Constitutional Courts: Democracy vs. Juristocracy?

Education ‘Master of Law’

Presented by

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Above all, this thesis has made me realize how many fundamental questions can be raised regarding our constitutional legal system. Notions like democracy, constitutionalism, sovereignty, rights protection have attained such an omnipresent status and are, in a way, taken for granted. Writing this thesis has made me delve in literature regarding the very fundaments of our constitutional democracy. At times, the sheer volume of rich, enlightening texts about this subject has been overwhelming.

Without any doubt I would have been lost in this maze without the support of my supervisor, Jurgen GOOSSENS. His feedback has been invaluable. I would explicitly like to thank him for his time and effort, despite his busy agenda.

I would also like to mention BelConLawBlog: it has provided me with a useful platform for finding the relevant judgments of the Belgian Constitutional Court.

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**BIBLIOGRAPHY**
The subject of this thesis concerns the paradoxical role of Constitutional Courts within a democracy. How is it possible that an elective democracy offers room to a few judges who can overthrow the will of the majority? This issue is known as the countermajoritarian difficulty.

Constitutional Courts rose in popularity due to the European ‘new constitutionalism’ movement in the twentieth century. This model of democracy prioritizes the protection of fundamental rights and requires a mode of constitutional review, which Constitutional Courts offered. This phenomenon was strengthened by the phenomenon of global constitutionalism and the occurrence of constitutional transplants. Moreover, Constitutional Courts also provided a solution to several contracting problems constitutional drafters faced. In order to fulfill its task of rights protection, Constitutional Courts resorted to the use of proportionality analysis, also known as balancing. However, this exposed them as legislators, for Constitutional Courts often have to undertake similar balancing exercises. This in turn fueled a vivid debate about the pros and contras of judicial review and whether or not it is undemocratic.

However, in Belgian legal doctrine this particular issue has gone by largely unnoticed. Therefore, this thesis turns to the Belgian Constitutional Court specifically. To what extent can the Belgian Constitutional Court be said to be undemocratic? The first part of this thesis outlines the general theory regarding Constitutional Courts. The second part turns to recent decisions of the Belgian Constitutional Court and highlights the varying influence of the Belgian Constitutional Court on the legislative process.

Finally, it will be shown that the thesis ‘Democracy vs. Juristocracy’ is possibly too strongly worded. Judges can be accountable and gain legitimacy in their own way. Although there is certain room for improvement, the Belgian Court can be said to be a modest court, willing to engage in constitutional dialogue. In doing so, it can however not be denied that it is slowly becoming a co-legislator, a fullfledged legislative partner.
INTRODUCTION

In July 2014, the Belgian Constitutional Court annulled the early retirement regime for police officers. As a consequence, 35,000 policemen who were eligible for an early retirement, were suddenly forced to continue working, possibly for eight more years. They used to be able to retire between the age of fifty-four and fifty-eight. However, as a result of the annulment of the specific regime for policemen, now the general regulation applies instead. According to the general regime, early retirement is only possible from the age of sixty-two. Evidently, this caused a lot of protest. Police syndicates immediately threatened with manifestations. If the Belgian Government could not find a solution for the affected policemen, a ‘heated autumn’ would ensue. The government itself too was taken by surprise. MILQUET, the resigning Minister of Internal Affairs, was perplexed: “The Constitutional Court has created an immense complication with this judgment”.3

To this day, the issue is still unresolved. Negotiations between the government and the syndicates about the pension system have proven to be futile. The past few months have been a concatenation of protest actions and manifestations. It is remarkable how far the consequences of a judgment of the Constitutional Court reach. Almost a year after the date of the decision, this discussion is still firmly on the political agenda. Evidently, the question arises whether such an interference is desirable within a representative democracy. More sharply put, does a democracy even benefit from having a Constitutional Court? Does the creation of such an entity not jeopardize the normal, prosperous functioning of a legislature?

The impact of a Constitutional Court within a democracy will be the central question of this thesis. The justification of constitutional judicial review has gained a vast amount of attention in American legal doctrine. BICKEL started the debate by introducing the ‘countermajoritarian difficulty’. Judicial review is countermajoritarian because it allows judges to thwart the will of the majority. It enables decisions by the legislature to be overturned by a small minority, through judgments. Although the Belgian Constitutional Court was installed in 1980, no questions have been raised in Belgian legal doctrine regarding the possible threat of the countermajoritarian difficulty. Consequently, this thesis will try to shed some light on this issue and will attempt to highlight some of the more pertinent questions regarding constitutional judicial review.

Evidently, the central research question revolves around this very issue: are constitutional courts undemocratic and if so, to what extent? In order to find an answer to this question, I will primarily turn

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1 Constitutional Court 10 July 2014, no. 103/2014.
2 http://www.standaard.be/cnt/dmf20140810_01211215
3 http://deredactie.be/cm/vrnnieuws/politiek/1_2030246
4 On the 18th of September 2014, more than 14,000 police officers held a march in the center of Brussels to protest against the annulment.
to American legal doctrine, where this subject has been discussed extensively. Afterwards, I turn to the Belgian situation. With the general theory in mind, how does the Belgian Constitutional Court perform? I hope to clarify this abstract theory by analyzing recent decisions from the past six months.

This thesis contains two major sections. In the first part, I will outline the theoretical framework concerning rights review and constitutional courts. Firstly, the most important theories about constitutional law and constitutionalism will be briefly introduced (Chapter 1). Secondly, the ‘new constitutionalism’ movement will be situated. It explains the rise and widespread success of judicial rights review and constitutional courts (Chapter 2). Thirdly, the importance and possible functions of constitutional courts themselves will be treated, along with how they exercise their judicial powers (Chapter 3). Finally, the last chapter contains a summary about the views regarding the undemocratic character of judicial review (Chapter 4).

In the second part, the Belgian situation will be treated more in detail. Firstly, I will go into detail on the typical ‘interferences’ of the Belgian Constitutional Court and outline its specific situation (Chapter 5). Afterwards, a few recent decisions of the Court will be analyzed which demonstrate the legislative influence the Constitutional Court exerts (Chapter 6). Finally, the last chapter contains a general evaluation and a final assessment about the possible democratic difficulties (Chapter 7).
Chapter 1: Theories on Constitutional Law

1. This chapter contains a summary of the most important legal theories on constitutional law. These theories formed the foundation for the movement towards constitutionalism. They shaped the way in which the concept of ‘law’ was perceived. Firstly, Kelsen’s Pure Theory of Law will be treated (1.1) in which the concept of the basic norm will be introduced. Next, Alexy’s distinction between rules and principles will be explained (1.2).

1.1. The Pure Theory of Law

2. To this day, Kelsen’s influence is widely recognized. His book ‘The Pure Theory of Law’ contains his theory on positive law in general. In this section I will give a brief oversight of Kelsen’s ideas related to the subject of this thesis.

3. The object of the science of law, according to Kelsen, are norms. They make certain acts legal or illegal. A norm means that something ought to happen, or that a human being ought to behave in a specific way. Thus, the legal order is a normative order of human behavior: a system of norms regulating human behavior. Acts of which the meaning is a norm can be performed in different ways: the gesture of a policeman for example, or a red traffic light.

4. The legislative process consists of a series of acts which, in their totality, have the meaning of a norm. Kelsen makes the distinction between the subjective and objective meaning of an act. ‘Ought’ is the subjective meaning of every act directed at the behavior of another. However, this does not imply that the act also objectively has that meaning. Only if the act of will also has the objective meaning of an ‘ought’, this ‘ought’ is called a norm. The ought which is the subjective meaning of an act of will is also the objective meaning of this act if it has been invested with this meaning, if it has been authorized by a norm. The norm which authorizes the objective meaning therefore has the character of a higher norm.

5 The original title is Reine Rechtslehre, first published in Vienna in 1934 by Deuticke.
7 Kelsen uses the expression ‘ought to’ to express the normative meaning of an act towards the behavior of others.
KELEN provides a clear example: the command of a gangster to turn over a certain amount of money has the same subjective meaning as the command of a tax-official: an individual ought to pay something. Only the command of the official has the meaning of a norm, because the official’s act is authorized by tax law, which cannot be said for the command of the gangster.

6. A legislative act, which subjectively has the meaning of an ‘ought’, also has the objective meaning (and thus the meaning of a valid norm), because the constitution has conferred this objective meaning upon the legislative act. This implies however that we presuppose in our juristic thinking that we ought to behave as the constitution prescribes. This presupposition establishes the objective validity of norms in a legal order. KELEN calls this presupposition the ‘Grundnorm’ (the basic norm). It is a completely fictional, abstract norm. The concept of the basic norm is crucial in KELEN’s theory.

7. According to KELEN, an order is a system of norms whose unity is constituted by the fact that they all have the same reason for their validity: the basic norm. The norms of a legal order regulate human behavior. More specifically it regulates the behavior of one individual in relation to one, several, or all other individuals. Typically, these norms have a coercive character. They react against certain undesirable events with a coercive act: they inflict on the responsible individual an evil, such as the deprivation of life, health, liberty or economic values. In this way, norms command a certain behavior by attaching a coercive act to the opposite behavior. As a result, law regulates human behavior in two ways: positively, in the sense that norms command a certain behavior and thereby prohibit the opposite behavior; negatively, by not attaching a coercive act to a certain behavior, therefore not prohibiting the behavior nor commanding the opposite behavior.

8. The basic norm is the cornerstone for the entire legal order, it constitutes the unity of the multitude of norms. A norm can only be validated by another norm. In other words, the reason of the validity of a norm can never be a fact, even not the act of will by which the norm is created. In this sense, the ‘validating’ norm is conceived as the higher norm of the two. However, this chain cannot go on endlessly: it must end with a norm which, as the last and highest, is presupposed. The basic norm’s validity is final, because there is no higher norm which it draws its validity from. Moreover, according to this theory, it is simply impossible that a positive legal order is not in conformity with its basic norm. As a result, the validity of the highest norm within its legal system is out of the question.

9. Naturally, this axiom raises questions. Firstly, is it even realistic to attach all norms within a legal system to a single chain of validity? RAZ\textsuperscript{20} provides the example of two countries A and B, where B is a colony of A. Consequently, they are both governed by the same legal system. Suppose that A grants B independence, conferring legislative powers to a representative assembly of B. Next, the assembly adopts a constitution which is accepted by its inhabitants. As a result, B considers itself an independent state. Furthermore, they are recognized by all other nations, including A. Consequently, the courts of A regard the legal system of B as a different system, distinct from their own. Yet, in KELSEN’s theory, B’s legal system would still be a part of the legal system of A: the constitution of B was authorized by the independence-granting law of A. Consequently, they belong to the same system and share the same chain of validity. In other words, The Pure Theory of Law considers only the content of laws and disregards the importance of the factual situation. However, according to RAZ, the attitude of the population and the courts is of the utmost importance in deciding the identity and unity of a legal system. Moreover, not all legally valid norms of a given system necessarily derive their validity from the same basic norm. For example, some norms may derive their validity from a customary constitution, while other norms owe theirs from an enacted constitution. In other words, KELSEN presupposes that there is one norm which belongs to the chain of validity of every norm in a legal system. However, the first constitution may contain several norms, some belonging to certain chains of validity, yet others belonging to other chains.\textsuperscript{21}

10. Secondly, the theory fails to address the problem of identity and unity of legal systems, because it relies on the basic norm as the identifying factor. Since the basic norm is the basis of the entire legal system, it can only be established after the entire legal system has been identified.\textsuperscript{22} In other words, the basic provides no adequate benchmark for identifying a legal system because it ultimately refers to itself, and consequently to the entire legal system.

11. Thirdly, is the concept of a basic norm not needlessly confusing?\textsuperscript{23} It could be avoided by simply assuming that people accept certain procedures as being the proper ones to identify binding rules in their society. In this context, the concept of the basic norm seems meaningless except either as a reference to the fact that people accept procedures laid down in the constitution, or as a moral axiom that people ought to accept these procedures.\textsuperscript{24}

12. Fourthly, the notion of the ‘presupposition’ itself provides an opportunity for a fertile debate. How is this notion to be interpreted? According to PECZENIK\textsuperscript{25}, the concept of presupposing a basic norm is

\textsuperscript{24} G. HUGHES, “Validity and the Basic Norm”, California Law Review 1971, volume 95, 705.
\textsuperscript{25} In his opinion, the basic norm is a duty-imposing norm. Namely, it describes the duty to follow and apply the constitution.
unproblematic within a ‘normal’ society whose legal norms are neither generally nor extremely immoral.\(^\text{26}\) Within this society, jurists take for granted that the constitution is valid law and should be followed.\(^\text{27}\) Consequently, they are ‘naturally’ and effectively applying Kelsen’s basic norm, but only insofar as the validity of the constitution is not questioned. So, in legal practice, the basic norm potentially exists and is inherently presupposed and applied. Raz\(^\text{28}\), on the other hand, uses a different approach by introducing the concept of the ‘legal man’\(^\text{29}\). This legal man sincerely believes in the validity of all legal norms, and those legal norms alone, that belong to his legal system. The basic norm is only valid for the legal man, because he is the only one being able to presuppose it.\(^\text{30}\) Consequently, a jurist presupposes the basic norm by referring to the point of view of the legal man. In other words, legal practitioners do not presuppose the basic norm directly, but instead professionally adopt the view of the legal man.\(^\text{31}\) Regardless of the theoretical framework, Bindreiter concludes that all jurists are unconsciously employing the basic norm all the time, in two ways. Firstly, by taking for granted that the law is considered valid and binding by the other members of their legal audience, and secondly, by being committed to this view themselves.\(^\text{32}\)

13. The Grundnorm refers to the creation of the norms of its legal order, it does not determine the content of the norms. This content is determined exclusively by acts of will of human beings.\(^\text{33}\) The constitution is the highest norm within a legal order and consequently also relies on the basic norm for its validity. In this context, the basic norm functions as an ‘ought’ proposition about the constitution. It states that one ought to comply with the constitution and the norms deriving from it, but it does not provide a reason why to do so. The concept of the basic norm provides, in other words, a purely formal justification for the validity of legal norms and the constitution.\(^\text{34}\) Yet, by doing so, Kelsen provides a rational solution to the dilemma of extra-legal constitution making: how can higher lawmaking be legal if the juridical norms necessary for assessing the validity of constitutional creation are absent at the very

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\(^{29}\) By introducing this concept, Raz tries to answer the question of morality in regard to Kelsen’s ‘pure’ theory of law.


moment of founding? Nevertheless, the basic norm remains essentially a hypothetical, ultimate ground; KALYVAS strikingly describes the Grundnorm as a “noble lie” of the Pure Theory of Law.

14. As a result, the legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms. Within a national legal order, the constitution represents the highest level of positive law. KELSEN regards a ‘constitution’ in a material sense: it is the positive norm which regulates the creation of general legal norms. The constitutional provisions determine the organs authorized to create legal norms. KELSEN also notes that most modern constitutions regulate the content of future statutes by using a catalogue of fundamental rights and freedoms, mostly to exclude certain contents. For example, by incorporating the principle of equality, the constitution tries to prevent future laws being made that would violate this principle, as it would violate the constitution.

15. In KELSEN’s view, constitutional courts were conceived as purely negative legislators. Because KELSEN considered legislation as any creation of general norms, a judgment that invalidates a statute changes the content of the set of legal norms, albeit in a negative way. The distinction with the formal legislator is clear: members of parliament are ‘positive legislators’: they make law freely, subject only to constitutional constraints. Simultaneously, KELSEN acknowledged that, should a constitution contain open-ended, enforceable rights, constitutional courts would inevitably erase this distinction. As I will demonstrate further on, KELSEN’s idea has proven to be right. Nowadays, constitutional courts are far from being a mere ‘negative’ legislator.

1.2. A Theory of Constitutional Rights

16. ALEXY shares KELSEN’s view on norms: they are an expression of what ‘ought to be’. According to ALEXY, the concept of a ‘norm’ embodies two types of norm: rules and principles. Principles are norms which require that something is realized to the greatest extent possible. They can be satisfied in varying degrees, and the degree of satisfaction depends on the legal and factual possibilities. In this sense, they

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40 This contrasts with the American classical view of constitutional adjudication, according to which a judicial holding of unconstitutionality amounted to an authoritative statement that the statute was void ab initio. L.P. CLAUS and R.S. KAY, “Constitutional Courts as ‘Positive Legislators’ in the United States”, American Journal of Comparative Law 2010, volume 58, 481.
42 Infra no. 80.
can also be described as ‘optimization commands’. Fundamental rights, for instance, can be seen as principles: they ought to be realized to the greatest extent possible, depending on what is legally and factually possible. Rules, on the other hand, are norms which are either fulfilled or not. If a rule applies, the requirement is to do exactly what it says. In other words, rules are norms that require something definitively, they are ‘definitive commands’. As a result of this distinction, a conflict between rules has to be managed differently than a conflict between principles.

17. A conflict between two rules can only be resolved in two ways. Either an exception is read into one of the rules, or one of the rules is declared invalid. This stems from the idea that a rule is either valid or not. If an exception cannot be made, one of the rules has to be invalid. The possibility that two incompatible ‘oughts’ might apply has to be excluded. ALEXY provides the example of a school regulation that prohibits leaving the classroom before the signal, but requires that one do just that in case of a fire alarm. The fire alarm (norm a) forms the exception to the general prohibition (norm b).

18. Conflicts of principles on the other hand require a different approach. If two principles compete with each other, one of the principles must be outweighed. In contrast to a conflict of norms, this weighing exercise does not mean that a principle is invalid, nor that is has to have an exception built into it. The weight of principles varies. Where principle A can trump principle B in one case, the exact opposite situation can happen in a different case. Consequently, conflicts of rules are played out at the level of validity, competitions between principles are played out in the dimension of weight.

19. Constitutions do not set out strict rules. They often contain general statements, considered to be fundamental by its drafters. A constitution can be defined as “a body of higher order legal rules and principles that specify how all other legal norms are to be produced, applied, enforced and interpreted”. Therefore, constitutional courts operate in the field of principles.

20. When dealing with a conflict of principles, a court must undertake a balancing exercise between the two principles at stake. This cannot be done by declaring one of the principles invalid. The solution lies in establishing a conditional relation of precedence, taking in account the circumstances of the case. The court must determine under what conditions a principle takes precedence over the other. ALEXY calls this the Law of Competing Principles: “The circumstances under which one principle takes

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48 According to ALEXY, this is the main purview of collision rules such as lex posterior derogat legi priori, or Bundesrecht bricht Landesrecht.
precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence”.\textsuperscript{53}

21. However, this idea of balancing is not uncontested.\textsuperscript{54} Often the objection is made that balancing does not represent a method subject to rational control. HABERMAS in particular offered two main objections against ALEXY’s theory of balancing. Firstly, by using rights as principles, balancing rights are downgraded to the level of goals: “If principles manifest a value that one should optimally realize, and if the norms themselves do not dictate the extent to which one must fulfill this optimizing prescription, then the application of such principles within the limits of what is factually possible makes a goal-oriented weighting necessary”\textsuperscript{55}. Secondly, according to HABERMAS, this downgrading of principles and fundamental rights comes along with a danger of ‘irrational rulings’, because weighing takes place either arbitrarily or unreflectively.\textsuperscript{56} As a result, constitutional rights, which have been changed to optimization requirements will therefore risk disappearing in a maelstrom of irrational balancing.\textsuperscript{57} Balancing remains within the discretion of the judges carrying it out, it creates space for judicial subjectivism. According to ALEXY, this criticism is only valid if the discretion merely means that there is no strict outcome for every case. The objection falls short if it suggests that balancing itself is not a rational procedure: “balancing is an argument form of rational legal discourse”\textsuperscript{58}.

22. To further this point, ALEXY makes the distinction between a decision-taking model and a justification model. According to the Law of Competing Principles, competing principles need to be resolved by establishing a conditional relation of precedence. If the act of balancing merely consisted of the creation of these preferential statements, the critique would be justified. A judge could follow his personal presuppositions and so the statement would be the outcome of a rationally uncontrollable mental process. The justification model counters this by separating the mental process and its justification. A balancing of principles is rational if the preferential statement can be rationally justified. Such justifications can be doctrinal considerations, precedent, empirical arguments or the intention of the constitution makers.\textsuperscript{59}

\textsuperscript{54} Infra no. 131.
\textsuperscript{55} J. HABERMAS, Between Facts and Norms (translation by W. REGH), Cambridge, Massachusetts, MIT Press, 1996, 254.
\textsuperscript{56} J. HABERMAS, Between Facts and Norms, Cambridge, Massachusetts, MIT Press, 1996, 259.
\textsuperscript{58} R. ALEXY, “The Construction of Constitutional Rights”, Law and Ethics of Human Rights 2010, volume 4, 32. In this article, ALEXY refers to the Weight formula to demonstrate why proportionality analysis does not endanger the power or force of constitutional rights.
1.3. The Concept of Law

23. Compared to Kelsen, Hart approaches the legal system in a different way. However, both their theories fall under the scope of ‘legal positivism’. It could be described as a meta-theory: it is a theory about theories of law, because it aims to lay down requirements that any adequate theory of law must meet.\textsuperscript{60} Hart’s major contribution to legal theory is his concept of the ‘rule of recognition’.

24. Hart’s starting point to develop his theory is an imaginative society without a legislature, courts or officials. The only means of social control is the general attitude of the society towards its own behavior in terms of rules of obligation.\textsuperscript{61} Such a system with unofficial rules can only be successful in a small community. It is only natural that such a simple set of rules has some disadvantages.

25. Firstly, there will be no procedure for settling doubts that arise as to what the scope of the rules are, or more in general, what the rules actually are.\textsuperscript{62} There is no official statement or an authoritative text to refer to. Hart calls this defect ‘uncertainty’. A second defect is the static character of those simple rules of obligation. The only way for a rule to change will be through slow growth, as the society slowly develops different behavior or adapts other standards over time. The third and last defect is the ‘inefficiency’ of the diffuse social pressure by which the rules are maintained. Disputes about whether or not a certain rule has been violated will continue to occur if there is no official agency that is empowered to ascertain the fact that a violation has taken place.\textsuperscript{63}

26. Hart offers a solution to these defects that consists of a set of secondary rules, which supplement the primary rules of obligation. A clear distinction can be drawn between those two sets of rules. Primary rules are concerned with the action of individuals: what they must or must not do. Secondary rules on the other hand are strictly concerned with the primary rules themselves: they specify how the primary rules can be changed, eliminated, introduced and when they are violated.

27. The ‘rule of recognition’ is a secondary rule which remedies the ‘uncertainty’ of the primary rules. It establishes the authoritative character of a rule and confirms that it is a rule that should be supported by the society. Such a rule of recognition can either be very simple or rather complex. It may be no more than an authoritative list or text found in a written document. In a more developed legal system rules of recognition can be more complex: they often refer to certain characteristics primary rules possess, for example if they have been enacted by a specific body.\textsuperscript{64} Even in its most simple form, the rule of

recognition introduces the idea of a legal system: rules are now unified because they have been recognized as rules.\textsuperscript{65}

\textbf{28.} The rule of recognition fulfills two important functions. Firstly, it identifies and ranks the sources of law: legislation, precedent, etc. Secondly, it constitutes the ultimate source of law’s normativity by imposing a legal duty on officials to apply all norms that meet the criteria of validity laid down in it.\textsuperscript{66} Consequently, according to RAZ, this means that the rule of recognition is a duty-imposing law. However, its law-subjects cannot be the population at large, for there is no duty on ordinary people to identify certain laws. Therefore, the behavior of officials and not the behavior of the population as a whole determines whether the rule of recognition exists.\textsuperscript{67}

\textbf{29.} In order to counter the static quality of the primary rules, HART proposes ‘rules of change’. These secondary rules empower an individual or a body to introduce new primary rules. Just like the rules of recognition, these can be simple or complex, depending on how detailed they are and how much power they confer. Immediately the connection between rules of change and rules of recognition appears: if rules of change exist, the rules of recognition will incorporate a reference to legislation as an identifying feature of the primary rules of obligation.\textsuperscript{68}

\textbf{30.} Lastly, in order to remedy the inefficiency of the society’s diffused social pressure, the third set of secondary rules empowers individuals to make authoritative determinations whether a primary rule has been broken. HART considers these rules as ‘rules of adjudication’: they identify the individuals who are to adjudicate. Simultaneously, the rules of adjudication also define the procedure which needs to be followed. However, they do not impose duties on judges, they confer a special status on judicial declarations about the breach of obligations. Once again the relation with rules of recognition becomes apparent: if courts are empowered to make authoritative determinations whether a rule has been broken, one must accept that these determinations also imply what the rules are. The rule which confers jurisdiction will also be a rule of recognition – identifying primary rules through judgments – and judgments will become a source of law.\textsuperscript{69}

\textbf{31.} Precisely this combination of the primary set of rules with the secondary rules of recognition, change and adjudication forms the very core of a legal system, according to HART. In his view, most legal concepts such as those of obligation and rights, validity and source of law, legislation and jurisdiction, and sanction are best spelled out in this combination of elements.\textsuperscript{70}

32. Just as any other legal theory, HART’s rule of recognition draws some critical attention. According to WALDRON, the rule of recognition seems to presuppose that rules of adjudication are already in place. The institutionalized social rule-enforcing pressure has already been installed, and the rule of recognition will tell how the organized apparatus will be used.\(^71\) Furthermore, rules of change might possibly be more important than the rule of recognition. WALDRON gives the example of a statute of will. Such a statute is a rule of change: it indicates procedures and requirements that have to be satisfied for the will to have the effect of changing the legally required postmortem distribution of his property. When a court recognizes this will, it checks if the steps required for legal change have taken place. Consequently, the idea of a rule of recognition is not necessary to explain the ‘recognition’ of a valid will.\(^72\) In this view, the rule of recognition plays the role of a certifying device.

33. SHAUER and WISE contest HART’s use of the term ‘rule’ of recognition. This reference to the concept of a rule is misleading, because it suggests some set of criteria of recognition capable of formulation in rule-like fashion. Consequently, HART’s way of characterizing the nature of law’s provenance appears to be an unfaithful depiction of the facts of legal life.\(^73\)

34. Both KELSEN’s and HART’s theories conceive law as a system of norms\(^74\) or rules\(^75\), which ultimately rests on a fundamental, presupposed\(^76\) or accepted\(^77\) norm. However, the biggest difference between the two theories lies precisely in this fundamental norm. The rule of recognition is a social norm, whereas the basic norm is merely a presupposition\(^78\). HART grounds his theory in social facts, whereas KELSEN does not, for it violates the is/ought distinction: only law can create law.\(^79\)

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\(^74\) Supra no. 3.

\(^75\) HART’s Concept of Law.

\(^76\) The Grundnorm of KELSEN.

\(^77\) HART’s rule of recognition.\(^79\) Be it in the mind of scholars, jurists or the legal man. Supra no. 12.

\(^78\) Be it in the mind of scholars, jurists or the legal man. Supra no. 12.

Chapter 2: New Constitutionalism

35. This chapter provides an overview of the ‘new constitutionalism’ movement and its effects on legal orders worldwide. Firstly, I will turn to phenomenon of global constitutionalism, including constitutional transplants and constitutional dialogue (2.1.). Secondly, the role of constitutional courts as promoters of this movement will be shown and the different forms of judicial review will be explained (2.2.). Unsurprisingly, the move to new constitutionalism is not universally accepted. Some critical remarks have been raised (2.3.) Finally, the last part of this chapter turns to the countermajoritarian difficulty (2.4.).

2.1. Global Constitutionalism

36. Nowadays, constitutional courts are part of many democratic polities. Remarkably, this is a fairly recent phenomenon. Before the Second World War, very few high courts possessed the power of constitutional judicial review.80 This changed in the 1950’s. A model of democracy emerged in Western Europe that is now labeled as ‘new constitutionalism’. It rejects legislative sovereignty, prioritizes fundamental rights and requires a mode of constitutional review. Its three main characteristics are a written constitution81, a charter of fundamental rights82 (Bill of Rights) and a mode of constitutional judicial review.83 This formula proved to be successful and quickly spread across the continent. By the 1990’s it had diffused globally.84 As a result, constitutional review has become a global institutional norm.85

2.1.1. Opportunistic Reasons

37. However, it is not only the democratic aura that made this movement so dominant. Constitutions are not only cornerstones of national identity, they are simultaneously instruments of policy.86 States employ

82 Nearly every recent constitution has expressed a core set of civil and political rights, including but not limited to: the right to life, the right to property, freedom of expression, the right to privacy, freedom of thought and religion, and the right to participate in government. D. LAW, “Globalization and the Future of Constitutional Rights”, Northwestern University Law Review 2008, volume 102, 1277.
constitutions to achieve certain goals, such as competing against other nations for investment capital or signaling conformity to the standards of the international community. As a result, states adopt similar constitutions for opportunistic reasons, because they aim to achieve similar goals. LAW and VERSTEEG list four theoretical reasons which explain this grade of constitutional convergence: constitutional learning, constitutional competition, constitutional conformity and constitutional networking.87

38. Firstly, constitutional learning refers to the process of copying legal and constitutional innovations from rivals that have proven to be successful in the hope of achieving similar success. Nevertheless, this is not always a deliberate process. Constitution makers lack the information to make the best possible choices and inevitably rely on examples and practices of other countries.88

39. A second explanation of global constitutionalism is constitutional competition. Globalization has increased the mobility of financial and human capital.89 Countries try to attract these sources by offering a tailored legal infrastructure to gain a competitive advantage. LAW strikingly describes this as a potential ‘constitutional race to the top’, but only insofar as targeted constitutional rights are appealing for investors and skilled workers, the two most important target audiences.90

40. A third stimulus consists of constitutional conformity. There are incentives for countries to conform their behavior to that of others. The most important reason is to secure recognition from the international community. States must satisfy certain expectations to attain international acceptance, and these are increasingly constitutional in nature.91 Examples include the United Nations and the European Union. The latter in particular provides a very specific platform regarding constitutional issues. Europe’s constitutional architecture challenges one of the classic conditions of a constitution, namely the association of a constitution and constitutional law with State- and peoplehood. It envisions the co-existence of national constitutional orders within a supra-national constitutional order in the form of the European Union. Consequently, it illustrates the utility of the transposition of constitutionalism to the

88 Because individuals often have difficulties retrieving a full sample of information, they tend to base their decisions on instances that are available to them. Consequently, the choice set of policy makers will be limited to policies of states that are immediately accessible. Z. ELKINS and B. SIMMONS, “On Waves, Clusters and Diffusion: A Conceptual Framework”, The Annals of the American Academy of Political and Social Science 2005, volume 33, 43-44.
92 The European constitutionalization process resulted in the Treaty Establishing a Constitution for Europe in 2004. However, because France and The Netherlands rejected its ratification, it never entered into force. Instead, the Treaty of Lisbon was adopted, as an amendment to the existing treaties, which entered into force on the 1st of December 2009.
supranational level, in order to acquire control over decision-making taking place outside national borders.\footnote{E. DE WET, “The International Constitutional Order”, International and Comparative Law Quarterly 2006, volume 55, 52.}

\textbf{41.} Lastly, constitutional networks contribute to a global constitutionalism. Shared legal standards generate network effects that benefit existing users, and encourage adoption by outsiders. Users within such a network dispose of an accumulated ‘legal capital’.\footnote{D. LAW and M. VERSTEEG, “The Evolution and Ideology of Global Constitutionalism”, California Law Review 2011, volume 99, 1184.} Furthermore, additional economic benefits can be: lowering barriers for exchange, attracting investments from other network members and larger markets and easier access to resources. Most important is that constitutional networks promote peace and prosperity on a global scale: membership in a constitutional network can positively influence a country’s economic prosperity and military security.\footnote{D. LAW and M. VERSTEEG, “The Evolution and Ideology of Global Constitutionalism”, California Law Review 2011, volume 99, 1185.}

\subsection{2.1.2. Constitutional Transplants and Constitutional Dialogue}

\textbf{42.} Constitutional learning can occur at several levels. The smallest example of a transplant can be a rule of constitutional structure, an institution or a fundamental rights provision. A larger transplant is possibly the migration of a regime itself, for example the US presidentialism in Latin-America. Furthermore, a constitutional method too can be the object of borrowing, of which proportionality analysis\footnote{Infra no. 117.} forms a prime example.\footnote{V. PERJU, “Constitutional Transplants, Borrowing and Migrations”, in M. ROSENFELD and A. SAJÓ (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford, Oxford University Press, 2012, 1315.}

\textbf{43.} Moreover, constitutional judges themselves are important contributors to constitutional borrowing as they read, cite and use decisions of their foreign peers. However, this is a somewhat recent event. Not all judges conceived the borrowing of foreign legal ideas as a positive evolution.\footnote{“Irrelevant are the practices of the ‘world community’, whose notions of justice are (thankfully) not always those of our people”. Atkins v. Virginia, 536 U.S. 304, 347 – 348 (2002) Dissenting opinion from Justice Scalia.} JACOBSOHN associates this with ‘constitutional imperfection’. By scrutinizing the work of foreign judiciaries, judges may get a better understanding of the scope of ‘their’ constitutional imperfection.\footnote{G.J. JACOBSOHN, “The Permeability of Constitutional Borders”, Texas Law Review 2004, volume 82, 1812.} In other words, by expanding the scope of constitutional resources, judges hope to expand the available options for judicial problem solving. Nonetheless, precisely those extra options are the main target for critique by opponents of borrowing. According to JACOBSOHN, the two most serious elements of critique can be described as the cultural objection and the juridical objection.\footnote{G.J. JACOBSOHN, “The Permeability of Constitutional Borders”, Texas Law Review 2004, volume 82, 1814. The former objection argues that constitutional interpretation must be grounded in the legal and political culture within which it operates: the fusion of
foreign sources undermines the role of the constitution in sustaining the national identity. However, as shown above, the concept of a constitution as the pinnacle of national identity has been mitigated by constitutional conformity and the rise of inter- or supranational organizations. The second objection on the other hand, focuses on the potential threat of more judicial activism. Judges will expand their scope in order to legitimate outcomes that would not have been possible if confined to domestic legal sources. While Jacobsohn acknowledges that the citation of foreign sources irrefutably opens extra possibilities, it is in his opinion not linked with judicial activism or restraint: often it is used to challenge the status quo.

44. Furthermore, the emergence of fora for transnational litigation strongly encourages judicial dialogue. Examples include the World Trade Organization, the International Court of Justice and the European Court for Human Rights. The distinction between domestic and international law is not as clear as it once was. Consequently, the institutional identity of courts, and the professional identity of judges who sit on them, is forged more by their common function of resolving disputes under law than by the differences in law they apply. According to Slaughter, this results in a growing global community of courts, constituted by the self-awareness of the judges who play a part: they see each other not as representatives of a particular polity, but as fellow professionals in an international endeavor. Slaughter mentions ‘constitutional cross-fertilization’ as a symptom of this growing global community of courts: constitutional courts cite each other’s precedents on varying issues. However, because constitutional borrowing is likely to be politically problematic, courts are often particular about when they borrow and who they borrow from.

45. Much in the same spirit, Justice L’Heureux-Dubé notes that “the process of international influence has changed from reception to dialogue. Judges no longer simply receive cases of other jurisdictions and then apply them or modify them for their own jurisdiction. Rather, cross-pollination and dialogue between jurisdictions is increasingly occurring. Judges around the world look to each other for persuasive authority, rather than some judges being ‘givers’ of law while other are ‘receivers’.” As a result, the dialogue of constitutional courts has become a major venue for the migration of constitutional ideas.

101 Supra no. 41.
46. *PERJU* indicates several motivations for voluntarily constitutional borrowing. The first is functionalist: systems borrow legal solutions that have already been tested in other systems. By doing so, the borrowing systems do not need to invest in a new legal solution. The second set is reputational: borrowing has ‘legitimacy generating’ effects. For example, it can be a sign of breaking with an undemocratic past. Reputational motivations occur at the drafting stage. Political actors seek to maximize their own preferences and reputation when choosing the institutional design. Finally, the last set can be described as normative. *PERJU* describes this as follows: “Normative motivations see the spread of liberal constitutionalism – both constitutional structure and bill of rights – as the recognition of a universal set of principles for organizing political power in a way that protects individual freedom in a modern state”.

47. It is clear that constitutional transplants are occurring frequently. This leads to some degree of constitutional convergence, strengthened by globalization. It is however unclear to what extent this process will continue. *LAW* and *VERSTEEG* discovered that global constitutionalism is increasingly characterized by an ideological schism that divides the world’s constitutions into two distinct clusters: a cluster of ‘libertarian’ constitutions and a cluster of ‘statist’ constitutions. Libertarian constitutions are influenced by the common law tradition and emphasize on judicial protection from deprivation of the core interests of life and physical liberty. Statist constitutions on the other hand, are defined by an emphasis on the power and responsibility of the state, across a broad range of social, economic, political and cultural domains. Within each cluster, constitutions are becoming more similar to each other, but the clusters themselves are becoming more distinct from one another. The overall result is a combination of convergence and polarization.

2.2. Constitutional Courts: Catalysts of New Constitutionalism

48. The development and success of new constitutionalism would not have been possible without constitutional courts. A constitutional court can be defined as “a constitutionally established, independent organ of the state whose central purpose is to defend the normative sovereignty of the

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constitutional law within the judicial order.” Historically, the first specialized constitutional courts appeared in Austria and the Germanic states. The concept of the modern constitutional court is firmly tied with the name of Kelsen. He developed the centralized model of review, which has later been adopted by constitutional reformers in the rest of Europe, making the ‘Kelsenian court’ a widespread success.114

49. This diffusion of the Kelsenian formula depends, according to Sweet on three factors.115 First of all, framers of new constitutions believed that the concentrated, centralized model of review would fit a parliamentary system of government better than the American system. A constitutional court can be attached to the existing state architecture without violating established principles, such as the separation of powers and the notion of legislative sovereignty. Secondly, it is no coincidence that the germ of new constitutionalism was found in Germany. It was a reaction against the Second World War and the Holocaust. Rights protection was perceived as a crucial element for future democratic societies.116 Here, a parallel can be drawn with a more recent ‘democratization’ wave: Central and Eastern European countries also adopted the European model of centralized judicial review.117 Under Communist rule, court judges were viewed as incompetent and corrupt, merely being puppets of the Communist Party. After the fall of the Berlin Wall, constitution drafters sought to isolate judicial review from ordinary judges. A specialized constitutional court offered a solution, while also sending out the message “out with the old, in with the new”.118

50. The last factor concerns the recursive nature of the diffusion process. Constitution makers are likely to copy successful legal arrangements. As stated above, this can be classified as ‘constitutional learning’119. The constitutional court has proved its worth as an instrument for consolidating constitutional democracy and many actors, such as judges, NGOs and law professors, actively defend the legitimacy of the model, making it increasingly dominant.120

51. As a result, modern constitutionalism changes the relation between courts and representative institutions. The latter have been demoted from sovereign entities to institutions restricted by legally

119 Supra no. 38.
enforceable constitutional limitations.\textsuperscript{121} MANDEL mentions that MONTESQUIEU’s fundamental distinction between legislatures making and judges applying the law has become unintelligible. The outcome of these shifted positions can be described as the ‘legalization of politics’\textsuperscript{122}, which moves the locus of political activity out of the parliaments and into the courts.\textsuperscript{123}

2.2.1. The American vs. the European Models of Judicial review

52. As briefly mentioned earlier, there are two models of constitutional review: an American one and a European one. The first concerns ‘decentralized’ judicial review: it is performed by the judiciary, in the course of resolving litigation. Review powers are held by all courts, not only by the Supreme Court.\textsuperscript{124} The latter involves ‘centralized’ constitutional review: a special, constitutional court is created to void legal norms when they conflict with the constitution. Ordinary judges do not have this authority.\textsuperscript{125}

53. This is the result of a different approach to the notion of separation of powers. In American judicial review, courts are a separate, but co-equal branch of government, within a system of ‘checks and balances’.\textsuperscript{126} The task of American courts is to resolve litigation under the laws of the United States, of which the Constitution is a part. The Supreme Court established this doctrine in the landmark Marbury vs. Madison decision:

“It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written Constitutions”.\textsuperscript{127}

\textsuperscript{121} M. MANDEL, “A Brief History of The New Constitutionalism, or ‘How we changed everything so that everything would remain the same’”, Israel Law Review 1998, volume 32, 251.
\textsuperscript{122} \textit{Infra} no. 151.
\textsuperscript{123} M. MANDEL, “A Brief History of The New Constitutionalism, or ‘How we changed everything so that everything would remain the same’”, Israel Law Review 1998, volume 32, 251.
54. The decentralized model was not successful in Europe due to several reasons. Firstly, this system appeared to create a ‘confusion of powers’: it permits courts to participate in the work of the legislature.128 Secondly, the European judicial organization was not considered appropriate for judicial review: most systems had more than one higher court as opposed to the Supreme Court.129 Moreover, the large size of the courts and the voluminous caseload - they generally lack the power to select the appeals they decide - decrease their decisional authority.130 Finally, the composition of the European judiciary and the code-based legal system were also important. Ordinary judges practice a more technical statutory application, which critics of the American system thought to be incompatible with the more creative balancing as requested for conducting constitutional review.131

55. As a consequence, the European model offers a clearly centralized model of constitutional review. According to SWEET, this model contains four components.132 Firstly, constitutional courts possess a monopoly on the power to invalidate legal norms as unconstitutional. Secondly, constitutional courts resolve disputes about the interpretation and application of the constitution, they do not preside over litigation. As a third characteristic, constitutional courts are detached from the legislative, executive and judicial branches of government. Fourthly, constitutional courts use abstract review: they strive to eliminate unconstitutional legislation before it enters into force.

56. This last component is simultaneously the second major difference between the American and European model: abstract review versus concrete review. The decentralized model implies that judicial review is incidental to ordinary litigation, whereas the centralized model allows constitutional courts to decide at an abstract level, without the need to examine the factual circumstances of the case.133

This chart134 offers an overview:

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Constitutional judicial review is decentralized: all judges possess the power to void or refuse to apply a statute on the grounds that it violates the constitution.

The Supreme Court is a court of general jurisdiction: it is the highest court of appeal in the legal order, not just for constitutional issues.

Judges possess review authority because their legal duty is to resolve legal ‘cases’, some of which will have a constitutional dimension.

Judicial review can be considered ‘concrete’, in that it is exercised pursuant to ordinary litigation.

Constitutional review authority is centralized: only the Constitutional Court may annul a statute.

The Constitutional Court’s jurisdiction is restricted to resolving constitutional disputes.

Review powers are defensible under separation of powers doctrines to the extent that it is exercised by a specialized organ, the Constitutional Court.

Constitutional review is ‘abstract’: the review court does not resolve concrete cases, but answers constitutional questions referred to it by judges or elected officials.

57. Logically, the Belgian Constitutional Court forms an example of the European model. However, how exactly does a constitutional court relate to the separation of powers theory? According to this theory, the power within a state ought to be divided between the legislative, the executive and the judiciary branch, whereby each power must be controlled by another one. On the one hand, a constitutional court clearly possesses legislative powers; but on the other hand a constitutional court, just like ordinary judges, produces judgments. Consequently, it might be qualified as belonging to two branches at the same time. Strictly speaking, this goes against the separation of powers theory, which states that none of the three powers should reside with one institution.

58. Nonetheless, this doctrine is not applied rigorously within the Belgian legal order. The separation of powers is mainly used to emphasize the independence of the three branches. It does not oppose the voluntary cooperation between each of the three powers, provided that the mutual control keeps occurring. In fact, this interpretation resembles the American system of ‘checks and balances’: no power may be exercised without control.

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135 SWEET uses the term ‘judicial’ review to refer to the general authority of ordinary judges. Obviously, this does not imply that European ‘constitutional’ review is not a form of judicial review.


137 M. UYTTENDAELE, Précis de droit constitutionnel belge: regards sur un système institutionnel paradoxal, Brussels, Bruylant, 2005, 68.


Moreover, the Belgian Constitutional Court is considered to be distinct from all other powers, even from the judicial branch. In fact, the Court was introduced by a separate chapter within the Belgian Constitution, aside from the chapter concerning the judiciary. As such, the Court is not a part of the complex, pyramidal judiciary system. Consequently, it provides a different ‘service’ to the community. As a result, the Constitutional Court is conceived as an institution sui generis: it occupies a separate, individual constitutional space.

2.2.2. Abstract Review, Concrete Review and Constitutional Complaint

In countries with a constitutional court, there are three main procedures that activate judicial review: abstract review, concrete review and the individual constitutional complaint. Nevertheless, a constitution does not necessarily establish all three procedures.

Abstract review is the pre-enforcement review of statutes. It is also called ‘preventive review’ since its purpose is to refine unconstitutional laws before they can cause damage. Usually abstract review is politically initiated. A further distinction is made between a priori review and a posteriori review. The first takes place before the statute enters into force, while the latter occurs after the promulgation but before its application.

Concrete review is initiated by the judiciary in the course of litigation in the ordinary courts. Ordinary judges activate review by sending a preliminary question to the constitutional court. Referrals suspend proceedings pending the constitutional court’s response. They are not allowed to determine the constitutional validity of statutes on their own, which contrasts with the American system. In this regard, this concrete review is still more abstract, because the constitutional court will not settle the case, which remains the responsibility of the referring judge.

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141 Within Title III of the Belgian Constitution, Chapter V concerns the Constitutional Court, while Chapter VI involves the judicial branch. This was deliberately done by the Belgian legislator.
63. Lastly, the constitutional complaint enables individuals to appeal directly to constitutional courts, usually after judicial remedies have been exhausted. As a result, most constitutional complaints are in effect appeals of final judicial rulings.

64. The Belgian Constitutional Court is accessible through two main procedures: an appeal for annulment, with a possible appeal for suspension, and through preliminary questions.

Firstly, the Court is capable of (partially) annulling laws, decrees or ordonnances. It is a form of *a priori* review: the applicant can contest these legislative acts before they are applicable to his situation. The appeal can be filed by both institutional applicants (the Council of Ministers, the Government, or the President of the Chamber of Representatives) and non-institutional applicants (individuals and corporations). However, an appeal for annulment needs to be filed within a period of six months after the contested law has been announced in the Belgian Official Journal.

Tied with the appeal for annulment, the applicant can also ask the Court to suspend the contested act. An appeal for suspension is accessory to an appeal for annulment, it cannot be filed as an independent claim. The purpose of such suspension is to prevent the contested act from inflicting major damage during the litigation.

Secondly, when the validity of an act is being questioned in the course of a litigation, the judge is obligated to pose a preliminary question to the Constitutional Court. Moreover, the referring judge is obligated to ask a preliminary question whenever a party requires him to do so. As a consequence, individuals cannot pose a preliminary question directly to the Constitutional Court.

2.3 Critical Remarks

65. The enormous success of new constitutionalism is not uncontested. In general, it can be said that new constitutionalism and the rise of constitutional courts are linked with the democratization process, yet simultaneously can be considered undemocratic. HIRSCHL describes this global trend toward the expansion of the judicial domain as “arguably one of the most significant developments in late twentieth and early twenty-first century government”. The massive delegation of powers from representative institutions to constitutional courts may indeed raise some pertinent questions.

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151 Nonetheless, there are exceptions to this rule. For example, when the Constitutional Court has already answered a similar question, the referring judge does not need to ask the question again.
New constitutionalism is often linked with a transition to democracy, through the constitutionalization of rights and the establishment of judiciaries and supreme courts with judicial review practices. However, this does not explain the significant variations in judicial power in different new, or existing democracies. Moreover does it fail to provide an explanation in the scenario where a system adopts constitutional reform without major changes in political or economic regimes. The cause for this difference in ‘degree of democratization’ lies with the choices of political actors. They may benefit from an expansion of judicial power in a number of ways. Firstly, delegating policymaking authority to the courts may reduce decision-making costs for politicians. It shifts responsibility to the institutional apparatus in which they operate and reduces their personal risk. Secondly, politicians can rely on a court’s apolitical and professional image to gain public support for sensitive issues.

More in general, HIRSCHL concludes that judicial empowerment through constitutionalization can be seen as the byproduct of a strategic interplay between political elites, economical elites and judicial elites. Although demand for constitutional change can emanate from various groups, the change will often be blocked if these three groups do not support this demand. Judicial empowerment through the constitutionalization of rights may provide an efficient institutional means by which political elites can insulate their challenged policy preferences against popular political pressure. Perhaps the most glaring example of this is the adoption of a Bill of Rights for black people during the Apartheid, because it had become clear to the regime that it could no longer sustain itself by repressive policies.

HIRSCHL concludes that judicial empowerment through constitutionalization is part of a broader trend whereby crucial policymaking functions are increasingly insulated from majoritarian control. In other words, the hegemonic preservation thesis implies that constitutional review leads to tyranny of the minority. This has taken place on the national and on the supranational level and it shows that constitutionalization of rights is becoming a key factor in international politics. Ironically, this has occurred alongside growing popular demands for political representation and the global spread of universal suffrage. As a result, new constitutionalism is “an attempt to defend established interests from

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155 HIRSCHL calls this the ‘Hegemonic Preservation’ thesis.
the potential threats posed by the voices of cultural divergence, growing economic inequality, regionalism, and other centrifugal forces that have been given a public platform through the proliferation of representative democracy.\textsuperscript{160}

\textbf{69. Ginsburg} developed a similar vision with his ‘insurance thesis’\textsuperscript{161}: elites will entrench rights within an institutional setting in order to ensure their survival within the future order. It is a deliberate preparation for the loss of power during democratization or political uncertainty.\textsuperscript{162}

\textbf{70.} Another fervent opponent of new constitutionalism is \textsc{Mandel}. In his view, judicial review is, rather than the essence of democracy, an antidote to it.\textsuperscript{163} It is meant to preserve the oligarchy of private property from the threat of representative institutions. Due to a broader suffrage, propertied classes lost control of these institutions and as a result started to worry about the ‘tyranny of the majority’. Judicial review was the appropriate solution, constitutional theory was changed in order to conserve the oligarchy of the wealthy.\textsuperscript{164}

\textbf{71. Waldron}\textsuperscript{165} too is not in favor of judicial review. He argues that there are no reasons for a reasonably functioning democracy to install constitutional courts and adopt judicial review. The legislator, who is inherently more democratic than courts due to elections, is perfectly capable of dealing with rights-issues itself. Consequently, there is no need for judicial rights review.

\section*{2.4. The Counter-Majoritarian Difficulty}

\textbf{72.} Perhaps the most well-known term of critique regarding judicial review, is \textsc{Bickel}’s ‘counter-majoritarian difficulty’. As shown above\textsuperscript{166}, the \textit{Marbury vs. Madison} ruling of the Supreme Court, established judicial review in the United States. In this case, \textsc{Marbury} and some others sued Secretary \textsc{Madison} for delivery of their commissions as justices. Great Chief Justice \textsc{Marshall} held that they indeed were entitled to their commissions, but that the Supreme Court could not order \textsc{Marbury} to deliver, since the authorizing section of the Judiciary Act was unconstitutional. Consequently, \textsc{Marshall} had assumed for his Supreme Court the power to apply the Constitution.

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\textsuperscript{161} \textit{Infra} no. 82.
\textsuperscript{162} Y. Hazama, “Hegemonic Preservation or Horizontal Accountability: Constitutional Review in Turkey”, \textit{Annual Meeting of the American Political Science Association Paper}, 2010, 3.
\textsuperscript{163} M. Mandel, “A Brief History of The New Constitutionalism, or ‘How we changed everything so that everything would remain the same’”, \textit{Israel Law Review} 1998, volume 32, 252.
\textsuperscript{164} M. Mandel, “A Brief History of The New Constitutionalism, or ‘How we changed everything so that everything would remain the same’”, \textit{Israel Law Review} 1998, volume 32, 253.
\textsuperscript{165} \textit{Infra} no. 132.
\textsuperscript{166} \textit{Supra} no. 53.
\end{flushleft}
73. Initially, MARSHALL’s argumentation is clear: every legislative act must conform to the Constitution. Therefore, an act which is contrary to the Constitution, cannot be considered as law. Normally, if two laws conflict, a court must obey the superior one. However, according to BICKEL, a statute’s repugnancy to the Constitution is in most instances not self-evident: it requires a policy decision. Consequently, the central problem is to establish who exactly should decide this issue of policy: the courts, the legislature itself, the President, or the people themselves through elections? MARSHALL did not deem it appropriate to leave this decision with the legislature; it would allow those, whose power is supposed to be limited, to set the limit themselves. This would ultimately lead to abuse. However, BICKEL argues that the Constitution does simultaneously limit the power of the courts as well. In other words, granting the power to decide this issue to courts is just as unfavorable as giving it to the legislator. Moreover, this would even be more absurd because courts are not subject to electoral control.

74. MARSHALL’s main argument for judicial review relies on a textual interpretation of the American Constitution, which states that “the Judicial Power shall extend to all Cases […] arising under this Constitution” Article III, Section 2 of the Constitution. In his view, it would be impossible to decide cases arising under the Constitution without examination and application of the Constitution itself. However, BICKEL argues, it is not clear whether this ‘Judicial Power’ goes as far as to review acts of legislature. In fact, the Constitution merely states the existence of the Judicial Power and does not determinate the nature and extent of the function of courts. Consequently, it could perfectly be conform the Constitution that the judiciary’s duty is to enforce the Constitution within its own sphere, when the Constitution addresses itself with fair specificity to the judiciary branch itself. This would result in a situation “where each branch of the government would construe the Constitution for itself as concerns its own functions, and that this construction would be final, not subject to revision by any of the other branches”.

75. Next, BICKEL turns to heart of the problem: judicial review is a ‘counter-majoritarian force’ within the legal system. When the Supreme Court declares a legislative act unconstitutional, it thwarts the will of representatives of the people and it exercises control against the prevailing majority. As such, judicial review is undemocratic. This undemocratic characteristic is, according to CALABRESI, strengthened because of two factors. Firstly, the American Constitution is over two hundred years old and was, at the

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168 However, it could be argued that by leaving the decision to the legislator, it ultimately leaves the decisions to the people. The people, as the principle within this relation, would set the limits of the power that they delegated to the agent.
170 Article III, Section 2 of the Constitution.
time, enacted by a small, wealthy minority. Secondly, most modern judicial decisions seem only remotely connected with the actual constitutional text.\textsuperscript{173}

\textbf{76.} However, BICKEL’s argument relies on two assumptions: firstly, that the electoral process is definitive of democracy, and secondly, that an unelected judiciary is politically unaccountable.\textsuperscript{174} Yet, to some authors, the ‘gap’ between a court and the legislative branch is rather small. According to DAHL, ‘policy views’ dominant on the Court are never for long out of line with the policy views among the lawmaking majority of the United States\textsuperscript{175}. Consequently, the Supreme Court will eventually come around to the majoritarian national view. In this regard, the countermajoritarian difficulty reduces the Supreme Court to a mere ‘lagging indicator’: it is able to impose delay on majoritarian policy preferences.\textsuperscript{176} Nevertheless, CALABRESI simultaneously adds a caveat to this notion. Firstly, unlike European Courts, there are no guarantees that vacancies for the Supreme Court will occur regularly. Therefore it is possible that an outdated majority holds power on the Court for a considerable amount of time. Moreover, this is strengthened because judges are appointed for life. Secondly, the countermajoritarian difficulty remains a serious issue when it comes to the Supreme Court as a political agenda setter. Issues like gender equality, racism, free speech can be catapulted to the forefront of public life, which is a tremendous power within a democracy.\textsuperscript{177}

\textbf{77.} GREENWOOD conceives the countermajoritarian difficulty as an inadequate theory: it judges the judiciary according to standards of the legislature. He agrees that, if judges were no more than inferior legislators, they would indeed be a truly anomalous institution, but this is not the case. In their own way, judges do possess democratic credentials, which should be taken into account. Indeed, the judiciary reflects a national constituency: the President appoints the federal judiciary, and judicial nominees are subject to a national debate. Congressmen and Senate members on the other hand, are elected locally and can consequently not claim to represent a national electorate.\textsuperscript{178}

\textbf{78.} According to CROLEY, the issue of the countermajoritarian difficulty is linked with judicial constitutional democracy itself. Indeed, constitutional democracy entails a simultaneous commitment to the principles of democracy and constitutionalism. Moreover, judicial constitutional democracy charges judges with the task of subjecting democratic decision-making to constitutional constraints. However,

these two principles are, to a certain extent, incompatible with each other. For a democrat, the will of the majority should govern. However, a constitutionalist is concerned with minority rights and attaches more importance to the protection of the individual autonomy. Historically, constitutionalism is rooted in fear of the consequences of the majoritarian rule: a constitution identifies the rights against a majority. As a result, majoritarian decisions are subject to judicial review to ensure their compatibility with constitutional rights. Consequently, constitutionalists have tried to reconcile judicial review with democracy. Tribe listed the most important justifications: “contributions have included those that defend constitutional review by an independent judiciary as an activity serving the ‘prophetic function’ of seeking objectively correct answers to moral and political questions; those that justify such judicial review as an enterprise designed to repair defective processes of participation and representation; those that support it as an undertaking in ‘interpreting’ certain social practices in such a way as to give them the greatest possible integrity; those that seek to ground judicial review in the avoidance of governmental actions justified solely by ‘naked preferences’; and even some that aim to link judicial enforcement of the Constitution to common-law principles of property, contract and tort law.”

79. As a result, it can be said that the countermajoritarian difficulty itself is a controversial normative claim about appropriate institutional relations among different governmental agencies. Bickel’s notion received a lot of attention and consequently caused a lot of debate. Yet, in all those discussions, the practice of judicial review itself remains in a sense unnoticed. Bickel did not conclude that judicial review should stop because it is undemocratic. The very concept of judicial review, Winter concludes, is so firmly established in our political, social and professional consciousness that its continued existence is utterly indisputable. In other words, “discussions of the countermajoritarian difficulty and the debates over the proper parameters for judicial review are foreground disputes that are actively shaped by the range of background assumptions against which they necessarily take place.” In the end, the countermajoritarian difficulty is the price we pay for our choice for a model of constitutional democracy. Ultimately, this fundamental choice is not questioned.

Chapter 3: Constitutional Courts

80. In this chapter, I will focus on the role and function of Constitutional Courts. The first section contains an overview of the reasons why policy makers decided to install Constitutional Courts and how they provide a solution to several issues (3.1.). Next, the possible influence of a Constitutional Court within its legal system will be concretized by introducing the notion of the ‘zone of discretion’ (3.2.). Then I will turn to the use of proportionality analysis. It is the main paradigm Constitutional Courts use to settle disputes about rights (3.3). In the following section I take a more in-depth look at judicial review (3.4.). Finally, the phenomenon of ‘judicialization of politics’ as a consequence of referring review powers to judiciaries will be treated (3.5).

3.1. A Theory of Delegation

3.1.1. The Constitution as an Incomplete Contract

81. The creation of a constitutional court seems, in a way, paradoxical. Why would constitution drafters choose to limit their own future legislative authority? The answer is, simply put, because it serves their own interest. A constitutional court helps drafters to resolve certain dilemmas and problems of imperfect contracting and commitment.\textsuperscript{184}

82. Firstly, constitutional choices typically have a great impact on subsequent political outcomes.\textsuperscript{185} Consequently, there are strong pressures on designers to choose institutions that will benefit their constituencies in the future. The uncertainty about the future political configuration at the time of the drafting is a crucial element for the constitutional drafters. This results in what GINSBURG calls the ‘insurance model of judicial review’: “Explicit constitutional power of and access to judicial review will be greater where political forces are diffused than where a single dominant party exists at the time of the constitutional design”\textsuperscript{186}. Judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain.

83. In this regard, a constitution can be seen as an incomplete contract. A contract is incomplete if meaningful uncertainty exists about the precise nature of the contract’s terms. It is impossible for the contracting parties to negotiate all possible contingencies, because conditions will change and the interest of parties will evolve.\textsuperscript{187} Therefore, the parties rely on ‘relational contracting’. Relational


contracting settles for an agreement that frames the relationship. The parties do not agree on detailed plans but on goals and objectives, on general provisions that are broadly applicable and on dispute resolution to be used if disagreements occur.\textsuperscript{188} The more acute the problems of incomplete contracting are, the more authority the framers need to delegate to the constitutional court if constitutional arrangements are to be successful.\textsuperscript{189}

3.1.2. Deferral

84. Constitution-making can be characterized as an attempt to regulate the future on behalf of the past. In theory, today’s drafters constrain future citizens. Without effective inter-temporal control constitutions cannot serve as effective pre-commitment devices.\textsuperscript{190} However, drafters often choose to not bind their successors and draft constitutional provisions in vague language. Or they explicitly delegate certain constitutional questions to future legislations. This is known as deferral.

85. In general, any rule not specified in the constitution is implicitly delegated to future legislations. Nonetheless, when drafters choose to explicitly delegate issues it shows that they wish to constitutionalize the issue in some way.\textsuperscript{191} The clearest way of delegating constitutional decision-making to the future is the use of ‘by law’ clauses. These clauses either require the future legislature to decide certain constitutional issues or else explicitly empower the legislature to decide the issues. GINSBURG distinguishes two types of by law clauses: a ‘requiring’ clause and an ‘empowering’ clause. Both clauses represent an explicit delegation to future decision-makers to decide how a certain issue should be resolved. However, the former is weaker than the latter. A requiring clause simply defers a certain issue to be regulated, while an empowering clause defers both the question of how to regulate and the question of whether to regulate at all.\textsuperscript{192}

86. As shown above, constitutions can be seen as incomplete, relational contracts.\textsuperscript{193} They have to be negotiated and thus come with decision costs and error costs. Decision costs are associated with reaching a decision; error costs are a possible consequence of that decision. In other words, decision costs are generated before any decision is made. Error costs on the other hand depend on a decision.\textsuperscript{194}

\textsuperscript{193} Supra no. 83.
87. In Belgium, decision costs are unusually high. This is perfectly demonstrated by the phenomenon of “waffle iron-politics”. In order to appease both the Flemish and Walloon Community, it was decided in the seventies that for every investment made in one of the two regions, the other region would automatically receive an equal amount of money. It was an expensive method of keeping the communal peace between the two communities: it led to a noticeable increase of Belgium’s debts.

88. Firstly, decision costs are the costs of deliberating, negotiating and finalizing an – in this case constitutional - agreement. These are caused by the asymmetric information among parties and are strengthened because constitutional bargaining often occurs amongst groups that have little in common. It makes reaching a constitutional bargain difficult to achieve, especially given the time-constraints which often apply to processes of constitution-making. ELSTER mentions how paradoxical this context inherently is: the task of constitution-making generally emerges in circumstances that are likely to work against good constitution-making.

89. Secondly, error costs involve the difference between the expected outcome of a policy and its actual outcome. These costs are affected by the level of information available to drafters about the possible consequences of their decisions. Drafters realize that the constitutional bargain they struck will change over time. A second contributing factor is tied with uncertainty: designers may not understand the full consequences of their choices.

90. Deferral may lower both decision and error costs. Firstly, it increases the potential area of agreement among parties to constitutional negotiations. It is namely easier for parties to agree that certain issues should be regulated by the constitution than to agree how they should be regulated. Secondly, it decreases the costs to losing parties of making certain concessions. Error costs that occur ‘down the road’ are more easily reversed, because future legislators will be subject to an ordinary legislative majority, instead of the higher threshold for constitutional amendment. In other words, the error will be more easily corrected.

195 Wafelijzerpolitiek in Dutch.
196 As a result, some useless investments were made. The most iconic example is the boat lift of Strépy-Thieu: a massive installation on a rather small canal. It was built as a compensation for the expansion of the port of Zeebrugge. Nowadays, it mainly functions as a tourist attraction.  
197 http://www.standaard.be/cnt/dmf20110804_112
91. However, in Belgium, error costs further down the road are occasionally much higher for the legislator. In some cases, an ordinary majority does not suffice to adopt a certain act. The Belgian Constitution requires a qualified majority for acts regarding the relations between the federal state and the Communities and Regions. These laws are called ‘special laws’ or ‘qualified majority laws’. Such a special law must be adopted in both the Chamber of Representatives and the Senate by a majority in both language groups and the total amount of positive votes must be at least two thirds of the total amount of votes. By introducing this special majority requirement, the constitutional legislator wanted to prevent the scenario in which a language group was forced to adopt a certain regulation because it was outnumbered by the ordinary majority voting system.203

92. As a result, deferral seems most likely in the context of issues that are either very high or low stakes, or in areas where there is a very high chance of error costs or high decision costs. The most common issues subject to deferral concern citizenship, the qualification of electors or citizens and the method of electing and replacing legislators.204

93. Although deferral may reduce some costs for constitutional drafters, it inevitably causes potential dangers. For one, overuse of deferral may overburden the institutional capacities of future legislators.205 Moreover, drafters are not sure whether the issue will actually be addressed in the future. Therefore it may be useful if constitution-makers combine deferral with the adoption of temporary default constitutional arrangements until subsequent legislation is actually passed.206 More in general, judicial review may remedy some of those potential dangers. Constitutional courts have been willing to demand that legislatures pass certain rules in response to constitutional and legislative lacuna.207

94. The amount of deferral is linked with the overall endurance of the constitution itself. With little or no deferral constitutions will involve more error costs and thus be more vulnerable to possible future replacement. Ironically, a high amount of deferral may also jeopardize the existence of a constitution, if future legislators or courts fail to decide key constitutional questions.208

95. In the end, leaving things for the future is an important element in constitutional design. It offers constitutional drafters some degree of flexibility and facilitates constitutional bargaining. Or, as DIXON and GINSBURG word it: “The genius of constitutional design is not only in figuring out which decisions

207 Infra no. 177.
should be taken off the table of ordinary politics, but also in identifying which should be laid out on the table as well.”

3.1.3. Constitutional Trusteeship

96. Constitution making often multiplies contracting problems. Its higher law status raises the stakes for negotiating parties. A constitutional court which is able to settle disputes that arise under the constitution can mitigate some of these difficulties, even though it comes with certain costs. These costs come in the form of ‘principal-agent’ relationships.

97. Principals are the rulers, while agents are those on whom the rulers have conferred some decision-making authority in order to perform services desired by the principals. In this case the drafters are the principals and the ordinary judges are the agents. The judges are delegated some amount of governmental authority in order to perform the function of dispute resolution and law application. And it is precisely from this delegation that courts draw their legitimacy. In this traditional view, the judges’ task is to strictly control the application of legal provisions. They are, in MONTESQUIEU’s famous words, la bouche de la loi.

98. The classic principal-agent framework does not entirely cover the position of constitutional courts within a system of constitutional justice. According to Sweet, a model of ‘constitutional trusteeship’, wherein drafters confer expansive, fiduciary powers on a review court, is more appropriate. A trustee is a particular kind of agent, it possesses the power to govern those who have delegated in the first place. In systems of constitutional trusteeship, political elites are never principals in their relation with constitutional judges, because the only way to overturn their decision is by amending the constitution, which is practically impossible in many countries. It is true that officials are still able to influence the constitutional courts by appointing the judges, but ultimately the power to control constitutional development has shifted to the judges themselves.

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210 Supra no. 85.
213 This translates roughly to the mere mouthpiece of the law.
99. To conclude, one can say that modern constitutionalism is characterized by structural judicial supremacy, where the principals have transferred significant ‘political property rights’ to judges, for an indefinite duration.\footnote{216}{A.S. SWEET and J. MATTHEWS, “Proportionality Balancing and Global Constitutionalism”, Columbia Journal of Transnational Law 2008, volume 47, 86.}

3.1.4. Constitutional Courts in Authoritarian Regimes

100. Constitutions can also perform a meaningful role within authoritarian regimes. A constitutional court established in such a regime is often meant to consolidate it, while disadvantaging any opposition.\footnote{217}{A.S. SWEET, “Constitutional Courts”, in M. ROSENFELD and A. SÁJÓ (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford, Oxford University Press, 2012, 821.} It is perhaps the most extreme application of the ‘insurance model of judicial review’.\footnote{218}{Supra no. 82.}

101. Moreover, sometimes constitutions even lie. These ‘sham’ or ‘façade’ constitutions fail to constrain or describe the powers of the state. In this case constitutions are referred to as ‘parchment barriers’.\footnote{219}{D. LAW and M. VERSTEEG, “Sham Constitutions”, California Law Review 2013, volume 101, 867.} Even within a well-performing democracy, there will always be a gap between the ‘formal’ constitution and the ‘informal’ constitution. The theoretical constitutional state – as it is conceived in the written constitution – and the actually existing state, determined by the body of rules, understandings and practices will differ.\footnote{220}{In this context, LAW makes the distinction between a ‘large-c constitutions’ and ‘small-c constitutions’. The former embodies the written, codified, or formal constitutions while the latter contains the unwritten, de facto, uncodified constitutions. D. LAW, “Constitutions” in P. CANE and H.M. KRITZER (eds.), The Oxford Handbook of Empirical Legal Research, Oxford, Oxford University Press, 2010, 377.}

102. However, authoritarianism and repression are not the only reasons why constitutions may not be respected. Poorer nations often lack the resources to honor the positive socioeconomic rights listed in their constitutions.\footnote{221}{D.L. CINGRANELLI and D.L. RICHARDS, “Measuring Government Effort to Respect Economic and Social Human Rights: A Peer Benchmark” in S. HERTEL and L. MINKLER (eds.), Economic Rights: Conceptual, Measurement and Policy Issues, Cambridge, Cambridge University Press, 2007, 215.} The obligations set out by the constitutions are in this sense unrealistic. It is worth noting in this aspect that precisely judicial review can be a way to bridge the gap between the formal constitutions and the state’s practice.\footnote{222}{D. LAW and M. VERSTEEG, “Sham Constitutions”, California Law Review 2013, volume 101, 875.}

103. LAW and VERSTEEG define a ‘sham constitution’ as a constitution which provisions are not upheld in practice.\footnote{223}{D. LAW and M. VERSTEEG, “Sham Constitutions”, California Law Review 2013, volume 101, 880.} They determined the gap between what a country promises in its constitution and what it delivers in practice. The larger this gap, the stronger the constitution can be considered as a sham. Yet not every descriptively inaccurate constitution is a sham. A further distinction needs to be made between
accurate and inaccurate constitutions, and among different types of accurate and inaccurate constitutions. This results in four types of constitutions, listed in the following chart:\(^{224}\): 

<table>
<thead>
<tr>
<th>A country…</th>
<th>… delivers little in practice (low \textit{de facto} rights protection)</th>
<th>… delivers much in practice (high \textit{de facto} rights protection)</th>
</tr>
</thead>
<tbody>
<tr>
<td>… promises much in its constitution (high \textit{de jure} rights protection)</td>
<td>‘sham constitution’, characterized by underperformance</td>
<td>‘strong constitution’</td>
</tr>
<tr>
<td>… promises little in its constitution (low \textit{de jure} rights protection)</td>
<td>‘weak constitution’</td>
<td>‘modest constitution’, characterized by overperformance</td>
</tr>
</tbody>
</table>

104. According to the table, ‘sham constitutions’ are linked to a country which promises much in its constitution, but delivers little in practice. These countries are underperforming relative to their constitutions. The opposite of this scenario, in which a country promises little in its constitution but respects more rights in reality can be classified as a ‘modest constitution’.\(^{225}\) These two types of constitutions are characterized by a clear difference between the state’s practice and the content of the constitution, for the better or for the worse.

105. On the other hand, there are countries which deliver roughly what their constitutions promise. In this group a division can be made between ‘strong’ and ‘weak constitutions’. Countries with a strong constitution practice a strong form of rights constitutionalism both in theory and practice: their constitutions promise a lot and all promises are being fulfilled. In contrast, countries which possess a weak constitution offer little respect for rights, but those meager contents are reasonably well upheld in practice.\(^{226}\)

106. Starting from this qualification of constitutions, some determinations can be made. Firstly, strong constitutions are more common than sham constitutions, while both weak and modest constitutions are relatively rare.\(^{227}\) Secondly, strong and weak performers are concentrated in different geographic regions: most sham constitutions are located in Africa and Asia while the strongest constitutions can be found in Europe.\(^{228}\) However, these differences between regions cannot be attributed solely to wealth.

differentials. Countries within the same region can serve as inspiration for one another and as a result they adopt similar approaches to the drafting and implementation of constitutions.

107. Some factors might have an influence on whether or not a country engages in ‘sham constitutionalism’. More democratic countries are more likely to uphold the rights they promise, in contrast to more authoritarian regimes. The latter seem to pay lip service to various rights just for the purpose of appeasing the international community, without any intention of honoring those. Another factor which correlates with constitutional noncompliance is civil war and ethnic fractionalization. Logically, the extent to which a constitution promises a wider variety of rights also has an impact. It is in general more difficult for those countries to honor all of them.

108. Thus far, none of these factors comes as a surprise. Much more striking is the list of variables that do not influence the amount of constitutional noncompliance. These variables are all related to a country’s formal legal system, such as the ratification of human rights treaties, the age of the constitution, the common law tradition and most importantly the existence of judicial review. This leads LAW and VERSTEEG to pose the following thesis: “The absence of a positive relationship between judicial review and constitutional compliance highlights the need for critical reexamination of widely held assumptions about the efficacy and necessity of judicial review.”

109. Recently, Egypt provided a clear example of a sham constitution. In 2013, president MORSI was overthrown. A new constitution was adopted, based on the amended Constitution of 2012. However, this Constitution provided no guarantees of human rights and failed to safeguard basic rights. Since January 2014, a new Constitution has been accepted through a referendum. Although some changes have been made to the version of 2012, the two texts are still quite similar. The new Constitution provides an extensive list of protected human rights. However, the role of the military has been altered severely. The Constitution introduced a military Supreme Court. The army has its own constitutional institute, which can interfere with the political process.

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229 Supra no. 37 and 42.
236 https://www.constituteproject.org/constitution/Egypt_2014.pdf; See in particular Chapter 3: “Public Rights, Freedoms and Duties”.
3.2. The Zone of Discretion

110. The qualification of constitutional judges as trustees indicates clearly the amount of power they theoretically possess. SWEET formalizes this unique position in terms of a ‘zone of discretion’.\textsuperscript{239} In short, it is the strategic environment in which a constitutional court operates. He defines it as: “the sum of powers delegated to the court and possessed by the court as a result of its own accredited rulemaking minus the sum of control instruments available for use by non-judicial authorities to shape or annul outcomes that emerge as the result of the court’s performance of its delegated tasks”.\textsuperscript{240} In situations of trusteeship this zone is unusually large, due to the fiduciary responsibilities of the agent. In contrast, the zone of discretion of an ordinary judge is much smaller, as he operates in a system of legal sovereignty.\textsuperscript{241}

111. Most constitutional courts operate in such a large zone of discretion that it is unlikely that their rulings will be overturned.\textsuperscript{242} This is especially so because most constitutions are difficult to amend, and some core constitutional elements may not be changed at all. These are referred to as ‘eternity clauses’.

112. Flexibility is an important condition for the durability of a constitution. However, the instrument for constitutional change, namely constitutional amendment, may possibly have negative consequences. Because the constituent power disappears after the constitution is created\textsuperscript{243}, it has no further control on the later amendment of the constitution. This causes an inevitable dilemma: in order to preserve the longevity of the constitution, the constituent must establish amending power, but it is this very same amending power which endangers the constitution.\textsuperscript{244} In order to solve this dilemma, constitutional drafters made use of eternity clauses, which are unamendable constitutional provisions. According to PREUSS, these clauses indicate the most constitutive elements of the founding act. Amendment to these fundamental clauses are ‘unconstitutional’, not because they violate a constitutional clause, but because they destroy the constitution altogether.\textsuperscript{245} Similarly, WEINTEL words it as follows: “An eternity clause can be defined as any constitutional agreement – either anchored in the constitution or deemed essential

\textsuperscript{243} The constituent power establishes the constitution, which in turn regulates the ordinary constituted powers, such as the executive, legislative, and judiciary, which govern every-day political life. Y. ROZNAI, “Towards a Theory of Unamendability”, 12.
to the system by the courts – designed to monitor future amendments in order to strike down revolutionary ones, which tend to cut of the chain of a nation’s founding narrative."246.

113. In essence, eternity clauses create a distinction within a constitution. Norms protected by an eternity clause can be said to be higher norms than ordinary constitutional provisions, subject to amendment.247

114. WEINTAL distinguished two types of eternity clauses: formal ones and judicial ones. The former are framed by the constituent assembly and are characterized by their clear language and purpose. The latter however have no clear trace in the constitutional text: they are established by courts.248 Judicial eternity clauses in particular might raise some questions. If eternity clauses are conceived to be fundamental elements of a state’s identity, judicial decisions about these highly sensitive matters can be seen as ‘judicial coups d’états’. SWEET describes these as “a fundamental transformation in the normative foundations of a legal system through the constitutional lawmaking of a court”249. Consequently, using KELSEN’s250 or HART’s251 concepts, these decisions might change the Grundnorm or a rule of recognition.

115. Nonetheless, the idea of protecting certain principles or institutions through unamendable provisions has been very successful. Simultaneously with the rise of new constitutionalism, including an unamendable provision became a symbol of modernism.252 As a result, it is now generally acknowledged that certain constitutional principles are indeed unamendable, based on the theory of ‘supra-constitutional’253 basic constitutional principles. Indeed, the global success of the idea of limiting the amendment power is linked to the rise of world constitutionalism, the global spread of constitutional supremacy, and judicial review. ROZNAI mentions how the spread of this idea, coupled with judicial review of constitutional amendments opens up great opportunities for constitutionalism. It can be regarded as a mechanism to prevent human rights violations and protect basic democratic values against temporary majorities.254 However, inevitably this practice raises questions about the undemocratic

247 supra no. 6.
250 supra no. 2.
251 supra no. 23.
253 ROZNAI notes that ‘supra-constitutional’ does not refer to principles outside or above the constitutional order. In fact, these stream from within the constitution: they remain ‘internal supra-constitutional principles.’ Y. ROZNAI, “Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea”, The American Journal of Comparative Law 2013, volume 61, 714.
character of courts and the counter-majoritarian difficulty. Therefore, ROZNAI concludes, “it is crucial that both constitution-makers use unamendable provisions carefully, and that courts employ the extraordinary power of declaring amendments unconstitutional with great restraint.”

116. In conclusion, the widest zone of discretion will be found in a country where the constitutional court has been delegated abstract and concrete review powers, as well as the authority to process individual complaints and where it is relatively difficult (or impossible) to amend right provisions, especially if the court simultaneously possesses the power to review constitutional amendments.

3.3. Proportionality Analysis

3.3.1. An Analytical Framework

117. A constitutional court resolves intra-constitutional conflicts. It is confronted with legal disputes in which each party pleads a constitutional norm or value against the other. If the conflict cannot be resolved by interpretation, a court could develop a conflict rule that determines which interest prevails. However, creating such hierarchies would effectively constitutionalize winners and losers. Instead, judges announce that no right is absolute and engage in a balancing exercise. The attitude of courts in this matter makes balancing the go-to method: each party is pleading a legitimate norm or value. The court holds each of these interests in equally high esteem. Determining which interest shall prevail is no mechanical exercise, but a difficult judicial task involving complex considerations. As a result, future cases concerning the very same two legal interests may be decided differently, depending on the facts of the case. In other words, each act of balancing is unique.

118. The mostly used balancing technique for managing rights disputes is proportionality analysis. It originated in Germany during the eighteenth century as an important instrument for the introduction of individual rights into an authoritarian legal system. Nonetheless, there is nothing inherently German about the roots of proportionality. De facto, it is a response to a universal legal problem: it reconciles an authority’s extensive reach with its unspecified limits. As a consequence, it quickly spread across the

255 Supra no. 72.
entire globe. By the end of the 1990s virtually every effective system of constitutional justice in the world embraced the use of proportionality analysis.\textsuperscript{262} A notable exception however are the United States. Balancing has never attained the status of an established doctrine in American constitutional law in the same way proportionality has in European constitutional law.\textsuperscript{263} Nevertheless, S\textsc{weet} and M\textsc{athews} consider proportionality-based rights adjudication as one of the defining features of global constitutionalism.\textsuperscript{264}

119. Proportionality analysis offers an argumentation framework for dealing with intra-constitutional tensions. These tensions occur when two constitutional principles conflict with each other. According to A\textsc{lexy},\textsuperscript{265} a conflict between principles needs to be resolved by balancing. The Court needs to establish a conditional relationship of preference. Proportionality analysis provides the best suited method to complete this exercise. As a framework it indicates to litigating parties how to plead their interests and how judges will reason their decision.\textsuperscript{266} Especially for judges, this proportionality structure provides an analytical framework to assess the necessary and sufficient conditions under which a right takes precedence over competing considerations. Consequently, the proportionality principle comes into play primarily in conflicts over fundamental rights and freedoms and the legislature’s power to intrude on them.\textsuperscript{267}

120. Balancing is a necessary exercise in rights adjudication because of several reasons. Firstly, rights provisions are open-ended norms. Judges need a way to formalize a balancing procedure in order to impose this on litigating parties. Proportionality analysis offers such a method.\textsuperscript{268} Secondly, most constitutions state that most rights provisions are not absolute and can be limited by another value of constitutional rank. These are called limitation clauses. So the constitution itself indicates that most rights are possibly limited, which automatically requires judges to adopt a method to manage these intra-constitutional conflicts.\textsuperscript{269}

\textsuperscript{262} A.S. S\textsc{weet} and J. M\textsc{athews}, “Proportionality Balancing and Global Constitutionalism”, \textit{Columbia Journal of Transnational Law} 2008, volume 47, 74.
\textsuperscript{263} M. C\textsc{ohen-eliya} and I. P\textsc{orat}, “American Balancing and German Proportionality: The Historical Origins”, \textit{International Journal of Constitutional Law} 2010, volume 8, 265.
\textsuperscript{264} A.S. S\textsc{weet} and J. M\textsc{athews}, “Proportionality Balancing and Global Constitutionalism”, \textit{Columbia Journal of Transnational Law} 2008, volume 47, 74.
\textsuperscript{265} Supra no. 16.
\textsuperscript{266} A.S. S\textsc{weet} and J. M\textsc{athews}, “Proportionality Balancing and Global Constitutionalism”, \textit{Columbia Journal of Transnational Law} 2008, volume 47, 89.
\textsuperscript{267} M. K\textsc{umm}, “The Idea of Socratic Contestation and the Right to Justification: the Point of Rights-Based Proportionality Review”, \textit{Law And Ethics human Rights} 2010, 142.
\textsuperscript{268} A.S. S\textsc{weet} and J. M\textsc{athews}, “Proportionality Balancing and Global Constitutionalism”, \textit{Columbia Journal of Transnational Law} 2008, volume 47, 90.
\textsuperscript{269} A.S. S\textsc{weet} and J. M\textsc{athews}, “Proportionality Balancing and Global Constitutionalism”, \textit{Columbia Journal of Transnational Law} 2008, volume 47, 91.
Proportionality analysis involves four steps, each involving a test. The first step concerns legitimacy, in which the judge confirms that the government is constitutionally authorized to take the measure in question. It has to serve a legitimate purpose. The second phase involves the suitability-test: the judge has to verify that the measure adopted by the government is rationally related to the policy objectives; it must further the goal the government intends to realize. The third step, which concerns necessity, is commonly referred to as the ‘less-restrictive means’ test: the judge needs to verify if the measure does not reduce the right in question any more than is necessary in order for the government to achieve its goals.

When all three previous tests have been passed the judge proceeds to balancing in the strict sense, the fourth and final step. He weighs the benefits against the costs incurred by the infringement of the right, in order to determine which constitutional value shall prevail. This last step in particular, combined with the least-restrictive means test, shows the possible issue with proportionality analysis: it exposes judges as lawmakers.

3.3.2. Judicial Lawmaking

The use of proportionality by judges combined with the rise of new constitutionalism fundamentally changed the relation between legislators and constitutional courts. Judicial balancing modifies the democratic standard: it is an expression of indirect democratic legitimacy and trust in judicial deliberation. Constitutional courts are very aware of this delicate form of trust. They know that balancing is democratically sensitive and often emphasize their respect for the legislature and legislative decision-making when undertaking balancing exercises.

Remarkably, Kelsen himself had identified this possible consequence. His legal theory focused on a legal system as a hierarchy of norms, which judges are enlisted to defend as to secure the validity

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277 Supra no. 2.
and legitimacy of the entire system. However, he made a clear distinction between the legislative and judicial branch within a legal system. Parliaments are, in his view’, ‘positive legislators’ which can make new laws freely. Constitutional courts on the other hand, were conceived as ‘negative’ legislators’: they can only annul statutes if they are in conflict with constitutional law. This distinction rests on the absence of enforceable rights in the constitution. Kelsen approached the notion of a constitution in a material sense: it only regulates the creation of general legal norms and does not entail constitutional rights. A constitutional court that would protect rights would eliminate the distinction between ‘negative’ and ‘positive’ legislators and eventually become ‘super-legislators’.

125. Consequently, new constitutionalism and the rising use of proportionality analysis proved Kelsen right: a rights-protecting, trustee court is a positive legislator. Yet, at the same time, new constitutionalism made Kelsen’s critique less relevant. Rights and constitutional review are now considered as a central element within the very idea of constitutionalism. The constitutional doctrine changed after the Second World War. It now makes the distinction between the scope of a constitutional right and the limitations to which it is subject.

126. The scope of a constitutional right defines the area that it covers and can only be changed by constitutional amendment. The limitations on the other hand set the constitutional conditions under which the rights may not be fully realized, often expressed in a limitation clause. Precisely those limitation clauses ‘constitutionalize’ the elements of proportionality. It is further proof of how constitutionalism has changed over time, and how Kelsen’s original theory has been altered.

127. Nonetheless, proportionality analysis still is subject to criticism. Balancing has a flair of subjectivism, for there is no objective method of balancing. Ideally, it is objectively possible to determine whether a means is functional and necessary, but the balancing of rights remains unavoidably subjective. Furthermore, balancing offers a judge excessive discretion, possibly impairing legal certainty. Additionally, critics also note how proportionality requires judges to commensurate the incommensurable, how proportionality analysis is deceptive and, perhaps even most importantly, opaque: often the reasons for a court’s decision are not clear. BARACK notes that, what really underlies

280 Supra no. 14.
the criticism of proportionality and balancing is nothing more than the general argument made against general judicial review of a law’s constitutionality.\textsuperscript{286}

3.3.3. Deference

\textbf{128.} In a reaction against the more active attitude of courts through proportionality balancing and increased judicial lawmaking, the theory of ‘deference’ was introduced. Deference involves the principle that the courts, out of respect for the legislature and the executive branch, will decline to make their own independent judgment on a particular issue.\textsuperscript{287} In fact, this can be conceived as an application of the separation of powers doctrine.\textsuperscript{288}

\textbf{129.} Traditionally, two justifications have been advanced for judicial deference. Firstly, rights-based review lacks democratic legitimacy. Deference ought to be used to mitigate the tensions between democracy and judicial review. The second argument indicates that the judiciary lacks the competence of the other branches of government.\textsuperscript{289} However, deference should not be interpreted as the refusal to decide on the validity of legislative or executive acts: it does not prohibit judicial review. Rather, it encourages judges to recognize the role of the legislator and the executive branch in determining the common good. In other words, from a democratic point of view, deference is required to decisions made by the legislature and executive which have serious potential results for the community.\textsuperscript{290}

\textbf{130.} In fact, it stimulates cooperation and mutual respect between branches. If courts decide to invalidate legislation, they should allow room in their orders for the legislature to choose between a number of options and consequently promulgate new legislation in response to the judgment.\textsuperscript{291}

3.4 Judicial review

\textbf{131.} Nowadays, constitutional courts have without any doubt a legislative impact within a legal system. Judicial review can be an effective tool of government. Judges are able to set forth certain provisions which, in some cases, have a general binding force. This is especially so for constitutional judges. Logically, this raises the question if such a far reaching influence is desirable within a modern democratic society.


\textsuperscript{288} Supra no. 57.


\textsuperscript{290} DYRO, “Some Thoughts on Judicial Deference”, \textit{Judicial Review} 2006, volume 11, 103.

3.4.1. Waldron’s Case

132. WALDRON has written one of the most cited articles on judicial review, “The Core of the Case against Judicial Review” in which he opposes this particular activity of constitutional courts. His thesis – based on four assumptions - is simple: there is no reason to make use of judicial review, for a legislator is capable of doing the same.

133. WALDRON’s assumptions are based on a modern, reasonably working democratic society. Firstly, he imagines a society with democratic institutions in good working order, including a representative legislature. Secondly, this society has a set of judicial nonrepresentative institutions, again in reasonably good working order, set up to hear lawsuits, settle disputes and uphold the rule of law. As a third assumption, most members of the society and its officials commit to the idea of individual and minority rights. Finally, there is persisting, substantial and good faith disagreement about those rights amongst the members of society. Immediately, the Achilles’ heel of this theory becomes apparent: to what extent can these assumptions hold true? What is to be understood under the notion ‘in reasonably good order’?

134. So, within this society the members of the community are committed to rights, but they disagree about rights. These issues are in need of settlement. Consequently, the members of the society need to share a theory of legitimacy for the decision-procedure that is to settle their disagreements. WALDRON identifies two sets of reasons which the members of the society could take into account for designing their decision-procedure: ‘outcome-related’ and ‘process-related’ reasons.

135. Process-related reasons are defined as “reasons for insisting that some person make, or participate in making, a given decision that stand independently of considerations about the appropriate outcome”. For example, a parent has the right to make the decision whether his child should be disciplined for a given infraction, it is not for a passer-by to make that decision – even though he might be able to make a better judgment than the parent.

136. Outcome-related reasons on the other hand are “reasons for designing the decision-procedure in a way that will ensure the appropriate outcome”. It strives to establish a good, just, or right decision. Outcome-related reasons are attractive in this context, because the protection of rights is at stake here. If the decision does not have a correct and just result, rights will unavoidably be violated.

293 J. WALDRON, “The Core of the Case Against Judicial Review”, Yale Law Journal 2006, volume 115, 1369. WALDRON recognizes that judicial review has some merit in this case: it allows citizens to bring issues, which the legislator could not have foreseen, to everyone’s attention.
In general, outcome-related reasons are associated with the case for judicial review. Judges dispose of certain advantages which will increase the probability of right and just decisions. First of all, issues of rights present themselves to judges in the form of individual situations, which helps them to see how an individual is affected by certain legislations. Furthermore, judges are required to explicitly reason their decisions, which shows the effort and accuracy of judicial deliberation. However, to some extent those same arguments also apply to legislators. Individual cases may be considered during the legislative process through lobbying and in debate, for example. Likewise, in-depth reasoning can be given in those same legislative debates. However, can this be considered to be the core task of a legislator? One could argue that the legislative branch should be occupied with the bigger scheme of things and should not engage in discussions on small or individual cases. Moreover, would reasonable disagreement within this ‘reasonably working democracy’ suffice to adequately address these issues?

While WALDRON acknowledges these potential outcome-related reasons in favor of judicial review, he does reject them because courts are no better than legislatures at resolving disputes about individual rights correctly. However, according to FALLON, one outcome-related reason is overlooked. The affirmative case for judicial review does not depend on the assumption that courts are better at identifying rights. Rather, both institutions should be enlisted in the cause of rights protection in order to protect fundamental rights to the greatest extent possible.

In contrast to outcome-related reasons, process-related reasons weigh in favor of legislatures. This is shown in the theory of political legitimacy. Why would a citizen, bound by a legislative decision, accept the consequences of said decision if he disagrees? A possible answer may be offered concerning the process by which the decision was reached. Even if the citizen disagrees with the outcome, he may accept that it was arrived at fairly. Within a democracy, legislatures are set up in a way that they provide a fair process in order to make their decisions acceptable, through fair elections and through the use of majoritarian decision. The same does not apply to judges. The system of legislative elections is superior as a matter of democracy to the indirect and limited basis of democratic legitimacy for the judiciary.

However, this lack of democratic legitimacy is not necessarily problematic. FALLON notes how WALDRON often equates ‘democratic legitimacy’ with ‘political legitimacy’, however, the latter is a broader concept. Even if judicial review is lacking in democratic legitimacy, decisions by courts can still be accepted by citizens if these institutions are well designed to safeguard individual rights. In other
words, if judicial review reduces the likelihood that important rights will be violated, then it may actually enhance a government’s overall political legitimacy.\textsuperscript{303}

\textbf{141.} So, WALDRON concludes, outcome-related reasons are inconclusive (they apply to a certain degree to both the judiciary and the legislative branch) and process-related reasons are strongly in favor of legislatures. Consequently, ordinary legislative procedures ought to be chosen to settle disagreements about rights. Judicial review as an additional layer “adds little to the process except a rather insulting form of disenfranchisement and a legalistic obfuscation of the moral issues at stake in our disagreements about rights”.\textsuperscript{304}

\begin{flushleft}
\textbf{3.4.2. In Defense of Judicial Review}
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\textbf{142.} WALDRON’s point is clear: the judiciary should only have a minimal function in resolving disputes about rights between citizens and legislature. The relative legitimacy of legislature and judiciary is self-evident in a reasonably functioning democracy. However, according to LEVER, this overlooks the possibility that courts might have ways of being democratic that are distinctive to themselves. There is no reason to suppose that a judiciary is less democratic than a legislature simply because it is not elected.\textsuperscript{305} Judges can represent democratic ideas and ideals in their own person and behavior, their actions and deliberations may reflect a democratic regard for the rights of all people.\textsuperscript{306}

\textbf{143.} Furthermore, WALDRON attaches too much importance to the importance of voting as the legitimation of democratic power within a society.\textsuperscript{307} Universal adult suffrage is but one of several democratic mechanisms for legitimizing power. It does not automatically make legislatures more democratic than judiciaries. In this regard, WALDRON also overestimates the political equality of legislatures. In his view, legislatures are elected by ‘one man one vote’ and then vote on such a basis themselves.\textsuperscript{308} Theoretically this might be true, but in reality some groups have more political and economic influence because they are more organized. Examples given are unions, political organizations, or the Catholic Church.\textsuperscript{309}

\textbf{144.} Judicial review offers a remedy against these issues: it can enable relatively poor, powerless and unpopular people to vindicate rights that they would otherwise have to let go. Or, it can enable oppositional political groups to challenge conventional notions. More in general, LEVER notes that

\begin{itemize}
  \item \textsuperscript{304} J. WALDRON, “The Core of the Case Against Judicial Review”, \textit{Yale Law Journal} 2006, volume 115, 1406.
  \item \textsuperscript{305} A. LEVER, “Is Judicial Review Undemocratic?”, \textit{Public Law} 2007, 286.
  \item \textsuperscript{306} A. LEVER, “Is Judicial Review Undemocratic?”, \textit{Public Law} 2007, 287.
  \item \textsuperscript{307} A. LEVER, “Is Judicial Review Undemocratic?”, \textit{Public Law} 2007, 288.
  \item \textsuperscript{309} A. LEVER, “Is Judicial Review Undemocratic?”, \textit{Public Law} 2007, 291.
\end{itemize}
“judicial review enables people to try to vindicate their rights, self-respect and public standing through means that speak to their sense that they have been wronged”.

145. In the end, LEVER concludes, there is no conclusive evidence whether courts or legislatures are better at protecting individual rights, however, “judicial review can be a useful and attractive addition to a democratic legislature even if judges, like legislators are fallible”.

146. Historically, over the course of the nineteenth century, regimes transitioned from direct to representative democracy. This involved a significant loss of individual citizen’s control over the political process and empowered a group of officials. After the Second World War, the establishment of constitutional courts can be seen as the further empowerment of another group of officials, whose task includes the supervision of activities by the first group of officials. KUMM notes that, once the step to the ‘initial’ empowerment is made, it becomes difficult to see why the restriction of the powers of legislators by judges can possibly be wrong as a matter of principle. This is especially so because the second officials (the judges) are generally appointed by the first group (the legislators): if representative democracy is legitimate, why can representative democracy involving a rights-based judicial review not be legitimate?

147. In the same spirit as LEVER, KUMM also acknowledges that individuals cannot make much difference by participating in the political process through their equal right to vote. The most likely way for an individual citizen to change the outcomes of a national political process is by going to court and claim that his rights have been violated. This effect should not be underestimated. In a modern representative democracy, the right to "persuade a court to veto a policy is at least as empowering as the right to vote to change policy. They complement one another”.

148. Another possible defense of judicial review lies in ‘rights-based’ theories. These theories emphasize the need for judicial review in order to guarantee an efficient protection of rights. Because the content of rights and their scope is dependent on societal norms, practices and values, these should be taken into account in order to assess what precisely these rights are. However, elections are not

designed to include these considerations. Courts are, and in that sense they can be described as an alternative form of democratic participation.\textsuperscript{316}

149. Next, settlement theories focus on the conducive character of judicial review. It stimulates settlement, coordination and stability. This theory is based on the premise that settlement is desirable: “One of the chief functions of law in general, and constitutional law in particular, is to provide a degree of coordinated settlement for settlement’s sake of what is to be done. In a world of moral and political disagreement law can often provide a settlement of these disagreements, a settlement neither final nor conclusive, but nevertheless authoritative and thus providing [...] a resolution that will make it possible for decision to be made, actions to be coordinated and life to go on”\textsuperscript{317}. Courts in particular are more suited for achieving settlement than the legislature, because of their insolation from political winds, their constrained procedures and their small number of members.\textsuperscript{318}

150. HAREL and KAVANA offer a different method in order to defend judicial review. In their opinion, the debate concerning judicial review is pervaded by the critical flaw that judicial review must be instrumentally justified. Or, in other words, that it has to be grounded in contingent desirable features of the judicial process.\textsuperscript{319} Examples include the superior quality of judicial decisions, the superior ability for judges to protect rights and the special deliberative power of judges. In order to counter this flaw, the authors propose another justification: judicial review is designed to provide individuals with a right to a hearing or a right to raise a grievance. As a result, judicial review is intrinsically desirable, rather than instrumentally: it is grounded in the fundamental duty of the state to consult its citizens on matters of rights, and especially to consult those whose rights may be affected.\textsuperscript{320} The right to a hearing consists of three components: the opportunity to voice a grievance, the opportunity to be provided with a justification for a decision that may infringe on someone’s rights and to reconsider the initial decision giving rise to the grievance.\textsuperscript{321} Precisely the judicial process embodies the right to a hearing, and consequently justifies the existence of judicial review.\textsuperscript{322}

3.5. Judicialization of Politics

151. The world has witnessed a transfer of power from representative institutions to judiciaries over the past few decades. As a consequence, a trend of ‘judicialization of politics’ has emerged. It can be described as “the reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies”\(^{323}\). Through these new judicial review procedures, courts have been asked to resolve a plethora of issues, ranging from the liberty of expression and religion, equality rights and privacy to public policies pertaining criminal justice, trade and commerce, property and environmental protection.

152. The growing political significance of courts also expanded in scope, beyond the ‘standard’ concept of judge-made policy making. Some of the most pertinent and polemical political controversies have been transferred to courts. This has been accompanied by the assumption that courts, and not the politicians, are the appropriate forum for making these key decisions.\(^{324}\)

153. HIRSCHL distinguishes three forms of ‘judicialization of politics’.\(^{325}\) Firstly, at the most abstract level, it refers to the spread of legal discourse, jargon, rules and procedures into the political sphere and policy-making forums. A second, more concrete form is the expansion of the territory of courts in determining public policy outcomes, through constitutional rights jurisprudence. It focuses on procedural justice and formal fairness in the decision-making process, and is often used by right claimants who challenge policy decisions ‘from below’. Finally, the third form of judicialization concerns decisions about political controversies that define whole policies. HIRSCHL calls this decisions about ‘mega-politics’.

154. The judicialization process has been increasingly apparent in electoral issues. Courts have been asked to settle matters about party funding, campaign financing and the approval of certain parties or candidates.\(^{326}\) In Belgium for example, the right-wing party Vlaams Blok has been banned by the Belgian Court of Cassation.\(^{327}\)

155. The judicialization of politics would not have occurred without the support of influential political stakeholders.\(^{328}\) After all, constitutional courts do not operate in an institutional vacuum: their jurisprudence cannot be understood separately from the political system in which they operate.

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\(^{327}\) Cass. 9th of November 2004, AR P.04.0849.N/1

Consequently, ‘bottom up’ judicialization is more likely to occur when judicial institutions are perceived by social and political groups as more effective decision-making bodies than government institutions. Politicians too can possibly gain an advantage by directing issues to courts: it forms a means to shift responsibility and reduce personal or electoral risk.³²⁹ Or, for the opposition, it can be useful to obstruct and harass government.³³⁰

Moreover, the creation of constitutional courts too has had a stimulating effect on the judicialization of politics. Not only have they been willing to invalidate and modify legislation, their existence pressed ordinary judges to take account of constitutional issues in their own judicial activities.³³¹ As such, the phenomenon of judicialization is strengthened. Furthermore, according to FOREJOHN, judicialization of politics leads ultimately to the politicization of courts. Since courts are able to make politically consequential decisions, those interested in judicial decisions have reason to seek influence and, if possible, to control appointments to the courts.³³²

Chapter 4: Is Judicial Review Undemocratic?

157. As chapters 2 and 3 have shown, judicial review has its opponents and defenders. The debate started with the countermajoritarian difficulty and has since then only gained more and more attention. In a way, it is only logical for the legitimacy of judicial review to be questioned. It cannot be denied that constitutional courts, even though they are inherently linked with the democratization process, are inherently undemocratic. It is an inevitable paradox, tied with democratic constitutionalism.

158. Kelsen himself immediately acknowledged the threat of Constitutional Courts that would start acting as a positive legislator, rather than a negative one. For this very reason, he opposed the idea of introducing a Bill of Rights within a Constitution, for it would expand the scope of judicial review. A Court that has to settle disputes about fundamental rights, automatically resides to balancing. And balancing is a legislative style of deliberation.333

159. The rise of new constitutionalism and the growing popularity of constitutional review worldwide has immensely increased the influence of Constitutional Courts. Although Kelsen was right to predict the changing role of a Constitutional Court when granting it the authority to settle disputes about fundamental, open-ended rights, it is clear that most democracies have embraced these Courts as positive lawmakers. Nowadays, rights protection is considered to be fundamental to democracy. It has led to a structural change within modern democracies: the traditional separation of powers doctrine is no longer strictly applicable. Constitutional Courts stretch the boundaries between the legislative and judiciary power. They serve as institutions that provide a forum in which legislatures can be held accountable, and are able to veto acts that infringe the legitimate interest of individuals.334

160. Moreover, the more rights review is effective, the more the Constitutional Court will act as a positive legislator and the more the legislative process will be judicialized.335 However, and this sets a them so radically apart from any other judge, Constitutional Courts were not meant to be purely judicial bodies. As shown above, they were introduced as a solution to several contracting problems336 and as a method to overcome certain uncertainties that constitutional framers could not have foreseen337. As a result, Constitutional Courts are more or less expected to participate in legislative politics.338 In fact, this unique form of participation could ideally further democracy by generating a constitutional dialogue

336 Supra no. 81.
337 Supra no. 84.
between these two main actors. However, simultaneously it can also be argued that the legislator performs its task less diligently, because he knows that any mistakes will be corrected by the Court. Nonetheless, constitutional systems that enable legislatures to respond to constitutional review, facilitate the regular resolution of smaller issues.

161. Ultimately, it cannot be denied that judicial review is undemocratic. It is an unavoidable paradox. More importantly, this paradox has become a crucial element for modern democratic constitutionalism. Sometimes the will of the majority needs to be altered, in order to respect an individual right. However, simply using the term ‘undemocratic’ might not even be entirely justified. Most opponents of judicial review judge apply the term undemocratic as in not elected, or not accountable. Consequently, judges are inferior to legislators. However, is it reasonable to judge judges by legislative standards? Moreover, perhaps too much importance is being given to elections. It can be argued that elections are too blunt, too infrequent and raise too many issues for electoral consideration to provide a good means of holding legislators accountable for violations of rights. Judges can be accountable for their decisions, and thus gain some ‘democratic credit’, in their own ways. This can for example be done through the publication of their decisions, which shows the underlying reasoning of a certain judgment and likewise exposes judges to criticism if they fail to provide a decent reasoning.

162. Moreover, judicial review might be the most efficient way of making a Constitution effective. If so much importance is being attached to fundamental rights and the protection against possible violation, a specialized Court offers the most reasonable solution. Ultimately, constitutionalism entails the understanding of being governed by a Constitution. In my opinion, this is preferably done through participation and dialogue. If the legislator and the Constitutional Court are capable of constructing a meaningful dialogue in order to reveal the meaning and scope of the fundamental rights embedded in our Constitution, then both will engage in a democracy-promoting process.

163. In the first part, I outlined the most relevant theoretical concepts and discussions regarding the position and political power of constitutional courts in general. This second part is conceived as a Belgian case-study, in which I will discuss recent judgments by the Belgian Constitutional Court. All decisions which declared a breach of the Belgian Constitution during the period from September 2014 until February 2015 have been covered. However, for the reader’s sake, I will only highlight the most interesting decisions: those that are linked with the possible juristocratic character of the Belgian Constitutional Court.

First, I will provide some detail on specific issues related with the Belgian Constitutional Court (Chapter 5). Next, I will summarize the reasoning of the Court in some of its recent decisions, related to the criteria I set out in the previous chapter (Chapter 6). Finally, I will provide a general evaluation and conclusion (Chapter 7).
Chapter 5: Outlining the Theory

164. In this chapter I will firstly provide an overview of all the decisions of the Belgian Court (5.1.). Then, I will turn to the different ‘criteria’ on which I classified the decisions. Namely, the difference between an appeal for annulment and the preliminary procedure (5.2.), the maintaining of effects (5.3.), interpretations (5.4.) and legislative lacunae (5.5).

5.1. Raw Data

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AA = Appeal for Annulment; PQ = Preliminary Question; ME = Maintaining of Effects; INT = Interpretation.
165. This table allows us to list some deductions. In total, 24 decisions\textsuperscript{344} established a violation of the Constitution of which

- 7 concerned an appeal for annulment;
- 17 contained a preliminary question;
- 3 decisions maintained the effects of the violation;
- 5 mentioned different possible interpretations;
- 3 determined legislative lacuna.

Furthermore, it is also worth mentioning that in only one decision\textsuperscript{345} the Court explicitly introduced a deadline by which the unconstitutionality must be resolved by the legislator.

5.2. Different Interferences

5.2.1. Directives and Injunctions

166. There are different ways in which the Court may influence the legislative process: one being more intrusive than the other. According to BEHRENDT, these can best be described as ‘interferences’.\textsuperscript{346} He defines an interference as a judicial norm which empowers its recipient to generate legislative norms with a certain content in the future.\textsuperscript{347} Applied to constitutional courts, this notion implies that decisions of the court entail an empowerment for the legislator to issue a new act which complies with the interference. Consequently, the court does not directly interfere: it does not engage in any lawmaking. This task is redirected back to the formal legislator: an interference supposes a new legislative intervention.\textsuperscript{348}

167. With the basic concept established, BEHRENDT distinguishes two possible forms of interference. If the empowerment does not oblige the legislator to adopt the solution which it proposes, the interference can be qualified as a ‘directive’\textsuperscript{349}. As a consequence, it can be said to possess a mere permissive nature.\textsuperscript{350} The legislator is empowered to create new norms, but is not obligated to do so. Contrarily,
some empowerments do contain an obligation for the legislator. In other words, the solution that is proposed in the judicial decision is binding. To describe this type of interference, BEHRENDT uses the term ‘injunction’.

5.2.2. Appeals for Annulment and Preliminary Questions

168. In regard to the possible interferences by the Constitutional Court, the difference between the two possible procedures should be kept in mind. Indeed, a judgment which answers a preliminary question has different effects than a decision after an appeal for annulment.

169. Firstly, an annulment decision has an absolute authority of res judicata erga omnes from the moment it is published in the Belgian Official Journal. Consequently, it is binding not only for the litigants, but also for all judiciaries, authorities and citizens. By invalidating a legislative act erga omnes, the Constitutional Court acts as a negative legislator. However, the consequence of this annulment competence ultimately results in an injunction towards the legislator: from that point on he is obligated to respect the annulment and is prohibited to create identical legislation. This binding force is not limited to the disposition of a decision; it also extends to all elements that are inherently connected with the disposition. Moreover, an annulment has a retroactive effect: all consequences of the annulled norm disappear from the legal order. In fact, the annulled norm is considered to have never existed in the first place. Of course, this is purely fictional: the norm will in most cases have had some effect in one way or another. Furthermore, it is accepted that provisions which had been abolished by the annulled act, spring back into force; unless the Court explicitly stated otherwise.

170. A preliminary ruling on the other hand has a smaller radius. The authority of res judicata is relative: only the referring judge is bound by the decision of the Constitutional Court. Consequently, public authorities and citizens are principally still able to apply the unconstitutional norm. Furthermore, a preliminary ruling does not remove the unconstitutional norm retroactively from the legal order. The Court simply establishes whether or not the norm is unconstitutional. In this sense, the Court performs

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357 And any other judge which has to make a decision in the very same case. J. VELAERS, Van Arbitragehof tot Grondwettelijk Hof, Antwerp, Maklu, 1990, 404.
an ‘abstract’ control of norms. As a consequence, the Constitutional Court itself is not bound by an earlier preliminary ruling when it needs to decide over an appeal for annulment.

171. However, the fact that an unconstitutional norm continues to exist after a preliminary ruling is hardly favorable for the legal certainty within the system. Therefore, the possibility was introduced to file an appeal for annulment within six months of the preliminary ruling which declared a norm unconstitutional. As a result, this method offers the possibility to extend the authority of res judicata of the preliminary ruling, similar to an annulment decision. Although this method offers a somewhat decent solution to counter the issue of legal uncertainty, it is rarely used in practice. Should instead the Court be given the competence to immediately annul the contested provision which has been declared unconstitutional in a preliminary ruling? ALEN argues that this is defendable within the Court’s existing litigation procedure. As a consequence, the authority of preliminary rulings would be permanently extended.

5.3. Maintaining Effects

172. By maintaining the effects of an annulled provision for a certain period of time, the Constitutional Court unavoidably takes considerations of policy into account. It tries to mitigate harmful effects the annulling decision might cause. In fact, the Court often explicitly refers to legal certainty, economic goals of the contested regulation or the financial consequences of an annulment as a justified reason for maintaining the effects of a decision. However, this does not imply that the Court is competent to propose an alternative to the annulled provisions. Yet, by maintaining the effects for a certain period of time, the Court can try to stimulate the legislator to address the unconstitutional legislation. Ideally, a constitutional dialogue between the two should appear. However, if the legislator fails to act, the consequences are severe: ultimately the provisions will become invalid.

360 J. VELAERS, Het Arbitragehof, Antwerp, Maklu, 1985, 140.
361 S. VERSTRAELEN, De lastige positie van een bestuur na de ongrondwettigverklaring van een regelgevende norm: hoe een duidelijk antwoord verloren geraakt in een veelheid aan opvattingen”, TBP 2012, 336.
362 S. VERSTRAELEN, De lastige positie van een bestuur na de ongrondwettigverklaring van een regelgevende norm: hoe een duidelijk antwoord verloren geraakt in een veelheid aan opvattingen”, TBP 2012, 336. This also shows in the selection of judgements for this thesis. Out of the 24 decisions, only case 148/2014 was brought before the Court using this possibility.
independently decides if and how certain effects should be maintained, it possesses a noticeable large margin of appreciation. Consequently, this decision can be considered as an act of legislation.\textsuperscript{367}

173. As a result, it cannot be denied that the Belgian Constitutional Court acts as a pseudo-legislator when it decides that certain effects should be maintained. It involves an opportunity assessment, similar to the one the legislator undertakes. Moreover, since the contested provision has been annulled, the Court’s decision \textit{itself} becomes the legal basis for the effects it chooses to maintain.\textsuperscript{368} To this extent, the judgment equals a legislative act. Nonetheless, the maintaining of effects is not as problematic in regards to the subject of this thesis. In fact, all the Court does is uphold a legislative majoritarian decision for an extended period of time. One could argue that this entails merely a democratic extension.

In three cases\textsuperscript{369} the Court has decided to maintain the effects: one decision concerned an appeal for annulment, and the two others involved a preliminary question.

5.4. Interpretations

5.4.1. Preliminary Questions

174. The possibility of establishing certain interpretations is another method at the disposal of the Belgian Constitutional Court in order to exert legislative influence. This technique is fairly well established within the preliminary litigation: the dialogue\textsuperscript{370} between the referring judge and the Constitutional Court encourages the formulation of interpretations.\textsuperscript{371} When confronted with a preliminary question, the Court suggest an interpretation which is conform the Constitution and invites the referring judge to adopt it.\textsuperscript{372}

175. However, in some cases, the referring judge asks a question about the interpretation of a certain norm which excludes a certain situation. The Court then answers that said interpretation does violate the Constitution, but immediately adds a second interpretation in the disposition which extends the scope of the contested norm. In this second interpretation, the violation disappears. As a consequence, these decisions are called ‘double disposition’ judgments.\textsuperscript{373} The first, narrow interpretation violates the

\footnotesize{\textsuperscript{368} S. LUST and P. POPELIER, “Rechtshandhaving door het Arbitragehof en de Raad van State door de uitoefening van de vernietigingsbevoegdheid: de positieve en negatieve bijdrage aan de rechtsvorming”, RW 2001-2002, volume 34, 1213.} 
\footnotesize{\textsuperscript{369} Case 130/2014, 185/2014 and 187/2014.} 
\footnotesize{\textsuperscript{371} B. LOMBAERT, “Les techniques d’arrêt de la Cour d’arbitrage”, RBDC 1996, 348.} 
\footnotesize{\textsuperscript{372} G. ROSCOUX, “Les réserves d’interprétation dans la jurisprudence de la Cour d’arbitrage: une alternative à l’annulation”, RBDC 2001, 385.} 
constitution, but the second, broader one does not. This technique is frequently used. VERSTRAELEN mentions how in 54 of 189 preliminary rulings the Court used a double interpretation.\textsuperscript{374}

5.4.2. Appeals for Annulment

176. In comparison to interpretations within preliminary decisions, interpretations in annulment judgments are not as frequent. Instead of simply annulling the contested provision, the Court rejects the annulment ‘under the condition’ that the contested provision is interpreted in a certain way. In other words, the Court creates a third option, in between annulment and rejection. Consequently, these decisions ‘with a proviso’ offer an alternative to a plain annulation. This can be seen as an attempt of the Court to safeguard the legislator’s oeuvre.\textsuperscript{375} According to LOMBAERT, a decision which rejects the annulation under a certain interpretation, grants a ‘relative seal of validity’.\textsuperscript{376} However, it cannot be denied that the Constitutional Court, in order to avoid the unconstitutionality of the norm, does ‘enrich’ its content.\textsuperscript{377}

5.5. Legislative Lacunae

177. The Belgian Constitutional Court has established two kinds of lacunae. The first form can be described as a ‘simple’ or ‘extrinsic’ lacuna: the Court establishes that the legislator did not provide provisions for certain persons, although their situation is comparable to other persons, whose situation has been regulated.\textsuperscript{378} Consequently, the first category of persons is being discriminated: their situation is not legally covered because no provisions exist. The second form concerns an ‘intrinsic lacuna’, because it is incorporated in the contested provision. The lacuna is established because the contested provision does not apply to persons who are comparable to persons to which the provision applies. In this case, the Constitutional Court does not reject the provision entirely: it remains valid to the extent in which it applies to the persons it is directed to. Consequently, the provision is only annulled to the extent it does not apply to the comparable category of persons.\textsuperscript{379}

\textsuperscript{374} Based on the annual reports for the period 2006-2010 of the Constitutional Court. S. VERSTRAELEN, De lastige positie van een bestuur na de ongrondwettigverklaring van een regelgevende norm: hoe een duidelijk antwoord verloren geraakt in een veelheid aan opvattingen”, \textit{TBP} 2012, 336.
\textsuperscript{376} B. LOMBAERT, “Les techniques d’arrêt de la Cour d’arbitrage”, \textit{RBDC} 1996, 345.
\textsuperscript{378} M. MELCHIOR and C. COURTOY, “Het verzuim van de wetgever of de lacune in de grondwettelijke rechtspraak”, \textit{TBP} 2008, volume 10, 588.
\textsuperscript{379} M. MELCHIOR and C. COURTOY, “Het verzuim van de wetgever of de lacune in de grondwettelijke rechtspraak”, \textit{TBP} 2008, volume 10, 588.
In other words, the first form of lacuna is established because there is no legislative provision. The absence of the norm constitutes the lacuna. However, in the second form, a provision does exist, but its scope is insufficient, because it does not apply to comparable persons and thus breaches the principle of equality.

One could pose the question if legislative lacunae are able to exist within a legal system. Did Kelsen not state how a legal order is a consistent, logical unity, grounded in the Grundnorm? Consequently, each legal system should foresee in a general rule which regulates all situations that are not explicitly stated within legislation. However, this is a simplification of legal reality. A legislator cannot regulate every situation individually. As a result, it is possible that an unregulated situation occurs which requires a legislative solution. In that case, a lacuna becomes apparent. According to Vandormael, law is a logically consistent system, rather than a logically exhaustive one.

However, the Constitutional Court is in theory not competent to address legislative lacunae. A direct appeal against the absence of a certain law is not listed in the Special Act which established the Court of Arbitration (the former name of the Constitutional Court). Historically, the Constitutional Court could only judge possible breaches of the rules concerning the division of competences. This changed in 1989, when the competences of the Constitutional Court were expanded. From that moment on, violations of the principle of equality and non-discrimination could be brought before the Court. As a result, the Court stopped being a true ‘negative’ legislator. In practice, the Court resolves this competence issue by requiring that the applicant attaches his claim to an existing act, so that it is not blatantly obvious that it is actually the inactivity of the legislator which is at the heart of the issue.

According to the Court of Cassation, the Constitutional Court is not competent to answer questions regarding legislative lacunae. When a party asks the Court of Cassation to pose a preliminary question to the Constitutional Court regarding a lacuna, the Court of Cassation does not deem it necessary to do so. In its opinion, the Constitutional Court can only verify the constitutionality of existing norms and not the ‘silence’ of law. However, this position was criticized. When a judge refuses to pose a preliminary question regarding a lacuna, he does effectively pronounce a judgment about the lacuna, by

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178. Supra no. 6.
183. H. Simonart, “Observations”, JT 1997, 5. This judgement of the Constitutional Court of 15 May 1996 is considered to be the first decision which established a legislative lacuna.
184. Foreseen in the articles 10 and 11 of the Belgian Constitution.
not having it assessed by the Constitutional Court. Consequently, he exceeds his competence.\textsuperscript{389} Moreover, SCHOLSEM mentions, this position from the Court of Cassation is contestable: asking a question whether a norm does not envisage a certain situation, equates posing a question about the norm itself, about its scope and how it can possibly cause a discrimination.\textsuperscript{390}

182. It should be mentioned that the concept of a lacuna in legislation should not be confused with the refusal of the legislator to act. A lacuna implies that a norm does not apply to a category of persons or a situation where it nonetheless should have been applicable, in regard to the principle of equality. When the legislator refuses to act, there simply is no legislation.

5.5.1. Lacunae within Preliminary Rulings

183. The first judgment in which a legislative lacuna was established by the Constitutional Court, concerned a preliminary ruling.\textsuperscript{391} From that point on, the Court regularly determined legislative lacunae within preliminary decisions.\textsuperscript{392} In a way, this is not surprising. The preliminary mechanism allows for a precise definition of the juridical context of a case\textsuperscript{393}, and consequently permits specific provisions to be targeted. SCHOLSEM assigns this to the strong contextualization of a preliminary question.\textsuperscript{394}

5.5.2. Lacunae within Appeals for Annulment

184. Initially, the Constitutional Court seemed to be cautious to establish a legislative lacuna within an annulment procedure.\textsuperscript{395} However, this cautious approach changed as time went by. Indeed, there does not seem to be a consistent explanation why the Court would establish lacunae in preliminary rulings, but not in appeals for annulment. POPELIER mentions how in both situations, the Court’s competence remains dubious.\textsuperscript{396}

\textsuperscript{389} M. MELCHOR and C. COURTOY, “Het verzuim van de wetgever of de lacune in de grondwettelijke rechtspraak”, \textit{TBP} 2008, volume 10, 598.


\textsuperscript{391} Court of Arbitration no. 31/1996. Until May 2007, the Constitutional Court was called the Court of Arbitration.


185. Nonetheless, some arguments can be listed which indicate the Court’s competence to acknowledge lacunae in legislation within an annulment procedure. 397 Firstly, the Constitutional Court is capable of maintaining the effects of an annulled provision. 398 When the Court decides to do so, it sends a signal to the legislator that a certain lacuna should be resolved. In this sense, it equals an injunction to legislate. 399 Moreover, the Court’s essential task is to protect the fundamental rights and freedoms of citizens. Paradoxically, since the Special Act regarding the Constitutional Court only protects persons against unconstitutional legislation, but not against unconstitutional inactivity, it contains a discriminating lacuna itself. 400

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398 Supra no. 172.
Chapter 6: Application to Recent Decisions

6.1. Prelude - Case 103/2014: Police Retirement Regime

187. In the introduction, I mentioned the decision of the Constitutional Court regarding the retirement regime for police officers. Now I will treat this decision more in detail and outline the Court’s argumentation. The case concerns an appeal for annulment regarding an Act of 2012 which changed governmental pensions, filed by two smaller police syndicates.

188. In 1998, the police was reformed. The regular communal police and the gendarmerie were integrated in one police force. However, because of this former distinction, there was a difference in retirement age between the two categories: the members of the former gendarmerie could apply for early retirement sooner, namely at the age of 54, 56 or 58, depending on the situation. Therefore, in 2001, the legislator introduced a unified retirement system. However, in order to respect the legitimate expectations of the former gendarmerie, they were excluded from the new system.

However, in 2011 the retirement system of all government’s personnel was changed. The minimum age to retire was set to 62, instead of 60, and a requirement of 40 years of service was introduced. Yet once again, an exception was foreseen for military staff and personnel of the integrated police. Precisely this second change is the subject of the appeal for annulment. The applicant argues that the difference between regular policemen, who need to be 62 years old and need to have 40 years of service before they are eligible for an early retirement, and former gendarmes, who need to be only 54, 56 or 58 and need to have 20 years of service, is discriminating. Said difference is no longer justifiable, since all police officers now have the same duties and are subject to similar risks.401

189. Firstly, the Court mentions that the contested changes are part of a general reform of the retirement regime for governmental personnel. The goal of this reform is to control the increasing costs of the ageing process. Therefore, the reform’s primary objective is to have people work for a longer period of time. For this objective, the legislator possesses a great margin of appreciation, because pensions are financed by governmental funds and consequently forms a financial burden for the State.402

Nevertheless, when a certain regime only targets certain categories of persons, it is the Court’s task to assess whether this causes a discrimination. The contested provisions must not have disproportionate consequences.

It would be desirable, the Court continues, if the retirement age of all government personnel was increased equally. This would result in a coherent regulation. In fact, maintaining these exceptions goes

401 Constitutional Court 10 July 2014, no. 103/2014, 22, consideration B.5.2.
directly against the prime objective to have all persons be professionally active for a longer period of time. Moreover, the legislator ultimately deteriorates the social support for the reform.\textsuperscript{403}

Back in 2001, the exception for the gendarmerie was justified\textsuperscript{404}, because the reform had just taken place and genuinely interfered with the expectations of gendarmes who were entitled to an early retirement. However, this justification no longer applies. It has been eleven years since the police and gendarmerie were integrated. Moreover, the Act of 2001 explicitly stated that in the future the regime of former gendarmes would be altered. Consequently, they should no longer expect to still enjoy a more favorable regime.\textsuperscript{405}

190. As a result, there is no reasonable justification for the exception to be maintained. The Constitutional Court annuls the exception for the integrated police. Nonetheless, the Court decides to maintain the effects of the annulled provisions for persons who were granted an early retirement based on the annulled provision in order to avoid violating their acquired rights.

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<td>Legitimacy</td>
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<td>Suitability</td>
<td>Maintaining the exception goes against the aim of the reform.</td>
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<td>n/a</td>
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<td>Proportionality</td>
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191. This judgment is about social security. The Court of Labor in Mons poses a preliminary question about a law, which dates from 2001. This law set up a system of guaranteed income for elderly people. Article 10 determines that, for the calculation of the means of the applicant, the sales value of any real estate from which the applicant parted in a period of 10 years before the application, should be taken into account. Remarkably, this remains the case when the revenue from the sale is still identifiable within the applicant’s capital. However, article 9 of the same law already takes the entire capital of the applicant into account for calculating the available means. Consequently, this asset is counted twice. An exception is made for the sale of the applicant’s residence, if he did not possess any other real estate and insofar as the revenue is still identifiable within the applicant’s capital. Then the amount is excluded from the calculation.

\textsuperscript{403} Constitutional Court 10 July 2014, no. 103/2014, 25, consideration B.7.3.

\textsuperscript{404} The Constitutional Court had declared that the regulation did not violate the principle of equality. Constitutional Court 5 December 2002, no. 177/2002.

\textsuperscript{405} Constitutional Court 10 July 2014, no. 103/2014, 26, consideration B.7.4. and B.7.5.
According to the referring judge, this statutory provision could create a discrimination because the same asset is being counted twice, except for the ‘residential’ exception. Moreover, in other branches of the social security this would be impossible: a certain asset is always counted only once. Consequently there is a discrepancy between this regulation and other, similar ones.

192. The Constitutional Court, in order to judge the possible discrimination, starts with the motivation behind the contested exception. Initially, any generated value due to a sale or cession was omitted from the calculation, if it was reinvested. This led to abuse. As a result, the law was changed to narrow down the exception, so that it only applied to the sale of the applicant’s residence.406

What follows is a clear example of the use of proportionality analysis407 by the Constitutional Court. The exception was narrowed down because the legislator wanted to counter negligence and fraud prior to an application. The Constitutional Court considers this a legitimate purpose.408 Hence, the legitimacy test is passed. Next, the Constitutional Court needs to determine if the measure is proportionate in order to achieve the purpose, the so-called necessity test. And in this aspect, the measure fails. The Court notes that “it does not seem necessary, when calculating the means of the applicant, to take both the market value and the effectively realized profit into consideration, when the paid price is still in the possession of the applicant”409. Moreover, this may also result in a fictional raise of the applicant’s capital even when he did not commit any fraud and had honorable intentions.

193. Consequently, the Court proclaims a violation of the Constitution. The principle of equality has been breached in the interpretation of the referring judge. The preliminary question is answered affirmatively.

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<td><strong>Necessity</strong></td>
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<td><strong>Proportionality</strong></td>
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406 Constitutional Court 19 September 2014, no. 126/2014, 6, consideration B.2.3.
407 Supra no. 117.
408 Constitutional Court 19 September 2014, no. 126/2014, 8, consideration B.4.
409 Constitutional Court 19 September 2014, no. 126/2014, 9, consideration B.7: “Voor de verwezenlijking van de beoogde doelstelling lijkt het in elk geval niet noodzakelijk om bij de berekening van de bestaansmiddelen zowel de verkoopprijs van het onroerend goed als de opbrengst van de verkoop ervan in aanmerking te nemen, wanneer en in zoverre de prijs die verkregen is als tegenprestatie voor het afgestane goed nog steeds in het bezit van de aanvrager is”.

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6.3. Case 130/2014: Fiscal Regularization

194. This case concerns an appeal for annulment against an act that brought some changes to the existing system of fiscal regularization. Back in 2005, this system was implemented without a time constraint. The legislator wanted to give taxable persons the option to permanently regularize their situation. In 2013, this was no longer deemed appropriate and the permanent character of the regularization was terminated. The last possible date for persons to apply for this regime was set at the 31st of December 2013. Furthermore, some of the conditions for regularization were also altered.

Firstly, the applicant argues that these changes breached the rules concerning the distribution of competences within the Belgian Federal State, especially those to the regularization of inheritance taxes and registration fees. Since 1989, a general competence regarding specific taxes has been transferred from the federal level to the regions. These taxes include inheritance taxes and registration fees. Although the Federal level is still able to regulate the procedure rules of said taxes, it ought to be careful not to infringe the competence of the regions.

195. As a result of regularization, persons that committed a fiscally-related crime are exempt from prosecution. However, the choice of punishment in this matter falls within the competence of the regions. The new federal procedure consequently breaches the region’s competence regarding inheritance taxes and registration fees, according to the Court. Consequently, the provisions of the 2013 law concerning this matter, are being annulled. Nevertheless, the consequences of the annulment need to be mitigated: persons that already applied for the procedure rely upon their situation being regularized. Therefore, the Court decides to maintain the effects the annulled provisions have already caused.

196. A second argumentation of the applicant concerns the provisions about when the new regularization enters into force. Normally, a new regulation enters into force ten days after it has been published in the Belgian Official Journal. In this case however, the new regulation has immediate effect from the moment it is published. The applicant argues that there is no reasonable justification as to why this regulation differs from the general rule. The Court acknowledges that the legislator can indeed introduce a new policy with immediate effect, if he deems it necessary. The very nature of a regularization regulation offers a justified reason: people should realize that a legislator might decide to change this favorable regime at any given time.

The date on which the application is filed decides whether it falls under the old or the new regulation. If the declaration is filed prior to the 15th of July 2013, the old regularization procedure still applies.

410 Constitutional Court 19 September 2014, no. 130/2014, 26, consideration B.12.4.
412 Constitutional Court 19 September 2014, no. 130/2014, 28, consideration B.14.3.
413 Constitutional Court 19 September 2014, no. 130/2014, 31, consideration B.19.3.
Starting from the 15th of July 2013, all new declarations fall within the scope of the new procedure. However, the law does not state what it comprehends under the word ‘to file’. And here, the Court makes a hypothesis. They set forth two interpretations, one which is in compliance with the Constitution, while the other one is not.

If ‘to file’ is to be interpreted as ‘received by the department for regularizations’, it would breach the Constitution. It could be possible that – before the new law is announced – a citizen sends his application by post before July 15th 2013, yet the department only receives and files it the next day – which makes it fall under the new regime. The person who sent his application could not have known about the new procedure, since the law was not yet published. Yet, due to the immediate effect of the law he is confronted with legal consequences he could not have foreseen. Consequently, this breaches the Constitution, in conjunction with the principles of trust and legal certainty.414

Nevertheless, ‘to file’ can also be interpreted as ‘delivered at the department or sent by post’. This interpretation does not violate the Constitution. It offers a clear criterion for the matter at hand. Despite the immediate effect of the new procedure, any application that has been initiated, or sent by post before July 15th 2013, will fall under the scope of the old regime.

197. The Court annuls the provisions concerning the inheritance taxes and registration fees, but maintains the effects of these provisions: persons who had already applied for the regularization procedure, rightly assumed that their situation was regularized. If the annulment was to be applied directly, the affected persons would suddenly be subject to possible prosecution. In other words, their legal position would become uncertain, which conflicts with the principle of legal security. It rejects the other claim415 of the appeal, with the proviso of the interpretation it set out earlier.

6.4. Case 141/2014: Compulsory Health Care and Benefits Insurance

198. This case contains a preliminary question about unemployment benefits. An act regarding compulsory health care and benefits insurance stipulates that an employee cannot claim any benefits for the period during which he is entitled to a wage. According to Belgian Law, severance payments are equated with wage. Consequently, severance payments suspend unemployment benefits. For an employee with multiple part-time employments, this might cause the following issue: if he receives a severance payment, calculated upon the wage he received in the context of that specific employment, this payment suspends other severance payments he might be entitled to within the context of his other part-time employments. This hypothesis is the subject of the preliminary question. Are part-time employees being discriminated in this situation, compared to full-time employees?

414 Constitutional Court 19 September 2014, no. 130/2014, 36, consideration B.19.5.
415 The appeal included several other arguments, but all of them were rejected.
199. The Court confirms the interpretation of the referring judge: the situation of part-time employees differs substantially from the situation of full-time employees.\textsuperscript{416} The former receive a severance pay which corresponds to their part-time employment, and thus only represents a part of their entire wage. It does not account for other part-time employments. The latter however, receive severance pays in relation to their full-time employment and consequently an amount equal to their entire wage.

Evidently, with this regulation the legislator hopes to prevent the situation in which an employee simultaneously receives both a wage and an unemployment benefit. This motivation justifies the suspension from the latter, the Court agrees.\textsuperscript{417} However, it does not justify that unemployment benefits, assigned to an employee with multiple part-time employments, are suspended entirely when he receives severance pays for one of his employments. The severance pay is being calculated on one employment, yet suspends the entire unemployment benefit, which applies to the entire wage.\textsuperscript{418}

Moreover, the labor market has changed significantly since 1963, when the act which introduced this regulations was approved. Part-time, multiple employments are much more common now than a single full-time one. Precisely because this act fails to differentiate between a full-time employee with a single job and a part-time one with multiple jobs, it breaches the Constitution. It treats two fundamentally different situations identical, which is in conflict with the principle of equality.\textsuperscript{419}

200. Nevertheless, the Court mentions a possible solution, if the act is interpreted differently. The Council of Ministers suggested that the contest article could be interpreted in a way that the principle of \textit{pro rata temporis} applies. As a result, the unemployment benefits would be suspended only for the terminated employment, for which the employee receives severance payments. The other employments would be unaffected. Under these circumstances, the Court agrees that the contested provisions would be in compliance with the Constitution. Ultimately however, the Court does not choose one interpretation over the other. The judgment simply lists the two possible outcomes, depending on the applied interpretation.\textsuperscript{420} In other words, this is a ‘double dispositive’ decision.

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<tr>
<td>Suitability</td>
<td>Preventing an employee who gets fired of cumulating a compensation of receiving a severance pay for the same period, attains this legal aim.</td>
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<tr>
<td>Necessity</td>
<td>However, employees with multiple part-time employments are disadvantaged.</td>
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<td>Proportionality</td>
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\textsuperscript{416} Constitutional Court 25 September 2014, no. 141/2014, 6, consideration B.5.  
\textsuperscript{417} Constitutional Court 25 September 2014, no. 141/2014, 6, consideration B.6.  
\textsuperscript{418} Constitutional Court 25 September 2014, no. 141/2014, 6, consideration B.7.1.  
\textsuperscript{419} Constitutional Court 25 September 2014, no. 141/2014, 7, consideration B.8.  
\textsuperscript{420} Constitutional Court 25 September 2014, no. 141/2014, 9.
6.5. Case 191/2014: System of Yearly Holiday

201. According to an act which dates from 1992 containing several social provisions, municipalities ought to make a choice regarding the system of yearly holiday for their contractual employees. Either they can choose for the regime applicable to staff of general administration, or for the holiday regime suitable for employees. There is however a significant difference between the two systems. Tenured employees keep their wages when they are absent on account of illness. Apart from the first month of absence, the same does not apply to contractual employees. As a result, the holiday pay is calculated differently, depending on the choice of the municipality. This is the subject of the preliminary question in this case: is this difference in violation with the principle of equality?

202. Briefly, the Court states that this difference is not justified. The disadvantage for contractual employees who work for a municipality, which has chosen the holiday regime for employees, is unconstitutional. However, the cause of this issue does not lie in the fact that a municipality is offered a choice. Rather, the lack of a proposition which mitigates the negative consequences is the cause for the unconstitutionality.

203. As a result, the Court identifies a legislative lacuna. Not the contested article itself poses a problem of constitutionality, but the absence of an alternative regulation which rectifies the negative consequences. The Court concludes that the referring judge is competent to end this unconstitutionality, because the lacuna has been established in detail by the Constitutional Court. In other words, the referring judge knows how to apply the contested provision in a constitutional way based on this judgment by the Constitutional Court.

6.6. Case 003/2015: Judicial Declaration of Incompetence

204. This case touches on the subject of judicial declaration of incompetence, when a person is in a persistent state of insanity. Article 504 of the Civil Code determines that actions of a deceased person cannot be contested on the basis of insanity, unless the incompetence had already been declared or had already been demanded before the moment of decease. A Court of First Instance interprets this provision in such a way that a claim for annulment of a legal act of the deceased is admissible when a petition for a declaration of incompetence is filed prior to the decease. However, when a petition for the appointment of a provisional administrator was filed prior to the decease, that same claim is inadmissible, since it is not mentioned in article 504. Consequently, the Court of First Instance poses a preliminary question

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421 Constitutional Court 18 December 2014, no. 191/2014, 6, consideration B.7.
422 Constitutional Court 18 December 2014, no. 191/2014, 6, consideration B.8.
423 Constitutional Court 18 December 2014, no. 191/2014, 6, consideration B.8: “Aangezien de vaststelling van die lacune is uitgedrukt in voldoende nauwkeurige en volledige bewoordingen die toelaten de in het geding zijnde bepaling toe te passen met inachtneming van de referentienormen op grond waarvan het Hof zijn toetsingsbevoegdheid uitoefent, staat het aan de rechter een einde te maken aan de schending van die normen”.
about this difference and whether or not it is in compliance with the Constitution, specifically with the principle of equality.

205. Firstly, the Constitutional Court accepts that both situations are effectively comparable. In both cases, it needs to be investigated whether heirs are entitled to claim the annulment of legal acts of the deceased, because they have undertaken steps in order to establish the incompetence of the deceased person, prior to the decease.424

Next, the Court turns to the motivations of the legislator behind the contested article. The legislator was concerned about the possible issues of evidence when heirs contest legal acts of the deceased on the basis of insanity. This could theoretically jeopardize all legal acts from a deceased person, without solid proof. Also, the legislator wanted to encourage heirs to timely start the procedure for incompetence. Simultaneously, heirs who did neglect to do so are punished. However, the procedure for a judicial declaration of incompetence can take a long time. Therefore, the legislator made the moment when the request is filed determinative for the possibility to claim the annulment of a deceased person’s legal acts later on, and not the final judicial decision.425

When a person is judicially declared incompetent, a guardian is appointed which will represent the incompetent person in all his legal transactions. All legal acts, both concerning his person and his capital are to be made by the guardian. This is where the difference lies with a provisional administrator: he is only competent to make decisions concerning the capital of the person he is governing. All personal decisions are to be made by the governed person himself, since he is not necessarily incapable of taking those decisions himself. A provisional administrator can be appointed because the governed person is temporarily not able to take some decisions himself. It is a temporary measure, unlike a judicial declaration of incompetence, but they serve a similar purpose: they assist the person they are appointed to.

With the legislator’s motivation in mind, the Court fails to see why it matters if the mental condition of the deceased person was persistent or not. For the purpose of avoiding issues of evidence, it suffices that heirs undertake certain steps to protect the concerned person. Whether this is through a judicial declaration of incompetence or through the appointment of a provisional administrator, is irrelevant.426

As a result, the Constitutional Court identifies another legislative lacuna. The contested article pursues a legitimate purpose and does so in a proportionate manner. However, it overlooks a specific situation and it that regard it violates the Constitution. Similar as in case 191/2014427, the Court enables the
referring judge to end the unconstitutionality for this case since it has been established in detail by the Constitutional Court.\textsuperscript{428}

206. Article 504 was changed by an act in March 2013, which reformed the rules concerning incompetence. The status of incompetence and the provisional administrator have been revoked. Nonetheless, the legislator maintains the same philosophy: the possibility to register a claim for annulment depends on whether or not a claim for judicial protection of the person has been timely filed. Since the two regimes have been merged, the unconstitutionality is resolved.

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<thead>
<tr>
<th>PA-chart</th>
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<tbody>
<tr>
<td>Legitimacy</td>
<td>Prevent posthumous issues of proof and encourage heirs to act timely.</td>
</tr>
<tr>
<td>Suitability</td>
<td>Excluding the claim of heirs based on the mental condition of the deceased is however not appropriate.</td>
</tr>
<tr>
<td>Necessity</td>
<td>n/a</td>
</tr>
<tr>
<td>Proportionality</td>
<td>n/a</td>
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6.7. Case 006/2015: Child Benefit

207. A preliminary question is presented by the Court of Labor regarding the General Child Benefit Act. Article 41 offers an increased monthly benefit to single-parent families on the condition that the parent is not married or is de facto separated. In this case however, a parent was remarried to a person who resided abroad and could not obtain the necessary authorizations to enter Belgian territory. For that reason he could not be a part of the family. Consequently, the referring Court desires to know if this article breaches the Constitution, for it denies an increased benefit to a person who is de facto separated from its husband due to circumstances independent from its will.

208. Firstly, the Constitutional Court confirms that it is not its task to determine whether a system of social security is fair or not. However, the Court can scrutinize if comparable categories of persons are being treated in a discriminatory manner. Applied to this case, it concerns children who are a part of a single-parent family.\textsuperscript{429}

The contested Act was adopted in order to combat child poverty. Logically, single-parent families are considered to be extra vulnerable since a single revenue has to support all costs. With respect to this objective, the civil status of the parent and the question whether or not he has been living together with

\textsuperscript{428} Constitutional Court 22 January 2015, no. 003/2015, 9, consideration B.11.

\textsuperscript{429} Constitutional Court 22 January 2015, no. 006/2015, 6, consideration B.4.
a person of which he divorced, is irrelevant. In both situations, the children are part of a single-parent family and consequently are comparable.

With this legal purpose in mind, in this case the position of the children will only improve if the husband is able to join his family in Belgium. Moreover the contested article takes a de facto separation after a marriage in account: the parent will in this case be able to receive an increased child benefit. It strikes the Court as unreasonable that the same logic has not been applied to a factual separation due to an external factor.\textsuperscript{430} In this hypothesis, the contested article violates the Constitution.

209. Nonetheless, the Court also identifies another possible interpretation under which an increased benefit is assigned to a single parent because her husband who resides abroad has insufficient revenue to contribute in the burdens of the marriage.\textsuperscript{431} Such an interpretation is constitutionally valid. It lists both interpretations in the disposition of the judgment.

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<tbody>
<tr>
<td>Legitimacy</td>
<td>Combat poverty, especially child poverty.</td>
</tr>
<tr>
<td>Suitability</td>
<td>However, the civil status of the parent is irrelevant for the economic situation of children.</td>
</tr>
<tr>
<td>Necessity</td>
<td>n/a</td>
</tr>
<tr>
<td>Proportionality</td>
<td>n/a</td>
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6.8. Case 19/2015: Additional Investigation Measures

210. Once more a penal matter is brought before the Constitutional Court. A Correctional Court asks a preliminary question about article 172 of the Code of Criminal Procedure. Normally, when the investigating judge finishes his investigation, the dossier is sent to the Crown prosecutor. If the prosecutor does not deem any more investigation measures necessary, he requests the regulation of the procedure by the Council Chamber. During a certain period however, the accused party and the civil party are able to request additional investigating measures by the investigating judge. As a consequence, the regulation of procedure is suspended. According to the referring judge, this article is not applicable to the situation in which the case has been withdrawn from the initial investigation judge due to territorial incompetence, when the public prosecutor does not bring the case before a new investigation judge.\textsuperscript{432} Indeed, in this hypothesis a regulation of procedure will be absent. This will prohibit the accused and

\textsuperscript{430} Constitutional Court 22 January 2015, no. 006/2015, 9, consideration B.10.
\textsuperscript{431} Constitutional Court 22 January 2015, no. 006/2015, 10, consideration B.13.
\textsuperscript{432} Constitutional Court 12 February 2015, no. 19/2015, 5, consideration B.2.1.
the civil party to request any additional investigation measures, before the Council of Chamber produces its decision. Given this interpretation, does article 172 violate the Constitution?

211. As usual, the Court first turns to the motivation behind the contested legislation. The possibility for the accused and the civil party to request additional investigations, serves both as an extension of the rights of defense and as an extra contribution to the contradictory element of the legal procedure. Nevertheless, the disposition which withdraws the case from the investigating judge is merely a measure of order, which does not end the legal procedure. Moreover, the actions undertaken by the territorially incompetent judge are not annulled: they can still be a legal basis for later prosecutions.\textsuperscript{433} Therefore, it is in everyone’s interest to enable all affected parties to inquire additional investigation measures. By doing so, possible irregularities can be avoided and it allows elements, which otherwise have been forgotten, to be added to the dossier.\textsuperscript{434}

With all of the previous arguments in mind, the Constitutional Court concludes that when the Crown prosecutor is able to summon an accused party directly before the trial court, based on investigations by a territorially incompetent investigation judge, this consequently deprives the accused and civil party from their rights to require additional investment measures. This situation cannot be reasonably justified. Indeed, the accused and civil party are deprived from a procedural right, which the legislator conceived to be essential.\textsuperscript{435} As a consequence, the Constitution has been breached.

212. Nonetheless, the Court mentions another possible interpretation. In this interpretation, the contested provision merely prohibits the situation in which the Crown prosecutor fails to redirect the case to a new investigational judge. In this form of a narrow prohibition, the article does not violate the Constitution.\textsuperscript{436} Once again, both interpretations are listed in the dispositive of the decision.

6.9. Case 20/2015: Levy on Vacancy of Buildings, Homes and Commercial Properties

213. For the first time, a Flemish Decree is the subject of a preliminary question. The Decree in question contained several measures to manage the budget of 1996, some of which in the form of levies to combat vacancy and dilapidation. The referring judge wishes to know whether the contested provisions were in conflict with the Constitution, insofar as they did not foresee in a limitation period during which these taxes on vacancy of buildings and homes could be collected. Since there was no specific provision, the general term of ten years was applied. However, for the taxes on vacancy of commercial properties, another Decree had specifically introduced a limitation period of only five years. Consequently, there is

\textsuperscript{433} Constitutional Court 12 February 2015, no. 19/2015, 9, consideration B.4.4.
\textsuperscript{434} Constitutional Court 12 February 2015, no. 19/2015, 9, consideration B.5.1.
\textsuperscript{435} Constitutional Court 12 February 2015, no. 19/2015, 10, consideration B.5.2.
\textsuperscript{436} Constitutional Court 12 February 2015, no. 19/2015, 11, consideration B.7.
a clear difference between the limitation period of the tax on vacancy of buildings and homes on the one hand, and the period of the tax of commercial properties on the other.

214. Firstly, the Constitutional Court determines that the difference between the two limitation periods has already been harmonized since 2008. Since then the limitation period in both situations equals five years.437

With these vacancy charges, the legislator tried to pursue three purposes. First, the taxes should have a dissuading effect in order to prevent vacancy. Secondly, they can also be used punitively for persons who deteriorate the environment by allowing their properties to be vacated. Lastly, the income from the taxes is used for initiatives which improve the environment. With respect to these purposes, it is irrelevant whether the levies apply to a building and/or home, or apply to a commercial property. Consequently, both situations are comparable.438

Immediately, the Court acknowledges the competence of the legislator to determine the limitation period during which a certain levy can be collected. However, the legislator is not allowed to introduce different limitation periods for similar categories of liable persons. Doing so would breach the principle of equality.439 In this case, the limitation period for the levy on houses and buildings was effectively twice as long as the limitation period for the levy on commercial properties. Moreover, the legislator failed to provide a legitimization for this substantial difference between the two regimes. Therefore, the Court concludes that the two categories of persons liable to the levy have unjustifiably been treated differently.440

215. Nevertheless, the Constitutional Court merely established a legislative lacuna which has occurred in the past, but has now been solved. Therefore, it enables the referring judge to apply the contested provisions in such a way that the unconstitutionality may be resolved for this particular case.441

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<tbody>
<tr>
<td>Legitimacy</td>
<td>Prevent vacancy and improve the environment.</td>
</tr>
<tr>
<td>Suitability</td>
<td>No justification was given for the substantial difference in limitation period between the two regimes.</td>
</tr>
<tr>
<td>Necessity</td>
<td>n/a</td>
</tr>
<tr>
<td>Proportionality</td>
<td>n/a</td>
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437 Constitutional Court 12 February 2015, no. 20/2015, 5, consideration B.3.
438 Constitutional Court 12 February 2015, no. 20/2015, 6, consideration B.4.
439 Constitutional Court 12 February 2015, no. 20/2015, 6, consideration B.5.
440 Constitutional Court 12 February 2015, no. 20/2015, 7, consideration B.6.3.
441 Constitutional Court 12 February 2015, no. 20/2015, 7, consideration B.8.
6.10. Case 185/2014: Mitigating Circumstances

216. In this case, the Court of Cassation poses a preliminary question regarding several articles of the Penal Code. As a result of these articles, it is possible that an accused, who committed a crime within five years of his last conviction but is referred to a Correctional Court due to mitigating circumstances, is labeled as a recidivist. However, if the same accused is referred to the Court of Assizes due to the absence of mitigating circumstances, the Court of Assizes cannot establish recidivism. Ironically, due to mitigating circumstances, the accused who is referred to a Correctional Court will be more severely punished, since he is considered a recidivist.

217. Commonly, recidivism is punished more severely because the first sentence seemed to be insufficient to make the convicted obey the law. As such, it serves a legitimate purpose: it seeks to protect society from even further harm.\textsuperscript{442} The possibility to refer a crime which should have brought before the Court of Assizes, to the Correctional Court due to mitigating circumstances, has been introduced to lighten the workload of the former.\textsuperscript{443} However, this is not a justified reason for the fact that an accused is being treated differently, depending on the Court he is brought for. In other words, the necessity test fails.\textsuperscript{444} The preliminary question is answered positively.

218. However, this unconstitutionality might have excessive consequences if applied directly. Therefore, the Constitutional Court decides to maintain the effects of the unconstitutional provision until an act has been adopted. Moreover, and this is probably the most noteworthy part of this decision, the Court explicitly states a deadline for the discrimination to be resolved. At the latest, the discrimination must be resolved by July 31\textsuperscript{st}, 2015.\textsuperscript{445}

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<tbody>
<tr>
<td>Legitimacy</td>
<td>Punish recidivism and protect society.</td>
</tr>
<tr>
<td>Suitability</td>
<td>The difference in a person’s treatment depending on the Court he is brought for, cannot be justified by the different nature of the punishment, nor by the motivation to lessen the workload of the Court of Assizes.</td>
</tr>
<tr>
<td>Necessity</td>
<td>n/a</td>
</tr>
<tr>
<td>Proportionality</td>
<td>n/a</td>
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219. As a result, the legislator is now forced to adopt an act to deal with this unconstitutionality by July 2015. It is the clearest example of a direct interference by the Court in the legislative territory. Although the Court does not state how the issue should be tackled specifically, it leaves little margin for the

\textsuperscript{442} Constitutional Court, 18 December 2014, no. 185/2014, 11, consideration B.9.
\textsuperscript{443} Constitutional Court, 18 December 2014, no. 185/2014, 12, consideration B.11.
\textsuperscript{444} Constitutional Court, 18 December 2014, no. 185/2014, 12, consideration B.13.
\textsuperscript{445} Constitutional Court, 18 December 2014, no. 185/2014, 13, consideration B.16.
legislator nonetheless. The Court explicitly mentions that the effects ought to be maintained in order to prevent that this discriminatory situation exceeds a ‘reasonable period of time’. Until this date, there has been no legislative initiative to solve this unconstitutionality. So far, the decision has only been mentioned in the annex of the plenary assembly report of January 8, 2015.

446 Constitutional Court, 18 December 2014, no. 185/2014, 13, consideration B.15.
Chapter 7: Evaluation and Conclusion

220. Since its foundation in the eighties, the relation between the Belgian Constitutional Court and the Belgian legislator has changed. Originally, the legislator showed nothing but distrust towards this new institution. Over time, this changed for the better. A form of dialogue between the Constitutional Court and the legislator has been established. The Court’s decisions possess a ‘signaling function’ to the legislator in order to improve its legislation.\textsuperscript{448}

221. One of these signaling functions consist of the use of interpretations by the Constitutional Court. By using the method of interpretation, the Court leaves the decision whether a new legislative initiative is required to the legislator. Generally, interpretations appear more often in preliminary rulings. Indeed, 4 out of 5 judgments\textsuperscript{449} which contained an interpretation, were ruled in response to a preliminary question. Moreover, three of those can be labeled as ‘double dispositive’ judgments: the Constitutional Court lists two possible interpretation, of which one is unconstitutional. Theoretically, the referring judge is free to choose which interpretation he prefers. Only one decision contained an interpretation in the course of an annulment procedure. In this case\textsuperscript{450}, the Court rejected the annulment if the contested provision was interpreted in a certain way. As such, the Court prevented a total annulment\textsuperscript{451}, which can be seen as an attempt to protect the legislator’s work.

222. A second signal from the Constitutional Court to the legislator, is the establishment of legislative lacunae. All legislative lacunae were found within preliminary rulings\textsuperscript{452}. However, two of the lacunae had already been resolved by the time the case was brought before the Constitutional Court. Consequently, the Court was only able to establish them for the past.\textsuperscript{453} In case 191/2014 however, the Court was able to distinguish a present lacuna in legislation. Because the lacuna could be qualified as an ‘intrinsic’ lacuna, the Constitutional Court was able to remedy the lacuna itself and invite the referring judge to apply the contested provisions conform the Constitution. As a result, the Court clearly acted as a co-legislator: it expanded the scope of the contested regulation.

Even though the referring judge is able to ‘fill the gap’ himself because the Constitutional Court was able to establish the lacuna in sufficient detail, a legislative interference might still be preferable in order to definitively remove the lacuna from the legal system. After all, a new initiative by the legislator will definitely further legal certainty.\textsuperscript{454}

\textsuperscript{448} A. GORIS, K. MUYLLE and M. VAN DER HULST, “Twintig jaar Arbitragehof v. wetgever: van wantrouwen naar dialoog”, \textit{TBP} 2005, 256.
\textsuperscript{450} Case 130/2014.
\textsuperscript{451} For the provisions that were annulled, the Court decided to maintain all effects definitively.
\textsuperscript{452} Case 191/2014, 003/2015 and 020/2015.
\textsuperscript{453} For the provisions that were annulled, the Court decided to maintain all effects definitively.
Constitutional judges can be held accountable for their decisions due to the exposure of their judgments to the public. The attention for decisions of the Belgian Constitutional Court will only rise, since the importance of rights review has steadily increased over the past few decades. If the Court is able to provide thorough, in-depth and fair reasoning behind their decisions, it will be able to generate its own legitimacy. MOONEN mentions how the motivation of a decision is the evidence of the deliberative process that has taken place. A decent motivation means that convincing arguments can be presented for every choice the Court has made. Such a motivation will guarantee that the decision will be more easily accepted, both by citizens and legislators.

The Court seems to pay extra attention to the considerations of the legislator itself when it needs to evaluate a possible unconstitutionality. In every judgment, the parliamentary proceedings are being cited extensively. Moreover, the Court does not seem to question whether the policy goals regarding the contested provisions are desirable, or realizable.

The Belgian Constitutional Court is a modest court and seems to become a reliable partner of the legislator. The initial distrust has disappeared and the foundations of a possible constitutional dialogue seem to have formed. However, there still is room for improvement. The legislator ought to act more quickly when confronted with a unconstitutionality, especially when the Court established a deadline. This is clearly shown in case 185/2014. Until now, no initiative has been taken by the legislator. Meanwhile, the deadline of 15 July 2015 creeps closer.

KELSEN, the spiritual father of the modern Constitutional Court, was not in favor of enclosing fundamental rights within a Constitution. In his view, a Constitution should be conceived in a material sense: it only regulates the creation of other legal norms. In doing so, the Constitutional Court would be restricted to the role of a purely ‘negative legislator’, which was everything KELSEN wanted a Constitutional Court to be.

Nonetheless, KELSEN’s warning has been ignored. In fact, the successful new constitutionalism movement is characterized by the presence of a Bill of Rights within a Constitution and the priority of fundamental rights. The factors for its widespread success are divers. It can be seen as a reaction against the authoritarian regimes and the blatant violation of human rights during the Second World War. Moreover, Constitutional Courts were a useful tool for constitutional drafters who were facing different relational contracting problems. Constitutional Courts can also function as a way to constrain political opponents when they are in power. In short, there are many opportunistic reasons for constitutional

455 T. MOONEN, Het Grondwettelijk Hof en de interpretatie van de Grondwet, onuitg. doctoraatsthesis Rechten Universiteit Hasselt, 2014, 599.
drafters and policy makers to install a Constitutional Court. Even within authoritarian regimes, Constitutional Courts may serve a meaningful role for its rulers. It shows how efficient these Courts can be as an instrument of policy.

227. Moreover, the success of Constitutional Courts is also recursive. It is a formula that works and thrives on its own success. As a result, other states are likely to adopt this favorable regime. This can be described as constitutional borrowing, or constitutional learning. This is further strengthened by globalization.

228. Because Constitutional Courts are required to solve intra-constitutional tensions, they make use of proportionality analysis. This method offers a clear analytical framework in order to balance different conflicting principles. A conflict between principles cannot be resolved by declaring one principle invalid; instead one of the principles must be outweighed. However, this does expose Courts as lawmakers: often they have to make considerations similar to the ones of legislators. Obviously, this form of judicial lawmakership has raised criticism, because balancing inherently has a flair of subjectivism.

229. As a result of the application of proportionality analysis, the classical separation between the legislative and the judicial branch has partly been erased. Constitutional Courts are expected to be more actively involved in the policy-making process. Moreover, the traditional separation of powers doctrine is starting to lose its relevance. Instead, a more cooperative model between the three branches is slowly forming.

230. It seems highly unlikely that the importance of Constitutional Courts will diminish in the near future. If anything, it will probably only rise. Fundamental rights protection and judicial review are inherently connected with each other, due to the enormous success of the new constitutionalism movement. Moreover, Constitutional Courts are a fairly recent phenomenon. These new ‘trustee’-courts are still developing their newly given abilities and are testing their (legislative) possibilities.

231. There is no denying that judicial review is, strictly speaking, undemocratic. Indeed, the will of the majority can effectively be overturned. However, it is a choice we have made by attaching so much importance to individual rights protection. In modern democratic constitutionalism, it is acknowledged that sometimes the interest of an individual or minority ought to prevail. However, this does not mean that judges are unaccountable. By thoroughly reasoning their decisions, judges too can create their own democratic legitimacy.

232. In my opinion, the true strength of this model lies in the possible interaction between the Constitutional Court and the legislator. Ideally, these two important actors ought to engage in a constitutional dialogue wherein they each respect the other’s position and expertise. Ultimately, constitutionalism encompasses the understanding of being governed by a Constitution. However, in Belgium this will require an effort from both sides.
Firstly, the Belgian Constitutional Court often slightly modifies legislation in order to encourage the legislator to act. This can be done through partial annulment, through the use of interpretations or by identifying legislative lacunae. Often the Court will also try to mitigate the harmful effects of an annulment by maintaining the effects of the annulled provisions for a certain period of time. However, the reasoning in the judgments of the Belgian Constitutional Court is often brief and consists mainly of an extensive citation of the Parliamentary Proceedings. Sometimes it also refers to earlier cases and literally copies the same reasoning, with a simple reference. Its decisions would certainly benefit from a more detailed and more approachable reasoning.

Secondly, the Belgian legislator on the other hand, should monitor the judicial rulings of the Constitutional Court more closely. A more swift legislative initiative would certainly benefit legal certainty. Moreover, it would also prevent the painful situation in which the Court establishes a breach of the Belgian Constitution because a certain inequality has been unresolved for several years, due to the lack of activity on the legislator’s part.

The notions of democracy and juristocracy in regards to a Constitutional Court might share a common ground: they both are deeply invested in constitutionalism. A Constitutional Court offers a hybrid institution which, strangely enough, embodies both concepts at the same time. It is a truly unique actor within the legal state.

I hope to have shown a glimpse of the immense diversity and complexity of opinions regarding this subject. Hopefully it is now clear how crucial the development of constitutionalism and the rise of Constitutional Courts have been for our modern democracy. Ideally, I also managed to shed some light on some of the most important legal theories and made them reasonably understandable. Should this humble thesis somehow be a help to others regarding this intriguing subject, its purpose will have been realized.
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