Andreas Voßkuhle

Constitutional Court: The Dilemma of Law and Politics

Introductory remarks[1]

When faced with complex questions, Germans like to quote from *Theodor Fontane*'s famous novel "*Effi Briest*" – in keeping with this tradition, I will borrow the words of *Effi*'s elderly father, who in the course of the novel repeatedly exclaims: "This opens up a broad expanse!" [*"Das ist ein weites Feld!"*]. I shall thus focus my remarks on five issues that I believe to be crucial to our discussion:

1. As regards the state of tension between the activities of parliament and government on the one hand and constitutional courts on the other, the traditional distinction between law and politics offers little insight. Drawing on a broad understanding of politics – which arguably has its merits[2] – it follows that the role of constitutional courts must be qualified as political given that constitutional court justices are vested with power and responsibility to provide answers where matters are left open to interpretation, as is so frequently the case. As early as the 1970s, *Rudolf Wassermann* drew attention to this issue in relation to the role of regular courts.[3] Moreover, every constitutional court decision has a bearing on both the life of the individual as well as the development of society as a whole. Therefore, an inherent political dimension can hardly be denied.[4] This notwithstanding, the manner and method of decision-making on the part of government or parliament differs fundamentally from the manner in which constitutional courts operate. Constitutional courts decide only upon application; they are generally called upon to review matters that are specific in nature and have already been concluded at the time the case is brought before them; their decision-making process is informed by (often) lengthy legal discussions and, in principle, conducted free of pressure derived from urgency; the justices deciding a case have no personal interest in its outcome; due to their judicial independence, justices have no reason to fear sanctions etc. An analysis limited to the contrasting of law and politics fails to sufficiently capture the fundamental differences in the functioning of constitutional courts as compared to the manner in which parliament and government function.

2. At the end of the day, there is no straightforward formula for preventing judicial activism. In its jurisprudence spanning almost seven decades, the Federal Constitutio-

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2 *Voßkuhle*, Die politische Dimension der Staatsrechtslehre, in: Schulze-Fielitz [ed.], Staatsrechtslehre als Wissenschaft, 2007, pp. 135 et seq.

3 *Wassermann*, Der politische Richter, 1972; for a brief retrospective analysis of the discussion cf. *Zinke*, Der Erkenntniswert der politischen Argumente in der Anwendung und wissenschaftlichen Darstellung des Zivilrechts, 1982, pp. 31-36 with further references.

4 *Grimm*, Ich bin ein Freund der Verfassung, 2017, p. 202.

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nal Court of Germany has developed a comprehensive methodology to ensure respect for the latitude afforded the legislature, protect the intrinsic rationale of the executive government, and avoid taking on the role of an "all-powerful appeals authority" (*Superrevisionsinstanz*) vis-à-vis the regular courts of the German judiciary.[5] Whether or not this methodology will be relied on, and in what manner it will be applied in the individual case, cannot always be predicted with certainty in so-called "hard cases". In this respect, a decisive factor appears to be the self-perception of the respective court, which in turn is embedded in a certain judicial culture. For its part, the evolution of judicial culture is dependent on the political and cultural environment in which constitutional courts operate.

3. Whether decisions rendered by constitutional courts are met with acceptance within both the general public and the political sphere hinges, most notably, on three factors:

(1) the content of the relevant decision, the persuasiveness of its reasoning, and feasibility regarding its consequences;
(2) the willingness on the part of constitutional court justices to foster understanding among the general public regarding the functioning of their court and the overarching themes and precepts set out in their case-law;
(3) based thereon, confidence of the people and politicians in the independence, integrity and professional competence of justices serving at the constitutional court, as well as confidence in their work.[6]

4. In Germany, the quote "Judges don't say what they are doing and they don't do what they say" (*Ralph Christensen*) enjoys a certain popularity; yet the above analysis raises concerns in this regard. The legal quality of a decision, its inner coherence, and the nuances reflected in the specific orders made as to its legal consequences do generally not suffice for the purposes of generating public confidence in and acceptance of the jurisprudence of constitutional courts. Why is that? Even politicians often have but limited knowledge of how courts function; this is especially true with regard to constitutional courts. It appears to be a rather common belief that the preferred way of reaching a decision was for justices to meet in the evening, share a bottle of wine and mull over which outcome they fancy the most. Similar misconceptions are prevalent among citizens as well. It is imperative that these misconceptions be refuted by way of cautiously engaging in public relations and outreach; the objective must be to convey the key statements contained in decisions that are at times quite complex, and to facilitate a better understanding of the institutional framework in which such decisions are made.

5. The election of constitutional court justices remains a problematic issue, yet there may not be a perfect solution. Those called upon to elect justices will naturally bring to bear their own political preferences and interests in the election. Given that it proves difficult in practice to set out and apply common criteria that make a "good

5 *Voßkuhle*, in: von Mangoldt/Klein/Starck [eds.], Grundgesetz, vol. 3, 2018, Art. 93 para. 35 et seq. with further references.

6 *Luhmann*, Vertrauen, 3. ed. 1989; in contrast, *Frevert*, Vertrauensfragen. Eine Obsession der Moderne, 2013.

justice" – suggested qualities typically include an "astute mind", physical resilience, legal experience, integrity, courage etc. –, the election of constitutional court justices will always be vulnerable to political influences. It is possible to moderate these influences somewhat by way of establishing election rules that force those vested with electoral powers to reach non-partisan compromises and agree on a common candidate. In this context, the two-thirds majority required for the election of the Justices of the Federal Constitutional Court by the *Bundestag* and the *Bundesrat* (§§ 6 and 7 of the Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz*) is just one example. This notwithstanding, it is my belief that the best way to curb political influence in relation to the election of constitutional court justices is to safeguard the independence of their office. If, in my capacity as a justice, I am elected for a specific and extended period of time (ranging from eight to twelve years), my re-election is not possible and pension benefits ensure that I am financially secure after ceasing to hold office, I will be much more inclined to base my decisions solely on legal considerations. Again, there is no absolute guarantee for this. Nonetheless, the organisational framework for constitutional courts as described above facilitates the development of an independent judicial culture.