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Subnational Constitutional Adjudication and Judicial Activism in Germany

by

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Abstract

In this paper, I examine the degree and causes of judicial activism in a German subnational constitutional court. This research goal entails two dimensions. On the one hand, I explore whether and to what extent a German subnational constitutional court affects the scope of maneuvering of subnational parliaments and has thus developed a tendency towards judicial activism. I determine the degree of judicial activism with a newly developed "strength index" that measures possible reverberations of decisions made by constitutional courts in the political realm. In this respect, the project addresses a central theme of constitutional democracies: the tension between political self-determination and constitutional adjudication. On the other hand, I assume that judicial activism in the German Länder depends on the competencies and the composition of the court. The project thus combines attitudinal/behaviorist and institutional-theoretical approaches to provide answers to the research question at hand. To provide a comprehensive understanding of the role, subnational constitutional courts play in the German Länder. I apply two methods: linear regression and crisp-set Qualitative Comparative Analysis.

Key-words

federalism, constitutional adjudication, judicial activism, constitutional courts Germany

1. Introduction

According to Ran Hirschl we can see a "global trend toward juristocracy" which is "part of a broader process, whereby political and economic elites, while they profess support for democracy, attempt to insulate policymaking from the vicissitudes of democratic politics" (Hirschl 2004: 73). As many other scholars examining the effects of judicial review on politics Hirschl presupposes that there is a tension, maybe even a contradiction, between major branches of government. In the end, the democratic "rule of law" will be replaced by an elitist or even semi-authoritarian "rule by law". At the same time, like many other scholars addressing such questions Hirschl ignores subnational constitutional courts. They just do not play any role in these concepts (e.g. Halberstam 2009; Williamson 2006, 2018). Even though constitutional democracies seem to require strong and effective constitutional courts it seems sufficient if there is one at the national level. Furthermore, studies on constitutional courts use different theories, apply varying methods, and refer to multiple data sets and cases (Rehder 2007; Epstein et al. 2013: 65-100; Maveety 2003).

I address both shortcomings in the research on constitutional adjudication in this paper: From a broad perspective, I hit the same path as other European researchers who examine the role of constitutional courts in political systems (Hönnige & Gschwend 2010; Hönnige 2011; Dyevre; 2010). In the same vein as these researchers, I focus on the question as to how "legal activity ... unfolds at the expense of political action" (Rehder 2007: 10). To put it differently: I strive to describe and explain judicial activism. Yet, distinct from other studies I take a different approach in three respects. Firstly, I limit my analysis to a subnational constitutional court in Germany. So far, German research on constitutional courts ignored the subnational level and failed to explore how far the constitutional courts of the Länder affect politics. Secondly, most research on the effect of constitutional courts is either based on a few examples and rulings or rather general measurements. I will determine the effect of judicial activism with a newly developed "strength index" to measure possible reverberations that decisions of subnational constitutional courts might have in the legislative realm. Thirdly, I will try to answer my research question by integrating two methods that should allow me to substantiate my findings in a robust manner. In a nutshell: Empirically, I study an institution overlooked by political scientists in Germany. Theoretically, I try to combine

attitudinal and institutional-theoretical approaches, and methodologically, I use a multi-method approach to study judicial activism at the subnational level.

To answer my research question about the causes and effects of subnational constitutional adjudication in the German Länder[I] I will first present the basic theoretical approaches that try to explain judicial behavior and judicial activism. In the second step, I describe my methodological approach. Thirdly, I will identify causes as well as sufficient and necessary conditions that might give a reason for judicial activism. Finally, I will draw some tentative conclusions.

2. Constitutional Courts and Politics: Theoretical Perspectives

Research by political scientists on German subnational constitutional adjudication is almost non-existent. Apart from introductory overviews that describe some basic features of German state constitutional courts (Leunig 2007: 200-208; Lorenz 2016), there are just studies by Martina Flick (2008, 2009, 2011a, 2011b) and an edited volume that includes articles on all 16 German Land constitutional courts (Reutter 2017a, 2017b). However, these studies address the question I am interested in not systematically. Thus, I must refer to theories mostly based on research on national constitutional courts.

The term "judicial activism" is dazzling. It is an offspring of the theoretical debate on how the separation of powers can best serve democracy (Green 2009; Kmiec 2004). According to Keenan D. Kmiec (2004), the term was introduced by Arthur M. Schlesinger in an article in the Fortune magazine in 1947. With this term, Schlesinger described a group of judges that was "more concerned with the employment of the judicial power for their conception of the social good" (Schlesinger 1947: 201). The other group that Schlesinger coined as "Champions of Self Restraint" (Schlesinger 1947: 76f) saw the Supreme Court as an instrument "to permit the other branches of government to achieve the results the people want for better or worse" (Schlesinger 1947: 201). Even though the term judicial activism has been defined many times since then there is still no understanding that seems to be generally acceptable. In consequence, many scholars see judicial activism as an "empty term" (Kmiec 2004: 1444) that hardly carries little more "than a pejorative connotation" (Kmiec 2004: 1444). Others, however, use the term to examine and measure the outcome of judicial decision-making (Hagan 1998; Cross & Lindquist 2007; Solberg & Lindquist 2006; Canon

1983). All studies using this concept endorse the idea that judges are not human computers but might pursue political preferences (Hönnige 2011). From this perspective constitutional courts encroach on the competencies and the functioning of the political system. Alec Stone Sweet provides a more catchy and quite well-known understanding of the relationship between the legislature and constitutional courts: He concludes: „In the end governing with judges means governing like judges" (Stone Sweet 2000: 204). This also means that the separation of powers risks of losing its balance. In both perspectives, the judiciary is not just a check on the legislature or politics anymore but either influences or even takes over legislative functions. This understanding of the relationship between the judiciary and the legislature triggered different interpretations and explanations (Dyevre 2010; Epstein et al. 2013: 25-64; Rehder 2007; Hönnige & Gschwend 2010; Hönnige 2011). We can distinguish normative-legalistic theories, behaviorist concepts, and institutionalist approaches (table 1). All these approaches try to capture the forms and the degree of judicial activism and explain judicial behavior that might give reason to strong decisions.

Table 1: Research perspectives on constitutional courts and politics (according to Rehder)

	Normative-legalistic approaches	Behaviorist (American)	Institutionalist (European)
Level of analysis	Court (macro-level)	Judge (micro-level)	Court (macro-level)
Dimension of analysis	Judicial decision making based on legal reasoning	Process: politics of judicial action	Effects: political impact and function of judicial action
Perception of the legal system	Autonomous sphere	Extension and part of the political system	Autonomous sphere
Interaction of legal and political system (judicial activism)	Constitutionalization of politics; check on politics	Politicization: politics invades legal sphere	judicial action invades or displaces politics

Source: based on Rehder 2007: 17; my amendments.

Normative-legalistic approaches, mostly represented by legal scholars, already challenge the idea that judges can be "politicians in robes" at all (Epstein et al. 2013: 2). Researchers adhering to this view describe the role of courts in legalistic terms and deny that other factors than judicial reasoning affect constitutional adjudication. The godfather of this strand of theory is nobody else but Charles-Louis de Secondat, Baron de La Brède de Montesquieu. According to Montesquieu judges are mere "the mouth that pronounces the words of the law", "la bouche, qui prononce les paroles de la loi" (Montesquieu 1748/1979: Book XI, chapter VI). Thus, for Montesquieu and his disciples judicial behavior is immune to extralegal considerations. Personal interests, policy preferences, or the social background of a judge ruling on a case will not affect the outcome of a trial. Even though I simplified this understanding (but not much), it describes the way German scholars understood the role of courts and judges in the German legal system for a very long time quite accurately (Beyme 2001; Rehder 2007; Dyevre 2010: 297f.). In consequence, nobody else but the legislature creates law. Judges merely discover laws and are supposed to apply these laws to facts in case of disputes "literally and in strict accordance with the legislator's will" (Kommers 1976: 44). In other words, politically neutral judges decide or adjudicate upon laws according to methods well-established. In this perspective, a German judge is a "human computer" (Epstein et al. 2013: 50) or "a cog in the wheel of judicial administration, unmoved by feeling or even conscience" (Kommers 1976: 44). This theory of judicial behavior has been coined "legalism"; it is rooted in "legal positivism" most intriguingly developed by Hans Kelsen (1942; cf also Epstein et al. 2013: 2). Insofar constitutional adjudication is purely jurisdictional reasoning. Constitutional courts as "negative legislatures" (Kelsen 1927) do not perform legislative functions at all, but just apply constitutional law to political issues. In consequence, judicial activism is a necessary and legitimate consequence of decisions made by constitutional courts that make politics comply with constitutional stipulations. In this perspective, judicialization or judicial activism is but "constitutionalization" of politics.

For obvious reasons, political scientists can hardly endorse such a view. Already due to their professional identity, they have to challenge the normative-legalistic understanding of judicial review and constitutional adjudication because many scholars of political science share a realistic view on judicial behavior and try to find out whether there are extralegal variables that shape rulings made by judges. Besides, they prefer to interpret the preconditions for and the effects of constitutional adjudication in terms created by political

scientists. Even though attempts to explain "judicial behavior in causal-positive rather than legal-normative terms [were] initially an all-American enterprise" (Dyevre 2010: 297), we also find important studies on German political justice going as far back as the early twenties. Emil Julius Gumbel, a legal scholar from the Weimar Republic, pioneered in this respect. According to his findings, criminal courts sentenced communist or leftist perpetrators to long-term imprisonment or even to capital punishment far more often than nationalistic or rightist criminals who committed significantly more and significantly more severe political crimes. Gumbel (1922) assumed that one reason for the differences in sentencing was the social and political background of the judges. Gumbel's study triggered a lasting debate on "class" or "political justice" and about judges that seemed to be more committed to conservative – or "Prussian" – values and to protecting privileges of incumbent elites than to apply impartially laws to facts (Kirchheimer 1993; Fraenkel 1927/1999; Jasper 1992). Hence, to understand judicial behavior, we cannot ignore the social and political background of the judiciary. Even though the American debate on "legal realism" has been triggered by other precedents and developments it shares the same underlying premise that judges are not "human computers" and court rulings are not just about applying laws to facts.

In spite of this common starting point, the European and the American research on judicial behavior, judicial activism, and judicialization took two different paths: Since Charles Hermann Pritchett's (1948) seminal study on the Roosevelt Court, the American research focuses on judicial behavior of single judges. In addition, all seminal studies on judicial behavior and judicial activism share a data analytic perspective covering all conceivable aspects of the judiciary (Pritchett 1948; Segal & Spaeth 1993; Murphy 1964; Epstein & Knight 1998; Epstein et al. 2013). Nonetheless, it would be misleading to assume that there is just one American approach to studying judicial behavior. According to Hönnige (2011; cf. also Dyerve 2019; Epstein et al. 2013: 26-64) we can distinguish three schools in the American literature on constitutional courts and judicial behavior: The "attitudinal model" strictly speaking stresses political preferences of judges. According to this approach, ideology is crucial for understanding the decisions made by courts. Political preferences and values count as the essential variables in explaining judicial behavior. The "strategic model" that Britta Rehder (2007: 14) regards as a "more sophisticated version of the attitudinal model" takes judges "as participants in the labor market" (Epstein et al. 2013: 25). In this broader rational choice perspective, the judges rule according to a utility function that shapes

decisions. This approach takes other actors and the institutional environment into account. Judges make their choices because they can only realize their goals when they consider choices other actors make. Finally, "interpretativists" attempt to explain judicial behavior with historical and sociological factors (Hönnige 2011). This approach can also be coined "personal attribute model" (Tate & Handberg 1991) which is a spin-off from the attitudinal model, as well. According to the personal attributes model, the social, professional, and economic background make the judges decide their cases in the way they do. Even though these concepts very often are lumped together under the heading of "legal realism" (Epstein 2013: 5) they take different stances on the issue at hand. Nonetheless, they share the premise that judges are not "calculating machines". On the contrary, judges enjoy a large degree of discretion (Epstein et al. 2013: 26). This leeway is shaped by extralegal motives.

Distinct from these dominant American approaches "research on European courts has never strived to explain judicial decision-making, but it confines itself to analyzing the effects of judicial action on politics and the political system" (Rehder 2007: 5). This focus on the effect of rulings and the institutional set-up is partly due to the fact, that researchers lacked data on judges and judicial decision-making in European constitutional courts. Very often, we do not even know whether a constitutional court has made its decisions unanimously or not. Making the best out of this lack of data, studies on European constitutional courts conceptualize these institutions as unitary actors. In this perspective, it is not the single judge, his or her background or the professional ambition that is supposed to explain the outcome of a judicial process. Instead, European researchers focus on the effects of judicial actions on politics and the political system. However, this perspective presupposes that the legal and the political system still operate differently. According to Rehder and others (Rehder 2007), from the European perspective the judicial and the political system act according to different logics. Legal action is supposed to be governed by "rules" while political action is "interest laden" (Stone 1994: 446; Vallinder 1994: 91). Accordingly, judges have to argue while politicians must bargain, and judicial decisions are based on deliberation while political decisions are ruled by the "majority principle". In this perspective, courts remain autonomous institutions and the judicial system invades or dominates the political system (table 1).

The assumptions that I try to verify in the following analyses are spin-offs from two of the aforementioned theories. I, thus, try to bridge the gap between the American and the

European paradigm. My level of analysis will be a single court, and I will try to determine judicial activism, i.e. the effects of court rulings by measuring the strength of decisions the BCC has made. Insofar I assume the legal system as an autonomous sphere that might encroach on state politics. At the same time, I will ask whether the composition of the court has had any effects on the outcome. Hence, it is not the individual values, the behavior, or the utility function of a single judge that I refer to. Instead, I will refer to the background of the judges that I will regard as a ruling body. In addition, I have to take into account the aforementioned institutional set-up. I do, thus, justice to the idea that judicial activism might be due to multiple causes.

3. Analyzing Judicial Activism with a Multi-Method Approach

From a methodological point of view, there are three ways to verify hypotheses or test theories: qualitatively with case studies, quantitatively with statistical techniques, and with a hybrid method called qualitative comparative analysis (QCA) (Reutter 2014). In this paper, I will use the last two methods, i.e. a crisp-set Qualitative Comparative Analysis as well as regression analysis. By using two methods to analyze the data at hand I strive to improve the validity of my results and broaden the understanding of the phenomenon to be explained. This kind of "sophisticated rigor" (Denzin 1989: 235) aims to better comprehend political and social phenomenon (Meuer & Rupietta 2016; Flick 2011b; Creswell 2014; Reutter 2018b: 161-163). As many researchers are not very familiar with QCA and as this is the first time that this tool is used to study constitutional courts and judicial activism, I will briefly outline the basic features of this method. Chapter 5 will provide further information on how I applied this method to study the causes of judicial behavior and the effects of constitutional adjudication by a German subnational constitutional court.

According to Charles C. Ragin who invented this method QCA is a means to "simplify complex data structures in a logical and holistic manner" (Ragin 1987: viii; cf. also: Legewie 2013; Rihoux & De Meur 2009; Reutter 2014, 2019, 2018: 101-129). QCA thus tries to "integrate the best features of the case-oriented approach with the best features of the variable-oriented approach" (Ragin 1987: 84). In other words, a QCA should preserve the information and the detailed knowledge qualitative research can acquire about single cases. Any QCA is, hence, case-oriented. It accepts the fact that outcomes are rarely due to just a

single cause, and cases are described as „configurations of conditions", to capture the complexity of cases in an encompassing and holistic way. At the same time, a QCA aims to overcome a major shortcoming of qualitative research: to compare cases. A QCA thus tries to make cross-case comparisons possible that meet the standards used in quantitative research and in statistics. QCA is a tool that allows comparing cases in a systematic, transparable and replicable manner und „to determine the different combinations of conditions associated with specific outcomes or processes" (Ragin 1987: 14; cf. also Rihoux & Ragin 2009). To identify patterns across cases, QCA applies the "Boolean logic" that helps to minimize complexity and explore causal links between conditions and outcome (Marx & Dusa 2011: 105 f.). It has to be pointed out, that QCA is based on the analysis of relations between a small or intermediate number of „sets". From this perspective, causal relations are set relations. For example, if we want to test the assumption that all „liberal courts" make „strong decisions" we have to define when we regard a court as a member of the set of liberal courts and when we see a decision as strong enough for being part of the set of strong decisions. Based on these definitions and our findings we can explore if the courts that are a member of the set of liberal courts make are also part of the set of courts that make strong decisions (Schneider & Wagemann 2007: 31ff.; Rihoux & De Meur 2009). Finally, QCA privileges parsimonious explanations. It leads to lean case descriptions and triggers basic equations that the researcher must interpret.

Yet, as Meuer and Rupietta QCA (2016) have rightfully pointed out, QCA and statistical analysis show specific features and differ in their epistemological premises. Distinct from QCA, statistical analyses rely on much larger data sets and explore correlational relations between independent and dependent variables. It is a deductive approach that allows to improve the predictive powers of theories and to test hypotheses derived from these theories (Meuer & Rupietta 2016: 6f). In contrast, qualitative research like QCA aims at inductively enriching concepts or identifying new constructs and thus improve the explanatory power of theories. These two methodological views resonate in the way how hypotheses are constructed (table 2). While linear regression analysis needs variables that quantitatively measure attributes across cases, QCA describes features of cases by defining conditions. Concerning the research question addressed in this paper and based on the theories outlined above I will try to verify four hypotheses. Depending on the methodological perspective these hypotheses take different forms, though (table 2). Furthermore, I have to

operationalize and to calibrate the outcome as well as the conditions resp. the variables in varying ways and based on the methodology used. Yet, before describing the variables and the conditions that might give reason to judicial activism I will lay out some basic features of the Berlin Constitutional Court.

Table 2: Linear Regression Analysis and Qualitative Comparative Analysis: Types of Hypotheses and Outcome

		Type of Hypotheses to be tested with	
	Condition / Variable	Regression Analysis	Qualitative Comparative Analyis
H1	Type of proceeding (abstract judicial review)	Decisions of the BCC tend to be stronger in cases of abstract judicial reviews	If a decision qualifies as an abstract judicial review it will be a strong decision
H2	Age of decision	Older decisions show a lower degree of strength than more recent ones.	An old decision will be a strong decision
H3	Oppositional judges (ideology)	Courts with a higher number of "oppositional" judges make stronger decisions than courts with a lower number of those judges.	If there are more than three "oppositional" judges decisions will be strong
H4	Professional Judges	Courts with a higher number of professional judges make stronger decisions than courts with a lower number of professional judges.	If there are more than three professional judges decisions will be strong
Outcome	Judicial Activism	Strength of decisions	Strong / weak decisions

Source: my compilation.

Berlin established its constitutional court after unification. After a lengthy and complicated process, the Berlin Constitutional Court (BCC) came into force in March 1992 when the state parliament, the House of Representatives of Berlin, elected the first judges to the court (Reutter 2017c, Reutter 2018a). The BCC consists of the president, the plenary meeting of all judges, members of the research staff, and the administration. The president chairs the plenary meetings, manages the general administration, and represents the constitutional body externally. According to the rules of procedure, the plenary deals with basic questions and decides on cases with the majority of votes. The court is entitled to come to a decision if at least six judges are present. Abstention from voting is not an option. On average, the judges meet once per month. If we take reports of former presidents and vice presidents as a reliable source, we should find teamwork, expertise, and collegiality reigning among the judges (Finkelnburg 2001; Schudoma 2012, 2014; Sodan 2008). Most importantly, the judges serve on a part-time basis at the court. They make their living as a judge at an ordinary court, as a professor at a university, or as a lawyer in a law firm and fulfill their duties at the BCC in some moonlighting fashion. This is possible because the caseload is limited. On average the Berlin Constitutional Court has to deal with about 180 motions per year. Apart from constitutional complaints that create the major chunk of the workload, the BCC's most important cases concern disputes between state organs and electoral complaints. There are only a few judicial reviews, which according to Hans Kelsen (1942) is a core element of constitutional adjudication.

4. Operationalizing the Variables for the Regression Analysis and Calibrating the Conditions for the csQCA

Ragin and others stress the point that operationalizing variables for regression analysis and calibrating conditions in a csQCA are two different things notably because variables are just measuring characteristics of cases without taking the contexts in which these variables operate properly into account. In contrast, a csQCA requires me to describe cases as configurations of conditions and to determine when a case is a part in a set and when it is not. In other words, I have to define thresholds to build a dichotomous data table. Hence, in a first step, I describe and explain the variables I use in the regression analysis and calibrate

the conditions for the csQCA. As the rules of "Good Practices" require (Schneider & Wagemann 2007: 266-271) I start with the outcome and then proceed with the variables that are supposed to explain the outcome resp. the conditions that are supposed to give a reason for the outcome.

4.1. Judicial Activism as Dependent Variable and as Outcome

As pointed out, I equal judicial activism with strong decisions made by the constitutional court of Berlin. The assumption, then is, that strong decisions manifest a "lack of deference" (Hagan 1988: 98: cf. also: Canon 1983: 238; Solberg & Lindquist 2006: 240-241) to the parliament in Berlin. To determine the strength of decisions I use an index that has been invented by Kálmán Pócza, Gábor Dobos, and Attila Gyulai who however try to measure judicialization with this index (Pócza et al. 2017; Pócza & Dobos 2019). I assume that strong decisions equal strong judicial activism while weak decisions lead to weak or no judicial activism. The preconditions inherent in these equations need some explanations. Three aspects are important in this respect.

First, I do not take into account whether politicians, political institutions, or the bureaucracy comply with prescriptions made by the BCC. Like Pócza et al. (2017) I just measure the strength of decisions, not their actual impact. To highlight what they mean with the term "strength", Pócza et al. refer to a boxing metaphor: In boxing terms, mapping out the strength means to measure "the power of a punch", not the impact the punch had on the other boxer. Pócza et al. (2017: 1563) do thus not consider whether the opponent "could side-step or has been only a little shaken" regardless of the strength of the punch. They just refer to the power of the punch and to the power of the punch alone. For my study, this means that I only refer to decisions of the Berlin Constitutional Court and nothing else and thus exclude reactions of the legislature to rulings of the court, which is in line with the term judicial activism that also exclusively refers to decisions courts have made (Pócza & Dobos 2019).

Second, Barbara Geddes (2003: 131-174) has rightfully pointed out that the evidence used in a research project affects the answers of this project. Of course, this truism holds for my study, as well. So, what is the evidence I use? The evidence can only be decisions made by the BCC. However, I do not include all decisions the BCC has made since 1992. That is not only far too many but most of them will not contribute to answering my research

question in the first place. More than 95 percent of all motions submitted to the BCC are constitutional complaints of which just 3 to 4 percent find a positive outcome for the claimant. Even if a constitutional complaint has a positive outcome for the claimant this does not entail legislative actions. At the state level, such decisions just trigger a change in the way in which laws will be applied by public authorities. These proceedings do not force the legislature to adjust or change a law, though. Even at the federal level only a few constitutional complaints caused legislative consequences and triggered "important decisions" (Lembcke 2019). Hence, I excluded constitutional complaints from my analysis. This leaves me with 128 proceedings for the period between 1992 and 2015. These proceedings address disputes between state organs (64), electoral complaints (45), abstract and concrete judicial reviews (11), and popular petitions (8). However, as I focus exclusively only on politically "salient decisions" as recommended by Pócza and Dobos (2019: 25f.) I further reduced the number of cases by including only decisions that have been regarded as important enough to be published in print since 1993. In sum, this leaves me with 45 decisions, including 5 abstract and 5 concrete judicial reviews, 14 disputes between state organs, 2 disputes concerning rights of city districts, 10 proceedings concerning the scrutiny of elections and 9 on direct democracy.

Third, as pointed out, I understand judicial activism as the degree as to which decisions of constitutional courts might infringe upon the legislature's competencies. In cooperation with an international group of comparative scholars, Kálmán Pócza and his colleagues developed a "strength index" that should allow to mapping out the strength of decisions made by constitutional courts. I have modified this approach slightly, to make the index more suitable for the purposes and goals of my research (Pócza et al. 2017; Pócza & Dobos 2019: 11-21). My index is composed of four elements (table 4):

- *Ruling*: The ruling captures the basic decision made by the court normally laid down in its tenor. For example, the court can reject a motion or find a law unconstitutional due to omissions or due to some procedural issues. In these cases, the legislature can easily remedy these problems. It is different if the law has been found unconstitutional for substantive reasons. In this case, the court provides guidelines for the legislature.
- *Completeness:* A court can invalidate a law completely or partially.

- *Timing:* Furthermore, a court can annul a law *pro futuro*, *ex nunc* or *ex tunc,* which has different consequences for the legislature.
- *Prescription:* Finally, the court can make binding prescriptions for the legislature or no prescriptions at all.

Decisions receive a score based on these four dimensions, with a maximum of 12 points possible. A low score means little or no judicial activism, higher scores mean strong judicial activism.

Table 3: Components and elements of judicial decision.

Ruling	Rejection or refusal (0.0)	Unconstitutionality by legislative omission (0.25)	Procedural unconstitutionality (1.0)	Constitutional requirements (2.0)	Substantive unconstitutionality (5.0)	Constitutional interpretation in abstracto (7.0)
Completeness	Qualitative partial annulment (0.0)	Quantitative partial annulment (1.0)		Complete annulment (2.0)		
Timing	Pro futuro (0.0)	Ex nunc (0.5)		Ex tunc (1.0)		
Prescription	No prescription (0.0)	Non-binding prescription (1.0)		Directive / binding prescription (2.0)		

Source: According to Pócza et al. 2017: 1564.

This strength index enables me to measure the outcome in such a way that I can use it for the regression analysis as well as for the QCA. Taking 45 decisions made by BCC into account, the strength index ranges between 0 and 8.5; its mean value is 2.2 (standard deviation is 2.4). For the regression analysis, I can use the data constructed with this tool without further modification. Yet, before I could use the data in the csQCA I had to modify the original information about the strength of a decision by defining a threshold that tells me when a case is a member of the set of strong or in the set of weak decisions. As this is the first time, a csQCA is applied to identify causes of judicial activism, I had to create the threshold from scratch. I assume that only those rulings that lay out some guidelines to the legislature contribute to judicial activism. Such a decision should at least interpret the law by making constitutional requirements (at least 2 points), and make non-binding or binding prescriptions (at least 1 point) that should apply ex nunc or pro futuro (at least 0.5 points). Rulings fulfilling these criteria receive a total of at least 3.5 points, which I take as the cross-over point. Thus, rulings with 3.5 or more points would be "in", that is part of the set of decisions contributing to judicial activism. Rulings with less than 3.5 points would be "out". In consequence, I have to set the threshold at 3.5. Admittedly, this threshold is not very high. It takes into account the aforementioned precondition that the BCC can dispose of only limited resources and that the judges serve only on an honorary and part-time basis on the court. Nonetheless, the threshold is high enough to make the parliament adjust laws to decisions made by the court.

4.2. Operationalizing Independent Variables and Calibrating Conditions

In the same manner as the outcome, I calibrated the conditions for the csQCA as well as the variables for the regression analysis. Table 4 provides some basic information on the variables used in the regression analysis.[II] Based on the review of the literature two aspects seem crucial: institutional and attitudinal/behaviorist dimensions. I operationalized the institutional dimension with two variables/conditions: the age of a decision and the type of proceeding (a). The attitudinal/behaviorist dimension is represented by the professional and ideological background of judges (b).

(a) Institutional factors (the type of proceeding and age of decisions): Neo-institutionalist theory sees norms, organizations, and rules as the major cause for policy outcomes or for political behavior (March and Olsen 1989). I take institutions to affect judicial behavior, as well,

because I assume that the degree of judicial activism is also due to institutional effects. This assumption can be tested in two ways: On the one hand, I presume that the type of proceeding affects the degree of judicial activism. In other words, the BCC court should make strong decisions if it has to decide abstract judicial reviews. In theory, abstract judicial reviews entail the greatest leeway to the court. They "provide courts with crucial opportunities to construct constitutional law, to extend jurisprudential techniques of control, and (the same thing) to make policy" (Stone 1994: 447f.). Alec Stone even claims that this proceeding may increase the "potential for higher levels of judicial activism" (Stone 1994: 448). A value of 0 means that the proceeding is not an abstract judicial review; a value of 1 indicates that the court had to deal with an abstract judicial review. For a csQCA the binary nature of this condition poses no problem at all. On the contrary, it indicates whether this case belongs to the respective set. Yet, in a regression analysis, it is common to replace such a binary variable with a dummy variable and thus include a nominal scale variable.

Table 4: Independent and Dependent Variables: Descriptive Statistics

	Mean	Median	Standard deviation	Minimum	Maximum	N
Age of Decision	9.6	7.6	7.1	0.60	22.20	45
Type of Proceeding	0.1	0.0	0.3	0	1	45
Number of "oppositional" judges	2.7	2.0	1.3	2.0	5.0	45
Number of professional judges	3.8	4.0	1.1	2.0	6.0	45
Degree of judicial activism	2.2	2.0	2.4	0.0	8.5	45

Source*:* my compilation.

On the other hand, I believe that each public institution bears the tendency to broaden its influence and its power. That assumption also holds for constitutional courts because over time they can refer to a higher number of decisions and knit a closer net of rules and decisions the legislature has to comply with. In consequence, decisions should become stronger over time. Thus, more recent decisions will tend to be stronger than the ones made

in the early years of the court. Once again, with regard to the regression analysis, this raises no problem at all, as I just used the age of decision (table in appendix). Yet, for the csQCA I have to calibrate this condition and define the threshold. The 45 decisions included in the analyses are on average 9.6 years old (the median is at 7.6 years). However, if possible it is recommended to define the threshold based on theoretical considerations and not on statistical calculations. Thus, I set the threshold at 8 years because then all judges elected in 1992 have been replaced by new judges. And I presume that later generations of judges might be more inclined to invalidate laws and infringe upon privileges of the legislature because they stand on the shoulders of founding judges that established the court and set it in motion.

(b) Attitudinal factors (ideology and profession): As pointed out, I will combine institutional and attitudinal variables: By attitudinal variables, I mean the professional and the ideological background of the judges. To start with ideology: Charles Herman Pritchett (1948) was the first who strove to prove statistically that ideology or political preferences might influence judicial behavior. Since then, we find countless attempts trying to take the ideological stance of a judge into account to explain judicial decision-making. The obvious challenge is, of course, to tell what kind of political preferences judges might have. To determine such values some scholars refer to rulings of a judge on politically salient issues; other scholars see party affiliations as an indicator to locate a judge on a left-right scale. One of the most common approaches in these studies rests on the assumption that a judge would endorse the policies of the party that has nominated him or her for the post at a court (e.g. Epstein 2013: 101-151). For example, in her study on the Federal Constitutional Court Christine Landfried assumed that judges proposed by the SPD would support left-wing policies and share basic ideological principles of this party (Landfried 1984).

I will use this indicator, as well, to capture the ideological dimension. In Berlin, the state parliament, the House of Representatives, has to elect all judges to the Constitutional Court. Table 5 provides some basic information on the number of judges that each parliamentary party has nominated for election to the Berlin Constitutional Court. Two candidates proposed by the leftwing party "PDS/The Left" failed to receive the necessary majority. Between 1992 and 2016 there have been 10 ballots and 37 judges have been elected to the BCC (Reutter 2018a). Quite surprisingly, for just one exception it did not matter at all whether the party in power or the party in opposition has proposed the candidate. All judges have been endorsed and supported by on average more than 76 percent of all members of

parliament. The only exception has been the two candidates of the FDP which received on average just 70 percent.

Table 5: Judges of the BCC According to Nominating Parliamentary Parties

	SPD	CDU	Green	Left[c)]	FDP	Pirates	All
Number of proposed candidates	13[a)]	14	5	5	2	1	40 [a)]
Number of elected judges	13[a)]	14	5	3	2	1	38[a)]
Yeas as share of ...							
- ... the valid votes	90,4	89,0	92,0	92,3	90,3	89,9	89,3
- ... the votes cast	86,5	84,8	85,5	87,1	80,4	87,9	82,6
- ... all members of parliament	80,1	78,7	79,8	85,0	70,4	82,6	76,6
Share of Judges at BCC[b)]	34,2	36,8	13,2	7,9	5,3	2,6	100,0
Share of seats in parliament (1990 bis 2017)[d)]	30,0	35,5	13,0	15,6	4,4	1,4	100,0

a) Including the election of Margret Diwell as president of the court; b) share of judges nominated by parliamentary party; c) only for the elected judges; d) average share of seats; at the beginning of the legislative period.

Sources: my calculations; Reutter 2018a: 491.

Yet, for methodological reasons, some annotations are necessary. To start with, I do not know the criteria according to which parliamentary parties in Berlin picked their candidates. The ideological proximity of the judge to the party in question might be just one aspect in the parties' considerations. Other aspects might be important, too, because the parties must comply with the criteria laid down in the constitution and the law on the constitutional court. In addition, a possible judge nominated by a parliamentary party does not necessarily share the views the party has on a specific policy not to mention the fact that a judge might give judicial reasoning precedence over political preferences. Nonetheless, I take the ideological proximity between the nominating party and the nominated judge as an indicator for the political preferences of judges because I assume that judges sustain some loyalty to the party

in parliament that nominated him or her as a judge to the BCC. Theoretically, this can be conceptualized as a specific type of "divided government" because the majority in the state legislature and the majority in the constitutional court might represent different political parties. I do not expect a judge to endorse all or some of the policies of the party that nominated him or her to the court. I simply figure that judges feel obliged or loyal to the party that supported him or her in the appointment process. Hence, if those judges proposed by parties in opposition have a simple majority in the court they will probably restrain the room of maneuverability for an incumbent government composed of other parties. Thus, I assume that the decisions of the BCC are „strong" if we have a „divided government" in the aforementioned sense. This variation of a „divided government" in which the constitutional court is composed of judges nominated by a party in opposition, lasted for six years since the Constitutional Court came into effect in 1992 (until 12/31/2017). For almost two-thirds of this time (03/26/1992 until 06/16/2001 and 06/21/2007 and 12/31/2007) the parties of the incumbent government had proposed a majority of the judges that served at the BCC. Hence, I would expect that in times of a „divided government", the Berlin Constitutional Court would be more active and make stronger decisions than in times of a unified government. Once again, in the regression analysis, I used this data without modifying them. However, in the csQCA I tested this assumption by examining whether the court will make strong decisions if judges nominated by a party in opposition can dispose of at least four seats. Thus, I set the threshold for this condition at 3.

Table 6: Main Profession of Judges at the BCC (1992-2017)

Main profession	Abs.	(%)
Judges at an ordinary court	16	44,4
Lawyer in a law firm	12	33,3
Professor of Law	5	13,9
Others	3	8,3
Total	a)36	100,0

a) For one judge the main profession is missing.

Source: Reutter 2018a: 494.

As pointed out, judges serve on an honorary and part-time basis at the BCC. They make their living in their main professions. As table 8 shows, 44.4 percent of the judges of the BCC served at an ordinary court when they got promoted to the BCC. A third of the judges were lawyers in a law firm, and 13.9 percent were tenured professors at a university. The three remaining judges also held a law degree and used to work as a lawyer before they became a member of a parliament and then elected to the BCC. In sum, constitutional adjudication in Berlin is a monopoly of judges and lawyers. Apart from these representational deficits, another question arises from the composition of the court. Does it affect the rulings? As already indicated, I assume that professional judges tend to make stronger decisions and thus contribute to the judicial activism of politics. This might be due to a sort of "déformation professionelle" because judges might be inclined to prove that they are the better legislators and can make better laws than the parliament. In the csQCA, I assume that if the number of professional judges lies above the threshold of 3 I expect strong decisions. In the regression analysis, I used the raw data once again.

5. Analyzing Causes of Judicial Activism

So far, I have tried to develop indicators and describe conditions that describe cases and help to find causal links or correlations between dependent and independent variables or between sufficient or necessary conditions and the outcome. In the next step, I analyze and compare the 45 decisions which I have included in my study. As pointed out, this will be done with a regression analysis followed by a csQCA.

5.1. Regression Analysis

According to Lee Epstein and Andrew D. Martin a linear regression model is the "workhorse of empirical legal studies", notably because the model "allows us to include more than one independent variable in our analysis (…) and draw causal inferences" (Epstein & Winter 2014: 173). In this paper I use linear regression to examine if and to what degree the age of a decision, the type of the proceeding, the ideology and the profession of the judges affect the strength of decisions and thus the degree of judicial activism. It has to be pointed

out that the number of cases is rather low for regression analysis with four independent variables. Yet, this might be justified due to the exploratory nature of this paper.

Table 7: Causes of Judicial Activisma) (OLS regression)

Independent Variables	Unstandardized CoefficientsB	T-Values	Standardized Coefficients (Beta)
(Constant)	-0.732	-0.464	-
Age	-0.072	-1.119	-0.218
Proceeding	2.401**	2.144	0.322**
Ideology	0.696**	2.373	0.371**
Profession	0.388	0.933	0.181
Cases	45	–	–
R^2	0.186	–	–
Adjusted R^2	0.104	–	–

*** p-value < 0.001; ** p-value < 0.05; * p-value <0.10.

a) We used the program "SPSS" and run a multiple linear regression.

Source: W. Reutter.

Table 7 presents the results of the regression analysis. Any regression model assumes that there is no or at least only little autocorrelation among the independent variables. This precondition is fulfilled as the Durbin–Watson test, that measures autocorrelations among variables, produced the value of 2.389 that is slightly below the acceptable value of 2.5.[III] The coefficient of determination in this model explains 10 percent of the amount of variances of the dependent variable, which is, in fact, not very impressive. Even though it still is close to a medium-sized effect (Cohen 1992: 156f.), this low r^2 makes it difficult to draw robust conclusions based on the analysis. Nevertheless, some coefficients are significant at the 5-percent level. There are four independent variables in the model. Two of these variables are statistically significant. Proceeding with a regression coefficient of b=2.401 (p=0.038) has a larger explanatory effect (beta=0.902). Ideology shows a regression coefficient of b=0.696

(p=0.23) and beta=0.835.[IV] Overall, these findings indicate that institutional (type of proceeding) and attitudinal factors (ideology) played a role in the behavior of the judges at the BCC. It is noteworthy that two variables failed to trigger significant coefficients. The age of the decisions and the profession of the judges do not seem to have affected the rulings of the court. In addition, the csQCA failed to corroborate the findings of the regression analysis, as well.

5.2. Crisp-set Qualitative Comparative Analysis

As pointed out, QCA is an encompassing research design that has been applied to various fields of research (Legewie 2013; Arvind & Stirton 2010; Schneider & Wagemann 2007; Berg-Schlosser et al. 2009; Meuer & Rupietta *2016;* Reutter 2014, 2016, 2018: 103-130). In this paper, I will use a special type of QCA: the crisp-set Qualitative Analysis (csQCA) as a tool that should help me to provide "a meaningful interpretation of the patterns displayed by the cases under examination" (Wagemann & Schneider 2007: 3). To my knowledge, this is the first time that csQCA is used to explain sufficient and/or necessary conditions that might give reason for judicial activism. While there are many qualitative and even more quantitative studies examining the politicization of judicial behavior or judicial activism of courts this is the first one using QCA.

The first step in any csQCA is to build a dichotomous data table (Rihoux & De Meur 2009: 39-44) which means that I have to adjust the original data in such a way that they are compatible with the binary logic on which the csQCA rests. In other words, I have to define when a decision of the BCC is either weak or strong. In the same way, I have to determine when I believe the conditions to meet the criteria mentioned above. As a matter of fact I have already explained and determined the thresholds for the outcome as well as for the conditions in the preceding chapter. The result of this transformation can be found in the dichotomous data table, which includes the raw data as well as their dichotomized csQCA values.

Table 8: Truth Table for 45 Decisions

Row	AD (8)	AJR (1)	IJ(3)	PJ (3)	dj (0)	DJ (1)	Cases(Outcome)
1	0	0	0	0	14	0	BE1(0), BE2(0), BE3(0), BE4(0), BE5(0), BE6(0), BE7(0), BE8(0), BE9(0), BE22(0), BE24(0), BE25(0), BE26(0), BE27(0)
2	0	0	0	1	11	2	BE10(0), BE11(0), BE12(0), BE13(0), BE14(0), BE16(1), BE17(0), BE18(1), BE19(0), BE20(0), BE21(0)BE44(0), BE45(0)
3	0	1	0	0	0	1	BE23(1)
4	0	1	0	1	1	0	BE15(0)
5	1	0	0	1	6	0	BE38(0), BE39(0), BE40(0), BE41(0), BE42(0), BE43(0)
6	1	0	1	0	5	1	BE28(0), BE29(0), BE30(0), BE31(1), BE33(0), BE34(0)
7	1	0	1	1	2	1	BE35(0), BE36(1), BE37(0)
8	1	1	0	1	2	0	BE44(0), BE45(0)
9	1	1	1	0	0	1	BE32

AD = age of decision (as of 03/22/1992; threshold = 8); AJR = abstract judicial review (= 1); IJ = Judges nominated by parties in opposition (threshold = 3); PJ = Professional judges (threshold = 3); DJ = Degree of judicial activism (threshold = 3.9); Frequency with outcome 0 = Number of weak decisions; Frequency with outcome 1 = Number strong decisions.

Source: my calculation; calculated with TOSMANA 1.54

Based on this dichotomous data table I constructed a truth table which means I compared all logical combinations of conditions with those that I found in the real world. If there are four conditions with a value of either 0 or 1, there are 16 logical combinations possible, that is 2^k (k = number of conditions). The truth table, a common tool in Boolean algebra, helps to reduce complexity and allows to compare cases in a systematic, transparent, and replicable fashion to identify necessary and/or sufficient conditions for an outcome. Table 9 tells us, which logically possible configurations are empirically existent.[V] However, as table 9 proves, not all logical configurations are causally linked to the outcome I want to explain. So, by checking the logical possible configurations against reality I can find out whether a cause is associated with a specific outcome. On this basis, I can identify the coherence of the data by examining whether all logical possible configurations of conditions meet a corresponding configuration in the real word. As it turns out, the reality is complex but not complex enough.

It has to be noted, though, that we find several contradictory cases that are configurations that triggered strong as well as weak decisions (rows 2, 6, and 7). These contradictions could be eliminated by adjusting the configurations, or by including new or removing existing causal conditions, by adding new cases, or by recalibrating the data (Ragin 1987: 113-118; Marx & Dusa 2011: 109-111.; Rihoux & De Meur 2009: 48-56). It will be a major challenge for future research to make these adjustments. Furthermore, there is no condition that figures in all cases in the same way and with the same effect. The outcome [O] occurred when the aforementioned conditions were present [AD+AJR+IJ+PJ] or when they were absent [ad+ajr+ij+pj]. In consequence, none of the conditions qualifies as sufficient or as necessary. Besides the same is true with regard to weak decisions. Here, we also find different paths leading to the outcome.

In the next step, I have to further minimize the information in the truth table. The truth table does not carry any theoretical content. Yet, it is striking that two variables identified in the regression analysis as significant – ideology and proceeding – do show no effect whatsoever in the csQCA. They are neither sufficient nor necessary. At least the outcome occurs with and without these conditions present. In addition, only 6 out of 45 decisions qualify as strong in the sense defined above. All other decisions did not require any political adjustment by the legislature even though I have set the threshold for strong decisions rather low. This finding confirms the assumption that subnational constitutional courts do hardly

dispose of the resources to develop strong decisions or judicial activism. Finally, we find only five configurations of conditions that seem to be linked to at least one strong decision (rows 2, 3, 6, 7, and 9). In Boolean terms[VI] these solutions can be expressed as follows:

ad*ajr*ij*PJ + ad*AJR*ij*pj+ AD*ajr*IJ*pj+ AD*ajr*IJ*PJ+ AD*ajr*IJ*pj → O.

In addition, we find only two configurations that exclusively trigger strong decisions, and these configurations explain just two cases. All other configurations lead to strong as well as to weak decisions, thus confirming the notion that multiple causalities are possible.

6. How to Interpret Contradictory Results: (Very) Tentative Conclusions

Apparently, my research did not produce the robust and comprehensive findings that I hoped for. Neither the regression analysis nor the csQCA led to unequivocal and definite results. Keeping these limitations and the exploratory character of this paper in mind, we still can draw some tentative conclusions based on the two analyses.

First, there are countless outstanding studies examining constitutional courts, judicial decision-making, and judicial activism. Nonetheless, there are still some blind spots and lacunas in this field of research. I focused on a blind spot of this research: the subnational level. I explored the role of a constitutional court in a German Land. This empirical focus raises the question of whether constitutional adjudication means the same thing at the national and the subnational level. As a matter of fact, my findings challenge the idea that any constitutional court can be treated in the same manner. At least as far as the Berlin Constitutional Court is concerned it is striking that only 13 percent of all politically salient decisions this court has made between 1992 and might contribute to what has been coined judicial activism. This low share of important decisions hardly proves the BCC as a major source of judicial activism. Distinct from Alec Stone Sweet (2000) my study did not corroborate the assumptions that ruling with a constitutional court means ruling like a constitutional court or that there is a global trend towards "juristocracy" (Hirschl 2004). At least not at the subnational level.

Second, according to Pócza et al. (2017: 1557) the "main deficiency of the systematic empirical research on constitutional adjudication consist[s] in an unsophisticated dichotomous approach that separates the merely positive and negative decisions of constitutional courts [...]". They developed a strength index to paint a "more nuanced and

[...] more systematic picture of the practice of constitutional adjudication" (Pócza et al. 2017: 1559) I, too, used this strength index to measure the degree of judicial activism in a German Land. Even though I found only a few decisions that would qualify as "strong" enough to make the parliament adjust laws the strength index proved to be an innovative and helpful tool that allows to determining whether a court decision might affect future legislative actions. It helps to differentiate among decisions and capturing various dimensions of decisions in a sophisticated manner.

Third, my analysis of the aforementioned 45 decisions of Berlin Constitutional Court failed to provide a definite answer to the research question at hand. Even though the regression analysis indicated that ideology and the type of proceeding might give reason to judicial activism, the csQCA failed to corroborate these findings in a satisfactory way. In this perspective the conditions mentioned above are neither necessary nor sufficient for judicial activism. Distinct from the Constitutional Court in Thuringia that Oliver W. Lembcke saw as a "learning" institution becoming more self-confident over time and in consequence more active, the Berlin Constitutional Court did neither made stronger decisions over time nor did abstract judicial reviews necessarily trigger strong decisions. At the same time, there are cases where both the institutional preconditions and attitudinal factors qualify as a reason for the outcome. Furthermore, notably the contradictory cases raise serious questions about the theoretical concepts mostly used in studies on judicial behavior and judicial activism. Because: "if several competing theories try to explain the same result, QCA techniques will quickly disqualify the theories that are unable to discriminate correctly between cases with and without the outcome under study. This will be indicated by the presence of so-called contradictory configurations (…)," which also occurred (Berg-Schlosser et al. 2009: 10). Overall, these findings might raise the question as to how the background of judges impacts on the degree of judicial activism in the German Länder. It will be up to future research to find out under what conditions subnational constitutional courts in Germany might contribute to judicial activism. Overall, the study made clear, that as far as political science is concerned the analysis and the explanation of judicial activism in the German *Länder* are still in its infancy.

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[I] I use the terms "Land" and "state" interchangeably.

[II] Furthermore it has to be noted that "ideology" as measured by the number of oppositional judges leads to only two expressions, 2 and 5. It is a metric variable (number of judges), but with a small variance only.

[III] The regression has been calculated by Christin Engel.

[IV] This finding is partly confirmed if we examine the bivariate correlations between the dependent and the independent variables. If we take proceeding as a metric variable we have a weak correlation (r=0.262) at the 10 percent level of significance. Due to the property of the variable, I have calculated the relationship with the nominal or interval measure Eta. In this case proceeding explains 26.2 percent of the variance on the dependent variable. The Chi-square test shows a value of p = 0.153. As p is greater than the level of significance (5 %) the null hypothesis cannot be rejected. As the null hypothesis is the default assumption that nothing happened this indicates that there is no causal link between proceedings and judicial activism. We can explore a possible causal link between the dependent variable and ideology if we also calculate the nominal or interval measure Eta. With p=0.012, the p-value remains below the level of significance. That is, the nullhypothesis can be rejected and there is a statistically significant association between the variables.

[V] The software needed for the analysis can be retrieved for free from: http://www.compasss.org/software.htm or from http://www.socsci.uci.edu/~cragin/fsQCA/software.shtml.

[VI] In Boolean algebra an uppercase letter means that a condition is present [1], while a lowercase letter indicates that the condition is absent [0]. Furthermore, the mathematical term "AND" is represented by an asterisk [*], and the term "OR" by the plus sign [+]. The arrow symbol at the end of a term links a set of conditions to the outcome to be explained.

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