

‘Juristocracy’ – Political, not Juridical

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In numerous countries around the world, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries, whether domestic or supra-national. One of the most significant effects of this trend has been the transformation of courts worldwide into major political decision-making bodies and a corresponding judicialization of “mega” politics. The ever-accelerating judicialization train has long left the traditional separation of powers and rights jurisprudence stations. From core executive prerogatives such as national security matters and macro-economic policymaking to foundational collective identity and nation building quandaries, from restorative justice to regime change controversies and electoral disputes, courts have become crucial fora for dealing with the most fundamental questions a democratic polity can contemplate. This global trend towards *juristocracy* is arguably one of the most significant developments in late-twentieth and early-twenty-first century government.

Despite the growing reliance on courts and judicial means for articulating and determining core political issues, mainstream constitutional theory discourse remains preoccupied with the somewhat exhausted, and often abstract, debate concerning the counter majoritarian nature of judicial review and the tension between constitutionalism and fundamental democratic governing principles. Perhaps nowhere is the gap between the *ought* and the *is* levels of academic inquiry as clear as with the divide between grand constitutional theory and the study of real-life constitutional law and politics worldwide. In this paper I address one aspect of this gap – the tendency of constitutional theorists to overlook the political conditions under which judicial activism is likely to emerge.

I begin by briefly illustrating the key role of constitutional courts worldwide in confronting fundamental political issues. I then move on to suggest that the ever-accelerating reliance on courts and adjudicative means for articulating and dealing with core political questions could not have developed without the support (tacit or explicit) of political power-holders. Critics of judicial “hyper activism” tend to overlook the political origins of deference to courts, thereby misguidedly portraying courts and

judges – rather than self-interested, risk-averse politicians – as the source of evil.

Everything is Justiciable

Armed with judicial review procedures, constitutional courts in most leading democracies have been frequently called upon to determine a range of matters, from the scope of expression and religious freedoms, privacy and reproductive rights, to public

policies pertaining to education, immigration, criminal justice, property, commerce, consumer protection, and environmental regulation. Bold newspaper headlines reporting on landmark court rulings concerning hotly contested issues such as same sex marriage, limits on campaign finance, or affirmative action have become a common phenomenon. This is true in the United States, where the legacy of active judicial review recently marked its bicentennial anniversary, and where courts have long played a significant role in policy-making and also in

younger constitutional democracies that have established active judicial review mechanisms only in the past few decades.

However, the expansion of the province of courts in determining political outcomes has not only become more globally widespread than ever before; it has also expanded in its local scope to become a manifold, multifaceted phenomenon, extending well beyond the now “standard” concept of judge-made policy-making through constitutional rights jurisprudence or judicial redrawing of legislative boundaries between state organs.¹ From post-authoritarian Latin America and post-communist Europe to so called “settler societies,” courts have become the ultimate venue for dealing with fundamental restorative justice dilemmas. During the past few years alone, constitutional courts in over twenty countries have been called upon to determine the political future of prominent political leaders through impeachment or disqualification trials. The Philippines’ president Estrada, Indonesia’s president Wahid, Thailand’s Prime Minister Thaksin, Pakistan’s prime ministers Benazir Bhutto and Nawaz Sharif, Peru’s president Fujimori, and Russia’s president Boris Yeltsin, to name but a few examples, have all had their political fate determined by courts. Even the fate of political regimes in the

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exotic island nations of Fiji, Madagascar, and Trinidad and Tobago has been determined by judicial tribunals. Likewise, courts have become ultimate decision makers in disputes over election outcomes, most recently in Taiwan. In that respect, the *Bush v. Gore* courtroom struggle over the fate of the American presidency was anything but an idiosyncratic moment in the recent history of comparative constitutional politics. From judicial review of the constitutionality of the war in Chechnya or the Pervez Musharraf-led military *coup d'état* in Pakistan to judicial appraisal of Argentina's economic policies, Hungary's welfare regime, or Germany's place in the EU – there is now hardly any core political controversy in the world of new constitutionalism that does not sooner or later become a judicial one. Even courts in Britain and New Zealand – countries fairly recently described as the last bastions of Westminster-style parliamentary sovereignty – have become key players in the respective political systems in which they operate. Arguably the clearest manifestation of the wholesale judicialization of core political controversies is the growing reliance on courts for contemplating the very definition, or *raison d'être*, of the polity as such. A few textbook examples include the unprecedented involvement of the Canadian judiciary in dealing with the status of bilingualism and the political future of Quebec and the Canadian federation, including the Supreme Court of Canada's landmark ruling in the *Quebec Secession Reference* (1998) – the first time a democratic country had ever tested in advance the legal terms of its own dissolution; the constitutional certification saga in South Africa – the first time a court refused to accept a national constitutional text drafted by a representative constitution-making body; the key role the Turkish Constitutional Court has played in preserving the strictly secular nature of Turkey's political system, by continually outlawing anti-secularist political forces in that country. Additional, and equally instructive examples would include the crucial role of courts in constitutional theocracies such as Egypt or Malaysia in determining the nature of public life in these modern states formally governed by principles of Islamic *Shari'a* laws; the wholesale transfer of the deep religious/secular cleavage in Israeli society to the Israeli judiciary through the judicialization of the question of “who is a Jew?” and the corresponding entanglement of the Israeli Supreme Court in interpreting Israel's fundamental definition as a “Jewish and Democratic State.” And we have not yet mentioned the emergence of judicial institutions as major political actors at the supra-national level. (Think of the key role the European Court of Justice has played in enforcing and accelerating the European integration – a role

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that will certainly increase with the EU enlargement and the corresponding adoption of the EU Constitution).

In short, the view that “nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable” as Aharon Barak, the proactive Chief Justice of the Supreme Court of Israel once said, appears to have become a widely accepted motto by courts worldwide. The wave of judicial activism that has swept the globe in the past few decades has not bypassed the most fundamental issues a democratic polity ought to address – whether it is coming to terms with its own (often not so admirable) past or grappling with its embedded collective identity quandaries. None of these recently judicialized questions are uniquely or intrinsically legal; whereas some have certain important constitutional aspects, they are neither purely, nor even primarily, legal dilemmas. As such, they ought to be resolved, at least on the level of principle, through public deliberation in the political sphere. Nonetheless, national high courts throughout the world have gradually become major decision-making bodies for dealing with precisely such dilemmas. Fundamental distributive justice, regime legitimacy, and collective identity questions have been framed in terms of constitutional claims (often for rights and entitlements), and as such, have rapidly found their way to the courts.

Everything is Political

Even as a new type of political regime – *juristocracy* – is rapidly establishing itself throughout the world of new constitutionalism, dozens of lengthy articles published in America's leading law reviews every year continue to portray an almost exclusively court-centric picture of constitutional law. Most of these articles are preoccupied with the compatibility of past or present American constitutional jurisprudence with grand constitutional theory. Almost none pay any attention to the critical institutional and political conditions within which constitutional courts operate and judicial review is exercised. Fundamental questions such as where judicial power originates; what accounts for the significant variance in the timing, scope, and nature of constitutional reform across the world of new constitutionalism; or what political conditions support the maintenance and expansion of judicial power are seldom addressed by constitutional theorists. Even more concrete questions such as the effect of institutional features of judicial review (e.g. single court versus all-court, abstract versus concrete, *a priori* or *a posteriori* review) on judicial engagement with politics are addressed almost exclusively by political scientists, not by legal scholars. None of Ronald Dworkin's six books on constitutionalism, for example, refer to any of these fundamental

questions or even cite any secondary sources dealing with the origins and consequences of constitutionalization and judicial review.² Indeed, this is a near perfect illustration of a “don’t let the facts ruin your theory” approach, as my father used to say. And Dworkin – arguably the most prominent contemporary constitutional theorist – is certainly not alone in this boat. Indeed, the entire enterprise of canonical constitutional theory seems to be caught up with the positivist notion of constitutional law as a sovereign venture, while ignoring the realist notion of it as “politics by other means.”

Even critics of the view that constitutionalism is an all-out “good thing” have not paid much attention to the actual political origins or consequences of judicial empowerment. Instead, they have been almost exclusively preoccupied with the well-rehearsed normative debate over the “counter-majoritarian” nature of judicial review, and the “democratic deficit” inherent in transferring important policy-making prerogatives from elected and accountable politicians, parliaments, and other majoritarian decision-making bodies to the judiciary. Indeed, one can count on the fingers of one hand the works that draw primarily upon empirical and inductive inquiry to question the democratic credentials of constitutionalism and judicial review, let alone the concrete political origins of judicial empowerment.

From Robert Bork on the right to Jeremy Waldron on the left, constitutional theorists critical of judicial activism often blame “power hungry” courts and judges for being too assertive and excessively entangled with moral and political decision-making, subsequently disregarding fundamental separation of powers and democratic governance principles.³ Even more politically astute critics of the United States Supreme Court’s expropriation of the American Constitution – Larry Kramer or Mark Tushnet, for instance – are more concerned with the Supreme Court’s “imperialist” impulse than with the political conditions that promote the transition to juristocracy.⁴ In my opinion, portraying courts and judges as the source of evil is misguided. For one, courts are first and foremost political institutions. Like any other political institutions, they do not operate in an institutional or ideological vacuum. Their establishment cannot be understood as developing separately from the concrete social, political, and economic struggles that shape a given political system. Indeed, constitutionalization, political deference to the judiciary, and the expansion of judicial power more generally, are an integral part and an important manifestation of those struggles, and cannot be understood in isolation from them. In that respect, the works of prominent European political sociologists such as Bourdieu, Gramsci, or Foucault, even some of Franz Kafka’s masterpiece short novels,

are more relevant for understanding the origins of judicial power than most canonical works by constitutional theorists.

Judicial activism may also emanate from an organic political problem such as a weak, decentralized, or a chronically deadlocked political system. The more dysfunctional the political system is in a given democracy, the greater the likelihood of expansive judicial power in that polity.⁵ Persistent political deference to the judiciary may be seen as an effective way of overcoming systemic political “ungovernability,” and ensuring the unity and “normal” functioning of such polities. A polity’s structural inability to deal with its embedded social and cultural rifts, and the stalemate faced

by that polity’s majoritarian politics corrode the authority of the legislative and executive branches of government, thereby leading to a systemic dependency of that polity on dominant, seemingly apolitical, professional decision-making agencies such as constitutional courts.

Political choices and interests are also crucial factors in explaining the origins of judicial hyper-activism. Like any other significant decision-making institution, courts produce differential dis-

tributive effects: they privilege some groups, interests, and worldviews over others. Other variables being equal, prominent political actors are likely to favor the establishment of institutional structures most beneficial to them. Moreover, because constitutional courts hold no purse-strings and have no independent enforcement power, but nonetheless limit the institutional flexibility of political power-holders, the voluntary self-limitation through the transfer of policy-making authority from majoritarian decision-making arenas to courts seems, *prima facie*, to run counter to the interests of power-holders in legislatures and executives. Unless proven otherwise, the most plausible explanation for voluntary, self-imposed deference to the judiciary is therefore that political power holders who either initiate or refrain from blocking such developments estimate that it serves their interests to abide by the limits imposed by greater judicial intervention in the political sphere. In short, those who are eager to pay the price of judicial empowerment must assume that their position (absolute or relative) would improve under a juristocracy.

From the politicians’ point of view, delegating policy-making authority to the courts may be an effective means of shifting responsibility thereby reducing the risks to themselves and to the institutional apparatus within which they operate. The calculus of the “blame defection” strategy is quite simple. If delegation of powers can increase credit and/or reduce blame attributed to the politician as a result of the policy decision of the delegated body, then such delegation can benefit the politician.⁶ At the very least,

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the transfer to the courts of contested political “hot potatoes” such as abortion or affirmative action in the United States, same-sex marriage or the Quebec question in Canada offers a convenient retreat for politicians who have been unwilling or unable to settle contentious public disputes in the political sphere. Likewise, it may offer refuge for politicians seeking to avoid difficult or “no win” decisions and/or avoid the collapse of deadlocked or fragile governing coalitions.⁷ Deference to the judiciary, in other words, is derivative of political, not judicial, factors.

An even more astute understanding of the origins of judicial empowerment suggests that the very emergence and maintenance of powerful constitutional courts is largely a function of politics and interests.⁸ For one, constitutions and judicial review mitigate systemic collective action concerns such as credible commitment and effective enforcement problems. In a similar vein, judicial review may be seen as a mechanism for conveying information to legislatures about judicial policy preferences vis-à-vis legislative policy preferences, as well as information concerning the actual effects of legislation.⁹ The information-conveying function of judicial review is likely to increase in cases of *a priori*, abstract judicial “preview” such as that exercised by the French *Conseil Constitutionnel* or by the Canadian Supreme Court in the reference procedure.¹⁰ Powerful national high courts may allow governments to impose a centralizing, “one rule fits all” regime upon enormous and diverse polities. (Think of the standardizing effect of apex court jurisprudence in exceptionally diverse polities such as the United States or the European Union).

Judicial empowerment may also reflect the competitiveness of a polity’s electoral market or governing politicians’ time horizons. According to the “party alternation” model, for example, when a ruling party expects to win elections repeatedly, the likelihood of an independent and powerful judiciary is low.¹¹ However, when a ruling party has a low expectation of remaining in power, it is more likely to support a powerful judiciary to ensure that the next ruling party cannot use it to achieve its policy goals. Recent studies build upon this logic to argue that akin to purchasing insurance in uncertain contracting environments, judicial review may provide “insurance” for self-interested, risk-averse politicians, negotiating the terms of new constitutional arrangements under conditions of political deadlock or systemic uncertainty.¹²

Following the same logic, the transfer of core political questions to the courts, and judicial empowerment more generally, may become an attractive option for influential yet increasingly threatened elites seeking to entrench their policy preferences, making them safe from the vicissitudes of democratic politics. As

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I have argued elsewhere, judicial review in many “new constitutionalism” countries resulted from actions taken by hegemonic yet threatened sociopolitical groups fearful of losing their grip on political power.¹³ Judicial empowerment may provide an effective solution for influential groups who, in light of serious erosion in their popular support, may seek to entrench or “lock in” their policy preferences against growing influence of “peripheral” groups and interests. Hegemonic elites and their political representatives are likely to initiate and carry out a delegation of power to the judiciary (a) when they find strategic drawbacks in adhering to majoritarian decision-making processes or when their worldviews and policy preferences are increasingly challenged in

such arenas; (b) when the judiciary in that polity enjoys a better reputation than the political regime for its rectitude, professionalism, and impartiality; (c) when sociopolitical elites who delegate power to the courts enjoy general control over legal education and judicial appointment processes; and (d) when the courts in that polity are inclined to rule in accordance with secularist ideological and cultural propensities. Under specific circumstances, then, political power-holders may choose to enhance their position by voluntarily tying their own hands. Such a strategic, counter-intuitive self-limitation may be beneficial from the point of view of threatened sociopolitical elites and power-holders when the limits imposed on rival elements within the body politic outweigh the limits imposed on themselves.

Understanding judicial empowerment as a form of hegemonic preservation by threatened elites may shed light on the political vectors behind the constitutional revolutions in formerly Westminster-style polities such as Canada, South Africa, and Israel. Canada’s adoption of the Charter of Rights and Freedoms in 1982 was part of a broader strategic response by the federalist, anglophone, business-oriented elites to the growing threat of Quebec separatism and the rapidly changing demographics of Canadian society. The near-miraculous conversion to constitutionalism and judicial review among South Africa’s white political and business elites during the late 1980s and early 1990s occurred when it became clear that the days of apartheid were numbered and an ANC-controlled government became inevitable. Israel’s 1992 adoption of two new Basic Laws protecting core rights and liberties, the corresponding establishment of constitutional review in 1995, and the Israeli Supreme Court’s continuous anti-religious jurisprudence over the past fifteen years were all part of a strategic response by Israel’s secular bourgeoisie who had been rapidly losing its historical political dominance.