THE OXFORD HANDBOOK OF

COMPARATIVE CONSTITUTIONAL LAW

Edited by

MICHEL ROSENFELD

and

ANDRÁS SAJÓ

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2012

Impression: 1

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Library of Congress Control Number: 2012933281

ISBN 978-0-19-957861-0

Printed in Great Britain on
acid-free paper by
CPI Group (UK) Ltd, Croydon, CR0 4YY

CHAPTER 38

CONSTITUTIONAL COURTS

ALEC STONE SWEET

New York

I. Introduction **816**

II. Origins, Models, Diffusion **817**

III. Design and Functions **820**

1. Functional Logics and Commitment 820
2. Jurisdiction 822
3. Appointment and Composition 824

IV. Effectiveness and Impact **825**

1. Effectiveness 825
2. Democratic Transition 826
3. Constitutional Lawmaking 827

VI. Conclusion: Legitimacy Discourses **828**

I. Introduction

Prior to the Second World War, only a handful of high courts in the world had routinely exercised the power of constitutional judicial review: the authority to invalidate statutes and other acts of public authority found to be in conflict with a constitution. In the 1950s, Western Europe began to emerge as the epicenter of a 'new constitutionalism',[1] a model of democracy and state legitimacy that rejects the dogmas of legislative sovereignty, prioritizes fundamental rights, and requires a mode of constitutional review. With successive waves of democratization, this new constitutionalism spread across the continent. By the 1990s, the basic formula—(1) an entrenched, written constitution, (2) a charter of fundamental rights, and (3) a mode of constitutional judicial review to protect those rights—had diffused globally.[2] The

[1] Martin Shapiro and Alec Stone, 'The New Constitutional Politics of Europe' (1994) 26 *Comparative Political Studies* 397.

[2] David Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163; Shannon Roesler, 'Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority' (2007) 32 *Law and Social Inquiry* 545. Of 106 national constitutions written since 1985, every one contained a charter of rights, and all but five established a mode of rights review, *Data Set on Written Constitutions, Rights, and Constitutional Review since 1789*, compiled by the author and Christine Andersen, 2007, on file with the author.

availability of the constitutional court (CC) has been crucial to this process. For reasons to be discussed, the framers of new constitutions have been more attracted to the 'centralized model' of constitutional review, with a specialized CC at its core, than to the 'decentralized (or *American*) model' of judicial review exercised by the judiciary as a whole.

This chapter provides an introduction to the basic institutional features of CCs, as well as an overview of the small but growing comparative literature on their design, function, impact, and legitimacy.[3] Every CC that operates with any effectiveness exhibits certain unique attributes that have been important to its success, however relative, in making a constitution effective as enforceable law. Although important monographs have been produced on specific courts,[4] this chapter is pitched at a higher level of abstraction. It presents the CC as an ideal type, with its own functional logics, and surveys the comparative scholarship seeking to explain commonalities and differences across systems. The chapter will emphasize inter-disciplinarity, in part, because political scientists have been at the forefront of empirical research[5] and, in part, because powerful CCs have shaped and reshaped their own political environments. Successful CCs routinely subvert separation of powers schemes, including elements on which their legitimacy was originally founded. In consequence, new legitimacy questions and discourses have emerged.

II. Origins, Models, Diffusion

A CC is a constitutionally established, independent organ of the state whose central purpose is to defend the normative superiority of the constitutional law within the juridical order.

Prior to the turn of the twentieth century, several specialized, constitutional 'jurisdictions' had appeared in Europe, notably in Austria and the Germanic states. The modern constitutional court, however, is largely the invention of Hans Kelsen. Kelsen developed what is now called the 'centralized' or 'European' model of review, first, in his role as a drafter of the constitution of the Austrian Second Republic (1920–34), and then as a theoretician.[6] The founders of

[3] The first book in this genre to appear in English was Christine Landfried, *Constitutional Review and Legislation: An International Comparison* (1989), followed by: Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (2000); Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000); Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (2002); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asia* (2003); Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2005); Victor Perreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (2009); and Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study* (2009).

[4] Including, in order of publication, Donald Kommers, *Judicial Politics in West Germany* (1976); Alec Stone, *The Birth of Judicial Politics in France* (1992); Heinz Klug, *Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction* (2000); Mary Volcansek, *Constitutional Politics in Italy: The Constitutional Court* (2000); László Sólyom and Georg Brunner, *A Constitutional Judiciary in a New Democracy* [Hungary] (2000); Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (2002); Georg Vanberg, *The Politics of Constitutional Review in Germany* (2005); Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (2007); and Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990–2006* (2008).

[5] Martin Shapiro and Alec Stone (eds), 'Special Issue: The New Constitutional Politics of Europe' (1994) 26 *Comparative Political Studies* 397; and Mary Volcansek (ed), 'Special Issue: Judicial Politics in Western Europe' (1992) 15 *West European Politics*.

[6] Hans Kelsen, 'La garantie juridictionnelle de la constitution' (1928) 45 *Revue de Droit Public* 197. The other indispensable classic is Charles Eisenmann's thesis, written under Kelsen's supervision, *La justice constitutionnelle et la Haute cour constitutionnelle d'Autriche* (1928, reprint 1986).

the present German and Italian systems constructed new CCs from the template Kelsen laid down.[7] His legacy was secured when constitutional reformers in Southern, Central, and Eastern Europe later rejected American-style judicial review, while embracing the Kelsenian court.[8]

As an ideal type, the 'centralized', or 'European', model of constitutional review can be broken down into four constituent components. First, CCs possess a monopoly on the power to invalidate infra-constitutional legal norms, including statutes, as unconstitutional. Meanwhile, the 'ordinary' courts (the judiciary, including specialized jurisdictions) are prohibited from doing so. In the United States, review authority inheres in judicial power: all judges possess it. Secondly, CCs resolve disputes about the interpretation and application of the constitution. The US Supreme Court is the highest court of appeal for almost all legal disputes in the American legal order, of whatever type. In contrast, CCs do not preside over litigation, which remains the purview of the ordinary courts. Instead, specifically designated authorities or individuals ask questions of CCs, challenging the constitutionality of specific legal acts; constitutional judges are then required to answer these questions, and to justify their answers with reasons. The rulings of CCs are final. Thirdly, CCs have links with, but are formally detached from, the legislative, executive, and judicial branches of government. Constitutional judges occupy their own 'constitutional space', which is neither clearly 'judicial' (the enforcement of preexisting legal norms in the course of litigation) nor 'political' (the creation of new legal norms) in classic continental terms. Fourthly, unlike the US Supreme Court, whose jurisdiction is constrained by the 'case or controversy' requirement, most CCs may review statutes 'in the abstract', before they have been enforced. 'Abstract review' is typically justified as a means of eliminating unconstitutional legislation and practices *before* they can do harm.

The successful diffusion of the Kelsenian court within Western Europe after the Second World War depended heavily on three factors. First, framers of new constitutions believed that the concentrated system of review would 'fit' a parliamentary system of government better than the decentralized, American system. A CC can be attached to the existing architecture of the state with minimal disruption to established orders, notably the separation of powers notions associated with legislative sovereignty. Under the European model, it remains possible to defend the notion that the ordinary courts are bound by the supremacy of statute, while constitutional judges are charged with preserving the supremacy of the constitution. More generally, whenever groups that negotiate new constitutions are dominated by political parties who are hostile to sharing their power with the judiciary, centralizing review authority in a single organ will appear to be a less costly option, compared to adopting the American system. Moreover, framers can easily design CCs so that their composition will reflect outcomes of political processes: members of CCs are typically appointed by elected officials or after bargaining among political parties; and members serve fixed terms.

Secondly, the new constitutionalism, with its heavy emphasis on rights and review, emerged first in Germany, in reaction to the horrors of the Holocaust and the destruction of the Second World War.[9] As authoritarian regimes collapsed in Southern Europe in the 1970s, and then across Central and Eastern Europe and the Balkans in the 1990s, that situation was reproduced in key respects, and the Austro-German approach to constitutionalism was adopted

[7] See also Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 *Journal of Politics* 183.

[8] The major exception is Greece, which adopted a mixed American/European system.

[9] Americans occupied West Germany and Italy during the founding period, and insisted that new constitutions include rights and review.

and adapted. In each of these episodes, the framers of new constitutions saw no contradiction between democracy and rights protection (at a time when the prestige of political parties and legislative authority was relatively low). On the contrary, a robust system of rights protection was viewed as a pre-condition for democratic rule. The Kelsenian court offered a means of prioritizing rights protection, while maintaining the prohibition of judicial review.

This last point raises a contradiction for the original model that deserves attention. In his seminal paper of 1928,[10] Kelsen laid out a blueprint for CCs, and a defense of the political legitimacy of the centralized model of review. Although he recognized that a constitutional judge's authority to invalidate unconstitutional statutes comprised a type of legislative power, he labored to distinguish between legislating and constitutional adjudication. Members of parliaments, he argued, are 'positive legislators': they make law freely, subject only to constitutional constraints, such as the rules of legislative procedure or federalism. Constitutional judges are 'negative legislators': their lawmaking authority is restricted to the annulment of legal norms that conflict with the constitutional law. The distinction between the positive and the negative legislator rests on the absence, within the constitutional law, of enforceable rights. Kelsen equated rights with (open-ended) natural law, and thought that, through the process of discovering and enforcing rights, a CC would inevitably obliterate the distinction between the negative and the positive legislator. The judges would become, in effect, supreme legislators. He therefore argued against conferring rights jurisdiction on CCs. The passage to the new constitutionalism proved Kelsen correct: any CC that protects rights with any measure of effectiveness will, at the same time, act as a positive legislator. Today, Kelsen's warning is usually politely ignored.

A third factor concerns the recursive nature of the diffusion process. Each adoption and adaptation of the Kelsenian court increases the likelihood that the next generation of constitutional framers will follow suit. Constitution-makers tend to copy arrangements that are considered successful. The CC has proved its worth as an instrument for consolidating constitutional democracy. In the 1970s, the framers in post-Franco Spain quite consciously copied the German system, without seriously considering the American model;[11] in the 1990s, the drafters of new constitutions in Central and Eastern Europe,[12] as well as in Latin America, looked to Germany and Spain;[13] the South African Constitution too was heavily influence by Germany.[14] In Asia, where American political influence is pronounced, the Austro-German model also served as a prototype for constitutional reform, most notably in South Korea.[15] As the institution has diffused, so has epistemic support for the decentralized model. Today, regional and global networks of judges, law professors, and rights-based non-governmental organizations actively defend the legitimacy of the model, further facilitating its broader diffusion.

As noted, virtually no one writes a constitution today without providing for rights protection and a mode of review. In 2005, of the 138 national systems of constitutional review that an

[10] Kelsen (n 6).

[11] See Enrique Guillén López, 'Judicial Review in Spain: The Constitutional Court' (2008) 41 *Loyola of Los Angeles Law Review* 530.

[12] Lach and Sadurski, 'Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity' in Harding and Leyland (n 3), 52.

[13] For a survey of review systems in the region, see Patricio Navia and Juilo Ríos-Figueroa, 'The Constitutional Adjudication Mosaic of Latin America' (2005) 38 *Comparative Political Studies* 189.

[14] Jörg Fedtke, *Die Rezeption von Verfassungsrecht—Südafrika 1993–1996* (2000).

[15] Tom Ginsburg, 'East Asia: Constitutional Courts in East Asia: Understanding Variation' in Harding and Leyland (n 3), 291.

analyst could clearly classify as conforming to either the American or the Kelsenian model, 85 (62 percent) were Kelsenian. CCs comprise the dominant organ of review in Europe, Africa, and the Middle East, and have made in-roads into Asia, South East Asia, and Latin America (where 'mixed' systems of various types are common[16]). The American model clearly dominates only in North America and the Caribbean.[17] Two of the world's most active and effective CCs are found outside Europe, in Colombia and South Africa. Finally, leaders of authoritarian regimes, who may have no intention of democratizing or weakening one-party rule, may nonetheless establish CCs. As Moustafa has shown, with respect to Egypt in the 1980s and 1990s, rulers may create a CC as a way of signaling to the international community that it is committed to reform, legal security, and property rights, not least to attract needed foreign investment and external support more generally.[18] Similar dynamics can be found in Latin America.[19]

III. Design and Functions

The establishment of a system of constitutional review raises a primordial question. Why, at the foundational moment, would the most powerful political actors in a state choose to constrain the future exercise of their own lawmaking authority? After all, in most places where new CCs have been adopted, the various dogmas of legislative sovereignty had previously reigned as embedded orthodoxy. In responding to this question, scholars have gradually developed what is, in effect, a functional theory of delegation to CCs. The Kelsenian court helps those who build new constitutional arrangements to resolve certain dilemmas, including problems of imperfect contracting and commitment. These problems are especially acute in the domains of federalism and rights. Although functional logics may help us to understand, in broad-brush terms, the turn to constitutional review, more fine-grained analyses are necessary to explain variation across cases, or the design and functioning of any specific CC.

1. Functional Logics and Commitment

A diverse group of scholars have developed variants of delegation theory[20] to explain why the founders of new constitutions would establish and confer authority on CCs. In this account, the availability of the CC gives drafters the confidence to strike constitutional bargains *ex ante*, as well as a means of guaranteeing the credibility of commitments made *ex post*.

Ginsburg has elaborated and tested an 'insurance model of judicial review' that explains variation in the design of systems of review with reference to the extent to which political authority (or the party system) is fragmented at the *ex ante* moment.[21] In a system dominated by one person or political party, rulers have little incentive to construct a review system that

[16] Navia and Ríos-Figueroa (n 13).

[17] See the website maintained by Arne Mavčič, at <http://www.concourts.net/>.

[18] Tamir Moustafa, 'Law and Resistance in Authoritarian States: the Judicialization of Politics in Egypt' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008), 132.

[19] Eduardo Dargent, 'Determinants of Judicial Independence: Lessons from Three "Cases" of Constitutional Courts in Peru' (2009) 41 *Journal of Latin American Studies* 251.

[20] For an introduction to delegation theory as applied to a range of political institutions, including courts, see Mark Thatcher and Alec Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 *West European Politics* 1.

[21] Ginsburg (n 3).

would constrain them. When they do establish a CC, it is often to consolidate a regime meant to benefit them while disadvantaging their opponents; examples include many authoritarian regimes, but also the Gaullist-dominated France of 1958. More interesting: to the extent that a competitive party system exists, or can be foreseen, each negotiating party will have an incentive in building a more robust mode of review, in order to protect its interests when it is out of power.[22] Ginsburg's work is exemplary in that he supplements deductive theorizing and quantitative analysis with detailed case studies of the creation and subsequent operation of CCs in Asia.[23]

More generally, CCs help framers resolve a bundle of contracting problems.[24] Modern constitutions are contracts that are typically negotiated by political elites—representatives of competing groups or political parties—seeking to establish the rules, procedures, and institutions that will permit them, under the cloak of constitutional legitimacy, to govern. In establishing a democracy, each contracting party knows that it must compete for office, through elections. As Ginsburg emphasizes, constitutional contracting allows each to constrain opponents when the latter are in power. The constitution thus produces two common goods for the new polity: a set of enabling institutions, and a set of constraints. If the system is to be federal or strongly regional, review will provide a means of settling boundary conflicts. It is an old truism that federalism needs an umpire, which helps to explain why all federal constitutions provide for review in some form. To be credible, contracting rights, too, necessitates delegation of review powers.

All contracts are 'incomplete' to the extent that meaningful uncertainty exists as to the precise nature of the contract's terms. Due to the impossibility of negotiating specific rules for all possible contingencies, and given that, as time passes, conditions will change and the interests of the parties to the agreement will evolve, most agreements of any complexity are generated by what organizational economists call 'relational contracting'. The parties to an agreement seek to broadly 'frame' their relationship, by agreeing on a set of basic 'goals and objectives', fixing outer limits on acceptable behavior, and establishing procedures for 'completing' the contract over time.[25] Constitutions negotiated by multiple parties, and modern rights provisions, in particular, are paradigmatic examples of relational contracting.[26]

Take the following scenario, which is a stylized version of what has recurred across the globe since 1945. Once the founders choose to include a charter of rights in their constitution, they face two fierce dilemmas. The first concerns disagreements about the nature and content of rights. The left-wing contingent favors positive, social rights, and limits on the rights to property. The right is hostile to positive rights, and they want stronger property rights. They compromise, producing an extensive charter of rights that (1) lists most of the rights that each side wants, (2) implies that no right is absolute or more important than another, and (3) is vague about how any future conflict between two rights, or a right and a legitimate governmental purpose, will be resolved. Secondly, they face a problem of credible commitment: How will rights be enforced? Delegating review powers to a CC helps them manage both problems, allowing them to move forward.

[22] See also Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

[23] Ibid; see also Tom Ginsburg, 'Constitutional Courts in East Asia: Understanding Variation' in Harding and Leyland (n 3).

[24] Alec Stone Sweet, 'Constitutional Courts and Parliamentary Democracy' (2002) 25 *West European Politics* 77; Law and Versteeg (n 2).

[25] Paul Milgrom and John Roberts, *Economics, Organization and Management* (1992), 127–33.

[26] Stone Sweet (n 3), ch 2.

Delegation theorists assume that the more acute are the problems of imperfect commitment and incomplete contracting, the more authority—or discretion—the framers must delegate to the review court if constitutional arrangements are to be successful. Relational contracting—the reliance on relatively imprecise legal provisions to express important objectives—can help divided framers to reach agreement in the first place. Yet, in the context of review, textual imprecision, if it is not to paralyze the review court *ex post*, must be understood to comprise a tacit, second-order form of delegation to the Agent. The decision rules that govern constitutional amendment are also built into the delegation of discretion to the CC: the harder it is to nullify the effects of the CC's rulings *ex post*, through constitutional amendment, the more the CC will determine how constitutional arrangements evolve.

These points can be formalized in terms of a theoretical *zone of discretion*—the strategic environment—in which any CC operates. This zone is determined by (1) the sum of powers delegated to a CC, or possessed as a result of a CC's own accreted rulemaking, minus (2) the sum of control instruments available for use by other constitutionally recognized authorities to reverse outcomes resulting from the court's performance of its delegated tasks. Most CCs operate in an unusually permissive strategic environment, to the extent that even their most important rulings are unlikely to be overturned. Entrenchment is a commitment device. Most contemporary constitutions are far more difficult to amend than statutes; and many constitutions declare off-limits to revision certain core constitutional elements (the most common of which are rights, parliamentary democracy, and federalism). Further, some CCs have the express authority to review the constitutionality of amendments to the constitution, or have asserted on their own that the constitution imposes substantive constraints on amendment.[27]

For these reasons, the analyst may conceptualize CCs as 'trustees' of the constitutional order, rather than mere 'agents' of the contract.[28] In a judicial system based on statutory supremacy, the courts are 'agents' of the legislature. If judges construct the codes in ways that are undesirable, legislators, as 'principals', may amend the law to put things right. The CC, however, has no permanently constituted 'principal' that supervises its work. Once a constitution has been ratified and enters into force, those who negotiated it possess no authority to change it, at least not as the founders. Instead, the CC typically exercises its powers in the name of a fictitious entity: the sovereign People. Meanwhile, political elites compete for and exercise state power under rules and procedures laid down by the constitution, of which the CC is the authoritative interpreter.

2. Jurisdiction

The functional logics just discussed will apply to any bargaining context in which the framers set out to build a system of constitutional review—of whatever type. Compared with the major alternative, however, the specialized CC has a powerful advantage, in that the framers can more easily tailor the details of jurisdiction to specific purposes. The standard design questions—What acts are to be subject to review, through what procedures?—will be supplemented by another: What important control functions should be withheld from the ordinary courts? Thus, in addition to providing for the constitutional review of legal norms and acts, the framers may charge the CC with resolving electoral disputes, banning undemocratic political parties, presiding over the impeachment cases of elected officials, and so on. Put bluntly,

[27] Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (2008).

[28] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 68.

CCs are given functions that would be viewed as too 'political', or constitutionally important, to confer on the ordinary courts. Partly for this reason, CCs are loath to develop formal deference doctrines, such as the 'political question' doctrine of the US Supreme Court, which would signal abdication of their duties.

The most important function of the modern CC is the protection of rights by constitutional review. As noted, once the protection of fundamental rights is prioritized, sharing lawmaking power with a CC will usually be viewed a less costly option than giving all judges review powers. The American and the European models differ with respect to the pathways through which cases arise. In the United States, rights review is activated once a litigating party properly pleads a right before a judge—any judge. In countries with constitutional courts, a range of different procedures organize rights review, although not all systems have established all of them, or in the same way.

The first is *abstract review*: the pre-enforcement review of statutes. As Sadurski puts it, in this mode of review, 'it is the textual dimension of the rule [*in abstracto*] rather than its operationalization in application to real people and...legal controversies that is assessed by judges.'[29] Some systems require the statute to be reviewed before entry into force, others after promulgation but before application. Abstract review is also called 'preventive review', since its purpose is to filter out unconstitutional laws before they can harm anyone. In its most common form, abstract review is politically initiated: executives, parliamentary minorities, the heads of regions or federated entities, and so on, are authorized to refer laws considered to be unconstitutional to the CC.

The second mode is called *concrete review*, which is initiated by the judiciary in the course of litigation in the courts. Ordinary judges send questions—Is a given legal norm, judicial decision, or administrative act constitutional?—to the CC. The general rule is that the presiding judge ought to go to the CC if two conditions are met: (1) the constitutional question is material to litigation at bar (who wins or loses will depend on the answer to the question); and (2) there is reasonable doubt in the judge's mind about the constitutionality of the controlling norm. Referrals suspend proceedings pending the CC's response. Once rendered, the CC's ruling is sent back to the referring judge, who then uses it to dispose of the case. Ordinary judges are not permitted to invalidate a statute on their own. Instead, aided by litigants, they are enlisted to help the CC detect unconstitutional laws and practices. Concrete review is 'concrete' because the CC's intervention constitutes a stage in ordinary litigation taking place in the courts.

The third procedure is called the 'constitutional complaint', which brings individuals into the mix. Individuals, firms, and groups may be authorized to petition the CC when they believe that their rights have been violated, after all other remedies have been exhausted. Because of this threshold requirement, most individual complaints are, in effect, appeals of final judicial rulings. Thus, when adjudicating individual complaints, the CC performs functions more closely associated with appellate review in the American system (see Section IV below).

These three modes of review are basic to the rights-protecting mission of the German Federal Constitutional Court, arguably the most powerful and influential CC in the world. As the centralized model diffused, they were routinely adopted. The drafters of subsequent European constitutions added new features, pathways to the CC that the German and Italian founders did not even consider. In Europe, the rights ombudsman first appeared in the

[29] Sadurski (n 3), 5.

Spanish Constitution of 1978; the institution then spread across Central and Eastern Europe. The ombudsman may refer cases to the CC on her own, including petitioning for abstract review. Post-Communist constitutions in Central and Eastern Europe have also expanded the right to initiate abstract review to a diverse range of other actors, including prosecutors, state auditors, courts, local government officials, and even trade unions.[30] Thus in many newer systems, there are few if any jurisdictional or standing obstacles to getting to the CC. Under the constitutions of Hungary and Colombia, for example, everyone possesses the right to petition directly the CC, through an *actio popularis*. The 'popular action' initiates abstract review of statutes, although the petitioner need not show that the law referred has actually harmed her personally.

As a formal matter, any constitutionally-based system of rights protection can be considered to be less robust, or 'complete', the more it permits or tolerates gaps in rights protection. Since the end of the Second World War, one important trend has been toward completeness: presumptively, no legal norm, no public act, no violation of a right should be beyond the control of the constitutional judge. The situation contrasts sharply with the American system, where the case or controversy requirement, inter-branch comity, and 'political question' and other deference doctrines are expected to constrain the exercise of review will routinely produce gaps in rights protection. It is important to recognize in this regard that, unlike the US Supreme Court, many CCs were created, explicitly and as a constitutional priority, to protect rights.

3. Appointment and Composition

In a recent volume on CCs, edited by Harding and Leyland, contributors report valuable information on appointment rules and politics across Africa, Asia, Latin America, and Europe.[31] Although procedures and recruitment patterns vary widely, several general points can be made (with the caveat that none covers all cases).

First, appointments to CCs are treated differently than recruitment to the ordinary courts. Elected politicians dominate these procedures, which may require bargaining and compromise among officials and/sor legislative majorities and oppositions. In Germany, for example, the lower house appoints its quota of members to the Court through a special committee, composed of representatives of the political parties and reflecting their respective strength in the Bundestag, pursuant to a two-thirds majority vote. In Spain, the Congress and the Senate appoint members on the basis of a three-fifths vote, which in practice gives the opposition a veto. In some countries in Central and Eastern Europe, two branches of government (eg the Senate and the President in the Czech Republic) must reach consensus to appoint. Requiring compromise among political elites is less likely to produce a polarized court. Secondly, members of CCs do not enjoy lifetime tenure, but are typically appointed for a fixed 9–12-year term (often non-renewable). Thirdly, although many constitutions require that a minority of seats be filled by career judges drawn from the high courts, many CCs are composed of a majority of law professors and former governmental officials and elected politicians. As Perreres Comella has argued,[32] diversity in the make-up of these courts counts as an important 'virtue'. All significant constitutional questions mix the abstract and theoretical with the practical and governmental, and thus law professors and former politicians nicely complement one another.

[30] Ibid 5–6.
[31] Harding and Leyland (n 3).
[32] Perreres Comella (n 3), 39–43.

Taken together, these three elements are likely to contribute to the political legitimacy of a CC, when it enforces the constitutional law in ways that the political majority find unwelcome.

IV. Effectiveness and Impact

Scholars would have little interest in these developments if CCs do not influence broader processes: the consolidation of new democracies, the development of the constitution, the protection of rights, the making of public policy, competition among political elites, and so on. To the extent that constitutional review is *effective*, CCs will have impact such processes in ways that can be described and measured empirically.

1. Effectiveness

Constitutional review can be said to be *effective* to the extent that the important constitutional disputes arising in the polity are brought to the CC on a regular basis, that the judges who resolve these disputes give reasons for their rulings, and that those who are governed by the constitutional law accept that the court's ruling have some precedential effect.[33] On this definition, effectiveness is a variable: it varies across cases and across time in the same country.

Most review systems throughout world history have been relatively ineffective, even irrelevant. Political actors may seek to settle their disputes by force, rather than through the courts, sometimes with fatal consequences for the constitutional regime. Rulers may care much more about staying in power at any cost, or enriching themselves, or rewarding their friends and punishing their foes, or achieving ethnic dominance, then they care about building constitutional democracy. Dictators of various stripes may also design and deploy review courts to administer and maintain their own rule, as an important research project organized Ginsburg and Moustafa details.[34] Despite the odds, some CCs have operated with measurable effectiveness in authoritarian settings, as in Egypt[35] and Pinochet's Chile.[36]

Where review systems are relatively effective, constitutional judges manage the evolution of the polity through their decisions. There are three necessary conditions for the emergence of effective review systems; each is conditioned by the court's 'zone of discretion'. First, constitutional judges must have a caseload. If actors, private and public, conspire not to activate review, judges will accrete no influence over the polity. Secondly, once activated, judges must resolve these disputes and *give defensible reasons* in justification of their decisions. If they do, one output of constitutional adjudication will be the production of a constitutional case law, or *jurisprudence*, which is a record of how the judges have interpreted the constitution. Thirdly, those who are governed by the constitutional law must accept that constitutional meaning is (at least partly) constructed through the judges' interpretation and rulemaking, and use or refer to relevant case law in future disputes.

Some might quibble with this account of 'effectiveness'. Harding, Leyland, and Groppi, for example, argue that effectiveness should be gauged against the following criteria: (1) 'whether the court's interventions are consistent with the norms set out in the constitution, and

[33] On ensuring constitutional efficacy, see further Chapter 37.

[34] Ginsburg and Moustafa (n 18).

[35] Moustafa (n 4); Clark Lombardi, 'Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian Aspirationally "Islamic" State' in Harding and Leyland (n 3), 217.

[36] Barros (n 3).

whether these norms themselves are consistent with principles of "good governance" as we understand this term in international law and development discourse', and (2) 'whether the court's pronouncements are then actually embedded in practice, that is, whether they are followed'.[37] Trustee courts, however, have the capacity to alter the 'norms set out in the constitution', not least in order to enhance the centrality and enforceability of the constitutional law as a framework of 'good governance'. To take just two examples of many to be found, in 1971 the French CC incorporated rights provisions into the Constitution of the Fifth Republic, against the express wishes of the framers; and in 1958 the German CC ordered the ordinary courts to enforce the rights contained in the Basic Law when they adjudicate private law disputes.[38]

Why only some countries are able to fulfill effectiveness criteria is a controversial question in the social sciences. The achievement of stable system of constitutional justice depends heavily on the same factors and processes related to the achievement of stable democracy, and we know that democracy is difficult to create and sustain. Among other factors, the new constitutionalism rests on a polity's commitment to: elections; a competitive party system; protecting rights, including those of minorities; practices associated with the 'rule of law'; a system of advanced legal education and advocacy. Each of these factors is also associated with other important socio-cultural phenomena, including attributes of political culture, which may be illiberal and fragmented. Constitutional judges can contribute to the building of practices related to higher law constitutionalism, but there are limits to what they can do if they find themselves continuously in opposition to powerful elites, institutions, and cultural biases in the citizenry.[39] In Russia, the new CC was curbed after it began to build effectiveness, by the same elites who claimed to be committed to building constitutional rule of law.[40] Not surprisingly, one finds relatively effective review mechanisms in areas where one finds relatively stable democracy. Ranked in terms of effectiveness, the author would place the systems of Colombia,[41] the Czech Republic, Germany, Hungary, Indonesia,[42] Poland, Slovenia, South Africa, and South Korea on top of the list.

2. Democratic Transition

Since the Second World War, rights and review have been crucial to nearly all successful transitions from authoritarian regimes to constitutional democracy (including the countries just listed).[43] Indeed, it appears that the more successful any transition has been, the more likely one is to find an effective constitutional or supreme court at the heart of it (Japan may be the most important exception). A CC performs several functions that facilitate the transition to

[37] Andrew Harding, Peter Leyland and Tania Groppi, 'Constitutional Courts: Forms, Functions and Practice in Comparative Perspective' in Harding and Leyland (n 3).

[38] Alec Stone Sweet, 'The Juridical Coup d'Etat and the Problem of Authority' (2007) 8 *German Law Journal* 915.

[39] Donald Horwitz, 'Constitutional Courts: A Primer for Decision-Makers' (2006) 17 *Journal of Democracy* 125.

[40] Kim Lane Scheppele, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for Rule of Law in Post-Soviet Europe' (2006) 154 *University of Pennsylvania Law Review* 157.

[41] Manuel Jose Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 *Washington University Global Studies Law Review* 529.

[42] Also see Marcus Mietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court' (2010) 10 *Journal of East Asian Studies* 397.

[43] On democracy, see Chapter 11.

democracy.[44] It provides a system of peaceful dispute resolution for those who have contracted a new beginning, in light of authoritarian and violent pasts. It provides a mechanism for purging the laws of authoritarian elements, given that the new legislature may be overloaded with work. And a CC can provide a focal point for a new rhetoric of state legitimacy, one based on respect for democratic values and rights, and on the rejection of former rhetoric (of fascism, military or one-party rule, legislative sovereignty, the cult of personality, and so on).

3. Constitutional Lawmaking

Constitutional judges make law through interpreting the constitution.[45] Constitutional lawmaking is typically registered on two levels, *simultaneously*. In resolving a specific policy dispute under the constitutional law, the CC will help to make that policy; at the same time, the CC will construct the constitutional law, clarifying, supplementing, or amending it outright. The polity cannot access the benefits of review without activating the court's prospective lawmaking capacity. In a system of constitutional trusteeship, the CC will usually have the last word on any dispute about meaning, thereby generating normative guidance for future lawmaking and judging. In this way, constitutional case law, as it unfolds, creates the conditions for the 'judicialization of policymaking' (the impact of a CC on the legislative process) and for the 'constitutionalization of the law' (the impact of a CC on the judiciary).

The present author has developed a theory of 'the judicialization of politics', a process conceptualized as a structured set of 'constitutional dialogues' between the CC and legislators.[46] The impact of CCs on legislative activity varies as a function of three factors: the existence of abstract review, the number of veto points in the policy process, and the accretion of a policy-relevant jurisprudence. The more centralized is the policy process—the greater the parliamentary majority, the more that majority is under the control of a unified executive, and the fewer veto points there are in legislative procedures—the more opponents of governmental initiatives will go to the CC to block important initiatives. In Western Europe, legislative politics have become highly 'judicialized', as the web of constitutional constraints facing legislators has grown and become denser, as registered in the jurisprudence of CCs. Sadurski has elaborated a related model to explain constitutional politics in Central and Eastern Europe.[47] The more effective the CC, the more law it will make. In Kelsenian terms, it is indisputable that CCs across Europe have developed into powerful 'positive legislators' when they protect rights.

With respect to impact on the judiciary, the development of constitutional review is gradually transforming the role and function of the law courts, at least in Europe. This complex process, called 'the constitutionalization of the legal order', has generated the following major outcomes: constitutional norms—especially rights provisions—become to constitute a source of law, capable of being invoked by litigators and applied by ordinary judges in private law case; the CC, through its jurisdiction over concrete review referrals and individual complaints, evolves into a kind of high court of appeal for the judiciary, involving itself in the latter's tasks of fact finding and rule application; and the techniques of constitutional decision-making become an important mode of advocacy and decision-making in the ordinary courts.[48]

[44] Tom Ginsburg, 'The Politics of Courts in Democratization' in James Heckman, Robert Nelson, and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (2010), 175.

[45] See further Chapter 32 on constitutional interpretation.

[46] Stone Sweet (n 3), chs 2–3.

[47] Sadurski (n 3), chs 3–4.

[48] Stone Sweet (n 24), ch 4.

Constitutionalization is partly the normative consequence of the horizontal effect (between private parties) of constitutional rights,[49] and in part the product of complex dialogues between constitutional judges and the judiciary.

Cross-national differences in the pace and scope of constitutionalization is closely tied to the existence of particular modes of review. Where concrete review and the individual constitutional complaint procedures coexist, extensive constitutionalization has proceeded rapidly, the paradigmatic examples being Germany and Spain. For a CC to decide on the merits of such claims, it must delve deeply into the workings of the judiciary, and it has the power to impose its own preferred outcome on any recalcitrant judge (if need be, by invalidating the judicial ruling as unconstitutional). The absence of the individual complaint reduces the capacity of the CC to control judicial outcomes. The paradigmatic case in Europe is Italy, where the CC must negotiate terms of engagement with the Supreme Court (Cassazione) on a continuous basis.[50]

VI. Conclusion: Legitimacy Discourses

Most CCs enjoy extensive formal legitimacy. Typically, the constitution itself designates the CC as the authoritative interpreter of the higher law, establishes enforceable rights, and lays out a blueprint for how the CC will interact with the other branches of government and the citizenry. The legitimacy resources that flow from explicit constitutional arrangements are enormously important. The contrast with the American situation—where the constitution does not expressly provide for judicial review, and rights protection, haunted by the 'counter-majoritarian difficulty', needs special justification—is palpable. Nonetheless, in every system in which a CC has been successful at enhancing the effectiveness of rights and review, legitimacy questions have been raised. In response, judges and scholars have been led to develop a range of defenses.[51]

This chapter has already noted variants of several dominant discourses. Today, for example, one still finds scholars invoking Kelsen's classic arguments, though these appear to be increasingly impotent. The more rights review is effective, the more the CC will function as a positive legislator, the more the legislative process will be judicialized, and the more the boundaries that once separated the respective jurisdictions of the CC and the ordinary courts will be blurred. The functional logics of delegation provide one type of response. We—the framers, the People, the epistemic community—delegated to the CC in order to realize certain higher purposes, such as protecting rights. The erosion of traditional separation of powers notions is the tax we pay for these benefits. Under this rubric, new questions (mixing the normative and the empirical) are posed. Do governments and parliaments legislate better, do the courts perform their functions better, by being placed under the supervision of CCs? The concept of effectiveness (discussed above) endogenizes a process-based source of legitimacy (the third necessary condition). Political legitimacy is created through use: CC's can only build effectiveness with the active complicity of political elites. After all, the same politicians that

[49] Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal* 341.

[50] Tania Groppi, 'Italy: The Italian Constitutional Court: Towards a "Multilevel System" of Constitutional Review' in Harding and Leyland (n 3), 125.

[51] The most comprehensive attempt to defend the legitimacy of CCs, as activist courts, is Perreres Comella (n 3). Also see Sadurski (n 3).

complain of the CC's influence on policymaking do not hesitate to activate it through abstract review referrals when in opposition. More generally, the political and social demand for rights review has steadily increased, and most effective CCs are now chronically overloaded.

In today's world, the ideology of rights has, arguably, achieved the status of a civic religion. A precept of the new constitutionalism is that regimes are not democratically legitimate if they do not constrain majority rule through rights and review. It should not shock that Scheppele[52] and others are able to claim that CCs can be more democratic than elected officials. At times, constitutional judges are more responsive to citizens' concerns than politicians, and they may cajole officials to be more democratic than they would otherwise be. Today, even after the consolidation of stable party systems, CCs typically score far higher than do executives and legislatures in opinion polls. The civic religion of rights also grounds a global discourse on the legitimacy of review. Many successful review courts do not conceive of constitutionalism in restricted national terms, but in terms of an emerging 'global constitutionalism' with human rights at its core. The CCs of Colombia, Hungary, Indonesia, Poland, Slovenia, and South Africa, for example, do not hesitate to cite international human rights treaties and the decisions of other CCs.

The ultimate measure of legitimacy for any CC may well be its success at helping the polity construct a new 'constitutional identity'[53]—a massive undertaking. Most CCs are expressly created as part of new orders established in opposition to prior, now thoroughly illegitimate, regimes. Party systems may be in disarray or flux; lawmaking institutions may be paralyzed by partisanship and overwhelmed with pent-up demand for reform; judiciaries may be tainted by association with past abuses; citizens may have unreasonable hopes for fundamental change, while the problems that beset the former regime persist. Yet, as Scheppele writes, a CC is often 'the primary mechanism' for organizing the transition away from the former 'regime of horror' to constitutional democracy.[54] Insofar as CCs are successful, the legitimacy of the constitution, as a basic framework for the exercise of public authority, will become indistinguishable from the regime's political legitimacy.

Bibliography

Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (2002)

Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asia* (2003)

Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study* (2009)

Hans Kelsen, 'La Garantie Juridictionnelle de la Constitution' (1928) 45 *Revue de Droit Public* 197

Heinz Klug, *Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction* (2000)

[52] Kim Lane Scheppele, 'Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)' in Wojciech Sadurski, Martin Krygier, and Adam Csarnota (eds), *Rethinking the Rule of Law in Post Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses* (2005), 25.

[53] On the concept of constitutional identity see Gary Jeffrey Jacobsohn, *Constitutional Identity* (2010); and Michel Rosenfeld, *The Identity of the Constitutional Subject* (2010).

[54] Kim Lane Scheppele, 'Constitutional Interpretation after Regimes of Horror' in Susanne Karstedt (ed), *Legal Institutions and Collective Memories* (2009), 233.

Christine Landfried, *Constitutional Review and Legislation: An International Comparison* (1989)

Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (2007)

Victor Perreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (2009)

Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2005)

Kim Lane Scheppele, 'Constitutional Interpretation after Regimes of Horror' in Susanne Karstedt (ed), *Legal Institutions and Collective Memories* (2009), 233ff

Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000)