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Feature:

Questioning Constitutional Justice

Introduction

The Legitimacy of Constitutional Courts: Notes on Theory and Practice

Cass R. Sunstein

Everyone agrees that the job a constitutional court is to interpret the constitution. But the fact that constitutional courts are entrusted with this job can create two kinds of problems for politicians and, above all, for leaders of the executive and legislative branches of government. The first kind of problem arises when a constitutional court invokes the *unambiguous* language of the constitution to invalidate a political act. The second kind of problem arises when a constitutional court invokes the *ambiguous* language of the constitution to invalidate a political act.

These problems are quite different, and their differences bear very much on the issues discussed in this symposium. When a court invokes unambiguous constitutional language to prevent politicians from doing what they want, politicians may suffer intense frustration. And if the court has the strength to resist politicians, constitutional amendment may be the only course. But from the standpoint of the rule of law, and constitutionalism itself, the politicians' frustration is no cause for alarm. It is part of the point. If a constitutional amendment is necessary, and the constitutional court invokes unambiguous language to say so, constitutional democracy is working very well. Frustrated politicians who attempt to "tame" the court, by bending it to their wishes, are making a travesty of the rule of law and the whole project of constitutional democracy. They may also

be harming their long-term interests. Politicians can benefit from an independent court; such a court can enable politicians to insulate themselves from pressures that they would like to avoid, and such a court can allow politicians the potential advantage of pointing to constitutional constraints, enforced by the court, as a limitation on their power of action.

Things are different when the governing constitutional provision is ambiguous—when reasonable people can interpret that provision in diverse ways. If a court invokes ambiguous language to strike down a political act, politicians may claim that the court's interpretation is erroneous, that the court is following not law but personal predilection, and hence that the politicians, rather than the judges, are the constitution's true loyalists. Of course many constitutional provisions are ambiguous. How do social and economic guarantees bear on political effort to change the fabric of socialist law? Does a constitutional ban on inequality, or a requirement of equal treatment, forbid discrimination on the basis of sex? In education? In the military? Does an equality provision forbid discrimination on the basis of homosexuality, or disability? Does a right to free speech protect the right to urge crime, revolution, or hatred of ethnic and religious groups? Does it include the right to engage in unrestricted commercial advertising or to spread pornography?

These are questions on which constitutional provisions are frequently ambiguous, and when politicians disagree with the Court, they may well claim to do so in the constitution's name. Their objection is to the court, not to the constitution.

These observations show the complexity of the notions of "judicial activism" or "an activist court." A court that invokes the unambiguous language of the constitution may be described as "activist" if and in the sense that it invalidates acts of public officials. But this form of activism is far from troubling. On the contrary, it is a tribute to the rule of law. Hence a court that ignores the unambiguous language of the constitution in order to *permit* public officials to do as they choose might also be described as "activist," though in a very different sense. Such a court is capitulating to the political winds; it is allowing the constitution to dissipate under pressure. We can conclude that when a constitution is clear, it should be obeyed; that the minimal role of a constitutional court lies here; and that the proper question to ask of such a court in such a case is whether it has or has not capitulated to politics.

A court that deals with ambiguous provisions is much harder to evaluate. Some people think that courts should consider themselves the special guardians of their constitutions, so that judicial use of ambiguous provisions, to invalidate public acts, is entirely acceptable. (In the United States, this position is sometimes associated with Ronald Dworkin; it is also one view of the situation in Hungary.) But some people think that the court should uphold public acts if the constitution contains any uncertainty. (In the United States, this position is sometimes associated with James Bradley Thayer; it is one view of the situation in Russia.) (Table 1)

Cells (1) and (2) are simple; the most serious question is whether the court will capitulate, and the answer is that it should not if constitutional democracy is to prevail. The hardest puzzles arise for constitutional courts when those courts are asked to invoke the ambiguous language of the constitution to invalidate acts of public officials. Why—politicians might and will predictably ask—should courts be allowed to interpret ambiguous language as they wish, especially in light of the fact that the interpretation of such language will inevitably involve not merely "law" but also the judges' own judgments of policy or principle? Interpretation of ambiguous language cannot avoid some such judgments. The vice of "formalism" can be found whenever judges claim, falsely, that they are simply speaking for "the law," and deny the role of their own values in interpretation. Formalism is a pervasive risk for cells (2) and (3).

But there are some answers to the politician's question about why courts should feel free to interpret ambiguous language to invalidate acts of other public officials. In ordinary life, we frequently confront ambiguous language, and we know that some interpretations are better than others. So, too, ambiguous constitutional language can be interpreted well or poorly; much depends on the context and the purposes of the relevant language. And perhaps judges are in an especially good position to interpret ambiguous provisions, precisely because they are insulated from political forces. In other words, judges' comparative independence may be a virtue, not a vice, even or perhaps especially if the interpretation calls for a judgment of principle. If the question is the scope of religious liberty, it is possible that courts are in a particularly good position to make reasonable judgments, and hence that while respectful of the decisions of public officials, courts

charged with constitutional interpretation should feel to reject those decisions if they seem inconsistent with the best understanding of the constitutional guarantee.

There is a more fundamental point. We should

TABLE I

	Constitution unambiguous against act in question	Constitution ambiguous
Invalidate act	(1) Rule of Law	(3) Judicial overreaching (?)
Validate act	(2) Cowardice; capitulation to politics	(4) Excessive judicial caution (?)

not be too quick to identify the outcomes of any particular political process with democracy. Perhaps the best course is for a constitutional court to interpret ambiguous provisions by reference to democratic ideals themselves—by, for example, assuming an especially large role when rights central to democratic government are at stake, or when groups not able to protect themselves through ordinary politics are at risk. This view, associated with both John Hart Ely (in the United States) and Jürgen Habermas (in Germany), lays great stress on what might be called the internal morality of democracy. Thus it might be said that courts should aggressively review any effort to stifle political dissent (by, for example, limiting criticism of public officials, or reducing the areas where dissenters can make their view heard), and also take strong steps to ensure full political participation and to counteract discrimination against groups at systematic risk in the political process, such as religious and ethnic minorities.

We might therefore conclude, at least provisionally, that a constitutional court acts legitimately when it invokes unambiguous constitutional provisions and when it interprets ambiguous provisions by reference to democratic ideals. When people question constitutional justice, these ideas provide a good place to start. But they raise questions of their own. Democratic ideals can themselves be ambiguous: What do such ideals require in the context of (say) libel law and equality on the basis of sex? In any case a constitutional court will inevitably be dependent on a constellation of political forces that will constrain it in one way or another. That latter lesson—involving the complex relations between theories of legitimacy and practical constraints on legitimacy—may be the principal one emerging from this symposium. Thus a full understanding of constitutional justice would have to consider not only accounts of democracy and (closely related) accounts of legal interpretation; it would also have to connect those accounts to an understanding of real-world limitations on what constitutional courts, consisting of human beings whose reputations, employment, and sometimes even lives may be on the line, are actually permitted to do.

Belarus

Interview with Former Constitutional Court Justice Mikhail Chudakou

Alexander Lukashuk

Mikhail Chudakou was born in 1949. In 1972, he graduated from Belarusian State University (BSU), worked in the attorney general's office as assistant counsel in civil matters from 1972-1976, and completed his doctorate, "The Legal Problems of Individual Participation in Direct Democracy in the USSR," in 1982. From 1977 to the present, he has taught at BSU. From 1990 to 1994 he was a member of the Constitutional Commission and, in June 1996, he became a member of the Constitutional Court. In protest against the president's December 1996 referendum, Justice Chudakov resigned from the Court on January 23, 1997. Before the referendum the Court had 11 members. Following the referendum, seven members resigned or were fired. On January 4, the president reappointed the four remaining justices to the Court and appointed two others. On January 24, the Council of the Republic (the upper house of the National Assembly) appointed five more justices. The post-referendum Court has 12 seats, although to date only 11 seats have been filled.

Alexander Lukashuk: The first Constitutional Court of Belarus existed for two and a half years. What favored and what hampered the work of the Court?

Mikhail Chudakou: First, the executive branch's antagonism toward the judiciary made it impossible to work in a normal way. Our invalidation of presidential decrees was invariably perceived by the executive as intentionally hostile. The executive viewed the Court as a functionary of the opposition. Another factor was that, in the majority of cases, one of the justices always would deliver a "special opinion." Today, the author of these "special opinions" is the new chairman of the Court, Ryhor Vasilevich. The purpose of these "special opinions" was to argue in legal terms why the president was always right. They had a particularly detrimental effect on the Court.

AL: Were these "special opinions" political rather than legal arguments?

MC: Yes. The public perception was that while one group of justices supported one approach,