CONSTITUTIONAL COURTS COMPARED; HOW POLITICAL ARE CONSTITUTIONAL COURTS?

A qualitative study about the political nature of constitutional courts and the implications for the government reform discussion in the Netherlands.

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Our political life rests on the assumption that we can produce equality through organization, because man can act in and chance and build a common world, together with his equals and only with his equals. The dark background of mere givenness, the background formed by our unchangeable and unique nature, breaks into the political scene as the alien which in its all too obvious difference reminds us of the limitations of human activity – which are identical with the limitations of human equality.

Hannah Arendt in The Origins of Totalitarianism (1951).

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Summary

Between 2005 and 2019, Dutch authorities wrongly accused many parents of childcare benefit fraud, reigniting an ongoing debate about government reform. Part of the discussion about government reform is the potential introduction of a constitutional court. In some countries, judges cannot strike down acts of Parliament or Congress because they violate the Constitution; in other systems, this is a normal part of political decision-making. Currently, article 120 of the Dutch Constitution prevents judges from reviewing the constitutionality of acts of parliament, although this is mitigated because Dutch judges can use international law, such as the European Convention on Human Rights. One of the main arguments against introducing a constitutional court is that such a court will become political. To contribute towards the discussion about government reform, this thesis explores the following research question:

To what extent do the constitutional courts reflect (elements of) political decision-making, and how can this be explained by characteristics of the courts or characteristics of the issues they deal with?

The main hypothesis of my literature review is that political polarisation and a transparent appointment procedure of the constitutional court contribute to politicising constitutional courts. There are many different constitutional systems around the world. There are significant divergences in how different countries appoint constitutional court judges. To test my hypothesis, I conducted six case studies. I have selected two countries where the executive power is responsible for appointing judges to the constitutional court, two where the legislature power is responsible, and two where the judiciary power is responsible. Per power, one of my selected cases has a high level of political polarisation, and one country has low levels of political polarisation.

In India, the Supreme Court is responsible for its appointments. Although the Indian Supreme Court has great power, it has failed to address recent democratic backsliding. In Canada, the governor general appoints Supreme Court judges on the prime minister's advice. The Canadian Supreme Court is an independent institution that regularly rules against the government. Still, judges are sometimes viewed as close to the ruling federal government because of the appointment procedure. In Germany, judges to the Federal Constitutional Court are appointed by a two-thirds majority of parliament. The Federal Constitutional Court enjoys high public trust and receives many constitutional complaints from citizens who think their constitutional rights are infringed and want the court to investigate. The two-thirds majority means that de facto centrist parties rotate nominations. The Polish Constitutional Tribunal used to be an independent court where an ordinary majority in parliament appointed judges. A populist government used political hardball and illegal tactics to bring the court under direct government control. Similar hardball tactics can be seen in the United States, where Supreme Court judges are nominated by the president and confirmed by the Senate. This required a supermajority in the past, but increased polarisation led to the Senate using an ordinary majority nowadays. The Supreme Court has always been a political actor, but the increased polarisation brought it closer to party politics, especially on controversial issues such as abortion and gun laws. A Constitutional Court was introduced in South Africa when it became a democracy in the 1990s. In South Africa, many political and social actors are responsible for appointing judges in the Constitutional Court. The South African Constitutional Court is a strong institution that safeguards democracy and the rule of law when facing social problems such as inequality and crime.

In conclusion, constitutional courts can safeguard democracy and the rule of law, but they are not infallible. Non-majoritarian institutions are political because they make decisions but should not be party-political. If political polarisation and/or weak institutions allow the court to be affiliated with or even captured by partisan politics, constitutional courts can threaten democracy. Therefore, a hypothetical Dutch constitutional court should have a clear constitution and a non-majoritarian or supermajority appointment procedure.

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List of Abbreviations

ABRvS	*Afdeling bestuursrechtspraak van de Raad van State* (highest administrative court in the Netherlands)
ANC	African National Congress
BVerfG	German Federal Constitutional Court (*Bundesverfassungsgericht*)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
GW	Dutch constitution (*Grondwet*)
HDCC	Hypothetical Dutch Constitutional Court
PiS	Law and Justice (*Prawo i Sprawiedliwość*) Polish political party
PO	Civic Platform (*Platforma Obywatelska*) Polish political party
SCC	Supreme Court of Canada
SCOTUS	Supreme Court of the United States of America
TEU	Treaty on European Union
US	United States of America
ZA	South Africa

Chapter 1. Introduction

In this chapter, I will discuss the background of my master's thesis. I will also introduce the child benefit scandal and how it reignited the Dutch debate about government reform. The potential introduction of a constitutional court is part of this broader debate about government reform. At the end of this chapter, I will introduce my main research question about the political nature of constitutional courts.

There is a recent discussion in Dutch politics about the relevance of constitutional judicial review. The recent debate and attention in society, politics, and the media originates from a "child-care benefit" scandal that culminated in the Dutch cabinet stepping down in January 2021. Between 2005 and 2019, Dutch authorities wrongly accused 26.000 parents of childcare benefit fraud. Families often had to pay back tens of thousands of euros, driving many into financial hardship. This scandal has reignited the debate about institutional reform in the Netherlands because many people got into trouble because of bad policy. Part of this discussion focuses on the failing role of the judiciary; a 2021 report from the judiciary itself argued that (Bazuin et al.) "Without wishing to comment on individual judicial decisions, the committee notes that the administrative judiciary has also made a substantial contribution for years to maintaining a not legally mandatory strict implementation of the childcare allowance regulations. The committee is particularly affected by the explanation in October 2019 of general principles of good governance, which should serve as a cushion and protective blanket for people in need). The highest administrative court of the Netherlands (ABRvS, 2021) was critical of its actions in the childcare benefit scandal. The argument was that the court followed the "all or nothing" approach of the government, meaning that parents had to repay childcare allowance advances in full if they could not prove payments or only partially. The strict interpretation of the law protected the unity of law but prevented adequate legal protection, neglecting its essential function of (legal) protection of individual citizens. The childcare benefit scandal reignited a discussion about whether the legal protection in the Dutch legal system is adequate.

Article 120 of the Constitution forbids judges from reviewing acts of parliament on their constitutionality. Judicial review is when a court declares a law or act of government invalid because it conflicts with a higher law. The Netherlands and the United Kingdom are currently the only member states of the Council of Europe that do not have (Mazák, s.d.) a form of constitutional review of acts of parliament. In the Netherlands, this ban only applies to acts of parliament vis-à-vis the constitution. Dutch judges can test all laws, including acts of parliament, against treaties. An example in the Netherlands is the ruling of the Dutch Supreme Court in the case of the Dutch state against the Urgenda Foundation in 2019. The ruling stated that based on the Paris Climate Agreement and the European Convention on Human Rights (ECHR), the Dutch state must reduce carbon emissions by 25% in 2020 compared to 1990. In such a case, parliament is too divided to make choices. Citizens submit these problems to the judiciary (ABRvS, 2019). The judge makes a ruling and is criticised for being political and taking the seat of parliament. The childcare benefit scandal has reignited the discussion of whether the Netherlands should change Article 120. The Venice Commission (2021) argues that it would not be clear that without Article 120, the "child-care benefit" scandal would have been prevented. The Venice Commission (2021) argues that "introducing constitutional review should not be considered as a quick fix but should be based on a profound analysis of the protection of the rights in the Dutch legal system and its institutions".

The last decades saw many developments; many countries introduced European constitutional courts. Judges were expected to be a "bouche de la loi", a mouth of the law which should review the legality of the law. In the 20th century and the early 21st century, many European countries have adopted systems

where judges can test laws on their constitutionality; these institutions vary widely. Heringa argues that in 2021, most European countries used to have a system without judicial review of acts of parliament. Germany and Italy introduced constitutional courts after the Second World War, with the memory of fascism still fresh. The constitutional council was formed in the French Gaullist 5th Republic to protect the president from an overzealous parliament. Belgium created a constitutional court when it changed from a unitary state to a federal state.

The Netherlands is close to adopting a form of constitutional judicial review; the prospective government wants to introduce a constitutional court to protect fundamental rights. By analysing how other countries function, this thesis can gain insights contributing to a deeper conversation regarding article 120 and the broader scope of institutional reform. There are two forms of judicial review. In a decentralised review system, any court can check the constitutionality of laws against higher laws (Heringa, 2021). A special court or judicial body exclusively performs constitutional judicial review tasks in centralised review. Among proponents of abolishing or amending Article 120, there is disagreement on whether constitutional judicial review should be centralised or decentralised (Hennekens, 2022). The Rutte IV cabinet argued (Bruins Slot & Weerwind, 2022) that it favoured the introduction of constitutional judicial review and opposed the introduction of a separate constitutional court. To limit the scope, this thesis focuses only on systems with central review, in a constitutional or supreme court. The discussion about Article 120 is as old as the modern Dutch constitution[1] (GW). Thorbecke (1916), who is regarded as the father of the modern Dutch constitution, was critical of this phrase because it, in his opinion:

- It breaks the unity of legislation;
- The constitution would cease to be a constitution because acts of parliament can overrule it;
- Parliament, whose legitimacy originated and derives its right only from the Constitution, would be placed above the Constitution.

In 2023, MP Pieter Omtzigt proposed introducing a constitutional court capable of judicial review. He argues that by lacking constitutional judicial review, the Netherlands places itself on the same list as countries such as Iraq, Cuba, Saudi Arabia, and North Korea, countries with dubious human rights records. In the Netherlands, judges are not allowed to review acts of parliament on their constitutionality. However, they can review their compatibility with treaties such as the European Convention on Human Rights (ECHR). Constitutional judicial review has also met with opposition and critique. Opponents of the introduction of constitutional judicial review argue that a democratically elected parliament, and not unelected judges, should have the final say regarding the constitutionality of laws. These opponents point to the risk that the introduction of constitutional judicial review might lead to a politicisation of the judiciary and that this politicisation is unwanted. In this thesis, I want to investigate the value of one of the most essential counterarguments against constitutional judicial review, that increasing the political power of the judiciary politicised the judiciary. Critics argue that introducing constitutional judicial review and/or a constitutional court can lead to judges interfering with topics that parliament should handle. These critiques often point towards the constitutional courts of other countries. Given the current discussion in the Netherlands, this thesis aims to answer the main research question:

To what extent do the constitutional courts reflect (elements of) political decision-making, and how can this be explained by characteristics of the courts or characteristics of the issues they deal with?

[1] In Dutch "*Grondwet*", abriviated to GW

1.1 Sub questions

2. What can we learn from the theoretical and empirical academic literature about the political nature of constitutional courts? What expectations about the impact of issue characteristics and institutional characteristics of the courts on the level of politicisation can we formulate based on this literature?

3. A. How does decision-making within constitutional courts occur regarding rules and competencies and a substantive issue? This sub-question will be addressed in chapter 4.

   B. How does politicisation materialise in different constitutional courts? This sub-question will be addressed in chapter 4.

4. To what extent can we explain the variation between the six cases from characteristics of the constitutional courts and/ or characteristics of the issues? This sub-question will be addressed in chapter 5.

5. What does this mean for a potential introduction of constitutional judicial review in the Dutch legal system?

Chapter 2. Theoretical framework

This chapter examines the theory and empirical research of several constitutional systems. The literature on the politicisation of constitutional courts has several themes, topics, and hypotheses that can be distinguished. Substantial research has focused on the U.S. constitutional system. Shepsle (2010), for example, is an American political scientist who pioneered rational choice theory in political science, including judicial decision-making. For the U.S. constitutional system, empirical datasets are available with much information about, among others, the political preferences of supreme court judges (e.g., www.FiveThirtyEight.com; see also Thomson-DeVeaux & Fuong, 2023). Less empirical data is available for other constitutional systems, and fewer academic studies have been published.

This master thesis aims to answer the research question, "To what extent do the constitutional courts reflect (elements of) political decision-making, and how can this be explained from characteristics of the courts or characteristics of the issues they deal with?" Ferejohn argues (2002) that in Germany and Italy, the legislature failed to prevent a fascist takeover. As a result, many European constitutional systems have introduced judicial review in the second half of the 20th century. Ferejohn argues (2002) that most left-of-centre European politicians opposed judicial review before the Second World War. Traditionally, these left-wingers viewed American-style judicial review as antimajoritarian, an attempt to entrench property rights.

2.1 Separation of powers

The legislature can set binding standards. Ferejohn (2002) defines legislative power as the ability to set binding norms. One of the main arguments favouring judicial review is that courts can be trusted to protect against legislative and executive abuses of power. The separation of powers and the rule of law are crucial to democracy (Del Llano, 2022). When the judiciary is politicised and acts partisan politically, the separation of powers and the rule of law are called into question. Judges should be independent, impartial, and honest and not be instruments of political power. The rule of law is fundamentally more than just formal legality and must protect the rights and freedoms of citizens. Del Llano (2022) argues that appointments based on political conviction endanger the independence of the judiciary. Judicial ethics and ethical codes must ensure that the judiciary remains an impartial, honest, and independent institution.

A recurring theme in the academic literature on judicial review and the politicisation of constitutional courts is the idea of judges as a mouth of the law, known by its French naming of "Bouche de la loi". Montesquieu held the option that the legislature should be separated from the judiciary to prevent arbitrary rules (Ferejohn, 2002). Montesquieu argued that the judge should be the "mouth or mouthpiece of the law". Musella and Rullo (2023) argue that the bouche de la loi is a myth. The other papers analysed do not mention the bouche de loi. People look for ways to tackle societal problems. (Hasan, 2019 & Ferejohn, 2002) If the legislature cannot make effective decisions because of polarisation and/or division, stakeholders will seek other institutions that can offer solutions, such as the judiciary. A more divided parliament leads to more choices being made by judges.

Munger wrote a reaction to Ferejohn's "Judicializing Politics, Politicizing Law" in 2002, analysing the legislative power of the judicial branch of the U.S. federal government. Ferejohn defines legislative power as the ability to set binding norms. Munger (2002) argues that Ferejohn's article is mainly used on legal arguments and lacks input from political science. Munger introduces a matrix shown in Table 1. When is it appropriate for courts to legislate? Munger (2002) argues that courts should be able to generate binding norms when appropriate and unable to exercise power in inappropriate areas. There

is a proposed dilemma that a court has or does not have legislative power. When it is appropriate for courts to interfere with the legislation, it is, to a certain extent, a subjective question (Heringa, 2021); in one system, it might seem normal or even natural, while in another system, the judicial review of legislation is an alien concept. Ferejohn's dilemma is that a court might have too much or too little power. There are three parts to Ferejohn's contribution:

1. Legislation can happen anywhere in government. If the legislative branch is too divided to make laws, executive orders and case law should solve social problems.
2. The justification of politics.
3. An increase in the power of courts.

Munger (2002) further argues that when courts get more legislative power, it might undermine the nature of the judiciary itself. Munger (2002) introduces Table 1 when he thinks it is appropriate for the judiciary to interfere with legislation.

Table 1: The dilemma of judicial legislation: too weak or too broad? Munger (2002)

Does the court have the power to legislate?	Is it appropriate for the court to legislate?	
	Yes	No
Yes	Court exercises power by generating binding norms in areas appropriate for such exercise: GOOD.	Court exercises too much power in areas inappropriate to such exercise: BAD.
No	The court is so weak that it cannot exercise legislative power even in areas where it would be appropriate: BAD.	The court is unable to exercise power outside of appropriate areas: GOOD.

2.2 Courts under pressure

2.2.1 Politics becomes legal, and legal rulings become political.

The U.S. has two major political parties, the Democrats and the Republicans. Bonica and Sen (2021) argue that decisions by Supreme Court of the United States (SCOTUS) justices and other U.S. judges determine, shape, and/or break policy whether they like it or not. Today, ideology is a critical factor in judicial behaviour in the US. Bonica and Sen (2021) distinguish different methods to measure the political ideology of judges:

- Pre-confirmation newspaper articles;
- Voting patterns;
- Measures based on appointments;
- Estimating judicial ideology using campaign contributions;
- Text-based analysis.

The federal judiciary in the U.S. has polarised over the last decades. In the past, it was common for a president to appoint a SCOTUS justice who was not necessarily aligned with their ideology. For example, Byron White was a justice who was appointed by democratic president John F Kennedy but held a

(minority) opinion against the right of abortion in Roe vs Wade. Nowadays, the polarisation of American politics means it would be difficult to imagine a president appointing a judge who does not fit in with their political ideology. Before the 1990s, there was a significant overlap in the voting pattern of judges appointed by democratic and republican presidents. Still, during 2018 and 2019, SCOTUS was divided among the political colour of the president who appointed them in around 10% of the cases (Bonica & Sen, 2021); this implies that in most cases, the justices do not act as partisans in robes. When SCOTUS justices provide uniformity and federal supremacy through unanimous or near-unanimous decisions on important questions of federal statutory or constitutional law, it is fair to view the Court as doing law, not politics. The same applies when lower court judges faithfully apply existing precedents to legal questions. However, the same cannot be said if the court shows strong divisions based on the political colour of the president who appointed them.

Partisan politics has always played a role in selecting federal judges in the US. Historically, partisan politics was mediated by an emphasis on judicial qualification and a need for bipartisan support in the Senate. Bonica and Sen (2021) use a database on Ideology, Money in Politics, and Elections (DIME). They estimate the ideology of judges by looking at the financial contributions made before being appointed. Federal judges are not allowed to make political contributions, but this does not apply to candidates aspiring to become federal judges. Bonica and Sen (2021) look at the financial contributions of candidate judges to political campaigns. The assumption is that Democratic candidates will make contributions towards progressive causes and Republican candidates will make contributions to conservative causes. A comparison of the distributions of recent and previous governments shows a general trend of ideologically motivated judicial selection. Bonica and Sen (2021) argue that the federal judiciary in the U.S. has become more polarised since the Carter era.

2.2.2 Judicial politicisation

Many political systems have ways of keeping extremists from power. Party elites act as gatekeepers. In multiparty systems, it might be tempting for mainstream parties to work together with extremists from their flank as opposed to the mainstream parties on the other side of the political spectrum. However, it would be better for democracy if democratic parties worked together when faced with a threat to democracy (Levitsky & Ziblatt, 2018). Democracy needs checks and balances and robust norms to prevent institutions from being undermined. One method a would-be autocrat would use is to gain control of the government and pack[2] and weaponise institutions such as courts, public broadcasting, and other neutral institutions. Levitsky and Ziblatt (2018) argue that norms and rules are essential to protect democratic institutions and prevent things such as courts from being packed. Norms would be unwritten rules that influence political decision-making. For example, the United Kingdom has no written constitution. Instead, centuries of traditions and acts of parliament are the unwritten British constitution. In a healthy democracy, different political parties recognise that they have different political views but endorse constitutional rules of the game. Traditions and culture sometimes are more important than the law. This thesis defines a commitment to "unwritten democratic rules" defined by Levitsky and Ziblatt (2018). As a result of democratic backsliding in the U.S. under the Trump presidency, Levitsky and Ziblatt (2018) distinguish four indicators of would-be authoritarians:

1. Rejection or weak commitment to the democratic rules of the game.
2. Denial of the legitimacy of political opponents.

[2]. Court packing is a process by which a government appoints new judges to a court to obtain rulings that are more favourable to government policy.

3. Toleration or encouragement of violence.
4. Readiness to curtail civil liberties of opponents, including media.

The (increased) politicisation of constitutional courts is a two-way street. Suppose there is a very political constitutional court. In that case, this very political constitutional court will also lead towards a judicialisation of politics because laws and policies need to be framed so that judges will not strike them down or interpret them in another way as was meant by the legislative (Ferejohn, 2002). The legislature has not been obligated to elaborate on why it wants to enact legislation and/or change policies compared to the executive and judicial branches; the legislative just needs an adequate majority of votes. Munger (2002) argues that in the US, the Lopez-Morrison-Garret cases of SCOTUS led Congress to emphasise the reasoning behind their legislation (Munger, 2002). Politicisation happens when judges strike down laws because the reasoning is not sufficient. As a result, the legislative branch will use more legal reasoning to prevent their laws from being declared in conflict with higher laws. Politicisation of the judiciary and justification of other branches of government are two-way streets; one will eventually lead to the other.

In the Netherlands, no strong laws protect an independent appointment procedure of judges (Graaf, 2023). Dutch judges are independent and trusted by most of the public. However, the appointment procedure for judges in the Netherlands is not very transparent and has few safeguards. The government appoints judges based on advice from the judiciary itself. Most safeguards in this process are not constitutionally protected but consist of Acts of Parliament, traditions, and informal norms.

Weiden (2010) writes an article on the ideology and judicial activism of the constitutional courts of Australia, Canada, and the U.S. The definition Weiden (2010) and this thesis use for judicial politicisation is the role of ideological and attitudinal factors in court cases. He argues that activist judges are likelier to strike down legislation that does not align with their ideology, while less politicised judges look at more legal factors. The theoretical framework that Weiden (2010) proposes is that the political selection mechanism of judges affects politicisation within the judiciary, leading to more ideology-driven cases. When you compare the US, Australia, and Canada, you can see that in the US, the process of appointing judges to the Constitutional Court is much more transparent than in Australia or Canada, but that SCOTUS is more politicised than their Australian and Canadian counterparts. Weiden (2010) argues that of the three countries analysed, the U.S. has the most politicised constitutional court and Canada the least, with Australia in between.

Hypothesis 1: Political culture in the form of unwritten norms has a larger impact on the function of constitutional courts than institutional aspects such as appointment procedure.

2.3. Appointment procedure

Judges became more powerful throughout Europe and the Americas in the second half of the 20th and early 21st centuries. In the US, the federal judiciary has become more active in enforcing “deliberate requirements” in congressional action. This results in the courts gaining more influence in legislative decision-making (Ferejohn, 2002). This increased judicial power led to appointing judges becoming a partisan political issue. The political aspect of court appointments is, to a certain extent, inevitable because courts need to have a form of (indirect) democratic legitimacy. Democracy and the rule of law are symbiotic concepts but can sometimes conflict. It is worrisome when courts become politicised in a partisan sense because partisan majorities shift. Munger (2002) argues that the law became more politicised in the U.S. because of the debate about appointing judges. When courts become more

powerful and influential, that power gets recognised by political groups, who see courts as a way to gain and/or increase their political influence. In most democracies, citizens have far less influence on the judiciary than on the legislative. Parliaments or Congresses have elections every few years, while judges often serve for life.

Ferejohn's (2002) theory argues that courts engage in political decision-making. Political actors such as citizens and organisations have interests in these decisions. Therefore, there is an interest in deciding the appointments in the court. As an American, Ferejohn admires Europe, where most constitutional court appointments have supermajorities in parliament instead of an ordinary majority in the senate and a single term as opposed to a life term and thinks this leads to less politicisation. European constitutional courts might be just as political as their American counterparts, but they are less partisan political. An appointment by an ordinary majority in a two-party system can lead to judges being appointed who are affiliated with the ruling party. An appointment by a supermajority typically leads to candidates with support from a part of the opposition. The opinion of individual SCOTUS justices generally is public. Meaning that everybody knows broadly where the balance of power lies within the court. In most European countries, the constitutional court deliberates in secret. It might very well be that, just as across the Atlantic, a minority of judges disagree with a ruling, but this is only known within the court. Therefore, interest groups have less idea of what is happening and whom to influence.

When analysing different constitutional courts, one can distinguish several ways countries appoint judges in high or Construction of court. In some systems, the judges are appointed by the court itself or by the council of the judiciary. An example is India, where the Supreme Court case law states that a part of the court itself is responsible for appointing new members. In some countries, these judges are appointed by Parliament or Congress. An example of this includes Germany, where half of the judges of the federal constitutional court are appointed by the Bundestag[3] and half by the Bundesrat, both using a two-thirds majority. In some states, judges in high courts are appointed by the executive. For example, in Canada and Australia, the governor general appoints high court judges on the prime minister's advice. In some countries, judges are appointed by a mix of the executive and the legislative branches of government in the U.S. Supreme Court, which is appointed by the president and confirmed by the Senate. In France, the president, the speaker of the national assembly, and the speaker of the Senate each appoint one-third of the judges on the constitutional council. In some countries, all three branches of government play a role in appointing judges in high or constitutional courts. In Italy, the president, parliament, and the courts appoint one-third of the constitutional court judges.

<u>Hypothesis 2: Constitutional courts appointed with a qualified majority in Parliament or Congress are less partisan political than constitutional courts appointed with an ordinary majority[4].</u>

2.4 Escalating polarisation undermines trust in the judiciary.

The polarisation in society and politics affect the judicial system (Hasen, 2019). First, polarisation affects judicial selection, whether the selection method is (sometimes partisan-based) elections or appointments by political actors. In times of greater polarisation, governors and presidents who nominate judges, legislators who confirm judges, and voters who vote on judicial candidates are more apt to support or oppose judges based on partisan affiliation. Second, driven in part by selection mechanisms, polarisation may be reflected in the decisions that judges make, especially on issues that divide people politically, such as in the U.S., abortion, guns, or positive discrimination. SCOTUS, for

[3] The Bundestag and the Bundesrat are the two houses of the German parliament

[4] An ordinary majority means that more than half of the members of a body agree with a proposal. The opposite of an ordinary majority is a supermajority, such as the two-thrids majority in parliament, which is required to amend the Dutch constitution.

example, is often divided along party and ideological lines in the most prominent and highly contested Cases. Those ideological lines now overlap with the party as we enter a period in which Democratic presidents have appointed all the Court liberals, and Republican presidents have appointed all the Court conservatives. Third, increasingly polarised judicial decisions are causing the public to view judges and judicial decision-making (at least on SCOTUS) through a more partisan lens. Fourth, polarisation may affect the separation of powers by empowering courts against polarised legislative bodies sometimes paralysed by gridlock.

2.5 Two models of legal decision-making

Two models of judicial decision-making can be distinguished (Hasan, 2019). In the attitudinal model, judges view and decide on cases in line with their preferences. In the strategic model, judges act as rational actions constrained by institutional factors. The political polarisation in the U.S. is not going away, and a way needs to be found to deal with the influence of this polarisation on the judicial system. According to Hasan (2019), judges in the U.S. are not partisans in robes, but political polarisation has affected the judiciary. To find an answer to the polarisation, Hasen (2019) recommends further research on the procedure of judicial selection and partisan behaviour and the effect of polarisation on the trust in the judiciary.

2.6 Intensity of use of concurring and dissenting opinions.

In the Dutch legal system, judicial rulings always reflect the opinion of a majority of the court; this is common in most civil law systems. In common law systems, there is a much stronger emphasis on case law. Many high courts in the Anglo-Saxon world and the ECHR judges can give a minority opinion. If a judge's opinion contradicts that of their colleagues, he/she can write it down in a dissenting or concurring opinion. A dissenting opinion is a reasoning where a minority of the court views the majority ruling as incorrect. In that case, the judge explains why he disagrees with most of his colleagues. A concurring opinion is a judgement where a minority of the courts agrees that the case's outcome is correct but argues that a different type of reasoning should have been used.

There are arguments in favour and against the use of dissenting and concurring opinions. When dissenting and concurring are used, the public might guess individual judges' personal and academic perspectives. This can increase the social and political interest in sensitive court cases. Proponents argue that using dissenting and concurring opinions is more transparent towards citizens. Opponents counter that transparency is a trait of legislative processes, and internal discussions within executive government organs are typically not public. Judges should be able to speak their minds towards their colleagues without being attacked by the outside world. Proponents argue in favour of using dissenting and concurring opinions because:

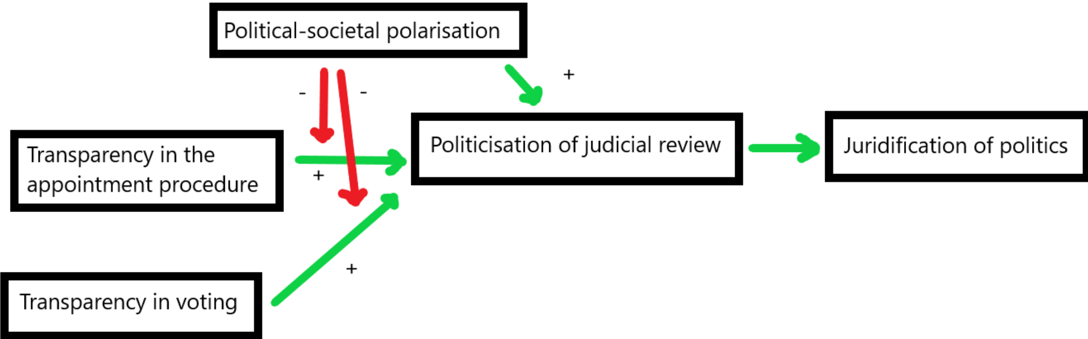
- It offers greater transparency;
- It provides more clarity if the general public knows if the decision is taken with unanimity or not;
- The use of dissenting and concurring opinions in public would improve the vividness of the legal debate;
- The increased transparency can contribute to a better quality of legal rulings and trust in the legal system.

Opponents argue that transparency is characteristic of the legislative, and the internal discussions of executive government organs are typically not public. Opponents argue that introducing dissenting and concurring opinions could undermine their trust in the judiciary; it is known that judges publicly have different views and opinions about the application of law. For example, suppose the ruling is taken with only a small majority. In that case, a different ruling might have occurred if different judges had been

responsible for the case. Judges might viewed more critically by the public if all their views are public, and therefore, they might be afraid to speak their minds. This can lead to criticism that judges use not only legal reasoning but also moral and ethical reasoning and, therefore, would be more political.

A system that allows dissenting and concurring opinions would ensure that judges' personal and academic views would be widely known to the broader public. This means that when there is a political interest in rulings, the political sensitivity of the appointment of judges, especially at high courts, increases. For example, in a court's ruling on politically sensitive cases, dissenting and concurring opinions would make judges' personal views more relevant. Broeksteeg (2011) argues that judges cannot always have a discussion based on legal arguments; sometimes, the law they need to interpret is aged, vague, or complete. Broeksteeg (2011) argues that in sensitive cases where, for example, fundamental rights might be conflicting, there would likely have been that discussion within the court. Broeksteeg (2011) argues that in the US, the use of dissenting and concurring opinions has undermined the authority of SCOTUS, which can lead to political polarisation in the court. Broeksteeg (2011) argues that dissenting opinions do not offer the citizen who brings a case to the court anything because even if a minority of judges agree with their position, they still lose the case. The use of concurring in dissenting options is only interesting for lawyers and academics interested in legal reasoning.

While conducting this literature review, I thought of the following hypothesis: Transparency in the appointment procedure for judges in constitutional courts, transparency in voting procedures using dissenting and concurring opinions, and social and political polarisation lead to a higher level of politicisation of judicial review. The politicisation of judicial review, in turn, leads to juridification of politics. This theoretical model is shown here in table 2:



<u>Hypothesis 3: Courts that use dissenting and/or concurring opinions frequently have a higher level of politicisation of judicial review than courts that vote and deliberate in private because if a court votes in public, the balance of power is better known, and interest groups are better able to influence appointments to the court.</u>

<u>Hypothesis 4: In systems with more transparency in appointment procedure and a relatively low level of polarisation, we expect a lower level of politicisation of judicial review.</u>

<u>Hypothesis 5: In systems with more transparency in appointment procedure and a relatively high level of polarisation, we expect a higher level of politicisation of judicial review.</u>

Chapter 3. Methodology

In this chapter, I will discuss how to measure the variables addressed at the end of chapter two and how I will conduct my research. The research methodology of this thesis is a comparative case study of six different constitutional courts. Two landmark cases will be discussed for each constitutional court, one regarding an ethical topic and one regarding an attributional topic. This chapter helps answer the main research question by providing the tools to gather the required knowledge.

3.1 Research question

As described in the introduction to this master thesis, the main research question of this thesis is:

To what extent do the constitutional courts reflect (elements of) political decision-making, and how can this be explained by the characteristics of the courts or characteristics of the issues they deal with?

3.2 Conceptualisation of variables

3.2.1 Transparency in the appointment and voting procedure.

Transparency in appointment procedure and voting are this thesis's two main independent variables. Transparency in voting can be measured easily. Is a court allowed to use *dissenting* and/or *concurring* opinions? If so, does the court use this often? Transparency in appointment procedure is more complicated to measure. Different constitutional courts have different institutional rules and methods about how judges in constitutional courts are appointed. From a democratic perspective, one might argue that the more democratic legitimacy, the better the legitimacy and transparency of the appointment. One can argue that judges appointed or confirmed by a majority in Parliament or Congress have more democratic legitimacy. Voters in parliament or Congress are usually public, unlike executive branch meetings, which generally occur behind closed doors. Following this reasoning, judges appointed by parliament or Congress have a more transparent appointment process than judges appointed by the executive branch of government.

3.2.2 Juridification of politics

Juridification of politics is a concept that means that because the judiciary plays a large role in policymaking in some countries, laws and decisions from the executive and legislative have extensive legal reasoning behind them to prevent them from being declared unconstitutional by a constitutional court. One might analyse all laws passed by a legislature and count how much legal reasoning they contain to prevent them from being overruled. This, however, is not feasible for the scope of this thesis. A better way of measuring the justification of politics might be to count how many members of the legislature and executive in the analysis county have a legal background and/or a law degree. The reasoning behind this is that in countries that have a very judicialised political system, a lot more people who want to go into politics pursue a law degree because they view this as beneficial towards their political career, and lawyers become more interested in politics because they view it as a natural path in their career. As opposed to a system where politics does not have a significant justification. In such a system, politicians would be expected to look more like the public regarding background.

3.2.3. Politicisation of the Judiciary

Most democracies have two kinds of institutions. Majoritarian institutions such as parliament or Congress make decisions with a majority of votes and are accountable to voters in free and fair elections (Zürn, 2019). Majoritarian institutions are associated with popular sovereignty and political polarisation because they make decisions by a majority and, therefore, will leave some people unhappy. Non-

majoritarian institutions can include courts, central banks, and international organisations. Non-majoritarian are defined by Zürn (2019) as government entities with a specialised form of public authority, distinct from other institutions, and not directly elected by citizens or under the control of elected officials. The role of non-majoritarian institutions is to protect the rights of individuals and minorities and promote depoliticisation, moderation, and compromise.

The politicisation of the judiciary is a challenging concept to measure. Separation of powers is an essential aspect of the rule of law. Suppose the judiciary is not independent but controlled by, for example, the executive. In that case, there is no separation between day-to-day politics; therefore, a judiciary that is not independent is politicised. An independent court can still be politicised. Green and Roiphe (2021) argue that political appointees who have worked to strengthen their ties to politicians and may have political aspirations are more likely to allow impermissible partisan consideration to affect their work. Green and Roiphe (2021) implicitly argue that the appointment procedure and career prospects of (aspirant) judges can influence their decision-making. If there is a solid Weberian institutional framework and/or culture of meritocracy, career incentives can improve the independence and professionalism of the judiciary. When promotions and career prospects are made by political appointment, this can influence the judiciary.[5] One can measure the politicisation of constitutional courts by:

- Looking at formal characteristics such as the appointment procedure, term limits, and retirement age.
- Looking at the balance of power within the court.
- Are most decisions taken unanimously, or are most rulings done by the majority?

3.2.4 Potential third variable: Political-societal polarisation

The theoretical framework hypothesises that increased political and/or societal polarisation independence leads to the politicisation of judicial review. McCoy, Press, Somer, and Tuncel (2022) argue that polarisation can be defined as a process, a state of equilibrium, and a political strategy. Polarisation as a process is a simplistic division of society into two mutually antagonistic camps. When polarisation becomes an equilibrium, it is divided into two mutually distrustful political camps that do not have incentives to depolarise. In extreme cases, this might lead to a decline in trust in democracy and democratic backsliding. Thirdly, polarisation can be used as a strategy. A moderate amount of polarisation can be considered part of a healthy democracy. Politics is about making choices; in a democratic system, it is good to have healthy debates. Too much polarisation can lead to gridlock and a decline in trust in democracy. V-Dem (2023) distinguishes between the polarisation of society and political polarisation. Both variables are measured using an ordinal 0 to 4 scale. The methodology V-Dem uses is expert interviews. All societies have people with a plurality of views and opinions. To what extent do these different opinions lead to conflicting views and polarisation? Is their consensus about the general direction society should evolve towards?

[5] A different approach is the American legal historian Rebecca Roiphe, who has developed the concept of mob testing (Fogteloo, 2024). Judges should ask themself in morally sensitive cases: What if not I, but someone with opposing moral convictions were sitting here? Would I feel comfortable if those convictions were reflected in the ruling? Judges should not assert their own moral convictions if the answer is no. This can be operationalised in the analysis of the case studies. Was the ruling anonymous, and what were the judges' backgrounds in this case?

The Polarisation of society (V-Dem, 2023) uses the following variables:

1. Serious polarisation. There are serious differences in opinions in society on almost all key political issues, which result in major clashes of views.
2. Moderate polarisation. There are differences in opinions in society on many key political issues, which result in moderate clashes of views.
3. Medium polarisation. Differences in opinions are noticeable on about half of the key political issues, resulting in some clashes of views.
4. Limited polarisation. There are differences in opinions on only a few key political issues, resulting in few clashes of views.
5. No polarisation. There are differences in opinions but there is a general agreement on the direction for key political issues.

Polarisation of society is about the extent to which political differences influence social relations beyond the political arena. Society becomes highly polarised when supporters of opposing camps do not engage in friendly interactions at places such as family gatherings, civic organisations, leisure activities, and workplaces. Political polarisation uses the following variables:

1. Not at all. Supporters of opposing political camps generally interact in a friendly manner.
2. Mainly not. Supporters of opposing political camps are more likely to interact in a friendly than a hostile manner.
3. Somewhat. Supporters of opposing political camps are equally likely to interact in a friendly or hostile manner.
4. Yes, to a noticeable extent. Supporters of opposing political camps are more likely to interact in a hostile than friendly manner.
5. Yes, to a large extent. Supporters of opposing political camps generally interact in a hostile manner.

3.3 Selection of case studies

While writing the literature review, I was able to analyse various hypotheses. I want to conduct research through research into various case studies. The literature review states different systems for appointing judges in constitutional and higher courts. The different categories I have distinguished here are:

- Appointment by the judiciary, for example, by the court itself or a council for the judiciary,
- Appointment by the executive branch,
- Appointment by Parliament or Congress,
- Appointment by a combination of several powers.

I want to select two constitutional courts from each category, except for the last category of appointment by several powers, because this is a broad category. The most essential factors in the selection are striking or outstanding situations, so the selection is not necessarily representative. The aim is to explain how several countries have designed comparable institutions in different ways. For the rest, there must be sufficient information available about the constitutional court; the country must be a functioning democratic constitutional state and have a central form of judicial review. Countries have different ways of appointing constitutional court judges on a spectrum of technocratic/bureaucratic or political appointments. The other aspect I used in selecting the case studies was polarisation. The appendix presents an analysis of the dataset of the different constitutional courts. This paper ideally wants two countries with each appointment procedure, one with low and one with high political polarisation. Given the limited data available, the U.S. and South Africa were selected despite having an appointment procedure involving multiple government branches.

Table 3: six case studies		Appointment by		
		The executive	The legislature	The judiciary
Political polarisation	Low	Canada	Germany	South Africa (mixed)
	High	Poland (mixed)	U.S. (mixed)	India

The constitutional courts I have selected are India, Canada, Germany, Poland, South Africa, and the US. All these countries have different appointment procedures for judges in constitutional courts and different state characteristics. Some of these countries are federations, others unitary states. Some of these constitutional courts have had the power of constitutional reviews of primary legislation for a very long time, others only recently. These six case studies described in table 3 will be a descriptive analysis of constitutional courts' role in these countries' political systems. In these case studies, I will describe different aspects,

- What is the exact appointment procedure for judges in the Constitutional Court/Supreme Court,
- A summary of the development of assessment of primary legislation against the constitution,
- A description of a prominent and recent case on a substantive topic. This means an investigation in which a law has been declared unconstitutional for substantive reasons,
- A description of a prominent and recent case on an attributive topic. An attributive subsection concerns which institutions have which powers. The lawsuit analysed here concerns a law passed by a situation without having the powers to do so.
- The politicisation of the constitutional court.

Chapter 4. Constitutional courts compared: six case studies

In this chapter, I will discuss and analyse the six countries selected in the previous chapter. These countries have different institutional, political, and social characteristics. This chapter contributes to answering the main research question by examining the functioning of six constitutional courts.

Table 4: Several statistics regarding high courts (V-Dem, 2023)

All variables are ordinal on a scale from 0 = no independent court to 4 = fully independent court.

	High court independence	Lower court independence	Compliance with the High Court	Court-packing
India	2,51	2,43	2,85	2,54
Canada	3,27	3,12	3,41	2,98
Germany	3,5	3,62	3,23	2,99
Poland	0,99	2,5	2,57	1,68
United States	3,46	3,32	3,6	2,98
South Africa	3,48	3,47	2,78	2,91

4.1 Supreme Court of India

A political context of high levels of polarisation and appointment of judges by the judiciary characterises the Supreme Court of India. With a population larger than 1,4 billion people, India is the biggest country on earth in terms of population size. India is a federal parliamentary republic with a bicameral parliament, 28 states and eight union territories. The Supreme Court of India is the final court of appeals in criminal and civil cases. As the highest constitutional court, it hears appeals from state high courts. It can advise on issues referred to by the president. The Indian Supreme Court has been called the most powerful court in the world because of its wide powers and the large population of India. Supreme court judges usually hear cases in benches of two or three judges (Chandra et al., 2023). Currently, the court has 31 active judges, including a chief judge, who is the judge who has served the longest at the court.

Appointment procedure

Article 124, § 2 of the Indian constitution states that the president shall appoint supreme court judges on the recommendation of the national judicial appointment committee. De facto appointment of Supreme Court judges is done by a group of senior Supreme Court judges known as the "collegium". This is the result of case law that will be discussed later. Most newly appointed judges tend to be judges who served in state high courts. Judges must retire at age 65. Most judges only serve a couple of years at the court because many candidates are quite old when appointed.

Analysis of an ethical case Navtej Singh Johar v. Union of India

Navtej Singh Johar v. Union of India was a 2018 case. The Supreme Court of India struck down section 377 of the Indian Penal Code as unconstitutional. Section 377 was a law dating to British colonial rule and banned "carnal intercourse against the order of nature". This law banned "unnatural" sexual acts such as anal sex and oral sex. It primarily but not only affected homosexual couples. The supreme court bench unanimously found that the act breads four articles of the Indian constitution:

14. Equality before the law
15. Prohibition of discrimination
19. Protection of freedom of speech
21. Protection of life and personal liberty

The part of the statute that banned sex with minors, rape, and bestiality remained in force. The ruling was applauded by human rights organisations such as Human Rights Watch and Amnesty International, who viewed it as a landmark case improving the legal position of the LGBTQ+ community within India.

Analysis of an attributional case three judges' case.

What makes India noteworthy is that appointments to the Supreme Court of India are made using the collegium system. The Supreme Court's rulings argue that to guarantee separation of powers; the judiciary should be responsible for its own appointments. This results from three cases, known together as the three judge's cases.

- S. P. Gupta v. Union of India - 1981
- Supreme Court Advocates-on Record Association vs Union of India - 1993
- In re Special Reference 1 of 1998

Supreme Court appointments are de jure done by a presidential appointment on the recommendation of the judiciary. The three judges' cases ruled that a special body within the Supreme Court is responsible for appointing judges. This collegium comprises four senior Supreme Court justices, including the chief justice. The Collegium is responsible for appointing the Supreme Court and other high judges. The collegium system is not in the Indian constitution but exists because of case law. The executive and the legislature wanted to change this system. The Indian parliament passed the 99th amendment to the constitution in 2014. This 99th amendment created the National Judicial Appointments Commission (NJAC) that would appoint judges and other lawyers working for the Indian government. The NJAC would consist of the chief justice, two senior supreme court judges, the union minister of law and justice, and two eminent persons. The eminent persons would be nominated by the chief justice, prime minister, and leader of the opposition.

In 2015, a five-court bench of the Supreme Court declared the 99th constitutional amendment unconstitutional, arguing that it violates the independence of the judiciary. The Supreme Court can declare constitutional amendments unconstitutional if they violate the Constitution's basic structure. This basic structure doctrine argues that fundamental concepts of democracy, the rule of law, and separation of powers cannot be changed, even with a constitutional amendment.

Politicisation?

There is criticism of the collegium system. Sceptics argue it is an undemocratic system that is not explicitly mentioned in the Constitution. Critics argue that it negatively affects the diversity of the Supreme Court, stating that most judges come from the higher echelons of society and that minority groups such as the Dalit are underrepresented in the Supreme Court.

Institutionally, the Supreme Court of India is among the most powerful courts in the world. According to some critics, India under Prime Minister Modi faces democratic backsliding. The Supreme Court has not overruled controversial decisions such as demolishing an old mosque to build a Hindu temple or revoking the statehood of India's only Muslim-majority state, Jammu and Kashmir (Freedom House, 2024). The Supreme Court is an independent body that sometimes overrules the government. Not all its landmark cases are unanimous.

4.2 Supreme Court of Canada

The Supreme Court of Canada[6] (SCC) is characterised by a political context of low levels of polarisation; the governor general appoints SCC judges on the prime minister's advice. Canada is a constitutional monarchy and a federal parliamentary democracy in North America using a Westminster-style bicameral parliament. In current Canadian constitutional theory, the ten provinces are considered co-sovereign, meaning sovereignty is shared between the federal and provincial levels; there are also three territories in the sparsely populated North that have less power than a province. Canada is the second largest country on earth and a multicultural and bilingual country; French and English are the two official languages. Most French-speaking Canadians live in Quebec. Quebec uses civil law, while the other Canadian provinces use common law. This makes the SCC one of the few courts in the world that uses civil and common law. The SCC is made up of nine judges. The Supreme Court Act mandates that three should come from Quebec. Typically, three judges come from Ontario, two from the Western provinces[7], and one from the Atlantic provinces[8]. Decisions in the SCC are not always unanimous; dissenting and concurring opinions are used frequently.

Appointment procedure

The SCC has nine members, eight puisne judges and the chief justice. The governor general appoints judges on the advice of the prime minister. Judges may serve until their 75th birthday. This system is sometimes criticised as the appointed judges would be ideologically close to the ruling federal party.

Analysis of an ethical case Frank v. Canada (Attorney General), 2019 SCC 1

Frank v Canada was a 2019 case regarding voting rights for Canadians living abroad. Voting in Canada is regulated by the Canada Elections Act, which states that any Canadian citizen aged eighteen or older who normally lives in Canada can vote. The Canada Elections Act allowed Canadians abroad to vote if they had lived outside Canada for less than five years and intended to return to Canada. Two Canadian citizens who lived abroad challenged the law and argued that this breaches section three of the Canadian Charter of Rights and Freedoms, which states that "*Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein*".

The government's defence was that the rule breached section three but that this was allowed under certain conditions. Section one of the charter states, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The first judges who heard the case ruled that the part of the Canada Elections Act that banned Canadians living abroad for more than five years from voting was unjustified. The court of appeal disagreed and ruled that the law was constitutional. A majority of the judges of the SCC held the option the law breached the charter by denying Canadians who live outside of Canada the right to vote. The majority of the judges ruled that voting is a right and not a privilege that parliament cannot easily limit.

Analysis of an attributional case Quebec (AG) v Canada (AG) 2015 2015 SCC 14

Unlike other federal countries, the Canadian Constitution only briefly indicates the powers of the provinces and the federal government (Brouillet, 2017). When Canada was formed as a federation, the

[6] The official name in French is "*Cour suprême du Canada*" (CSC).
[7] British Columbia, Alberta, Saskatchewan, and Manitoba
[8] New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island

reasoning was that the federation and the provinces were two separate spheres with their own responsibilities. Starting in the middle of the 20th century, the case law of the SCC moved towards a more cooperative form of federalism. Federalism in Canada is described as modern, flexible, and cooperative, meaning that there is no absolute separation of the spheres of the provinces and the federation and that they should work together.

The position of Quebec is interesting because it is the only province where French is the only official language. The federal government and the province of New Brunswick are officially bilingual. English is the official language of the other Canadian provinces. Quebec has a strong independence movement. In 1995, a small majority (50,58% no and 49,42% yes) of Quebec voters rejected independence.

In 1995, the Canadian parliament passed the Firearms Act, which required owners of firearms with long barrels to register their guns. This was a controversial law, and it was repealed in 2012. The province of Quebec wanted to have its own long gun registry. The province of Quebec asked the federal government to share the data about Quebec's long gun owners. The federal government denied sharing this data. The province of Quebec started a court case against the federal government, arguing that disbanding the long gun registry and not sharing the data with the Quebec province violated the constitutional principle of cooperative federalism.

In a five to four majority, the SCC ruled that the federal government had acted within the constitution and could destroy the long gun registry. A four-judge minority argued that the law was unconstitutional as destroying the data prevents the sharing of the data with the provinces, preventing them from exercising their powers. These four judges, however, thought there was no legal basis for Quebec to request to share the data. Critics argue that the ruling is unfortunate because, within the Canadian constitution, the provinces and the federal government should try to work together. The Canadian press noted that three of the four judges who dissented were from Quebec (Fine, 2015).

Politicisation?

In Canada, supreme court judges are de facto appointed by the prime minister. However, the Supreme Court is an independent body whose rulings are sometimes critical of the federal and provincial governments. The federal and provincial parliaments in Canada can use section 33 of the Canadian Charter of Rights and Freedoms, also known as the notwithstanding clause. The notwithstanding clause prevents courts from overruling legislation protected by the notwithstanding clause. The notwithstanding clause is a middle ground between the British doctrine of parliamentary sovereignty and the American doctrine of a written constitution with strong courts that can overrule a legislature.

4.3 Federal Constitutional Court of Germany

4.3.1. State structure and development of constitutional judicial review

The Federal Constitutional Court[9] (BVerfG) is characterised by a political context of low levels of polarisation; judges are appointed by the German parliament using a two-thirds majority. Constitutional judicial review introduced the new German 1949 basic law. This new construction was drafted with the instability and the horrors of the nazi takeover of the Weimar Republic still being fresh memories. During German reunification in 1990, the basic law was applied to the reunited Germany and lost its provisional nature. Germany is a federal parliamentary republic consisting of 16 states. Generally, state courts apply state and federal law; federal courts serve as courts of appeal when interpreting federal law (Claes et at, 2021). Apart from "ordinary" courts, each state has its constitutional court. State constitutional courts mainly decide on constitutional disputes within federal law, including their establishment, administration, and jurisdiction. On the federal level, the BVerfG in Karlsruhe is responsible for interpreting constitutional law. The main tasks of the BVerfG are protecting fundamental rights and freedoms and settling institutional disputes. Other powers of the BVerfG include banning political parties that threaten democracy and the impeachment of federal judges. Germany has a dualist approach to international law. Treaties must be converted into national laws to have a direct effect. The BVerfG sees itself as the guardian of the constitution.

Appointment procedure

The BVerfG consists of two senates of eight judges. The first senate is responsible for regulatory reviews and constitutional complaints. The second senate is responsible for disputes between states and the federal government or between state organs. Since 1970, the BVerfG Act allows dissenting and concurring opinions, but they are only used limitedly. Article 94 of the basic law states that the Bundestag appoints half of the members of the BVerfG, and the Bundesrat appoints the other half. The Bundestag is the lower house of the German parliament and is elected directly by the German public using mixed-member proportional representation. The Bundesrat represents the 16 states on the federal level and consists of state government members.

The BVerfG act states that judges are elected by the Bundestag or Bundesrat using a 2/3 majority. Because Germany uses proportional representation, a single party is unlikely to obtain this supermajority. Therefore, appointments to the BVerfG need the support of multiple parties. Traditionally, the two big parties of German politics, the Social Democrats (SPD) and the Christian Democrats (CDU/CSU), alternated nominations. Currently, the centrist political parties alternate appointments. This alternation is roughly based on their share of votes in parliament. The current appointment ratio per senate is three appointments for the SPD and the CDU/CSU and one appointment for the Greens and the liberal FDP. The left-wing Die Linke and the far-right AfD have no judges whom they nominate; the centrist parties refuse to work with the AfD and Die Linke. After the appointment, the judges primarily affiliate themselves with their senate and not with a political party. Three judges in each senate must have been appointed to high federal courts to bring experience. Most judges in the BVerfG hold a PhD in law, and many of them worked in academia.

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[9] In German: "*Bundesverfassungsgericht*", abrivated to BVerfG.

Analysis of an ethical case BvR 357/05 (2005)

During the 9-11 attack, terrorists used passenger aeroplanes as suicide weapons against the World Trade Center in New York, the Pentagon near Washington D.C., and unsuccessfully against the U.S. Congress or the white house. In the wake of the terrorist attacks of 11 September 2001, many countries adopted laws to improve aviation security, including Germany. In Germany, the Aviation Security Act allows the armed forces to shoot down passenger aircraft as a last resort to prevent the planes from being used as weapons. A constitutional complaint challenged the constitutionality of this law. Shooting down a hijacked aircraft will kill the passengers and crew on board but prevent the aeroplane from being used as a weapon against ground targets. From a perspective of virtue ethics, shooting down a hijacked aircraft and killing not only the hijackers but also innocent passengers and crew would be a bad thing to do, being state murder. Using the ethical philosophy of consequentialism, it might be a justifiable lesser evil to kill hundred innocent people to save a thousand people. In a 2006 ruling, the first senate of the BVerfG ruled that the part of the law that allowed the government to shoot down hijacked passenger planes as a last resort was unconstitutional because:

- The German basic law puts police powers primarily as a responsibility of the states. The use of combat aircraft with specific military weaponry does not comply with the constitutional requirements necessary for the domestic deployment of the armed forces in the case of a natural disaster or grave emergency.
- Using military force to shoot down a hijacked aeroplane denies the fundamental right to life and human dignity to the passengers and the crew of the aeroplane, innocent people who are not participants in the crime. If the state would kill innocent people to save others, the passengers and crew of the aeroplane would be objects and not human beings with rights.

Other countries made different choices. In the US, the shooting down of hijacked planes would be permissible (Zanen, 2022). This moral dilemma was the basis of a theatre play called Terror. In this fictional scenario of Ferdinand von Schirach (n.d), a fighter pilot shoots down a hijacked plane heading towards a full football stadium against orders of the defence minister. Two-thirds of audiences worldwide would not convict the pilot. This play was shown in the Wolfgang Borchert Theater in Münster 89 times in 2016. Six thousand four hundred nineteen theatregoers would acquit the military pilot while 4238 convict him.

Analysis of an attributional case BvR 859/15 (2020)

The 1963 van Gend en Loos ruling of the Court of Justice of the EU (ECJ) established that the Treaty of Rome established a supranational legal order and that decisions of European institutions have a direct effect regardless of the member state has a monist or a dualist approach vis-à-vis international law. The 1964 Arrest Costa/ENEL ruling established the supremacy of EU law over national law. According to the case law of the ECJ, EU law has a direct effect, can be invoked before a member state's court, and takes precedence over national law, including constitutional law.

The BVerfG rejects the notion that EU law takes precedence over national constitutions, arguing that EU law that conflicts with the German basic law cannot enter into effect in Germany. In 1974, the BVerfG ruled that German constitutional provisions take precedence so long as no European level of protection is equal to the German basic law. In 1986, the BVerfG ruled it would refrain from reviewing fundamental rights in EU law so long as the EU maintained its perception of human rights developed by the Court of Justice of the EU. A consistent line of rulings from the BVerfG is that the EU has no "*Kompetenz-Kompetenz*", meaning the EU cannot give itself authorities that are not attributed by the member states to European institutions in the EU treaties. According to the BVerfG, European institutions that practise powers not given to them by the treaties breach the EU treaties and the constitutional conditions

Germany accepted when ratifying the European treaties. For years, it remained a theoretical possibility that the BVerfG would issue a statement stating that a European institution had exceeded its powers. This changed in 2020 when contrary to the Court of Justice of the EU, the BVerfG ruled in a 7:1 ruling that the European Central Bank (ECB) acted beyond her powers (ultra vires in Latin) in buying bonds. Article 282(1) of the Treaty on the Functioning of the EU (TFEU) states

"The European Central Bank, together with the national central banks, shall constitute the European System of Central Banks (ESCB). The European Central Bank, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union."

As a result of the 2007/08 financial crisis, the European Central Bank started a public sector asset purchase programme ('PSPP') to promote price stability and maintain inflation "*sufficiently close but below 2%*". PSPP allows countries like the ECB and national central banks to buy state bonds at the secondary market. This means the bonds are not directly purchased from governments. According to the TFEU, the ECB and the national banks of Eurozone countries are responsible for monetary policy within the Eurozone, while national governments are responsible for fiscal policy. A definition of monetary policy from EUR-Lex (s.d.) is:

"Monetary policy concerns the decisions central banks take to influence the cost and availability of money in an economy. In the case of the European Central Bank (ECB), the main objective of monetary policy is to maintain price stability in the euro area, which is defined as year-on-year inflation of 2% over the medium term (as measured by the Harmonised Index of Consumer Prices). The ECB Governing Council's commitment to the 2% inflation target is symmetric, meaning that negative and positive deviations from the target are considered as equally undesirable."

A definition of fiscal policy of the IMF (2019) is:

"Fiscal policy is using government spending and taxation to influence the economy. Governments typically use fiscal policy to promote strong and sustainable growth and reduce poverty."

The question is if the public sector asset purchase programme of the European Central Bank is monetary policy or fiscal policy. The BVerfG ruled the Court of Justice of the EU ruling regarding the principle of proportionality was "not comprehensible". The BVerfG ruled that the ECB acted ultra vires by not considering economic effect. The ruling of the BVerfG was criticised by the European Commission (2020), which stated:

"In the same vein, the European Commission upholds three basic principles: that the Union's monetary policy is a matter of exclusive competence, that EU law has primacy over national law and that the ECJ rulings are binding on all national courts.

The final word on EU law is always spoken in Luxembourg. Nowhere else."

Politicisation?

Appointments to the BVerfG are made with a two-thirds majority in either the Bundestag or the Bundesrat. The BVerfG is a strong and independent institution. De facto centrist parties rotate appointments based on their electoral results. The BVerfG does not often use dissenting opinions compared to other constitutional courts. Therefore, it is harder to assess if, for example, there is a link between the political party nominating the judge and their voting behaviour. In 859/15, one judge disagreed with their eight colleagues, but it was not known who they were.

4.4 Constitutional Tribunal of Poland

The Constitutional Tribunal[10] is characterised by a political context of high levels of polarisation; judges are nominated by the prime minister and confirmed by the Sejm. Poland is a country with a complex history. It became a liberal democracy after the fall of communism in the late 1980s. Applebaum (2021) starts her book Twilight of Democracy with a party where the Polish right is happy. They defeated communism, and Poland was on its way to becoming a liberal democracy with a market economy and joining Western institutions such as NATO and the EU. Nowadays, the Polish right is divided. The right is getting divided, with some members remaining advocates for traditional centre-right ideas such as the rule of law, market economics, and international organisations such as the EU. Others now support a nativist populist party called Law and Justice (PiS), whose ideas are paranoid, xenophobic, and authoritarian. PiS won the 2015 elections. Poland is a parliamentary republic, but its constitution has several semi-presidential characteristics. Poland is among Europe's most politically polarised countries, and perhaps the world. This polarisation affected the Polish judiciary. The 2015-2023 PiS-led government was criticised for undermining the independence of the Polish judiciary (Jaraczewski, 2021).

Appointment procedure

The Constitutional Tribunal was created in 1982 at the request of the Solidarity movement. Its powers increased when Poland became a full liberal democracy in the early 1990s. The Constitutional Tribunal has 15 judges. The Sejm appoints constitutional tribunal judges serving a non-renewable nine-year term, and new judges must take an oath before the president. Because of the parliamentary system, the prime minister usually nominates the candidate judges. The president of Poland appoints the president and vice-president of the Constitutional Tribunal.

Constitutional crisis

Since 2015, the constitutional tribunal has been the subject of a constitutional crisis. In 2015, PiS won the presidency and a parliamentary majority. In 2015, five of the fifteenth seats on the constitutional tribunal were to become vacant. Three seats were to become vacant between election day and the installation of the new parliament, two after that. Before the new president and parliament were installed, the outgoing parliament, controlled by the civic platform (PO), appointed five new judges. The new president, Duda, refused to let them take their oaths of office. The new Sejm, with a PiS majority, appointed five judges as well. The remaining judges in the constitutional tribunal who were in the majority appointed by the PO ruled out 3 PiS nominees and instead validated 3 PO nominees (Śledzińska-Simon, 2015). The PiS-controlled Sejm passed a law forcing the PiS appointees to the bench. In May 2021, the European Court of Human Rights (ECtHR) found that the constitutional tribunal was not a "tribunal established by law" because some of its judges were appointed illegally. The European Court of Human Rights found in Xero Flor vs Poland (2021) a violation of "the right to a tribunal established by law" because part of the Polish constitutional tribunal was appointed illegally.

Since taking power in 2015, the PiS-led government has attempted to control the judiciary. In 2017, the justice minister was given the power to dismiss court presidents and deputy presidents. In 2018, the retirement age of the Supreme Court was lowered, meaning that 27 out of 73 judges had to retire without presidential dispensation. This move was later retracted under pressure from the EU. The European Commission launched an infringement procedure, and the European Court of Justice (ECJ) ruled that lowering the retirement age violated European law. In December 2019, the Sejm allowed the disciplinary chamber of the supreme court to sack judges who took part in "political activity". The PiS government

[10] In Polish: *Trybunał Konstytucyjny*

that governed Poland between 2015 and 2023 attempted to assert direct control of the judiciary. For example, Marzanna Piekarska-Drążek was a Warsaw criminal judge who was transferred to a different court after she was critical of the judicial appointment of the government (Freedom House, 2024).

At the end of 2023, the opposition won the Sejm elections. Donald Tusk again became prime minister, leading to increased relations with the EU. Donald Tusk's third cabinet has vowed to restore independent institutions and the rule of law. However, there remains a big challenge. Many institutions, such as the judiciary and the public broadcaster, are filled with PiS political appointees. This question is playing out right now: How do you restore the rule of law without violating it?

Analysis of an ethical case K 1/20

In 2020, the constitutional tribunal declared a provision of a 1993 law allowing abortion when the foetus likely has a disability or incurable illness unconstitutional. At this time, the constitutional tribunal had a majority of its members appointed by the PiS government, some of them illegally (Jaraczewski, 2021). The constitutional tribunal argued that abortion violates the right of life of the foetus. The ruling means a near-total ban on legal abortions in Poland. This ruling led to protests by Poles, who opposed the court ruling.

Analysis of an attributional case 3/21

In 2021, the Polish constitutional tribunal declared that part of the treaty on EU (TEU) was incompatible with the Polish constitution. At this time, the constitutional tribunal had most of its members appointed by the PiS government, some of them illegally (Jaraczewski, 2021). The primacy of EU law over national law is an established case law principle (Costa v ENEL, 1964). There is less consensus about what happens when EU law conflicts with a national constitution. As a result of the monist tradition, the Dutch constitution explicitly mentions that treaties are a higher law than the constitution (art. 91 and art. 94 GW). Case law allows the BVerfG to test treaties and obligations from treaties against the constitution. When Poland joined the EU in 2002, the then-independent constitutional tribunal was asked what would happen in a hypothetical case of a conflict between the Polish constitution and EU law. In judgement K 18/04, the constitutional tribunal said that when there was a conflict, there were three options:

- Poland can attempt to change the EU law in question.
- Poland can amend its constitution.
- Poland can leave the EU.

In 3/21, the Polish constitutional tribunal argued that case law based on Article 19(1) of the TEU does not allow Polish courts to overrule domestic laws that the CJEU has ruled incompatible with EU law. This ruling puts EU law, a national constitution, in conflict with one of the EU treaties. This ruling is described as a “Polexit”. This ruling was made with a European critique of the decline of judicial independence in Poland as background. The ECJ has several critical rulings regarding “reforms” of the Polish judiciary. One of the reasons for undermining judicial independence in Poland is that within the EU framework, national judges play an essential role in the application and interpretation of EU law. Denying Polish judges the ability to review national laws to EU law undermines European cooperation's legal foundation (Thiele, 2021).

Politicisation?

The Polish constitutional tribunal is an example of a captured court. The 2015-2023 PiS government appointed party loyalists to the court, sometimes illegally. Because the constitutional tribunal is under the control of elected officials, it is a fully politicised court.

4.5 Supreme Court of the United States

State structure and development of constitutional judicial review

The Supreme Court of the United States (SCOTUS) is characterised by a political context of high levels of polarisation; justices are nominated by the president and confirmed by the Senate. The U.S. declared independence from Great Britain in 1776. The United States at this time were thirteen British colonies in North America that had grievances with the British government regarding taxes. The United States fought their independence war against the British Empire and won, leading to the Treaty of Paris in 1783. In this treaty, Great Britain recognised the independence of the US. At this time, the U.S. was a confederation. The states had almost all the power, and the national government could not have an effective diplomatic, military, and monetary policy due to a lack of funding. Congress could not effectively govern because most legislation required nine of the thirteen states to agree. In response, the Americans drafted a new constitution in 1787, ratified in 1788. This makes the U.S. Constitution the oldest constitution still in force worldwide. This changed the U.S. from a confederation of states to a federal presidential republic. The federal government itself was divided along the lines of Montesquieu.

- The president is the head of the executive,
- Congress consisting of the House of Representatives and the Senate being the legislative,
- SCOTUS and other federal courts being the judiciary.

American judges have been critical political functionaries since the revolution (Tocqueville, 1848) and held more power than their European counterparts. In 19th-century France, the constitution was immutable. In the United Kingdom, the constitution parliament can modify the constitution, so it does not exist as an entity separate from parliament. Unlike most European countries at that time, American judges had the authority to declare laws incompatible with the Constitution. The first time SCOTUS declared an act of Congress unconstitutional was the 1803 Marbury v. Madison case; this case established that SCOTUS has the power to strike down legislation it finds unconstitutional. This authority gives American judges a large amount of political power. Tocqueville (1848) views the American system as favourable towards public order and liberty. American judges can only judge a case when it is brought before them. Many contemporary American authors, such as Shepsle (2010), agree with Tocqueville that Judges in America are important political figures. Shepsle (2010) argues that in the US, the federal judiciary, including SCOTUS, is just as much part of politics as the president and Congress. In the US, all federal judges can hear cases about the compatibility of legalisation with the federal constitution. The highest federal court is the SCOTUS. Federal judges, including SCOTUS justices, are nominated by the president with Senate confirmation. Members of the SCOTUS serve for life or until they voluntarily retire. The Constitution does not set how many justices sit on the Supreme Court. The Judiciary Act of 1869 sets the number of justices at nine: one chief justice and eight associate justices. Tocqueville noted in 1848 that:

"The cause is this single fact: the Americans have recognised the right of judges to base their decisions on the constitution rather than the laws. In other words, they have allowed them not to apply laws that would appear unconstitutional. I know that other countries' courts have sometimes claimed a similar right, but it has never been granted to them. In America, it is recognised by all powers; no party, not even a man, is met who contests it. The explanation for this must be found in the very principle of American constitutions."

Recently, one can see that the voting pattern of justices overlaps with the political colour of the president who appointed them. Currently, 6 of the justices are appointed by republican presidents and three by

democratic presidents. Typically, justices appointed by republican presidents have a more conservative voting pattern and justices appointed by Democratic presidents have a more progressive voting pattern. It sometimes happens that SCOTUS overruled its old case law. Brown v. Board of Education of Topeka (1957) overruled Plessy v. Ferguson (1896), and Dobbs v. Jackson Women's Health Organization (2022) overruled Roe v. Wade (1973). SCOTUS decisions are an important source of case law and influence American politics.

Appointment procedure

When there is a vacancy on the court, the president proposes a candidate, and the Senate can confirm this candidate. The appointment procedure of Supreme Court justices is viewed as an important decision. Because SCOTUS rulings can be very influential, a president can have influence after their term through the appointment of judges. Because judges are appointed for life and have no mandatory retirement age, many serve till death. Because judges are appointed for life, they can turn out differently than expected. Conservative republican president H.W. Bush appointed two judges to the SCOTUS, Clarence Thomas and David Souter. Clarence Thomas is considered one of the most conservative justices on the court. David Souter was also expected to be conservative but turned out to be much more progressive (White, 2018).

The increased political polarisation in the U.S. made SCOTUS appointments important and sensitive to political issues. For example, in 2006, Justice Antonin Scalia died; he was appointed by Ronald Reagan and was viewed as part of the court's conservative wing. At his death, the Democrat Barack Obama was president, and the Republicans held a majority in the Senate. President Obama nominated Merrick Garland. The Republican majority in the Senate refused to discuss his nomination, arguing it was an election year and the new president should make the nomination, hoping a Republican would win the presidential election and nominate a more conservative candidate. Merrick Garland would later serve as attorney general for the next democratic president, Joe Biden. When the republican Donald Trump won the 2016 election, he nominated Neil Gorsuch, who was quickly confirmed by the republican majority Senate, using the “nuclear option”.

Senate confirmation used to be done with a qualified majority of 60 out of 100 senators; this supermajority was not part of the Constitution but of the Senate's rules of procedure. A filibuster could prevent the appointment if the 60/100 supermajority were not met. A filibuster is when a senator continues to talk in a debate, preventing a vote. Closing a debate and starting a vote required a 3/5 majority vote. The filibuster allowed a minority to prevent legislation from being passed. Republicans thought of abolishing the filibuster when Democrats used the filibuster to block appointments of G.W. Bush. Democrats abolished the filibuster for cabinet posts and federal judges other than SCOTUS justices when Republicans were using the filibuster to block President Obama’s nominations. Therefore, their confirmation only required a normal 51/100 majority. In 2017, then-Republican Senate majority leader Mitch McConnell changed the rules and procedures of the Senate so that Neil Gorsuch could be confirmed with an ordinary majority of 51 senators. Appointment to the federal judiciary, including SCOTUS, used to require a 3/5 supermajority in the Senate; now, they only require an ordinary majority. Therefore, when a party controls the presidency and a majority in the Senate, they can make appointments without bipartisan support.

The Constitution does not say how many justices SCOTUS has; an Act of Congress says it is nine. In theory, congress and the president can appoint more than nine justices by changing the law. This has never happened in recent politics, but in 1937, President Roosevelt tried this after several SCOTUS rulings were critical of FDR’s new deal that greatly expanded the Federal government’s size. This plan was highly controversial and did not go ahead because many people, including those within the Democratic party,

opposed it. After the threat of “court packing”, SCOTUS became less critical of the economic interventionism of President Roosevelt (Levitsky & Ziblatt, 2018).

Procedure and types of rulings

SCOTUS and other federal courts can only concretely review laws. All American courts have the power to verify whether legislation is constitutional. American courts are not allowed to practise abstract review, such as writing an advisory opinion, because that would fall outside an actual court case and, therefore, would not be the responsibility of the judiciary.

Analysis of an ethical case Dobbs v. Jackson Women's Health Organization (2022)

Dobbs v. Jackson Women's Health Organization is a 2022 SCOTUS ruling. The ruling argues that the U.S. Constitution does not include the right to have an abortion. The ruling overruled the previous rulings Roe v. Wade (1973) and Planned Parenthood v. Casey (1992).

The 1973 Roe v. Wade case ruled that the Constitution generally protects abortion. This case struck down many state laws banning or limiting abortion. In Roe v. Wade, SCOTUS ruled with a 7 to 2 majority that the right to have an abortion is protected by the right to privacy protected in the Fourteenth Amendment of the Constitution. For example, Byron White was a justice who was appointed by democratic president John F Kennedy but held a (minority) opinion against the right of abortion in Roe vs Wade. In contrast, the justices appointed by Republican presidents Eisenhower and Nixon voted for Roe v Wade. This reflected that American society was less polarised back then in a way that there were more liberal Republicans and conservative Democrats.

Roe v Wade is controversial. Many conservatives opposed abortion, mainly on religious grounds. Abortion has become one of the hotly debated issues in the “culture war” between progressives and conservatives. During the Trump presidency, there seemed to be a clear conservative majority on the court; 6 out of 9 justices at that time were appointed by Republican presidents.

Dobbs v. Jackson Women's Health Organization (2022), where SCOTUS overruled Roe v. Wade by arguing that there is no right to abortion within the Constitution. The case brought before the court was the question of whether a Mississippi state law that banned most abortions after 15 weeks of pregnancy was constitutional. The ruling was not unanimous. The three justices appointed by Democratic presidents opposed the ruling. Chief Justice John Roberts, whom Republican G.W. Bush nominated, upheld the legality of the Mississippi law but refused to overrule Roe v Wade completely. Depending on how to count John Roberts's vote, there was a 6/3 or a 5/4 majority in favour of overturning Roe v Wade. When Roe v. Wade was overruled, the question of legality of abortion went back to the states. Nowadays, the 50 states have a large variety of abortion laws; in 17 states, mainly in the American South, abortion is greatly restricted.

Analysis of an attributional case Gonzales v. Raich (2005)

The U.S. is a federal republic. Federalism means that sovereignty is shared between a federal government and the states. Both the federal government and the states have their own powers and responsibilities. Sometimes, conflict arises between two states or states and the federal government about allocating powers. One such case in the U.S. is the 2005 Gonzales v. Raich ruling. At that time, the use of marijuana in the U.S. was limited by federal law in the form of the Marijuana Tax Act of 1937. A majority of Californians voted in a referendum in favour of the use of medical cannabis in 1996. The situation led to a conflict between federal and state law; federal law prohibited the use of medical cannabis, while California state law allowed it. Federal laws are higher in the legal pecking orders than state laws. The question before the court was whether the Controlled Substances Act (21 U.S.C. 801)

exceeded the power of Congress defined by the commerce clause of the Constitution by banning the growth and use of marijuana for medical purposes.

Angel Raich suffered from chronic pain because of a car crash. She decided, along with her physician, to use marijuana as a painkiller after unsuccessfully trying conventional medication. In 2002, federal and local law enforcement destroyed six cannabis plants of California resident Diane Monson. Monson and Raich sued the use of federal law enforcement and then violated several amendments of the constitution.

SCOTUS ruled in a 6-3 decision that Congress has the authority to ban Marijuana because the Constitution authorises Congress to regulate interstate commerce. They argued that Congress can regulate purely local activities when necessary to implement a comprehensive national regulatory program.

Three judges dissented from the majority. They argued that state sovereignty should be protected from federal encroachment to maintain a healthy power distribution. The minority argued that federalism should allow states to experiment with policies.

Politicisation?

SCOTUS is an independent institution, and its rulings from the 18th century strengthened its power in cases such as Marbury v. Madison, where SCOTUS ruled it had the power to overturn an act of Congress. Appointing SCOTUS justices are among the most influential decisions an American president makes. Because judges sit for life, they allow a president to have influence long after their term ends. The life term means that judges sit until death or voluntary retirement, which makes it hard to know when a vacancy occurs. Because judges are independent and sit for life, they, the president, and the Senate can find it tricky to choose candidates. In a way, appointing a SCOTUS justice is like throwing a paper plane in the wind; you can guess the general direction, but you do not know where it will land. For example, Republican president H.W. Bush nominated two justices, David Souter and Clarence Thomas. Clarence Thomas is widely regarded as one of the most conservative justices on the court. David Souter was expected to be a conservative justice but showed more progressive voting patterns over time. Over the 2005 to 2019 period, 5-4 majorities were 21% of all cases heard by SCOTUS (Scotusblog, s.d.); of these 5-4 splits, 76% were along ideological splits. Authors such as Shepsle (2010) argue that the SCOTUS has always been part of federal American politics. The increased social and political polarisation in the U.S. has affected SCOTUS. SCOTUS has become more partisan political over the last couple of decades. The abolition of the qualified majority in the Senate by (nuclear option) makes SCOTUS nominations more divisive political issues. Unlike other supreme or constitutional courts, SCOTUS has clearly visible ideological blocks, and judges are seen as affiliated with political ideology. For example, Justice Samuel Alito's house flew the U.S. flag upside down (Benen, 2024), a symbol associated with the January 6 insurrection.[11]

[11] On January 6, 2021, a mob of President Trump's supporters stormed the capitol to prevent Biden from being confirmed as the winner of the 2020 presidential election. Incumbent President Trump lost that election to Biden. Many Trump supporters think Trump lost the elections due to voter fraud, but there is no evidence of mass voter fraud during the 2020 presidential election acording to Eggers, Garro, and Grimmer (2021).

4.6 Constitutional Court of South Africa

The Constitutional Court of South Africa (ZACC) is characterised by a political context of medium levels of polarisation; the president nominates judges based on a list of candidates provided by the Judicial Service Commission.

South Africa is a state located at the southernmost point of Africa. In the 17th century, the Dutch East India Company colonised part of modern-day South Africa. The main goal of the Dutch Cape Colony was as a supply station between Europe and Asia. Before the Suez Canal, all ships travelling between Europe and Asia had to go around Africa. Having a harbour at the border of the Atlantic and Indian oceans allowed ships to restock on food and fresh water. The British conquered South Africa in 1806. As a result of the British conquest and the outlawing of slavery, several descendants of Dutch settlers known as Boers or Afrikaners decided to move into the interior. The British also aimed to control these lands and fought the Boers and native African tribes such as the Zulu.

At the beginning of the 20th century, the British managed to conquer the Boer republics of Transvaal and the Orange Free State. South Africa became a self-governing dominion within the British Empire, gaining formal full sovereignty with the Balfour Declaration of 1926. The politics of South Africa in the 1950s became dominated by the National Party, which strived for white minority rule. This system was called apartheid and was characterised by racism and human rights abuses. Apartheid is explicitly named as a crime against humanity by the Rome Statute of the International Criminal Court (2002).

South Africa did not have universal suffrage; in most provinces, suffrage was restricted by race, but the Cape Province had census suffrage. Voting restrictions based on race and/or income are morally appalling. In 1909, the British parliament passed the South Africa Act. This act stated that removing voting rights based on race required a two-thirds majority of the joint session of then both houses of the South African parliament. In 1948, the National Party won the elections on a platform of white supremacy and racial segregation. They wanted to strip the right to vote of non-whites in the Cape province but did not have the required two-thirds majority. Nonetheless, they passed the Separate Representation of Voter Act 1951 with an ordinary majority. As influenced by the British, South Africa had a doctrine of parliamentary sovereignty. Four voters affected by the act repealed it in the South African legal system. In 1952, judges declared the act invalid because it contradicted the South Africa Act's procedure. Grey (1953) argues that in a Westminster system, a sovereign parliament can, besides abolishing itself, limit its parliamentary sovereignty by prescribing its constitution and process of legislation. Parliament remains sovereign because no other body dictates what it can and cannot do. At the end of his paper, Grey uses these words:

"It is not for the lawyer but for the political scientists and constitution-makers to ensure that the sovereignty of representative institutions does not carry with it the seed of its own destruction. We are not here concerned with probabilities or even possibilities but with the legal effects of a legal doctrine; but at least we may legitimately say that the future of the sovereignty of Parliament since Harris v. Dönges does not seem the same Authority Transcendent and Absolute 51 that it seemed when The Law of the Constitution was written."

The reaction of the National Party government to this court ruling was furious. National Party sympathiser Albertyn argued that it was not a court case but a political case, and he felt like losing a rugby match because the referee made a mistake[12]. Prime Minister Malan wanted to ensure the

[12] His actual words in Afrikaans were more vulgar; therefore, I shall not repeat them here.

sovereignty of parliament and eliminate the court's "testing right". The national party majority in parliament discussed creating a new high court in parliament that could overrule the rule. Ultimately, the government packed the Senate, which was then appointed like the House of Lords in the United Kingdom. While not having universal suffrage, South Africa had competitive elections in the early 20th century. The authoritarian National Party lost the popular vote in 1948 but won a majority in parliament due to the first past the post-voting system. It used this majority in parliament to implement racist laws, white minority rule, commit major human rights violations, state terrorism, and maintain its grip on power by gerrymandering electoral districts.

Apartheid ended in the early 1990s. South Africa held its first democratic election based on universal suffrage in 1994; these elections were won by the African National Congress (ANC) of Nelson Mandela. South Africa adopted a new constitution. Because of the human rights violations in the apartheid era, the new South African constitution broke with the doctrine of parliamentary sovereignty. In modern-day South Africa, the constitution is the supreme law of the land that guarantees basic rights and freedoms. From a rational choice perspective, judicial review is insurance; if your party loses the election, there is a way to challenge government policy in court if it goes against a fundamental value. Judicial review lowers the stake of electoral defeat. During apartheid, South Africa was a police state, and the judiciary was a part of many atrocities. At that time, negotiations were going on between the ANC, led by Nelson Mandela, and the white minority government, led by F.W. de Klerk. These negotiations were tense. South Africa needed a democratic constitution. The white minority government led by F.W. de Klerk was afraid that compromises made by the ANC would be overruled in the next election, especially regarding land ownership[13]. One of the compromises F.W. de Klerk got from the negotiations was a constitutional provision that banned expropriation without adequate compensation (article 25). The negotiations included several principles that should form the basis of the new constitution, including social rights[14] favoured by the political left and the protection of private property favoured by the political right. These principles were binding on the new constitutional assembly and were enforceable by the new constitutional court that had to approve if the new constitution was in line with the multi-party negotiation form.

The ZACC has the explicit power to strike down Acts of Parliament when they violate the constitution. Article 167 of the South African constitution regards the constitutional court. The original text was amended several times. South Africa, like Germany, established a constitutional court because of dictatorship and human rights violations in the past. The Constitutional Court has done so in the past. In a 2006 case, the court argued that the constitution forbade discrimination based on sex, gender, or sexual orientation; therefore, same-sex marriage should be legal in South Africa, and parliament had one year to rectify this situation. South Africa remains a country with significant problems; it is one of the most economically unequal countries in the world and has big social problems such as poverty, HIV/AIDS, and corruption. Despite many social problems, South Africa is an established democracy, a noteworthy achievement given its troubled past and current challenges.

[13] During apartheid, most of the economic resources in South Africa were owned by the white minority. This is still the case nowadays. During apartheid, many South Africans were driven from their land because they were not white. F.W. de Klerk got a compromise that a new democratic South African government would not expropriate his base of white farmers without compensation. Nowadays, land reform in South Africa is still a hot topic. South Africa is among the most economically unequal countries on earth. Almost everybody agrees that land reform needs to happen, but disagreements prevent effective policy (Vermeulen, 2018).

[14], such as the right to join a trade union, the right to basic education, and the right to an environment that is not harmful to health and/or well-being.

South Africa has a centralised form of judicial review. Article 167 of the constitution of South Africa states that only the constitutional court can dispute between state organs and decide on the constitutionality of any parliament or provincial bills. The South African constitutional court can hear cases both abstract ex-ante review and concrete legalisation ex-post. When a bill is considered in parliament, both a minority in parliament and the president can ask the constitutional court for an abstract ex-ante review. Article 80 of the constitution of South Africa states:

1. *Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.*
2. *An application*
    a. *must be supported by at least one-third of the members of the National Assembly; and*
    b. *must be made within 30 days of the date on which the President assented to and signed the Act.*
3. *The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if*
    a. *the interests of justice require this; and*
    b. *the application has a reasonable prospect of success.*
4. *If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.*

South Africa is a unitary parliamentary republic. It is distinctive in that the president is both head of state and head of government and requires the confidence and support of a majority in parliament. Apart from South Africa, Botswana, Kiribati, the Marshall Islands, and Nauru are parliamentary republics with executive presidents. De facto, the role of the president is like that of the prime minister in most parliamentary systems. Article 79 of the South African constitution regards the assent to bills and states:

1. *The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.*
2. *The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.*
3. *The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if —*
    a. *The president's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or*
    b. *section 74(1), (2) or (3)(b) or 76 was applicable in the passing of the Bill.*
4. *If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either —*
    a. *assent to and sign the Bill; or*
    b. *refer it to the Constitutional Court for a decision on its constitutionality.*

5. *If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.*

Appointment procedure

Judges to the constitutional court of South Africa are appointed by the president after consulting with the Judicial Service Commission and serve for a non-renewable term of 12 years or until mandatory retirement at age 70. The president appoints candidates from a list of the Judicial Service Commission. The Judicial Service Commission consists of:

- The Chief Justice of South Africa, who presides over its meetings.
- The President of the Supreme Court of Appeal.
- One Judge President designated by the Judges President.
- The Minister of Justice and Constitutional Development or their designated alternate.
- Two practising advocates nominated from within the advocates' profession.
- Two practising attorneys nominated from within the attorneys' profession.
- One teacher of law, designated by the teachers of law at South African universities.
- Six members from the National Assembly, including three from opposition parties.
- Four members from the National Council of Provinces; and
- Four more persons designated by the President after consulting the leaders of all the parties in the National Assembly.

Analysis of an Ethical Case State v Makwanyane and Another (1995)

In the 1995 State v Makwanyane and Another, the Constitutional Court argued that the death penalty contradicts the right to life and human dignity. The South African interim constitution at that time did not explicitly prohibit or allow the death penalty. South African interim constitution at that time prohibited "cruel, inhuman or degrading" punishment. The court argued that the death penalty is inconsistent with the South African interim constitution. Provisions within laws that sanction the death penalty are invalid. This was one of the first rulings of the Constitutional Court. South Africa only became a democracy in 1994. This ruling marked a transformation in South African politics. Judicial review of acts of parliament was not possible in the apartheid system. Opinion polls at that time suggested that most South Africans favoured retaining capital punishment (Laubscher & Van Staden, 2023). The court argued:

"The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence."

Analysis of an attributional case Minister of Police and Others v Premier of the Western Cape and Others

Crime is a serious problem in South Africa. Khayelitsha is a township of Cape Town. In Khayelitsha, trust was broken down in the South African Police Service. On the 28th of November 2011, eight residents of Khayelitsha delivered a petition to the premier of the Western Cape, claiming the police were inefficient, apathetic, and incompetent towards Khayelitsha residents. The residents were especially worried about the rise of crimes such as homicide, assault, and rape. The petition asks the premier of the Western Cape to appoint a commission of inquiry into how the police operate in Khayelitsha.

The premier of the Western Cape forwarded the petition to the provincial police commissioner, the national police commissioner, and the national minister of police. Over a period of nine months, the premier gained more information regarding a "breakdown in the rule of law" in Khayelitsha. The premier of the Western Cape appointed a commission of inquiry to look at police inefficiency in Khayelitsha and the breakdown in trust between the community and the police. The minister of police sent a letter to the premier, saying that he was not pleased that the commission was appointed without discussing it with

him. He requested the premier to postpone the inquiry, but the premier declined. South Africa is a decentralised unitary state. The Western Cape province is the only province where the African National Congress (ANC) is in opposition. The Democratic Alliance (DA), nationally in opposition, governs the Western Cape. Sometimes, there is tension between the Western Cape and national governments because they have different political ideologies.

In October 2012, the commission issued a subpoena to provincial police officers to give evidence to the commission. The police officers declined to respond and instead went to the Western Cape High Court and argued that the appointment of the inquiry was inconsistent with the constitution. The High Court ruled in the majority that the premier could set up an inquiry. The decision was appealed to the constitutional court. The applicants want the constitutional court to declare the appointment of the commission and its issued subpoenas unconstitutional because:

- The complaints of the Khayelitsha were not sufficient to appoint a commission.
- The constitution does not allow a provincial premier to appoint a commission that can hear police officers against their will.
- The premier did not cooperate with the national government.
- The terms of the commission are vague and too broad.

The case was a dispute between national and provincial state organs. Does a provincial premier have the power to appoint a commission of inquiry with subpoena powers over the Police Service? The constitutional court argued that the premier of the Western Cape had the power to do so; she made every reasonable effort to settle the dispute before approaching a court.

Politicisation?

Roux (2020) argues that rhetoric about the politicisation of courts has increased. Courts and media safeguard against corruption. The South African constitution is more modern and precise than the American one, so there is less room for judges to insert their own views. It is hard to divide ZACC judges into ideological blocs. Roux (2020) is optimistic about the constitutional court. According to him, the constitutional court functions as an independent institution. The constitutional court is sometimes attacked, but Roux (2020) thinks these attacks are not grounded. South Africa has big social problems such as corruption, crime, and inequality. Unlike the U.S. or the Netherlands, South Africa has a clearly written and modern constitution. Roux (2020) argues that this contributes towards a less politicised constitutional court. If the law judges need to interpret is clearer, judges need to interpret less and therefore have less opportunity to insert their personal views.

Chapter 5. Cross case analysis

In this chapter, I will compare the theoretical framework of chapter 3 with the case studies of chapter 4. The goal of this chapter is to see if the theory and practice overlap.

The six countries analysed have different histories, laws, and political institutions. All the analysed courts regularly use their power to overrule laws that constitutional courts think violate the Constitution. There are patterns that can be found. In Germany, Poland, and South Africa, introducing a constitutional court was part of the transformation from authoritarianism to democracy. Most constitutional courts see it as part of their job to protect the Constitution, including from political majorities. Constitutional courts ought to be anti-majoritarian institutions that should protect the rights of people who are underrepresented in the democratic process, such as minorities. Constitutional courts often interpret the law in a way that gives the higher court, as an institution, more power, such as the Collegium system in India. The BVerfG has clarified, strengthened, and expanded the constitution with case law. The more specific, clear, and modern the Constitution is, the less discussion there is about its interpretation. In South Africa, there is much less discussion than in the U.S. about the interpretation of the Constitution because the Constitution is more precise and, therefore, has less room for interpretation.

Hypothesis 1: Political culture in the form of unwritten norms has a larger impact on the function of constitutional courts than institutional aspects such as appointment procedure.

Political culture and polarisation may also be related. SCOTUS had no significant changes in the institutional framework, but increased polarisation affected all federal institutions. The Polish constitutional tribunal operates in the context of a hyper-polarised system where political culture is more important than institutional aspects; the 2015-2023 PiS government was willing to break the law to increase its grip on power. Germany's political culture is an interpretation of the institutional aspects. The basic law of Germany provides the basics of the functioning of institutions, and the BVerfG act further elaborates the institutional framework. Appointments to the BVerfG are made by centrist political parties, alternating depending on their size in parliament. The same unwritten rules between centrist parties keep the far right and the far left out of this arrangement. South Africa appoints a political but broad appointments committee. India's Supreme Court gives itself more power over appointments. Institutions try to maintain/increase their power. There are written and unwritten rules about the ratio of provinces in Canada. It depends, but on average, this hypothesis is mostly right.

Hypothesis 2: Constitutional courts appointed with a qualified majority in Parliament or Congress are less partisan political than constitutional courts appointed with an ordinary majority.

The BVerfG is the only constitutional court in our selection of cases in which a qualified majority in the legislature appoints the judges. The other constitutional court in the selection of cases in which the legislature appoints judges is the U.S. Supreme Court, although not anymore by a qualified majority. To test hypothesis two, we should compare the BVerfG's partisanship with the SCOTUS's partisanship. Thereby, we should also consider that the context in which the BVerfG operates is much less polarised than the context in which SCOTUS operates. Based on hypothesis two, we would expect that the BVerfG is less partisan political than SCOTUS, even considering that the U.S. political landscape is much more

polarised than that of Germany. The question arises of whether the differences between SCOTUS and the BVerfG can be explained by the polarisation and/or the use of a qualified majority in appointments.

BVerfG uses dissenting and concurring opinions far less often than SCOTUS. Therefore, assessing the exact balance of power within BVerfG is harder. Not all BVerfG rulings are unanimous, and it is reasonable to assume that there are differences in ideology and schools of thought. SCOTUS has a further division that is not just ideological but partisan. In politically sensitive cases, there is often a difference between justices appointed by Republicans and Democrats.

In the US, SCOTUS justices are nominated by the president and confirmed by the Senate. In Germany, judges of the BVerfG are appointed by parliament using a two-thirds majority. In a way, these systems are the more majoritarian American and consensus-based German systems. Based on the theory, there is a strong case that appointments with a supermajority lead to more consensus and less politicisation. The BVerfG and SCOTUS have a transparent appointment procedure. SCOTUS has more transparency in voting and a higher political-social polarisation. SCOTUS has a higher level of politicisation of judicial review. Therefore, the hypothesis of Table 2 is correct in the comparison. However, it must be noted that the abolishment of the Senate supermajority for SCOTUS justices' confirmation happened because of and in the same timeframe as an increased polarisation within the US. Therefore, it is hard to measure the abolishment of the Senate supermajority and the increased polarisation separately.

SCC and the Constitutional Tribunal of Poland have a de facto appointment by the prime minister. The different levels of polarisation can explain the difference. Canada has relatively low levels of polarisation, while Poland has very high levels. In Poland, appointments to the constitutional tribunal are made by an ordinary majority. This made it easier for a populist government to turn the constitutional tribunal into a captured court. Based on the analysed case studies, the hypothesis seems correct: constitutional courts with a qualified majority appointment might be just as political, but they are less partisan political than similar courts using an ordinary majority in the appointment procedure. Because the transparency in appointment procedure and voting is similar, polarisation is the only different factor; thereby, the hypothesis of Table 2 is correct in the comparison.

The Supreme Court of India and the ZACC have similar appointment procedures where the judiciary plays an important role. Both courts use dissenting and concurring opinions often. Political-societal polarisation in India is higher than in South Africa. The appointment procedure is different. Senior members of the Supreme Court of India appoint new members. The president appoints ZACC judges after consultation with the Judicial Service Commission, consisting of politicians and lawyers. While both systems differ, they are not very transparent. The ZACC is a respected institution that serves as a strong protector of democracy and the rule of law in South Africa; the Supreme Court of India has been criticised for not being assertive against democratic backsliding in India. The politicisation of judicial review can also mean that a court is unwilling to act against executive and/or legislative excesses because it is more concerned with institutional continuity. Part of the reason for having a constitutional court is to provide checks and balances. The data in Table 2 shows that ZACC is more independent than the Supreme Court of India. The hypothesis of Table 2 is correct in the comparison because politicisation does not have to mean action; it can also be the lack of action when it would be appropriate for the judiciary to intervene, such as democratic backsliding. The ZACC mostly sticks to conventional judicial interpretation of a clearly written modern constitution.

Hypothesis 3: Courts that use dissenting and/or concurring opinions frequently have a higher level of politicisation of judicial review than courts that vote and deliberate in private because if a court votes in public, the balance of power is better known, and interest groups are better able to influence appointments to the court.

All six analysed countries allow a form of dissenting and concurring opinions, but the use of the practice varies. In Germany, it is, for example, less common than in other courts analysed. When comparing the BVerfG with SCOTUS, one can argue that, unlike SCOTUS, there are no clearly visible ideological divisions within the BVerfG, even though many of the BVerfG rulings are not unanimous. Because of this unanimity, it is hard to assess deliberations within the BVerfG and compare them with those of other constitutional courts. The case studies do not provide enough evidence to support this hypothesis.

Hypothesis 4: In systems with more transparency in appointment procedure and a relatively low level of polarisation, we expect a lower level of politicisation of judicial review.

Based on the six analysed case studies, this hypothesis is not true. In the three countries with low polarisation, I could not find a reasonable assumption that the more transparent German system has higher or lower politicisation than the less transparent Canadian and South African systems. The BVerfG, SCC and the ZACC have no clear distinction based on internal blocks. A distinction can be made in Germany and Canada based on the political party that made the appointment. In Canada, a distinction can be made between the province or the region of the judges, especially between the majority Francophone province of Quebec and the other provinces of Canada with an Anglophone majority. Within

Hypothesis 5: In systems with more transparency in appointment procedure and a relatively high level of polarisation, we expect a higher level of politicisation of judicial review.

These hypotheses are partly true. There is a negative link between social and political polarisation and the public's trust in the judiciary. In countries with high polarisation, such as the U.S. and Poland, the appointment of judges has become highly political. In the US, increased polarisation has affected the ideological profile of newly appointed judges. The ideological distance between judges appointed by Democrats and Republics has increased since the 1990s. In Poland, the executive wanted to control the judiciary. The theory is partly true. Polarisation affects the trust in the judiciary. Increased polarisation has led to more ideological appointments (USA) or full court capture (Poland). When analysing the case studies, the theory missed that increased polarisation could lead to political decisions that undermine the trust in the judicial system.

Chapter 6. Conclusion and discussion

In conclusion, I will discuss the information gathered in the previous chapters to answer the main research question: To what extent do the constitutional courts reflect (elements of) political decision-making, and how can this be explained by the characteristics of the courts or the characteristics of the issues they deal with?

In an ideal world, constitutional courts are independent and counter-majoritarian institutions that should protect fundamental values against executive and/or legislative abuses of power. Constitutional courts are sometimes criticised as being "political". Politics are activities of decision-making and power distribution; this way, every public institution that makes decisions is political, including the courts. In ideal situations, constitutional courts are impartial referees of politics. One can view constitutional courts like the mast Odysseus used to tie himself to listen to the Sirens. Constitutional courts are (part of) the (non-majoritarian) mast that democracies use to prevent being tempted by the sirens of autocracy, oligarchy, or kleptocracy. When politics is too divided to make decisions, stakeholders will be more likely to look to judges to make decisions. If politics is too divided to make laws and politics, case law is often used as a temporary solution, and there is nothing as permanent as a temporary solution.

The way constitutional courts operate differs widely depending on laws and culture. Constitutional courts are always political in the sense that they are institutions with extensive powers, including rejecting laws and decrees if they conflict with the Constitution. In an ideal situation, the constitutional court stands above party politics; this is not always the practice case. Decisions of constitutional courts often protect the power of themselves, such as the collegium system in India. India is experiencing democratic backsliding at this moment, and the Supreme Court is being criticised for picking fights and not doing enough to prevent democratic erosion. For example, political and social polarisation in the U.S. has led to clearly disguisable ideological blocks within SCOTUS. The former government captured the constitutional tribunal in Poland and turned the court into a party puppet. Political polarisation in courts can be prevented by a democratic political culture, including respect for judicial independence and judicial making political compromises. What is noteworthy is that in many constitutional courts (part of), the appointment process is not part of the Constitution. Increased polarisation in the U.S. led to hardball in the appointment process, and therefore SCOTUS became more intertwined with majoritarian partisan politics instead of being a non-majoritarian institution. A more extreme case happened in Poland, where polarisation and hardball led to illegal appointments and court capture. Chances in judicial appointments often reflect political polarisation; in a very polarised society, those who are not with me are against me, and capturing non-majoritarian institutions can become another way to reach political goals and/or entrench power. To prevent a future Dutch constitutional court from being too close to party politics, it is important that judges in this court are appointed using a non-majoritarian method or a supermajority in parliament.

What does this mean for the Netherlands?

The international trend has favoured judicial review over parliamentary sovereignty. Political culture is just as influential, if not more important, than the written constitution. The Dutch constitution is quite old and vaguely phrased[15].

If a constitutional court were established today, it would have a large space that can/must be filled in by this constitutional court with case law. Furthermore, other documents within the Dutch legal system have a (quasi)constitutional status, such as the ECHR, some traditions and case law. Other documents within the Dutch legal system have a (quasi)constitutional status, such as the ECHR, some traditions and case law[16], and the Charter for the Kingdom of the Netherlands[17]. The ZACC is viewed as less politicised than SCOTUS because the South African constitution is more modern and clearer, leaving less room for interpretation and debate. T. A new Dutch constitutional court would gain many decision-making powers because of this space. Introducing a constitutional court in the Netherlands is not a silver bullet, but it can improve decision-making quality and human rights protection. If the Dutch parliament wants to introduce a constitutional court, it should not be done alone but as part of a bigger government and constitutional reform.

The discussion about article 120 GW is as old as the article itself. Many of the countries analysed have historical links with the Netherlands. For Germany and Poland, this link is European and parliamentary. For the U.S. and South Africa, this link is colonial and maritime. Constitutional Courts are institutions that can add additional checks and balances. After a period of grotesque human rights violations, constitutional courts have played an important role in anchoring democracy and the rule of law in Germany and South Africa. Introducing a constitutional court would significantly overhaul the Dutch political system.

Thorbecke supported the judicial review of acts of parliament, but it is unclear if he supported a special Constitutional Court. If a two-thirds majority of the Dutch political landscape favours changing Article 120 GW, there are several questions they need to answer.

- Do they favour review by a centralised constitutional court or decentral review by ordinary courts?
- What legal documents are allowed to be used in review? Only the bill of rights within the constitution, the whole constitution, the ECHR and/or the Charter for the Kingdom of the Netherlands?
- If a constitutional court were established, what appointment method would be used?
- Would judges have a term limit or serve for life/till retirement?

Because of the vague wording of the Dutch constitution and these questions, the introduction of a constitutional court should be done into a broader discussion of government reform.

[15] For example, the GW and the ECHR both guarantee the right to privacy. Article 10 of the GW says this can be limited by an act of parliament while Article 8 of the ECHR says this right can be limited "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". As can be seen, the ECHR is more specific.

[16] Such as the "trust rule", meaning that the government or an individual minister should resign after the House of Representatives adopts a motion of no confidence against them.

[17] The Charter for the Kingdom of the Netherlands establishes the relationship between the Netherlands and the Caribbean islands of Aruba, Curaçao, and Sint Maarten. Together, these four countries make up the Kingdom of the Netherlands.

Scientific and social relevance

The social importance of this thesis is that it contributes to the discussion in the Netherlands about administrative innovation in light of the childcare benefit scandal. Many Dutch politicians argue for introducing some form of constitutional review of laws. By analysing different countries, best practices can be learned.

The scientific importance of this thesis lies in the combination between an institutional analysis and social-political polarisation. The link with political polarisation offers a new perspective to look at institutions. Furthermore, this thesis aims to link the Dutch discussion about government reform with a worldwide debate regarding checks and balances and best practices. Democracy worldwide is declining; by contributing to the debate on democracy and the rule of law, I hope to contribute towards the academic discussion about how democracy can be protected.

Reliability and validity

In the case study regarding SCOTUS, it is hard to distinguish the abolishment of the Senate supermajority confirmation from the increased polarisation. The supermajority was abolished because of and in the same timeframe as an increased polarisation within the US. Therefore, it is hard to measure the abolishment of the Senate supermajority and the increased polarisation separately.

What would I have done differently with the knowledge of hindsight? Most of the countries selected in the case studies are federations; maybe by introducing more unitary states, I would be better able to reflect on the Dutch situation of a unitary state with a parliamentary system. Most federations have a constitutional court[18]. In a presidential or semi-presidential system, a constitutional court might seem logical to judge executive and legislature disputes regarding power allocation. In some parliamentary systems, there is a thought of parliamentary sovereignty, meaning that parliament is directly elected by the people and, therefore, the highest organ of state, capable of overruling the executive and the judiciary. This is in contradiction to a strict interpretation of the *trias politicas* of Montesquieu.

Recommendations for further research

This thesis only focuses on constitutional judicial review in a centralised setting. It can be valuable to analyse countries that use a decentralised form. This thesis mainly focuses on federal governments; examining more unitary countries with a constitutional court is worthwhile.

For a well-functioning constitutional court, its decisions must be legitimate. These decisions do not necessarily need to reflect public opinion but require a certain amount of acceptance. What factors contribute to the legitimacy of constitutional courts can be further examined?

This thesis mainly methodologically used qualitative desk research. It would be interesting to see if a more quantitative or expert interview-driven methodology would lead to similar results.

The case studies did not offer enough evidence to support Hypothesis 3[19]. Further research can be done on the use and frequency of dissenting and concurring opinions in constitutional courts and their effect on politicisation.

[18] Sometimes or initially only for judging cases between states or between states and the federal government.

[19] Courts that use dissenting and/or concurring opinions frequently have a higher level of politicisation of judicial review than courts that vote and deliberate in private because if a court votes in public, the balance of power is better known, and interest groups are better able to influence appointments to the court.

Reflection

In the reflection, I will look back at the process of writing my thesis, reflect on my sources, and share my personal views and experiences of writing this master's thesis. Karl Popper argued that one should be critical based on thorough reasoning. Personal reflection is a part of this critical reasoning. Methodology This thesis mainly uses qualitative desk research. Adding quantitative methods and expert interviews would have improved the quality of this thesis, but I did not use them due to time limitations. Personally, it might have benefited my academic development if I used a multi-method approach.

Personal view

In this chapter, I will share my view about introducing a constitutional court in the Netherlands. Discussions about the desirability of judicial review of acts of parliament date back towards the revolutionary year of 1848. In that year, revolutions swept across Europe. The bourgeoisie demanded more say in government and opposed the divine right of absolute kings. The Netherlands had a constitution that vested most power in the king. In 1948, King Wiliam the Second accepted a new constitution that limited royal power from an active political figure to a figurehead[20]. This discussion was already discussed in 1848 between the writers of the new constitution. The liberal Johan Rudolph Thorbecke favoured constitutional judicial review. The constitution should have a higher position towards acts of parliament, just as acts of parliament should have a higher position than a municipal ordinance.

The conservative Donker Curtius opposed constitutional judicial review. There is still debate about why he did this. He might have favoured parliamentary sovereignty as an ideal. It might also be that he wanted political power to be vested in the national government, of which he was soon to be part. During the ancient regime, the Netherlands was very decentralised; local and provincial governments had most of the power, and the national government was weak. Ironically, the case studies in my thesis regarding Canada and the U.S. were cases where a constitutional court protected the power of a national government against a state government. What also might have played a role was that the heir (the later King Wiliam the Third) was known for his erratic behaviour. Donker Curtius might want to protect the power of parliament against the king by making acts of parliament conditionally inviolable against a cabinet and/or judiciary that the king could control. Today, Dutch judges are still appointed by the crown, even though nowadays, the monarch's role is purely ceremonial.

Personally, I think Thorbecke was right. A constitution without constitutional judicial review ceases to be a real constitution and becomes more of a guideline. Because of a monist view of international law and international cooperation in organisations such as the EU, treaties and laws that result from treaties are more important than the Dutch constitution in discussions about human rights and the limits of state power. The ECHR is more clearly formulated than the Dutch constitution. You have the odd situation that Dutch judges can review acts of parliament based on treaties but not the constitution. The current Dutch political system outsources judicial review to international courts such as the European Court of Human Rights (ECtHR) in Strasbourg and the ECJ in Luxembourg. Treaties like the ECHR are good but should complement and not replace national institutions. The Halsema and Omtzigt proposals would only allow judges to review based on the "negative rights" within the Bill of Rights, a part of the Constitution. I would argue against this because, to quote Thorbecke, the Constitution would cease to be a constitution. It

[20] There were rumors that the king was blackmailed because of his alleged homosexuality.

should be meaningful if something is so crucial for the Dutch people that they put it in their most important legal document. This ties into the problem that the Dutch constitution is quite vaguely worded and that this would give a court with constitutional judicial review much space to fill in with case law. It would be unwise to introduce constitutional judicial review without updating the Constitution.

Should constitutional judicial occur by ordinary courts (decentral review) or a special constitutional court (central review)? Arguments favouring decentral review are that decentral review is the current system used for judicial review based on treaties and that the Dutch judiciary would be competent to use similar methods for the constitution.

There are arguments in favour of a separate constitutional court. Such a court would be more experienced and legitimate in constitutional judicial review. One of the main arguments against constitutional judicial review is that it can lead to the politicisation of the judiciary. A separate constitutional court can shield the rest of the judiciary from this politicisation. Much of how an HDCC Hypothetical Dutch Constitutional Court (HDCC) would function would depend on its institutional characteristics, such as term limits, retirement age, and appointment procedure. In my thesis, I analysed countries where constitutional court judges have fixed term limits and others where judges have terms for life or till fixed retirement age. I see no apparent differences between a temporary appointment and a life appointment. However, I will avoid the U.S. system, where a life appointment is until death or voluntary retirement. This is because deaths are often unexpected, giving more room for political opportunism in the appointment procedure, as opposed to a fixed term or mandatory retirement age.

More important is the appointment procedure. Who selects and approves the new judges tends to influence the court's decision. I was surprised that there are no strong safeguards to protect the independence of the judiciary in judicial appointments. Judicial appointments in the Netherlands are made by the crown, de facto by the minister of justice and security. In practice, the judiciary mainly selects its members through a meritocratic process. There is a strong tradition of judicial independence in the Netherlands, but this might not prevent a future government from trying to influence the judiciary by packing the courts. I would support legislation or even a constitutional amendment to better protect the independence of new judicial appointments. This is even more the case for the HDCC. The BVerfG and the ZACC are strong guardians of their nation's constitutions and democracy, human rights, and the rule of law. The HDCC should be non-majoritarian institutions that guard an essential continuity in fundamental values. This should mean that courts should not fundamentally change when there is a chance of a parliamentarian majority or government. For the HDCC, I recommend an appointment, a government nomination, and a confirmation by parliament using a two-thirds majority because this would reduce the risk of court capture. Since the Netherlands has a bicameral system, several ways exist. Appointments can be confirmed by both houses of parliament using a two-thirds majority, or each house chooses half of the judges. The Germans and the Belgians let each house confirm halve of the judges, which seems to work for them. The constitutional court amendment should be as straightforward as possible, setting a fixed number of judges, their terms, and appointment procedure and not leaving this to acts of parliament or case law to prevent court capture.

Both central and decentral constitutional judicial review are suitable solutions. A constitutional court will more often declare laws unconstitutional than an ordinary judge (Claes et al., 2021). A system of decentral review would have the advantage that it would be a smaller chance, therefore requiring less effort. An HDCC would be more transparent and more knowledgeable. This knowledge, however, might scare the legislature and the cabinet because they would lose power using a zero-sum game approach. There is always the risk that a parliamentarian majority uses the HDCC to rule beyond the grave by

limiting the political room for the next parliament. If a parliamentarian supermajority wants to play constitutional hardball, a supermajority reduces but does not eliminate the risk of politicisation.

This is just speculation because I did not look at countries with decentralised review; I think the differences between centralised and decentralised judicial review are overstated. Many people view SCOTUS as the prime example of a constitutional court. SCOTUS, however, is not just a constitutional court; it is the highest federal court in the US. SCOTUS typically hears appeals from state supreme courts and federal courts. De jure, the U.S. has a decentralised method of judicial review; every American judge can review the constitutionality of laws since the times of Washington and de Tocqueville. De facto, the most critical judicial questions end up at SCOTUS. Currently, the Netherlands has four different high courts[21]. In a system of decentral review, this might lead to conflicts if, in similar cases, for example, the highest civil and criminal court (Supreme Court) and the highest administrative court (Council of State) develop different methods of interpretation undermining legal certainty, in an extreme and theoretical case they might even declare each other rulings invalid because they view their court should have the final say. My thesis has examples showing that one consistency of supreme and constitutional courts is that their rulings typically safeguard and expand their powers; the Dutch Supreme Court is an exception to this rule. In several rulings, the Dutch Supreme Court strictly interpreted Article 120[22], limiting its ability for judicial review (Voermans, 2023).

[21] Supreme Court (Hoge Raad), Counsel of State (Raad van State), College van Beroep voor het bedrijfsleven, and the Centrale Raad van Beroep.
[22] Such as van den Bergh v. Staat der Nederlanden in 1961 and the Harmonisatiewet ruling in 1989

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Appendix

Table 5: Relation between political polarisation and trust in courts and the legal system							
Country	Trust in courts (OECD, 2007)	Trust in courts (OECD, 2014)	Trust in courts (OECD, 2014/2021)	Trust in courts (OECD, 2021)	Political polarisation (V-Dem. 2022)	Social polarisation (V-Dem, 2022)	Social polarisation transformed (V-Dem, 2022)
Australia	49	60	52,6	52,6	1,27	1,81	2,19
Austria	74	66	59,97	59,97	2,46	1,56	2,44
Belgium	52	49	51,09	51,09	1,78	2,25	1,75
Brazil	37	41	41	-	3,81	0,04	3,96
Canada	60	55	55,66	55,66	2,17	2,18	1,82
Chili	20	19	19	-	2,62	0,88	3,12
Colombia	34	26	19,12	19,12	2,6	0,73	3,27
Czechia	32	39	39	-	1,81	1,64	2,36
Denmark	84	83	78,12	78,12	0,72	3,14	0,86
Estonia	43	54	64,61	64,61	2,01	2,37	1,63
Finland	77	74	74	-	1,41	3,27	0,73
France	48	48	41,7	41,7	2,52	0,68	3,32
Germany	51	67	67	-	1,22	1,75	2,25
Greece	47	44	44	-	2,5	0,84	3,16
Hungary	49	44	44	-	3,88	0,02	3,98
Iceland	44	63	52,69	52,69	1,33	-	-
India	73	67	67	-	3,37	0,52	3,48
Indonesia	35	54	54	-	2,4	1,21	2,79
Ireland	65	67	68,06	68,06	0,32	1,64	2,36
Israel	49	60	60	-	2,82	0,47	3,53
Italy	39	29	29	-	3,25	0,8	3,2
Japan	53	65	48,34	48,34	0,82	2,85	1,15
Latvia	35	31	44	44	1,2	1,67	2,33

Luxembourg	76	76	72,28	72,28	0,29	2,68	1,32
Mexico	37	39	39	-	3,25	0,56	3,44
Netherlands	65	65	68,99	68,99	1,74	1,21	2,79
New Zealand	48	63	64,83	64,83	1,53	1,36	2,64
Norway	79	83	83	-	0,26	1,36	2,64
Poland	38	36	36	-	3,98	0,07	3,93
Portugal	40	33	42,03	42,03	1,27	1,89	2,11
Russia	22	36	36	-	3,51	1,98	2,02
Slovakia	30	30	30	-	2,44	0,3	3,7
Slovenia	30	30	30	-	3,8	0,12	3,88
South Africa	51	60	60	-	2,39	0,75	3,25
South Korea	29	27	49,06	49,06	2,8	0,52	3,48
Spain	44	36	36	-	2,4	0,13	3,87
Sweden	68	69	56,67	56,67	1	2,18	1,82
Switzerland	73	81	81	-	1,29	-	-
Turkey	67	48	48	-	4	0,05	3,95
Ukraine	8	12	12	-	3,64	1,94	2,06
United Kingdom	55	60	68,07	68,07	2,38	0,79	3,21
United States	55	59	59	-	3,57	0,35	3,65

Table 6: Relation between political polarization, trust in courts and the legal system, and appointment procedure of constitutional/supreme courts									
Country	Trust in courts (OECD, 2007)	Trust in courts (OECD, 2014)	Trust in courts (OECD, 2014/2021)	Trust in courts (OECD, 2021)	Political polarisation (V-Dem. 2022)	Social polarisation (V-Dem, 2022)	Social polarisation transformed (V-Dem, 2022)	Appointment procedure (Venice Commission, 1997 and Constitute, 2024)	Appointment procedure codified (Venice Commission, 1997 and Constitute, 2024)
Australia	49	60	52,6	52,6	1,27	1,81	2,19	Appointed by the governor-general, nominated by the prime minister	Executive
Austria	74	66	59,97	59,97	2,46	1,56	2,44	Appointed by President; nominations by cabinet, National Council, Federal Council	mixed
Belgium	52	49	51,09	51,09	1,78	2,25	1,75	Appointed by king (2/3 majority); Lifetime appointment	executive and legislative
Brazil	37	41	41		3,81	0,04	3,96	Appointed by the President, confirmed by the Senate	executive and legislative
Canada	60	55	55,66	55,66	2,17	2,18	1,82	Appointed on the advice of the Prime minister	Executive
Chili	20	19	19		2,62	0,88	3,12	Elected by parliament, appointed by the president, appointed by supreme courts	mixed
Colombia	34	26	19,12	19,12	2,6	0,73	3,27	Nominated by the Superior Council of Judiciary, elected by the Supreme Court	judiciary
Czechia	32	39	39		1,81	1,64	2,36	Appointed by the president, confirmed by the senate	executive and legislative
Denmark	84	83	78,12	78,12	0,72	3,14	0,86		
Estonia	43	54	64,61	64,61	2,01	2,37	1,63	Chief Justice by parliament; others by Chief Justice proposal	judiciary
Finland	77	74	74		1,41	3,27	0,73		
France	48	48	41,7	41,7	2,52	0,68	3,32	Appointed by the president (3/5 vote);	Mixed

								Assembly and Senate presidents appoint three each.	
Germany	51	67	67		1,22	1,75	2,25	Appointed by Bundestag and Bundesrat (2/3 vote)	Legislative
Greece	47	44	44		2,5	0,84	3,16		
Hungary	49	44	44		3,88	0,02	3,98		
Iceland	44	63	52,69	52,69	1,33	99	no data		
India	73	67	67		3,37	0,52	3,48	Appointed by the President on collegium recommendatio n	judiciary
Indonesia	35	54	54		2,4	1,21	2,79		
Ireland	65	67	68,06	68,06	0,32	1,64	2,36		
Israel	49	60	60		2,82	0,47	3,53	Appointed by the President upon Judicial Selection Committee nomination	Executive and judiciary
Italy	39	29	29		3,25	0,8	3,2	Elected by parliament, appointed by the president, appointed by supreme courts	Mixed
Japan	53	65	48,34	48,34	0,82	2,85	1,15	Cabinet selection: Chief Justice appointed by Emperor	Executive
Latvia	35	31	44	44	1,2	1,67	2,33	Majority in Parliament	legislative
Luxembou rg	76	76	72,28	72,28	0,29	2,68	1,32		
Mexico	37	39	39		3,25	0,56	3,44	Appointed for 15 years, ratified by Senate from President's list	executive and legislative
Netherlan ds	65	65	68,99	68,99	1,74	1,21	2,79		
New Zealand	48	63	64,83	64,83	1,53	1,36	2,64		
Norway	79	83	83		0,26	1,36	2,64		
Poland	38	36	36		3,98	0,07	3,93	President, Vice-President appointed by President; others nominated by PM	Executive
Portugal	40	33	42,03	42,03	1,27	1,89	2,11	Parliament election (2/3 majority); 3 by existing justices	legislative

Russia	22	36	36		3,51	1,98	2,02		
Slovakia	30	30	30		2,44	0,3	3,7	Appointed by the president from National Council candidates	Executive and legislative
Slovenia	30	30	30		3,8	0,12	3,88	Elected by National Assembly on President's proposal; 9-year term	Executive and legislative
South Africa	51	60	60		2,39	0,75	3,25	Judicial Service Commission selects; President chooses	Executive and legislative
South Korea	29	27	49,06	49,06	2,8	0,52	3,48	Appointed by the president; recommendations from the assembly, supreme court, and president.	Mixed
Spain	44	36	36		2,4	0,13	3,87	Appointed by the king; nominated by Congress, Senate, government, judiciary	Mixed
Sweden	68	69	56,67	56,67	1	2,18	1,82		
Switzerland	73	81	81		1,29	No data	No data		
Turkey	67	48	48		4	0,05	3,95	Appointed by the president and parliament on the recommendation of the judiciary	mixed
Ukraine	8	12	12		3,64	1,94	2,06	Appointed by the President, Parliament, Congress of Judges	Mixed
United Kingdom	55	60	68,07	68,07	2,38	0,79	3,21		
United States	55	59	59		3,57	0,35	3,65	Appointed for life; nominated by President, confirmed by Senate	Executive and legislative