activist high court has curtailed or sabotaged reforms pursued by the executive. A notable example

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from the post-Communist region is the Hungarian Constitutional Court under the leadership of Laszlo Solyom.⁴⁵ A Latin American example is the Chilean Supreme Court. The Chilean justices actively sabotaged Salvador Allende's radical socialist policies, which they saw as profoundly inimical and threatening to the dominant ethos of Chilean politics.⁴⁶ The U.S. Supreme Court also has a long history of opposing executive policies on ideological grounds, starting with the Slaughterhouse cases and culminating with opposition to the New Deal legislation.⁴⁷ Recent scholarship has actually questioned the accuracy of the traditional "stitch in time saves nine" interpretation of Franklin Delano Roosevelt's "court-packing" plan and argues that the judges' positions had actually evolved by 1936 to be more accepting of state intervention in the economy.⁴⁸ Both interpretations of the "court-packing" episodes, however, assume that the quality of the executive-judicial relationship depended on the ideological positions of its incumbents, rather than on narrow personal or institutional interests as in the Bulgarian case.

An Analytic Narrative Approach to Analyzing Executive-Judicial Conflict in Bulgaria

Why did the government initiate the confrontation in the first place? How did the judiciary and the government end up in this sub-optimal situation? This outcome is all the more puzzling if we compare the Bulgarian events to the notorious Roosevelt "court-packing" plan of 1936, arguably the most analyzed historical example of executive-judicial conflict. In contrast to a "war of attrition," the confrontation between the popular U.S. president and the Supreme Court came to a swift resolution. Congress stalled the bill in committee, the Supreme Court reversed its long-standing opposition to New Deal legislation, and the president abandoned his institutional reform plan. Moreover, all players in this conflict arguably scored a partial win: Roosevelt removed a major obstacle to his New Deal program, the Congressional leadership successfully prevented the expansion of presidential power, and the Supreme Court reinforced its legitimacy and thwarted an attack on its political independence. Carson and Kleinerman (2002) convincingly argue that Roosevelt achieved this quick victory because he had a credible threat at his disposal and the judiciary chose to abandon its defiant policy position in order to protect its institutional integrity.

Interestingly enough, there are many reasons why the Bulgarian judiciary should have folded even quicker than the U.S. Supreme Court did in 1936. First, the Bulgarian government's threat should have appeared even more credible than Roosevelt's. Not only is it easier for an executive in a parliamentary system to pass laws, but also the Bulgarian Constitution is much easier to amend than the U.S. Constitution. The Bulgarian executive indeed successfully adopted both the reform bill and, a year later, the constitutional amendments. Second, while the U.S. Supreme Court had over a century of institutional and behavioral independence from the executive as a legacy in 1936, the Bulgarian judiciary has barely forgotten the practice of "telephone law" that reigned until 1989. Finally, while the U.S. Supreme Court reportedly enjoyed high levels of popular legitimacy, the Bulgarian judiciary is among the least trusted and respected of state institutions. Thus, we need to explain why the more vulnerable, purportedly less independent and less popular Bulgarian judiciary did not back down, but launched an all-out attack on the executive, while the more independent, and more popular U.S. Supreme Court folded almost immediately after Roosevelt threw the first punch.

Why could the Bulgarian government not score a quick victory, as Roosevelt did in 1936, especially given the judiciary's dimly low popular legitimacy? To gain comparative leverage from the U.S. court-packing episode, this article follows Carson and Kleinerman (2002) and models the confrontation between the executive and the judiciary as a multi-actor non-cooperative game with three main players. While in both cases the government is the first mover, given Bulgaria's parliamentary system it makes little sense to include the legislature as a separate player. Instead, the third player whose actions significantly impact the outcome is the Constitutional Court.

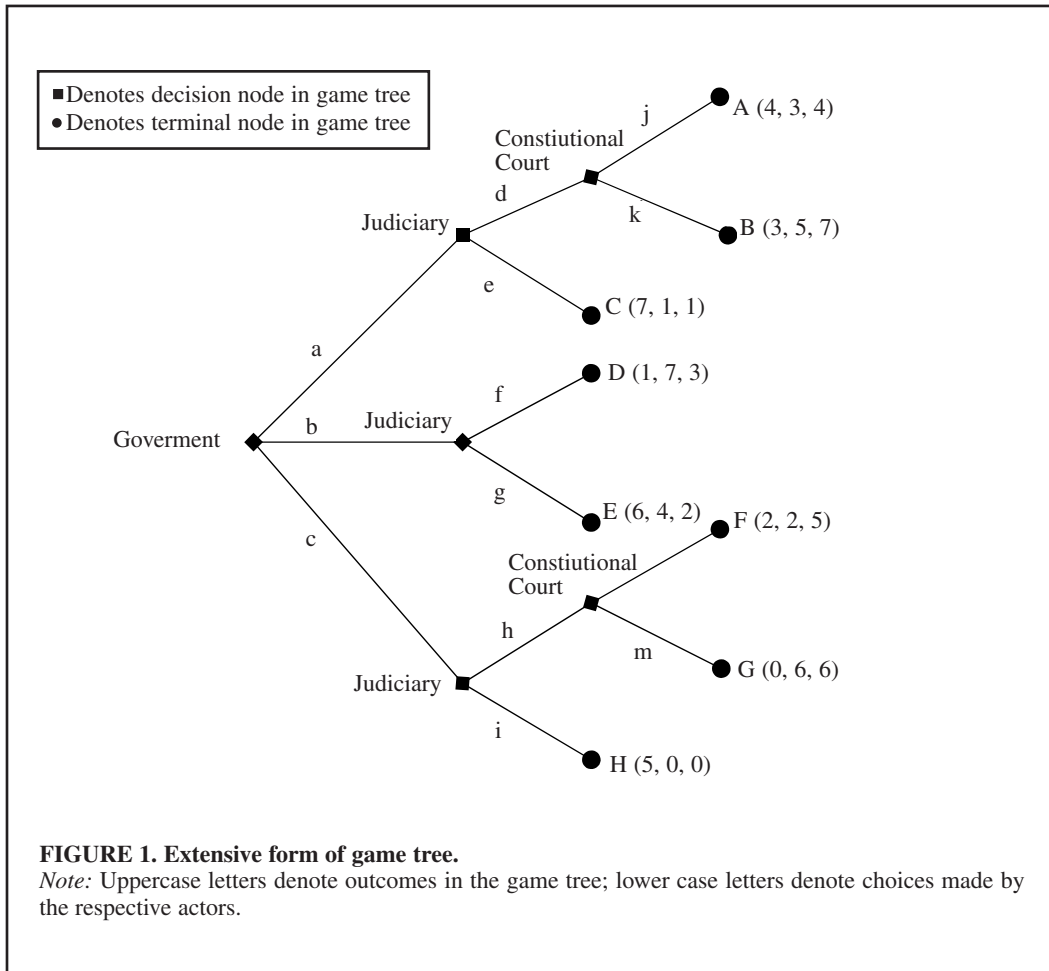
There are two ways to use a non-cooperative game to better understand after-the-fact the dynamics of a strategic interaction between two or more players. The first way is to assign our best estimation of the payoffs by trying to gauge the preferences of each player from their observed behavior prior to the start of the game. If the game suggests that the outcome should have been different from the outcome that we observe, we either conclude that the players must have committed a strategic mistake along the way or we reassess our logic in assigning the payoffs.

This analytic route involves a lot of guess-work. The actors involved are not likely to be forthcoming during interviews or reveal preferences, which may contradict the general perception of the mandate of their institution. For example, judges, especially those trained in the civil law doctrine—which envisions judges as automatons who only apply the laws drafted by the legislature—are unlikely to admit that they want to maximize their discretion and power. The executive, especially a post-Communist executive that is expected to establish the rule of law, is unlikely to admit to attempts to control the judiciary. Thus, if the actors are unlikely to state their preferences, we would need to infer them from their behavior, which is not much easier.

Given these difficulties, a second analytic route seems more useful. It originates from the assumption that the outcome of the interaction between the players that we observe in reality is the unique equilibrium that results from all players pursuing their dominant strategies. The fact that this outcome (in our case the outcome is executive-judicial conflict) happens repeatedly only strengthens the possibility that it is a unique equilibrium. If we accept this assumption, we could use the equilibrium to make inferences about how each player must have assessed each payoff and consequently about the preferences of the players. The next section does precisely that.

The Battle for the Judicial Power Act as a Non-Cooperative Game Between the Government, the Judiciary and the Constitutional Court

The extensive form of the game is displayed in Figure 1. The government, as the first mover, has three choices of action: it can propose a new Judicial Power Act (JPA) (represented by choice a in the game tree), it can introduce a constitutional amendment (choice c), or it can decide to stay away from structural judicial reform altogether and take no action (choice b). The next mover is the ordinary judiciary, which can respond with two courses of action to each move by the government: it can either attack (choices d, f, and h) or defer to the executive (choices e, g, and i). An essential part of the ordinary judiciary's belligerent strategy is an appeal to the Constitutional Court. In the case of inaction by the executive this is not an available option, but if the government proposes either a new law or a constitutional amendment, the judiciary can appeal to the Constitutional Court. The Constitutional Court also has two types of strategies at its



disposal—a deferent and a belligerent one. In the case of a new law, the Constitutional Court can uphold the law's constitutionality (choice j) or strike it down (choice k). If the government instead introduces a constitutional amendment, the Constitutional Court decides whether the amendment can be passed by the sitting ordinary parliament (choice l) or whether the amendment requires pre-term elections and the convocation of a Grand National Assembly (choice m).

The uppercase letters denote the different outcomes in the game tree. The outcome that we observe in reality is B—the government proposed a new Judicial Powers Act; the ordinary judiciary launched an attack on the government, which included an appeal in the Constitutional Court; and the Constitutional Court responded by striking down the law as unconstitutional.

In the parentheses after each outcome, I have listed the respective payoffs of the outcome for the government, the ordinary judiciary, and the Constitutional Court, in this order. These payoffs are inferred from the fact that we observe outcome B in reality. These particular payoffs produce outcome B as a unique equilibrium. The values of the individual payoffs vary on an ordinal scale that represents each actor's preference ordering. Thus a payoff of 7 simply denotes an actor's most preferred outcome, while a payoff of 0 denotes

the same actor's least preferred outcome. I do not know, however, how much more utility the actor in question derives from his top choice than from his last choice. Finally, it is important to note that while the EU is not a player in the game, its position on the issue of judicial reform and its relationship with all the actors plays an important role in the formation of the preference ordering of each actor. Table 2 summarizes all available choices, the outcomes they bring about, and the payoffs for the individual actors.

Some payoffs are straightforward and thus represent somewhat trivial findings of the game. In other words, we hardly need a game to tell us that the executive's top preference should be outcome C, in which it proposes amendments to the Judicial Powers Act and the judiciary is deferential. Since NDSV has a stable parliamentary majority and Bulgaria has a parliamentary system passing a bill is not politically costly. Moreover, the government would be demonstrating to the EU that it is seriously working on reforming the judiciary. Needless to say, a cooperative judiciary, which takes the reforms in stride and does not seek to protect its institutional insulation, would only further increase the government's utility from this outcome.

It also appears clear that the least desirable outcome for the government is G, because the government then expends significant political efforts to garner the qualified majority needed to pass a constitutional amendment, but does not reap any benefits whatsoever—it has to deal with the repercussions of a belligerent judiciary and a disappointed EU monitoring team, but the only route towards judicial reform goes through political suicide in the form of pre-term elections for a Grand National Assembly.

Neither is it a surprise that the government always prefers a deferential judiciary to a belligerent judiciary. The judiciary is deferential when it produces judicial output in line with the government's program and responds to EU demands for increased effectiveness and reduced corruption within the judiciary. As previously mentioned, if the government can ensure judicial compliance through a relatively low-cost route, such as a new Judicial Powers Act, it would reap the largest benefits: both smooth negotiations with the EU and bragging rights for agency in the successful reform of the judiciary. However, if the same effect could be achieved without institutional reforms, the government would still receive higher payoffs than if it has to deal with a belligerent judiciary. It is essential to note, however, that the game has the same unique equilibrium (outcome B) regardless of how the three "deferential judiciary" outcomes (C, E, and H) are ranked in the government's preference ordering relative to each other.

The game produces preferences for the judiciary, which are also straightforward. The judiciary derives its highest utility if its institutional insulation remains intact, along with its freedom to rule against the government as it pleases (outcome D). The worst-case scenario for the judiciary is outcome H, in which the government successfully curtails the institutional insulation of the judiciary with a constitutional amendment, which, unlike ordinary legislation, is virtually irreversible.

The rest of the judiciary's payoff estimates suggest that the judiciary has the exact opposite preference to the government: it always prefers to be belligerent, rather than deferential. Clearly, compliance without legislative action on the part of the executive is a sub-optimal strategy for the judiciary. Why would it pursue internal reforms, which would remove existing opportunities to engage in corruption? Why would it refrain from attacks on the government's program, which give it leverage on the government to extract budget increases? The judiciary realizes that the government has to at least

TABLE 1. Summary of outcomes and payoffs for each player

Outcome	Scenario	Description	Government payoff	Judiciary payoff	Constitutional Court payoff
A	a-d-j	Government proposes new JPA law; Judiciary is belligerent and appeals to Constitutional Court, which upholds the law	4	3	4
B	a-d-k	Government proposes new JPA law; Judiciary is belligerent and appeals to Constitutional Court, which strikes down the law.	3	5	7
C	a-e	Government proposes new JPA law; Judiciary defers; Constitutional Court does not play.	7	1	1
D	b-f	Government takes no action; Judiciary is belligerent; Constitutional Court does not play.	1	7	3
E	b-g	Government proposes a constitutional amendment; Judiciary is belligerent and appeals to the Constitutional Court; Constitutional Court sanctions the constitutional amendment procedure.	6	4	2
F	c-h-l	Government proposes a constitutional amendment; Judiciary is belligerent and appeals to the Constitutional Court; Constitutional Court sanctions the constitutional amendment procedure.	2	2	5
G	c-h-m	Government proposes a constitutional amendment; Judiciary is belligerent and appeals to the Constitutional Court; Constitutional Court strikes down the amendment procedure and orders convocation of Grand National Assembly.	0	6	6
H	c-i	Government proposes a constitutional amendment; Judiciary defers; Constitutional Court does not play.	5	0	0

attempt to satisfy EU demands for increased judicial effectiveness and decreased judicial corruption. At the same time, however, the judiciary is well aware of the EU's emphasis on judicial independence. As a result, the judiciary is in a win-win situation, because an attack on the government might get the government to abandon its institutional reform plans or serve as an effective blackmailing tool for extracting higher budgets. And moreover, if the government decided to punish the judiciary for being belligerent, it could easily cry "attack on judicial independence" and argue that the government's punishment comes in retaliation for the judiciary's independent behavior. Thus, emphasis on judicial independence in EU conditionality creates a powerful incentive for the judiciary to be belligerent.

The most important contribution of the game is that it helps us unpack the role of Bulgaria's powerful and independent Constitutional Court, which has consistently drawn praise and is seen as a guarantor of Bulgarian democracy.⁴⁹ Contrary to this view, the game suggests that the powerful Constitutional Court is responsible for fanning the costly conflict between the executive and the ordinary judiciary. The powerful court does indeed constrain the executive, but it pursues this strategy, not because it seeks to implement the rule of law. Rather, the behavior of the Constitutional Court seems motivated mostly by its desire to maximize its influence. The fact that outcomes B and G carry the highest payoffs for the Court means that the Constitutional Court derives its highest utility whenever it is called to be an arbiter in the confrontation between the executive and the ordinary judiciary. Moreover, it demonstrates its power by consistently siding with the ordinary judiciary against the executive.

That the Constitutional Court is biased in favor of the ordinary judiciary is evident not only from the outcome of this particular conflict, namely the battle over the JPA amendments proposed by the Saxe-Coburg-Gotha cabinet. In fact, as Ivan Grigorov, the Supreme Court of Cassation chairman bragged openly, his institution has won every single case that it has brought to the Constitutional Court.⁵⁰ Regardless of whether Grigorov's assessment is completely accurate, his confidence signaled a truly close relationship between the leadership of the ordinary judiciary and the Constitutional Court.

The game also suggests that the Constitutional Court's least-preferred outcomes are H, C, and E. In these scenarios, the court is marginalized from the political process and does not get a chance to play at all because there is no conflict between the judiciary and the executive. Thus, the Constitutional Court, in its pursuit of institutional power, facilitates the highly costly war between the executive and the judiciary.

Finally, this model of the confrontation between the government and the judiciary shows why the government got itself into this mess in the first place and why it could not score the quick victory that Franklin Delano Roosevelt achieved through his "court-packing" initiative. Even if the Saxe-Coburg-Gotha cabinet were well aware that the JPA amendments would spark a war of institutions, it could not have pursued a different strategy, because the judiciary has a dominant strategy to be belligerent and the government has to demonstrate that it is trying to implement judicial reforms in order to achieve its number one priority, namely EU accession.

Conclusions and Implications for the FSU Region

This analysis of executive-judicial confrontation in Bulgaria suggests that we should qualify our enthusiasm for powerful judiciaries bent on constraining the executive. The

Bulgarian experience suggests that an insulated ordinary judiciary can use its power to maximize its private interests rather than to further the rule of law. Moreover, it can use its power to sabotage any attempt by the executive to introduce accountability measures. In addition, the Bulgarian experience shows that an assertive Constitutional Court will sometimes act to maximize its own power, even if such action would ultimately undermine the rule of law and carry negative consequences for the country as a whole.

Thus, the former Soviet Union (FSU) states who are considering a Euro-Atlantic integration policy should approach calls for judicial reform carefully. The Bulgarian experience is particularly relevant to Ukraine, where the post-Orange Revolution period, has also ushered in bitter conflict between the executive and the judiciary. Rather than applaud these events as evidence that the judiciary is constraining the executive and upholding the rule of law, however, we should be worried about the consequences of this conflict. The conflict between the presidential administration and the courts has produced negative externalities, such as high political instability and politicization of the legal process. The latter, of course, is detrimental to the rule of law.

If the argument that independent courts and powerful courts can be dangerous is correct, should we conclude that a judiciary subordinated to incumbent politicians would serve Bulgaria's rule of law project better? Hardly. Dependent courts that further the agendas of incumbent politicians seriously threaten equality under the law, which is at the heart of the rule of law doctrine. However, judicial accountability need not necessarily bring about judicial dependence and subordination to political interests. It is possible that politicians who have the power to discipline judiciaries and keep them in check would not abuse this power to further their own interests. In fact, in many consolidated democracies (the U.S., UK, France, etc.) politicians have ample powers at their disposal to punish the judiciary if it is seriously out of line, but they do not abuse these powers for short-term political gains.⁵¹ This means that rule-of-law promoters in new democracies could benefit from shifting their focus from trying to create an independent judiciary through institutional engineering to creating incentives for incumbent politicians to respect judicial independence, while holding the judiciary in check.

In the area of judicial reform, the Bulgarian experience suggests that rather than rush to empower the Constitutional Court and ordinary judiciary, consolidating democracies should first ensure that the judicial branch has internalized a mission to uphold the rule of law, rather than safeguard its corporate interests. In addition, there should be mechanisms in place to guarantee judicial accountability. These do not need to outright subordinate the judiciary to political control, but rather delineate a boundary, which if overstepped by the judiciary would trigger legitimate intervention by the executive or the legislature. For example, the executive and the legislature could be given a role in disciplining judges who blatantly shirk their responsibilities or engage in corruption. The key to this policy suggestion is the term "consolidating democracies," however. Judicial accountability is likely to turn into judicial subordination in regimes with dubious democratic credentials, such as Russia and the Central Asian states. But in regimes where politicians have accepted that there would be frequent turnovers in power and do not try to hold on to power through any means possible, judicial accountability measures are less likely to be abused.

NOTES

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