European University Institute
Department of Political and Social Sciences

Legalization and Juridification—
Judicial Review as a Catalyst of Institutional Change

Dennis-Jonathan MANN

1. **Introduction**

While research on *institutional change* often focuses on the big *formal* change of rules—in that case mostly *laws*—the most interesting institutional change can occur through small, gradual changes of (often *informal*) rules (Héritier 2007: 1). This paper focuses on *legalization* as a special type of institutional change and furthermore narrows down the analysis by focusing on legalization through *judicial review*.

While (constitutional) courts are often left aside in political science studies, they can—as I argue in this paper—serve as mere *catalysts* of institutional change. By looking at two cases, the US Supreme Court (SC) and the German Constitutional Court (*Bundesverfassungsgericht*, GCC) this paper aims to cover what are usually believed to be two of the most powerful *judicial review*-courts (Höreth 2008: 150 ff.).

Two aims are pursued with this paper. The first is to bring courts (and judicial review in particular) to the attention of political scientists studying institutional change. The second aim is to look into the mechanisms by which the two respective courts *boost* or at least facilitate institutional change and what the mechanisms explaining theses outcomes might be.

As a first step (section 2), by contrasting different uses of the concept of *legalization* I seek to define what is to be understood as legalization for the purpose of this text. Secondly, our understanding of legalization is to be connected with the broader framework of institutional change theory.

In the main part (section 3), both of the courts will be analyzed in view of two questions; first, how the respective courts have institutionalized their role and, second, what the mechanisms and processes are by which the courts have triggered ongoing institutional change.

As a conclusion we may find that judicial review can indeed become a trigger for institutional change and that thus, the important role of courts should not be overlooked by political scientists concerned with institutional questions.

2. **Brining together and defining *legalization* and *institutional change***

In this section, the concepts of legalization and institutions are to be defined and brought together so that judicial review can be operationalized as a form institutional change.

2.1. **Legalization and Juridification**

In "Concept of Legalization" Abbott (et al. 2000) understand legalization as a special form of *institutionalization* which can be broken down into three components—obligation, precision and delegation. For instance, if there were strong legalization in all three components we would find a *binding rule* (obligation), which would be *precise* and *highly elaborated* (precision) and would be implemented *domestically* or by an *international court* (delegation).

While these authors' framework to measure (different components of) legalization is presented in a neutral way, in the field of international relations (IR)—to which the text undoubtedly belongs—the term has traditionally been used with a positive normative connotation. The so-called English School of IR is for instance implying that given the "anarchical" character of world politics, the more legalization, the better to overcome this state (Bull 1995).

There is, however, a second use of the term *legalization* that has originated from the field of domestic politics (or constitutional theory in particular). Here, the term is used quite ambiguously (see Blichner / Molander 2005), sometimes mostly descriptive simply meaning "rule of law", thereby often also incorporating normative concepts with a positive connotation. Yet, the more interesting use of the term legalization—then often labeled *jurification* or sometimes *judicialization* (Shapiro / Stone Sweet 2002)—for our purposes is one that understands legalization as the expansion and differentiation of law over time through its implication (Habermas 1987: 357 ff.). Here, also, normative considerations can come into play, often empathizing that the practice of judicial review is in danger of leading to an increase of judicial power vis-à-vis the executive and especially the legislative branch of government.

Furthermore, the mere existence of judicial review is seen as fundamentally changing the logics of the whole political process; in that the political actors anticipate court rulings, they no longer strive for the best (political) solution for a given problem but rather for what they think would be the *constitutional* one. Thereby, the political process is legalized or "judicialized" (Tate / Vallinder 1995: 5 f.; Berger 1997) and the judiciary is in turn politicized (Tate 1995: 28; Schmitt 2003: 199).

In this paper *legalization* clearly is to be used in the second, domestic sense; as an expansion and differentiation of law over time—in our case through the exercise of judicial review. However, the three components of legalization as presented by Abbott (et al. 2000) might be helpful in outlining the focus of this paper. While both cases clearly show strong legalization in all three dimensions, it is the component of *delegation* that we are interested in. Yet, while Abbott et al.'s framework is best suited to (and seems to be targeted to) analyzing the constitutive act of legalization (Blichner / Molander 2005: 6 ff.), our goal is a different one. It is to look into the mechanisms that trigger institutional change through the exercise of judicial review *after* it has been delegated to—or successfully claimed by—a court.

2.2. **Institutions and institutional change**

If we use North's (1990: 3 ff.) definition of an *institution* as an actor-created rule of behavior, constraining and shaping actors' behavior, we have little trouble to accept that a law is a case—if not the *par excellence* case—of a rule of behavior. As a second step, this allows us to conceptualize legalization as an example of institutional change, for instance by (as would be the case for the above presented IR use of the term) regarding legalization as the process of *rules* (laws) being established (institutionalization).

Accordingly, in our understanding of legalization emphasis is to be put on the process of rules becoming more refined, or even redefined, over time by judicial review. Put differently, the kind of institutional change we seek to investigate in is a change in the "rules of the game" (ibid.: 5) caused by the exercise of judicial review.

Regarding the common distinction between *formal* and *informal* rules, the phenomenon of judicial review is particular interesting, yet challenging. While the outcome of judicial review is certainly more than an informal rule which would "not (be) written down, and/or not (be) subject to formal sanctioning" (Héritier 2007: 6) in that court decisions are themselves binding law and can therefore be enforced, two features—while not generally questioning it—put into perspective the quality of judicial review as a *formal* change of rules. While a court ruling is for sure formal in the sense that it is "written down" (ibid), judicial review can, however, *without* altering the actual text (e.g. a constitution)—as e.g. a formal amendment would do—change the meaning of a text *without* a change in the wording of that respective rule.

Furthermore, (constitutional) courts are notorious for their lack of political *power* because they have to rely on the other branches of government to respect and enforce their rulings, making them highly dependent on their authority, which also resembles some of the qualities usually associated with informal rules.

3. **The mechanisms of institutional change through judicial review**

While the normative questions regarding judicial review are undoubtedly highly interesting,[1] here, however, we will have to limit our research to a purely descriptive look into the mechanisms of judicial review.

Both of the two courts' analysis will be divided into two steps. First, we look what the respective court did to establish, operationalize or expand judicial review and how this already changed the overall rules of the game. As a second step we then look into how exactly the specific *application* of judicial review by those courts has further triggered institutional change.

3.1. **The US Supreme Court**

While making the judiciary the final arbiter of constitutional interpretation was already considered by Hamilton (2003) in Federalist № 78, it was ultimately the U.S. Supreme Court (1803) itself that claimed the final say about the interpretation of the law (including the US Constitution) could only be his.

Often overseen but not least significant, it was not only that the SC claimed—and ultimately successfully defended (Chemerinsky 2003: 265 ff.)—the right to exercise judicial review over federal law, but that at the same time that the SC claimed "the authority to decide whether a particular issue is a matter for federal appeal in the first place" (Boom 1995: 89). Both characteristics taken together transferred the SC from merely being the highest court on the federal level into the highest court of the whole polity including all the functions attributed (from today's perspective) to a constitutional court (Shapiro 2006: 195).

To be sure, this "invention" of judicial review by the SC alone can be seen as a case institutional change—or, as the creation of a new institution—in that the mere existence of *judicial review* itself

[1] Tate (1995: 28 ff.) gives a typology of these debates in which he distinguishes discourses over judicial review related to "Democracy", the "Separation of Powers", "Politics and Rights", "Interest Group Use of the Courts", "Opposition Use of the Court", "Ineffective Majoritarian Institutions", "Perceptions of the Policy-Making Institutions" and finally "(Willful) Delegation by Majoritarian Institutions" to courts.

fundamentally changed the rules of the game between the political powers, thereby shaping each ones strategies and goals (Thelen / Steinmo 1992: 9).

Leaving aside this question of rather "big bang" (Héritier 2007: 1) institutional change we shall focus on the most important mechanics of a more gradual institutional change caused by the SC's judicial review.

3.1.1 **Broad construction as a mechanism of institutional change**

Without claiming that it is the only one, the doctrine *broad construction* can clearly be seen as a most important vehicle by which the SC has triggered institutional change. By a broad reading of the so called "necessary and proper clause" (US Constitution, article 1, section 8, clause 18; Tribe 2000, § 5-3 ff.) Chief Justice Marshall argued, that the enumerated powers of the federal government *implied* also all the powers needed to "carr(y) into execution" the assigned duties to it (U.S. Supreme Court 1819).[2]

Pairing this principle with the US Constitution's "commerce clause" (US Constitution, article 1, section 8, clause 3) allowed the Supreme Court to establish a constitutional basis that would enable the federal government to legislate in a wide variety of fields as long as the federal law could be somehow tied to regulating (interstate) commerce, exemplified by the SC's statement "motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control" (U.S. Supreme Court 1941).

A second mechanism by which the SC has altered the institutional setting of the United States' polity can be found in the courts interpretation of the US Constitutions 14th amendment. Usually being traced back to the so-called *slaughter-house cases* (U.S. Supreme Court 1873) the SC started to develop a broad reading of the provision that "no state shall (...) deny to any person within its jurisdiction the equal protection of the laws" (US Constitution, 14th amendment, section 1) which gradually led to an incorporation of (portions of) the *Bill of Rights* to be applied to the states also (*incorporation doctrine*).

3.1.2 **The US Supreme Court—a catalyst of centralization?**

[2] „Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (U.S. Supreme Court 1819: Justice Marshall, Opinion).

While the patterns of SC's interpretation of the commerce clause have at all times varied a great deal (Donahue / Pollack 2001: 80; Höreth 2008: 203 ff.), broad construction definitely gained additional momentum after Roosevelt's (failed) court packing plan ultimately caused what some consider nothing short of a "Constitutional revolution" (Corley 2004). It was this revolution that finally made the SC accept Roosevelt's *New Deal* programs which immensely increased the federal governments role (Donahue / Pollack 2001: 85 ff.).

While recently—beginning with "United States v. Lopez" (U.S. Supreme Court 1995)— the SC has started to (re-)apply stricter standards for the federal government when tieing legislation to the commerce clause, the overall tendency of the courts impact on the institutional arrangement of the US is clearly that of a consolidation and centralization of power at the federal level (Donahue / Pollack 2001: 91 ff.).

The same can be said of the about the incorporation doctrine which radically increased federal power—not least that of the SC itself—in that it allowed federal provisions to be enforceable against state governments, thereby tightening the scope of state action.

We may therefore conclude, that the SC's judicial review has had a twofold effect on the institutional arrangement of the United States. First, claiming to be the final arbiter of constitutional interpretation has enabled to SC strengthen its own position vis-à-vis the other powers and thereby already has triggered a great deal of institutional change. Secondly, the specific doctrines the SC has developed in excising judicial review have served as a mechanism by which the court could not only solidify its own position, but—on the whole—also facilitated an increase in federal power.

3.2. **The German Constitutional Court**

Unlike the SC (Shapiro 2006: 195), the GCC is following the Austrian model of a separate court whose sole purpose is dealing with "issues of constitutionality" (ibid.). Hence, in contrast to the SC, the GCC did not have to claim judicial review because its exercise is the main purpose of the court, clearly allocated to it by the German Basic Law (articles 92 ff.).

Also, the GCC didn't have to establish its jurisdiction vis-à-vis the German states (*Länder*) since—unlike the US court system's "two-tired structure" (Amar 2005: 209) that resembles dual-federalism—Germany's cooperative federalism provides for an integrated court system in which the

state-organized lower courts are overseen by federal appellate courts (or, as to be shown below, in the case of the GCC rather a *super-appellate* court).

3.2.1 "**Third-party effect" of fundamental rights and cooperative federalism**

Clearly, compared to the SC, the GCC has a highly precise mandate of engaging in judicial review as far as the formal rules are concerned. Yet, for instance, the Austrian example clearly shows that a powerful *formal* position of a court must in practice by no means go hand in hand with—to make use of this normative challenged word—an *activist* court (Mason 1986: 7 ff.).

Accordingly, also in case of the GCC we are—apart from the changes that the mere existence of judicial review might cause in an institutional setup—able to find certain mechanisms by which the court has been able to increase not only its own responsibilities but also shifted the logic of the German federal system.

Surprisingly, it was not primarily through its function as a mediator for disputes over competences and procedures (be it state-federal disputes or federal disputes) that the GCC changed the rules of the game but rather through its interpretation of the German Basic Law's fundamental rights. Starting with the "Lüth" case (German Constitution Court 1958a) the court developed the doctrine of a *third-party effect* ("Drittwirkung"; ibid.: 204) of the Constitution's fundamental rights. Thereby, the court held, the fundamental rights did not just apply to state action but would also apply to all legal relationships between citizens. In other words, every statutory (especially of civil law) has in any case to be interpreted in light of the constitutional provisions (ibid.: 208).

In the same case, the GCC also ruled that the fundamental rights acknowledged by the German Basic Law are not to be seen as separate, specific provisions protecting the people's rights against the government. Rather, the GCC argued, they are—being more than the sum of their parts—to be seen as an interconnected concept of *objective ethical values* ("objektive Wertordnung"; ibid.: 205) or and that it is on the court itself to develop and enforce this "coherent normative order" (Abromeit / Hitzel-Cassagnes 1999: 29).

Combining the two doctrines allowed the GCC not only to increase the legal protection of the German citizens but also to turn almost any legal dispute into a matter of Constitutional law. Thereby, the court transferred its role from that of a specialized court for the interpretation of the German Basic Law into a *super-appellate* court on almost all legal matters. By outlawing a great deal

of customary status—or *reinterpretating in light of the Constitution* ("verfassungskonforme Auslegung")—the GCC has effectively *rewritten* large parts of the German civil as well as the criminal code and thereby not only changed the basic institutional rules of the political game but literally *legislated in detail* also.

A second striking mechanism by which the GCC has—at least until the court for the first time changed its "agenda" (Scharpf 2005: 11)—altered the institutional arrangement is its broad reading of the German *Bundesrat*'s (literally *federal council*)[3] veto powers. In that the German Constitutional Court's (1958b) one-entity doctrine (*Einheitstheorie*) demanded the approval of *all* provisions of a bill by the *Bundesrat* even if the Länder's competences where only affected by bits of administrative procedure included in the bill, the court contributed a great to increasing the interlock between federal and state level and thereby aggravated what Scharpf (2005: 3 f.) has coined the "joint decision trap".

3.2.2 **The GCC—a catalyst of juridification and cooperatization?**

While the German Basic Law explicitly assigned to the GCC the task of judicial review, the German court did not follow the modest approach of, for instance, the Austrian Constitutional Court (*Verfassungsgerichtshof*) but rather took an activist role.

The GCC's two most important vehicles in exercising judicial review have led to two sorts of institutional change. As could be shown, it was the interpretation of the fundamental rights and, more specifically, the concept of a *coherent normative order* that has been a mechanism by which the court has not only greatly extended its own role but also gradually *juridified* the institutional rules in the sense that almost every instance of (private) legal interaction can become a matter of Constitutional reasoning—to be resolved by the GCC.

Secondly, while maybe well intentioned to increase the German *Länder*'s rights vis-à-vis the federal government, the courts broad reading of the *Bundesrat* veto power ironically further limited the states' autonomy in that it (further) strengthened the cooperative features of German federalism. This mechanism, though of course not creating the German "joint decision system" (Scharpf 2005: 2 ff.), with out a doubt played a key role in turning the system into a trap. In summary, the overall

[3] Germany's *second chamber of the federal legislative branch* constituted by the executive(!) branch of the *Länder* (states).

effect of judicial review in the German case could be characterized as a further *cooperatization* or *unitarization* of the federal arrangement.

4. **Conclusion: Institutions matter—so does judicial review**

We started out with the concept of legalization as a case of institutional change (as presented by Abbott et al.); while this IR framework was found to be helpful concerning the constitutive act of legalization, it was considered unsatisfactory when looking into possible effects *after* the event of delegation. Accordingly, additional—domestic—concepts of legalization (or juridification) were introduced in order to be able to capture potential, gradual institutional changes *ex post* the act of delegation.

Conceptualizing legalization as the *expansion and differentiation of law over time through its implication* allowed us to examine the practice of judicial review as a case of legalization. In a next step (section 2.2.), this framework was linked to the theory of *institutions* and its distinction between formal and informal rules. This allowed for judicial review to be conceptualized as a case of *institutional change*.

Following (section 3), this theoretical model was applied to two cases—the US Supreme Court (SC) and the German Constitutional Court (GCC)—in order to first look into general, and subsequently to look into more specific mechanisms by which judicial review may cause institutional change.

In both cases, while the invention (SC) or the existence (GCC) of judicial review alone was found to have greatly impacted the institutional arrangement of the respective polities, specific mechanisms could be identified that literally served as "catalysts" in gradually changing the respective systems.

In the case of the SC, it was the doctrine of *broad construction* in conjunction with the *commerce clause*, as well as the concept of *incorporating* (parts of) the Bill of Rights into the 14th amendment, thereby applying it to the state level, that were found to have the most profound impact in terms of institutional change. The effect, or outcome, of this mechanism was found to be—at large—that of a *centralization* of powers on the federal level.

The GCC on the other hand was found to have initiated two quite differing mechanisms by its exercise of judicial review. Surprisingly, it was not primarily through a broad construction of federal powers in state-federal disputes but rather by its doctrines of a *third-party effect* and a *coherent normative order* of the German Constitution's fundamental rights by which the GCC boosted institutional change. These doctrines allowed the court to turn virtually all legal questions into a matter of *constitutionality* and thereby enabled the GCC to establish itself as a German super-appellate court, effectively rewriting a large portion of the German legal order. This mechanism used by the GCC was therefore characterized to be a catalyst of *juridification*.

A second important mechanism identified was the GCC's role in broadening the German *Bundesrat*'s veto powers through the court's so called *one-entity doctrine*. This was seen as having been a main factor in turning Germany's *joint decision system* into a trap and was therefore understood as a *cooperatization* (or unitarization) *mechanism*.

In sum, our findings suggest that the practice of judicial review in an institutional setting can set the path for different sorts of institutional change. Yet, the fact that the outcomes of institutional change are sharing characteristics of both formal and informal rules makes them hard to analyze—also, judicial review is often impacting institutional arrangements only gradually over long periods of time. Both reasons might explain why the relevance of courts, and judicial review in particular, is often overseen by political scientists studying institutional change.

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