HIRSCHL

THE JUDICIALIZATION OF MEGA-POLITICS AND THE RISE OF POLITICAL COURTS

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OUTLINE

In a recent lead article in the Harvard Law Review, Prof. Fredrick Schauer suggests that the U.S. Supreme Court operates “overwhelmingly in areas of low public salience”. Perhaps so. But when we turn our gaze overseas, the picture is distinctly different. Over the past two decades, there has been a tremendous growth worldwide in the reliance on courts for dealing with some of the most fundamental political quandaries a polity can contemplate. The judicialization of politics worldwide has expanded its scope beyond flashy rights issues to encompass what we may term ‘mega-politics’ – matters of outright and utmost political significance that often define and divide whole polities. In this article, I explore the scope and nature of judicialization of this kind. I begin by identifying the characteristics of the judicialization of mega-politics. I then illustrate the various forms and manifestations of the judicialization of mega-politics through recent examples drawn from jurisprudence of courts and tribunals worldwide. Next, I turn to explanatory factors. Works that attempt to explain (not merely describe) the judicialization of politics may be grouped, for the sake of simplicity, into four main categories: functionalist, rights-centered, institutionalist, or court-centered. None of these four approaches takes the conceptualization of courts as political institutions seriously enough. To complement these approaches, I advance here a more ‘realist’ judicialization-from-above account, which emphasizes support from the political sphere as a necessary precondition for judicialization of pure politics. To further illustrate this point, I survey patterns of political reaction to recurrent manifestations of unsolicited judicial intervention in the political sphere in general, and unwelcome judgments concerning contentious political issues in particular.

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I. INTRODUCTION

The judicialization of politics – the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies – is arguably one of the most significant phenomena of late twentieth and early twenty-first century government. Armed with newly acquired judicial review procedures, national high courts worldwide have been frequently asked to resolve a range of issues, varying from the scope of expression and religious liberties, equality rights, privacy, and reproductive freedoms, to public policies pertaining to criminal justice, property, trade and commerce, education, immigration, labor, and environmental protection. Bold newspaper headlines reporting on landmark court rulings concerning hotly contested issues – same sex marriage, limits on campaign financing, and affirmative action, to give a few examples – have become a common phenomenon. This is evident in the United States, where the legacy of active judicial review recently marked its bicentennial anniversary; here, courts have long played a significant role in policy-making. And it is just as evident in younger constitutional democracies that have established active judicial review mechanisms only in the last few decades. Meanwhile, transnational tribunals have become main loci for coordinating policies at the global or regional level, from trade and monetary issues to labor standards and environmental regulations.

While several scholars have identified a decline in the political salience of the United States Supreme Court (e.g. Schauer 2006), the global expansion of judicial power has marched on. In recent years, the judicialization of politics has expanded beyond flashy rights issues to encompass what we may term ‘mega-politics’ – matters of outright and utmost political significance that often define and divide whole polities. These range from electoral outcomes and corroboration of regime change to foundational collective identity questions, and nation-building processes pertaining to the very nature and definition of the body politic as such. Although many public policy matters still remain beyond the purview of the courts, there has been a growing legislative deference to the judiciary, an increasing and often welcomed intrusion of the judiciary into the prerogatives of legislatures and executives, and a corresponding acceleration of the judicialization of political agendas. Together, these developments have helped to bring about a growing reliance on adjudicative means for clarifying and settling highly contentious political questions, and
have transformed national high courts worldwide into major political decision-making bodies.

Despite the increasing relevance of this trend to the study of domestic and international law and politics, the literature addressing the judicialization of politics worldwide remains surprisingly sketchy. The term ‘judicialization’ suffers from analytical fuzziness; it is often used in an umbrella-like fashion to refer to different, if often interrelated, processes, ranging from judge-made policy-making to rights jurisprudence to debates over judicial appointments and the politicization of the judiciary – the inevitable flip side of judicialization. Relatively few works (e.g., Tate & Vallinder 1995; Goldstein et al. 2001; Hirschl 2002, 2004a; Ferejohn 2002; Shapiro & Stone-Sweet 2002; Miller 2004; Pildes 2004; Sieder et al. 2005) go beyond single-country case studies to treat the judicialization of politics as a broad sociopolitical phenomenon. With a few notable exceptions, much of the pertinent literature seems not to recognize that the great judicialization train has long since left the ‘rights jurisprudence’ station. Some of this oversight stems from lack of a genuinely comparative perspective (Hirschl 2006). Because the number of American scholars who work in the field still far exceeds the number of citizens of the rest of the world who study the same set of phenomena, American constitutional experience is still the main reference point for most pertinent studies published in leading academic venues. Consequently, the judicialization of politics continues to be portrayed as broadly synonymous with American-style rights jurisprudence and judicial activism. Although such an account might have been accurate as recently as the 1990s, it no longer captures the current scope of judicialized mega-politics.

In this article, I explore the scope and nature of the emerging new level of judicialized pure or mega-politics, as well as its main causes. I proceed in four stages. The next two sections define and illustrate the characteristics of the judicialization of mega-politics, and illustrate its various manifestations through recent examples drawn from jurisprudence of constitutional courts and tribunals worldwide. Next, I turn to explanatory factors. Works that attempt to explain (not merely describe) the judicialization of politics may be grouped, for the sake of simplicity, into four main categories: functionalist, rights-centered, institutionalist, or court-centered. None of these four approaches takes the conceptualization of courts as political institutions seriously enough. To complement these
approaches, I advance here a more ‘realist’ judicialization-from-above account, which emphasizes support from the political sphere as a necessary precondition for judicialization of pure politics. To further illustrate this point, I survey patterns of political reaction to recurrent manifestations of unsolicited judicial intervention in the political sphere in general, and unwelcome judgments concerning contentious political issues in particular. As I suggest in my concluding remarks, the strategic approach to judicialization illustrates the increasingly inexplicable divide between grand constitutional theory and the study of real-life constitutional law and politics.

II. WHAT IS THE JUDICIALIZATION OF MEGA-POLITICS?

The ascendancy of legal discourse and the popularization of legal jargon has become evident in virtually every aspect of modern life. It is perhaps best illustrated by the subordination of almost every decision-making forum in modern rule-of-law polities to quasi-judicial norms and procedures. Matters that had previously been negotiated in an informal or non-judicial fashion have now come to be dominated by legal rules and procedures. However, the judicialization of politics started much before what we may label (following the early legal sociologists) the ‘juridification’ of modern life. The elimination of political rivals by means of showcase trials can be dated back to the Roman Empire or the days of King Herod the Great. Next came the indictment by the courts of novel, counter-establishment ideas – from the Papal trials of Galileo’s heliocentric theory (1633) and Gracchus Babeuf’s post French Revolution radical egalitarianism (1797) to Benjamin Gitlow’s ‘criminal anarchy’ and the Scopes trial concerning the teaching of evolution theory in the 1920s’ United States. The post World War II reconstruction years saw the trials of war criminals at Nuremberg, Tokyo and Jerusalem in a grand show of what has been called ‘victors’ justice’.

The global convergence toward constitutional supremacy – a concept that have long been a major pillar of American political order and is now shared, in one form or another, by more than 100 countries across the globe – brought about an inevitable and often welcomed increase in the salience of constitutional courts worldwide. Today, not a single week passes without a national high court somewhere in the world releasing a major judgment pertaining to the scope of constitutional rights or the limits on legislative or
executive powers. The most common are cases dealing with procedural justice and criminal ‘due process’ rights. Aggregate data suggest that approximately two-thirds of all constitutional rights cases in the ‘world of new constitutinalism’ deal with that type of rights. Also common are rulings involving classic civil liberties, the right to privacy, and formal equality. This ever-expanding body of civil liberties jurisprudence has expanded and fortified the boundaries of the constitutionally protected private sphere (often perceived as threatened by the long arm of the state and its regulatory laws) and has transformed numerous policy areas involving individual freedoms.

In recent years we have seen the emergence of another level of judicialized politics: reliance on courts and judges for dealing with what we might call ‘mega-politics’ – core political controversies that define the boundaries of the collective or cut through the heart of entire nations. This level of judicialization includes several subcategories: judicial scrutiny of executive-branch prerogatives in the realms of macroeconomic planning or national security (i.e., the demise of what constitutional theorists call the ‘political question’ doctrine); judicialization of electoral processes; judicial corroboration of regime transformation; fundamental restorative-justice dilemmas; and above all, the judicialization of formative collective identity, nation-building processes, and struggles over the very definition or raison d'être of the polity as such – arguably the most troubling type of judicialization from a participatory democracy standpoint. These emerging areas of judicialized politics expand the boundaries of national high-court involvement in the political sphere beyond any previous limit.

Consider the judicialization of such core issues as the fate of the American presidency or the Mexican presidency, multicultural citizenship in Western Europe, the place of Germany in the EU, the war in Chechnya, the near-constant political turmoil in Pakistan, quandaries of transitional justice from the post-communist world to post-authoritarian Latin America to post-apartheid South Africa, the status of indigenous populations in Australia and New Zealand, the political future of Quebec and the Canadian federation, the eminence of Shari’a law in Egypt, ‘who is a bumiputra?‘ (‘authentic’ Malay) and the boundaries of the collective in Malaysia, the secular nature of Turkey’s political system, or Israel’s fundamental definition as a ‘Jewish and democratic state’ and the corresponding question, ‘Who is a Jew?’ These diverse matters have all been framed as constitutional
issues, with the concomitant assumption that courts – not politicians or the public – should resolve them. Aharon Barak, the former proactive president of the Supreme Court of Israel, once said that “nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable,” and it seems that this motto has become widely accepted by courts worldwide.

It is difficult to overstate the significance of this transition. Whereas oversight of the procedural aspects of the democratic process – judicial monitoring of electoral procedures and regulations, for example – falls within the mandate of most constitutional courts, questions such as a regime’s legitimacy, a nation’s collective identity, or a polity’s coming to terms with unsavory episodes in its past, primarily reflect deep political dilemmas, not judicial ones. As such, they ought – at least in principle – to be contemplated and decided by the populace itself, through its elected and accountable representatives. Adjudicating such matters is an inherently and substantively political exercise that extends beyond the application of rights provisions or basic procedural justice norms. Judicialization of this type involves instances where a nation’s courts decide its watershed political issues – even those not directly addressed by its constitution – despite the obvious recognition of the very high political stakes for the nation. It is precisely these instances of the judicialization of core political issues that make the democratic credentials of judicial review most questionable. Whereas courts may be a suitable setting – perhaps even the best one, both in terms of the their institutional position in a democracy and in terms of the judges’ expertise – for assessing evidence, determining responsibility for alleged wrongdoing, or for dealing with matters of procedural justice and fairness, it is ultimately unclear what makes courts an appropriate forum for deciding what are quandaries of a purely and substantively political nature.

The distinction between ‘ordinary’ instances of judicialization and the judicialization of ‘mega-politics’ depends, in part, on our conceptualization of the political. A political decision must affect the lives of many people – but many cases that are not purely political (e.g., large class-action lawsuits) also affect the lives of many people. Because there is no simple answer to the question “what is political?” – for some social theorists, the answer to that question would be “everything” – there can be no plain and simple definition of the judicialization of politics, either. And there are other complications. A controversial
political issue in one polity (say, affirmative action in the United States) may be a nonissue in another polity. And different polities may have very different views of a single issue. For example, reproductive freedom may be framed mainly as a clash of rights (e.g., in the United States), as reflection of the status of the historically influential church (e.g., in Colombia), or as a conflict between national preferences and supranational norms (e.g., the compatibility of Irish abortion laws with provisions of the European Convention of Human Rights).

But regardless of how one defines the boundaries of the political, there seems to be little doubt that a landmark court judgment determining the political fate of voters, leaders and parties, the legitimacy of a polity’s regime, the forms of transitional justice, or a nation’s collective identity is a ruling with an explicit and utmost political salience. Few issues may be considered more ‘political’ than those that authoritatively define a polity’s very identity, such as the status of Quebec and the Canadian confederation, the place of Germans in the European demos, or the ‘who is a Jew?’ question in Israel. This elusive yet intuitive category of ‘existential’ national issues is what differentiates the judicialization of mega-politics from other levels of judicialization.

III. A FEW ILLUSTRATIVE CASES

The judicialization of mega-politics includes several types of issues and controversies. For the sake of simplicity, these will be grouped here into five categories.

(i) Electoral processes and outcomes
Arguably, the most overtly political area is the judicialization of the democratic process itself. The U.S. Supreme Court’s rulings in matters such as campaign financing, gerrymandering, and the redrawing of electoral districts are probably well known to the readers (see, e.g., Issacharoff et al. 2007). North of the border, the Supreme Court of Canada has also been active with respect to the law of democracy – from extending voting rights to prisoners (Sauvé 2002) and the approval of spending limits on third party election advertising (Harper 2004) to lowering the threshold for formal federal recognition of a political party (Figueroa 2003). Unlike numerous popular accounts in the United States, the Bush v. Gore courtroom struggle over the fate of the American presidency was no
idiosyncratic moment in the recent history of comparative constitutional politics. During the last five years alone, constitutional courts in over twenty-five countries have become the ultimate decision makers in disputes over national election outcomes, for example in Taiwan (2004), Puerto Rico (2004), Ukraine (2005), Congo (2006), Italy (2006), Mexico (2006), and Nigeria (2007). Italy’s Constitutional Court, for example, approved a win by <25,000 votes to the center-left leader Romano Prodi in one of the country’s closest elections. Likewise, a series of election appeals and counter-appeals culminated in Mexico’s Federal Electoral Court dismissing the claim of the leftist runner-up Andres Manuel Lopez Obrador of massive fraud by right-wing candidate and election winner Felipe Calderon in the July 2006 presidential election. Calderon won the election with a margin of <0.6%. Constitutional courts have also been centrally involved in deciding election outcomes in states and provinces.

Likewise, constitutional courts worldwide have been called upon to determine the political future of prominent leaders. Pakistan’s former prime ministers Benazir Bhutto and Nawaz Sharif, Colombia’s president Alvaro Uribe, Nepal’s prime minister Sher Bahadur Deuba, Uganda’s president Yoweri Museveni, Nigeria’s vice-president Atiku Abubakar, and Russia’s president Boris Yeltsin – among others – all had their political fate determined by courts. To that list one could add corruption indictments against heads of state (e.g., Italy’s Silvio Berlusconi, Peru’s Alberto Fujimori, and Thailand’s Thaksin Shinawatra), and ‘political trials’ – arguably the oldest form of judicialized politics – in which prominent opposition leaders have been indicted, disqualified, or otherwise removed from competition by a politicized judiciary.

Courts elsewhere are frequently requested to decide on the approval or disqualification of political parties and candidates, or the validity of voter lists. Often, the political stakes are high. For example, the Constitutional Chamber of the Venezuelan Supreme Court was called upon to determine the validity of over 2.5 million signatures to a petition to hold a referendum that would determine whether President Hugo Chavez should be recalled. Ultimately, Chavez won the referendum (2004) and avoided impeachment. In the past decade, courts in a number of countries – notably Algeria, Bangladesh, Belgium, India, Israel, Spain, Thailand, and Turkey – have virtually or literally banned political parties from participating in national elections. As this paper is
being written, Thailand’s Supreme Court is deliberating whether the People Power Party (an offshoot of the formerly banned *Thai Rak Thai* Party), which won the largest number of parliamentary seats in December 2007 election, should be disbanded for violating election laws. Such dissolutions of political parties raise substantive questions about the boundaries of democracy and the very definition of the polity (see e.g., Rosenblum 2007).

**(ii) Core executive prerogatives**

A second emerging category of judicialized mega-politics is the increased judicial scrutiny of core executive prerogatives in national security, foreign affairs, and fiscal policy. One aspect of this type of judicialization that is easily reconcilable with the checks-and-balances doctrine is judicial scrutiny of ‘process-lite’ measures adopted by governments to combat terrorism since 9/11. In 2004, the Law Lords declared unconstitutional Britain’s post-9/11 state-of-emergency legislation (*Belmarsh Case* 2004). Recently, the Law Lords went on to address such questions as whether the provisions of the European Convention of Human Rights and the British Human Rights Act applied to British forces in Iraq (*Al Skeini*, 2007), or whether the prohibition on torture in international law required the UK to take positive action in the case of Guantanamo detainees who might be suffering torture at the hands of US authorities (*Al Rawi*, 2007). In 1999, the Israeli Supreme Court banned the use of torture in interrogations by Israel’s General Security Services but allowed the use of ‘moderate physical pressure.’ In late 2006 it ordered the weighing of security considerations against potential harm to civilians in determining the legality of ‘targeted killings’ (the controversial practice of assassinating suspected Palestinian terrorists) by Israel’s security forces. In a similar fashion, Peru’s Constitutional Council annulled in 2002 the secret trial by a military tribunal of the leaders of the Shining Path Maoist underground rebel movement.

Courts have cast the judicial net wide to catch broader matters of national security. In contrast to the due-process realm, court rulings in virtually all of these cases have affirmed the official government position. In the *Chechnya Case* (1995), the Russian Constitutional Court agreed to hear petitions by opposition members of the Duma, who challenged the constitutionality of three presidential decrees ordering the invasion of Chechnya. Rejecting Chechnya’s claim to independence and upholding the constitutionality of President
Yeltsin’s decrees as *intra vires*, the majority of the judges of this court stated that maintaining the territorial integrity and unity of Russia was “[a]n unshakable rule that excludes the possibility of an armed secession in any federative state.” Similarly, the Israeli Supreme Court ruled in 2004 on the constitutionality and compatibility with international law of the controversial West Bank barrier separating Israel from Palestinian territory. It also heard arguments concerning the constitutionality of the Oslo Peace Accords and Israel’s unilateral pullback from the Gaza Strip. The Korean Constitutional Court recently upheld the government decision to deploy Korean troops in Iraq. The Supreme Court of Papua New Guinea declared unconstitutional the deployment of law enforcement officers sent there by Australia to fight corruption and restore law and order. (The Australian task force was rumored to have discovered government ties to organized crime.)

The Supreme Court of Canada was quick to reject the ‘political question’ doctrine (non-justiciability of explicitly political questions) following the adoption of the Canadian Charter of Rights and Freedoms in 1982. In its early Charter ruling in *Operation Dismantle* (1985) – a challenge to the constitutionality of U.S. missile testing on Canadian soil – the Supreme Court of Canada held that “[i]f a case raises the question of whether executive or legislative action violated the Constitution, then the question has to be answered by the Court, regardless of the political character of the controversy … [d]isputes of a political or foreign policy nature may be properly cognizable by the courts.”

In matters of broad economic and social policies, the courts have generally been less active. With few exceptions (most notably South Africa, Brazil, and India), courts have not been particularly active in arenas such as income distribution, eradication of poverty, or subsistence rights (e.g., basic education, health care, or housing), all of which require wider state intervention and changing public expenditure priorities (Hirschl 2004a, 2005a; Tushnet 2007). But other core social policy areas have gone judicial, such as the provision of health care in Canada (*Chaoulli v. Quebec*, 2005), national welfare reform in Hungary (*Austerity Package Decisions*, 1995), or the Argentine government’s plan to convert the Argentine economy to pesos and freeze savings deposits held in U.S. currency – a consequence of Argentina’s major economic crisis of 2001 (*Corralito Case*, 2004).
(iii) Legitimacy of regime change

A third type of increased judicial involvement in mega-politics is the corroboration of regime change. The most obvious example is the ‘constitutional certification’ saga in South Africa – the first time a constitutional court refused to accept a national constitutional text drafted by a representative constitution-making body. Other recent manifestations include the 2004 dismissal by the Constitutional Court of South Korea of the impeachment of President Roh Moo-hyun by South Korea’s National Assembly (the first time in the history of modern constitutionalism that a president impeached by a legislative body has been reinstated by a judicial body); the astonishing but rarely acknowledged restoration of the 1997 Fijian constitution by the Fijian Court of Appeals in *Fiji v. Prasad* 2001 (the first time in the history of modern constitutionalism that a polity’s high court restored a constitution and the democratic system of government created by it); and the crucial yet seldom recognized involvement of the Pakistan Supreme Court in the political transformation of that country. Since 1990, Pakistan has known five regime changes, and its Supreme Court has played a key role in each.

A case in point is the Pakistan Supreme Court’s appraisal of the legitimacy of the military coup d’état of October 1999 (*Zafar Ali Shah v. Pervez Musharraf*, 2000). Amid charges of runaway corruption and gross economic mismanagement by the government, General Pervez Musharraf seized power from Prime Minister Nawaz Sharif. Musharraf declared himself the country’s new chief executive, detained Sharif and several of his political allies, and issued a Proclamation of Emergency that suspended the operation of Sharif’s government, Pakistan’s National Assembly, and its Senate. In a widely publicized decision released in May 2000, the Pakistan Supreme Court drew on the doctrine of ‘state necessity’ and the principle of *salus populi suprema lex* to unanimously validate the coup as having been necessary to spare the country from chaos and bankruptcy.

(iv) Transitional justice

A fourth area in which mega-politics has undergone rapid judicialization is restorative or transitional justice. The Nuremberg-style ‘trial and punishment’ mode of restorative justice has become quite prevalent. The International Criminal Court (ICC), ratified by over 100 countries as of 2007, was established in 1998 as a permanent international judicial body...
with potentially universal jurisdiction over genocide, crimes against humanity, and war crimes. Also established in the 1990s were the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Meanwhile, quasi-judicial ‘truth commissions’ or special tribunals dealing with core issues of transitional justice have been established in dozens of countries from El Salvador to Ghana. This international trend has been described as a ‘justice cascade’ (Lutz & Sikkink 2001). Also in this category are the ‘hybrid courts’ in Cambodia, East Timor, Kosovo, and Sierra Leone – tribunals working within the domestic legal system while applying a compound of international and national, substantial and procedural, law. Activist constitutional courts are eager to capitalize on the opportunity to expand their influence in the area of international human rights. In 2005, for example, the Spanish Constitutional Tribunal ruled that Spanish courts could adjudicate cases concerning genocide and crimes against humanity, regardless of whether Spanish citizens were involved or directly affected.

National high courts have also been significant players in the field of restorative justice. Akin to the judicialization of restorative justice in the United States (e.g., the U.S. Supreme Court jurisprudence on affirmative action), there has been an extensive judicialization of the battle over the status of indigenous peoples in so-called ‘settler societies,’ particularly Australia, Canada, and New Zealand. The Australian High Court rulings in *Mabo II* (1992) and *Wik* (1996) – both are discussed below – are two clear illustrations of how high the political stakes are in these cases. And less frequently traveled destinations have also had their fair share of judicialized restorative justice. In a historic ruling in 2006, for example, Botswana’s High Court ruled that the country’s Bushmen – one of the world’s last surviving groups of hunter gatherers – could return to their ancestral lands in the Kalahari Desert. In other instances, courts in these countries were asked to go beyond the question of restorative justice to determine the boundaries of collective entitlement for reparation. In 2000, for example, the New Zealand Court of Appeal defined the boundaries of the Maori community for the purpose of entitlement to government compensation for native fisheries title based on the Treaty of Waitangi (1840) – the constitutive document governing the relationship between European settlers and the Maori

The transformation of constitutional courts into a key arena for dealing with transitional-justice issues of near-existential proportions may lead judges to reevaluate entire periods in their nation’s history. A political quest for legitimacy, a lack of political will, or inability to confront a less-than-dazzling past often motivates deference to courts in such matters. A paradigmatic case – among many in the former Eastern Bloc – is the 1993 decision of the Constitutional Court of the Czech Republic to uphold a law that declared the entire Communist era in the former Czechoslovakia illegal. The Supreme Court of El Salvador also took up the task of judging the nation’s political history when it upheld a contentious across-the-board amnesty to gross human rights violators, granted by the government as part of the national reconciliation process in the early 1990s. Argentina’s Supreme Court upheld in 1987 amnesty laws aimed at shielding perpetrators of serious human rights violations committed during the military junta era in that country. That ruling was overturned by the Inter-American Commission on Human Rights in 1992. In 2005, after nearly two decades of fierce legal and political battles, the amnesty laws were declared unconstitutional and void by the Supreme Court of Argentina (*Simón Case* 2005).

The shadow of the Pinochet era continued to haunt Chile’s political system for years after his retirement. Courts in Chile and elsewhere became the main forum for dealing with the aftermath of his ruthless dictatorship. Arguably the epitome of this kind of judicialization was seen in the early post-apartheid years in South Africa: The ‘amnesty-for-confession’ formula had been given a green light by the South African Constitutional Court in *AZAPO* (1996), allowing the establishment of the quasi-judicial Truth and Reconciliation Commission. With that court ruling, the possibility of a radical redistribution of wealth, not merely symbolic self-purification, in one of the most unequal polities on earth was finally put to rest.

(v) Defining the nation via courts

The clearest manifestation of the judicialization of core political controversies – arguably the type of judicialization of politics that is the hardest to reconcile with canonical constitutional theory concerning the position of courts in a democracy – is the growing
reliance on courts for contemplating the very definition or raison d’être of the polity. A paradigmatic example is the unprecedented involvement of the Canadian judiciary in determining 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 constitutional court had ever tested in advance the explicit terms of its own polity’s dissolution.

Following a slim 50.6% to 49.4% loss by the Quebecois secessionist movement in the 1995 referendum, the federal government was quick to draw upon the reference procedure to ask the Supreme Court to determine whether a hypothetical unilateral secession declaration by the Quebec government would be constitutional. In the reference submitted by Ottawa to the Supreme Court in 1996, three specific questions were asked: (1) Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec affect the secession of Quebec from Canada unilaterally? (2) Does international law give the National Assembly, legislature or government of Quebec the right to affect the secession of Quebec from Canada unilaterally? In other words, is there a right to self-determination in international law that applies to Quebec? (3) If there is a conflict between international law and the Canadian Constitution on the secession of Quebec, which takes precedence?

The Court accepted the challenge with open arms. It took the liberty to articulate with authority the fundamental pillars of the Canadian polity in a way no state organ had done before. It stated that the Canadian Constitution is based on four principles (nowhere in the Canadian Constitution are these principles stated in such way) – federalism, democracy, constitutionalism and the rule of law, and the protection of minorities – none of which trumps any of the others. Hence, even a majority vote (adhering to the fundamental democratic principle of majority rule) would not entitle Quebec to secede unilaterally. However, the Court stated that if a clear majority of Quebecois voted ‘oui/yes’ to an unambiguous question on Quebec separation, this would “confer legitimacy on the efforts of the government of Quebec to initiate the Constitution’s amendment process in order to secede by constitutional means.” Such a clear majority on a clear question would require the federal government to negotiate in good faith with Quebec in order to reach an agreement on the terms of separation. The Court went on to determine that although the
right of self-determination of peoples did exist in international law, it did not apply to Quebec. While avoiding the contentious question of whether the Quebec population or part of it constituted a ‘people’ as understood in international law, the Court held that the right to unilateral secession did not apply to Quebec, as it was clear that Quebecois are neither denied their rightful ability to pursue their “political, economic, social and cultural development within the framework of an existing state,” nor do they constitute a colonial or oppressed people.

Another illustration of judicialization of core nation-building processes is the German Federal Constitutional Court’s key role in the creation of the unified Germany. In the Maastricht Case (1993). Here, the Court drew on Basic Law provisions to determine the status of postunification Germany vis-à-vis the emerging European supranational polity. In its decision, the Court addressed at great length the rationale behind the creation of a supranational European community and stipulated the necessary conditions for generating democratic legitimacy at the supranational level. The Court went on to define the legislative purview of member states and national parliaments with respect to the EU and stated that the Bundestag should retain functions and powers of substantial importance. The court also held that fundamental democratic principles of political participation and representation did not prohibit German membership in the EU, so long as the transfer of power to such bodies “remain[ed] rooted in the right of German citizens to vote and thus to participate in the national lawmaking process” (Kommers 1997, p. 182). In other words, the Court did not shy away from dealing with an explicitly political question. Rather, it upheld the constitutionality of the Maastricht Treaty – the constitutive document of the ‘ever closer [European] union’ notion – specifically placing the Treaty under the judgment of German Basic Law and its principles. Landmark rulings pertaining to EU membership and expansion have been rendered by at least half a dozen other national high courts in Europe (e.g., the Hungarian Constitutional Court’s ruling of 2002 on Hungary’s association with the EU).

Similar to the judicial construction of a European demos debate – both in its constitutive nature and in its divisiveness – is the judicialization of collective identity, particularly relating to religion and state, and the subsequent prominence of constitutional courts as secularizing agents in countries where popular support for theocratic governance
is on the rise. National high courts in Germany (e.g. the Ludin Case, 2003) and Britain (Shahina Begum, 2006) have recently addressed the hotly contested question of ‘differnetiated citizenship’ and the wearing of religious attire in the public education system. The Euorpean Court of Human Rights was relcutently dragged into the matter with its controversial ruling in Leyla Sahin v. Turkey (2006). The Turkish Constitutional Court (TCC), for its part, has been active in preserving the strictly secular nature of Turkey’s political system amid the growing popularity of principles of theocratic governance. For instance, the TCC has continually outlawed antisecularist political forces. It dissolved two major Islamic parties – the Welfare (Refah) Party and the Virtue (Fazilet) Party – in 1998 and 2001, respectively.

Pakistan provides a telling illustration of how constitutional courts and jurisprudence have become key actors in shaping a polity’s collective identity. In 1973, Pakistani legislators departed from that country’s rich British common-law tradition by enabling the Pakistani judiciary to use Islam as an authoritative source in constitutional interpretation. In 1979, president Zia-ul-Haq established the Shari’at Benches at the provincial High Courts (a Federal Shari’at Court) as well as the Shari’at Appellate Bench at the Supreme Court; each of these would be responsible for ensuring the appropriate implementation of Shari’a law. In 1985, president Zia went on to introduce the Ninth Amendment to the Constitution, article 227(1), which stipulates, “All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur’an and Sunna, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.” In theory, this means that legislation must be in full compliance with principles of the Shari’a.

The Supreme Court of Pakistan has, however, begged to differ. In response to the possible conclusiveness of 227(1), the Court developed its ‘harmonization doctrine’, according to which no specific provision of the constitution, and that includes section 227(1), stands above any or all other provisions. The constitution as a whole must be interpreted in a harmonious fashion so that specific provisions are read as an integral part of the entire constitution, not as standing above it. In the words of the Court: “It may be observed that the principles for interpreting constitutional documents as laid down by this Court are that all provisions should be read together and harmonious construction should
be placed on such provisions so that no provision is rendered nugatory” (Jamaat-e-Islami Pakistan vs. General Pervez Musharraf, 2002). At the same time, the Supreme Court of Pakistan retained its overarching jurisdictional authority, including its de facto appellate capacity over the Shari’at Appellate Bench at the Supreme Court. This has proved itself time and again to be a safety valve for secular interests vis-à-vis the 1985 formal Islamization of law.

In a similar vein, Egypt’s Supreme Constitutional Court has played a central role in dealing with the core question of the status of Shari’a rules – arguably the most controversial and fundamental collective-identity issue troubling the Egyptian polity. Under the guidance of the Muslim Brotherhood, Islamism has enjoyed an astounding growth in Egypt over the last three decades. The political support for radical Islamism has been massive. In the 2005 parliamentary elections, candidates representing the banned Muslim Brotherhood (running as independents) were able to capture approximately 20% seats in the National Assembly. And this is the same Egypt that attracts tens of millions of tourists every year, a country that produced Anwar al-Saadat, initiator of the historic peace accord with Israel, Naguib Mahfouz, winner of the Nobel Prize in Literature, and Butrus Gali, former U.N. Secretary General, among other world-class luminaries. This foundational tension between particularism and universalism quickly found its way to the Supreme Constitutional Court.

Bounded by Article 2 of the Constitution (stating that Shari’a is the primary source of legislation in Egypt), the Court has developed its own moderate ‘interpretation from within’ of religious rules and norms. For over twenty years now, the Court has increasingly been called upon to determine the constitutionality of legislative and administrative acts on the basis of their adherence to the principles of the Shari’a. The question before the Court in all of these cases (e.g., Niq ’ab [veil] Case, 1996; Khul Case 2003) has been which principles of the Shari’a possess determinative and absolute authority. To address this question in a moderate way, the Court developed a complex interpretative matrix of religious directives – the first of its kind by a non-religious tribunal. It departed from the ancient traditions of the fiqh (Islamic jurisprudence or the cumulative knowledge/science of studying the Shari’a) schools, and has instead developed a flexible, modernist approach to interpreting the Shari’a that distinguishes between unalterable and universally binding
principles, and malleable applications of those principles. In developing this somewhat
elastic interpretive device, the Court relied on the fact that the classical Islamic jurists and
the different schools of jurisprudence vary in their interpretations and applications of the
texts. This wide scope offers the chance to implement Shari’a in different social
environments and to allow jurists to choose which interpretive school they want to follow in
a given instance.

Perhaps nowhere in the world is the judicialization of core collective identity issues
more evident than in Israel. Not a single week passes by without the Supreme Court of
Israel (SCI) issuing a politically charged ruling that is widely reported by the media and
closely watched by the political system. The clearest examples of the SCI’s entanglement
with formative questions of collective identity are its spate of rulings concerning Israel’s
self-definition as a ‘Jewish and democratic state’ and the related question of ‘who is a Jew’
– arguably the most charged question pertaining to collective identity in present-day Israel.
Let us explore in some detail this prime example of the judicialization of collective-
identity questions.

Since the establishment of the State of Israel in 1948, the fundamental collective-
identity issue on the table has been the issue of medinat hok (a state based on civil law)
versus medinat halakhah (a state based on Jewish law). Israel’s constitutional system is
based on two fundamental tenets: that the state is Jewish and democratic. The creation of
an ideologically plausible and politically feasible synthesis between particularistic (Jewish)
and universalistic (democratic) values has been the major constitutional challenge faced by
Israel ever since its foundation. Reaching such a synthesis is especially difficult because
approximately one fifth of Israel’s citizenry (excluding the Palestinian residents of the
West Bank and Gaza Strip) consists of non-Jews – primarily Muslims, Christians, and
Druzes. Even within the Jewish population, the meaning of a ‘Jewish state’ has been
highly contested. Opinions differ bitterly as to whether Jews are citizens of a nation,
members of a people, participants in a culture, or followers of a faith. The latter is
arguably the most stable of these constructions, but even among Jews as coreligionists
there are widely divergent beliefs and degrees of practice.

Nevertheless, for historical and political reasons, the Orthodox stream of the Jewish
religion has long been the sole branch of Judaism formally recognized by the state. This
exclusive status has enabled the Orthodox community to establish a near-monopoly over the supply of public religious services and to impose rigid criteria for determining ‘who is a Jew?’ (This question has crucial symbolic and practical implications; according to Israel’s Law of Return, Jews who immigrate to Israel are entitled to a variety of benefits, including the immediate right to full citizenship). All this has taken place while over two thirds of the world’s Jewry – on whom Israel relies for symbolic, material, and strategic support – continues to live outside of Israel and does not subscribe to the Orthodox stream of Judaism.

To add further complications, the past three decades have witnessed a continuous decline in the political power and representation of Israel’s historically hegemonic Mapai (Labor) party and its largely secular Ashkenazi constituencies (mostly Jews of European descent). This trend has been evident in virtually all of Israel’s majoritarian decision-making arenas, from the presidency and the Knesset (parliament) to the municipal sphere.

On the legislative front, the potentially far-reaching Hok Yesodot Ha’Mishpat (Foundations of the Law) was passed in 1980, making Jewish law (Mishpat Ivri) a formal source of interpretation in instances involving precedent or legal lacunae. Into this boiling political crater the SCI was flung. This has resulted in the Court’s transformation into a (if not the) main forum for addressing the country’s most fundamental collective-identity quandaries. As with other contested political affairs in Israel, the political system’s inability or unwillingness to confront the issue (aided by the incredibly lenient standing and access rights to the SCI) brought the question of ‘who is a Jew?’ – to pick one example – to the Court.

From 1989 onwards, the SCI delivered over a dozen landmark judgments on a question at the heart of the state’s collective identity. The judicialization of the conversion question culminated in early 2002 with the SCI’s historic decision (9:2) to recognize non-Orthodox conversions to Judaism performed abroad. In its most recent ruling on the subject (Thais-Rodriguez Tushbaim v. Minister of Interior, 2005), the Court agreed (7:4) to recognize non-Orthodox ‘bypass’ conversions to Judaism performed de jure abroad but de facto in Israel. It held that a person who came to Israel as a non-Jew and, during a period of lawful residence there, underwent conversion in a recognized Jewish community abroad would be considered Jewish. In its judgment, the Court stated: “The Jewish nation is one....
It is dispersed around the world, in communities. Whoever converted to Judaism in one of these communities overseas has joined the Jewish nation by so doing, and is to be seen as a ‘Jew’ under the Law of Return. This can encourage immigration to Israel and maintain the unity of the Jewish nation in the Diaspora and in Israel.” Recall that this was supposed to be a court ruling, not a political speech or manifesto.

On the matter of Jewishness and related topics, the Court delivered the goods for its largely secular-nationalist proponents. Over the past two decades, it has pursued a distinctly liberalizing agenda in core matters of religion and state. At the same time, it has also protected the ‘Jewishness’ pillar of the state’s collective identity. In a landmark ruling (Citizenship Law Case, 2006), the SCI upheld – in a 263-page 6:5 decision – the new Citizenship and Entry to Israel Law, which imposes age restrictions on the granting of Israeli citizenship and residency permits to Arab residents of the Occupied Territories who marry Israeli citizens. Because the practice of marrying Palestinians is far more common among Israel’s Arab minority, the law effectively targets Arab citizens, while maintaining the ‘demographic balance’ in favor of Israel’s Jewish population. The dividing line between the majority and dissenting opinions was between the Justices who favored the first tenet in Israel’s self-definition as a Jewish and democratic state, and those who gave priority to the second.

As we have seen, the wave of judicial activism that has swept the globe in recent decades has engulfed the most fundamental issues a democratic polity ought to address. Although foundational political questions of this nature may have important constitutional aspects, they are not purely, nor even primarily, legal dilemmas. Therefore one would think they ought to be resolved, at least in principle, through public deliberation in the political sphere. Nonetheless, constitutional courts throughout the world have become major decision-making bodies for dealing with precisely such dilemmas. Fundamental restorative justice, regime legitimacy, and collective-identity questions have been framed in terms of constitutional claims, and as such, have rapidly found their way to the courts.

**IV. Why the Judicialization of Politics?**

Akin any other major socio-legal phenomenon, the judicialization of politics across a wide spectrum results from a confluence of factors rather than any single cause. Works that
attempt to explain (not merely describe) the judicialization of politics may be grouped, for the sake of simplicity, into four main categories: functionalist, rights-centered, institutionalist, or court-centered. The functionalist approach attributes the judicialization of recent decades to the proliferation in levels of government and the corresponding emergence of a wide variety of semi-autonomous administrative and regulatory state agencies (Shapiro & Stone-Sweet 2002). According to this approach, independent and active judiciaries armed with judicial-review practices are necessary for the efficient monitoring of the ever-expanding administrative state. Moreover, the modern administrative state embodies notions of government as an active policy maker rather than a passive adjudicator of conflicts. It therefore requires an active, policy-making judiciary (Feeley & Rubin 1998). Along the same lines, the judicialization of politics may also stem from the increasing complexity and contingency of modern societies (Luhmann 1985) and/or from the creation and expansion of the modern welfare state with its numerous regulatory agencies (Teubner 1987, Habermas 1988). Some accounts of the rapid growth of judicialization at the supranational judicial level portray it as an inevitable institutional response to complex coordination problems deriving from the systemic need to adopt standardized legal norms and administrative regulations across member-states in an era of converging economic markets (Stone-Sweet 2000). In some instances, economic liberalization may be an important projudicialization factor. In the regulatory arena, the combination of privatization and liberalization may encourage ‘juridical regulation’ (Vogel 1998, Kelemen & Sibbitt 2004).

The second approach emphasizes the prevalence of rights discourse or the greater awareness of rights issues, which is both reflective of and contributing to what may be termed ‘judicialization from below.’ An authentic, ‘bottom up’ judicialization is more likely when judicial institutions are perceived by social movements, interest groups, and political activists as more reputable, impartial, and effective decision-making bodies than other institutions, which are viewed as bureaucracy-heavy or biased (Tate & Vallinder 1995). Judicialization of this kind relies on a perceived contrast between the relative openness and integrity of the judicial process and the corruptibility of political bargaining (Scheingold 1974). A well-developed support structure for legal mobilization may aid this kind of judicialization by allowing historically under-represented or disenfranchised
groups and individuals to invoke potentially favorable laws and constitutional provisions through strategic litigation (Epp 1998).

A third approach emphasizes institutional features that are, *ceteris paribus*, hospitable to judicialization. At a bare minimum, the judicialization of politics requires acceptance of the rule of law, some level of legitimacy of the legal system, and a relatively independent and well-respected apex court armed with some form of judicial-review power. Hence, the proliferation of democracy worldwide is said to be a main cause of judicialization and the expansion of judicial power more generally. By its very nature, the establishment of a democratic regime entails some form of separation of powers among the major branches of government, as well as between the central and provincial/regional legislatures. It also entails setting up procedural governing rules and decision-making processes to which all political actors are required to adhere. The persistence and stability of such a system requires at least a semiautonomous, supposedly apolitical judiciary to serve as an impartial umpire in disputes concerning the scope and nature of the fundamental rules of the political game. Active judicial review is both a prerequisite and a byproduct of viable democratic governance in multi-layered federalist countries (Shapiro 1999). In other words, more democracy equals more courts. However, the ‘proliferation of democracy’ thesis cannot account for the judicialization of politics in non- or quasi-democratic polities, nor account for significant variations in levels of judicialization among new democracies. And it does not adequately explain increased levels of judicialization in stable democracies with no apparent changes in their political regime.

An institutional catalyst for judicialization is provided by the proliferation of courts and tribunals at the supranational level (Romano 1999, Slaughter 2000, Goldstein et al. 2001). Perhaps nowhere is this process more evident than in Europe (e.g., Weiler 1999; Stone-Sweet 2004). A similar process has taken place with respect to international trade disputes. The establishment of the dispute settlement mechanism of the World Trade Organization (WTO) has had far-reaching implications for trade and commerce policies at the national level. The 1994 North American Free Trade Agreement (NAFTA) also established quasi-judicial dispute-resolution processes regarding foreign investment, financial services, and antidumping. Similar arrangements were established by the MERCOSUR agreement in South America.
Models of judicial review employed by constitutional democracies vary in their procedural characteristics. This variance is said to have implications for the scope and nature of judicial review in these countries. A system that permits a priori and abstract review initiated by politicians (e.g., France), unlike a system that permits only a posteriori and concrete judicial review (e.g., the United States), would appear to have a greater potential for judicialized policy making using the process of constitutional review. However, as scholars have correctly pointed out, “the apparently more restrictive combination of a posteriori and concrete review has hardly relegated the US Supreme Court to a minor policy role” (Tate 1992, p. 6). Likewise, the impact of the judiciary on public policy outcomes is said to be more significant under a decentralized, all-court review system (e.g., the United States) than under a centralized, single-tribunal (constitutional court) review (e.g., Germany, Austria, Italy, Spain, and almost all new democracies in postcommunist Europe). But akin to the a priori/abstract versus a posteriori/concrete distinction, the real significance of the distinction between decentralized and centralized review is questionable. Constitutional courts in Italy, Germany, France, Russia, Poland, and Hungary appear to have been as engaged with core political controversies as their counterparts in countries that employ a decentralized approach. Finally, liberal standing and accessibility rights along with lower barriers of nonjusticiability provide an important institutional channel through which ordinary citizens can challenge what they regard as infringements on their constitutionally protected rights before a country’s judicial system, thereby increasing the likelihood of judicial involvement in public policy making.

The fourth perspective holds that the courts and judges are the main driving force behind the expansion of judicial power. This court-centric approach is often advanced by scholars of supranational judicial organs (e.g., Weiler 1994, Mattli & Slaughter 1995, Alter 2001, Oliveira 2007). It is shared by constitutional theorists who often treat unelected justices as seizing power from elected officials, thereby illustrating the so-called counter-majoritarian difficulty, or the tension between democratic governing principles and judicial review. Even politically astute critics of judicial activism, both leftists and conservatives, often accuse ‘power hungry’ judges and ‘imperialist’ courts of expropriating the constitution, being too assertive or overinvolved in moral and political decision making.

None of these four approaches takes the conceptualization of courts as political institutions seriously enough. As the seminal work of Robert McCloskey, Robert Dahl, and Martin Shapiro (among others) established, constitutional courts and their jurisprudence are integral elements of a larger political setting and cannot be understood in isolation from it. Taking the notion of courts as political institutions even further, recent political science scholarship suggests that judicial review is often politically constructed, and that elected officials may have political and policy reasons for empowering constitutional courts (e.g., Gillman 2002; Ginsburg 2003; Lovell 2003; Hirschl 2004a, 2009; Graber 2006; Whittington 2007). Accordingly, a more strategic or realist approach to the judicialization of politics has emerged, emphasizing ‘judicialization from above’ and the political conditions that are likely to promote it. Concrete political power struggles, the interests of elites and other influential stakeholders, and clashes of worldviews and policy preferences are considered the main catalysts of the judicialization of mega-politics. Political conditions that are hospitable to the expansion of judicialized politics – alongside a constitutional framework that promotes the judicialization of politics and a relatively autonomous judiciary that is easily enticed to dive into deep political waters – is the explosive formula here.

In its structuralist guise, the ‘realist’ branch of scholarship emphasizes organic features of the political system as conducive to judicialization. For example, the judicialization of collective-identity questions may reflect constitutional disharmony caused by a polity’s commitment to apparently conflicting values, such as Israel’s self-definition as a Jewish and democratic state, or Ireland’s Catholicism and EU membership (e.g., Jacobsohn 2004). It is also more likely when the values protected in a country’s constitution contrast with values prevalent among its populace. Consider Turkey’s strict separation of religion and state despite the fact that the vast majority of Turks define themselves as devout Muslims. An all-encompassing judicialization of politics is, ceteris paribus, less likely in a polity featuring a unified, assertive political system that is capable of restraining the judiciary. In such polities, the political sphere may signal a credible threat to an overactive judiciary, exerting a chilling effect on the courts. Conversely, the
more dysfunctional or deadlocked the political system and its decision-making institutions are in a rule-of-law polity, the greater the likelihood of expansive judicial power (Guarnieri & Pederzoli 2002, pp. 160-181). Greater fragmentation of power among political branches reduces their ability to rein in courts and correspondingly increases the likelihood of courts asserting themselves (Ferejohn 2002).

A more ‘strategic’ guise suggests that the judicialization of politics is largely a product of concrete choices, interests, or strategic considerations by self-interested political stakeholders. From the politicians’ point of view, delegating policy-making authority to the courts may be an effective means of shifting responsibility and thereby reducing the risks to themselves and to the institutional apparatus within which they operate. The calculus of the ‘blame deflection’ strategy is quite intuitive. If the delegation of powers can increase credit or legitimacy, and/or reduce the blame placed on the politician as a result of the delegated body’s policy decision, then such delegation can benefit the politician (Voigt & Salzberger 2002; Stephenson 2003). At the very least, the transfer to the courts of contested political ‘hot potatoes’ offers a convenient retreat for politicians who are unwilling or unable to settle public disputes in the political sphere. Delegation also helps politicians avoid difficult or ‘no win’ decisions and/or the collapse of deadlocked or fragile governing coalitions (Graber 1993). Conversely, political oppositions may seek to judicialize politics (e.g., through petitions and injunctions against government policies) in order to harass and obstruct governments (Tate & Vallinder 1995). Opposition politicians may even resort to litigation to enhance their media exposure, regardless of the outcome of litigation (Dotan & Hofnung 2005).

Politicians may seek public support for contentious views by relying on national high courts’ public image as professional and apolitical decision-making bodies. A political quest for legitimacy often stands behind the transfer of certain regime-change questions to courts (e.g., the aforementioned Pakistani Supreme Court legitimization of the 1999 military coup d’état). Empirical studies confirm that national high courts in most constitutional democracies enjoy greater public legitimacy and support than virtually all other political institutions – even when courts engage in explicit manifestations of political jurisprudence (Gibson et al. 2003). The judicialization of mega-politics may allow governments to impose a centralizing ‘one-rule-fits-all’ policy on enormous and diverse
polities (Morton 1995, Goldstein 2001). (Following in this vein, consider the standardizing
effect of apex-court jurisprudence in exceptionally diverse polities such as the United
States or the European Union). Likewise, when politicians are obstructed from fully
implementing their own policy agenda, they may favor the active exercise of constitutional
review by a sympathetic judiciary in order to overcome those obstructions (Hirschl

The judicialization of politics may 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. 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 the judiciary to achieve its policy goals. Scholars draw on this
‘competitiveness of the electoral market’ logic to explain the variance in judicial power
between Japan and the United States (Ramseyer 1994), between different periods in the
late nineteenth-century United States (Gillman 2002), between three post-authoritarian
Asian countries (Ginsburg 2003), and between two Argentine provinces (Chavez 2003).

The threat of losing control over pertinent policy-making processes and outcomes
may be a significant driving force behind attempts to transfer contentious issues to courts.
Politicians are more likely to divert policy-making responsibility to a relatively supportive
judiciary when present or prospective transformations in the political system seem to
threaten their own political status and policy preferences. Influential sociopolitical groups
fearful of losing their grip on political power may support the judicialization of mega-
politics, the establishment of judicial review and empowerment of constitutional courts
more generally, as a hegemony preserving maneuver. Such groups and their political
representatives are more likely to support the judicialization of formative nation-building
and collective-identity questions when their hegemony, worldviews, and their entitlement
to disproportional perks and benefits are being increasingly challenged in majoritarian
decision-making arenas (Hirschl 2004a).

White elites in South Africa discovered the virtues of judicial review only when it
became clear that the days of apartheid were numbered. Israel’s Mapai (Labor) party and
its mainly Ashkenazi bourgeoisie constituencies opposed judicial review for decades but
embraced constitutional supremacy once the country’s electoral balance shifted against it. The Mexican government, led for more than seven decades by PRI (Partido Revolucionario Institucional), launched a major expansion of judicial power during the 1990s as it became clear that PRI’s control over Mexican politics was about to end. My favorite example is the attempt by the historically hegemonic secular-nationalist Fatah movement in its last days of majority in the Palestinian Legislative Authority to establish a constitutional court with wide judicial-review powers, following the landslide victory by the religious Hamas movement in the January 2006 parliamentary elections. In short, it is the arrival of political competition, or the emergence of a new constellation of power, that makes threatened elites discover the charms of constitutional protection and powerful courts.

As we have seen, the politicians’ drive toward using the courts when it is politically expedient to do so is perhaps best illustrated in countries where growing popular support for principles of theocratic governance threatens the cultural propensities and policy preferences of secular-nationalist elites. It is well established in the literature that constitutionalization and the introduction of judicial review improve the international reputation and credibility of regimes (see, e.g., Moustafa 2003). But this is only part of the picture. In countries struggling with the challenge of ‘constitutional theocracy,’ constitutional courts may also be viewed as the guardians of relative secularism, modernism, and universalism against increasingly popular theocratic principles. In order to govern effectively, politicians and ruling elites in predominantly religious polities must confront the challenge of constitutional theocracy while maintaining popular support for their regimes. Indeed, an increasingly common strategy for those who wield political power (and represent the groups that object to theocratic governance) is the transfer of fundamental collective-identity questions of ‘religion and state’ from the political sphere to the courts. Consequently, constitutional courts have become important secularizing agents in these countries (Hirschl 2004b, 2008, 2009). Recall the examples of the judicialization of core collective-identity questions in Egypt, Pakistan, Israel, and Turkey.

The transfer of contested ‘big questions’ to courts and other quasi-professional and semiautonomous policy-making bodies, domestic or supranational, may be seen as part of a broader process whereby political and economic elites, while professing support for
democracy, attempt to insulate substantive policy making from the vicissitudes of
democratic politics (Hirschl 2004a, pp. 211-223). When seen through that prism, there is
little qualitative difference between the political origins of constitutional courts, state-
established religious authorities, central banks and other vital macro-planning bodies, the
World Trade Organization and the International Monetary Fund. Judicial empowerment is
simply a weak form of that trend. One of the clearest manifestations of this dynamic is the
continuous attempt by ‘Eurocentric’ politicians, bureaucrats, and jurists to create an ‘ever
closer union’ in Europe by the adoption of an EU constitution (Hirschl 2005b). As was
demonstrated by the rejection in 2004 of a proposed EU constitution by voters in France
and the Netherlands, attempts by elites to impose constitutionalization are often resented
by the demos.

V. POLITICAL REACTION TO EXCESSIVE JUDICIAL ACTIVISM

Intentional delegation of authority is hard to positively ascertain. As we have seen, the
distinction between what counts as mega-politics and what counts as ordinary politics is
often intuitive and context-specific rather than analytical or universal. Akin to other
complex sociopolitical phenomena, multiple causality is inevitable; disentangling the
contribution of political factors from that of other judicial or institutional factors is an
almost impossible task. Incentives are abstract and hard to pinpoint. Paper trails are
virtually nonexistent; few political power holders would publicly confess to strategic
calculations in their support of such noble ventures as constitutionalism or judicial
independence, let alone willful deference to the judiciary in matters involving very high
political stakes. But as Jorge Amado, the great Brazilian novelist once wrote in an
admittedly politically incorrect fashion, “it is impossible to sleep with all the women in the
world; that in itself, however, is not a sufficient reason for why one should stop trying”
(Amado 1978).

John Locke’s often-cited maxim “I have always thought the actions of men the best
interpreters of their thoughts” statement provides some direction here. Perhaps the clearest
illustration of the necessity of political support for judicialization is the political sphere’s
decisive reaction to instances of unwelcome judicial activism. To begin with, the transfer
of foundational collective-identity questions to the courts seldom yields judgments that run
counter to established national meta-narratives. In addition, political power holders often
possess some control over the personal composition of national high courts. As a recent comparative study of judicial appointment procedures concludes, no matter how the process is constructed, it always has an important political dimension (Malleson & Russell 2006). Consequently, the demographic characteristics, cultural propensities, and ideological tilts of supreme court judges in most countries are likely to match the rest of the political elite in these countries. As Dahl (1957, p. 291) observes with regard to the U.S. Supreme Court, “it is unrealistic to suppose that a Court whose members are recruited in the fashion of the Supreme Court justices would long hold to norms of rights of justice that are substantially at odds with the rest of the political elite.”

The appeal of judicialization is even more evident in polities facing deep divisions along secular/religious lines. Most constitutional court judges have had a general legal education and are familiar with western law’s basic principles and methods of reasoning. More often than not, the judges’ educational background, cultural propensities, and social milieu are closer to those of the urban intelligentsia and top state bureaucrats than to any other social group. Constitutional courts are established and funded by the state. Their judges are appointed by state authorities, often with the approval of political leaders. A judge’s record of adjudication is well known at the time of his or her appointment. What is more, the very logic of modern constitutional law and courts – with their state-driven legitimacy and authority, procedural rules of engagement, methods and styles of reasoning, and often measured approach to politically charged questions – seems intrinsically consonant with a moderate approach to issues of religion and state.

Occasionally, courts may respond to counter-establishment challenges with rulings that threaten to alter the political power relations in which the courts are embedded. Legislatures in most countries in the world of new constitutionalism have been able to respond effectively to such unfavorable judgments or to hinder their implementation. As the recent history of comparative constitutional politics tells us, recurrent manifestations of unsolicited judicial intervention in the political sphere in general – and unwelcome judgments concerning contentious political issues in particular – have triggered significant political backlashes aimed at clipping the wings of overactive courts. These include legislative overrides of controversial rulings, political tinkering with judicial appointment and tenure procedures to ensure the appointment of compliant judges and/or to block the
appointment of undesirable judges, ‘court-packing’ attempts by political powerholders, disciplinary sanctions, impeachment or removal of judges deemed objectionable or overactive, the introduction of jurisdictional constraints, or limiting jurisdictional boundaries and judicial review powers. In some instances (e.g., Russia in 1993, Kazakhstan in 1995, Zimbabwe in 2001, Thailand in 2006, Pakistan in 2007, and on three occasions in Ecuador from 2004 to 2007), such a backlash has ended in constitutional crisis, leading to the reconstruction or dissolution of high courts. To this we may add another political response to unwelcome rulings – more subtle, and possibly more lethal: bureaucratic disregard, or protracted or reluctant implementation (Rosenberg 1991, 1992; Garrett et al. 1998; Conant 2002).

Examples of the legislative override scenario in the world of new constitutionalism are plentiful. In its famous ruling in *Mohammed Ahmad Kan v. Shah Bano* (1985), the Supreme Court of India held that the state-defined statutory right of a neglected wife to maintenance stood regardless of the personal law applicable to the parties (Shachar 2001, pp. 81-83). This decision had potentially far-reaching implications for India’s longstanding practice of Muslim self-jurisdiction in core religious matters. Traditionalist representatives of the Muslim community considered this to be proof of Hindu homogenizing trends that threatened to weaken Muslim identity. India’s Parliament bowed to massive political pressure by conservative Muslims and overruled the Indian Supreme Court’s decision in *Shah Bano* by passing the Muslim Women’s (Protection of Rights of Divorce) Act. This Act, its reassuring title notwithstanding, undid the Court’s ruling by removing the rights of Muslim women to appeal to state courts for postdivorce maintenance payments. It also exempted Muslim ex-husbands from other postdivorce obligations. The Court, it seemed, understood the message. In a case dealing with the constitutionality of the Muslim Women’s Act (*Danial Latifi v. Union of India*, 2001), the Court’s ruling was notably more moderate and ambiguous than its original ruling in *Shah Bano*.

The harsh political reaction to, and corresponding legislative override of, the Australian High Court’s expansion of Aboriginal rights is another prime example of political interference in the judicial process. In its historic ruling *Mabo v. Queensland II* (1992), the High Court abandoned the legal concept of *terra nullius* (‘vacant land’) that had served for centuries as the basis for the institutional denial of Aboriginal title,
established native title as a basis for proprietary rights in land, and held that Aboriginal title was not extinguished by the change in sovereignty. In *Wik Peoples v. Queensland* (1996), the High Court went on to hold that leases of pastoral land by the government to private third parties did not necessarily extinguish native title. Such extinguishment depended on the specific terms of the pastoral lease and the legislation under which it was granted. The potentially far-reaching redistribution implications of *Mabo II* and *Wik* prompted an immediate popular backlash; the powerful agricultural and mining sectors, backed by the governments of Queensland, Western Australia, and the Northern Territory, demanded an across-the-board statutory extinguishment of native title. In early 1997, the conservative government under John Howard willingly bowed to the counter-court political backlash by introducing amendments to the Native Title Act that, for all intents and purposes, overrode *Wik*.

Responding promptly to an unfavorable ruling by the Singapore Court of Appeal concerning due process rights of political dissidents, the government of Singapore (controlled for the past four-plus decades by the People’s Action Party) amended the constitution to revoke the Court’s authority to exercise any meaningful judicial review over governmental powers of preventive detention (Silverstein 2003). But it went even further. In a widely publicized ruling in 1993, the Judicial Committee of the Privy Council (JCPC) in London overturned a decision of a Singaporian district court to expel J.B. Jeyaretnam – a leading opposition politician – from the Singapore Bar Association. Prior to its judgment in *Jeyaretnam*, the JCPC’s status at the apex of Singapore’s judicial system appeared inviolable. But as soon as the JCPC issued a ruling that was interpreted as running directly against the political interests of Singapore’s ruling elite, the JCPC was denounced by government officials as “interventionist,” “going outside its prescribed role,” “out of touch” with local conditions, and “playing politics.” Mere months after the JCPC had issued its ruling, the Singapore government passed a constitutional amendment that imposed severe restrictions on appeals to the JCPC.

Recognizing the crucial political significance of the judiciary, politicians in other new constitutionalism countries have opted for tighter control over the judicial appointment process. In late 1997, for example, a serious rift developed between Pakistani Prime Minister Nawaz Sharif and the Chief Justice of the Supreme Court, Sajjad Ali Shah, over
the appointment of new judges to the court. The constitutional crisis came to a dramatic
end when the chief justice was suspended from office by rebel members of the Supreme
Court. A crisis of a similar nature occurred in January 2000, when President Pervez
Musharraf insisted that all members of the Supreme Court pledge allegiance to the military
administration. The judges who refused to take the oath were expelled from the Court. In
March 2007, Pakistan’s President Musharraf ordered Supreme Court judge C.J. Iftikhar
Chaudhry to resign, presumably for being overly independent and therefore ‘unreliable.’
Protests by Pakistani lawyers and opposition groups, instigated by followers of Benazir
Bhutto, led to fierce clashes with police. Meanwhile, Musharraf’s popularity in both the
domestic and the international political arenas took a deep dive. Sensing Musharraf’s
political difficulties, the Pakistan Supreme Court ordered in July 2007 the reinstatement of
Chaudhry. The embattled Musharraf had to accept the ruling because maintaining his hold
on power now depended on Bhutto’s support. A few weeks later, the Court allowed the
early return from exile of Musharraf’s nemesis Nawaz Sharif. In November 2007, the
Court was about to release a decision that decalres Musharraf ineligible to head Paksitan’s
armed forces while he serves as the country’s president. Moushrarf reacted by declaring a
state of emergency, suspending the constitution, and by dismissing the Supreme Court and
C.J. Chaudhry.

In Egypt, disciplinary hearings were held against Egypt’s Supreme Constitutional
Court Judges Hisham el-Bastawisi and Mahmoud Mekki for openly accusing the
government of electoral fraud in the 2005 elections. In 2007, a less-than-principled rivalry
between Israel’s incumbent Minister of Justice (Daniel Friedman) and the new Chief
Justice (Dorit Beinish) triggered the introduciton of law that limits the incumbency of chief
justices to seven years. Following two and a half years of conservative jurisprudence in
religious matters by the newly established Afghan Supreme Court, President Hamid Karzai
opted for a shake-up of the Court’s composition. In 2006, he appointed several new, more
moderate members to the court. In addition, the reappointment of the conservative Chief
Justice Faisal Ahmad Shinwari – a conservative Islamic cleric with questionable
educational credentials – did not pass parliamentary vote. Karzai then chose his legal
council, Abdul Salam Azimi – a former university professor who was educated in the
United States – to succeed Shinwari. The new, distinctly more moderate Court was sworn in August 2006.

Reacting to political turmoil following the controversial expropriation of white farmers’ land in 2000, Zimbabwe’s President Robert Mugabe and his ruling ZANU (PF) party ousted the ‘hostile’ C.J. Gubbay in March 2001 and appointed the supportive Chidyausiku as new Chief Justice of Zimbabwe’s Supreme Court (Matyszak 2006). Mugabe also stacked the court with three other ZANU (PF) supporters to ensure his party’s control over the judicial branch.

In April 1990, Argentina’s President Carlos Menem expanded that country’s Supreme Court from five to nine members and single-handedly appointed the four new justices. This blunt court-packing exercise effectively created an automatic progovernment majority on the bench. Over the past few years, President Eduardo Duhalde, and later President Néstor Kirchner, have forced all members of this bloc to step down, thereby creating a distinctly more progressive court. Venezuela adopted a law in 2004 permitting President Hugo Chávez’s coalition to both pack and purge the country’s Supreme Court. The law increased the number of justices from 20 to 32 and simplified the mechanisms for removing justices. In neighboring Ecuador, major political crises in late 2004 and early 2005 led to the dissolution of the Supreme Court twice in four months. In April 2007, Ecuador’s Congress, led by President Rafael Correa’s supporters, sacked nine top judges after the Supreme Court ruled unconstitutional the dismissal of 51 lawmakers who had been fired for opposing a referendum on constitutional reform. At the same time in Trinidad and Tobago, Prime Minister Patrick Manning (of the mainly Afro-Trinidadian People’s National Movement) suspended Chief Justice Satnarine Sharma (an Indo-Trinidadian) for allegedly trying to help ousted Prime Minister Basdeo Panday (an Indo-Trinidadian and Manning’s chief political foe).

The post-communist world has also had its share of anticourt backlash. The appointments of several activist judges of the Hungarian Constitutional Court, including that of Justice László Sólyom (now Hungary’s president) – advocate of a form of judicial activism based on an invisible constitutional ‘spirit’ rather than text – were not renewed upon the completion of their initial nine-year term. Instead, the court was filled with new, notably more formalist judges, advocating judicial restraint (Schepple 1999). Kazakhstan’s
first Constitutional Court was dissolved after its election crisis in 1995, and a new French-style Constitutional Council was introduced. The Albanian Constitutional Court was suspended in 1998, its chair arrested, and a constitutional amendment limiting the justices’ tenure to nine years introduced.

Arguably, the most glaring example in the postcommunist world is the widely documented 1993 constitutional crisis in Russia. As is well known, President Boris Yeltsin reacted to an overactive involvement of the first Constitutional Court in Russia’s political sphere by decreeing the Constitutional Court suspended until the adoption of a new constitution. This marked the demise of the first Constitutional Court and the downfall of its controversial Chair, Valerii Zorkin, and brought about the establishment of the second Constitutional Court. A controlled comparison of the dockets of the first and second Constitutional Courts (Epstein et al. 2001) reveals that in the first Court era the docket was dominated by politically charged federalism and separation-of-powers cases, whereas the second Court resorted to the ‘safe area’ of individual rights jurisprudence and tended to avoid federalism issues or separation-of-powers disputes. In other words, harsh political responses to unwelcome activism or interventions on the part of the courts, or even the credible threat of such a response, can have a chilling effect on judicial decision-making patterns. Variations on the same logic explain prudent and/or strategic judicial behavior in countries as different as Argentina (Helmke 2005), Germany (Vanberg 2005), Pakistan (Newberg 1995), Georgia, Ukraine and Kyrgyzstan (Trochev 2008), and Japan (Ramseyer & Rasmusen 2001). Who says supreme court judges are not shrewd political animals?

CONCLUSION: “THE WORLD IS FILLED WITH LAW” (AND WITH POLITICS TOO)

Over the past two decades, there has been a tremendous growth worldwide in the reliance on courts for dealing with some of the most fundamental political quandaries a polity can contemplate. The trend has extended well beyond the now standard judicialization of policy making through procedural justice or rights jurisprudence, to encompass mega-politics – electoral processes and outcomes, restorative justice, regime legitimacy, executive prerogatives, and foundational collective-identity issues and nation-building processes. The judicialization of mega-politics reflects the demise of the 'political
question’ doctrine (see, e.g., Tushnet 2002) and marks a transition to what I have elsewhere termed ‘juristocracy’ (Hirschl 2004a).

Whereas some rulings discussed here, particularly those involving judicial review of the laws of democracy, may be seen as relatively easily justifiable instances of judicial monitoring of, and removal of stoppages to, the democratic process per se (e.g. Ely 1980), many other rulings discussed here clearly fall outside of these parameters. All of these latter type decisions represent clear manifestations of substantive political choices by judges. In fact, most cases that would fall within the judicialization of disputes over electoral procedures and outcomes would appear to fit with Ely’s process-centered justification of confined, umpire-like judicial review. By contrast, most instances of deep judicial entanglement in nation-building processes and restorative justice schemes fall far beyond the scope and nature of judicial activism permitted by process-oriented justifications.

The crucial point in assessing the scope of this phenomenon is not, as a few observers have suggested, whether a large number of public policy matters are handled with little judicial intervention (Graber 2004, Schauer 2006). No doubt many are. The question is whether the courts today are significantly more involved in dealing with core political predicaments than they were, say, a generation ago. At least outside the United States, the answer, both quantitatively and qualitatively, is unequivocally in the affirmative. The proportion of policy-making areas that are insulated from judicial intervention is distinctly smaller in 2008 than it was 25 years ago. Compared to the early 1980s (roughly a generation ago), many more hitherto purely political issues are now considered primarily judicial or constitutional issues.

Of the various institutional, societal, and political factors hospitable to the judicialization of politics, three stand out as being crucial: the existence of a constitutional framework that promotes the judicialization of politics; a relatively autonomous judiciary that is easily enticed to dive into deep political waters; and, above all, a political environment that is conducive to the judicialization of politics. Lawyers and rights-seeking groups often push toward ‘judicialization from below.’ Certain institutional features are more hospitable than others to the expansion of judicial power. The existence of an active, nondeferential constitutional court is a necessary (but not sufficient) condition for
persistent judicial activism and the judicialization of mega-politics. However, the judicialization of mega-politics is first and foremost a political phenomenon. No matter how we look at it, various key issues – the secular nature of Turkey’s political system, the war in Chechnya, Israel’s identity as a ‘Jewish and democratic state,’ the transition to democracy in South Africa, the near-permanent political limbo in Pakistan, the creation of a European *demos*, the future of Quebec and the Canadian federation – are first and foremost political questions, not judicial ones. A political sphere conducive to the judicialization of such purely political questions is therefore at least as significant in its emergence and sustainability as the contribution of courts and judges. It is naive to assume that core political questions of this type could have been transferred to courts without at least the implicit support of influential political stakeholders.

This should come as no surprise to those who view courts as ‘political’ institutions. Like any other political institution, they do not operate in an institutional or ideological vacuum. Their establishment does not develop and cannot be understood separately from the concrete social, political, and economic struggles that shape a given political system. Political deference to the judiciary and the consequent judicialization of mega-politics – indeed, the profound expansion of judicial power more generally – are an integral part and an important manifestation of those struggles. A political quest for legitimacy, or for lowering risks or costs, is often what drives deference to the judiciary, in cases involving hotly contested political issues. This insight suggests that the court-centric orthodoxy common among legal scholars may be misguided. As the examples discussed here illustrate, the portrayal of constitutional courts and judges as the major culprits in the all-encompassing judicialization of politics worldwide is over-simplistic. Strategically motivated political stakeholders are at least as responsible. The judicialization-of-politics fish, to paraphrase the old saying, stinks from its head first.

Little by little, constitutional theorists start to take notice. An increasing number of public law professors (e.g., Balkin & Levinson 2001, Friedman 2005, Posner 2005, Tushnet 2006, Vermeule 2006) now pay attention to the emerging social science, most notably political science, body of scholarship that points to the institutional, attitudinal and strategic, not merely juridical, sources of judicial entanglement with high politics. This scholarship suggests that no theory of judicial review (or grand constitutional theory more
generally) is complete if it does not consider the extra-judicial determinants of judicial empowerment and behavior. It also suggests that an informed comparative research agenda concerning the political role of courts might help bridge the traditional gap between grand constitutional theory and real-life constitutional politics worldwide.

**APPENDIX: MAIN CASES CITED**

This article refers to more than 120 landmark constitutional court rulings from numerous jurisdictions worldwide. Below is a list of the 40 main cases.

Corte Suprema de Justicia (CSJN), 26/10/2004, *Bustos, Alberto Roque y otros v. Estado Nacional y otros/amparo* (Corralito Case) [Argentina]

Corte Suprema de Justicia (CSJN), 14/06/2005, *Simón, Julio Héctor y otros s./privación ilegítima de la libertad*, Supreme Court (Full-Stop Law Case) [Argentina]


*R (on the application of Begum (Shabina)) v The Headteacher and Governors of Denbigh High School* (2006) UKHL 15 [Britain]

*R (Al Skeini) v Secretary of State for Defence* (2007) UKHL 26 [Britain]

*Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441 [Canada]


*Chaoulli v. Quebec* (2005) 1 S.C.R. 791 [Canada]

PL.US 19/1993 *Decision on the Act on the Illegality of the Communist Regime* [Czech Republic]

*Wassel v. Minister of Education* (the *Niq’ab* [veil] Case), No. 8 of the 17th judicial year (May 18, 1996) [Egypt]


*Leyla Sahin v. Turkey* 19 BHRC 590 [2006] ELR 73 [European Court of Human Rights]

*Republic of Fiji Islands v. Prasad* (2001) 1 LRC 665 (HC), (2002) 2 LRC 743 (CA) [Fiji]


BVerfG [Federal Constitutional Court] 2 BvR 1436/02 A.I.1 (Ludin Case, 2003) [Germany]
HCC Decision 43/1995 *Austerity Package Case* [Hungary]


*Danial Latifi v. Union of India*, A.I.R. 2001 S.C. 3958 [India]

Report No. 28/1992 *In re: Full Stop and Due Obedience Laws* [Inter-American Commission on Human Rights]


*HCJ 5070/95 The Conservative Movement v. Minister of Religious Affairs* (2002) 1 TakEl 634 (Non-orthodox Conversions Case) [Israel]

*HCJ 2056/04 Beit Sourik Vill. Council v. The Gov’t. of Isr.* (2005) IsrSC 58(5) 807 (West Bank Barrier Case) [Israel]

*HCJ 2597/99 Thais-Rodriguez Tushbaim v. Minister of Interior* [2005] IsrSC 59(6) (“Leap Conversions” Case) [Israel]

*HCJ 7052/03 Adalah v. Minister of the Interior*, (2006) 2 TakEl 1754 (Citizenship Law Case) [Israel]

2004 Hun-Na 1, *Impeachment of the President Roh Moo-hyun Case* (16-1 KCCR 609, May 14, 2004) [Korea]


*Russian Federation Constitutional Court’s Ruling Regarding the Legality of President Boris Yeltsin’s Decree To Send Troops To Chechnya* (July 31, 1995) [Russia]

*Chng Suan Tze v. Minister of Home Affairs* (1988) 1 S.L.R. 132 [Singapore]

*Azanian Peoples’ Organization (“AZAPO”) v. President of the Republic of S. Afr.* 1996 (4) SA 672 (CC) [South Africa]

*Certification of the Constitution of the Republic of S. Afr.* 1996 (4) SA 744 (CC) [South Africa]

*Certification of the Amended Text of the Constitution of the Republic of S. Afr.* 1997 (2) SA 97 (CC) [South Africa]
STC 237/2005, Rigoberta Menchú Tunn y otros v. a Tribunal Supremo/amparo 1744-2003, Sept. 26, 2005 (Universal Jurisdiction of Spanish Courts in Genocide Cases) [Spain]


TCC Decision 57/2001 (Virtue [Fazilet] Party Dissolution case), June 21, 2001 [Turkey]


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