

CONSTITUTIONAL ADJUDICATION AND CONSTITUTIONAL INTERPRETATION: BETWEEN LAW AND POLITICS

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This article aims to deal with the evolution of constitutional adjudication as a formal mechanism for resolving disputes in the area of constitutional law. The interface between law and politics is rather evident in the interpretation offered by courts. This can create obstacles mainly because of the differences that exist between constitutional law and ordinary law. While this interaction has always existed, at times, it gives rise to certain inevitable conflicts in interpretation thus casting doubts on the efficacy of constitutional democracy. The paper proposes to suggest remedies such as restraint in use of power by courts by way of amendments. Since the role of the judiciary is only to interpret the existing law, any change in the law or an amendment should vest only with the political powers. This can serve as a check on judicial imperialism and perhaps give incentives to the judiciary to actively participate in discussing the reactions of society to their decisions.

I. INTRODUCTION

While constitutionalism has a rather long history, constitutional adjudication and constitutional courts or courts with constitutional jurisdiction were a rarity before the end of World War II. A worldwide demand for constitutional adjudication arose only after the experiences with the many totalitarian systems of the 20th century. The post-totalitarian constitutional assemblies regarded judicial review as the logical consequence of constitutionalism. In a remarkable judgment the Israeli Supreme Court said in 1995: “Judicial review is the soul of the constitution itself. Strip the constitution of judicial review and you have removed its very life... It is therefore no wonder that judicial review is now developing. The majority of enlightened democratic states have judicial review... The twentieth century is the century of judicial review.”¹

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¹ United Mizrahi Bank Ltd. v. Migdal Village, HCJ 6821/93. See also Omi, *Leading Decisions of the Supreme Court of Israel and Extracts of the Judgment*, 31 ISR. L. REV. 754 (1997) for excerpts in English.

Based on this universal trend the Israeli Court claimed the power of judicial review although it had not been explicitly endowed with it in the constitution.

Just as the transition from absolute rule to constitutionalism had modified the relationship between law and politics, this relationship was now modified by the establishment of constitutional courts. As long as law was regarded as being of divine origin politics were submitted to law. Political power derived its authority from the task to maintain and enforce divine law, but did not include the right to make law. When the Reformation undermined the divine basis of the legal order and led to the religious civil wars of the 16th and 17th century the inversion of the traditional relationship between law and politics was regarded as a precondition for the restoration of social peace. The political ruler acquired the power to make law regardless of the contested religious truth. Law became a product of politics. It derived its binding force no longer from God's will but from the ruler's will. It was henceforth positive law. Eternal or natural law, in spite of its name, was not longer law, but philosophy.

Constitutionalism as it emerged in the last quarter of the 18th century was an attempt to re-establish the supremacy of the law, albeit under the condition that there was no return to divine or eternal law. The solution of the problem consisted in the reflexivity of positive law. Making and enforcing the law was itself subjected to legal regulation. To make this possible a hierarchy had to be established within the legal system. The law that regulated legislation and law-enforcement had to be superior to the law that emanates from the political process. Yet, since there was no return to divine law the higher law was itself the product of a political decision. But in order to fulfil its function of submitting politics to law it needed a source different from ordinary politics. In accordance with the theory that, in the absence of a divine basis of rulership, the only possible legitimization of political power is the consent of the governed, this source was found in the people. The people replaced the ruler as sovereign, just as before the ruler had replaced God. But the role of the popular sovereign was limited to enacting the constitution while the exercise of political power was entrusted to representatives of the people who could act only on the basis and within the framework of the constitution.

Hence, one can say that the very essence of constitutionalism is the submission of politics to law. This function distinguishes constitutional law from ordinary law in various respects. There is, first, a difference in object. The object of constitutional law is politics. Constitutional law regulates the formation and exercise of political power. The power holders are the addressees of constitutional law. Secondly, constitutional and ordinary law have different sources. Since constitutional law brings forth legitimate political power it cannot emanate from that same power. It is made by or attributed to the people. Consequently, the making of constitutional law differs, thirdly, from the making of ordinary law. It is usually a special body that formulates constitutional

law and its adoption is subject to a special procedure in which either the people take the decision or, if a representative body is called upon to decide, a super-majority is required.

Fourthly, constitutional law differs from ordinary law in rank. It is higher law. In case of conflict between constitutional law and ordinary law or acts of ordinary law application, constitutional law trumps. What has been regulated in the constitution is no longer open to political decision. Here the majority rule does not apply. This does not mean a total juridification of politics, as Carl Schmitt believed.² Such a total juridification would be the end of politics and turn it into mere administration. Constitutional law determines who is entitled to take political decisions and which procedural and substantive rules he has to observe in order to give these decisions binding force. But the constitution neither predetermines the input into the constitutionally regulated procedures nor their outcome. It regulates the decision-making process but leaves the decisions themselves to the political process. It is a framework, not a substitute for politics.

Finally, constitutional law is characterized by a certain weakness compared to ordinary law. Ordinary law is made by the government and applies to the people. If individuals do not obey government is entitled to use force. Constitutional law, on the contrary, is made by or at least attributed to the people as its ultimate source and applies to the government. If the government does not comply with the requirements of constitutional law there is no superior power to enforce it. This weakness may differ in degree, depending on the function of the constitution. Regarding the constitutive function the structure of public power will usually conform to the constitutional arrangement. Regarding its function to regulate the exercise of political power this cannot be taken for granted. The historical and actual evidence is abundant.

It was this weakness that gave rise to constitutional adjudication, in the United States soon after the invention of constitutionalism, in Europe and other parts of the world only after the collapse of the fascist and racist, socialist and military dictatorships beginning in the 1950s and culminating in the 1990s. Although many of these systems had constitutions their impact was minimal, and invoking constitutional rights could be dangerous to citizens. In the light of this experience constitutional courts were generally regarded as a necessary completion of constitutionalism. If the very essence of constitutionalism is the submission of politics to law, the very essence of constitutional adjudication is to enforce constitutional law vis-à-vis government. This implies judicial review of political acts including legislation. Constitutional courts or courts with constitutional jurisdiction, however, cannot fully compensate for the weakness of constitutional law. Since the power to use physical force

² Cf. Carl Schmitt, *Das Reichsgericht als Hüter der Verfassung* in VERFASSUNGSRECHTLICHE AUFSÄTZE 98 (1958). See also CARL SCHMITT, DER HÜTER DER VERFASSUNG 22 (1931).

remains in the hands of the political branches of government, courts are helpless when politicians refuse to comply with the constitution or disregard court orders.

But apart from this situation, which is exceptional in a well-functioning liberal democracy with a deeply-rooted sense for the rule of law, it makes a difference whether a political system adopts constitutional adjudication or not. Even a government that is generally willing to comply with the constitution will be biased regarding the question what exactly the constitution forbids or requires in a certain situation. Politicians tend to interpret the constitution in the light of their political interests and intentions. In a system without constitutional adjudication usually the interpretation of the majority prevails. In the long run this will undermine the achievement of constitutionalism. By contrast, in a system with constitutional adjudication an institution exists that does not pursue political intentions, is not subject to election and specializes on constitutional interpretation in a professional manner. It is thus less biased and can uphold constitutional requirements vis-à-vis the elected majority. Even more important is the preventive effect of constitutional adjudication. The mere existence of a constitutional court causes the political majority to raise the question of the constitutionality of a political measure quite early in the political process and in a more neutral way. It observes its own political plans through the eyes of the constitutional court.

Kelsen, whom the Israeli Supreme Court quotes approvingly in the Mizrahi opinion, may have exaggerated when he said that a constitution without constitutional adjudication is just like not having a constitution at all.³ There are a number of long-established democracies where the constitution matters although no constitutional review exists. Here constitutional values have become part of the legal and political culture so that there is less need for institutionalized safeguards. But for the majority of states, in particular for those who turned toward constitutional democracy only recently, it is true that the constitution would not matter very much in day-to-day politics if it did not enjoy the support of a special agent that enforces the legal constraints to which the constitution submits politics. The small impact of fundamental rights before the establishment of judicial review proves this.

The existence of a constitutional court alone, however, is not sufficient to guarantee that politicians respect the constitution. Just as constitutionalism is an endangered achievement constitutional adjudication is in danger as well. Politicians, even if they originally agreed to establish judicial review, soon find out that its exercise by constitutional courts is often burdensome for them. Constitutions put politics under constraints and constitutional courts

³ HANS KELSEN, WER SOLL DER HÜTER DER VERFASSUNG SEIN? 24 (1931) (a reply to Schmitt); See also Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit* in VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRICHTSLEHRER, Vol. 5, 30 (1929).

exist in order to enforce these constraints. Not everything that politicians find necessary – be it for themselves or their party, be it for what they deem good for the common interest – can be effectuated if the court sees it not in line with the constitution. Politicians therefore have a general interest in a constitutional court that, to put it mildly, is at least not adverse to their objectives and plans. But there is also a specific interest in the outcome of constitutional litigation on which the implementation of a certain policy depends.

Yet, any political interference with the judicial process would undermine the whole system of constitutional democracy. This is why judges must be protected against political influence or pressure. The dividing line between the various organs of the state drawn by the principle of separation of powers is particularly strong where the judiciary is concerned. Independence of the judiciary is indispensable for the functioning of a constitutional system and is therefore itself in need of constitutional protection. If it is true that constitutional courts are helpless when political actors refuse to obey their orders, it is even truer that constitutional courts are useless when they cannot take their decisions independently from politics. The best protection of judicial independence is, of course, a deeply-rooted conviction on the side of politicians that any interference with court procedures is unacceptable, supported by a strong backing for the constitution within society. But this cannot be taken for granted. Rather, special safeguards are necessary. Judicial independence must be guaranteed, not only against any attempt to directly influence the outcome of litigation, but also against more subtle ways of putting pressure on the judiciary. This is why constitutions usually guarantee the impossibility of removal of judges and often a sufficient salary, to mention only a few devices.

A special problem in this context is the recruitment of judges of constitutional courts or courts with constitutional jurisdiction. Since these courts have a share in public power the judges need democratic legitimation. If they are not elected directly by the people, a circumstance which presents problems of its own regarding judicial independence, some involvement of the elected branches of government in the recruitment process seems inevitable. Yet, every involvement creates the temptation to elect or appoint deferential judges. Recruitment of judges is the open flank of judicial independence. A constitutional court that simply reflects political interests will hardly be able to keep the necessary distance from politics. Hence, safeguards against a politicization of the court are of vital importance.

Most countries with constitutional adjudication have some special provisions for the election or appointment of constitutional judges. If they are elected by Parliament often a supermajority, like the one required for amending the constitution, is prescribed. This means that majority and minority must agree on one candidate, which makes extreme partisan appointments unlikely. Other countries prefer a mixed system of election and appointment

by dividing the right to select constitutional judges among different bodies of government. In others, non-political actors are involved in the process, for instance representatives of the legal profession. It may be difficult to determine which system is the best. But it is not difficult to see that some barriers against the threat of a politically docile constitutional court must be erected if constitutionalism is to live up to its aspirations.

Judicial independence is the constitutional safeguard against the threat arising from politicians to the judges' proper exercise of their function. It is directed against attempts to induce judges not to apply the law but to bend to political expectations. This is an external threat. But it would be naïve to assume that this is the only threat the functioning of the constitutional system is exposed to. There is an internal threat as well that comes from the judges themselves. It comes in two forms. One is the inclination to voluntarily follow, for what reasons ever, political expectations or even party lines. The other is the temptation to adjudicate according to one's own political preferences or ideas of what is just and unjust instead of following constitutional standards. The constitutional guarantee of judicial independence protects judges against politics, but it does not protect the constitutional system and society against judges who, for other reasons than direct political pressure, are willing to disobey or distort the law.

Therefore, external independence must be accompanied by internal independence. The constitutional guarantee of judicial independence is not a personal privilege to decide at will, but a functional requirement. It shall enable judges to fulfil their function, namely to apply the law irrespectively of the interests and expectations of the parties to the litigation or powerful political or societal forces. It frees judges from extra-legal bonds, not to give them leeway in their decisions, but to enable them to decide according to the law. The reason for the independence from extra-legal bonds is to give full effect to the legal bonds to which judges are submitted. Submission to law is the necessary counterpart of judicial independence. Like for external independence, precautions can be taken for internal independence as well.

Since internal independence is, however, largely a matter of professional ethics and individual character, the possibilities of the law are limited. Gross misbehaviour such as corruption can of course be outlawed and made a crime. Experience, however, shows that it is difficult to fight corruption within the judiciary when corruption is habitual among politicians and in society as well. This seems to be quite a problem in a number of new democracies. It is likewise justified to criminalize perversion of justice. But it is not easy to clearly distinguish perversion of justice from false or questionable interpretation of the law. This is why convictions because of perversion of justice are rare. Yet, criminalizing corruption and perversion of justice and removing judges

from office who committed these crimes is not a violation of the independence of the judiciary.

A more subtle misconduct is the willingness or pre-disposition to interpret the law in a way that is favourable to certain political views or to a party or a candidate for political office, either in general or in an individual case. This usually comes in the disguise of a legal argumentation that seeks to hide that, as a matter of fact, it is result-driven. This will not always occur intentionally. Self-deception of judges as to the motives of their judicial behaviour is not impossible. The problem is that this type of misconduct does not only appear in a number of new democracies. It can be observed in solid constitutional states as well. The decision of the US Supreme Court in *Bush v. Gore* in the year 2000 may serve as an example.⁴ There will hardly be a legal sanction in these cases. But there may be harsh public criticism or even a loss of trust in the judiciary to which no court can remain indifferent.

II. EVOLUTION OF PROCESS OF CONSTITUTIONAL ADJUDICATION

Law owes its existence to a political decision. Political motives are legitimate in the process of law-making. But in a constitutional democracy the role of politics ends when it comes to applying the law. Application of the law is a matter for the legal system in which political motives are illegitimate. For this reason the division between law and politics is of crucial importance. But what if law application and in particular constitutional adjudication were in itself a political operation so that all attempts to separate law from politics on the institutional level are thwarted on the level of law application? This is a serious question, and it is a question that should not be confused with the abuse of judicial power which lies in the intentional non-application or misapplication of the law.

Of course, constitutional adjudication is inevitably political in the sense that the object and the effect of constitutional court decisions are political. This follows from the very function of constitutional law, which is to regulate the formation and exercise of political power, and the function of constitutional courts, which consists in enforcing this law vis-à-vis politics. Constitutional courts are a branch of government. Excluding political issues from judicial scrutiny would be the end of constitutional review. Hence, the question can only be whether operations that judges undertake in order to find the law and to apply it to political issues are of a political or a legal character.

⁴ *Bush v. Gore*, 531 U.S. 98 (2000).

This question arises because all analyses of the process of law application to concrete issues show that the text of the law is unable to completely determine judicial decisions. One of the reasons is that the law in general and constitutional law in particular is neither void of gaps and contradictions nor always clear and unambiguous, and it can hardly be different, given the fact that a legal system is a product of different times, reacting to various challenges, inspired by different interests or concepts of justice and depending on the use of ordinary language. Filling the gaps, harmonizing the contradicting provisions, rendering them precise enough for the decision of an issue is the task of the law applicants, in the last resort of the courts, which, in turn, draw profit from the efforts of legal science.

But even if provisions are formulated as clearly and as coherently as possible they can raise questions when it comes to solving a concrete case. This incapacity to guarantee a full determination of legal decisions, even in the case of seemingly clear provisions, is inherent in the law because a law is by definition a general rule applicable to an indefinite number of cases arising in the future. This is why it must be formulated in more or less abstract terms. Consequently, there will always remain a gap between the general and abstract norm on the one hand and the concrete and individual case on the other. The judge has to find out what the general norm means with regard to the case at hand. This is achieved by interpretation, which always precedes the application of the norm. The general norm must be concretized to a more specific rule before the individual case can be decided.

Like the task of filling gaps, harmonizing contradicting provisions, clarifying vague norms, the concretization contains a creative element. Norm application therefore is always to a certain extent norm-construction. The fact as such is undisputable. The degree can vary. It depends on a number of variables. The most important one is the precision of a norm. A narrowly tailored norm leaves less room for the constructive element whereas a broad or even vague norm requires a lot of concretization before it is ready for application to a case. Usually a constitution will contain more vague norms than, say, the code of civil procedure. This is certainly true for the guiding principles and for fundamental rights, less so for organizational and procedural norms. Another variable is the age of a norm. The older a norm is, the larger the number of problems that were not or could not have been foreseen by the legislature and thus it raises questions of meaning and applicability.

The mere fact that the law does not fully determine the judgment in individual cases is not sufficient to turn law application from a legal into a political operation. It remains a legal operation if what the judge adds to the text of the law in the process of interpretation has its basis in the text and can be derived from it in a reasonable argumentative manner. If not it becomes a political one. The task therefore is to distinguish between legal and non-legal

arguments, be they political, economic or religious. This decision can only be taken within the legal system. No other system is competent to determine what counts as a legal argument. Within the legal system the distinction between a legal and a non-legal argument is the concern of methodology. By doing so, methodology attempts to eliminate subjective influences from the interpretation of the law as far as possible. This is why the distinction between legal and non-legal operations in the course of law application becomes largely a question of legal method.

Yet, different from the text of the law that is the product of a political decision and thus not at the disposition of judges, methodology is itself a product of legal considerations. It emerges in the process of interpreting and applying the law or is developed in scholarly discourse, but it is nowhere decreed authoritatively. This means at the same time that various methodologies can coexist and so can different variations of a certain methodological creed. Method is a matter of choice within the legal system. All historical attempts by legislators to prohibit interpretation or to prescribe a certain method have been in vain. They were themselves subject to interpretation. But the lack of one authoritative method does not mean that methodology can justify any solution and thus loses its disciplining effect on judges. Just as certain legal systems have their time in history methodologies have their time, too. There is usually a core of accepted arguments or operations and a number of arguments or operations that are regarded as unacceptable. The degree to which a method can succeed in eliminating all subjective elements from interpretation is controversial. There were and are methods that claim this capacity.

A historically influential method that promised to eliminate subjective influences was legal positivism, not in its capacity as a theory of the validity of law opposed to all natural law theories, but in its capacity as theory of legal interpretation. For a positivist in this sense the legal norm consists of its text and nothing else, and the only instrument to discover the meaning of the text is philology and logic, i.e. not the legislative history, not the motives or the intent of the legislature, not the values behind the norm, not the social reality that brought forth the problems which the norm was meant to solve and in which it is to take effect, not the consequences the interpretation may entail. There can be but one correct understanding of a norm and this remains correct as long as the norm is in force, no matter how the context changes.

The problem with positivism was on the one hand that it could not fulfil its promise to eliminate all subjective influences on interpretation. Rather these influences were infused into the interpretation in a clandestine way, mostly in connection with the definition of the notions used by the legislature. On the other hand, positivism prohibited an adaptation of the law to social change by way of interpretation. Since the social reality in which the norm was to take effect was regarded as irrelevant for the interpretation a positivist

could not even perceive of social change. Of course, a positivist would not have denied that, because of social change, a legal norm may miss its purpose and produce dysfunctional results. But this was regarded as a matter for the law-maker, not for the law-applicant. It was this deficit that largely contributed to the decline of positivism after the far-reaching social change in the wake of the Industrial Revolution and World War I.

There is yet another influential theory of interpretation that claims to preclude all subjective influences, namely originalism. Different from positivism, originalists believe that only a historical method is the right way to ascertain the meaning of a legal norm. The law-applicant must give a norm, in particular a norm of the constitution, no meaning other than the one that the framers had in mind. Sometimes originalism appears in a crude way that excludes the application of a norm to any phenomenon the framers could not have known. If the First Amendment to the U.S. Constitution protects the freedom of the press, this would not allow the law-applicant to extend the protection to radio and TV by way of interpretation. Sometimes originalism appears in a more enlightened form. The law-applicant is then permitted to ask whether the framers clearly would have included a new phenomenon had they known it at the time when the law was enacted. In this case it would be methodologically permissible to include radio and TV into the protection of the First Amendment by way of interpretation. But like a positivist an originalist is not prepared to acknowledge that there can be more than one sound interpretation of a norm and that the interpretation can legitimately change when the circumstances change in which it is applied.

The problem with originalism is first a practical one. In most cases it is difficult or even impossible to know what the original understanding or the original intent was. It is the more difficult if many persons are involved in the process of constitution-making many of whom may not have expressed their understanding or intent. For this reason ascertaining the original intent or understanding is often a highly selective process, in which some utterances of actors are singled out and taken for the whole. The second problem is the same that positivism encountered. There is extremely limited or even no room at all for the adaptation of legal norms to social change. If social change affects the constitution adversely the only remedy is to amend the text, which can be extremely complicated in a country like the United States. The constitution tends to petrify, in opposition to the theory of the constitution as a “living tree” as emphasized in the jurisprudence of the Canadian Supreme Court.⁵

Although one would have difficulties in finding positivists or originalists in Germany, these methodologies are by no means of historical interest only. Positivism, or more precisely a crude literal understanding, plays

⁵ Originally in *Edwards v. A.-G. Can.*, 1930 A.C. 123 (136) (Later on frequently used, Cf. *Same Sex Marriage Case*, [2004] 3 S.C.R. 698, 22).

a considerable role in a number of post-communist countries and in parts of Latin America. Originalism has a stronghold in the United States in reaction to the activist Warren Court of the 1950s and '60s. In Germany, the idea that a legal method exists that can exclude any subjective element from the interpretation of legal norms is no longer upheld. The same is true for the majority of American legal scholars. But the consequences drawn from this premise differ considerably in the two countries. A very powerful school in the United States, Critical Legal Studies, is of the opinion that not only law-making is a political operation, but also the interpretation and application of law, with the only difference that the legislature operates in a political setting while judges operate in a judicial setting. As a further consequence the focus of academic interest in the law differs. The question many American jurists tend to ask is: How will the courts decide? The dominant question in Germany would be: What is the correct decision?

In the last resort a different attitude toward the autonomy of the law appears behind the two concepts. While the adherence to Critical Legal Studies does not leave much room for scholars to recognize the autonomy of the legal system, in Germany at least a relative autonomy of the law is widely accepted. This concept acknowledges on the one hand that law is a political product. It emerges from the legislative process, where political arguments dominate. On the other hand, once enacted the law is disconnected from politics. It is up to the legislature to decide whether a legal norm remains in force or not. But as long as it is in force its application does not follow political criteria. It is not only a difference in the institutional setting of political and judicial decisions. There is also a specific rationality of the legal system, which differs from the rationality of the political system.

The difference is not without impact on the recruitment and the behaviour of judges. If interpretation and application of the law is regarded as a political operation the political preferences and affiliations of the judges are important, whereas they do not matter as much when the neutralizing effect of the legal rationality is recognized. The degree of politicization of the judiciary is linked to this. It explains at the same time the constant concern of the American constitutionalists as well as the American public with the "counter-majoritarian difficulty"⁶ or the undemocratic character of judicial review, which is more or less absent in Germany and other countries where the establishment of judicial review was a reaction to the experience with non-democratic regimes.

An inside perspective of a constitutional court can confirm to what extent doctrine and methodology are able to bridge ideological differences. During my term on the bench I could observe that decisions were not necessarily result-driven. Legal arguments mattered and it happened quite

⁶ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1986).

often that members of the court changed their mind because of the arguments exchanged in the deliberation. Of course, this observation in one court cannot be generalized. Yet, it certainly shows how important it is that judges have to give reasons for a decision. It is true that there may be good reasons for different results, but it is also true that not every result can be supported by legal reasons.

Which method guides the German Constitutional Court when it decides constitutional conflicts? Authentic descriptions by the Court itself are rare, and where they appear in an opinion they do not come in form of a systematic and coherent explanation. Courts hardly discuss methodological questions, let alone describe in their opinions which method they followed. The method is practiced, not theoretically developed. This means that it must be inferred from the way a court usually reaches its solutions. Easier than a positive statement on which method the Court adopts is the negative statement on what it avoids: there are neither positivists nor originalists on the bench in Germany, which does neither mean that the text of the constitution is neglected nor that historical arguments are absent.

In very general terms the method can be described as purposive or functional. Constitutional norms are regarded as expressions of values or principles that society wanted to establish on the highest legal level. These values, in turn, inform the concretization of those constitutional provisions that apply to a concrete case. The goal of interpretation is to give utmost effect to these values or principles behind the text. Whenever the meaning of a constitutional provision *vis-à-vis* a concrete issue is to be determined, the Court asks for the objective that a constitutional provision pursues or for the function that it is to fulfil in society. Why shall the media be free? Why does the family enjoy the special protection of the state? Why is Parliament limited in delegating legislative power to the executive? Why are political parties obliged to organize themselves democratically and to lay open their finances?

The result of the value search matters. It makes a difference whether the idea behind freedom of the media is to give the owners and journalists the possibility to disseminate their individual opinions to a larger public or whether it aims at allowing the owners to make as much profit as possible, or whether it is meant to enable the individual recipient to form his or her opinion and to guarantee that society gets the information it needs in the interest of self-government. In the two first cases media regulation would present a constitutional problem, in the third case it may be a constitutional obligation. If a conflict between constitutionally protected values arises the Court does not establish a hierarchy among them but tries to harmonize them in a way that both retain as much as possible of their content. Thus balancing becomes an important tool for the Court when it adjudicates fundamental rights issues.

The methodological maxim, according to which the purpose of the constitutional provision at stake shall be given the utmost effect, has a further consequence that characterizes the methodological attitude of the German Court. What the utmost effect is cannot be ascertained without knowledge about the segment of social reality in which the constitutional provision is to take effect. Legal norms are formulated in view of a certain state of social reality. Next to text and purpose this context is constitutive for the meaning of the legal norm. But different from the text and the purpose, which are determined by the legislature and remain the same as long as the norm is in force, the context is subject to social change. As a consequence, an interpretation that served the purpose best under certain conditions may cease to do so under changed conditions.

If this is so, sticking to the original interpretation can lead to suboptimal results. It can even miss the function of the norm completely and produce dysfunctional results. It characterizes the jurisprudence of the Court that it takes social reality into account in order to secure that the law keeps up with new challenges and retains its normative force also *vis-à-vis* new problems. The Court goes even one step further and asks for the probable consequences of alternative interpretations in the real world and chooses the interpretation whose consequences are closer to the normative purpose. In this way, it reacted in particular to new threats to constitutionally protected liberties that arise from scientific and technological developments and their commercial use and thus broadened the protective scope of fundamental rights.

In sum, this method endows the constitution with high practical relevance. A number of important doctrinal innovations owe their existence to this approach, such as the principle of proportionality, the horizontal effect of human rights, the constitutional obligation of the legislature to protect fundamental rights against menaces from private actors or societal forces. They were meanwhile adopted in many new constitutions or in the jurisprudence of many constitutional courts. Yet, it is just this dynamic interpretation of the Court that brings back the question of the law-politics-divide. At what point does a new interpretation amount to an amendment of the constitution? Of course, in a formal sense an amendment requires a textual change of the constitution. This cannot be done by a court. In a more substantive sense, however, changes in the meaning of given text may have a bigger impact than textual changes.

III. CONCLUSION

The Basic Law has been formally amended 58 times in sixty years. Yet, the changes by way of interpretation, particularly in the field of fundamental rights, are certainly of a similar if not greater impact. Is there a borderline behind which interpretation turns from a legal into a political operation?

The answer cannot be different from the one given earlier. As long as the interpretation is derived from the text in a legally acceptable way it remains within the realm of the law. The political consequences may nevertheless be severe. Every new content that a court derives from constitutional norms changes the balance between the political branches of government and the judiciary, mostly in favour of the latter. Sometimes this is called “judicial imperialism”.⁷ But it seems necessary to distinguish between intent and effect. The intent of courts usually is to give effect to constitutional requirements. The effect often is a gain of power that corresponds with a loss of power on the side of the legislature. Still it seems very difficult to convince courts not to enforce what for them follows from the constitution.

In this situation many authors resort to judicial self-restraint as a remedy. But self-restraint, as recommendable as it may be, is but an appeal to professional ethics, not a legal rule. Descriptively, one can distinguish between active and deferential courts. Prescriptively, no operational criteria are visible. Too many factors are at stake, and often closer analysis shows that an interpretation which looks extremely bold is well-founded under the circumstances in which it was taken. In addition, it is by no means clear that there is a connection between judicial self-restraint and the degree of politicization of courts. The German Constitutional Court, for example, is more active than the U.S. Supreme Court, but it is less politicized.

A more promising tool to limit the expansion of judicial power is the amending power. Courts are bound by the text of law. Changing the text belongs to the political power. The political powers can re-program the judiciary when they disapprove of their jurisprudence. There is, however, one important difference between ordinary courts and constitutional courts. If the legislature is of the opinion that the interpretation of a law runs against their legislative intention it can change the law with a simple majority. Constitutional courts apply the constitution whose amendment is usually more difficult for good reasons. Yet, only by amending the constitution can the political branches of government correct or re-program constitutional courts. Therefore, amendments should not be made too difficult. When they are very difficult, like in the United States, the burden of the adaptation of the constitution to new challenges lies on the judges’ shoulders and makes them more political. If the judges shy away from carrying this burden, say for methodological reasons like originalism, and the amendment procedure is extremely difficult it is to the detriment of the normative force of the constitution.

Amendments are an external corrective to the power of courts. But there is also an internal corrective: even if it is true that, what is legally acceptable and what is not, can only be defined in the legal system, it is

⁷ For a discussion see DIETER GRIMM, JUDGES IN CONTEMPORARY DEMOCRACY 17 (Robert Badinter & Stephen Breyer eds., 2004).

never defined once and for all and judges are not the only actors to take part in the ongoing discussion. It is therefore extremely important that constitutional courts are embedded in a lively discourse in which the division of functions between the political and the juridical branches of government, the acceptability of legal methods and the soundness of interpretations are constantly evaluated and readjusted. Judicial independence is not in danger when judges pay attention to the reaction their decisions find in society.

