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# Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review

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## 1 The Spread of Constitutional Courts and Constitutional Review

Constitutional review is, in short, a procedure for examining the conformity of legislation with the constitution and its provisions, and the judicial determination that legislation that is inconsistent with the provisions of the constitution is unconstitutional and null and void.<sup>1</sup> That is, constitutional review is an instrument that limits the discretion and scope of action of political decision-makers, especially with regard to the fundamental rights and freedoms protected by the Constitution.<sup>2</sup> Constitutional review extends the idea of constitutionality – according to which the supremacy of the constitution limits government – beyond the realms of public law towards the realms of criminal, civil and administrative law,<sup>3</sup> and in these senses constitutional review is central to the idea of neo-constitutionalism.<sup>4</sup>

Recent comparative research shows that Constitutional or Supreme Courts play a wide range of roles that go far beyond ‘ordinary constitutional review’. Prohibitions of political parties, cancellation of election results or disqualification

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<sup>1</sup> Marie-Luce Paris, ‘Setting the Scene: Elements of Constitutional Theory and Methodology of The Research’ in John Bell and Marie-Luce Paris (eds), *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar Publishing 2016) 1, 2–3.

<sup>2</sup> On the effectiveness of such mechanisms, see Julianne Kokott and Martin Kaspar, ‘Ensuring Constitutional Efficacy’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook on Comparative Constitutional Law* (OUP 2012) 796, 805.

<sup>3</sup> András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press 1999) 243.

<sup>4</sup> Alec Stone Sweet, ‘Constitutions and Judicial Power’ in Daniele Caramani (ed), *Comparative Politics* (OUP 2008) 217, 221.

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of political appointments are just some of the actions that may be controversial. Courts also deal with areas that were previously considered the exclusive jurisdiction of elected political authorities, such as those with enormous budgetary implications such as health services, food security and environmental protection, and also intervene in foreign relations and the fiscal system.<sup>5</sup> Naturally, the power increase of the judiciary vis-à-vis the political authorities – which stems in part from the fact that Constitutional or Supreme Courts now oversee a wide range of actions related to the core of political and social action – has also been accompanied by increasing criticism of the courts in light of the wider space for the court to deliver counter-majoritarian decisions.<sup>6</sup> Prof Ran Hirschl, for example, called the phenomenon in which courts around the world hold increasingly broad powers – ‘juristocracy’.<sup>7</sup>

After World War II, and especially after the third wave of democratization that began in the 1970s,<sup>8</sup> constitutional courts were widespread around the world and, more generally, the power of the courts has increased compared to the other governing authorities.<sup>9</sup> To illustrate, in 1910 less than a quarter of existing constitutions included some judicial review authority, whereas about a hundred years later, in 2008, 158 of 191 constitutions explicitly authorized judicial bodies to guard the constitution and its provisions from violations, including by the legislature.<sup>10</sup> That is, today this authority is recognized in developed democracies, in developing democracies and also in non-democracies. It is this trend that has led Martin

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<sup>5</sup> Amal Sethi, ‘Towards a Pluralistic Conception of Judicial Role’ (forthcoming 2021) 90 (1) University of Missouri-Kansas City Law Review <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3545792](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3545792)> accessed 24 December 2020.

<sup>6</sup> 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* (Springer International Publishing 2016) 19, 26.

<sup>7</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

<sup>8</sup> On waves of democracy, see Samuel P Huntington, ‘Democracy’s Third Wave’, (1991) 2 (2) *Journal of Democracy* 12.

<sup>9</sup> Mauro Cappelletti, ‘The Expanding Role of Judicial Review in Modern Societies’ in Shimon Shetreet (ed), *The Role of Courts in Society* (Brill Archive 1988) 79; C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995). On the global wave of adopting constitutional review, see also Doreen Lustig and J H H Weiler, ‘Judicial Review in the Contemporary World: Retrospective and Prospective’ (2018) 16 (2) *International Journal of Constitutional Law* 315, 325.

<sup>10</sup> Tom Ginsburg, ‘The Global Spread of Constitutional Review’ in Keith Whittington, R Daniel Kelemen, and Gregory A Caldeira (eds), *Oxford Handbook of Law and Politics* (OUP 2008) 81.

Shapiro to ask ‘why do so many people, in so many parts of the world entrust so much of their governance to judges?’<sup>11</sup>

The explanations for the rise in the power of courts and the need for judicial review are numerous and varied.<sup>12</sup> The increase in judicial review is linked, among other things, to the need to find an arbitration mechanism that will apply in the relationship between the states and the federation in federal regimes; to the need for a body to oversee the work of the authorities throughout the country in order to maintain an adequate system of separation of powers;<sup>13</sup> to the migration of the constitutional idea between countries or in response to constitutional developments in other countries;<sup>14</sup> to the attempt by hegemonies to preserve their power through courts (hegemonic entrenchment);<sup>15</sup> to be a product of social movements and local public pressures;<sup>16</sup> to be the result of global and international influences;<sup>17</sup> the attempt of hybrid regimes (ie, undemocratic and not fully authoritarian) to present a misleading appearance (façade) of liberal democracy;<sup>18</sup> and be a mechanism of ‘insurance’ or pre-commitment of political forces to certain rights and interests.<sup>19</sup>

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**11** Martin Shapiro, ‘The Success of Judicial Review’ in Sally Kenney, William M Reisinger, and John C Reitz (eds), *Constitutional Dialogues in Comparative Perspective* (Palgrave 1999) 193, 218.

**12** David Landau, ‘Substitute and Complement Theories of Judicial Review’ (2017) 92 *Indiana Law Journal* 1283; Steven Gow Calabresi, ‘The Origins and Growth of Judicial Enforcement’ in Erin F Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar Publishing 2018) 83; Steven G Calabresi, ‘The Global Rise of Judicial Review Since 1945’ (forthcoming) *Catholic University Law Review* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3234313](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3234313)> accessed 24 December 2020; Francisco Ramos, ‘The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions’ (2006) 2 (1) *Review of Law & Economics* 103.

**13** Mauro Capelletti, *Judicial Review in the Contemporary World* (The Bobbs-Merrill Co 1970); Martin Shapiro, ‘The Success of Judicial Review and Democracy’ in Martin Shapiro and Alec Stone Sweet (eds), *On Law, Politics, & Judicialization* (OUP 2002) 149; Barry Friedman and Erin Delaney, ‘Becoming Supreme: The Federal Foundation of Judicial Supremacy’ (2011) 111 *Columbia Law Review* 1137.

**14** Miguel Schor, ‘Mapping Comparative Judicial Review’ (2008) 7 (2) *Washington University Global Studies Law* 257, 263.

**15** Hirschl (n 7).

**16** Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspectives* (University of Chicago Press 1998).

**17** Heinz Klug, *Constituting Democracy: Law, Globalism, and South Africa’s Political Representation* (CUP 2000).

**18** Eric C Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (CUP 2019) 42.

**19** Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003); Tom Ginsburg and Mila Versteeg, ‘Why Do Countries Adopt Constitutional Review?’ (2014) 30 (3) *Journal of Law, Economics, and Organization* 587; George Tridimas, ‘Constitutional Judicial Review and Political Insurance’ (2010) 29 (1) *European Journal of Law and Economics* 81.

Especially against the backdrop of world wars and human rights violations in the 20th century, and as a lesson from totalitarian regimes accompanied by the violation and denial of rights, constitutional courts have sprung up in Europe, designed to protect human rights and democracy and prevent these atrocities in the future.<sup>20</sup> The main lesson was that a political majority could not be trusted to protect and respect human rights, especially when it comes to the rights of permanent minorities, which are subject to the arbitrariness of the majority. As Christoph Schönberger described, the importance attached to human rights after Nazism was one of the main reasons for the establishment of the Federal Constitutional Court in Germany;<sup>21</sup> Or as Mauro Cappelletti pointed out, the constitutional courts in Germany and Italy have been set up to find a protective mechanism against the return of ‘evil’ – the horrors of dictatorship and the suppression of fundamental rights by legislators operating in tyrannical regimes.<sup>22</sup> This explanation was also of paramount importance in the establishment of the constitutional courts in the countries of Central and Eastern Europe in the late 1980s, designed to ensure the protection of democracy and respect for the constitution and the rule of law.<sup>23</sup>

Although not occurring in every country, taken together, these theories seem to help explain the rise in state judicial review.<sup>24</sup> Indeed, as Bruce Ackerman described, the global trend is clear: judicial review has come an exceptionally long way since the prevailing British and continental conception regarding the

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**20** Alec Stone Sweet, ‘Constitutional Courts and Parliamentary Democracy’ (2002) 25 (1) *West European Politics* 77, 82; 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?)’ (2014) 62 (3) *American Journal of Comparative Law* 613, 614; Francesco Biagi, *Three Generations of European Constitutional Courts in Transition to Democracy* (CUP 2020) 24–27.

**21** Christoph Schönberger, ‘The Establishment of Judicial Review in Postwar Germany’ in Pasquale Pasquino and Francesca Billi (eds), *The Political Origins of Constitutional Courts: Italy, Germany, France, Poland, Canada, United Kingdom* (Fondazione Adriano Olivetti 2009) 76, 78–79.

**22** Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989) 161.

**23** Martin Shapiro, *Courts – A Comparative and Political Analysis* (University of Chicago Press 1981) 155. For judicial review in Central and Eastern Europe, see Robert F Utter and David C Lundsgaard, ‘Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective’ (1993) 54 *Ohio State Law Journal* 559; Wojciech Sadurski, *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Springer 2002); Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer Science & Business Media 2005).

**24** Cheryl Saunders, ‘Courts With Constitutional Jurisdiction’ in Roger Masterman and Robert Schutze (eds), *The Cambridge Companion to Comparative Constitutional Law* (CUP 2019) 414, 737.

American model of judicial review as an undemocratic innovation, when now – 50 years later, judicial review is a central element of liberal democracy.<sup>25</sup>

Indeed, compared to 1946, when only 25% of the countries in the world included in their constitutions some explicit mechanism of judicial review, in 1951 already 38% of the world constitutions included such authority, in 2006 – 82%, and in 2011 – 83% of countries have an explicit mechanism of judicial review. To this one must add countries like the United States, where judicial review has been adopted not by virtue of an explicit provision in the Constitution, but following a court's ruling, so that in effect the proportion of countries where courts conduct judicial review is higher. In 1946, in 35% of countries, judicial review existed *de jure* (by virtue of the Constitution) or *de facto* (even without an explicit provision in the Constitution), and in 2006 such an authority existed in 87% of countries.<sup>26</sup>

In the modern and global reality judicial-constitutional review has important advantages: it is an important feature of democratic constitutionality;<sup>27</sup> it is a fundamental component of good governance and the rule of law, according to which political power is subject to mechanisms of accountability and legal restraints;<sup>28</sup> is an institutional 'investment' that signals to foreign and international players about the government's commitment to property rights and thus helps attract foreign investment;<sup>29</sup> and is a basic condition for acceptance of a global appraisal.<sup>30</sup> Constitutional reviews by judicial bodies has become a dominant feature of liberal democracies and a global and almost universal phenomenon.<sup>31</sup>

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**25** Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard University Press 2019) 97.

**26** David S Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163, 1199.

**27** David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press 2010).

**28** Aylin Aydin, 'Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition' (2013) 47 (1) *Law & Society Review* 1–5.

**29** Nuno Garoupa and Maria Maldonado, 'The Judiciary in Political Transitions: The Critical Role of U.S. Constitutionalism in Latin America' (2011) 19 *Cardozo Journal of International & Comparative Law* 592.

**30** Tom Ginsburg and Robert Kagan, 'Introduction: Institutionalist Approaches to Courts as Political Actors' in Tom Ginsburg and Robert Kagan (eds), *Institutions and Public Law: Comparative Approaches* (Peter Lang 2005) 1, 5.

**31** C Neal Tate, 'Why the Expansion of Judicial Review?' in C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995) 27; Albert HY Chen and Miguel Poiares Maduro, 'The Judiciary and Constitutional Review' in Mark Tushnet, Thomas Fleiner, and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 100–101; Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar Publishing 2014) 41; Georg Vanberg, 'Constitutional Actors in Comparative Perspective: A Theoretical Assessment' (2015) 188 *Annual Review of Political Science* 167.

## 2 Models of Judicial Review

When it comes to judicial-constitutional review, three broad main models are recognized: a strong and decentralized judicial review (the American model), according to which every court is competent to review legislation; centralized strong judicial review – constitutional court (Continental or Austrian model), which centralizes the authority of constitutional review within a designated institution; and weak judicial review – supremacy of the legislature (the Canadian model, the British model, or New Zealand model), which gives the legislature the ‘final word’ regarding judicial decisions.

The first model is a strong judicial review, sometimes known as the American model. It is important to note that the US Constitution did not explicitly establish judicial review, but this was established in the Supreme Court ruling of 1803 in the famous *Marbury v Madison* case.<sup>32</sup> According to this model, every court of law has the power to carry out judicial review, with the Supreme Court standing at the top of the pyramid of justice. In this model the review is exercised only as part of a concrete legal dispute. A decision of a lower court in a constitutional matter will apply to the parties to the hearing only (*inter partes*), and if following the appeals to the lower courts the decision on the question arrives to the Supreme Court, its decision in the constitutional question will apply to everyone by virtue of the binding precedent principle.<sup>33</sup>

In the 19th century this model was adopted in several countries in Latin America. After the Spanish colonies gained independence they examined constitutional models, and following the prestige of the United States in the region, its constitutional model, with judicial review, became the example for constitutional model across the continent.<sup>34</sup> As a result, the American decentralized model was

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<sup>32</sup> *Marbury v Madison*, 5 U.S (1 Cranch) 137 (1803). On the recognition of judicial review prior to the Marbuty case, see Jack N Rakove, ‘The Origins of Judicial Review: A Plea for New Contexts’ (1997) 49 Stanford Law Review 1031, 1047; William M Treanor, ‘Judicial Review Before Marbury’ (2005) 58 Stanford Law Review 455, 457; Barry Friedman, ‘The Myth of Marbury’ in Mark Tushnet (ed), *Arguing Marbury v Madison* (Stanford University Press, California 2005) 65; Mary Sarah Bilder, ‘The Corporate Origins of Judicial Review’ (2006) 116 Yale Law Journal 502, 504.

<sup>33</sup> Danielle E Finck, ‘Judicial Review: The United States Supreme Court Versus the German Constitutional Court’ (1997) 20 (1) Boston College International and Comparative Law Review 123, 131–312.

<sup>34</sup> Robert J Kolesar, ‘North American Constitutionalism and Spanish America: A Special Lock Ordered by Catalogue which Arrived with the Wrong Instruction and No Keys?’ in George A Billios (ed), *American Constitutionalism Abroad: Selected Essays in Comparative Constitutional History* (Greenwood Press 1990) 41; Keith S Rosenn, ‘The Success of Constitutionalism in the United States and its Failure in Latin America: an Explanation’ (1990) 22 The University of Miami Inter-American Law Review 4, 24; Miguel Schor, ‘Constitutionalism Through the Looking Glass of Latin America’ (2006) 41 Texas International Law Journal 1.

very successful in Latin America, and in the early 20th century it became the dominant model of constitutional review.<sup>35</sup> This model remains accepted today, and more than 30% of the world's constitutions stipulate that judicial review be conducted in the Supreme Court within the ordinary court system.<sup>36</sup>

The second model – celebrated in this special volume – is the centralization of a constitutional court (the continental model), which exercises strong judicial review. According to this model, the constitutional review authority is concentrated in a special court. That is, the Constitutional Court has a monopoly on the power of judicial review and other ordinary courts cannot exercise constitutional review.

The model originated in the work of the well-known legal theorist Hans Kelsen, who designed it about a century ago for the First Austrian Republic in its 1920 Constitution.<sup>37</sup> 'Ordinary' judges, according to Kelsen, should not be given the authority to examine the constitutionality of legislation, but only to implement it. This view is in line with the tradition of civil law based on Montesquieu's writing, according to which the governing authorities are completely separate from each other and do not cooperate with each other or supervise each other while maintaining a system of checks and balances.<sup>38</sup> To preserve as much as possible the sovereignty of the legislature and the traditional conception of the separation of powers, Kelsen designed a 'Constitutional Court' – a special body with political characteristics, designed to decide constitutional issues (especially those concerning federalism).<sup>39</sup> This body, Kelsen believed, would be separate from the legislature and independent of it, and would act as a kind of 'negative legislator'

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35 Charles Grove Haines, 'Some Phases of the Theory and Practice of Judicial Review of Legislation in Foreign Countries' (1930) 24 (3) *The American Political Science Review* 583.

36 Donald L Horowitz, 'Constitutional Courts: A Primer for Decisions Makers' (2006) 17 (4) *Journal of Democracy* 125.

37 See Nicoletta Bersier Ladavac, 'Hans Kelsen (1881–1973): Biographical Note and Bibliography' (1998) 9 *European Journal of International Law* 391, 391–392; Clemens Jabloner, 'Kelsen and His Circle: The Viennese Years' (1998) 9 *European Journal of International Law* 368, 374.

38 Mauro Cappelletti, 'Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice"' (1986) 35 *Catholic University Law Review* 1, 11–14.

39 Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 (2) *The Journal of Politics* 183, 185–186. See also J A C Grant, 'Judicial Review of Legislation under the Austrian Constitution of 1920' (1934) 28 *The American Political Science Review* 670; Theo Öhlinger, 'The Genesis of the Austrian Model of Constitutional Review of Legislation' (2003) 16 (2) *Ratio Juris* 206.

and could even repeal legislation that was unconstitutional.<sup>40</sup> That is, the Constitutional Court will serve as the ‘guardian of the Constitution’.<sup>41</sup>

In contrast to the American model, this judicial review is often abstract: the Constitutional Court does not resolve a concrete dispute between parties for a legal hearing, but responds to a constitutional question addressed by government bodies or private individuals, before (such as the French model) or after a law is passed.<sup>42</sup> In addition to the abstract review many constitutional courts are also empowered to exercise concrete judicial review, usually following constitutional questions that courts have referred to them during an ordinary legal proceeding in which a constitutional question has arisen. In this situation the normal procedure is delayed until the Constitutional Court decides on the constitutionality of the law. On the basis of the decision of the Constitutional Court, the judiciary will decide in the legal proceedings.<sup>43</sup>

Interestingly, despite the historical and political differences between the United States and Austria, there are some similarities in the development of models of judicial review. For example, in both countries from the beginning there was the power of judicial review over federal issues (ie, competing claims of federal and state legislation), and in both countries judicial review has developed for the examination of federal legislation.<sup>44</sup> However, as Victor Ferreres Commella remarked, in recent years the centralized model has weakened, and European countries are approaching a decentralized model, because EU enforcement and the ordinary interpretive power of lower courts.<sup>45</sup>

Together with and following Austria, other countries such as Czechoslovakia (1920), Liechtenstein (1921), Iraq (1925), and especially the German Basic Law of 1949 adopted the Kelsenian model of constitutional review, with some modifications.

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**40** Paul Yowell, ‘The Negative Legislator: On Kelsen’s Idea of a Constitutional Court’ in Martin Belov (ed), *Courts, Politics and Constitutional Law: Judicialization of Politics and Politicization of the Judiciary* (Routledge 2019) 125.

**41** ‘Kelsen on The Nature and Development of Constitutional Adjudication’ in Lars Vinx (ed), *The Guardian of the Constitution* (CUP 2015) 22, 44–46.

**42** See Alec Stone, ‘The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe’ (1990) 19 *Policy Studies Journal* 84.

**43** Herbert Hausmaninger, ‘Judicial Referral of Constitutional Questions in Austria, Germany, and Russia’ (1997) 12 *Tulane European & Civil Law Forum* 25.

**44** Stanley L Paulson, ‘Constitutional Review in the United States and Austria: Notes on the Beginnings’ (2003) 16 (2) *Ratio Juris* 223.

**45** Victor Ferreres Commella, ‘The European Model of Constitutional Review of Legislation: Toward Decentralization?’ (2004) 2 (3) *International Journal of Constitutional Law* 461.



Unlike in Austria, where the model conferred on the Constitutional Court jurisdiction limited to certain disputes, the German model allows for a constitutional complaint so that individuals can appeal against the constitutionality of any legislation or government action. This ‘new’ mechanism played an important role in democratizing access to the Constitutional Court and strengthening the court’s role as a defender of constitutional rights, as the direct petition mechanism of individuals regarding unconstitutionality has a double advantage: it encourages citizens to develop awareness and not infringe on rights; and it reinforces the demand towards the authorities – through court rulings – to respect and protect rights. The constitutional petition procedure is in this context a mechanism of deterrence for the future, through which the authoritarian tradition was broken, and the principles of free democracy controlled by the rule of law were promoted.<sup>46</sup>

The first wave of constitutional review, which took place after the WWI, was followed by a second wave in the second half of the 20th century, following the fall of the tyrannical regimes in Spain, Portugal and Greece. A similar institutional model, but without direct access, was also adopted in Italy in its 1947 Constitution, with the establishment of a constitutional court, which began operating in 1956.<sup>47</sup> Thus, following the Austrian, German and Italian model, a Kelsenian-style constitutional review was adopted throughout Europe, for example in Cyprus (1960), Turkey (1961), Malta (1964), Greece (1975), Portugal (1976), and Spain (1978). This was a natural adoption instead of US style judicial review. How could the American judicial review system operate in Germany, Italy, Spain or Portugal with judges serving from the time of the dictatorial regime? The adoption of the American model for judicial review in these countries would have required the replacement of many judges, with a relatively small number of constitutional judges who were not involved with previous regimes and could perform their duties relatively easily.<sup>48</sup> In the third wave, with the end of the Cold War, constitutional courts were also established in the countries of the former Soviet bloc.<sup>49</sup>

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46 Jutta Limbach, ‘The Role of the Federal Constitutional Court’ (2000) 53 *SMU Law Review* 429, 440.

47 Giuseppino Treves, ‘Judicial Review of Legislation in Italy’ (1958) 7 *Journal of Public Law* 345; Giovanni Cassandro, ‘The Constitutional Court of Italy’ (1959) 8 *American Journal of Comparative Law* 1; Vincenzo Vigoriti, ‘Italy: The Constitutional Court’ (1972) 20 *American Journal of Comparative Law* 404; Alessandro Pizzorusso, Vincenzo Vigoriti, and G L Certoma, ‘The Constitutional Review of Legislation in Italy’ (1983) 56 *Temple Law Quarterly* 503.

48 Louis Favoreu, ‘American and European Models of Constitutional Justice’ in David S Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Duncker & Humblot 1990) 110.

49 Alec Stone Sweet, ‘Why Europe Rejected American Judicial Review and Why It May Not Matter’ (2002–2003) 101 *Michigan Law Review* 2744.

The third model is a weak judicial review.<sup>50</sup> This model, accepted in Canada, the United Kingdom and New Zealand, differs from the American judicial review model in that it separates judicial review from judicial supremacy in giving the legislature the ‘final word’.<sup>51</sup> For example, the Canadian Charter of Rights and Freedoms gives the courts the power to repeal legislation that infringes on protected rights (according to the American model), and at the same time section 33 includes an ‘overriding clause’ that allows the legislature to enact a law despite these rights, that is, overcoming the constitutional restriction. In Canada, the examination of the violation of fundamental rights is also largely the responsibility of the executive branch, which does not leave much room for independent constitutional examination by parliament. As part of the legislative process, it is the responsibility of the Minister of Justice to ensure that a bill presented by a Minister of Government to the House of Representatives does not violate an obligation to protect protected rights.<sup>52</sup>

In the UK, the courts cannot repeal parliamentary legislation, but the court is empowered to declare incompatibility of legislation with the European Convention on Human Rights adopted into British domestic law under the Human Rights Act of 1998. This law has become the cornerstone of the British constitution,<sup>53</sup> and it is expected from Parliament that following a judicial declaration of incompatibility it will change the legislation.<sup>54</sup> It should be noted that in accordance with the Human Rights Act, the legislation must be as explicit as possible and in line with the European Convention on Human Rights. The law also established a Joint Committee on Human Rights to advise Parliament on the compatibility of bills with the

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**50** See Mark Tushnet, ‘Alternative Forms of Judicial Review’ (2003) 101 *Michigan Law Review* 2781, 2781–2802; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP 2013); Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press 2016); Janet L Hiebert, ‘New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?’ (2004) 82 *Texas Law Review* 1963.

**51** Rosalind Dixon, ‘Weak form Judicial Review and American Exceptionalism’ (2012) 32(3) *Oxford Journal of Legal Studies* 487; Sujit Choudhry, ‘The Commonwealth Constitutional Model or Models?’ (2013) 11 *International Journal of Constitutional Law* 1094; James B Kelly and Matthew A Hennigar, ‘The Canadian Charter of Rights and the Minister of Justice: Weak-form Review within a Constitutional Charter of Rights’ (2012) 10 (1) *International Journal of Constitutional Law* 35.

**52** Tsvi Kahana, ‘Understanding the Notwithstanding Mechanism’ (2002) 52 *University of Toronto Law Journal* 221; Janet L Hiebert, ‘Rights-Vetting in New-Zealand and Canada: Similar Idea, Different Outcomes’ (2005) 3 *New Zealand Journal of Public & International Law* 63, 92; Janet Hiebert, *Charter Conflict: What Is Parliaments Role?* (McGill-Queen’s University Press 2002) 3–20.

**53** Vernon Bogdanor, *The New British Constitution* (Hart 2009) 62.

**54** Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009).

provisions of the European Convention. In contrast to the strong preliminary judicial review as in France, this is a preliminary parliamentary constitutional scrutiny at the legislative stage.<sup>55</sup>

In New Zealand, section 4 of the New Zealand Bill of Rights Act 1990 explicitly states that no court is empowered to determine that a constitutional provision is invalid or inapplicable because it is inconsistent with the provisions of the Bill. Section 6, however, further provides that when a provision of law has several interpretive possibilities, the law must be interpreted in a manner appropriate to the protected rights and freedoms. In New Zealand, in light of the principle of parliamentary sovereignty, the emphasis was therefore not on the courts, but on the political bodies responsible for examining the compatibility of legislation with human rights.<sup>56</sup> Thus, section 7 obliges the Attorney General to examine whether the proposed legislation is in line with human rights and in cases of non-compliance to report to Parliament.<sup>57</sup> It should also be noted that although the Act does not state such remedy, the New Zealand Supreme Court ruled in 2018 that a declaration of incompatibility stems from the structure of the Bill of Rights and its applicability to the legislature and judiciary and that such declaration does not infringe Parliament's power to legislate and does not affect legal rights.<sup>58</sup> To strengthen human rights protection, the New Zealand

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55 See generally, David Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead' (1999) 10 *Public Law Review* 252; David Feldman, 'Can and Should Parliament Protect Human Rights?' (2004) 10 (4) *European Public Law* 635; Francesca Klug and Keir Starmer, 'Standing Back from the Human Rights Act: How Effective Is It Five Years On?' [winter 2005] *Public Law* 716, 718; Janet L Hiebert, 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?' (2006) 4 *International Journal of Constitutional Law* 1; Dawn Oliver, 'The "Modernization" of The United Kingdom Parliament?' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (6th ed, OUP 2007) 161, 169; Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 (1) *Australian Journal of Political Science* 41.

56 James B Kelly, 'Judicial and Political Review as Limited Insurance: The Functioning of the New Zealand Bill of Rights Act in "Hard" Cases' (2011) 49 (3) *Commonwealth & Comparative Politics* 295, 304.

57 Walter Iles CMG, QC, 'New Zealand Experience of Parliamentary Scrutiny of Legislation' (1991) 12 (3) *Statute Law Review* 165; Paul Fitzgerald, 'Section 7 of the New Zealand Bill of Rights Act 1990: A Very Practical Power or a Well-intentioned Nonsense' (1992) 22 *Victoria University of Wellington Law Review* 135; Grant Huscroft, 'The Attorney General's Reporting Duty', in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds), *Rights and Freedoms: The New Zealand Bill of Rights* (Brookers, Wellington 2003) 215.

58 *Attorney-General v Arthur William Taylor*, [2018] NZSC 104. See Leonid Sirota, 'Breaking the Silence: New Zealand's Courts and Parliament after Attorney-General v Taylor' (2019) 30 *Public Law Review* 13.

government has recently introduced a bill designed to authorize the country's high court to declare domestic legislation incompatible with the two main human rights laws.<sup>59</sup>

In section 3, I wish to suggest a hybrid model between strong and weak forms of judicial review, in which judicial supremacy and parliament supremacy live in harmony.

### 3 A Hybrid Model between Strong and Weak Forms of Judicial Review

My core argument is that to invalidate an unconstitutional legislation, a special – rather than a simple – majority of judges would be required. Of course, the questions of the majority required to make complicated decisions involve many considerations, both in decisions of the legislature and in decisions of the judiciary.<sup>60</sup> I want to suggest that a proper rule for invalidation of legislation would be a special two-thirds majority. This requirement of special majority will be an important means of increasing judicial 'deference' to the political institutions. Through this requirement, the court can still defend the provisions of the constitution and enforce them as long as it has a broad judicial consensus. On the other hand, in cases where judges disagree about the constitutionality of a law, institutional restraint will prevail.

Comparative law provides some examples of such super-majority judicial rulemaking. In the United States, famously, decisions regarding the repeal of legislation are made by a simple majority.<sup>61</sup> Indeed, some of the most famous invalidations of legislation were passed by a narrow majority of five against four justices.<sup>62</sup> Over the years, however, this approach has been widely discussed and

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<sup>59</sup> New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill.

<sup>60</sup> Stéphanie Novak and Jon Elster, *Majority Decisions: Principles and Practices* (CUP 2014); Adrian Vermeule, 'Absolute Majority Rules' (2007) 37 *British Journal of Political Science* 643, 645. For how judicial decision-making may affect the judicial outcome, see Arthur Dyevre, 'Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour' (2010) 2 (2) *European Political Science Review* 297, 320.

<sup>61</sup> This was probably adopted without much thinking but as a natural rule of decision-making. Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles we Live By* 360 (Basic Books 2012).

<sup>62</sup> Robert E Riggs, 'When Every Vote Counts: 5–4 Decisions in the United States Supreme Court' (1993) 21 *Hofstra Law Review* 667.

often criticized.<sup>63</sup> For example, as early as 1910, American jurist and politician David Watson claimed that:

‘Can it be said that an act is a clear violation of the Constitution when five justices declare it to be so, and four declare with equal emphasis that it is clearly not so? All doubt must be resolved in favor of the constitutionality of the law, and it must be clear in the mind of the court that the law is unconstitutional. But can this condition exist when four of the justices are equally earnest, equally emphatic, equally persistent and equally contentious in their position that a law is clearly constitutional?’<sup>64</sup>

In recent years there has been an increase in the number of decisions decided by a narrow majority of four to five judges, and voting among judges is usually decided on a political-party basis, especially in decisions on nationally controversial issues.<sup>65</sup> The politicization of the judiciary, stemming in part from the method of political appointments of US Supreme Court justices, has led the court to a crisis of legitimacy.<sup>66</sup> In a recent article in the *Yale Law Journal*, Daniel Epps and Ganesh Sitaraman argue that in order to save the US Supreme Court from its crisis of legitimacy, a rule of a special majority (seven to two) must be adopted to repeal federal legislation. Proposals for judicial reform that would include a special majority to repeal laws, they argue, have a long history dating back to the 1920s.<sup>67</sup> Proposing a special majority to repeal laws, Doerfler and Moyn recently explained, would significantly limit the Supreme Court’s ability to intervene in federal policy, but would preserve its ability to intervene in undisputed constitutional violations. This demand transfers power

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**63** Evan H Caminker, Thayerian ‘Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past’ (2003) 78 (1) *Indiana Law Journal* 73; Robert Eugene Cushman, ‘Constitutional Decisions by a Bare Majority of the Court’ (1921) 19 (8) *Michigan Law Review* 771.

**64** David Kemper Watson, *The Constitution of the United States: Its History Application and Construction* (Callaghan & Company 1910) 1191.

**65** Lawrence Baum and Neal E Devins, ‘Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court’ [2016] *Supreme Court Review* 301.

**66** Michael Tomasey, ‘The Supreme Court’s Legitimacy Crisis’ *New York Times* (6 October 2018). <<https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html>> accessed 24 December 2020; Paul Waldman, ‘Yes, the Supreme Court Is Facing a Legitimacy Crisis’ *Washington Post* (24 September 2018) <<https://www.washingtonpost.com/blogs/plum-line/wp/2018/09/24/yes-the-supreme-court-is-facing-a-legitimacy-crisis-and-we-know-exactly-whose-fault-it-is/>> accessed 24 December 2020.

**67** Daniel Epps and Ganesh Sitaraman, ‘How to Save the Supreme Court’ (2019) 129 *Yale Law Journal* 148.

from the judiciary to the political authorities in an uncertain constitutional sphere.<sup>68</sup>

In a detailed article from 2003, Jed Shugerman argued in favor of a special majority to repeal legislation in the US Supreme Court. Shugerman noted that the problem is not in the institution of judicial review itself, but in situations where the court abandons its judicial restraint. Therefore, a voting mechanism that establishes the judicial deference to that of the legislature is required, and in Shugerman's opinion it is worthwhile to determine the decision-making rule of six judges versus three as the preferred mechanism. In his view, the US Supreme Court derives its legitimacy from a combination of expertise, indirect representation of the people, the strength of its arguments, the binding precedent force and the need for checks and balances. The requirement for a special two-thirds majority, in his view, reinforces each of these aspects: a narrow majority is too random to provide an experts' seal of approval, and in light of the imperfect representation of the people, a consensual rule reduces problems and the appearance of arbitrariness. In terms of the strength of reasoning, a two-thirds majority promotes democratic values of dialogue, consensus, reason, and legitimacy; and in terms of checks and balances in the – in light of the US amendment process, the requirement for two-thirds functions as a symmetrical rule and fits into constitutional politics. Finally, this rule promotes precedent stability, since in view of the instability of judicial decisions made by a narrow majority and their low legitimacy, decisions by a majority of five to four may be short-term victories followed by a sharp political reaction.<sup>69</sup>

It should also be noted that although invalidation of legislation in most state constitutions in the United States requires the rule of a simple majority, in two states there is a requirement for a special majority: Article 5.2 of the Nebraska Constitution from 1920 states that for invalidation of unconstitutional legislation, there is a requirement of a majority of five of seven judges, and section 6.4 of the North Dakota Constitution requires, since 1919, that repeal of legislation be done by a majority of four out of five judges.<sup>70</sup>

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**68** Ryan D Doerfler and Samuel Moyn, 'Democratizing the Supreme Court' (forthcoming 2021) 109 *California Law Review* 23. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3665032](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665032)> accessed 24 December 2020.

**69** Jed Handelsman Shugerman, 'A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court' (2003) 37 *Georgia Law Review* 893, 897, 932–951.

**70** See generally, Jonathan L Entin, 'Judicial Supermajorities and the Validity of Statutes: How Mapp Became a Fourth Amendment Landmark Instead of a First Amendment Footnote' (2001) 52 *The Case Western Reserve Law Review* 441, 469; Sandra Zellmer and Kathleen Miller, 'The Fallacy of Judicial Supermajority Clauses in State Constitutions' (2015) 47 *University of Toledo Law Review* 73.

What other examples of a super-majority requirement exist in comparative law? This requirement is not very common but does exist in some countries and concerning several issues. This is the situation in some Latin American countries. For example, Article 105 of the Mexican Constitution requires a special majority of eight judges out of 11 to invalidate legislation in abstract constitutional review. And what happens when only six or seven Supreme Court justices declare a law unconstitutional and null? By custom, such a declaration of nullity is not binding, meaning that although in the majority opinion the law is unconstitutional and null and void, it will continue to be effective and legally enforceable.<sup>71</sup> Another example is the mechanism established in the Chilean Constitution since 2005, according to which the Constitutional Court can decide, in the majority opinion, that a provision of law that has been discussed in a legal proceeding contradicts the Constitution and should not be applied. If such a ruling has been passed, according to section 93.7 of the Constitution, the Constitutional Court may decide, by a majority of eight out of 10 judges, that the law is unconstitutional and null and void.<sup>72</sup> In Peru, the Constitutional Court consists of seven judges and makes decisions by a simple majority, except for decisions regarding the unconstitutionality of a legal norm, where the consent of five judges is required. In Brazil, unconstitutional decisions are usually taken by a simple majority, but in some exceptional cases a two-thirds majority is required.<sup>73</sup> In this context, Rubens Becak and Jairo Lima recently proposed that the repeal of amendments to the Constitution (as opposed to the repeal of ordinary legislation) be passed by a special two-thirds majority.<sup>74</sup>

Provisions that require a special majority can also be found in Europe. Thus, for example, according to paragraph 13 of the Czech Constitutional Court Act, 1993, the court consists of 15 judges and makes decisions by a simple majority, but when it comes to constitutional review of legislation or international treaty, the consent of nine judges is required.<sup>75</sup> And in Turkey, Article 149 of the Constitution requires a special two-thirds majority of Constitutional Court judges for repealing amendments to the Constitution and disqualifying political parties. In Germany, the Constitutional Court consists of two senates (eight judges each, a quorum of at

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71 Jorge A Vargas, 'The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995' (1996) 11 (2) *American University International Law Review* 295, 315.

72 Dante Figueroa, 'Constitutional Review in Chile Revisited: A Revolution in the Making' (2013) 51 *Duquesne Law Review* 387, 407.

73 Rubens Becak and Jairo Lima, 'When  $5 \times 4$  is not a Winning Majority: Judicial Decision-making on Unconstitutional Constitutional Amendments' in Oesten Baller (ed), *Violent Conflicts, Crisis, State of Emergency, Peacebuilding – Constitutional Problems, Amendments and Interpretation* (Berliner Wissenschafts-Verlag 2019) 161, 175.

74 *Ibid* 176–178.

75 Czech Republic, Constitutional Court Act, 182/1993 Sb, § 13.

least six judges). Under section 15(4) of the Federal Constitutional Court Act, although the Constitutional Court as a rule decides by a simple majority, in certain proceedings a two-thirds majority is required, for example, denial of rights under section 18 of the Basic Law, the removal of judges or the disqualification of parties.<sup>76</sup> Of course, when the Senate sits on a panel of eight judges, the majority required to repeal legislation is five out of eight.

There are some examples in East Asia as well. In Taiwan under section 14 of the ‘Constitutional Interpretation’ Procedure Act a simple majority is required to determine that secondary legislation is unconstitutional, but a two-thirds majority for ‘constitutional interpretation’ – meaning invalidation of primary legislation.<sup>77</sup>

In South Korea, according to section 113 (1) of the Constitution and section 23 of the Constitutional Court Law, a decision on the unconstitutionality of a law requires a special majority decision of at least six out of nine judges. This rule leads to the strange situation (at least in the eyes of some jurists) where a law remains in force even though a majority of five constitutional court judges have ruled that it is unconstitutional.<sup>78</sup>

The background to the two-thirds special majority demand was a desire to limit the power of the Constitutional Court, but in a detailed article recently devoted to the issue, Joon Seok Hong argued that this super-majority rule increased the power and influence paths of the court, as it expanded the court’s signaling powers to lower courts, political actors and the general public. Ironically, by a majority decision of 4:5 the Constitutional Court can say a lot without actually repealing the law. Legislation that survives under a 4:5 resolution may lack legal or political legitimacy in the eyes of lawmakers and the public, which may prompt the National Assembly to act to repeal or amend the law. In return, the court strengthened the democratic process while retaining an important role.<sup>79</sup>

This signaling ability helped the court to navigate a turbulent environment on highly-heated issues, and provided it with a means to measure, shape, and prepare the country for social change through law. Seok Hong argues that the special majority mechanism has in fact strengthened the constitutional court’s authority and its democratic legitimacy by ensuring that important and controversial issues

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<sup>76</sup> Bundesverfassungsgerichtsgesetz, § 12 BVerfGG 1951, Sec 15 (4).

<sup>77</sup> Jau-Yuan Hwang, ‘Taiwan’s Constitutional Court from 2003 to 2011: New Appointments and Different Performance’ (2012) 53 (2) *Seoul Law Journal* 41, 49. In 2019, the Constitutional Court Procedure Act was enacted that reduces the majority needed to repeal primary legislation from a special majority to a regular majority. The law will come into force in 2022. I thank Prof. Ming-Sung Kuo for this reference.

<sup>78</sup> Joon Seok Hong, ‘Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea’ (2019) 67 (1) *American Journal of Comparative Law* 177, 186–187.

<sup>79</sup> *Ibid* 205.



are not decided by a single vote majority. This instrument also helped to silence allegations of judicial activism on the part of the court.<sup>80</sup>

The proposal for a special requirement has some drawbacks. First and foremost, the enactment of a special majority for the repeal of legislation weakens the court's ability to protect human rights.<sup>81</sup> This is of course a considerable disadvantage, but it should be examined in the light of other alternative models such as the British or New Zealand model, according to which the court has no authority to repeal laws. In terms of the court's ability to protect constitutional rights it seems that – compared to such alternatives – the proposal of a special majority provides the best protection for constitutional rights, as it still allows the court to repeal unconstitutional legislation. It is also possible to argue that the requirement for super-majority may actually improve the protection of rights, for example in that it may prevent the invalidation of legislation that protects rights, benefits minorities, etc.

The second disadvantage is that judicial decisions, especially of extended benches, are characterized by controversy and pluralism of judicial positions. The higher the threshold requirement for judicial decisions, that is, the higher the consensus requirement, the more paralyzed the court may be and the more difficult it will be to declare legislation as unconstitutional.<sup>82</sup>

The third disadvantage is that if this model is combined with political control over the mechanism of appointing or electing constitutional judges, the requirement for a special majority will make it easier for the political majority to create a veto of a minority within the court and capture it.<sup>83</sup> In fact, the Polish example shows this well. As part of the takeover of the Constitutional Court, the Law and Justice Party passed a law requiring a two-thirds majority for judicial decisions to be binding and raised the quorum requirement for a hearing of cases from nine judges to thirteen (out of 15 in total). This legislation, among others, was later repealed by the legislature. Apparently, this story shows the risk of a special majority in the context of constitutional capture. But as Wojciech Sadurski

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**80** Ibid 203–217.

**81** Pablo Castillo-Ortiz, 'The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions' (2020) 39 *Law and Philosophy* 617, 640: '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.'

**82** Ibid.

**83** Ibid.

explained in the Polish context, after the ruling party took over the Constitutional Court, it removed this requirement as there was no need for these provisions that actually limited the court in carrying out its new role as ‘government seal’.<sup>84</sup> Therefore, even in the context of constitutional capture, one can see advantages in demanding the special majority.

The fourth disadvantage is that majority decision is based on the assumption that judges are an equal community. The majority decision best represents the quality of the constitutional arguments heard. If the majority is convinced of constitutionality or unconstitutionality, this is a proper way of deciding based on political equality.<sup>85</sup> This is also seen as the fairest decision. According to this claim the requirement for a special majority in fact benefits the minority, which is convinced that the law is constitutional. But why prefer the position of the minority over the majority? As Shugerman remarked, although four judges may be in the minority, it must not be forgotten that their position is supported by the other authorities and probably also by the public as it is represented in the legislature. As he has pointed out, and I agree with him, care must be taken when repealing legislation of the democratic legislature, and when rejecting the will of the majority, it is important to be sure of the judicial decision.<sup>86</sup>

The requirement for a super-majority has multiple advantages. First, courts repeatedly state that invalidation of legislation is a serious matter and is a ‘last resort’, ‘judgment day weapon’ etc. This is correct since invalidation of a law enacted by the elected legislature is not like any other judicial decision. If the invalidation of legislation is an ‘unconventional weapon’, then it is appropriate that this weapon be used only when there is no sharp disagreement among the judges as to the necessity of its operation. The basic idea of the proposal is that if judges – all experts and skilled in constitutional questions – do not clearly agree on whether the constitution allows or prohibits the content of a particular law, it seems that in this question the unconstitutionality is not clear enough.<sup>87</sup> In such a case, a judicial decision in this favor of the legislature is proper. In this way the

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<sup>84</sup> Wojciech Sadurski, *Poland’s Constitutional Breakdown* (OUP 2019) 73–75.

<sup>85</sup> Roderick M Hills Jr, ‘Are Judges Really More Principled than Voters?’ (2002) 37 *The University of San Francisco Law Review* 37, 58–59.

<sup>86</sup> Shugerman (n 69), 934.

<sup>87</sup> Compare with Eric A Posner and Adrian Vermeule, ‘The Votes of Other Judges’ (2016) 105 *Georgetown Law Journal* 159; William Baude and Ryan D Doerfler, ‘Arguing with Friends’ (2018) 117 *Michigan Law Review* 319.

demand of the special majority can be regarded as an institutional mechanism that incorporates Thayer's 'obvious mistake' rule for judicial review,<sup>88</sup> and to some extent resembles the 'clear violation rule' that exists in Sweden and Finland.<sup>89</sup> A consensus demand that crosses ideological judicial disputes is a kind of indication, even if imperfect, that the constitutional violation is clear.

Second, the super-majority demand ensures that a wide range of views will find expression in the decision. Given that tests such as proportionality are vague, subject to subjective value judgment and require judicial discretion, the special majority requirement requires that only when there is judicial consent of judges from different approaches, positions or backgrounds, law can be invalidated.

Third, in the context of appointing judges the special majority requirement that does not allow decision by a slim majority for a single vote, may slightly reduce the political pressure to control appointments to the Supreme or Constitutional Court.

Fourth, the requirement for a special majority may strengthen public confidence in the judicial system. Take a case where an expanded panel of nine or 11 judges decides to repeal a law on the tip of a single vote (5–4 or 6–5). It seems to me that a court decision regarding the repeal of a law that five or four justices regard as constitutional is very problematic in terms of legitimacy and undermines public trust. As Shugerman notes

'A bare majority of experts is not at all convincing. If four out of five experts agree that Brand X is the best toothpaste, this consensus establishes a degree of reliability. But if five out of nine experts agree that Law X is unconstitutional, one cannot conclude that the experts have spoken one way or the other. With five-four

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**88** James B Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129, 144.

**89** Kungörelse (Instrument of Government) C 11, Article 14 (Sweden) (1974): 'If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest'; Suomen perustuslaki, (Constitution Act of Finland) s 106 (1999): 'If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution'. See Eivind Smith, 'Judicial Review of Legislation' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart Publishing 2018) 107; Andreas Follesdal and Marlene Wind, 'Introduction – Nordic Reluctance towards Judicial Review under Siege' (2009) 27 (2) *Nordisk Tidsskrift For Menneskerettigheter* 131; Veli-Pekka Hautamäki, 'Reasons for Saying: No Thanks! Analysing the Discussion about the Necessity of a Constitutional Court in Sweden and Finland' (2006) 10 (1) *Electronic Journal of Comparative Law* 4; Jaakko Husa, *The Constitution of Finland: A Contextual Analysis* (Hart Publishing 2011) 186–187.

decisions, there is some sense of randomness that the decision came out one way and not the other. [...] supermajority rule would establish an appropriate external standard circumscribing the judge's role and would send a message about deference to legislatures. When one vote is the difference in a decision, the result from the Supreme Court is, at the risk of hyperbole, more an empire of men and less an empire of law.<sup>90</sup>

Studies from the United States show that when Congress reversed Supreme Court decisions, it was mainly when the issue revealed a split and ideologically divided court.<sup>91</sup> A decision by a special majority reflects a consensus. This requirement can therefore strengthen public confidence and the legitimacy of the decision, and therefore has a purpose that is not only functional but also expressive.

However, what will be done in a situation where the majority thinks that a law is unconstitutional, but it is not a super-majority decision (for example five against four)? First and foremost, it is important to mention that the special majority requirement refers only to the remedy of the repeal of the legislation. An ordinary majority can still take interpretive measures that result in the legislation's compliance as far as possible with the provisions of the constitution. But what if such an interpretation is not possible?

I propose a solution that would preserve the model of judicial superiority when there is a special majority but adopts the principles of the parliament sovereignty model when there is a majority in court, but it is not a special majority. In this case, the law will remain in force despite its unconstitutionality. In other words, I propose that if there is a majority that believes a law is unconstitutional, but there is no super-majority for annulment, the court will declare non-compliance with the constitution without annulment.

This idea is not new. A declaration of unconstitutionality without nullity is a remedy recognized in the constitutional literature and in practice in all sorts of circumstances. For example, the Federal Constitutional Court in Germany has developed a technique of declaring unconstitutionality without nullity (*Unvereinbarkeitserklärung*).<sup>92</sup> A similar method is accepted in the Italian Constitutional Court, where it is called an 'unofficial declaration of unconstitutionality' or 'declaration of incompatibility' (*dichiarazione di incompatibilità*), according to

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<sup>90</sup> Shugerman (n 69), 934–7.

<sup>91</sup> William N Eskridge Jr, 'Overriding Supreme Court Statutory Interpretation Decisions' (1991) 101 *Yale Law Journal* 331, 346.

<sup>92</sup> Lothar Determann and Markus Heintzen, 'Constitutional Review of Statutes in Germany and the United States Compared' (7 August 2018) *UC Hastings Research Paper No 299*. <<https://ssrn.com/abstract=3228016>> accessed 24 December 2020.

which the court points to a constitutional defect that exists in law without nullity. This declaration is accompanied by a warning that if the legislature does not amend the law within a reasonable time, the court will be required to decide the issue through nullity.<sup>93</sup> The proposed mechanism is very similar to the British ‘declaration of incompatibility’ mechanism described earlier.

After a declaration of unconstitutionality without nullity, the law will return to the legislature for consideration as to whether to amend it in such a way that its provisions will better comply with the constitutional provisions, based on the court’s ruling. The idea of upholding a law that most court judges believe is unconstitutional does seem strange; and it may also undermine public confidence (which is required to obey and act in accordance with an unconstitutional law). It should be remembered, however, that this is a law that many of the court judges (at least four, when it comes to a nine-judge panel) believe is constitutional and its provisions are consistent with the provisions of the constitution.

Moreover, an appropriate response by the legislature to such a declaration will assist in alleviating the difficulties mentioned above and will contribute to the constitutional dialogue. The aspiration is that over time a constitutional culture of mutual respect will develop: the court will declare non-compliance without the repeal of legislation, while the legislature will take the appropriate actions in response to these declarations. This proposal has several advantages: it maintains a ‘strong judicial review’ in case of violation of constitutional rights when a special majority believes that legislation should be repealed, but on the other hand adopts a kind of ‘weak judicial review’, which institutionally restrains the court and at the same time strengthens the legislature’s responsibility for basic rights. This proposed model can thus be a bridge between strong and weak forms of constitutional review.

## 4 This Volume

In this special volume, we present different perspectives on constitutional courts and constitutional review.

In his ‘Constitutional Courts as Majoritarian Instruments’, **Jorge Farinacci-Fernós** challenges the prevailing view that constitutional courts are ‘counter-majoritarian’ institutions. Courts, he argues, often engage in majoritarian exercise when they strike down ordinary legislation because it contravenes the policy choices entrenched in the constitutional text, and the constitution’s majoritarian

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<sup>93</sup> William J Nardini, ‘Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court’ (1999) 30 (1) *Seton Hall Law Review* 1.

qualifications are superior to that of the legislative branch. So constitutional courts are guardians not only of minority rights but also of majoritarian self-government.

In 'Kelsen versus Schmitt and the role of the sub-state entities and minorities in the appointment of constitutional magistrates in continental systems', **Antoni Abat Ninet**, focuses on the important issue of judicial appointments and analyses, from a comparative constitutional law perspective, the under-researched role sub-state entities and minorities play and should play in the system of appointment of constitutional judges in concentrated systems of control of constitutionality.

In 'Judicial Activism' in Europe: Not a Neat and Clean Fit', **Nausica Palazzo** conveys potential reasons why US-style notions of 'judicial activism' cannot be easily transferred to continental Europe. Palazzo illustrates that the very fact that judicial activism matters so much in constitutional discourse signals a profoundly different legal system and professional culture. It is careless to apply notions of judicial activism without due care to distinct professional legal culture, different model of constitutional review and diverse types of constitutional decisions.

The success of constitutional courts in Europe had influence at other parts of world, including Thailand and Indonesia, which have established constitutional courts in 1997 and 2003 (respectively) in order to strengthen the democratic transition. In their article, 'The relationship between the Kelsenian-style Constitutional Court and National Ideology: Lessons from Thai-ness and Pancasila', **Rawin Leelapatana & Abdurrachman Satrio Pratomo** explore how and to what extent national ideologies in Thailand and Indonesia have been exploited to reinforce the political hegemony of elites against the trends of liberalization and democratization. It demonstrates the struggle of implementing a Kelsenian model of constitutional review within local culture with prevailing values and ideologies that may hinder its proper functioning.

Local adjustments to the Austrian model are also evident in **Constantinos Kombos**' article, 'Idiosyncratic Constitutional Review in Cyprus: (Re-)Design, Survival and Kelsen', in which he shows how in the Cypriot context, Kelsen's model of constitutional court was influential in different and varying manners, yet was never adhered to as a systematic model. Kombos elaborates on the Cypriot mixed decentralized constitutional review system that has evolved from the Austrian one after its remodeling due to the law of necessity, and expounds upon its elements of both repressive and preventive review, as well as with abstract and concrete review.

Courts do not only have to adapt to changing circumstances but also often to face enormous pressures and act strategically in order to gain legitimacy. An example for this is provided by **Jaime Olaiz-González** in his article 'Mexican Supreme Court at Crossroads: Between Affirmation and Accommodation.' In this

article, it is shown how in the last quarter of century Mexico's Supreme Court of Justice has gained authority, independence and fully assumed its role as a constitutional court. Yet, it now faces attempts to undermine its independence and pressures to align its decisions with the government's approach. The article explores these challenges, which can have tremendous influence on the entire Mexican constitutional order.

Finally, in her article 'Constitutional Review of Legislation in the form of Constitutional Complaint as an Evolution of the Kelsenian model: Constitutional Review Complaint in Korea and *Gesetzesbeschwerde* in Austria', **Jeong-In Yun** reviews the concrete constitutional review system of the Korean Constitutional Court as established by the 1987 Constitution. More particularly, she analyses the unique constitutional review procedure of 'constitutional complaint' by a party of an ordinary court's proceeding who's motion for a constitutionality review has been rejected. This system, she claims, has been effective in removing from the legal order unconstitutional statutes. After comparing it to the Austrian constitutional complaint mechanism, Jeong-In Yun argues that the Constitutional Review Complaint activates constitutional review regardless of a passive approach of ordinary courts, increases individual access to the court, assists in protecting minority rights and constitutional democracy, and guarantees remedy for the unlawful consequences of applying unconstitutional statutes in the proceedings, and thereby advances the Kelsenian model.

It is my hope that this special volume will advance our understanding of the challenges and advantages Kelsen's model of constitutional review brings with it, for the 21st century.

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