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THE POLITICAL IMPACT OF CONSTITUTIONAL COURTS: A CRITIQUE

R. Taylor Cole

In this paper, I shall deal in summary fashion with five points involving constitutional courts which merit concluding consideration.¹ These points are (1) the meaning of "impact" and "constitutional courts," (2) the need for additional empirical data dealing with the several pertinent variables involved in theorizing about constitutional courts, (3) the scope of studies seeking to compare the impact of constitutional courts, (4) other illustrative criteria by which the political impact of constitutional courts might be examined, and (5) additional considerations involved in assaying the impact of constitutional courts.

First of all, in dealing with the "political impact of constitutional courts," I shall assume that "political impact" is more limited in coverage than "impact." I can in this regard express general agreement with Professor David J. Danelski, who considers "political impact" to refer primarily to the influence and effects of certain actions on, and the response by, specific institutions and groups that exercise power (i.e. the executive, legislature, political parties, electorate, citizenry, media, etc.).² By constitutional courts, I refer to those organs which are called constitutional courts in Western Europe, that is, the constitutional courts of West Germany, Italy and Austria. I agree with Professor Edward McWhinney who has spoken of the institution of special constitutional courts as being "peculiarly Continental European and Civil Law-based in its historical origins, and one might add, too, Western European."³

I recognize, as illustrated by the titles of several papers on this roundtable, that there is widely accepted precedent for including in our discussions all of the highest national courts which exercise some form of judicial review, including even the interpretation of the constitutionality of administrative acts.⁴ I realize

1 This discussion of the political impact of constitutional courts was originally prepared as a critique of a number of papers presented on the same topic at a Specialist Group Meeting of the International Political Science Association (IPSA) in Montreal, Canada, in August 1973. As revised, it bears the evidences of its origin, and references are made to a number of the papers which were presented at the IPSA meeting. In addition, I have also referred to several other papers which were prepared for IPSA panels on "Comparative Judicial Systems and Processes" and "Approaches to Comparative Judicial Studies." [Some of these papers have likewise been revised and also appear in this issue — *ed.*]

2 Danelski, *The Political Impact of the Japanese Supreme Court*, IPSA paper at 3-5.

3 McWhinney, *The Political Impact of Constitutional Courts: The Canadian Supreme Court*, IPSA paper at 1. Note, however, reference to the Constitutional Court of Yugoslavia. M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971).

4 Note the introductory reference to "Constitutional courts, such as the Supreme courts of Canada, India, Ireland, Japan, and the United States, the High Court of Australia, and the Constitutional Court of West Germany," in Joseph Tannenhaus, Walter F. Murphy, *et al.*, *Diffuse Support for Constitutional Courts: A Methodological Analysis*, IPSA paper at 1. Professor Margherita Rendel in her IPSA paper, *The Political Impact of the French Conseil D'Etat*, at 1, while recognizing that the Conseil D'Etat is not a "constitutional court" in the ordinary sense and that "it cannot declare a law unconstitutional," does "advise on the interpretation of the constitution." Though the Constitutional Council in France is not to be classed in our view as a constitutional court, its invocation in a decision in 1971 of the Preamble of the Constitution has possibly given the Constitutional Council some special recognition in the French constitutional system. Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431-452 (1972).

consequently that one can, in being a purist, run afoul of widely accepted usage. Nevertheless, as a member of an unreconstructed minority, I feel that the objectives of clarity, and, in particular, precision, would be served if we limited the discussion of constitutional courts to the three Western European ones which bear that title. This limitation does not preclude under more appropriate terminology the widest latitude in analysis and comparison of courts which exercise the functions of judicial review.

Second, I would argue that at this formative stage of our inquiries regarding the political impact of constitutional courts, we should accumulate a better data base than we now possess before we indulge in too much "general theorizing." The temptation is present, for example, to view the constitutional courts as part of the overall governmental structure and in consequence for impact studies to become converted into examinations of outputs of the political systems as a whole. Unless we take a more limited middle-range course, at least at this point in time, I am fearful that we may end, to borrow the words of a European statesman, with theories "thrown contemptuously on the blue waves of conjectural politics." I accordingly disagree with those who are critical of a continuing emphasis *at this time* on "empirical work rather than on the development of theory."⁵

There are a number of variables on which additional data are needed before hypotheses can be properly presented, comparisons indicated, and generalizations ventured. Some of them would include:

1) The political cultural, as well as subcultural, setting in which the court operates. Included would be the nature of the party system, the fragmented subcultures, the tendency to "resort to formal adjudicative dispute settlement,"⁶ the political changes and crises.⁷

2) Unique features of the legal systems. There are well-recognized differences, significant for judicial review, between the common law and civil law countries. The three constitutional courts of Western Europe fall within the civil law orbit.

3) Unique constitutional features of the political systems, particularly those incorporating special guarantees of civil rights and those which provide contours for evolving federal relationships. The role of the constitutional courts in West Germany, Italy and Austria is affected by the varying constitutional relationships existing between the federation, or central government, and the governments of the constituent units.

4) The organization and membership of the courts, and especially the relationships of the lower courts to the highest courts in the judicial hierarchies,⁸

5 Note reference in Professor Stephen L. Wasby's paper, *The U.S. Supreme Court's Impact: Broadening Our Focus*, IPSA paper at 5.

6 See Joel B. Grossman and Austin Sarat, *Courts and Conflict Resolution: Some Observations on the Choice of Dispute Settlement Forum and Its Political Impact*, IPSA paper at 25.

7 The IPSA paper by Professor Glendon Schubert, *Political Culture and Judicial Ideology: Some Cross and Sub-Cultural Comparisons*, represents initial research on "the effect of cultural parameters upon judicial thinking and decision making" in Switzerland and South Africa.

8 See Danelski, *supra* note 2, at 10-14.

the attitudes of the judges,⁹ the method of selecting the judges,¹⁰ etc.

5) The jurisdiction of the courts. Breadth of jurisdiction and extent of geographical coverage obviously affect the impact of the courts. The jurisdiction of the Federal Constitutional Court in West Germany is clearly broader than that of the courts in Italy and Austria, and, for that matter, than that of the Supreme Court in the United States. Limitations on the jurisdiction of the Irish Supreme Court, and provisions regarding emergency powers, coupled with some tacit assumptions regarding emergency powers, have served to restrict the impact of the Supreme Court on "Irish jurisprudence as well as on Irish social and economic life," argues Professor Paul C. Bartholomew.¹¹

6) Access to the courts. To what extent does the private citizen have direct access to the courts, as in West Germany, or to what extent is access channelled through or limited to specific courts or governmental organs, as in Italy and Austria?¹² Are interpretations indirectly arrived at as being incidental but necessary for determinations in cases involving adversary proceedings, as in the United States, or are they the primary and perhaps sole concern of the courts, as in cases involving constitutionality of legislation in West Germany?

7) The characteristics and features of the persons, officials and communities which are affected by the decision. What is, to borrow a query of Professor Wasby, the "level of knowledge and belief systems of the court's 'recipients', including their attitudes, orientations, expectations, and role perceptions?"¹³

8) The mode of implementation of the court's decisions. Is the court solely dependent on the executive, the bureaucracy, or law enforcement officials at low hierarchical levels for implementation.¹⁴

9) The decisions of the constitutional courts. Any study of the decisions of the courts will suggest a higher degree of effect on enforceability in some subject matter areas than in others. Perhaps one might in mentioning decisions themselves refer here to the discussion of "weight" of the court's decisions.¹⁵

Third, I might mention the efforts which have been made to compare the actual impact of European constitutional courts. The most promising work with

9 Note the challenging and promising research project in West Germany, undertaken by Professor Rudolf Wildenmann and his associates, reported in their IPSA papers dealing with the "Attitudes of Judges as a Subject of Comparative Study: Design, Theory and Method of an Empirical Study of Judges in Germany."

10 Professor Giovanni Boggetti in his IPSA paper, *The Political Role of the Italian Constitutional Court*, at 11, suggests that the method of selecting judges to the Italian Constitutional Court is primarily responsible for the "admixture of moderately liberal tendencies," of "cautious self-restraint," and of "respect for the rights of Parliament and of the Executive" in the Court.

11 Bartholomew, *The Supreme Court of Ireland*, IPSA paper at 17.

12 The use of the constitutional complaint in West Germany, where there were more than 23,000 filed during the period from 1951-1971, explains over 60 per cent of the cases accepted for hearing by the Federal Constitutional Court. Rupp, *The Federal Constitutional Court and the Constitution of the Federal Republic of Germany*, 16 St. Louis U. L. J. 359-383 (1972).

13 Wasby, *supra* note 5, at 3.

14 Note, for a special instance, the issuance of "admonitory decisions" affecting the actions of legislative bodies in West Germany, as explained by a member of the Federal Constitutional Court. Rupp-v. Brünneck, *Germany: The Federal Constitutional Court*, 20 AM. J. COMP. L. 387-403 (1972).

15 Professor Danelski states *supra* note 2, at 24: "The weight of the [Japanese] Supreme Court's impact depends to the extent to which (1) its behavior is uninfluenced by others and (2) its behavior contributes to the behavior of others."

which I am acquainted is that of Professor Donald P. Kommers in a recent article in the *Jahrbuch des Öffentlichen Rechts*.¹⁶ Therein he examined the impact of the constitutional courts in West Germany and Italy under three general headings: *compliance*, including degree of acceptance of and acquiescence in constitutional court decisions by lower courts, law enforcement officials including police and prosecutors, and others; *support*, evidenced in the opinion surveys of elite groups and the public, and in the nature and extent of criticism of the courts and decisions of the courts;¹⁷ and *awareness* of the activities and decisions of the courts, as indicated particularly by the methods and extent of the publicizing of the courts' decisions, and the general receptivity of the public to governmental decisions in general and to judicial decisions in particular. On all three counts—compliance, support and awareness—Professor Kommers found that the extent, intensity, and pervasiveness of the impact in West Germany were substantially higher than in Italy.¹⁸

Fourth, there are other types of considerations which might be taken into account in assaying the political impact of the constitutional courts. I shall offer three suggestions, three additional variables, as illustrative of new areas for exploration. The one is to examine the *durability* of the courts. This durability might be measured by the role and activities of the courts, and continuing attitudes toward the courts, under *crisis* conditions. On the assumption that the most crucial, final and decisive measure of impact would be determined under such conditions, we might look at selected governmental crisis periods to appraise the continuing role of the court under such conditions. Illustrative instances or periods might be the action of Chancellor Dollfuss in deactivating the Austrian Constitutional Court when it was preparing to pass on the constitutionality of the Law of 1917 on which his regime was based;¹⁹ the prolonged periods of delay and controversy involving the first appointments to the Italian Constitutional Court; the EDC advisory opinion episode in 1952-53, and the party finance case in 1966 following the enforced exclusion of Professor Gerhard Leibholz from the final determination by the Second Senate in West Germany. These latter instances mentioned must, of course, be viewed as minor crises. In none of the three countries has there been a type of constitutional, or revolutionary crisis with which the political regimes were faced, at least comparable to those prior to the advent of Fascist dictatorships at an earlier period.²⁰ Only under these circumstances can a final answer be given as to how deeply ingrained are the courts in the political consciousness of the people.

16 Kommers, *Judicial Review in Italy and West Germany*, 20 JAHRBUCH DES ÖFFENTLICHEN RECHTS 111-133 (1971). Some incidental consideration was given to the impact of courts' decisions in Cole, *Three Constitutional Courts: A Comparison*, 53 AM. POL. SCI. REV. 963-984 (1959).

17 Note reference to survey research on "diffuse support" in several countries in Tannenhaus, Murphy, *et al.*, *supra* note 4.

18 Professor Bognetti feels that, while there is a lack of empirical data dealing with some of these matters in Italy, the extent of non-compliance in Italy has been exaggerated. Bognetti, *supra* note 10, at 9-11, 18.

19 K. STEINER, *POLITICS IN AUSTRIA* 403 (1972).

20 However, prior to 1968, this type of major crisis was in the minds of the framers of statutory and constitutional amendments to deal with future emergencies in West Germany; guarantees were incorporated therein for a significant involvement and activity during such periods by the Constitutional Court.

The succession of crisis periods during the last 43 years in the history of Argentina is depicted in Professor Peter G. Snow's account in his IPSA paper, "Judges and Generals: The Role of the Argentine Supreme Court during Periods of Military Government." This paper indicates the modest but continuing role of the Supreme Court in the periods when military officials have replaced the regularly constituted civil authorities.²¹ If the Argentine Supreme Court were to be adjudged for purposes of our discussion to be a "constitutional court," its history would undergird our contention that it is under crisis conditions when the "most crucial, final and decisive" impact of the court can be ascertained.

A second suggestion is to evaluate the *continuity* of the impact of the courts, that is to view and assess their impact over a period of *time*. Have the aspects of compliance, support, and awareness, to borrow the three criteria used by Professor Kommers, changed with time and, if so, in which respects and in which directions? Both the Italian and West German Constitutional Courts are post-World-War-II creations, and their history cannot be viewed in the same temporal perspective with which one might look at the Supreme Court of the United States. Indeed, the recentness of the creation of the two constitutional courts is in itself a matter of note. Nevertheless, in the brief time period since their creation, one might find periods marked by greater degrees of compliance, support and awareness than others. Measured in these terms, there might be various correlations with the business cycle, the course of international events, election results and party changes, etc. Over the period, I would hypothesize, for a number of reasons, that the political impact of the Federal Constitutional Court has been greater than that of the Italian and Austrian Courts, and would agree with Professor Boggetti that the impact of the "low-key" Italian Constitutional Court, marked by its discreet "presence in Italian life,"²² has remained relatively unchanged.

A third criterion for measurement of impact might be *adaptability*, the capacity to adjust to pressures for basic change exerted through appropriate political channels. Alteration in the methods of selecting judges, changes in jurisdiction, and modifications in procedure are examples of adaptations. The introduction of dissenting opinions by the Federal Constitutional Court in West Germany was an answer to both internal and external criticism and might well have provided a wider support and awareness of the Court's decisions. On the other hand, the abolition of advisory opinions in West Germany in 1956 might also be cited in the light of Professor McWhinney's warning that advisory opinion jurisdiction in Canada may be a means of "passing the buck."²³ The rigidity of the Italian and Austrian Constitutional Courts, in contrast, may help explain their more limited recognition. In short, one might hypothesize that a modest degree of adaptability can increase the political impact of the court.

21 The Court's political impact seems to rest in the very limited extent to which the court is willing and able under such circumstances "to save those institutional values which can still be saved." Snow, *Judges and Generals: The Role of the Argentine Supreme Court during Periods of Military Government*, IPSA paper, at 21.

22 Boggetti, *supra* note 10, at 9.

23 McWhinney, *supra* note 3, at 4.

These three variables, durability, continuity, and adaptability, might be added to those of compliance, support, and awareness. They, in turn, could well suggest others which might make use of presently available empirical data for ascertaining the impact of constitutional courts.

Finally, after making the efforts to "measure" the impact of the courts in the specific directions indicated, there will remain many unanswered questions about the overall impact of the court in the evolution of the constitutional political system. Here one will, in my opinion, have to rely in part upon the reasoned appraisals of recognized scholars and authorities. Two illustrations might be cited. In the case of Canada, where IPSA has met, there is agreement by some selected personages that Canadian constitutional development has been through channels *other than* the Supreme Court—especially through negotiation and "unobtrusive bureaucratic consensus" underlying "co-operative federalism."²⁴ Expert appraisers have arrived at a much more positive conclusion on the impact of the Federal Constitutional Court in West Germany after reviewing its decisions, and their reception, in cases involving civil rights, federalism, political parties, restraints on the exercise of administrative discretion and other matters. In some eyes, the Federal Constitutional Court has indeed been the "arbiter of the Constitution," to borrow a characterization used by Professor Gerhard Leibholz. In short, after we have exhausted all other answers for a more accurate determination of the political impact of the constitutional courts in the search for a comparative theory, let us not overlook the traditional appraisals of our professional peers who combine an expertise, a trained awareness and even an intuitive appreciation of the political role and impact of the courts. They can safeguard us from the danger, to borrow the words of an American humorist, in referring to the missionary use of profanity by his wife, that the "words are alright but the accent is all wrong."

24 J. MALLORY, *THE STRUCTURE OF CANADIAN GOVERNMENT* 386 (1971). See in particular the writings of Donald V. Smiley, including *CANADA IN QUESTION: FEDERALISM IN THE SEVENTIES* (1972); McWhinney, *supra* note 3, at 4.