

Chapter 2

Constitutional Courts and Democracy. Facets of an Ambivalent Relationship

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Abstract This chapter addresses the ambivalence of judicial review as a safeguard for and constraint on democracy. On the one hand, constitutional review provides an important safeguard for rights and procedures which are essential to democracy. On the other hand, an institution which is able to protect democratic rights and principles will necessarily – at least now and then – come to be seen as overreaching, and thereby itself intruding upon principles of democracy. The chapter also draws attention to factors promoting the institutionalisation of constitutional adjudication worldwide, and to institutional frameworks shaping the more or less activist approach of courts in constitutional matters. It shows why German democracy has fared well, so far, with a powerful constitutional court which has, to a certain extent, assumed the role of a guardian of rational lawmaking, and why there is no “one and only” proper solution to the democracy dilemma implicit in the question of constitutional review.

Keywords Constitutional courts • Judicial review • Democracy • Interpretation • Standards of scrutiny • Ambivalence • Federalization • Proportionality • German Federal Constitutional Court

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2.1 The Ambivalence of Judicial Review

Constitutional courts – apex courts with the competence to review statutory legislation for compatibility with constitutional law¹ – are a widely accepted part of many democratic political systems. Whether a judicial institution with the competence to declare legislative acts unconstitutional is compatible with the principle of democracy is, however, contested.² The late Robert Bork even saw constitutional courts as an institutionalised conspiracy of leftist elites, designed to fence their queer political agenda off against the common voter.³

In fact, there are two perspectives from which the operation of constitutional courts can be analysed: either with a focus on their possible or actual safeguarding and fostering function with respect to democracy, or with a focus on how they may or do restrict democratic decision-making. To get a complete picture, both aspects must be considered.

Democracy depends on a framework of rules. These rules are themselves an object of democratic decision-making, but they cannot be established, changed or disregarded *ad libitum* if the system in which they apply and which they constitute is to be a democratic one. Constitutional courts are commissioned to protect the constitutional framework of democracy. In that respect, they appear as instruments of securing, rather than restricting, democracy, even if their task includes defending the rules of democracy against the will of a ruling majority.⁴ It goes without saying that complying with certain constitutional rules is not undemocratic but a necessary prerequisite for the functioning of democracy as such, as well as of the particular type of democracy established by the relevant constitution.

On the other hand, a court with the power to bring constitutional rules to bear even against a legislative majority will necessarily also come to attention as a factor limiting democratic decision-making. The power of a constitutional court can be misused. And, to make it worse, it is in the nature of things that in the usually difficult cases decided by constitutional courts, opinions on whether this power has been used properly or misused will typically be divided. There are no perfectly operational, invariable and cross-culturally valid standards determining a dividing line between reading something out of the constitution (or any other legal rule) and reading something into it, between interpretation and rule-making, or between

¹For alternative – strong or weak – forms of such review see Tushnet (2008: 18 et seq.). The above definition includes courts that are not specialized in constitutional review.

²Waldron (2006), concerning judicial review in countries with basically functional legislative institutions; Waldron acknowledges that judicial review may be in place where this condition is not met.

³Bork (2003). By contrast, Hirschl (2004) sees the transfer of power which judicially administered constitutionalism implies as the result of a self-interested strategy of conservative ruling elites designed to insulate their hegemonial position against democratic majorities.

⁴On constitutional jurisdiction as a safeguard of the democratic constitutional system see Böckenförde (1999: 10 et seq.); for more extensive analysis of the role of the German FCC with respect to the consolidation and quality of democracy in Germany see Kneip (2009, 2013).

applying the law and making policy.⁵ Once a constitutional court has been established or – as in the case of the Supreme Court of the United States and the Supreme Court of the German *Reich* (*Reichsgericht*) under the *Weimar* constitution⁶ – has established itself by assuming a competence for judicial review which the constitution has not conferred upon it explicitly, accusations of excess of power will inevitably arise. And opinions on whether such accusations are justified or not will inevitably be divided. Where “political question” doctrines have been devised to avoid trespassing on the terrain of other constitutional powers,⁷ there is as much controversy over their proper area of application as over the reach and limits of judicial power in general.

2.2 Cultural Differences and Current Trends

Whether and to what extent the operation of a given constitutional court will be criticised for transgressing judicial power depends not only on the behavior of that court and the contents of the constitution which it interprets, but also on expectations of the observers which are shaped by the legal and political culture to which they belong. In the historical circumstances in which the Basic Law (*Grundgesetz*, the German Constitution) and the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) were created in 1949 and 1951, respectively, it is hardly surprising that strong precautions to secure democracy and the rule of law were held necessary, and that the Federal Constitutional Court (FCC) was accordingly established as a powerful veto player. The experience of the dimensions of evil which neglect and destruction of institutions securing human rights and the rule of law had set free, militated for a minimax strategy in legal policy – a strategy that would as safely as possible prevent another worst case. The decision to establish a powerful constitutional court was part of such a strategy, and it was taken consciously,⁸ although contemporary political actors did not grasp the full implica-

⁵On the tradition of confronting “law” and “politics” in German constitutional thinking see Haltern (1998: 81 et seq.); Kau (2007: 130 et seq.).

⁶See Lübke-Wolff (1990). For the jurisprudential background Gusy (1985).

⁷Cf. Burchardt (2004: 32 et seq.).

⁸This is common wisdom and one of the reasons why the FCC, in spite of its rather extraordinary role in the German political system, is accepted as an integral part of it. As an illustration, see the following remarks from a presentation of the FCC on the website of the German diplomatic missions in France: “Quel est le point commun entre les missions de l’armée allemande à l’étranger, le droit à l’avortement, la fermeture des magasins le dimanche, le traité européen de Lisbonne et le montant de l’aide sociale ? Dans tous ces domaines, les responsables politiques allemands ont, un jour, dû se plier à un arrêt de la Cour constitutionnelle fédérale. Cette dernière veille au respect de la Loi fondamentale. Mais ses arrêts revêtent parfois une grande portée politique. Ainsi, en 2011, elle examinera la constitutionnalité du plan de sauvetage de l’euro, mis en place en mai 2010. Historiquement, le rôle qui est assigné à la Cour constitutionnelle fédérale est la conséquence des expériences vécues entre 1930 et 1945. En 1949, les pères de la Loi fondamentale ont ainsi voulu fixer des limites au pouvoir politique au sein de l’État. Pour ce faire, ils ont doté la Cour

tions of their decision to set up a powerful court, as chancellor Adenauer's famous remark on the role of the Constitutional Court in the dispute over the European Defense Community Treaty ("That ain't what we imagined!"⁹) nicely illustrates.

Besides the strongly felt need to fortify the new constitutional order, remainders of a widespread scepticism towards western concepts of democracy¹⁰ contributed to acceptance of, and even a demand for, a strong countermajoritarian institution. In addition, the establishment of a potent constitutional court fitted in with the new Republic's federal organisation, which was itself regarded as an essential rampart against the resurgence of totalitarianism. The Swiss example shows that judicial competences to review federal legislation are not a necessary concomitant of federalism,¹¹ but there obviously is an affinity between the two.

To most British observers, a constitutional court operating as the German one does would appear as an unacceptable restriction of parliamentary sovereignty. Between the traditional British model of parliamentary sovereignty and the German post-war-model of a parliamentary democracy flanked by extensive constitutional adjudication, there is extensive middle ground. In France, for instance, the perspective of a "*gouvernement des juges*" is traditionally dreaded,¹² but an *a priori* review of legislative acts by the *Conseil Constitutionnel* (CC), and an additional competence of the CC, introduced in 2008, to review the constitutionality of legislative provisions upon referral by ordinary courts ("*question prioritaire de constitutionnalité*") have come to be accepted.¹³ Much of what the German FCC does, however, looks like a judicial *excès de pouvoir* to French observers, and in past discussions in France concerning the introduction of an individual constitutional complaint, the role which the German FCC has been able to assume due to the popularity accrued to it from its competence to hear individual constitutional complaints¹⁴ has served as a deterrent example.¹⁵

constitutionnelle fédérale de compétences étendues, exposées dans l'article 93 de la Loi fondamentale...", at <http://www.allemagne.diplo.de/Vertretung/frankreich/fr/03-cidal/09-dossiers/Karlsruhe/00-karlsruhe-seite.html> (retrieved 30 August 2015). For the establishment of the FCC as a reaction to the atrocities of the Nazi period see Benda/Klein (1991: 1, 7); Anzenberger (1998: 6–7). When in 1951 the law on the FCC was passed, vesting the court with the power to hear individual constitutional complaints, a strong safeguard for and symbol of the rule of law was also favored in opposition to Bolshevism, see Deutscher Bundestag, minutes of the 112th session, 18 January 1951, 4195 (4218 C) (<http://dipbt.bundestag.de/doc/btp/01/01112.pdf>).

⁹ On that remark and its background Bommarius (2009: 219 et seq.).

¹⁰ Günther (2004).

¹¹ Even in Switzerland, however, the supremacy of all federal law over cantonal law is buttressed by federal judicial review. For an example see below, text with note 31.

¹² The constitutions of 1791 and 1795 explicitly ruled out judicial review of legislative acts, see Kiemansegg (2013: 148).

¹³ For details on the successive development of competences of the Conseil Constitutionnel see Stirn/Aguila (2014: 633 et seq.); on the *question prioritaire de constitutionnalité* Walter (2015).

¹⁴ See Lübke-Wolff (2011: 133–137).

¹⁵ Joop (2006: 588 et seq.).

Worldwide, constitutional adjudication is on the advance. The number of states with democratic constitutions – democratic at least on paper – has increased tremendously in recent decades. The “new democracies” have not developed in a long and essentially continuous process of political modernisation. Unlike, for instance, the United Kingdom or Switzerland, they could not rely on deeply entrenched democratic traditions, fully developed civil societies, a culture of compromise, or a broad popular awareness of the importance of procedural rules and other institutional framework. Accordingly, in their constitutional policies, as in the constitutional policies establishing the Federal Republic of Germany after World War II, the safeguarding function of constitutional jurisdiction usually carried greater weight than the so called “counter-majoritarian difficulty”¹⁶ which it raises.¹⁷ Most of the new democracies have, however, opted for a somewhat less pervasive type of constitutional jurisdiction than was chosen for post-war Germany. The great majority of Middle and Eastern European countries, for instance, have created specialised constitutional courts but have not endowed them with a competence to hear individual constitutional complaints against the judgments of other courts (within the EU, the Czech Republic and Slovenia are exceptions), which leaves the judiciary out of direct control by the relevant constitutional court, and the constitutional court without the popularity, prestige and – as a result – power to be gained from that competence.

Besides the demand for institutional safeguards stabilising new political systems, two more factors have promoted the propagation of constitutional adjudication, and will probably promote it further: the tendency towards federalisation or similar forms of autonomisation of regional entities within nation states, and the increasing importance of transnational integration, particularly integration into international treaty systems for the protection of human rights.

The affinity between regional autonomy structures and judicial safeguards that will protect them from unilateral distortion has already been mentioned above. In line with this affinity, not only Germany (Art. 93 GG), but also, for instance, Italy in its constitution of 1948 (Art. 134), Spain in its post-Franco-constitution of 1978 (Art. 161), and the Russian Federation in its constitution of 1993 (Art. 125) have provided for constitutional courts with competences to secure the constitutional distribution of powers among the central state and decentralised regional units. The autonomisation of regions (Scotland, Wales and Northern Ireland) within the United Kingdom, on the other hand, irreversible as it may be as a matter of fact, is not constitutionally, let alone judicially, protected against cutbacks by Westminster legislation. It is, however, protected against overreaching acts of the national executive; just as national competences are protected against overreaching regional legislation.¹⁸ These are matters of supremacy of central legislation over acts of the executive as well as over regional legislation, and therefore matters within the ambit of

¹⁶ Bickel (1986).

¹⁷ In some cases, a mere signalling function may have been dominant, instead, see Stone Sweet (2012: 820).

¹⁸ von Andreae (2005: 490 et seq., 495 et seq.).

judicial control. Judicial review of regional legislation is a traditional element of federal or otherwise decentralised systems even where these do not allow for judicial review of legislative acts on the national level. Regional autonomisation, which is on the rise worldwide, has been and will continue to be a driving force in the ascent of constitutional adjudication.

Moreover, the growing importance of integration into transnational legal systems promotes the creation of domestic mechanisms of judicial review that will ensure conformity of national acts, including legislative ones, with international obligations, and lower the risk of being caught in violation of treaty obligations by international courts. British, French and Turkish adaptations to the system of judicial protection established by the European Convention on Human Rights (ECHR) can serve as examples.

The United Kingdom, although traditionally averse to judicial review of parliamentary legislation, has created judicial competences to review the compatibility of legislative acts with the Convention. In 1998, the Human Rights Act (HRA) made the Appellate Committee of the House of Lords – which has since been transformed into the Supreme Court of the United Kingdom – and a few other judicial bodies guardians of the compatibility of UK legislation with the guarantees of the ECHR. According to Sec. 4(2) HRA, the empowered courts, if satisfied that a provision of (primary) legislation is incompatible with the Convention, may make a statement of that incompatibility. Parliamentary sovereignty was and is preserved in that the new judicial competence does not extend to voiding a provision which has been found incompatible. It will be for Parliament to decide whether or not to repeal or amend it.¹⁹ Nevertheless, and although the HRA is not a constitution, review of compatibility under Sec. 4 HRA very much resembles constitutional adjudication.

The French *question prioritaire de constitutionnalité* also came into being as a consequence, at least indirectly, of the growing importance of the European Convention on Human Rights. Under the French Constitution of 1958 (Art. 55), treaties or agreements duly ratified or approved prevail over acts of parliament (subject to a condition which does not exclude the ECHR). Due to this elevated rank of the Convention, and due to a decision of the *Conseil Constitutionnel* in 1975 leaving the resulting task of *contrôle de conventionnalité* (review of compatibility with the convention) with the regular courts exclusively,²⁰ the growing importance of the Convention brought about an untenable asymmetry of reviewing functions in the French judiciary, as well as ensuing changes in the perception of judicial reviewing tasks, which eventually led to the invention of the *question prioritaire de constitutionnalité*.²¹

The nexus between protection of human rights by international instruments and expanding constitutional adjudication on the national level is particularly obvious in

¹⁹ Judicial review as established by the HRA is therefore classified as a weak form of review, see Tushnet (2008: 24, 27 et seq.).

²⁰ Decision n° 74–54 of 15 January 1975, http://www.lexinter.net/JPTXT2/loi_relative_a_l%27interruption_volontaire_de_grossesse.htm

²¹ See Walter (2015: 93 et seq.).

the case of Turkey, where in 2010, the institution of a “constitutional complaint” was introduced which, however, allows alleged violations of individual constitutional rights to be brought to the Constitutional Court only insofar as the relevant right is “within the scope of the European Convention on Human Rights”.²² The function of the new constitutional remedy to filter out occasions for embarrassing decisions of the European Court of Human Rights could not be more clearly expressed.

EU membership must also be mentioned. It is the source of the greatest increase in reviewing competence ever witnessed by the judiciaries of EU Member States. Due to the primacy of EU law, national law which is incompatible with directly applicable EU law is not to be applied in the Member States. The competence to check the compatibility of national legislation with EU law and, if the finding is negative, leave it unapplied, is not a monopoly of apex courts. As the European Court of Justice (ECJ) has put it, “every national court must, in a case within its jurisdiction, (...) set aside any provision of national law” which may conflict with directly applicable EU law.²³ The “compatibility review” thus incumbent upon all Member State courts bears even more resemblance to the review of national legislation typically exercised by constitutional courts than the above-mentioned compatibility review resting with the UK Supreme Court with respect to the European Convention of Human Rights.²⁴

2.3 Institutional Frameworks

Whether a given constitutional court will make extensive use of its competences depends not only on the culture of legal interpretation in the respective country, but also on the institutional framework. “Integrated” constitutional courts, i.e. supreme courts which are not specialised in constitutional adjudication, will, *ceteris paribus*, tend to be less expansive in their constitutional case-law than specialised ones with extensive competences, mainly because they have other fields to cultivate and build upon in a way that will make their work visible and gain them reputation. And the extent of judicial activism in specialised constitutional courts is, at least in the long run, likely to be influenced by the extent of their respective competences. Those without a competence to hear individual constitutional complaints, including complaints against judgments of the regular courts, will be likely to exercise more judicial restraint (be it *generally* or at least *more often*), simply because without the

²² Art. 148 (3) of the Constitution of the Turkish Republic. For details see Göztepe (2010: 693 et seq.); Göztepe (2015: 487 et seq.).

²³ C-106/77, Simmenthal II, ECR 1978, 629.

²⁴ In both cases, the standard against which national statutory law is measured is not national constitutional law but transnational law. Review of compatibility with EU law comes closer to traditional judicial review by constitutional courts in that it has immediate consequences for the applicability of legislation which is found incompatible.

prominence and popularity to be gained from such a competence²⁵ they will, *ceteris paribus*, have greater reason to fear disrespect on the part of the political powers.²⁶ Procedural details like the amount of time a constitutional court can take to pass judgment²⁷ or the majority which it needs to declare a piece of legislation void or incompatible with the constitution²⁸ also affect the likelihood of judicial interference with parliamentary majority decisions.

2.4 Costs and Benefits of Constitutional Adjudication: The German Case

The institutional framework and the dominant view of what is ‘proper’ interpretative judicial behavior are obviously interrelated; they shape each other mutually. The different outcomes of different national histories in this field each have their advantages and disadvantages, their costs and benefits. Benefits in terms of protection, integration and stabilisation which democracy may derive from the existence of an effective constitutional court inevitably come at some cost to the relevance of the political arena and perhaps also to the vividness of genuine political debate.²⁹ Besides, such a court will inevitably, at least *sometimes*, make decisions which a substantial or even the greater part of the public and its parliamentary representatives (and/or, visibly or not, a smaller or greater minority of the sitting judges) will regard as exceeding judicial competence and interfering with democracy.³⁰ At best this will, as in the case of the German FCC, be the exception rather than the rule,

²⁵ For the case of the German FCC see Lübbe-Wolff (2011).

²⁶ For the relationship between public support and the power of a constitutional court see Vanberg (2005: 119 et seq.), concerning the German FCC.

²⁷ The French *Conseil Constitutionnel*, for instance, has one month, or even just eight days in cases that have been declared particularly urgent, to decide in cases of *a priori* control of constitutionality (Art. 61 (3) of the Constitution of the French Republic) and three months to answer a *question prioritaire de constitutionnalité* (Loi organique n° 2009–1523 du 10 décembre 2009 relative à l’application de l’article 61–1 de la Constitution). Such time constraints put a narrow limit on what the court for which they hold can do.

²⁸ Renate Jaeger, former ECtHR judge, has suggested a 2/3 majority requirement for decisions of the European Court of Human Rights holding legislation incompatible with the European Convention on Human Rights, Jaeger (2014a: 9 et seq.). For critical comments on the suggestion that a qualified majority ought to be required for FCC decisions see von Danwitz (1996: 481 et seq.); Sacksofsky (2014: 716 et seq.).

²⁹ Tushnet (1999). Bickel (1986), at 22, suggests that judicial review might also promote sloppiness on the part of the legislature with respect to the constitutionality of its acts. This is definitely far from reality. Legislatures are much more afraid of being corrected by judicial review than they would, absent judicial review, be afraid of producing unconstitutional law. The effect of judicial review is that parliaments pay *more* attention, not less, to the compatibility of legislation with the constitution; cf., for the German parliament, Landfried (1994: 117).

³⁰ I myself have more often found decisions of the German FCC overly activist than overly restrained.

and varying parts of the political and societal spectrum will suffer from that impression. The likeliness of such a lucky outcome is again influenced by institutional framework conditions as well as by mindsets of the judges involved who are themselves to a great extent influenced by such framework conditions.³¹

On the whole, German democracy – as such – has gained more than it has lost from the operation of that Court, so far.³² In Germany, policy decisions certainly are to rather a great extent restricted by the case-law of the Federal Constitutional Court. On the other hand, without the FCC, German democracy would be far less open, less transparent, and less secured against abusive efforts of those in public power to keep themselves in that position, than it actually is. By way of just a few examples: If it weren't for the Federal Constitutional Court, German political majorities would have barred competitors from parliament by exclusion clauses with thresholds of 7,5 % or more³³ and reserved public financing of political parties to those already represented in parliament.³⁴ Governments would dominate public TV,³⁵ use taxpayers' money to finance re-election campaigns,³⁶ conceal a great deal more information from parliament (or keep it secret longer),³⁷ and enjoy considerably greater manoeuvring room to obstruct unwelcome media outlets or otherwise

³¹ For relevant institutional details in the German case and for the nature of the nexus between institutional framework conditions and judicial attitudes see Lübke-Wolff (2014a: 509 et seq.).

³² That seems to be the prevalent perception in Germany. In opinion polls, the FCC usually ranks as the most highly trusted public institution or as one of the most highly trusted public institutions (together with the president of the republic and, notably, the police). For the empirical data see Limbach (1999: 7–8); Vorländer (2006: 199); Köcher (2014); Bruttel/Abaza-Uhrberg (2014: 510 et seq.).

³³ BVerfG, Order of 5 April 1952, 2 BvH 1/52, 1 BVerfGE 208. For more controversial judgments invalidating 5 %- and 3 %-thresholds in the German EP election laws see BVerfG, Judgment of 9 November 2011, 2 BvC 4/10 et al., 129 BVerfGE 300, and BVerfG, Order of 26 February 2014, 2 BvE 2/13 et al., 135 BVerfGE 259. Observers have spotted in the latter decisions a lack of understanding of the importance and democratic dignity of the EP on the part of the majority of FCC judges. The 2011 judgment on the 5 %-threshold contains passages on which such an assessment might be based. It should be noted, however, that these passages, as well as similar ones, are absent in the order concerning the 3 %-threshold, and that a passage in an FCC judgment does not necessarily express the opinion of most of the majority judges in the relevant case (why that is so, is explained in Lübke-Wolff 2014a).

³⁴ BVerfG, Judgment of 19 July 1966, 2 BvE 1/62 et al., 20 BVerfGE 119 at 132, with further references; cf. also BVerfG, Order of 21 February 1957, 1 BvR 241/56, 6 BVerfGE 273 at 279 et seq., concerning equal treatment of political parties, irrespective of whether or not they are represented in parliament, with respect to tax deductibility of donations to them.

³⁵ For a short account of some important FCC decisions on broadcasting see Kommers/Miller (2012: 510–518).

³⁶ BVerfG, Judgment of 2 March 1977, 2 BvE 1/76, 44 BVerfGE 125 at 147 et seq.

³⁷ To pick just a few recent examples: BVerfG, Order of 17 June 2009, 2 BvE 3/07, 124 BVerfGE 78 at 114 et seq.; BVerfG, Order of 1 July 2009, 2 BvE 5/06, 124 BVerfGE 161 at 188; BVerfG, Judgment of 19 June 2012, 2 BvE 4/11, 131 BVerfGE 152 at 194 et seq., all concerning governmental disclosure or sufficiently early disclosure of information (to MPs, party groups or a parliamentary investigation committee, respectively).

suppress what they find will not help them retain their power.³⁸ And, what is perhaps even more important in view of the German historical background, without the FCC and its prominence in the German institutional architecture, German citizens would be much less aware than they currently are of the values of democracy, human rights and the constitution which provides for both.³⁹

There is something admirable about democracies which proudly rely on their citizens or their elected representatives to prevent deterioration of the constitutional order, rather than on constitutional adjudication. It should also be remembered, though, that in Switzerland, it needed constitutional adjudication to eventually provide women with the right to vote in the canton of Appenzell-Innerrhoden in 1990.⁴⁰

The German FCC has often been criticised for being overly activist and, particularly in applying equality and proportionality standards, exercising a rationality control that goes beyond the proper limits of judicial power. Proportionality and equal treatment (in the sense of treatment without unjustifiable differentiation) are, however, both standards of practical rationality and necessary elements of democracy. Where an active constitutional court administers these standards, this will sometimes lead to judicial decisions censuring deliberate political choices that have been made by the legislative and executive powers. But that is not the only effect, and not even the most important one. In the case-law of the German FCC, for instance, equality and proportionality standards have also been used to correct many irrationalities in the legal system which had simply escaped political attention, i.e. where a conscious democratic decision on the specific matter in question had not really been made.⁴¹ Moreover, and more importantly, the case-law of the FCC has infused the German legislative, administrative and judicial systems as well as the public at large with an awareness of and attention for issues of equality and proportionality that had not existed previously.⁴² Such indirect effects have not only enhanced the rationality of legislation in important respects. They have also enhanced its democratic quality.

The costs and benefits, with respect to democracy, of constitutional adjudication can be optimised by differentiated standards of judicial review, with stricter scrutiny applying in matters affecting the democratic character of the system⁴³ and/or in

³⁸ For a short account of some important FCC decisions on freedom of the press see Kommers/Miller (2012: 502–5 10).

³⁹ See Lübbe-Wolff (2011).

⁴⁰ Swiss Federal Court, Judgment of 27 November 1990, BGE 116 Ia, 359.

⁴¹ For an overview of the application of the principle of proportionality by the FCC, and for and criticism that has been voiced against the Court's case-law see Lübbe-Wolff (2014b).

⁴² For paramount importance of the preventive rather than the repressive effects of the Court's case-law cf. also Grimm (2001: 28). For the preventive role of national constitutional courts in an international human rights context Jaeger (2014b: 127).

⁴³ See, e.g., Kneip (2009: 311). Kneip advocates strict scrutiny with respect to legislation directly affecting the "core of democracy", and counts fundamental liberties, but not constitutionally guaranteed social rights, among the core elements of democracy. For a more restrictive view of the core elements of democracy that should be protected by constitutional adjudication see Waldron (2006).

matters where the democratic decision-making process is for systemic reasons particularly prone to fall short of democratic values,⁴⁴ and less stringent review in other areas. There is also an argument in favour of stricter scrutiny where a problem seems to have been overlooked in the legislative process and, conversely, in favour of greater judicial restraint in the face of legislative decisions insofar as these are the result of pondered option.⁴⁵ Such differentiations are but fine-tuned elaborations of the idea underlying the institution of constitutional courts as such, as well as other intra-commonwealth institutions equipped with a degree of independence or autonomy. The underlying idea is that a democratic system may, perfectly in line with democratic values, find certain risks or undesirable tendencies in the regular process of representative or direct democratic decision-making and choose to counteract them by counter-majoritarian elements, just as an individual may use his liberties to commit himself and still be considered a free person.⁴⁶ Neither liberty nor democracy, neither individual nor collective self-determination are incompatible with self-restrictions.

2.5 Conclusion

A rather powerful constitutional court, a supreme court with limited constitutional court competences, no constitutional court at all – none of this is in principle incompatible with democracy. In the area of constitutional jurisdiction as in many others, democracy can take various forms. Views on the acceptable range of competences of independent institutions – be it courts, accounting offices, regulatory agencies or central banks – as well as on the acceptable or necessary degree of their independence differ, depending on traditions and experiences. Democracy requires *limited* judicial competences, but the exact demarcation of the limits may vary according to legal culture and historical circumstances. Democratic countries ought to mutually

⁴⁴ This might include matters where self-interest of ruling majorities concerning the chances of competitors for power is involved (this is why FCC scrutiny has been strict in the much-debated decisions on electoral thresholds in the national legislation on EP elections, see BVerfG, Judgment of 9 November 2011, 2 BvC 4/10 et al., 129 BVerfGE 300 at 322, and BVerfG, Order of 26 February 2014, 2 BvE 2/13 et al., 135 BVerfGE 259 at 289), the protection of structural minorities (cf. BVerfG, Order of 7 May 2013, 2 BvR 909/06 et al., 133 BVerfGE 377 at 408, with further references, concerning differentiated standards of review with respect to discrimination), and matters which are by nature or circumstances disadvantaged with respect to the chance of becoming politicised.

⁴⁵ For an example see, BVerfG (Plenary), Order of 2 July 2012, 2 PBvU 1/11, 132 BVerfGE 1 at 23, declaring that only strict construction of a constitutional norm is appropriate where that norm was adopted after extensive debate by way of political compromise in a highly controversial matter.

⁴⁶ On the comparison of a democratic society subjecting itself to constitutional review to Ulysses tying himself in order to be able to resist the seductive chant of the sirens see Cassese (2011: 7 et seq.).

respect the differences obtaining between them in this respect, and national as well as transnational courts must take them into account in dealing with matters of transnational importance.

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