Judicial Activism in a Comparative Perspective

The Supreme Court of India vs. the Bundesverfassungsgericht
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Nomos
This doctoral thesis is dedicated to the two most important women in my life, my mother and my wife.
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Writing a doctoral thesis is always a great challenge, which I could not have mastered without the help of several people, to whom I owe my deepest gratitude. First, I would like to express my sincere gratitude to my advisor Prof. Subrata K. Mitra for the support of my doctoral thesis over the last five years.

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Fabian Schusser
Karlsruhe, November 2018
Foreword

All stable political systems have a functional need for a fixed point around which the dynamics of political competition can revolve. This is a complex issue because the institution which affects politics needs to be independent of politics. However, in practical terms, people occupying this institution need to be selected, elected or appointed by leaders who are themselves politicians, subject to the usual pressures and cross-pressures of political competition. How can a political system ensure both judicial integrity and the comprehensive attention of the judiciary to the full range of conflictual issues that characterise contemporary societies? Fabian Schusser’s contribution to this important issue, drawing on the cases of India and Germany, analyses this complex problem in a comparative framework.

In modern political systems, it is the judiciary that occupies the key role of adjudicator, and enforcer of norms’ compliance. In addition, liberal democracies require a sense of fairness in political transactions in order to generate the requisite political legitimacy to reinforce authority with force. The supreme judiciary has the responsibility of ensuring a level playing field for competing political forces. Finally, in changing societies and stable liberal democracies facing rapid social change, an institution is needed to oversee political change and ensure orderly transition of the system from one context to another. The judiciary is endowed with this function of being an adjudicator for competing social forces. The importance of Fabian Schusser’s contribution lies in the fact that he undertakes an analysis of the Supreme Court in India and the Constitutional Court in Germany with these aspects in mind. He undertakes his analysis in a comparative framework and his empirical analysis is driven by neo-institutional theory.

The Supreme Court is an integral part of the court system of India. It is not only a constitutional court, but also a supreme civil and criminal court. Its judges are mainly recruited from the ranks of the high courts and hold their office until the age of 65. The Supreme Court has control over an extensive jurisdiction. It can review laws for constitutionality or intervene when individuals see their constitutionally guaranteed rights violated. In contrast to the Bundesverfassungsgericht, the Supreme Court has the power to handle and decide on populist complaints (also known as Public.
Interest Litigation). In this case, people can sue for the rights of third parties in front of the Supreme Court.

In this important and pioneering work, Fabian Schusser casts the development of the judiciary in India and Germany in a historical framework, divided into three phases.

The first phase began immediately after the creation of the Supreme Court after Independence from British colonial rule. During the early years after Independence, under the leadership of Prime Minister Jawaharlal Nehru, the Indian parliament tried to pass several land reforms, which intended a redistribution of land from the landlords (zamindars) to tenants. However, there were several lawsuits in front of the Supreme Court, especially by the zamindaris. The Supreme Court, defending the fundamental right to property, opposed the government and, in many cases, decided that the laws were incompatible to the constitution. This caused the government to add amendments to the constitution more and more often in order to enforce its land reforms somehow. There was no clear winner in this dispute, but the court was able to strengthen its position as guardian of the constitution and most particularly, fundamental rights.

In the second phase, the Supreme Court again had to decide upon cases of land reforms and oppose the parliament’s arbitrarily amending the constitution. In the Golak Nath case, the Supreme Court denied the parliament this opportunity, while some time later, in the Kesavananda case, it granted this power back to the parliament. In the judgement on the Kesavananda case, the Supreme Court decided that the parliament had the power to change the constitution, but these changes should not damage the rights and freedoms enshrined in the basic structure of the constitution. This doctrine of the basic structure is still valid today. The problem here, however, is that only the judges decide what the basic structure of the constitution is. That opened up the scope for potential conflict between the government, representing majority political opinion in the country, and the judiciary as the defender of the constitution. The third phase saw the creation of the Public Interest Litigation (PIL). Under the leadership of Judge Iyer, the PIL was developed. To this day, it is one of the most widely used legal remedies in front of the Supreme Court. It led to the restoration of the reputation for the Supreme Court which was tarnished during the Emergency.

Contrary to the Supreme Court, the Bundesverfassungsgericht of Germany is part of the judiciary while at the same time, it is also detached
from it. It is not integrated into the German court system, but stands outside as an independent court. It cannot decide upon in civil or criminal cases. Its task is to check whether state actions conform to the constitution. This includes both state and judicial actions. Like the Supreme Court of India, the Bundesverfassungsgericht has various instruments at its disposal. There are several possibilities for federal states to file cases against one another or against the federal government. Most important, however, is the constitutional complaint, in which every citizen can report a violation of their constitutionally guaranteed rights.

Unlike in India where judges are appointed by the President of the Republic, the judges of the Bundesverfassungsgericht are elected for a 12-year term of office. A re-election is not possible. Thus, a possible political dependence of the judges on the powers that can be, is avoided. The court is divided into two senates with eight judges each, including a president and vice-presidents. The Bundesverfassungsgericht went through only two critical phases in its development. The first phase began immediately after its foundation. The court had a status memorandum drawn up on its behalf in which it elevated itself to the status of a constitutional organ. However, the government under Konrad Adenauer saw this differently and had its own legal instruments drawn up which contradicted the court. However, the Bundesverfassungsgericht was able to assert itself despite the political obstacle. In the years to follow, the Bundesverfassungsgericht ruled in several cases, such as the Lüth case or the German television case, by which it was able to assert its position as a constitutional body.

The second phase began in the 1970s under Willy Brandt's government. Here, the Bundesverfassungsgericht got into a political dispute. The Bavarian state government wanted to scuttle the new Eastern politics of the federal government and used the Bundesverfassungsgericht for its purpose. Through various proceedings, the Bavarian government succeeded in changing the composition towards a conservative majority of judges. A decision rejecting the Eastern politics could have plunged the court into a deep crisis. However, this was avoided by the Bundesverfassungsgericht itself since it decided to commit itself to the guiding principle of judicial self-restraint.

There are only a few similarities in the development of the two courts. The Supreme Court had to defend the Indian constitution and democracy more often, whereas the Bundesverfassungsgericht rather had to defend its own position. However, the two courts are similar when it comes to com-
petence and equal power. In most cases, both courts can only become active if they are activated from outside. They cannot determine and control the political agenda themselves. Thus, while they do have power, this possession of power is rooted within and justified by the system of checks and balances. Nevertheless, they are important institutions for the development of democratic states. They protect the constitution and prevent an excessive policy without borders. Without them, functioning democratic states would be unthinkable.

Based on historical neo-institutional and case study approaches, Schusser analyses the critical junctures in the development of the judiciary in two societies that are apparently very different, and deals with the question of whether the respective judiciaries have the requisite power to undertake their allocated functions. Political analyses of judicial institutions, especially of the German Bundesverfassungsgericht are rare, which is why this study is intended to contribute to further expanding this field and closing the gap between political science and law.

While one must compliment the author for venturing into a comparative analysis of the Indian and German judiciaries, rarely visited by students of comparative politics, his work also points towards the need for further research in the method of comparison, design of judiciaries and contribution of judicialisation to transition to democracy and its consolidation. Overall, this pioneering work which combines a good knowledge of area with an appropriate selection of tools from neo-institutional theories, raises interesting issues that add variety, depth and complexity to the analysis of the reciprocal relationship of governance and political development in two apparently dissimilar countries. Many of the questions that Fabian Schusser raises in this interesting and innovative study point in the direction of new areas of research which hold the potential to enrich comparative politics.

On the whole, the author has demonstrated his capacity to formulate interesting research questions and shape them into testable conjectures, and examine these conjectures in the light of qualitative empirical data. Fabian has shown a good command of the theoretical literature, competence in interdisciplinary research, and a penchant for undertaking rigorous conceptual analysis and good use of qualitative empirical data. The findings are interesting in their own right and would contribute towards further exploration of the important theme of judicialisation in the context of democracies facing rapid social change.
The work responds well both to interdisciplinary research as well as to South Asian and comparative studies. Written with clarity, in accessible English, this important monograph will certainly constitute a reference point for South Asian and comparative studies, neo-institutional theories and comparative research on the judiciary, both in stable democracies and transitional societies.

Professor Subrata K. Mitra
Heidelberg, November 2018
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