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Nomos
CPG Series of Comparative Constitutional Law, Politics and Governance

Edited by the German-Southeast Asian Center of Excellence for Public Policy and Good Governance

Vol. 3
Henning Glaser (ed.)

Constitutional Jurisprudence

Function, Impact and Challenges

Nomos
Preface

Constitutional courts and constitutional adjudication continue to provide crucial topics for the scholarly debate on constitutional politics and constitutional law. With an increasing number of states adopting the continental European model of specialized constitutional review, many of them in contexts more or less different from those of the countries usually attributed with specialized constitutional review, new perspectives and theoretical approaches have been developed. While newly emerging forms of institutional design and judicial performance enrich the debate, basic questions of the ‘classical’ discourse on constitutional jurisprudence remain vividly discussed. With the present volume on the issue which is the third of the *CPG Series of Comparative Constitutional Law, Politics and Governance* we would like to contribute to the ongoing debate on constitutional jurisprudence from both, theoretical and practical perspectives.

The work on and with constitutional courts is indeed an important part of our Center’s academic and professional engagement which is reflected by the fact that besides a number of distinguished scholars, also justices and former justices from three constitutional courts contributed to this publication. Two of them are senior research fellows of the CPG, the other one an old partner and friend since our establishment. All in all, with the 15 papers collected in this volume, studies on nine jurisdictions and courts in Asia and Europe are presented – among them Croatia, Cambodia, Germany, Indonesia, Japan, Poland, South Korea, Spain and Taiwan. They are complemented by articles reflecting on general theoretical or genuine comparative aspects.

Along the way, a number of individuals and institutions have continuously enabled our work and the completion of the present book. First and foremost, particular thanks are owed to the authors for their time and efforts to make this collection possible, especially for their willingness to timely respond to our editorial requests. Moreover, the work of our Center is only possible due to the generous support of the German Foreign Ministry, the Federal Foreign Office, and the German Academic Exchange Service (DAAD) for which we extend our gratitude. Formed by the German Universities of Frankfurt, Münster and Passau and Thammasat University in Thailand as the host of CPG, the enriching academic
cooperation between Germany and Thailand behind it has been owed during the last years especially to the steady support of Prof. Narong Jaiharn, Dean of Thammasat’s Faculty of Law, Prof. Dr. Ingwer Ebsen (Frankfurt), Prof. Dr. Dr. hc. Dirk Ehlers (Münster), Prof. Dr. Robert Esser (Passau), Assist. Prof. Dr. Kittisak Prokati (Thammasat), and Assoc. Prof. Dr. Worachet Pakeerut (Thammasat). We would like to thank them all for their constant endorsement of the work of our joint institution.

Among our Asian colleagues for whose opinion and advice we owe thanks particular in our work on constitutional jurisprudence we would like to express our acknowledgement to Prof. Dr. Yueh-sheng Weng, Dr. Warawit Kanithasen, Prof. Dr. Boonsri Mewongukote, Prof. Dr. Widodo Ekatjahjana and Prof. Dr. Seog-Yun Song.

For their editorial and technical support we furthermore acknowledge the contributions of Dr. Archibald Alexander III, Dr. Duc Quang Ly, Adam Reekie, Terence Freibier, Dr. Sabine Carl, Wang Xiaochuan and Chatmongkhon Suttiwichai.

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Part I: Introduction
Constitutional Courts – understood as institutions conclusively applying constitutional law based on a juridical rationale – remain a continuing theme of contemporary constitutional theory. While constitutional jurisprudence is globally gaining relative importance in general, it is especially the institutional model of specialized CCs spreading over the globe. However, the most fundamental issues pertaining to constitutional jurisprudence concern all models of constitutional review, the diffused as well as the specialized (Ebsen), in more or less equal ways. With the ‘classical’ questions of the related scholarly debates being still relevant, some new sound, instructive perspectives have been added to the rich discourse on the issue since it started to emerge in the early days of modern constitutionalism. The articles collected in this volume reflect this spectrum, most of them from the perspective of selected country studies.

To start with some of the most fundamental aspects of this ‘classical-contemporary’ discourse on constitutional adjudication, three major layers of its evolution might be distinguished. The first and still most fundamental one results from the court’s power to invalidate legislation, to act, so to speak, as a ‘negative’ or even ‘positive legislator’. This form of judicial power poses basic questions about any CC’s legitimacy in relation to the sovereign who made the constitution as incarnated in its original formulation – this is very much an American debate conducted

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1 Hereafter “CCs”.
2 See Marcic’s hopeful observation according to which “the globe is more and more captured by the web of light of constitutional jurisprudence” by specialized CCs (translation by the author). Marcic, Verfassung und Verfassungsgericht, 1963, p. 207. See also Ginsburg, Judicial Review in New Democracies, Constitutional Courts in Asian Cases, 2003, p. 60; Shapiro, “Political Jurisprudence,” 2002, pp. 19-54.
3 Names in italics and brackets refer to the respective chapters in this volume.
under the label of ‘originalism’ – or to the elected legislature whose legitimacy is derived more directly from the sovereign (Ebsen and Wyrzykowski).

The second discursive layer follows from the discovery of the transformative effects which constitutional jurisprudence exerts on the legal system as a whole. They are described and analyzed as ‘constitutionalization’ (Jestaedt).

The issue became particularly relevant with the arrival and rise of multilevel-constitutionalism (Esser) raising also the question of an implied competition between the involved normative regimes and judicial actors. Unlike the debate on the fundamental legitimacy of constitutional review, the perspective on constitutionalization puts the accent not on the invalidation of legislation but on the realization of the constitution. Furthermore, the focus on constitutionalization invites also to discuss those doctrinal, methodological or procedural elements in the constitutional order which enable the endeavor to effectively entrench the constitution into ‘plain’ law by the legal process (Banić, Chon, Cho, Hasebe, Jestaedt and Makowicz).

A third common layer of the discourse on the very phenomenon of constitutional jurisprudence is formed by the discussion of the judicialization of (mega) politics and the politicization of courts respectively. Especially the latter formulation echoes the older issue of basic judicial legitimacy with a certain negative notion (Heru, Wyrzykowski), while the discussion of ‘judicialization’ reflects the increasing juridification of public ordering from a more neutral point of view. As a historical process it started in the 1970s with the onset of the ‘third wave of democra-

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8 Whereas Dworkin, “Political Judges and the Rule of Law,” 2011, p. 3, points out in this respect that “my own view is that the vocabulary of this debate about judicial politics is too crude [...]”, at least the phenomenological analysis of judicialization has gained some advancement with contributions like those of Ran Hirschl or Tom Ginsburg (see below).
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tization’, the ‘rights revolution’⁹ and the accelerating proliferation of constitutional law ‘beyond the state’¹⁰. Emerging in the ‘Western’ world, this process of a spreading judicialization gained momentum in Eastern Europe, Latin America, Africa and Asia especially during the 1990s when (transitional) political systems started to become increasingly defined by a more meaningful constitutional law.¹¹ Focus of the debate on judicialization are the specific forms and dynamics of constitutional politics favoring an increasing encroachment of courts on mega politics.¹² This includes especially the underlying strategic rationales and performative patterns enabling and realizing this form of constitutional politics by courts.¹³

A number of articles in this volume reflect these basic problems of constitutional adjudication: the legitimacy of constitutional jurisprudence and the position of CCs within the political power structure, the processes of constitutionalization and judicialization and both’ normative basis and procedural/methodological drivers (A.).

Furthermore, especially with many constitutional systems still experimenting in developing the best formula for the implementation of an appropriate form of constitutional jurisprudence, the institutional frame of constitutional adjudication forms another major topic of the present volume, in particular the institutional environment, design and infrastructure of CCs (B.).

Another perspective employed by a number of the papers presented here is directed at the external influences on constitutional adjudication, namely the role of the migration, transfer and diffusion of institutional models and doctrinal achievements relevant for the evolution of constitutional jurisprudence (C.).

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¹¹ Additionally, one might raise the question in how far judicialization can be further linked to the global expansion of neoliberalism as a dominating political ideology since the 1980s. See Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism, 2004, pp. 146 ff., 154 ff., and 164 ff.
¹² See Hirschl, Towards Juristocracy.
The first perspective, directed at the legitimacy of constitutional review and the position of CCs in the political power structure, the processes of constitutionalization and judicialization as well as the normative basis and practices enabling them, addresses some of the most complex and partly also most disputed issues in the scholarly debate on constitutional adjudication.

I. Legitimacy and Power Structure, Constitutionalization and Judicialization

Pertaining to the basic legitimacy of constitutional jurisprudence and the courts’ position within the political power structure, it has been said that judges conducting constitutional review are doing more or less the same as legislators with a difference only in degree not in kind. Starting from this observation, two layers of the problem can be distinguished.

A first one is represented by the discussion of whether courts are legitimately entitled to invalidate legislation in principle. This is very much an Anglo-Saxon debate based on the British conception of parliamentary sovereignty or the ‘originalist’ understanding in American

14 See Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law, 2008, p. 92; see for the similarity of legislator and court already Brutus, “Essay XI,” p. 188. He somehow anticipated Kelsen who acknowledged in principle that the power to declare legislation unconstitutional is equivalent with the power to make law. While Kelsen stressed, however, that the court was acting just as a ‘negative’, not a ‘positive’ legislator, he also stressed the importance of maintaining the juridical character of legal decisions to justify this creative judicial act of lawmaking as still distinct from parliamentary legislation.

15 See Ferejohn and Pasquino, “Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice,” 2002, p. 28: “Parliamentary sovereignty regimes by definition regard both the executive and the courts as subordinated to legislature, with their role being to implement and enforce the legislator’s commands.” The notion of judicial review is therefore basically alien to these types of constitutional models. For the decline of parliamentary sovereignty and the advent of CCs in new democracies see Ginsburg, Judicial Review in New Democracies, p. 1.
Constitutionalism while it is much less debatable in other constitutional settings.

What is generally debatable and debated however, and this is subject of the second discursive layer, is the question of the degree of legitimate judicial encroachment on the realm of the elected powers. Here, the concrete accent of the debate will be put differently in different constitutional settings dependent from a number of variables including the deep structure of legal thought and judicial role understanding and the actual balances of power. Broadly speaking, the more impact CCs have, the more likely they will provoke fundamental questions in terms of legitimacy.

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17 See Dworkin, Law’s Empire, 1986, p. 356. The different basic attitude towards constitutional review are institutionally reflected by the two basic models of constitutional review with Anglo-Saxon ‘diffuse’ review in the one hand and ‘specialized’ constitutional review on the other hand with the latter being rooted in the conception of constitutional supremacy. Different from the British conception of parliamentary supremacy as a continuum of supreme power ‘in action’ and the American idea of a foundational exercise of the same sovereign power for once and ever, the idea of constitutional supremacy acknowledges the need to be continuously realized by the collaboration of all constitutional actors in a normative frame concretized by judicial adjudication.

18 In fact, the principled approach against any judicial review is meanwhile often softened (especially after the introduction of a Supreme Court in the UK) and rather inclined to represent the radical skeptical position within the discursive spectrum dealing with a basically accepted judicial review arguing to limit its scope in favor of the elected powers. See for an overview of the different positions Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, 2007, p. 91 ff., and his own skeptical stance on pp. 260 ff. He aims at defending (electoral) democracy against judicial review particularly not on the basis of parliamentary supremacy but a functional differentiation between the politics and courts against the ultimate goal to preserve “the equality of concern and respect between citizens that lies at the heart of the constitutional project” (Bellamy, Political Constitutionalism, p. 260). Not a clear-cut conception of parliamentary sovereignty but an open discourse on the quality of democratic governance thus forms the background of the debate in this sense. See Rubenfeld, “Legitimacy and Interpretation,” p. 226: “There are splendid pragmatic explanations – organized around the need for long-term stability – but no one has ever quite managed to explain why, if a political community is to govern itself, past-enacted law can deny to a current majority of voters, but grant to a supermajority, the right to alter or abolish that law as it pleases.”

19 See Tushnet, Why the Constitution Matters, 2010, p. 4: “What the Supreme Court says our rights are depends in a complicated way on the state of our politics.”
For the scholarly debate on this issue, the qualification of CCs as “negative legislators” is an important starting point as it implies a differentiated qualification of constitutional review far away from its blunt denial rather than involving notions of a constructive skepticism. Decisive in this respect is the reservation that CCs, while doing essentially the same as legislators, still act only negatively. *Kelsen*, introducing this differentiation, consequentially stressed the importance of maintaining the juridical character of these negative ‘legislative’ acts, an aspect which will be taken up below. However, with increasing powers occupied by CCs – one might think of the invalidation of ‘unconstitutional constitutional law’, the introduction of new laws and profound encroachments on mega politics in general – CCs are meanwhile often explicitly labeled as ‘positive legislators’ reiterating the basic boundary and legitimacy problem with emphasis.

A ‘classical’ answer to the problem where to draw the line between the elected and the law-applying powers is the widely discussed, yet only vaguely prescribable, self-restraint recommended to or asserted by justices. Given this vagueness and the fact that “there is no way for a CC to be out of the way of politics” (*Wyrzykowski*), conflicts are inevitable if CCs intend to play any meaningful role within the polity. The more closely constitutional adjudication affects the elected, ‘political’ powers, the less will vague defined attitudes or proclamations of self-restraint convince, the more decisive is it to delineate the functional differentiation between political and juridical decision making in terms of legitimacy. In this respect, contrary to the statement above, there is arguably a difference in kind between judicial decision making and the one of ‘political’ powers: Whereas judges decide according to a juridical rationale, legislators and governors follow a political one. If, thus, the constitution

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22 See Silverstein, *Law’s Allure – How Law Shapes, Constrains, Saves, and Kills Politics*, 2009, p. 63: “[J]udicial decision making follows different rules and is driven by different incentives, limited by different constraints and addressed to different audiences in a different language than it is the case for the political process. The way judges articulate, explain, and rationalize their choices and the way earlier decisions influence, shape, and constrain later judicial decisions are distinctly different from the patterns, practices, rhetoric, internal rules, and driving incentives that operate in the elected branches and among bureaucrats.”
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gives a court the function to scrutinize the political process according to the constitution as the supreme law. CCs are enabled and entitled by a functional legitimacy based on the constitution’s quality as law and the specific rationale of judicial decision making. This implies that court decisions are principally legitimized as long as they are convincingly derived on the basis of legal methodology. Methodology represents then both an enabling and a limiting power with respect of constitutional adjudication as already implied by Kelsen.

However, as much as judicial adjudication is thus grounded in terms of a functional legitimacy as much the basic tension with the legitimacy of the ‘political’ powers remains. This prompts the problem of competing notions of legitimacy which cannot be fully resolved, even more as constitutional (if not all) law is in itself inescapably political or ideological.

23 The rationale of constitutional adjudication is then complementary to those of the political process (see Richard H. Fallon, Implementing the Constitution, quoted after Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law, 2008, p. 92). Arguably, CCs even secure the legislator’s legitimacy in law making by reinforcing implementable rules by invalidating unconstitutional ones (see also Möllers, Gewaltengliederung, 2005, pp. 138 f.). This functional complementarity is grounded in the need for an impartial institution which operatively corresponds with the political ones which, on their part, have to be partial to function according to their (political) rationale. See Rosanvallon, Democratic Legitimacy: Impartiality, Reflexivity, Proximity, 2011, pp. 163 f.

24 Therefore, with respect of the diverging underlying decision making rationale of courts and parliaments, the oversight and review functions of courts cannot be attributed to legislative committees (as practiced for example by some Socialist constitutions) without ultimately changing the nature of the constitutional dynamics. See for such a proposal Rawlings, “Introduction: Testing Times,” 2010, p. 17.

25 See Stone Sweet, Governing with Judges: Constitutional Politics in Europe, 2000, p. 105: “When the court annuls a bill on right grounds it substitutes its own reading of rights, and its own policy goals, for those of the parliamentary majority.”

26 Formally, both, CCs and legislatures, receive their necessary legitimacy from the constitution. While the legislature’s legitimacy, however, is additionally derived from the direct exercise of sovereign power is the CCs sufficient legitimacy ‘only’ a functional one, yet one which is inevitable to ensure the legislature’s formal legitimacy as being bound to the legal prescriptions of the constitution as a political actor.

27 See Sadurski, “Introduction,” 2006, p. 1, who refers to the inherently political character of rights: “All rights are political.”
The consequences are twofold: The best safeguard to keep the inevitable tensions between the two competing notions of legitimacy in balance is a consequent practice of methodological integrity by the courts.\textsuperscript{28}

Moreover, the different branches of power practically communicate and informally exert mutual influence on each other’s decision making. Regularly, both sides are prone to anticipate how the other might react and adjust its behavior accordingly, – at least to a certain extent.\textsuperscript{29} Such a practice of implicit ‘inter-power communication’ can contribute to mitigate the tension between the diverging involved institutional rationales to reinforce the ‘complementary potential’ of the different powers. On the other side, it might also weaken the methodological vigor and integrity of judicial decision-making as the fundament of the CC’s (functional) legitimacy vis-à-vis the democratically more directly mandated constitutional powers.

Anyhow, practically no established relationship between CCs and the ‘political’ powers will be set in stone. Evidence shows that the influence that CCs exert on the polity varies considerably over time. For not a few CCs even their very institutional mission and outlook has substantially changed in the context of the emerging balances of power. Such transformations result particularly from what be called ‘emancipating moments’ of constitutional review laying the ground for a new positioning of the CC as a more meaningful constitutional player in the respective setting. Examples for those acts of institutional self-empowerment are displayed by the Marbury-Court, the German Federal CC, the French Constitutional Council, the Taiwanese, South Korean or the Indonesian CC and the European Court of Justice and the European Court of Human Rights as well. Regularly, such ‘second foundations’ are accompanied by conflicts with the other branches of power. Though they are only the most visible

\textsuperscript{28} This methodological integrity is not only the necessary condition to preserve a CC’s functional legitimacy but also the sufficient one to ensure its function as an exemplary deliberative institution as \textit{John Rawls} has described the court’s role in a democratic society: as a forum in which reasons, explanations and justifications for coercive state policy are not only offered to the public but in which the public opinion is integrated in discourses, a phenomenon which \textit{Häberle} calls the “community of interpreters of the constitution”. See Rawls, \textit{Political Liberalism}, 1996, pp. 231-236; Häberle, “Die offene Gesellschaft der Verfassungsinterpreten. Ein Beitrag zur pluralistischen und ‘prozessualen’ Verfassungsinterpretation,” 1975, pp. 297-305.

\textsuperscript{29} See Blankenburg, “Mobilization of the German Federal Constitutional Court,” 2002, p. 171: “The political process [...] anticipates constitutional arguments” and this, that should be added, is also true vice versa.
expression of the inherently tension loaded relationship between the judicial and the ‘political’ constitutional powers, they exert a specific impact as they permanently modify the constitutional balances of power.

In Germany for instance, the CC fought over – and won – acknowledgment as an autonomous constitutional organ in the so called ‘status dispute’ (1952/53) which resulted in the court’s institutional separation from the ‘normal’ judiciary and its positioning on equal footing with the other constitutional powers. Similarly in France, the Constitutional Council, 13 years after its foundation, single-handedly changed its role by a landmark decision. Having hitherto functioned as the President’s – precisely General De Gaulle’s – ‘watchdog’ against the Parliament, the Council’s role changed fundamentally after the General’s death with its famous 1971-decision on a new law of associations. With this decision, the body started to emerge from an insignificant political council to become a veritable juridical body.\(^{30}\) Acting henceforth as a defender of citizens’ and (legislative) minorities’ rights, it eventually reached eye-level with the other constitutional powers. In both cases, the court’s institutional self-emancipation was soon reflected by the legislator’s granting of new competences to the CCs which further increased their reach and standing.\(^{31}\)

Notwithstanding the extraordinary occurrence of emancipatory processes like these, tensions and conflicts form a normal part of the interagency relationship between courts and governments/parliaments. How these conflicts shape up depends not only on the actual balances of power but largely also on the stability and maturity of the given constitutional setting.\(^{32}\)

\(^{30}\) Initially the French ‘Council’ was supposed to just check the formal constitutionality of laws, especially pertaining to the competencies allocated among the state powers, effectively functioning as a “cannon aimed at parliament”. See path breaking Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, 1992, pp. 60 f.

\(^{31}\) The same is true for their Taiwanese CC (Hwang) which experienced another version of a ‘status dispute’.

\(^{32}\) In this sense, conflicts might for instance remain in the frame of doctrinal or political debates remaining far away from challenging the basic functions of the involved institutions but also result in a wide range of pathologies of inter-party relations. The latter might comprise procedural misbehavior and non-compliance, the non-execution of judicial decisions and accompanying damaging debates, allegations and various forms of threats. See for South Korea Cho, for Poland the examples of damaging public accusations and procedural non-compliance presented by Wyrzykowski in this volume. For Egypt see El-Borai, “The...
Another typical conflict evolves between specialized CCs and the regular judiciary, namely Supreme Courts. While the former apply the supreme law conclusively and often with encompassingly binding effect, Supreme Courts regularly represent the older and much ‘bigger’ judicial institution in terms of institutional ‘volume’. Often CCs are also linked to a different political culture than Supreme Courts. In many transitional contexts the introduction of a specialized CC is more or less explicitly also attributed to the desire for personal and institutional discontinuity with the established judiciary by implementing a new body which is – at least partly – staffed by the new political powers and often not only comprising career judges.

Generally, inter-court conflicts are inclined to accompany processes of constitutionalization. This is particularly the case during the earlier years of newly introduced CCs when they start to realize a new constitution’s...
promise in the realm of ‘plain law’ which normally is the domain of the regular and long established courts.

These observations lead to two central topics in the scholarly debate on constitutional jurisprudence which are addressed in several papers presented in this volume: ‘constitutionalization’ and ‘judicialization’.

Constitutionalization, as indicated above, describes the entrenchment of the constitution into ‘plain law’, a process which takes the form of a downward directed process to realize the supremacy of the constitution. Occasionally it is met with resistance of the other courts favoring different interpretations on laws they use to apply on a routine basis. Practically, constitutionalization is largely also a matter of opportunity and ability on the side of the CC requiring the initiative of concerned parties and the necessary competences and methods.

Judicialization on the other hand, describes the expansion of the court’s authoritative definition of constitutional rules with respect to mega politics, thus a shifting of the horizontal boundaries between the different branches of power. Correspondingly, it requires first and foremost a supportive attitude and functional determination of justices in reaching out to the political. While the view on constitutionalization ultimately focuses on doctrinal changes in the law, judicialization points to the political effects of selected decisions of high impact and strategic importance. Going hand-in-hand with conflicts between CCs and the ‘political’ branches of power, the qualification of a judicial performance as ‘judicialization’ implies always a certain gravity of judicial activism. This assessment however, is always a relative one, – not only with respect to the observer but especially also to the given context of the respective constitutional-political system. In fact, what is considered as ‘judicialization’ – especially when it comes with an implied notion of a somehow problematic judicial legitimacy – varies strongly from system to system.35

34 Pertaining to this ‘promise’, Jestaedt, in this volume, equates ‘constitutionalization’ graphically with the rise of the number of people “who can claim fundamental rights” instead of the mere multiplication of the “number of fundamental rights” within the constitutional order. Especially in transitional settings, this development is very much dependent on the introduction of specialized CC with sufficient competences.

35 While in Indonesia the invalidation of laws as such is enough to foster a fierce debate over the CC’s legitimacy (Heru), the Thai debate on judicialization for instance refers to a CC which ended three elected governments in a row by disqualifying the prime minister, dissolved two times the then biggest party, annulled two national elections and invalidated several constitutional amendments.
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While processes of constitutionalization are easily to be identified and generally positively connoted is the qualification of a court’s activities as ‘judicialization’ regularly based on only vaguely describable and often negatively connoted developments. However, processes of judicialization can become particularly visible as phenomena of institutional change when courts which formerly refrained from ‘activism’ start to shift the boundaries of self-restraint to a more ambitious stance. In this sense, moments of emancipatory self-authorization are often representing visible expressions of such shifts towards constitutionalization and/or judicialization. An interesting example is the Thai CC which, almost overnight, switched from a notoriously ‘passive’ body to one of the most aggressive judicial defenders of the constitution in contemporary constitutionalism. Interestingly, in doing so, it displays an immensely forceful process of judicialization coinciding with the almost total absence of any constitutionalization.

36 Such a coincidence of constitutionalization and judicialization in the moment of judicial self-empowerment is the case of the Marbury- and especially those of the French 1971 decision. With the latter, the Council authoritatively affirmed the so-called “valeur constitutionnel” of normative texts which were not part of the 1958 Constitution but only contained in the 1946 preamble, the 1789 declaration and the 1946 principles, a list of “political, economic, and social principles particularly necessary for our times” (Stone Sweet, The Birth of Judicial Politics in France, p. 66, quoting the Council). The German “status dispute” on the other side does not represent any process of constitutionalization nor, arguably, of judicialization rather than a very untypical form of institutional emancipation which was possible without the need of an open power struggle in form of judicial decision-making because the adversary actors were able to find a solution before the dispute escalated, an outcome strongly supported by the vivid discursive links among them as well as the involvement of the professional public.

37 See Glaser, “Thai Constitutional Courts and the Political Order,” 2012, pp. 65-163. Generally, this kind of ‘judicialization without constitutionalization’ might be found, even not necessarily, in cases requiring decisions on “foundational nation-building-questions” or “fundamental restorative justice dilemmas” – if the respective decisions are not subsequently translated into a new judicial orthodoxy or comparable dogmatic changes. See for these types of cases as expressions of judicialization Hirschl, Towards Juristocracy, pp. 172 ff., 190 ff. The significant difference of constitutionalization and judicialization as suggested here is the effect on the legal rather than the political system. Insofar ‘constitutionalization’ describes a CC’s decision making which triggers long lasting and repetitive transformations of the law’s substance and legal doctrine. On the other side, acts of judicialization can but do not necessarily have such long-term fertilizing effects on the law. Pertaining to the effects of decision-making in high impact cases another distinction might be suggested. In fact, some of these decisions exert ground-breaking effect by setting a trend in legal thought and doctrinal differentiation but
A special type of ‘judicialization without constitutionalization’ is found within the class of those cases labelled as ‘political trials’. Relevant in terms of judicialization among them are only those in which courts defend the integrity of the Constitution against ‘political’ powers assumed to challenge it. This can take the form of impeachments, removals from office, party dissolutions, compensation claims or criminal charges eliminating the concrete challenge danger and setting powerful symbols of domination for the future. These kinds of ‘political trials’ are typical for deeply divided societies with the political division being reflected by a corresponding division of or within the constitutional bodies. While it is possible that these particular cases of judicialization coincide with processes of constitutionalization do they more often tend to represent the rare type of ‘isolated’ moments of ‘judicialization without constitutionalization’.  

II. The Normative Basis and Reference of Constitutional Adjudication

Pertaining to the numerous variables enabling and framing judicial behavior two partly intersecting dimensions might be distinguished. The first can be circumscribed by the factors ‘might, attitude and ideology’ fail to immediately influence the underpinning reality of the concrete case. However, some rulings might not at all emerge in long lasting constructive developments but exert an immediate outcome of high practical impact. An example for the first group of cases is provided by Rosenberg who argues with respect of the famous U.S. Supreme Court decision Brown v. Board of Education opposing the judgment (Rosenberg, The Hollow Hope: Can Courts Bring About Social Change?, 1991, quoted after Hirschl, “On the Blurred Methodological Matrix of Comparative Constitutional Law,” 2010 [2006], p. 56). Despite this immediate failure it nevertheless had a long lasting symbolic influence which indirectly contributed to the accompanying societal tendencies of transformative impact. An example for the second group of cases are some recent cases of the Thai CC on mega politics which created a maximum effect on politics while they were scarcely contributing to dogmatic doctrine or any objectively reproducible case record.  

38 See Christenson, Political Trials: Gordian Knots in the Law, 1999, pp. 291 ff., according to whom these culminations of the mentioned law-politics entanglements are not only revealing “moments for understanding nations and entire civilizations” but also chances to productively bring a society’s inescapable contradictions, its inner nature and history to clear focus and thus “opening the way to see and accept the ironies of law, politics and history”.

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with respect of judicial decision-making, the second consists of the normative frame and reference of constitutional adjudication. It comprises questions of jurisdiction and methodology of CCs as well as the general meaning and impact of constitutional law in a given system.

An example for the first complex is the debate on attitudinal analysis of judicial decision-making which seeks to explore the tension between a constitutional application de lege artis and one guided by the interests and moral and ideological preferences of judges. Noteworthy in this context is Dworkin’s argument that judges decide cases already on political grounds when they base their decision on “the ground that certain principles of political morality are right” rather than only if their decision is one “that certain political groups would wish” for. Is the former somehow inevitable in constitutional adjudication, the latter becomes critical thus far as decision-making is made in deference of partial interests. However, the more CCs are operating at the borders between a legitimate and an illegitimate recourse on ‘political’ considerations, the more they will be “at pains to make it appear that the decisions [are] reached on technical, legal, rather than political grounds”.

This is leading to the second complex, the normative basis and reference of constitutional adjudication. It consists of the normative framework to be applied by CCs, namely the constitution, and the methodological principles, rules and practices prescribing how to apply it. Pertaining to the latter aspect, most contemporary constitutions for example contain rules and principles which counterbalance the allowed restriction of rights by limiting the scope of the state’s power to restrict them. Most widespread among them and most important for the ad-

41 Dworkin, “Political Judges and the Rule of Law,” p. 2, referring to Griffith, The Politics of the Judiciary, 1977. The decisive distinction so far is that between arguments of political principle and those of political policy. In his view, judges should rest their judgments on controversial cases solely on arguments of political principle but not political policy (Dworkin, “Political Judges and the Rule of Law,” p. 4). See also Ebsen, Das Bundesverfassungsgericht als Element gesellschaftlicher Selbstregulierung: Eine pluralistische Theorie der Verfassungsgerichtsbarkeit im demokratischen Verfassungsstaat, 1985, who is inclined to cast some doubts on the determinative power of constitutional norms in constitutional adjudication.
vancement of constitutionalization is the principle of proportionality (Banić, Jestaedt, Markowicz, García Roca).

Probably the most forceful and differentiated tradition in terms of limiting right-restrictions is provided by German constitutional law. Especially in the wake of the global trend to juridify the exercise of public power some of its related achievements have become part of a sort of contemporary common constitutional knowledge, namely the principle of proportionality or the rule that no basic right may be infringed upon in its essential substance (Art. 19 II German Basic Law). Although having influenced a great number of jurisdictions all over the world, the respective adoptions and modifications differ largely in concept and practice, especially with respect to the principle of proportionality.\footnote{See Goldsworthy, “Conclusions,” 2007, pp. 320 ff. While some countries refer to one abstractly defined and broadly applied version of the principle of proportionality do other jurisdictions differentiate for different rights and allow larger limitations of rights, sometimes, for instance, by truncating the original principle of proportionality to necessity. In Canada rights shall be subject only to such reasonable limits prescribed by law as they can be demonstrably justified in a free and democratic society while the European Convention on Human Rights, being incorporated for example into English constitutional law by the 1998 Human Rights Act, states for certain rights that they are guaranteed subject only to such laws as are “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” See Robertson, The Judge as Political Theorist: Contemporary Constitutional Review, 2010, pp. 358 f.}

Another important layer of rules framing as well as enabling CCs beyond such substantial principles of constitutional law is formed by legal methodology. Its rules, however, are as crucial as precarious. While the proper application of methodological rules will shield the court from undue contestation, will methodological inconsequence or inconsistence bear the potential to provoke fierce challenges of the court’s legitimacy (Wyrzykowski). In this sense, it is the ineluctable paradox of CCs as being legitimized by their juridical decision-making rationale vis-à-vis the elected powers while having to apply an inevitable political/ideological law that makes constitutional methodology to be such a crucial factor for the legitimacy of constitutional adjudication.\footnote{See for an overview Corkin, Europeanization of Judicial Review, 2015, pp. 61 ff.} Dworkin draws the conclusion with his “doctrine of political responsibility” which requires the court to observe a certain degree of methodological consistency as a
necessary condition of its integrity and legitimacy. Based on it, it might be said that the more political a judicial decision is the more the judges need to be aware of the importance to prove their role as impartial referees by the methodological standard they apply.

Crucial in this respect – and here methodology and substantial constitutional law are intersecting – is the principle of procedural equality and nondiscrimination. To realize it requires a consistent standard of methodological practice in general, the court’s accountability to the professional public and a sufficient and equal participation of the involved parties. This specific kind of equality and fairness formulates nothing less than the default line of legitimate constitutional adjudication. Moreover, it also offers a litmus test to assess judicial activism. In this sense, it answers the question whether a CC is ‘political’ only with regard of its decision making’s subject (what is somehow unavoidable) or politicized in substance by unduly favoring one of the involved parties (which severely undermines the court’s legitimacy). As Wyrzykowski in this volume points out: “[T]he immutable rules of legal interpretation are the very foundation of modern democratic states […] based on the rule of law.” In contrast, the deliberate deviation from the interpretational path defined by a proper application of legal methodology is one of the most self-damaging possible behaviors of a CC and severely undermining its institutional authority. However, the decisive function of a proper application of methodological standards to keep “at bay the dangers of logical and linguistic games” (Wyrzykowski) is dependent not only on judicial integrity, legal knowledge and methodological expertise but also on the court’s institutional culture and environment (see below). This is even more true as methodological rules, despite their importance, can barely be prescribed by law. In this sense, probably all CCs have (had) to face the challenge of developing their own body of relevant knowledge and acquiring a practice of methodological expertise. This challenge, however, is much easier to handle for those CCs which were founded in well established, big and differentiated legal systems rather than for those

which are operating in ‘younger’ settings or leading the avant-garde of transition into a rule-of-law based political community.46

A last layer of normative framing and enabling of constitutional adjudication is, at least to a certain degree, a court’s style of decision making. In this context, the French and the German court exemplarily represent two opposing models. The German court provides extensive reasoning which reveals the ratio decidendi in detail, reflects former decisions, the relevant scholarly debate, methodology, and the anticipated impact of the decision. The French Council, on the other side, refrains from any detailed account on its decision making, solely relying on the authority of the constitution’s letter.47 Beyond such differences, however, the actual impact of a court’s decision making style is dependent on a number of factors. Apart from the justices’ aptness and willingness to provide detailed account of their considerations, the general tradition of judicial communication in the respective setting and the way in which legal questions are discussed in society also plays an important role in this respect. This is again exemplified by the French case. The fact that the Council’s decisions barely reflect the high art of legal interpretation in an easily recognizable way carries less weight given the broader discursive context in which the decisions are received. It compensates the brief reasoning at least partly with a rich tradition of differentiated legal thought corresponding with a general intellectual environment which represents one of Europe’s ‘discourse-cultures’ par excellence. Arguably, this ensures a certain dialogue between Court, academia and general public which contributes to a degree of accountability despite the Council’s less than optimal decision making style.48

A last aspect to be mentioned here is the normative reference of constitutional adjudication, the general meaning and impact of constitutional law to be applied by the CC.

48 See also Jouanjan, “Conseil constitutionnel und Bundesverfassungsgericht: zwei verschiedene Modelle der europäischen Verfassungsgerichtsbarkeit,” 2011, p. 144. Moreover, at least until the 2008 constitutional amendment, the classical jurisdiction of the Council being competent to scrutinize legal sources only before their enactment in the form of the French-style apriori review (art. 54 and 61 French Constitution) objectively required much less effort concerning the facts of the case than the German constitutional complaint by citizens does.