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SYMPOSIUM ARTICLE

Reflections on Constitutional Adjudication in a Democracy

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Abstract

This article examines the necessity for constitutional adjudication in a democracy. Democracy is not the government of the minority by the majority, but self-government of the people in a pluralist society. The article regards constitutional adjudication as a necessary component of a constitutional democracy to preserve self-government and individual rights as a pre-condition for the acceptance of majority decisions by the minority. Thus, constitutional adjudication is needed to uphold the possibility of democratic change and to protect individual rights also against the majority. Recent critique of individual decisions does not change this basic insight and practice of constitutional democracies.

Keywords: constitutional adjudication; democracy; basic rights; constitutional court

1. Introduction

Democracy means, in the famous words of Abraham Lincoln, government of the people, by the people, for the people.[1] It does not mean absolute power of the majority of the people, and even less so the rule of the majority over the minority. Indeed, anxiety over the establishment of a 'tyranny of the

The article is only lightly footnoted as it does not claim to present new original ideas, but rather provides a summary of well-rehearsed arguments for constitutional adjudication in a democracy. It nevertheless reflects only the personal views of the author.

[1] Abraham Lincoln, 'Gettysburg Address Delivered at Gettysburg Pa. Nov. 19th, 1863', Library of Congress, https://www.loc.gov/item/rbpe.24404500.

majority'[2] constitutes one of the foundations of constitutional democracy. On the occasion of the Israeli debate on the future of its Supreme Court – in particular, in its capacity as High Court of Justice addressing constitutional issues such as coalition agreements and the appointment of government ministers, as well as human rights and humanitarian law – the following contribution examines the democratic function and legitimacy of constitutional adjudication. However, both for lack of expertise and due self-restraint on the part of a former German constitutional justice, this brief contribution does not intend to deal directly with the current debate in Israel – and does not give concrete advice on how to resolve the current impasse.

While democracy does not require the constitutional jurisdiction of courts, and even less so a specialised court for constitutional issues pursuant to the 'Austrian model',[3] the existence of a court with competence to address constitutional issues seems now to be the Western norm. Another option is the authorisation of 'regular' courts to adjudicate constitutional questions. Recent examples of both systems are the introduction of the United Kingdom Supreme Court in 2009[4] and the development of the French Conseil Constitutionnel.[5] Such constitutional issues include disputes between parliament and the executive, parliamentary majority and minority, cases regarding democratic elections and access thereto and, last but certainly not least, the protection of civil rights of all forms, whether free speech, anti-discrimination, or property and social rights. In Europe, the European Court of Human Rights in Strasbourg fulfils a similar role in the protection of human rights for the (at present) 46 member states of the Council of Europe, as does the European Court of Justice as far as the European Union is concerned. The Venice Commission, composed of independent experts, albeit not a court, plays an important role as a 'watch dog' for democracy and the rule of law in the Council of Europe and beyond, counting also the United States, Canada, Korea, and Israel among its members.

Yet, what legitimises the capacity of all these courts, *conseils* and tribunals to nullify laws, or limit their application, even if they are approved by parliaments? Some of their judges or justices are not even democratically elected; others sit on the bench for a long time (9 to 12 years, or even for life). Many are chosen by a super-majority, including electors from the political opposition. In some systems, their formal legitimacy is derived from existing

[2] While generally attributed to (and frequently used by) Alexis de Tocqueville, *De la démocracie en Amérique* (12th edn, Institut Coppet 2012) 254, the term was probably coined by John Adams, *A Defence of the Constitutions of Government of the United States of America*, Vol 3 (London 1788) 290–91, 310; a similar term, the phrase 'tyranny of a multitude is a multiplied tyranny' is used by Edmund Burke, *Correspondence of Edmund Burke between the Year 1774, and the Period of his Decease, in 1797* (Rivington 1844) 147; see also John Mill, *On Liberty* (1859) (Walter Scott 2011) 7.

[3] The model of a constitutional court separate from the highest ordinary court(s) or Supreme Court(s) is based on the design of the Austrian Constitutional Court of 1919 by, among others, Hans Kelsen, as well as the German Bundesverfassungsgericht of 1949/51.

[4] Constitutional Reform Act 2005 (UK), Part III.

[5] According to Art 61-1 of the French Constitution, which entered into force in 2010, the Conseil receives '*Questions prioritaires de constitutionalité*' regarding the constitutionality of legislation.

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judges; in others, from bodies composed of (partly) the same politicians whose policies they are afterwards tasked to control. In the latter case, a politically pluralist electoral body and the requirement of a larger 'super'-majority may guarantee greater independence of judges. Anyway, judges are not bound by the result of elections, but only by the constitution in force.

Let me first – in a section entitled 'Why constitutional democracy?' (Section 2) – address the definition of a Western-style liberal democracy and its relationship with the constitutional set-up. In the following section (3), entitled 'The necessity for constitutional adjudication', I will look at the constitutional function and legitimacy of the role of constitutional adjudication by courts or other judicial bodies in a democracy. I will also draw on my practical experience as constitutional justice in Germany from 2010 to 2022, but rest mindful on the contingency of that experience. I will conclude by asking what these insights mean for the practical design of a democratic constitution, including for the election of judges. In my view, maintaining liberal democracy requires at least some constitutional functions to be given to courts or court-like bodies. Otherwise, democracy may well lead to its own destruction.

2. Why constitutional democracy?

One device of authoritarianism resisting pluralist constitutional democracy is to declare that everyone who disagrees with it is not part of the people. However, 'the people' consists of many different individuals with diverging interests and values, belonging to different but not necessarily overlapping groups. Any vision of a unified people in complete harmony without conflicts of interests is a fiction, or worse, a myth serving to exclude minorities from the people.[6] Of course, communities and states may have collective interests, but that cannot take away the pluralism of rights and interests within any society, in particular, in modern and postmodern societies.

All human beings, though, enjoy human dignity and a right to be respected. If it is true that self-government is enshrined in the human dignity of the citizens,[7] every person belonging to the people takes part in self-government, whether in the majority or in the minority. In a democracy, everybody is a minority on some issues; thus, the existence of a single majority and a single minority constitutes a political construct to establish a political majority in parliament, where members of parliament need to compromise on some of their goals to reach a legislative majority. The minority is not excluded from self-government – just the opposite. Even when, in minority, you govern yourself, the majority governs also for and in the interests of the minority ('for the people', to take up Lincoln's phrase). In other words, democracy is rule of the people, but not rule of the majority, and even less so the rule of the majority over or against the minority. The majority must imagine itself as ruling for

[6] cf Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* (Rothschild 1931) 43.

[7] In particular, the Decision of the German Federal Constitutional Court, BVerfGE 144, 20; English translation: BVerfG, Judgment of the Second Senate of 17 January 2017, 2 BvB 1/13, para 542, http://www.bverfg.de/e/bs20170117_2bvb000113en.html (with further references).

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everybody. In the words of the German Grundgesetz, the members of parliament are 'representatives of the whole people … and responsible only to their conscience'.[8] If democracy is based on the equal dignity of all human beings, it is itself predicated on the respect of equal dignity of the members of the present minority by the present majority.[9]

As government by the people, democracy must allow for a change of policies when the views of the people have changed. This is why democracies hold regular elections, adjusting the will of parliament to the will of the people; but old majorities die hard. They do not readily wish to hand over power to their successors; they may even believe that the new majority is unjust or has come to power irregularly, or by telling lies. In a representative democracy, holding the reins of power can only be temporary; it will need adjustments, and allow for a real possibility that the present majority must give way to a new majority after the next election (or a mere change of the views of parliament).

If democracy is collective self-government, where does rule by majority come from? It is again Hans Kelsen who explains this convincingly.[10] There is no other rule that would better avoid government by others, which is based on the equality of citizens, as it is the principle in which the least number of people are subjugated by others. From this perspective, super-majorities may even be regarded as suspect – they imply that a minority can disregard or modify the will of the majority. In this case, a lesser number of people governs a greater number of people. That would imply a higher value for their votes compared with those of other people. On the contrary, when majority rules, the individuals belonging to a minority can at least be assured that their personal worth is not in question, that they had the same procedural rights as their neighbour who just happens to be in the majority regarding the question at hand, whether on major constitutional issues or on simple regulations. While the concept of an original constitutional contract at the beginning of times is a mere fiction, the concept of a constitution subject to a '*plébiscite de tous les jours*'[11] is not. The minority, however, needs assurances – not only regarding its participation in the next election to build a new governing majority – that its equal rights are protected, both from fellow citizens as well as from the majority. These assurances must go beyond equal participation in the next election to establish a new governing majority.

In spite of Kelsen's scepticism, one typical constitutional solution to reconcile the legitimate claims of the majority with the rights of the minority is to require super-majorities for certain decisions. This follows from the idea of an original constitutional compact predating the promulgation of the

[8] German Grundgesetz [Basic Law], art 38(1) (C. Tomuschat and others transl), https://www.gesetze-im-internet.de/englisch_gg.

[9] cf BVerfGE 144, 20 (n 7) para 541 ('Human dignity is egalitarian'), and para 543 ('The possibility of equal participation by all citizens in the process of forming the political will as well as accountability to the people for the exercise of state authority … are indispensable for a democratic system').

[10] Hans Kelsen, *Vom Wesen und Wert der Demokratie* (2nd edn, JCB Mohr (Paul Siebeck) 1929) 8–10.

[11] Ernest Renan, *Qu'est-ce qu'une nation?* (2nd edn, Calman Lévy 1882) 27.

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constitution, which contains guarantees for the eventual minority that their basic rights are protected and not at the disposal of the majority.[12]

To accept majority rule, individuals need assurances that their core individual rights are protected. No one shall give up his or her dignity on becoming a citizen – indeed, we as citizens are given rights that we have not even requested. Majorities must respect the individual rights of the minority. Otherwise, the minority cannot and will not accept majority rule – not even majority rule for a certain time. That is why majorities – even super-majorities – cannot and must not trample on the rights and the dignity of minorities. Such a constitutional arrangement, be it in writing or not, does not contradict majority rule; rather, it is the basis of the acceptance of majority rule by the respective minority.

3. The necessity for constitutional adjudication

However, the constitutional basis does not protect itself. History tells us that political power is power of people over people, and goes along with wealth, influence – and its abuse. Unchecked power is dangerous. Or, in the famous words of Lord Acton, 'power tends to corrupt and absolute power corrupts absolutely'.[13] Democracy does not only mean regular elections. It means continuous checks and balances of political power to establish 'the rule of law, and not of men', to repeat US President John Adams' adage about the American Revolution.[14] The law is equal for everybody; it measures facts against norms applicable to the powerful and the powerless alike.

This is one reason why democracy works only when someone exists who – in the words of US Chief Justice John Roberts – calls the balls and strikes:[15] an umpire who is neutral between the parties, but is not neutral regarding the values of democracy and human dignity, as enshrined in a written or unwritten constitution. In particular, this umpire must see that democratic elections mean government for a limited period of time only, that government must be exercised in a way that permits change or even reversal at the next election. In every single issue, it must see to it that the will of the majority is observed, but it also needs to preserve the rights of the minority against the majority.

To check against an abuse of the power of the majority is the task of an independent judiciary. To be able to exercise these functions, it needs to be independent of the current governing majority – and also of the minority. It must be acceptable to and accepted by both, even in the event of strong disagreement with the contents of their decision. As the debate in the Weimar

[12] cf John Rawls, *A Theory of Justice* (Harvard University Press 1971) 60, 250, 542.

[13] Letter to Mandell Creighton, 5 April 1887, in John Emerich Edward Dalberg-Acton, *Historical Essays and Studies* (John Neville Figgis and Reginald Vere Laurence eds, Macmillan 1907) Appendix 504.

[14] John Adams, 1774 *Boston Gazette*, No 7. See also Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (9th edn, Macmillan 1956) 188.

[15] Confirmation Hearing on the Nomination of John G Roberts, Jr, to be Chief Justice of the United States, Hearings before the Committee on the Judiciary, United States Senate, 109th Congress (US Government Printing Office 2005) 55–56.

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Republic has shown, such a force cannot be found in the political branches, not even in a politically neutral president, but only in an independent court.[16]

In addition, the very determination of the 'majority' is in need of constitutional determination and eventual adjudication. Majority rule can be exercised only if someone determines who is in the majority. In a representative democracy, the majority in parliament is often associated with the majority of the people. This is, of course, a mere fiction; the majority of the people, more often than not, will be different from the majority in parliament. Individuals vote for persons or party lists with a programme that will not fully correspond with their views on every issue. Representatives and voters may change their positions in opposing directions. In most cases, and in the absence of formal referenda, we will not even know whether this is the case. Opinion polls are endemic, but not necessarily accurate. Besides, a parliament is voted in for a lengthy period of time – between two years (US House) to five years (most German Länder) – but public opinion is subject to permanent change. Representative democracy also demands that its representatives should not decide in line with current popular opinion, but with what they responsibly think is in the best interests of (all of) the people. This is what is meant by government 'for the people'.

If there is such a thing as a 'natural' majority, it will be the majority of all those who could have cast a vote. All other 'winners' in an election will have a majority of people in their constituency who are against, or at least do not support them. Of course, the non-exercise of a vote may be the responsibility of voters; it is their own problem that they did not vote. However, that does not change the fact that such an abstention is not a vote for the winner and, as such, does not legitimate that person. What type of majority is needed for which purpose needs to be regulated by law, and these laws must be interpreted and applied, and the application checked, in a manner determined by the constitution as interpreted by the relevant jurisdiction. In other words, constitutional adjudication is necessary to check on the fairness of elections (and their preconditions), whether by a constitutional court or other (quasi-) judicial body.

Every democracy must find its own way to set up an independent judiciary, implementing the majority will and protecting minority rights at the same time. The balance struck depends on a comprehensive analysis of the structure of a constitutional compromise. In some states, the judiciary will add to their numbers by the decision of a body of judges, thus allowing the judicial branch to complement itself. In others, judges will be elected by members of parliament with the inclusion of members of the opposition, or include representatives of federal units. In each case, the independence of judges is furthered by a non-partisan or pluralist composition of the body tasked with electing or appointing judges, or by requirements of a super-majority to prevent the current political majority from acquiring control of the judiciary.

[16] cf Kelsen (n 6) 6, 12; Kelsen (n 10) 75 ff; Hans Kelsen, 'La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)' (1928) 45 *Revue du droit public et de la science politique en France et à l'étranger* 197, 223.

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Constitutional review of legislation may include control of the conformity of both form and substance of amendments with core provisions of a constitution. Even in the absence of provisions that explicitly protect core constitutional values from amendment,[17] courts may rely on the so-called *basic structure doctrine*, as applied by the Indian Supreme Court, which found that the power to *amend* the constitution 'does not enable Parliament to alter the basic structure or framework of the Constitution'.[18]

One thing is clear: without an independent judiciary, democracy is in deep peril. A majority without limits is in danger of marching, ever so slightly, towards autocracy. What works perfectly well to prevent this in one democracy may fail miserably in the next. Striking the right balance between majoritarian rule and protection of the minority shields a democracy from the tyranny of the majority.

4. Checks and balances

The control of constitutionality of acts of parliament, and even more so of governmental action, is the cornerstone of modern constitutional democracy. It is not by accident that, next to an independent media, it is the independence of the judiciary – in particular, the constitutional judiciary – that is first attacked by the new democratic authoritarianism, an authoritarianism that seeks its legitimacy in the rule of the majority in disregard of the separation of powers. It is this very separation in which also the limitation of constitutional adjudication resides. While we need courts and tribunals to check on the exercise of power by the political branches as against the constitutional foundation of democracy and liberty, we must also check judicial power against a collapse into politics; otherwise, constitutional courts cannot perform their task of monitoring the political power of the majority. It would destroy the very separation of powers the courts are out to protect. Courts, however, are well aware of the fact that their interpretation and application of constitutional principles will, at some time, help one side in a political conflict and, at another time, the other. It is the search for generalisable principles that distinguishes constitutional adjudication from arbitrariness and politicisation.

[17] eg, Supreme Court of Kenya, *Attorney-General & 2 Others v Ndii & 79 Others* [2022] KESC 8 (KLR), Judgment, 31 March 2022 (referring to Art 255 of the 2010 Constitution of Kenya, http://kenyalaw.org/kl/index.php?id=398, which lists core provisions amendable only by referendum). For a provision that entirely excludes amendments of certain constitutional provisions see Art 79(3) of the German Basic Law.

[18] *Kesavananda Bharati v State of Kerala* [1973] 4 SCC 225, majority view, 1001. Inter alia, this view was inspired by Dietrich Conrad, 'Limitations of Amendment Procedures and the Constituent Power' (1970) *Indian Yearbook of International Affairs* 375. See also Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 *Israel Law Review* 321, with further references. In its *Ndii* judgment (n 17) paras 3 onwards (Chief Justice Koome), the Kenyan Supreme Court did not apply the doctrine because the Constitution of Kenya (n 17) already regulates the amendment of core provisions. The Israeli Supreme Court has not yet decided on the judicial review of its Basic Laws; see HCJ 5555/18 *Hason v The Knesset & 14 Other Petitions* (8 July 2021) (Chief Justice Hayut).

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To prevent judicial arbitrariness, Kelsen was still of the view that a constitution should be as precise as possible in checking the exercise of judicial power: '*Unbestimmte Rechtsbegriffe*', imprecise legal terms, would render their task impossible.[19] In contemporary jurisprudence, however, such fears have proven unfounded. Contemporary constitutional and supreme courts apply standards of reasonableness and proportionality without major difficulty. They are basic tests of rationality, limiting state intrusion into the lives of its citizens to what is strictly necessary. They may have political consequences, but they are not political in the sense of party politics. The proportionality test originates in the nineteenth-century control of the police powers of the prince.[20] Today, it is used by courts all over the world, with the notable exception of the US Supreme Court – its reluctance stemming from an anxiety that rights would lose their bite, their character as trump cards, when they are balanced against the legislative purpose.[21] The critique of recent Supreme Court decisions taking away the right to abortion,[22] overruling long-standing precedent,[23] or allowing the carrying of guns in public[24] does not, though, remove the need for judicial protection of constitutional rights and for control of the exercise of public power.[25] This is particularly acute for electoral law where the current majority may be tempted to prevent democratic change.[26]

Such control is not partisan. In my own constitutional practice we have discussed and decided many cases on the grounds of proportionality analysis with controversial results, but in most cases without major dissent. Where the 'political question doctrine' was raised, it did not concern questions of the balance of powers, but rather checks against European interference in the domestic legal sphere.[27]

[19] cf Kelsen (n 10) 24 ff; Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' (1929) 5 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 30, 69 ff.

[20] See Preußisches Oberverwaltungsgericht, Judgment of 14 June 1882, Rep. II B.23/82, PrOVGE 9, 353 ff – Kreuzberg II.

[21] See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) xi, 192; for a critical analysis see Jamal Greene, 'Foreword: Rights as Trumps?' (2018) 132 *Harvard Law Review* 28.

[22] US Supreme Court, *Dobbs v Jackson Women's Health Organization*, No. 19-1392, Judgment of 24 June 2022, 597 US__, 142 S Ct 2228 (2022).

[23] US Supreme Court, *Roe v Wade*, 410 U.S. 113 (1973); *Planned Parenthood v Casey*, 505 US 833 (1992).

[24] US Supreme Court, *New York State Rifle & Pistol Association, Inc. v Bruen*, 597 US ___, 142 S Ct 2111 (2022).

[25] In this sense see also Laurence H Tribe, 'Constrain the Court—Without Crippling It', *New York Review of Books*, 17 August 2023, https://www.nybooks.com/articles/2023/08/17/constrain-the-court-without-crippling-it-laurence-h-tribe/#:~:text=Critics%20of%20the%20Supreme%20Court,essential%20to%20our%20constitutional%20system; for past critique see also Dieter Grimm, 'Neue Radikalkritik an der Verfassungsgerichtsbarkeit' (2020) 59 *Staat* 321 (both with further references).

[26] On the necessity for court control cf., most recently, US Supreme Court, *Moore v Harper*, 600 US __ (2023); *Allen v Milligan*, 599 US __ (2023).

[27] BVerfG, Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13 -, http://www.bverfg.de/e/rs20140114_2bvr272813en.html, OMT submission, dissenting opinion of Justice Lübbe-Wolff, paras 105–113, BVerfGE 134, 366 (419).

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Constitutional adjudication is not necessarily the only or primordial check on political power. In the United Kingdom it has rarely been exercised,[28] and, in the matter of human rights, it does not necessarily include the power of courts to set aside Acts of Parliament.[29] My home country, Germany, is a federal state with many checks and balances involved, as enshrined in a written constitution – there is no federal state that can do without a court to delineate the spheres of competence at the various democratic levels. The German Länder, for example, have democratically elected parliaments and governments of their own, not necessarily (at the moment, only rarely) composed in the same way as the federal government. The judicial system is also federalised. Lower courts are essentially regional courts; only the highest courts are federal. In addition, local laws are in the hands of local administrations of different types – cities, counties, and communes – which have great influence on human lives and enjoy their own democratic legitimacy, even in implementing federal laws.

Thus, one function of constitutional courts in federal states is the delineation of competences of several democratically governed public entities. Similarly, in the European Union – which is not a federal state, but nevertheless also makes law that enjoys directly binding effect and precedence, or 'supremacy', over national legislation – the European Court of Justice has a similar function both with regard to the delineation of competences and the protection of human rights. The absence of a 'neutral' arbiter in disputes over competences – either the Court of Justice or national courts having jurisdiction in this regard – can lead to serious disagreements between both levels, which can be resolved only by a judicial attitude of mutual respect and consideration. When such 'vertical' separation of powers between different bodies with their own democratic legitimacy is absent, the 'horizontal' control by a constitutional or quasi-constitutional court or tribunal plays a particularly central role in preventing absolute power from developing.

As becomes clear, judicial control of political power is an indispensable component of the separation of powers and a central element of democracy, protecting the citizenry from the abuse of political power and confirming 'government by the people, of the people, for the people' as the essence of democracy.[30] Thus, intervening in the independent decision making of judges by limiting the principles they use to control political power – including concepts

[28] For recent cases see *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5 (on Brexit), and *Miller v The Prime Minister* [2019] UKSC 41 (on prorogation of Parliament (Miller II); for an older case see *Case of Proclamations* (1611) 12 Co Rep 74; *Entick v* Carrington (1765) EWHC KB J98, 95 ER 807 (cited in Miller II, ibid para 32).

[29] Human Rights Act 1998 (UK). The current government has apparently abandoned attempts at weakening the human rights control of non-legislative acts by the so-called 'Bill of Rights Bill' (A Bill to Reform the Law relating to Human Rights, Bill 117 2022–23); see Lord Chancellor Alex Chalk, *Hansard*, 27 June 2023, col 145: 'Having carefully considered the Government's legislative programme in the round, I can inform the House that we have decided not to proceed with the Bill of Rights'.

[30] Lincoln (n 1).

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such as 'reasonableness' or 'proportionality' – not only endangers the rule of law, but also the protection of democracy.

5. Selection of constitutional judges

If judicial control of political powers is essential, so is the selection of judges. In this regard, there is even less similarity between different countries than with the mechanisms of judicial accountability of government.

Taking the example of the country I know best, in Germany the Constitutional Court handles sensitive political issues, mainly the relationship between the branches of government and the preservation of basic rights and human dignity. The justices are elected by parliament or the federal council representing the Länder in a political process, but most are academics, judges or lawyers of renown; only rarely are former politicians elected. Indeed, there are agreements between the political parties well in advance to ensure that the rights of nomination go in equal numbers to the centre right and the centre left. However, each and every justice needs a majority of two thirds, either in parliament or in the federal council. It is not rare for the first nominee to be rejected. This system ensures that each of the parties supporting the constitution has one or more justices whom it trusts to understand its concerns. Yet, the parties can never be sure that 'their' judges will vote their way. Frequently, judges vote very differently from the political predispositions of those who nominated them. To remove a judgment of a court, or a piece of legislation, a majority of five out of eight is required, which can be reached only with strong legal arguments. The burden of showing unconstitutionality will always fall on those who wish to nullify a law or executive decision.

The very moment you enter the court building and sit as a judge, you leave your politics behind. In deliberations, only juridical arguments work. In my 12-year term, never was I subject to an attempt to politically influence my decision in future cases. Of course, there was criticism of past decisions, but without name calling. It may also have helped that the Federal Constitutional Court is in Karlsruhe, some 700 kilometres from the seat of the other federal branches of government.

In a state with a smaller territory, such as Israel, the physical distance between judges and politicians will be less. Because of the professionalism of its judges, the metaphorical distance between the Israeli Supreme Court and Israeli politics certainly exceeds the physical distance between court and parliament. However, the appeal to individual ethics may not be sufficient. Independence and impartiality must be guaranteed by the institutional arrangement of the respective constitution.

6. Conclusion: The legitimacy of constitutional adjudication

Democracy and constitutional adjudication cannot be presented as opposites. Rather, the tendency of aggrandisement of power suggests the contrary conclusion: if self-government of the people is to be preserved, meaningful

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constitutional adjudication appears to be necessary. It is not by accident that citizens in Israel are turning to the streets in the exercise of their rights to demonstrate in order to prevent a limitation of the very checks and balances that uphold a democracy: that government serves the interests of the governed and must preserve their rights and dignity, and that no group can protect its exercise of power against peaceful protest and democratic reversal in the next election. Maybe, but only maybe, recent events can lead to a 'constitutional moment'[31] in which Israel will manage to find common ground for a grand new design of a constitution for a 'Jewish and democratic' state. As a final check of political power in a democracy, I am confident that such a constitutional grand compromise will provide for a court with the competence to decide constitutional issues. Democracy and constitutional adjudication do not contradict, but are predicated on each other.

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[31] cf Bruce Ackerman, 'Constitutional Politics/Constitutional Law' (1989) 99 *Yale Law Journal* 453, 489, 545 ('those rare moments when political movements succeed in hammering out new principles of constitutional identity that gain the considered support of a majority of American citizens after prolonged institutional testing, debate, decision)'.

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