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"Juristocracy" -- Political, not Juridical

Ran Hirschl

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In lieu of an abstract, here is a brief excerpt of the content:

‘Juristocracy’ – Political, not Juridical

Ran Hirschl (bio)

In numerous countries around the world, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries, whether domestic or supra-

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

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

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

source of evil.

Everything is Justiciable

Armed with judicial review procedures, constitutional courts in most leading democracies have been frequently called upon to determine a range of matters, from the scope of expression and religious freedoms, privacy and reproductive rights, to public policies pertaining to education, immigration, criminal justice, property, commerce, consumer protection, and environmental regulation. Bold newspaper headlines reporting on landmark court rulings concerning hotly contested issues such as same sex marriage, limits on campaign finance, or affirmative action have become a common phenomenon. This is true in the United States, where the legacy of active judicial review recently marked its bicentennial anniversary, and where courts have long played a significant role in policy-making and also in younger constitutional democracies that have established active judicial review mechanisms only in the past few decades.

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

political fate determined by courts. Even the fate of political regimes in the [End Page 6] exotic island nations of Fiji, Madagascar, and Trinidad and Tobago has been determined by judicial tribunals. Likewise, courts have become ultimate decision makers in disputes over election outcomes, most recently in Taiwan. In that respect, the *Bush v. Gore* courtroom struggle over...

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