Introduction

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The authority of national, supranational, and international constitutional courts to issue binding rulings interpreting a constitution or an international treaty has been endlessly discussed. What does it mean for democratic governance that non-elected judges, by interpreting a constitution, have the power to influence politics and policies? The authors of this volume, scholars and judges, take a fresh look at this problem. To date, research has concentrated on the legitimacy,[1] or on the effectiveness,[2] or on specific decision-making methods of constitutional courts.[3] In this volume, by contrast, we explore the *relationship* among these three factors.

The emphasis is on linking the legitimacy and effectiveness of constitutional courts to methods of judicial decision-making. National and transnational constitutional courts[4] must be perceived by citizens as properly endowed with the power to review acts of public authority. This trust not only grounds the legitimacy of constitutional adjudication, but is also a precondition of its effectiveness. And both the legitimacy and effectiveness of constitutional adjudication require a specific judicial logic of decision-making.

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[1] A. Føllesdal, J. K. Schaffer, and G. Ulfstein (eds.), *The Legitimacy of International Human Rights Regimes* (Cambridge: Cambridge University Press, 2014).

[2] M. Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford: Oxford University Press, 2009).

[3] K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015).

[4] The term *transnational constitutional courts* is used as term for both international courts like the ECtHR and supranational courts like the ECJ.

Constitutional Adjudication as a Resource for Democratic Governance

A modern constitution creates a people comprised of free and equal citizens who agree on principles and rules of self-governance (Preuß, Chapter 16). In a liberal democracy, the realization of constitutional principles, for example freedom and equality, must rely on procedures that are based on human dignity and equal respect for all. The very integrity of democracy requires mechanisms for protecting persons against the misuse of political power, and judicial review is seen as such a mechanism (Rosenfeld, Chapter 2). Judicial power, like political power, derives its authority from the sovereignty of the people, which "makes itself felt in the power of public discourses."[5] Both political and judicial power, if they are to be legitimate, must be anchored in the discourses of public spheres.

From this perspective, the "judge's obligation to participation in a dialogue"[6] must be interpreted in its broadest sense, as a dialogue within courts, among courts, between courts and political actors, and between courts and the public at large. The binding rulings of constitutional courts give rise to debates that may, over time, produce new rulings changing the principles announced. This interaction between courts having judicial power and the political, legal, and societal landscapes in which they operate is a core concern of this book.

To analyze judicial decision-making in the twenty-first century within this larger political context, we need to take into consideration the challenges of a globalizing world. Within nation-states, the reality of democratic constitutionalism is increasingly confronted with deeply-rooted cultural, economic, and political differences. Beyond the nation-state, there is the challenge of a "multiplication of different normative orders."[7]

In both contexts, differences can have negative and positive consequences for democratic constitutionalism. Therefore, it becomes important to practice an understanding of constitutionalism in which actors take differences seriously, and at the same time consider how differences

[5] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg (Cambridge, MA: MIT Press 1998), p. 486.
[6] O. M. Fiss, "The Forms of Justice," *Harvard Law Review* 93 (1979), 1–58 [13].
[7] S. Sassen, *Territory – Authority – Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press 2006), p. 11.

might support principles of democratic constitutionalism.[8] When different cultures live together, conflicts based on "intense moral dissension"[9] increase. We thus need a "morally reflexive constitutionalism that demystifies the idea of progress but does not deny it altogether."[10] Constitutional courts can facilitate such a constitutionalism and encourage a society continuously to reflect upon the rules of self-governance insofar as judges are called upon to relate concrete policies to the "values inherent in the constitutional agreement the society has accepted."[11] Thus, constitutional courts can contribute to good governance by creating room for the paradox of "political unity in dissension."[12]

But in a world of rising populism, we confront the grim reality of growing segments of the population repudiating the principles of constitutional democracy, with its separation of powers and independent courts. It is no coincidence that populist leaders "secure power through control of the judiciary and the media."[13] Lech Garlicki's precise analysis of the development of the Polish Constitutional Court demonstrates how the content and the style of judicial decisions change once the independence of a court is endangered and "the distrust towards a pluralistic concept of state and society" has led to the "elimination of mechanisms based on the separation of powers" (Garlicki, Chapter 6).

Legitimacy and Effectiveness through Modes of Decision-Making

The legitimacy and effectiveness of constitutional courts depend upon the difference between political and judicial decision-making. To be sure,

[8] C. Landfried, "The Concept of Difference," in K. Raube and A. Sattler (eds.), *Difference and Democracy: Exploring Potentials in Europe and Beyond* (Frankfurt and New York: Campus, 2011), pp. 15–45. Cf. R. Putnam, "E Pluribus Unum: Diversity and Community in the Twenty-First Century," *Scandinavian Political Studies* 30 (2007), 137–174 has shown by an empirical study that the greater the ethnic difference in a community, the less citizens participate in public life. He concludes that the key challenge for modern, differentiated societies is to create a new, more capacious sense of "we."

[9] U. K. Preuß, "Toward a New Understanding of Constitutions," in C. Offe and U. K. Preuß, *Citizens in Europe: Essays on Democracy, Constitutionalism and European Integration* (Colchester, UK: ECPR Press 2016), p. 141.

[10] Ibid., p. 140.

[11] D. Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton, NJ, and Oxford: Princeton University Press 2010), p. 7.

[12] Preuß, "Toward a New Understanding of Constitutions," p. 141.

[13] J. W. Mueller, "Homo Orbánicus," review of P. Lendvai, Orbán: Hungary's Strongman (Oxford: Oxford University Press, 2018), *The New York Review of Books*, April 5, 2018.

constitutional courts are not apolitical. But the interesting question is: "What exactly is political about constitutional adjudication and what not?"(Grimm, Chapter 14). The object of constitutional adjudication is political because constitutional courts review acts of public authority. And, inevitably, the judgments of these courts have far-reaching political effects. But the process of judicial decision-making should follow legal procedures and criteria (Chapter 14). This volume aims to examine this mix of political and legal elements within constitutional adjudication.

It is my *hypothesis* that judicial review allows for a method of reflecting on social integration that differs from the mode of politics and, precisely because of the difference between judicial and political decision-making, increases the overall rationality of democratic governance. In modern societies, law and politics are not only used as distinct phases of a larger process of social integration,[14] but also as distinct modes of social integration. Therefore, constitutional courts should be independent but not detached from politics.[15]

Parliamentary law as one of the objects of judicial review is the result of politics with its manifold conflicts of interest. And while law rests on "the presumption of agreement," in fact conflicts routinely continue.[16] Constitutional court judges, when applying very abstract constitutional norms to concrete cases, cannot avoid dealing with political conflicts that may have been temporarily reconciled, but not resolved, by the concrete parliamentary law under review. Such conflicts, as well as conflicts arising in federal systems between subunits and the central government, should not be seen as "pathological." As Judith Resnik (Chapter 11) proposes, they should instead be acknowledged as "positive features in governance in which political and legal transformations are always underway."

When the arena changes from a parliament to a constitutional court, the actors, procedures, and criteria that count as reasons all change. Courts require distinctively legal methods. Though the interpretation of constitutional norms needs more creativity than the application of ordinary law,[17] legal methodology channels and limits judicial discretion (Grimm, Chapter 14). It is always a warning sign of the politicization

[14] R. Post, "Theorizing Disagreement: Reconceiving the Relationship between Law and Politics," *California Law Review* 98 (2010), 1319–1350 [1324].
[15] Ibid., 1343: "As social practices, politics and law are both independent and interdependent."
[16] Ibid., 1323.
[17] This is why Robertson, *The Judge as Political Theorist*, p. 348, argues "that the richness of judicial activity on constitutional matters can only be handled if we cease to try to force

when judges clearly violate legal methods.[18] By offering an additional layer of deliberation on the basis of legal methods of decision-making, national and transnational constitutional courts enhance the complexity of governance structures. The enhanced complexity of the decision-making structures, in turn, is a resource for solving complex problems in liberal democracies of the twenty-first century. When judges, however, decide in the same way as politicians, and politicians are "governing like judges,"[19] then the complexity of decision-making structures is reduced.

Judicial methods are not "better" than political methods; they are different. The crucial point is rather to emphasize how differences between judicial and political decision-making create legitimacy and effectiveness. A constitutional democracy is built upon the "differentiation (separation and division) of powers none of which having the right to monopolize speaking in the name of the popular sovereign" (Arato, Chapter 15). And likewise, there should be different modes of decision-making in the realm of politics and the realm of courts.

Connecting the legitimacy and effectiveness of judicial review to modes of deciding builds upon "a genuinely proceduralist understanding of democracy. The point of such an understanding is this: the democratic procedure is institutionalized in discourses and bargaining processes by employing forms of communication that promise that all outcomes reached in conformity with the procedure are reasonable."[20] Therefore, the most decisive variable for democratic governance is the "discursive level of the public debates."[21] The capacity of public discourses for rationalizing political power is all the more important, the more we experience the emotional dimension of public opinion. We should not

constitutional courts into the classic trichotomy, and accept instead that they have come to exercise . . . a new, fourth branch of power."

[18] For a striking topical example see U. K. Preuß, "Kataloniens Kampf geht nicht um Freiheit, sondern um Identität," *Verfassungsblog*, April 3, 2018.

[19] A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press 2000), p. 204.

[20] Habermas, *Facts and Norms*, p. 304. The English translation of the quoted passage does not fully correspond to the German text. Jürgen Habermas speaks of democratic procedures that presumably have reasonable results: "die Vermutung der Vernünftigkeit begründen sollen." *Faktizität und Geltung* (Frankfurt: Suhrkamp, 1992), p. 368. In his normative concept, Habermas relates democratic procedures to the expectation of reasonable results. See the different understanding of a proceduralist understanding of democracy with decoupling the process of communication from normative expectations: N. Luhmann, *Legitimation durch Verfahren* (Frankfurt: Suhrkamp, 10th ed., 2017), pp. 32–37.

[21] Habermas, *Facts and Norms*, p. 304.

exclude the emotional dimension from public discourses but open up our perspective for possibilities to combine rationality and emotion.

Constitutional courts can potentially enhance the discursive level when they listen to the arguments of persons involved in concrete cases, when they debate in judicial public hearings with representatives of politics and civil society about the constitutionality of specific policies, and when they interact with other courts. With a few exceptions, like the Brazilian Supreme Court (Barroso and Osorio, Chapter 7), constitutional courts do not deliberate in public. But from the questions judges ask in public hearings, the reasons they give for their decisions, and their published dissents, we can construct the specific character of the method applied in the case. We can determine whether or not that method is legal and seek to ascertain whether or not it has actually informed judicial decision-making.

There are many forms of difference between the specific logic of judicial decision-making and the specific logic of political decision-making. There are differences of competence,[22] communication, and interaction (Lübbe-Wolff, Chapter 10), representativeness (Kumm, Chapter 12), temporality (Tushnet, Chapter 13), and methodology (Resnik, Chapter 11 and Grimm, Chapter 14) just to name the dimensions addressed in this book. Mattias Kumm explores, for example, the degree to which judges can practice a reasoning that is connected to public debates thereby gaining "argumentative representativeness" (Chapter 12) without undermining their independence.

The differences between judicial and political decision-making are not dichotomous but gradual. Let us take, for example, the difference of competence between constitutional courts and parliaments. John Ely compared the task of a constitutional court judge to a referee.[23] A referee must intervene when a team has broken the rules, but may not comment on the result of the play. In Ely's opinion, constitutional review is compatible with democracy so long as judges decide on political processes rather than on political outcomes. This distinction is convincing but not sufficient. There are cases in which constitutional courts have to make choices between competing constitutional principles. If one defines the legitimacy of legislative acts not only by democratic

[22] G. Lübbe-Wolff, dissenting opinion in the OMT Case, BVerfG, Second Senate, Order of 14 January 2014, BVerfGE 134, 419, paras. 5 and 8.

[23] J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA, and London: Harvard University Press, 1980), p. 103.

processes but also by just and reasonable outcomes, constitutional courts cannot avoid evaluating political outcomes. Therefore, a more flexible interpretation of the division of power between constitutional courts and politics is required. When it comes to the evaluation of processes, constitutional courts have broad competence and power shifts in favor of judicial review. When it comes to the evaluation of outcomes, the competence of constitutional courts is more restricted, and the authority shifts in favor of democratic politics.[24]

A clearly political way of decision-making cannot be transported into the judicial realm without consequences. This might be illustrated by an example. Gertrude Lübbe-Wolff (Chapter 10) scrutinizes judicial interactions between national and transnational courts. As the hierarchies between national and transnational courts are especially contested and, in addition, the involved actors have to cope with manifold differences in legal cultures, a "mutually cooperative" approach becomes necessary to prevent "disruptive clashes." "Ping-pong games" are a way of cooperation. In these games, cooperation develops by several judicial decisions as a method of dealing with judicial conflicts between national and transnational courts. The point is illustrated by the decision of the German Constitutional Court referring preliminary questions to the European Court of Justice (ECJ) concerning the Outright Monetary Transactions (OMT) program of the European Central Bank. The ECJ rejected some of the objections made by the German Constitutional Court against the OMT program. Yet it did not create an open conflict but instead took the German concerns to be hypothetical. The next step in the ping-pong game was the decision of the German Constitutional Court that the OMT program was constitutional given certain restrictions. This result was possible only because the German Constitutional Court judges "read some more restrictions out of the ECJ's ruling than the ECJ may have been aware of pronouncing" (Chapter 10).

Such forms of cooperation involve diplomacy built upon compromises. In the opinion of Gertrude Lübbe-Wolff, these compromises belong to the world of politics. That is why compromises do not explicitly appear in the judgments of national and transnational constitutional courts. Instead judges take care to justify their decisions through legally defensible arguments. The more important such compromises become for judicial interactions, the less judicial review is distinct from policy-making.

[24] C. Landfried, "The Judicialization of Politics in Germany," *International Political Science Review* 15 (1994), 113–124 [122].

This does not mean that courts should not consider political circumstances, economic interests, or sociological enquiries. Martti Koskenniemi has rightly shown that lawyers "have already extended the range of argumentative options open to them. They have argued about economic interests, social progress, the need of political stability and so on. Yet, they have done this in secret, perhaps more by intuition than by reasoned choice."[25] The inclusion of political, economic, and social considerations into judicial discourses should nevertheless be done in a way that differs from political discourses. Bargaining is, for example, a matter of politics. Even if judges must bargain to get majorities in their respective court or chamber of court, the focus of their internal work should be on arguing.[26]

But what about the real world of constitutional courts? Do these courts really add value to democratic governance by deciding in different ways than politics?

Structure of the Book

The organization of the book follows the line of our argument. In the first part, the authors focus on theoretical concepts for analyzing the democratic legitimacy of judicial power within and beyond the nation-state. The judicialization of politics, the possibility of a principled distinction between judicial and ordinary politics, the judicial methods of protecting the law of democracy itself, and the political interests behind the European judicial appointment reforms are discussed. In the second part, case studies of democratic effectiveness of judicial power in political transformations are presented. We have selected studies of the role of constitutional courts in transitions to democracy and in the transformational processes of European integration. Throughout the case studies, it becomes obvious that modes of judicial decision-making are decisive for the capacity of constitutional courts effectively to protect a constitution, treaty, or convention of human rights. In the third part, the relationship between legitimacy, effectiveness, and judicial methods is

[25] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), p. 543.

[26] Robertson, *The Judge as Political Theorist*, p. 21, concludes based on a comparative empirical analysis of constitutional adjudication in Canada, Eastern Europe, France, Germany, and South Africa: "Of course judges bargain with each other to get majorities on multimember courts – but the currency they trade in is itself argument."

explored. Analyses of transnational judicial interactions, as well as of methods of mediating conflicts between subunits in pluralist legal regimes, are presented. In the fourth part, judicial power in processes of transformation is scrutinized. Because the rise of populism is endangering the very foundations of constitutional democracy, we examine the relation between populism and constitutional courts, and ask why populists so vehemently attack independent constitutional courts.

We start the debate with Martin Shapiro's argument that judicial review and democracy are not compatible. Judicial review involves, in his opinion, "a small number of unelected men and women making public policy or blocking public policy made by the people or their representatives," whereas "democracy means public policy made by the people or their elected representatives." For him, the really interesting question is: "How do they get away with it? How do a few people without the purse or the sword make public policy pronouncements that people and powerful institutions are willing to obey?"(Shapiro, Chapter 1). The authors of the book tend to give three answers.

Democratic Legitimacy of Judicial Power

First, democracies are built upon the majority-principle but at the same time "no constitutional democracy can be purely majoritarian" (Rosenfeld, Chapter 2). It is the task of constitutional courts to protect fundamental rights and the basic rules of democratic governance from the risks of majoritarian politics. As it might happen, and as it has happened, political majorities can act against the principles of constitutional democracy, thereby damaging the rules of self-governance and violating fundamental rights. That is why in many democracies around the world constitutional courts have been established as institutions that have the power to issue binding interpretations of the constitution and that can – and actually do[27] – decide against majoritarian politics. Once the constituent power of a state has decided to have judicial review, it is inevitable that constitutional court judges will affect politics and policies.

[27] See Landfried, "The Judicialization of Politics in Germany," p. 119. For the Supreme Court see R. H. Pildes, "Is the Supreme Court a 'Majoritarian' Institution?," *The Supreme Court Review* (2010), 103–158 [143] citing data that show that the Supreme Court from 1789 to 2006 has "struck down or constitutionally limited federal legislation in 25 percent of the cases involving a constitutional challenge."

To ensure that acts of public authority accord with the rules and principles of the constitution necessarily impacts policy-making.

Constitutional courts "can get away with it" because it is assumed that judicial review is one way (among others) of guaranteeing that elected majorities must act in accordance with the constitution. The authors of this volume believe that national democracies – even if judges are not neutral arbiters[28] – are better off with regard to the legitimacy of politics when having constitutional courts. They also assume that international and supranational organizations are more likely to comply with treaties when there are transnational courts.

This explanation for accepting judicial review has been criticized as an "overly idealist self-binding pre-commitment story."[29] Instead, the global trend toward judicial review is interpreted as part of a broader process, "whereby self-interested political and economic elites, while they profess support for democracy and sustained development, attempt to insulate policy-making from the vagaries of democratic politics."[30] This generalization is not justified because empirical evidence with regard to national constitutional courts shows that judicial review cannot altogether be characterized as being in the interest of the political and the economic elites.[31] This conclusion is especially significant because we need constitutional courts and the public debates triggered by these courts to counteract the increasing privatization of adjudication. "Democracies need the opportunities for public, multi-party interaction that adjudication entails."[32] Constitutional courts frequently initiate public debates about constitutional questions and enhance multiparty interactions.

There are, nevertheless, mechanisms in the relationship between democratic politics and judicial review that can be and often are detrimental to self-governance. The mere existence of judicial review changes the conditions of democratic policy making. Members of parliament adjust their drafts to existing or possible future decisions of the

[28] M. Shapiro, *Courts: A Comparative Political Analysis* (Chicago and London: University of Chicago Press 1981), p. 27.
[29] R. Hirschl, "The Origins of the New Constitutionalism: Lessons from the Old Constitutionalism," in S. Gill and A. C. Cutler (eds.), *New Constitutionalism and World Order* (Cambridge: Cambridge University Press 2015), p. 97.
[30] Ibid., p.107.
[31] Landfried, "The Judicialization of Politics in Germany," p. 119.
[32] J. Resnik, "Reinventing Courts as Democratic Institutions," *Daedalus: Journal of the American Academy of Arts & Sciences* 143 (2014), 9–27 [22].