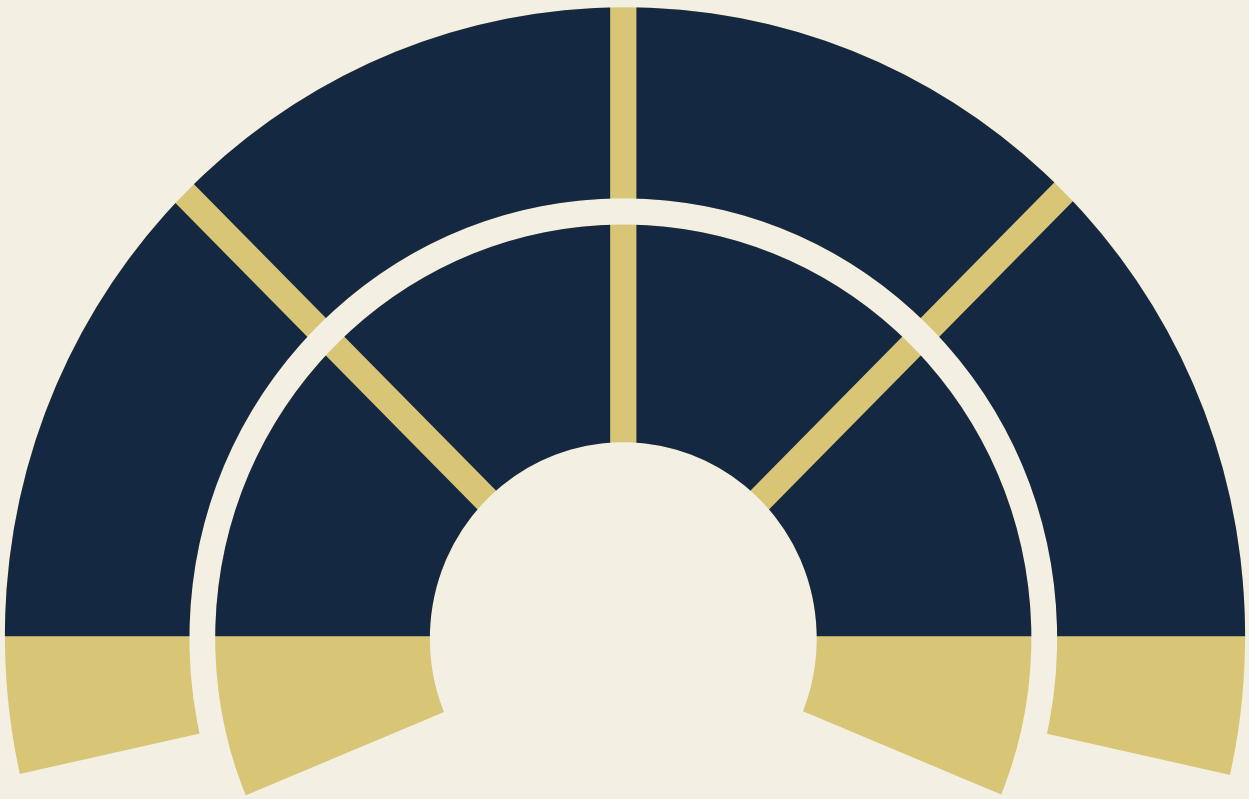
Parliament
Austria

Parliaments and Constitutional Courts

A Comparative Report through the Lens of Parliamentary Practice



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Forewords

Wolfgang Sobotka | President of the Austrian National Council

2020 was a very special year for Austria: We commemorated the 100th anniversary of the resolution of the Austrian Federal Constitution, 75th anniversary of the Austrian 2nd Republic and 25 years of Austrian EU membership. All three jubilees were of high significance for the appreciation and perception of constitutional law in Austria: The formation of the constitution amidst sharp political conflicts in 1920, the renewed understanding with a strong focus on democracy and the rule of law since 1945 and the opening-up of the constitution to a common European spirit since 1995. Also, we celebrated 100 years of the Austrian Constitutional Court and the Austrian model of centralized constitutional review that pioneered the development of modern constitutional courts worldwide.

The Austrian Federal Constitutional Law 1920 was devised and concluded in parliament. The summer of 1920 saw politicians and experts working closely together, considering international examples and experiences, seeking for compromise and finally reaching a decision. Among the experts was Hans Kelsen who would soon become one of the most important legal theorists of the 20th century and a pronounced fighter for democracy and parliamentarism.

In this context, it was most appropriate to discuss the understanding and application of constitutional law in parliaments and the relations between parliaments and constitutional courts. Both topics have gained great significance over the last years.

Questions of constitutionality are discussed more than ever before in parliaments and the role of courts as the shapers of constitutions has greatly increased. These developments affect parliaments in many ways but the ways in which they approach and discuss them are rarely perceived in public and academic debates.

The ECPRD Seminar held in November 2020 and this book edited by the Austrian Parliamentary Administration is thus a pioneering work. It tells of the great expertise gathered in parliaments and the various ways in which parliaments engage with constitutional matters. The chapters and case studies provide us with insight in best practices and experiences. I'm convinced that they will make an impact.

Katrin Ruhrmann | **Valerie Clamer** | ECPRD Co-Directors

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Director of the Directorate for Relations with National Parliaments at the European Parliament

Valerie Clamer
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The European Centre for Parliamentary Research and Documentation (ECPRD) is widely regarded as one of the most active networks of parliamentary experts and researchers. Every year, almost 250 requests are exchanged between the member parliaments, and seminars and meetings in various areas of interest encourage personal encounters and creation of knowledge. This all happens beside the daily duties and responsibilities of people serving parliamentary democracy in each of the member states. They leave little time to make the knowledge and expertise that are the backbone of ECPRD available for a broader audience.

All the more we welcome this volume that grew out of an ECPRD Seminar on Parliaments and Constitutional Courts organised by the Austrian Parliament in November 2020. It brings together the insights and experiences of parliamentary practitioners from all over Europe and makes an important contribution to one of the most salient topics in our democracies, the relations between parliaments and political-decision-making on the one hand, and constitutional court and the rationality of constitutional review on the other. This volume provides insights into how those relations are perceived in practice and how constitutional jurisprudence influences legislative procedures.

Over the last years, the dialogue between ECPRD and legal and political science

has continuously increased. ECPRD-correspondents and coordinators are regarded as a reliable and well-informed source of information. This volume shows, on what broad basis of knowledge and experience we can rely on. We therefore thank the Austrian Parliament and the President of the National Council Mr. Wolfgang Sobotka for taking the initiative to publish this book. And we congratulate the editorial team and all contributors for their perseverance, their enthusiasm, and the time they have invested in this publication. It is yet another great testimony to the knowledge and creativity found in the ECPRD!

Gerlinde Wagner | Head of the Legal, Legislative and Research Services of the Austrian Parliamentary Administration

2020 we celebrated the 100th anniversary of the Austrian Federal Constitution coming into force. The Constitution is internationally known for the 'invention' of a constitutional court and the Austrian model of a centralized constitutional review. Taking this anniversary as a starting point, the idea of organising an event especially dedicated to the relation between constitutional law and parliaments as well as parliaments and constitutional courts grew. A seminar within the ECPRD network offered a perfect set-up for bringing together esteemed experts and practitioners from the parliamentary context to exchange on how legislative proposals and enacted laws are reviewed whether they are in line with the constitution and whether there are procedures in place for settling parliamentary and political conflicts before courts. Having a panel with two distinguished justices expressing their arguments and views on the topic, added another valuable perspective and completed the seminar.

Originally planned as an on-site seminar in Vienna, plans had to be adapted due to COVID-19. Even though the participants didn't meet face-to-face it was a delight to see parliamentary practitioners from all over Europe, Israel and Canada gathering virtually to discuss these topics of mutual interest.

During the seminar, two elements made it possible to directly dive into the topics of the panels: First, a summary report containing a comprehensive questionnaire on constitutional law, parliaments and constitutional courts (ECPRD request # 4503) was provided to all participants and second, all panel presentations were pre-recorded and accessible in advance for all participants. Swiftly opening the virtual floor for all participants further enabled vivid discussions. The exchange within the seminar proved to be highly interesting regarding the implications deriving not just from different political systems but as well from how the rules are implemented and executed in practice.

I am more than happy to see the findings of the seminar have resulted in this volume – drawing an insightful picture of the manifold relations between parliaments and constitutional courts complemented with practitioners' views, especially from parliamentary administrations. I want to thank all authors who have contributed their country case studies as well as the two justices who gave their consent to include the conversation between them as a special chapter into this volume.

Finally, I would like to thank the editorial board within the Legal, Legislative and Research Services, namely Franziska Bereuter, Christoph Konrath and Marlies Meyer, as well as Sophia Witz, University Assistant at the University of Vienna, for compiling the ECPRD questionnaire and the consequent summary report, for organising the seminar as well as taking care of this publication.

Parliaments, Constitutions and Constitutional Courts – an Introduction

Franziska Bereuter – Christoph Konrath – Marlies Meyer

Today, constitutional courts and judicial review are core aspects of the legal systems of many European states. But still, their function and role are contested in many states throughout Europe. Although it is now generally accepted that constitutions have normative force, the extent to which constitutional adjudication structures the work of governments, parliaments and administrators is disputed. Interestingly, most such debates consider the practice of constitutional courts in meticulous detail but refer only generally to other institutions. More often than not, the latter will be subsumed under broad references to democracy.

This volume aims to widen the perspective and to consider constitutional courts and the constitutional jurisdiction exercised by other courts along with parliamentary practices of constitutional scrutiny during legislative procedures and after the enactment of laws. What follows is based on how the role of parliaments vis-à-vis constitutional law and adjudication (in the widest sense) is conceived and defined in parliamentary practice. This volume showcases examples of practice in a multitude of parliaments, and it is written in the context of questions that arise in practice.

In this volume, we follow an approach that can be described as institutional. Institutions can be conceived as the interplay of three components: (1) formal rules, (2) actual practices, and (3) narratives that reveal an institution's purpose (Lowndes & Roberts, 2013). A legal system in its entirety and its individual elements can both be conceptualised as institutions. The system and its components interact in multiple ways. They reinforce, complement, or weaken one another. Hence, in taking an institutional perspective on a constitution we encounter not just a sum of higher-

ranking rules, but also the practice of constitutional bodies and narratives about their development and their specific roles (Jakab, 2020). The same applies to parliaments, governments, etc..

Most legal academics and practitioners look at constitutions from the perspective of courts and court proceedings (Wintgens, 2012). They focus on formal legal rules and their interpretation by justices and fellow academics, they emphasise the value of the rule of law and, more often than not, they tell a story of rational discourse. Such an approach seems logical, as courts and academics use the same grammar, so to speak. In striking contrast, legal academics characterise parliamentary activities as a jumble of arguments, attitudes and approaches that conflate the legal and political spheres and seem to combine anything except principled and rational decision-making (cf. Waldron, 1999).

Such views do not deny that academic and judicial discourse is concerned with the democratic legitimation of constitutional review – even more so as many of them are concerned with the judicialisation of politics that accompanies the increasing role of constitutional courts. Academics ask what it means for democratic polities that a substantial portion of policy decisions is governed by the influence of constitutional judges and that constitutional courts thoroughly discuss and decide highly political matters, e.g. end-of-life questions. Some conclude that constitutional courts do in fact fulfil what was once expected from parliaments (cf. Sweet, 2000).

We encounter all aspects of institutions in this brief sketch, and it may remind many readers of their everyday experience of politics and of the interplay between governments and parliaments. But it does not reveal much about how parliaments perceive themselves in the webs of inter-institutional relations. There is not much on that topic to be found on websites or in brochures in which parliaments describe themselves, nor in parliamentary debates or academic literature. We will often find utterances of mutual appreciation of parliaments and constitutional courts. However, we do not know much about the practice of parliaments and their administrators. How do they view their relations with constitutional courts? How closely

do they follow a court's jurisprudence? How do they inform parliamentarians and how do they support them when they decide to address the court?

Starting points

The idea for this volume developed in the context of the centenary of the Austrian Federal Constitution 2020. This constitution is internationally known for its introduction of the Kelsenian, or centralised, model of constitutional review (Öhlinger, 2003; Wiederin, 2021).

In the Kelsenian model, the power of review is centralised in a special constitutional court. In contrast, the US approach is characterised by the fact that the power of review can be exercised by all courts. It was established over a century earlier, in 1803, and adopted by some Nordic countries in the following decades (albeit with a limited practice). However, most European scholars and politicians remained sceptical. The academic debates continued in the late Habsburg Empire with a type of specialised supreme court imagined as an arbitrator in conflicts between federal entities. This idea was taken up in the negotiations on a constitution for the Republic of Austria 1919–20, which were overshadowed by a conflict between centralist and federalist standpoints. It was decided that a constitutional court should be established to resolve disputes between the Federation and the Länder. Creating a new, centralised court meant that its competences could be clearly delineated and that the judiciary would not be overpowered relative to the legislation as such and of individual justices in particular.

But the new Austrian Constitutional Court was not limited to resolving federal conflicts. Its competencies included judicial review and the power of ex-officio review – the initiation of review proceedings by the Constitutional Court itself when it has doubts as to the constitutionality of a statutory provision that it would have to apply in other proceedings. In the years to come, Hans Kelsen developed this idea further.

From a theoretical point of view, Kelsen was concerned primarily with the problem of legal validity and with reconciling the rule of law and democratic law-making. His

specific way of understanding a legal system and thus his justification for centralised constitutional review is based on the idea that any given legal act is valid only if it is enabled by, and does not conflict with, a formally superior legal rule. In addition, all legal rules must be enforced by some authority. In this way, a legal system is a closed, hierarchically ordered, system of norms. Every legal rule is lawful by virtue of another, higher legal rule. Therefore, the enactment of laws is nothing but the application of constitutional rules, and the legislative or norm-creating activities of parliaments must be subject to the control of (constitutional) legality.

The Kelsenian model can be presented in a very technical manner. When it was, it became acceptable for politics and was almost never questioned in Austria. However, the Kelsenian model has political implications as well, and it does, in fact, establish a kind of third parliamentary chamber, a 'negative legislator', as Kelsen himself stated. Also, such a model can establish clear limits for democratic decision-making and support rational policy making. Therefore, Kelsen emphasised that special attention should be given to the formulation of constitutional texts in order to limit the margins of interpretation for constitutional courts, too.

The Kelsenian model found international recognition only after the catastrophe of World War II. Thenceforth, the establishment of a constitutional court was seen as a means to safeguard the rule of law, to stabilise democratic governments and to secure human rights. The model was developed in many ways, and against Hans Kelsen's intentions, it gained particular ground by the inclusion of fundamental rights and arguments of principle. Ever since 1945 a variety of models have been developed throughout Europe. They have highly influenced constitutional thinking, constitutional politics and legislation even in countries with no constitutional court or established system of constitutional review. In Europe today, it is generally accepted that constitutional arguments must be considered in all stages of the policy cycle and in legislative procedures in particular. Thus, the viewpoint of constitutional review informs law-making to a high degree. As a result, constitutional arguments and constitutional courts can lead to a judicialisation of political processes, while at the same time courts and their members can become politicised.

This history explains the particular focus on the Constitutional Court in the centenary celebrations of the Austrian Federal Constitution. Since around 2015, the Constitutional Court's role vis-à-vis Parliament received wider public attention in Austria and questions about the experiences of other European countries were raised. As there was little information available that explained and considered those matters from a parliamentary perspective, the idea of organising an exchange of practitioners gained ground.

The European Centre of Parliamentary Research and Documentation (ECPRD) provided the perfect environment for that endeavour. The ECPRD is a network of parliamentary research services and libraries that enables and fosters exchange through surveys and seminars. The problems outlined in this chapter provided the basis for a survey of ECPRD members, which in turn served as the reference point for the organisation of a two-day seminar that discussed the understanding and importance of constitutional law in the legislative process and in conflicts within parliaments and between parliaments and other branches of government. Also, it considered the dialogue between parliaments and courts, and that between courts. The seminar report and the seminar presentations were taken as a starting ground for an exchange between organisers and participants that has finally led to this publication.

Contributions

This volume is made up of five parts reflecting the variety and richness of relationships between parliaments and constitutional jurisdiction. All chapters (except Chapter 5) open with an overview chapter introducing the key aspects and outlining the formal rules and actors in the surveyed countries. The comparison of the countries is based on the before-mentioned ECPRD-survey as well as the written contributions of ECPRD correspondents and their colleagues in this book. The replies to the ECPRD-questionnaire were reviewed and cross-checked with constitutional texts and reference works of comparative constitutional law. Given the practical approach of this volume, references were kept to a minimum. In parts 2 to 4, the overview chapters are complemented by case studies written by constitutional experts of parliamentary administrations. The case studies present the institutional framework and prac-

tice of a specific parliament. They introduce exemplary cases and provide insights into the self-understanding and self-definition of parliaments and their administrations. Some case studies are based on seminar presentations; the rest are contributions to the seminar discussions. The final part, Chapter 5, turns to practitioners in constitutional courts and documents a dialogue between two justices on their self-understanding and the relationship between constitutional courts and parliaments. With these contributions, the present volume considers all three key elements of institutions, namely formal rules, practice and narrative or purpose-formulation.

Chapter 1: Constitutional Law and Constitutional Courts

The first chapter is a general introduction to constitutional law and constitutional jurisdiction in Europe and lays the ground for the chapters and case studies that follow. It was written by Sophia Witz. The overview starts with constitutional documents and constitutional amendments. Both are of crucial importance for how a constitution is perceived in political processes and how a government, a political majority or a parliament can and might react to constitutional court rulings. While some countries, like the Netherlands, have high formal thresholds for constitutional amendments, other countries, like Germany, have conferred a distinctive status on the constitution that has led to a restrained attitude towards constitutional amendments. In contrast, countries like Austria treat the constitution almost like any other law and show a high frequency of amendments. Here, changes to the constitution have been, at least for a certain period of time, a means to react to constitutional court rulings, too.

The second set of parameters considered in this chapter are the varieties of constitutional jurisdiction, the composition of constitutional and supreme courts, and the style of judgments. Even though the Kelsenian court is viewed as the exemplary model of European constitutional jurisprudence, we find a variety of other models in Europe. As well, within the group of courts that can be described as Kelsenian there are huge institutional differences in the way justices are appointed, how the courts are organised internally, and how judgments are written and presented. This is of crucial importance for the way court rulings will structure further political debates. For example, the German Federal Constitutional Court (‘Bundesverfassungsgericht’)

issues detailed and scholarly informed judgments that not only contain recommendations for legislation and the proper practice of other state organs but also assume a particular role in the dialogue with academy and other courts. Also, dissenting opinions can point to alternative views. On the other hand, short and declaratory judgments like those of the Austrian or the Italian Constitutional Court follow conventions of civil and administrative courts. On the one hand, they can leave more room for political reactions, but on the other hand they might be strategically used as 'final words on the matter' in political debates.

Chapter 2: Parliamentary Practice and Constitutional Discourse

The second chapter deals with the constitutional scrutiny of legislative proposals and laws before their publication and entry into force. Regarding legislative proposals, the focus lies on the proceedings within parliaments. Nevertheless, we consider two exemplary cases of constitutional scrutiny in the pre-parliamentary stage as they form important reference points in the practice of the Dutch and the Swedish parliament. First, Sophia Witz gives an overview of the situation in all countries studied regarding issues such as the following: Does a legislative draft contain information on its constitutionality? Is it regularly scrutinised by parliamentary staff, by a political committee or by a body outside parliament? Who can read the results and what are the consequences for the parliamentary proceedings in the event that a provision is found to be unconstitutional? How many countries provide for judicial review of a law adopted by parliament but not published in the official law gazette? Who can initiate such a review? Besides the Head of State, can Members of Parliament also do it?

The case studies start with Louis Middelkoop from the Netherlands and Kalina Lindahl from Sweden, who present the elaborate pre-parliamentary phase in their countries. In the Netherlands, the Council of State, an independent, non-judicial body plays an important role, as does the Council of Legislation, which is also a non-judicial body in the formal sense, in Sweden. The latter can also be involved to pronounce on the legal validity of legislative proposals based on a majority decision in the responsible committee during parliamentary proceedings.

In addition, Cristina Ferreira, José Filipe Sousa and Nélia Monte Cid from Portugal and Krisztina Csillag from the Slovak Republic describe in detail how parliamentary experts scrutinise legislative proposals after parliaments have received them. The Portuguese study reveals how challenging it could be for parliamentary employees to give an opinion on an item of business which may be welcomed by some of the members and met with scepticism by others. Tanja Nurmi shows that the Constitutional Law Committee (CLC), which is in charge of constitutional scrutiny of bills in Finland, generally hears independent key experts on constitutional law and is supported by parliamentary secretaries specialised in the Constitution. That a political body scrutinises legislative drafts in Finland is only true regarding the formal responsibility to decide. In practice, legal experts are given a high degree of influence in this decision-making process, especially as the CLC aims at decisions by consensus. The Norwegian Constitution is one of the rare examples which provide for a constitutional assessment of a bill by a Supreme Court on the request of Parliament. As Ingunn Skille Jansen mentions in her comprehensive study on the Norwegian system, this constitutional provision is seldom used. Alexandre Anglade from France gives an impression of the increasing role of the Council of State, a court that is responsible to decide on the constitutionality of a law adopted by parliament (but not yet published), as well as on a law in force. An ex ante review by the Council of State is mandatory for adopted organic laws and the regulations of the Houses of Parliament. Ordinary legislation may be brought before the Court prior to promulgation by the President of the Republic, the Prime Minister, the Presidents of the Houses of Parliament, or at least 60 Members of Parliament. The latter causes ex ante reviews most frequently, as Anglade shows.

Chapter 3: Parliaments and Constitutional Review of Laws

The third chapter mainly deals with the constitutional review of laws (published and in force). At the heart of Sophia Witz's country overview is the centralised constitutional review by constitutional or supreme courts. Which state authorities, courts and individuals can initiate a review of a law? Is there broad or narrow access to constitutional review? How often do members of parliament use their right to contest a law before the Court? Does the review of a law include the question whether

the parliamentary proceedings were in line with the constitution and the Rules of Procedure (RoP)? Are parliaments asked to give their opinion on a pending case of constitutional review? How often do parliaments have to face the fact that one of their laws (or individual provisions) is declared unconstitutional and is – as in some countries – even repealed by the court?

The country studies start with Jindřiška Syllová from the Czech Republic, who shows how many questions can be raised by a bi-cameral parliament's right to submit an opinion on the law in question, and how the Constitutional Court reacted to opinions which expressed the political views of the chambers' chairpersons. The country studies by Christof Rattinger and Albert Goris tell us how far the Constitutional Courts in Austria and in Belgium go when reviewing the parliamentary procedure applied to produce the contested law. In Austria, only 'qualified' violations of the RoP matter, i.e. only these can lead to the repeal of the law. In Belgium, the Court only ensures that the mandatory forms of cooperation between the Federation, the (language) Communities and the Regions, as well as between Belgium and the European Union, are complied with. A law can be repealed because a duty to consult or to notify was not obeyed. In Italy, justices who have doubts on the constitutionality of a law they have to apply have to ask the Constitutional Court for a decision on the applicability of this law. The Italian Constitutional Court may also be asked for arbitration 'among the powers of the State'. Cristina de Cesare reports on recent developments regarding parliamentarians' access to the Constitutional Court, which they were given to defend their constitutional prerogatives in the law-making procedure. A law that was made in violation of such prerogatives may be unconstitutional. Cristina Ferreira, José Filipe Sousa and Nélia Monte Cid from Portugal focus on the effects of the Constitutional Court's decisions when reviewing laws (before and after promulgation/publication). Among other things, they give insights into how parliamentarians' right to challenge a law before the Constitutional Court was used in the past. The third chapter closes with a contribution from Greece describing the functioning of a diffuse system of constitutional review. Every court – even a court of first instance – is bound not to apply a statute the content of which is contrary to the Constitution. The court's decision is binding only for the pending case. According to Dina Gavatha, such decisions

on the constitutionality of a law by courts of first and second instance usually land, after a considerable period of time, before the three highest courts of Greece. If two of these courts disagree on the constitutionality of a law, the Special Highest Court (composed of justices of all three highest courts) has to settle the conflict. The statute declared unconstitutional becomes generally unenforceable, and the judgment is published in the Greek Official Journal. This again shows how much the dividing lines between different systems of judicial review of the constitutionality of laws can become blurred and how useful it is that systems are portrayed by practitioners from the respective countries.

Chapter 4: Parliamentary and Political Conflicts before the Court

The fourth chapter considers a particular role of some constitutional or supreme courts, namely the arbitration of conflicts within parliaments or between parliaments and other branches of government. Such competences are very different from constitutional review, and many will claim that they are core political matters which should be kept from any court. As Sophia Witz shows in her introduction, only a handful of countries have explicitly vested their constitutional or supreme courts with such powers. While the German Federal Constitutional Court has a decades-long practice of deciding 'Organstreit' proceedings ('Organstreitverfahren'), only in the last 25 years have such procedures emerged in further countries: including Israel, Ireland and most recently Austria. However, there seems to be a growing interest among parliaments in resolving political and constitutional conflicts in an impartial manner and averting deadlock in the context of increasing political fragmentation. The country contributions of this chapter look at four models of conflict resolution.

The first case study by Christina Ziegenhorn introduces the German 'Organstreit' or constitutional conflict and its firmly established procedures. She explains how 'Organstreit' decisions have shaped the legal framework of political decision-making and have been crucial to the system of checks and balances in Germany. Today, those disputes are regarded as safeguards of the rule of law and the protection of parliamentary minorities. While the German experience can be explained by the

troubled history of pre-war Germany, Israel is an example of a constitutional framework that is constantly evolving and transforming. Efrat Hakak looks at conflicts between the Knesset and the Israeli Government since the 1990s and shows how the Israeli Supreme Court became an arbitrator between them. In the third case study, Mellissa English and Ramona Quinn present yet another example. The Oireachtas, the Irish Parliament, is proud of its status of parliamentary privilege. For decades, it was deeply held that conflicts between parliament and other state organs or individuals could only be solved by political means. But the infringement of individual rights with severe consequences for a witness before a parliamentary committee led the Irish Supreme Court to a re-interpretation of the strongly rooted concept of parliamentary privilege. Finally, Christof Rattinger shows how in recent years the Austrian Parliament came to establish carefully delineated conflict resolution procedures that are – in stark contrast to the other examples – strictly limited to specific constellations of conflict in the context of parliamentary committees of inquiry.

Chapter 5: Constitutional Courts and Parliaments – a Conversation

The fifth chapter replays a highlight from the end of the ECPRD Seminar, the conversation between two justices from two powerful constitutional courts on the relationship between parliaments and constitutional courts. The dialogue between Christoph Grabenwarter, President of the Austrian Constitutional Court, and Susanne Baer, Justice of the 1st Senate of the German Federal Constitutional Court, moderated by Christoph Konrath, was highly inspiring for all participants, providing a great deal of information on the German and Austrian systems of constitutional review.

At the beginning, Christoph Grabenwarter reminded everyone of other functions of constitutional courts that clearly strengthen the role of parliaments: judicial control of the executive to ensure that all measures taken are based on law, and control of elections to parliaments, which guarantees their legitimacy. Concerning constitutional review of laws, 'parliaments and constitutional courts cover different roles and have different functions, yet they pursue the same goal: democracy-based constitutional rights', as Susanne Baer put it. In parliaments, she went on to point out, the majority makes the decision but constitutional courts check whether the law is in line with the

constitution and fundamental rights, and whether the perspective of minorities and all individuals has been taken into account, maybe by inviting all relevant groups to express their opinion. 'In our Court', Christoph Grabenwarter said, 'we have sometimes found that there had been a lack of political debate in Parliament … It was only before the Constitutional Court that arguments were heard properly for the first time.' How should such an institution with a 'backup function' for an open, democratic process be composed? The two justices agreed that legal provisions as well as political culture should enhance 'plurality or diversity on the bench'. Christoph Grabenwarter underlined the importance of being strict about the justices' qualifications because: 'Although a constitutional court deals with political issues, it always deals with those issues by means of the law and the constitution'. We hope this extract serves as an invitation to read the whole dialogue between the justices.

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I Constitutional Law and Constitutional Courts

1. Overview

Sophia Witz

In order to examine the relationship between a parliament and a constitutional court, one must first study a country's constitution, for a constitution is the backbone of a state. Equally important are the constitutional courts, because even the most elaborate constitution is of little significance if its observance is not ensured.

1.1 Introduction

In this first chapter, general information on constitutional law and constitutional courts will be presented. This lays the cornerstone for understanding the constitutional background of a country, as well as the judicial system as it relates to constitutional matters. This chapter will serve as a backdrop to the more specialised chapters and to the case studies. Constitutional comparison is particularly interesting because states approach constitutional law and constitutional jurisdiction in various ways. Nevertheless, there is a mutual influence in terms of constitutional culture, which leads to some unified forms and to the development of models that are then followed by a number of states, especially with regard to the relationship of constitutional courts and parliaments and politics in Europe.

First, we will introduce general aspects of constitutional law that will form the basis for the comparison of constitutional systems. In doing so, we must of course first address the form of the constitutional text itself, and examine the questions of whether there is a written or unwritten constitution in the respective countries and whether the constitutional laws are found in a single document or in several or even countless documents. In order to understand each constitution, an understanding of the historical context in which it came into being is needed. Therefore,

we will also examine the age of the original version of the constitution that is still in force today.

Since constitutions are not set in stone, we will then examine the process of constitutional amendment, which is not only extremely significant for democratic politics but also reflects the constitutional system as a whole in each country. Given that constitutional law is usually of higher rank than other laws and of immense importance for the functioning of a state, its creation and amendment is subject to particularly stringent requirements (e.g. higher quotas, referenda), which are typically laid down in the constitution itself. We will explore the path of constitutional amendment from the initiation of the process to the question of what happens when an amendment is rejected. At the end of this section we will look at the frequency of constitutional amendment, as this reveals how the constitution is being handled in practice.

In the second part of this chapter, we focus on the courts with constitutional jurisdiction, as they are responsible for upholding and enforcing the constitution. First of all, a fundamental distinction must be made as to whether there is a specialised constitutional court responsible for this (centralised/concentrated system) or whether constitutional jurisdiction is exercised by several courts (diffuse system); some countries combine features of the diffuse and the centralised systems. The advantages and disadvantages of the choice of system will be discussed, as will the tasks and the time of establishment of specific courts in the countries themselves.

We will then look in more detail at the decisions of courts with constitutional jurisdiction. Here we are interested in what information is published along with the judgment (e.g. voting ratios) and whether dissenting/concurring opinions may be published. We will also examine whether the courts issue recommendations to the legislature, as such recommendations have the potential to interfere with the democratic process. Finally, we will study the effects of a judgment by a court with constitutional jurisdiction that repeals a law or declares it unconstitutional. Of particular relevance is when a judgment comes into effect and whether that can also be delayed (ratione temporis).

The focus in the last part of this introductory chapter is on the justices of courts with constitutional jurisdiction. We look at the number of justices and analyse whether these justices always decide a case together or split into senates or panels. Subsequently, we examine the procedure for appointments to courts with constitutional jurisdiction, since the appointment of justices to the constitutional or supreme court is of paramount importance not only for the functioning of the court itself, but also for the state and the rule of law. Related to this is the question of the tenure for which constitutional justices are appointed. The issue, then, is whether appointments to the constitutional courts (or courts with similar functions) are for life or are limited to a certain age or to a certain term of office (or a mixture of these). The final point on this topic will be the incompatibility provisions that apply to justices of constitutional or supreme courts, regarding additional professional practice as well as participation in political parties.

1.2 General Aspects of Constitutional Law

1.2.1 Constitutional Documents

1.2.1.1 Form of the Constitution

A priority in a discussion of constitutional law is to define the term 'constitution', since the term is ambiguous and there are several interpretations possible. Constitutional law can be viewed from a formal and a substantive perspective. In a substantive meaning, a constitution expresses the basic legal order of a state and contains norms that are, because of their importance for the state, typically the matter of a constitution. From a substantive perspective, only the content of the norm is decisive. In the context of this publication the formal meaning of the term 'constitution' is significant. In the formal sense, a constitution is to be understood as the body of legal norms that were created in the specific form required for the creation of constitutional law. Usually, these norms are laid down in a specific constitutional document or designated as constitutional law.

A constitution can assume several different forms. Distinctions can be made between written and unwritten constitutions as well as with respect to the number

of constitutional documents. Written constitutions in Europe date back as early as 1791 in France and Poland. Nowadays all European states, with the exception of the United Kingdom, have a **written constitutional document** (some have additional constitutional laws and provisions separate from the main constitutional document). The UK does not have a codified constitution. The highest form of law in the UK is an Act of Parliament; while many Acts of Parliament embody constitutional rules or principles, they are not consolidated into one single text or canon. Some UK constitutional rules are not even embodied in legislation at all and are not legal rules, but constitutional conventions.

The written constitutional law of a state needs not be restricted to a single constitutional document, although having a single document entails some major advantages in overview and coherency. Therefore, the constitutions of most European countries are each laid down in **one single document** (Albania, Belgium, Bulgaria, Cyprus, Finland, Georgia, Germany, Hungary, Ireland, Moldova, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Spain, Switzerland and Turkey). Germany, amongst others, takes an additional step in ensuring the model of a single constitutional document by embedding an incorporation rule (‘Inkorporationsgebot‘) in the constitution, which stipulates that the text of the constitution can only be amended in the constitutional document itself.

The following map on page 28 "Form of the Constitution" shows the distribution of states whose constitutional law is found in a single document, in several documents or in countless documents.

The countries whose constitutional law is divided into **several documents** (Austria, Croatia, Czech Republic, Estonia, France, Greece, Israel, Italy, Latvia, Lithuania, Slovak Republic, Slovenia and Sweden) may have a handful or over one hundred of additional constitutional documents or provisions. These additional documents may stand independently beside the main constitution, but in some countries the main constitutional document may also declare certain laws to be of constitutional character or allow the creation of additional constitutional acts outside of the

Form of the Constitution

Different forms of the constitution: states having constitutional law in a single document, in several documents or in countless documents. Source: ECPRD Request # 4503 except Croatia: Koprić in Karpen/Xanthaki p 92; Greece: Koutnatzis p 185 (other opinion Küpper p 216); Italy: Wieser p 112; Slovenia: Bohinc et al p 82. Data preparation: Sophia Witz.

Country	Single document	Several documents	Countless documents
Albania	X		
Austria			X
Belgium	X		
Bulgaria	X		
Croatia		X	
Cyprus	X		
Czech Republic		X	
Estonia		X	
Finland	X		
France		X	
Georgia	X		
Germany	X		
Greece		X	
Hungary	X		
Ireland	X		
Israel		X	
Italy		X	
Latvia		X	
Lithuania		X	
Moldova	X		
Netherlands	X		
North Macedonia	X		
Norway	X		
Poland	X		
Portugal	X		
Romania	X		
Slovak Republic		X	
Slovenia		X	
Spain	X		
Sweden		X	
Switzerland	X		
Turkey	X		
United Kingdom	No codified constitution		

main document. Besides the main text of the constitution, there are often only a few additional constitutional acts, concerned with particular issues. In the Czech Republic, for example, the Constitution contains a main text and some additional acts (e.g. Charter of Fundamental Rights and Freedoms, Constitutional Act on the Security of the Czech Republic). The Swedish Constitution consists of four fundamental laws. Israel's constitution has been created piecemeal and can therefore be found in several Basic Laws. Austrian constitutional law includes not only several constitutional acts (with one central constitutional document) but also over one hundred constitutional provisions contained in ordinary law. For the constitutional character of a law or provision to be externally recognisable it must be explicitly designated as a constitutional law or provision; this designation has a constitutive effect.

Most of the states examined follow the model of a written constitution contained in one single document. If the constitution is laid down in several documents, there are rarely more than 10 additional constitutional acts. Austria deviates from this generalisation significantly by allowing Parliament to adopt individual provisions in an ordinary act without constitutional rank as constitutional provisions.

1.2.1.2 Historical Background of the Constitution

Constitutions in Europe originate in various historical eras and often have a complex genesis. The process of drafting a constitution differs, depending on whether the constitution is largely based on a previous version or an entirely new document is being constructed (e.g. after a new country becomes independent). The constitution can be the outcome of a years-long process and is oftentimes influenced by the surrounding constitutional environment.

The age of a constitution – more precisely, the age of the original version of the constitution that is still in force today – is significant because a constitution is a landmark and a reflection of the time when it was drafted. Moreover, the age of the original version of the constitution that is still in force today is also relevant to its interpretation and application by constitutional courts as well as their role in

the constitutional and political system. Therefore, a constitutional document must always be read against its historical background, and this background has to be kept in mind especially when comparing constitutions and constitutional courts.

Some constitutions, like the British one, grew over centuries, whereas others are only a few decades old. There are also more recent constitutions, such as the Swedish Constitution from 1975 or the French Constitution from 1958, that build on previous versions of the respective constitution. In Sweden's case, the constitutional process goes back to 1634; the French Constitution dates back to the second half of the 18th century.

One of the oldest constitutions still in force – the second oldest written constitution in the world still in existence – is the Norwegian Constitution, which entered into force in 1814. The Constitution of the Netherlands dates from 1814 as well, but in the meantime many adjustments and revisions have been made. The Belgian Constitution originated in 1831, after Belgium's separation from the Netherlands. Nearly nine decades later, the Austro-Hungarian monarchy decayed, and two years after that, in 1920, the Austrian Constitution entered into force. The Constitution of Latvia is the oldest Eastern European constitution still in force today; it dates back to 1922. Ireland's constitution has been in operation since 1937.

The end of the Second World War and the destruction of the fascist regimes provided the impetus for Germany and Italy to create a new constitution. The new Italian Constitution was adopted in 1947 and entered into force in 1948, in 1949 the German Grundgesetz (Basic Law) followed. Greece, Portugal and Spain also established new constitutions after they broke with authoritarian regimes. The Greek Constitution entered into force in 1975, the Portuguese one in 1976 and the Spanish Constitution that is still in force today goes back to 1978.

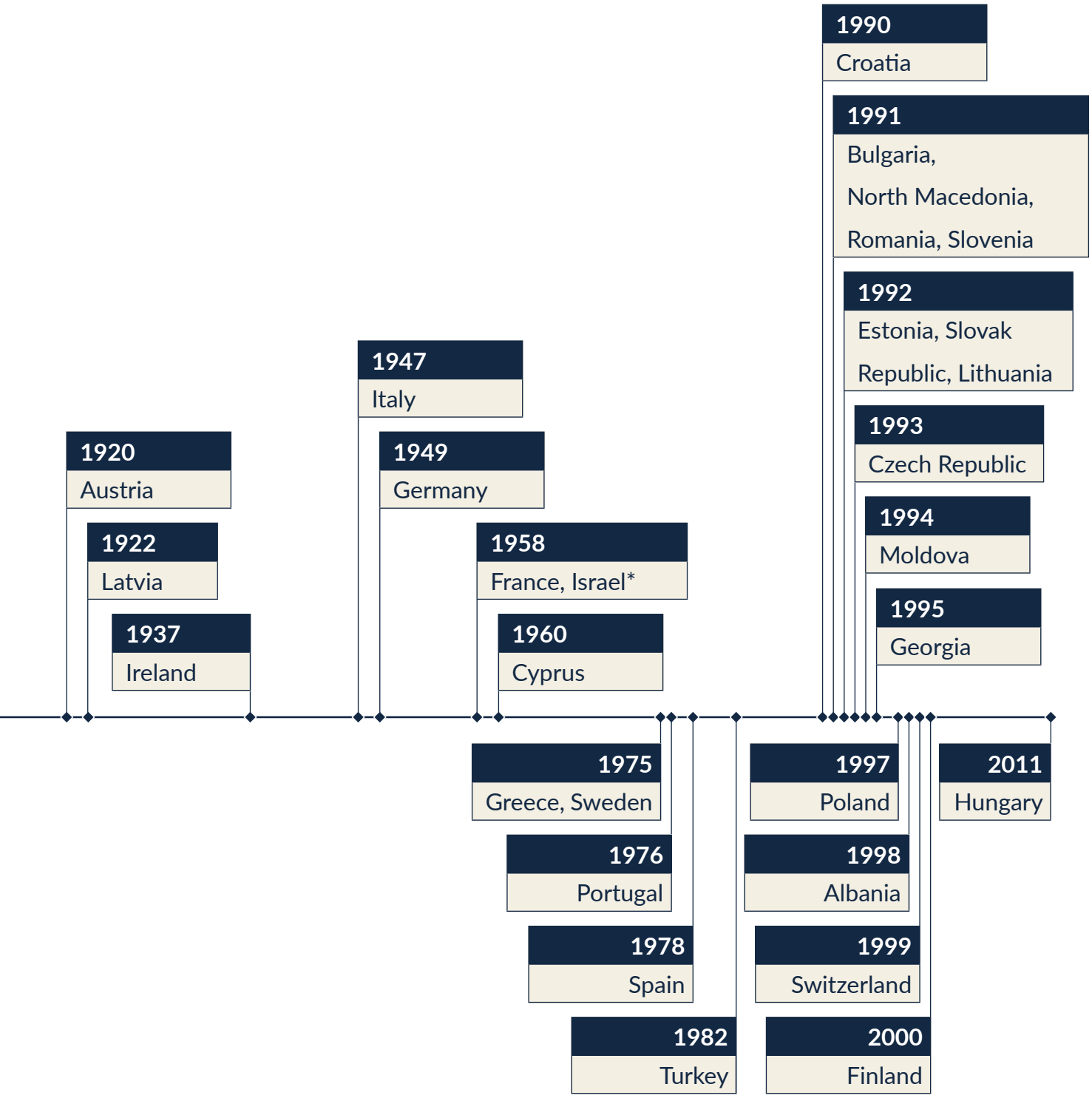
The Constitution of Cyprus dates back to 1960 with the establishment of the Republic of Cyprus and is therefore the first and so far only constitution of the state. In Israel, the Constituent Assembly was elected in Israel's first general elec-

Year of Origin of the Constitutions that are still in force today

States and the year of origin of the constitution that is still in force today.
Source: ECPRD Request # 4503. Data preparation: Sophia Witz.

United Kingdom - No codified constitution

*first basic law


1920
Austria
1922
Latvia
1937
Ireland
1947
Italy
1949
Germany
1958
France, Israel*
1960
Cyprus
1975
Greece, Sweden
1976
Portugal
1978
Spain
1982
Turkey
1990
Croatia
1991
Bulgaria,
North Macedonia,
Romania, Slovenia
1992
Estonia, Slovak
Republic, Lithuania
1993
Czech Republic
1994
Moldova
1995
Georgia
1997
Poland
1998
Albania
1999
Switzerland
2000
Finland
2011
Hungary

tions in 1949. The constitution, however, was never completed. In a compromise, the idea was introduced of a constitution 'by chapters' instead of one formal written document. The first of these chapters (each of which constitutes a separate Basic Law) was enacted in 1958 and the most recent one in 2018.[1] Turkey's constitution dates back to 1982 and replaced the earlier constitution of 1961.

Another historical event, the breakdown of the socialist regimes in Eastern Europe and the emergence of new states, led to the establishment of democratic constitutions in those states. The Croatian Constitution, one of the first of these new constitutions, was established in 1990. Bulgaria, Romania, North Macedonia and Slovenia followed in 1991. One year later, Lithuania, Estonia and the Slovak Republic issued their constitutions. In 1993 the Constitution of the Czech Republic entered into force, in 1994 the Moldovan Constitution followed and in 1995 Georgia's constitution entered into force. Poland and Albania mark the end of this development. The Polish Constitution was established in 1997 and the Albanian Constitution dates back to 1998.

The foundation of the Swiss Constitution came in the year 1848, with the constitution that founded the Swiss State. The constitution that is still in force today, however, is much more current: it was adopted in 1999 and entered into force in the year 2000. Similarly, Finland has a constitution that dates back to 1919, but the version that is in force today was also established in 2000. The youngest of the analysed constitutions belongs to Hungary. It entered into force in 2011.

1.2.2 Constitutional Amendments

1.2.2.1 Requirements for Constitutional Amendments

Since constitutional law, containing as it does the basic rules of the state's organisation, is generally of superior rank to and more important for the state than other

1 | For further details see the Israeli Case Study on p. 218 et seq.

laws, its creation and amendment are subject to special **requirements** usually stipulated in the constitution itself. These requirements can take on various shapes and forms and differ from country to country, with the goals of stability and the protection of minorities. The creation or amendment of a constitutional law or provision starts with the initiation of the amendment procedure; countries stipulate who is competent to initiate such a change. Next, certain quotas have to be met as to the number of members of parliament who must be present and how many of them must vote in favour of the amendment. Some countries have the additional requirement of a referendum if requested by a certain number of house members, and in others a constitutional amendment can never be carried out without a referendum. In federally organised countries, the upholding of the distribution of competencies requires additional measures to ensure that this balance is preserved. In some states, amending the constitution requires two parliamentary votes with a break between them, or a new election and the approval of the new parliament. If a constitutional amendment is rejected, there are several possible ways to proceed. In many cases, a rejection has no impact, but there are states where a rejection leads to a lock on that issue for a certain time period.

The requirements for the **initiation** of the amendment procedure vary across countries. There is no clearly predominant model for the specific requirements of the initiation process. Usually, however, a certain number of members of parliament have the right to initiate the procedure. In some countries a single member of parliament has the power to initiate a constitutional amendment procedure (e.g. Finland, Hungary, Ireland, Sweden), in some more than half of members of parliament are needed (e.g. Georgia) and there are countries representing everything in between (e.g. Albania, Estonia: one fifth of the members of the Assembly; Bulgaria, Lithuania: one fourth; Moldova, Turkey: one third). Additionally, the right to initiate the procedure frequently falls to the government, the president of the state, a committee or the second parliamentary chamber. In many cases a certain number of citizens also has the power to start the amendment procedure (e.g. Slovenia: 30 000 voters, Finland: 50 000, North Macedonia: 150 000, Moldova: 200 000, Lithuania: 300 000, Romania: 500 000). Lower requirements for the initiation of constitutional amendments are

advantageous in that they allow for constitutional matters to be discussed in parliament, even if they do not reach the necessary approval quotas in the end.

After the procedure is initiated, there are requirements to be met as to how many members of parliament have to vote in favour of the amendment and sometimes how many MPs have to be present. The **quota** to be fulfilled when changing laws of constitutional character is usually higher than when changing ordinary laws. The higher approval rates ensure the stability of the constitution and the need for parties to compromise, since it is rare nowadays that one or even two political parties can rely on the required majority of e.g. two thirds or three quarters of members of parliament. The quotas in the examined states are often for the presence of at least half the members of parliament or the approval of a total number of members of parliament (not only the approval of a number of the members present); these rules ensure that the mere low attendance of members of parliament during a parliamentary session will not give a minority the power to amend the constitution. The quota for approval also varies across countries (e.g. three fifths, three quarters), but two thirds is common. For example, in Norway, at least two thirds of the members of Parliament have to be present and two thirds of those have to vote in favour. In Austria, the requirement is the presence of at least half the members of the National Council and a two-thirds majority of the votes cast (and the additional requirement to designate the constitutional act or provision explicitly as such). The Bulgarian Constitution requires a majority of three quarters of the votes of all Members of the National Assembly in three ballots on three different days. Israel, on the contrary, allows most of the provisions in the Basic Laws to be changed in the same way as regular legislation, by a simple majority. However, some changes require a specific quorum.

The graph on the next page shows the quotas for approval needed to amend the constitution through the standard procedure of the respective country.

Some states stipulate citizens' participation and require a **referendum** in addition to higher quotas in parliament (Ireland; Romania; Spain if so requested by one tenth of

Country	Quota
Albania	2/3
Austria	2/3
Belgium	2/3
Bulgaria	3/4
Croatia	2/3
Cyprus	2/3
Czech Republic	3/5
Estonia	1/2
Finland	2/3
France	3/5
Georgia	2/3
Germany	2/3
Greece	3/5
Hungary	2/3
Ireland	1/2
Israel	1/2
Italy	1/2* 2/3
Latvia	2/3
Lithuania	2/3
Moldova	2/3
Netherlands	2/3
North Macedonia	2/3
Norway	2/3
Poland	2/3
Portugal	2/3
Romania	2/3
Slovak Republic	3/5
Slovenia	2/3
Spain	3/5
Sweden	1/2
Turkey	3/5
United Kingdom	No codified document, no universal standard

Majority Quotas Required for Amending the Constitution.

Source: ECPRD Request # 4503 except Croatia: Art 149 Constitution of Croatia; Ireland: Wieser p 130.

Data preparation: Sophia Witz.

* 1/2, 2/3 if no veto shall be risked

the members of either house; Slovenia if so requested by at least 30 deputies; Italy if requested by one fifth of the members of a house or 500 000 voters or five Regional Councils) or instead of a certain majority (France, three fifths of members of parliament or referendum). France also has an unusual provision (only applied twice) that allows an amendment through a referendum, without the consent of the assemblies. The benefit of requiring a referendum for constitutional amendments lies in the enhanced participation of the public. Such a requirement can lead to greater citizen involvement in the constitutional process and to amendments that are more balanced, because the envisaged changes have to be explained to the public and will generally be the subject of public discussion. However, it also opens the possibility of dividing the public through populist actions, and it tends to slow down the amendment process, since a referendum has to be prepared and carried out.

A constitution can consist of several layers. In some states, this affects the way in which provisions or chapters can be amended, as higher-ranking constitutional law is usually subject to enhanced amendment thresholds. For **total revisions** (which are defined differently in every country) or the **altering of important principles** or certain **chapters**, there is often the additional requirement of approval in a referendum (Austria; Estonia; Italy; Latvia; Lithuania; Poland if requested by one fifth of the members, the Senate or the President of the Republic and regarding certain chapters; Spain with the further condition of the dissolving of the Cortes and ratification of the houses elected). Some constitutions contain a core that is not amendable at all (Cyprus, Czech Republic, France, Germany, Greece, Italy, Norway, Portugal, Romania). In France's case, that core is the republican form of government. Others establish a series of time limits, e.g. Spain does not permit the initiation of a constitutional amendment procedure in time of war or a state of emergency (Belgium, Estonia, Lithuania, Moldova, Portugal and Romania are similar). All of these requirements have in common that they protect fundamental principles or important provisions of the respective state by making them more difficult to alter. This means that these particularly important fundamental principles or chapters are even more protected from changes in political majorities and upheavals than is already the case for 'normal' constitutional law.

In countries that are **federally organised**, there are additional provisions dealing with the interference of powers, e.g. in Austria the consent of the Federal Council or in Germany its counterpart the Bundesrat. In Switzerland, where the amendment process lies heavily on the people (there is an obligatory referendum) and the cantons (member states of the Swiss Confederation) rather than the assembly, an increased parliamentary majority is not necessary. In states with a **bicameral system**, the approval of both chambers is usually necessary, but not always with the same quotas (e.g. Poland).

Some constitutions require a certain **break in parliament or a new election** to amend the constitution (Belgium, Finland, Greece, Lithuania, Netherlands, Norway, Sweden). The Norwegian Constitution provides that a proposal for a constitutional amendment has to be submitted to the Storting during the first three years of a four-year parliamentary term. Interestingly, these proposals cannot be considered until the next parliamentary term, allowing the electorate to form an opinion and express it via the election of the new parliament. Similarly, in Sweden, Finland and the Netherlands the constitution can be amended through two decisions made by parliament, between which an election to the parliament has to be held. In Finland, if a five-sixths majority declares the amendment urgent, the constitution can be amended in a single parliamentary act. In Greece, a resolution of the parliament (three-fifths majority in two ballots, at least one month apart) is needed to amend the constitution. The next parliament then decides by an absolute majority. If the three-fifths majority in the former parliament was not reached, the next parliament can revise provisions with a three-fifths majority. In Belgium, an amendment has to be initiated by concurring declarations of the three branches of the legislative power (House of Representatives, Senate, King) that list the articles that may be amended during the next term. After the publication of those declarations both houses are automatically dissolved, triggering an election within 40 days. The newly elected houses may then undertake the revision. If a new election is a prerequisite for an amendment, the electorate can demonstrate their support or rejection of the proposed amendment through voting. Therefore, the prerequisite of a new election may introduce an element of public participation into the constitutional amendment

procedure. However, this claim has to be taken with a grain of salt, since oftentimes the proposed amendment is not the main focus during the election campaign and not decisive for the election.

There may be a requirement of a **period of time passing** between votes or between amendments. Lithuania, for example, demands that amendments to the Constitution be considered and voted twice, with a break of at least three months between. In Italy, laws amending the Constitution and other constitutional laws must be adopted by each house after two successive debates at intervals of not less than three months (and be approved by an absolute majority of the members of each house in the second voting). In Portugal, the Assembly of the Republic may revise the Constitution five years after the date of publication of the last ordinary revision law (Greece's law is similar). At any time, an extraordinary revision by a majority of four fifths is possible. The requirement of a break or in some cases even a new election (see above) ensures that changes to the constitution are not made prematurely. Such a requirement also generally leads to fewer amendments overall, since it draws out the process.

There are also several different ways to deal with the **rejection** of a proposed constitutional amendment. Bulgaria provides for a bill that has received fewer than three quarters but more than two thirds of votes to be eligible for reintroduction within a certain time frame and with a lesser quota of two thirds. In contrast, in Albania, the rejection of a constitutional amendment leads to a lock on that issue: when the assembly rejects the draft law the lock lasts for a year from the day of rejection, and if a referendum does the issue is locked for three years. In most of the countries examined, though, the rejection of a proposed constitutional amendment has no impact.

It is evident that the **difficulty of amending the constitution** correlates to the status of both the constitution itself and the constitutional courts and courts with constitutional jurisdiction in the respective countries. Many states that have high requirements for constitutional amendments do not have a specialised constitutional court

in the classic sense. On the other hand, it should be noted that in states where the constitutional court has a strong position, the procedures for amending the constitution are rather simple.

1.2.2.2 Frequency of Constitutional Amendments

There are a plethora of reasons for constitutional adaptations, including societal changes, political changes and court decisions. The background to and reasons for a constitutional change are sometimes quite evident and transparent, but at other times rather complex and opaque. One thing that is readily available is information on the frequency with which a constitution undergoes amendments; there are striking differences amongst the countries, which are listed in the following paragraphs approximately in descending order of frequency of change.

One caveat about these figures is that they do not reflect how major the constitutional amendments have been. Thus, in a country with a high number of constitutional amendments, there may have been very few changes altogether, while a country with fewer amendments may have had much more significant and substantial changes to the constitution overall.

In some states constitutional amendments take place **fairly frequently** – at least one amendment every three years, and in some cases amendments almost every year. In Austria, for example, the Constitution has been amended almost annually since 2000, with the number of amendments to the Federal Constitutional Act varying between one and six per year (with some exceptional years when there were none). Similarly, Germany's constitution has undergone 64 amendments since it came into force in 1949, almost one amendment per year on average. North Macedonia also amends its constitution frequently: while it has years without amendments, it also has years with up to 15 amendments. The Hungarian Constitution has been amended seven times since it came into force in 2011. In Slovakia, the Constitution has been amended by 18 constitutional laws since 1992. The Turkish Constitution also often undergoes changes; it has been amended every two years on average since 1982. In Ireland there have been 32 amendments since 1937. Similarly, the French

Constitution has been amended 24 times since 1958, which is relatively seldom compared to France's previous constitutions. In Lithuania, there have been 10 laws amending the Constitution since 1992 and Slovenia's constitution has been amended 10 times since 1991 (on average approximately one amendment every three years).

In terms of the frequency of constitutional amendments, Moldova, Albania, Turkey, Sweden, Italy, Finland, Estonia and Portugal form the **middle** group. The Moldovan Constitution has been amended eight times since 1994, the Albanian Constitution six times since 1998. In Turkey there have been 14 amendments since 1960. In Sweden, where an election is required for constitutional amendments, amendments have been made with every election to the Riksdag. Italy's constitution has undergone on average one amendment every five years since 1947; in Finland, the constitution has been amended four times since its entry into force in 2000. The Estonian Constitution has been amended once every six years on average since 1992. Portugal completes this group of countries with one constitutional amendment every six and a half years on average since the 1970s.

In other countries, constitutional amendments are **far rarer** (less than one constitutional amendment in 10 years). The Greek Constitution of 1975 has been revised four times, and no revisions are permitted within five years of the completion of the last revision. The Polish Constitution has been amended twice since 1997, while the Spanish Constitution has undergone only two reforms since 1978. In Romania, there have been no amendments since 2003; the Constitution of 1991 has only been amended once.

How often a constitution undergoes changes may be interesting from an analytical standpoint, but the frequency of amendments does not necessarily correlate to the quality of a constitution. A comparative approach reveals that the number of amendments is highly context specific and can – but does not always – relate to

the difficulty of fulfilling the amendment requirements.[2] Frequent amendments may be useful and customary in one state, whereas in another state a mostly consistent constitution might be preferable.

1.3 General Aspects Regarding Courts with Constitutional Jurisdiction

1.3.1 Constitutional Courts and Supreme Courts

1.3.1.1 Centralised Systems

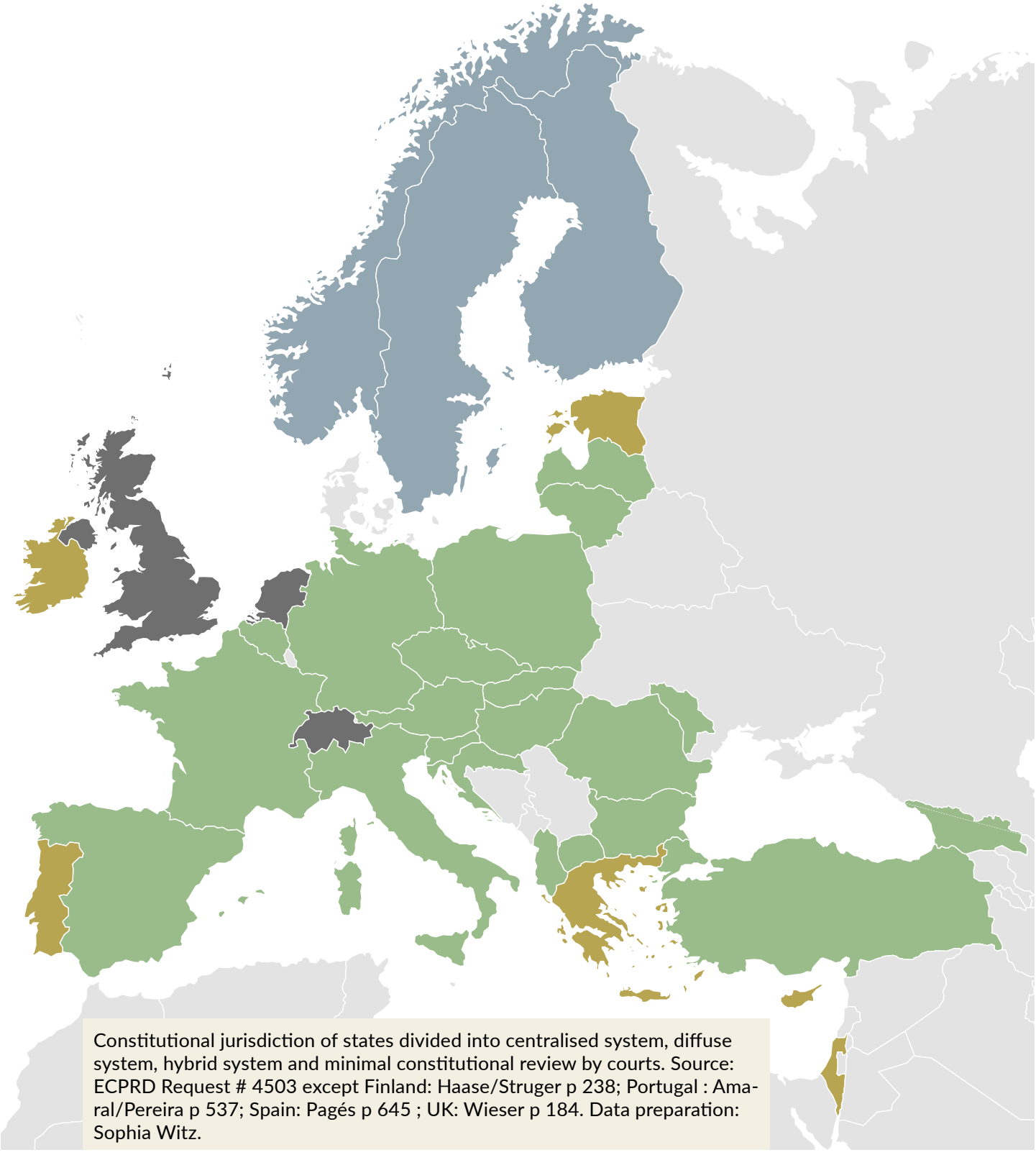
With a general foundation of the constitutional system in the individual countries laid out in the first part of this chapter, the question now arises as to how these constitutions are to be upheld and enforced; hence, above all who is to enforce them to ensure their effectiveness. The responsibility for enforcing the constitution may rest exclusively on courts, may be divided among several actors, or may involve no judicial bodies at all.

The vast majority of countries provide for constitutional jurisdiction to be exercised by courts or quasi-judicial bodies, which are independent, in contrast to political bodies, which tend to be guided by political ideas rather than the constitution. Constitutional jurisdiction can be understood as a court's activity of deciding constitutional matters in a binding way. This may include reviewing the constitutionality of state acts (especially reviewing legal norms), resolving constitutional disputes arising between state entities or protecting fundamental rights. Constitutional jurisdiction may either be entrusted to one specialised central court (centralised/concentrated system) or be exercised by several courts (diffuse system), but some countries combine features of the diffuse and the centralised system.

The following map on page 44 illustrates which countries have a centralised system, a diffuse system, a hybrid system or a system of minimal constitutional review by courts. In Europe, the **centralised system of constitutional jurisdiction** is predominant, and

2 | For a discussion on striking a balance between rigidity and flexibility, see the study of the Venice Commission, Report on Constitutional Amendment, CDL-AD(2010)001, 19.01.2010.

Constitutional Jurisdiction



Constitutional jurisdiction of states divided into centralised system, diffuse system, hybrid system and minimal constitutional review by courts. Source: ECPRD Request # 4503 except Finland: Haase/Struger p 238; Portugal : Amaral/Pereira p 537; Spain: Pagés p 645 ; UK: Wieser p 184. Data preparation: Sophia Witz.

Country	Centralised system	Diffuse system	Hybrid system	Minimal constitutional review by courts
Albania	X			
Austria	X			
Belgium	X			
Bulgaria	X			
Croatia	X			
Cyprus			X	
Czech Republic	X			
Estonia			X	
Finland		X		
France	X			
Georgia	X			
Germany	X			
Greece			X	
Hungary	X			
Ireland			X	
Israel			X	
Italy	X			
Latvia	X			
Lithuania	X			
Moldova	X			
Netherlands				X
North Macedonia	X			
Norway		X		
Poland	X			
Portugal			X	
Romania	X			
Slovak Republic	X			
Slovenia	X			
Spain	X			
Sweden		X		
Switzerland				X*
Turkey	X			
United Kingdom				X

*for the nuanced system in Switzerland see p. 52

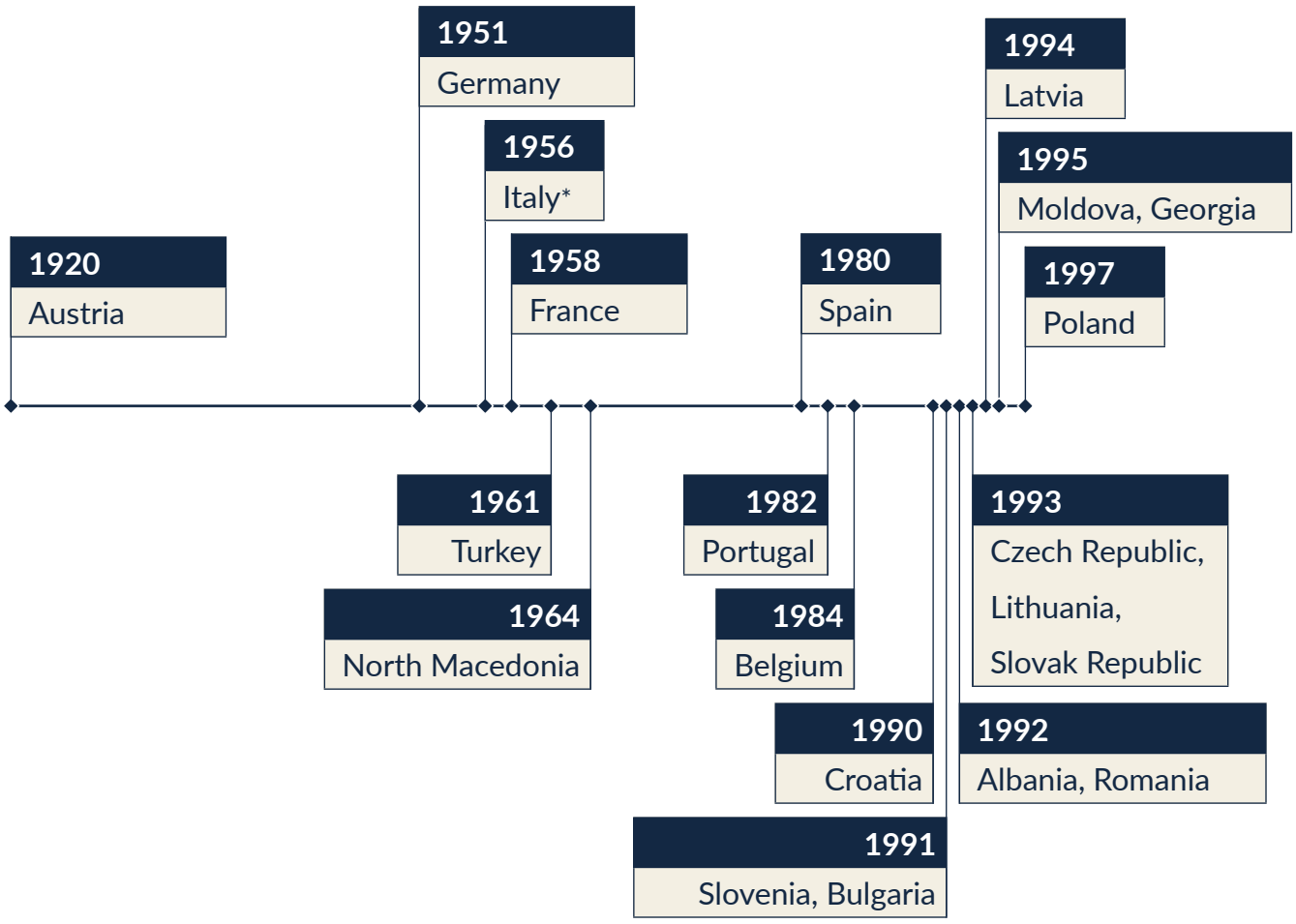
compliance with the constitution is therefore enforced by a **constitutional court** with independent judges who are not part of the ordinary judiciary (in contrast to the diffuse system). The development of specialised constitutional courts started in the year 1920 with the establishment of the Austrian Constitutional Court, influenced by Hans Kelsen, which became the main model of European constitutional jurisdiction. The centralised system of constitutional jurisdiction came to the forefront in the second half of the 20th century, beginning with the establishment of the Italian Constitutional Court, followed by the German Constitutional Court and the French Constitutional Court.

The illustration "Year of Origin of the Constitutional Courts" on the next page depicts the timeline of the establishment of these specialised constitutional courts. It also shows that some constitutional courts were established at the same time as the original version of the constitution that is still in force today in the respective country.

There are several **advantages** to having a centralised system with a constitutional court. One advantage is unified adjudication: since no court other than the constitutional court has the power to review legislation it considers to be contrary to the constitution, conflicting judgments of different instances are not possible (unlike in the diffuse system). Since only one court can decide on the constitutionality of laws, there is greater legal certainty than in the diffuse system. Moreover, in states with a centralised system, it is the duty of the constitutional courts to verify and ensure that the legislature respects the limits indicated by the constitution. Therefore, these states allow not only concrete review (reviewing laws when they are applied in a concrete case), but also abstract review (measuring them against the constitution without a specific case at hand). This has the advantage that the constitutional issue can be clarified more quickly than in the diffuse system, in which all of the lower courts would have to deal with the concrete case before it gets to the court with constitutional jurisdiction.

However, such a centralised system with abstract review also has some **disadvan-**

Year of Origin of the Constitutional Courts



Year of origin of the constitutional courts. Source: ECPRD Request # 4503 except Italy: Bifulco/Paris p 279. Data preparation: Sophia Witz.

* established by the constitution of 1947

tages. The fact that in this system laws can be examined independently of a case raises greater concerns that constitutional courts could act in a politically motivated manner. These concerns arise from the understanding that an institution such as the constitutional court should not decide on political choices of the legislature, because courts should generally not be responsible for solving political tasks and are not democratically legitimised to do so (legislative monopoly of the parliament). However, it has to be ascertained that the constitution prevails over ordinary laws, and it must be ensured that this precedence is respected. It is therefore imperative that a state body can be called upon if a law violates the constitution. For reasons already mentioned, it is preferable that an independent constitutional court, rather than a body politic, is responsible for overseeing compliance with the constitution.

Of the countries that do have a constitutional court, most do not allow other courts to perform functions that are usually exercised by their constitutional courts. Therefore, **the constitutional court has a monopoly** on reviewing the constitutionality of laws. In Austria for example, no other court has the power to repeal laws as unconstitutional. This approach is followed by most countries that have a constitutional court in the classic sense (Albania, Belgium, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Italy, Latvia, Lithuania, Moldova, North Macedonia, Poland, Romania, Slovak Republic, Slovenia, Turkey). Germany grants its 'Länder' (constituent states) constitutional jurisdiction over the compatibility of 'Land' laws with the 'Land' constitutions. In Belgium (and in some other countries), the Constitutional Court has the power to repeal laws as unconstitutional, but not executive regulations as unlawful. Only the Council of State (supreme administrative court) has the power to repeal executive regulations.

1.3.1.2 Diffuse Systems

A **diffuse system of constitutional jurisdiction**, where there is no specialised constitutional court and the review is performed by ordinary courts, usually without the possibility of abstract judicial review, is in place in only a few European countries. Under a diffuse system, individuals have the power to challenge the constitutionality of norms or acts before the ordinary courts while cases are being litigated.

This offers the **advantage** that individuals with standing can raise issues of constitutionality quite early on in court proceedings (although it is also possible to raise issues of constitutionality in centralised systems early on, depending on the procedural rules). In addition, the diffuse system is less likely to give the impression that a supreme court is exercising political control over the legislature, because constitutional questions can only ever be dealt with in the context of a current case.

However, abstract legislative review (in which a legal norm is measured against the constitution without an individual and concrete case at hand) is usually not possible under a diffuse system, which entails the **disadvantage** that the review of possibly unconstitutional provisions can take place only if there is a case pending. In addition, concrete review in a diffuse system usually has the effect that the inapplicability of the law pertains only to the specific case, and no formal repeal of the law by the court takes place (although the precedent binding on the lower instances often extends the effect of the decision beyond the individual case).

The **classic model** of a diffuse system is followed in Europe by Nordic countries (Norway, Denmark, Sweden and Finland). In those countries, a supreme court performs some of the functions that are usually exercised by a constitutional court. Norway has such a Supreme Court, which executes certain functions similar to those of a constitutional court. Both the Supreme Court and lower courts have the power to review whether applying a statutory provision is contrary to the Constitution. The review, however, is limited to the particular case before the court.[3] In Sweden, judicial preview (ex ante) is practised by the Council on Legislation and judicial review (ex post) is practised by the ordinary courts. With regard to judicial review by the ordinary courts, the Swedish Constitution states that a court or a public body should not apply a provision if it finds that it conflicts with a provision of fundamental law or other superior statutes. The courts cannot declare a rule null and void, but only set aside a provision in the particular case.

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3 | For further details see the Norwegian Case Study on p. 117 et seq.

However, if such a ruling is made by a Supreme Court it will act as a precedent and, consequently, have a general effect on all similar cases.

Some countries **combine** features of the **diffuse and the centralised system** of constitutional jurisdiction. In Portugal, for example, although there is a Constitutional Court, the ordinary courts are also involved in the constitutional review of laws, as every court has the authority not to apply unconstitutional norms. However, there is a concentrated review competence of the Constitutional Court regarding the recourse to appeal.

Cyprus, Estonia, Greece, Ireland and Israel do not have centralised systems of constitutional jurisdiction in the classic sense of a specialised constitutional court. However, these countries do provide for a system in which a superior court takes on functions similar to those of a constitutional court and which in some of the countries is even able to repeal laws.

Israel, for example, has a Supreme Court (established in 1948) sitting as the High Court of Justice that rules on constitutional matters and binds all lower courts with those rulings. Any court may rule on constitutional matters, but these rulings are only relevant for the case at hand. However, when the Supreme Court in Israel decides upon the constitutionality of the law, it has discretion to determine what effect the decision has, and in some cases, the law is struck down (repealed, declared void from the outset). Similarly, in Estonia, the Supreme Court (established in 1992) is also the court of constitutional review. It can declare a legislative act or a provision to be contrary to the Constitution and invalidate that act or provision, which makes this Court quite similar to a constitutional court in the classic sense.

In Greece, all courts can deal with constitutional matters ad hoc, and any judge can refuse to apply a law that they reasonably find contrary to the constitution. Nevertheless, there are some competences granted to the Special Highest Court (e.g. settlement of controversies as to whether the content of a statute enacted by parliament is contrary to the constitution). In these rare cases, the provisions of a

statute that are found unconstitutional become unenforceable, but the Court has no power to annul the statute itself.[4] In Ireland, only certain senior courts (High Court, Court of Appeal, Supreme Court) have the authority to determine the constitutionality of legislation. The Supreme Court (established in 1961) acts as the final arbiter in constitutional matters; the lower courts are expressly prohibited from considering issues of constitutionality (this restriction only applies to primary legislation passed under the current Constitution). If a law is declared to be unconstitutional, it is treated as never having been enacted, rather than being repealed.

In Cyprus, the constitution expressly provides for the existence of a Supreme Constitutional Court (established in 1960), but that court is currently not in function, because of the constitutional crisis of 1964. Therefore, the Supreme Court (established in 1964) is temporarily carrying out the relevant competences. The competent court only ceases to apply the law or provision declared unconstitutional, and the effect is only inter partes. The courts do not have the power to repeal or annul law; this competence is reserved for the legislature. However, a judgment of the Supreme Court declaring the law or provision unconstitutional is final and binding on all other courts in their interpretation and application of the law.

The systems in the UK and the Netherlands allow for only **minimal constitutional review by courts**, usually without the possibility of reviewing legislation against the whole constitution. In the UK, issues to do with constitutional law can be raised in the ordinary courts. Some forms of constitutional review are exclusively exercised by the UK Supreme Court, established in 2009 (e.g. the statutory reference procedure, which is used when a bill passed by a devolved legislature may not have been within its legislative competence). The judgments of the Supreme Court are binding on all lower courts. However, the constitutional court does not repeal laws: only further legislation can repeal or revoke legislation. In the Netherlands, the review of the constitutionality of acts is the privilege of the legislature; no court has the

4 | For further details see the Greek Case Study on p. 188 et seq.

power to review the constitutionality of Acts of Parliament or treaties against the constitution. It is, however, possible for courts to review laws against a plethora of European and international legal norms.

Switzerland proves to have a unique combination of minimal review for federal laws and regular review for cantonal laws. Switzerland provides for a system where all authorities that apply a law must examine its compatibility with superior law and must not apply the provision if it is not compatible. However, this is not the case for federal laws; these have to be applied, even if they are deemed to be unconstitutional. In contrast, though, there is constitutional review of the cantons. Cantonal laws may be reviewed and even repealed by the Bundesgericht (Federal Supreme Court).

In countries with minimal constitutional review, the idea is that parliamentary control should only be exercised by voters. This system can therefore be seen as expressing distrust of constitutional jurisdiction, since justices are not democratically legitimised in the same way as the parliament that passed the law. With this line of thinking, it is understandable that judges cannot override the democratically elected parliament and thereby limit both democracy and the sovereignty of the people. It is therefore only parliament that is in a position to judge the constitutionality of a law.

1.3.2 Judgments

1.3.2.1 Publication of Judgments and Dissenting/Concurring Opinions

It is usual for judgments of constitutional courts to be published. However, the information in addition to the judgment itself that is publicly available varies. Information on dissenting or concurring opinions (opinions written by one or more justices expressing disagreement or agreement with the majority opinion of the court) is often of interest. Some states prohibit the publication of the voting ratio and/or of dissenting/concurring opinions. It has been argued[5] that such a prohibi-

5 | See, for example, the study of the Venice Commission, Report on Separate Opinions of Constitutional Courts, CDL-AD(2018)030, 17.12.2018.

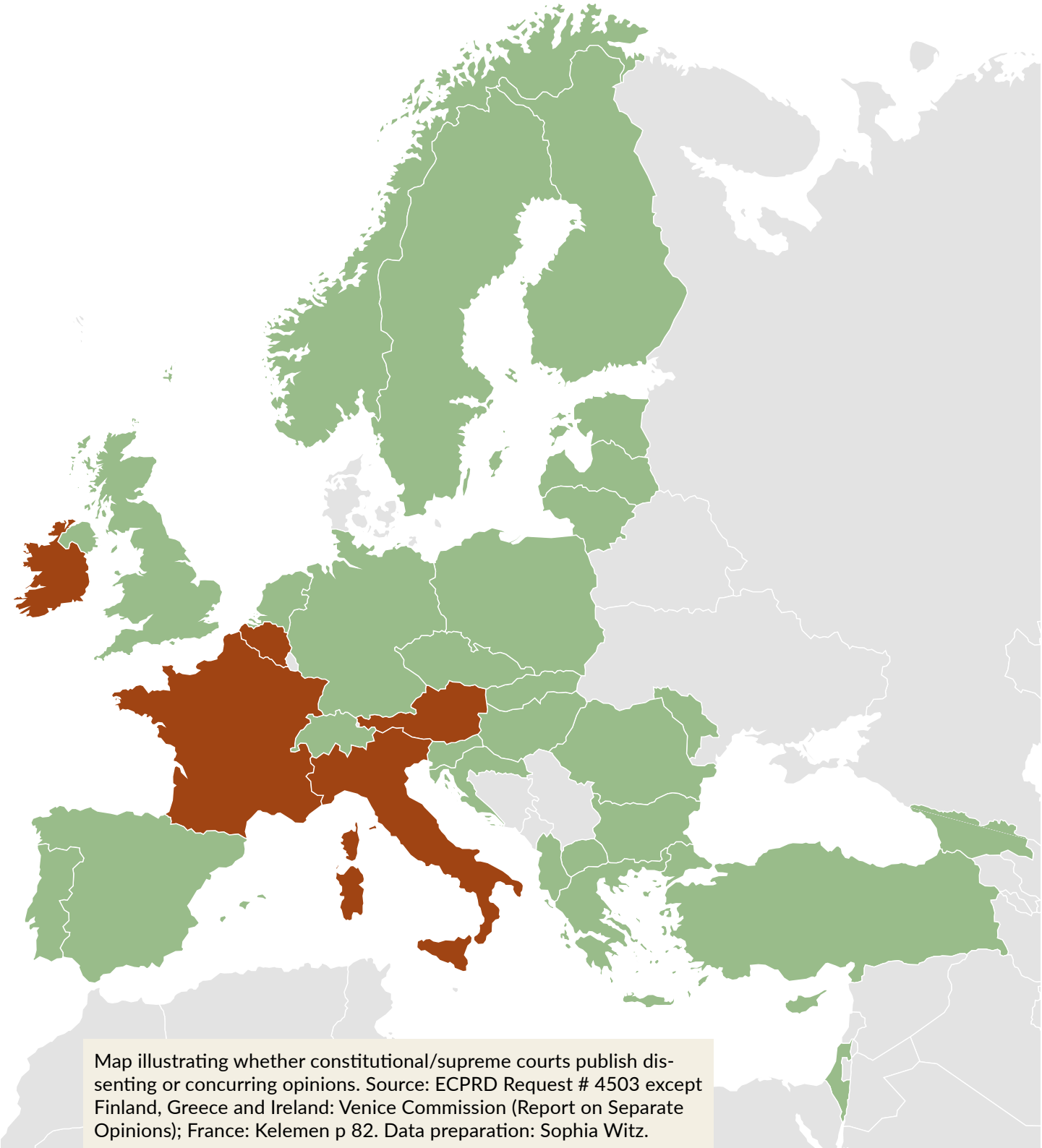
tion promotes the depersonalisation and therefore the judicial independence and authority of the court as well as ensuring unity (speaking with one voice). However, the lack of transparency of such a system also leads to speculation about the judges' voting behaviour and about the possibility that minority positions are not sufficiently heard. Allowing the publication of dissenting or concurring opinions can therefore be seen as democratic and helpful for the public's understanding of the process of the judgment. However, dissenting opinions can have the disadvantage of making a judgment seem less credible or convincing, which may reflect negatively on the court and its standing.

In some countries, **a lot of information** is available about the court's judgment-making process. Slovenia provides for a system in which each decision of the Constitutional Court contains information on the composition of the Court; the names of judges, if any, who were excluded from the case; whether the decision was taken unanimously or who voted against it; and, if separate opinions were given, which judge gave an affirmative or negative separate opinion. This information is published together with the decision. In Germany, the Senates can choose to disclose the ratio of the votes (without revealing the identity of the judges on each side) and dissenting opinions may be published. There are also states where dissenting opinions are publicly available, but the justices' voting ratio is not disclosed (e.g. Lithuania).

Other countries are rather **reluctant** to give out information on dissenting opinions and the like. In Belgium for example, the deliberations of the Court are secret and there is no opportunity for dissenting opinions. The same applies to Italy, France and Austria, where whether a decision was made unanimously or by majority vote is also not revealed.

The map "Publication of Dissenting/Concurring Opinions of Constitutional/Supreme Courts" on the next page shows whether dissenting/concurring opinions of the justices may be published in the countries studied.

Publication of Dissenting/ Concurring Opinions of Constitutional/Supreme Courts



Map illustrating whether constitutional/supreme courts publish dissenting or concurring opinions. Source: ECPRD Request # 4503 except Finland, Greece and Ireland: Venice Commission (Report on Separate Opinions); France: Kelemen p 82. Data preparation: Sophia Witz.

Country	Publication / Yes	Publication / No
Albania	X	
Austria		X
Belgium		X
Bulgaria	X	
Croatia	X	
Cyprus	X	
Czech Republic	X	
Estonia	X	
Finland	X	
France		X
Georgia	X	
Germany	X	
Greece	X	
Hungary	X	
Ireland		X*
Israel	X	
Italy		X
Latvia	X	
Lithuania	X	
Moldova	X	
Netherlands	X	
North Macedonia	X	
Norway	X	
Poland	X	
Portugal	X	
Romania	X	
Slovak Republic	X	
Slovenia	X	
Spain	X	
Sweden	X	
Switzerland	X	
Turkey	X	
United Kingdom	X	

*regarding most constitutional matters

The comparison demonstrates that most of the examined countries do allow the publication of dissenting opinions (Albania, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Georgia, Germany, Greece, Hungary, Israel, Latvia, Lithuania, Moldova, North Macedonia, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Turkey and the United Kingdom). In countries that do not allow such publication, there are discussions from time to time, on both the political and the academic levels, as to whether a change of policy would be beneficial.

1.3.2.2 Recommendations

In addition to dissenting and concurring opinions, a constitutional court can also give recommendations or suggest guidelines as part of a judgment. Whether or not a constitutional court's remit includes recommending alternative legislative options or reference points touches the issue of constitutional courts as negative or positive legislative bodies. When a constitutional court declares a law or provision to be unconstitutional, it acts as a negative legislative body, since it removes the unconstitutional law or provision without deciding what a constitutional solution to the issue at hand should look like. However, such an approach may cause problems such as a gap in the area to be regulated. To avoid this kind of gap, some courts try to take on the role of a positive legislative body and suggest alternative solutions to the actual legislature. These kinds of recommendations may be criticised as restricting the democratic procedure, because the legislature may wish to follow the recommended path for no other reason than to avoid further disputes before the constitutional or supreme court.

In most of the countries examined, the constitutional court **does not usually give recommendations overtly**. In Austria, Slovenia and Portugal, for example, the legislature can only find indirect guidelines in the reasoning of the court's decision. In the Slovak Republic, the Court may comment in some way on shortcomings or the lack of legal regulation, but that depends on the style of the justice writing the reasoning. A related issue is the **constitutional interpretation** with which constitutional and supreme courts decide how a law or a provision is to be understood. In France, as in many other countries, the court can declare provisions to be in need of inter-

pretation and then determine how they should be interpreted or complemented. The effect of such a determination may be similar to that of a recommendation, since some courts occasionally repudiate the effect intended by the legislature and give new meaning to a provision, without even having to declare the provision unconstitutional. They thereby act as a positive legislative body in a different way.

However, there are countries where the constitutional court does give **recommendations** (e.g. Germany, Moldova). In Belgium, the Court sometimes makes recommendations to the legislative bodies in the reasoning set out in its judgments. In Croatia, the Court can also give recommendations if it deems it necessary to do so, while the Israeli Court often makes recommendations. The Italian Constitutional Court occasionally addresses itself to the legislature with a 'warning' (sentenza di monito) that contains suggestions and guidance to resolve legislative issues in compliance with the Constitution. Unlike most constitutional courts, that of the Czech Republic not only makes recommendations when the law has been repealed, but may also give advice when the law has not been repealed.

1.3.2.3 Effect of Judgments

The core task of a constitutional court is the constitutional **review of legislation**, in other words the review of general legal norms adopted by the parliament, against the standards set by the constitution. There are two types of review of legislation, a priori (ex ante) and a posteriori (ex post) review. In the course of the ex ante review of legislation the constitutionality of the norm is examined before it enters into force or is published (see chapter II.1.2.4 Ex Ante Review by a Court, p. 89). In contrast, the ex post review applies to a law that is already in force. The effect of the latter type of review will be discussed here.

The legal consequences of a judgment regarding the unconstitutionality of a law, meaning the **effect of a judgment** on the law itself or on its applicability, differ between countries. In states with a concentrated system of constitutional jurisdiction, the constitutional court usually has the power to 'repeal' valid laws for violating the constitution, which means that the affected norm is eliminated from the body of

law. In contrast, in states with diffuse systems, there is often only the possibility of declaring the unconstitutional norm 'invalid' or even only 'inapplicable' in the specific case (see I. 1.3.1.2 Diffuse Systems, p. 48).

Irrespective of this, in countries with concentrated constitutional jurisdiction and in countries with hybrid systems, the question also arises as to what effects a decision to repeal or declare a norm unconstitutional triggers in **temporal terms**. This section therefore addresses the question of whether a decision by the constitutional or supreme court has an immediate effect (and which kind of immediate effect) and whether it is also possible to repeal or declare a law unconstitutional pro futuro.

In most cases in nearly all of the countries, the repeal or declaration of unconstitutionality of a law by the constitutional or supreme court **takes effect immediately** upon publication or the day after. However, a distinction must be made as to whether the effect is retroactive to the time of the enactment of the unconstitutional norm (ex tunc) or is based on the time of the decision by the constitutional court – either on the day of publication or upon the expiry of that day (ex nunc). However, the vast majority of the countries studied avoid undesirable consequences by not following the pure form of either approach to the effects of a judgment.

An **ex tunc approach** offers the advantage of legal accuracy, but entails the disadvantage that all decisions taken in the meantime are deprived of their legal basis. Consequently, most countries that follow this approach order that the final administrative acts and final court decisions issued on the basis of an unconstitutional legal norm remain unaffected (often with the exception of criminal convictions). The **ex nunc approach** leads to greater legal certainty, but has the disadvantage that court rulings that were based on the unconstitutional norm before the court with constitutional jurisdiction made its decision cannot be corrected. Therefore, the legislature may deviate from a pure ex nunc approach for reasons of justice and order the reversal of some of the effects caused by the unconstitutional norm.

If the effect of a judgment, i.e. the repeal or declaration of the unconstitutionality of

a norm, occurs immediately, a legal vacuum may be created – a clear disadvantage. Consequently most of the countries also allow the court to repeal a law **pro futuro** (i.e. the judgment takes effect in the future), to give the legislature time to work out a new solution (e.g. Albania, Austria, Croatia, Czech Republic, Estonia, France, Georgia, Germany, Hungary, Israel, Latvia, Lithuania, Poland, Slovenia, Turkey). Often the court itself can specify, sometimes with an established maximum period, how much time the legislature has to enact a new law. In Slovenia and Turkey, the legislature cannot take longer than one year, while in Estonia the maximum period is six months. Austria provides for an option of up to 18 months, as does Poland in the case of laws.

An **ex tunc approach** is followed by Belgium, Germany, Ireland, Portugal and Spain. In Portugal, for instance, the repeal of a law takes effect retroactively to the date it came into force (with exceptions). In Germany, the procedural law of the court leaves it to the court whether, when and for how long to repeal a law or certain parts of a law and to order parliament to reregulate the question. Belgium belongs in this group of countries, but the Court there can uphold the effects of the annulled act if it deems it necessary. In Ireland, a finding of unconstitutionality is in theory a finding that the law was never enacted, but in practice various procedural restrictions mean that such a finding often only operates for the benefit of the immediate parties, persons with similar pending cases, and pro futuro.

In contrast, the **ex nunc approach** is followed by Albania, Austria, Bulgaria, the Czech Republic, Georgia, Hungary, Italy, Lithuania, Poland, Romania and Slovenia. In Austria, the repeal of a norm takes effect at the end of the day the decision is published. The decision has retroactive effect only for the parties who initiated the review procedure (‘Ergreiferprämie’). A norm may also be repealed pro future. The Constitutional Court of the Czech Republic also follows the ex nunc approach, but the reopening of criminal cases can be demanded. Italy follows this system as well; established expectations are protected, but if the Court invalidates a substantive criminal provision, final convictions cease to have effect. Likewise, in Albania decisions of the Constitutional Court have no retroactive effect, with exceptions in cases

such as decisions repealing criminal penalties. Poland does not have a pure ex nunc system either, as it is possible to reopen some types of proceedings there. Hungary takes a different approach, allowing the Constitutional Court to provide for retroactive effect in special cases. In North Macedonia anyone whose rights had been infringed by a final court decision on the basis of a repealed law has the right to ask the competent organ to revoke the final court decision within six months of the publication of the repeal of the law.

It can be concluded that the effects of judgments in the countries studied do not differ very much in terms of the review of legislation (excluding, of course, those countries with purely diffuse systems). Countries that follow an ex tunc system often allow certain judgments to remain in force and countries that follow an ex nunc system often order the reversal of some of the effects caused by the unconstitutional norm. In addition, some countries leave the decision on the temporal effect of the judgment to their constitutional court or allow the court to repeal a law pro futuro.

1.3.3 Constitutional and Supreme Court Justices

1.3.3.1 Number of Justices

Both the constitutional and supreme courts in Europe vary in size, notably in the number of justices. The number of constitutional or supreme court justices should correspond to the size of the country and the court's area of responsibility. As the tasks of many courts with constitutional jurisdiction have expanded over time, it may become necessary to make adjustments to the number of justices. A model widely used in Europe provides for nine justices on the constitutional court. But the number of justices ranges from six in Moldova to 20 in Norway (the latter being a supreme court and not a constitutional court in the classic sense).

The graph on page 61 shows the number of justices on the constitutional courts. The smallest constitutional courts are in Moldova and Latvia, with six and seven justices respectively. Albania, Estonia, France, Georgia, Lithuania, North Macedonia,

Romania and Slovenia all follow the model of nine justices. In Estonia's case the Constitutional Review Chamber of the Supreme Court comprises nine justices, while the Supreme Court en banc comprises 19 justices; both deal with cases regarding constitutional issues. In France, the constitutional court consists of nine appointed justices; additionally there are members ex officio (former presidents of the republic). The Irish Supreme Court consists of 10 justices (the President and not more than nine ordinary members). Additionally, the President of the Court of Appeal and the President of the High Court are ex officio members of the Supreme Court. The special highest court of Greece has 11 members.[6]

Constitutional or supreme courts in Bulgaria, Spain, the UK and Belgium are medium-sized, each with 12 justices. In Belgium, six of them are Dutch-speaking and six French-speaking. In Croatia, Cyprus, Portugal and the Slovak Republic there are 13 members of the respective constitutional or supreme court. In Austria, the Constitutional Court has 14 members (the President, the Vice President, 12 additional members and six substitute members). The Czech Republic, Hungary, Israel,

Country	Number of Justices
Albania	9
Austria	14
Belgium	12
Bulgaria	12
Croatia	13
Czech Republic	15
France	9 + former presidents
Georgia	9
Germany	16 in two senates
Hungary	15
Italy	15
Latvia	7
Lithuania	9
Moldova	6
North Macedonia	9
Poland	15
Portugal	13
Romania	9
Slovak Republic	13
Slovenia	9
Spain	12
Turkey	15

Number of Justices of the Constitutional Courts
Source: ECPRD Request # 4503. Data preparation: Sophia Witz.

6 | See the Greek Case Study on p. 191 et seq.

Italy, Poland and Turkey all follow a 15-judge model. The German Constitutional Court consists of 16 members (split into two senates).

1.3.3.2 Panels and Senates

Justices can form several **different panels or senates** within a constitutional or supreme court. In some states all of the constitutional court justices decide a case together, but there are also models in which certain decisions can be made in smaller structures, depending on the case, and models in which the court always decides in two or more separate senates (e.g. Germany).

In countries where the constitutional court is **never subdivided into panels** composed of only a subset of the justices, it nevertheless may be able to decide a case without all of the members present. In Lithuania, for example, no less than two thirds of all the justices have to participate; in Italy a minimum of 11 of 15 members are needed, if some positions are vacant or justices are absent. The Austrian Constitutional Court also works as one adjudicating body; neither the constitution nor ordinary law mentions panels. However, only five justices (including the chairperson) are necessary for a quorum in cases where the legal issue in question has been sufficiently clarified by previous rulings, or for deliberations on appeals in connection with parliamentary committees of enquiry or the classification of information.

Where the respective provisions provide for constitutional court justices to form **panels**, these often consist of three justices who decide on certain issues but not on all cases. For example, in the Czech Republic and Slovak Republic there are four panels consisting of three justices, and in Slovenia there are usually three members per panel. Latvia provides for a review of all applications to decide whether the case is initiated or refused, usually by a court panel composed of three justices. In Hungary, the Constitutional Court may decide in plenary sessions, in panels or as individual judges, depending on the matter at hand. At the proposal of the President, the plenary session decides on the number and composition of panels and on who will be the presiding justice of each. The composition of the panels changes every three years, while the presiding justices of the panels

change every year. In Portugal, the number of adjudicating bodies or panels is not prescribed by the Constitution. The Constitutional Court sits in plenary sessions or in sections depending on the nature of the subject matter on which it is called to rule.

1.3.3.3 Appointment Procedure

Since the appointment of justices to the constitutional or supreme court is of paramount importance not only for the functioning of the court itself, but also for the state and the rule of law, most states stipulate separate procedures for that kind of appointment. Different countries have a range of methods by which constitutional court justices are proposed, elected and/or appointed. In most countries, the competences for appointing justices are distributed among different stakeholders. Oftentimes, both parliament and the executive are involved. The specific process for appointments, in particular the question of who may actually appoint how many judges, is extremely significant, especially because of the influence that judges have on the constitutional system in a country. Those institutions or persons who have the right of appointment thus exercise a great deal of power and can, within certain limits, influence not only the positioning but also the reputation of the constitutional or supreme court.

A typical appointment model provides for the involvement of the **legislative and executive branches**. Such a model may provide for the possibility of cooperation or interaction between the parliament and the president of the republic. In some countries the president of the state proposes the justices and the national assembly elects them (e.g. Slovenia) and in some the president appoints the justices on the proposal of the national council (e.g. Slovak Republic, where twice as many candidates are proposed as appointed). Similarly, in Belgium justices are appointed by the king on the proposal of either the House of Representatives or the Senate, taking turns, by a majority of at least two thirds of the members present. In the Czech Republic, the President appoints the members with the consent of the Senate. In contrast, in Romania three of the constitutional judges are elected by the Chamber of Deputies and three by the Senate by simple majority, while the last three are appointed by the President.

In France, justices are appointed by individual people, namely the President of the Republic, the President of the National Assembly and the President of the Senate, without any participation from the parliamentary chambers.

Another appointment model provides for the participation of **all three state authorities**. In several states a certain number of judges are appointed by the president of the state, some by parliament and some by the supreme courts. This is the case in Georgia, where a three-fifths majority is required in Parliament; Albania's system is similar. Bulgaria provides for a joint meeting of the justices of the Supreme Court of Cassation and the Supreme Administrative Court to elect one third of the justices. That is similar to Italy, where a third of the justices are elected by members of the three superior tribunals. In Spain, the king appoints the 12 justices, who have been nominated by Congress (four of them, by a majority of three fifths), the Senate (four, with the same majority), the government (two) and the General Council of the Judiciary (two). In Lithuania, the Seimas (parliament) appoints the justices, but the President of the Republic, the President of the Supreme Court and the Speaker of the Seimas submit nominations. The Moldovan Constitutional Court consists of six justices, of whom two are appointed by parliament, two by the government and two by the Superior Council of Magistrates (six judges and six persons who enjoy a high professional reputation).

In Turkey, the President of the Republic has a powerful role. Two of the 15 justices are nominated by the president and members of the Court of Accounts from among their number and elected by the Grand National Assembly. One justice is nominated by the heads of the bar associations and elected by the assembly. The President of the Republic selects three justices from the Court of Cassation, two from the Council of State nominated by the respective General Assembly, three nominated by the Council of Higher Education and four from among high-level bureaucrats, attorneys, senior justices and prosecutors as well as rapporteurs of the Constitutional court.

There are some countries that have **bodies** dedicated to the selection of justices (Israel, Norway, UK, Ireland). In Israel, justices are appointed by the President,

on the recommendation of the Judicial Selection Committee (comprised of the President of the Supreme Court, two other Supreme Court justices, two ministers, two members of the Parliament and two representatives of the Israel Bar Association). In Norway, the King-in-Council appoints justices, with the Judicial Appointments Board for Judges, an independent body, giving recommendations. In the UK, the monarch, on the recommendation of the Prime Minister, formally makes new appointments of justices. A statutory 'selection commission' (consisting of at least one member of the Supreme Court, one member of the Judicial Appointments Commission, one member of the Judicial Appointments Board for Scotland, one member of the Northern Ireland Judicial Appointments Commission and one lay member) is then set up and identifies a candidate, whom the Prime Minister must nominate. In Ireland, unless an appointment is made from among serving justices, candidates are usually chosen from those recommended by a statutory board, but in any event the decision is the government's, while the President makes the formal appointment. In Sweden, the Judges Proposals Board administers all matters regarding the appointment of permanent justices and submits proposals to the government as to which candidates are best suited for a certain post.

In some countries, **only the parliament** is responsible for the appointment of justices (Hungary, Germany, Croatia, North Macedonia, Poland). Hungary, for example, provides for the nomination procedure to take place at committee level. The Nominating Committee, which consists of at least nine and at most 15 members appointed by the parliamentary factions of the parties represented in Parliament (at least one member of each faction), proposes the members of the constitutional court. The final decision is then made by Parliament. Similarly, in Germany, the Ministry of Justice creates a list with possible candidates, which is not binding. Then, the electoral committee, consisting of members of parliament, makes its own suggestion. Half of the justices are elected by the Bundestag, the other half by the Bundesrat on the proposal of the respective electoral committee (although driven by state governments, not parliaments) with a majority of two thirds. In North Macedonia, the Assembly elects all of the justices, and for three of the nine justices the majority vote must include a majority of the votes from Representatives

belonging to communities that are not in the majority of the population of North Macedonia. In Poland, the justices are elected by the Sejm (the lower house of Parliament) with a simple majority and the presence of at least half of the members. The President and Vice President of the Constitutional Court are appointed by the President of the Republic, from among the candidates that are suggested by the general assembly of the constitutional court justices. A variation of this is followed by Portugal, where 10 of the constitutional court justices are appointed by the Assembly of the Republic and three are then co-opted by those 10.

As mentioned above, there are some countries where **justices participate** in appointing constitutional or supreme court justices. The justices may be part of a selection body, or the justices may directly select a certain number of justices or have the right to nominate justices.

In the UK, Israel and Ireland justices are part of the selection committee. Italy follows a similar model, the difference being that the body electing one third of the justices consists of members of the Supreme Court, the Council of State and the Court of Auditors. In Bulgaria, a joint meeting of the justices of the Supreme Court of Cassation and the Supreme Administrative Court elects one third of the justices. In Latvia, two justices (selected from among the judges of Latvia) are confirmed upon the proposal of the Plenary Session of the Supreme Court. In Portugal, the Constitutional Court selects three of the justices. In Georgia three justices are appointed directly by the Supreme Court, in Lithuania, the President of the Supreme Court nominates three candidates and in Albania, three members are elected by the High Court. In Turkey, the president and members of the Court of Accounts have the right to nominate two justices (the Grand National Assembly elects them from among three candidates); in Spain the General Council of the Judiciary nominates two justices. In Estonia, the Chief Justice of the Supreme Court recommends justices.

1.3.3.4 Tenure of Appointments

Since the independence of judges and consequently the independence of their

judgments is of vital importance for the rule of law, judges usually enjoy certain privileges connected to their employment (e.g. the principle of irremovability of judges, permanency, immunity). This is especially important for constitutional or supreme court justices, because their judgments frequently entail major political implications. Political interference can be prevented by guaranteeing that justices may carry out their function for a predetermined period of time without the possibility of re-election. The logical consequence of longer terms is increased independence from any attempts to exert influence. On the other hand, and simultaneously, longer terms lower the constitutional court's opportunities for renewal. These two principles have to be balanced when the duration of appointments to the constitutional courts is being decided. Appointments to the constitutional courts (or courts performing similar functions) may be for life or may be limited to a certain age or to a certain term. It is also possible to have both an age limit and a term limit for the appointment. The model of appointment for a certain term, in most cases nine years, and the exclusion of re-election seems to be the standard for the analysed countries.

Some countries follow the approach of a **retirement age** for justices (Austria, Belgium, Estonia, Cyprus, Sweden, Ireland, Israel, Norway, Moldova, Albania, Latvia, Germany, Turkey, UK). The stipulated retirement ages vary from 65 to 70 years, or higher in exceptional cases. Austria, Belgium, Israel, Norway and the UK all appoint justices with a retirement age of 70 years (in Norway justices have the opportunity to leave with full pension at the age of 67, and in the UK there are transitional arrangements for justices who were appointed before that retirement age came into force). Estonia and Cyprus appoint justices with a retirement age of 68 years (the Estonian Supreme Court itself can in exceptional cases increase the maximum age for a judge by up to two years at a time, but not more than four years in total).

Ireland, Moldova, Albania and Latvia follow the approach of a **retirement age** of 70 along **with a term of office**; Germany's approach is similar, but with a retirement age of 68. Turkey has the lowest retirement age for constitutional court justices, 65, and its appointments are also for a certain term.

As mentioned, several countries appoint justices for a **certain term**, either combined with age limits or not. The terms range from six years (Moldova) to 12 years (Germany, Hungary, Turkey, Slovak Republic) without the possibility of re-election. In Croatia, the term of office lasts eight years, and is extended until a new judge takes office. In Latvia and the Czech Republic, the term of office is 10 years. Bulgaria, France, Lithuania, Italy, Romania, Slovenia, Spain, Albania, Portugal, Poland and North Macedonia limit appointments to nine years without the possibility of renewal (except in France, where former presidents of the republic are lifelong members of the court).

1.3.3.5 Incompatibility

The work of constitutional or supreme court justices entails major responsibilities and expenditure of time. Therefore, the vast majority of countries deem it necessary to stipulate limitations on **additional professional practice**. A possible downside of such an approach is that justices might not be as involved in the various areas of legal professions and may miss out on the inspirations such an involvement can create. Moreover, if the appointment period is rather short and the maintenance of professional practice is not permitted, a conflict with the independence of constitutional court justices can arise.

There are very few countries that **do not allow any paid occupation.** Bulgaria, Ireland, Portugal and Italy follow this model. Portugal prohibits the exercise of any position or function of a public or private nature, except for unpaid teaching or scientific research of a legal nature. Italy prohibits any other form of paid activity, with the exception of receiving copyright royalties. In Ireland, the constitution prohibits a judge from taking up paid employment, but not from receiving royalties or serving in a voluntary capacity.

In most other countries, the position of a judge is **incompatible with any other public or private remunerated position, except for teaching and academic or creative activities** (e.g. Croatia, Czech Republic, Estonia, France, Georgia, Germany, Lithuania, Moldova, Romania, Slovak Republic, Slovenia, Spain). In Albania, constitutional court justices are also allowed to teach and engage in

academic and scholarly activities for the development of doctrine, but the duration of the allowed professional activity is determined by the Meeting of Judges. Similarly, in Belgium, justices are not allowed to exercise another profession, but the king can permit a derogation after a favourable and explained opinion from the Constitutional Court. These exceptions, however, are relatively narrow. They are allowed for teachers or professors carrying out these functions for no more than five hours or two half-days a week, as well as for members of an examining board and lastly for participation in a commission, council or advisory committee. In addition, no more than two functions are permitted and their maximum total remuneration is one tenth of the annual gross wage of the function at Court. In Israel, justices are permitted to engage in other activities on a limited basis as well, if this is determined by law or subject to approval by the President of the Supreme Court and the Minister of Justice.

Austria takes a very **liberal** approach to this issue. The members of the Constitutional Court are free to continue exercising their profession, unless they are administrative officials, who must be exempted from all official duties.

The membership or participation of justices in the activities of **political parties** and other **political organisations** is also forbidden in most of the countries (e.g. Lithuania, North Macedonia, Bulgaria, Italy, Slovak Republic, Georgia, Albania, Poland). In Austria, for example, persons holding certain political offices or persons that are employed by or functionaries of political parties are barred from serving as justices. France only prohibits justices from having leading roles or positions of responsibility in political parties. In Ireland, a judge is expressly forbidden from being a member of either House of Parliament.

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II Parliamentary Practice and Constitutional Discourse

1. Overview

Sophia Witz

How the constitutional discourse unfolds in the parliamentary practice is reflected in the quality of laws. Therefore, it is worth highlighting how the constitutionality of legislative drafts is reviewed – in parliament, by experts on demand and by the courts ex ante.

1.1 Introduction

The aim of this second chapter is to discuss parliamentary practice and constitutional discourse in relation to legislative drafts. It will give an overview of debates, opinions and the preliminary review of constitutional questions in legislative procedures. To that end, it is structured into four main sections. The first two sections address how legislative drafts are handled within parliament; the third section focuses on the involvement of external experts on demand during the legislative process; the fourth section discusses the involvement of courts in an ex ante review.

The first two parts of this chapter answer the question of whether legislative drafts have to contain information on their constitutionality as well as how institutionalised scrutiny of the legislative drafts within parliament works. The discussion will cover not only the form of scrutiny, but also the frequency and the scope of such scrutiny. Not all countries provide for such institutionalised scrutiny, but most of those that do stipulate that it should be performed by either an expert advisory body of the parliament or a committee. This section will also detail how parliaments proceed with the results of the scrutiny, whether the results are published and how the results have to be considered in the further legislative proceedings.

The third part of this chapter focuses on external experts and constitutional discourse. First, we will introduce the several fields of expertise that can be included in the legislative process (public administration, members of interest groups, scholars and judges). Who has the right to invite those experts will be considered as well. In some countries, it is also usual to hear from experts within the parliamentary administration on debates about the constitutionality of legislative drafts or constitutional amendments.

In the fourth section, whether or not countries stipulate that their courts perform an ex ante review will be analysed. The discussion will include whether it is possible or mandatory for a court to review legislative drafts – or adopted but not yet enacted legislative bills – for conformity with the constitution, and whether this is carried out ex officio or upon application. Lastly, what effect the expert opinions or rulings of these courts have on the legislative procedures in question will be addressed.

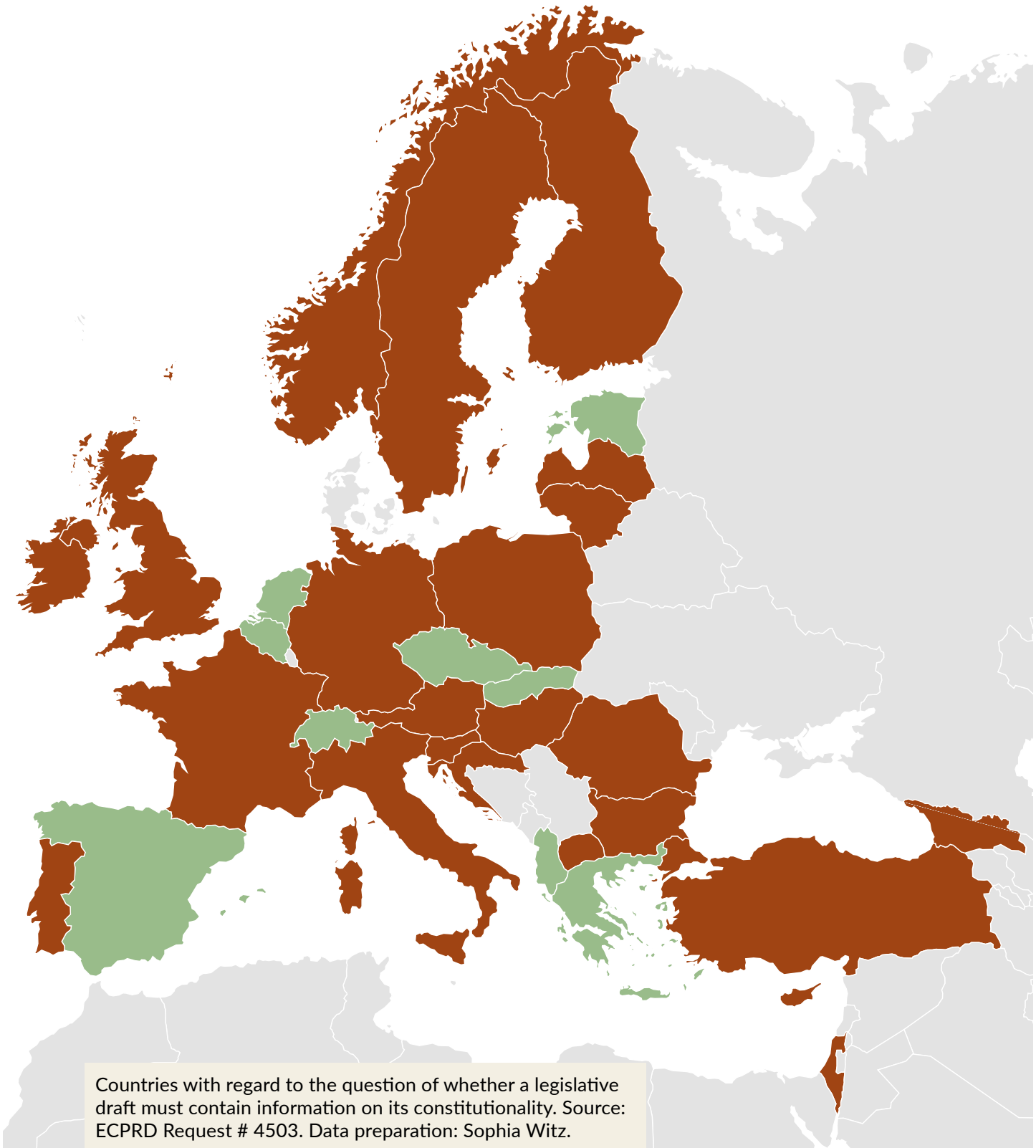
1.2 Legislative Drafts

1.2.1 Information on Constitutionality

The first chapter provided a broad overview of the legislative process across the chosen countries. Now we want to focus on the legislative drafts themselves. Some constitutions stipulate that legislative drafts should be accompanied by additional information (e.g. an impact assessment or explanatory memorandum). They may require that legislative drafts to be considered in the parliament include information on their constitutionality. Such a requirement can have a beneficial effect on the quality of the legislative draft. When the question of a draft law's compatibility with the constitution is raised very early in the legislative process, parliamentarians can also address concerns about the constitutionality of a draft at a very early stage, which may be advantageous.

The chart on page 74 shows which countries do and which do not require information on its constitutionality to be included in a legislative draft.

Information on Constitutionality



Countries with regard to the question of whether a legislative draft must contain information on its constitutionality. Source: ECPRD Request # 4503. Data preparation: Sophia Witz.

Country	Information / Yes	Information / No
Albania	X	
Austria		X
Belgium	X*	
Bulgaria		X
Croatia		X
Cyprus		X
Czech Republic	X	
Estonia	X	
Finland		X
France		X
Georgia		X
Germany		X
Greece	X	
Hungary		X
Ireland		X
Israel		X
Italy		X
Latvia		X
Lithuania		X
Netherlands	X	
North Macedonia		X
Norway		X
Poland		X
Portugal		X
Romania		X
Slovak Republic	X	
Slovenia		X
Spain	X*	
Sweden		X
Switzerland	X	
Turkey		X
United Kingdom		X

*in case of government bills

Most of the countries do not explicitly require that a legislative draft contain information on its constitutionality (Austria, Bulgaria, Croatia, Cyprus, Finland, France, Georgia, Germany, Hungary, Ireland, Israel, Italy, Latvia, Lithuania, North Macedonia, Norway, Poland, Portugal, Romania, Slovenia, Sweden, Turkey, United Kingdom). However, some of these countries stipulate that care must be taken in the drafting of laws to ensure that they comply with constitutional law (e.g. Hungary).

Of those countries that do require information on the constitutionality of drafts to be added (Albania, Belgium, Czech Republic, Estonia, Greece, Netherlands, Slovak Republic, Spain, Switzerland), the scope of that information varies. In the Slovak Republic, for example, the explanatory memorandum has to contain information on the constitutionality, but the wording is generally the same and very short. In Spain, a specific mention of the conformity with the constitution is required only for bills submitted by the government. Albania, on the other hand, prescribes the rapport which accompanies the draft law to contain information about its compliance with the constitution. In Belgium, all government bills tabled in Parliament are accompanied by the advisory opinion of the Council of State on the draft bill. This opinion always addresses the constitutionality of the draft.

1.2.2 Institutionalised Scrutiny Within Parliament

1.2.2.1 Form of Scrutiny

The following section addresses the question of whether legislative drafts undergo any institutionalised form of scrutiny of their constitutionality within parliament, and if so, in what form. An institutionalised form of scrutiny within parliament may be undertaken after the submission of a legislative draft. In some cases, the scrutiny starts even before the legislative draft has been introduced, as part of the procedure for the admission of the bill (e.g. Portugal,[1] Greece). Of the countries that do have a form of institutionalised scrutiny, it may be carried out by either an expert advisory body of the parliament or a political committee, or, in some countries, by both.

1 | For further details see the Portuguese Case Study on p. 103 et seq.

Institutionalised scrutiny within parliament can ensure that an in-depth discussion of the question of a draft law's constitutionality takes place at the parliamentary level. However, such scrutiny may also slow down the legislative process, and it may be merely pro forma. Whether the scrutiny is carried out by an expert advisory body or in a committee can affect the direction and depth of the scrutiny, as subject matter experts will have a different understanding of the constitutionality of legislative drafts than a body politic.

The map "Institutionalised Scrutiny within Parliament" on page 78 shows whether states provide for such scrutiny and, if so, whether an expert advisory body of the parliament or a political committee or both are responsible.

No institutionalised form of scrutiny within parliament is required in Albania, Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, France, Germany, Israel, the Netherlands,[2] Norway, Poland, Spain, Sweden and Switzerland. However, that does not mean that there is no scrutiny performed at all.[3] In Germany, for example, almost all legislative proposals come from the government. They are drafted by one of the ministries and their constitutionality is examined in the specialised unit of either the Ministry of the Interior or the Ministry of Justice. Similarly, in Ireland, government proposals for legislation are scrutinised for constitutionality by the government's legal adviser before being introduced, but they are not usually formally scrutinised as they go through the Houses. In Greece, a similar examination takes place before the proposed legislation is introduced to the plenum: the regulatory impact assessment.[4] The difference in Greece is that legislative drafts undergo scrutiny again within Parliament in an institutionalised way.

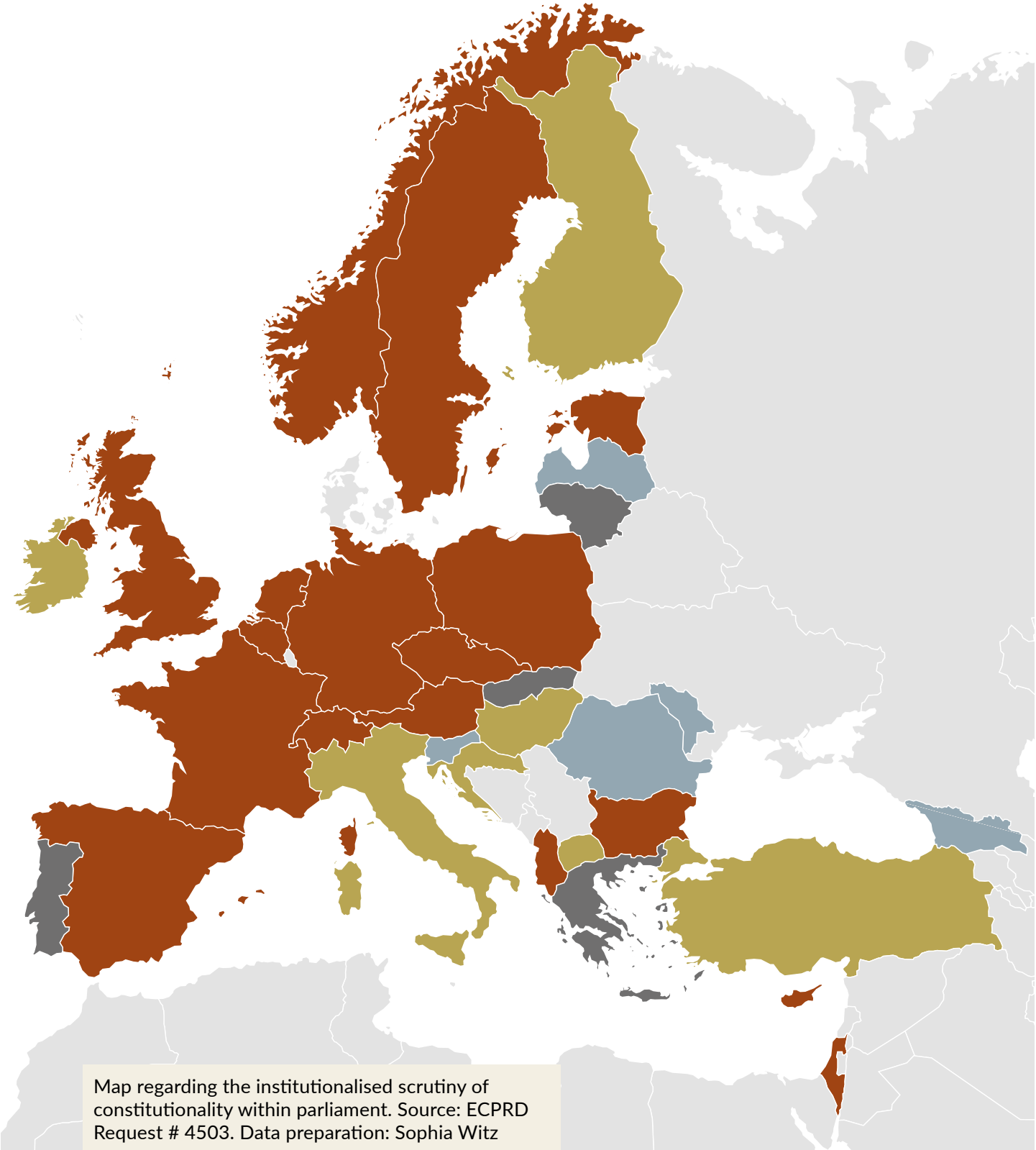
About half of the countries surveyed stipulate that legislative drafts undergo an **institutionalised scrutiny** of their constitutionality within parliament. An **expert**

2 | For the conventional deliberation in committees, see the Case Study of the Netherlands on p. 97 et seq.

3 | See e.g. the Swedish Case Study on p. 99 et seq.

4 | See the Greek Case Study on p. 192 et seq.

Institutionalised Scrutiny within Parliament



Map regarding the institutionalised scrutiny of constitutionality within parliament. Source: ECPRD Request # 4503. Data preparation: Sophia Witz

Country	No institutionalised scrutiny	Scrutiny by expert advisory body of the parliament	Scrutiny by a political committee	Scrutiny by both*
Albania	X			
Austria	X			
Belgium	X			
Bulgaria	X			
Croatia			X	
Cyprus	X			
Czech Republic	X			
Estonia	X			
Finland			X	
France	X			
Georgia		X		
Germany	X			
Greece				X
Hungary			X	
Ireland			X	
Israel	X			
Italy			X	
Latvia		X		
Lithuania				X
Moldova		X		
Netherlands	X			
North Macedonia			X	
Norway	X			
Poland	X			
Portugal				X
Romania		X		
Slovak Republic				X
Slovenia		X		
Spain	X			
Sweden	X			
Switzerland	X			
Turkey			X	
United Kingdom			X	

*scrutiny by expert advisory body of the parliament and by a political committee

advisory body of the parliament is responsible for the scrutiny in Georgia, Greece, Latvia, Lithuania, Moldova, Portugal (scrutiny by legal advisers of the parliament), Romania, the Slovak Republic and Slovenia. **A political committee** performs the scrutiny within parliament in Croatia, Finland, Greece, Hungary, Ireland, Italy, Lithuania, North Macedonia, Portugal, the Slovak Republic, Turkey (only for drafts by MPs, not for government drafts) and the United Kingdom.

1.2.2.2 Frequency of Occurrence and Scope

Along with the question of whether scrutiny takes place at all and, if so, whether an expert advisory body or a committee carries it out, it is especially relevant whether such a review takes place routinely or is only possible on request. It is also interesting to know the extent of such a review in the various countries: at what stage the review takes place, what scale is used for the review and in what detail this review takes place.

In some countries, there is a fairly extensive routine procedure within parliament whereby **several bodies** are involved in the process of examining a legislative draft with respect to constitutional compliance. In Portugal for example, the scrutiny takes place very early on, since it is part of the procedure for the admission of the bills. The constitutional conformity of every single bill is verified before its admission to prevent unconstitutional bills from being admitted. It is the responsibility of the President of the Parliament to admit or reject bills, and therefore to verify the constitutional requirements. The President's decision is supported by a technical document prepared by the services of the Parliament.[5] After the admission, the President of the Parliament refers the text to the competent parliamentary committee, which also issues a brief opinion on the (formal) constitutionality of the draft. The Assembly's departments and services also analyse the bill in a technical note, which is attached to the opinion of the parliamentary committee.[6] In the Slovak Republic as well, more than one body is involved; both the Department of Legislation and Approximation of Law (at the parliamentary administration level) and the Constitutional and Legal

5 | For further details see the Portuguese Case Study on p. 186 et seq.

6 | For further details see the Portuguese Case Study on p. 103 et seq.

Affairs Committee (at the political level) are part of the process.[7]

In some countries, an **expert advisory body** of the parliament undertakes the task of reviewing the constitutionality of a draft bill. In Slovenia, the Legislative and Legal Service, which is an independent and professional service of the National Assembly, delivers opinions on the conformity of draft laws with the constitution (with constitutional principles and with all articles of the constitution) and the legal system, as well as on legislative and technical aspects of the drafts. These opinions are delivered regularly as a routine procedure and are not binding. In Greece, any bill or law proposed may be referred to the Scientific Service of the Parliament. The scope of the scrutiny is very comprehensive.[8] In Moldova, draft legislative acts are sent to the Legal Department of the Parliament, which, within a maximum of 30 working days, submits its advisory note on conformity with the constitution to the standing committee responsible and the Department of Parliamentary Documentation. Similarly, all registered Lithuanian draft laws undergo scrutiny by the Legal Department of the Office of the Seimas for conformity with the constitution, legislation principles and technical rules of law-making.

Other countries, such as Hungary, stipulate that the designated **committee** examine the legislative proposal for compliance with the substantial and formal requirements of the fundamental law, as a routine part of the legislative procedure. Similarly, in Italy the Committee on Constitutional Affairs gives its opinion on the constitutional legitimacy of a bill. This opinion is then printed and annexed to the report written for the plenary. The Croatian Parliament Legislation Committee also considers draft legislation with a view to its compliance with the constitution and informs the Parliament on possible unconstitutionality in its reports. In the UK, all public bills are examined for constitutional implications in the House of Lords – the second chamber – by the Constitution Committee, but the Committee does not report on every bill that is introduced. The scope of scrutiny depends

7 | For further information see the Case Study of the Slovak Republic, p. 106 et seq.

8 | For further details see the Greek Case Study on p. 188 et seq.

on the time available and the nature of the bill. In Finland, the Constitutional Law Committee routinely examines any bill that is deemed to have constitutional issues (20% of all bills during the last parliamentary term, 2015–2018).[9]

In countries where there is **no obligatory form of scrutiny** within parliament, there are some instances where such an examination can be requested. The President of the National Council in Austria, for example, can instruct the parliamentary administration to perform such scrutiny and decide on the scope of it. However, such instruction is very rare. In Sweden, one committee may give another the opportunity to state its opinion in a matter falling within the remit of the second committee, including the Committee on the Constitution. In practice, the Secretariat of the Committee on the Constitution monitors all bills submitted by the Government to the Riksdag, to see if they contain any constitutional aspects or issues relating to fundamental rights and freedoms. There is no institutionalised scrutiny in Spain either, but the Legal Advisors of the Parliament are in charge of the constitutionality review of any bill.

1.2.2.3 Consideration of Results

Just as important as whether a country provides for institutionalised scrutiny within parliament is the question of how parliament approaches the results of such a scrutiny. Countries that do have an institutionalised form of scrutiny generally stipulate that the results be considered in parliamentary proceedings. However, the results are **almost never binding**; they are generally of a supportive nature or serve as a talking point. In the UK for example, the recommendations of the Constitution Committee are quite frequently referred to in debate in the House of Lords. In Portugal, the President of the Parliament takes the scrutiny into consideration in the decision to admit a legislative draft or to unschedule the debate of a bill. However, the Committee's opinion does not bind the President, since it is supportive in nature.

Nevertheless, there are countries where the results of the scrutiny into possible

9 | For further details see the Finnish Case Study on p. 114.

unconstitutionality do have a **greater impact** (e.g. Lithuania, Italy, Finland). If the reporting committee in Italy has not adapted the text of the bill to the conditions set out in the opinions of the Committee on Constitutional Affairs, it must explain why in its report to the plenary. In Finland, the statements of the Constitutional Law Committee must be followed; the committee responsible has to make the required amendments. The Speaker must refuse to include a matter on the agenda if they consider it to be contrary to the Constitution and explain the reasons. If this refusal is not accepted by the Parliament, the matter is referred to the Constitutional Law Committee, which rules on the correctness of the Speaker's action. In Lithuania, the Seimas Committee on Legal Affairs must undertake preliminary consideration of the draft if the Legal Department concludes that a draft law is unconstitutional. If the Committee comes to the conclusion that the draft law is not in conformity with the constitution and if there are no amendments to the constitution presented, the Seimas decides how to proceed with the draft law. The draft law can be considered further if, by a majority of the votes cast by all Members of the Seimas, the Seimas does not agree with the conclusions of the Committee.

In countries where there is **no institutionalised form** of scrutiny, formal consideration of the results of a possible scrutiny is rarely foreseen (e.g. Austria, Spain). There are however, countries where the result is considered in the proceedings (e.g. Sweden).

1.2.2.4 Publication of Results

An institutionalised form of scrutiny that takes place within parliament almost always results in the production of documents. Therefore, the question arises of whether the documents connected to the scrutiny within parliament will be made available to the public. Publication has the advantage of making all the arguments of the body responsible for the review within parliament – in favour of and against the constitutionality of the draft law – transparently available. For interested parties, this can lead to a better understanding of the arguments and debate around the draft law. Some countries, however, prefer to keep all or some of the documents connected to the scrutiny to themselves and only use them internally.

Most of the countries that do have an institutionalised form of scrutiny within parliament **publish** the connected documents (e.g. Greece,[10] Hungary, Lithuania, Portugal, Slovak Republic, Slovenia, UK). In Portugal, for example, this information can be found on the Parliament's website and includes the President of the Parliament's decision to admit or reject a bill and the Committee's legal opinion, as well as the technical note. In the Slovak Republic only the resolution of the Constitutional and Legal Affairs Committee gets published; the legal opinion of the Department of Legislation and Approximation of Law is available only on the internal network.

Among countries with **no institutionalised form** of scrutiny within parliament, the publication of results is structured in various ways. In Austria, where there is no institutionalised form of scrutiny, but there is the option of ordering a scrutiny, the President of the National Council or the competent committee may decide on its publication. In Sweden, if an opinion has been stated by the Committee on the Constitution, it is published in the committee report. In Estonia, where there is also no institutionalised form of scrutiny, all support materials needed for analysing draft legislation are intended for internal use only.

1.2.3 Scrutiny by Experts on Demand

1.2.3.1 Field of Expertise

The previous section addressed institutionalised scrutiny within parliament. However, in order to include several points of view, parliaments often involve not only internal experts but also external experts from various fields of expertise in the debates on the constitutionality of legislative drafts or constitutional amendments. The involvement of external experts or interest groups brings the advantage that a draft law can be widely discussed beyond the parliament. The external experts represent a wide range of expertise, such as **public administration** and **interest groups** as well as **academia** and experts from the **judiciary**. In some countries,

10 | For further details see the Greek Case Study on p. 194 et seq.

courts (regarding the ex ante review by courts see below Chapter II.1.2.4 Ex Ante Review by a Court, p. 89) or special **councils** are involved in an institutionalised way and pronounce on the constitutionality of draft laws as well.

An example of a country that includes many **external experts** in the debates on draft legislation is Finland, where experts from public administration and scholars are invited in almost all cases and experts from the highest courts are consulted now and then (e.g. when the matter concerns their activities). In Ireland, representative organisations are generally invited to give their opinion on drafts; they usually discuss wider aspects of the draft, but they may give opinions on constitutional matters as well. Other countries follow an approach whereby experts are invited when the topics are of high sociopolitical relevance (e.g. Germany). Germany usually invites scholars and interest-group representatives, as well as experts from the courts if the issue has a connection to jurisdiction.

There are, however, some countries where it is **not usual** to invite external experts to give their opinion on the constitutionality of drafts (e.g. Hungary, Greece, Poland). The same is true of Slovenia with regard to legislative drafts, but not constitutional amendments. In Greece, for example, the standing committees can request hearings with a wide variety of experts (e.g. public functionaries; public servants; representatives of local government agencies, unions or other social agencies), but it is uncommon for them to invite experts to give their opinion on the constitutionality of the law, since that is discussed in the standing committees.[11]

Councils may also be involved in an institutionalised way, but it has to be noted that the nature of such councils is consultative and the expertise is not binding. In the Netherlands, the government has to ask the advisory division of the Council of State (independent, non-judicial body) for advice on the compatibility of a bill with higher law before the bill is sent to the House of Representatives.[12] However,

11 | See the Greek Case Study on p. 195 et seq.

12 | For further details see the Dutch Case Study on p. 97.

the government is not obliged to follow this advice (a similar procedure is followed when an MP presents an initiative bill). Similarly, in Sweden the Council on Legislation (an advisory government agency, whose members are justices or former justices drawn from the Supreme Court and the Supreme Administrative Court) pronounces on the legal validity of legislative proposals at the request of the Government or a Riksdag standing committee. The government is not obliged to allow the council to review every bill (proposition), but it has to provide a rationale if it does not do so.[13] Both Sweden and the Netherlands are countries without ex post abstract legislative review; the Council's involvement ex ante can be a substitute for this, to a certain limited extent.

1.2.3.2 Invitation

If external experts are to give their opinion on a draft law, the question naturally arises as to which experts should be heard and who has the right to decide this. The competence to decide which external experts to invite often lies within the parliaments themselves; how these decisions are made varies. The selection of experts can have an influence on the further legislative process, so it is politically relevant whether, for example, parliamentary minorities also have the right to invite or propose experts, or whether this decision is made by a simple majority or even an individual.

Many countries authorise the **committee** responsible to decide whom to invite (Belgium, Bulgaria, Estonia, Finland, Georgia, Germany, Greece,[14] Ireland, Israel, Latvia, Lithuania, the Netherlands, Norway, Portugal, Slovak Republic, Sweden, Switzerland, Turkey, UK). The committee responsible may be the committee that deals with constitutional law issues (e.g. Finland) or the committee hosting the hearing (e.g. Lithuania) or debating the bill (e.g. Israel). It is also relevant whether the experts are heard only by the parliamentarians or the committees themselves, or whether, for example, members of the government can be obliged to hear the experts as well. In Moldova for example, members of the government and leaders

13 | For further details see the Swedish Case Study on 99 et seq.

14 | For further details regarding the invitation of experts see the Greek Case Study on 195 et seq.

of other public administration authorities are obliged to be present if invited by the committee responsible.

In other countries, either in some cases or routinely, it is only **one person** who decides which external experts to invite. In the Czech Republic, each committee has a procedure for deciding who to invite, and in many cases the procedure calls for the president of the committee to make that decision. Similarly, in Hungary the chair of the parliamentary committee may extend an invitation.

There are also countries in which experts are invited not to offer one-time expertise on a particular draft law, but as **specialists** for a **longer period of time**. In Albania, committees or councils can appoint temporary specialists; the appointment is made by a decision of the Bureau of the Assembly, based on the proposal of the committee or council. In the UK, the committee begins by seeking written evidence and some of the experts who have made submissions are asked to appear before the committee. The committee also appoints specialist advisers, sometimes for a period of time, or in connection with a specific issue. These advisers then assist the committee in understanding the information at hand; they are paid a daily rate.

Similarly, the **working bodies** of the Assembly in North Macedonia can invite experts to their sessions. These working bodies (committees) may have two members who are scientists and/or experts, and who have no right to vote. One is elected upon a proposal by the parliamentary groups from the ruling majority, the other upon a proposal by the parliamentary groups of the opposition parties. In Croatia, working bodies of Parliament can usually appoint up to six public officials, scholars and/or professionals (without decision-making rights) to working bodies.

In contrast to these examples, in some countries the **parliamentary parties** have the decision-making power in inviting external experts. In Austria and Spain the decision is up to the parliamentary groups: either each group nominates one expert or they agree on one to be invited jointly (without the involvement of the parliamentary administration). Italy follows the same procedure. In Romania, the decision is up to

the parliamentary groups or parliamentary structures, including standing committees. Either each group nominates one expert, or the groups agree on experts to be invited jointly. The parliamentary administration may be involved in the decision-making process.

1.2.3.3 Experts from the Parliamentary Administration

The involvement of experts within the parliamentary administration in the examination of draft laws has already been discussed as an aspect of institutionalised scrutiny within parliament. The focus here is whether it is also usual to hear from experts in the parliamentary administration about the constitutionality of legislative drafts or constitutional amendments on demand.

Some countries involve experts from the parliamentary administration **occasionally** (Cyprus, Czech Republic, Estonia, Finland, Latvia, Slovak Republic[15]). In Finland, the Constitutional Law Committee may consult experts from the parliamentary administration on matters relating to Parliament's activities. In the Czech Republic, the MPs may request the opinion of the experts from the Parliamentary Institute (research centre), and sometimes but not frequently they are invited to the committee. In Estonia, experts from the parliamentary administration are heard in a committee meeting as required (occasionally).

Another model provides for a more **active** role for these experts. In Turkey, the parliamentary legislative experts attend the commission meetings and provide legal and technical support. In Israel, the Knesset's legal advisors often present their opinion on issues of constitutionality.

Georgia makes it **possible** but not mandatory for experts from the parliamentary administration to give opinions. In Norway, experts from the parliamentary administration can participate by presenting their view, but there is no formalised role for them and such participation is not common. Ireland's position could be

15 | For details see the Case Study of the Slovak Republic, p. 106 et seq.

said to be intermediate; committees undertaking detailed scrutiny of law proposals from private members regularly seek formal advice from the Office of Parliamentary Legal Advisers (since these proposals will not have been reviewed by the government's legal adviser). Such advice is rarely – but not never –sought for government legislation.

1.2.4 Ex Ante Review by a Court

1.2.4.1 Possibility and Requirements

We have already discussed two of the three ways draft legislation may be scrutinised: institutionalised scrutiny within parliament and scrutiny by external experts on demand. Now we will address the question in which countries it is possible or even mandatory to have legislative drafts, or adopted legislative bills not yet in force, reviewed by a court for their conformity with the constitution (ex ante review) and whether this is carried out ex officio or upon application.

The **advantage** of such an ex ante review is that the unconstitutional law never enters into force, resulting in legal certainty. However, such a system also has some **disadvantages**. The obligation to consult a court may well delay the legislative process. Sometimes, therefore, the deadlines set for the review of a draft law are very short, but then the question arises as to how extensively a court can review a draft in that time. Furthermore, if an ex post review is not also possible, a law that has been adopted cannot be reviewed afterwards, even if its unconstitutionality is obvious. Given that the unconstitutionality of a law often proves itself only later when the law is applied or over time, a constitutional system where only an ex ante review is possible cannot react accordingly.

Due to the disadvantages described above and for historical reasons, in most of the examined countries an ex ante review of legislative drafts is generally **not possible** (Albania, Austria, Bulgaria, Croatia, Czech Republic, Finland, Georgia, Germany, Greece, Israel, Italy, Latvia, Lithuania, Moldova, the Netherlands, North Macedonia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom).

Even if the ex ante review by a court of legislative drafts or adopted legislative bills prior to their enactment is generally not possible, in some countries **international treaties** may be reviewed against the constitution ex ante (e.g. Latvia, Czech Republic, Georgia, Slovak Republic,[16] Slovenia, Spain). In the process of ratifying a treaty, the Slovenian Constitutional Court, for example, issues an opinion on the conformity of such a treaty with the Constitution upon request of the President of the Republic, the Government or a third of the deputies of the National Assembly. The National Assembly is then bound by the opinion of the Constitutional Court.

In the countries where a review of legislative drafts, or, more frequently, adopted legislative bills prior to their enactment by a court, is **possible but not mandatory** (Cyprus, Estonia, Hungary, Ireland, Norway, Poland, Portugal, Romania), several different procedures exist. In Norway, for example, it is possible but not mandatory to have legislative drafts reviewed by the Supreme Court. The opinion given is advisory in nature and not binding; moreover, this provision is very rarely used.[17] In Hungary, adopted but not yet promulgated acts may be examined by the Constitutional Court upon receipt of a petition containing an explicit request submitted by an authorised person (Parliament or President of the Republic). In Portugal, the Constitutional Court may be asked to rule on the constitutionality of a decree before its enactment. This can be requested by the President of the Republic, the Prime Minister, or one fifth of all members of Parliament or Representatives of the Republic.[18] In Romania, the Constitutional Court is empowered to examine bills at the request of the President of Romania, the Presidents of the Parliament chambers, the Government, the High Court of Cassation and Justice, the Ombudsman, 50 deputies or 25 senators, and it is empowered ex officio to examine proposals to revise the Constitution.

In some of the countries, only the **President of the Republic** can refer bills to a court prior to their enactment. In Cyprus, the President of the Republic has the

16 | For details see the Case Study Slovak Republic, p. 106 et seq.

17 | For further details see the Norwegian Case Study on p. 119 et seq.

18 | For further details see the Portuguese Case Study on p. 183 et seq.

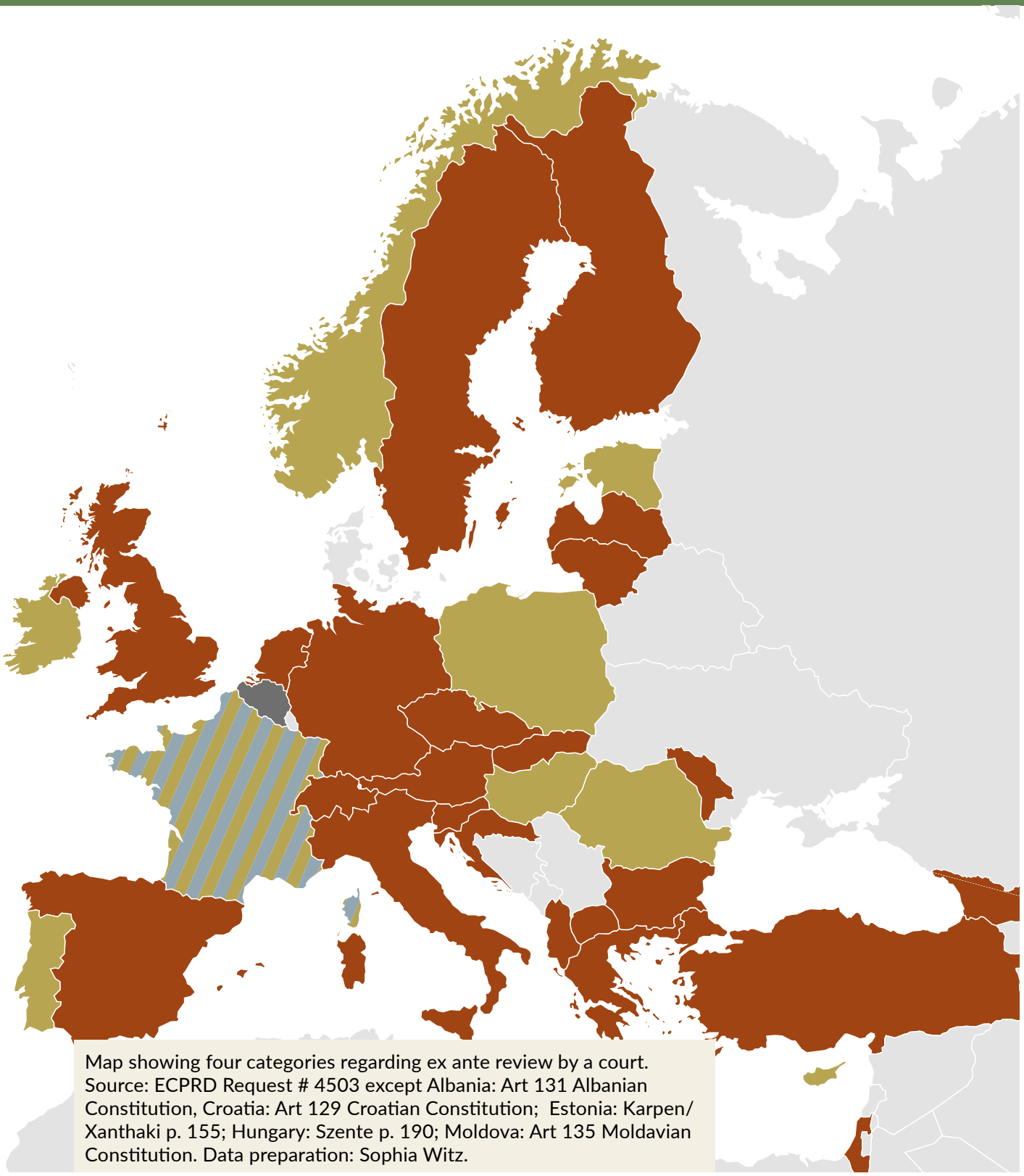
possibility to refer proposed legislation to the Supreme Constitutional Court once the bill is approved by the House of Representatives, but before it is published as law. In Poland, before signing a bill the President of the Republic can refer it to the Constitutional Tribunal for adjudication of its conformity with the constitution. Similarly, in Ireland, a President with concerns about a proposed law's constitutionality may, after consulting the Council of State, ask the Supreme Court to deliver an opinion as to its constitutionality. If the opinion is against the proposed law, the President must not sign it; conversely, if the constitutionality of the proposed law is upheld it cannot be challenged in court again. The court in such a case must deliver a single judgment without recording assenting or dissenting opinions.

An example of a country in which a supreme court **mandatorily** gives **advisory opinions** is Belgium. The Council of State (supreme administrative court) gives mandatory advisory opinions on all government draft bills, and its opinions on drafts that were not submitted to the Council can also be sought by the Presidents of the Houses of Parliament in the course of parliamentary procedure. The Presidents of the Houses of Parliament are obliged to request the opinion of the Council of State if the consultation proposal is supported by one-third of the Members or by the majority of the Members of a linguistic group. The scope of scrutiny is quite broad; the opinion always covers the compatibility of the draft with higher legal norms, the authority of the body drafting the law and compliance with procedural requirements. The opinions also carry special weight in the interpretation of the norms allocating authority between the federal level and the federal entities. The advisory opinions of the Council of State are not legally binding but impose great moral authority and are therefore duly considered in the parliamentary proceedings, as well as being published.

The map "Ex ante Review by a Court" on page 92 illustrates in which countries a court undertakes an ex ante review of draft laws, and if so, whether this review is mandatory, voluntary or compulsory but only advisory.

Moldova follows a different approach: the Constitutional Court only undertakes

Ex ante Review by a Court



Map showing four categories regarding ex ante review by a court. Source: ECPRD Request # 4503 except Albania: Art 131 Albanian Constitution, Croatia: Art 129 Croatian Constitution; Estonia: Karpen/ Xanthaki p. 155; Hungary: Szente p. 190; Moldova: Art 135 Moldavian Constitution. Data preparation: Sophia Witz.

Country	No ex ante review by a court	Mandatory ex ante review	Voluntary ex ante review	Mandatory advisory opinions
Albania	X			
Austria	X			
Belgium				X[1]
Bulgaria	X			
Croatia	X			
Cyprus			X	
Czech Republic	X			
Estonia			X	
Finland	X			
France		X[2]	X[3]	
Georgia	X			
Germany	X			
Greece	X			
Hungary			X	
Ireland			X[4]	
Israel	X			
Italy	X			
Latvia	X			
Lithuania	X			
Moldova	X			
Netherlands	X			
North Macedonia	X			
Norway			X	
Poland			X	
Portugal			X	
Romania			X	
Slovak Republic	X			
Slovenia	X			
Spain	X			
Sweden	X			
Switzerland	X			
Turkey	X			
United Kingdom	X			

1) for government draft bills 2) for draft organic laws, parliamentary proceedings and legislative proposal submitted to referendum 3) for ordinary draft laws 4) only under Art 26 of the constitution

a prior review of initiatives to revise the Constitution. Alongside **draft constitutional laws** submitted to Parliament there must be the advisory opinion of the Constitutional Court adopted by a vote of at least four justices.

Of the countries studied, only France has **mandatory ex ante review** of legislation (and until 2008 it excluded ex post review). The Conseil Constitutionnel may review every legislative act. For some kinds of laws the review is mandatory: organic laws, private members' bills on certain issues before they are submitted to referendum, and the standing orders of both parliamentary chambers. Simple laws, however, are only reviewed upon request. The President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, 60 Members of the National Assembly or 60 Senators can refer these acts of parliament to the Constitutional Court before their promulgation.[19] The period in which the court has to decide is relatively short: it has to rule on the constitutionality within 30 days, and on application of the government, in case of urgency, within eight days.

1.2.4.2 Effect of the Review

There are several ways that a negative opinion delivered by a court on the ex ante review of a legislative draft or an adopted but not yet enacted legislative bill may be further considered in parliament. Since the law is not yet in force, the consequence of an ex ante review may be that the president has to reject the act, that the legislative act cannot be published or that it has to be brought into line with the court decision.

In some countries the **president has to reject** the legislative act. In Portugal, the President of the Republic must veto the legislative act and return it to the Parliament if the Constitutional Court pronounces it unconstitutional. The Parliament then has to either expunge the unconstitutional norm or confirm it by a majority of at least two-thirds of all Members who are present and more than

19 | For further details see the French Case Study on p. 124 et seq.

an absolute majority of all MPs. If the draft is reformulated, the President of the Republic or the Representative of the Republic may request the prior review of the constitutionality of any of the norms in the reformulated text. In Ireland, the proposed law is simply never signed by the President and never becomes a law, but the Houses may reconsider the underlying proposal and bring forward a new proposed law, presumably taking the Supreme Court's reasons into account.

In France, if the court decides that an adopted bill is unconstitutional, it **cannot be proclaimed**. The Parliament has to follow the decision of the court. In Cyprus as well, the proposed legislation may not be published and cannot become operative. In Hungary, the Constitutional Court decides on the constitutionality of a legislative act within 30 days. If the court deems it unconstitutional, it shall not be promulgated. The Parliament can then start the procedure again with the corrected text or withdraw the proposal.

In Romania, if the President of Romania, MPs, the High Court of Cassation and Justice or the Ombudsman has made notifications concerning bills, the Constitutional Court is obliged to **inform** the Presidents of the Chambers as well as the Government, within 24 hours of registration, when the debates will take place. Until then the Presidents of the Chambers, the Government and the Ombudsman may submit their viewpoints in writing. If the Constitutional Court determines an unconstitutionality, the Parliament has to reconcile the provision with the court decision before the promulgation of the law (Article 147 para. 2 of the Romanian Constitution).

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Netherlands

On the organisation of constitutional review of draft legislation in the Netherlands

Louis Middelkoop[1]

In the Netherlands, constitutional review of draft laws takes places at various stages of the legislative process and is undertaken by a range of institutions and people. Although members of the House of Representatives have the right to initiate legislation, most bills originate from the government. The following section therefore focuses mostly on government-initiated legislation.

Pre-parliamentary phase

During the departmental drafting stage, policy makers and legislative lawyers must follow the 'aanwijzingen voor de regelgeving' ('directions for regulations') and the 'integraal afwegingskader' ('integral assessment framework'), which are a type of quality control documents. These documents aim, among other goals, to ensure compliance with the constitution and applicable international law. The constitutionality of the proposed legislation must also be addressed in the explanatory memorandum. At the end of this stage, the government usually publishes a draft version of the legislation online for public consultation. After the consultation period and possible adaptations, the Council of Ministers discusses the draft law. Next, the draft is mandatorily sent to the advisory division of the Council of State, an independent, non-judicial body. The Council of State usually scrutinises constitutional aspects of the draft law, among many other points of attention. The government responds to the opinion, either by accepting recommendations or rejecting them, stating the reasons for their choice.

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House of Representatives

After these internal and external drafting and scrutiny processes, the bill is submitted to the Parliament. Bills are first taken up by the House of Representatives. Within the House, each policy committee is responsible for scrutinising all aspects of the legislation, including constitutionality. After the committee stage, which is usually a written round, the bill is sent to the plenary for an oral debate with the minister responsible. At this stage amendments to and motions on the legislation may be tabled. The parliamentary staff, both at committee level and plenary level, are trained to advise on constitutional issues. The committee staff draw up a summary of the legislation, including a paragraph on constitutional aspects. Moreover, committees regularly invite independent experts to give their opinion on the constitutionality of legislation. Recent examples are the 2017 Intelligence Act, the 2019 Brexit Contingency Act and the 2020 COVID-19 Emergency Act. In addition, the House can ask for a new opinion by the Council of State, for example on the changes made by the government in reaction to the original Council of State opinion or on any other issues that came up during the parliamentary phase.

Senate

Should a bill be adopted by the House of Representatives, it is sent to the Senate. The Senate has a right of veto, but no right of amendment. The role of the Senate is conceived as somewhat apolitical and more focused on the legality and practicability of legislation, traditionally paying attention to constitutionality. The Senate meets part-time (one day a week) and has a considerably smaller staff. In practice, the Senate also hears independent experts. After adoption by the Senate, the law is sent to the King who is required to sign. However, for legislation initiated by a member of the House of Representatives, the government has a right of veto.

Finally, it can be noted that the government is also obliged to discuss the constitutionality of draft regulations, directives and other types of EU legislation in the memoranda that are shared with the Parliament on legislative proposals from the European Commission.

Sweden

Constitutional review in the Swedish context

Kalina Lindahl[1]

Sweden does not have a constitutional court with the power to repeal enacted legislation. The main reason for this is that the guiding principle of the Swedish form of government is a strong emphasis on popular sovereignty. Successive constitutional reform commissions have argued that vesting the power to overturn legislation passed by the Parliament in an unelected judicial body would contradict the principle of parliamentary supremacy (SOU 1975:75; SOU 1993:40; SOU 2008:125).

Constitutional review is, however, performed both during the legislative process (ex ante) and in the application of legislation (ex post). Abstract constitutional review is carried out only ex ante, while ex post constitutional review is carried out only in concrete cases by the ordinary courts (Instrument of Government (IG) 11:14).

In the strict sense of the term, ex ante constitutional review is carried out by the Council on Legislation, which is an independent body set up specifically for this task. In the wider sense, the legislative process encompasses various components that provide for a review of the constitutionality of proposed legislation (SOU 2007:85; Bull, 2011). Notable features of the Swedish legislative process include the thorough preparation of legislation by expert commissions, a constitutional obligation for the Government to consult with the relevant public authorities (often including courts and faculties of law, etc.) in the preparation of legislation, and mandatory and often thorough consideration of business in parliamentary committees. The limitations of constitutional review, and a tradition of judicial restraint, are best understood in the context of the quality of the legislative procedure.

The sections below, focusing on constitutional review during the parliamentary

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stage of the legislative process, briefly describe the possibility of referral to the Council on Legislation and procedures for constitutional review – in the wider sense – within the Parliament (Riksdag).

Ex ante constitutional review by the Council on Legislation

The Council on Legislation is a constitutionally established organ with the task of scrutinising draft legislation. It comprises justices or former justices of the Supreme Court and the Supreme Administrative Court, typically appointed by these courts for a period of one year (IG 8:20; Act on the Council on Legislation). The Government, or a committee of the Parliament, is obliged to refer draft legislation with significant implications for private citizens or the public to the Council. Exceptions can be made if the examination would lack significance or delay the matter with major negative consequences (IG 8:21). The Government, or parliamentary committee, must state its reasons for not obtaining the opinion of the Council on a relevant item of legislation (IG 8:21, Riksdag Act (RA) 10:5). The Council's scrutiny covers not only the constitutionality of draft legislation, but also whether it conforms with other parts and basic principles of the legal system (IG 8:22).

In practice, since most legislation in Sweden originates in a government bill, almost all referrals to the Council come from the Government. Apart from the rare cases in which a parliamentary committee proposes substantial amendments to a bill or raises a matter of law on its own initiative, the committee responsible for preparing a government bill that was not referred to the Council may – by a majority decision – seek the opinion of the Council. This is, however, also quite unusual. Between January 2018 and April 2021, less than 2 per cent (7 out of 461) of the opinions issued by the Council were requested by a parliamentary committee for various reasons.

The power of the Council is limited by the fact that its opinions are not formally binding, and that failure to obtain its opinion on a draft law does not constitute an obstacle to application of the law (IG 8:21). However, the fact that the Council is composed of the highest judges of the country on a rotating basis gives special

weight to its advice, both because that advice comes from the most important authorities in the legal system and because its opinions may be relevant in any subsequent judicial review (SOU 2007:85; Bull, 2011). All opinions pronounced by the Council are published and shall be included in the relevant government bill (RA 3:1).

Ex ante constitutional review within Parliament

During the consideration of business, a parliamentary committee may – even without a majority decision– give another committee the opportunity to state its opinion on a matter falling within the remit of that other committee (RA 10:7 and 10:9). If a matter raises constitutional issues, in most cases the committee responsible obtains the opinion of the Committee on the Constitution. In practice, legal experts in the Secretariat of the Committee on the Constitution monitor all government bills submitted to the Parliament, to ensure that attention is brought to any constitutional aspects during the consideration of the matter. The committee responsible is generally expected to comply with the position of the Committee on the Constitution on any constitutional matter. This procedure is sometimes referred to as an instance of constitutional review. However, being performed by a political body whose majority reflects the majority in the Parliament, it cannot claim to be truly independent (Bengtsson, 2007; Bull, 2011).

It may also be noted that the Speaker, who puts the questions forward for decision in the Chamber, shall not do so if he or she considers an item of business to conflict with constitutional provisions. If the Chamber requests that the question be put forward, the matter is referred to the Committee on the Constitution for decision (RA 11:7). In practice, however, this has only been applied in very rare cases.

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Portugal

The scrutiny of constitutionality within the Portuguese Parliament's legislative procedure – a brief overview

Cristina Ferreira,[1] José Filipe Sousa[2] and Nélia Monte Cid[3]

There are two points in the Portuguese parliamentary legislative procedure at which an internal check on the compliance of each bill with the Constitution takes place. However, these are mostly superficial checks, rather than thorough reviews.

They take place:

1. before the bill is admitted by the President (who has the power to ask the Committee on Constitutional Affairs for a non-binding reasoned opinion on the constitutionality of the bill)
   and
2. after the bill's admission, when the Committee is to give its ordinary formal opinion on the bill – which is different from the specific reasoned opinion mentioned in point 1 – including, among other checks, verifying the bill's compliance with the Constitution, in order for it to be discussed and voted on by the plenary.

The parliamentary officials are involved in these procedures. First, they shall prepare a note to enable the President to admit or reject a bill (before the President's decision referred to in point 1). More importantly, after the admission, they shall draw up a technical note for each bill, containing, among other information, a brief analysis of the bill's compliance with the Constitution and the Rules of Procedure, as an assessment of formal requirements. This note underpins the Committee's opinion referred to in point 2; it may also be useful during the discussion and voting on the details of the bill, because a possible unconstitutionality of any of the rules may be detected and amended afterwards.

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The check for compliance with the Constitution contained in this note is often quoted in the Committee's opinion, even though it is itself attached to the opinion as an annex and published in the same way. The notes are usually extensive, but the arguments referring to constitutionality are not extensively developed. The aim is to raise questions about the lack of compliance with the Constitution in such a way as to allow the Committee to reflect and hold a political discussion on the matter, rather than to impose a technical constitutionality assessment. The note is issued at a stage in the legislative procedure when the admission of the bill is no longer at stake. Therefore, its main utility lies in the possibility it allows for the rules deemed to be unconstitutional to be amended, which is still important for preventing unconstitutionality and allows the bill to be discussed and voted on. The note is a tool within the procedure to save a bill from previously unidentified breaches of the Constitution: an internal tool for an internal constitutional scrutiny.

A decision by the President not to admit a bill on the grounds of its unconstitutionality is rather unusual:[4] although the President may raise questions about the bill's lack of compliance with the Constitution, he or she often believes that if such lack may be overcome during the legislative procedure it should not prevent the bill from being discussed. Moreover, before the bill's admission, a reasoned opinion of the Committee on Constitutional Affairs confirming the unconstitutionality of the bill is often very controversial. Members of Parliament from some political parties argue that the Committee is not the Constitutional Court and its opinion is not purely legal but may be politically motivated, as the Committee decides on the basis of a political majority.

This leads us to several final observations: what if a technical note raises questions as to the constitutionality of a bill? The controversy may be even larger: on one side, the author of the bill may not be pleased if a technical note points out a breach of the Constitution, and he may argue that the parliamentary administration

4 | Until the beginning of the XVth Legislature (2019-2022).

lacks legitimacy to do so; on the other side, a political opponent will often welcome such a remark and use it politically. Also, if a rapporteur raises a constitutionality issue over a bill in its draft opinion to the Committee but the technical note does not, the parliamentary administration might be accused of incompetence for not having pointed it out.

This is indeed a very sensitive issue: according to the Parliament's Rules of Procedure, 'no bill or draft amendment shall be admitted if it is in breach of the Constitution or the principles enshrined therein'. But experience reveals that scrutiny of constitutionality within the legislative procedure is not unanimously accepted or considered to be legitimate. Is such scrutiny necessarily politically motivated? Shall it be considered in a lighter way in order not to prevent bills from being discussed and voted on by the Parliament, allowing them to follow their course and only afterwards be scrutinised by the Constitutional Court? Should all bills have the opportunity to be discussed, regardless of their compliance with the Constitution, because the constitutional review takes place only afterwards through the judgment of the Constitutional Court, or should the debate on those matters be blocked a priori within the Parliament if there is a breach of the Constitution? Is a Constitutional Court judgment of unconstitutionality more easily accepted by the Parliament than an internal decision by the President of the Parliament to not admit a bill on grounds of unconstitutionality? The reaction of the Members of Parliament to a ruling of the Constitutional Court may also be politically motivated. Political parties that voted in favour of the bill are often very critical of the judgment, and their opponents may be pleased with it. Nevertheless, judgments do seem to be more easily accepted than internal scrutiny.

What cannot be forgotten is that, according to the Constitution, the Parliament, in the exercise of its scrutiny functions, has the competence 'to scrutinise compliance with the Constitution and the laws' (article 162 (a) of the Constitution of the Portuguese Republic). How could the Parliament ignore this constitutional duty within its own activity by not scrutinising the bills submitted to parliamentary debate and voting?

Slovak Republic

Constitutionality check of legislation in the Slovak Republic

Krisztina Csillag[1]

In a number of countries, laws are subject to an ex ante review before their promulgation; this review is a crucial tool for ensuring the constitutionality of legislation. Nevertheless, there is no common European standard for the application of the ex ante review, nor for the specific methods used for this control. Based on their own constitutional traditions and specific needs, countries shall decide who is authorised to initiate and who to carry out a priori control, and what the extent of that authorisation is.

In Slovakia, the judicial review of the constitutionality of legislation is vested with the Constitutional Court of the Slovak Republic (referred to in this section as 'the Constitutional Court'), which is, pursuant to Article 124 of the Act no. 460/1992 Coll. the Constitution of the Slovak Republic as amended (referred to in this section as 'the Constitution'), an independent judicial authority with the mandate to protect the constitutionality of the Slovak Republic.

However, the Constitutional Court is authorised to review only laws that have gone through the legislative procedure in the National Council of the Slovak Republic (referred to in this section as 'the National Council') and have been published in the Collection of Laws.[2] According to Article 125 para. 4 of the Constitution, the Constitutional Court shall not decide on the conformity of a bill submitted to the National Council or a proposal of other generally binding legal regulation with th

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2 | For the purpose of the case study, the paper deals with the constitutional review of laws to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated in the manner laid down by a law. Pursuant to Article 125 para. 1 (b), c) and d) of the Constitution, the Constitutional Court shall also decide on the conformity of government regulations, generally binding legal regulations of Ministries and other central state administration bodies, generally binding regulations pursuant to Article 68 of the Constitution, generally binding legal regulations of the local bodies of state administration, and generally binding regulations of the bodies of territorial self-administration pursuant to Article 71 para. 2 of the Constitution.

Constitution, with an international treaty that was promulgated in the manner laid down by a law, or with the constitutional law.

The Constitutional Court can perform ex ante judicial review of constitutionality only in the following cases:

a. proceedings on the compliance of negotiated international agreements with the Constitution and constitutional laws

Pursuant to Article 125a para. 1 of the Constitution, the Constitutional Court shall decide on the conformity of negotiated international treaties to which the assent of the National Council with the Constitution and constitutional law is necessary. Such proposal to decide the conformity of international treaties before their approval by the National Council may be submitted to the Constitutional Court by the President of the Slovak Republic or the Government before the negotiated international treaty is presented to the National Council for discussion. If the Constitutional Court decides that an international treaty is not in conformity with the Constitution or with constitutional law, the international treaty cannot be ratified. The purpose of this specific preventive review of the constitutionality of the agreed international agreements is to prevent any conflict with the Constitution or with constitutional laws.

b. proceedings on the conformity of the subject of the referendum with the Constitution and constitutional laws

The Constitutional Court shall decide on whether the subject of a referendum to be declared upon a petition of citizens or a resolution of the National Council according to Article 95 para. 1 of the Constitution is in conformity with the Constitution or constitutional law. The proposal for a decision may be submitted to the Constitutional Court by the President of the Slovak Republic before a referendum is declared. If the Constitutional Court holds that the subject of the referendum is not in conformity with the Constitution or with constitutional law, the referendum cannot be declared.

In the constitutional system of the Slovak Republic, any judicial review of bills that have not yet been approved by the National Council is explicitly forbidden. However, limited ex ante scrutiny of constitutionality is usually carried out by parliaments within the lawmaking process, during the drafting of laws and during parliamentary deliberations in parliamentary committees and by specific administration units. Although the decisions of these bodies are reviewed and approved (or not) by the parliament, they are generally not binding.

In the National Council, limited ex ante review of bills is the primary responsibility of the Department of Legislation and Approximation of Laws of the Chancellery of the National Council, which is an administration unit of the Chancellery and the Constitutional and Legal Affairs Committee of the National Council, a parliamentary body created pursuant to Section 45 para. 1 of Act no. 350/1996 Coll. the Rules of Procedure of the National Council as amended (referred to in this section as 'the Rules of Procedure').

The main tasks of the Department of Legislation and Approximation of Laws (referred to in this section as 'the Department') are set out by organisational rules of the parliamentary administration. In the context of constitutional review, the Department reviews submitted drafts of constitutional laws and bills, prepares opinions and proposals to remove identified shortcomings in terms of their compliance with the Constitution, constitutional laws, international treaties that are binding for the Slovak Republic, laws of the Slovak Republic, EU law and the Legislative Rules for Law Making. Although its scope of work is defined, it is not regulated at the level of law.

The Department has a role in the ex ante review of legislation throughout the legislative process in the National Council. The legislative procedure in the National Council consists of three readings. The first reading involves a general debate on the substance or what is known as the 'philosophy' of the proposed bill. In the second reading, the bill is discussed in the National Council committees to which it has been assigned. Every bill must pass through the Constitutional and Legal Affairs Committee, in particular as regards its compatibility with the Constitution, consti-

tutional laws, international treaties binding the Slovak Republic, laws of the Slovak Republic and EU law. In the second reading, amendments and additions may be tabled and these are voted on after committee discussions are completed. Various positions have to be brought together before the bill is discussed in the plenary. This is the job of the lead committee, which shall prepare the joint report of committees to which the bill has been assigned. The report is the basis for the National Council's debate and vote on the bill. In the third reading, the only changes MPs can put forward are corrections of legislative drafting errors and grammar and spelling mistakes. Once these have been debated, the bill is voted on as a whole. For further details, see Sections 71–86 of the Rules of Procedure.

The first main task of the Department is the elaboration of the First Information, also known as the Zero Information or the Twenty-four-hour Information. The First Information is submitted to the Speaker of the National Council within 24 hours of the bill's submission to the National Council. It serves as background material to determine which committees the bill should be assigned to in the second reading. It has a recommendatory nature; this means it is not binding for the Speaker. At this stage of ex ante scrutiny, the Department will not review in detail whether the bill is in conformity with the Constitution; it provides information as to whether the bill complies with basic requirements pursuant to the Rules of Procedure and the Legislative Rules of Law Making. The First Information is prepared for all bills, whether private member's bills, committee bills or governmental bills. The only exceptions are bills that have been vetoed by the President of the Republic.

Based on the findings of the First Information, the Speaker may, pursuant to Section 70 of the Rules of Procedure, recommend that the sponsor of the bill corrects any shortcomings. If the sponsor disagrees with such recommendation, the Speaker shall present the recommendation together with the sponsor's opinion at the next session of the National Council, which shall decide on them without debate.

If the bill is approved in the first reading and goes into second reading, the Department shall prepare the Second Information, also known as the Legislative

Standpoint. Compared to the First Information, the Second Information provides a more thorough and in-depth analysis of the bill in terms of formal and legal requirements pursuant to the Rules of Procedure and Legislative Rules of Law Making. It serves as the basis for MPs, and particularly for the common Rapporteur, to correct the identified shortcomings of the draft bill.

The main issues to be taken into account by the Department include the effective date of the draft bill, transitional arrangements, internal references, conflict with the Constitution and other legislation, the name of the draft bill, unified terminology in the bill, the use of legislative abbreviations and the scope and wording of authorising provisions, so that it is the bill, and not an implementing act or recitals, that stipulates obligations. The character of the Second Information is recommendatory and the final resolution of any incompatibility has to be reached by the MPs themselves; solving the outlined shortcomings is within the competence of MPs only.

On the political level, the compatibility of bills is debated by the Constitutional and Legal Affairs Committee. Pursuant to Section 59 (b) of the Rules of Procedure, the Constitutional and Legal Affairs Committee shall debate all bills, particularly with regard to compatibility with the Constitution, constitutional laws, international treaties binding the Slovak Republic, laws of the Slovak Republic and the laws of the EU. This scrutiny is carried out during the second reading. The committee members (MPs) do not have to take into consideration the Second Information prepared by the Department. Although those recommendations are not binding, the findings are acknowledged by the committees to which the bill had been submitted and can be a starting point for further discussion about the compatibility of the bill with the Constitution. Recommendations of the Department to amend legislative-technical errors, such as grammar and spelling mistakes, inconsistent terminology, etc., are usually accepted without further debate.

In further stages of the legislative procedure, the employees of the Department are available for possible consultations and take notes on the course of committee meetings during which specific bills are debated. They mainly note whether procedural

motions or amendments by MPs were submitted. The employees of the Department are allowed to present their findings but only on demand and with the consent of the committee's members (MPs). Before a committee meeting, the Department employee responsible shall contact the bill's sponsor or the Secretary of the committee concerning preparation of possible amendments. Rapporteurs in each committee to which the bill has been submitted shall inform that committee of the written opinion of the Department. Moreover, during the second reading the lead committee shall summarise the positions of all opinion-giving committees, including the position of the Constitutional and Legal Affairs Committee. The common Rapporteur presents the lead committee report in the plenary. The results of the scrutiny of both the Department and the Constitutional and Legal Affairs Committee are considered during debates in the plenary; however, they are not binding.

Only after the bill has been promulgated can it be the subject of judicial review by the Constitutional Court. Proceedings before the Constitutional Court are governed by the disposition principle, which means that the Constitutional Court cannot act and decide without a motion to initiate proceedings. Unlike other state bodies, it does not act ex officio; it can review legislation only upon the motion of a certain group of subjects. Pursuant to Section 74 of Act no. 314/2018 Coll. on the Constitutional Court of the Slovak Republic as amended, this right belongs to the following group of subjects:

- at least 1/5 of MPs,
- the President of the Slovak Republic,
- the Government,
- the court in connection with a certain case,
- the Attorney General,
- the President of the Judicial Council, for legislation on the administration of justice,
- the Public Defender of Rights, if the further application of the law may jeopardise fundamental rights or freedoms or human rights and fundamental freedoms arising from an international treaty ratified by the Slovak Republic and declared in the manner prescribed by law.

Natural persons cannot submit such a motion.

The National Council shall always be a party to the proceeding before the Constitutional Court if the challenged law was approved by the National Council and was ratified and promulgated in the manner laid down by a law. Before deciding on the substance of the matter, the President of the Constitutional Court shall request the opinion of the National Council, which issued the legal regulation under review. The National Council is also obliged to attach to the draft of the challenged law an explanatory memorandum of its opinion and the record of the debate at its meeting.

The Constitutional and Legal Affairs Committee shall recommend to the Speaker of the National Council the procedures necessary for the implementation of tasks related to proceedings before the Constitutional Court. The opinion is usually drafted by the Department for Legislation and Approximation of Laws; however, if the committee rejects the drafted statement it can request the Department to redraft it.

Judicial review of constitutionality (or its results) by the Constitutional Court is currently primarily of a value nature, through which the general constitutional principles and constitutionally protected values are 'translated' into a comprehensible form, thus creating and concretising real material limits and restrictions on the exercise of political power, which are based on generally accepted social values, and which at the same time materially legitimise the results of the judicial interpretation of the Constitution. On the other hand, the scope of scrutiny carried out at the parliamentary level is restricted predominantly to the technical side of lawmaking. Even though there might be differences between the National Council's and the Constitutional Court's standpoints on a challenged law, the final decision is always upon the Constitutional Court. Nevertheless, the National Council and the Constitutional Court are of equal status, and their actions and interaction give birth to the meaning of the constitutional text and the dialogue between them is a precondition for the rule of law.

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Finland

Monitoring constitutionality in the Parliament of Finland

Tanja Nurmi[1]

In Finland the constitutionality of acts is ascertained while they are being considered in the Finnish Parliament (called Eduskunta).[2] In practice, the constitutionality of a law is examined in advance, that is, before the act enters into force. The determination of the constitutionality of bills and other matters is entrusted to the Constitutional Law Committee of Parliament (Husa, 2020). At the end of the preliminary debate the Parliament refers the matter to the appropriate committee or committees, which may include the Constitutional Law Committee. Additionally, according to Parliament's Rules of Procedure (Section 38), if a question arises as to the constitutionality or relation to human rights treaties of a legislative proposal or another matter under preparation in a committee, that Committee shall request a statement on the matter from the Constitutional Law Committee. The Constitutional Law Committee dealt with approximately 20% of all bills during the last parliamentary term (2015-2018).

The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties. Thus, the primary verification of the constitutionality of legislation is the advance evaluation (ex ante) carried out by the Constitutional Law Committee. The Committee plays a central role in enforcing the Constitution when laws are enacted.

The Constitutional Law Committee has 17 ordinary and nine alternate members, appointed by the Parliament for the entire electoral period. The composition of the Committee reflects the relative strength of the parliamentary groups. All members are Members of Parliament. Members need not be lawyers, but in general the

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2 | The legal basis is the Constitution of Finland.

Committee includes several lawyers. It normally meets four times a week because it deals with many and complex issues.

The Committee's task is to issue a statement on whether a bill or other proposal being considered in Parliament contains provisions that are in conflict with the Constitution. The committee to which the bill has been referred shall make the amendments to the bill required by the Constitutional Law Committee. As a rule, the Committee's assessment is binding on Parliament. According to Section 42 of the Constitution, the Speaker shall refuse to include a matter on the agenda that he or she considers to be contrary to the Constitution. Additionally, according to the Constitution of Finland, it is still possible to provide for limited exceptions to the Constitution, in a procedure similar to that by which the Constitution is amended. However, such exemption laws are very rare. In practice, they have only been enacted when the Constitutional Law Committee has expressly stated that it is possible to enact an exemption law.

The Constitutional Law Committee establishes the correct interpretation of the Constitution in a matter that it deals with, for which it consults key experts on constitutional law. Its opinions generally enjoy great authority, and Parliament and authorities comply with them. In the absence of a constitutional court, this makes the Committee the most central constitutional body in Finland.

The Committee generally starts its deliberation by hearing from experts. Experts usually give oral presentations at committee meetings, but a written statement is also requested. The experts shall be qualified non-partisan experts in the fields of fundamental rights of citizens and the rule of law (e.g. university professors). Committee deliberations are based on the Committee's own earlier legal praxis and opinions given by constitutional experts. The experts do not have any official status, nor is their role even mentioned in the Constitution. Sometimes experts may disagree on some issues.

The Committee hardly ever votes. It aims at consensus and makes compromises in

order to accommodate conflicting views. This is seen as supporting its authority. Decisions taken by the Committee are based on drafts prepared by the Secretaries to the Committee following instructions from and a general discussion in the Committee. The Secretaries assisting the Committee are experienced civil servants specialised in the Constitution. Committee meetings are not open to the public, but Committee reports, statements, expert opinions and minutes are public documents.

Finland maintains no constitutional court, but all courts are authorised to perform judicial review of legislation to a certain limited extent. Courts play a secondary role in the assessment of constitutionality. The review (ex post) is practised by the courts of law. According to the Constitution, if 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. This means that the courts of law have power, not to declare a piece of legislation null and void, but to set it aside in the concrete case at hand. However, this kind of decision in courts of law is very rare; there have been seven such cases in higher courts in the past 20 years.

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Norway

The Norwegian system of constitutional review

Ingunn Skille Jansen[1]

The Norwegian Constitution was adopted on 17 May 1814 and set out a division of power based on Montesquieu's teachings. The judiciary (the Supreme Court) was to be free and independent of the legislative power (the Storting) and the executive power (the King). The Constitution did not – and does not – establish a Constitutional Court as such in Norway. The Constitution was also silent on the issue of whether the elected representatives have the final say as to the interpretation of the Constitution, and was thus ambiguous on the powers of judicial review.

However, in practice, the Norwegian Supreme Court assigned to itself the power to invalidate legislation that contravened the constitution. As early as 1822, partly inspired by the US Supreme Court judgment in Marbury v Madison, the Court would not apply any provisions of a law that were found to be in conflict with the Constitution. This principle was formally established in 1866, in the Wedel Jarlsberg judgment (Grev Wedel Jarlsberg v Marinedepartementet), where the Chief Justice articulated the grounds and method for exercising judicial review (Langford & Berge, 2019).

Since 2015, the principle of judicial review by the Norwegian courts has been enshrined in Article 89 of the Norwegian Constitution. The Parliament emphasised in the preparatory works related to the adoption of Article 89, that this provision refers to a principle already established through customary constitutional law and that Article 89, accordingly, was intended as a (pure) codification (Innst. 263 S (2014–2015) pp. 9–14 and Dokument 12:30 (2011–2012)). The adoption of Article 89 formed part of the Norwegian constitutional reform of 2014 (where the

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Norwegian Constitution – in addition to several more 'technical amendments' – also was given a new chapter E with the headline 'Human Rights', formally securing the constitutional rank of a wider selection of internationally recognised human-rights provisions.

The judicial power and duty to review the constitutionality of a provision within the scope of a specific case belongs to all Norwegian courts – both the Supreme Court and lower courts. Article 89 thus implies a right and obligation for all Norwegian courts to set aside or to interpret narrowly a law provision that proves to be contrary to the Constitution, in particular as to the constitutionally protected fundamental rights and freedoms of individuals. The right includes a right to review administrative decisions. Consequently, ordinary courts deal with constitutional matters that may arise from the case in question under an ordinary court proceeding.

Article 89 reads as follows (wording as adjusted in May 2020, see Innst. 258 S (2019–2020)): 'In cases brought before the Courts, the Courts have the power and the duty to review whether applying a statutory provision is contrary to the Constitution, and whether applying other decisions under the exercise of public authority is contrary to the Constitution or the law of the land.'

The question of constitutionality will not be a case as such. The review will always be integrated into a specific case already before the Court – penal, civil or administrative. The Court's review is limited accordingly, to the particularities of the specific case before the Court. It is not concerned with the constitutionality of the law or the relevant decision in the abstract. However, because the Supreme Court's judgments serve as precedents, a provision that is set aside or interpreted narrowly will lose its authority in any other cases as well (Andenæs & Fliflet , 2017).

The relationship between the Parliament (Stortinget) and the Supreme Court

The Supreme Court's (and the lower courts') power to set aside a legislative provision found not to be in conformity with the Constitution does not allow the courts to quash the law or the contested provision as such. Technically, it will be up to the

Parliament to make the necessary alterations. In practice, this implies a need for amendments to the relevant provision or legal statute. Further, when the constitutionality of a statute is in question, the Supreme Court (or the lower courts) will take into account the Parliament's own deliberations and opinion as to the provision's constitutionality. Hence, there is a 'margin of appreciation'. Moreover, according to case-law, the intensity of the review varies depending on the kind of constitutional right that is being challenged. When a provision of the Constitution deals with the personal freedom and security of individuals, the review will be more far-reaching and thorough, while the Parliament's view will be given some weight when the constitutional provision deals with the safeguarding of economic interests. Further, the Parliament's own view on the question of constitutionality will be given considerable weight, if the provision relates to the allocation of powers between the Parliament and the Government.

In recent years, however, the Supreme Court has attached great weight to constitutional rights, even in cases where the legislation is a result of a political battle or expresses a clear and strong political will. The more recent development of the Norwegian Supreme Court as a rather strong defender of the rule of law is connected to a general development within European law, with the European Convention on Human Rights having a greater impact, through the case-law of the European Court of Human Rights (Baardsen, 2015).

There is no institutionalised form of scrutiny of the constitutionality of legislative drafts within the Norwegian Parliament. However, according to Article 83 of the Constitution, the Parliament may ask the Supreme Court for an opinion on a specific legal matter: 'The Storting may obtain the opinion of the Supreme Court on points of law.'

A Supreme Court opinion under Article 83 is advisory, and not binding for the Parliament. The provision is also very rarely used. Until very recently, it had not been applied since 1945, and subsequent proposals set forth to use the provision had been voted down in Parliament.

In December 2020, however, a majority in the Parliament voted for a proposal from the Standing Committee on Transport and Communications to ask the Supreme Court for an advisory opinion. The question was related to the competence of the Storting to consent to referral of power (cession of supremacy) to the European Railway Agency as a part of incorporating the directive 2012/34/EU, which set up a single European railway, (and other related legal acts) into the EEA Agreement. The Supreme Court found in its plenary opinion of 26 March 2021 that Article 26 of the Constitution was applicable, and thus that the Parliament could consent to the referral of power with a simple majority (Plenary opinion, HR-2021-655-P).

A majority of the Parliament subsequently consented to two decisions by the EEA Committee to incorporate into the EEA Agreement Directive 2012/34/EU on the establishment of a single European railway area and legislative acts that constitute the fourth railway package (Innst. 526 S (2020-2021) and Prop LS 101 (2019-2020).

In addition, the Supreme Court has recently handled two other interesting cases related to the Court's competence in constitutional review.

On 22 December 2020, the plenary of the Supreme Court – fifteen justices – handed down a judgment in the case known as the climate lawsuit. Environmental groups had argued that exploratory drilling licences in the Arctic (Barents Sea) violated the right to a healthy environment enshrined in the Constitution.

The Supreme Court dismissed the appeal with an 11 to 4 vote. The minority found that the appeal had to prevail on the counts related to production licences granted in the southeast part of the Barents Sea. The case concerned the validity of a royal decree to grant 10 production licences on the Norwegian continental shelf in the south and southeast part of the Barents Sea, the 23rd round. The 2016 decree was based, among other things, on the Parliament's consenting to the opening of the Barents Sea for petroleum production in 1989 and 2013.

One of the key issues of the case was whether the 2016 decision was incompatible

with Article 112 of the Constitution on the right to a healthy environment. Further, the Supreme Court assessed whether the decision was a violation of Article 93 of the Constitution on the right to respect for life or Article 102 on the right to privacy and family life – and the corresponding rights in Articles 2 and 8 of the European Convention on Human Rights (ECHR). The Court also assessed whether the decision was otherwise invalid due to procedural errors.

The case was the first climate-change litigation to be brought under the Norwegian Constitution's environmental provisions, which were passed in 2014. The two lower courts had declined to invalidate the exploration well licences issued by the Government in 2016, though both recognised the right of citizens to bring cases under this article (Plenary judgment, HR-2020-2472-P).

In another plenary sitting, on 1 March 2021, in the ACER case, the Supreme Court found that in principle Article 89 of the Constitution allows constitutional review of a decision by the Parliament to enter into an international agreement. The Supreme Court was split (12 to 5) as to the circumstances under which such constitutional issues may be reviewed. The disagreement related to possible limitations following from the Constitution's Article 89 on constitutional review and from Section 1-3, cf. Section 1-4, of the Norwegian Dispute Act on which cases may be brought before the courts – and thus whether the non-governmental organisation Nei til EU ('No to the EU') had legal standing in the case at hand.

The majority of the Supreme Court found that none of the provisions prevents No to the EU from bringing the action. The minority found that Article 89 of the Constitution precludes such an action. As ordinary statutory provisions must yield when in conflict with the Constitution, there was no reason for the minority to consider the right to bring an action under the Dispute Act.

The main question in the underlying case is whether a decision of the Parliament under Article 26 of the Constitution to consent to referral of power is in breach with the Constitution itself. No to the EU's action against the State claims that

it was contrary to the Constitution that in 2018 the Parliament consented with a simple majority to the incorporation of the EU's third energy market package into the EEA Agreement. The organisation claims that the consent implies such a radical transfer of power to an international body that, under Article 115 of the Constitution, the decision should have been made with a three-fourths majority.

The Attorney General claimed on behalf of the Norwegian Government that the lawsuit was inadmissible, as the claim entailed a request for abstract judicial review of an act of Parliament, which the above-mentioned provisions do not allow. The lower courts agreed, holding that it would 'break with the tradition of Norwegian constitutional law' if the case was deemed admissible.

The Supreme Court found, however, in its order 1 March 2021 that in principle the courts may review whether the Parliament acted in accordance with the Constitution. (Plenary decision HR-2021-417-P)

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France

Pre-constitutional review performed by the Conseil Constitutionnel and its relation to Parliament

Alexandre Anglade

This case study will describe the constitutionality review and the Constitutional Council in general, and then deal with the two types of checks on the law the Council carries out, and the relations between the Parliament and the Constitutional Council for a priori checks.

There are two kinds of checks: a priori and a posteriori reviews.

An a priori check is carried out:

- in a very limited period of time (only between the final vote on the bill and the promulgation of the text by the President of the Republic);

- only at the request of a limited number of constitutional authorities (the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, at least 60 deputies, at least 60 Senators).

A posteriori reviews (or 'priority preliminary rulings on constitutionality') have been possible since the revision of the Constitution in July 2008. The litigant must have an 'interest in acting' (in French: 'interêt à agir'). The solution of his lawsuit before the criminal or administrative judge must depend on the decision rendered by the Constitutional Council in the context of the QPC ('question prioritaire de constitutionnalité').

The referral to the Constitutional Council may come from the Parliament; it may be initiated by a limited number of petitioners listed in Article 61 of the Constitution ('the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators'). The text adopted in the last

reading, by the National Assembly or the Senate, may thus be the subject of one or more referrals by one of these petitioners. However, it appears that most referrals are made by parliamentarians. For the National Assembly alone, the statistics of the Constitutional Council indicate that from 1958 to December 2020 there were 48 referrals from the President of the National Assembly, but 453 referrals from MPs (deputes). (Statistics on the website of the Conseil constitutionnel)

The constitutionality review and the Constitutional Council

The Constitutional Council was established by the Constitution of the Fifth Republic adopted on 4 October 1958.

The composition of the council is specified in Article 56 of the Constitution:

'The Constitutional Council shall comprise nine members, each of whom shall hold office for a non-renewable term of nine years. One third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate.'

It is a court with various powers, notably including reviewing the constitutionality of legislation.

The Constitutional Council is also an electoral judge. The council oversees elections of the President of the Republic and referenda, and proclaims the results. The Constitutional Council monitors the regularity of the election of MPs. It intervenes at three stages. Firstly, it deals with disputes concerning eligibility. Indeed, certain situations render a candidate ineligible: persons placed under guardianship or curatorship; persons who have been declared ineligible following infringements of the rules governing the financing of electoral campaigns; the exercise of certain administrative functions. Secondly, it ensures the litigation of the electoral operations: the electoral propaganda must respect certain rules to prevent situations of imbalance between the candidates and the voting operations must take

place in accordance with the electoral code (opening hours of the polling stations, methods of counting the ballots). Thirdly, it enforces the rules relating to the financing of legislative elections, in particular the obligation to file a 'campaign account'. In the event of fraudulent intent or a particularly serious breach of the rules relating to campaign financing, the Constitutional Council must declare the candidate ineligible.

Constitutionality review was introduced in France with the 1958 constitution.[1] There had been a 'constitutional committee' in the previous constitution, that of the Fourth Republic (1946 to 1958). But it was almost never used, for at least two reasons. Firstly, its reviews required a referral from the President of the Republic and the President of the Senate; secondly, if there was a conflict between the constitution and a new law, it was the text of the constitution that had to be changed and not the text of the new law.

The constitutionality review constitutes a break with France's constitutional tradition.

Indeed, for a long time the law could not be challenged because the 1789 Declaration of Human Rights stated in Article 6 that 'the law is the expression of the general will' (in French: 'la loi est l'expression de la volonté générale'). Thus, for more than two centuries in France, the law was considered an infallible, unquestionable text, because it was written by representatives of the people.

It should also be noted that from the 1930s onwards many French jurists became interested in the model of constitutionality review that existed in Austria, among other states. Most of them were fluent in German and had a direct access to sources written in this language. The idea slowly came to the fore that 'legicentrism' must be put to an end. It must be possible to check the law against the constitution, in particular to ensure that it respects the fundamental rights of the citizen.

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1 | The history of constitutional justice in France is presented in two recent books: Rousseau et al. (2020) and Drago (2020).

The two possible reviews of the law carried out by the Council

The Constitutional Council is the court in charge of assessing the constitutionality of legislation. The constitution specifies the two types of checks.

Ex ante review (In French: 'controle a priori')

This type of review has existed since 1958. Article 61 of the Constitution reads as follows:

'Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.'

Referrals to the Constitutional Council for ex ante review occur:

- mandatorily, prior to promulgation of organic laws and prior to the entry into force of the regulations of the Houses of Parliament;

- for 'ordinary legislation' (in French: 'lois ordinaires'). A law may be referred to the Council before it is promulgated. Depending upon the act under review, the referral may come from a political authority (the President of the Republic, the Prime Minister or the President of the National Assembly or the Senate), or from at least 60 MPs of the National Assembly or 60 Senators. Sometimes the same law may be referred to the Council in several requests at the same time (one from the Senate and one from the National Assembly, for instance).

Ex post review (In French: 'a posteriori')

This review is also known in France as 'QPC control' – 'question prioritaire de constituionnalité', in English: 'priority preliminary ruling on constitutionality'.

This review was introduced when the constitution was revised in July 2008. It came into effect in March 2010.

The ex post review was modelled on the constitutionality reviews that can be carried out by an individual in a court case, such as existed in Spain ('Amparo') and Germany ('Verfassungsbeschwerde'). This possibility to review the constitutionality of the law, after its promulgation, had not yet existed in France.

Article 61-1 of the Constitution reads as follows:

'If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État [Council of State] or by the Cour de Cassation [Court of Cassation] to the Constitutional Council, within a determined period.'

Concretely, a litigant will ask, during a trial, for the annulment of an article of a law already promulgated. The jurisdiction before which the trial takes place will send that request to one of the two supreme courts (the Court of Cassation for judicial courts; the Council of State for administrative courts). The supreme court will act as a 'filter' and will send the request to the Constitutional Council only if three conditions are met:

1. Applicability to the dispute: The legislative provision in question must be applicable to the dispute or the proceedings, or constitute the basis for the proceedings;

2. No prior declaration of conformity: The legislative provision in question must not have already been declared by the Constitutional Council to be in conformity with the Constitution;

3. The seriousness or novelty of the matter: The judge of first instance or appeal must determine that the matter is not devoid of seriousness.

Some statistics

From March 2010 to June 2020, there were a total of 871 ex post (QPC) decisions, 404 sent by the Council of State, 467 sent by the Court of Cassation. The QPC system works very well: about 40 decisions a year on average.

From 1958 to June 2020, there were 1062 ex ante decisions. The referrals to the Council for these came from the President of the Republic (14 referrals), the Prime Minister (190 referrals), the President of the National Assembly (47 referrals), the President of the Senate (51 referrals), at least 60 deputies (447 referrals), at least 60 Senators (313 referrals). (Statistics on the website of the Conseil constitutionnel)

Relations between the Parliament and the Constitutional Council for a priori review

The relationship between Parliament and the Constitutional Council has evolved over more than 60 years of practice, in several ways:

1. Constitutionality review has become commonplace – almost all laws are now referred for constitutionality review. The request may be more or less extensive: it may concern a part of the adopted law or, more rarely, all the articles of the law. Moreover, the Council very rarely cancels a bill in its entirety. Instead, the annulment will concern an article, a paragraph or even just a sentence.

2. The limits of constitutionality review have been set – the Constitutional Council very quickly indicated that it did not constitute a 'third chamber' (after the National Assembly and the Senate). In a 1975 decision (on the abortion law), it ruled that: 'Article 61 of the constitution does not confer on the Constitutional Council a general power of appreciation and decision identical to that of Parliament, but only gives it the competence to pronounce on the conformity with the constitution of laws referred to it for examination.' The Council has repeatedly pointed out that the Council's check on the law is purely legal and non-political.

3. The jurisprudence of the Constitutional Council has become much better known.

Each bill is accompanied by an 'opinion of the Council of State' (the Council of State is both the supreme court of the administrative courts and the 'legal adviser to the Government'). In this opinion, which is public and published on the Parliament's website, the Council of State can inform the Government of the 'fragility' of an article (e.g., if a similar article in another bill has already been annulled by the Constitutional Council).

Parliament integrates the jurisprudence of the Constitutional Council in the 'making of the law'

The risk of annulment by the Constitutional Council is sometimes mentioned during the examination of the text in committee, and then possibly during its examination in public session. The legislator therefore considers this factor while drafting the amendments.

The Constitutional Council will thus verify several aspects of parliamentary procedure contained in the Constitution and in several organic laws[2] (an organic law is one whose purpose is to specify certain articles of the Constitution, such as the organic law of 15 April 2009).

Among the points the Constitutional Council verifies are:

- That certain deadlines are respected. For example, Article 42 of the Constitution provides that 'The plenary discussion at first reading of a Government or Private Members' Bill may only occur before the first House to which it is referred, at the end of a period of six weeks after it has been tabled. It may only occur, before the second House to which it is referred, at the end of a period of four weeks, from the date of Transmission.'

- The Government's obligation to table an 'impact study' (in French: 'étude d'impact') at the same time as the bill. The impact study must enable the

2 | La procédure parlementaire et le Conseil constitutionnel | Conseil constitutionnel (Nouveaux cahiers du Conseil constitutionnel – janvier 2013).

Parliament to assess the consequences of a future law beforehand. The purpose of this mechanism is therefore to improve the quality of laws and to enlighten the Parliament on the scope of reforms.

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III Parliaments and Constitutional Review of Laws

1. Overview

Sophia Witz

The intersection between parliaments and the constitutional review of laws by courts is particularly interesting: the parliament has enacted the law under review and may be involved in and affected by the review in a variety of roles (right to initiate, delivery of opinion, review of legislative procedure).

1.1 Introduction

This chapter focuses on the role of parliaments in proceedings before constitutional or supreme courts. It also analyses the relationship between parliaments and constitutional or supreme courts by examining various points of contact, including the review of parliamentary procedures before court and the average number of declarations of unconstitutionality, since these can reflect the relationships between each country's constitution, parliament and constitutional or supreme court.

More generally, the chapter illustrates the overall role, efficacy and significance of the constitution in a country. It indicates the balance of power between the parliament and constitutional jurisdiction, bearing in mind the different approaches of centralised and diffuse systems of constitutional jurisdiction. It also describes the roles of individuals as well as other bodies in constitutional review.

Constitutional review proceedings are always initiated by either private individuals, courts or state authorities such as the government. In some countries, members of parliament also have the right to initiate constitutional review. How many members of parliament are needed and how many judgments are issued upon application of members of parliament will be discussed in the first part of this chapter. We will

also look at whether the countries follow a broad or narrow approach to the entitlement of other state authorities and individuals besides members of parliament to initiate the review of legislation, since the scope of constitutional jurisdiction is also determined by who can turn to the constitutional or supreme court.

The second part of this chapter concerns itself with parliamentary opinions in constitutional review proceedings. Whether or not parliament is involved in constitutional review proceedings and if so, in what form will be addressed in this section. In countries whose parliaments must or can submit an opinion in proceedings before the constitutional or supreme court, there are several options for who prepares such a statement and who is entitled to request such an opinion from parliament.

Another intersection between parliaments and proceedings before constitutional or supreme courts comes with the review of parliamentary procedures by constitutional or supreme courts. The question of whether a constitutional or supreme court has the power to review parliamentary legislative proceedings and declare a law unconstitutional if there were violations of procedural rules can speak to the parliament's overall trust of the constitutional or supreme court. It should be noted, that in this chapter, the term 'declaration of unconstitutionality' is used broadly as an umbrella term not only for declarations of unconstitutionality or illegitimacy but also for judgments repealing laws or finding/declaring laws invalid, unconstitutional or unlawful because of the different approaches each country takes.

Lastly, the frequency of declarations of unconstitutionality will be analysed, since the number of declarations can also determine the complex relationship between the constitution, the parliament and the court, as well as reflecting the constitutional culture overall.

1.2 Initiation of the Constitutional Review

1.2.1 Members of Parliament

1.2.1.1 Right to Initiate

The question of who has a right to initiate legislative review proceedings before the constitutional or supreme court is of fundamental importance for the system of constitutional jurisdiction itself and of course also has political implications. In most countries, individuals have the power to initiate constitutional review proceedings before their constitutional or supreme court if they have standing according to the procedural rules. Clearly this applies to individual members of parliament in their role as private citizens if they have standing. However, it may also be possible for members of parliament to initiate the review of legislation by the constitutional court or supreme court not as citizens with standing but in their capacity as members of parliament. Depending on how many MPs are needed to initiate such a review procedure, this can also be an instrument for the parliamentary opposition to challenge laws passed and adopted by the majority.

The map "Members of Parliament - Right to Initiate the Constitutional Review" on page 136 shows that in most countries it is possible for parliamentarians to apply to the court with constitutional jurisdiction for a review of laws.

The majority of the analysed countries grant members of parliament the **right to initiate** this kind of review (Albania, Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Georgia, Germany, Hungary, Latvia, Lithuania, Moldova, Poland, Portugal, Slovak Republic, Slovenia, Spain, Turkey). However, different countries have several different requirements for the number of MPs needed to initiate proceedings before the constitutional or supreme court.

The **quotas** range from one tenth (Portugal)[1] to two thirds (Belgium). Usually one third

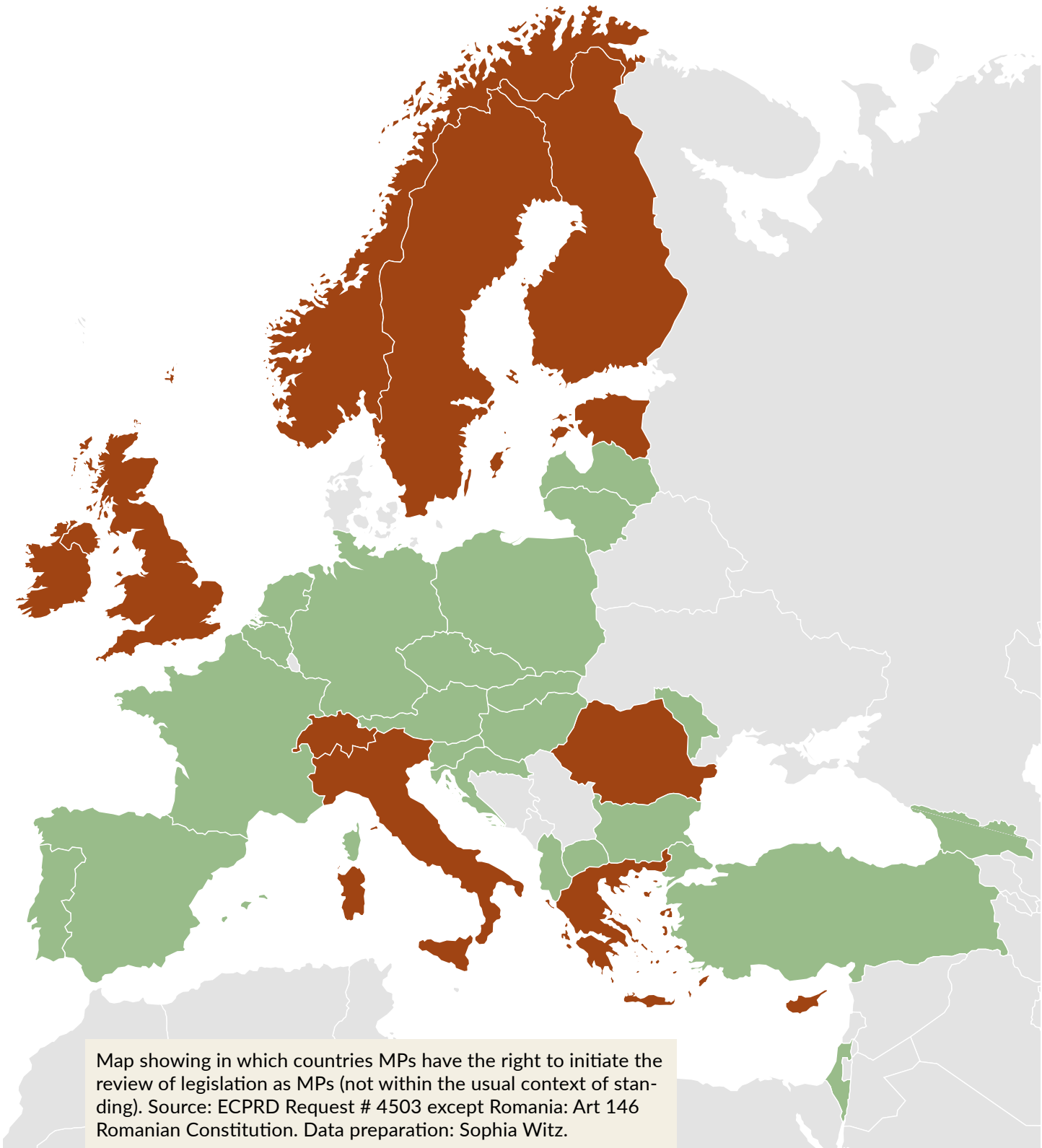
1 | For further details see the Portuguese Case Study on p. 186.

(e.g. Slovenia, excluding the MPs who voted in favour of the law originally; Austria), one quarter (e.g. Germany, Hungary) or one fifth (e.g. Albania, Croatia, Lithuania, Slovak Republic, Turkey) of all members of parliament are needed to initiate the procedure for the review of the constitutionality of legislation before the court. In France only 60 deputies out of 577 or 60 of the 348 senators are needed to initiate the review of legislation. In Austria, a federal state, one third of the Members of the National Council or one third of the Members of the Federal Council can initiate the review for federal laws; one third of the members of provincial parliaments have the right to initiate the proceedings with regard to provincial legislation (if the province's constitution allows it, which is the case in eight of the nine provinces).

Besides quotas, there may be **additional options** for initiating the review. In Lithuania, not only one fifth of MPs, but also the Seimas in corpore (as a whole) can initiate the review (if this happens, the validity of the legal act that has been challenged is suspended until the litigation before the Court is concluded). In Turkey, the two political party groups that have the largest number of members in the assembly also have the right to initiate a review.

Most of the countries that do not have a constitutional court in the classic sense **do not give** members of parliament **the opportunity to initiate** the review of legislation (Cyprus, Estonia, Finland, Greece, Ireland, the Netherlands, Norway, Sweden, Switzerland, United Kingdom). Italy does have a constitutional court, but no right for MPs to initiate proceedings. However, Italy, like Estonia, provides for **other options for parliament** to turn to the court. In Estonia, the Parliament can file a petition with the Supreme Court for an opinion on interpreting the constitution in conjunction with EU law. In Italy, the Constitutional Court recently adjudicated on the admissibility of two constitutional conflicts between powers of the State, promoted by some of the Members of the Italian Parliament against the approbation of the National Budget Law. The Court affirmed – for the first time – that an individual Member of Parliament has standing in some specific cases. To respect the autonomy of the Italian Parliament, the review has to be strictly limited to breaches that result

Members of Parliament - Right to Initiate the Constitutional Review



Map showing in which countries MPs have the right to initiate the review of legislation as MPs (not within the usual context of standing). Source: ECPRD Request # 4503 except Romania: Art 146 Romanian Constitution. Data preparation: Sophia Witz.

Country	Right to initiate review	No right to initiate review
Albania	X	
Austria	X	
Belgium	X	
Bulgaria	X	
Croatia	X	
Cyprus		X
Czech Republic	X	
Estonia		X
Finland		X
France	X	
Georgia	X	
Germany	X	
Greece		X
Hungary	X	
Ireland		X
Italy		X
Latvia	X	
Lithuania	X	
Moldova	X	
Netherlands	X only minimal review	
Norway		X
Poland	X	
Portugal	X	
Romania		X
Slovak Republic	X	
Slovenia	X	
Spain	X	
Sweden		X
Switzerland		X
Turkey	X	
United Kingdom		X

in manifest violations of the constitutional prerogatives of Members of Parliament.[2]

1.2.1.2 Number of Judgments

The theoretical possibility for MPs to initiate constitutional review proceedings is one point, but the actual number of judgments issued by the constitutional or supreme court at the request of MPs is also relevant, and this section is dedicated to those figures. These numbers provide information on whether it is usual or uncommon for members of parliament to initiate the review of legislation, if that is possible.

It should be noted that in some of the countries processes are very rarely sought by parliamentarians despite low initiation requirements. It is therefore not possible to draw conclusions about the frequency of the procedures from the difficulty of the requirements. However, it can be stated that lower requirements are advantageous for minority rights and that very stringent requirements almost exclude the possibility that MPs bring laws to the Constitutional Court against the will of the government. As not all countries collect specific data on this issue, only those countries with concrete figures can be compared.

The time frame for the comparison is the years 2000 to 2019; the following section shows how many judgments the constitutional or supreme courts issued upon applications by members of parliament from 2000 to 2019. It should also be mentioned that the **number of judgments issued is not equal to the number of laws actually declared unconstitutional**, since the constitutional courts also have the option to uphold the law. In Austria, for example, the constitutional court issued 48 judgments upon applications by members of parliament in that time frame. However, in only 25 of these cases (approximately half) did the court decide to repeal the law or provision. In comparison, the Latvian constitutional court decided to repeal only a third of the laws or provisions submitted to the constitutional court by MPs (15 of 46 cases).

2 | For more details see the Case Study on Italy, 179 et seq.

The data shows that the countries can be divided into **two distinct groups**. In Slovenia, Portugal, Latvia, Austria and the Czech Republic the number of judgments range (in that order) from 35 to 50 during the analysed time frame. Hungary and Lithuania can also be assigned to this group, even though they could not provide data for the whole time frame. The second group includes Slovakia and Spain, each with over 100 judgments issued upon applications by members of parliament between 2000 and 2019. France can also be put into this group, even though until 2010 only constitutional preview and not ex post review was possible there.

Of the countries with **few judgments** upon application by MPs, Slovenia has the fewest. There have been a total of 35 Constitutional Court decisions made on request of Members of Parliament from 2000 to 2019. Portugal had 40 judgments made and had some years without any judgments. In other years the numbers fluctuate between one and four. In Latvia between one and six judgments per year were issued upon application by Members of the National Council, for 46 judgments overall. Austria's numbers are similar: 48 judgments from the years 2000 to 2019, with some years in which no judgments of this type were made. Applications by Members of the Austrian Federal Council are especially rare: there have only been two years since 2000 in which judgments have been made. Applications by members of a provincial parliament fluctuate between one and three per year. For Members of the National Council there are also quite a few years without judgments; in other years the numbers range from one to six judgments. The Czech Republic completes this group with 50 judgments issued.

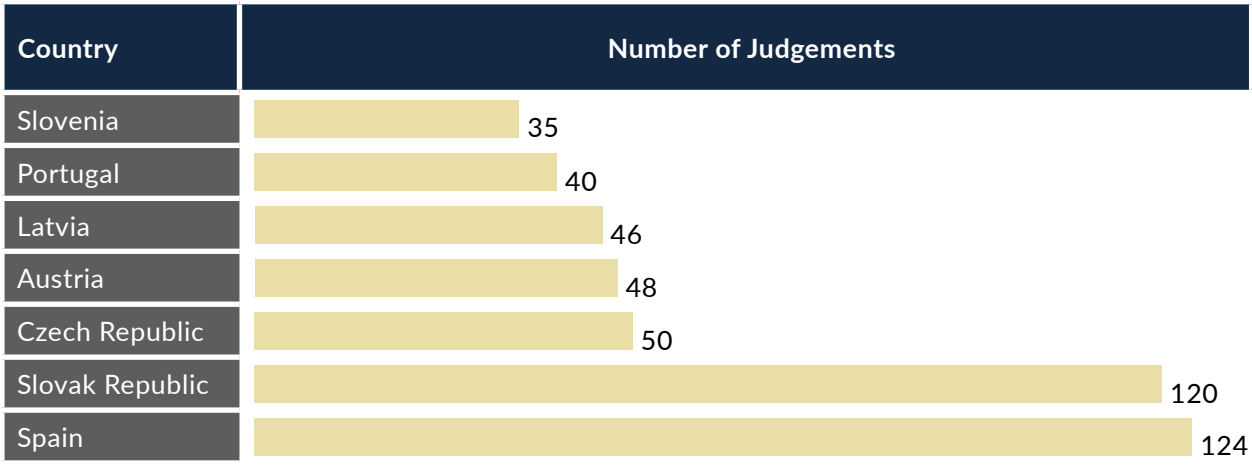
A different time frame applies to Hungary and Lithuania. In Hungary, 20 judgments were issued upon application by Members of Parliament between the years 2012 and 2019. In Lithuania, there were two to eight judgments upon applications by Members of the Seimas per year, and zero to two by the Seimas as a whole (32 judgments in total during the years 2014–2019).

Larger numbers of judgments upon application by MPs have been made in Slovakia, Spain and France. In Slovakia there were 120 such judgments by the constitutional

court between the years 2000 and 2019. This is slightly surpassed by Spain, with 124 judgments; between two and 18 such judgments per year (usually in the single digits) were made by the Spanish Constitutional Court upon application by MPs.

Since France has provided for constitutional ex post review only since the year 2010, the numbers from 2000 to 2009 represent only the judgments that were made by the Constitutional Court in the ex ante review process (nine to 26 per year) upon application by MPs. Since 2010 and the introduction of the ex post constitutional review, these numbers have grown immensely to over 80 judgments per year, reaching a maximum in 2011 with 133 judgments. However, these numbers cannot be directly compared, as they include both ex ante and ex post reviews.

The following graph illustrates the number of judgments resulting from parliamentary applications from 2000 to 2019. Only those countries with concrete figures over the entire period are shown.



Total number of judgements in the period of 2000 to 2019 resulting from parliamentary applications. The table comprises only countries which collected specific data between 2000 and 2019. Source: ECPRD Request # 4503. Data preparation: Marlies Meyer.

1.2.2 Other Bodies and Individuals

With regard to the general entitlement of bodies or individuals other than MPs to initiate the review of legislation by the constitutional court or supreme court, a distinction must be made between abstract and concrete legislative review. **Abstract legislative review** takes place when a legal norm is measured against the

constitution without an individual concrete case at hand. The objective of this kind of review is to analyse whether a legal rule is in line with the constitution by itself, regardless of possible applications in concrete situations. In contrast, **concrete review** is based on an actual case before a court.

Both forms of review are used in almost all countries in Europe that have centralised systems of constitutional jurisdiction and constitutional courts. Typical diffuse systems, on the other hand, almost exclusively provide for only concrete legislative review (see, however, the hybrid system with the possibility of abstract review in Estonia and to a limited extent also in Greece, as well as in Israel for 'public petitioners').

In addition to MPs, it is mostly higher state authorities that are entitled to initiate abstract legal review, although there are differences as to which specific bodies are entitled to do so. In the case of concrete legislative review, on the other hand, it is an affected party that raises concerns as to the constitutionality of a provision, with the aim of preventing the court from applying the provision to the issue at hand. If the court comes to the conclusion that the legal norm relevant to the decision in the specific case is unconstitutional (either on the basis of party submissions or independently), it does not apply that norm (diffuse system) or it suspends the proceedings and submits the question to the constitutional court for a decision (centralised system).[3] Political actors therefore do not have the power to take up unconstitutionalities in systems with only concrete legislative review, because they would need a concrete legal case to do so.

Some countries follow a rather **broad approach** to the entitlement to initiate the review of legislation (e.g. Albania, Poland, Portugal, Slovak Republic, Slovenia). In Slovenia, there are a number of stakeholders (other than MPs) that can initiate the review of legislation. A court that is deciding on a matter and deems that

3 | See the study of the Venice Commission, Study on Individual Access to Constitutional Justice, CDL-AD(2010)039, 27.01.2011.

a law it should apply is unconstitutional has to initiate proceedings before the Constitutional Court (concrete review). Others that can submit a request are the National Council, the Government, the Ombudsman for human rights (if there is interference with human rights/fundamental freedoms), the information commissioner and the Bank of Slovenia. The Court of Audit may submit a request in connection with a procedure they are conducting, and the State Prosecutor General may do so in connection with a case. Representative bodies and associations of local communities (if the law interferes with their constitutional rights), as well as national representative trade unions (for an individual activity/profession if rights of workers are threatened) or anyone who demonstrates legal interest may lodge a petition to initiate the review. In the Slovak Republic, the President, the Government, a court, the Attorney General, the President of the Judicial Council (regarding the administration of justice) and the Public Defender of Rights (regarding human rights and fundamental freedoms) are entitled to initiate a review.

In other countries, fewer bodies are allowed to initiate an abstract legislative review before the constitutional court: they follow a **narrower approach**. In Hungary for example, the Government, the Commissioner for fundamental rights, the president of the Curia and the General Prosecutor have that right. In Turkey, only the President of the Republic (other than MPs), has the right to apply for annulment action directly to the Constitutional Court. In France, the President of the Republic, the Prime Minister, the President of the National Assembly and the President of the Senate can initiate the review of a law, and, indirectly, every person can.

There are some countries where a law **cannot be directly challenged** before the court by any party (no abstract review). As mentioned above, this is usually the case in countries with a diffuse or minimal system of constitutional jurisdiction (Denmark, Finland, Ireland, the Netherlands, Norway, Switzerland, Sweden). However, even some states with classical constitutional courts have models where abstract legislative review is not possible. In Italy, for example, questions on the constitutionality of a law can only be raised by parties or judges applying the law in a specific case (there is also the possibility of constitutional review in cases of

constitutional controversy between the Regions and the State, where either the Government or the Region can appeal directly).

Whether countries follow a **broad or narrow approach** to the entitlement to initiate the constitutional review of legislation **does not necessarily correlate with the frequency of declarations of unconstitutionality and the effectiveness of the system as a whole**. Italy, for example, does not allow for abstract legal review, but the number of declarations of unconstitutionality there is considerably larger than in most countries with a broad approach to the issue of entitlement to raise concerns before the constitutional court (see section III.1.5 Frequency of Declarations of Unconstitutionality, p. 152). The importance and effectiveness of courts initiating the constitutional review of laws must therefore be paramount. Analysing the countries that do provide the options of both abstract and concrete legal review, e.g. Austria, shows that most declarations of unconstitutionality are attributable to concrete legal reviews.

1.3 Parliamentary Opinions in Constitutional Review Proceedings

1.3.1 Delivery of Opinions

Procedural rules can stipulate that after the constitutional review proceedings before the constitutional or supreme court have been initiated by the body or individual entitled to do so, parliament is to deliver an opinion on the matter at hand. This section discusses when and if this is possible when the proceedings were initiated by institutions or individuals other than the parliament; who is responsible for preparing such an opinion; and who is entitled to request one. At first glance, it is quite obvious why countries stipulate for parliament to deliver an opinion in constitutional review proceedings. The now disputed law was discussed, reviewed, maybe even drafted in parliament and then adopted by the necessary majority. Therefore, it can be seen as a logical step for parliament to deliver an opinion regarding the law in question. However, it has to be noted that the composition of parliament and political majorities can change swiftly. As a result, the opinion that is delivered by parliament is not necessarily representative of the opinion at the time

of adoption, especially if the law in question was adopted decades before.

There is no predominant model among the analysed countries for whether the parliament delivers an opinion in constitutional review proceedings initiated by other institutions or persons. Rather, the models fall into **three different categories**: the first model stipulates that parliament deliver an opinion, the second has no provision for parliament to deliver an opinion at all and the third provides the option to deliver an opinion or the possibility to request one.

The first model, in which **parliament delivers an opinion**, is used for example in the Czech Republic, Estonia, Israel, Portugal, Poland and the Slovak Republic. In Estonia, the Parliament, as the body that adopted the legislative act, is a party to the proceedings and therefore delivers an opinion. Similarly, the National Council in the Slovak Republic delivers an opinion provided it is a party to the proceeding (if a law that had been approved by the National Council is challenged); otherwise it does not have a procedural legitimation to do so.[4] In the Czech Republic, for parliamentary legal acts the opinion of the parliament, as the intervener of this proceeding, is obligatory; in other proceedings it may be requested by the Court.[5] Israel provides for the Knesset to be represented before the Court in all petitions arguing against the constitutionality of legislation. Furthermore, the Legal Advisor of the Knesset can join any court proceedings that the Legal Advisor thinks may influence the Knesset.

Among the countries that do **not provide** for parliament to deliver an opinion in constitutional review proceedings, a distinction can be made between countries that simply do not provide for this option and countries where the system of constitutional jurisdiction does not favour such an involvement of parliament. Most of the latter have either a diffuse system of constitutional jurisdiction or minimal constitutional review. The second category includes Finland, Greece, Ireland, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom. The countries

4 | For further details see the Case Study of the Slovak Republic, p. 112.

5 | For further details see the Case Study of the Czech Republic, p. 157 et seq.

that do have constitutional courts but do not provide for parliament to deliver an opinion in the constitutional review process are Austria, Hungary, Italy, Moldova, North Macedonia, Romania and Turkey. However, the lack of opinion from parliament does not mean that other state authorities do not deliver an opinion. In North Macedonia, for example, the Constitutional Court is required to obtain an opinion from the Government. This is also true for Austria, where depending on the law concerned either the Federal Government or the Provincial Government issues these kinds of statements.

There are also quite a few countries where the delivery of an opinion by parliament is **optional** or depends on whether such a statement was **requested** (e.g. Belgium, Bulgaria, Georgia, Germany, Latvia, Lithuania, Slovenia). In Germany, for example, the Bundestag and the Bundesrat have the opportunity to issue a statement. They may also join the proceedings if the assembly decides to do so. In Slovenia, the National Assembly is the opposing party for the constitutional review of legislation and may provide a response or not. In Belgium, the President of the House may submit a statement to the Constitutional Court. Latvia takes a different approach, stipulating for parliament to deliver an opinion if the court requests one.

1.3.2 Preparation of Opinions

With the countries where parliament issues an opinion in constitutional review proceedings initiated by other institutions or individuals having been identified, this section will focus on who is responsible for drafting such an opinion. Several options are conceivable, but a general distinction can be made between external and in-house preparation, the latter being by experts from the parliamentary administration and committees. In most of the countries, the statement is prepared in house, by either the parliamentary administration or a political committee; there are also models where both are involved and draft the opinion in a collaborative effort.

The **parliamentary administration** is responsible for preparing the opinion of the parliament on constitutional review proceedings in Albania, the Czech Republic, Latvia, Lithuania, Poland, Portugal, Slovenia and Spain. In the Czech Republic, the

Legislative Department of the Office of the Chamber of Deputies drafts the opinion in the name of the president of the Chamber.[6] In Slovenia, the reply is prepared by the Legislative and Legal Service, based on the opinion of the working group responsible. In Portugal, the statement is supported by information from the parliamentary administration (data generated in the course of the legislative process). In Spain, the Parliament's Legal Counsel prepares the statement. In Lithuania, the statement may be prepared by members of the Seimas Office staff (Legal Department) or by MPs.

In some countries, it is customary to entrust an **individual** with the preparation of the parliament's opinion. In Israel, the Knesset's Legal Advisor or their representative prepares the statement. In Albania, the Secretary General appoints one adviser from the Legal Service to represent the Parliament before court.

In other countries, a **committee** is responsible for preparing the opinion. In Estonia, for example, the parliamentary committee in whose area of authority the act belongs prepares the opinion. The Slovak Republic provides for a **collaborative system**, where the Constitutional and Legal Affairs Committee of the National Council prepares the statement with the expert support of the Department of Legislation and Approximation of Law and Committee secretariat.[7]

There are also models where **external experts** prepare the statement for, or in cooperation with, the Parliament. The Cypriot House of Representatives, for example, appoints an advocate. In Belgium, the House of Representatives appoints a lawyer, whenever the House is involved in judicial proceedings. The House very rarely makes a statement, but if it does, it is a statement prepared by a lawyer in collaboration with parliamentary administration. In Germany, the collaboration takes place between external experts and a committee. The draft statements are prepared by the external expert and then discussed in the law committee.

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6 | For further details see the Case Study of the Czech Republic, p. 159 et seq.

7 | For further details see the Case Study of the Slovak Republic, p. 112.

1.3.3 Entitlement to Request Opinions

As already mentioned, some countries stipulate that certain bodies are entitled to request the opinion of the parliament on constitutional review proceedings. Not surprisingly, in most cases, the constitutional court, as the deciding court, can request such a statement. In a few countries, however, applicants also have the option of requesting a statement from parliament. A third model provides for only parliamentary bodies themselves to make this decision.

In most countries where such an approach is possible (e.g. Slovenia, Czech Republic), the **constitutional court** sends the request or petition to the National Assembly and determines an appropriate period of time for response. In the Slovak Republic, as well, the Chair of the Constitutional Court requests a statement from the Parliament. In Portugal, the Constitutional Court President directs the President of the Assembly to deliver an opinion. In Estonia, the Supreme Court asks the parties to the proceedings (the parliament and the opposing party) to submit their opinion, and in Latvia the reporting judge of the Constitutional Court requests the statement.

However, some systems provide for **parliamentary bodies** to decide whether or not to issue an opinion or request the opinion of another body. In Germany, the assembly decides on the submission of a statement (after an advisory resolution from the law committee) and in Spain the request is made by the Bureau of the House itself to the Legal Council. In Belgium, the Clerk of the Constitutional Court notifies to the House. The President of the House may then be requested to submit a statement by two thirds of the Members.

In Lithuania and Georgia, both the Constitutional Court itself and the **applicants** can request such a statement from Parliament.

1.4 Review of the Parliamentary Legislative Proceedings

Another factor that reflects on the relationship between parliament and constitutional or supreme court is the range of scrutiny in the review of legislative proceedings. The constitutional review of a law may focus only on the content of a law or could also include a review of the parliamentary legislative proceedings. Such a review usually encompasses the law's conformity with the standards set by the constitution and by the rules of procedure.

The exercise of procedural judicial review is beneficial for several reasons. Errors can occur in the legislative process, either for political reasons, because one party tries to gain an advantage by circumventing procedural rules, or because legislation is often enacted under great time pressure. It is therefore important that an independent court reviews compliance with the rules of the law-making procedure so that errors that have arisen in the legislative process can be corrected. Moreover, such a review can also lead to greater attention to and compliance with these rules in parliament, because actors are aware that non-compliance can have consequences. Nevertheless, it should of course be noted that there is a tension between respect for parliamentary autonomy and the task of verifying the correctness of the legislative process.

The analysis has revealed three different models: no review of parliamentary legislative proceedings at all; review of the proceedings under the stipulation that only the violation of 'qualified' procedural rules leads to a repeal or declaration of unconstitutionality; and review without any limitations. The graph below on page 150 shows the distribution of the three models.

Some of the countries **do not allow** their court to review parliamentary legislative proceedings at all (Belgium, Cyprus, Finland, Greece, Ireland, Italy, the Netherlands, North Macedonia, UK), as procedural rules can be considered an internal parliamen-

tary matter.[8] Furthermore, it can be argued that a review of procedural rules may disrupt the separation of powers.

In Belgium the Court has declared repeatedly that its jurisdiction does not extend to the legislative proceedings. However, there exist exceptions regarding the special majority requirement for the adoption of certain acts, the mandatory forms of cooperation between the federal level and the entities and certain EU-based acts.[9] In Ireland, the potential for such a review cannot be wholly excluded, but the case-law suggests that intervention would be rare. In Italy, the constitutional court cannot review the conformity of laws with parliamentary rules of procedure. Only the conformity with constitutional provisions regarding the legislative process can be reviewed, but there are very few of these provisions.

In a few countries the effect of the courts' review of parliamentary legislative proceedings is that only the **violation of 'qualified' rules** leads to a repeal or declaration of unconstitutionality of the law (Austria, Estonia, Hungary, Latvia, Norway, Portugal, Romania, Slovenia, Spain, Sweden, Turkey). Which rules are deemed 'qualified' varies. Such an approach has the advantage that important procedural rules are adhered to, but the violation of less significant procedural rules does not lead to unconstitutionality.[10]

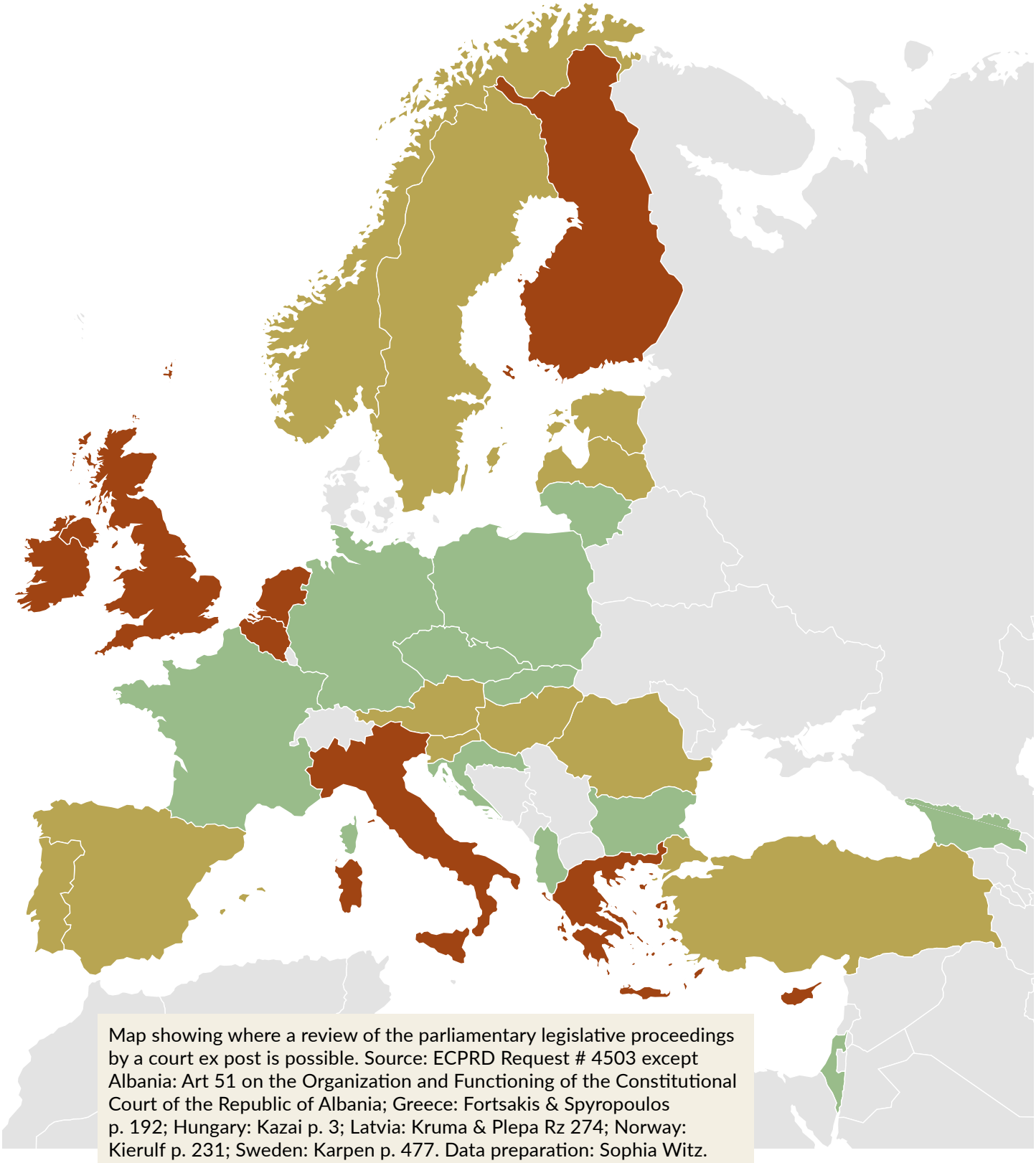
In Spain, qualified rules include provisions concerning the lack of legal reports or the selection of the type of legislative procedure. In Austria and Romania, provisions on voting in the plenary and rules governing members' participation in votes, as well as rules made in the interest of clarity about the subject or question to be voted on, are considered 'qualified' procedural rules. In Turkey, only whether a majority was obtained in the last ballot is relevant. For constitutional amendments, the review is restricted to determining whether the majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited proce-

8 | See e.g. the Greek Case Study on 196 et seq.

9 | See the Belgian Case Study on p. 173 et seq.

10 | See e.g. the Austrian Case Study on p. 167 et seq.

Review of the Parliamentary Legislative Proceedings by a Court ex post



Map showing where a review of the parliamentary legislative proceedings by a court ex post is possible. Source: ECPRD Request # 4503 except Albania: Art 51 on the Organization and Functioning of the Constitutional Court of the Republic of Albania; Greece: Fortsakis & Spyropoulos p. 192; Hungary: Kazai p. 3; Latvia: Kruma & Plepa Rz 274; Norway: Kierulf p. 231; Sweden: Karpen p. 477. Data preparation: Sophia Witz.

Country	Review possible	Review not possible	Review possible, but only the violation of "qualified" procedural rules leads to a repeal or declaration of unconstitutionality
Albania	X		
Austria			X
Belgium		X[1]	
Bulgaria	X		
Croatia	X		
Cyprus		X	
Czech Republic	X		
Estonia			X
Finland		X	
France	X		
Georgia	X		
Germany	X		
Greece		X	
Hungary			X
Ireland		X[2]	
Israel	X		
Italy		X[3]	
Latvia			X
Lithuania	X		
Netherlands		X	
Norway			X
Poland	X		
Portugal			X
Romania			X
Slovak Republic	X		
Slovenia			X[4]
Spain			X
Sweden			X
Turkey			X
United Kingdom		X	

1) except in special cases
2) the possibility of such a review cannot be completely ruled out
3) review of conformity with parliamentary rules of procedure not possible, only the conformity with constitutional provisions regarding the legislative process (there are few) can be reviewed
4) the Court repeals laws only if the Constitution was violated

dure was observed. This review of form can be requested by the President of the Republic or by one fifth of the members of the National Assembly.

Most of the countries, however, do provide for the **review** of parliamentary legislative proceedings to be part of the constitutional review without limitations (Albania, Bulgaria, Czech Republic, France, Georgia, Germany, Israel, Lithuania, Moldova, Poland, Slovak Republic). Croatia does the same in certain cases, and Sweden does for legislative proposals.

1.5 Frequency of Declarations of Unconstitutionality

We have already looked at the number of judgments issued by the constitutional or supreme court upon application by members of parliament. However, the number of laws (or legal provisions) that have been declared unconstitutional by the constitutional or supreme court in general is also informational and reflects on the constitutional court, the constitutional culture and the parliament itself. It should be noted that in this chapter, because of the different approaches each country takes, the term 'declaration of unconstitutionality' is used broadly as an umbrella term not only for declarations of unconstitutionality or illegitimacy but also for judgments repealing laws or finding/declaring laws invalid, unconstitutional or unlawful (for further details see I.1.3.2.3 Effect of Judgments, p. 57).

Not all countries collect specific data on the frequency with which laws have been declared unconstitutional; only the countries that gather this kind of data can be compared. The time frame for the comparison is the years 2000 to 2019, so the following section outlines how many declarations of unconstitutionality the constitutional or supreme courts have issued from 2000 to 2019 (unless otherwise indicated). The data show that the countries can be divided into **four distinct groups** according to the frequency with which laws have been declared unconstitutional since the year 2000.

However, it has to be mentioned that the annual (average) number of rulings declaring laws or provisions unconstitutional can only be an approximation, since in Austria, for example, because of procedural rules it may be that rulings deal

with several applications, but concern the same legal provision. Where such an occurrence has been recognised, the multiple mentions are separated out, for example according to the numbers from the Austrian Constitutional Court's annual reports. It cannot be ruled out, though, that different countries and courts calculate declarations of unconstitutionality in a different way; therefore a direct comparison of the countries entails some uncertainty.

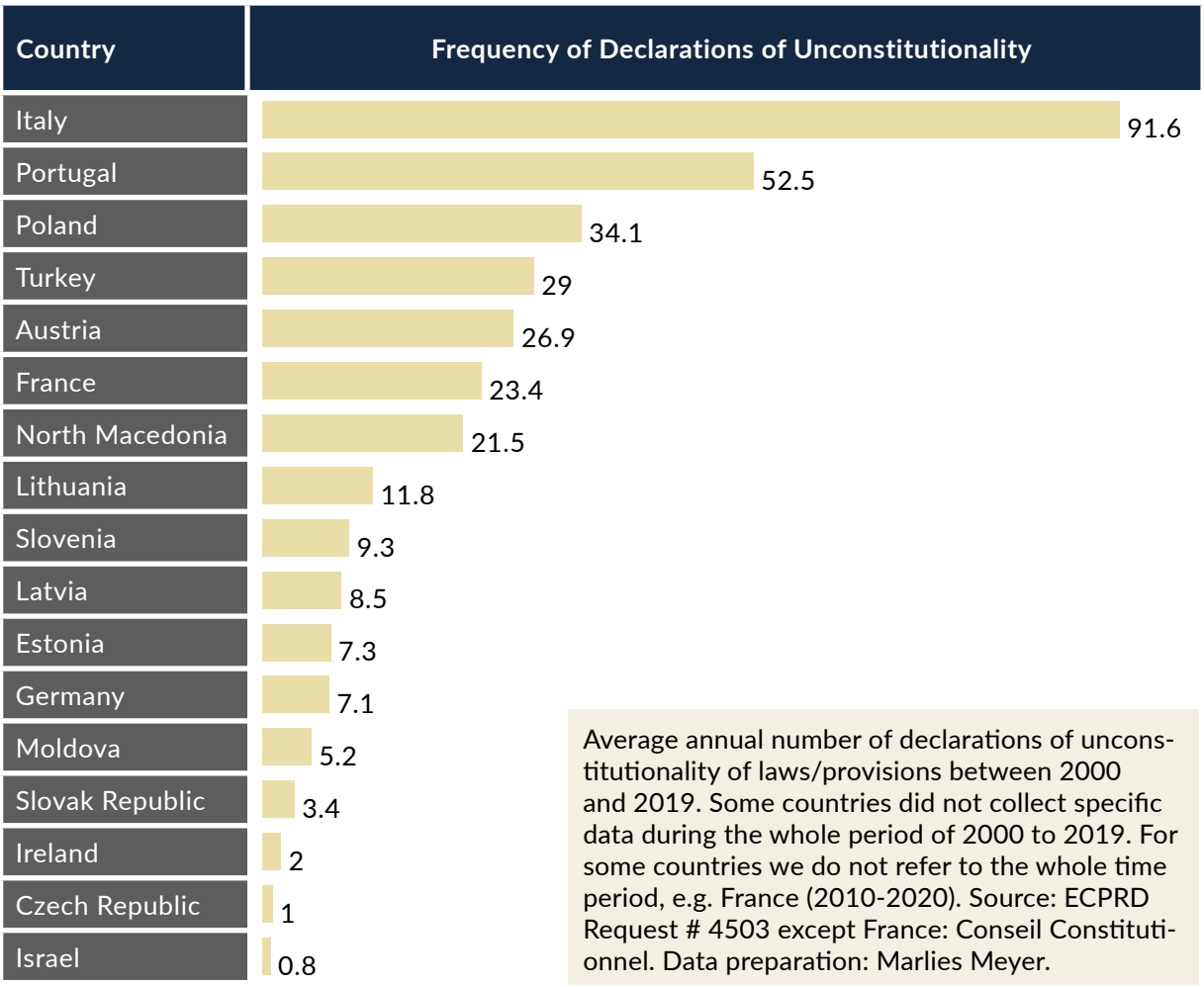
The first group is composed of countries with **very few declarations of unconstitutionality**, ranging from **one to five declarations per year** on average during the selected period. It comprises Israel (0.75 declarations of unconstitutionality on average per year), the Czech Republic (1), Ireland (2), the Slovak Republic (3.4) and Moldova (5.2). There are years when no provision was declared unconstitutional at all in Israel; in other years one to three provisions were declared unconstitutional. The Constitutional Court in the Czech Republic declared 20 laws (or provisions) unconstitutional since 2000. In the Slovak Republic 68 laws (or provisions) were declared unconstitutional since 2000, on average around three per year. In Moldova around 94 laws (or provisions) were declared unconstitutional between 2000 and 2017.

The second group, with **slightly more declarations of unconstitutionality**, on average between **seven and 12 declarations per year** during the relevant period comprises Germany (7.1), Estonia (7.3), Latvia (8.5), Slovenia (9.3) and Lithuania (11.8). The German Constitutional Court declared between three and 15 laws (or provisions) unconstitutional per year. Similarly, in Estonia (2007–2019) the numbers fluctuate between three and 15 laws (or provisions) deemed unconstitutional. In Latvia two to 15 laws (or provisions) were declared unconstitutional each year since 2000. In Slovenia there have been from three to 17 individual provisions declared unconstitutional every year – on average around nine laws. The Lithuanian Constitutional Court declared between five and 15 laws (or provisions) unconstitutional per year during the years 2014 to 2019, on average around 12 laws per year.

The third group shows a **medium number of declarations of unconstitutionality**, with numbers ranging from **21 to 34 declarations per year** on average. It consists

of North Macedonia (21.5 declarations on average per year), France (23.4 declarations on average per year between 2010 and 2020), Austria (26.9), Turkey (29) and Poland (34.1). The numbers of declarations of unconstitutionality in North Macedonia show a high fluctuation between the years 2005 and 2019. Only three provisions were declared unconstitutional in 2019; in the years before that the numbers varied between six and 42. Austria is also in the middle for number of laws (or provisions) declared unconstitutional. The highest number in the period was recorded in 2004: there were 49 declarations of unconstitutionality. The lowest number is eight declarations, and the average number of laws (or provisions) found unconstitutional per year is around 26. The Turkish Constitutional Court declared between 13 and 59 laws (or provisions) unconstitutional per year. In Poland from 17 to 49 laws (or provisions) were declared unconstitutional between 2000 and 2018.

The following graph illustrates the frequency of declarations of unconstitutionality per country.



Average annual number of declarations of unconstitutionality of laws/provisions between 2000 and 2019. Some countries did not collect specific data during the whole period of 2000 to 2019. For some countries we do not refer to the whole time period, e.g. France (2010-2020). Source: ECPRD Request # 4503 except France: Conseil Constitutionnel. Data preparation: Marlies Meyer.

The last group is the countries with the **highest numbers of declarations of unconstitutionality**, averaging over 50 declarations per year. This group consists of only Portugal (52.5 declarations on average per year) and Italy (91.6). In Portugal, every year around 40 to 70 laws (or provisions) are declared unconstitutional. Italy has the highest number of declarations of unconstitutionality, with between 68 and 137 laws (or provisions) declared unconstitutional every year during the years 2009–2019.

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Czech Republic

'The Opinion of the Parliament' in the Proceedings of the Constitutional Court

Jindriška Syllová[1]

Constitutional review in the Czech Republic

The Constitutional Court of the Czech Republic is a specialised type of constitutional court. The task of the Constitutional Court is to protect the people from violations committed by the legislature, executive power or any other public authority. The Constitutional Court judges are appointed by the President of the Republic with the consent of the Senate of the Parliament of the Czech Republic.

The reviewing power of the Constitutional Court in relation to legislative acts is called 'abstract constitutional review'. This term uses the Czech constitutional research as the synonym for the power to repeal legal acts (laws, secondary decrees, regional or municipal regulations) that conflict with the constitutional order.

In contrast, 'concrete constitutional review' is the competence of the Constitutional Court of the Czech Republic to decide on the complaints of individuals who claim that their constitutional fundamental rights were violated by an individual decision of a public authority.

In addition to abstract and concrete constitutional review, the Constitutional Court has the power to review proceedings to dissolve political parties, review court decisions on parliamentary elections, protect municipal self-government and decide on the Senate's constitutional action against the President of the Republic.

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The most important competence of the Constitutional Court is the abstract review of parliamentary legal acts (primary normative acts – 'zákony'). An abstract review considers legal acts that conflict with the constitutional order; it need not apply to an individual case. There are a limited number of potential applicants for this type of constitutional review: the competence to file a petition (application) belongs to a group of 41 Members (of 200) of the Chamber of Deputies, a group of 17 (of 81) Senators, the President of the Republic, a court, a complainant to the Constitutional Court whose constitutional rights were violated by the applications of the respective act, or the Constitutional Court itself. The Constitutional Court reviews two aspects of the act's constitutionality: the constitutionality of the legislative proceedings and that of the content of the legal act.

This chapter describes the 'opinions' of the chambers of parliament that are sent to the Constitutional Court during the abstract constitutional review proceedings. The description of the procedures that have developed around the 'opinions' shows very well how the relationship between parliament and the constitutional court has gradually evolved over the decades. In the early 1990s the Constitutional Court was a rather passive body that accepted all the procedural customs of the parliament. In the beginning, the Constitutional Court accepted any opinion, but over time it reduced its scope. Over the decades the Constitutional Court began to play a much stronger role and eventually determined what the parliament's opinion should look like. Even a subtle phenomenon such as the parliamentary 'opinion' to the Constitutional Court, shows how relations between the constitutional bodies of the constitutional system of the Czech Republic developed.

Parliament or chambers as party to the proceeding?

The 'opinion' is sent to the Constitutional Court at its request during the proceedings. The 'opinion' has no connection with a petition for proceedings which seeks a review of an act by a Constitutional Court. Even if the petition is filed by a group of Deputies or Senators.

According to § 69 of the Act on Constitutional Court the 'opinion' is intended to

provide an objective insight into who issued the legislation, in line with the situation at the time the legislation was issued. In contrast, a petition to initiate proceedings looks at the act in the context of the constitutional order in the current situation, and very often reflects the political affiliations of the members of the senatorial or parliamentary group.

Act on the Constitutional Court provides that the body that issued the act reviewed in abstract proceedings must express an opinion. The provision of § 69 states that the 'body' that issued the legislative act (that is to be reviewed by the Constitutional Court) is in the position of a party to the proceedings. Therefore, the Parliament of the Czech Republic as a whole is a party to the proceedings. It should be deduced from this, when an act of parliament is being reviewed, the Parliament should deliver only one opinion on the reviewed act for the Constitutional Court proceedings. However, historical developments have altered the interpretation, and today each chamber has the right to express its own opinion on the reviewed act separately.

From 1993 to 1996, the Parliament in the Czech Republic functioned as a unicameral parliament. Until 1996, the Chamber of Deputies performed its own function as well as the competencies of the Senate, because the Senate had not yet been established. For this reason, according to the above-mentioned § 69, the Constitutional Court (established in 1993) required an opinion from the Chamber of Deputies.

In 1995 the act on Senate elections was passed (Act 247/1995 on parliamentary elections) and the Senate, the upper chamber, was elected in 1996. However, the preparations for the Senate's functioning were inadequate, and no legal act regulated relations that would exist between the chambers after the Senate was elected. There was no umbrella body for parliament as a whole, nor a co-chair to coordinate relations. For this reason, there was no coordination between the chambers in the drawing up of opinions for the proceedings under the abstract review of the Constitutional Court. After the first Senate election, the Constitutional Court requested opinions from both chambers – the Chamber of Deputies and the Senate.

In addition to the lack of regulation, another reason for this requirement is that the Constitutional Court itself is politically connected to the Senate: judges of the Constitutional Court are appointed with the consent of the Senate. The Senate's opportunity to submit its own opinion to the Constitutional Court is considered one of the features of the independence of the upper chamber, which is otherwise significantly less powerful than the Chamber of Deputies. The practice of two separate opinions being issued and the position of two chambers of parliament as two separate parties in the abstract review preccedings of the Constitutional Court continued for 20 years (Sládeček et al., 2016; Rychetský et al., 2014).

For many years there was no legal regulation of the relations between the two chambers of the Czech Parliament, even though such a legal act was envisaged by Article 40 of the Constitution. The regulation was not adopted until 2017, when the chambers finally agreed on the wording of this law. Act 300/2017, 'On principles of relations of the Chamber of Deputies and the Senate with each other and externally' was adopted. The act regulates, inter alia, the position of the chambers in the Constitutional Court proceedings. According to Act 300/2017, the position of the chambers is as follows: 'If the Parliament is a party to proceedings (...) before the Constitutional Court, individual chambers act on its behalf. If the proceedings deal with the act that was adopted before the existence of the Senate or if the act is the state budget, the Chamber of Deputies acts on behalf of the Parliament.' It can be observed that Act 300/2017 confirmed the previous practice of having two separate opinions, although this practice did not correspond exactly to the previous legal regulation. With this act, the constitutional custom that had been developed over 20 years by the Senate together with the Constitutional Court, and that strengthened the role of the Senate, finally became a legal rule.

The author of the 'opinion for the Constitutional Court'

One of the commentaries of the Act on the Constitutional Court (Wagnerová et al., 2007) holds that the 'opinion' for the Constitutional Court proceedings should be adopted as a resolution of a chamber. The commentary assumes that the creation of an opinion for the Constitutional Court, like any other decision of the chambers

of parliament, is a collective result. The constitutional convention in both chambers of parliament has developed in the opposite direction to that recommended by the commentary. Opinions of the chambers are drawn up and forwarded to the court by the chair of the respective chamber (the speaker). No other parliamentary organ discusses or decides on the opinion, nor does the plenary. The interpretation has been developing in the Chamber of Deputies starting in 1993, after the establishment of the Constitutional Court. The Chair, who had the right to represent the chamber as a party to the proceeding of the Constitutional Court (§ 30 of the Act on the Constitutional Court says that 'the head of the unit' represents the chamber before the Constitutional Court), inferred from this right an competence to formulate an opinion. The Chair's interpretative practice excluded parliamentary collective bodies from drawing up an opinion and passing that opinion to the Constitutional Court. This practice has essentially grown into a constitutional custom.

The Constitutional Court's restrictive approach to the content of the chamber opinions

In the first decade of its activity, the Constitutional Court accepted any kind of opinion from chairs of chambers. On several occasions, however, the chairs expressed their own views in the opinions, views that followed their political affiliation. In some cases, opinions had to be internally rewritten several times because the political views of a chair of the Chamber of Deputies differed from the objective opinion elaborated by the employees (lawyers) of the Office of the Chamber of Deputies. A well-known example is a judgment called the large electoral judgment (Pl. ÚS 4/2000). The amendment of the electoral act proposed by the government was sued in the Constitutional Court. The Chair of the Chamber of Deputies, Václav Klaus, supported the amendment (in fact, he was one of the main creators of the amendment). In the opinion for the Constitutional Court, Václav Klaus as the Chair insisted that the amendment was compatible with the constitution. Finally, the amendment was repealed by the Constitutional Court (opinions of the chambers are not published, but they are part of the justification of the judgment that is published).

It has also happened that the Chamber of Deputies and the Senate have expressed

opposite opinions. A good example of this is the 'legislative emergency' judgment (judgment Pl. ÚS 55/10). The Chair of the Chamber of Deputies stated in that chamber's opinion that the act was passed in a properly completed legislative process, albeit through an accelerated procedure. The Chair of the Senate stated in the Senate's opinion that the act was passed in the period between two Senate terms, and the newly elected senators could not participate due to the accelerated procedure in the Chamber of Deputies. The Constitutional Court repealed the act due to the Chamber of Deputies' total abuse of the accelerated procedure in the legislative process.

In 2008, an obiter dictum of the Constitutional Court commented on the practice by the chairs of the chambers of abusing their opinions. In the judgment Pl. ÚS 24/07 (approved in the year 2008) the Constitutional Court stated that chairs of the chambers should confine themselves to commenting on the legislative procedure and not give an opinion on the content of the law. The Constitutional Court thus in fact agreed with the commentary quoted above. The Constitutional Court said: 'The authority of the Chair of the Chamber is limited to factual circumstances, i.e. a description of the procedure that took place in the Chamber.' This obiter dictum clarifies that the content of the opinion is limited to the procedure, significantly reducing the importance of the opinion.

Who prepares the 'opinion' in the Office of the Chamber of Deputies?

The competence to write opinions for the Constitutional Court is included in the organisational chart of the Office of the Chamber of Deputies, which describes the scope of work of the Legislative Department.[2] This determination is logical. The Legislative Departments of both chambers consist of clerks (lawyers) who follow each legislative draft through the legislative process and assist committee reporters in drafting the final wording of the bill. The clerks also coordinate with the author – in most cases the ministry – on the final text of the bill. Thus, the clerk who guided

2 | The organisational chart of the Senate says the same.

the bill in the legislative proceeding has the competence to write an opinion to the Constitutional Court if the bill, or part of it, becomes the object of constitutional review. (A clerk undergoes a hierarchical check in the Legislative Department by the director of the Legislative Department.) After that, the opinion is delivered to the chair of the respective chamber.

An important question arises as to whether the opinion for each bill must declare that the bill is constitutionally compatible. The clerk of the Legislative Department of the Chamber of Deputies always writes an opinion claiming that the act complied with the constitution, even if there is some doubt that the rules of procedure were followed in its adoption. In all past cases in which the legal act was repealed by the Constitutional Court for non-compliance with the rules of procedure and the constitution, the chair's opinion insisted that the constitutional and procedural rules had been complied with.[3]

Conclusion

What to say in conclusion about parliamentary opinions for constitutional review? In the Czech Republic, both chambers have the opportunity to give opinions to the Constitutional Court when the Constitutional Court is reviewing the act of parliament. This is a very positive feature because it strengthens the upper house and introduces another check and balance element into the constitutional system. An opinion is drafted by a clerk of the office of the respective chamber and signed by the chair of the chamber. The content of the opinion is limited to procedural aspects of the reviewed act; it usually consists of details, conventions and procedural practices of the relevant chamber. Opinions also note other possible solutions and alternative discursive variants dealing with the reviewed act. The conclusions of opinions usually show their drafters´ loyalty to collective decisions of the plenary and conventions of the relevant chamber. Even after the judicial interpretation

3 | For instance, the decisions: Pl. ÚS 21/01 dealing with the legislative riders, Pl. ÚS 5/02 dealing with cancelling the resolution in the next meeting, Pl. ÚS 55/10 dealing with the legislative emergency régime. All Constitutional Court decisions cancelled the act because of the unconstitutional legislative procedure.

has limited their content, the opinions of the chambers are an important, comprehensive, and historically and comparatively substantiated source of parliamentary law. Although it might seem that parliamentary opinions are only marginally important, developments in their interpretation show the relationship between the Constitutional Court and Parliament and reflect the changes in relations between the chambers of the Czech bicameral system.

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Austria

Parliamentary Rules of Procedure as a Guideline for the Constitutional Review of Laws

Christof Rattinger[1]

Since 2001, the Austrian Constitutional Court has viewed parliamentary Rules of Procedure as a guideline for the constitutional review of laws. According to the Constitutional Court, however, there is a need to distinguish within the Rules of Procedure between 'qualified' and 'non-qualified' provisions; only when a qualified provision of the Rules of Procedure is violated is the respective law unconstitutional. The purpose of this case study is to outline the Austrian Constitutional Court's approach to parliamentary proceedings in this regard, particularly its typology of parliamentary Rules of Procedure (1.1.3). First, however, some overall context is needed: information on the Austrian Parliament and the Austrian Constitutional Court (1.1.1), and on the relationship between federal constitutional law[2] and parliamentary Rules of Procedure (1.1.2).

Context

The Austrian Parliament

The Austrian Parliament is a bicameral parliament comprising the National Council ('Nationalrat') and the Federal Council ('Bundesrat'). The members of the National Council – 183 in total – are directly elected by all Austrian citizens who are aged 16 or over on election day, for a legislative period of five years.[3] The members of the

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2 | The term 'federal constitutional law' will be used to describe the totality of federal laws enacted by Parliament in the specific form that is required for the creation of federal constitutional law and that are also designated as such (= 'Bundesverfassungsrecht'). In contrast, 'Federal Constitutional Law' – with capital letters – is the name of the main legal document of the Austrian federal constitutional law (= 'Bundes-Verfassungsgesetz').

3 | Article 26 of the Federal Constitutional Law (B-VG). Detailed provisions concerning the electoral process are laid down in the Federal Law on the Election of the National Council 1992 (NRWO), BGBl 471/1992 idF BGBl I 32/2018.

Federal Council – currently 61 in total[4] – are elected by the nine provincial parliaments, for the duration of their respective province's legislative period. Each provincial parliament elects a number of members of the Federal Council proportionate to its population.

In general, Austrian federal laws have to pass through both chambers of Parliament. However, according to the Federal Constitutional Law, certain laws can be enacted only by the National Council: the Federal Council has no claim to participation in National Council enactments on the National Council's Rules of Procedure, on the dissolution of the National Council, on specific federal finance laws and on the federal budget.[5]

The National Council and the Federal Council each have their own Rules of Procedure: the Rules of Procedure of the National Council[6] are a federal law in the proper sense,[7] while the Rules of Procedure of the Federal Council[8] are an autonomous resolution. Nevertheless, according to the Federal Constitutional Law, they also have the status of a federal law.[9]

The Austrian Constitutional Court

Since the Austrian Constitutional Court was established in 1920, its main task has been the constitutional review of laws. According to the Federal Constitutional Law, the power of constitutional review of laws in Austria is conferred on one single court: the Constitutional Court examines the constitutionality of both federal and provincial laws.

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4 | Articles 34 and 35 of the Federal Constitutional Law (B-VG). After every official population census, the Federal President is entitled to determine the number of members of the Federal Council to be elected by each provincial parliament. The current distribution is laid down in the Resolution of the Federal President on the Number of Members to be Delegated into the Federal Council by the Provinces ('Entschließung des Bundespräsidenten betreffend die Festsetzung der Zahl der von den Ländern in den Bundesrat zu entsendenden Mitglieder'), BGBl II 237/2013.

5 | Article 42 para 5 of the Federal Constitutional Law (B-VG).

6 | Rules of Procedure of the National Council 1975 (GOG-NR), BGBl 410/1975 idF BGBl I 63/2021.

7 | Article 30 para 2 of the Federal Constitutional Law (B-VG).

8 | Rules of Procedure of the Federal Council (GO-BR), BGBl 361/1988 idF BGBl I 79/2021.

9 | Article 37 para 2 of the Federal Constitutional Law (B-VG).

The constitutional review of a law may be initiated not only by courts, public authorities and private individuals, but also by the Constitutional Court itself in applying a law in a suit pending before it, or by one third of the members of each chamber of Parliament.[10] The Constitutional Court is not limited to checking the contents of a law, but may also examine errors in the legislative procedure. In doing so, the Court guarantees that the procedural aspects laid down in federal constitutional law and – as discussed below – (some of) the parliamentary Rules of Procedure have been respected. Procedural irregularities regarding parliamentary Rules of Procedure are most often brought before the Constitutional Court by one third of the members of a chamber of Parliament – usually by members of the opposition parties who have voted against the respective law.

Relationship between federal constitutional law and parliamentary Rules of Procedure

As laid down in the Federal Constitutional Law, the Constitutional Court is competent to pronounce judgment on the unconstitutionality of laws.[11] Thus the standard of review for the Constitutional Court would seem to be federal constitutional law. Since 2001, however – as mentioned above – the Constitutional Court has also considered parliamentary Rules of Procedure a guideline for the constitutional review of laws. This raises the question of whether parliamentary Rules of Procedure form a part of Austrian federal constitutional law.

Parliamentary Rules of Procedure are, in fact, part of the federal constitutional law in its 'substantive' meaning ('Verfassungsrecht im materiellen Sinn') since they regulate the functioning of Parliament and therefore a central aspect of human coexistence in the State. However, they are not part of the federal constitutional law in its 'formal' meaning ('Verfassungsrecht im formellen Sinn') because they were not created in the specific form that is required for the creation of federal constitutional

10 | Article 140 para 1 of the Federal Constitutional Law (B-VG).

11 | Article 140 of the Federal Constitutional Law (B-VG).

law and are also not designated as such[12] (e.g. Konrath, 2017, Art 31 B-VG § 23; Siess-Scherz, 2019, Art 30 B-VG § 55). Quite the contrary: the principle of parliamentary autonomy entails the right of each chamber of Parliament to amend its Rules of Procedure on its own. Amendments of federal constitutional law, however, can only be adopted jointly by both chambers of Parliament.

The Constitutional Court's typology of parliamentary Rules of Procedure

The extension of the standard for constitutional review of laws

Since 2001, the Constitutional Court has also considered parliamentary Rules of Procedure to be a standard for the constitutional review of laws. This raises the question of why the Constitutional Court decided to diverge from its previous case-law and now also repeals laws as unconstitutional for violations of parliamentary Rules of Procedure, which – as noted above – are not formal constitutional law.

Most likely, the main reason behind the change is that the Austrian Federal Constitutional Law lays down very few aspects of parliamentary procedure. It sets out, for instance, who can introduce legislative proposals in Parliament (the Federal Government, Members of Parliament and citizens)[13] and what is required for a valid parliamentary decision (e.g. the quorums for attendance and decisions).[14] The Federal Constitutional Law does not, however, explain in what way votes have to be held in the chambers of Parliament (e.g. the chronology of votes or the voting procedures); detailed provisions of that kind are laid down in the Rules of Procedure of each chamber of Parliament.[15] In this regard, parliamentary Rules of Procedure may clarify certain constitutional provisions, but they also go far beyond what is written down in the Federal Constitutional Law.

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12 | Article 44 para 1 of the Federal Constitutional Law (B-VG).

13 | Article 41 of the Federal Constitutional Law (B-VG).

14 | Article 31 and Article 37 para 1 of the Federal Constitutional Law (B-VG).

15 | Article 30 para 2 and Article 37 para 2 of the Federal Constitutional Law (B-VG).

The Constitutional Court therefore draws a distinction within the Rules of Procedure between 'qualified' and 'non-qualified' provisions. If 'qualified' provisions of the Rules of Procedure are violated, the respective law is unconstitutional and for that reason the Constitutional Court repeals the law in its entirety. From the Constitutional Court's point of view, provisions of the Rules of Procedure are qualified 'if they are supposed to ensure that parliamentary decisions reflect the true opinion of the majority of Members of Parliament'. Some examples would be provisions that make sure that Members of Parliament can take part in votes or that the subject or question of a vote is sufficiently clear during the vote (e.g. Lienbacher, 2012, p. 21; Konrath, 2017, Art 31 B-VG § 22; Siess-Scherz, 2019, Art 30 B-VG § 55).

In contrast to these, the Constitutional Court considers all 'non-qualified' provisions of the Rules of Procedure to be merely internal rules of Parliament. According to the Constitutional Court, it is the sole responsibility of Parliament to comply with them. Therefore, violations of non-qualified provisions of the Rules of Procedure do not render a law unconstitutional.

The Constitutional Court's typology will be illustrated with three examples from case-law.

Case-law example 1: Voting irregularity in the plenary of the National Council

The first case in which a violation of the National Council's Rules of Procedure led the Constitutional Court to declare a law unconstitutional concerned an irregularity in a vote in the plenary of the National Council. During the vote on the Pension Reform Law 2000 ('Pensionsreformgesetz 2000'), the chairing president accidentally misread parts of the prepared voting script. As a result, some amendments were put to a vote although they had not been proposed, while some of the proposed amendments were not put to a vote at all.

The Constitutional Court ruled that this irregularity during the vote had to be considered a serious one that therefore led to the unconstitutionality of the law in questi-

on. According to the Constitutional Court, the provisions governing the vote on a bill in the plenary are at the heart of the qualified provisions of the Rules of Procedure.[16]

Case-law example 2: 24-hour time limit between the distribution of the committee report and the beginning of the debate in the plenary

In another case, the Constitutional Court had to rule on a matter of a time component of the parliamentary procedure. In the Austrian Parliament, the debate on a draft law in the plenary shall in general start no sooner than 24 hours after the committee report on the draft law has been distributed among the Members of Parliament.[17] This shall guarantee the Members of Parliament the right to inform themselves about the items of business. In the relevant case, the committee report on the Budget Accompanying Act 2003 ('Budgetbegleitgesetz 2003') had been distributed only about two hours before the beginning of the debate in the plenary of the National Council.

The Constitutional Court found that the relevant provision of the Rules of Procedure of the National Council was only an internal and not a qualified provision. According to the Constitutional Court, the 24-hour time limit relates only to the preparation of the National Council's decision, and not to the decision-making process itself.[18] Therefore, the Constitutional Court considered the procedure within the National Council to have been constitutional.

This judgment of the Constitutional Court is interesting because the relevant question could have been seen differently. Giving Members of Parliament sufficient time to look into a matter before the final vote in the plenary makes sure that they get a full picture of what they will be voting on. Therefore, the provision about the 24-hour time limit could also be considered one that guarantees – in the words

16 | Judgment of the Constitutional Court of 16 March 2001, G 150/00, VfSlg 16.151/2001.

17 | § 44 of the Rules of Procedure of the National Council; § 44 para 2 and 3 of the Rules of Procedure of the Federal Council.

18 | Judgment of the Constitutional Court of 13 March 2004, G 211/03, VfSlg 17.173/2004.

of the Constitutional Court – 'that the true opinion of the majority of Members of Parliament is reflected'. In some other cases, the Constitutional Court has ruled that the clarity of a vote is crucial. In this particular case, however, the Constitutional Court did not maintain this strict interpretation.

Case-law example 3: Incorrect official records

The third example of a case brought before the Constitutional Court does not concern the federal Austrian Parliament, but relates to the official records of plenary sittings of the Carinthian provincial parliament ('Kärntner Landtag'). However, the lessons to be learned from the Constitutional Court's judgment in this case can also be applied by way of analogy to the Rules of Procedure of the National Council and the Rules of Procedure of the Federal Council.

In the relevant case, the official verbatim records of a plenary sitting of the Carinthian provincial parliament were incorrect: they did not correctly describe the course of the plenary sitting. However, both the official decision records and the tape recordings proved that the proceedings were correct and in accordance with the Rules of Procedure.

The Constitutional Court held that the Rules of Procedure provisions on the official records of sittings are, in general, merely internal rules of Parliament. According to the Constitutional Court, these rules make sure that parliamentary proceedings are properly documented.[19] However, in cases where the records do not provide sufficient proof (e.g. when there is a disagreement as to whether a parliamentary decision is valid), a law could become unconstitutional for lack of evidence (e.g. Siess-Scherz, 2019, Art 30 B-VG § 57 footnote 271).

Conclusion

In cases of constitutional review of laws, the Constitutional Court takes parliamen-

19 | Judgment of the Constitutional Court of 27 November 2002, G 215/01 et al, VfSlg 16.733/2002.

tary Rules of Procedure into consideration. The Constitutional Court's typology of parliamentary Rules of Procedure follows a reasonable logic: the Court does not consider all provisions of parliamentary Rules of Procedure, but only some of them, namely those provisions that further specify provisions of the Federal Constitutional Law. In doing so, on the one hand, the Constitutional Court guarantees that the provisions of the parliamentary Rules of Procedure with a direct link to the Federal Constitutional Law gain a significance beyond Parliament. On the other hand, the Constitutional Court makes sure that not every minor violation of the parliamentary Rules of Procedure leads to the unconstitutionality of a law; if they did, it would be very easy to block legislative procedures intentionally (e.g. Konrath, 2017, Art 31 B-VG § 23).

In this context, it is worth mentioning that the Federal President, who is bound to authenticate the constitutional enactment of federal laws,[20] also examines whether the provisions of the parliamentary Rules of Procedure have been duly respected. In 2020, the Federal President decided not to authenticate the constitutional enactment of the Federal Budgetary Framework Act 2021–2024 ('Bundesfinanzrahmengesetz 2021–2024'), given that a motion for amendment introduced in the plenary sitting had not been signed by five members of the National Council – as prescribed in the Rules of Procedure of the National Council[21] – but by only four members. Since there was no case-law of the Constitutional Court deciding whether the provision of the Rules of Procedure violated in that case should be considered a qualified or a non-qualified provision, it would seem to have been appropriate for the Federal President to authenticate the constitutional enactment of the law and leave that question to the Constitutional Court (e.g. Rattinger, 2021, Art 47 B-VG § 10; Rattinger & Wagner, 2021, pp. 254-259).

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20 | Article 47 para 1 of the Federal Constitutional Law (B-VG).

21 | § 53 para 3 of the Rules of Procedure of the National Council (GOG-NR).

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Belgium

A brief note on the review of parliamentary legislative proceedings by the Belgian Constitutional Court

Alberik Goris[1]

The scope of judicial review by the Belgian Constitutional Court is determined by the Belgian Constitution and the Special Act of 6 January 1989 on the Constitutional Court. That scope gradually widened from 1984, when the 'Court of Arbitration' was inaugurated, to 2007, when it was renamed the 'Constitutional Court'. The Court was at first tasked with adjudicating conflicts of jurisdiction – hence its original name – between the legislative assemblies in Belgium, at a time when the country was evolving into a federal state, with federated entities having, within their respective exclusive jurisdictions, legislative powers equal to those of the federal State.

Nowadays, the jurisdiction of the Constitutional Court is much broader: the Court still reviews only legislative acts, but against much broader standards. It verifies their conformity not only with the rules that have been set by or in pursuance of the Constitution to determine the respective powers of the federal State, the Communities and the Regions, but also with the provisions of Section II of the Constitution, which relate to rights and freedoms (Articles 8 to 32), as well as with Article 143 (1) (the principle of federal loyalty) and Articles 170 (the legality principle in tax matters), 172 (the equality principle in tax matters) and 191 (the protection of foreign nationals) of the Constitution.

Articles of the Constitution pertaining to legislative procedure fall outside the Court's jurisdiction. Neither does the Court rule on the conformity of the Rules of Procedure of the legislative assemblies with these articles or with the law in general, if only because these rules are not formally legislative acts.[2]

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1 | Deputy Secretary General of the House of Representatives (former position: Director of the Department of Legal Affairs and Parliamentary Documentation).

2 | In Belgium, federal legislative power is exercised jointly by the King, the House of Representatives and, in some cases, the Senate; on the federated level, it is exercised jointly by the Parliament and

As a rule, the Court reviews only the constitutionality of the substance of legislative acts and not of the process that led to their adoption.[3] This principle applies first and foremost to parliamentary legislative proceedings. The Court takes account of parliamentary debates, but generally refuses to review parliamentary procedure as such. The same principle applies to the fulfilment of formal requirements, often prescribed by statutory law, of the law-making process at earlier or later stages, up to and including promulgation.

The Court thus consistently refuses, for example, to examine whether the opinion of the Legislation Section of the Council of State[4] or of other advisory bodies should have been sought or stakeholders should have been consulted. Neither does it check, for example, whether normative provisions were removed from a budget bill, in accordance with the Rules of Procedure.[5] It even chose not to review a legislative provision on the constitutional rules determining the distribution of competence between the House of Representatives and the Senate.[6]

Sometimes, however, when examining the substance of legislative acts, the Court considers how the lawmakers came to their decision. To determine whether a legislative provision is reasonably justified or whether the lawmakers' assessment of the available data was not manifestly unreasonable, the Court will, especially in technical matters, probe whether sufficient use was made of the available information or expertise.

There are also some exceptions to the principle that the Court does not review the constitutionality of the law-making process.

The first exception relates to the rules that have been set by or in pursuance of

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the Government.

3 | See for further details and references Muylle (2020).

4 | E.g. Cour constitutionnelle 28 April 2016, no. 58/2016, B.13.1.

5 | Cour constitutionnelle 28 April 2016, no. 58/2016, B.13.1.

6 | Cour constitutionnelle 16 May 2013, no. 67/2013, B.14.

the Constitution to determine the respective powers of the federal State, the Communities and the Regions. Special Acts distributing competence between the federal State and the federated entities should be adopted by a majority of the votes cast in each linguistic group in each House (of the federal Parliament), on condition that a majority of the members of each group is present and provided that the total number of votes in favour that are cast in the two linguistic groups is equal to at least two thirds of the votes cast.

The Court considers this special majority requirement a necessary part of the system for determining the respective powers of the federal State, the Communities and the Regions.[7] It therefore checks whether a legislative provision concerns a matter requiring that special majority. It does not, however, verify whether the special majority was calculated correctly.

The second exception concerns the mandatory forms of cooperation between the federal State, the Communities and the Regions referred to in Article 30bis of the Special Act of 6 January 1989 on the Constitutional Court, such as mandatory consultation of the federated authorities. The Court checks whether these requirements have been met.

The Court holds that it also has jurisdiction to check whether mandatory cooperation agreements between the federal State, the Communities and the Regions have been concluded, because it deems the absence of such agreements where a Special Act requires them incompatible with the proportionality principle that is inherent to any exercise of competence.[8] On the same principle, the Court has extended this case-law to cases where no Special Act requires a cooperation agreement, but where powers of the federal State, the Communities and the Regions are intertwined to such an extent that they can only be exercised in mutual cooperation.[9]

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7 | E.g. Cour constitutionnelle 1 December 2016, no. 154/2016, B.9.

8 | E.g. Cour constitutionnelle 8 March 2012, no. 40/2012, B.5.

9 | Cour constitutionnelle 14 July 2004, no. 132/2004, B.6.2.

Finally, on the basis of the primacy of EU law, the Constitutional Court has reviewed aspects of parliamentary procedure in specific cases, when procedural requirements derived from EU and international law had to be met.

For example, after having ascertained that a legislative act is a 'technical regulation' in the sense of the European EIA-Directive,[10] the Court checks whether the draft has been duly notified to the EU Commission.[11] It also checks whether State aid has been duly notified to the EU Commission.[12]

In other decisions the Court had to examine the applicability to legislative acts of provisions of international and EU environmental law[13] prescribing a prior environmental impact assessment. That was the case, for example, with a decree of the Walloon Parliament authorising infrastructure works, which for urgent reasons of general interest went through the legislative procedure, whereas they would normally have been subject to administrative procedures.[14]

Whether this specific case-law, grounded on the primacy of EU law, will lead the Court, without any changes to the Constitution and the Special Act on the Constitutional Court, to re-examine its policy on the review of the law-making process in general, remains to be seen.

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Muylle, K. (2020). Naar een (veralgemeende) grondwettigheidstoetsing van de totstandkoming van wetgeving, In R. Leysen, K. Muylle, J. Theunis & W. Verrijdt (Eds.), Semper perseverans. Liber amicorum André Alen (pp. 493-508). Antwerpen-Gent-Cambridge. Intersentia.

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10 | Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

11 | Pursuant to Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

12 | Cour constitutionnelle 7 November 2013, no. 145/2013, B. 6.1-6.2.

13 | Treaty of Aarhus (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998) and the EIA-Directive (see footnote 10).

14 | The Constitutional Court put prejudicial questions to the EU Court of Justice. See Cour constitutionnelle 22 November 2012, no. 144/2012.

Italy

The way of access to the Constitutional Court and recent developments - A focus on the constitutionality of laws

Cristina de Cesare[1]

According to Article 134 of the Italian Constitution, the Constitutional Court shall pass judgment on controversies on the constitutional legitimacy of laws and enactments having force of law, as well as on conflicts arising from the allocation of powers of the State and from those powers themselves.

Judgment on the constitutionality of a law

The first and, historically, the most important task of the Court is to rule on controversies or disputes 'regarding the constitutional legitimacy of the laws and acts having the force of law issued by the State and the Regions' (Article 134, Italian Constitution).

The Court is called on to review whether legislative acts have been enacted in accordance with the procedures stipulated in the Constitution ('formal constitutionality'), and whether their content conforms to constitutional principles ('substantive constitutionality').

In Italy, who is authorised to apply to the Court to pass judgment on the constitutionality of a law?

First of all, Article 127 of the Constitution authorises the government to contest, before the Constitutional Court, regional laws alleged to be incompatible with the Constitution. The Regions, in turn, can contest laws of the State deemed prejudicial to their own autonomy guaranteed by the Constitution within a relatively short time after the publication of these laws (the same time is provided for the government).

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1 | Counsellor of the Italian Chamber of Deputies.

Secondly, one of the most discussed issues regarding the Italian Constitutional Court in its capacity of 'judge of the laws' has been the question of access to the Court. The Constitutional Court is not free to decide autonomously which questions to examine, but must be called on to consider cases through specific procedures.

In 1947 the Italian Constitution made a fundamental choice about the general system of the judicial review of the constitutionality of laws.

It stipulated that questions as to a law's constitutionality could be raised only by judges in the course of applying that law. Thus, any judicial authority who must resolve a dispute that requires a legal provision of questionable constitutionality to be applied has both the power and the duty to certify that question to the Constitutional Court. No Member of Parliament or parliamentary House has such a power or duty.

Judges cannot simply decide the case as if the law did not exist, that is, by ignoring it, even if they are convinced of its unconstitutionality, but neither are they required to apply that law 'mechanically': if a judge is unable to confer upon the law an interpretation that enables it to conform to the Constitution, they must instead put the question of constitutionality to the only organ with authority to resolve it – that is, the Constitutional Court.

Thus, there are as many means of access to the Court as there are judges, at all levels. To sum up, one can say that a judge is not obliged to apply a law where there is a doubt as to its constitutionality, but that only the Constitutional Court can definitively free the judge from the obligation to apply that law by declaring it unconstitutional and thus allowing the judge to decide the case without taking that law into account. This type of constitutional review is referred to as 'incidental'. In Italy ordinary judges act as 'gatekeepers' for constitutional decisions, with the power to open or close the door that allows access to the Court.

In the recent past, the constitutional reform approved by the Italian Parliament in 2016 provided the possibility to call on the Constitutional Court by a quarter of the

Members of Parliament on the electoral laws. The popular referendum on the constitutional reform (on December 2016) did not pass and the constitutional law did not enter into force, but the parliamentary debate on that issue was very intense (Session of the Italian Chamber of deputies, 16th December 2014). In this framework, some sought the possibility for any MP to have access to the Court, while others sought such access with regard to all laws, or at least for the most relevant ones.

Judgment on conflicts arising from allocation of powers of the State

The Court is also called on to arbitrate 'among the powers of the State', when those organs claim that the powers assigned to them by the Constitution have been encroached upon by another branch of government. Because the Constitution is designed to ensure that an arbitral body impartially applies the rules governing the allocation of powers, such disputes have been entrusted to the Constitutional Court.

A conflict may arise, for example, between a judicial organ and a house of Parliament, on the immunity guaranteed to Members of Parliament by the Constitution; between the Minister of Justice and the Superior Council of the Magistrature on their respective powers over magistrates; between the Government and a public prosecutor regarding the use of classified documents ('segreto di Stato'); between a Minister and a House of Parliament that has passed a vote of no confidence against the Minister; or between the sponsors of an abrogative referendum and the Office of the Supreme Court that reviews compliance with referendum procedures.

The Constitutional Court has attributed to a number of bodies the legitimacy to raise conflict: the individual branches of Parliament, the Council of Ministers and each judge and public prosecutor, the President of the Republic, the Constitutional Court itself, the Court of Auditors, the Higher Council of the Judiciary, the parliamentary Commissions of inquiry, the President of the Council of Ministers, the Minister of Justice, etc.

Political parties, on the other hand, were denied that legitimacy. That legitimacy was also denied to individual parliamentarians until 10 January 2019, when Constitutional

Court Order number 17 was adopted. The jurisdictional conflict between powers of the State in that case concerned the Senate approval process of the 2019 Budget Law.

This case was the first time the Court opened a door for applications by individual Members of Parliament. The Constitutional Court stated that individual Members of Parliament are entitled to a set of prerogatives that are constitutionally distinct from those that fall to them as members of the Assembly (i.e. the right to speak, to make proposals, and to vote), which they may exercise autonomously and independently, and which they may defend before the Constitutional Court using the tool of the jurisdictional dispute.

In that case (order no. 17/2019), a group of 37 senators objected to the usage of a procedural mechanism in the Senate whereby the government amended draft budgetary legislation in an en bloc amendment, and also associated the legislation's approval with a confidence vote, thereby preventing amendments from being tabled. The Court noted that Members of Parliament could theoretically have standing to initiate a jurisdictional dispute, although this matter turned upon the specific circumstances of each case. Standing lies only with bodies with the power 'to state the definitive position of the respective branch of state', and Members of Parliament have a right under constitutional law to state 'an intention that is in itself definitive and conclusive'. However, given the broad margin of discretion in the application of parliamentary rules, the Court's power of review must be limited to cases in which violations are already identifiable through a summary consideration of the evidence. The Court held that, on the facts, this exacting test was not met in this case, although it reserved the right to review particularly manifest violations of the rights of parliamentarians in future.

In accordance with the principle of the autonomy of Parliament, the Constitutional Court established that Members of Parliament can request the Court to verify whether 'any abuse of the legislative procedure was committed' regarding 'manifest violations of the constitutional prerogatives of the members of Parliament, which constitute prerequisites for admissibility in these circumstances'.

The Constitutional Court reaffirmed this principle in the judgment adopted on 27 February 2020 no. 60 regarding budget law for the year 2020.

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An English translation of the most important decisions of the Italian Constitutional Court is available on the Court's website.

Portugal

The Constitutional review of legislation in Portugal and the minority's rights in the Parliament

Cristina Ferreira,[1] **José Filipe Sousa**[2] **and Nélia Monte Cid**[3]

The Portuguese Parliament is unicameral and has 230 members (MPs), who are entitled to initiate both prior review and abstract subsequent review procedures on the constitutionality of bills and legislation.

The Portuguese Republic uses a semi-presidential system, structured on the principle of separation of powers and with a framework of checks and balances between the various bodies. Both the President and the Parliament are elected through general elections.

The President appoints the Prime Minister and the members of the Government, but the Government submits its programme to the Parliament for consideration. If the programme is rejected, the Government steps down. The Parliament is also charged with political supervision of the Government.

The President of the Republic can remove the Government, although this has never happened, and can dissolve the Parliament and call for new elections, an option seldom taken in the democratic history of the country. The latter is not a direct removal of the Government, but it has that effect, because the legitimacy of the Government comes from the Parliament and the legislative elections.

Given that the President of the Republic, the Government and the Parliament can request a review of the constitutionality of norms, it can be affirmed that defence

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2 | Legal Advisor at the Plenary Support Division of the Portuguese Parliament.

3 | Legal Advisor at the Committees Support Division of the Portuguese Parliament.

of the constitutional order falls within their competence as constitutional bodies. Enshrined in the procedures for constitutional review is the principle of separation of powers, along with democratic oversight by the different organs and the democratic legitimacy of each of them.

The Constitutional Court is the court 'with the specific competence to administer justice in matters of a constitutional-law nature', according to Article 221 of the Constitution of the Portuguese Republic. It was created with the first amendment of the Constitution in 1982, which set out the composition of justices, how they are appointed, and the competencies of the court.

Whereas any ordinary court can rule on the constitutionality of a norm in a specific lawsuit, it is up to the Constitutional Court to declare norms generally unconstitutional, following the procedures analysed in the present case study: prior review of legislative bills and the subsequent abstract review of norms.

Prior review

The prior review of constitutionality is carried out on legislative bills already approved but not yet enacted – Parliamentary Decrees. These are reviewed by the Constitutional Court upon application, so that the Constitutional Court rules on the constitutionality of a decree before its enactment.

This prior review may be requested by the President of the Republic before the enactment of a decree (a legislative bill passed by the Parliament but not yet enacted, published and put into force as a law), or by the Prime Minister or one fifth of all the Members of Parliament in full exercise of their office – 46 of 230 – for any decree that is sent to the President of the Republic for enactment as an organic law. Organic laws are legal acts with reinforced value (that, under the terms of the Constitution, must be respected by other laws), approved by the Parliament, that must be passed in the final overall voting by an absolute majority of all the Members of the Assembly of the Republic in full exercise of their office and that cover the following matters, which are within the Parliament's exclusive legislative competence:

- election of the President of the Republic and the Assembly of the Republic, as well as of Legislative Assemblies of the autonomous regions and local government organs,
- referenda,
- the organisation, modus operandi and procedure of the Constitutional Court,
- the organisation of national defence and organisation of the Armed Forces,
- the regulation of state of siege and state of emergency,
- Portuguese citizenship,
- political associations and parties,
- the Republic's intelligence system and state secrets,
- the finances of the autonomous regions,
- the administrative regions.Effects

If the Constitutional Court pronounces a norm contained in any decree unconstitutional, the President of the Republic must veto the legislative act and return it to the Parliament.
The decree cannot be enacted unless the Parliament expunges the norm that has been deemed unconstitutional or confirms the norm by a qualified two-thirds majority of all Members present (which must also be greater than an absolute majority of all the Members in full exercise of their office).

The President of the Republic is then able to enact it, although the Constitutional Court may later, in a different constitutionality review procedure, decide that such rules are unconstitutional.
If the legislative act is redrafted into a new text, the President of the Republic may request a prior review of the constitutionality of any of its norms.

If the Court does not pronounce the text unconstitutional, the President of the Republic must enact it, unless he or she opts to exercise the right to impose a political veto.

Subsequent abstract review
In addition to the possibility of prior review of bills, MPs have the power to initiate a

different procedure – the subsequent abstract review of legal acts.

In this procedure, one tenth of the Members of Parliament – 23 of 230 – or the President of the Parliament can request a constitutionality review of any rule in the Portuguese legal system or a legality review of rules because a reinforced-value law (such as an organic law) has been violated.

The President of the Republic, the Prime Minister, the Ombudsman and the Attorney General are also entitled to initiate this review. When the grounds for the request are a breach of the rights of the autonomous regions or of the respective statute, the Representatives of the Republic, Legislative Assemblies of the autonomous regions, presidents of such Legislative Assemblies, presidents of Regional Governments, or one tenth of the members of the respective Legislative Assembly can also initiate it.

Effects

If the Constitutional Court concludes that one or more rules are unconstitutional, its ruling possesses generally binding force. This means that the rule is eliminated from the legal system and can no longer be applied, be it by the courts, the public administration, or private individuals.

The constitutional review of a law may also include a review of the parliamentary legislative proceedings – of their conformity with the standards set by the Constitution and by the Rules of Procedure.

In addition to verifying the conformity of the content of a decree or law with the Constitution, the Constitutional Court also verifies its conformity with the procedural standards set by the Constitution.

In some cases, 'qualified' procedural rules are set; these include provisions for voting in the plenary and rules governing the participation of members in votes, such as the absolute majority or two thirds majority needed for approval, as well as the electronic casting of votes in those situations.

There is also an important constitutional provision for trade unions' participation in the drawing up of labour legislation, which, if not complied with, may lead to a rule's being deemed unconstitutional.

Constitutional review and the minority rights

As the number of MPs needed for the prior request review is 46 (one fifth) and that for successive review is 23 (one tenth), historically, only the two major parties have reached the threshold for initiating any of the procedures for constitutional review of laws in their parliamentary group by themselves. Statistics from the Constitutional Court show that most rulings come from specific requests in ordinary courts and only 1.4% come from political parties or coalitions. There are necessarily fewer requests for prior review procedures upon application by MPs, because MPs can only require review of decrees sent for enactment as organic laws.

The parties less represented therefore need coalitions or at least the support of MPs from other parliamentary groups to initiate any review process. One interesting example, although it was referred to a subsequent review procedure, is a 2016 ruling initiated by nine MPs from the major party supporting the coalition government together with 21 from the major opposition party, on perpetual monthly State subsidies for former holders of political positions.

Ex ante scrutiny of bills

When a bill is presented to the Parliament, the President of the Assembly of the Republic may reject it on grounds of unconstitutionality.

To aid in this decision, parliamentary staff prepares a technical document, a brief first diagnosis of the proposed bill. Its main goal is to inform the president about the bill's compliance with the formal and legal requirements for the presentation of bills, to analyse whether the matter affects the autonomous regions of Azores and Madeira, and to suggest the committee competent to discuss it.

The document is informative and not binding to the President, who may not concur with the technical opinion or decide against bearing in mind the possibility to correct

any constitutionality issues during the legislative process.

The decision to reject a bill on these grounds is quite exceptional, and the matters of constitutionality are seldom brought up, because applies only to serious infringements of the Constitution (as would be the case, for instance, of a bill aimed at reinstating the death penalty). Also, this analysis by the President is not deemed to be a definitive and thorough assessment of the bill's compliance with the Constitution and it may not result in a non-admission if the unconstitutional norms can be expunged during the legislative process (Opinion of the Constitutional Affairs Committee regarding Bill 16/IX presented by the Government). Recently, this controversial matter has been raised more frequently, regarding, for example, bills proposing chemical castration of sexual aggressors or the loss of Portuguese citizenship for people convicted of certain crimes (Opinion of the Constitutional Affairs Committee regarding Bills 711/XIV and 697/XIV). In all these situations, the President asked for the Constitutional Affairs Committee's reasoned opinion on the constitutionality of the bills.

In any case, the Parliament's Rules of Procedure dictate that unconstitutional bills should not be admitted. So, the President of the Parliament, who is responsible for admitting or rejecting bills, must verify that the constitutional requirements are fulfilled before admitting any bill. It This decision is a moment of 'democratic tension', and there may be different opinions, not only internally, among different political groups, but also according to relevant constitutional literature (Gomes Canotilho & Moreira, 2010, p. 298), about the powers of the President on this matter.

Nevertheless, the competence to scrutinise compliance with the Constitution should be considered not an exclusive power of the Constitutional Court, but a shared function of all sovereign organs, which must take place at a preliminary stage in the admission of bills.

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Greece

The Greek constitutionality review system

Dina Gavatha[1]

Introduction – a brief presentation of the Greek constitutionality review system

Greece does not have a constitutional court but instead has a decentralised system of constitutional review. Judicial constitutional checks in Greece are made a posteriori and are diffused and incidental (ad hoc). There are main and centralised judicial constitutionality checks in Greece only when the Special Highest Court is convened, in the rare case in which two of the three highest courts of the country (Council of State, Supreme Court, Court of Auditors) issue opposite decisions on the constitutionality of a law. In such an instance, the Special Highest Court makes a final decision on the constitutionality of the law, not in the context of the disputes themselves (i.e. it does not rule on cases pending before the courts), but as the main object of the trial. If the Special Highest Court considers the law unconstitutional, that decision has the consequence of rendering the law unenforceable.

Parliamentary review of legislation takes place only under the legislative power, without the involvement from the judicial. The courts do not have the power to verify that the provisions of the Constitution are observed in the process of passing the law (quorum of deputies, majorities, etc.). The courts consider this process with all the procedural stages involved interna corporis (internal affairs) of the Parliament, which are checked only by it and by the President of the Republic while exercising the presidential power to promulgate the laws voted by the Parliament. Constitutionality checks are incorporated into the parliamentary legislative procedure. The Scientific Service of the Hellenic Parliament prepares a legislative elaboration report of each bill, which covers issues of constitutionality. The members of the Parliament also have the right to raise constitutionality objections, which are further discussed in the Plenum.

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Main characteristics of judicial constitutional review in the absence of a constitutional court

Diffused and Incidental Constitutional Review

There is no constitutional court in the Greek legal system. Instead, there is a system of diffused judicial constitutional review.

The duty of the courts not to apply unconstitutional laws was enshrined for the first time in the 1927 Constitution, but a relevant custom of constitutionality review existed decades before the formal adoption of that constitutional rule. The first court decision resulting in non-application of law as unconstitutional goes back to 1897.

Under the Hellenic Constitution of 1975, which, after a series of revisions, is still currently in force, our system of a judicial diffused and ad hoc constitutionality review is enshrined in Articles 93(4) and 87(2), according to which every court should verify the constitutionality of laws and safeguard the application of the Constitution. Article 93(4) of the Constitution states that 'the courts shall be bound not to apply a statute whose content is contrary to the Constitution'. Article 87(2) provides that 'in the discharge of their duties, judges shall be subject only to the Constitution and the laws; in no case whatsoever shall they be obliged to comply with provisions enacted in violation of the Constitution'. Thus, every judge has the right and the duty to refuse to apply a law that they reasonably find to be contrary to the Constitution. Subsequently, all courts, even courts of First Instance, may engage in the constitutional review of statutes, but only for a specific case brought before them (i.e. the review is ad hoc), and the court's decision is binding only in reference to that specific case. As a result, any future court reviewing the same statute may take a different stance on its constitutionality. Courts do not nullify the statutes they consider to be unconstitutional; they just do not apply them. Even the Supreme Administrative Court of Greece (Council of State) – which has the power to annul Ministerial Decisions (which are considered acts of the executive power) that implement provisions of laws deemed contrary to the Constitution – still does not have the power to annul the law itself.

This type of constitutional review in Greece is often described as 'diffused and incidental'. It is 'diffused' because the competence is not restricted to one court and 'incidental' because the judgment of constitutionality of a law or legal provision is made ad hoc, on a case-by-case basis. Furthermore, it is a type of review that may only be exercised a posteriori, as there is no possibility for a court to check the constitutionality of a law before this law enters into force. The only exception is for the Court of Audit's ex ante review of pension bills; pursuant to Article 73(2) of the Constitution 'bills pertaining in any way to the granting of a pension and the prerequisites thereof shall be introduced only by the Minister of Finance after an opinion of the Court of Audit'.

The only objects of constitutionality checks by the Greek courts are the content of the law and its conformity to the Constitution. In practice, this means that in most cases the issues raised have to do with the violation of fundamental rights. The 'external' typical features of the laws examined by the Greek courts are limited to the main procedures that are required for the law to be put into force, i.e. the enactment of law by the Parliament, its promulgation by the President of the Greek Republic and its publication in the Government Gazette. Reviewing the 'formal' constitutionality of laws, in the sense of compliance with the parliamentary procedural aspects of law-making, such as the observance of the rules of majority voting or quorums, falls outside the competence of the judicial power. These parliamentary procedures are considered part of the interna corporis of the Parliament and judicial review of them would violate the principle of separation of powers, provided for in Article 26 of the Hellenic Constitution.

It is worth noting that even though matters of constitutionality may arise in every field of law, most cases appear in the field of administrative law, where individuals may complain about the way the State has regulated an issue contrary to their interpretation of the Constitution. Also, from a practical point of view, issues of constitutionality review dealt with by courts of First and Second Instance, are usually forwarded, after a considerable period of time, to one of the highest courts (Council of State, Supreme Court, Court of Auditors).

The Special Highest Court of Greece

Some of the more particular competences typical of constitutional courts in other European legal systems are, in our country, awarded to the Special Highest Court. Article 100 of the Hellenic Constitution provides that this Court shall be composed of the President of the Supreme Administrative Court, the President of the Supreme Civil and Criminal Court, the President of the Court of Audit, four Councillors of the Supreme Administrative Court and four members of the Supreme Civil and Criminal Court, the latter eight members chosen by lot for a two-year term. The Court shall be presided over by the President of the Supreme Administrative Court or the President of the Supreme Civil and Criminal Court, according to seniority. In certain types of cases, the composition of the Court shall be expanded to include two law professors from the law schools of the country's universities, chosen by lot.

The jurisdiction of the Special Highest Court shall comprise ruling on objections in parliamentary elections, verifying the validity and returns of a referendum, pronouncing judgment in cases involving the incompatibility or the forfeiture of office by a Member of Parliament, settling any conflict between the courts and the administrative authorities, or between the Supreme Administrative Court and the ordinary administrative courts on one side and the civil and criminal courts on the other, or between the Court of Audit and any other court, settling controversies related to the designation of rules of international law as generally acknowledged, etc.

One of its competences, of particular interest here, is that it settles controversies over the compliance of the content of a statute enacted by Parliament with the Constitution, or over the interpretation of provisions of such a statute, when conflicting judgments have been pronounced by the Supreme Administrative Court, the Supreme Civil and Criminal Court or the Court of Audit. After the irrevocable decision of the Special Highest Court has been made, the provisions of a statute declared unconstitutional shall become unenforceable, but still, the Court has no power to annul the statute itself. The judgments of this Court are irrevocable. Provisions of a statute declared unconstitutional shall be unenforceable as of the date of publication of the respective judgment, or as of the date specified by the ruling.

The same article of the Constitution, following a revision in 2008, provides that when a section of the Supreme Administrative Court or a chamber of the Supreme Civil and Criminal Court or of the Court of Audit judges a provision of a statute to be contrary to the Constitution, it is bound to refer the question to the respective Plenum, unless the question has been judged by a previous decision of the Plenum or of the Special Highest Court. The Plenum shall be assembled into judicial formation and shall decide definitively, as specified by law.

Thus, the Special Highest Court is the only judicial body in Greece whose finding that a law provision is unconstitutional has the practical effect of removing the relevant provision from the legal order, by rendering it unenforceable. According to the legal theory, this is why the relevant decisions of the Special Highest Court are published in the Greek Official Journal, despite the fact that the latter is intended to publish only laws, not court decisions.

Parliaments and Constitutional Review of Legislation

Regulatory Impact Assessment of bills submitted to the Parliament.

Legislative drafts submitted to the Hellenic Parliament must contain information on their constitutionality. According to the recent amendment of the Parliament's Standing Orders (Rules of Procedure), Article 85, bills must be accompanied by an analysis of the consequences of the provisions (regulatory impact assessment) which includes the following:

- an explanatory report on objectives and reasons,
- a general impact report on effects of the regulation,
- a public consultation report on the procedure and results of the public consultation,
- a legality report, focusing on the constitutionality of the provisions and their compatibility with European and international law,
- a report on the implementation of the regulation, identifying the administrative bodies responsible and presenting the timetable.

The legality report is prepared by the Committee for the Quality Assessment of the Legislative Drafting Process, which functions as an independent, interdisciplinary, advisory body. The Committee evaluates the application and observance of the principles of good legislation in matters referred by the Secretary General for Legal and Parliamentary Affairs: draft laws, ministerial amendments, legislative acts, decrees (before sending them to the Council of State), Ministerial Decisions and regulatory impact assessments. It provides an opinion to the Secretary General of Legal and Parliamentary Affairs of the Government on its findings. In particular, in the context of this evaluation, the Committee: (a) examines the constitutionality of the proposed regulations and their compatibility with European Union law and international law, in particular with the rules of the European Convention on Human Rights; (b) checks the completeness of the regulatory texts being drafted, in particular for repealed or amended provisions, while examining their accompanying documents; (c) examines issues of overlap and conflict between the provisions of the regulatory texts under development and provisions of applicable law; (d) evaluates the quality of regulatory impact assessments, including their quantitative aspects

The constitutionality review of the Scientific Service of the Hellenic Parliament and the Constitutionality Objections

Pursuant to Article 65 of the Constitution, a Scientific Service to the Parliament may be established under the Standing Orders to assist Parliament in its legislative work. The Scientific Service of the Hellenic Parliament, pursuant to Article 160 of its Standing Orders, enjoys full independence in the discharge of its duties, following scientific principles and methods exclusively (thus avoiding any other considerations that could affect the independent objective opinion of its members).

Pursuant to Article 74 of the Hellenic Constitution, any bill or law proposal may be referred for legislative elaboration to the Scientific Service of the Hellenic Parliament before it is submitted to the Plenum or to a section of Parliament. Furthermore, pursuant to Article 92 of the Hellenic Parliament's Standing Orders, bills and law proposals may be referred to the Scientific Service for legal elaboration, by the President of the Parliament and/or upon proposal of the competent committee. The Scientific

Service prepares a report with its observations, including constitutionality issues. The report must be published before the bill is debated in the Plenum.

Additionally, pursuant to Article 100 of the Hellenic Parliament's Standing Orders, at the debate in principle stage, the Speaker of Parliament or any MP or member of Government may request that the Parliament resolves specific objections raised about the constitutionality of a bill or law proposal. The participants in the debate are one person among those that posed the objections, one person among those that oppose the proposal, the Presidents of Parliamentary Groups and competent Ministers, each for 5 minutes. The relevant resolution is adopted by the members either standing or raising a hand. Constitutionality objections are not unusual in the Hellenic Parliament, and in many cases the argumentation presented in the relevant debate derives from the legal elaboration report of the Scientific Service.

The scope of scrutiny by the Scientific Service in elaborating bills is to examine the function of a provision within the framework of the Constitutional provisions, their interaction, their application and the relevant theory and jurisprudence on currently accepted meaning; to indicate the potential for the persons affected by the provisions of the bill to resort to justice in the future, and the possibility of a provision to be deemed by the courts to be contrary to the Constitution, thus contributing to insecurity about the law and consequently affecting the rule of law. The elaboration by the Scientific Service is not limited to constitutionality issues but covers all aspects of legislative elaboration.

The legal and constitutionality scrutiny performed by the Scientific Service is a routine procedure for all bills (except those ratifying international treaties) but not a routine procedure for law proposals (initiated by opposition parties), since those seldom make it to a discussion in the Plenum. The Scientific Service's report is taken into consideration; Ministers often follow its suggestions and amend draft provisions. When a constitutionality issue is raised in the report, the opposition usually includes it in the Plenum debate, and the competent Minister usually replies. This may or may not lead to a constitutionality objection and vote, since the parliamentary minority's right to a

constitutionality objection may – in some cases – function as political tool more than a legal one, so it is sometimes exercised even without a relevant indication of possible unconstitutionality in the report of the Scientific Service.

Constitutionality objections are discussed whenever they are raised pursuant to Article 100 of the Standing Orders. It is not uncommon for parliamentary groups and their associated political parties to announce in advance their intention to raise constitutionality objections, often sparking an in-depth public debate in which legal theorists, professors and scientific and research bodies participate. This is usually the case when there are substantial concerns about the constitutionality of a certain provision of a bill.

The Scientific Service's legislative elaboration reports for every bill are published on the Parliament's official website. Each bill has its own page, which includes the following:

- the text (and the accompanying reports) as submitted,
- the sittings of the committee(s) at which the bill was discussed (dates, rapporteurs, audio-video recording, minutes) and the committee report(s),
- the text of the bill after the discussion in the committee(s),
- the report of the Scientific Service,
- the text of any additions and amendments proposed,
- the debate in the Plenum (dates, audio-video recording, minutes),
- the text of the bill as finally voted/adopted.

Discussions and votes on constitutionality objections are published as part of the official Minutes of the Plenum.

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Invitation of external experts

Pursuant to Article 38 of the Hellenic Parliament Standing Orders, when preparing important bills or law proposals, standing committees may request hearings with

public functionaries, public servants, representatives of local government agencies, unions or other social agencies, experts who can enlighten the committees on specific and technical matters, or any other person deemed useful for their work. When these invited interested parties have questions based on the constitutionality of some provisions, they raise them even if they are not accompanied by a legal expert (e.g. organizations like the World Wide Fund for Nature, WWF, presents its arguments on constitutionality either by its representatives or by its legal experts). But it is not common practice for individual experts on constitutional law to be called to give their professional opinion on the constitutionality of legislative drafts ad hoc. In any case, constitutionality issues are indeed included in the specific matters discussed in such hearings, so when a bill raises constitutionality concerns, discussion of them usually starts at the early stages of parliamentary elaboration at the level of standing committees.

The standing committee can decide to request a hearing of non-parliamentarians on its first sitting and following a motion by the competent Minister or by one tenth of the total number of the committee members or of the members of the parliamentary group. The relevant motion must mention the names and the capacities of the persons whose hearing is requested as well as the subject on which each is called to enlighten the committee. The minority of the committee should propose one third of the invited non-parliamentarians. The decision by which the standing committee accepts the motion for the hearing of non-parliamentarians must determine the persons to be called and the object of the hearing. The hearing of non-parliamentarians takes place at least 24 hours after the commencement of the first sitting of the committee.

Review of legislation and parliamentary legislative procedure by other institutions

No court can intervene in the legislative procedure of the Parliament, and the members of the Parliament do not have the right to initiate a court's review of legislation. Even the ex post review of the 'formal' constitutionality of laws, in the sense of compliance with the parliamentary procedural aspects of law-making, such as the observance of the rules of majority voting or quorums, falls outside the competence of the judicial power. These procedures are considered part of the interna corporis of

the Parliament, and their judicial review would violate the principle of separation of powers, provided for in Article 26 of the Hellenic Constitution.

Only Presidential decrees – which are not parliamentary acts, but acts issued by virtue of special delegation granted by a law and within the limits of such delegation – undergo elaboration by the Supreme Administrative Court (Council of State) to check their legality before they are issued.

Only the President of the Hellenic Republic intervenes in the process of a voted law entering into force. In the original version of the Hellenic Constitution of 1975, the President of the Republic had the competence to ratify the bills voted in the Parliament before they were published in the Government Gazette and were put into force. Theoretically, this competence to ratify allowed the President of the Republic to exercise substantial scrutiny of the content of the voted bill. When the Constitution was first revised in 1986, this was one of the competences of the President of the Republic that was repealed; it was replaced by a mere duty to promulgate and publish the bills passed by the Parliament within one month from the time of the vote. According to the prevailing view, in theory such promulgation allows only for a review of 'external constitutionality' and thus makes the Parliament a legislative body in its own and exclusive right. This review of 'external constitutionality' is a check of whether the constitutional rules on the applicable parliamentary proceedings were observed (i.e. voting majorities for each type of law). The President of the Republic may, within this time limit for promulgation, send back a bill passed by the Parliament, stating the reasons for this return. A bill sent back to the Parliament by the President of the Republic shall be submitted to the Plenum and, if it is passed again by an absolute majority of the total number of members, the President of the Republic is bound to promulgate and publish it within 10 days of the second vote. In practice, this right to send back a bill has never been exercised by the President of the Republic.

Concluding note

Greece has a long tradition of constitutionality review and of the courts examining the constitutionality of the provisions of the law. The system of diffused and inci-

dental constitutional control by all courts in Greece, along with the absence of a constitutional court, which could annul legislation that is not in compliance with the Constitution, has affected the way constitutionality scrutiny takes place within the Parliament. Consistent with our system of separation of powers, the judicial power does not intervene in the Parliament's law-making process, and only the President of the Republic may exercise an 'external constitutionality' review in the discharge of the presidential duty to promulgate voted legislation. Some of our scholars consider the absence of a constitutional court a deficit, especially for the procedural aspects of law-making, which are not checked by the judiciary as to their conformity with the Constitution. Some others consider that the diffused and incidental constitutionality review after a law is put into force enhances democracy by not allowing this power to be concentrated in one body and by diminishing the possibility of political control over the review. The discussion in legal theory is ongoing, although no political initiative has been taken in recent years to bring amendments to our national system of constitutionality review.

IV Parliamentary and Political Conflicts before the Court

1. Overview

Sophia Witz

Parliamentary intra- and inter-organ conflicts are political in nature; the option of seeking a court decision on these issues is therefore highly uncommon. Given their controversial nature, however, it is particularly interesting to examine how courts are involved in the various countries.

1.1 Introduction

The following chapter is concerned with the role of constitutional or supreme courts as arbitrators in conflicts between parliamentary organs, between parliament and other branches of government, and between parliaments and individuals. It addresses the question of whether a court's decision may be sought when there is a disagreement on legal issues within Parliament (intra-organ dispute) and/or between Parliament and other state organs (inter-organ dispute).

What this chapter discusses is not competence conflicts between the federation and the individual states in federally organised countries or conflicts over elections, but situations where the parliament (or parts thereof) is a party to the proceedings. These conflicts are not necessarily constitutional conflicts, since not every parliamentary intra- or inter-organ dispute raises strictly constitutional questions. In Germany for example, the Constitutional Court decides these issues not in relation to a specific case, but in a general judgment for cases of this kind.[1] In other countries (such as Austria) specific individual parliamentary intra- and inter-organ con-

1 | For a more in-depth analysis see the German Case Study on p. 210 et seq.

flicts are directly decided by the constitutional or supreme court.

Parliamentary intra- and inter-organ conflicts before the constitutional or supreme court must also be distinguished from the usual constitutional review of laws. Parliamentary legislative proceedings may be part of the overall constitutional review of a law (see chapter III.1.4 Review of the Parliamentary Legislative Proceedings, p. 148). However, such a review can only address the law's conformity with the standards set by the constitution and by the rules of procedure. Parliamentary intra- and inter-organ disputes, on the other hand, may be broader in scope and variety since they are not linked to the review of a law.

Since parliamentary intra- and inter-organ conflicts are of a particularly political nature, the option to involve a constitutional or supreme court to decide these issues speaks volumes about the relationship between the respective parliament and court. With rulings on this subject matter the courts contribute to the further development of parliamentary proceedings and the relation between state organs.

The option to seek a constitutional or supreme court decision for conflicts that involve the parliament is also often designed as a minority right. As such, it aids the political opposition in pursuing their democratic duty of scrutiny, since the government is usually sustained by the parliamentary majority. It can, for example, support political minorities that are overruled in committees of inquiry. For instance, the questions of whether evidence is admissible and whether it must be obtained can be controversial. Therefore, it is crucial that the opposition has the opportunity to challenge the legal validity of such a resolution before an impartial court.

In many countries constitutional or supreme courts are not authorised to decide parliamentary intra- and inter-organ conflicts, because such involvement can be seen as a form of interference in internal parliamentary affairs. It is also argued that parliament's clear democratic legitimation is the main reason why intra-organ conflicts should not be decided by an outside force. Another concern is an unintentional juridification of the political process and overly powerful constitutional or supreme courts.

However, involving a neutral body, such as a constitutional or supreme court, to decide internal and external parliamentary conflicts can be beneficial from the standpoints of rule of law and minority rights. Even the possibility to initiate court proceedings can have a positive impact on the manner in which politics are handled. Courts that are entitled to be an arbitrator for these kinds of issues have to tread quite carefully and be aware of the trust placed in them. In any case, experience in countries where constitutional or supreme courts are competent to decide parliamentary intra- and inter-organ conflicts shows that rather such few proceedings are initiated.

1.2 Option for a Court Decision

Involving a court in parliamentary intra- and inter-organ conflicts is rarely part of constitutionalism and the tasks of a constitutional or supreme court as they have historically been understood. Therefore such a procedure is **not possible** at all in most of the examined countries (e.g. Belgium, Finland, Latvia, Norway, Sweden, Switzerland).

In other countries it is possible to seek a court's decision when there is disagreement on legal issues within parliament and/or between parliament and other state organs, but this is a newer development in most of them. There is **a lot of variation** in the subject matters that may be brought before the court, as well as in how frequently such a procedure occurs.

Some countries do not **impose limitations** as to whether a conflict between parliamentary organs, between parliament and other branches of government, or between parliaments and individuals can be brought before the constitutional or supreme court. The constitutional law in Germany for example stipulates in Article 93 para. 1 no. 1 of the German Constitution, that an 'Organstreitverfahren' is possible. Additionally, intra- and inter-organ conflicts about the legislative procedure can be an important element of an abstract review of legislation.

In Israel, legal conflicts within Parliament or between Parliament and other state organs can be challenged before the Supreme Court, because any action or decisi-

on taken by Parliament or a government body can be brought before the Supreme Court, in accordance with the regular rules of standing. However, the Parliament is granted a high degree of deference by the Court, and it is rare that the Court intervenes.[2]

With respect to parliamentary intra- and inter-organ conflicts some countries allow for **only certain subject matters** to be decided by their constitutional or supreme court. In Ireland, it is possible to seek a court's decision on any disagreement on legal issues that come within the jurisdiction of the courts; there is no special procedure regarding this. However, not all disputes over legal issues within Parliament do fall within the jurisdiction of the courts. Examples of disputes that are excluded are the speeches made by House Members in the Houses; the Chair of a House disallowing a parliamentary question; and Standing Orders that the Houses make for themselves.[3] However, if a procedure affecting a Member's parliamentary activities is established by ordinary law, an issue arising from application of the procedure is justiciable.

In Austria it is possible to seek the constitutional court's decision on certain matters regarding parliamentary investigating committees in the event of conflicts within parliament (intra-organ conflicts) and conflicts between parliament and other state organs (inter-organ conflicts). These matters include, for example, the question whether the establishment of a committee of inquiry is admissible or whether other state organs are obligated to provide information to the committee.[4]

There have recently been **examples** of **and discussions** on parliamentary intra- and inter-organ conflicts before the constitutional or supreme courts in Slovenia and the UK. Slovenia has no provisions for the initiation of a dispute before the Constitutional Court in the event of legal issues within parliament. Nevertheless,

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2 | For further details see the Israeli Case Study on p. 221 et seq.

3 | See the Irish Case Study, p. 228 et seq.

4 | For further details see the Austrian Case Study on p. 245 et seq.

there is for example an ongoing debate about whether the Parliamentary Inquiry Act is constitutional, because a third of the deputies may request the initiation of a parliamentary inquiry, but if the President of the National Assembly does not order such an inquiry, it is unclear whether a third of the deputies could initiate a dispute before the Constitutional Court (the Parliamentary Inquiry Act does not provide for such a possibility).

In the UK, proceedings in parliament cannot be questioned in any court and Parliament does not normally participate directly in proceedings. However, there are recent examples where individuals challenged decisions of the executive, with implications for Parliament's constitutional powers. Private citizens (some of them parliamentarians) challenged the validity of the Government's exercise of the prerogative power to prorogue Parliament in September 2019.

1.3 Initiation of the Procedure

Because of the nature of parliamentary intra- and inter-organ conflicts, for the most part those disputes can only be brought before the court by the parties immediately involved, and not by third parties. The right to bring such issues before the court may be held by persons with standing, by a certain percentage of members of the National Council (or an Investigating Committee), or by political parties or organs of the state.

In many cases **only the parties immediately involved** can bring such an issue before court. For instance in Ireland, third parties would not have locus standi (the obligation on a litigant to show they have an interest in the subject matter of the dispute in legal proceedings). In Israel, anyone who can demonstrate 'sufficient interest' has standing and may therefore bring an action if they think that a public body has acted unlawfully.

Other countries' systems also allow for **other bodies or organs** to bring parliamentary intra- and inter-organ conflicts before court. In Germany, the highest organs of the federation (e.g. National Assemblies, President of the Republic, Government) as well as other participants vested with rights through the constitution or rules

of procedures (political parties, individual MPs with regard to their own rights) can bring these issues before court.

In Austria the right to initiate proceedings **varies depending on the subject matter**. A quarter of the Members of the National Council, the majority or a quarter of the members of the Investigating Committee and any other state organ that is required to submit information can bring an issue regarding conflicts relating to investigating committees before the court. Conflicts about the classification of information can be brought before the Court only by the originator of the information.

1.4 Special Requirements

Since parliamentary intra- and inter-organ conflicts are often of a highly political nature, it may be that special requirements have to be met before the dispute can be brought before a constitutional or supreme court. A prime example of this is the requirement to attempt to resolve the conflict politically before an application to the court is admissible.

Such a stipulation, however, is **uncommon** among the countries. In Israel no special requirements have to be met. In Ireland there are no special requirements to be met, but the courts expect parties to have taken basic steps to resolve the conflict prior to launching legal action (just as in all legal disputes that go before the courts).

Whether special requirements have to be met can also **depend on the subject matter** at hand. This is the case in Austria, where the Rules of Procedure pertaining to conflicts about the submission of information to an investigating committee require that a political resolution of the conflict must be attempted. In all other cases the parties can apply to the Constitutional Court immediately.

In Germany, an attempt at a political conflict resolution regarding the 'Organstreitverfahren' is generally not necessary. However, the Constitutional Court ruled in 2017 that the existence of **a conflict has to be discernible** to the respondent. The case concerned a supposedly inaccurately answered parliamentary

inquiry. The federal government in this instance was not able to examine the situation and revise its answer if necessary, since the claimant did not point out that the government's answer was (allegedly) incorrect. The judgment therefore clarifies that the claimant is obligated to confront the other party before the court proceeding can be initiated.

Stipulating requirements such as an attempt at a political solution means that if that attempt is successful, the constitutional or supreme court does not have to be involved, which can be beneficial for the overall political climate and the workload of the court. However, such requirements can also prolong the conflict. If a party is inclined to involve the court, it may be that a political solution is no longer possible; then the requirement to seek a political agreement delays the clarification by the constitutional or supreme court.

1.5 Preparation of the Application

In the case of parliamentary intra- and inter-organ conflicts, as in other cases, the parties to the conflict are responsible for preparing the application to the court. The parliamentary administration, their legal office or designated attorneys can support them in drafting the application.

In Austria, the **parliamentary administration** offers their support if so ordered by the President. Statements by the President are usually prepared by the parliamentary administration as well.

In Ireland, the legal representatives chosen by the claimant for the case prepare the application. Parliament has its own **statutory legal office**, the Office of Parliamentary Legal Advisers, which will **instruct lawyers** on behalf of a relevant House or Committee. The Government is represented by the Attorney General.

In Germany the involved parties can and often do **designate attorneys of record**. If the National Assembly is involved as defendant, its statements are coordinated with the fractions in the judiciary committee.

1.6 Effect of Judgments

The effects a decision by the constitutional court can bring forth were discussed in the first chapter regarding the constitutional review of legislation. However, this section will analyse the effects of judgments specifically with respect to parliamentary intra- and inter-organ conflicts before the constitutional court and will answer the question of whether the court's decisions take effect immediately or have no immediate legal effect. In some countries, the effect of a judgment depends on the type of dispute, whereas in others the decision either always takes effect immediately or does not have an immediate legal effect. Another alternative is that the constitutional court itself decides the effect of the judgment.

In Austria, the effect of a judgment **depends on the type of dispute**. In cases regarding conflicts about the establishment of investigating committees, the scope of the subject of investigation, the summoning of persons to be heard or the taking of evidence, the Constitutional Court's decision takes legal effect immediately and becomes the basis for further action by the National Council. In disputes relating to obligations to submit information to an investigating committee, the decisions have no immediate legal effect. The Constitutional Court only declares whether or not there is such an obligation.

One country where a decision by the court on parliamentary and political conflicts **takes effect immediately** is Ireland. This is true unless the decision is appealed and a stay is put in place pending appeal. Very rarely, a court may issue reasons for its decision but postpone the delivery of the formal order, to allow the relevant organ of State to remedy the illegality.

Some countries stipulate for their **courts to decide the effect** of a judgment with respect to parliamentary intra- and inter-organ conflicts. In Israel for example, the court can decide the effect of the judgment.

An alternative model is followed by Germany, where a court decision regarding parliamentary and political conflicts does not have an immediate legal effect. The

Constitutional Court in Germany asserts in its decision whether the action or omission is in breach of the constitution, but there is **no immediate legal effect**. Since every state organ is bound by the constitution, it is expected that the court decision will be heard and consequences will be drawn even without an immediate legal effect.

The decisions as to whether a judgment takes effect immediately or not and whether this depends on the type of dispute or on the court itself pose certain advantages and disadvantages. Having decisions take effect immediately can be seen as favourable for time-sensitive issues, such as matters relating to investigating committees. On the other hand, judgments that have no immediate legal effect can shape the legal situation more fundamentally and avoid politicisation. If the court can decide the effect of a judgment itself, it can react in a flexible way and tailor the effect to the issue raised. Then again, such an approach entails uncertainties, while stipulating certain legal effects depending on the type of dispute avoids uncertainty.

1.7 Time Frame

Since parliamentary and political conflicts may be urgent in nature, a specified deadline within which the constitutional court has to decide the matter can be advantageous. However, if the term within which the court must decide is short, courts often have to decide amidst heated political debates, with political parties trying to influence the decision-making process. A prolonged decision deadline can be beneficial for circumventing not only time pressure but also political pressure and may defuse an ongoing intense public discussion.

In most of the countries, there are **no deadlines** within which the Court has to decide parliamentary intra- and inter-organ conflicts. Neither Israel nor Germany sets any deadlines in these cases. In Ireland, there are generally no deadlines specific to constitutional cases.

In Austria, the Constitutional Court generally has **four weeks** to decide in such cases. For subject matters that entail immediate legal effects, this confers the

advantage of a clarified legal position to proceed with, for example when summoning persons to be heard in an investigating committee.

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Germany

Parliament vs. Government and Parliament vs. Parliament: A German Perspective on Constitutional Court proceedings

Christina Ziegenhorn[1]

In Germany, conflicts between and within supreme federal bodies (or 'organs') such as the German Bundestag (the lower house of the German Parliament) are litigated before the Federal Constitutional Court ('Bundesverfassungsgericht'). Since the Court was founded in 1951, its decisions in these 'Organstreit' proceedings have shaped the legal framework of political decision-making and have been crucial to the system of checks and balances in Germany.

The legal remedy of 'Organstreit' proceedings

Under Article 93(1)(1) of the German constitution,[2] the Federal Constitutional Court 'shall rule on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body'. These are adversarial proceedings: one body or part of a body is the applicant, and the other body is the respondent.[3]

In many other countries, such conflicts are usually settled politically. However – after a few tentative attempts in German history – the deliberate choice in the Basic Law was to judicialise disputes between supreme federal bodies, partly for reasons of the rule of law and the protection of parliamentary minorities (Pietzcker,

1 | Head of the Secretariat of the Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure of the German Bundestag.

2 | Basic Law for the Federal Republic of Germany, available in English.

3 | See Sections 63–67 of the Act on the Federal Constitutional Court for the legal basis of 'Organstreit' proceedings before the Federal Constitutional Court, available in English.

2001, pp. 588–589). This innovation was in line with constitutional developments in several countries during the 20th century, but most were quite limited compared to the German system (Loewenstein, 1957, pp. 239–240). Nowadays, 'Organstreit' proceedings are regarded as an essential part of modern constitutional jurisdiction in Germany (Umbach, 2005, p. 808).

Nevertheless, 'Organstreit' proceedings account for only a small proportion of the proceedings before the Federal Constitutional Court. From the Court's foundation in 1951 to the year 2020, a total of 368 applications in 'Organstreit' proceedings were filed with the Federal Constitutional Court, an average of 5.3 applications per year (Federal Constitutional Court, 2021, p. 57). During the same period, a total of 249 023 proceedings were brought before the Court, more than 95 per cent of which were constitutional complaints by citizens claiming their constitutional rights had been infringed (Federal Constitutional Court, 2021, pp. 56–57).

Whether this suggests that the relationship between and within the supreme federal bodies is particularly cordial is a matter for debate. But it is certain that the Federal Constitutional Court has, through decisions in 'Organstreit' proceedings, quite crucially influenced both the relationship between the bodies and specific procedures within the bodies. In this way it has helped shape the nature of parliamentary democracy in Germany. Decisions of the Federal Constitutional Court promoted and further developed for example the law of the financing of political parties,[4] the law of committees of inquiry[5] and the Bundestag's right to information.

Excursus: The relationship between the Bundestag and the Federal Constitutional Court

In Germany, the Federal Constitutional Court is one of five permanent supreme federal bodies. As such, it is integrated into a system of mutual influence and interaction. This starts with the way the justices of the Federal Constitutional Court are

4 | Section 18 of the Political Parties Act, available in German. An outdated but structurally comparable version can be found in English.

5 | Committee of Inquiry Act, only available in German.

appointed: half of the Court's justices are elected by the Bundestag and half by the Federal Council ('Bundesrat'), which represents the 16 federated states of Germany at the federal level. Justices of the Federal Constitutional Court are elected for 12-year terms and may not be re-elected.

Even though some people consider this election procedure to be at risk of personal influence and political bias, that has never been a problem in practice (Zypries, 2010, pp. 96–97). On the contrary: from the perspective of 'guardians of the constitution', some justices make decisions quite different from what could be expected from political statements they had made before their appointment. The limitation of the term of office and a self-imposed Code of Conduct of the Federal Constitutional Court help to ensure their political independence (Seibert-Fohr, 2020, pp. 56–57).

Example of an inter-organ dispute: deployment of the German army abroad

Disputes between the Bundestag and the federal government are a typical example of inter-organ disputes between two supreme federal bodies and make up by far the largest group of 'Organstreit' cases.

The following case[6] is a representative example of such proceedings:

In the late 20th century, the German federal armed forces, the Bundeswehr, were deployed abroad more and more frequently. The Parliament was always informed of these deployments by the Ministry of Defence, which was the competent body. But decisions as to whether and on what scale soldiers were engaged in deployments abroad remained solely within the federal government's purview.

Given recent political developments, an opposition parliamentary group thought it wrong for the government to have these extensive rights. In that group's opinion, the decision on foreign deployment was so fundamental that it should require the con-

6 | Federal Constitutional Court, judgment of 12 July 1994, 2 BvE 3/92, 2 BvE 5/93, 2 BvE 7/93, 2 BvE 8/93. English translation: International Law Reports, 106, pp. 319–352, https://doi.org/10.1017/CBO9781316152355.020. Official press release in English.

sent of the German Bundestag. The parliamentary group thus applied to the Federal Constitutional Court in 'Organstreit' proceedings.

In this case, the legal question was how to demarcate the responsibilities of the constitutional bodies. To what extent may the federal government decide on military deployments and at what point does a decision of the German Bundestag as elected representatives of the people become necessary?

This is a typical dispute between parliament and government, two supreme federal bodies. Since the Parliament's majority usually underpins the government's policy in the German parliamentary system of government, disputes between the parliamentary majority and the government are rarely decided in court. 'Organstreit' proceedings before the Federal Constitutional Court are therefore designed to assert the rights of minority parties that see the rights of parliament as endangered (Kommers & Miller, 2012, pp. 217–218). It should be possible for the Court to weigh the rights of the Bundestag as an independent organ against the federal government as a whole; to guarantee that possibility, parts of organs are also able to enforce the rights of the whole organ. In procedural law, this is known as representative action on behalf of an organ ('Organstandschaft'). Thus, one parliamentary group may pursue the rights of the whole Parliament in court even without a majority decision of the Bundestag. In general, 'Organstreit' cases are intended to strengthen supervisory powers and the right to information that in principle belong to the Bundestag as a whole, but which are naturally of particular interest to opposition parliamentary groups.

In this case, quite unusually, the federal government as the respondent welcomed the 'Organstreit' proceedings, because they offered a definitive answer to the legal question in dispute.

The procedure within the Bundestag in such a case, where an opposition parliamentary group asserts the rights of the Bundestag against the government, is typically brief: the Bundestag as a whole does not take a position in these proceedings, even if the Federal Constitutional Court gives it the opportunity. Since the majority parliamentary

groups form the federal government, which is the respondent, the federal government represents their political opinion.

However, decisions of the Federal Constitutional Court most certainly affect the whole Bundestag. If the Federal Constitutional Court holds that a particular measure is incompatible with the Basic Law, the Bundestag must critically consider this declaratory judgment (Zypries, 2010, p. 95). Sometimes it even has to pass legislation to comply with the requirements of the Court's decision.

In the armed forces case, such legislative action became necessary after the Out of Area decision of the Federal Constitutional Court. The Court declared that a majority decision of the Parliament was indeed necessary for such fundamental decisions on the deployment of the military (Wiefelspütz, 2010, p. 1163; Collings, 2015, pp. 282–283). Ever since, the Parliament always debates such operations abroad and formally decides on them once an operation is supposed to start or is prolonged (Heintschel v. Heinegg & Haltern, 1994, p. 308–309; Kommers & Miller, 2012, p. 204). The Parliamentary Participation Act[7] is now the statutory basis for such decisions, laying down the relationship between the Bundestag and the Federal Government in this case. Without the parliamentary group's 'Organstreit' proceedings, these laws might never have been enacted.

Disputes within organs: the Wüppesahl decision

The situation is different for disputes within organs, or intra-organ disputes, where one part of the Bundestag institutes proceedings against another part or against the whole organ. In these cases, the whole Bundestag is the respondent.

The Wüppesahl decision of the Federal Constitutional Court[8] is another case illustrating such proceedings:

7 | Parliamentary Participation Act, only available in German.

8 | Federal Constitutional Court, judgment of 13 June 1989, 2 BvE 1/88, only available in German.

Thomas Wüppesahl, a member of the German Bundestag and delegate of a particular parliamentary group, took a political position against that of his parliamentary group. He decided to leave his political party and was therefore excluded from the parliamentary group, from then on being an independent delegate. However, he wanted to continue his work in committees of the Bundestag and also to have the right to vote there.

The German Bundestag did not permit him to work in a committee, since the Rules of Procedure of the German Bundestag did not provide for this. Thomas Wüppesahl challenged this decision in 'Organstreit' proceedings to the Federal Constitutional Court, claiming that the Bundestag injured his constitutional rights as a delegate.

Such intra-organ disputes allow parts of a supreme federal body to assert their constitutional rights before the Federal Constitutional Court. As parts of an organ, individual delegates or parliamentary groups have their own rights, and they can challenge the organ as a whole.

This intra-organ dispute shows how the procedure within the Bundestag unfolds in practice: within the Bundestag, the Committee on Legal Affairs is responsible for proceedings before the Federal Constitutional Court. A group of delegates (one for each parliamentary group) within this committee deals with all proceedings before the Federal Constitutional Court on which the Bundestag may give an opinion. The details of the opinion are then decided on by the Bundestag by a majority decision. It appoints an attorney of record, usually a university lecturer specialising in the topic in dispute, to represent the Bundestag – in this case the majority opinion of the Bundestag – before the Federal Constitutional Court. He or she drafts a pleading to the Court; the delegates and members of staff of the German Bundestag may make comments and bring in practical knowledge of parliamentary operations. If an intra-organ dispute concerns the rights of a whole parliamentary group, it is parliamentary custom that this parliamentary group does not take part in the internal deliberations.

In the above-mentioned proceedings, independent delegate Thomas Wüppesahl as applicant was – to a large extent – successful against the German Bundestag. The

Federal Constitutional Court decided that it is not sufficient for individual delegates to be permitted only to propose amendments in a plenary session (Collings, 2015, p. 216). Instead, it must be possible for a delegate to be involved earlier, in the committees, since most of the specialist work in the legislative process is done during committee meetings. The committees extensively discuss, deliberate on and, if necessary, amend the draft law to be presented for a final vote during a plenary session of the Bundestag. However, an independent delegate shall have no voting right in a committee, because that might endanger the proportional composition of the committee, but he or she may propose amendments in the plenary session (Kommers & Miller, 2012, p. 228).

As a consequence of the Wüppesahl decision, the German Bundestag decided to amend its Rules of Procedure and to strengthen the rights of independent delegates. During the 19th electoral term (2017 – 2021), it has become clear that this was not an individual case: a total of eight delegates have left their parliamentary groups. They can now benefit from the rights that Thomas Wüppesahl won over 30 years ago before the Federal Constitutional Court.

Conclusion

Since its foundation in 1951, the Federal Constitutional Court has repeatedly proven to be an important player in resolving conflicts between supreme federal bodies. Its decisions on inter- and intra-organ disputes have often been ground-breaking and have helped to strike a balance within the structure of the Basic Law. Parliamentary minorities in particular, as shown above, have always been able to rely on the Federal Constitutional Court to uphold their rights when a majority wanted to restrict them further and further. Thus, the jurisdiction of the Federal Constitutional Court is a decisive element of a fair system of checks and balances in Germany.

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Israel

Remarks at the ECPRD Seminar: Parliamentary intra- and inter-organ conflicts before a constitutional court

Efrat Hakak[1]

Israel is a parliamentary democracy whose government consists of executive, legislative and judicial branches. Its political institutions include the President, who is the symbolic head of state; the Government, comprising a cabinet of ministers, led by the Prime Minister; the Knesset; and the judiciary. As in many parliamentary democracies, the executive branch is subject to the confidence of the legislative branch. And as in most democracies, the independence of the judiciary is guaranteed by law.

The **Knesset** is a unicameral body, and its 120 Members are elected by nation-wide elections, in a party-list proportional representation system (there is no geographic representation in the Knesset). Currently, the Knesset has 15 Permanent Committees and seven Special Committees, and approximately 650 Parliament employees. The **Executive** is led by the Prime Minister; there can also be an official Alternate Prime Minister, as is the case in the current Israeli government (Israel's 36th government), who will switch posts with the Prime Minister on an agreed-upon date. The government is usually composed of multiple parties, and the political instability that results from that fact has led to multiple elections in recent years. It also often results in quite a sizeable number of government ministries and ministers. The **Supreme Court** functions as both the country's highest court of appeals and the High Court of Justice ('Bagatz'). Its 15 justices are appointed by the President of Israel, on the basis of the recommendation of the Judicial Selection Committee. Judicial appointments are permanent, and mandatory retirement age is 70. There is no dedicated constitutional court in Israel.

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A brief constitutional history – the Knesset 'wears two hats'

Israel's Constituent Assembly was elected in Israel's first general elections on 25 January 1949. The Constitution, however, was never drafted in full. The first act of the Constituent Assembly was to pass the Transition Law, 5709-1949, by which it reconstituted itself as the First Knesset. The Assembly thereby became the Legislature of the State of Israel. A protracted debate ensued between those favouring the immediate enactment of a constitution, and those who believed either that there should be no constitution, or at the very least, that the time was not yet ripe.

In 1950, the Knesset adopted a compromise, transferring the powers of the Constituent Assembly to subsequent Knessets, and introducing the idea of a constitution 'by chapters' instead of one formal written document. The text of this resolution, known as the Harari Resolution after its sponsor, MK (Member of Knesset) Yizhar Harari, read as follows:

'The First Knesset instructs the Constitution, Law and Justice Committee to prepare a draft State Constitution. The constitution will be built chapter by chapter, in such a way that each will constitute a separate Basic Law. The chapters shall be presented to the Knesset when the committee completes its work, and all the chapters together shall comprise the Constitution of the State.'

The First Knesset was dissolved before its time, without enacting a single chapter of the constitution. The Knessets that followed occasionally used their constitutive powers to enact Basic Laws, with Basic Law: The Knesset the first to be enacted, in 1958, and Basic Law: Israel – the Nation State of the Jewish People the most recent to be enacted, in 2018. (Amendments to the Basic Laws are frequent, and have become even more so in the past decade.)

For the better part of the 20th century, most of the Basic Laws that were enacted dealt with governmental institutions, including the Basic Law: The Knesset

(1958); State Lands (1960); The President (1964); The Government (1968); The State Economy (1975); The Army (1976); Jerusalem, the Capital of Israel (1980); The Judiciary (1984); and The State Comptroller (1988). But no Basic Laws setting out human rights had been legislated. In 1992, however, a political compromise was reached, and the Knesset passed two Basic Laws concerning human rights, one on Human Dignity and Liberty, and the other on Freedom of Occupation.

Three years after those Basic Laws were enacted, Israel's Supreme Court, led by President of the Supreme Court Aharon Barak, published its judicial ruling on United Mizrahi Bank v. Migdal Cooperative Village and ruled that the Court was entitled to strike down Knesset legislation if it stands in conflict with the Basic Laws. Barak explained that the Knesset was actually two separate bodies in one:

'Indeed, the Knesset wears a number of "hats" or "crowns", among them the crown of constituent authority – under which the constitution is adopted (by enactment of the Basic Laws) – and the crown of legislative authority, under which legislation is adopted.' (para. 5)

In essence, the ruling altered the status of the Basic Laws, declaring that they have normative constitutional status, making them superior to ordinary laws.

Together, these two developments have been labelled Israel's constitutional revolution.

In the Barak era, very few provisions were struck down – but the Court developed a number of substantive and procedural legal doctrines that broadened the Court's discretion in constitutional and administrative cases, including broadening standing requirements and developing a broad definition of human dignity. In the post-Barak era, the Court has struck down more laws –though in the last few years we may also be witnessing a gradual narrowing of some of the legal doctrines that had been broadened in the early years.

This constitutional revolution, and the role of the courts in it, has been quite controver-

sial. However, the Israeli Knesset has not – for various political reasons – been able or willing to enact legislation that would set out the parameters of judicial review in Israel.

2017 – A Watershed Moment?

Having given a bird's-eye view of Israel's constitutional setting, we will now zero in on the role of the courts in the relationship between the Knesset and the executive branch.

This relationship is becoming more and more imperative to understand – and more complex – in parliamentary democracies. We are also, to my mind, in the midst of a fascinating moment in Israel's constitutional story in this regard, one which is still being told.

In 2017, the Supreme Court intervened in two landmark cases. In the first, the Supreme Court for the first time invalidated a law based on flaws in the legislative process itself; in the second, the Court issued a nullification notice to a temporary Basic Law that changed the annual budget to a biennial budget.

In the **Quintinsky** case (HCJ 10042/16 Quintinsky v. Knesset[2]), a law imposing a tax on owners of three or more homes was passed as part of Israel's omnibus-style law (the Multiple Apartments Tax Arrangement). Israel's 'Arrangements' law includes a great number of legislative amendments relevant to the Government's economic and policy goals, and is usually brought to the Knesset's approval en bloc alongside the budget law. This arrangement leads to an extremely short legislative timeline for deliberation and strict coalition discipline (Rolef, 2006). In this case, the Court ruled that the legislative process was so inadequate that the Knesset Members did not have enough time to formulate a substantive position on the question at hand; the Executive had brought a new draft to the committee late at night, giving them no time to adequately prepare the bill. As a result, the Court struck down the law.

2 | Full text available in English (unofficial translation).

In the **Ramat Gan** case (HCJ 8260/16 Ramat Gan Academic Center of Law and Business v. Knesset (6 September 2017)), the Court ruled on a temporary amendment to the Basic Law: The State Economy, which – for the fifth time in a row – allowed the Executive to bring a biennial Budget to the Knesset instead of an annual one. In this case, the Court declared what is known as a nullification notice, meaning that the Court did not invalidate the law, but warned the Knesset that if another similar amendment were to be passed, it would be struck down.

Why are these cases significant?

One narrative of these cases is that the Court was bolstering the separation of powers doctrine, ensuring that each branch of government is able to do its job and serve the public in its own role. But another way of looking at these two cases is by noting that the Court intervened in what was ultimately a conflict between the Knesset and the executive branch. In both cases, the Executive was successful in passing legislation that the Court believed weakened the institution of Parliament – in the first because the Knesset Members could not formulate an educated opinion on the question that the government brought before it, and in the second, because the Knesset would not be able to supervise fiscal policy properly. Some may view these moves as the Court stepping in as the guardian of the Knesset, protecting the Knesset Members who represent the people. Others may claim that when the Executive and the Knesset work in tandem, as is the wont in a parliamentary democracy, any court interference subverts the will of the political majority. However you wish to tell this story, it is clear that beneath the surface of the constitutional discussion that occurred in these cases, it is ultimately a story of tension between Parliament and the executive branch.

Now where are we, a number of years later?

On a practical level, we have seen several important consequences to these rulings. The **Quintinsky** ruling certainly opened the door for similar claims against other legislation. The **Ramat Gan** case deepened the constitutional conversation in Israel about the Court's authority for judicial review of the semi-constitutional texts, our Basic Laws. [Note – since these remarks were given, two other significant court

decisions on this question have been delivered, which are not discussed herein: HCJ 5969/20 Stav Shafir v. The Knesset (23 May 2021), and HCJ 5555/18 Akram Hasson v. Knesset (8 July 2021)].

But on a deeper level, I believe that these rulings have led those of us who work within the system, and reflect about these issues on a daily basis, to focus in on a structural question that has been neglected for many years. In a parliamentary system, where the executive rules only with the support of the majority of parliament, the line between the executive and parliament is always a little blurry. As someone who grew up in the US, where the branches of government are clearly delineated, it strikes me that in parliamentary systems, as opposed to the American one, the parliament will have a tendency to be the long arm of the executive branch. Thus, on the one hand, the Knesset is expected to assist the Executive branch in carrying out its policy – but on the other hand, the Knesset is expected to (and indeed does) function as a check on the Executive branch, allowing a broad swathe of the public to debate and determine public policy. The conflict between the branches will always simmer under the surface in the Knesset.

I will open a quick parenthesis here: one of the complicating, and complicated, features of a parliament is that it is by definition not a monolithic entity. In fact, it comprises numerous entities that are at times existentially at each other's throats. This means that conflicts between 'the Knesset' and the Executive may entail various elements of the Knesset, whether they be the opposition, individual Members of the Knesset, or various members of the coalition government making a stand in the Knesset. Each type of entity will manifest itself in different types of institutional conflicts with the Executive.

But to return to our topic: in this complicated relationship between the Executive branch and Parliament, the Court has stepped in and, in the two cases described above, made a constitutional claim that was based directly on the separation of powers doctrine. Again – in one case the Court voided a law because the MKs did not have enough time to adequately comprehend the material; in the other, becau-

se the law would not allow the Knesset to perform its supervisory role. The Court warned the parties that the Knesset cannot blindly do the Executive's bidding; it defined the constitutional conflict as a conflict between the branches, and inserted itself into that conflict.

As a result, I think, all the practitioners in our field, and the legal department of the Knesset as an example, will have to think long and hard about this conflict in the next few years. The continuation of this story will of course be impacted by other constitutional stories being played out here in Israel, and around the globe. There are also political attempts, here as in other places, to change the balance of power between the branches of government. How this will play out in terms of the complex trifecta of the Supreme Court – Executive – Parliament, I cannot predict. But I can tell you that for all of us who care about the institution of parliament, it will be worth paying attention to Israel's constitutional story over the next few years.

Information on the Knesset's legal department

The Knesset's legal department functions as a professional legal department of the Knesset. It accompanies the legislative process in the committees and advises the MKs; interprets and upholds the Knesset's procedural rules; represents the Knesset before the courts; runs a comparative legal research department; created and administers the national legislative database. In the legislative committee, we are tasked with bringing the Court's rulings on constitutional matters to the attention of the Knesset members, as part of the legislative process. The department also defends the law, as passed by the majority, in Court – and represents the Knesset itself, as an institution, before the Court. So we also bring before the Court the back and forth that happens as a matter of course in legislation, explaining to the Court how the political compromises come about. Additionally, on the most practical level, the department's main professional interlocutors during the legislative process are the legislative drafters of the Executive branch, who come to the Knesset table with well-thought-out and well-drafted propositions. So we ourselves, as a department, live and breathe this tension between the three branches described in this piece.

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Ireland

The role of the Irish courts in determining conflicts between Parliament and individuals

Mellissa English[1] **and Ramona Quinn**[2,3]

While the chapter addresses the specifics of how constitutional or supreme courts act as arbitrators in conflicts between parliamentary organs, this case study focuses on the role of the courts in determining conflicts between parliaments and individuals.

Irish constitutional landscape

Ireland is a parliamentary democracy whose modern parliamentary system was established under the Constitution of 1937, known as Bunreacht na hÉireann. The National Parliament (the Legislature) consists of the President and two Houses – a lower house of representatives, Dáil Éireann, and an upper house, a senate, known as Seanad Éireann. Collectively, the Houses are referred to as the Houses of the Oireachtas. Subject to certain exceptions provided for by the Constitution, the Constitution vests exclusive power for the making of laws in the Oireachtas. Dáil Éireann elects the Taoiseach (Prime Minister) and approves the nomination by the Taoiseach of the members of the Government.

The Constitution provides that:

> All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good. (Article 6.1, Bunreacht na hÉireann 1937)

and accordingly reflects the tripartite jurisprudential division of governmental powers.

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In terms of the interaction between the respective arms of government, the form of separation of powers adopted in the Irish Constitution was not the 'hermetically sealed' branches of government outlined by Montesquieu (Bradley, Conleth SC: Judges, Politics and the Constitution, DCU). Rather, the Irish Constitution prescribes 'points of intersection, interaction and occasional friction' (Pringle v. Ireland [2012] IESC 47 [17] (O'Donnell J)). It is the view of many that an independent judiciary is a vital element of the separation of powers whose function it is to ensure that one branch does not unnecessarily trespass on another.

Relevant Constitutional provisions

Parliament

Article 15 of the Constitution provides for and delineates the constitutional provisions on the workings of the Oireachtas.

Article 15.2 vests the sole and exclusive power to make laws for the State in the Oireachtas and confirms that no other legislative authority has power to make laws for the State. Article 15.10 confers power on each House to make and enforce its own rules (known as Standing Orders). Articles 15.12 and 15.13 confer absolute privilege on Members' utterances and publications of either House. In particular, Article 15.13 confirms that the Members of either each House are not amenable to any authority other than the House itself for their utterances. This latter provision acts as a complete ouster of the jurisdiction of the Courts. Therefore, Article 15 is, in essence, a basket of privileges and immunities for Members of the Houses of the Oireachtas, allowing them to manage their own affairs, free from outside interference.

From the above it is clear that the Constitution creates a zone of non-justiciability, into which the judiciary may not venture. As already mentioned, matters such as Members' utterances in either House are beyond the purview of the Courts as the relevant constitutional provisions have ousted the jurisdiction of the Courts in so far as amenability for such utterances is concerned. That being said, the judiciary clearly considers its role to be setting out the proper area of functioning of each of the branches of government.

The Judiciary

Article 34.1 of the Constitution provides that justice must be administered by the courts of law and only in the courts, subject to certain limited exceptions which do not arise in the context of this case study. The import of this constitutional provision is that the other arms of government, namely the Legislature and the Executive, may not trespass on the judicial function. Of further relevance to this principle, which will be discussed below, is that powers constituting in essence an administration of justice cannot be conferred on, for example, Oireachtas Committees, and the purported conferral of such powers has been held to be unconstitutional by the Supreme Court. Notwithstanding the separation of powers, the ordinary Superior Courts exercise a constitutional function in reviewing the constitutionality and legality of actions of the other organs of State. Unlike in a number of other legal systems, it has not been thought necessary, given the quasi-legislative effect of legislation being declared constitutionally invalid, to reserve for a special constitutional court or tribunal the right to consider such validity.

The Executive

Article 28.2 mandates that the executive power of the State shall be exercised by or on the authority of the Government. This aspect of the separation of powers is not canvassed in this case study, which focuses on the relationship between the judicial and the legislative arms of government and the extent to which the actions of an Oireachtas Committee are justiciable.

Chronology of decisions of the Superior Courts where individuals have sought recourse to the Courts for perceived wrongs occasioned by Parliament

For over 75 years, individuals have sought recourse to the Courts for perceived wrongdoing or excess of power on the part of Parliament or a parliamentary Committee. Outlined below is a selection of such cases. These cases include proceedings taken by Members of the Houses arising out of decisions taken by Oireachtas Committees or the Speaker/President of the House. The proceedings issued by non-members, or ordinary citizens, resulted from unlawful actions of an Oireachtas Committee or from utterances made by a Member under privilege. They provide an

insight into the conflicts brought before the Courts and the approach taken by the judiciary in an attempt to remedy such conflicts.

(i) 'Wireless Dealers Association v Minister for Industry and Commerce'
Citation: Unreported, Supreme Court, 7 March 1956.

Facts:

Article 15.4.2° of the Constitution provides:

> Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid.

Article 34.3.2° contemplates the existence of courts with the power to declare that invalidity. The 'Wireless Dealers Association v Minister for Industry and Commerce' decision, which has been cited repeatedly in later judgments, is unfortunately not formally reported and, indeed, is very poorly recorded in any form, but it appears that the plaintiff had conceived the opinion that a bill, if enacted in the terms proposed, would be unconstitutional. The bill had passed Dáil Éireann and the sponsoring Minister proposed to introduce it in the Seanad. The plaintiff sought an order restraining him from doing so.

Judgment:

The Supreme Court held that the courts had no part in the legislative process, and that granting an injunction would interfere in the privileged process of debate on the bill before the Houses and in the Minister's constitutional right of attendance in the Seanad under Article 28.8 of the Constitution to advocate in favour of the bill.

The judgment is arguably subject to a number of observations:

1. The reasoning would seem to preclude an approach taken in other jurisdictions, e.g. Israel, by which a bill that was enacted after a procedure that was non-compliant with the internal rules of parliament might be declared unconstitutional on that ground.

2. Ireland's constitutional tradition is marked by a (fairly) gradual separation from the United Kingdom, and part of this process involved an assumption that the competence of a devolved or semi-colonial Irish legislature to pass particular laws could be reviewed by the courts; after independence this procedure was reformulated as Article 26 of the Constitution by which the President may, having engaged in certain consultations, refer a bill to the Supreme Court for advice as to its constitutionality and, if the Supreme Court advises that the bill is unconstitutional, the President must refuse to sign it, and it does not become law.

3. The decision does not address purported legislation that failed to comply with an express constitutional prerequisite; for example, a bill to amend the Constitution that was initiated in Seanad Éireann contrary to Article 46.2, or that was signed by the President as a valid amendment having passed both Houses but without the referendum required by the same provision.

(ii) 'In re Haughey' Citation: [1971] IR 217

Facts:
Following on from the 'Arms Trial' of the early 1970s (where two former Government Ministers were prosecuted, unsuccessfully, for illegally importing arms in the context of civil disturbances in Northern Ireland), the Committee of Public Accounts of Dáil Éireann (the Committee), conducted an inquiry into the use of public funds. The allegation was that the funds had been unlawfully used to purchase those arms in defence of the Irish nationalist community in Northern Ireland. During the Committee hearings, a senior Garda (member of the Irish police force) made allegations of arms smuggling against Padraig 'Jock' Haughey, brother of a former Minister, Charles Haughey, who had been tried and acquitted in connection with the planned importation. Padraig Haughey was summoned to give evidence to the Committee. He read a prepared statement denying all knowledge of or connection with the subject matter of the investigation but refused to answer subsequent questions from Committee members.

Under Section 3(4) of the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act 1970 (the '1970 Act'), a Committee could 'certify' to the High Court that an offence had been committed (in this case a refusal to answer questions), and direct the High Court to sentence the offender as though he or she were guilty of contempt against that Court. The 1970 Act did not make provision for the accused to be sent to the High Court for trial, instead the High Court merely 'rubber stamped' the decisions, effectively rendering the Oireachtas the trial court.

Following Padraig Haughey's refusal to answer questions, the Committee certified to the High Court that an offence under the 1970 Act had been committed by reason of this refusal. The High Court ordered Mr Haughey to provide evidence as to why he should not be punished in accordance with the terms of the 1970 Act and at the hearing of the motion before the High Court the evidence was furnished on affidavit (a sworn written statement).

Mr Haughey was ultimately convicted under the 1970 Act for refusing to answer the Committee's questions and was sentenced to a 6-month term of imprisonment.

Judgment:
Padraig Haughey appealed the order and judgment of the High Court to the Supreme Court, with the Supreme Court subsequently striking down s 3(4) of the 1970 Act as unconstitutional.

The Supreme Court held that it was not constitutionally permissible for the Oireachtas to try someone for a criminal offence, a power reserved to the courts under Articles 34 and 38 of the Constitution. It further held that the Oireachtas, or indeed any public body, had to afford certain basic protections of constitutional justice to a witness before it, where its proceedings may have an adverse effect on the reputation of that person. This panoply of protections, which include a right to cross examine one's accuser and to speak in one's own defence, have become known as 'Re Haughey Rights'.

O'Dálaigh CJ set out those rights in the Supreme Court judgment as follows:

'... in all the circumstances, the minimum protection which the State should afford his client was (a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross examine, by counsel, his accuser or accusers; (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence.'

Here the Courts demonstrated an appetite for intervening, at the behest of an individual, where it was clear that the administration of justice was occurring other than before the Courts. The Supreme Court helpfully identified this panoply of protections which have proved to be guiding principles even in quasi-judicial and administrative fora.

Although the precise point has been addressed as an aside in later decisions, the decision marks a contrast with parliaments in the Westminster tradition (including in this context the United States Congress), which traditionally had the power to fine or imprison non-members for contempt of parliamentary authority. Indeed, the restriction of parliamentary authority is not without its difficulties, in that a witness who deliberately misleads a parliamentary Committee cannot be punished by the Committee because of the separation of powers and arguably cannot be punished by a court because the misleading contribution will have been privileged.

(iii) 'Ahern v Mahon' Citation: [2008] 4 IR 704

Facts:
The applicant (Bertie Ahern) was a Member of Dáil Éireann and until just before the case was heard, the Taoiseach (Prime Minister). The respondents were Circuit Court judges who were members of the Tribunal of Inquiry into Certain Planning Matters and Payments (the Planning Tribunal).

The Planning Tribunal had been established in 1997 to enquire into (among many other matters) the nature and source of certain lodgements that were made into the bank accounts of Mr Ahern and persons with whom he was associated. The Planning Tribunal wished to question Mr Ahern about alleged inconsistencies between statements he had made to the media and evidence tendered to the Planning Tribunal, as well as statements he had made in Dáil Éireann.

Mr Ahern instituted judicial review proceedings seeking a declaration that the Planning Tribunal was prohibited from attempting to make him answerable for statements he made in the Dáil Éireann and an order quashing the Planning Tribunal ruling that rejected his claim of privilege with regard to these statements.

Judgment:
The High Court held, in granting the reliefs sought to Mr Ahern, that Article 15.13 of the Constitution protected Members of the Oireachtas from direct and indirect attempts to make them answerable to a body other than the Houses of the Oireachtas in respect of utterances made in those Houses.

In concluding that Mr Ahern was entitled to a declaration that the Planning Tribunal did not have the power to question him on statements made in the Dáil, the High Court commented that:

Drawing the applicant's attention to statements made by him in parliament which are inconsistent with statements made outside it, may incorporate a suggestion that the words spoken in parliament were untrue or misleading. That is not permissible. ([2008] IR 704 [37])

This case was not appealed to the Supreme Court.

(iv) 'Kerins v McGuinness and others' Citation: [2019] 2 ILRM 301, 361.

Facts:

Ms Kerins was the Chief Executive Officer of the Rehab Group, a private charity which received public funding to provide social services and health care. In early 2014, there was significant public interest in and controversy surrounding transparency in the charity sector. In particular, questions were raised about the level of pay and expenses of executives in the Rehab Group. Given that the group received public funding, the Committee on Public Accounts of Dáil Éireann (PAC) invited Ms Kerins to answer questions before it about the running of the group.

Ms Kerins accepted that invitation in a voluntary capacity and PAC questioned her on a number of matters that she had not been given advance notice of. She claimed she was subjected to unfair treatment and that her reputation was damaged as a result of the questioning. She was asked to return for further questioning but refused to do so. PAC sought the power of compellability from the Committee on Procedure and Privileges (CPP) so as to compel her to attend again, but this request was rejected by the CPP. The CPP was of the view that PAC was acting beyond its powers since the Rehab Group was not a body that was audited by the Comptroller and Auditor General, and so it was not within PAC's authority to investigate it.

Ms Kerins subsequently brought a judicial review proceeding seeking a declaration that PAC had acted outside of its jurisdiction and that PAC's examination had been unfair. She also brought a claim for damages over her treatment by PAC, seeking compensation for:

(a) damage to her reputation;
(b) the breach of her right to constitutional justice;
(c) malfeasance in public office;
(d) the loss of income as a result of the ending of her employment with the Rehab Group;
(e) personal injury.

Judgment (High Court – Justiciability)

The respondents (the members of PAC) contended that by virtue of Articles 15.12

and 15.13 of the Constitution, the conduct of the Members of the Houses of the Oireachtas or any Committee of them could not be subject to judicial scrutiny. Mr Justice Peter Kelly of the High Court dismissed Ms Kerins' claim, holding that the inquiry conducted by PAC was not an adjudication or determination, as PAC did not possess any powers of compellability, meaning that the issue of jurisdiction did not arise. The Court took the view that 'the exercise of jurisdiction involves the exercise of a power' and because no such power was exercised, no question of jurisdiction arose ([2017] IEHC 34 [103]). The Court noted that there must be some adjudication or determination affecting the good name of the citizen.

The High Court distinguished the 'Kerins' case from others previously before the Courts, such as Re Haughey, in that the applicants in those cases were subjected to a compulsory determinative process, while Ms Kerins had not been. The Court found that PAC did not make any findings against Ms Kerins and did not have any coercive power to ensure her presence at further hearings.

Judgment (Supreme Court):
Ms Kerins appealed the non-justiciability findings of the High Court to the Supreme Court. The Supreme Court found in favour of Ms Kerins and made the following determinations ([2019] 2 ILRM 301):

1. That a Committee has the same constitutional privileges and immunities as the Oireachtas itself, where the Oireachtas has delegated to the Committee a legitimate constitutional function. The Supreme Court also clarified that absolute privilege attaches to utterances of members of the public before Committees.

2. That it is permissible for a court to receive and consider evidence of what was said at a meeting of a Committee in order to determine in what actions the Committee was engaged. This does not dilute the principle that Members are not amenable to the courts for their utterances in the Houses.

3. That Article 15 of the Constitution confers a wide scope of privilege and immunity on the Houses and their Committees.

4. That notwithstanding this, it does not provide an absolute bar to the bringing of proceedings concerning the actions of a Committee. The Supreme Court also clarified that it was not necessary for a witness to be compelled to attend before a Committee to bring the matter within the remit of the Courts.

5. That there are certain circumstances under which it would be inappropriate for a court to intervene – i.e. where the matter was technical, insufficiently serious or closely aligned to areas which are given express constitutional immunity.

6. That it was not appropriate to bring the case against the individual Committee members as Ms Kerins had done: the correct defendant was Dáil Éireann.

7. That the Oireachtas should provide a remedy to a private citizen affected by an alleged unlawful action – the Supreme Court could intervene here because there had been a significant and unremedied unlawful action on the part of a Committee.

8. That the actions of the Committee as a whole, and not the individual utterances of members of the Committee, should be examined by the Court. The extent to which the Committee Chair seeks to impose appropriate limitations on the actions of the Committee will be relevant.

9. That a private citizen who accepts an invitation to attend before a Committee is entitled to expect that the Committee will act within the boundaries of the invitation.

As an aside, the Court noted as an instance when a declaration might be made about the House itself any purported invocation of the power enjoyed by Westminster-tradition parliaments and Congress to punish persons for contempt. That expressly fell outside the powers of the Oireachtas (see 'Re Haughey', above).

The Supreme Court found that PAC's claim to constitutional privileges and immunities was significantly weakened as it had acted outside the remit delegated to it. In

coming to this view, the Supreme Court was swayed by the fact that the CPP had already concluded that PAC had acted outside its remit. Also key to the reasoning of the Court was that no appropriate action had been taken by the Houses of the Oireachtas to prevent or remedy the matters Ms Kerins complained of.

The second question addressed by the Supreme Court, delivered in a later judgment ([2019] 2 ILRM 361), was whether PAC had acted beyond the terms of the invitation given to Ms Kerins. The four key points set out by the Court in that judgment are relevant for the operation of Oireachtas Committees, and echo some of the comments made by the Court in the first judgment on justiciability:

1. A court will find that a Committee acted unlawfully if it acts significantly outside its terms of reference, as it found that PAC had in this case. The Supreme Court noted that this remit was potentially very wide as terms of reference can be adjusted by the Oireachtas.

2. A court will find that a Committee acted unlawfully if it departs significantly from the terms of invitation to the witness, again something that the Supreme Court found PAC had done in this case.

3. A court will intervene where the unfair conduct and order of the Committee hearing represents the actions of the Committee as a whole rather than individual Members. The Supreme Court found that PAC had acted as a whole in unfairly conducting its questioning of Ms Kerins.

4. A court will intervene where there is no other remedy. The Supreme Court noted that there was no avenue for Ms Kerins to complain of her treatment before PAC other than by taking a case to the courts.

The decisions of the Supreme Court certainly represented food for thought for the Oireachtas in terms of how it should conduct its business and what remedial action was required. Of some succour was the indication from the Court that the remedy lay within the four walls of parliament and that, once addressed, it would require

a significant and unremedied unlawful action on the part of a Committee before a court could intervene. The Oireachtas response to the Supreme Court decision in 'Kerins' took the form of an Oireachtas Working Group on Parliamentary Privilege and Citizens' Rights. This is discussed further below. As for the current status of Ms Kerins's appeal, the second module which relates to the issue of damages is currently before the High Court for determination.

(v) 'O'Brien v Clerk of Dáil Éireann and others' Citation: [2019] 1 ILRM 385

Facts:
These proceedings arose out of statements made in Dáil Éireann in 2015 by Deputies Catherine Murphy and Pearse Doherty (the 'Deputies') in relation to Denis O'Brien's personal banking arrangements with the Irish Bank Resolution Corporation Limited (IBRC). Mr O'Brien had secured a temporary injunction against RTÉ (the national broadcaster) revealing the information, which was subsequently disclosed by the Deputies within the Dáil. Mr O'Brien argued that the effect of the disclosure by the Deputies was to completely negate the High Court's injunction as the information was now in the public domain.

Mr O'Brien brought proceedings against the Clerk of the Dáil and members of the Committee on Procedures and Privileges (CPP), who had found that the statements by the Deputies did not breach the Standing Orders of the Dáil and that the Deputies had not abused parliamentary privilege. One specific claim was that Deputy Murphy had breached what was then Dáil Standing Order 57(3) on matters which are sub judice – meaning under judicial consideration and therefore prohibited from public discussion elsewhere. The CPP held that there was no breach of the relevant Standing Order as the utterances were made on the floor of the House in a responsible manner, in good faith and as part of the legislative process.

Regarding Mr O'Brien's allegation that both Deputies had breached the terms of the High Court injunction against RTÉ, the Clerk of the CPP had advised that any such finding was solely and exclusively a matter for the courts.

Judgment (High Court):
Mr O'Brien issued High Court proceedings against the members of the CPP, seeking multiple declarations to the effect that the utterances made by the Deputies and the failure of the CPP to properly sanction them breached both his constitutional rights and the doctrine of the separation of powers.

The High Court ([2017] IEHC 179) dismissed Mr O'Brien's case, holding that a court could not intervene in the way the Oireachtas functioned, due to the separation of powers between the executive and the judiciary under the Constitution.

Judgment (Supreme Court):
Mr O'Brien appealed the findings of the High Court to the Supreme Court.

The Supreme Court dismissed the appeal. It held that, while, as per 'Kerins', there is no absolute barrier to proceedings relating to the functioning of the Oireachtas, a court cannot intervene where in doing so would breach an express privilege contained in the Constitution, such as the privilege with respect to utterances in the Houses. The Supreme Court found that the challenge maintained by Mr O'Brien against the decision of the CPP involved an 'indirect challenge' to the utterances made by the Deputies ([2017] IEHC 179 [77]), which was constitutionally impermissible by reference to the principle of parliamentary privilege enshrined in Article 15 of the Constitution and the doctrine of the separation of powers.

The Supreme Court stated that it is for the Oireachtas, and not the courts, to protect any rights infringed by privileged utterances such as arose in this case. The Court did, however, note that it may be permissible for it to take action where there was an 'egregious breach' ([2019] 1 ILRM 385 [6.9]) of the constitutional obligation of the Oireachtas to protect the rights of citizens or 'a persistent failure' ([2019] 1 ILRM 385 [10.5] on the part of the Oireachtas from which it could be inferred that it did not intend to afford appropriate protection to the rights of citizens. As neither of those situations was present, the Supreme Court held that Mr O'Brien's attempt to review the CPP's decision was non-justiciable.

It is interesting to note that the 'Kerins' and 'O'Brien' cases were decided around the same time, by the same judges on the Supreme Court, but had very different outcomes – with 'Kerins' coming within the remit of the courts but 'O'Brien' being non-justiciable.

The key difference between 'O'Brien' and 'Kerins' is that in 'O'Brien', the Supreme Court considered that the action directly concerned the utterances of a Member, something that attracts an express privilege under the Constitution. In 'Kerins', the Supreme Court drew a distinction between the actions of the Committee as a whole and the utterances of individual Members; the Court could infer the substance of the Committee's true agenda from the conduct of its members taken as a whole, but still each Member remained non-amenable in respect of his or her individual contribution.

Analysis of the case-law and its impact on the workings of parliament.

As can be seen from the foregoing chronology, there are distinct features common to the approach of the judiciary when considering such cases. Where relevant to the proceedings, the Courts held paramount the constitutional protections afforded by Articles 15.12 and 15.13 and refused to make any findings that would amount to either a direct or an indirect attack on parliamentary utterances. The Courts also refused to engage in any examination which would invoke a jurisdiction over matters closely connected with those privileges and immunities. Indeed, the Courts determined that to do so would amount to a breach of the separation of powers. Therefore, any proceedings that seek relief on the basis of a Member's parliamentary utterances appear to be doomed to fail.

That being said, in the 'Kerins' case referred to above, the Court determined that it was permissible for a Court to receive and consider evidence of what was said at a meeting of a Committee in order to determine the actions in which the Committee was engaged. The Court was of the view that consideration of such evidence, including the utterances of Members, does not infringe the privileges conferred by Article 15. The Court was further of the view that it is not precluded from examining what was said, but that does not mean that the case – or any case – is then justiciable, nor does it dilute the constitutional principle that Members are non-amenable to the

courts for their utterances. The Court is simply examining the materials, and therefore the utterances, to determine what action the Committee as a whole was engaged in, in order to then ascertain whether the actions of the Committee were lawful. To reiterate this principle, the Supreme Court ordered that the correct respondent in the 'Kerins' proceedings, and proceedings of its kind, is the relevant House and not the individual members of an Oireachtas Committee.

While certain zones of non-justiciability have been accepted by the Courts, such as intramural processes and Members' parliamentary utterances, the Courts have indicated that they will continue to intervene in instances where there appears to have been an unlawful and unremedied breach of a citizen's rights.

A question remained, after the 'Kerins' judgments, as to the extent to which the Courts would continue to intervene in future disputes relating to the Oireachtas and further as to the role of the Oireachtas in upholding and protecting the rights of witnesses. Parliament's response to this call to action is addressed below.

The Oireachtas Working Group on Parliamentary Privilege and Citizens' Rights

Following the two judgments of the Supreme Court in 'Kerins', the Dáil Committee on Procedure and the Seanad Committee on Procedure and Privileges, as they were then known, agreed to establish an official-level Working Group to review the procedures of the Houses, and in particular their Standing Orders. This Working Group, known as the Working Group on Parliamentary Privilege and Citizens' Rights, engaged in a consultation with stakeholders and made recommendations in relation to the remedial measures necessary in light of the decision in 'Kerins'. These recommendations are contained in the Joint Report on the Response of the Houses of the Oireachtas to the Judgments of the Supreme Court in the 'Kerins' case, which was discussed and agreed by the Dáil Committee on Procedure and the Seanad Committee on Procedure and Privileges at a number of meetings in November and December 2020, and which was laid before both Houses in December 2020. A range of Standing Orders were suggested and agreed by both Houses following the recommendations contained in the Report.

The Supreme Court in 'Kerins' was keen to reiterate that the constitutional rights of citizens do not disappear at the gates of the Houses and that it is for the Oireachtas itself to adopt Standing Orders, or other measures, to protect individuals against inappropriate infringement of their rights, while at the same time protecting the freedom of speech guaranteed to Members and protecting the Oireachtas from undue interference with its entitlement to carry out its constitutional role in whatever way it considers appropriate. In light of the foregoing, the amendments to Standing Orders consist of three main constituent parts, as follows:

1. New system of remit oversight:
Dáil Standing Orders now contain new provisions whereby Committees can seek a determination on remit from a new Committee on Remit Oversight, chaired by the Ceann Comhairle (the Speaker of the lower House). The new procedures also allow Committees to apply for an extension of remit for a specific purpose through an 'instruction motion' in the relevant House/s and provide a formal mechanism for assessing the appropriate allocation of remit as between Committees, on application by a Committee.

2. Elaboration of the role of the Committee Chair:
The role of the Chair has been set out in more detail in Standing Orders which provide that the Chair is responsible inter alia for the 'orderly and fair conduct of the proceedings of the Committee' and further provides that the Chair has responsibility to:

- ensure that the Committee acts within the scope of its orders of reference as determined by the House;
- ensure that the Committee acts within the scope of the terms of any invitation issued to a witness to appear before the Committee;
- maintain order in the Committee, including ruling on matters of order when requested to do so by a Member, witness or third party;
- balance the rights of persons referred to during proceedings with the rights of Members, having regard to the Witness Protocol.

3. Rights of witnesses and remedies for persons adversely affected by Committee proceedings:

Standing Orders now provide a right for a Committee witness to request a ruling from the Chair on any matter of order and require the Chair to rule on any such request as soon as is practicable. Such matters include, but are not limited to the following:

- the relevance of the proceedings to the orders of reference of the Committee,
- the relevance of questioning to the matter or matters under examination during the proceedings as set out in the invitation to the witness,
- utterances made in the course of the proceedings,
- inadequate notice of matters raised during the proceedings, including documents,
- compliance with the Witness Protocol, and
- any other matter related to the general conduct of the proceedings.

Furthermore, Standing Orders set out a process whereby any person who believes themselves to have been adversely affected by an utterance which has been made in Committee can make a submission to the Committee Chair in the first instance, and can also appeal to the Committee on Parliamentary Privileges and Oversight. This process builds on the previous process which only applied to utterances in the Dáil or in Dáil Committees. The adoption by the Seanad of similar Standing Orders provides a remedy in respect of all utterances, including those made in Joint Committees or on the floor of either House.

Conclusion

In its judgments, the Supreme Court expressly recognised that Oireachtas Committees form an essential part of the workings of parliament and acknowledged the ability of the Houses of the Oireachtas to conduct their legitimate constitutional

business through the work of their Committees. In this context, the Court in 'Kerins' held that the work of Oireachtas Committees must be conducted in a manner which respects and appropriately protects the rights of witnesses, including access to appropriate remedies, while also respecting the freedom of speech guaranteed to Members under the Constitution. It is the view of the Office of Parliamentary Legal Advisers that, as the remedial mechanisms suggested by the Court have been implemented by the Oireachtas with the adoption of the Standing Orders referred to above, the likelihood of future judicial intervention in the work of Oireachtas Committees in order to protect witnesses is significantly reduced. Indeed, the Supreme Court has indicated that in order to assess whether the boundary for judicial intervention has been crossed, a significant margin of appreciation in how the Houses conduct their business will be afforded. It is likely that the jurisdiction of the Court to intervene can only arise where, as a result of an assessment of all of the circumstances of the case, there has been a significant and unremedied unlawful action on the part of a committee. These Standing Orders and the processes implemented in the wake of 'Kerins' have not yet been the subject of judicial scrutiny, which remains the ultimate litmus test.

Austria

Parliamentary Committees of Inquiry and Conflicts before the Constitutional Court

Christof Rattinger[1]

In 2015[2], the right to establish a committee of inquiry of the National Council ('Nationalrat') was set as a minority right; since then, a committee of inquiry must be set up by the National Council on the demand of a 'qualified minority' – one quarter of its members.[3] At the same time, the Constitutional Court was declared competent to rule on conflicts involving committees of inquiry – conflicts within Parliament (intra-organ conflicts) and conflicts between Parliament and other state organs (inter-organ conflicts).[4] In general, the Constitutional Court is bound to decide on such matters without undue delay, and if possible, within four weeks.[5]

Competence for Conflicts within Parliament (Intra-Organ Conflicts)

Conflicts over the admissibility of establishing a committee of inquiry

If a qualified minority of the members of the National Council exercise their right to demand the establishment of a committee of inquiry, the Rules of Procedure Committee of the National Council is bound to deliberate on the demand and to examine whether it is permissible under the Federal Constitutional Law.[6] If (by a simple majority vote) the Rules of Procedure Committee considers the demand or specific parts of it impermissible, it rules that the demand is impermissible in whole or in part.

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1 | Legal expert at the Legal, Legislative and Research Services of the Austrian Parliamentary Administration.

2 | This case study takes into account the case law of the Constitutional Court until 1 January 2022.

3 | Article 53 para 1 of the Federal Constitutional Law (B-VG).

4 | Article 138b of the Federal Constitutional Law (B-VG).

5 | Cf. § 56c para 6, § 56d para 6, § 56e para 6, § 56f para 3, § 56g para 6 and § 56j para 5 of the Constitutional Court Act 1953 (VfGG). Committees of inquiry of the National Council are, in general, established for a duration of 14 months with the possibility to extend their duration twice for three months each (§ 53 of the Rules of Procedure for Parliamentary Committees of Inquiry, appendix 1 to the Rules of Procedure of the National Council; VO-UA): Therefore, the proceedings pending before the Constitutional Court must be accelerated.

6 | § 3 para 2 of the Rules of Procedure for Parliamentary Committees of Inquiry, appendix 1 to the Rules of Procedure of the National Council (VO-UA).

Any such order from the Rules of Procedure Committee may be challenged before the Constitutional Court by the qualified minority which demanded the establishment of the committee of inquiry.[7]

The Constitutional Court had to rule on such a conflict in 2020: the qualified minority demanding the establishment of the 'Ibiza committee of inquiry' ('Ibiza-Untersuchungsausschuss') challenged the order of the Rules of Procedure Committee, which found parts of the demand for the establishment of the committee of inquiry to be impermissible. The Constitutional Court ruled that the qualified minority is, in general, free to choose the subject matter for a committee of inquiry's investigation, within the boundaries of the Federal Constitutional Law. If the qualified minority's right to demand the establishment of a committee of inquiry is to be effective, it cannot lie within the (political) discretion of a majority of the Rules of Procedure Committee to adjust the subject matter of investigation.[8]

Conflicts over the scope of the Rules of Procedure Committee's basic order to take evidence

If a committee of inquiry is established upon a demand of a qualified minority of the members of the National Council that the Rules of Procedure Committee of the National Council finds to be (at least partially) permissible, the Rules of Procedure Committee is bound to adopt the basic order to take evidence (by a simple majority vote). The basic order to take evidence obliges the relevant state organs and bodies to submit all files and documents falling within the scope of the subject matter of investigation to the committee of inquiry.[9]

If the qualified minority finds the scope of the Rules of Procedure Committee's basic order to take evidence to be insufficient (e.g. because the order does not oblige spe-

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7 | Article 138b para 1 cipher 1 of the Federal Constitutional Law (B-VG); cf. also § 56c of the Constitutional Court Act 1953 (VfGG).

8 | Judgment of the Constitutional Court of 13 March 2020, UA 1/2020, VfSlg 20.370/2020.

9 | § 24 of the Rules of Procedure for Parliamentary Committees of Inquiry, appendix 1 to the Rules of Procedure of the National Council (VO-UA)..

cific state organs to submit their files and documents to the committee of inquiry even though the committee would need them for their investigation), it may request the Constitutional Court to examine the matter.[10]

Conflicts over the connection between a demand to take further evidence or to summon a witness and the committee of inquiry's subject matter of investigation

A minority of one quarter of the members of a committee of inquiry may turn to the Constitutional Court in cases when the majority of the committee of inquiry opposes the minority's demand to take further evidence or to summon a witness. The Constitutional Court shall then examine whether there is an objective connection between the specific demand of the minority and the committee of inquiry's subject matter of investigation.[11]

In January 2021, the Constitutional Court ruled that the majority of a committee of inquiry opposing the minority's demand to summon a witness must sufficiently justify their opposing decision. In the case at hand, the majority's generalised reasoning, without substantiated arguments as to the specific person's lack of connection with the committee of inquiry's subject matter of investigation, was therefore considered insufficient and unlawful; as a consequence, that person had to be summoned as a witness before the committee of inquiry.[12]

Competence for Conflicts between Parliament and Other State Organs (Inter-Organ Conflicts)

Conflicts over the obligation to provide information to the committee of inquiry

Conflicts may arise between a committee of inquiry and another state organ as to the latter's obligation to provide information (e.g. official files or documents) to the committee of inquiry. In such cases, the committee of inquiry, one quarter of its members and the respective state organ may address the Constitutional Court, which shall

10 | Article 138b para 1 cipher 2 of the Federal Constitutional Law (B-VG); cf. also § 56d of the Constitutional Court Act 1953 (VfGG).

11 | Article 138b para 1 ciphers 3 and 5 of the Federal Constitutional Law (B-VG); cf. also § 56e and § 56g of the Constitutional Court Act 1953 (VfGG).

12 | Judgment of the Constitutional Court of 18 January 2021, UA 4/2020.

then determine whether the respective state organ is obliged to provide the disputed information to the committee of inquiry.[13]

Between 2015 and 2021, nine differences of opinion of that kind have been brought before the Constitutional Court. The Constitutional Court ruled that state organs must provide all information falling within the scope of the subject matter of investigation (relevant in the abstract to the subject matter of investigation) to the committee of inquiry without blacking out information for privacy, including data privacy reasons. In such cases, state organs are bound to classify[14] all the information submitted to the committee of inquiry that is deemed to be worthy of protection and that shall not be unduly disseminated. The Constitutional Court also found that other legal confidentiality obligations (e.g. banking secrecy) cannot justify a refusal to submit files or documents to a committee of inquiry.[15] Moreover, the Constitutional Court ruled that state organs are bound to provide adequate justification directly to the committee of inquiry (and not to the Constitutional Court during the proceedings at a later stage) if they consider specific information not to be relevant even in the abstract to the committee of inquiry's subject matter of investigation.[16] In this context, it is worth mentioning that June 2021 marked the first time that the Federal President made use of that position's competence to execute judgments of the Constitutional Court. Until then, the Federal Minister of Finance had refused to comply with the Constitutional Court's judgment ordering him to provide specific documents to the 'Ibiza committee of inquiry'.[17]

Conflicts over the requirement for and the interpretation of an agreement on the activities of the law enforcement authorities

Since 2015, the Rules of Procedure for Parliamentary Committees of Inquiry have

13 | Article 138b para 1 cipher 4 of the Federal Constitutional Law (B-VG); cf. also § 56f of the Constitutional Court Act 1953 (VfGG).

14 | The conditions regarding classification of information submitted to Parliament are laid down in the Information Rules Act (InfOG).

15 | Judgment of the Constitutional Court of 15 June 2015, UA 2/2015 et al, VfSlg 19.973/2015.

16 | Judgment of the Constitutional Court of 3 March 2021, UA 1/2021.

17 | Resolution of the Constitutional Court of 5 May 2021, UA 1/2021-39.

provided for consultation procedures between committees of inquiry and the Federal Minister of Justice. If the Federal Minister of Justice is of the opinion that demands for submission of files and documents, requests to take evidence, or summonses of witnesses affect the activities of the law enforcement authorities with respect to specific investigations, the Federal Minister of Justice may bring the Chairperson of a committee of inquiry into the consultation procedure. In such a procedure, the Chairperson and the Federal Minister of Justice may agree on appropriate measures to give due consideration to the activities of the law enforcement authorities in conducting specific investigations. In general, the interests of law enforcement shall be weighed against the interests of parliamentary control.[18]

In this regard, the Constitutional Court is competent to rule on conflicts between the committee of inquiry and the Federal Minister of Justice over the requirement for a consultation procedure and the interpretation of an agreement stemming from such a procedure.[19]

Conflicts over the classification of information available to a committee of inquiry

Lastly, the Constitutional Court has the power to rule on conflicts over the classification of information available to a committee of inquiry. In general, the state organ providing information to a committee of inquiry is obliged to classify the information according to the necessity of protecting it. The President of the National Council, however, may reduce the level of classification or declassify the information entirely on finding that there is no need for such (extensive) protection. In such a case, the state organ that originally submitted the information to the committee of inquiry may turn to the Constitutional Court and challenge the reclassifying or declassifying decision of the President of the National Council as unlawful.[20]

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18 | § 58 of the Rules of Procedure for Parliamentary Committees of Inquiry, appendix 1 to the Rules of Procedure of the National Council (VO-UA).

19 | Article 138b para 1 cipher 6 of the Federal Constitutional Law (B-VG); cf. also § 56h of the Constitutional Court Act 1953 (VfGG).

20 | Article 138b para 2 of the Federal Constitutional Law (B-VG); cf. also § 56j of the Constitutional Court Act 1953 (VfGG).

Side note: Complaints about the Infringement of Personality Rights in the Context of a Committee of Inquiry

Even though, strictly speaking, it concerns neither a parliamentary intra-organ conflict nor a parliamentary inter-organ conflict, it is still worth mentioning here that the Constitutional Court is also competent to rule on people's complaints about the infringement of their personality rights in the context of a committee of inquiry.[21] Examples of the case-law include allegations that witnesses' rights to honour and to protection of their economic reputation were infringed by statements of members of the committee of inquiry and the failure of the committee of inquiry's officials to intervene,[22] as well as alleged infringements of persons' personality rights due to the allegedly insufficient classification of information submitted to a committee of inquiry[23] or due to the allegedly unlawful disclosure of confidential information submitted to a committee of inquiry[24]. However, the Constitutional Court has not yet found any personality rights infringements in the cases brought before it and ruled that an insufficient classification of information submitted to a committee of inquiry cannot be the subject of a complaint about personality rights infringements.

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21 | Article 138b para 1 cipher 7 of the Federal Constitutional Law (B-VG); cf. also § 56i of the Constitutional Court Act 1953 (VfGG).

22 | Judgment of the Constitutional Court of 8 October 2015, UA 3/2015, VfSlg 20.015/2015; judgment of the Constitutional Court of 6 October 2021, UA 2/2021.

23 | Resolution of the Constitutional Court of 11 December 2018, UA 2/2018, VfSlg 20.303/2018.

24 | Resolution of the Constitutional Court of 25 September 2021, UA 6/2021.

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V Constitutional Courts and Parliaments – a Conversation[1]

Christoph Grabenwarter and Susanne Baer

On 13 November 2020, at the end of the two-day Online Seminar on Parliaments and Constitutional Law – Parliaments and Constitutional Courts, a conversation between Christoph Grabenwarter, President of the Austrian Constitutional Court, and Susanne Baer, Justice of the 1st Senate of the German Federal Constitutional Court, took place, moderated by Christoph Konrath.

Konrath: It is a great honour to welcome Prof. Christoph Grabenwarter, the President of the Austrian Constitutional Court, and Prof. Susanne Baer, Justice of the 1st Senate of the German Federal Constitutional Court. Both are distinguished scholars of constitutional law and human rights, and both have written on parliamentary matters.

Prof. Grabenwarter, the Austrian Constitutional Court has become a model worldwide. The Court and its understanding of constitutional review also represent a particular model of combining democracy and the rule of law. Susanne Baer, too, has emphasized the importance of seeing law in a wider context.

We have been discussing constitutional law from the perspective of parliaments, and there is a question whether a court should be a guardian of constitutional law. It would be interesting to get a different perspective and hear how you would describe the relationship between constitutional courts and parliaments.

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1 | The editorial team wants to thank Daniela Eichmeyer-Hell and Claudia Fischer-Ballia for speech-to-text interpretation during the webinar and their transcript for Chapter 5 which was the starting point for the further editing of this conversation.

Grabenwarter: It is a great pleasure for me to participate in the seminar, and it is an even greater pleasure for me to do this together with my colleague from the Federal Constitutional Court, Susanne Baer.

As to the relationship between parliaments and constitutional courts, in a first step I will try to make a distinction between three forms of relationships. The first point is that the Constitutional Court has a controlling function vis-à-vis Parliament: the Court reviews legislation, i.e. it checks whether laws are in line with the Constitution, both from a formal and a material perspective.

Secondly, constitutional courts strengthen the position of national parliaments, which can be shown by several examples I just want to mention briefly, rather than explain in detail. Maybe we can do that in the second round.

One way in which a constitutional court can strengthen the position of parliament is against the national executive, when it comes to the requirement for a legal basis following the rule-of-law principle, or when it comes to interference with particular human rights. This has recently been the case in Austria, where – in the context of the COVID-19 pandemic – the question arose before our Court wich measures the Minister of Health is authorized to take by means of regulations and administrative orders.

Another issue I want to touch on concerns elections and the review of elections by constitutional courts. Perhaps, the elections in the USA are not the best example, and the current problems in the US do not affect the legislature, but generally speaking, the effective control of the integrity of elections by the courts is an instrument that strengthens the position of national parliaments in the end.

My third remark in this context concerns the Constitutional Court as an arbiter between the minority and the majority in parliament. In Austria, we are just starting to gain experience in settling disputes in connection with committees of enquiry.

Then, in many countries, there is the right of the parliamentary minority to challenge laws before the Constitutional Court. In Austria, for example, one-third of the members of either chamber of Parliament may contest a federal law before the Constitutional Court.

In a second step, I want to mention two further issues concerning the relationship between Parliament and Constitutional Court. The first issue is the budgetary function of Parliament. Through this, Parliament could influence the way the Court works, e.g. by ensuring sufficient funding. When it comes to legislation on the Court and its proceedings, it is important that the relevant parliamentary committee has a positive attitude towards the Court, and the opposition plays a major role on this committee, as well.

Konrath: Prof. Baer, how do you see the relation between Court and Parliament? Prof. Grabenwarter has painted a very positive picture, with the Court and Parliament working together and the Court helping to ensure the rights of Parliament, for example in terms of COVID legislation and the remit of ministers, a highly topical issue with regard to decision-making.

Baer: Constitutional courts and, for sure, the European courts as well are working hard to find good and acceptable ways to navigate the field. Regarding the relationship between a constitutional court – or a supreme court with constitutional power – and Parliament, I fully agree with Prof. Grabenwarter as to the productivity of that relationship. Parliaments and constitutional courts cover different roles and have different functions, yet they pursue the same goal: democracy-based constitutional rights. This is the key, the heading on top of all of it. Then, we might look at the different roles and functions. In fighting the COVID pandemic, Parliament has a very difficult task to address. Parliament has a lot to do because most measures limit fundamental rights, and for a constitutional court, this means that we have to do what we always do: allow Parliament to do its job in a democratic way, and make sure that no citizen is left behind. This is crucial because parliaments are driven by majorities, and fundamental rights protect the ultimate minority: the individual. There is thus pressure on

such courts, because they have the function of a safety net for everyone in society. This is also why the Constitutional Court has not only been described as a guardian, but also as a figure prominent in soccer – not a player, nor the coach, but the referee in the middle with the guys watching the outer boundaries. Here, it is constitutional courts that watch out that there is no foul play. This is already difficult in a national context, and more difficult in federal states, and even more difficult in Europe, because there are more players in the field. Today, we live with multiple layers and players, and must cooperate in new modes, trying to balance power in order to safeguard democracy with respect to fundamental rights.

Sometimes, this results in hard questions, and a constitutional court has to respond in ways that stop or even reject the decision taken by the majority in Parliament. Certainly, the German Court is known to eventually take a stance. However, and this is something that I underestimated when I came to the bench, it is also the ultimate challenge. Which is why, in almost all decisions we take, we do accept what Parliament does, or what the courts did with what Parliament decided. But there are some hard cases where we believe that political majorities went too far, regarding basic rights or democracy, the rule of law, the welfare state principle or the guarantee of a sustainable future.

The obligation of the Court is thus to find the courage to intervene, despite knowing that many people, including the political majority, will dislike this type of intervention, while other people will love it. The Court does always please some and disappoint others. But we have to do what we always do, namely intervene only when and if the basic rules of the Constitution are being violated.
In our work, we often think of a constitutional court to open space for political debate, to safeguard the space for democracy, but also to watch the outer limits of what elected majorities may do. We must make sure that no one ever goes too far and tramples on human democratic rights. This is the starting point.

Konrath: This is very important because in the course of the seminar, we have often

heard from countries that do not have constitutional courts that they would regard such an intervention as an infringement. This brings us to the question that Prof. Grabenwarter tried to answer with regard to creating space for democratic decision-making and safeguarding that space. It is also a case of how a court approaches these questions and how such a court is composed. This is being discussed in many European countries. He also referred to the budget, the financial resources a court has. The German and the Austrian model differ a lot. In Germany judges are appointed for a specific period of time, in Austria they remain in office until they are 70. Occasionally former politicians join the Court as justices. How do you see this? Can the rules that are in place in Austria and Germany be effectively maintained?

Baer: It is a delicate matter because institutional design is a delicate task. Design also matters tremendously as to the standing and the options available to a supreme court or a constitutional court to intervene in what is always also a political question. Put differently, constitutional courts deal with political questions, but always from a legal point of view, anchored in the Constitution. So how can we design such an institution in an acceptable way, even for those who eventually lose their case? They need to accept the judgment as well. How to design an institution that is accepted and trusted and understands politics, but does not engage politically?

In Germany, there is a two-thirds majority requirement to elect justices to the Court in both chambers of Parliament. In the German political context, this majority threshold has for the longest time ensured that no governing party can place anyone on the Court who will not be accepted by the minority, the opposition. This largely ensures that there are conservatives and progressives on the bench, but no extremists. As long as all sides are needed for a two-thirds majority, it is an important safeguard of a court.

When the political landscape changes, this must be modified to work. In Germany, there is an agreement between the former big parties. They gave the right to propose a justice for election to the smaller parties near their camp. Still, candidates have to be accepted by a broad majority from across the political spectrum, so that politi-

cal diversity is reflected on the Court. But to date, four parties have the privilege to propose who they see fit to serve.

Beyond electing judges, there is much more to institutional design. A twelve-year term plus an age limit makes sure that time and again, new people come in. This is a very important device in the German Constitutional Court. Every new judge has the right to disagree with precedent. Every new person brings a new perspective. It provides for a fresh look at matters. Therefore, this constant renewal is very important. Also, the President and the Vice President of the Court are alternately appointed by the two chambers of the Federal Parliament, which makes the Court a rather peaceful unit, because there are no elections in the Court, and nobody has to be nice, or lobby, to be elected President. Instead, much is defined and decided from outside, by Parliament.

Beyond such rules, there are the informal traditions that matter. As soon as you come in, as a justice, you have a say, and you are an equal. You can be a former politician or a lawyer, but the minute you enter the Court, our culture matters, and it says you start acting as a justice. You are not a political actor anymore, you have to observe the secrecy of deliberations, you have to be loyal to the institution, defend it wherever you are, and you have to work together, you depend on consensus, and have to anchor your arguments in the law.

This does not make you a non-political actor, but a justice, each and everyone with a specific perspective. You have been appointed by politicians, but now you are fully geared towards compliance with the law. Just imagine that post-1945 Germany was in shambles and wanted to build a Court that protects democracy and fundamental rights. It was, and it is, key to be a legal institution, not a political one. And to make sure that happens, there is a context in which the Court is closely watched, by qualified media, but even more so by legal academics. We get feedback on the doctrinal consistency of everything we ever say. This is a very important moment of control, in addition to the public deliberative control of what we do.

There are more aspects of German constitutionalism that matter. Different from some other countries, we are no pop stars. Nobody would ever recognize me in the street. Also, we are not super-well paid. The Court negotiates its budget directly with Parliament, which makes us independent, but also motivates us to not spend to much. But independence is key, because there is nobody who has disciplinary power over us; this power rests with the Court alone. If I do something outrageous, my colleagues can kick me out. But no one else can. Overall, we are not seen as individual superheroes, but as a body, a collective, an institution. This gives the proper context to our rulings.

Konrath: This has been very interesting. Both of you have managed to convey the spirit of your respective courts. Would you like to add something, Prof. Grabenwarter?

Grabenwarter: Your question implies that you do not really expect any contradiction, and you are right at this point. I would just like to emphasize a few things that are slightly different from an Austrian perspective.

Let me start with a slight difference regarding terms of office: As you mentioned, our system does not have a specific term of office, such as nine or twelve years. There is only the age limit of 70 years. That means that the change of judges is not as dynamic as in the German system. In Austria, the de-facto average term of office on the Court is twenty years, considerably shorter than in the United States, for example, but still longer than the term of office in most European constitutional courts. I agree that this is a system where you do not see so many new faces on the Court.

The example of Poland shows us that a longer term of office is a guarantee for more stability. Most of the judges have been replaced by the current majority in Parliament since 2015. In Hungary, even without the increase of the number of justices, all justices would have been nominated by the current government by now. Moreover, the Hungarian government had a two-thirds majority for most of the time during the last decade.

Besides a two-thirds majority, another element to guarantee a good composition of a court is the involvement of different powers or bodies. The comparative ECPRD Report[2] shows quite well how that can be done. Interesting examples of involving the judicial power can be found in Portugal and in Italy.

I would like to underline another point Susanne Baer has made. We have rules in the Constitution, but what is at least as important is political culture when it comes to the appointment of justices. In many countries there are three elements that are decisive in this context. These elements should be considered in assessing the quality of the composition of a constitutional court: first, plurality or diversity on the bench.
The second element is being very strict about qualifications. Our Constitution in Austria, for instance, provides for ten years' experience in a legal profession. Theoretically, as we do not have a minimum age of 40 as in Germany, that would mean that you could become a constitutional judge at the age of 32 or 33. We have seen such examples at the European Court for Human Rights when some member states had nominated very young judges, which has been very problematic. The culture of nominating judges must aim to find persons who are established in the legal world, who enjoy authority, be it as judges or as practicing lawyers, for example.

The third cultural element which is very important is consensus in the election process. In Germany the culture even goes beyond that. The election bodies in Parliament may well look for a female Catholic person from the southwest of Germany. I am exaggerating a little bit, but what I would like to say is that even religion can be important in the election process.

To underline this and to give an example showing the development in the United States: Ruth Bader Ginsberg died a few weeks ago. In 1993 she was elected in the Senate by a majority of 96:3. Amy Coney Barrett followed her on the bench, she was elected by a majority of only 53:47. In order to maintain the authority of the Consti-

2 | Draft Final Summary on the replies to the Austrian ECPRD Request No. 4503 on Parliaments and Constitutional Law – Parliaments and Constitutional Courts (November 2020).

tutional Court, even a party in the majority should aim at broad support for its candidate. So, I think both of us are expressing very much the same opinion here.

Konrath: You said it is very important that members of a constitutional court enjoy a certain authority. Yesterday especially our Finnish, Swedish and Greek colleagues said that authorities should be consulted in the legislative phase as this makes for better legislation. In Finland, for example, the Constitutional Chamber organizes hearings on difficult constitutional questions.
You, too, have such difficult questions in your courts, involving minority and majority groups. You have to decide very difficult ethical questions. For example, the German Federal Constitutional Court had to rule on the right to assisted suicide last year. Such cases are pending before the Austrian Court as well. When you think about such decisions, what is your approach?

Some people would say this should be left to parliament, not to a court decision. Can you say something on this? It is very interesting for those participants who do not have a constitutional court or whose constitutional review is very much restricted, as in Norway.

Baer: These are very hard and interesting questions. Many countries have experimented with the answers. And this resulted in what I call varieties of constitutionalism, including different institutional arrangements. The crucial question is: who protects the Constitution when deciding political issues? This is not an either-or question. From the German point of view, it is a question of a dialogue, of a shared commitment.

The idea is, thus, divided and shared responsibility. Politicians and parliaments have the first say, and they are proactive actors. Parliament can choose what issues to address and in what way. And they have a way of assessing tricky issues. However, the risk is, since democratic policies are driven by properly elected majorities, that majorities may use their power to exclude the political opposition, or leave minorities behind. Then, someone has to step in to safeguard their rights. This is the role of the Court.

Thus, someone has to make sure that even in a working democracy, the power of the majority is not abused to silence the opposition, to also ensure that this opposition can eventually become the majority. This is the very idea of democracy, and again, you need an institution that makes sure it works. Similarly, majorities pursue their interest, their moral beliefs, their priorities. This is fine, as long as no one is harmed along the way. The German idea regarding our institutional function in democracy is to make sure there is no such harm, as well. So when majorities decide issues like lockdown measures against the Corona pandemic, someone has to make sure that they do not do it at the expense of fundamental interests of people who do not have that kind of influence. Everyone deserves equal rights. Who safeguards that outer limit of political decisions? For Germany, this is the description of our Constitutional Court.

In Germany, there were times in history when some people did not count. We do not want to have that happen again. This is a priority for our Parliament. And this is the commitment of the Court. We often refer to room for decision-making, room for compromise, to allow for better solutions. But we also step in when that fundamental promise is broken.

As such, there is a very dialogue-oriented relationship between Parliament and the Constitutional Court. We are not proactive, never picking the issues. But we are a backup, a safeguard, the last resort. The Court hardly ever declares a law unconstitutional. But it is still important to tell the people who come to us that someone has checked whether everything is okay. This is a very important function, even if the complaint is not successful. This checking function is first, and the second one is that we remind the legislatures not to forget about fundamental rights and an open democratic process. There, too, the Court has a backup function.

Konrath: Here I can add something from our particular experience: When we, the Legal, Legislative and Research Service of the Austrian Parliament, are asked to give an opinion on a specific legal problem, the President of the National Council, or party group experts, will immediately ask whether the Constitutional Court has spo-

ken on the matter. If so, everything might be settled at once.

Grabenwarter: This is a fundamental issue: In Germany and Austria we had these debates in the 1920s, and it was a very harsh debate between two protagonists, Kelsen and Schmitt. We are following Hans Kelsen today, in particular his very important book on The Nature and Value of Democracy (Wesen und Wert der Demokratie). He developed the theory for our Constitutional Court and the idea of a constitutional court as a prerequisite for an effective constitution.

I want to come back to my first remark, and Susanne Baer has referred to that already: a Constitutional Court protects the minority against the majority. The majority in Parliament does not need a Constitutional Court in order to turn ideas into laws. It is the minority that needs the protection of such a court.

Although a Constitutional Court deals with political issues, it always deals with those issues by means of the law and the constitution. The principle of equality is a good example. The legislature is free in setting certain goals within the framework of the constitution, but it has to maintain the principle of equality. What a constitutional court does in much of its work is to check whether this is consistently done, to look at the legislature's goals and see whether the provision in question is in line with these goals.

It is important, and becoming ever more important, that we now have several relevant provisions in place, such as the prohibition of inequality at European level. We have a constitutional principle of equality in place in all member states of the European Union. Bringing these principles of equality together is an important task for the courts.

Proceedings before the Constitutional Court are also very important. Both a minority in Parliament and an individual applicant have equal standing, with the government defending the legislation in question. In our Court, we have sometimes found that

there had been a lack of political debate in Parliament because something had been fast-tracked through Parliament without the proper procedure for government bills. It was only before the Constitutional Court that arguments were heard properly for the first time.

Now let me come to another point Susanne Baer has addressed: Constitutional Courts having the final say. This is the case when there is no need to enact new legislation following the Court's decision. But the Austrian Constitutional Court quite often declares something unconstitutional, in particular when it comes to the principle of equality. The legislature then passes new legislation, and there is room for manoeuvre for it to decide. For example in tax law, when one group is discriminated against vis-à-vis another group, Parliament can reduce taxes for the first group or increase taxes for the second group.

It has rightly been pointed out that whatever the Constitutional Court has said in its decision must be respected. This is just a footnote on what is meant by "the last word, the final say".

Konrath: You both have managed to give us a comprehensive introduction to the theory and practice of constitutional courts. I just want to give the participants the chance to post short questions to our panellists. We have a question from Canada.

Brideau: Thank you very much for the presentations. Could you provide some examples and comment on recent, or not so recent, constitutional court interventions which had significant implications? And also on the process which the constitutional court follows in those interventions?

Baer: As one example, the Canadian Constitutional Court works in a similar manner, regarding the application of proportionality, procedures, and fundamental rights. Regarding interventions, I could point to a recent challenge. The case is "triage".

Here, people with disabilities and chronic diseases are afraid that they will not be treated fairly in hospitals that are under immense pressure by the Corona pandemic, because their life expectancy may be considered lower. In legal terms, they are afraid of discrimination. But this is also a serious problem of medical ethics for doctors. And the question of who gets treated when there are not enough intensive care units is a question for many. Now it has been brought before the Constitutional Court. Our task is to respond in a procedure where everybody is heard: the medical people, the minority, the majority, etc. Therefore, we have sent out requests to all of those concerned to state their perspective, to get as much information as possible. Certainly, we have also asked Parliament to respond.

Then, we have to base our response to the challenge on the law. I always carry the Constitution with me. My argument needs to be anchored in legal text. Of course, I have personal opinions, preferences, morals, politics. But as a Justice, I have to base my arguments only on the law.

In addition, supreme and constitutional courts are designed so that no-one ever decides alone. In the German Court, I always have to consult with and convince my colleagues on the bench. Some rather conservative people, some religious and some not, older and younger, etc. There is at least some diversity. So I have to find arguments which are convincing to those who are not in my camp, naturally, and write a ruling which will later on be acceptable to society at large. Finally, as a court we will never give the final answer to this question. But we will define what the Constitution allows or obliges Parliament to do.

Again, the Court needs to define the outer limit, so to say. This always also means creating space for politics, in redefining how and where Parliament can act. Even regarding a very tricky bioethical question like triage, it is a shared commitment. I hope this answers your question.

Konrath: Thank you very much. This is an excellent conclusion to the seminar.

Abbreviations

cf.	compare ('confer')
CPP	Committee on Procedure and Privileges
e.g.	for example ('exempli gratia')
ECHR	European Convention on Human Rights
ECPRD	European Centre for Parliamentary Research and Documentation
Eds.	Editors
EEA	European Economic Area
EIA	Environmental Impact Assessment
et al.	and others ('et alia')
et seq.	et sequentia
etc.	et cetera
EU	European Union
i.e.	that is ('id est')
IBRC	Irish Bank Resolution Corporation Limited
IG	Instrument of Government
MK	Member of Knesset
MP	Member of Parliament
MPs	Members of Parliament
No.	Numero
p.	page
PAC	Committee on Public Accounts of Dáil Éireann
para.	paragraph
pp.	pages
Prof.	professor
QPC	question prioritaire de constitutionnalité
RA	Riksdag Act
RoP	Rules of Procedure
RTÉ	Raidió Teilifís Éireann (Irish national broadcaster)
s.	section
UK	United Kingdom
USA	United States of America

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