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THE DILEMMAS OF CONSTITUTIONAL COURTS AND THE CASE FOR A NEW DESIGN OF KELSENIAN INSTI- TUTIONS

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ABSTRACT. Legal and political controversies persist about the performance of Kelsenian-type constitutional courts in democratic systems. One of the reasons is that the design of these institutions cannot easily accommodate simultaneous but conflicting demands for the strong protection of democracy and human rights, judicial independence and constitutional restraint. Challenging the dominant approach to the design of contemporary constitutional courts, this article proposes a new way to balance these three values through reforms to the structure of Kelsenian institutions. The proposal seeks to institutionalize constitutional restraint, embedding it into courts' internal functioning rules while, concurrently, emancipating constitutional judges from political control through a reform of appointment procedures. It is argued that the combined effects of these two reforms will produce constitutional courts that are more independent and able to protect the core elements of a democratic political community while, at the same time, increasing constitutional deference to the democratically elected legislator.

I. INTRODUCTION

Constitutional courts are today recognized as central institutions in democracies all over the world. Where they exist, they are often seen as the ultimate guarantee for the protection of the democratic system of government and the culture of human rights that lies at the core of liberal political communities. In addition, however, despite the high purposes they serve, constitutional courts are often

surrounded by controversy and criticisms. Constitutional courts are frequently dismissed as politicized institutions that simply follow the instructions of their appointers.¹ At other times, constitutional judges are accused of being activists that pursue their own policy goals under the guise of defending the constitution.² Courts entrusted with powers of constitutional review have even been accused of being inefficient and unfit for their very purpose of defending human rights or democracy.³ All these criticisms are different and, to some extent, contradict each other, but all of them have damaging effects on the prestige and reputation of these institutions.

Constitutional courts can be defined as judicial-type organs that, in a political system, have a monopoly on the assessment of the constitutionality of legislation and the power to invalidate laws and statutes that do not conform to the constitution. In this regard, they are central to the idea of ‘neo constitutionalism’.⁴ They are often called ‘Kelsenian courts’ because they follow the model of the Austrian Constitution of 1920 in whose creation the eminent jurist Hans Kelsen had a prominent role. As an alternative to the US model of diffuse review, Kelsen’s original idea was for a court that could ensure the uniformity of the assessment of the constitutionality of statutes through a monopoly on this activity.⁵ In the original Austrian model, legislation declared unconstitutional was generally invalidated *erga omnes* and *ex nunc*.⁶

This article reflects on the design of constitutional courts and on their role in contemporary democracies. It aims at deeply recon-

¹ Francesc de Carreras Serra, ‘The Inevitable Jurisprudential Construction of the Autonomous State’, in Alberto López Basaguren and Leire Escajedo San Epifanio (eds.), *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain: Volume 1* (Berlin, Heidelberg: Springer, 2013), pp. 481–500, 492; Pablo José Castillo Ortiz, ‘Framing the Court: Political Reactions to the Ruling on the Declaration of Sovereignty of the Catalan Parliament’, *Hague Journal on the Rule of Law* 7(1) (2015): pp. 27–47.

² Arthur Dyevre, ‘Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour’, *European Political Science Review* 2(2) (2010): pp. 297–327, 320.

³ See Rosenberg, Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 2008); Richard Bellamy, ‘The Democratic Constitution: Why Europeans should Avoid American Style Constitutional Judicial Review’, *European Political Science* 7(1) (2008): pp. 9–20, 17.

⁴ Alec Stone Sweet, ‘Constitutions and Judicial Power’, in Daniele Caramani (eds.), *Comparative Politics* (Oxford: Oxford University Press, 2008), pp. 217–239, 221.

⁵ Hans Kelsen, ‘Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution’, *The Journal of Politics* 4(2) (1942): pp. 183–200, 185.

⁶ *Ibid.*, p.186. As Kelsen puts later on in that article, the only exception to the lack of retroactive force of declarations of unconstitutionality refers precisely to the case that originated the review of constitutionality (p. 187).

ceptualizing the way in which we theorize and design these institutions. To do so, I will undertake a double task. First, I will provide a novel theoretical framework aimed at understanding constitutional courts, which reveals that these institutions are subject to inherent tensions of design. Second, building on that theoretical framework, the article proposes a new type of constitutional court, which aims at helping constitution makers minimize inherent trade-offs of institutional design. Far from a mere academic exercise, the proposal aims at being applied to real world cases.

Let me analyze these two aspects separately and in greater detail. The first task has to do with the construction of a new theoretical framework to understand constitutional courts. As Pasquino puts it, 'a theory of democracy should also be nowadays a theory of constitutional democracy. That means, it should analyse and compare different modalities of constitutional control and try to exhibit the rationale –alternatively the lack of rationale– of those institutions'.⁷ As is generally the case with political institutions,⁸ this article shows that designing constitutional courts often involves choosing between conflicting values. Focusing on constitutional courts' function of the constitutional review of legislation, it is argued that these institutions are simultaneously expected to be good defenders of democracy and human rights, to be independent from political actors and to avoid judicial activism through self-restraint. Furthermore, it is argued that the problem with these three values is that it is not possible to completely maximize all of them at the same time. For that reason, we must see constitutional courts as subject to a constitutive tension: their design involves unavoidable trade-offs because, in order to maximize certain institutional values, other values must –at least partially, give way.⁹

The most immediate consequence of this tension is that it is logically impossible to design a perfect constitutional court. Kelsenian-type courts will always be subject to criticism simply because the trade-offs they face prevent them from completely maximizing one or another valuable political good, therefore creating constantly

⁷ Pasquale Pasquino, 'Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy', *Ratio Juris* 11(1) (1998): pp. 38–50, 41.

⁸ See Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (New York, NY: Oxford University Press, 2007), 10.

⁹ See Nuno Garoupa, 'Empirical Legal Studies and Constitutional Courts', *Indian Journal of Constitutional Law* 5(1) (2011): pp. 26–54, 28–29.

unmet social and political demands. Nevertheless, knowledge of those trade-offs can help us improve this design. This brings me to the second task undertaken by this article: the proposal for a new design of constitutional courts. In this regard, it is argued that we should give up on the ambitious but impossible task of designing constitutional courts that maximize all three values at the same time. Instead, I argue that we should focus on the more modest but also more realistic objective of finding the optimal proportion of those values and embed it into the institutional design of constitutional courts. Furthermore, I argue that such an optimal proportion may lie in a design that departs from the contemporary dominant model of constitutional courts. In my proposal, I suggest that we should consider limiting the power of constitutional courts, albeit only with regard to aspects that are not essential to the protection of a democratic political system. In exchange, I argue that constitutional courts should be given more independence from political actors. While I do not suggest that all currently existing constitutional courts should immediately adopt this model, I believe that this proposal might be useful in countries currently without a system of review but that are considering its implementation or in those countries in which such a system exists, but it is dysfunctional or lacks sociological legitimacy.

This article is structured as follows. I begin by reflecting on the three aforementioned values that constitutional courts are expected to maximize and show that the failure to uphold each of them is problematic from the perspective of the legitimacy of these institutions, creating reputational costs. Next, I will explain why, despite the fact that all three of the values are important, they cannot be simultaneously maximized, setting a dilemma for any attempt to design a Kelsenian court. Subsequently, I will present my proposal for a new approach to the institutional design of constitutional courts. While, in my view, no design can eliminate the constitutive tension of constitutional courts, I believe the proposal presented in this article is a good way to mediate among those conflicting values and to create, not 'perfect' constitutional courts but 'good imperfect' ones. In the following section, I will emphasize the configurational, context-specific nature of institutional designs, and I will reflect on how each of the elements of my proposal may interact with the

wider constitutional and sociopolitical context of the courts. Subsequently, I will devote some discussion to the problem of illiberalism and its relationship with constitutional courts, analyzing it with the help of the theoretical framework advanced by this article. The last section concludes.

II. THE VALUES OF CONSTITUTIONAL COURTS

There are three main values or goods that justify the existence and design of constitutional courts. Most academic and social discussions about the merits of Kelsenian courts gravitate around the performance of these institutions vis-à-vis these values. These values are the protection of democracy and human rights, judicial independence and constitutional restraint. While I do not claim that these values are the only ones that matter for Kelsenian-type constitutional courts, I will demonstrate that justifications of these institutions typically deal with the maximization of at least these three goods: constitutional courts are deemed to be desirable, well-designed institutions insofar as they realize these three values. At the same time, these values are linked to general principles of liberal constitutionalism. Judicial independence is linked to the principle of the rule of law, because the ideal of the rule of law can only be realized through independent courts. Constitutional restraint is linked to the democratic principle, because in exhibiting self-restraint vis-à-vis the parliament constitutional courts allow a democratically elected actor to make the most important policy decisions. And protection of democracy and human rights is linked to the general preservation of liberal constitutionalism, because liberal constitutionalism has political freedom at its core.

Therefore, the judicial values of independence, restraint and protection of democracy and human rights have implications for liberal constitutionalism in general. Hence their importance. Furthermore, when constitutional courts fail to uphold any of these judicial values, it usually results in important reputational costs for them. In the next lines, each of these values is explored in detail.

A. The Protection of Democracy and Human Rights

The literatures on law and politics generally agree that the protection of democracy and human rights is the central aim of postwar

constitutional courts. As was put correctly by Stone Sweet, ‘contemporary Kelsenians claim that constitutional courts function to protect constitutional rights, and that this function is basic to the legitimacy of review’.¹⁰ In this regard, constitutional courts do not only perform judicial review, but also they are bestowed with judicial supremacy: unlike in the ‘new Commonwealth model of constitutionalism’,¹¹ in enforcing the constitution to protect democracy and human rights constitutional courts can strike down decisions of the parliament with effects *erga omnes*. Constitutional courts, and not legislatures, have the final word.¹²

The idea of the judicial enforceability of human rights and the protection of democratic institutions by constitutional courts has much to do with the moral dimension of the catastrophes of the 20th century. Kelsenian courts spread in postwar Europe against the background of totalitarian experiences and massive violations of human rights and with an aim of avoiding the repetition of these horrors in the future.¹³ Very often, the protection of democracy and human rights in these new-born, fragile liberal polities was one the reasons that justified the creation of constitutional courts. The best example, precisely because of its dark historical background, is that of Germany. According to Schoenberger, the ‘new significance of human rights after Nazism’ was one of the main reasons behind the creation of the Federal Constitutional Court:

The Parliamentary Council started its document with a proclamation of human dignity and a catalogue of human rights... Theirs was a string reaction to the Nazi period. And they wanted not only to proclaim fundamental rights, but to make them judicially enforceable... They cared less for the problem of the delicate balance between Parliament and the new Court than for the clean and unequivocal break with the Nazi experience.¹⁴

¹⁰ Alec Stone Sweet, ‘Constitutional Courts and Parliamentary Democracy’ *West European Politics* 25(1) (2002), pp. 77–100, 82. See also Arthur Dyevre, ‘Technocracy and Distrust: Revisiting the Rationale for Constitutional Review’, *International Journal of Constitutional Law* 13(1) (2015): pp. 30–60, 36–37.

¹¹ See on this Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge: Cambridge University Press, 2013).

¹² See Stephen Gardbaum, ‘The New Commonwealth Model of Constitutionalism’, *American Journal of Comparative Law* 49 (2001): pp. 707–760, 709.

¹³ Stephen Gardbaum, ‘Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?)’, *American Journal of Comparative Law* 62(3) (2014): pp. 613–39, 614.

¹⁴ Schoenberger Christoph, ‘The Establishment of Judicial Review in Postwar Germany’, in Pasquale Pasquino and Francesca Billi (eds.), *The Political Origins of Constitutional Courts* (Berkeley, CA: Berkeley Law, 2009), pp. 76–83.

The protection of democracy and human rights is, therefore, the first of the three values that constitutional courts should seek to maximize. Furthermore, this article defends the idea that, when balancing the protection of democracy and fundamental rights against the other two values of constitutional courts (judicial independence and judicial restraint), the former should be given a special weighting. For this reason, when proposing reforms of the design of constitutional courts, this article will only put forward those that are compatible with the maximum possible protection of democratic arrangements and human rights. There are two types of reasons for this approach: theoretical and practical.

At the theoretical level, the importance of fundamental rights in contemporary legal constitutionalism seems uncontested. Jürgen Habermas argued that, rather than as a constraint on democracy, 'basic rights as a whole and not merely political rights, are constitutive for the process of self-legislation'.¹⁵ In Dworkin's well-known theory, 'rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole'.¹⁶ At the core of Dworkin's approach, there is thus a clear statement about the prevalent character of the defense of fundamental rights in a liberal polity. Finally, according to Alexy, fundamental rights should be treated as 'optimization requirements, that is, as principles, not simply as rules. As optimization requirements, principles are norms requiring that something be realized to the greatest extent possible'.¹⁷ In the writings of all of these authors, what we find is a defense of the character of fundamental rights as a central feature of constitutionalism. Furthermore, there is a corollary to these approaches to fundamental rights: other values, such as deference to the legislature, must be at least partially subordinated to an adequate protection of fundamental rights.

At the practical level, in the era of illiberal populism, institutional defenses of human rights and democratic arrangements, such as those afforded by Kelsenian courts, are probably more necessary than ever. Even an opponent of constitutional review such as Jeremy

¹⁵ Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', *Political Theory* 29(6) (2001): pp. 766–781, 776.

¹⁶ Ronald Dworkin, 'Rights as Trumps', in Jeremy Waldron (eds.), *Theories of Rights* (Oxford: Oxford University Press, 1984), pp. 153–167, 153.

¹⁷ Robert Alexy, 'Balancing, Constitutional Review, and Representation', *International Journal of Constitutional Law* 3(4) (2005): pp. 572–581, 572–573.

Waldron admits that his case against this arrangement is dependent on one premise: the existence of stable, properly functioning democracies with societies committed to the rights of individuals and minorities.¹⁸ The issue is that the current époque demonstrates that such a premise can no longer be taken for granted. No society, whatever the strength or age of her democracy, seems to be immune to the eventual rise of illiberalism. From the perspective of the first of their values, constitutional courts can be understood as insurance mechanisms against those situations.

The countermodel of the protective constitutional court is the ‘inefficient court’: a court that is unable to protect democracy and human rights against authoritarian politicians. To illustrate this, we can think about the traditional understanding of courts under authoritarian or semi-authoritarian regimes. According to Ginsburg and Versteeg, ‘when autocrats expect that they will be able to control the court, constitutional review might boost the regime’s international reputation without imposing any real costs’.¹⁹ Recent literature on judicial politics provides for a very nuanced understanding of courts in authoritarian contexts, where these can be instruments of repression but also sites of active resistance.²⁰ Such courts can be used to decimate the opposition and to consolidate the ruling coalition of power, but they can also open avenues for the political opposition to challenge the regime.²¹ Nevertheless, constitutional courts in such contexts are very frequently unable to sufficiently maximize the value of the protection of the democratic order. A good example of this is the current Russian Constitutional Court, which has been unable to prevent the Russian Federation from consolidating a semi-authoritarian regime. As explained by Valor, the current Constitutional Court of Russia is strongly supportive of the Russian government and its political machinery, having upheld the constitutionality of democratically regressive legislation.²² Cases such as this very clearly demonstrate the importance of the connection between the value of the protection of democracy and human rights and the

¹⁸ Jeremy Waldron, ‘The Core of the Case against Judicial Review’, *The Yale Law Journal* 115(6) (2006): pp. 1346–1406.

¹⁹ Tom Ginsburg and Mila Versteeg, ‘Why do Countries Adopt Constitutional Review?’, *Journal of Law, Economics, and Organization* 30(3) (2014): pp. 587–622, 610.

²⁰ Tamir Moustafa, ‘Law and Courts in Authoritarian Regimes’, *Annual Review of Law and Social Science* 10(1) (2014): pp. 281–299, 282.

²¹ *Ibid.*, pp. 281–299.

²² Ozan O. Varol, ‘Stealth Authoritarianism’, *Iowa Law Review* 100 (2015): pp. 1673–1742, 1689–1690.

value of judicial independence, which will be dealt with in the next subsection. The Russian Constitutional Court is doubtlessly deferent to the political branches of government, especially the executive. However, this happens at the cost of losing its institutional independence, and precisely for this reason, the court is largely unable to protect democracy in its country.

B. Judicial Independence

The second value that a constitutional court's design should ideally maximize is independence. In this context, judicial independence refers to the capacity of a court to solve disputes 'without regard to the power and preference of the parties appearing before it, including those of the legislative and executive branches of government'.²³ In fact, judicial independence can be deemed a continuum. In one extreme, we would find totally independent courts whose process of decision making is absolutely free from external influences. In the opposite extreme of the continuum, we would find judicial institutions that completely submit to the will of other actors, often political actors, and with no agency of their own. Empirically, existing courts are located in a range of intermediate positions within that continuum.

Judicial independence is deemed to be a precondition for any polity based on the rule of law.²⁴ Victor Ferreres rightly points to how ordinary courts obtain legitimacy from the idea that they are independent law adjudicators:

ordinary courts are strongly linked to rule of law values. They act as impartial third parties... To the extent that people view ordinary courts as independent institutions, they are more likely to support them and to be critical of efforts that undermine their independence.²⁵

Judicial independence is also of the utmost importance for institutions performing constitutional review of legislation. For Tridimas, constitutional review of policies is 'only meaningful when conducted

²³ George Tridimas, 'Constitutional Judicial Review and Political Insurance', *European Journal of Law and Economics* 29(1) (2010): pp. 81–101, 85.

²⁴ Lee Epstein, Jack Knight and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government', *Law & Society Review* 35(1) (2001): pp. 117–164, 117.

²⁵ V Ferreres Comella, 'The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism' (2004)', *Texas Law Review* 82 (2003–2004): pp. 1705–1736, 1728.

by an independent court'.²⁶ According to Kyritsis, it is precisely by virtue of their independence that courts are good candidates to perform the task of legislative supervision.²⁷ Constitutional courts are deemed legitimate when they can claim that their decisions are the result of the independent and neutral application of the constitution.²⁸ Furthermore, the more independent constitutional courts are, the more they will be able to protect democracy and human rights when these are attacked by political actors.

However, despite its important role in legitimizing these institutions, the independence of constitutional courts is often questioned. As put by Ferreres:

Constitutional courts, in contrast [to ordinary courts], are relatively new institutions, and they are not purely 'judicial': they specialize in politically sensitive issues, their members are usually selected in a more political manner, and sometimes they decide challenges brought by political institutions. To the extent that constitutional courts appear to be more 'political', they cannot easily draw from the moral capital that ordinary courts may have accumulated as impartial interpreters and enforcers of law.²⁹

The extreme countermodel of the independent Kelsenian court would be the 'politicized court' or, to put it more bluntly, the 'puppet court'. Briefly, the idea behind these depictions would be a constitutional court that is not a neutral, independent adjudicator of the constitution but rather an instrument at the service of the political actors that have control over it, a court that uses the constitution as an excuse to implement the preferences of its principals. The idea of a 'puppet court' must be deemed an abstract type rather than an accurate description of empirical constitutional courts, especially in democracies in which these institutions are subject to political pressures but simultaneously preserve significant independence. However, the fact is that it is not unusual for political actors during political debate to use this depiction of constitutional courts as 'puppets' or 'politicized' institutions when the courts make decisions against their preferences. A good example is the recent series of accusations of politicization against the Spanish Constitutional Court.³⁰ Regardless whether this

²⁶ Tridimas, *supra* note 23, p. 85.

²⁷ Dimitrios Kyritsis, 'Constitutional Review in Representative Democracy', *Oxford Journal of Legal Studies* 32(2) (2012): pp. 297–324, 303.

²⁸ Castillo Ortiz, *supra* note 1, p. 31.

²⁹ Comella, *supra* note 25, p. 1728.

³⁰ Castillo Ortiz, *supra* note 1, pp. 27–47.

institution actually lacks sufficient independence or not vis-à-vis politicians, it is clear that such perceptions among the public is dangerous and detrimental to the reputation of the court. This shows that Kelsenian courts, like other types of courts, need a modicum of independence to be deemed legitimate. The paradox is that, while constitutional courts move necessarily in the arena of politics, their 'politicization' usually becomes problematic.

C. Constitutional Restraint

The third value that Kelsenian courts ought to uphold is constitutional restraint. In the US context, Judge Posner defined constitutional restraint as a type of judicial restraint that refers to a judicial reluctance to declare legislative or executive action unconstitutional, generally based on an attitude of respect for the elected branches of government.³¹ Posner provides for a lengthy list of reasons why restraint is indeed a desirable judicial practice, including *inter alia*: the unintended consequences of judicial decisions, the weak claims to objective validity in most constitutional decisions and especially in difficult cases, the vast scope of the constitution and the limited information available to judges, as well as the nonlegal factors operating unconsciously in judicial decision making, such as personal values or peer pressure.³²

Beyond these reasons, a very powerful argument in favor of constitutional restraint has to do with the often tense relationship between constitutional review and democracy, which can be traced back to the very creation of this arrangement. Constitutional review is now a feature of most democratic political systems.³³ However, that was not always the case. As explained by Stone Sweet, 'prior to the appearance of the Kelsenian constitutional court, it was widely assumed that constitutional review was incompatible with parliamentary governance and the unitary state'.³⁴ In countries such as France, the idea of constitutional review had to fight a long battle against the pre-existing model of parliamentary sovereignty, which

³¹ Richard A. Posner, 'The Rise and Fall of Judicial Self-Restraint', *California Law Review* 100(3) (2012): pp. 519–556, 521.

³² *Ibid.*, pp. 553–554.

³³ See Ginsburg and Versteeg, *supra* note 19, p.587. See also Alec Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why it May not Matter', *Michigan Law Review* 101(8) (2003): pp. 2744–2780.

³⁴ Stone Sweet, *supra* note 10, p. 78.

saw the legislature as the democratically legitimate site of law making and distrusted the excessive power of ‘unelected’ judges to overturn parliamentary decisions.³⁵

The tension between the democratic legitimacy of the political branches of government and the power of judicial-type organs to overturn their decisions still permeates the discussion about constitutional review and fuels criticisms of this arrangement.³⁶ The literature refers to this tension by calling it the ‘countermajoritarian difficulty’.³⁷ As noted by Kyritsis, given that in a democracy the legislature is the main locus of democratic legitimacy,

for many, the fact that constitutional review cuts away the power of the legislature and gives it to unelected judges is reason to object to it, even if it is true that such a practice better protects the fundamental rights of citizens.³⁸

This objection is so powerful that it continues to inspire some empirically existing political systems. Political constitutionalism, which has as a central tenet the defense of the supremacy of the legislator,³⁹ is probably still the dominant constitutional theory in the United Kingdom, a country that provides a prominent example of an advanced democracy where parliamentary sovereignty has managed to survive.

In countries where they have been implemented, constitutional courts are always in the difficult position of trying to defend the constitution without being accused of supplanting the legislature. For that reason, even defenders of the idea of constitutional review often acknowledge that this arrangement should be compatible with a modicum of deference to elected politicians. According to Kyritsis, courts reviewing legislation should still respect the legislature.⁴⁰ He argues that constitutional review should not overshadow or overly

³⁵ See Gardbaum, *supra* note 13, p. 628. See also Pasquale Pasquino, ‘Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy’, *Ratio Juris* 11(1) (2002): pp. 38–50, 45.

³⁶ See Waldron, *supra* note 18, pp. 1346–1406.

³⁷ See Or Bassok and Yoav Dotan, ‘Solving the Countermajoritarian Difficulty?’, *International Journal of Constitutional Law* 11(1) (2013): pp. 13–33.

³⁸ Kyritsis, *supra* note 27, p. 297.

³⁹ See Graham Gee and Gregoire Webber, ‘What Is a Political Constitution?’, *Oxford Journal of Legal Studies* 30(2) (2010): pp. 273–299; Richard Bellamy, *Political Constitutionalism* (New York, NY: Cambridge University Press, 2007); Richard Bellamy, ‘The Democratic Constitution: Why Europeans should Avoid American Style Constitutional Judicial Review’, *European Political Science* 7(1) (2008): pp. 9–20.

⁴⁰ Kyritsis, *supra* note 27, p. 299.

obstruct the role reserved to the legislature,; rather, it should have a subsidiary character.⁴¹

The countermodel of the constitutionally restrained court is probably best reflected by the idea of the '*gouvernement des juges*', to borrow the title of Lambert's famous work.⁴² In his book, the French academic expressed fear that judges would use their powers of review to advance their own policy goals, which he denounced as reactionary at that time.⁴³ Note that, according to some authors, a modicum of activism is an intrinsic part of Kelsenian courts.⁴⁴ Constitutional courts are expected to be 'active' in the defense of the constitution against unconstitutional legislation passed by the parliament. However, such activism can become excessive in a hypothetical situation in which constitutional judges displace democratically elected decision makers by using the constitutional text as an excuse to advance their personal policy preferences.⁴⁵ We can call this 'pathological activism'. The question is, therefore, where is the boundary that separates legitimate judicial behavior from pathological activism. For political constitutionalists, any judicial enforcement of the constitution against the will of the democratically legislature is generally unacceptable.⁴⁶ In contrast, neo-constitutionalists consider constitutional review of legislation a necessary part of democracy, but as argued above, even within these postulates, judicial restraint and deference to the legislature are desirable. Indeed, when constitutional courts are, in real politics, accused of 'activism', the criticism often refers to what I have called pathological activism. Furthermore, such an accusation shows that constitutional restraint and deference to democratically elected political actors is a social and political expectation of Kelsenian institutions.

⁴¹ *Ibid.*, p. 318.

⁴² Édouard Lambert, *Le Gouvernement des Juges et la Lutte Contre la Législation Sociale Aux États-Unis: L'expérience Américaine du Contrôle Judiciaire de la Constitutionnalité des Lois* (Paris: Marcel Giard & Cie, 1921).

⁴³ Although Lambert's critique was mainly addressed to the American model of diffuse judicial review and its introduction in France. See Stone Sweet, *supra* note 33, p. 2759.

⁴⁴ Comella, *supra* note 25: pp. 1705–1736.

⁴⁵ See Garoupa, *supra* note 9, pp. 34–35.

⁴⁶ Gee and Webber, *supra* note 39, p. 288.

III. THE THREE VALUES AND KELSENIAN COURTS' INSTITUTIONAL DESIGN

In the previous section, I argued that there are at least three values that all Kelsenian courts should aim to maximize simultaneously: strong protection of democracy and human rights, judicial independence and restraint vis-à-vis democratically legitimized policy makers. In this section, I argue that the problem with these three values is that, in fact, they might not always be compatible with each other. As I will show, there seems to be a strong tension underlying the relationship between them. At a theoretical level, the simultaneous maximization of the protection of the democratic constitution and of judicial independence seem conceptually possible. It is plausible to imagine a constitutional court endowed with great powers to protect democratic institutions and human rights, as outlined by the constitution, and to conceptualize such a court as removed from all possible control by political actors. However, in order to realize these two values together, the third value, constitutional restraint or deference, must give way, at least partially.

In fact, each of the first two values is autonomously in tension with the third. The defense of the constitution as a higher rule entrenching democracy and human rights is in tension with the idea of deference. As put by Ferreres in his reading of Alexy, 'if the constitution covers so much terrain, and the constitutional court is the supreme interpreter of the constitution, what is left for the democratic branches to do?'⁴⁷ That is, the wider the range of tools that are available to the constitutional court to protect the constitution, the wider the range of opportunities there are to issue countermajoritarian decisions and to be activist. Independence is also in tension with deference and restraint because constitutional judges removed from political control are more likely to challenge the preferences of elected politicians.⁴⁸ Constitutional judges removed from all political control will have little to fear when they overturn democratically legitimized policy choices, and such challenges will become more frequent. Furthermore, if the protection of democracy

⁴⁷ Comella, *supra* note 25, p. 1735. See also Gertrude Lübke-Wolff, 'Constitutional Courts and Democracy. Facets of an Ambivalent Relationship', in Klaus Meßerschmidt and A. Daniel Oliver-Lalana (eds.), *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court* (Cham: Springer International Publishing, 2016), pp. 19–32, 26.

⁴⁸ See Garoupa, *supra* note 9, p. 29, c.f., see Comella, *supra* note 25, p. 1733.

and independence are each autonomously in tension with the ideas of deference and restraint, when they combine, such tensions increase exponentially. Courts with a wide range of tools to protect the constitution and emancipated from political control would be more prone to engage in countermajoritarian decisions and to more often challenge the preferences of elected politicians. As the constitutional text would provide a wide cloak for judicial action, very independent constitutional courts would increasingly become a veto point and would contest the policy choices of the political branches of government. By maximizing the protection of the constitution and judicial independence simultaneously, constitutional restraint is minimized.

In this regard, it is important to underline that this tension is not the product of the inefficient institutional design of constitutional courts. It is in fact inherent to the very essential elements of Kelsenian-type constitutional review, possibly of constitutional review in general, and to the conceptual relation among the three values that constitutional courts are expected to maximize. Institutional design can provide, for better or worse, a balancing among those values, but no design will ever be able to entirely overcome the intrinsic tension among them. In fact, variations in the designs of constitutional courts over time and space can be read as variations in the approaches to the balancing of those values and to the management of the tensions among them. In the next two subsections, I will analyze this point, focusing first in Kelsen's original model of a constitutional court and then on the type of constitutional courts that became dominant in postwar Europe.

A. Kelsen's Original Court: Restricted Powers with Political Legitimation

Kelsen's view was that, in his time, there were 'very poor' guarantees of the constitutionality of statutes.⁴⁹ The idea to create a constitutional court must be explained as a reaction to this political-constitutional background. In his definition, a constitutional court was 'an organ that is distinct from the legislator and independent of it, and thus of any other public authority, [which] must be

⁴⁹ Hans Kelsen, 'Kelsen on the nature and development of constitutional adjudication', in Lars Vinx (eds.), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge, MA: Cambridge University Press, 2015[1929]), pp. 22–78, 25.

empowered to annul the unconstitutional acts of the legislator'.⁵⁰ However, beyond this basic definition, Kelsen's original design of constitutional courts provided for an interesting institutional setup that involved a very specific combination of the three values outlined above. This is so for at least two reasons.

First, Kelsen's original idea was for a court that would enforce mostly constitutional procedural rules but not fundamental rights or substantive provisions. According to Stone Sweet,

Kelsen argued that constitutions should not contain human rights, which he associated with natural law, due to their open-ended nature... Adjudicating rights claims, in his view, would inevitably weaken positivism's hold on judges, thereby undermining the legitimacy of the judiciary itself, since judges would become the lawmakers.⁵¹

In a way, Kelsen seemed to fear the increase in judicial activism that the enforcement of fundamental rights might cause.⁵²

Second, Kelsen's original design included appointment procedure for constitutional judges that was totally under the control of political actors. In his time, Kelsen faced politicians that were suspicious of judicial power.⁵³ The Austrian Constitution of 1920 explicitly included the parliamentary appointment of members of the constitutional court. As put by Kelsen,

Since the Constitution conferred upon the Constitutional Court a legislative function, i.e. a function which, in principle, was reserved to the Parliament, the Austrian Constitution of 1920, provided that the members of the Constitutional Court had to be elected by the Parliament and not like other judges, to be appointed by the administration... This way of constituting the Court was accepted in order to make the Court as independent as possible from the administration. This independence was necessary because the Court had the control over different acts of the administration... By a misuse of this power the administration could easily suppress the parliament and thus eliminate the democratic basis of the State.⁵⁴

Note that this passage combines two ideas. On the one hand, the parliamentary appointment of members of the court was necessary because, after all, the court would perform legislative functions. On the other hand, it was appropriate because the alternative was appointment by members by the administration, which could

⁵⁰ Kelsen, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, at p. 45.

⁵¹ Stone Sweet, *supra* note 33, pp. 2767–2768. See also Stone Sweet, *supra* note 10, pp. 81–82.

⁵² See also Hans Kelsen 'La garantie juridictionnelle de la Constitution (la Justice constitutionnelle)', *Revue du Droit Public et de la Science Politique en France et à l'étranger*, 45 (1928), pp. 197–257, 241.

⁵³ Stone Sweet, *supra* note 33, p. 2766.

⁵⁴ Kelsen, *supra* note 5, p. 188.

threaten the democratic functioning of the state. I will return to this tension between parliamentary and administrative appointments later in this article.

If we keep in mind the three values of constitutional courts outlined earlier in this article, what we find in Kelsen's original design is an interesting combination: a constitutional court with only moderate powers of review and not very insulated from political actors. Given its range of powers, we can say that the original Kelsenian institutions were clearly less powerful than most contemporary constitutional courts. In addition, although they were independent vis-à-vis the administration, they were not independent vis-à-vis the parliament because this latter institution had control over the appointment of constitutional judges. Note that this depiction of the original Kelsenian courts is not intended as criticism of the design devised by the Austrian jurist; rather, it simply aims at describing the design. Indeed, the two features of institutional design identified in this subsection were probably functional to achieve sensible political-constitutional aims: maximizing the deference of the court vis-à-vis elected politicians in the legislature, avoiding 'the government of judges'⁵⁵ and minimizing the risk of an activist court.

B. The Postwar Court: Expanding the Range of Powers of the Institution

Contemporary constitutional courts do not fully fit the original design envisaged by Kelsen. Stone Sweet is right when he suggests that the destruction of World War II made possible the diffusion of Kelsenian-type constitutional courts but, paradoxically, only under the condition that one of the central elements of Kelsen's original design was overcome.⁵⁶ After the horrors of totalitarianisms, constitutional courts are not only now allowed to enforce the fundamental rights listed in the constitution, but in fact, that is one of their main functions. This gives contemporary constitutional courts a wide range of opportunities to engage in the constitutional review of legislation, and in this regard, they have become notably more powerful than they were meant to be in Kelsen's initial plan.

⁵⁵ Stone Sweet, *supra* note 33, p. 2768.

⁵⁶ *Ibid.*, p. 2769.

However, the other aspect of Kelsen's original idea, the political appointment of judges, continues to be solidly embedded in the design of most constitutional courts. In Europe, the mechanism of the appointment of constitutional judges typically grants political actors a prominent role.⁵⁷ In Germany, the legislative chambers appoint constitutional judges by qualified majorities. Additionally, in Spain, the government can appoint some of the *magistrados*. Other systems do not even require parliamentary supermajorities. An argument put forward to justify the political appointment of members of the court is that it helps overcome the so-called counter-majoritarian difficulty. As put by Ferreres,

Judicial review of legislation may give rise to a 'democratic objection' inasmuch as the legislation in question is the product of a democratic legislature. This objection may be minimized if the members of the court are selected in ways that are relatively democratic.⁵⁸

Again, I believe this idea reflects the tensions among the values of the constitutional courts that I described earlier: the power to appoint constitutional judges is bestowed upon political actors because of the democratic legitimacy of the latter, but in so doing, the independence of the court is sacrificed.

The political appointment of members of the constitutional court soon proved problematic. The independence of constitutional judges vis-à-vis politicians depends on a number of factors, *inter alia* the duration of tenures, the autonomy of the court to manage resources or the enforceability of its decisions. However, judicial appointments are crucial in this regard. Stone Sweet differentiates between two main systems of appointment: nomination by an individual authority or election, typically by supermajority, in a legislative assembly.⁵⁹ Systems requiring supermajorities in legislative assemblies were, in principle, designed to avoid excessively partisan appointments, but in practice, they often function like quota systems in which each party appoints a number of judges 'roughly proportionate to relative parliamentary strength'.⁶⁰ A likely outcome of this system is the

⁵⁷ Talking about this aspect and about the general intertwining of constitutional courts with politics, Victor Ferreres calls these institutions as 'fragile'. Comella, *supra* note 25, pp. 1705–1736.

⁵⁸ V Ferreres Comella, 'The European Model of Constitutional Review of Legislation: Toward Decentralization?', *International Journal of Constitutional Law* 2(3) (2004): pp. 461–491, 468.

⁵⁹ Stone Sweet, *supra* note 10, p. 88.

⁶⁰ *Ibid.*, p. 88. See also Garoupa, *supra* note 9, p. 30; Tom Ginsburg, 'Economic Analysis and the Design of Constitutional Courts', *Theoretical Inquiries in Law* 3(1) (2002): pp. 49–85, 68.

appointment of ideologically like-minded constitutional judges in a context in which the empirical evidence that the ideology of judges plays a role in their process of decision making is overwhelming.⁶¹ As argued by Garoupa, 'Constitutional judges are appointed by heavily politicized bodies and could be heavily influenced by political parties when these play an active role in the appointment process. Therefore, judicial independence becomes an issue', even if constitutional judges have an interest in maintaining some distance from party politics to protect the prestige of the court.⁶²

The skepticism about constitutional interpretation inherent in the findings of the empirical literature on constitutional courts must however be subject to at least two caveats. First, this skepticism does not prejudice the questions of whether constitutions actually provide for 'right answers' to the cases or for 'reasons for action', to borrow the concepts used *inter alia* by Dworkin and Greenberg.⁶³ Rather, it means that, regardless of the reasons for the action provided by the constitution, constitutional judges have an incentive to decide cases on political rather than constitutional grounds. This points to a serious flaw of institutional design in current constitutional courts. Second, our empirical knowledge of constitutional judges' decision making does not suggest that constitutional courts are totally subject to the preferences of political actors: constitutional judges do preserve agency and autonomy, and their behavior cannot be explained solely with reference to the preferences of their appointers. However, that said, the type of deference to politicians inherent to the hegemonic system of appointment of constitutional judges has as a side effect, a relative loss of institutional independence. In this regard, current constitutional courts can continue to be deemed relatively dependent vis-à-vis politicians. The corollary of this weakened judicial independence is frequently a correlative loss of reputation and sociological legitimacy for the court.

⁶¹ Dyevre, *supra* note 10, pp. 41 ff.

⁶² Garoupa, *supra* note 60, p. 29.

⁶³ See Ronald Dworkin, 'No Right Answer?', *New York University Law Review* 53(1) (1978): pp. 1–32; Ronald Dworkin, *Taking Rights Seriously* (London, UK: Bloomsbury, 1997); Mark Greenberg, 'Moral Concepts and Motivation', *Philosophical Perspectives* 23(1) (2009): pp. 137–164; Mark Greenberg, 'Implications of Indeterminacy: Naturalism in Epistemology and the Philosophy of Law II', *Law and Philosophy* 30(4) (2011): pp. 453–476.

IV. STRIKING A NEW BALANCE: THE CASE FOR LESS POWERFUL BUT MORE INDEPENDENT CONSTITUTIONAL COURTS

In his piece on constitutional review, Kyritsis argued that ‘constitutional design can choose from among a number of institutional options and experiment with variables such as the scope and intensity of review’.⁶⁴ In this section, I apply that idea to Kelsenian institutions with the hope of achieving a better balance between the conflicting values that constitutional courts ought to maximize simultaneously. To do so, I first explore the possibilities of institutionalizing deference to the legislature through changes in Kelsenian courts’ benchmarks for review and internal procedures of decision making. Second, I explore institutional alternatives to current political forms of appointment of constitutional judges and other aspects of court design with a view to fostering judicial independence and increasing the technocratic legitimacy of these institutions. As I argue below, these two aspects are not unrelated. In contrast, they are complementary and only make sense if implemented simultaneously.

A. *Constraining Courts’ Powers of Review*

The first element of my proposal deals with the idea of constraining constitutional courts’ capacity to declare the unconstitutionality of legislation. In general, we can also think of constitutional review as a continuum. In one extreme of the continuum, we would find the British system of parliamentary sovereignty, where no court can strike down primary legislation. In the opposite extreme of the continuum, we would find models of constitutional review with widely empowered constitutional courts,⁶⁵ which are powerful given the role they play in democratic processes and the extensive opportunities to strike down legislation that they have. What is important to keep in mind is that these two grand models are not the only institutional possibilities available to constitution makers. Instead, in this subsection, I will argue that in between them there is a wide range of intermediate approaches, which can be selected by

⁶⁴ Kyritsis, *supra* note 27, p. 299.

⁶⁵ For the sake of analytical clarity, I am deliberately ignoring here the third possibility: the model of diffuse or decentralized review.

playing with courts' institutional settings along two dimensions: the breadth of courts' benchmark for review and courts' internal decision-making rules.⁶⁶ Indeed, these two aspects can interact, offering a wide range of possible constitutional courts with a more moderate capacity to declare legislation unconstitutional. Furthermore, the diverse types of designs to which these institutional settings give rise provide for different solutions to the problem of the conflicting values that Kelsenian institutions ought to maximize, although, as I will argue, some of these options might be risky from the perspective of the protection of democracy.

With this background, in this section, I explore three potential ways to embed deference to the legislature into courts' design. In line with the general argument of this article, my starting point is the acknowledgement that each of these three possibilities also faces unavoidable dilemmas and trade-offs, as each of them maximizes certain values of Kelsenian courts at the cost of reducing the weighting of others:

- The first option is to reduce courts' benchmark for review to only certain aspects of the constitution. Put simply, the constitutional court could be allowed to invalidate statutes that contradict certain constitutional provisions but not all provisions of the constitution. Of course, in choosing which provisions to include, there would be a new trade-off: the more constitutional provisions that are included in the benchmark for review, the weaker is the institutionalized deference to elected politicians. Conversely, the inclusion of fewer provisions would maximize deference to the democratically elected legislature but at the cost of reducing the capacity of the court to protect certain aspects of the constitution. It is for every political community to make the, political, choice of which provisions to include based on the specific needs, circumstances and preferences of their society. However, in any democratic polity, at least all the provisions that protect human rights and the functioning of democratic institutions (which are often the majority of the constitution) should be always included.⁶⁷ Therefore, the protection of democracy and human rights, the first of the values of constitutional courts, would also be maximized. For the rest of provisions, a good criterion could be the inclusion of specific and concrete rules, as they constrain judges to a larger extent and leave less room for activism. More abstract, vague and general rules and principles could be excluded, as these allow judges' personal preferences to filter more easily into judicial outcomes.⁶⁸ Together, these two criteria provide for an interesting interplay. If seriously taken into account, they mean that the benchmark for review *must always include* the catalogue of fundamental rights of every constitution, as well as provisions establishing the separation of powers and rules that are specific in the regulation of the functioning of democratic organs. Provisions that *can, but do not need to be, included* comprise *inter alia* those stating general principles of the legal system or general, vague principles about the functioning of the institutions and those establishing federal arrangements and the economic constitution (except when constitution makers opt for phrasing social and

⁶⁶ Literature in judicial politics has devoted great attention to how internal rules of decision-making affect judicial outcomes. Dyevre, *supra* note 2, pp. 303–304.

⁶⁷ For a proposal in the line of affording specific protection to rules 'directly affecting the "core of democracy"', see Sascha Kneip, *Verfassungsgerichte als demokratische Akteure. Der Beitrag des Bundesverfassungsgerichts zur Qualität der bundesdeutschen Demokratie* (Baden-Baden: Nomos Verlagsgesellschaft, 2009), p. 311; see also Lübke-Wolff, *supra* note 47, 28.

⁶⁸ On vagueness of rules and judges' policy preferences, see Dyevre, *supra* note 10, p. 40.

economic rights as enforceable fundamental rights). Note that, even if not included in the benchmark for review, such provisions would have constitutional value as a mandate to political actors and citizens, although they would not be enforceable by the constitutional court. The reason for this is simply to give democratically elected actors more freedom with regard to how such provisions should be interpreted. Finally, in order to provide for legal certainty and to avoid an expansive interpretation by the constitutional court, the very constitutional document could specify which provisions are part of the benchmark of review of the court and which are not. This proposal may seem radical, as it would deny full normativity to certain parts of the constitution. However, it is less radical than it might seem. First, many constitutions already establish distinctions between their many provisions, for instance, when they create flexible procedures of amendment for some rules and rigid procedures for others. Second, this idea is actually applied in countries that have constitutional systems with an uncontested democratic pedigree, such as Belgium. In this country the constitutional court can declare legislation unconstitutional only when it violates certain, but not all, constitutional provisions, *inter alia* those relating to fundamental rights or those defining the powers of different state authorities. In addition, finally, this idea is in fact connected with Kelsen's original intuitions; he

insisted that constitutional review should only take place with respect to rather specific clauses of the constitution, for he thought that the final authority to interpret the more abstract clauses that protect, for example, "justice," "liberty," or "equality" should rest with the parliament.⁶⁹

The fundamental difference between my proposal and Kelsen's original approach is that in my approach the catalogue of fundamental rights would be protected by the court. Unlike rules on the functioning of democratic institutions, which are often concrete and specific, provisions on human rights might be vague and abstract. Indeed, as Waldron suggests, some of the major issues that a democratic society faces have to do precisely with disagreements about the content of the rights.⁷⁰ I concede that these are powerful arguments in favor of deference to the legislature as well in this regard. However, I believe that rights provisions must still be judicially enforceable, together with rules on democratic institutions and procedures, as part of constitutional review. The reason for this position is that we can never exclude that, in addition to actors that disagree about the specific content of rights, our societies may face at some point actors who are willing to undermine the more general idea of a culture of rights in a democratic society.⁷¹ I am therefore taking a precautionary approach here. The inclusion of rights as part of constitutional review implies, in effect, an important 'delegation of policy-making authority'⁷² and therefore an increased risk of judicial activism. It is the price to pay. After human societies expe-

⁶⁹ Comella, *supra* note 58, p. 487.

⁷⁰ Waldron, *supra* note 18, p. 1367.

⁷¹ I am using here Waldron's concepts, although to defend a thesis different to his own. See Waldron, *supra* note 18, p. 1366 ff.

⁷² Stone Sweet, *supra* note 10, p. 90.

rienced totalitarianism, facing the dilemma between greater protections of human rights and a more deferential court, the second must give way.

- The second option to increase constitutional deference to the legislature would consist of requiring a qualified majority of judges to allow the court to declare legislation unconstitutional.⁷³ This option is notably riskier, as was demonstrated by the recent example of Poland. For reasons of analytical exhaustivity and as it is relevant to the rest of my discussion in this section, I will explain this option here. However, as I will argue later, democratic systems should be very careful when considering this possibility and be fully aware of its inherent problems.

The normative justification for this proposal would lie in the idea that, if different judges, all of them highly qualified lawyers, largely disagree with regard to whether the constitution does or does not forbid the content of a rule, it must be because the constitution does not contain a clear prohibition, and in the absence of a clear prohibition, the court should be deferent to the legislature.⁷⁴ This idea could be deemed somewhat related to the principle of the ‘clear mistake rule’ that exists in countries without a Kelsenian court, such as Sweden and Finland. According to this principle, ‘only when the statute is unconstitutional beyond any reasonable doubt may a court set it aside for purposes of deciding the case’.⁷⁵ By requiring a higher threshold for judges to declare legislation unconstitutional, a form of the ‘clear mistake rule’ can be embedded into Kelsenian institutions through the norms of internal decision-making.⁷⁶ As with the former possibility, this option institutionalizes deference to the legislature, but it does it in a very different way. Instead of leaving parts of the constitution unprotected, the constitutional court can still enforce the normativity of all constitutional provisions as long as there is sufficient consensus to do so. Institutionalized constitutional restraint would be increased but only in case where judges disagree regarding the constitutionality of a rule.

⁷³ The idea that judicial supermajorities be used, often with the aim of increasing deference towards political actors, is not new. See for discussions on the issue Evan Caminker, ‘Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past’, *Indiana Law Journal* 78(1) (2003): pp. 73–122; Jonathan L. Entin, ‘Judicial Supermajorities and the Validity of Statutes: How Mapp Became a Fourth Amendment Landmark Instead of a First Amendment Footnote’, *Case Western Reserve Law Review* 52(2) (2001): pp. 441–470; Renate Jaeger, ‘Nach der Reform ist vor der Reform’, in Andreas Zimmermann (eds.), *60 Jahre Europäische Menschenrechtskonvention – die Konvention als ‘Living Instrument’* (Berlin: BWV-Verlag, 2014), pp. 125–131; see also Lübke-Wolff, *supra* note 47, p. 26.

⁷⁴ See also Caminker, *supra* note 73, pp. 94–96.

⁷⁵ Comella, *supra* note 58, p. 462.

⁷⁶ See a similar approach in Caminker, *supra* note 73, pp. 94 ff.

As was said above, however, this option presents three very serious problems. The first is that, again, institutional design must confront dilemmas. In this solution, the price to pay for this increased form of deference to the legislature is a weakening of another important value of Kelsenian institutions: its capacity to protect democracy and human rights. As it will be more difficult for the court to strike down legislation, undemocratic and illiberal reforms might find less resistance from the court. Second, when the threshold to declare legislation unconstitutional is too high, the court might become paralyzed. Disagreement and the plurality of doctrinal opinions is inherent in judicial decision making; therefore, if the judicial consensus required is very high, the court will struggle to actually ever declare the unconstitutionality of legislation. Third, if this model is coupled with political control of the appointment of constitutional judges, the result might be fatal because it will be easy for political majorities to create a veto minority within the court. In fact, as I show in more detail later in this article, the case of Poland is a perfect example of how these three risks can materialize simultaneously, with dramatic consequences. Given these important risks, in what remains of this article, when I discuss my proposal for a new design of constitutional courts, I will be referring to the first option outlined above, or the third option explained just below, and not to this second model, unless I make a specific reference to it.

- A third option is a mix of the two former possibilities. It would entail establishing two different groups of constitutional provisions, as in the first option. But similar to the second option, all constitutional provisions could be enforced if a sufficient consensus is reached among the judges. Core constitutional provisions, such as those regulating human rights and democratic institutions and procedures, could be enforced and used to declare the unconstitutionality of legislation as long as a simple majority of judges considered it necessary. However, for the rest of the constitutional provisions, a higher threshold might be required. This way, the institutional design would take a precautionary approach to the core democratic values and arrangements and a more deferential approach towards democratically elected actors with regard to the rest of the constitutional provisions. This option therefore offers a different mix of the three values that I have discussed throughout this article, and it confronts the dilemmas of constitutional courts in a different way: compared to most current Kelsenian institutions, this option does not reduce courts' capacity to defend democracy and human rights, and it only slightly weakens their capacity to protect nonessential constitutional provisions. However, in exchange, this type of constitutional court is much less deferential to democratically elected politicians than the two options outlined above, although it is still slightly more deferential than most existing constitutional courts.

Outlined in this way, the proposal aimed at increasing constitutional courts' deference to the legislature would be, in fact, modest and symbolic. However, these two qualities are an asset rather than

a problem from the perspective of improving the design of constitutional courts.

The reform proposed would be *quantitatively modest* because it will in fact not significantly alter the everyday work of constitutional courts. This is true, first, because it only affects one of the functions of constitutional courts: constitutional review of legislation. Other functions, such as the adjudication of constitutional complaints or the mediation between organs or levels of government, do not need to be modified, even if, as suggested above, the proposal is not a priori incompatible with certain such modifications. More importantly, with regard to the review of the constitutionality of legislation, the aspects of the constitution excluded from review or subject to a higher voting threshold in the court are in fact a minority of provisions. The greatest majority of provisions in every constitution refer to fundamental rights or regulate the functioning of democratic institutions. Only for those constitutions that have a significant proportion of provisions proclaiming general and vague principles or rules unrelated to democracy and human rights would the proposal make a significant quantitative impact. Furthermore, when a law is brought for constitutional review before the court, it is usually on a mix of grounds that combine constitutional provisions that are both essential and nonessential for democracy. Therefore, in fact, the changes brought about in constitutional courts are very limited. The proposal is not for a revolution but rather for a modest reform. This is a good thing if we think about the fundamental importance of constitutional courts and the fact that gradual changes are less risky to implement. More importantly, the quantitative modesty of the reform clarifies an essential point: my proposal for a new design of constitutional courts is not about a more flexible or 'weak' constitutional review. In contrast, it advocates for the maximum possible deference to the legislature that is *compatible* with a strong protection of rights and democracy through constitutional review by a more independent court. In fact, nothing prevents constitution makers from enlarging the catalogue of rights in the constitution as a complement to the implementation of this type of court. Given the analytical complexity of the topic, I cannot here enter into a discussion of the political or moral merits of this latter option.

In addition to this quantitative modesty, however, the proposed reform would be qualitatively *ambitious* because it would affect very limited but yet very meaningful aspects of the constitution. It would affect mostly principles –as opposed to rules, that are vague, indeterminate and thus more prone to interpretative controversies and allegations of activism and judicial politicization. It would also affect provisions that are not essential for democracy, covering topics that democratically elected politicians should have a prominent role in regulating. By carrying out this reform, the political branches of government and the public will receive a signal that the constitutional court can no longer be accused of activism but without actually disempowering the court in its ability to carry out the functions that truly matter. Instead, as we will see below, disempowering constitutional courts with regard to aspects of the constitution that are not essential for democracy can –and should, empower it to enforce the constitutional rules on which the functioning of democracy actually relies.

In summary, my claim is that this quantitatively modest but qualitatively ambitious change in the design of constitutional courts will alleviate concerns about excessive judicial activism and will increase deference to the legislature. Against this claim, the objection could be made that constitutional courts will still be enforcing human rights provisions. Since constitutional provisions protecting human rights are characterized by a high degree of generality and indeterminacy and by an expansive nature, their enforcement opens the door to judicial activism and the possibility of countermajoritarian decisions. This objection can be partially conceded without refuting the central claims of this article. Remember that the proposal in this article is not for constitutional courts to be unable to make countermajoritarian decisions. Rather, as was said above, the proposal is for an increase in constitutional courts' deference to the legislature that is compatible with a strong protection of democracy and human rights. In the model that I propose, constitutional courts will still have opportunities to engage in countermajoritarian decisions. This is politically healthy given that these courts will do so when core elements of the democratic system of government are at stake. However, constitutional courts under this new design will still be more deferential to the democratically elected legislature because

they will be less able to use general principles or rules that are nonessential to democracy in order to strike down legislation. That is, the catalogue of provisions that they would be able to mobilize to review the constitutionality of legislation will be more limited, even if it is still large enough to be active in the defense of democracy and human rights.

B. More Independent Courts

The second aspect of the proposal to constraint constitutional courts' powers of review has to do with the need to, simultaneously, make them more independent from political actors. The appointment procedures of constitutional judges play a central role in this.

In general, forms of the appointment of members of constitutional courts have tried to combine two forms of legitimacy. On the one hand, constitutional judges are generally expected to be lawyers with a solid reputation and high moral character who are capable of making sophisticated decisions following the best knowledge of the law. This is a clearly technocratic form of legitimacy. On the other hand, however, constitutional judges are usually appointed by political actors, which, in theory, should bestow on them with a modicum of democratic legitimacy. This is, conversely, a political form of legitimacy. The problem is that, in practice, these two forms of legitimacy are often in tension. Earlier in this article, we saw that, when confronted with the dilemma of whether members of the constitutional court should be appointed by the parliament or by the administration, Kelsen opted for the first option as a means to protect democracy. However, we also saw that parliamentary appointment, which has become the standard practice, often means a degree of political control over Kelsenian institutions that undermines their reputation as independent courts. As was shown by the empirical literature,⁷⁷ such practices often lead to a filtering of political preferences into judicial decision making, which is at odds with strict conceptions of judicial independence and the idea of constitutional courts as unbiased constitutional adjudicators. In this

⁷⁷ See Sofia Amaral-Garcia, Nuno Garoupa and Veronica Grembi, 'Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal', *Journal of Empirical Legal Studies* 6(2) (2009): pp. 381–404; Nuno Garoupa, Fernando Gomez-Pomar and Veronica Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court', *The Journal of Law, Economics, and Organization* 29(3) (2013): pp. 513–534.

subsection, I argue that judicial appointments to the constitutional court should move away from democratic legitimacy (and definitely avoid partisan appointments or quota systems) and focus on technocratic legitimacy in order to preserve their reputation as independent, neutral enforcers of the constitution or, even more importantly, impartial defenders of democracy.

The shift towards the technocratic legitimacy of constitutional judges would be facilitated by the general reform of constitutional courts proposed by this article. In exchange for an increase in constitutional courts' deference towards democratically elected politicians, which I described above, these institutions can be compensated through an increase in their independence vis-à-vis those politicians. By circumscribing constitutional courts' powers to defend basic democratic arrangements and human rights, the concern about judicial activism is alleviated. Constitutional courts will now be less likely to engage in activist countermajoritarian decisions. However, they will not do so because they are subject to a delegitimizing and often ineffective control by political actors. Rather, the minimization of potential activism will be embedded in courts' mandates and the rules that regulate the internal functioning of the institution. With constitutional courts now less likely to engage in battles about issues of general policy and more focused instead on the protection of core democratic arrangements, politicians will have less to fear from them. These courts can now be emancipated from political control, while minimizing politicians' concerns that they will make a fraudulent use of their newly gained freedom in order to impose their own policy preferences at the expenses of the democratic will.

The range of institutional reforms that potentially can be used to minimize political control over constitutional courts is relatively vast, although, unfortunately, there is still much at the empirical level that we ignore about the effectiveness of many of those arrangements.⁷⁸ In fact, Kelsen himself thought at some point about some alternatives to the parliamentary appointment of constitutional judges.⁷⁹ A good starting point would be to replace, where they

⁷⁸ About the level of development of empirical literature on constitutional courts, see Garoupa, *supra* note 60, pp. 27–28. See also Dyevre, *supra* note 10, p. 31.

⁷⁹ See Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge, MA: Cambridge University Press, 2015), p. 48.

exist, simple and absolute majorities for the appointment of such constitutional judges with supermajorities. However, as was said above, supermajorities have often proved insufficient due to the creation of political 'quota systems'. To overcome this, a solution would be the combination of the system of supermajorities of members of the legislative chambers with a requirement that a qualified majority of parliamentary groups accept the appointment: this way, big political groups that can add up supermajorities of MPs would have to include in their agreements political minorities, making quotas less straightforward. Another option would be the granting to parliamentary minorities of certain types of veto rights on the candidates proposed by majorities, thus making more politicized candidates less likely to be appointed.

All these arrangements, however, still put the appointment of judges in the hands of political actors. They still move within Kelsen's dilemma between parliamentary versus administrative appointment,⁸⁰ opting for sophisticated forms of the first option. However, for once, there are ways out of this institutional dilemma. It is possible to imagine alternatives beyond these two options. Braver proposals would release partially or completely the appointment of judges from the hands of politicians from both the executive and the legislative branches. The appointment of constitutional court members could be bestowed upon ordinary judges or even official organizations of certain legal professions.⁸¹ In general, the appointment of constitutional judges by bodies that have an institutional ethos that is deeply linked to the ideas of human rights and the rule of law can reinforce the independence of the institution vis-à-vis politicians, its reputation and its technocratic legitimacy. When correctly socialized, legal professionals or career judges can be ideal for this task. While it is important to acknowledge the risk that these actors or bodies may have their own ideological biases, the different forms of institutionalized deference to the legislature should reduce the problems this poses, albeit not completely annul them. Again, designing institutions means choosing among imperfect options. Additionally, the appointment of different constitutional judges by different methods and combinations of actors from legal and political

⁸⁰ Kelsen, *supra* note 5, p. 187.

⁸¹ See in this regard Ginsburg, *supra* note 60, pp. 66–67.

backgrounds, and the introduction of veto rights and supermajorities in appointments, can also help further minimize such problems. A final idea has to do less with the type of appointer than with the criteria for appointment: difficult as this might be, systems of appointment that include objective and independent assessments of the technical merits of the candidates would also help to increase the technocratic legitimacy of constitutional judges and to minimize politicization in appointments.

All these proposals should increase the technocratic legitimacy of constitutional courts while reducing political control of the institutions. Of course, the risk in this case arises when and if political actors find new ways to repoliticize the new technocratic systems of appointment of constitutional judges. For instance, political actors could accept bestowing upon ordinary judges the appointment of some constitutional judges but only after securing control over those very ordinary judges. Maneuvers such as this would be, of course, contrary to the overall telos of the reform proposed by this article. In the next section, I will approach this type of questions in more detail, addressing the institutional design of constitutional courts from a configurational perspective. However, for now, suffice it to say that implementing reforms in constitutional courts is a delicate operation. Reforms to increase the independence of constitutional courts might be devoid of real content and might even become counterproductive if the source of the politization of the institution is displaced to other aspects of their design rather than suppressed.

The mechanisms for the appointment of constitutional judges are, however, not the only aspect of institutional design deserving of reform. Other reforms to strengthen judicial independence could include the prohibition of the renewability of judges where this exists, the granting of life tenure to them, or the selection of them exclusively from among members of the judicial branch. For instance, limited terms for constitutional judges, which is deemed to be detrimental to judicial independence,⁸² is sometimes justified as a mechanism to 'reduce the risk of a serious gap between the constitutional jurisprudence of the court and the basic moral and political beliefs of the people and their elected representatives'.⁸³ However, in

⁸² Garoupa, *supra* note 60, pp. 29–30. Ginsburg, *supra* note 60, p. 65.

⁸³ Comella, *supra* note 58, p. 468.

the model of constitutional court proposed by this article, this would be less necessary because deference to democratically elected politicians is institutionalized through the courts' benchmarks for review and the rules of judicial decision making rather than in the procedures of judicial appointment, thus also safeguarding judicial independence. Under this institutional setting, and as long as partisanship has been completely removed from the appointments, constitutional judges with life tenure might make much more sense. In general, the implementation of reforms aimed at the depoliticization of appointments and the granting of more independence to constitutional judges is both facilitated and demanded by this type of court.

The idea behind the proposal for a new design for constitutional courts can now be seen more clearly. The proposal aims at striking a better balance among the three values of constitutional courts. By transforming the appointment procedure, constitutional judges are emancipated from political control, thus maximizing judicial independence. In exchange, and to avoid the excessive activism this might cause, constitutional restraint is institutionalized in the internal rules of the functioning of the court but only for policy issues that are not essential to the functioning of a democracy and without having to subject constitutional judges to political control, as in the traditional model. Core democratic arrangements and human rights will still receive the protection of the constitutional court, which will now be more independent from politicians in carrying out this important function.

V. CONSTITUTIONAL COURTS AND THE CONFIGURATIONAL NATURE OF INSTITUTIONAL DESIGN

After proposing institutional reforms, in this section, I would like to emphasize how constitutional courts are systems in equilibrium. By this, I mean that their performance depends on the interaction between the different aspects of their design and between these and their sociopolitical context. As Kyritsis notes, 'constitutional review in a democratic regime is not decided in an all or nothing fashion, but is rather a matter of fine-grained, context specific institutional balances and adjustments'.⁸⁴ One element of institutional design that

⁸⁴ Kyritsis, *supra* note 27, p. 299.

can be useful in a certain constitutional court can be dysfunctional for another Kelsenian court with a different setting. A type of constitutional court that performs well in a certain type of constitutional context or sociopolitical environment might underperform in a different one. Constitutional courts are configurations of elements in which all aspects of the design of the institution interact with each other and with the context in which they are embedded, so a small change in one element might lead to different results for the institution as a whole. With this in mind, I will review three aspects for which this configurational nature is particularly relevant.

First, the interaction between the two dimensions of institutional design in which this article focuses is very important, as has already been suggested. Having constitutional courts with more restricted powers to declare the unconstitutionality of legislation only makes sense if we simultaneously make them more politically independent, and vice versa. A court with more restricted powers of review that continues to be under the control of politicians will probably be ineffective as a countermajoritarian institution. This could potentially affect its performance in regard to the important function of protecting democracy and human rights. The next section provides some examples of this. An independent court emancipated from political control, which continues to be very powerful because constitutional restraint has not been institutionalized, risks becoming an activist institution. It is likely that we would see such a court often striking down democratically legitimized policy choices based on judges' constitutional interpretations or even political preferences, and in the long run, this could undermine the very legitimacy of the court. In my view, both of these two options achieve a suboptimal balance of constitutional courts' three values.

Second, the two elements of institutional design on which I have focused interact with other aspects of Kelsenian courts that this article has deliberately left aside. Constitutional courts perform other functions in addition to the review of legislation. They often receive constitutional complaints in defense of fundamental rights or mediate between levels or branches of government. Therefore, any reform would have to assess how the type of Kelsenian court pro-

posed by this article, and its specific institutional setting, interacts with these other functions and with the way in which they are regulated in each specific court. Furthermore, the very technicalities of the implementation of the proposal for a new design of constitutional court will involve a number of important procedural and logistical choices whose consequences deserve careful consideration.⁸⁵

Third, all the elements of institutional design interact with the wider political and social context of constitutional courts. Let me focus on the idea of providing legal professionals with powers over the appointment of constitutional judges. As I suggested above, this idea is scarcely useful if these actors or institutions are subject to political control themselves. For instance, in Spain, two members of the constitutional court are appointed by the Council of the Judiciary. However, the members of this organ happen to be appointed by the parliament. Giving nonpolitical actors, such as a judicial council, control over the members of the constitutional court might be less efficient or even counterproductive if these actors are actually themselves subject to political control. Another good example are countries in transition from authoritarian regimes to democracy. In these countries, the new democratic political elites often coexist with institutions packed with individuals loyal to the former regime. Such institutions might include organizations of legal professionals or even the judiciary. For obvious reasons, giving these actors control over the appointment of the judges who will be entrusted with the protection democratic arrangements and human rights would be a counterproductive idea.⁸⁶ These types of sociopolitical, context-specific considerations should always be taken into account with regard to all other aspects of the design of constitutional courts.

VI. ILLIBERALISM AND THE CASE FOR A NEW DESIGN OF CONSTITUTIONAL COURTS

Before concluding, I would like to devote some final words to the problem of illiberal populism and its relationship with constitutional courts. To do so, I will focus on the current governments of Poland and Hungary, as both have carried out disquieting reforms of these

⁸⁵ Caminker, *supra* note 73, p. 78.

⁸⁶ See, in this regard, the interesting comment by Comella, *supra* note 58, p. 469. See also Garoupa, *supra* note 60, p. 31.

institutions and have done so despite their membership in the European Union and their location in a region where a more functional version of the Kelsenian model seemed to be consolidated. The theoretical framework provided by this article can be particularly useful to understand the type of constitutional courts that these governments have aimed at creating and to analyze the problems associated with them.

In Poland, the attack on the constitutional court was operated, specifically, by means of political control and paralysis. In 2015, under a new legislation, the Civic Platform party majority in parliament appointed five new constitutional judges to replace those whose terms would expire that year. Among those five judges, there were two whose terms were to expire after a new parliament was elected.⁸⁷ After new elections took place, the Law and Justice party (PiS), now with a majority of seats, refused to swear in the five judges appointed by the previous parliament and appointed five new judges to the court.⁸⁸ Furthermore, Law and Justice passed a law requiring a two-thirds majority of judges for any court decision to be binding and raising the quorum for hearing a case from nine to thirteen in a context in which there were only twelve judges on the tribunal.⁸⁹ Earlier in this article, I warned against the risks of supermajorities in judicial decision making, especially if these are too high. However, the disempowerment of the Polish Constitutional Court cannot be blamed only on this aspect but rather on its coupling with the PiS-controlled appointment of new judges and the composition of the court. As was suggested above, the functioning of a constitutional court is the result of how different aspects of its design interact. Indeed, it is often in the interaction of certain features that specific elements of the institutional design of a court become particularly dysfunctional. The assault on the Polish court was complemented by the requirement that cases remain on the docket for at least six months before they can be decided and the

⁸⁷ Tomasz Tadeusz Koncewicz, 'Of institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond', *Common Market Law Review* 53(6) (2016): pp. 1753–1792, 1755.

⁸⁸ Bojan Bugarič and Tom Ginsburg, 'The Assault on Postcommunist Courts', *Journal of Democracy* 27(3) (2016): pp. 69–82, 73.

⁸⁹ *Ibid.*, p. 73.

granting of powers to the parliament to terminate a judge's mandate.⁹⁰ The result is a dysfunctional court and a constitutional crisis in Poland with European-level implications.

The case of Hungary is probably even more complex. Using its parliamentary supermajority, Orbán's government changed the rules for the constitutional court so that the appointment of judges required a two-thirds majority in the legislature.⁹¹ In principle, this is in line with the standards of other European democracies. The problem is that, unlike in functional democracies, Orbán's party Fidesz had, at that time, a two-thirds majority in the Parliament, so it could control the appointments. This illustrates two ideas that have been put forward earlier in this article. First, the system of parliamentary appointment, even when supermajorities are required, might be insufficient to ensure the independence of the court. Second, the elements of the institutional design of a court interact with its wider political environment: a requirement for a parliamentary supermajority might be futile in a context of party hegemony.

Orbán's control over the constitutional court was furthered by a bolder move: the number of constitutional judges was increased from eight to fifteen so that Orbán could fill the new positions with his candidates.⁹² At this point, judicial independence had been severely weakened, and political control over the court was secured. At the same time, Orbán's government tried to limit the power of the constitutional court. Fidesz deprived the court of authority over fiscal matters,⁹³ and the system of 'actio popularis' was replaced by a more limited model of 'constitutional complaint'.⁹⁴ In 2013, the Basic Law was again amended so that the pre-2012 case law of the Constitutional Court would no longer have legal effect,⁹⁵ and the court could no longer review constitutional amendments on substantive grounds.⁹⁶ The result is a weakening of the capacity of the court to protect democracy and human rights in Hungary at a time when such a capacity would be most crucial. As was argued by Bugarcic and

⁹⁰ *Ibid.*, pp. 73–74.

⁹¹ Bojan Bugarcic, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge', LSE 'Europea in Question' *Discussion Papers* 79/2014, 2014, 9.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*, p. 10.

⁹⁵ *Ibid.*, p. 12.

⁹⁶ *Ibid.*, p. 13.

Ginsburg after the reforms, 'Hungary's once-powerful and highly respected Constitutional Court has effectively disappeared from the political scene'.⁹⁷

The model of constitutional court that is defended in this article seeks to increase deference to democratically elected politicians while simultaneously increasing courts' independence from those politicians and while shielding the court's power to protect democracy and human rights. In contrast, the illiberal governments of Poland and Hungary have opted for a model of politically-dependent and disempowered constitutional courts. Rather than deference, these courts are designed to show submission to ruling majorities, they lack judicial independence, and their capacity to protect democracy and human rights in their countries, instead of being protected, is deliberately weakened. There are powerful arguments based on general democratic theory as to why the reforms of constitutional courts carried out by these governments should be rejected. However, the theoretical framework of this article offers one additional compelling reason to do so: given their design, these courts are unable to properly provide for any of the three values that legitimize these institutions.

VII. CONCLUSIONS

I believe the proposal for a new type of constitutional court suggested in these pages still moves within the family of neo-constitutional forms of constitutional review. However, it is very likely that the proposal is as close to the ideal point of political constitutionalists as is conceptually possible within the range of neo-constitutional options. The reason is that the proposal not only acknowledges the importance of deference to democratically elected actors but also tries to embed it into the institutional design of courts. If the 'new Commonwealth model of constitutionalism'⁹⁸ proposes judicial review without judicial supremacy, the proposal for a new model of constitutional courts is about accepting judicial supremacy but restricting it only to the protection of core democratic arrangements.

⁹⁷ Bugarič and Ginsburg, *supra* note 88, p. 73.

⁹⁸ Gardbaum, *supra* note 13.

While I believe that the capacity of this proposal to increase deference to the democratic legislator is positive, I assume it will often be met with skepticism. Conservatives will dislike it when progressive majorities can implement their policy choices with slightly fewer constraints. Left-wing voters will feel frustrated when a right-wing government passes legislation while facing a reduced veto threat, and vice versa. However, at the end of the day, this is simply what deference to the democratically elected legislature looks like. My aim was to achieve this deference while increasing judicial independence and preserving or improving what I consider to be the most precious value of postwar constitutional courts: their capacity to protect democracy and human rights.

In a world increasingly populated by illiberals and populists, the idea of increased and embedded deference to a legislature that could one day be dominated by these actors might be disquieting. However, my proposal for a new type of constitutional court is designed to ensure that illiberal policy choices are deactivated, as democracy and human rights should actually receive reinforced protection from a more independent court. In fact, increased judicial independence might be the best insurance against an eventual illiberal majority in parliament. This article's proposal for a new design for constitutional courts seeks to fine-tune mechanisms of checks and balances. While it can soften the countermajoritarian character of constitutional courts vis-à-vis nonessential aspects of the constitution, at the core of the proposal is the reinforcement of such a countermajoritarian character with regard to the fundamental structural elements of a liberal polity. In fact, if the proposal manages, as I hope it would, to improve the functioning of constitutional courts, to defend their reputation and to protect their sociological legitimacy, it could help to counter some of the discourses of illiberal populists who often exploit the dysfunctions of liberal institutions for their own benefit.

Finally, the proposal for a new design of constitutional courts advanced by this article is moderately ambitious but also prudent with regard to its prospects for implementation. I do not suggest that all countries with Kelsenian institutions should now rush to reform them along the lines recommended by this article. In fact, in places

where constitutional courts are prestigious, functional and efficient, maintaining them the way they are might often be the best option. The proposal, however, might be considered in countries where the constitutional court has serious reputational problems. It might also be an option in countries where no system of constitutional review exists at all, as opponents of this arrangement will probably feel less uncomfortable with this variety of constitutional court. In addition, the proposal would definitely be a step forward in countries where the constitutional court has been disempowered by illiberal or authoritarian governments. My proposal for a new model of constitutional courts should be deemed one more legitimate option in the menu of democratic institutions and should be picked when it is considered to best fit the political needs of a country.

Challenging the hegemonic contemporary approach to the design of constitutional courts, this article has proposed far-reaching, and possibly controversial, reforms to the structure of these institutions. It has done so by acknowledging that constitutional courts face insurmountable dilemmas that we can accommodate but not overcome. The article has made some of those dilemmas explicit and has explored them from a theoretical perspective. In so doing, I hope that, in addition to my proposal for reform, I have provided colleagues and policy makers with a useful framework for general reflection on constitutional courts. While a healthy approach to these institutions should acknowledge that, in the view of the structural trade-offs they face, perfect designs will probably never exist, the endeavor to improve these designs is still possible and should emphatically be advanced.

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