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What Exactly Is Political About Constitutional Adjudication?¹

The standard question in connection with constitutional adjudication is whether constitutional courts or supreme courts with constitutional jurisdiction are legal or political institutions and whether judicial review is a legal or a political activity. Academics are not less interested in it than the general public. However, the answers to the question differ considerably among the disciplines. While political scientists overwhelmingly understand constitutional adjudication as politics in a legal garment, this is different in the legal world. Courts and judges insist on the legal nature of constitutional adjudication, which may not be surprising. But legal scholars, at least outside the United States, tend to share this view as well.

If the answers to the question differ so greatly, one is inclined to ask whether something might be wrong with the dichotomy. Could it be that, in the exercise of judicial review, politics and law are not mutually exclusive but can coexist – with the consequence that each discipline misses an important aspect of its object when it insists on the dichotomy? Are both right, but only partially? It is obvious that constitutional courts play an important political role when they decide about the validity of political measures. But it is equally obvious that the activity of constitutional court judges differs from that of politicians, and it is just their specialization on legal control which makes the difference.

This suggests a differentiation of the question whether constitutional adjudication is a legal or a political operation. Instead of looking for a uniform answer, one should try to find out what exactly is political about judicial review and what not. In addition, it seems helpful to distinguish between the institution of constitutional adjudication in its presupposed functioning; individual constitutional courts or supreme courts with constitutional jurisdiction and their behavior that may well deviate from the ordinary

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function; and the output of these courts, their judgments, not all of which may be based on legal reasoning. In this article, the emphasis lies on the institution as such whereas the other two levels will be treated in passing only.

So, what is political about judicial review? Certainly the object. The function of constitutional courts consists in enforcing the rules of the constitution. The constitution, in turn, is the law that specializes on establishing and regulating public authority. It not only determines the political structure of a country but also guides and limits political behavior. Political decisions are valid only if they comply with the constitution. If this is so, the objects of judicial review are by necessity political acts, usually the acts of the highest organs of the state, the various branches of government including those powers that derive their authority directly from popular elections.

It should be mentioned, however, that a lot of what constitutional courts and even more so general supreme courts with constitutional jurisdiction do is not of a political nature in this sense. Only those constitutional courts whose task is limited to reviewing legislation always deal with objects of a political nature. In courts with broader powers, not every constitutional case concerns actions of the highest political authorities. Many constitutional complaints are directed against administrative acts or decisions of lower courts. But it is the relatively small number of highly political cases that determines the image of constitutional courts in the general public and nourishes the concerns about the political character of constitutional jurisprudence.

Inevitably political is secondly the effect of constitutional judgments insofar as their object is political. Whether a statute passed by a majority decision in parliament may enter into force or not is of eminent political impact. The same is true when a court is called upon to decide whether parliament may ratify an international treaty that the government has concluded. Even acts of a purely executive nature, like the decision to wage war or to participate in peace-keeping missions abroad, may depend on the constitutional court's final word. Decisions about the rules of political competition such as election laws, campaign financing rules and so forth are of an enormous political impact. Never was the political effect of a court decision as obvious as in *Bush v. Gore*.²

All this comes inseparably with constitutional adjudication. It is the essence of it. It is why we have constitutional courts. A constitutional court that would abstain from deciding cases because the object or the effect of its judgment is political would betray its function. There may be reasons to reject judicial review. But if a country decides in favor of it, it has to accept that the court interferes with the political process. Everyone for whom this is democratically unacceptable must be against judicial review. But then he must also accept that compliance with constitutional requirements is left to the willingness of those who are bound by these requirements, which will reduce the impact of constitutional law considerably.

Remains the question whether the process in which the judges reach their decisions about the constitutionality of a political act is also political in nature or whether it can be qualified as legal. This is the central question. Much depends on

² *Bush v. Gore*, 531 U.S. 98 (2000); 121 S.Ct. 525 (2000).

the answer. If judicial decision-making turns out to be political, it will be much more difficult to justify judicial review. Why should political decisions of great impact be entrusted to unelected and unaccountable actors? But also, the achievement of constitutionalism would suffer a severe blow if constitutional law were no longer justiciable. After all, it was the spread of judicial review in the second half of the 20th century that made constitutions matter in many countries where they had been of little impact for decades.

While the political character of the first two aspects of constitutional adjudication can hardly be denied, this is different regarding the third aspect that concerns the application of constitutional norms to actual cases. Here, the answer is much less obvious. Partly, the internal proceedings of the courts are secret, so that it is difficult to shed light on the way judges reach their decisions. Partly, what goes on in the process of adjudicating is not accessible at all because it happens in the heads of judges so that, at best, self-portrayals are available whose reliability may be questionable. Consequently, the proportion of speculative elements in descriptions of judicial behavior is relatively high.

However, parts of the process are open to observation. Obviously, a change of arena takes place when a political act is challenged in the constitutional court. The actors change, the criteria change, and the procedure changes. Politics mutate from subject to object. Had politicians been the decision-makers before, they now find themselves in the role of claimant or defendant whereas the lead is taken by judges. They differ from politicians in various respects. They are legal professionals. Usually, they do not owe their office to popular elections. They need not campaign for their position. They don't come with an agenda. They cannot even act upon their own initiative but have to wait for cases being brought before them.

But they are usually recruited by politicians in a political process, be it elections by parliament, be it appointments by the head of state or the cabinet, or other mixed or in between-forms, sometimes with representatives of the judiciary participating. This gives politics a considerable influence on the personnel of highest courts. It cannot be excluded that political motives or expectations play a role in the selection of judges. If they become decisive, the proper functioning of constitutional courts may be endangered. This is why constitutions frequently contain safeguards against election or appointment by the ruling party alone. Conformity between the controller and the controlled tend to undermine the control.

A further safeguard against the politicization of courts is the guarantee of judicial independence. Once in office, judges are immunized against politics. They are not subject to instructions and they cannot be removed or dismissed because of their decisions. Independence is justified because judges underlie different bonds, namely the constitution that they have to apply to the cases at hand. Their independence is not a personal privilege. It exists for law's sake. It is guaranteed to secure that judges can decide according to the law without fearing any disadvantage. Attempts to instrumentalize courts for political, religious, economic interests are illegitimate.

Separation of powers is stricter at this front than between the legislature and the executive.

The criteria for deciding also change. Had party platforms, government interests, viewpoints of expediency, public opinion, financial costs, and the like been the criteria in the political arena, it is constitutional law in the legal arena. This is not to say that constitutional law plays no role in the political process. But usually, it does not come in first, but last, namely as a corrective after the political will has been formed. The constitutional question is raised to reassure whether what is politically desirable is also legally permitted. Because of this auxiliary function, it is likely that the constitutional question will be regarded through the lens of political desirability. Without judicial review looming in the background, the question of the constitutionality of a political measure would probably be without much weight.

A change occurs, furthermore, in terms of procedure. The objective of the legal proceedings is to determine what the relevant provisions of the constitution mean with regard to the object of review. Consequently, it is an argumentative process, in which only legal arguments are acceptable. There may be doubts as to what counts as a legal argument. But it is not dubious that nonlegal arguments are unacceptable. The question whether a political measure is wise, useful, and affordable does not play a role unless it can be formulated as a legal argument. Even more so, it is irrelevant for the legal process whether a political measure helps or hurts the chances of political parties, entrepreneurs, churches and so forth.

As a consequence, the quest of whether constitutional adjudication is political or legal in nature can be narrowed to the process of judicial decision-making. Is it a legal operation despite the fact that its object and effect is political? Here, observation reaches its limits. Only in a very small number of countries, like Brazil, courts deliberate in public. But it seems that this deliberation is not the place of actual decision-making.³ In most courts, the deliberation takes place behind closed doors and is not recorded. The core of judicial activity, the determination of whether the constitution permits or prohibits a certain political measure, remains a black box for academic research and the general public alike.

However, constitutional courts are obliged to give reasons for their decisions. The reasons demonstrate why and how the concrete ruling is derived from general constitutional provisions and, if applicable, precedents in a rational process based on specifically legal methods of interpretation. They are presented as acts of cognition, not of will. Common law-countries allow further insights as not only the opinion of the court but also dissenting opinions are published and thus open a window to the internal debate. This is rare in civil law countries. Where separate opinions are allowed in the constitutional court like in Germany, experience shows that the opportunity is not used frequently. The absence of dissenting opinions is no proof of unanimity.

³ See: V.A. da Silva, "Deciding without Deliberating," *International Journal of Constitutional Law* 2013, vol. 11, issue 3, p. 557.

One knows, of course, that the making and the presentation of a decision can fall apart. This holds true for common law and civil law judges and for majority and minority opinions alike. As a matter of fact, the majority of political scientists and quite a number of legal scholars, certainly in the United States, assume that judges do something different from what they say they do. They are seen as strategic actors, guided by personal or institutional self-interest, subjective values, or political preferences. After having taken a decision on this basis, they try to present it as dictated by the provisions of the constitution. The determinative force of legal rules on judicial behavior is thus denied. This is described as a realistic view of judicial behavior.

There are undoubtedly cases for which this is a correct description. If one turns to specific courts, one will find judges who care little about the law and follow their own preferences or material interests. There are also judges for whom the institutional interests of the judiciary prevail over legal reasoning. Judges exist who try to avoid a conflict with powerful political actors and decide constitutional issues according to explicit or anticipated expectations of politicians. Some of them may have good reasons to believe that decisions that interfere with political interests or plans will have serious consequences for them. History furnishes sufficient evidence for this and present times do so as well. The question is, however, whether this is normal or deviant behavior.

There is, at least, one political scientist who vehemently refuses to adopt the realistic approach. After comparing the output of eight courts with constitutional jurisdiction, he writes: „This book is rather different from most work by political scientists on courts, not because I think other work wrongly conceived, but because I am much more concerned with judicial argument, which I take to be the core of judges' activity, and central to understanding the role courts play in complex societies. (...) My method is to take judicial argument seriously as one of the major, if not the sole, determinants of the decisions courts make." He prefers this approach "because it simply seems beyond credibility that so many thousands of professionally socialized able men and women should be lying or deluding themselves in their arguments."⁴

This is a plausibility argument and thus a weak argument compared, say, to observation. But not all judicial behavior lends itself to observation and it seems that legal realists do not have more empirical insights since they derive their findings about judicial behavior from a theoretical assumption called rational choice. It is by no means clear under what conditions, to what extent and in which areas of social life rational choice promises a full and reliable explanation of human behavior. In addition, social scientists are often unfamiliar with the specific legal reasoning, the way in which a concrete and individual ruling is derived from a general and abstract norm, and thus tend to underestimate it, as Robertson correctly observes.

The following discussion refers to the Robertson-type judge, the judge whose sincere intention is to decide constitutional issues according to what in his or her best

⁴ D. Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review*, Princeton 2010, p. 21.

understanding is required by constitutional law. This judge is not regarded as an ideal type or a role model but a reality in many courts. Robertson's description corresponds with my own experience as member of such court. Judges routinely tried to develop the answer to a constitutional issue from the constitution. They used constitutional arguments to justify their solution, and it was normal that members of the court changed their initial idea about the right solution because they were convinced by legal arguments raised in the deliberation.

If we assume with Robertson a serious attempt on the part of constitutional judges to derive their decisions from constitutional law, this is not the end of the discussion. The attempt could be in vain. The constitution might just not contain enough information to decide a case on a purely legal basis. We can therefore once again narrow the focus and ask whether and to what extent the process of applying a constitutional norm to a case is in itself a political act. This would be so if constitutional norms lacked the capacity to determine judicial decisions so that extra-legal viewpoints become decisive. This requires a closer look to the determinative force of legal norms in general and constitutional norms in particular.

Different from individual commands, which are directed to an already existing situation and exhaust themselves in the execution, legal norms are designed to apply to an unforeseeable number of future cases. This is why they have to be formulated in a more or less abstract manner. This leaves a gap between the general and abstract norm and the individual and concrete case. As a consequence, the norm is often not ready for immediate application to the case. The gap has to be bridged by interpretation. Interpretation is the attempt to ascertain what the general and abstract norm means regarding the concrete case at hand. A more specific sentence has to be derived from the general and abstract norm, which is then applicable to the case.

This can be more or less difficult, depending on the degree of determinacy of the norm and the complexity of the case. But no legal norm is so clear that it never leaves doubts about its meaning with regard to a particular case. One can tell that a norm is vague and open-ended by reading it. Whether a norm is clear and unambiguous cannot be determined independently of the case to which it applies. One and the same norm may be clear with regard to one set of facts and unclear with regard to another. It is possible that no reasonable doubts exist about the meaning of a norm with regard to a certain case. But cases like these usually do not reach the courts. Most constitutional trials arise from legitimate doubts about the meaning of constitutional provisions with regard to a concrete case.

Constitutional law is notoriously unclear. Many of its norms are principles, not rules, in Robert Alexy's terminology.⁵ The gap between norm and case is usually broader than with ordinary law. The less determinate a norm is the more the judge has to add to it before it can be applied to the case. This process is not merely cognitive. Interpretation is not about disclosing a meaning that had been deposited in the norm

⁵ R. Alexy, *Theorie der Grundrechte*, Baden-Baden 1985, p. 71 (published in English as *A Theory of Constitutional Rights*, Oxford 2010).

from the moment of its adoption on. The determination of a more concrete meaning from the text, which fits the case, has a creative element. The more concrete sentence is not just found, but to a certain extent constructed, however, such that it can be traced back to the norm, even if a long chain of arguments may be necessary.

Is this sufficient to prove that the application of constitutional norms to cases is by nature political? If it were true that, where the indeterminacy of a norm ends, adjudication starts to be political, not only constitutional adjudication but all adjudication would be politics. However, this would overlook a number of constraints under which lawyers work. Filling the space of indeterminacy and making an ambiguous norm applicable to the case at hand is not left to the discretion of judges. It is itself legally guided. Even when filling the space of indeterminacy, the judge works in a field that is delimited by legal doctrine and legal precedents, and he applies legal methods in ascertaining the meaning of a norm with regard to a specific case.

Doctrine and precedents contain a stock of proven and shared understandings of legal norms and notions and make available solutions to recurrent problems, which the judge may use in good faith instead of starting always from scratch. Legal methods show ways as to how concretization of indeterminate norms can work rationally and faithfully to the norm. In doing this, methods typically delimitate what counts as a legal argument when a norm is prepared for application to the case. Legal education consists largely in getting acquainted with doctrine and precedent and acquiring the skills that allow a nonsubjective, rational way to deal with legal norms that do not lend themselves to immediate application to a case.

Hence, there are various sources of information about the meaning of a norm that is relevant for a case, even if its text is inconclusive. The relevant provision is not isolated. It is part of a larger complex of norms. Often the systematic connection with other norms will provide further information about the meaning. The same is true for the question about the normative purpose. Legislation is a purposive activity. Every norm is enacted with a certain effect in mind, which it shall develop in the real world. A look to legislative history may be instructive. Describing all the legal tools that help clarifying the meaning of a seemingly ambiguous norm would amount to writing a methodology of constitutional interpretation.

To be sure, neither legal doctrine nor legal methods bind the judge in the same authoritative way as the text of the norm does. Legal doctrine and legal method are products of an ongoing process of working with the law, in which academics and practitioners participate. This process is seldom uncontroversial and never completed. Different methods compete, and the outcome of a law suit may depend on the method that a court prefers. The borderline between legal and nonlegal arguments may be drawn differently by different methods. For quite some time purposive arguments were regarded as extralegal. The adaptation of old norms to modern challenges would be politics for one methodological school, but law for another.

But still, they are legal methods. Each of them formulates conditions under which an interpretation of a norm can claim to be legally correct. But since there is no external instance that is entitled to decide which doctrine and which method is the correct one,

one must conclude that contradicting interpretations will exist without the possibility of determining that one of them is correct while the other is wrong. Cases with regard to which only one meaning can claim to be correct are rare exceptions. For the vast majority of cases, and certainly for those which become the object of constitutional controversies, there is more than one solution that may be legally justified.

This should, however, not be confused with an “anything goes.” There are interpretations that are clearly wrong, regardless of which doctrine or method prevails. “Wrong” then means outside the range of possible interpretations. Inside this range, disagreement among judges is not an indication that the judges acted politically instead of legally. Every judge works under the premise of determining the correct meaning of a norm but has to admit that other judges reach a different result without necessarily erring. But it remains the case that delimiting and filling the space that a norm leaves for interpretation requires decisions that are not completely determined by the text of the norm.

This allows a last narrowing of the problem. The question is now what determines the choice between different, but possible legal solutions? Do political convictions, party affiliation interests of the judges reassert themselves here? Some sociologists have tried to shed light on the inside of the black box by collecting the social data of judges: their gender, race, family background, religious beliefs, fortune or property and so forth. If this is relatively easy it will be extremely difficult to demonstrate a causal nexus between these data and judicial behavior. It cannot be taken for granted that a believer will always decide in favor of the churches or a stockholder against a wealth tax.

Background assumptions may play a role, sometimes even subconsciously. Some are of a superindividual nature, *Zeitgeist*, changed attitudes, say, vis-à-vis gender roles or sexual orientation may influence the understanding of constitutional guarantees of equality. Courts do not operate outside the society for which they say what the law is. Background assumptions may also concern certain conceptions of a just order, of what can be left to market regulation, and what the state should take into its own hands. Part of background assumptions may be judges’ self-perception of the judicial function, more activist or more deferential for instance.

Assumptions about the state of social reality, insofar as it is the object of legal regulation, may play a role. Social reality gains relevance for the interpretation and application of constitutional law because legal norms are formulated with regard to a certain state of affairs in which the norm shall fulfill its purpose, be it preserving this state, or altering it. Social reality is, however, in constant change. Hence, it may happen that sticking to the original understanding of a provision may lead to missing the purpose and producing dysfunctional results so that an interpretation has to be found that can fulfill the purpose under changed conditions.

Additional assumptions like these are unavoidable as long as adjudicating cannot be left to robots. But although they are not strictly legal, one should not take them for pure subjectivism because they are prompted by the task to determine the meaning of a constitutional provision and are integrated into the process of constitutional

interpretation. The background assumptions or conceptions of social reality do not have a direct impact, but exercise their influence in a normatively mediated and molded way. In addition, subjective inclinations are mitigated by the fact that determining the meaning of a norm is a collective endeavor. The arguments used must be acceptable to the group as relevant for fulfilling the legal function.

Nevertheless, one cannot exclude that even constitutional courts that take their legal function seriously transgress the subtle borderline between interpreting the constitution and altering it or that they get out of step with the society in whose name they say what the law is. This makes correctives necessary. An important one is the critical observation by the legal science as to the legal plausibility and logical consistency of the jurisprudence. Another one consists in the public debate to which judges are exposed with the assistance of the media, not in the sense that judges should orient their decisions at public opinion, but in the sense that they are called upon to critically reflect their behavior.

All this is by no means without impact on constitutional judges. Judges are aware that constitutional courts are particularly vulnerable, as in constitutional adjudication the addressees of the rulings are the highest authorities of the state. There is no superior enforcement institution as in matters of ordinary law. Judges are susceptible to this vulnerability of their position. Ultimately, however, counterweights are necessary against the democratic risks that constitutional courts present. The practice of constitutional courts must be subject to correction. The adequate means for this are constitutional amendments. Constitutional courts are legitimate only insofar as they serve instead of dominating the constitution.

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Summary

Dieter Grimm

What Exactly Is Political About Constitutional Adjudication?

The article argues that the frequently asked question as to whether constitutional courts or apex courts with the power of judicial review are political or legal institutions and whether judicial review is a political or a legal activity are insufficiently differentiated. The question should rather be in which way and to what extent they are legal or political. One would then distinguish between (1) the object of judicial review, (2) the effect of judicial review and (3) the process of adjudicating. The object and the effect of judicial review are inevitably political. The question is whether this holds also true for the process of adjudicating. The discussion of this question is in the center of the article.

Keywords: constitutional courts, judicial review, law and politics, constitutional interpretation, legal reasoning.

Streszczenie

Dieter Grimm

Na czym dokładnie polega polityczny charakter kontroli konstytucyjności prawa?

Autor argumentuje, że często zadawane pytanie, czy sądy konstytucyjne lub sądy najwyższe uprawnione do kontroli sądowej są instytucjami politycznymi czy prawnymi, a także czy kontrola sądowa jest działalnością polityczną czy prawną, jest niewystarczająco precyzyjne. Pytanie powinno raczej brzmieć, w jaki sposób i w jakim stopniu są one instytucjami prawnymi, a w jakim politycznymi. Kluczowe jest w efekcie wyróżnienie: 1) przedmiotu kontroli sądowej, 2) skutku kontroli sądowej i 3) samego procesu orzekania. Przedmiot i skutek kontroli sądowej mają nieuchronnie charakter polityczny. Pytanie brzmi, czy dotyczy to również procesu orzekania. Dyskusja na ten temat stanowi centralną część artykułu.

Słowa kluczowe: sądy konstytucyjne, kontrola konstytucyjności, prawo i polityka, interpretacja konstytucyjna, rozumowanie prawnicze.