Edited by Martin Belov

Courts, Politics and Constitutional Law

Judicialization of Politics and Politicization of the Judiciary

Comparative Constitutional Change

ROUTLEDGE

Courts, Politics and Constitutional Law

This book examines how the judicialization of politics, and the politicization of courts, affect representative democracy, rule of law, and separation of powers.

This volume critically assesses the phenomena of judicialization of politics and politicization of the judiciary. It explores the rising impact of courts on key constitutional principles, such as democracy and separation of powers, which is paralleled by increasing criticism of this influence from both liberal and illiberal perspectives. The book also addresses the challenges to rule of law as a principle, preconditioned on independent and powerful courts, which are triggered by both democratic backsliding and the mushrooming of populist constitutionalism and illiberal constitutional regimes.

Presenting a wide range of case studies, the book will be a valuable resource for students and academics in constitutional law and political science seeking to understand the increasingly complex relationships between the judiciary, executive and legislature.

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Comparative Constitutional Change
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Introduction

Martin Belov

There is a well-established belief in both legal theory and socio-political discourse that judges are just experts and courts are institutions which are and should be detached from politics. In fact, they are not. Or at least not to the extent required by the dogma of apolitical judiciary engraved in the normative ideology of Western modernity by key authoritative thinkers such as Montesquieu. Courts are involved in politics in many ways. They adopt legal standards thus participating in the law-making activity of the state. They pave the way for constitutional reform or even may accomplish such reform by virtue of implicit, 'virtual' constitutional amendment or by declaring the unconstitutionality of constitutional amendments. They promote or hamper authoritarian, democratic, lobbyist, or general interests thus engaging with constitutional or sector-specific politics. And vice versa, courts are also exposed to politics and political influence. The political branches have different means of influencing the 'non-political', depoliticized judiciary. This trend is especially visible in the context of democratic backsliding and the so-called 'illiberal democracies' which are currently gaining momentum. However, it is latently also a present danger in liberal democracies.

This book critically assesses the phenomena of judicialization of politics and politicization of judiciary.[1] It explores the rising impact of courts on key constitutional principles, such as democracy and separation of powers, which is paralleled by increasing criticism of this influence from both liberal and illiberal perspectives. The book also addresses the challenges to the rule of law as a principle preconditioned on independent and powerful courts which are triggered by both democratic backsliding and mushrooming of populist constitutionalism and illiberal constitutional regimes.

1 For the general problem of the judicialization of politics and politicization of the judiciary see R. Hirschl, 'The Judicialization of Politics' in: G. Caldeira, R. D. Kelemen & K. Whittington (Eds), *Oxford Handbook of Law and Politics*, Oxford, Oxford University Press, 2008; D. Weiden, 'Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia', *Political Research Quarterly*, Vol. 64, No. 2, 2011, pp. 335–347; and P. Domingo, 'Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America', *Democratization*, Vol. 11, No. 1, 2004, p. 104 and the following.

The current volume aims to contribute to the discussion on the role of courts in contemporary legal orders. It brings together the analysis of diversified legal systems under the same roof framed by a strong unifying idea around which the various contributors operate. This is the idea of the centrality of the courts in contemporary constitutional orders and their strategic engagement with and exposure to constitutional politics. More precisely, the book engages with some specific discourses which are part of this broader discussion such as: the role of courts in a democratic society; their status, functions, and practical impact on representative democracy and separation of powers; the tension between key constitutional principles such as rule of law on the one hand, and democracy and sovereignty on the other; the impact of the constitutional courts on the constituent power due to their performance as key players in a multilevel constitutional setting; promoters of constitutional change or negative legislators declaring the unconstitutionality of constitutional amendments; the role of courts as legislators or as administrators of justice; and their interaction with the parliament and the government.

The book combines case studies demonstrating specific but rather characteristic problems with the provision of comparative analysis, and the launching of ideas with broader and general theoretical importance. The book is not focused on a single state or even on a specific region. The research provided by the contributors ranges globally from Europe (Italy, UK, Sweden, Germany, France, Hungary, Poland, Bulgaria etc.) to Eurasia (Russia and Turkey), Asia (Nepal), Africa (The Republic of South Africa), and Latin America (Venezuela, Honduras, and Colombia).

The first part of the book comprises the chapters of Daniel Valchev, 'Democracy and courts beyond the ideological banality', and Konrad Lachmayer, 'Disempowering courts: The interrelationship between courts and politics in contemporary legal orders or the manifold ways of attacking judicial independence'. Both chapters are engaged with the discussion of the role of courts in a democratic constitutional order. Valchev highlights the special standing of courts in a constitutional democracy and their contribution to the maintenance of a democratic order whereas Lachmayer outlines the main threats to courts' independence and their impact on democracy and rule of law. The common claim of these two chapters is that the courts are the last bastion of constitutionalism with paramount importance to constitutional ideology, institutional design, and the socio-legal practice of the modern democratic state based on rule of law.

Valchev's chapter reminds us that all regimes are based on a consensus which requires not only logical foundations but also a bit of magic. This is particularly true for modern liberal democracy which has been produced as a result of a consensus on elitist and popular level. Valchev's main claim is that we need to protect the ideological standing and the emotional perception of the courts as safeguards of individual freedom and liberal democracy. The author appeals to us to not disenfranchise the courts from their rather privileged role as islands of expertise in the great sea of majoritarian democracy. He puts forward the provocative question whether the courts can save liberal democracy.

Valchev defines liberal democracy as 'governance founded on elections, which is, for the sake of protecting individual freedom, restrained by procedures, bodies of professional élites, and a normative ideology'. In his account, there is a logical inconsistency enshrined in the foundations of liberal democracy. It consists of the simultaneous belief in democratic legitimacy, people's rule and majority decision-making paralleled by inherent distrust in majoritarian rule. Thus, the author indirectly engages in the current ongoing debate on the intellectual and political divorce between the 'revolutionary', radical democratic and the populist trend of constitutional democracy, and the liberal, counter-majoritarian strain in it.[2] This split is largely debated in the literature on illiberal democracies, democratic backsliding, and especially on populist constitutionalism.

According to Valchev there are three main constraints on majoritarian government and decision-making provided by contemporary liberal constitutionalism. These are procedures, the counter-majoritarian expertise-based institutions, and a particular type of normative ideologies. The author briefly explains the main types of such procedures developed in the course of modern constitutional history and the range of institutional design of counter-majoritarian institutions which is currently available. He emphasizes the role of the courts in this context.

Valchev suggests that the courts' legitimacy is currently grounded on a normative ideology which is centered on human rights and the aim of defense against excessive majoritarianism. The author highlights the role of university professors in preserving the 'magic' of courts. He claims that this magic should not be unspelled for the sake of preserving the courts as the most resilient and reliable fortress against rising authoritarianism and populism. Valchev points to the principle of primacy of EU law over the national constitutions of the member states as an example of well-functioning constitutional magic safeguarding the degree of EU integration which could not have been otherwise produced by political means via the democratically elected institutions. In that regard, the primacy of law is a fundamental principle coined by the Court of Justice of the EU functioning in the context of lacking clear political consensus for such long-lasting political decisions shaped in legal terms.

The chapter by Konrad Lachmayer explores recent developments of increased political influence and pressure on the judiciary. Thus, it is part of the general debates on politicization of judiciary, democratic backsliding, and the rise of illiberal democracies. In that regard, Lachmayer is indirectly engaged in an intellectual dialogue with the chapters of Angela Di Gregorio and Enrico Albanesi, who also raise similar questions. However, it is also a logical continuation of Valchev's chapter exposing the 'magic' of the normative ideology behind judicial independence. In other words, while Valchev pleads not to desacralize the courts Lachmayer shows what happens if we do so.

2 See P. Blokker, *Populist Constitutionalism*, pp. 1–5, available at: Verfassungsblog.de and L. Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity', *European Constitutional Law Review*, Vol. 12, No. 01, 2016, pp. 6–26.

Lachmayer's chapter commences with a brief comparative overview of the infringement of judicial independence in increasingly illiberal democracies such as Poland and Hungary. He outlines the main devices for limitation of judicial autonomy by a populist and illiberal government. Furthermore, the author outlines the main challenges to courts in times of neo-nationalism and rising authoritarian tendencies. He explores the adverse effects of political pressure on courts not only for democracy but also for the rule of law. Thus, Lachmayer implicitly makes the classical suggestion which is typical for liberal constitutionalism that rule of law and authoritarianism should be deemed incompatible. He raises the important claim that 'while international courts are primarily limited by nationalism, national courts have to deal with authoritarianism'. Again, as in the analysis of the Polish and Hungarian cases, Lachmayer outlines the main strategies and tools used by nationalist and authoritarian power centers to put pressure and impose limits on the effects of the decisions of international courts.

Two further observations made by Lachmayer deserve special attention. The author suggests that 'nationalistic approaches create effects on national rule of law systems. While weakening international courts, domestic courts can be attacked much more easily by authoritarian developments on a national level'. Furthermore, 'authoritarian approaches do not only limit domestic courts in their independence, but also affect the acceptance of following judgements of international court'.

An intellectual pillar of Lachmayer's chapter is the thesis that the 'concept of the independence of courts is culturally divergent.' Thus, the author explores the core of the idea of judicial independence, taking into account the fundamental cultural diversity affecting its local manifestations. Claiming that 'cultural diversity cannot serve as justification or legitimation to undermine or destroy judicial independence' the author 'identifies problems and challenges of courts in different legal systems' and provides 'an overview of the different strategies of disempowerment of courts'.

Lachmayer offers an elucidating analysis of the rising prominence of the courts in recent decades. He engages with the general discussion of the legitimacy of the courts' expansion with a view to democracy and separation of powers. Lachmayer provides a critical assessment of the way the national, international, and supranational courts 'gained political control over the constitutional arena'. Thus, he explores the different factors and instruments by virtue of which courts became political factors and produced judicialization of politics that reversely also triggered the politicization of judiciary.

Lachmayer puts special emphasis on the impact of the booming expansion of the executive on the rising importance of courts. Thus, he explores the uneasy interaction between these two institutional players with increasing importance in contemporary constitutional orders. According to the author 'from the perspective of separation of powers, the new rivals of the courts are not the parliaments any more but dominating governments, which are pushing back parliaments and courts alike'. Subsequently, Lachmayer provides us with an interesting analysis of

the strategies of the governments and the executive power in general for gaining predominance over the courts.

Consequently, Lachmayer launches an original typology of disempowerment of courts based on the 'authoritarian strategies to limit the role of courts by destructing their judicial independence'. In doing so, he outlines the main features of judicial independence and, vice versa, of tools for undermining it proposed in the scholarship. This enables Lachmayer to systematize the components of the three main dimensions of obstruction of the courts' independence which according to him are the institutional, the personal, and the procedural dimensions. The predominant part of the rest of Lachmayer's chapter is devoted to a profound analysis of these three dimensions. Finally, the author outlines the phenomenon of the erosion of rule of law masqueraded as a sovereigntist and democratic fight against juristocracy and suggests several approaches to strengthen judicial independence.

The second part of the book explores the relationship between courts, parliaments, and the institutions of the executive power. It provides an insightful analysis of courts' engagement with legisprudence, legislation, and legislative power, but also the perception of courts as law-implementing bodies with an administrative outlook. The general idea of the whole second part, which unifies and frames all chapters, is to challenge the traditional understanding of the courts as institutions limited exclusively to the judicial power. Thus, the accomplishment of legislative and administrative functions by the courts equals enhanced engagement in politics. The four contributions in Part II demonstrate that the courts may be extensively engaged in legislation or may be publicly perceived as part of the state administration. The authors demonstrate the advantages and disadvantages of such engagement, its historical roots, and its socio-legal determinants.

Helen Xanthaki's chapter, 'Courts and legislation: Do legislators and judges speak the same language?', is an outline of a communicative theory of legislation focusing on a particular problem – the mismatch between the approaches of legislators and courts to the language of legislation. According to the author

> the hypothesis of this chapter is that recent innovations in drafting techniques have disturbed the continuity of language used by those who produce and those who interpret legislation. Which, in turn, confirms that, currently, legislators and judges speak a different language.

Xanthaki defines 'legislation as a fluid collective task'. She presents her concept of legislation as an inclusive and open-ended process of communication between different stake-holders and key players. In her account, legislation is not limited to the task of the legislator. It also includes the law implementers and law interpreters as well as the addressees of the law. In Xanthaki's words

> if one takes this holistic picture of legislation as a tool for regulation into account […] drafters can only perform a small, albeit crucial, part in the

> application of governmental policy better expressed as regulation. Legislation becomes a collective task that can only be achieved with the synergy of all actors, including judges.

Xanthaki stipulates that the 'fluidity of legislation' is currently missing. She suggests that 'identifying the users of legislation' in recent empirical surveys 'has led to not one but two earthquakes. First, the law does not speak to lawyers alone. Second, the law does not speak to the "average man".' According to the author these findings have produced a revolutionary change in the approach to legislative drafting. Her main claim, however, is that despite 'this drafting revolution, judges and courts have remained excluded. There seems to be a rather gaping schism between the linguistic perceptions of drafters and interpreters of legislation in the UK today'. The main concern of the author which underpins her whole chapter is that 'judges, as interpreters of legislation, are excluded from the debate on easification, legislative diversity, and effectiveness.'

In the subsequent chapter, 'Text, values, and interpretation: The role of judges and legislative power in private law', Attila Menyhárd suggests a radical realist approach to the role of courts combined with criticism of the traditional syllogistic and mechanic law implementation. In his account,

> interpretation is about establishing the content of the norm. Thus, creation of the law on one hand and application of it on the other hand cannot be distinguished. Interpretation is about establishing the content of the norm which per se means that it is not the legislator but the court that establishes the content of the norm. Thus, in a realistic model of judicial adjudication, the court does not merely state the norm but construes it. This makes the distinction between law-making and application relative; the judgment of the court does not create the norm, but the court, by finding the norm, does.

Menyhárd's theory can be defined as radical legal realism oriented toward the legitimation and establishment of a value-based jurisprudence. The author suggests that 'courts have to implement and enforce the general values prevailing in the society in each of the cases'. He believes that 'theoretically a choice has to be made between textualist (or pure interpretive) model and the supplementer approach'. Moreover, he defines law as a 'mechanism of transmitting and implementing values'.

The radical legal realism of Menyhárd is visible in his thesis that

> the written norm provided by the legislator establishes the basic evaluation only, which can be overruled by the court. This overruling can be performed with different methods. The main tools of such enforcement of values are: interpretation of abstract norms, concretizing general clauses, assessment of "hard cases", or procedural solutions like reversal of burden of proof in cases of information asymmetry. The legislator may also leave the balancing of interests and establishing priorities to the courts.

Furthermore, the author explains, frequently using concrete examples, how these value enforcement devices make possible a flexible and value-oriented concept of law in general and of private law in particular.

According to Menyhárd

> the most precise description of how private law works describes the judgment of the court as a process of evaluation. In this mechanism, the court decides the case on the basis of a closed number of relevant values, counterweighing them in the context of the facts of the case.

Thus, the author adheres to the theory of the flexible system of private law, proposed by Walter Wilburg. Menyhárd suggests that legislation and judicial interpretation are just the two sides of the same coin. He comes to the very provocative conclusion that the difference between judicial and legislative measures cannot be found in hierarchy but in their different legitimacy and efficiency.

Mauro Zamboni's chapter, Supreme courts in Sweden: Are they "real" judges?, presents a very interesting case study. It is a valuable contribution to the comparative constitutional law literature not only because it elaborates an intriguing and peculiar situation in a specific jurisdiction such as Sweden, but also due to the fact that it produces conclusions regarding the compatibility or incompatibility of service-oriented and administration-like attitudes toward the judiciary with democratic orders based on separation of powers. Zamboni poses the fundamental question with broad comparative law importance 'whether a supreme court with a fully judicial nature is a *conditio sine qua non* for every democracy'.

Zamboni's chapter explores the reasons why the Swedish supreme courts 'are considered and consider themselves as part of the larger public administration within legal and constitutional discourse'. Zamboni points out that 'the highest judges tend to operate as an extension of the public administration into the higher legal instance rather than as a third party in disputes among public and private actors'. Thus,

> judges consider themselves as internal reviewers of the public agencies (aiming at shaping a "good administration" according to the criteria set by the legislator) rather than external referees (determining winners and losers in legal disputes, based on the valid law).

This particularly Swedish self-perception of the courts produces peculiar reversed side-effects on the administration. Zamboni is interested in

> how this positioning (on the part of both the judges and the outside actors) of the supreme courts as public agencies, in its turn, fuels another shift: the perception of public agencies not simply as "implementers", but also as authoritative "interpreters" of the law.

He believes that 'there is a perception of the role of judges as a compliance agency as regards public administration decisions, which in turn stimulates the public agencies to operate not only as executive, but also as quasi-judicial actors'.

Zamboni explores the reasons for this specific public and scientific perception of the supreme courts in Sweden as well as self-perception of the Supreme Court judges as being 'a prolongation of the public administration'. He outlines 'three fundamental (interconnected and mutually reinforcing) sets of reasons, related to factors of political, legal, and purely administrative nature'. The first reason according to Zamboni is 'the Swedish or "social-democratic" version of the welfare state – transforming the state into the "house of the people"'. The second reason is 'the Swedish constitutional architecture; one of its major components is a refusal of the principle of division of powers' replaced by the principle of separation of function which conceives the Parliament 'as the only true power (being the only one representing "the people")' while delegating 'the other two functions (judicial and executive) to the courts and the public agencies'. The third reason suggested by the author is the 'specific career system a judge has to follow in order to be likely to be selected for such courts'.

After describing the reasons for the traditional attribution of the courts in general and the supreme courts in particular to the administration, Zamboni identifies also some fragile and initial, but still visible novel trends toward a re-judicialization of the judiciary. According to the author there are five such recent developments. The first one is the increase of judicial activism. The second one is the general reinforcement of the role and status of the courts triggered by Swedish EU membership. The third one is the slow but steady transition toward a post-welfare society. Zamboni explains that one of its central dogmas of this gradually emerging post-welfare is the strong idea of the rule of law. According to the author

> this implies a moving away from the traditional Swedish model of the welfare state and its basic idea that legal actors (and in particular the judicial bodies) should consider and use the law as structurally soft in relation to the values expressed by the political environment (and implemented by the administrative apparatus). In a post-welfare system, it is the other way around: the political, social, and economic discourses are perceived by the judges as generally bending when conflicting with fundamental legal principles, either explicitly in the constitutional documents or through the legal system.

This process leads in Zamboni's view to a situation in which

> the judges operate as a true third party in the disputes, as their focus is mainly inserting and evaluating the disputes under discussion not in relation to the political will or the administrative practices, but rather in relation to the systems of rules and fundamental principles superseding the legal system.

The fourth development is the Swedish constitutional reform of 2011 which has introduced a new system of recruitment to the higher courts. The fifth factor

according to Zamboni is that 'the Swedish political, social, and financial atmospheres have changed considerably in the last decade, becoming more conflictual'.

The chapter of Monica Bonini, 'From separation of powers to superiority of rights: The Italian Constitutional Court and end-of-life decisions', is devoted to the relationship between the parliament and the Constitutional Court. This question is of fundamental importance for all constitutional orders. It has central place in constitutional debates on separation of powers, political role of courts, politicization of judiciary, and judicialization of politics. Moreover, it is the focus of the intellectual debates on the proper standing and adequate framework of parliaments in the context of modern liberal democracies. The principal impetus behind this debate is the intrinsic tension between democratic and liberal components of modern constitutionalism. In other words, the intellectual background against which Bonini's chapter should be read is the counter position and cooperation between the parliament as the central representative institution in a democratic constitutional order and the Constitutional Court as the main safeguard of freedom and individual rights.

Bonini engages in the debates on separation of powers and the impact of the concepts of judicial activism, judicial self-restraint, and 'political question' on it. Moreover, the author launches a new concept defined by her as 'parliamentary inertia'. Bonini focuses on the problem of balancing of complex values in the context of two lines of tension: judicial choices versus separation of powers and judicial choices versus parliamentary inertia. She exposes the fragility of our theoretical and normative conceptualization of the relationship between constitutional courts and parliaments in the context of the 'double sided liaison between law and politics', defined by her as '"symbiotic" and conflicting at the same time'. Thus, Bonini engages in the wider conceptual debate on political constitutionalism versus legal constitutionalism[3] existing in the legal theory.

According to Bonini 'under the Italian Constitution, democratic processes and constitutional review should live together in harmony'. However, she demonstrates the huge tensions between these two imperatives of modern constitutionalism in the Italian context on the basis of a case study of the 'end-of-life decisions' of the Italian Constitutional Court. Bonini raises several important questions such as: 'whether the Constitutional Court and other judges are well suited for the purpose of balancing complex values characterizing this specific subject matter' and 'whether the Constitutional Court shall balance complex values when the Parliament refuses to decide upon them'.

One of the aims of Bonini's chapter is 'to reflect upon parliamentary inertia and judicial intervention setting it in the framework of the separation of powers'. In her account, the Constitutional Court should protect human rights against 'parliamentary inertia'. However, 'parliamentary inertia may be a political choice – i.e. a political domain to be strictly left out of the Court's reach.' The

3 See R. Bellamy, *Political Constitutionalism*, Cambridge, Cambridge University Press, 2007, pp. 90–142.

author comes to the conclusion that a delicate balance should be sought between human rights-based judicial activism of the Constitutional Court aiming at protection of rule of law and the due respect of the political discretion of the parliament based on representative democracy and separation of powers.

The third part of the book is devoted to courts, constitution-making, and the separation between constituent and constituted powers. It provides original theoretical views on the role of constitutional courts in constitution-making process, their functioning as negative legislators and as ultimate players in multilevel constituent power games, and their increased engagement with control of constitutionality of the constitutional amendments. Thus, the authors engage in classical discussions, e.g. on the Kelsenian model of constitutional justice, but also in current debates which are gaining momentum such as the scientific discourse on 'unconstitutional constitutional amendments' or the enhanced role of the courts as mediators on the border between the national, international, and supranational constitutional orders. This part of the book combines conceptual contributions to constitutional theory with comparative research and case studies.

The third part starts with Paul Yowell's chapter, 'The negative legislator: On Kelsen's idea of a constitutional court'. Yowell explores Kelsen's view on the role of the constitutional court as negative legislator. He starts with a brief outline of the main features of the Kelsenian model of constitutional courts and constitutional review. He then contrasts it with its theoretical antipode – the American model of constitutional review. Yowell outlines the main differences between both models.

Yowell explains Kelsen's account of human rights as a possible (or actually impossible) object of constitutional review. He provides an insightful analysis of Kelsen's denial of abstract formulas and vague moral formulas as criteria for control for constitutionality of laws. Yowell explains that

> Kelsen opposed giving the constitutional court power to enforce principles formulated in abstract moral language, that is, those which make "an appeal to the ideals of 'justice', 'freedom', 'equality', 'equity', 'decency', and so on". He thought that such terms were legally "vacuous", providing no determinate guidance to judges. They could serve as political norms, directing legislative organs in their creation of law; and law-making is rightly seen as a process that specifies vague principles into positive law. But it would be "highly dangerous" to make the principles a basis for constitutional adjudication, in particular for review of the constitutionality of statutes.

Yowell notes that despite of Kelsen's theoretical influence in Europe most of the European models do not follow all of its postulates very strictly. An important example according to the author is the fact that the European constitutions contain chapters on human rights and allow their constitutional courts to use them as criteria for constitutional review.

Yowell contrasts the Kelsenian and the American approach to the temporal effect of the Constitutional Court decisions. The author contrasts 'Kelsen's

practical approach – which is realized in the 1920 Austrian Constitution – with the approach in the American model and other systems'. Yowell provides an informative analysis of the evolution of the practice of the US Supreme Court and other common law courts such as the Australian, Canadian, and Irish Supreme Courts on the concept of initial invalidity of unconstitutional norms and on the retroactive force of the court's decisions. The author highlights key decisions of these courts to show the evolution of their standing on these conceptual problems. He provides an overview of the shift of the jurisprudence of the US Supreme Court from the position of absolute initial invalidity of unconstitutional provisions to a more moderate and compromise stance. Paul Yowell also analyzes the leading decisions of the Irish, Australian, and Canadian supreme courts with regard to the validity of unconstitutional provisions, the effect of the courts' decisions declaring such unconstitutionality, and the subsequent effect on their standing as courts or also as negative legislators. Yowell provides very interesting comparative analysis of the 'void *ab initio*' doctrine with regard to unconstitutional acts in Europe devoting special attention to Germany, Austria, Italy, and Spain.

Yowell thoroughly explores Kelsen's theory of the constitutional court as a negative legislator. He critically assesses Kelsen's functional attribution of legislative power to the constitutional court based on the logic that both the Parliament and the Constitutional Court adopt general norms, in contrast to the courts. In that regard, Yowell's analysis should be read in conjunction with the chapters of Attila Menyhárd and Mauro Zamboni who also provide original views on the status of the courts in the separation of powers especially with a view to the proximity of their functions to institutions belonging to the legislative and the executive power. Both the papers of Menyhárd and Yowell offer refreshing alternative view on the courts as legislators. The difference between them is that Yowell's paper explains the role of the constitutional courts as legislators from the viewpoint of Kelsen's theory.

Furthermore, Yowell provides a thorough analysis of the 'void *ab initio*' debate in the legal theory. The author focuses on 'the relationship between different constitutional practices and doctrines, and the problems they can generate, and legal theory about the precise status (in regard to validity) of an unconstitutional statute'. Before presenting Kelsen's views on that issue Yowell outlines the debate between Supreme Court judges on the matter which constitutes an important contribution of the chapter to the scientific debate. In the author's words 'the debate among judges is also illustrative of tensions in Kelsen's thoughts'. Moreover, Yowell provides an insightful analysis of Hans Kelsen's theory of the status of unconstitutional laws tracing his intellectual evolution throughout the years as objectivized in various publications. Finally, Yowell comes to important conclusions regarding Kelsen's contribution to theory and practice as well as the shortcomings of his theory.

My chapter of the book, 'Constitutional courts as ultimate players in multilevel constituent power games: The Bulgarian case', presents the different roles simultaneously played by the constitutional courts which make them ultimate players in multilevel constituent power games. The constitutional courts are gatekeepers

of the bridge between the constitutionalism 'within' and 'beyond statehood'. They are safeguards, promoters, or limitations of constitutional nationalism, constitutional internationalism, constitutional supranationalism, and constitutional globalism. Last but not least, they are mediators of the participation of the member states in the European Union.

The analysis is limited to the Bulgarian case not only due to space constraints, but also because of the principle need to broaden the analysis of the role of constitutional courts to less researched constitutional jurisdictions which do not actively engage in intense judicial dialogue with the Court of Justice of the EU. The Bulgarian case requires attention because the jurisprudence and the general stance of the Bulgarian Constitutional Court with regard to Bulgaria's integration in the EU's multilevel constitutionalism are still rather under-researched.

The chapter commences with research on the impact of the transfer of constitutional competences to the EU as precursor for the increasing role of domestic constitutional courts. Furthermore, I am defining the concept of 'multilevel constituent power game'. This is done in the context of explaining the role of the EU integration in the form of multilevel constitutionalism for the shift in the power schemes provided by the domestic constitutions. The constitutional courts are exposed as gatekeepers of the bridge between national, international, and supranational constitutionalism which allows them to engage in the redefinition of the rules of the multilevel constitutional game thus entering in the domain of the constituent power.

I am demonstrating my general claim that the EU integration makes the constitutional courts insurmountable factors on the edge between constitutionalism 'within' and 'beyond' statehood and on the border between constituent and constituted power on the basis of a case study of the Bulgarian constitutional system. I am outlining the concept of constituent power and external power according to the Bulgarian constitutional model. I am showing that a rigid or semi-rigid constitution in the context of the European integration actually fosters the standing of the constitutional court as ultimate player in multilevel constituent power games. This thesis is also launched by Antonios Kourotakis in the context of the constitutional models he explores in his chapter.

I show that the Bulgarian constitutional court is engaging in 'multilevel constituent power games' related to activist interpretation of the 1991 Constitution, redrawing of the demarcation lines between constituent and constituted powers, paving the way for transfer of sovereignty or, vice versa, for implicit and hidden domestic constitutional protectionism and nationalism. Such engagement of the Bulgarian constitutional court in constitutional politics seems to go against the initial idea of the founding fathers and mothers of the 1991 Constitution for establishment of a moderately rigid constitution and for drawing a clear distinction between constituent and constituted powers. Moreover, the Bulgarian constitutional court is becoming an unexpected player in the external power of the state. Last but not least, the Bulgarian constitutional court has established itself as the gatekeeper of the bridge between the EU and the Bulgarian constitutional orders.

Furthermore, I demonstrate that the procedure for the transfer of constitutional competences to the EU provided by the Bulgarian Constitution is an 'unconstitutional constitutional amendment' that is enhancing the potential of the Bulgarian constitutional court to be the ultimate player in multilevel constituent power games. This is done on the basis of a comparative analysis of the procedure for amendment of the constitution and the procedure for transfer of constitutional amendments to the EU against the background of the case-law of the Bulgarian constitutional court related to the EU integration.

Finally, I come to the conclusion that stringent amendment procedures for domestic constitutional change enhance the role of domestic constitutional courts as players in constituent power games in the context of the EU multilevel constitutionalism. In the light of the Bulgarian case it is highly questionable whether rigid constitutions really protect sovereignty or foster alternative ways for amendment and even surpassing the restraints to EU integration imposed by the domestic constitution. Rigid constitutions may foster 'unconstitutional constitutional amendments' accomplished by alliances of constituted powers – parliaments and constitutional courts – acting as *de facto* constituent powers.

Another important conclusion is that the open texture of the 1991 Constitution, the fuzziness of the EU integration clause, the lack of clear and coherent concept underlying the constitutional foundations of the Bulgarian EU membership, and the already established tradition of judicial activism and jurisprudential virtual amendment of the Constitution make the Bulgarian constitutional court the ultimate player in multilevel constituent power games. The Bulgarian constitutional court is even the ultimate player in the strategic shaping of the framework, principles, and the range of the constituent power. This strategic place of the Bulgarian constitutional court is the result of tactical use of a combination of explicit pro-European activism in seminal decisions paving the way to EU integration and implicit constitutional nationalism in instances that keep the control of the domestic players over the points of interaction between the supranational and the national constitutional orders.

The chapter by Antonios Kourotakis, 'Courts in the constitution-making process: Paradoxes and justifications', explores the role of the judiciary in the constitution-making process in four constitutional orders. These are Colombia, South Africa, Honduras, and Nepal. The author briefly summarizes the classical definition of constituent power launched in modern political and constitutional theory. He reminds us that according to this traditional account the courts are by definition excluded from the constituent power and thus from the accomplishment of constitutional amendment.

However, the author also proves that

> the existence of an interim constitution or a total revision of the existing constitution may grant direct authority to the court to intervene in the constitution-making process, for instance by controlling the constituent assembly, reviewing its acts and even certifying the final constitutional document. In addition, the courts' participation in the constitution-making process might

> be justified on substantive grounds such as natural law principles, common constitutional principles, or the so-called supra-constitutional principles that exist in every democratic society and are pervaded in the general belief of the people.

Kouroutakis explicitly defines the aim of his chapter. This aim is 'to highlight paradoxes but also to offer justifications, both formal and substantive, for the intervention of the Courts in the constitutionalization of a new legal order'.

The author defines the concept of constituent power 'in order to highlight the paradoxes from the judicial intervention in the constitution making process'. Moreover, he presents the limits of the constituent power. Then he outlines the formal and substantial justifications for the courts' intervention. Subsequently Kouroutakis explains the theoretical framework of the total revision of the constitution and argues that 'such process also offers formal justifications for the courts' intervention'. The final part of the chapter provides for insightful case studies of the constitution-making process in Nepal, Colombia, and Honduras with a special emphasis on the role of courts in it.

Kouroutakis suggests that 'the existence of an interim constitution offers the conditions for the participation of the courts in the constitution-making process'. He proves his thesis with a case study of the constitutional amendment process in South Africa using Jon Elster's theory of upstream and downstream constraints on the constituent power. The author believes that excepting the interim constitution there is also one more formal justification for engagement of courts in constituent power. Kouroutakis suggests that this is the explicit recognition of the procedure for total revision of the constitution in the text of the constitution itself.

Kouroutakis contrasts the South African case, where a formal justification for the engagement of the constitutional court was in place, with the cases of Nepal, Colombia, and Honduras. In the last three states a substantial justification was needed. In the part of the chapter devoted to the substantial justifications for the participation of the judiciary in the constitution-making process Kouroutakis also engages in the debate on the unconstitutional constitutional amendments. Kouroutakis explains the role of moral principles, general values, and the suggestion for substantial hierarchy of the constitutional provisions for the engagement of courts in the constitution-making process. Again, his theoretical assumptions are proved on the basis of examples from Nepal, Colombia, and Honduras.

The chapter by Michael Hein, 'The least dangerous branch? Constitutional review of constitutional amendments in Europe', is a valuable contribution to the contemporary debate in constitutional theory and political theory on several interrelated topics. These are the issues of the judicialization of constitutional politics, judicial activism, the engagement of courts in constitutional reform, and unconstitutional constitutional amendments. The key question posed by the author is the following one: 'does constitutional review of constitutional amendments empirically contribute to the protection of modern democracy, or is it endangering the people's democratic right of self-government?' Hein's chapter

is engaged in the intellectual debate on the role of constitutional courts in constitutional politics debated by all chapters belonging to Part III of this volume.

One of the most important contribution of Hein's chapter is that it is grounded on impressive empirical research. The author makes us acquainted with 154 decisions that European national courts have made on the constitutionality of constitutional amendments from 1945 until 2016. On the basis of this solid data analysis Hein's main claim and conclusion is 'that when invalidating constitutional amendments, European courts predominantly do so in a democracy-adverse, judicial activist manner'.

Hein starts with the convincing example of the Constitutional Court of Moldova which changed the form of government by striking down a constitutional reform of the procedure for election of the President many years after it had been adopted by the constituent power. After demonstrating the clear need for reflection on the engagement of constitutional courts in constitutional reform and in controlling its substantial and procedural compliance with the constitutional model of the constituent power, Hein carefully explains his methodology and the conceptual framework that lies at the basis of his research. More precisely, the author defines judicial activism, outlines its different manifestations, and contrasts it with judicial self-restraint. He provides an insight into how to identify judicial activism in the constitutional review of constitutional amendments. This is done on the basis of substantive assessment of court decisions which enables the author

> to determine whether they constitute a case of judicial activism encroaching on the people's democratic right of self-government instead of protecting democracy, or a case of judicial restraint, that is, a decision that accepts the people's democratic right of self-government and intervenes only insofar as the court is (at least implicitly) entitled and called upon by the constitution to do so.

Furthermore, Hein develops 'a framework for the substantive analysis of court decisions' and explores the 'phenomenon of constitutional review of constitutional amendments in the literature on judicial activism'. The author provides the reader with a brief overview of the history of the constitutional review of constitutional amendments in Europe since 1945. An important contribution is the provision of typical examples of judicial self-restraint and judicial activism as well as their visualization via comparative tables.

Finally, Hein summarizes his key findings and provides some conclusions regarding 'their implications for the normative debate on and the constitutional practice of reviewing constitutional amendments'. In his account 'constitutional review of constitutional amendments has become an important and regular feature in many European countries' that 'fluctuates between judicial activism and judicial restraint'. Hein's analysis shows that most decisions are either completely or partially restrained non-interventions (interventions which do not produce

any real change) or activist decisions. The author concludes that 'constitutional review of constitutional amendments – although theoretically a reasonable feature of the protection of modern constitutional democracy – is empirically the opposite: a threat to democracy'.

The fourth and final part of the book addresses the challenges to courts stemming out of the rise of illiberal democracies, democratic backsliding, and self-assertive executives. While many of the previous chapters explore the judicialization of politics, consisting of the engagement of courts in constituent, legislative, and executive power, the two chapters of Part IV provide an analysis of the reversed problem, namely the political pressure of the political powers on the courts. Thus, Part I and Part IV of the volume frame the book by focusing on the problem of politicization of the judiciary.

Part IV of the book consists of two chapters which are logically interconnected. The chapter by Angela Di Gregorio, 'Constitutional courts in the context of constitutional regression: Some comparative remarks', sets the conceptual framework of the challenges to courts in the context of democratic backsliding whereas the subsequent and final chapter by Enrico Albanesi explores concrete mechanisms, instruments, and procedures that may provide a remedy for violations of the rule of law inflicting infringement of judicial independence by political powers and especially by illiberal executives.

Di Gregorio's chapter is devoted to the 'limitations on the independence of constitutional courts' as 'the main pointers of constitutional regression'. Thus, her chapter should be read in conjunction with the chapter by Konrad Lachmayer addressing the challenges to judicial independence in the context of rising illiberalism, neo-nationalism, and democratic backsliding. Both chapters are a solid theoretical basis paving the way for the research on the effectiveness of possible sanctions of illiberal regimes for infringement of the rule of law in the EU – a topic explored by the last chapter in this volume written by Enrico Albanesi.

Di Gregorio's chapter analyzes 'how the "normalization" or "neutralization" of the courts has triggered and then maintained illiberal degeneration'. This task is settled in the context of a comparative constitutional research combined with a case study of the challenges to constitutional courts' independence in Hungary, Poland, Russia, Turkey, and Venezuela.

The author explores the problem of constitutional regressions challenging the perspective of constitutional transitology and more precisely its 'transition paradigm'. She explains the relationship between the 'degeneration' and 'transition' paradigms used to explain the role of constitutional courts and their independence in fragile, semi-established, or non-established democracies.

Di Gregorio explores the problematic interplay between semi-consolidated democratic and non-consolidated authoritarian features in the emerging illiberal democracies in the context of democratic backsliding with a special emphasis on their effect on constitutional courts. Di Gregorio suggests that there are several factors for 'the involvement of constitutional courts in constitutional regression'.