Fabrizio E. Crameri

A Precursor to Constitutionalism

The Role of Apex Courts in Normative Constitutional Transitions

Carl Grossmann Verlag

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Author:
Fabrizio E. Crameri, MLaw, Poschiavo, Switzerland

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"lo peor es no tomar una decisión" (*PS*), *y yo la tomé...*

Preface

In light of an increase in the number of conflicts in recent decades, the (re) framing of post-conflict states has simultaneously seen a rise in the need for constitutionalism. During the transition, there is the propulsive need to uphold the basic elements of constitutionalism, such as the rule of law, democracy and limited government. In order to achieve this, the transition comes, almost typically, with the inclusion of a solid and independent judiciary acting as protector of the transition by guarding process and, indirectly, the future constitutional order. Throughout the transition, courts have to continue enforcing the rights of the people, protect the basic principles of the future definitive constitution and thus allow legitimate constitutionalism to develop. The judiciary plays the important part of ferrying the country during the transition, not only in principle but especially (and first and foremost) legally. Constitutionalism has to first be implemented legally, before actually having a chance to feel its presence and effects in society. This facet of a constitutional transition is what this research labels normative constitutional transition and the role and functions apex courts play specifically during this period has hardly been researched. In fact, a comparison of the various roles and the functions courts serve in the transition have been neglected by academics. Nevertheless, it is very much a current topic, given the need of peaceful negotiated settlements.

The purpose of this thesis is to investigate and define the role of the judiciary during a normative constitutional transition. Drawing upon constitution-making literature, case studies of specifically chosen countries (Turkey, Egypt and South Africa) and direct data from research on the field, this study examines the effects of the judiciary on the creation and implementation of new constitutional documents. The text seeks to introduce legal scholars to new methodological approaches and to open up legal research to other disciplines, and hence combines research methods and disciplines that are positioned in both law and social science.

A normative analysis (i. e., from a legal perspective) of this topic will not only be handy for future policy makers and law scholars, but will also contribute to create a basis of research for other disciplines, such as history and political science. The outcome of this project will hopefully assist states worldwide undergoing a power shift to tackle the right issues properly by portraying

and analyzing a central aspect (i.e., the judiciary) of a new, and hopefully effective instrument of transition, that is a constitution.

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A special thanks also to Gerald and Cirilla of CD Project Red, as well as Nathan Drake and Joel of Naughty Dog, without whom this book would have been completed at least a couple of years earlier.

Poschiavo, October 2021 Fabrizio E. Crameri

Table of Contents

List of Figures

List of Tables

List of Cases

If there is no other suggestion, the case label refers to the apex court in the country, as in the one vested with final jurisdiction over constitutional matters.

Turkey

TCC Decision 40/1965, (September 26, 1965) [*Protection of certain principles from amendment*]

TCC Decision 31/1970, (June 16, 1970) [*Protection of certain principles from amendment*]

TCC Decision 37/1970, (April 3, 1971) [*Protection of certain principles from amendment*]

TCC Decision 87/1975, (April 15, 1975) [*Protection of certain principles from amendment*]

TCC Decision 19/1976, (March 23, 1976) [*Protection of certain principles from amendment*]

TCC Decision 46/1976, (October 12, 1976) [*Protection of certain principles from amendment*]

TCC Decision 4/1977, (January 28, 1977) [*Protection of certain principles from amendment*]

TCC Decision 117/1977, (September 27, 1977) [*Protection of certain principles from amendment*]

TCC Decision 15/1987, (decision released June 18, 1987; legal reasoning released September 4, 1987) [*Constitutionality of constitutional amendments under the 1982 Constitution*]

TCC Decision 12/1989, (March 7, 1989) [*Headscarf Decision of 1989*]

TCC Decision 8/1991, (decision released April 9, 1991; legal reasoning released July 31, 1991) [*Headscarf Decision of 1991*]

TCC Decision 2/1994, (June 16, 1994) [*Democracy Party* (Demokrasi Partisi – DEP) *Dissolution case*]

TCC Decision 1/1998, (January 16, 1998) [*Welfare Party* (Refah Partisi – RP) *Dissolution case*]

TCC Decision 57/2001, (June 21, 2001) [*Virtue Party* (Fazilet Partisi – FP) *Dissolution case*]

TCC Decision 54/2007, (decision released May 1, 2007; legal reasoning released June 27, 2007) [*Constitutionality of the first round of voting over Gül's candidacy*]

TCC Decision 68/2007, (decision released July 5, 2007; legal reasoning released August 7, 2007) [*Constitutionality of the proceedings of the vote on constitutional amendments*]

TCC Decision 86/2007, (decision released November 27, 2007; legal reasoning released February 16, 2008) [*Constitutionality of constitutional amendments under the 1982 Constitution*]

TCC Decision 116/2008, (decision released June 5, 2008; legal reasoning released October 22, 2008) [*Headscarf Decision of 2008*]

TCC Decision 2/2008, (decision released July 30, 2008; legal reasoning released October 24, 2008) [*Justice and development Party* (Adalet ve Kalkınma Partisi – AKP) *Dissolution case*]

TCC Decision 87/2010, (decision released July 7, 2010; legal reasoning released August 1, 2010) [*Constitutionality of Constitutional Amendment Package of 2010*]

TCC Decision 128/2012, (September 20, 2012) [*Example of TCC's Packed Jurisprudence*]

Egypt

SCCE Decision No. 56, Judicial Year 6, June 21, 1986 (Official Gazette No. 27, July 3, 1986)

SCCE Decision No. 49, Judicial Year 6, April 4, 1987 (Official Gazette No. 16, April 16, 1987)

SCCE Decision No. 131, Judicial Year 6, May 16, 1987

SCCE Decision No. 44, Judicial Year 7, May 7, 1988 (Official Gazette No. 21, May 26, 1988)

SCCE Decision No. 14, Judicial Year 8, April 15, 1989

SCCE Decision No. 23, Judicial Year 8, April 15, 1989

SCCE Decision No. 37, Judicial Year 9, May 19, 1990

SCCE Decision No. 11, Judicial Year 13, July 8, 2000

SCCE Decision No. 20, *Anwar Sabah Darwish Mustafa v. Chairman of the Supreme Council of the Armed Forces*, Judicial Year 34, June 14, 2012 (translated at <https://static.squarespace.com/static/4f334481cb12c1acadc57623/5177e444e4b0244b5f673736/5177e46ee4b0244b5f678445/1340005862207/Supreme%20Constitutional%20Court%20Ruling%20-%20full.pdf>)

SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012 (translated at <https://static.squarespace.com/static/4f334481cb12c1acadc57623/5177e444e4b0244b5f673736/5177e46ee4b0244b5f678445/1340005862207/Supreme%20Constitutional%20Court%20Ruling%20-%20full.pdf>)

SCCE Decision No. 112, *Adnan Mukhtar ʿUthman Muḥammad v. The Chair of the Supreme Electoral Commission*, Judicial Year 34, June 3, 2013

South Africa

Constitutional Court

S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995)

S v Mhlungu and Others (CCT25/94) [1995] ZACC 4; 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) (8 June 1995)

Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995)

In re: National Education Policy Bill No 83 of 1995 (CCT46/95) [1996] ZACC 3; 1996 (4) BCLR 518; 1996 (3) SA 289 (3 April 1996)

Du Plessis and Others v De Klerk and Another (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658 (15 May 1996)

Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)

Certification of the Constitution of Kwazulu-Natal (CCT15/96) [1996] ZACC 17; 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996)

Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996)

President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997)

Certification of the Constitution of the Western Cape, 1997 (CCT6/97) [1997] ZACC 8; 1997 (4) SA 795 (CC); 1997 (9) BCLR 1167 (CC) (2 September 1997)

Soobramoney v Minister of Health (*Kwazulu-Natal*) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

City Council of Pretoria v Walker (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998)

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998)

President of the Republic of South Africa and Others v South African Rugby Football Union and Others – Judgment on recusal application (CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999)

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (*Pty*) *Ltd and Others In re: Hyundai Motor Distributors* (*Pty*) *Ltd and Others v Smit NO and Others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) (25 August 2000)

Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211; [2000] 12 BLLR 1365 (CC) (28 September 2000)

Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

Member of the Executive Council for Local Government and Development Planning Western Cape and Another v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm (CCT38/01) [2001] ZACC 7; 2002 (2) BCLR 133; 2002 (3) SA 1 (CC) (14 December 2001)

Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002)

United Democratic Movement v President of the Republic of South Africa and Others (*African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae*) (*No 2*) (CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 (4 October 2002)

Bato Star Fishing (*Pty*) *Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)

Minister of Finance and Other v Van Heerden (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC) (29 July 2004)

Kaunda and Others v President of the Republic of South Africa (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) (4 August 2004)

Mkontwana v Nelson Mandela Metropolitan Municipality (CCT 57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (6 October 2004)

City of Cape Town and Other v Robertson and Other (CCT 19/04) [2004] ZACC 21; 2005 (2) SA 323 (CC) (29 November 2004)

Minister of Health and Another v New Clicks South Africa (*Pty*) *Ltd and Others* (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005)

Joseph and Others v City of Johannesburg and Others (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) (9 October 2009)

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (18 June 2010)

Mankayi v AngloGold Ashanti Ltd (CCT 40/10) [2011] ZACC 3; 2011 (5) BCLR 453 (CC); 2011 (3) SA 237 (CC); [2011] 6 BLLR 527 (CC); (2011) 32 ILJ 545 (CC) (3 March 2011)

Glenister v President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011)

Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011)

Maccsand (Pty) Ltd v City of Cape Town and Others (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) (12 April 2012)

eThekwini Municipality v Ingonyama Trust (CCT 80/12) [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) (28 March 2013)

Rademan v Moqhaka Local Municipality and Others (CCT 41/12) [2013] ZACC 11; 2013 (4) SA 225 (CC); 2013 (7) BCLR 791 (CC) (26 April 2013)

Liebenberg NO and Others v Bergrivier Municipality (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) (6 June 2013)

National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others (CCT 120/12) [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC) (11 July 2013)

Britannia Beach Estate (Pty) Ltd and Others v Saldanha Bay Municipality (CCT11/13) [2013] ZACC 30; 2013 (11) BCLR 1217 (CC) (5 September 2013)

Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others (CCT 41/13) [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) (20 November 2013)

Mbatha v University of Zululand (45/13) [2013] ZACC 43; 2014 (2) BCLR 123 (CC); (2014) 35 ILJ 349 (CC); [2014] 4 BLLR 307 (CC) (5 December 2013)

Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others (117/13) [2014] ZACC 9; 2014 (5) BCLR 591 (CC); 2014 (4) SA 437 (CC) (4 April 2014)

Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017)

My Vote Counts NPC v Minister of Justice and Correctional Services and Another (CCT249/17) [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (21 June 2018)

Supreme Court of Appeal

Government of the Republic of South Africa v Malevu 1995 (8) BCLR 995 (D)

CDA Boerdery (Edms) Bpk en Andere v Nelson Mandela Metropolitan Municipality (526/05) [2007] ZASCA 1; 2007 (4) SA 276 (SCA) (6 February 2007)

Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others (518/09) [2010] ZASCA 128; [2011] 2 All SA 46 (SCA) (30 September 2010)

Lagoonbay Lifestyle Estate (Pty) Ltd v Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape and Others (320/12) [2013] ZASCA 13 (15 March 2013)

Western Cape High Court, Cape Town

Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others (10751/2011) [2011] ZAWCHC 327; [2011] 4 All SA 270 (WCC) (31 August 2011)

Other Courts

Belize

Supreme Court of Belize, *The British Caribbean Bank Limited v. Attorney General of Belize*, Claim No. 597 of 2011; [2012] CCJ 1 (AJ) (R)

Chile

Constitutional Court of the Republic of Chile [*Tribunal Constitucional de la República de Chile*], Decision No. 33 (September 24, 1985)

Colombia

Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-426/92 (June 24, 1992)

Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-011/98 (January 29, 1998)

Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-384/98 (July 30, 1998)

Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-1002/99 (December 9, 1999)

Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-148/02 (March 1, 2002)

Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision C-551/03 (July 9, 2003)

Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-391/04 (April 29, 2004)

Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-249/05 (March 17, 2005)

Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision C-141/10 (February 26, 2010)

Costa Rica

Supreme Court of Justice of the Republic of Costa Rica [*Corte Suprema de Justicia de la República de Costa Rica*], Constitutional Chamber [*Sala constitucional*], Decision No. 7818–00 (September 5, 2000)

Supreme Court of Justice of the Republic of Costa Rica [*Corte Suprema de Justicia de la República de Costa Rica*], Constitutional Chamber [*Sala constitucional*], Decision No. 2771–03 (April 4, 2000)

European Court of Human Rights (ECtHR)

Refah Partisi (*Welfare Party*) *and Others v. Turkey* [GC], Nos. 41340/98, 41342/98, 41343/98, 41344/98, ECtHR 2003-II (February 13, 2003)

Leyla Sahin v. Turkey [GC], No. 44774/98, ECtHR 2005-XI (November 10, 2005)

Germany

Federal Constitutional Court of Germany: [*Bundesverfassungsgericht, BVerfGE*], Decision No. 1 BvR 147/52 (December 17, 1953) [*Beamtenverhätnisse*]

India

Supreme Court of India, *Kesavananda Bharati Sripadagalvaru and Others. v. State of Kerala and Anr.* (1973) 4 SCC 225: AIR 1973 SC 1461

Supreme Court of India, *Olga Tellis and Others v Bombay Municipal Council and Others* (1985) 3 SCC 545: AIR 1986 SC 180

Inter-American Court of Human Rights (IACHR)

Juan Carlos Apitz Barbera and Others (*'First Court of Administrative Disputes'*) *v. Venezuela*, IACHR Series C No. 182, IHRL 3056 (IACHR 2008) (August 5, 2008)

Italy

Italian Constitutional Court [*Corte Costituzionale italiana*], Decision No. 1/1956 (June 5, 1956)

Nicaragua

Supreme Court of Justice of the Republic of Nicaragua [*Corte Suprema de Justicia de la República de Nicaragua*], Constitutional Chamber [*Sala de lo constitucional*], Decision No. 504–09 (October 19, 2009)

United Nations (UN) Security Council

UN Security Council, *Security Council resolution* 418 (1977) [*South Africa*], November 4, 1977, S/RES/418 (1977)

UN Security Council, *Security Council resolution* 591 (1986) [*South Africa*], November 28, 1986, S/RES/591 (1986)

UN Security Council, *Security Council resolution* 919 (1994) [*Termination of the arms embargo and other restrictions related to South Africa imposed by resolution 418*], May 25, 1994, S/RES/919 (1994)

USA

U.S. Supreme Court, *Marbury v. Madison*, 5 U.S. 1 Cranch 137 137 (1803)

U.S. Supreme Court, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)

U.S. Supreme Court, *United States v. Butler*, 297 U.S. 1 (1936)

Venezuela

Supreme Court of Justice of the Republic of Venezuela [*Corte Suprema de Justicia de la República de Venezuela*], Political-Administrative Chamber [*Sala político-administrativa*], Decision No. 17 (January 19, 1999)

List of Abbreviations

The list only contains technical terms and not commonly used abbreviations or those employed to indicate the internal coding of the case law.

AAA	United States of America. U.S. Congress. United States Code: Agricultural Adjustment Act of 1938, 7 U.S.C. §§ 1281–1388 (Suppl. 3 1982)
AJ	Acting Judge
AKP	Justice and Development Party (Turkish: *Adalet ve Kalkınma Partisi*), Turkey
ALGFS	South Africa. National Local Government Negotiating Forum. Agreement on Local Government Finances and Services, 20 January 1994
ANC	African National Congress; South Africa
Art.	Article
AT	Amended Text
AU	African Union
AVF	Afrikaner People's Front (Afrikaans: *Afrikaner Volksfront*), South Africa
BDP	Kurdish Peace and Democracy Party, Turkey
BVerfGE	Decision of the German Federal Constitutional Court
BVerfGG	Germany. Act on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*), 11 August 1993
CA	Constitutional Assembly, South Africa
CCC	Constitutional Conciliation Commission, Turkey
CCZA	South African Constitutional Court
cf.	*confer/conferatur*
CHP	Popular Republican Party, Turkey
CODESA	Convention for a Democratic South Africa
CP	Constitutional Principles, South Africa

DEP	Democracy Party (Turkish: *Demokrasi Partisi*)
DFA	Development Facilitation Act, 1995 (No. 67 of 1995), South Africa
DP	Deputy President
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed./eds.	edition/editions
e. g.	for example
et al.	*et alia*, and others
etc.	et cetera
EU	European Union
f./ff.	and the following page(s) or paragraph(s)
FP	Felicity Party (Turkish: *Saadet Partisi*)
GC	Grand Chamber
GDP	Gross Domestic Product
GIZ	German Corporation for International Cooperation (German: *Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH*)
GTZ	German Technical Cooperation Agency (German: *Gesellschaft für technische Zusammenarbeit*)
HDP	Kurdish People's Democratic Party, Turkey
IACHR	Inter-American Commission on Human Rights
ibid.	ibidem
IC	Interim Constitution
i. e.	that is
IFP	*Inkatha* Freedom Party, South Africa
J.	Justice
JA	Justice of Appeal
JSC	Judicial Service Commission, South Africa
LG	Local Government
LGTA	Local Government Transition Act 209 of 1993, South Africa
LUPO	Land Use Planning Ordinance Act 15 of 1985, South Africa
MEC	Members of the Executive Council, South Africa

MENA	Middle East and North Africa
MPNF	Multi-Party Negotiating Forum, South Africa
MPNP	Multi-Party Negotiating Process, South Africa
MHP	Nationalist Movement Party (alternatively translated as Nationalist Action Party; Turkish: *Milliyetçi Hareket Partisi*)
NATO	North Atlantic Treaty Organization
NCOP	National Council of Provinces, South Africa
NDP	National Democratic Party, Egypt
NGO	Non-Governmental Organization
NIRA	National Industrial Recovery Act of 1933
NLGNF	National Local Government Negotiating Forum
NP	National Party, South Africa
NSC	National Security Council, Turkey
NT	New Text
para/paras	paragraph/paragraphs
PEC	Presidential Election Commission
PKK	Kurdistan Workers' Party, Turkey
PR	Proportional Representation
RP	Welfare Party (Turkish: *Refah Partisi*)
SCAF	Supreme Council of the Armed Forces, Egypt
SCCE	Egyptian Supreme Constitutional Court
sch.	schedule
STV	single transferable vote
TBMM	Grand National Assembly of Turkey (Turkish: *Türkiye Büyük Millet Meclisi*)
TCC	Turkish Constitutional Court
UAR	United Arab Republic
UN	United Nations
U.S.	United States
US$	United States dollar
v./v	against (Latin: *versus*)

vol./vols.	volume/volumes
VP	Virtue Party (Turkish: *Fazilet Partisi*)
WP	Welfare Party (Turkish: *Refah Partisi*)
WW1/WW2	World War 1/World War 2

Introduction

A. Problem Statement

In recent years many countries have fallen into civil war or experienced internal turmoil followed by a constitutional transition, causing a shift from authoritarianism towards democratic constitutionalism.[1] Transitions towards democracy have therefore become much of a topical event, although they are not new to human history.[2]Recent studies have shown that conflicts are more likely to end by negotiated settlement, rather than by military victory of one side.[3] The negotiated settlement, which can itself be the result of years of peace talks including ceasefires and concessions, commonly culminates with a new constitutional arrangement, the nature of which can vary: whole new constitutions, sets of crucial amendments or, as it is increasingly more the case, interim constitutional arrangements acting as bridges towards the drafting of new constitutional dispensations (e.g. peace agreements, interim constitutions, memorandum of understandings, etc.).[4]

1 See, for instance, the wave of anti-government protests, armed uprisings, and violent rebellions that spread throughout the Middle East in late 2010, known commonly as the 'Arab Spring', but also other cases, such as South Africa in 1994, Nepal in 2008–2015, Afghanistan in 2009–2013, and many more.

2 Samuel P. Huntington, for instance, coined the term 'Third Wave of Democracy' when referring to the transitions towards democracy in the following article: Samuel P. Huntington, "Democracy's Third Wave," *Journal of Democracy* 2, no. 2 (1991). He further expounded it in his book *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991). According to Huntington, history has literally seen surges of democratic transitions referred to as 'waves'. Apparently, the first wave of democracy had its roots in the American and French Revolutions, creating about 29 democracies, and lingered on until the coming into power of Italy's dictator, Benito Mussolini in 1926. The second one was followed by the victory of the allies in World War II reaching its peak in 1962, with a total of 36 democracies existing. Huntington argues that a third wave was brought into being in 1974, with the Carnation Revolution in Portugal and lasting through the collapse of the post-soviet era. Depending on the criteria used for the assessment of democracy one can argue that the Arab Spring represented the beginning of a 'fourth wave' of democracy.

3 See e.g. Roy Licklider, "The Consequences of Negotiated Settlements in Civil Wars, 1945–1993," *American Political Science Review* 89, no. 3 (1995); Monica D. Toft, *Securing the Peace: The Durable Settlement of Civil Wars* (Princeton: Princeton University Press, 2009); "Ending Civil Wars: A Case for Rebel Victory?," *International Security* 34, no. 4 (2010); Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford: Oxford University Press, 2016), 113.

4 Such interim arrangements often include rules of transition, which can extend from the regulation of the process of transition itself to the inclusion of minimum standards for

With the adoption of new constitutional dispensations, the willingness to take constitutions seriously has grown. These new constitutions are putting a lid on decades of conflicts caused mainly by authoritarianism.[5] By incorporating values of constitutionalism, such as democracy, the rule of law, the separation of powers, the protection of fundamental rights and above all the principle of constitutional supremacy, countries have remembered the historical importance of constitutional law when moving away from authoritarianism: i. e. limiting the *Leviathan.*[6] Countries have

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the new constitution (e. g., the inclusion of human rights, vertical power-sharing arrangements, demilitarization pacts, etc.).

5 Charles M. Fombad, "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism," in *The Resolution of African Conflicts: The Management of Conflict Resolution & Post-Conflict Reconstruction*, ed. Alfred Nhema and Paul T. Zeleza (Rochester, NY: James Currey, 2008), 179.

6 Thomas Hobbes (Westport, 5 April 1588 – Hardwick Hall, 4 December 1679) is, together with Niccolò Machiavelli and John Locke, one of the most important protagonists of Renaissance political philosophy, known for his exaltation of monarchic power as the only brake on the *bellum omnium contra omnes* ('war of all against all'). The philosopher set out his model of state in a complete and systematic manner in the *Leviathan* (1651), a defense on the absolute power of kings. The Leviathan is a biblical monster, which, given its majesty and power, becomes a metaphor for the power of the State, embodied in the monarchical power. Hobbes synthesizes that human beings are born evil and bad and, without adequate control of authority, a climate of civil war would be established, because, man, in the state of nature, is a wolf for his fellow men (*homo homini lupus*). In the opinion of the British thinker, a 'social contract' between kings (authority) and subjects is thus necessary: subjects will renounce part of their rights and freedom, the protection of which will be entrusted to the royal authority (or the State). In other words, Hobbes likened the Leviathan to government, a powerful state entrusted with absolute power, created to impose order. Only in this way, by placing all power in the hands of the Leviathan, Hobbes argues, will it be possible to maintain peace and order. However, the days of absolutism were numbered. Soon the realization emerged that the Leviathan, here to protect the people, can itself transform into a threat. And that is when *constitutionalism* emerges: a powerful State is good, otherwise life would be too dangerous and inefficient, but the State cannot be all-powerful and sit above the law. That power must be limited. The social contract – a constitution – needs to be drafted in a way that it also limits the Leviathan. Especially enlightenment philosopher John Locke, but also Charles Montesquieu, and Jean-Jacques Rousseau, all developed theories of government in which some or even all the people would govern, contributing to the shaping of today's idea of constitutionalism. For more information on the different theories cf. Constitutional Rights Foundation, "Hobbes, Locke, Montesquieu, and Rousseau on Government," *Bill of Rights in Action* (*BRIA*) 20, no. 2 (2004), http://www.crf-usa.org/bill-of-rights-in-action/bria-20-2.html (accessed 16 January 2019).

come again to realize how constitutionalism can beat totalitarianism, and its (re)introduction is the key factor of this research.

Such process of constitutionalization can stem from different events that trigger a constitutional transition. These events, as Hirschl points out, can – from an empirical perspective – be sorted out roughly into five differing scenarios:[7]

1) First, constitutional reform can derive from the political *reconstruction* of a state in the aftermath of an existential political crisis (e.g., the adoption of new, post-World War II constitutions of Japan in 1946, Italy in 1948, Germany in 1949 and in France in 1958). Reconstruction, as in a constitutional transition triggered by the need of constitutionalism after an existential threat to a specific country, remains a rather timeworn reason for transition, which has lost some of its actuality and pertinence. Paradigmatic examples of reconstruction date back to the aftermath of World War II. States, such as Italy, Germany, Japan and France were war-torn and needed more than reform, including new structures and values, in order to find a new birth from the ashes of the war. The constitutional needs for such new arrangements were steered towards economic growth.[8]
2) A further wave of constitution-making has risen from the *decolonization* processes (e.g., India in 1948–1950). Independence has a strong link with decolonization but can also include secession and/or drawing of new territorial boundaries. The difference, of course, lies in the concept of statehood. On the one hand, secession precludes the founding of a new state as such.[9] On the other hand, decolonization did not necessarily mean the creation of a new state, but it did not signify democratization, neither.[10] From a constitutional law perspective, decolonization refers to a constitution-making wave featuring the

7 The original description of all scenarios by Hirschl can be found at: Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law," *The American Journal of Comparative Law* 53, no. 1 (2005): 151.

8 Cf. Huntington, "Democracy's Third Wave," 12–14.

9 This excludes e.g., the dissolution of the Soviet Union or the breakup of Yugoslavia, *inter alia*.

10 Most of the decolonization processes were not really colored by constitutional negotiations between the people of the country and the colonial power, but rather stained by a handing over of power to undemocratic figures.

colonial powers simply handing their power over, not necessarily creating a new state and democratizing it. Many colonial powers left the reins to autocrats, not to the people

3) In a sense, decolonization created the cause for the next, and more contemporary, reason of constitutional transitions, which is *democratization.* This rather current factor for constitutional transition is derivative of a transfer of power from authoritarian to democratic regimes (e.g., earlier, the constitutional revolutions in newer democracies in Southern Europe in the 1970 s, and in Latin America in the late 1980 s and early 1990 s, as well as, *inter alia*, the series of protests and demonstrations across the Middle East and North Africa that commenced in the early 2010 s, which resulted in a wave of constitutionalization in the region).
4) Furthermore, partly parallelly to democratization, yet not quite with the same objective, is the *'dual transition'* scenario, in which the transition to democracy is combined with a western model of market economy (this is the characteristic shown mostly by the numerous constitutional revolutions of the post-communist and post-Soviet countries). Within this scenario, countries combine democratization with a deep-rooted thrive for economic reform, prioritizing the latter.
5) Finally, the *incorporation* of international and trans-national or supranational legal standards into domestic law is another possible explanation for a constitutional transition (e.g. the passage of the Human Rights Act 1998 in Britain, which effectively incorporated the provisions of the European Court of Human Rights into British Constitutional Law or the exact opposite in the same constitutional order in the recent process of the so-called 'BREXIT' and the disbanding of European basic law from the British constitutional order).

Some of these reasons for constitutional transitions can overlap and serve as mere reference to point out the complexity of their categorization. All in all, a common element in Hirschl's scenarios is the process of constitutional transition, no matter what reason lies behind.[11]

Constitutional reforms resulting in new constitutions have increasingly become overt evidence of democratization processes. It is clear, however,

11 As of now, it is enough to think of it as a process in which an old constitution is replaced by a new one but will be defined further in another chapter.

that the mere existence of a new constitution, as well as its successful implementation, may not necessarily mean that authoritarianism, corruption and incompetent rule are cured, nor assure constitutionalism. After all, many autocrats managed to hide their totalitarian regimes behind written constitutions. Therefore, the problem is not the absence of a written constitution, but mostly of constitutionalism itself.[12]

However, as Prof. Charles Fombad contends, a well-designed written constitution built around the core elements of constitutionalism is a minimum requirement:[13]

> 'Although the presence or absence of constitutionalism could arguably best be assessed by a careful examination of how the constitution actually operates in practice, an analysis of the provisions themselves can provide a reasonably satisfactory or even conclusive indication of the prospects of constitutionalism under any given constitution. The assumption underlying this analysis is that, in the absence of constitutional provisions that enhance the possibilities for constitutionalism, there is little chance that the actual implementation of the constitution will itself result in constitutionalism.'[14]

In other words, to even only give a slight chance at constitutionalism, the same needs to first be legally and institutionally established. This process is what in this thesis I label as *legal* constitutional transition, as it addresses the legal (as in constitutional entrenchment) and institutional establishment of all core elements of constitutionalism.[15] Whether or not constitutionalism thrives is a question, which does not necessarily have to be answered within the legal spectrum, but rather (also) by the social sciences.

Transitory periods are commonly characterized by being unstable, while conflict and chaos are peeking from just around the corner. Both the fragility of the transitory period and the (re)introduction of constitutionalism call for the need of an umpire in the transitional process and a guardian of the new constitutional dispensation. Courts are often given this function.[16] An indicator of such impression is that most of the new liberal democracies established constitutional courts or supreme

12 Fombad, 179.

13 ibid.

14 ibid.

15 A legal constitutional transition as opposed to the empirical one. This differentiation will be clarified in the next section.

16 See indirectly e.g., Art. 167 Constitution of South Africa, 1996.

courts (henceforth both named 'apex courts') during the transition with the power of judicial review, and that and independent judiciary itself is often seen as a key element of constitutionalism.[17] The establishment of apex courts could be, in other words, a means to support the transformation from authoritarian (one-party) regimes to multi-party constitutional democracies. In fact, in some of these countries apex courts proved remarkably successful in contributing to this transformation, while at the same time establishing themselves as powerful institutions in their respective political systems.[18]

However, whether apex courts actually succeed in fulfilling the function given and/or what role they actually play within the legal-constitutional (and political) skirmish is not always clear or defined.[19] What role they played and should play is thus a current issue, and an aspect of it is the object of this thesis.

B. Research Question(s)

Given the problem outlined, this thesis seeks to examine the role of apex courts in the legal constitutional transition process in terms of one main research question: *What is the role and behavior of apex courts in a normative constitutional transition?* This thesis reviews the role courts play in shepherding the country through the *legal process* towards a new constitutional order. In other words, what role and behavior do apex courts adopt in establishing – legally and institutionally –

17 Fombad, 180–83.

18 See recently e.g., Kenya, Nepal, Tunisia and Zimbabwe, Colombia, Hungary and South Africa, as well as lesser-known examples across the world, such as Spain, Portugal, practically all Central and Eastern European states, Brazil, Uruguay, Indonesia, Mongolia and South Korea. All these examples share a common view of what the judiciary should look like in the new state: a judiciary, able to act as the protector of the constitution and its values.

19 Let us not forget that sometimes the judiciary struggles or even fails to position itself as an effective actor in the transition and subsequently in the new constitutional framework. In most countries emerging from an internal conflict, courts either simply do not exist anymore or existing courts are not suitable for the task, for they are not acceptable to the conflicting parties, commonly due to legitimacy issues. However, also in this scenario, there is no established doctrine on 'if' courts should play a role and, if yes, what role they should be playing.

constitutionalism? This question is tackled by means of three case studies (Turkey, Egypt and South Africa). In the case studies, a focus is given on describing, analyzing and comparing the role of apex courts in shepherding the constitutional transition to its end: *Did the apex court play a role in the normative constitutional transition? What role did they play? How did they play it* (*i.e., with what behavior*)*? Why did they play it* (*i.e., what factors influenced their role and behavior*)*?* These sub-questions are answered at the end of each case study.

A secondary question, which fills the conclusions of the study is: *What role and behavior should, or could, an apex court play in the normative constitutional transition? In addition, what can constitution-builders do to foster such role and behavior* (*policy implications*)*?* Here the thesis glances at the normative and policy implications drawn based upon the lessons learned while answering the main comparative research question. An extensive comparative part of this thesis will therefore be followed by a rather normative conclusion, in which an attempt is made to fill the loophole left by those experiences where the judiciary was non-existent or simply did not play any specific role, or an ineffective one.

C. Intellectual Setup and Research Scope

The thesis does not focus on the role a court has played in helping the extra-legal – i.e., social – transformation of a country, but stresses on the part played by an apex court in facilitating the full realization of the constitutional transition in a *strict legal* (or *normative*) *sense.* This legal facet of a constitutional transition must be differentiated from the extra-legal (or *empirical*) transformation of a country, which starts from the enactment of a new constitution, but its development in the 'real world' is independent from any constitutional codification. This differentiation stems from the intellectual foundation of this thesis, which is based upon Grimm's definition of constitution and its effects, the clarification of which is needed to better define the research question (and the topic that it tries to cover).

I. Constitution: A Working Definition

According to Grimm, 'every political unit is constituted, but not every one of them has a [written] constitution. The term "constitution" covers both conditions, but the two are not the same.'[20] Accordingly, to Grimm, the term 'constitution' has two different meanings.

On the one hand, it refers 'to a *law* [emphasis added] that concerns itself with the establishment and exercise of political rule'.[21] This concept carries the label of *normative* and *prescriptive* constitution and represents the written rules by which political rule should be exercised under law.[22] This is mostly what we know as a codified or a written constitution.

On the other hand, a constitution can also indicate 'the *nature* [emphasis added] of a given country with reference to its political conditions'.[23] This is what he labels as *empirical* or *descriptive* constitution. Looked at from this perspective, empirical constitutions reflect the actual political conditions prevailing in a specific country at a given time; it reveals the reality of the results of the constitutional order in a country, and reasonably it cannot be codified.

In other words, Grimm's assertion uncovers the differentiation between the constitution in formal legal terms and the constitution in political terms;[24] a distinction that is key to define the research scope of this thesis. However, both do not remain unrelated: the normative constitution comes to life

20 See Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford: Oxford University Press, 2016), 3. For the history of the term 'constitution', cf. also Heinz Mohnhaupt and Dieter Grimm, *Verfassung: Zur Geschichte Des Begriffs Von Der Antike Bis Zur Gegenwart*, 2nd ed. (Berlin: Duncker & Humblot, 2002).

21 Grimm, 3.

22 ibid.

23 ibid.

24 Not to be confused with the concepts of 'legal' and 'political constitutionalism', which refer to the system of checks exercised on the executive. A 'legal constitution' is where the judiciary is the main checks upon government, whereas a 'political constitution' is a constitution where the legislature provides the greater checks upon government. For more on the subject cf., *inter alia*, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); Graham Gee and Grégoire C. N. Webber, "What Is a Political Constitution?," *Oxford Journal of Legal Studies* 30, no. 2 (2010); Paul Blokker to VerfBlog, 4 June 2017, https://verfassungsblog.de/from-legal-to-political-constitutionalism/; Marco Goldoni, "Two Internal Critiques of Political Constitutionalism," *International Journal of Constitutional Law* 10, no. 4 (2012).

through political decisions, the result of which is the empirical constitution. That is the real effect of constitutional law through the political process. From another perspective, instead, the normative constitution is a constraint on politics, even though politics created the normative constitution in the first place.[25] In a way, politics ends up executing the normative constitution, thus molding the empirical constitution. 'Constitution' can thus be seen as a medal with two faces of the same:

– *Constitutional law* (*or normative constitution*)*:* A normative constitution is basically the written consensus reached in a negotiation between the different entities within the constituent power, seeking a limitation of the *Leviathan.* The legal consensus is produced by a political decision, but can also be modified by a same form of decision: an amendment.[26]The limitation to the political process, Grimm admits, cannot be a total constraint,[27] for a total limitation of political power (the *Leviathan*) would be equal to a negation of politics.[28] Accordingly, the normative constitution as 'the fundamental legal order of the state'[29] does not remove the political and extra-legal debate, instead it serves as the procedural and substantive framework for it.
  Nevertheless, Grimm argues that the normative constitution is not a mere description or 'picture', yet the epitome of provisions that the political

25 Grimm, 17.

26 These principles, which shape the identity of a country, are deemed to remain valid over a longer period of time; they confer a higher degree of confidence in their stability compared to ongoing political decisions. Even eternity clauses and qualified entrenchments of certain provisions that create a gradient within constitutional law, are only valid and effective as long as the constitution containing such entrenchment remains in force and is not annulled or superseded by a new constitution. Cf. Ibid., 18.

27 Cf. "Politik Und Recht," in *Grundrechte, Soziale Ordnung Und Verfassungsgerichtsbarkeit, Festschrift Für Ernst Benda*, ed. Eckart Klein (Heidelberg: C.F. Müller, 1995), 96; *Die Verfassung Und Die Politik* (München: Beck, 2001), 21.

28 Accordingly, Grimm states that '[p]olitics would be reduced to executing the constitution, and thus ultimately become administration. Yet the constitution should not make politics superfluous but should channel and rationalize it. Consequently, it can never be more than a framework for political action. It defines the constraints under which political decisions can command binding force but determines neither the input into constitutional channels nor the results of constitutional processes. […] The result can only claim to be binding when the constitutionally legitimated actors act within the constitutionally established bounds.' See *Constitutionalism: Past, Present, and Future*, 17.

29 See Werner Kägi, *Die Verfassung Als Rechtliche Grundordnung Des Staates* (Zürich: Polygraph Verlag, 1945).

system must uphold; '[i]t does not depict social reality but makes demands of it'.[30] For Grimm, it takes thus its distance from reality and accordingly serves as a standard for behavior and assessment in and out of politics. 'Thus', continues Grimm, 'it cannot be resolved in a one-time decision as to the nature and form of the political unit [*Schmitt*] or in a continuing process [*Smend*].[31] Rather, as a norm it becomes independent

30 Grimm, *Constitutionalism: Past, Present, and Future*, 18.

31 Grimm thus separates itself on the matter in particular from Carl Schmitt and Rudolf Smend. These two scholars, even though of a different methodological and object-oriented approach, were both united by an antipositivistic view of the law, e. g., typical of Hans Kelsen. In short, on the one hand, Kelsen saw the Constitution exclusively as a legal norm. On the other hand, Smend and Schmitt developed 'material theories of the Constitution' and saw the Constitution as more than just an ordinary legal norm but, in fact, as a global law of the political life of the State and society. Let it be explained. Kelsen identified jurisprudence with normativism, affirming that the entire legal system springs from the basic and unifying norms, essence of a Constitution. Therefore, a jurist must limit himself to analyzing and interpreting the various aspects of the law within the confines of the norms, not letting himself be influenced by politics, sociology, ethics, history, in such a way as to leave the pure doctrine of law untouched by factors prejudicing the juridical ideas. Schmitt and Smend saw it differently, basically arguing that normativists, too concerned about 'scientific objectivity', tend to end up ignoring the reality of political and sociological changes. Cf. Stefano Guerra, "Il Dibattito Giusfilosofico Tra Carl Schmitt, Hans Kelsen E Rudolf Smend Sullo Sfondo Della Crisi Della Repubblica Di Weimar" (Università degli Studi di Macerata, 2017), 110. At the same time, both scholars diverged when it came to their 'material' idea of constitution. On the one hand, Schmitt had a decisionistic view of constitutions: he defined it as a one-time political decision as to the nature and form of the political unit it tries to establish (cf. Carl Schmitt, *Verfassungslehre* (München: Duncker & Humblot, 1928), 20.) Unlike Schmitt, Smend does not resolve the written constitution in favor of a one-time decision, but rather an ongoing process. In contrast to Schmitt, he does not dissolve the tension between 'individual and community' through a predetermined political unity (no matter how it may be justified). For Smend, the state as a political unit is not a static character but, as an 'integration', a continuous, dynamic process. Robert Chr. van Ooyen, *Integration: Die Antidemokratische Staatstheorie Von Rudolf Smend Im Politischen System Der Bundesrepublik* (Wiesbaden: Springer VS, 2014), 26. In his own words, the constitution serves 'life in which the state has its vital reality, namely its integration process. The purpose of this process is always to create the totality of life of the state anew, and the constitution is the legal regulation of individual aspects of this process.' See Rudolf Smend, *Verfassung Und Verfassungsrecht* (München: Duncker & Humblot, 1928), 78. Accordingly, the state is a spiritual context, a unity structure in the will of the individual. A spiritual unity arises from the fact that the citizens of a state want to live together and continuously adjust their behavior accordingly. This no longer allows a fixed boundary to be drawn between law and reality and is the radical conception of constitution opposing the positivistic one. In his own words Smend asserts that, 'as positive law, the con-

of the decision to which it owes its political validity and provides support for the process that it assumes as a prerequisite.'[32] Its content is therefore not the object [*Schmitt*], but the veritable premise of political decisions.[33] Henceforth, terminologically speaking, whenever the talk is of 'constitution', unless otherwise specified, it is meant the 'normative [written] constitution'; and

– *Constitutional reality* (*or empirical constitution*)*:* When it comes to the empirical constitution, Grimm approaches the concept of constitutional reality; the content of the normative constitution is no longer the object of examination, but the premise of the empirical constitution.[34] The normative constitution is not self-executing, as it cannot guarantee its own realization. Therefore, *whether and to what extent a country succeeds in reaching the normative aspiration of the normative constitution depends mostly on extra-legal actions.*[35] Exactly where to find these extra-legal actions is the empirical constitution, which lines up with the *integrative function* of a constitution.[36]

As the definition itself describes, the normative constitution is a notion that does not leave the boundaries of the law, whereas the empirical constitution breaks through those boundaries and reflects the 'constitutional reality' of a country. Such reality can only be seen outside of the law, yet it is the result of the application of the normative constitution. Therefore, both definitions are not two different concepts of constitution, but they rather interact and are simply two sides of the same medal and take place on two different levels: legal and extra-legal.

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stitution is not merely a norm, but also reality; as a constitution it is integrating reality'. See ibid., 80.

32 Grimm, *Constitutionalism: Past, Present, and Future*, 18.

33 ibid.

34 ibid.

35 ibid., 19.

36 For a comprehensive clarification of the integrative function of constitutions cf. "Integration by Constitution," *International Journal of Constitutional Law* 3, no. 2–3 (2005). Cf. also "Integration Durch Verfassung: Absichten Und Aussichten Im Europäischen Konstitutionalisierungsprozess," *Leviathan* 32, no. 4 (2004).

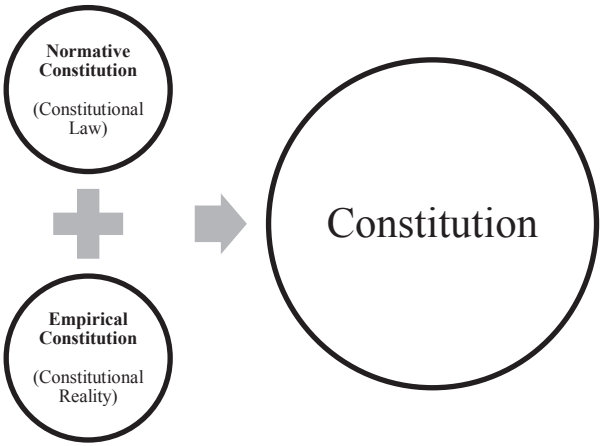

Figure 1 'Constitution': A working Definition

II. The Interlocking Sinergy between the Normative and the Integrative Function of Constitutions

As a set of highest-ranking norms, the normative constitution is intended to generate normative effects. Grimm describes it as the political foundation of a polity:

> 'It constitutes the public power of a society that has resolved to form a political entity, and it determines how this power is to be organized and exercised in the expectation that in so doing it best serves the needs and convictions of the polity.'[37]

Accordingly, it is normal that the political order championed by a normative constitution is claimed by them to be 'good', because for the public authorities that it creates, it serves also as a standard of behavior.[38] This is the normative function and effect of a normative constitution.

The integrative function of constitutions instead refers to the extra-legal effects of the legal object. The legal object, i. e., the normative constitution, is a set of norms with precedence over all other legal norms, which regulate the creation and exercise of political power. The effect, i. e. (social) integration, 'is an actual process by which the members of a polity develop a sense of belonging together and a collective identity that

37 See "Integration by Constitution," 194.
38 Cf. Ibid.

differentiates them from other polities.'[39] Such integration becomes thus the condition for both unity and collective action in polities that aim at maintaining a plurality of opinions and interests existing within them.[40] In other words, the integrative effect is the result of the application of the normative constitution, and is to be found in the empirical constitution.

Both functions – the normative and the integrative one – of a normative constitution are fulfilled on different levels. The normative function of the normative constitution takes shape in the processes of *constituting*, *legitimizing* and *regulating* public authority. All these take place on a juridical level,[41] and are evidently directly realized by the normative constitution. Even if constitutions produce normative effects, their integrative impact is a different matter. The process of integration does not unfold on a juridical level. The reason is, and here Grimm links it to the empirical constitution, 'that the process of social integration does not unfold on a normative level. Integration takes place in the real world. It is a social process that can be linked with the constitution, but it is not controlled by it. […] Laws can influence, but never determine, such processes.'[42] Hence, the empirical constitution does not substitute the normative one, but rather they occur (roughly) at the same time[43] and interact.[44] The normative does not remove the political and extra-legal debate, instead it serves as the procedural and substantive framework for it.

39 See *Constitutionalism: Past, Present, and Future*, 143. But also "Integration by Constitution," 193.

40 Cf. *Constitutionalism: Past, Present, and Future*, 143. But also "Integration by Constitution," 193.

41 'The constitutive function is fulfilled by the very existence of the constitution. It is what it exists for: creating and regulating public authority that did not previously exist or did not exist in the same form. The same is true of its legitimizing function, as the constitution defines who is entitled to wield political power. The constitution's function as a standard of behavior and judgment is no different. The constitution sets out this standard, conferring upon it a legal validity that is independent of whether or not the standard is actually followed. Individual violations of a law do not invalidate the constitution. Its effect consists in allowing people to determine what behavior is lawful or unlawful and in attaching legal consequences to these qualifications.' See "Integration by Constitution," 195. See also *Constitutionalism: Past, Present, and Future*, 145.

42 Cf. *Constitutionalism: Past, Present, and Future*, 145; "Integration by Constitution," 195.

43 Strictly chronologically speaking, the normative constitution precedes the empirical constitution.

44 'Whenever the political process leaves the constitutionally stipulated track, the empirical constitution usually emerges from behind the legal one as the cause of the failure.' See

Thus, by describing the political identity of a specific polity, the normative constitution also adopts a certain integrative function because it contributes to the 'integration of society'.[45] Irrelevant of what a 'good' constitution is or is not,[46] the effects of a normative constitution are normally expected to reach beyond its normative regulatory ones and stretch towards social integration. People expect a normative constitution to unify the society that it establishes as a polity, no matter its diversity or differences in opinions, which exist in all societies. As such, the normative constitution is seen as the guarantee of the basic consensus necessary for social cohesion, and serves as the document in which a society's basic convictions and ambitions are spoken.[47] Therefore, the normative constitution is itself an integrative factor, but other integrative factors such as religion, history and culture and can also have an

Grimm, *Constitutionalism: Past, Present, and Future*, 19. Instead, where it succeeds, the political process runs according to the rules of the normative constitution. The empirical constitution would then very much reflect the normative one.

45 Cf. Ibid., 143 ff; Hans Vorländer, *Verfassung Und Konsens* (Berlin: Duncker & Humblot, 1981); *Integration Durch Verfassung* (Wiesbaden: Westdeutscher Verlag, 2002). Or at least it bases his reasoning on the idea that a constitution also has an integrative function. When it comes to the integrative function of the State, it is essential to read Smend between Grimm's lines. Smend is considered the greatest exponent of the 'theory of the integration' of the State, putting himself in contrast with formalism and positivism. Smend stands next to the doctrinaire strand of H. Triepel, E. Kaufmann, C. Schmitt, G. Holstein and H. Heller. The doctrine of the integration of the state poses as its starting point the problem of the relationship between the individual and the social universe. The individual is understandable only as a participant in a social reality. Consequently, the State and the law are not considered in an isolated and static sense but exist only as expressions of reality. The State lives and integrates itself in its constant renewal, as continuous integration. The State is not an immobile entity, but it exists precisely because of these expressions of life. The effectiveness of this integrative function depends on the fact that there is a set of shared values (the normative constitution), not constantly called into question by the political struggle, which is not conducted against the same community that provides the rules for the struggle itself, giving it a sense of integration. Cf. Rudolf Smend, *Costituzione E Diritto Costituzionale* [Original Publication: Smend, Rudolf. Verfassung und Verfassungsrecht. Leipzig, München: Duncker & Humblot, 1928], trans. Fabio Fiore and Jörg Luther (Milano: Giuffré Editore, 1988), 67–125.

46 For more on the debate whether a constitution is 'good' and 'just' or not cf. Grimm, "Integration by Constitution," 194.

47 *Constitutionalism: Past, Present, and Future*, 144; "Integration by Constitution," 194 f. Cf. also *Vorländer, Verfassung Und Konsens; Integration Durch Verfassung.* But see Ulrich Haltern, "Integration Als Mythos," *Jahrbuch des Öffentlichen Rechts* 45, no. NF (1997).

integrative effect.[48] Therefore, a normative constitution does not paint a social reality, but acts as a tool that tries to shape that reality; it distances itself from reality and from this derives its essence as 'standard for behavior and assessment in politics'.

III. Looking Forward: The Transformative Function of Constitutions

Grimm's conception of constitutions and their integrative effect goes together with the emerging approach of constitutions having a so-called 'transformative' character or function. Transformative constitutionalism has increasingly seen the light in recent transitions and will be touched upon later in the thesis.

Transformative constitutions are those, which explicitly seek a veritable (social, and not merely legal) transformation of society.[49] Steytler states that

> '[t]ransformative constitutionalism means that a constitution and its implementation by the state apparatus, including the courts, are committed to the transformation of a society to achieve social justice. This changes the state from a passive regulator of power to a "developmental" one, where the constitution is a bridge from conflict and past injustices to an inclusive and just society.'[50]

By way of explanation, a normative constitution with transformative character explicitly pretends a social transformation of society, the veritable transformation would however, – again – take place in the

48 Cf. Grimm, *Constitutionalism: Past, Present, and Future*, 146.

49 'Transformative' as in doing more than just regulate public authority like the classic conception of constitutionalism, seeking to use that power for the (social) transformation of a highly unequal society. Cf. Pius Langa, "Transformative Constitutionalism," *Stellenbosch Law Review* 17, no. 3 (2006): 357; Karl E. Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14, no. 1 (1998): 150; Theunis Roux, "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?," *Stellenbosch Law Review* 20, no. 2 (2009): 260; Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Claremont: Juta, 2010), passim.

50 See Nico Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," in *Decentralisation and Constitutionalism in Africa*, ed. Charles M. Fombad and Nico Steytler (Oxford: Oxford University Press, 2019), 27 – 29.

empirical constitution. In a way, transformative constitutionalism is what Smend had in mind with his own concept of integration.

IV. Constitutional Transition and Constitutional Transformation

Grimm's view of constitutions flows from the differentiation between precisely political principles for political decisions (i. e., the normative constitution) and the decisions themselves (i. e., empirical constitution).[51] This idea of 'constitution' as basically having two different meanings is at the basis of the differentiation between 'constitutional law' and 'constitutional reality' (or for want of a better word, the 'true constitution').[52]. So, one says 'inside' and 'outside' the law because law is a system defined by a boundary and drawing the boundary is an operation of law connected to the extra-legal, but separate from it by virtue of law being a closed system of meaning (that which is law). The following diagram should help support such concept.

51 In a way, Grimm continues, the constitution is fundamental for exactly this reason: if a constitutional order is formulated in such a way as to level this differentiation, their function is threatened. Cf. Grimm, *Die Verfassung Und Die Politik*, 126.

52 Ferdinand Lassalle, *Über Verfassungswesen* (Berlin: G. Jansen, 1862)., which highlights the problem of constitutional law and constitutional reality.

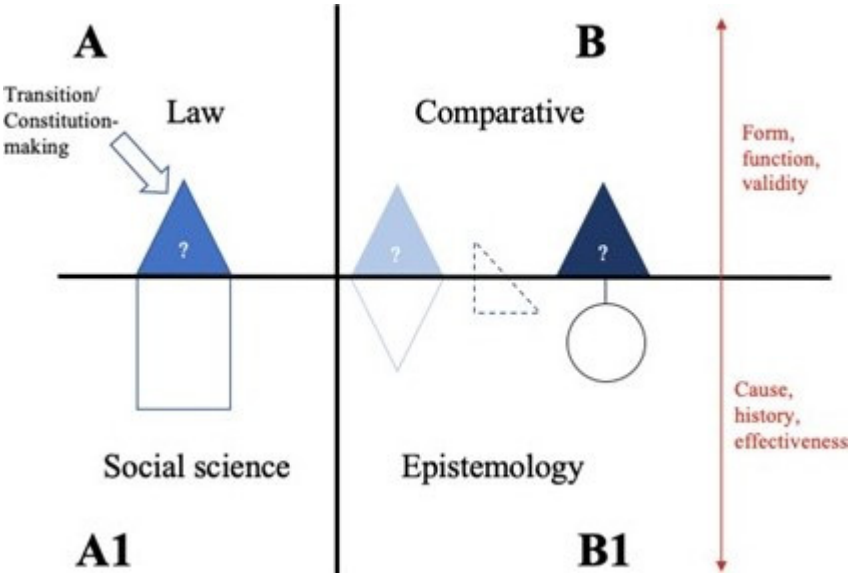

Figure 2 Prof. Derek Powell's Diagram[53]

This diagram represents four zones, in which law becomes conceptually relevant. 'A' represents the legal concept in a country (the inside of law), with the triangle symbolizing the normative constitution. 'B' refers to the cosmopolitan legal form (here the link to comparative law). When it comes to comparison, of course, the legal constitutions of other countries (even though possibly different from each other) are also 'triangles', i. e., normative constitutions, yet relevant and acceptable subjects of comparison. 'A1' and 'B1' are the extra-legal zones, i. e., what lies below is a product of the legal form(s), but might look very different from one context to the next (hence, the different shapes below the apparent regularity of legal forms). 'A1' is the zone of the empirical constitution, the outside of the law. 'B1' instead, is about epistemology, i. e., theory of knowledge: What we know, for instance, success, impact,

53 *Source:* Prof. Derek Powell (Associate Professor), Head of the Applied Constitutional Studies Laboratory (ACSL), Dullah Omar Institute for Constitutional Law, Governance and Human Rights, University of the Western Cape, South Africa. *Note:* This diagram was designed by Prof. Derek Powell and was part of his response to my submitted text at the 16th Doctoral Colloquium of the Faculty of Law of the University of the Western Cape on 1 November 2018. I have taken the liberty of reshaping it to fit the format of the present work.

effectiveness of the law, etc. and what the foundations of what we know are, cannot be determined solely by reference to 'A1' alone. There needs to be the inclusion of more contexts and their extra-legal assessment. Interpretation of legal practice against legal doctrine is a function of 'A'. Once one ventures below the line into zones 'A1' and 'B1' – which would happen, for example, because one wants to measure the 'success' of a transition – the concepts will have to come from those zones – not zones 'A' and 'B' alone – and that makes things more complex and interdisciplinary. Below the line, the triangles on top do not look like they are part of the same phenomenon below anymore.

It is clear that a constitutional transition resulting in a new normative constitution, which in addition champions a (social) transformation of society, is the spark that triggers an extra-legal transition towards this very goal of transformation. This transformation reflects the sought integrative effect and connects thus with the empirical constitution. Therefore, we can almost say that two parallel transitions take place: the *legal or normative constitutional transition* from one constitutional law order to another, which seeks evidently the creation of a new constitutional document and is thus the legal process, during which an old normative constitution is superseded by a new one, and the extra-legal one, the (*empirical*) *constitutional transformation*, which seeks a social transformation of society, from one empirical constitution to another (i. e. from one constitutional reality to another). The former would be the precursor of the latter. Hence, the differentiation within the concept of 'constitution' (i. e., normative constitution v. empirical constitution) has its repercussions in defining 'constitutional transition' within the scope of this thesis.

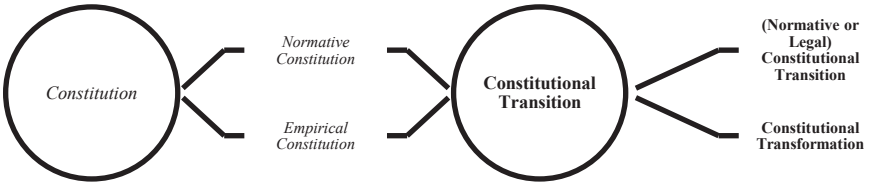

Figure 3 'Constitutional Transition': A Working Definition

Hereinafter, terminologically speaking, the former will be labelled 'normative' or 'legal constitutional transition' whereas the latter '(empirical) constitutional transformation'. The word 'constitutional transition' without

any further specification has to be understood in the broader sense as the entire process including both the normative constitutional transition and the constitutional transformation.

V. The Research Scope: The Role of Apex Courts in a Legal Constitutional Transition

When it comes to analyzing the role of an apex court in a constitutional transition, the question arises: What is the exact object of the thesis? It is the role played by an apex court in a constitution transition. But if a constitution can be seen either as a normative constitution or as an empirical one, then is it the role played by an apex court in a transition from the one normative constitution to another, or also the one constitutional reality to another?

Of course, apex courts can play a role in both transitions. Therefore, there is an important distinction to be made when it comes to the role of an apex court during a constitutional transition.

- On the one hand, there is the role an apex court plays or could play in facilitating the very legal process of transition, as in seeking to ratify its goals and ambitions of a new society in a formal way or as in establishing the legal constitutional basis and framework of a new country.
- On the other hand, instead, there is the role a court plays in the very (social) transformation of the society of the country in transition, as in seeking to reach and consolidate those goals and ambitions a normative constitution champions in reality. These are two different aspects of a court's performance, and both need to be treated separately (even though they interact, of course).

However, while assessing the performance of the apex court in a constitutional transformation, one leaves the realm of the law, breaches its boundary, and enters the social studies. One would necessitate the adoption of extra-legal methods of research and preclude by and large the legal facet of the research. It follows that, as a legal thesis, the focus lies on the normative constitutional transition, i. e., the transition from one normative constitution to another, *without considering the integrative effect of each constitution* (i. e., without dealing with the assessment of the

court's performance with regards to the empirical constitution). In terms of Powell's diagram, this thesis will basically not venture below the horizontal axis.

In this sense, the thesis will not bother whether or not the new constitution was successful in its integrative – and transformative – function, or in other words, whether the (extra-legal) constitutional transformation took place effectively or not. This would be a question for the social sciences. Rather, it analyses whether or not an apex court is able to facilitate the creation of a normative constitution, and with it *constituting*, *legitimizing* and *regulating* public authority. The focus lies strictly on the idea of an apex court trying to shepherd the legal constitutional transition itself, and not the political reality and development of the same constitution in the future.

VI. Measuring and Assessing a Court's Performance

The performance of an apex court in a legal constitutional transition is dependent on, first, what goal a constitutional transition seeks (cf. Chapter C. VI. 1. *infra*) and, of course, what issues (i. e., transitional matters) arise during the transitory period and reach the doorstep of the court (cf. Chapter C. VI. 2. *infra*).

1. The Normative Transitional Goals: Constitutionalism

The goals of a normative constitutional transition – i. e., those within the boundaries of the law – are closely linked to the measurement and assessment of a court's performance, therefore they have to be briefly mentioned.

In a constitutional transition as a whole, regardless of Grimm's differentiation, the ultimate and paradigmatic goal is to reach functioning and long-lasting *peace*, and this through a working liberal democracy based upon constitutional supremacy. An integratively transformed and peaceful society is what we would like to see at the end of the empirical constitutional transformation, with *constitutionalism* as the means to reach this goal. The establishment of constitutionalism has thus to be the goal of what comes before the constitutional transformation: the normative constitutional transition.

Constitutionalism, in its classical Western notion, includes three unamendable elements: *democracy*, *limited government* and the *rule of law*. Democracy entails the establishment of an accountable government supported by representative and participatory mechanisms. Limited government involves necessary separation of powers, a system of check and balances among them and the creation of enforceable fundamental rights. Finally, the rule of law is necessary to uphold the first two elements. It means supremacy of the constitution is enforced by an independent judiciary. The *establishment* of constitutionalism in a legal sense means *constituting*, *legitimizing* and *regulating* these elements, or in other words, putting in place the legal and institutional framework for these elements to thrive, or legally and institutionally ascertain constitutionalism as in democracy, limited government and the rule of law.

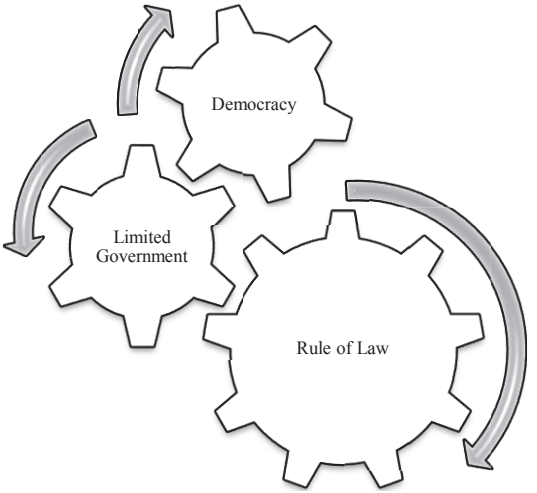

Figure 4 Interaction of the Elements of Constitutionalism

This is the primary goal of the normative constitutional transition, opposed to the primary goal of the empirical constitutional transformation, which is the implementation of said elements in the real world resulting in the very transformation of society, both of which ultimately should synergistically lead ideally to stable constitutionalism and accordingly to peace.

But why constitutionalism? New (normative) constitutions tend to include the aspiration for a new society, a developmental or transformative

element; a *vision.*[54] The normative constitution can only put this vision on paper and set the legal and institutional framework to fulfil it.[55] Such framework or standard is to be embodied within the three classical elements of constitutionalism. This research argues that the end of a legal constitutional transition is when the legal and institutional framework of the three elements of constitutionalism is put in place. If one of these elements is not even envisaged, then the legal constitutional transition cannot be considered concluded. The missing of one of these fundamental 'gears' of constitutionalism would mean the certain failure of the normative constitutional transition. The constitutional entrenchment of said elements is the criteria on which to measure and assess the apex court's performance. In other words, this thesis focuses upon the role an apex court plays or could play in facilitating the establishment of the three elements of constitutionalism.

54 An increasingly frequent notion of constitutionalism in recent constitutions includes – in addition to the three classical elements – a developmental or transformative facet. Most of the current constitutional transitions around the world are triggered by deep social deficiencies. Therefore, this developmental or transformative element becomes a necessary pillar to reach the ultimate goal of peace.

55 However, this is where one reaches the boundary of the law and what it can do. The actual social transformation – the vision – takes shape mostly outside of it. Accordingly, the fulfilment of the vision of society championed by the normative constitution is the objective of the (empirical) constitutional transformation, whereas the previous step of establishing the elements of constitutionalism legally and institutionally, is the objective of the (normative) constitutional transition. If one asserts that the ultimate goal of a constitutional transition is to reach peace, not only through the finding of a consensus on a constitutional dispensation as such, but through a deep social transformation of society, one needs to look for such transformation in the empirical constitution as a result of the implementation of the normative one. The socio-political effects of the constitutionally entrenched elements of constitutionalism take place in the constitutional reality, and therefore whether they succeed or not in a given context is a question for the social sciences and will not be part of this thesis.

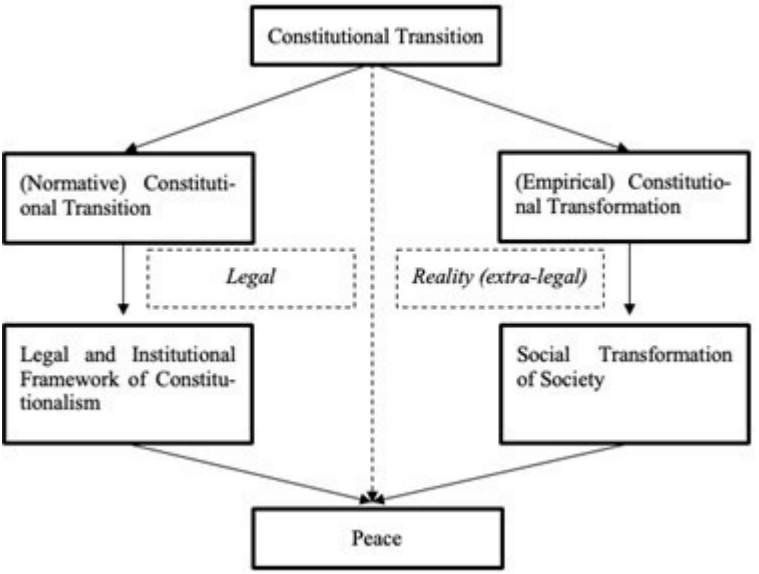

Figure 5 The Objectives of the Constitutional Transition

2. The Court's Performance Grounds: 'Transitional Matters'

For most legal scholars, apex courts' success in facilitating constitutionalization should probably be assessed by their jurisprudential performance. Courts are essentially reactive institutions, with basically only the power to influence through interpretation of the constitution: democratic rights, federal disputes on the allocation of powers, and more, in the cases they happen to be asked to rule upon. Political scientists instead would probably go beyond the law and analyze the actual effect of a court's ruling can have on the overall consolidation of constitutionalism. The political science account probably represents a more accurate image of the activity of apex courts shaping the law. The issue here, however, is that it is arduous to find true indicators that facilitate the assessment of the impact of any particular ruling on democratic health; intervening variables are just too many outside the law.

Hence, for practical reasons, one is forced back to assessing apex courts' performance by observing their record in adjudicating constitutional disputes. Still, this does not mean one has to treat them merely as reactive institutions. The key to appreciate their role in facilitating a normative constitutional transition is to fuse the sense legal scholars have

of their method to assess cases according to law with a political science perspective that help understand the motives behind a specific decision.

Yet, how in general should the role and behavior of a constitutional court be measured when it comes to facilitating the normative constitutional transition? When it comes to the performance of an apex court in a constitutional transition, it is demanding to identify its most indicative judicial activity to actually assess its behavior. It is hereby believed that the best results are reached by using 'transitional matters' as indicators, i.e., by specifically selecting among the vast range of constitutional disputes (e.g., federal disputes, rights disputes, etc.) that a court faces, those that show transitional importance; issues that arise in a constitutional transition shaping or calibrating somehow (in positive or negative) elements of constitutionalism within the law are 'transitional matters'. Those matters, which if they remain 'unresolved' during the transitory period, lead to the failure of the legal establishment of constitutionalism, and thus the transition itself cannot be considered as concluded.

It is likely to detect several transitional matters during a transitory period, some of which however are not necessarily indicative in relation with the role courts play in said transition. Therefore, identifying the transitional matter that best exposes the role of an apex court is paramount from a practical point of view, as the activity apex courts can be broad and not all of it reflects the true nature of the court in a transitory period. For instance, the enforcement of socio-economic rights in South Africa[56] was not affecting in the accomplishment of the normative constitutional transition, but was rather a core issue in the social transformation championed by the new South African Constitution of 1996.[57] Instead, the

56 Cf., for instance, the *Grootboom* case: See, *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

57 Socio-economic rights represent a special case. Although courts can be instantly vested with the function to enforce them, their enforceability has not been spared by criticism. Cf. David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford, New York: Oxford University Press, 2007), passim; Oliver Gerstenberg, "The Justiciability of Socio-Economic Rights, European Solidarity, and the Role of the Court of Justice of the Eu," *Yearbook of European Law* 33, no. 1 (2014): passim; Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (London: Routledge, 2012), passim. Socio-economic rights are mostly

establishment of local government in South Africa has proved an indicative transitional matter, as it created a transitory period by its own nature,[58] and up until the moment it was not established, one could not consider the normative constitutional transition as concluded. Without its establishment, democracy – one of the elements of constitutionalism championed by the new South African constitutional order – would not have been institutionally established delaying thus the normative constitutional transition.[59]

Depending upon the context and the nature of the transition, transitional matters can differ. In Colombia, the enforcement of fundamental rights took on crucial transitional significance. In Egypt, the Supreme Constitutional Court was at the core of a political struggle between the military forces and the Islamic-led legislature. During the transition, the Egyptian Supreme Constitutional Court ruled on at least two key transitional matters regarding the parliamentary elections law and a disenfranchisement law. In Turkey, the banning of political parties was also an essential transitional matter. Clearly, transitional matters are subject to variation from case to case.

All in all, as for this research, transitional matters are the indicator that help measure a court's behavior in a normative constitutional transition. When an apex court deals with one of these matters, it is most likely to show its true colors of its role and character in a normative constitutional transition. The court has to legally prepare the 'machinery' to reach the end goal of transition. It can do so by making sure that eventually all state institutions and political entities (including, for instance, local governments) are in place so as to allow democracy to work, the separation of powers (including the independence and neutrality of the

progressive by own nature, do not represent however the turning point of the conclusion of a constitutional transition. Cf. Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz: Der Schutz Des Individuums Auf Globaler Und Regionaler Ebene* (Basel: Helbing Lichtenhahn, 2013). The enforcement of socio-economic rights is not strictly a transitional matter. It is indeed a pivotal facet of the transformational character of the new constitutional order, a matter that transforms society deeply, but their non-implementation does not in fact hinder the constitutional transition to conclude. It is rather an element of the constitutional transformation.

58 See e.g., Schedule 6 Art. 26(2) Constitution of South Africa, 1996.

59 Once local government is established, their performance is not a transitional matter anymore, but simply a federal one (not less important).

court itself) and constitutional supremacy to be constitutionally embedded, and more.

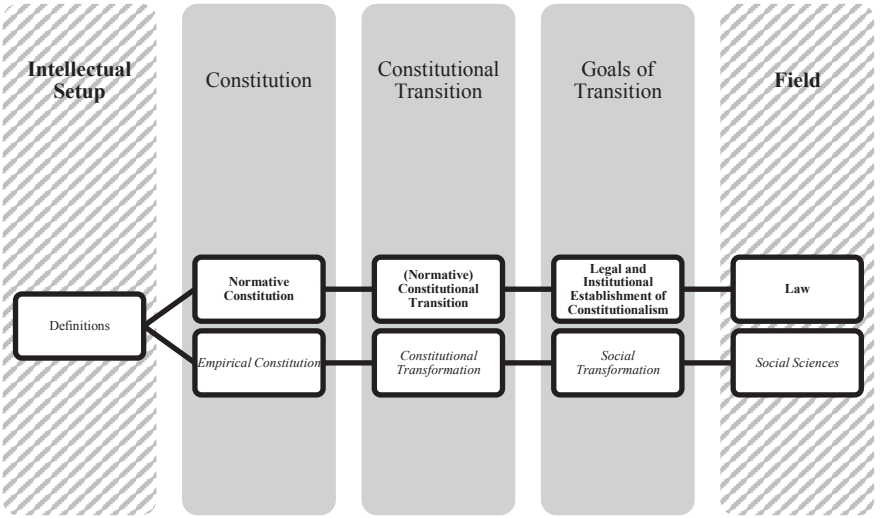

Figure 6 Intellectual Setup of the Thesis

D. Literature Survey and Research Relevance

The area of research for the present thesis has been clarified: the apex court plays a role in both above and below the horizontal axis of Powell's diagram. Above the line, we are in the realm of the law, and below we find ourselves in the field of social sciences. Two questions need to be answered: why only look at the role of courts above the horizontal axis, and why is it relevant with regards to the problem statement and research question?

As already mentioned, venturing below the horizontal axis of Powell's diagram would entail entering in the field of social sciences. Law and social sciences represent the two sides of a coin. Law is made to set the limits and to maintain the mechanism of social orders, whereas social sciences enlighten about the interpersonal relations and behavior of human society to live harmoniously. As a legal scholar, this would require additional expertise and inflates the amount of work needed to reach acceptable results.

I. Literature Survey

The performance of an apex court is a subject that has been dealt with thoroughly throughout the existing literature. The list of literature on the role of courts in a non-transitional period, i. e., what an apex court is and what it does in mature democracies, is longer than one could even start to make a list. However, in assessing the performance of apex courts in transitional settings, one can easily realize how the circle narrows. Naturally, speaking of 'performance of a court' is simplistic, for one can assess a long catalogue of objects and aspects of a court's activity during a constitutional transition.[60] Additionally, depending upon what methodology the researcher uses, i. e., how the court's activity is assessed, the results can differ.[61]

When it comes to the assessment of an apex court's performance during a constitutional transition, most literature focuses on one specific aspect of the transition, without really analyzing what the court has tried to do to facilitate the normative transition itself, i. e., the creation of the new normative constitution. There is a loophole in the literature when it comes to the role of apex courts in a normative constitutional transition. This thesis tries to fill this gap. In other words, it is devoted to analyzing the performance of an apex court in the normative constitutional transition of a country and wants to attempt at drawing some comparative conclusions from a narrow set of case studies, even though a bigger set of case studies would enhance the academic relevance of the results.

The study's structure draws from mainly three different outstanding works: the intellectual framework is based upon Grimm's *Constitutionalism: Past, Present, and Future*,[62] the theory around constitution-making draws from Arato's *Post Sovereign Constitution Making: Learning and Legitimacy*,[63]

60 For instance, court's performances in establishing federalism, consolidating democracy, dealing with past wrongs, or with regards only to the enforcement of human rights (including socio-economic rights).

61 Some researchers opt for a desktop research, others might add more field research. Some might include only existing doctrine, others might go for a pure case law-based assessment or mix both sources. Then again, some might look at the bigger picture of an apex court's performance in a given context, others might dive right into the details. All methods are valid, but they all take different directions.

62 *Grimm, Constitutionalism: Past, Present, and Future.*

63 Arato.

while the concluding assessment of the thesis mirrors Daly's *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders.*[64]

General studies on the role of courts in normative constitutional transitions are not common. There are scattered works here and there, but they usually seek to assess the role of courts either for only one specific region or one specific task, such as the role of courts in enforcing human rights. Instead, this study aims to broaden the spectrum and tries to assess the role of courts in facilitating the transition itself.

The work that probably gets closest to what I mean is Daly's *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders.*[65] Daly succeeds in drawing a very complex picture of what a very complex topic is. His work not only looks at domestic forces and factors that influence the role and behavior of a court in a young democracy, but also goes beyond the national view of things and considers the impact of regional human rights courts' jurisprudence on a country striving for constitutionalism and stability. Roux's *Politics of Principle*[66] is an outstanding account on the South African Constitutional Court's (hereinafter 'CCZA') first 20 years under the new Constitution of South Africa, 1996. It is a highly theoretical analysis drawn from empirical experiences of the court, devoted to assessing its performance in the first decade of its existence. It analyzes how the court was successful in fulfilling its task of judicial review (especially with regards to adjudicating fundamental rights disputes) in the first years of democratic reconstruction on the grounds of the unprecedented empowerment the constitution-builders chose for it. The circumstances leading up to the choice of empowering the CCZA have been dealt with from several different viewpoints: by history scholars involved in the internal dynamics of the constitution-making process,[67] by transitional justice scholars interested in South Africa's effort to deal with

64 Tom Gerald Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (Cambridge: Cambridge Unviersity Press, 2017).

65 ibid.

66 Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge: Cambridge Unviersity Press, 2013).

67 See, among others, Hassen Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa* (Cape Town: Oxford University Press, 1998); Derek Spitz and Arthur Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Oxford: Hart Publishing, 2000).

its undemocratic past,[68] and by comparative politics scholars concerned with the grounds and nature of South Africa's turn to liberal constitutionalism.[69] However, Daly's work deals with how it came about that a court that was given such a politically uncomfortable and morally contested mandate (one that numerous mature democracies have been reluctant to give to their apex courts) was able to carry it out so successfully and efficaciously.

A more constitutionally structure-oriented study can be found in Fowkes' *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa.*[70] His work shows how support from politics, especially from the African National Congress (hereinafter 'ANC') government and other political actors has reinforced the CCZA's landmark jurisprudence. Fowkes' work sees beyond the standard accounts, which present the Court as guardian of a negotiated constitutional compromise against the rising majoritarian rising of the same ANC. He believes that in reality, the successes of South Africa's quest for constitutionalism have been built upon wider and more estimable constitutional politics. The dynamics of politics, *inter alia*, are a core factor in Fowkes' work.

Both Roux's and Fowkes' accounts are a remarkable legacy of judicial behavioral research. However, they both stop at the South African border and do not engage in extensive comparative analysis. This does not mean that there is no research being undertaken in the field. The list is clearly non-exhaustive, yet can give an idea of the judicial behavioral research present in the field. Among the contemporary prominent works, there are single-cases monographs that employ a rather longitudinal approach: for instance, Hilbink's *Judges Beyond Politics in Democracy and Dictatorship:*

68 See, for example, Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001).

69 The two leading accounts of the lessons to be learned from the South African case are Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000); Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000* (New York: Cambridge University Press, 2008). In addition to these, South Africa is also one of four case studies considered in Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2007).

70 James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge: Cambridge University Press, 2017).

Lessons from Chile,[71] analyzing and understanding the reasons why Chile's judiciary was so inert both during and even after Pinochet's dictatorship; Meierhenrich's *Legacies of Law*,[72] which assesses the development of law in South African law before, during, and after *apartheid*; or Trochev's *Judging Russia: Constitutional Court in Russian Politics 1990–2006*,[73] seeking to analyze the performance of three different bodies charged with judicial review in both the Soviet Union and Russia. Other single-country works are strictly focused upon the role of apex courts in the transitional period, yet do not engage in comparative practices: for instance, Haimerl's *Agent der neuen oder der alten Ordnung?: Die politische Rolle des ägyptischen Verfassungsgerichts nach der ägyptischen Revolution 2011*,[74] which analyzes the assertive behavior adopted by the Egyptian Supreme Constitutional Court; or, Orucu's *The Constitutional Court of Turkey: The Anayasa Mahkemesi as the Protector of the System*, which is one amongst several accounts on the role of preserver of the hegemony by the Turkish Constitutional Court (hereinafter 'TCC'). There are two edited volumes with the aim to present an account of the more significant role of Latin American courts, in a region that has experienced a wave of democracy in the past couple of decades: on the one hand, Couso, Huneeus, and Sieder's *Cultures of Legality: Judicialization and Political Activism in Latin America*,[75] and on the other hand, Helmke and Rios-Figueroa's *Courts in Latin America.*[76] Both volumes focus upon the period of democratic consolidation, which is mainly on the period of time after the constitution-building process. This period is commonly stained by extra-legal perspectives on the role of courts. Finally, Harding and Nicholson's

71 Elisabeth C. Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (New York: Cambridge University Press, 2007).

72 Meierhenrich.

73 Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics 1990–2006* (New York: Cambridge University Press, 2008).

74 Maria Haimerl, "Agent Der Neuen Oder Der Alten Ordnung?: Die Politische Rolle Des Ägyptischen Verfassungsgerichts Nach Der Ägyptischen Revolution 2011," *Working Paper No. 12* (2014), https://www.polsoz.fu-berlin.de/polwiss/forschung/international/vorderer-orient/publikation/working_papers/wp_12/WP12_Haimerl_FINAL.pdf (accessed October 30, 2019).

75 Javier A. Couso, Alexandra Huneeus, and Rachel Sieder, eds., *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2010).

76 Gretchen Helmke and Julio Rios-Figueroa, eds., *Courts in Latin America* (Cambridge: Cambridge University Press, 2011).

New Courts in Asia,[77] puts together a very diverse set of case studies in Asia. Most of these works were reviewed by Ginsburg and together, provide a very rich *sample* of accounts (by no means this is even close to an exhaustive list of literature) about the role and behavior of courts from different perspectives and with different methodologies.[78] The recentness of most works is evidence of the growth of judicial power in many regions of the world.

Apart from Daly's *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*,[79] rarely has someone completed an extensive comparative study on the role of courts in the normative part of a constitutional transition.[80] From my own perspective, and without accrediting myself with the exclusivity of the content, I will try to add my contribution.

II. Research Relevance

In a legal constitutional transition, whether a state is restructuring itself or undergoing a complete metamorphosis, the role played by the apex court can be critical. In recent processes of constitution-making, we have seen a

77 Andrew Harding and Penelope Nicholson, eds., *New Courts in Asia* (New York: Routledge, 2009).

78 Tom Ginsburg, "Courts and New Democracies: Recent Works," *Law & Social Inquiry* 37, no. 3 (2012).

79 Daly.

80 See, for instance, Ebrahim Afsah, "Guides and Guardians: Judiciaries in Times of Transition," in *Judges as Guardians of Constitutionalism and Human Rights*, ed. Martin Scheinin, Helle Krunke, and Marina Aksenova (Cheltenham, UK: Edward Elgar Publishing, 2016); László Sólyom, "The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary," *International Sociology* 18, no. 1 (2003); Frederick H. Setzer, "Judicial Power in Transitional Regimes: Tunisia and Egypt since the Arab Spring" (Cornell University, 2017); Tom Gerald Daly. "The Judiciary and Constitutional Transitions." *International Institute for Democracy and Electoral Assistance* (*IDEA*). (2016); Sujit Choudhry and Katherine Glenn Bass. "Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence." *Center for Constitutional Transitions at NYU Law and International Institute for Democracy and Electoral Assistance* (*IDEA*). (2014); Asli Ü. Bâli, "Courts and Constitutional Transition: Lessons from the Turkish Case," *International Journal of Constitutional Law* 11, no. 3 (2013); Antoni Abat i Ninet, "The Role of the Judiciary in Egypt's Failed Transition to Democracy," in *Judges as Guardians of Constitutionalism and Human Rights*, ed. Martin Scheinin, Helle Krunke, and Marina Aksenova (Cheltenham, UK: Edward Elgar Publishing, 2016).

veritable empowerment of the judiciary,[81] during which e. g., a new court was established, by a transitional document[82] or a new constitution,[83] or a pre-existent court was institutionally 'renewed' under the new constitutional arrangement.[84]

Apart from the 'general' lack of research in the field, the significance of the problem outlined above resides mainly in three focal factors:

– Firstly, the practicality of the subject due to the increase in number of constitutional transitions witnessed around the world recently. This trend raises the pertinence to take a closer look.
– Secondly, the very nature of the judiciary power itself deserves particular attention. The judiciary is not only the system of courts tasked to interpret and apply the law, but also to provide a mechanism for the resolution of disputes. Being a constitutional transition, a prime and basic societal dispute within a polity, the courts' behavior could be key for its success. Transitional periods are politically and legally fragile and can easily come undone if parties do not keep to their side of the bargain. This makes third-party intervention essential for the effective transition. Courts may play a beneficial role in this sense, for they are empowered with the power to 'resolve'; they apply, they decide, and they enforce.

81 E.g. promises of judicial independence were in the center of the debates of the Constituent Assembly for the new Nepalese Constitution in 2014; the 2010 Constitution of Kenya saw an utter overhaul of the judiciary; in Egypt, the judiciary has played an essential role in the writing of its 2014 Constitution; in Ukraine, a law was passed by which the sitting judges would be subjected to lustration; the Constitutional Court of Tunisia was significantly strengthened its 2014 Constitution; and in South America, courts in countries, such as Colombia or Mexico seek a continuous elaboration of new means for protecting constitutional rights. Furthermore, the judiciary has played a predominant role in assisting the progress of political transitions e. g., by serving as transitory chief executives in Bolivia and Nepal, or by overseeing constitution-making processes like the Nepalese Supreme Court, when in 2012 it dissolved the Constituent Assembly for failing to carry out its assignment on time.

82 See e. g., South Africa, where the *Interim* Constitution established the Constitutional Court and entrenched its functions. Cf. Art. 98 IC.

83 For example, the Constitutional Court of the Democratic Republic of the Congo, which was established by the latest and current Constitution of the Third Republic on 18 February 2006. The same for the Supreme Court of Kenya, which came into being under Art. 163 of the current Kenyan Constitution promulgated on 27 August 2010.

84 See e. g., Nepal, where the Supreme Court was established in 1956, but was 'confirmed' by the *Interim* Constitution of Nepal, 2007 through its Art. 162.

Courts (in general) are by definition an instrument of dispute-resolution, as they bring reasoning to the political sphere, which is otherwise driven by political interest. It brings into the arena of political contestation the discipline of justification for political action.

– Thirdly, the judiciary is 'generally' perceived by the people of a state to be the wise, rational, corrupt-free and rule-bound institution of a country. Courts are not only important due to the task or function they nurse in a stable state, but also due to the perception people might have of them, which extends also to independence and neutrality. Clearly, this factor is far-fetched, especially in a country in political torment. This perception could easily be the opposite. However, history has shown that most (if not all) new constitutions in the aftermath of a crisis have arranged the establishment of a judiciary (and with it an apex court), as proven that 'generally' people believe justice can almost exclusively be served only through the judiciary. In general, especially during a constitutional transition, this perception is not wrong: Courts establish independence and impartiality through their reasoning and thus establish a stable core in a sea of uncertainty.

E. Hypotheses

As anticipated, in order to reply to the research questions, a number of hypotheses have been developed based upon the existing literature. The country and comparative studies test these hypotheses, the results of which are analyzed and compared in the book's concluding chapters. The thesis contemplates a research question (*What is the role and behavior of apex courts in a normative constitutional transition?*), which can be answered by tackling the following above-mentioned questions in each case study:

– *Did* the apex court play a role in the normative constitutional transition?
– *What* role did they play?
– *How* did they play it (i. e., with what behavior)?
– *Why* did they play it (i. e., what factors influenced their role and behavior)?

The hypotheses presented in this section were formulated in a way that they would be tested roughly by the data gathered by answering the previous questions in relation to the case studies. The case studies were built in a way that they first treat the normative *constitutional transition* of the specific country as such; second, the *role and behavior* of the courts in the normative constitutional transition; finally, the *factors* that had an influence on the role and behavior of the court. Around these three elements of research, the following hypotheses were formulated:

1. **Hypotheses in relation to constitutional transitions** (Chapter 7):
   a. When one or more of the elements of constitutionalism are not established, the normative constitutional transition fails.
   b. The constitution-making form is a key factor in the failure or success of the normative constitutional transition.
   c. The performance of the apex court is a decisive factor in the failure or success of the normative constitutional transition.

   It is argued that the role and behavior of an apex court during a constitutional transition can in fact have a direct influence on the outcome of the legal constitutional transition. If a court puts effort in facilitating the constitutional transition, constitutionalism can thrive, depending of course upon the contents of the constitution itself. That is, if a constitution does not include elements of democracy, rule of law or limited government, then constitutionalism has failed from the very beginning, regardless of what the judiciary does.

2. **Hypotheses in relation to the role of courts in a normative constitutional transition and how they play it (i.e., their behavior)** (Chapters 8 and 9):
   a. Role of apex court (Chapter 8):
   b. The roles apex courts play in a normative constitutional transition boil down to mainly two (or three) alternatives: *facilitating* the transition, *obstructing* the transition and *irrelevance.*
      By observing the practice of courts, the dissertation seeks to eventually assess whether they actually helped facilitating or not the process of legal constitutional transition. It is believed that courts, especially newly established ones, tend to do so. It goes without saying that in cases where the judiciary is non-existent, no role is played, unless

another (non-judicial) institution is given similar functions.[85] Instead, where a court is instated, it is argued that it can steer a constitutional transition mainly towards two directions depending upon a myriad of factors. Apart from courts that show utter *inertia* in the real implementation of a transition,[86] the two main directions mentioned are the following:

i. courts either *facilitating* the normative constitutional transition (i. e., pushing forward the constitutional transition and thus the establishment of constitutionalism); or

ii. *obstructing* it (i. e., holding against the constitutional transition and thus the establishment of constitutionalism).

In other words, a court either hinders the constitutional transition or it facilitates its process, although the former seems unlikely for those cases where the apex court is newly established by the very same new constitution. It is hard to imagine the fostering of an additional scenario, in which a court tries to drive the country towards neither one of them.

c. The role an apex court plays during the constitution-drafting period and after the enactment of the new constitution is possibly different.[87]

d. *Behavior of apex courts* (Chapter 9): the role played by apex courts in a normative constitutional transition can either be played *pro-actively* or *passively* (i. e., reactive). As judicial bodies, which act according to the law and within its framework, apex courts need sometimes to step over the political realm in order to overcome temporary crisis, such as transitional periods.

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85 However, this does not mean that other (non-judicial) institutions might take on court-like functions. In Ethiopia, for instance, during the constitution-writing period the Council of Representatives, a political and transitional institution, was given supervisory functions up until the enactment of the new Constitution of 1995 (see, Art. 9 of the Transitional Period Charter of Ethiopia, charter No.1 of 1991, negarit Gazetta, 50th Year). Even though the new Constitution established a Federal Supreme Court, Ethiopia has entrusted the function to interpret the Constitution to the House of Federations, which is the upper house of the bicameral Federal Parliamentary Assembly.

86 Courts might be instated and given a certain function, yet remain inactive for the period of the implementation.

87 Both phases of the normative constitutional transition have slightly different goals. Whereas the constitution-drafting period focuses upon the democratic 'production' of a written constitutional document, once that document is enacted, the aim shifts towards consolidating it.

How the courts acted in practice is hypothetically different in each case study. However, the dissertation argues that courts would probably step out of their untainted legally-allocated capacity, especially in transitional times. This study has revealed how, in modern constitutional democracies, it has become practice to design apex courts as more than just judicial bodies with the power to review the constitutionality of legislation. This is true even more in a transitional setting. Even though, in the formal sense, an apex court can be considered a judicial tool, it also has the capacity and tendency to wrestle with politics. In other words, the constitutional judiciary is designed as a power delivered on the grounds of the law yet with the function to balance the oscillation of the political pendulum. Depending on numerous factors, which can often coincide with the same factors that influence the role of the court, there cannot be the right behavior (that is, the *how* it fulfills such role). This is why the answer will be the typical one coming from a legal scholar: *it depends.* One thing is clear nonetheless, it will be found somewhere between politics and law: *a balance.*

3. **Hypotheses in relation to why an apex court plays a specific role, that is, what factors influence the role and behavior of an apex court in a normative constitutional transition** (Chapter 10):

   The role of the apex court is influenced by a multitude of factors, but especially those which revolve around three main elements of the transition:

   a. the nature, structure and composition of the apex court (*institutional factors*);
   b. the end-product itself, i. e., the constitution and what it advocates (*constitutional factors*); and
   c. the transitional process and context (*transitional and political factors*).

F. Methodology

The world of social sciences and humanities has developed a rather diverse spectrum of methodologies in research, which can differ from each other, depending e.g. upon the cultural background of the author, yet eventually all boil down to the same objective: the advancement of new and the testing of developed theories.[88] One of the analysis methods used in the social sciences methodology is comparative, which is also the one used here in this research.[89] In this context, the dissertation focuses mainly on the journal article by Hirschl, 'The Question of Case Selection in Comparative Constitutional Law', which was published in 2005 in The American Journal of Comparative Law.[90]

88 See *inter alia* Peter Atteslander, *Methoden Der Empirischen Sozialforschung*, 13 ed. (Berlin: Erich Schmidt Verlag, 2010); Kathleen deMarrais and Stephen D. Lapan, eds., *Foundations for Research: Methods of Inquiry in Education and the Social Sciences* (Mahwah: Lawrence Erlbaum Associates, Publishers, 2004); Johann Mouton and H.C. Marais, *Basic Concepts in the Methodology of the Social Sciences*, ed. Johann Mouton, 2 ed., Hsrc Series in Methodology (Pretoria: Human Sciences Research Council, 1990); Else Øyen, ed. *Comparative Methodology: Theory and Practice in International Social Research*, Sage Studies in International Sociology (London: Sage, 1990); Patrick White, *Developing Research Questions: A Guide for Social Scientists* (Palgrave MacMillan, 2009).

89 Cf. *inter alia* Giuseppe De Vergottini, *Diritto Costituzionale Comparato*, 9 ed., Manuali Di Scienze Giuridiche (Padua: CEDAM, 2013), 1 ff; Tom Ginsburg and Rosalind Dixon, "Introduction," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon, Research Handbooks in Comparative Law (Cheltenham, UK; Northampton, USA: Edward Elgar Publishing, 2011), 5 ff; Vicki C. Jackson, "Comparative Constitutional Law: Methodologies," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó, Oxford Handbooks in Law (Oxford: Oxford University Press, 2012); Fulco Lanchester, *Gli Strumenti Della Democrazia: Lezioni Di Diritto Costituzionale Comparato* (Milan: Giuffrè Editore, 2004), 3 ff; Michel Rosenfeld and András Sajó, "Introduction," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 16 ff.

90 Hirschl, "The Question of Case Selection in Comparative Constitutional Law." This article was chosen among the several works cited because it addresses the issue of methodology in the study of comparative constitutional law in a very clear and thorough manner. Specially, most of the previously-cited articles and collections of essays, while illuminating in many respects, do not include an objective explanation of the question of case selection in comparative constitutional law. Hirschl's article identifies the main types of scholarship named as comparative and at the same time pares them with a few basic principles of case selection.

I. Research and Analysis Methodology

The dissertation uses 'methodological triangulation' to solve the research questions. Rothbauer cites that triangulation 'has come to mean a multimethod approach to data collection and data analysis. The basic idea underpinning the concept of triangulation is that the phenomena under study can be understood best when approached with a variety or a combination of research methods'.[91] On the whole, the present project embraces a qualitative *research method* through data collection from a handful of case studies and a comparative *analysis method.*

1. Research Method: Qualitative Case Study

The research question will be answered with reference to a selection of case studies, by using the constitution-making experiences of a sample of post-conflict countries featuring a set of criteria, explained shortly.

In order to test theories and hypotheses, there are three major ways of causal inference: experimental research, statistical analysis ('large-N'), as well as the systematic examination of a smaller number of cases ('small-N').[92] This last one can be associated with the so-called qualitative research method, and it is the most prevalent type of research employed by scholars. This dissertation adopts the 'small-N' research method in order to reach an in-depth understanding of what role apex courts have played constitutional transition.

2. Analysis Method: Comparative

This thesis will describe, analyze and compare in an exploratory approach the role of the judiciary in the selected case studies.[93] Within each case

91 Paulette M. Rothbauer, "Triangulation," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Los Angeles: Sage, 2008), 892. See also, John W. Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Los Angeles: Sage, 2014); Norman K. Denzing, *The Research Act: A Theoretical Introduction to Sociological Methods* ([Place of publication not identified]: Routledge, 2017).

92 Hirschl, "The Question of Case Selection in Comparative Constitutional Law," 132 f.

93 Many case studies are exploratory, or hypothesis-generating, insofar as they aim to identify a possible cause of an outcome. The outcome, Y, is established, and usually framed as a research question.

study, in order to best address the research questions in both its facets (what role *did* and *should* a court play), the analysis methods are twofold:[94]

- On the one hand, to know what role courts played and, if any, how they performed it, one has to *generate a theory through multi-faceted description.*[95] Pure comparison between the case studies is the fundament, which sharpens scholarly analysis and description, and is absolutely essential in generating new theories by focusing on potential similarities and differences.[96] This is most commonly done through a search for detailed understanding of how a specific dilemma, *in casu* the role of courts in a constitutional transition, was dealt with in each case study, i. e. by studying different solutions to roughly similar constitutional challenges.[97] This comparative work is meant to generate concepts and analytical frameworks as to which practices were brought about by courts in dealing with a constitutional transition, rather than testing them.[98]
- On the other hand, this research goes beyond the mere concept formation through multiple description, and shifts towards the ultimate goal of social

94 However, one should not look for each methodology in a specific reply to a research question. This research adopts the methodological triangulation, and in this sense, it combines the different methodologies throughout the entire work.

95 Hirschl, "The Question of Case Selection in Comparative Constitutional Law," 129.

96 David Collier, "The Comparative Method," in *Political Science: The State of Discipline Ii*, ed. Ada W. Finifter (Washington D.C.: American Political Science Association, 1993), 105.

97 A number of leading textbooks in comparative constitutional law follow this approach. See e. g., Tom Ginsburg and Rosalind Dixon, eds., *Comparative Constitutional Law*, Research Handbooks in Comparative Law (Cheltenham, UK; Northampton, USA: Edward Elgar Publishing, 2011); Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law*, 3 ed., University Casebook Series (St. Paul: Foundation Press, 2014); Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law*, Oxford Handbooks in Law (Oxford: Oxford University Press, 2012); Mark Tushnet, ed. *Comparative Constitutional Law*, 3 vols., The International Library of Comparative Law (Cheltenham, UK: Edward Elgar Publishing, 2017); Mark Tushnet, Thomas Fleiner, and Cheryl Saunders, eds., *Routledge Handbook of Constitutional Law* (New York: Routledge, 2013).

98 John Gerring, *Case Study Research: Principles and Practices* (New York: Cambridge University Press, 2007), 38; Hirschl, "The Question of Case Selection in Comparative Constitutional Law," 129.

inquiry, which is *theory building through causal inference.*[99] Whilst the first method tends to clarify a certain phenomenon, this second method instead pushes towards offering a causal explanation for the clarified phenomenon. Hence, not only to describe, but also to explain, through the validation or refutation of hypotheses. This is why the research includes, firstly, the formulation of testable arguments (concerning possible causal links among well-defined variables), secondly, the confirmation or disconfirmation of these arguments through qualitative[100] data collection and analysis, and finally, the generation of conclusions based upon inductive inference. Thus, here the goal is rather generating conclusions based upon the testing of the created hypotheses, rather than merely creating them by description.[101] This second method shows how the research does not want to solely draw conclusions from chaotic exploratory descriptions of the case studies, but rather encourages controlled case selection and comparison based upon precise formulated hypotheses.

II. Data

This dissertation comprises the use of more than one method to gather data, such as interviews, observations, literature, and official documents, and mostly of a desktop study of both primary and secondary sources, such as books (legal and non-legal literature), academic journal articles, published

99 "The Question of Case Selection in Comparative Constitutional Law," 131; Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton: Princeton University Press, 1994), 8.

100 Inference-oriented research in the social sciences can be quantitative and/or qualitative. The term 'quantitative research' ('large-N', with 'N' standing for 'observations', and confusingly used to refer to the number of cases analyzed, although in most circumstances they coincide) is commonly used to describe studies that draw a large number of observations (i. e., any piece of evidence or data enlisted to support an argument) in order to determine causal links among pertinent variables. It is also true that 'large-N' studies look for patterns in a rather large number of cases, which are mostly randomly selected. The term 'qualitative research' ('small-N') refers to detailed, often more nuanced and contextual studies of a small number of cases, which are deliberately selected. Usually large-N approaches have better external validity, while small-N approaches have better internal validity and measurement validity.

101 Gerring, 38; Hirschl, "The Question of Case Selection in Comparative Constitutional Law," 131 f.

expert reports, legal documents, jurisprudence (e.g. analysis of the jurisprudence during a transition), databases,[102] historical documents (for example, a transcript of oral history, or interview data)[103], and other records. Specific documents, including the texts of temporary constitutions, will be sourced from the appropriate government and/or UN agency websites. Newspaper articles, magazine articles and opinion pieces and websites, although not commonly academic, helped to find out more about the context of specific aspects of a transition. The variety of sources reflects the interdisciplinary nature of the project. Since this topic has hardly been studied, most of the information found comes from different sources of the case studies selected above, although not exclusively. Throughout the book, there is also going to be reference to case studies other than the main ones selected above.

G. Case Selection

The right selection of cases is – after the formulation of the research question – in my opinion, among the hardest initial obstacles in a thesis. The growing importance of the role of apex courts in transitional settings, accompanied by the increasing literature on the matter, has great potential to expand our thinking on the relationship between constitutionalism and the law, especially in times of constitutional reconstruction outside the western contexts that have delivered most theories to date. In more unstable countries, apex courts may be called upon to implement essential governance functions when other institutions are weak, ineffective or even inexistent. Therefore, instead of constraints, these instable periods may create opportunities for innovation.

In a case-based analysis, the selection of cases is critical. A case is a 'spatially and temporally delimited phenomenon observed at a single point in time or over some period of time – for example, a political or social group, institution, or event (*in casu*, a series of constitutional transitions).'[104]

102 Including the Princeton University's Constitution Writing Conflict Resolution database and the University of Chicago's Constitute Project database.

103 IDEA has recently commissioned a book on transitions based on interviews with world leaders and therefore of strong interest to the project: Bitar/Lowenthal, *passim*.

104 Gerring, 211.

I. Selective Triangulation

Before applying limiting criteria to the case selection, a few specifications need to be considered:

- Firstly, the number of cases, which showed a hint of constitutional transition, is considerable.
- Secondly, the lack of information on the role of courts in specific and detailed case studies has contributed to the selection of merely three case studies. This has pushed me to limit the list of case studies, as they had to be undertaken from scratch, which would require additional time-consuming case research.
- Thirdly, the choice of the cases is crucial, especially in the realm of comparative constitutional law. Comparative constitutional law presents high levels of assessment complexities, also due to the large number of sources from which to draw information. Theoretically, judges might play various roles: 'gadfly or scapegoat, regime supporter or opponent, protector of minorities or tool of majority rule. The only assumptions are that judges find themselves confronted with different problems, audiences, and constraints in different contexts, and have some ability to shape their own role in response.'[105] Therefore, due to the high level of diversity among the various countries, even only selecting the cases is a very time-consuming task, yet an essential one.
- Furthermore, it is extremely demanding to pin down those cases, which will produce the highest amount and quality of information related to the main research question. This not only content-wise, but also culturally and linguistically. Among the many countries with the sought-for characteristics, many of them lack an existing pool of information available in any language known to me, but also specific cultural backgrounds that not even a research stay could properly provide. This was especially true for Nepal. Nepal was initially selected as a case study and despite having had the pleasure to travel to Kathmandu, the lack of information in any language other than Nepali, a language composed in Devanagari alphabet, has made Nepal an unfitting case study for this research. The amount of literature on the role of courts, or even the jurisprudence itself, in any language other than Nepali, was

105 See, Ginsburg, 722.

simply not enough to formulate a theory. I did not deem it accurate enough to add Nepal as a full case study merely on the grounds of articles written mainly by non-Nepalese scholars.[106]

– Finally, the size of the project covered by the research question generated the necessity to additionally limit the research scope (the first limit was the differentiation between constitutional law and constitutional reality).

These are the reasons why, in order to delimit the spectrum of research, a 'selective triangulation' was applied to elect the relevant cases. By 'selective triangulation', I mean the confinement or limitation of case studies from different vertices (or variables), which are: *context*, *time* and *space*.[107] In short, even if there may be cases that meet all of the criteria, every case chosen for in-depth analysis must afford enough data to address the question of interest. If sources are unreliable, scarce, or for one reason or another inaccessible, the case is of little value. In addition, the chosen cases must be independent of each other. If cases affect each other, they are not providing independent evidence of the proposition.

1. Contextual Frame

This vertex splits in two sub-criteria: *constitution-making process* and the existence of an *apex court* (or any other institution vested with the power to interpret, enforce and implement the new constitutional dispensation).

– *Constitution-making Process:* it goes without saying that the first vertex, within the contextual criteria, applied to the case selection is some sort of constitution-making process, hinting at a constitutional transition. The reason why a constitutional transition was triggered remains redundant; something must have felt seriously wrong by a group in the

106 The contributions by Nepalese scholars in English were simply not enough to influence the case study selection.

107 This method for the selection of cases was excerpted in the third chapter of the following book: Bishawjit Mallick, "Methodik," in *Der Gesellschaftliche Umgang Mit Zunhemnder Verwundbarkeit: Eine Analyse Der Sozialen Bedingungen Für Vulnerabilitätsorientierte Räumliche Planung in Den Küstenzonen Von Bangladesch* (Karlsruhe: KIT Scientific Publishing, 2014), 27 ff. The tag 'Selective Triangulation' was not mentioned in the book and it is self-made, in order to distinguish this method from 'Methodological Triangulation'.

country, which led to a political struggle and the need for a new constitutional beginning.

– *Apex Court:* the study focuses on apex courts, i. e., the highest courts within the hierarchy of the judiciary vested with the power to interpret and enforce the constitution, and it is not subject to further review by any other court. The existence of such an institution is, needless to say, the very reason this research is being conducted.

2. Temporal Frame

It is challenging to find a moment in time where a case becomes 'remote' and 'obsolete' and stops being 'recent' and 'contemporary'. With cases coming from different eras, creating the links between them may prove impossible. Therefore, this research focuses on cases of constitutional transitions that took place roughly in the same period of time in history, i. e., postmodernity. Postmodernity, as in the period of time after the modern era, which, according to the view represented here, ended roughly with the fall of the Berlin Wall in 1989. The reason thereof is the pertinence and contemporaneity of the cases. After the collapse of the Soviet Union, one can somehow witness the birth of a new constitutional age. Fukuyama went even further and foretold in his essay, *The End of History?*, that history had indeed ended with the fall of the Berlin Wall in 1989.[108] Of course, nothing could have been further from the truth.

However, something did 'change' in the early nineties because the end of the arm-wrestle between the West and the East did in fact have global resonance. In this sense, the research focuses on what Daly labeled 'young democracies', versus the term 'mature democracies'. For the sake of clarity, even though, for some minds, the term 'young democracies' may appear unfit for many states that transitioned to democracy over twenty years ago, it is used here to distinguish them from longer-established

108 Fukuyama believed that the question of political philosophy had been solved and that significant disputes over fundamental values would no longer arise since 'all prior contradictions are resolved and all human needs […] satisfied. There is no struggle or conflict over "large" issues, and consequently no need for generals or statesmen; what remains is primarily economic activity.' Cf. Francis Fukuyama, "The End of History?," *The National Interest*, no. 16 (1989): 5.

democracies (e.g., Germany as 'mature democracy' and South Africa as 'young democracy'). Daly writes:

> 'The term "mature democracy" denotes any polity that achieved electoral democracy in the period before 1974, and which has not since suffered authoritarian reversal, or full rupture in democratic governance."[109]

3. Spatial Frame

The spatial limitation defines the area from which the case studies were selected. Among all countries with the right contextual characteristics, I preferred to analyze cases from preferably assorted regions, geographically and historically, in order to appraise the cultural and different legal traditions.

Table I Parameters of Selective Triangulation for Case Selection

Context	**Time**	**Space**
(Normative) Constitutional Transition	Postmodernity ('young' democracies)	Geographically and historically assorted
Apex Court		

II. Case Studies: Overview and Relevance

Among many other cases, which fulfilled the very broad selective triangulation, South Africa, Turkey and Egypt were selected.[110] These three case studies have been selected for a number of reasons:

– First, the role of the apex courts in the transitional period of all three cases has individually already been reasonably studied. Thus, the goal of the study was clearly not to assess (again) the role of a court in South Africa, Turkey, Egypt or any other country fulfilling the criteria of the above-mentioned triangulation individually, but to seek out common denominators and generate a potential general theory around it. Not

109 *Daly, The Alchemists: Questioning Our Faith in Courts as Democracy-Builders.* The same, regarding the achieving of a functioning electoral democracy, cannot (yet) be confirmed for 'young democracies'.

110 However, other cases such as Nepal, Colombia, Hungary and Tunisia, were taken into consideration throughout the entire research when it was pertinent to do so.

being able to visit each and every possible country due to time and financial constraints, the presence of an already developed thick literature on these three cases was a crucial factor for me to choose them.

– Second, all three cases represent different types of democratic transition. I strongly believe that depending upon what constitution-making process the constitution-builders adopted, the role of courts could be different. By combining both concepts of *legitimacy* and *legal continuity*, different practices of constitution-making can be distinguished.

Table II Types of Democratic Transition and Ideal Forms of Constitution-Making

	Legitimacy continuous	**Legitimacy ruptured**
Legality continuous	Reform: *Turkey* Reiterated constitutional amendments	Regime change with legal continuity: *South Africa, Hungary, Nepal* Roundtable (two-staged transition)
Legality ruptured	'Revolutionary Reform': *Colombia* Constitutional Convention	Revolution: *Egypt, Tunisia* Constituent Assembly

The various forms of constitution-making and relative examples will be clarified in Part I of the thesis. No revolutionary reform was taken as a case study owing to its rarity in recent years and keen resemblance to the reform form of constitution-making (for further explanations on the above-illustrated combination between legality and legitimacy, and thus on the difference between reform and revolutionary reform cf. Chapter 1. C. II.).

– Third, just as I believed since the beginning that the form of constitution-making was a factor that could have an impact on the role of courts, so too I thought was the appointment process and composition of the court itself. In this sense, all three cases reveal three different appointment processes: Egypt and the judiciary-executive model, Turkey and the multi-constituency model, and South Africa and the judicial council model.
– Fourth, preliminary research revealed how these three cases had completely diverse outcomes: Egypt and the strongly autonomous, self-interested, assertive role of the Supreme Constitution Court; Turkey and the role of the Constitutional Court as preserver of the old regime's values; and South Africa as precursor of constitutionalization and pillar of transformation.

I have structured the thesis so that additional case studies may easily be added if the future should present further research opportunities in the field. Due to the diversity of each and every possible case study, a 'right' number of cases does, in my opinion, not exist.

1. Turkey

Like many facets of Turkish politics, constitution-making in the late Ottoman Empire and republican Turkey thereafter has been a top-down process. Constitutions commonly surfaced as the result of revolutions and military coups and were never the product of democratic deliberation. The lack of a true democratic legacy helps explain why a majoritarian sense of democracy (as opposed to consensual democracy) has constantly been a core feature of Turkey's constitutions in the past century.

Turkey is a country that embarked in a democratization process a couple of years after the military coup of 1980 and the subsequent enactment of the authoritarian 1982 Constitution. The establishment of a military regime from 1980 to 1983, and the tutelary role of the army entrenched by the authoritarian 1982 Constitution, meant that Turkey's quest towards democracy, which was an ongoing process ever since the dissolution of the Ottoman Empire, was put on hold. However, democratization steps in the form of reiterated constitutional reforms started almost right away and marked the beginning of a difficult progressive constitutional transition, with (to put it simplistically) the secularists (i. e., the military and supporters of Kemalism) and the religious on opposite sides of the political struggle. Due to the tutelary role of the military and the fact that the military was *de facto* also the guardian of the old Kemalist values, revolution would have been a risky move for democratization forces. That is why a process of progressive reform took place. Thus, Turkey is an example of a constitutional transition in the form of a long-term reform process.

Due to the fragmented political spectrum at the time, the process of reform left most authoritarian institutions in place until they either conformed to the democratization process or were slowly replaced. The legislature was the first to be conquered by democratization forces. One of these institutions with authoritarian past was the TCC, which to this day represents one of the best examples of hegemonic preservation and protection of the old regime. Turkey makes the perfect example where

democratizing governments and the apex court wrestle throughout the constitutional transition, with the court obstructing the democratization process. The Court has acted essentially to meet the expectations of the old elite that had empowered it by protecting their vision and has been consistent in its attitude up until its 'packing' by the Justice and Development Party (Turkish: *Adalet ve Kalkınma Partisi*, AKP) in 2010. All in all, the Turkish case study is relevant because the country, which formally inherited an authoritarian constitutional order undergoing reiterated constitutional change in the years after the military coup and enactment of the 1982 Constitution, is an example of a constitutional transition in the form of a long-term reform process, rather than a revolutionary break.[111]

2. Egypt

In February 2011 – during the full swing of the regional series of anti-government protests, uprisings, and armed rebellions that covered much of the Islamic world (so-called Arab Spring) – after days of mass protests in Cairo and other Egyptian cities, Egyptian Vice President Omar Suleiman announced the resignation of President Husni Mubarak, who had ruled Egypt for over 30 years. The Supreme Council of the Armed Forces (SCAF) took power and suspended the constitution. In the months following the fall of Mubarak, various forces struggled to shape the social and political order and to create a new constitution that would reflect and enshrine it. The struggle was mainly between the democratically elected Islamic-led legislature (and subsequently also executive) and the secular military.

No new democratic order has yet been established in Egypt. Free elections were held, and a new constitution was adopted in December 2012. However its existence was short-lived: it was suspended in July 2013, after the military took power again, and a new 2014 Constitution enacted.

An organ of the suspended constitution of 1971, the Supreme Constitutional Court of Egypt (SCCE), has played an important role in the political struggles following the Arab Spring revolution. As the name tells, the Egyptian account narrates a case of revolution. Despite a complete break of legality and legitimacy of the old regime, power was handed over to the military,

111 Levent Köker, "Turkey's Political Constitutional Crisis: An Assessment of the Role of the Constitutional Court," *Constellations* 17, no. 2 (2010): 328.

which decided to leave the pre-existent Supreme Constitutional Court in place. The SCCE was not dissolved by the SCAF, unlike the two chambers of parliament, and has continued to perform its function of judicial review despite the revolutionary break. This is a move that had a deep impact on the role and behavior of the court throughout the transition because of the court's past.

To add to the relevance of the Egyptian case is the political struggle that ensued between the democratically elected Islamic-led legislature (and later also presidency), and the secularist military. This political fragmentation led to the judiciary having to take a careful opportunist approach throughout the transition in order not to get packed and survive.

The SCCE was established by the Constitution of 1971 under Anwar al-Sadat and became operational in 1979. It has mainly been loyal to the regime and has not touched the regime's core interests. At the same time, over the years, its judges developed a pronounced self-confidence, especially in the 1990 s, which are called the 'golden era' of the court. During this era, it declared a large number of laws to be unconstitutional and thus acted as an institutional counterweight to the executive. In order to put a stop to the growing activism of the SCCE, President Mubarak appointed some judges who were extremely loyal to the regime from 2001 onwards. In its new composition and through the introduction of various amendments to the law of the court, the court from then on served primarily as an institution that legally legitimized the regime's actions.

Due to its ambivalent institutional heritage, the SCCE differs from other recently newly established apex courts (such as South Africa, Tunisia or Colombia), which are often attributed an extremely positive role in the transformation processes. It is precisely the break with the past that the new institutions embody that is often seen as an important prerequisite for the courts to play the role as democracy guarantors by enforcing and protecting the new constitutional order.

3. South Africa

The Republic of South Africa, established by the Dutch as the first colony in the territory in 1652, was later incorporated into the British Empire at the end of the Napoleonic Wars. It became a self-governing Dominion in 1910, and stayed part of the British Commonwealth until 1961, when the Afrikaner

National Party (NP), which had come to power in 1948, broke ties with the Commonwealth and declared the country a Republic.

Sequential colonial and White minority regimes or governments (in particular the NP government) endorsed policies of racial segregation between the White minority and Black majority populations, commonly known as *apartheid*. The population was classified into racial and ethnic groups and forced to live separately in different areas (so-called homelands); a state and social structure, which was clearly economically unsustainable, apart from also being unacceptable from a human rights standpoint, of course.

Over the years, resistance to the *apartheid* system grew under the guidance of the ANC. By the 1980 s South Africa was basically a police state, on the edge of civil war, with a shattered economy; the only solution was a negotiated settlement between the White NP government and the ANC during the first half of the 1990 s.

In the field of constitutional law, there are rarely openly informative and well-defined exemplative cases. South Africa is one of those, which go very close to being one. As a consequence, the slightly idealized South African case was from the beginning the case around which the research question turned, one which could be considered the most complete and normatively paradigmatic realization of two-staged form of constitution-making. This process included two stages with a democratic general election between them;[112] it involved the making of two constitutions (an *interim* constitution and the definitive constitution), a multi-party negotiating forum (or, as Arato[113] labels it 'Round Table') for the drafting of the *interim* constitution, a democratically elected Constitutional Assembly for the writing of the definitive constitution, and a constitutional court tasked to ensure that the process would progress as dictated by the interim constitution.

Klug synthetizes the entire process as follows:

112 Among the vast literature on the topic, see for instance Steven Friedman and Doreen Atkinson, eds., *The Small Miracle: South Africa's Negotiated Settlement* (Johannesburg: Raven Press, 1994); Murray Faure and Jan-Erik Lane, eds., *South Africa: Designing New Political Institutions* (London: SAGE Publications, 1996); Ebrahim; Penelope Andrews and Stephen Ellmann, eds., *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Johannesburg: Witwatersrand University Press, 2001).

113 See, Arato.

> 'In the first stage an 'interim' constitution was adopted and a democratic election held to both elect a new government as well as legislative body whose two houses met jointly to form a Constitutional Assembly that produced a 'final' Constitution for post-apartheid South Africa. This two-stage process was facilitated by an agreement to adopt a set of Constitutional Principles that would be attached as a schedule to the negotiated 'interim' Constitution providing the framework within which the democratically-elected Constitutional Assembly would formulate a 'final' Constitution. While the new constitutions both introduced extensive bills of rights as a response to the country's history of colonialism and apartheid, the Constitutional Principles promised those who would lose power in a democratic election that their fundamental concerns would still be addressed in the final constitutional dispensation. It was in order to guarantee this outcome that the negotiating parties agreed that there would be a Constitutional Court and that it would serve the unique function of certifying whether the 'final' constitution produced by the Constitutional Assembly was in conformity with the parameters set by the Constitutional Principles.'[114]

South Africa is thus an example of a third type of transition, in which the legitimacy of the old *apartheid* regime was interrupted, yet a continuity of legality was sought. The type of constitution-making here had a pivotal influence on the overall role and behavior of the CCZA, which was newly established and was empowered to act as guardian not only of the new constitutional dispensation, but also of the constitution-making process itself, and was itself a product of the above-mentioned negotiated settlement.

From the South African case study, one can not only learn paradigmatic lessons for other cases, but it also represents the paradigm itself of a court facilitating a normative constitutional transition. Due to the vast activity of the CCZA throughout the entire constitutional transition, I specifically analyzed the role and behavior of the court through the lenses of decentralization, and in particular, the establishment of local government. Key rulings in the establishment of local government have spurred the transition forward. Local government, as the closest level of governance in the country, represents the backbone of constitutionalism and as such perfectly reflects the facilitator's performance of the court.

Such a process was not unprecedented; it had been anticipated in Spain in the 1970 s, and in several Central and East European countries (such as Hungary) in the aftermath of the fall of the Soviet Union. Despite this, the South African example has been the most comprehensive and consistent

114 Heinz Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid," *Journal of Comparative Law* 3, no. 2 (2008): 174–75.

development of what Arato defined in general as 'post-sovereign paradigm'.[115] I follow Arato's opinion when it comes to choosing South Africa as the main case study because it represents the best form of constitution-making when it comes to the regeneration of democratic legitimacy.

In addition to its successful constitutional transition, the justification for South Africa as case study rests in both its increasing role as democratic precursor in Africa and its exemplar model in the international theoretical debate on fundamental rights, political transitions, representative politics and decentralization.

H. Chapter Outline

This dissertation contains ten substantive chapters, excluding this introduction and the conclusions, classified into three different Parts.

Part I seeks to theoretically conceptualize the research scope, i. e., to clarify concepts such as 'constitutional transitions', 'constitutionalism' and 'apex courts', in order to construct an analytical framework for examining the role of courts as facilitators of a normative constitutional transition.

Chapter 1 explores the various possible understandings of 'constitutional transition', not from a temporal perspective, but from a rather substantial one. When does a constitutional transition take place? The Chapter addresses two possible approaches to explaining the notion of constitutional transition: the Kelsenian approach of the replacement of the Basic Norm and the rather Schmittian approach of a fundamental constitutional change. In doing so, this Chapter searches for the best possible approach to explain the phenomenon of constitutional transition, which will then facilitate the analysis of the case studies. It turns out that the latter is a more comprehensive solution, as it includes cases, which

115 The term 'round table' relates to the type of negotiating body in the constitution-making process, involving regime *and* opposition actors, aimed at working out interim arrangements for constitutional transitions. It can be found in different countries: for instance, Poland, Hungary, Czechoslovakia, German Democratic Republic, Bulgaria, and South Africa, in that order. Nepal's similar process did not involve a governmental actor. See Arato, 107. See also, Jon Elster, ed. *The Roundtable Talks and the Breakdown of Communism* (Cambridge: Cambridge University Press, 1996); András Bozóki, ed. *The Roundtable Talks of 1989: The Genesis of Hungarian Democracy* (Budapest: CEU Press, 2002).

the former precludes. Chapter 1 concludes by outlining four types of constitutional transitions based upon the combination of both legitimacy and legality: reform, revolution, revolutionary revolution and the roundtable form (i. e., regime change with legal continuity). These theoretical variations of constitutional transitions can have an impact on the role and behavior of an apex court.

Chapter 2 instead addresses the end-goal of a constitutional transition: peace through constitutionalism. Peace can be attained by several means; constitutionalism is recognized nowadays as to cover most of them. This Chapter simply seeks to present the reader with a widely accepted definition of constitutionalism. It is important to define constitutionalism since the role courts play in facilitating a normative constitutional transition will most likely have as object its elements: limited government (i. e., a written constitution, horizontal and vertical separation of powers in federal systems, fundamental rights and freedoms), the rule of law (i. e., constitutional supremacy, independent judiciary, constitutional review, etc.) and, of course, electoral democracy. It is one of this research's hypotheses to believe that a constitutional transition, in order to succeed, requires the establishment and presence of all elements of constitutionalism.

Chapter 3 seeks to explore the main object of this research: the apex court, which is itself an element of constitutionalism. The Chapter tries to clarify as straightforwardly as possible what apex courts do and how they do it. Since the appointment process for the justices, composition and removal process (as means to steer judicial independence) can have a convinced influence on the role and behavior of an apex court, Chapter 3 also includes a brief introduction to these concepts.

Part II narrates the three case studies: Turkey (Chapter 4), Egypt (Chapter 5) and South Africa (Chapter 6). It is here that the information needed to later test the hypotheses set out in the conceptual framework in this introduction is gathered. A rather descriptive exercise seeks to depict the role and behavior of courts within each and every context of the case studies. These cases studies apply the conceptual framework in order to achieve a finer-grained picture of the texture and nature of the role and behavior of apex courts in specific cases.

Part III sees the conceptual framework applied to the case studies comparatively and pursues to test the hypotheses with the information gathered. Here is where the comparative methodology seeks an analytical

understanding of the role and behavior of apex courts in a normative constitutional transition.

Chapter 7 deals with the hypotheses in relation to the constitutional transitions themselves. In this Chapter, I argue that when one or more of the elements of constitutionalism are not established, the normative constitutional transition fails. This first hypothesis is confirmed and lays the foundation for further analysis. Here I analyze the success or failure of a constitutional transition and try to come up with factors that might have influenced such an outcome. In order to justify further investigation on the role of courts, two additional hypotheses were formulated, which link constitutional transitions, constitution-making and the role of apex courts in these processes: both the constitution-making form, on the one hand, and the performance of the apex court, on the other hand, are key factors in the failure or success of the normative constitutional transition. Confirming these hypotheses greenlights the testing of the others. The research has shown that indeed the constitution-making form chosen, and the apex courts have had great impact on the way the constitutional transitions have succeeded or failed. Failure or success of a constitutional transition was measured based upon the elements of constitutionalism: i. e., whether all three elements were fulfilled in each and every case study.

Chapter 8 channels all the information gathered in the case studies and deals with the veritable 'role' apex courts have played in the normative constitutional transitions. The argument here is that the roles apex courts play in a normative constitutional transition would possibly boil down to mainly two (or three) alternatives: *facilitating* the transition, *obstructing* the transition or *irrelevance*. This was confirmed by the study since few alternatives to either push forward or hold back during a constitutional transition could be conceptualized. The analysis also resulted in finding out that the role of utter 'inertia' is actually not really possible. A court can rarely have 'no role' in a constitutional transition because even if it remains mainly passive during the period, by doing so it might for instance just as well be supporting the new regime's course. The study showed how the role of apex courts could be different in different phases of the normative constitutional transition. During the constitution-building phase, a court has slightly different goals than once the constitution is enacted, despite the motives being the same: i. e., either obstructing or facilitating the constitutional transition.

This creates a nice changeover to the next chapter, Chapter 9, which deals with the behavior of the apex courts in a constitutional transition. This is to be differentiated from the 'role' a court plays and responds to the question of *how* courts play the role they do. The argument here was that the role of apex courts in a normative constitutional transition could either be perceived as *pro-active* or *passive* (i. e., reactive). As judicial bodies, which act according to the law and within its framework, apex courts need sometimes to step over the political realm in order to overcome temporary crisis, such as transitional periods. This was mainly confirmed, yet it had to be corrected. The analysis revealed how a court needs to engage strategically to find a balance between law and politics. Exaggerating in being too politically active could lead to disputes between the different branches of government, while holding back too much from the political spectrum in times of transition can lead to the court not being enough efficacious with its rulings, especially when it comes to its check function over the other branches.

Chapter 10 rests at the core of the causal inference, for it not only tests further hypotheses formulated at the beginning of the research, but also intends to explore possible explanations of *why* an apex court might act in one way or another. The role of the apex court is impacted by a myriad of factors, but especially those that revolve around three main elements of the transition: the nature, structure and composition of the apex court (*institutional factors*); the end-product itself, i. e., the constitution and what it advocates (*constitutional factors*); and the transitional process and context (*transitional and political factors*).

Finally, based on the empirical data and conceptual framework built up in the initial chapters and fulfilled in the following ones, the conclusions explore normative debates and policy implications with regards to the appropriate role for apex courts in facilitating a normative constitutional transition, contrasting these with the classical debate on the role of courts in mature democracies.

PART I:
Theoretical Conceptualization of the Research Scope: An Analytical Framework

The research scope was demarcated in the introduction. However, it needs further conceptualization to better contextualize the role played by apex courts. In this regard, a first Chapter includes a comprehensive conceptualization of 'constitutional transition' – unlike the mere working definition expounded in the introduction used to simply delimit the research scope – supported by well-known theories of legal scholars such as Hans Kelsen and Carl Schmitt. In a second Chapter, the main objectives of a constitutional transition – or at least those which depict a shift from authoritarianism to constitutionalism – will be exposed in order to refine upon which criteria the analysis of the apex courts' behaviors rests. In this sense, the concept of peace through constitutionalism as well as the link between constitutionalism and decentralization will be at the core of the section. Finally, an introduction to what an independent (apex) judiciary is, what its powers and structure are, will conclude Part I. This theoretical discussion also enables me to present justifications for different judicial behaviors, which I will present later in the book.

Chapter 1: Conceptualizing Constitutional Transitions

The hereby-drawn definition is not intended to be presented as a personal theory on constitutional transitions, but rather as a concept deemed to support the reasoning behind the case selection, the measurement and assessment of the court's activity and help contextualize its behavior.

The Oxford English Dictionary reveals that transition is 'a passing or passage from one condition, action, or (rarely) place, to another; change'[116]. This definition was favored as a starting point for describing a 'constitutional transition', for it does not define transition as a 'period' in which something changes, but rather as a 'process' of change, detached from the concept of duration or time.

According to the opinion conveyed here, the expression 'transiting from one condition to another' suggests that the new condition in which one finds itself is *significantly* different from the older one. A non-significant change does not truly inspire the idea of 'transition', but rather that of a mere 'modification'. In other words, this research sees 'constitutional transition' as the process in which a new constitutional order is born, not merely punctually modified (even though, as we will see, profound amendment processes can end up changing the core values of a constitutional order). Accordingly, the following question arises: when is a new constitutional order born?[117]

A. Definition 1.0: The Replacement of the Basic Norm

Colón-Ríos attempts to answer this question by leaning on Kelsen's theory of the 'Basic Norm' (German: *Grundnorm*), a central notion to the *Pure Theory*

116 "Transition." Oxford English Dictionary. Accessed February 21, 2019. http://www.oed.com/view/Entry/204815?rskey=YF5boD&result=1&isAdvanced=false#eid.

117 This passage takes inspiration from the following contemporary study on the definition of constitutional transition: Joel Colón-Ríos, "What Is a Constitutional Transition?," National Journal of Constitutional Law 37, no. 1 (2017).

of Law (German: *Reine Rechtslehre*)[118] and probably one of the most influential approaches to transitional constitution-making among legal scholars.

I. General Theory: Kelsen's Theory of the Basic Norm

Unless we are seeing the dawn of a completely new state, the birth of a new constitution is (commonly) linked to the annulment of an older constitutional document; a substitution of a constitutional order, and therefore the moment when a 'valid' constitution becomes 'non-valid' and a new one – plausibly – valid. The question of validity lies, therefore, at the core of the question of when a new constitution is born and is typical of the legal sciences. The legal sciences, unlike the non-legal sciences, which tend to answer the 'question of truth' of a statement,[119] seek the answer to the 'question of validity' of a norm. A norm cannot be considered as either 'true' or 'false', but rather 'valid' or 'non-valid'.[120] So, how can we measure the validity of a norm, if it is not a statement of reality? The answer to this question turns around Kelsen's theory of the 'basic norm'. In Kelsen's theory, a norm withdraws its validity from another superior law, creating a veritable chain of validity or legality. According to this chain, higher norms confer validity on lower norms.[121] If the system is not arbitrary, for each binding decision or norm we can trace back a superior norm. From this reasoning follows that the reason for validity of a norm is always another norm, not a fact. Therefore, if we

118 Hans Kelsen, Reine Rechtslehre: Einleitung in Die Rechtswissenschaftliche Problematik, 1 ed. (Scientia Verlag Aalen, 1994).

119 A statement is real or true when it corresponds to reality. The statement corresponds to reality because we were able to observe it through experience. So, we know the statement 'Global warming is having an effect on nature' to be true, because through constant and non-exceptional observance we are able to confirm that due to the increase in temperature of the Earth's climate system glaciers, permafrost and sea ice are drastically retreating. The truth of the results of e.g., a natural experiment lies in the reality of things. If a result corresponds to reality, it is true, if not, it is false.

120 Hans Kelsen, General Theory of Law and State, trans. Anders Wedberg (Boston: Harvard University Press, 1945), 110.

121 For example, a parking ticket is valid, because there is a law that confers on the police the power to issue binding pecuniary fines; this law was written by the parliament, which again was given the authority by the constitution to write acts conferring such power. "The Function of a Constitution," in Essays on Kelsen, ed. Richard Tur and William L. Twining (Oxford: Clarendon Press, 1986).

seek the reason for validity of a norm we need to go back in the chain and look for the first norm, the validity of which cannot be derived from another superior norm. This rootless norm is what Kelsen labelled the 'basic norm'.[122] If there is no basic norm, then the lower norm is non-valid and everything else based upon it arbitrary. Following this reasoning, all norms whose validity can be traced all the way back to the same basic norm form a valid legal order;[123] on one single basic norm entire legal systems have been built. A constitution is also part of the chain of validity, as it was drafted according to the rules of amendment set in an even older constitution, which perhaps descended by an even earlier one, and so on until we would reach the very first constitution.[124] To put it simply, if we go back in the chain of validity, we would reach a historically first constitution (i. e. the basic norm of a legal order).[125] Yet, where does the basic norm withdraw its validity? The basic norm is 'presupposed' to be valid, and its validity does not reside in any positive norm. Hence, the formulation of this presupposition (i. e., the first constitution) is the basic norm. The first constitution is a real document, a real constitution with real binding force due to the presupposition of its validity. In a clerical legal system, the basic norm would state that one ought to act as God and its delegated authority have prescribed; in a secular legal system, one ought to behave following the vision of the 'fathers' of the constitution and their delegates after them. Basically, one ought to have some sort of blind trust and faith in those who wrote the first constitution. The reason why a first constitution is presupposed valid finds its place in the Principle of Effectiveness. Without wandering off into more details, this principle simply assumes that if the individuals subjected to a specific legal order behave largely in conformity to it, then it is considered as an efficacious order and thus, valid.[126]

122 So, e. g. a statute, an administrative act or even a judicial opinion is valid because somewhere at the beginning of the chain of validity there is a basic norm from which it derives. General Theory of Law and State, 111.

123 ibid.

124 ibid., 115; see also Colón-Ríos, 46.

125 Kelsen, General Theory of Law and State, 115 f. and 18 f; see also Colón-Ríos, 46.

126 Kelsen, General Theory of Law and State, 111. Whereas the truth of a statement lies in its correspondence with reality, the validity of a norm finds its ground in a presupposition of its validity.

II. Kelsen's Theory Applied

Now, what does all of this have to do with 'constitutional transition'? In his *General Theory of Law and State*, Kelsen states that norms '[...] remain valid as long as they have not been invalidated in the way which the legal order itself determines'.[127] Instead, the basic norm changes whenever a constitutional order is 'replaced in violation of the rules of change of the previously established constitutional order'.[128] This would coincide with a break in the chain of validity. Therefore, it is not hard to see how Kelsen's theory immediately appeals when trying to identify constitutional transitions. The theory seems to suggest that a constitutional transition is what takes place when the basic norm is replaced, and under these terms, such replacement would always be accompanied by a break in legal continuity, or in other words, by a legal revolution. Colón-Ríos has pointed out that this theory had been applied by several judges when courts, in the aftermath of a legal revolutionary act, were called upon to determine whether or not a new constitution had successfully been born, or the old one was still in place.[129] In a legal revolution, one basically witnesses the replacement of a legal order by another one without following the amending rules prescribed in the to-be-replaced order, and therefore the validity of the new constitution (as well as the validity of all the norms of the legal system) requires the presupposition of a new basic norm.[130]

127 ibid.

128 See Colón-Ríos, 44. In this passage Colón-Ríos paraphrases Kelsen [no source is given].

129 ibid.

130 Kelsen, General Theory of Law and State, 117–18. It is most interesting how usually in a revolution a great part of the old laws is kept also in the new system, while the toppling regime merely changes the constitution and some politically fundamental laws. Most of the old legal order remains valid, and the only thing that has changed in the chain of legality is the 'reason of validity', which would be the basic norm. Norms, which were introduced under the older order, continue to be valid only as a result of the new constitution vesting in them validity. Therefore, the old laws, which continue to be valid under the new constitution, are not identical with the old ones, as their basic norm has changed. In this sense, we can say that in a revolution, although many old laws continue to have binding force, the entire legal order has been replaced, and not only the constitution. Therefore, purely juristically, the entire old legal system ceased to be valid after the nullification of the old constitution and a new one was born receiving its validity exclusively from the new constitution.

However, for the understanding of constitutional transitions, there are limitations to the usefulness of Kelsen's theory of the basic norm. According to the theory explained above, the change of the basic norm would always be accompanied by a revolutionary break in the chain of legality, i. e., by a violation of the amendment rules in force. A regime is overthrown and its constitutional order scratched. A constitutional transition has taken place. What about the other cases in which a new constitution is drafted following the amendment rules of the old constitution? For instance, South Africa witnessed a change of transition without a break in the chain of validity. Still, nobody really questions the presence of a constitutional transition when the country replaced the system of *apartheid* and embraced democracy. Therefore, a central problem in attempting to define a constitutional transition from a *Kelsenian* point of view is that it is highly likely that a considerable number of cases would be left out.[131]

B. Definition 2.0: A Fundamental Constitutional Change

Kelsen's view fails to consider that constitutional transitions can also happen without breaking the chain of validity. It consists in all those cases, in which a constitution is subject to a series of amendments, which could be qualified as so *fundamental* that we could almost say there is a new constitutional regime. To give but a few examples:

– 'Patriation' is the transfer of the sovereignty to a newly autonomous country from its previous mother country. A typical scenario of patriation would be that of a colonial power transferring its authority to a former, now independent, colony. The main example is the political process, which led to full Canadian sovereignty and culminated with the *Canadian Act, 1982*. The patriation of the Canadian constitution included among other amendments the creation of a new amendment rule and the severing of all legal ties with the United Kingdom, or for want of a better word,

131 For a thorough analysis and criticism of the application of Kelsen's theory on constitutional transitions cf. J.W. Harris, "When and Why Does the Grundnorm Change?," *The Cambridge Law Journal* 29, no. 1 (1971). Cf. also T.C. Hopton, "Grundnorm and Constitution: The Legitimacy of Politics," *McGill Law Journal* 24, no. 1 (1978).

independence. This, argued Kay, was fundamental enough to create a new Constitution.[132] However, given Kelsen's emphasis on legal discontinuity, and thus from a *Kelsenian* perspective, this conclusion is particularly difficult to reach: the legal continuity was not broken and thus no new basic norm had been created.[133] Hence, no legal revolution had taken place (given that the patriation process followed the amendment rules of the *Constitution Act, 1867*).[134] What is clear however, is that something fundamental has changed in the constitutional order, regardless of whether the basic norm was replaced or not, and that the old order that had been established in 1867 was no more.

– The same could happen in situations where independence is not at stake. In 1989, the Hungarian Constitution of 1949 was subject to a series of amendments, which resulted in the successful transition from a 'communist' to a democratic system.[135] According to some authors, these

132 Cf. Richard S. Kay, "The Creation of Constitutions in Canada and the United States," Canada-United States Law Journal 7 (1984).

133 Some authors suggest the contrary by arguing that a 'covert' or 'disguised' break in the legal continuity must have taken place anyways: Cf. for the cases of Australia, Canada and New Zealand, Peter C. Oliver, The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand (Oxford: Oxford University Press, 2005). For the New Zealand case, cf. Frederic M. Brookfield, Waitangi and Indigenous Rights: Revolution, Law and Legitimation (Auckland: Auckland University Press, 2006).

134 In fact, several authors argued that no constitutional revolution had taken place, and that the old 1867 constitution had merely been modified and retained mostly intact. Cf. Alan Cairns, "The Politics of Constitutional Conservatism," in And No One Cheered: Federalism, Democracy, and the Constitution Act, ed. Keith Banting and Richard Simeon (Toronto: Methuen, 1983); Peter H. Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People?, 3 ed. (Toronto: University of Toronto Press, 2004), 107–26. On patriation cf. also more generally Peter W. Hogg, Constitutional Law of Canada (Toronto: Thomson Reuters, 2018), Chapter 3.5. For more specifics on the patriation of Canada cf. the Patriation Reference of the Supreme Court of Canada: Reference Re Resolution to amend the Constitution, [1981] 1 S.C.R. 753.

135 Without dwelling on details, if one compares the new preamble with e.g., Art. 2 of the original Constitution of 1949, it is easy to see the fundamental change that took place in the constitutional order. The new preamble steered the country towards 'a multi-party system, parliamentary democracy and a social market economy', whereas Article 2 of the original text positioned Hungary within the 'Second World': (1) The Hungarian People's Republic is a State of workers and working peasants. (2) All power in the People's Republic is vested in the working people. The workers of town and country exercise their power through elected delegates responsible to the people'. These amendments were

particular amendments were so fundamental that they could be qualified as amounting to a new constitutional order.[136] From a pure *Kelsenian* point of view, there was no break in the chain of legality, hence no constitutional transition, yet here also, nobody would really argue that no transition has taken place.

– The equivalent applies when the same country faces a process of devolution of important powers in a state. We could imagine e.g., the loss by the central state of some of its law-making faculties. Within this particular scenario, a state becomes politically unable to legislate over devolved areas, which makes it actually less influential. The degree of devolution of power to regional legislatures can result in a fundamental constitutional change. In the United Kingdom, we witnessed the creation of the Scottish Parliament in 1999 and the ongoing increase transfer of powers to it from Westminster. By doing so, the British Parliament has lost some of its legislative power over Scotland. In this case, a fundamental change has occurred within the English Constitution. Once again, however, a change in the basic norm would not be detected. The same could be said for any considerable and substantial devolution of powers from member states to the European

supposed to be temporary, but they became permanent after several failed attempts to create a fully new constitution. Hungary was the only Eastern Bloc country without an entirely new constitutional document after the end of the Cold War. Cf. Rett R. Ludwikowski, Constitution-Making in the Region of Former Soviet Dominance (Durham, London: Duke University Press, 1996), 180–89. Nevertheless, in 2011, a new constitution (the Fundamental Law of Hungary) came into effect through an arguably controversial process. For a discussion, cf. Andrew Arato, "Regime Change, Revolution, and Legitimacy," in Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law, ed. Gábor Attila Tóth (Budapest: Central European University Press, 2012). For more on the 1989 reforms and the constitutional development thereafter cf. Attila Harmathy, *Introduction to Hungarian Law* (The Hague, Boston: Kluwer Law International, 1998), 7–9.

136 On the question of legal continuity in Hungary cf. Péter Paczolay, "Constitutional Transition and Legal Continuity," Connecticut Journal of International Law 8, no. 2 (1993): 572–74. Cf. also János Kis, "Between Reform and Revolution," East European Politics and Societies 12, no. 2 (1998): 441–42; William Partlett, "The Elite Threat to Constitutional Transitions," Virginia Journal of International Law 56, no. 2 (2016). In Hungary, the process of regime change appeared to be similar to Spain's constitutional transition in the aftermath of Franco's dictatorship, with the exception of political extremes and legal breakdown of the authoritarian system.

Union, in the sense that the member states lost significant decision-making powers to the Union on important matters.[137]

These examples demonstrate that whether or not the chain of legality is broken, the replacement of the basic norm is not a necessary indicator for the determination of a constitutional transition.[138] Too many cases are left out of the equation. Whether or not the procedural rules were broken, and a new basic norm installed, the reality of the facts leads us to face that in the end we find ourselves with a new constitutional order. Kelsen's theory is a one of positivism and structure of the legal system, and thus it does not consider changes in the substance of that legal system (and there is of course no reason why it should do so). The constitutional order can change fundamentally, all in conformity with the same basic norm, and that is also a constitutional transition. Therefore, in order to define 'constitutional transition' the focus needs to shift towards the 'substance' of the new constitutional change, rather than the procedure used or whether it is a simple amendment, a deep revision or a total new text.[139] Therefore, how *fundamentally* does a constitutional order have to change in order to admit that there has been a constitutional transition?

In order to answer this question, both concepts of 'material' and 'formal' constitution are helpful. Their definition has been the object of various opinions among scholars.[140] In this research and leaning on Colón-Ríos'

137 On the impact devolution can have on parliamentary sovereignty cf. Mark Elliott, "United Kingdom: Parliamentary Sovereignty under Pressure," International Journal of Constitutional Law 2, no. 3 (2004); Gavin Little, "Scotland and Parliamentary Sovereignty," Legal Studies 24, no. 4 (2001).

138 See generally on the continuity of legal orders for instance Benjamin Spagnolo, The Continuity of Legal Systems in Theory and Practice (Oxford, Portland: Hart Publishing, 2015); John Finnis, "Revolutions and Continuity of Law," in Philosophy of Law, Collected Essays (Oxford: Oxford University Press, 2011); Nimer Sultany, Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring (Oxford: Oxford University Press, 2017).

139 For instance, it is common to witness cases where a country undergoes a total revision of its constitution, yet no real fundamental change in the substance of the constitution has taken place, and thus although we are presented with a completely new constitutional text, the constitutional order has not changed. An example would be the total revision of the Swiss Federal Constitution in 1999.

140 Important scholars such as Hans Kelsen (Kelsen, "The Function of a Constitution," 113–14; General Theory of Law and State, 124–26.; for a debate on Kelsen's view see Lars Vinx, Hans Kelsen's Pure Theory of Law: Legality and Legitimacy (Oxford: Oxford University Press, 2007), 157–60.); Georges Vedel (Georges Vedel, Manuel Elémentaire De Droit

estimation in his own analysis, the focus will rest on Carl Schmitt's view of formal and material constitution, as it allows the best approach in conceptualizing constitutional transitions. Instead of the words 'formal' and 'material' constitution, Schmitt differentiated between 'constitutional laws' and 'constitution', as it is based upon his own 'theory of the constituent power'.[141]

Following this theory, for Schmitt, the constituent power should not be accosted to the exercise of ordinary amendment procedures, referendums or universal suffrage elections. Such are indeed important instruments, but are meant for the exercise of powers given by the constitution and not for the modification of fundamental political decisions adopted by the constituent power:[142]

– According to Schmitt, 'constitutional laws' are those provisions which can be found in a written constitution in order to protect them from parliamentary majorities.[143] Schmitt uses the Weimar Constitution[144] as an example to clarify its concept. Art. 149 of the Weimar Constitution stated: 'Universities will maintain Faculties of Theology.' This provision is undoubtedly important, yet not fundamental. The main difference between Art. 149 and an ordinary law is that it can only be amended

Constitutionnel (Paris: Dalloz, 2002), 112–13; for the French example see "Débat : Souveraineté Et Supraconstitutionnalité," Pouvoirs 67 (1993): passim.); Olivier Beaud (Olivier Beaud, La Puissance De L'etat (Paris: Presses Universitaires de France, 1994), 329–76.) and Carl Schmitt have all contributed with an own view on the definition of 'material' constitution. A thorough and useful summary of their opinions adapted to the exercise of defining constitutional transitions can be found at Colón-Ríos, 56–61. Another important author on the subject is Constantino Mortati, La Costituzione in Senso Materiale (Milano: Giuffrè Editore, 1998).

141 These concepts are not to be confused with Grimm's idea of constitution and the differentiation between normative constitution and empirical constitution, which delineates the different effects of the same constitution in two different fields (within the law or outside of it), rather than the contents of the same.

142 Cf. Joel Colón-Ríos, "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia," Constellations 18, no. 3 (2011): 367. Interestingly enough, Schmitt believed that the 'natural form' in which a people takes the fundamental political decisions is through an act of acclamation, that is an assembled multitude that decides by consenting or disapproving with a simple 'yes' or 'no'. Cf. Carl Schmitt, *Constitutional Theory* [Verfassungslehre] (Durham: Duke University Press, 2008), 131.

143 Cf. *Constitutional Theory*, 67.

144 The Reich Constitution of August 11th 1919 (Weimar Constitution).

through the special amendment rules of the constitution. In this sense, constitutional laws lean on the concept of formal constitution and as such, an amendment of these provisions does not correspond to a constitutional transition.

– Instead, what Schmitt labels 'constitution' is by and large what other scholars define as the material constitution. His idea of material constitution reflected what he termed 'the conscious decision' of the constituent body about 'its peculiar form of political existence'.[145] Such 'decision' can, for instance, usually be identified in those constitutional provisions that refer to the basic structure of government, the type and form of the state. Several provisions of the Weimar Constitution comprised the adoption of democratic form of government and its dismissal of monarchy,[146] the embracing of a federal structure of government,[147] of parliamentarianism[148] and of the rule of law,[149] with its institutions, fundamental principles and rights,[150] and the separation of powers.[151] In this sense, all those provisions that somehow identify the form of government, the rules that govern the relationship between state and citizen, the basic structure of the state, including any form of

145 Cf. Schmitt, *Constitutional Theory*, 75–76. In this regard, cf. also Jeffrey Seitzer, "Carl Schmitt's Internal Critique of Liberal Constitutionalism: Verfassungslehre as a Response to the Weimar State Crisis," in Law as Politics: Carl Schmitt's Critique of Liberalism, ed. David Dyzenhaus (Durham: Duke University Press, 1998), 289–90. Cf. whole essay by Seitzer for a comprehensive discussion on Schmitt's substantive constitutional theory (*Verfassungslehre*) as a response to the Weimar State Crisis.

146 For example, see Art. 1: '(1) The German Reich is a republic. (2) State authority derives from the people.' See also partly, for example, the Preamble: 'The German people [...] has adapted this constitution.'

147 For example, see Art. 2: '(1) State territory of the Reich is composed of the territories of the German states. (2) Other areas may be included in the Reich, if their population desires in exercise of its right of self-determination.' See also, for example, Article 14: 'Reich laws are executed by state authorities, inasfar Reich laws do not specify otherwise.' Or Article 17(1) Phrase 1, for example: '(1) Every state must have the constitution of a free state.'

148 See, for instance, Article 20: 'The Reichstag is composed by the representatives elected by the German people.'

149 See, for instance, Art. 102: 'Judges are independent and subject only to the law.'

150 See, for example, Art. 17(1) Phrase 2: 'State parliament must be elected in a general, equal, immediate and secret ballot, in which all Reich German men and women participate, according to the principles of representative election.' See also an extensive list of articles (109–165) under the Section labelled 'Basic Rights and Obligations of the Germans'.

151 Schmitt, *Constitutional Theory*, 77–79.

decentralization, and other fundamental principles of a constitutional order, are what Schmitt would label as material, or fundamental.[152]

All in all, Schmitt alleged that the distinction between 'constitutional laws' (Schmitt's formal constitution) and 'constitution' (Schmitt's material constitution) had direct legal implications and was not a mere categorization of constitutions. In his 'decisionistic' view, Schmitt argued that the formal constitution could be legally amended, whereas modifying one of these fundamental political decisions, which formed the material constitution, could not be achieved by basic legal and already constituted means, but rather by an extra-constitutional power, the 'constituent power'.[153] These fundamental elements are for Schmitt 'the substance of the constitution',[154] and as such, the entire hierarchy of the legal order needs to be consistent with them and is thus built upon them.[155] This is why he differentiated the constituent power with the power to amend the constitutional laws. Under this view, when there is a change in these fundamental decisions, it is incorrect to speak about constitutional reform,

152 ibid., 77–78. In the context of a written constitution, these provisions are what Schmitt defines as fundamental political decisions, and are those which can usually be recognised in the constitutional text in those articles that refer to the basic structure of government, but also in the preamble. Schmitt insists that preambles frequently contain clear statements of such decision by the constituent power (which in a modern democracy would be directly or indirectly the people) and should therefore not be mistaken as simple proclamations. This, unlike Kelsen, who saw preambles as having a mere 'ideological rather than juristic character'. Kelsen, General Theory of Law and State, 260–61. Not all constitutions include unamendable provisions such as eternity clauses. In order to fill that void, some courts have developed the 'doctrine of implicit limits to constitutional reform'. '[T]he idea is that even in the absence of unamendable constitutional clauses, there are certain constitutional changes that are out of the scope of the amending power.' Joel Colón-Ríos, "Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America," Victoria University of Wellington Law Review 44, no. 3 (2013): 521. In this sense, for instance, both the Supreme Court of India and the Supreme Court of Belize attributed an important role to the preamble when adopting the similar 'doctrine of the basic structure'. For both cases of India and Belize, see also Supreme Court of India, *Kesavananda Bharati Sripadagalvaru and Others v. State of Kerala and Anr.* (1973) 4 SCC 225: AIR 1973 SC 1461 and Supreme Court of Belize, *The British Caribbean Bank Limited v. Attorney General of Belize*, Claim No. 597 of 2011; [2012] CCJ 1 (AJ) (R), 50. See more on the subject and both the doctrine of the basic structure and the doctrine of implicit limits to constitutional reform' at ibid., passim.

153 Schmitt, *Constitutional Theory*, 150.

154 ibid 78

155 Colón-Ríos, 57–59.

but about constitution-making, and specifically about the creation of a new and different constitution.

Hence, Schmitt shapes the idea of constitutional norms not having the same hierarchy within the same constitution. In his constitutional theory, he thus creates the peculiar disjunction between form and substance, making it a genuine assist, in my opinion, to identify and recognize constitutional transitions. In practice, what the content of the material constitution is, remains often unclear. As Colón-Ríos points out:

> 'Schmid and Beaud transformed this problem into one of constitutional interpretation [...]. That solution may seem unsatisfying since, rather than solving the problem, it merely displaces it to the realm of political and legal argumentation. But there is hardly any other choice [...].'[156]

Thus, the initial question stands: when is a new constitutional order born? Under Colón-Ríos' approach, one is required to rely upon the notion of Schmitt's (material) constitution in order to identify and capture (also) all those scenarios in which, in absence of a break in the chain of validity, a new constitutional order has emerged. This is the case when a fundamental change of the previous constitution has taken place, which would correspond to a change in the material constitution. This reasoning sees as transition any constitutional change that suppresses or replaces constitutional elements that, given their significance, are considered untouchable. You change those, regardless of how the alteration takes place, a new and different constitutional order is born, and instead of a mere constitutional amendment, we would talk about constitutional transition. Instead, when the change affects the non-material aspects of a constitution, then no fundamental change is in sight and, accordingly no constitutional transition.[157]

This approach helps capture those scenarios which were described above, i. e., those in which Kelsen's the theory of the basic norm is unable to help us. In sum, a constitutional transition occurs when the basic norm of a constitutional order is replaced or, in any case, when a fundamental element of the same is altered, regardless of how that alteration befalls.

156 Colón-Ríos, 61. See also Beaud, 345.
157 Colón-Ríos, 57 – 59.

C. Constitutional Transitions and Constitution-Making

Schmitt's notion of material constitution facilitates the identification of constitutional transitions in those situations where Kelsen's theory of the basic norm fails to provide a clear answer. The theory of the basic norm also fails in telling us *how* and by *who* a constitutional transition should take place. From its perspective, 'the identity of the constituent power or the type of processes through which a "historically first constitution is created" is irrelevant'.[158] As so far explained, even Schmitt's approach does not provide any guidance about the sort of constitution-making form that takes place in the case of a transition. We saw how a constitutional transition takes place when there is a fundamental change to the constitution, irrelevant of *who* changes it.[159] It could be a new dictatorship, as well as a democratic constituent assembly. So, even though this notion facilitates the identification of a constitutional transition, it is somehow 'blind' as to *how* it happens. Therefore, whilst the question of *legal continuity/discontinuity* has been answered, the question of *legitimacy* is thus raised. In the milieu of massive forces tugging at the string of constitutional law, the legitimacy of constitution-making and the institutional foundation of the state provided for by constitutions quickly becomes a matter of concern. Like any other legal norm, a constitution owes its effectiveness to the fact that it is adopted and operated with authority. Authority can effectively be exercised if it is legitimate. What such legitimation is based upon will be the object of the next sections, but we can anticipate that it is based upon a sufficient degree of acceptance by the people and democratic pedigree.[160]

After answering the question of *legitimacy*, its interrelation with the question of the *legal continuity/discontinuity* results in a series of possible forms of constitution-making. But before, why is it important to answer the question of legitimacy? That is, why is it important to look at constitution-making form? Since this thesis targets transitions towards constitutionalism, and given that one of the core elements of

158 ibid., 62.

159 We will see that Schmitt has however an opinion on who it should be.

160 François Venter, "Constitution Making and Legitimacy of the Constitution," in *National Constitutions in the Era of Integration*, ed. Antero Jyränki (The Hague: Kluwer Law International, 1999), 13.

constitutionalism is democracy, it is more than coherent that a constitutional transition, to be legitimate, should (at least) be democratic and democratically made.

I. Sovereignty and Constituent Power, the Paradox of Constitutionalism, and Legitimacy

1. Sovereignty and Constituent Power

In order to fill the theoretical loophole left by both Kelsen's and Schmitt's notions, Colón-Ríos believes that one has to understand constitutional transitions 'as exercises of an ultimate constitution-making faculty'.[161] In other words, one needs to analyze constitutional transitions in light of the theory of the constituent power, which 'supposes that in every constitutional order, there is an unlimited constitution-making entity'.[162]Constituent power means constitution-making power, as in the source of those fundamental provisions that we call constitution. The differentiation between constituent [*pouvoir constituant*] and constituted [*pouvoirs constitués*] powers was first forged by Emmanuel Sieyès during the French Revolution:[163]

- According to Sieyès, the constituent power is the power that can always change established constitutional orders, and as such has unlimited power and cannot be restricted by any form of positive law, not even constitutional law. It follows that the constituent power, in Sieyès view, remains in the state of nature, that is that it does not require any regulation or anything whatsoever, but its own existence, to be legal, since it is the source of all legality. The holder of such power, he maintains, is the 'nation', which he describes as 'a body of associates living under *common laws* and represented by the same *legislative assembly*, etc.'.[164]
- Instead, in crafting a new constitution, the constituent power allocates certain institutions the power to make ordinary legislation, to adjudicate

161 Colón-Ríos, 61.

162 ibid., 61 – 62.

163 For the entire work of Sieyès cf. Emmanuel J. Sieyès, What Is the Third Estate (New York: Praeger, 1963).

164 ibid., 58.

disputes, and more, but such institutions lack the ability to create (original) constitutional law.[165] 'They are constituted, rather than constituent, powers',[166] and therefore are always limited by the constitution, which grants them their existence.[167]

Sieyès notion of constituent power was shared and picked up by Schmitt, who further developed it. Schmitt saw the constituent power as 'the political will, whose power or authority is capable of making the concrete, comprehensive *decision* [emphasis added] over the type and form of political existence'.[168] In this regard, he rejected Kelsen's idea according to which a constitution rests on another norm (often the *Grundnorm*), the validity of which is presupposed. Instead, Schmitt maintains that a constitution rests solely on a sovereign decision.[169] Moreover for Schmitt, the constituent power remains in its state of nature and cannot be limited or regulated by law;[170] it survives alongside and above the Constitution.[171]

165 However, Arato stresses that '[w]e have long assumed that constitutions can be made by extraordinary or ordinary powers, by the pouvoir constituant or by various pouvoirs constitués. In the latter case, [...] the main role will be played by legislative assemblies, or by powerful executives who can manipulate assemblies, or even bypass them through plebiscites. While especially in common law countries the courts certainly do play a major role in shaping the constitution [...], constitutional courts are supposed to be irrelevant, for almost logical reasons, to the original establishment of a constitution. This is so because within any plausible scheme of the modern separation of powers courts can play their constituent role only under the guise of adjudication or interpretation. When there is nothing to interpret because the old constitution is dead and the new one has not been created, constitutional courts have nothing to do, and indeed their existence becomes temporarily questionable.' See Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 79.

166 Colón-Ríos, 61–62. For a longer discussion on the theory of the constituent power cf. Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power (London, New York: Routledge, 2012), 79–101.

167 For instance, ordinary laws adopted by the legislature must be drafted and adopted in accordance with the prescribed procedure of the constitution. Cf. "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia," 366.

168 Schmitt, *Constitutional Theory*, 125.

169 Schmitt based the validity of a constitution 'by virtue of the existing political will of that which establishes it'. See ibid., 76.

170 Cf. Ibid., 132. This meant, in Schmitt's view, that as such the constituent power can neither be delegated, nor the ways it is initiated prescribed, in any way whatsoever. This, of course, does not sit comfortably with liberal constitutionalism, which has at one of its main aims the domestication of the constituent power and its channeling through an ordinary amendment procedure.

The bearer of the constituent power (in a democracy, the people)[172] can determine or adapt its form of political existence, at any time, whenever it decides such change is necessary, even after the Constitution is already in place.[173]

Despite all of this, Schmitt understood that even though the constituent power could not be limited by any law or institution, the 'execution and formulation' of the said decision of the people required some sort of organization and procedure.[174] Without any organization or some sort of procedure as to how the constituent power should be executed, Colón-Ríos maintains that the people would remain in a state of chaos, unable to transform its political decision into actual constitutional law.[175] This acknowledges somehow the idea of *normativism* of liberal constitutionalism, but probably for different reasons:

171 ibid., 125–26.

172 In his important work, *Constitutional Theory*, Schmitt departs from his monarchical view under which he appeared to operate in his *Political Theology*. He shifts towards operating with the idea that the people are the legitimate subject of constituent power. Cf. *Political Theology: Four Chapters on the Concept of Sovereignty* [Politische Theologie: Vier Kapitel zur Lehre von der Souveränität] (London: MIT Press, 1985); *Constitutional Theory*, 126–28, 255–79.

173 Latin American courts are known to often discuss in detail the theory of constituent power, and even also to consciously adopt Schmitt's conception of constituent power as surviving even once the Constitution has been adapted. Jurisprudence from Venezuela and Colombia suggest that Schmitt's theory of constituent power should not be summarily rejected because of its populist connotation. In Venezuela, the Supreme Court of Justice, in Supreme Court of Justice of the Republic of Venezuela [*Corte Suprema de Justicia de la República de Venezuela*], Political-Administrative Chamber [*Sala político-administrativa*], Decision No. 17 (January 19, 1999), declared that 'the people' were not bound by the amendment procedure included in the constitution. Such procedure only applied to Congress in the exercise of the ordinary power of constitutional reform, and the people could thus change the constitution through other, constitutionally unspecified procedures. In the Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision C-551/03 (July 9, 2003), ruled that the constituted powers could not operate under the constitution's amendment procedure in order to introduce changes, which are so fundamental that they amount to the adoption of a new constitution. This could only be done by the bearer of the constituent power. Colón-Ríos, "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia," 367.

174 Cf. Schmitt, *Constitutional Theory*, 132, 38. See also Colón-Ríos, "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia," 367.

175 Cf. "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia," 367.

– On the one hand, Schmitt sees the regulation of the constituent power a practical necessity, but wants to maintain the idea alive that the sovereign can always revive it in all its power whenever it deems fit.
– On the other hand, liberal constitutionalism has the explicit objective to permanently tame such constituent power.[176]

In the context of democracy, and depending upon the context, this translation of the political will of the constituent power into constitutional law, takes on different forms and each form bears different risks, as legitimacy might get spilled in the process.[177] No matter what form it

176 William E. Scheuerman, "Carl Schmitt's Critique of Liberal Constitutionalism," *The Review of Politics* 58, no. 2 (1996): 301, 05. Liberal constitutional theory assumes that the unregulated original *pouvoir constituant* can be somehow absorbed or replaced by procedures and institutions of the *pouvoir constitué*, that is the resulting constitutional system. Of course, from a Schmittian perspective, one deems this to be incoherent. If one recognizes the constituent power to be all-powerful, inalienable and indivisibile, then the liberal attempt to absorb it into 'normal' liberal politics is in fact incoherent. To permanently constrain the *pouvoir constituant* with constitutioanl rules and procedures would deprive it of the essence that made it the *pouvoir constituant* in the first place. According to Schmitt, the constituant subject survives in its natural form even after the act of constituting is complete. Thus, the all-powerful subject of every liberal constitutional democracy, the people, continues to exist above and beyond liberal constitutionalism's legal and institutional system. In this sense, the *pouvoir constituant* makes use of normativistic liberal institutional devices to come to life, but it can also rightfully discard them whenever it deems fit. Liberal procedures and institutions are mere instruments of the constituent power, and therefore they unavoidably lack the perpetuity liberals attribute to them. The original constituent subject is not to be found in the halls of ordinary legal institutions and it cannot be identified with constitutional or statutory rules and procedures that it may (momentarily) have decided to acknowledge. Even a legally ordained constitutional convention or constituent assembly remains, in a way, a inadequate expression of the constituent power's true nature unless the possibility to revive such power at will has been acknowledged. Cf. Ibid., 310–11. In sum, Schmitt has a completely authoritarian and puplistic idea of the matter. For him, the natural form of the direct expression of a people's will, is through an act of acclamation, which is assembled multitude's declaration of their consent or their disapproval. Cf. Schmitt, *Constitutional Theory*, 131.

177 For instance, in the case of a complete rupture of legality and legitimacy (that is, a revolution), the constitution-making paradigm would be the one of the Constituent Assembly, who then writes a constitution. However, in order to be fully representative of the constituent power, it needs to be wholly democratically elected, otherwise it would lose in its legitimacy. However, as Arato argues, there is one form which would theoretically solve this legitimacy problem (called paradox of constitutionalism, as I will explain later) and it is what he calls the round-table-led regime change, or two-stage

takes, in the case of, for example, a constituent assembly, it would act as the sovereign even though it is not the sovereign itself, but a mere representation of it. In this sense, it is bound to act in 'the name of and under commission from the people, which can at any time decommission its agents through a political act.'[178] However, exactly this statement and the friction between the base of Schmitt's theory of constituent power and liberal constitutionalism introduce the paradox of constitutionalism, the clarification of which follows.

It is not my intention here to express myself on where I position myself on the axis between Schmitt's authoritarian notion of constituent power and liberal constitutionalism; the one sees the constituent power in its all-powerful natural form and the other represents the idea of domesticating it. Depending upon the context and the specific case, how and how tight such domestication happens is here irrelevant. What is important is that its domestication is required, and therefore constitutionalism necessary.

2. The Paradox of Constitutionalism and the Legitimacy Question

The question that modern theories of legitimacy try to answer, and thus the starting point, was originally asked by Rousseau in his work *The Social Contract:* 'If men are born free, what can justify their chains?'[179] In other words, Rousseau's question reflects the 'paradox of constitutionalism', the answer of which varies from author to author and tries to explain the legitimacy of the constituent power.

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constitution-making process. Cf. Arato, Post Sovereign Constitution Making: Learning and Legitimacy, 1–13.

178 Schmitt, *Constitutional Theory*, 110.

179 See Bodansky and Benn paraphrasing Rousseau's famous question '*L'homme est né libre et partout il est dans les fers. Tel se croit le maître des autres, qui ne laisse pas d'être plus esclave qu'eux.* [...] *Qu'est-ce qui peut le rendre légitime ?*' (English: 'Man is born free but everywhere he is in chains. Here's one who thinks he is the master of others, yet he is more enslaved than they are. [...] What can make it legitimate?') to be found inter alia in Jean-Jacques Rousseau, Contrat Social Ou Principes Du Droit Politique (Paris: Librairie Garnier Frères, 1762), 236. Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?," American Journal of International Law 93, no. 3 (1999): 596; Stanley I. Benn, "Authority," in The Encyclopedia of Phlosophy, ed. Paul Edwards (New York, London: Macmillan Publishers and The Free Press, 1967), 215.

Modern constitutionalism has at its core a paradox between the people as sovereign (that is the constituent power) and the constitution, in the sense that constitutions are the creation of the people, yet, at the same time, the people are limited by it.[180] The constituent power (i. e. the extra-constitutional actor; 'the people' in a democratic context)[181] as source of the constitutional order, gains its identity and ability to act only through ordinary law, that is a constituted process or regime. This even though it is understood commonly as being 'sovereign' in the traditional sense of being unlimited and in the state of nature. The solution to this paradox would answer the question; what would be the form of constitution-making that allows the constituent power to be the least limited? If the only actor legitimated to write the constitution is the constituent power – the people – then what is the form of constitution-making that allows for the highest level of legitimacy to be generated? For Arato, such constitution-making form would be the so-called round-table-led one, which I will expound in a second moment.[182] But first, what is legitimacy and what does it mean to 'generate legitimacy'?

Constituent power has an important connection to legitimacy, which is however a highly debated concept and difficult to define. Even in order to define it for the modest purposes of this thesis has been quite the challenge. According to Zelditch, theories of legitimacy span 24 centuries, starting with Thucydides' history of the Peloponnesian war.[183] Yet before going any further, I need clarify that when I talk about legitimacy, I intend what is regularly said to be 'political' legitimacy, that is legitimacy

180 For more on the paradox of constitutionalism cf. Martin Loughlin and Neil Walker, "Introduction," in The Paradox of Constitutionalism: Constituent Power and Constitutional Reform, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007). For a discussion on the topic cf. Arato, Post Sovereign Constitution Making: Learning and Legitimacy, 1–10. As even Ulrich Preuss maintains, in the traditional liberal conception, 'the constitution is the final act of the revolution [...] by making a constitution, the revolutionary forces are digging their own graves'. See Ulrich K. Preuss, "Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution," *Cardozo Law Review* 14, no. 3–4 (1993): 641.

181 Which is the only context this thesis considers.

182 Cf. Arato, Post Sovereign Constitution Making: Learning and Legitimacy, 10–13.

183 Morris Zelditch, "Theories of Legitimacy," in The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations, ed. John T. Jost and Brenda Major (New York: Cambridge University Press, 2001).

as being about the justification of authority.[184] Under this view, the concept of legitimacy is not about the procedure that a constitution establishes for law-making, but rather the process it establishes for its own modification.[185] In its natural state, the activity of the constituent power of creating a constitution takes place in an extra-constitutional terrain, that is there is obviously no constitutional order that limits the constitution-making process. Therefore, the activity of the constituent power (as well as its identity) can only be judged in the political sphere. In other words, such activity is either legitimate or illegitimate. What legitimacy is, follows.[186]

Rousseau might have been among the first to raise the question of legitimacy addressed to all political formations and regimes.[187] Legitimacy, in a political dimension, can be seen as a contrary to tyranny. Usurpation of monarchical powers was one of the meanings of tyranny for the Ancient Greeks and Romans, and today you could add, for example, the ruling against the law, as well as the rule in interest of the tyrant instead of in the common interest. His answer to his statement, or question, is thus well known: all the classical forms of government can be legitimate if resting on the foundations of popular sovereignty understood as democratic legislative power. This was a new principle of 'normative' legitimacy. Despite the efforts of American, French and Latin American revolutionaries, the principle of normative legitimacy did not become universal at least not right away. Another equally important innovation stood in the way. The concept of legitimacy introduced by Talleyrand, at the Congress of Vienna. Talleyrand's principle of legitimacy was based upon the older dynastic idea of legitimacy and was thus less 'revolutionary' than Rousseau's idea, but at the same time extremely progressive. After Napoleon's abdication

184 In other words, political legitimacy fundamentally concerns why a government has the right to coercively impose and enforce laws, unlike 'legal legitimacy', which is the question of validity of a law. Under the view of legal legitimacy, a constitution would be considered legitimate if it was adopted according to previously established rules of constitutional amendment. Cf., for instance, Kelsen, "The Function of a Constitution."

185 Colón-Ríos, Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power, 9.

186 "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia," 370 ; Schmitt, *Constitutional Theory*, 138.

187 Before, God was seen mainly as the source of all legitimacy and manifested itself mostly in dynastic inheritance. Thus, religion stood at the base of political legitimacy. The great revolutions in America and in France, of course, put this idea under question.

and the restoration of the monarchy in France, the Congress of Vienna[188] demanded that King Louis XVIII bring in a constitution of some sort, the *Charte Constitutionnelle* of 1814. The *Charte Constitutionnelle* basically shifted the basis of monarchical legitimacy from 'tradition' to 'law'.[189] Monarchical constitutionalism was probably a suitable compromise to the political needs of that time.[190] Compromise, however, implied that the future monarchical government had to be limited and moderated. The framework within which monarchical power should have been exercised was strongly influenced by Talleyrand's final report of the Congress of Vienna to Louis XVIII. As mentioned, he still based his idea of legitimacy upon the old dynasty concept, with usurpation as its contrary. Yet this time, new meanings were involved. On the one hand, he stressed that it had to be accepted that the nature of dynastic legitimacy had changed and could no longer be based upon religion in an age when religious sentiment had been dramatically weakened. On the other hand, restoration could work, as far as Talleyrand was concerned, only with the support of what he called public opinion. Thus, legitimacy was based upon basically 'belief' in legitimacy. This belief according to Talleyrand is not a one-time thing, as must thus be renewed with important concessions (mainly through constitutions and representative bodies). With Talleyrand, the question of legitimacy at the Congress of Vienna, had finally become an international issue and was contingent on the

188 The Congress of Vienna was a meeting of ambassadors of European states with the objective of providing a long-term peace plan for Europe by settling critical issues arisen from the French Revolutionary Wars and the Napoleonic Wars. The main goal was not simply to restore old boundaries, but to resize the main powers, so that they could balance each other and remain at peace.

189 Markus J. Prutsch, "'Monarchical Constitutionalism' in Post-Napoleonic Europe," in *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences*, ed. Kelly L. Grotke and Markus J. Prutsch (Oxford: Oxford University Press, 2014), 70–74.

190 For Chateaubriand, who thought that the return to the Ancien Régime was a high-risk due probably to the revolutionary spirit of the population, it was sufficiently suitable to satisfy both social demands and safeguard the essence of the monarchy: '*Toutes les bases d'une liberté raisonnable y sont posées; et les principes républicains s'y trouvent si bien combinés, qu'ils y servent à la force et à la grandeur de la monarchie.*' (English: All the foundations of reasonable freedom are laid; and the republican principles are so well combined that they serve the strength and grandeur of the monarchy). See François-René de Chateaubriand, Réflexions Politiques Sur Quelques Écrits Du Jour Et Sur Les Intérêts De Tous Les Français (Paris: Le Normant, 1814), 69.

recognition of other legitimate powers. Talleyrand's principle of legitimacy was thus sociological, as against Rousseau's normative concept.

Both principles of legitimacy have been further developed by several prominent authors;[191] however, for the purposes of this thesis, their basic meaning is briefly laid out:[192]

– On the one hand, Rousseau's principle of normative legitimacy is generally assumed to be popular sovereignty.[193] Normative legitimacy is a concept closely linked to the process of constitution-making, that is allowing different actors and groups to participate. But why? Since the idea of popular sovereignty has one thing in common no matter which version, namely the claim that ultimately it is those subjected to the law who should also be its authors.[194] If it is the people who are reigned, then it should be the same people who should decide. In a way, in this sense, the concept of normative legitimacy takes on a veritable ethical dimension, rather than sociological.
  This is, by and large, what Colón-Ríos defines as 'democratic' legitimacy. Of course, there are several degrees of democracy, but the concept of legitimacy as a democratic notion connects to the idea of constitution-making and constituent power, and as such an integrated process of

191 As for the principle of normative legitimacy cf., inter alia, Colón-Ríos, Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power; John A. Simmons, "Justification and Legitimacy," Ethics 109, no. 4 (1999); Justification and Legitimacy: Essays on Rights and Obligations (Cambridge: Cambridge University Press, 2000). As for the principle of sociological legitimacy instead cf., inter alia, David Beetham, The Legitimation of Power, 2 ed. (Basingstoke: Palgrave Macmillan, 2013), 3–41; Max Weber, "The Profession and Vocation of Politics," in Weber: Political Writings, ed. Peter Lassman and Ronald Speirs (Cambridge: Cambridge University Press, 1994); Charles Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late-Twentieth Century Canada," in Constitutionalism, Citizenship and Society in Canada, ed. Alan Cairns and Cynthia Williams (Toronto: University of Toronto Press, 1994; reprint, C. Taylor, 'Alternative Future'. In Reconciling the Solitudes, edited by G. Laforest (Montreal: McGill, Queen's University Press 1993): 59–120).

192 Of course, both the normative and the sociological principles of legitimacy raise new definitional questions as of what, for example, is popular sovereignty, or what is meant with having the support of the people. Again, for the purposes of this thesis, there is no need to further specify these concepts. For a thorough explanation of these concepts see Arato, Post Sovereign Constitution Making: Learning and Legitimacy, passim.

193 ibid., 131.

194 ibid., 133–34.

constitution-making is only but the *minimum* condition to political legitimacy.[195] Beyond the recognition of fundamental rights of political participation, a democratic constitution should, for instance, guarantee democratic fundamental rights, such as the susceptibility to democratic re-constitution.[196] Colón-Ríos argues that in order to be 'democratically' legitimate, a constitution has to fulfill two conditions. On the one hand, 'a constitutional regime should have a democratic pedigree',[197] and, on the other hand, 'a constitutional regime must be susceptible to democratic re-constitution'.[198] However, in the end, it boils down to legitimacy being 'as democratic as possible'. Or at least, that is what I personally believe.[199]

195 That is to say that there are multiple political practices and institutional forms that can increase the political legitimacy of a constitutional order well above this minimum. One of these is the round table-led regime change. Colón-Ríos sees as a 'fully' democratically legitimate constitutional regime, one that 'would have originated in a democratic constitution-making act, one characterized by intense episodes of popular participation and by the absence of any external or internal limits on the content of the new constitution (other than those self-imposed by the constitution-maker, such as those limits based on a country's political culture). [...] However, most constitutional regimes [...] would not even come close to meeting the requirement of a democratic pedigree' See Colón-Ríos, Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power, 9.

196 There must be, for instance, some mechanisms in place that allow the polity to propose, deliberate and decide upon fundamental changes of the constitution, the possibility of electing the drafting assemblies, the public involvement in general, and all sustained by enforceable fundamental communication rights. In other words, the constitution to be democratically legitimate must provide for the means for the constituent power to reappear, after the constitution has been enacted, if the need be. Both democracy and constituent power negate themselves when the conditions that make them possible are violated or even non-existent. The entire process of constitution-making needs to be 'free and fair' in order to be considered legitimate, that is.

197 See above, fn. 195. For more on the first condition and the concept of democratic pedigree cf. Colón-Ríos, Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power, 115–16.

198 For more on the second condition cf. Ibid., 116–18.

199 Kalyvas goes even further than Colón-Ríos and goes as far as making 'legal validity' conditional on the democratic pedigree of a constitution. That is, for Kalyvas, if the constitution-making process fails to comply with the requirements of participation and inclusion, then the entire constitutional order is legally not valid. Cf. Andreas Kalyvas, "The Basic Norm and Democracy in Hans Kelsen's Legal and Political Theory," Philosophy and Social Criticism 32, no. 5 (2006); "Popular Sovereignty, Democracy, and the Constituent Power," Constellations 12, no. 2 (2005). Colón-Ríos, instead, maintains that in case these principles are not complied with the constitutional order would suffer from a

– On the other hand, the principle of sociological legitimacy is basically the longer-term support of social actors, of the people… the sovereign.[200] This sociological notion of legitimacy has in the present thesis, of course, to be seen as detached from the dynasty idea, and merely as the 'belief' of the people that a constitution is legitimate. Here, democratic legitimacy is just but a precondition of legitimacy as a whole. Legitimacy is mostly a sociological concept. One can state that legitimacy is when democracy is in the game, but eventually a polity can revolt against its own democratically elected government. In that moment, even if democratic, it loses its legitimacy.

However, it is easy to identify the mutuality of both concepts of legitimacy. The reality of things demonstrates how operating with both concepts of legitimacy is the best solution to Rousseau's constitutional paradox. Even Talleyrand pointed out that first one has to distinguish 'source' and 'exercise' of political power.[201] Legitimacy takes place in different spaces, and in a similar way, Grimm distinguishes between normative and empirical (*in casu* terminologically sociological) constitution. The normative legitimacy is fulfilled by the time of creating the constitution. Since the constitution was democratically drafted, it is accordingly normatively legitimate.[202] A normatively legitimate constitution has higher chances of being accepted by the population, and thus sociologically legitimate.[203] Therefore, a state (in its constitutional form) is legitimate if

deficit of democratic legitimacy, not of legal validity (which is another issue completely). Cf. Colón-Ríos, 62 – 63.

200 Venter, 21 – 22.

201 Prutsch, 76.

202 It is actually irrelevant what form of government has been decided for (monarchy, republic, etc.). The important point is how it was elected. Therefore, the normative legitimacy is interrelated strictly with the form of constitution-making, which has to necessarily be democratic.

203 Arato sees legitimacy generally as a mediating link between norm and fact, that is that it addresses the question whether a set of political decisions 'should be' (normative legitimacy) and 'are' (sociological legitimacy) considered adequately just. In this sense, popular sovereignty is foundational for all conceptions of constitutional transition that fall under the research scope of this thesis. Cf. Arato, Post Sovereign Constitution Making: Learning and Legitimacy, 130. This democratic ideal 'should be' and 'is' behind every constitutional transition, provided the constitutional transition is seen as in fact having per definition as main goal the establishment of constitutionalism. The combined solution, which Arato equally shares in its own way, originated in both the early and later work of Habermas and Lefort. Cf., for instance, Jürgen Habermas, Legitimation Crisis (Boston: Beacon Press, 1975), passim; Between Facts and Norms (Boston: The MIT Press,

perceived as being legitimate when its citizens treat it as properly holding (i. e. democratically elected) and exercising (i. e. respecting the fundamental and democratic rights) political power.[204] In other words, legitimacy derives from the popular perception that the elected regime abides by democratic principles while governing, and thus is legally accountable to them.[205]

Therefore, in order to reconnect both concepts of constituent power and legitimacy, in its contemporary formulation, the former is attributed to the nation, the people or the community, or better to all those who will become subject to the new constitutional order. Constituent power indicates a democratic constitution-making muscle. As such, in its popular and collective nature, it is incompatible, for instance, with imposed constitutions.[206] Not every constituent power is as such legitimate, yet since having an important connection to legitimacy it does, fittingly, also have a close link to democracy. However, democracy is only but one of the instituting elements of constitutionalism, which is the main goal of a constitutional transition. The modern political concept of constitutionalism establishes the law as supreme over the private will, by integrating rule of law, democracy, and limited government. Therefore, in a similar way as with the combination of the sociological and normative meaning of the

1992), passim; Claude Lefort, Democracy and Political Theory (Cambridge: Polity Press, 1988), 7–56. For Arato's solution cf. Arato, Post Sovereign Constitution Making: Learning and Legitimacy, passim.

204 So, why is a combination of both perspectives of legitimacy the best answer? If one considers legitimacy only from a normative point of view, then you could have absolutely acceptable democratically-made constitutions, which however do not have the support of those who are governed and therefore, theoretically, the need to adapt the constitution would be non-existent. Instead, if one would only consider legitimacy as a sociological concept, that is that the legitimacy of a constitution depends upon whether those who are governed (including the state institutions) assent to its terms, he would, for instance, identify as legitimate a constitution imposed by an external actor according to which a sole individual exercises unlimited power, as long as the 'relevant' group of citizens consents to its terms. Cf. Venter, 21.

205 Roger Charlton, Comparative Government (London: Longman, 1986), 23.

206 Colón-Ríos, Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power, 102. For a comprehensive work on the legitimacy of imposed constitutions cf. Richard Albert, Xenophon Contiades, and Alkmene Fotiadou, eds., The Law and Legitimacy of Imposed Constitutions (London: Routledge, 2018). For the case of Iraq in specific cf. Andrew Arato, Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq (New York: Columbia University Press, 2009).

link between democracy and constituent power, the political legitimacy of constitutionalism originates in the popular belief and acceptance that the actions of the government are legitimate because they abide by the constitution, which incorporates not only democracy, but also limited government and the rule of law.

Even after having seized the conceptual idea of constitutional transition, no indication is made as of how to differentiate a 'bad' from a 'good' constitutional transition. The question of legitimacy does not necessarily show us whether or not a constitutional transition takes place, but it helps to categorize said transitions as legitimate or not. In a way, it helps us distinguish an ethical 'good' from a 'bad' constitutional transition. In addition, it facilitates the identification of *who* is legitimated to create constitutional law, and accordingly *how* it should happen. The combined theory of legitimacy seems to require that any change that amounts to the birth of a new constitutional order must happen through a legitimate, thus democratic, procedure. From this perspective, a 'good' constitutional transition would have taken place. All other means for transitioning from one constitutional order to the other would be seen as unacceptable (political) practices, albeit constitutional transitions, nonetheless.

II. Types of Transition and Forms of Constitution-Making

After having seized the ethical and sociological question of who should be legitimated to make constitutional law and how, both concepts of legitimacy and legal continuity can be combined to distinguish different practices of constitution-making.[207] When we talk about constitutional transitions towards constitutionalism, we are talking about a process to instore or restore legitimacy. Therefore, constitution-making has to generate political legitimacy (or at least not damage it). As seen, not all forms of constitution-making spawn political legitimacy in the democratic sense explained above. However, this section tries to categorize those constitutional transitions, which fit the scope of the present research, that is those sensed to generate said democratic legitimacy.

207 This requires that we differentiate both concepts of legality and legitimacy, as seen in the previous section, and disregard Kelsen's view, which sees a fusion between both notions. Cf. Kelsen, General Theory of Law and State, passim.

Why is this form of constitution-making even relevant? The reason thereof is twofold:

– First, if we recall Schmitt's idea of constituent power, we will remember that the people are the unlimited source of constitutions, but also that such unlimited power can realistically not be implemented in its natural form unbound by any rules; it must be somehow channeled, organized and given some sort of procedure in order to use it. This is problematic, as in doing so, portions of democratic legitimacy are inevitably chipped off or, the other way around, it risks to not generate the level of democratic legitimacy that we seek. For instance, in the case of a revolution, where one side of a conflict wins and the other loses, the constituent power is likely channeled through a constituent assembly, which is likely to be elected by that part of the population who stands on the winning side. Not always 'all' the people are included in the constitution-making process; supporters of the old regime, as well as minorities are possibly left out. This is why the constitution-making form is intertwined with the generation of legitimacy. Different forms of constitution-making generate different levels of legitimacy.
– Second, the role of a constitutional court in a (normative) constitutional transition could differ depending on whether legality or legitimacy were ruptured in the process of transition.

The combination in a matrix of rupture and continuity with either legitimacy or legality reveals another intense subject of debate, that is whether constitutional transitions were veritable revolutions or simply reforms. Arato and Kis introduced a schema that tries to facilitate such reform-revolution dichotomy.[208]

208 For the main pieces on the scheme, cf. Arato, "Regime Change, Revolution, and Legitimacy."; Civil Society, Constitution, and Legitimacy (Lanham, Boulder, New York, Oxford: Rowman & Littlefield, 2000), Chapter 3; Post Sovereign Constitution Making: Learning and Legitimacy, 110, Table 2; Kis, passim; Arato, Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq, Chapter 1. For an earlier development, cf. "Forms of Constitution Making and Theories of Democracy," Cardozo Law Review 17 (1995).

Table III Major Types of Transition and Ideal Forms of Constitution-Making[209]

	Legitimacy continuous		**Legitimacy ruptured**
Legality continuous	Reform: *Turkey* Reiterated (normal) constitutional amendments. Major amendments or new constitution within same regime		Regime change with legal continuity: *South Africa, Hungary, Nepal* Roundtable (two-staged transition)
Legality ruptured	Type 1	'Revolutionary Reform': Constitutional Convention (*Colombia*)	Revolution: *Egypt, Tunisia* Constituent Assembly
	Type 2	(Self-) coup with plebiscitary legitimacy: Plebiscites	

Of course, this table is only an attempt to categorize types of transition and forms of constitution-making. 'In principle', Arato maintains, 'in a particular form of transition there can be ways of using any of the constitution-making methods'.[210] Here, with the help of this scheme, I only describe the ideal typical presentation of the four types of democratic change along with the relevant forms of constitution-making. Additionally, Arato himself reminds how, firstly, a process that starts one way can easily turn into another,[211] and secondly, classification as such is not always neat depending on the context.[212]

The identification with Kelsen's idea that legitimacy and legality are one would result in the existence of only two major types of democratic transition: reform and revolution. Instead, by differentiating between legality and legitimacy and combining them akin to Arato's scheme, offers two additional types of democratic transition with ideal corresponding

209 *Note:* This scheme uses the double polarity of legality and legitimacy, and continuity and rupture, to depict four different forms of democratic constitution-making. *For a thorough commentary of the table, see* Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford: Oxford University Press, 2016), 108–116. *Source:* See fn. 208

210 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 109.

211 Arato shows different examples for such situations. The first is the one of Latin America, in particular of Argentina in 1949 and Venezuela recently, where they started off as conventions and ended up as plebiscitary coups or as sovereign constituent assemblies (or both combined). Reforms too can fail and turn into round tables (for instance, South Africa), but also into revolutionary constituent processes, such as India or other post-colonial cases. See ibid., 110–11.

212 An example here would be Nepal, where there was a legal break, but the process of constitution-making belongs to the round table form. Ibid., 111.

forms of constitution-making: revolutionary reforms and regime changes without legality rupture.

1. Reform

Where legality and legitimacy are continuous, *reform* would be the topical type of democratic transition, which would take place according to established rules of change or amendment.[213] In this case, we would see the form of constitution-making as fundamental changes to the constitutional order acting up as a constitutional transition without a break of the chain of legality (according to the amendment rules of the current constitutional order) and with no rupture of democratic legitimacy (in countries where the constituted power was democratically established).[214] In other words, here, legal legitimacy suffices, although the use of such amendments rules for the replacement of the entire constitution, especially where such option is not provided for,[215] would raise both legality and legitimacy questions.[216]

The reform type of transition can be witnessed, for instance, in Turkey from 1983 until the present. Without going into details,[217] the current Constitution

213 ibid., 108.

214 Arato maintains that in a constitutional reform sovereign power can sometimes be incorporated in a single organ, which would however be determined by constitutional rules, which makes it thus legitimate. Cf. Ibid.

215 As in, for instance, Art. 146 *Grundgesetz* (English: Basic Law for the Federal Republic of Germany): '*Dieses Grundgesetz, das nach Vollendung der Einheit und Freiheit Deutschlands für das gesamte deutsche Volk gilt, verliert seine Gültigkeit an dem Tage, an dem eine Verfassung in Kraft tritt, die von dem deutschen Volke in freier Entscheidung beschlossen worden ist.*' (English: 'This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect').

216 Written constitutions and especially the differentiation between constituent and constituted powers were introduced to limit the ability of the incumbent government to change fundamental rules of the constitutional order. Cf. both the Supreme Court of India and the Supreme Court of Belize with regard to the 'doctrine of the basic structure', see fn. 152 above.

217 For a comprehensive case study of Turkey's ongoing constitutional reform and its categorization cf. Arato, Post Sovereign Constitution Making: Learning and Legitimacy, 223–65. For a useful insight of the role played by the Turkish Supreme Court during this time cf. Bâli. A lighter, yet straightforward, summary of Turkey's constitutional change can be found at Andrew Arato, "Ten Theses on Constitutional Change in Turkey," *Public Seminar*

of the Republic of Turkey of 1982 is no longer the same constitution ratified by popular referendum during the military junta of 1980–1983. In fact, sequential or reiterated sets of amendments produced a substantially new constitutional order or material constitution. Such reform took place in Turkey through several amendment rounds in 1987, 1995, 2001, 2004, 2010 and last but not least, 2017.[218] This last referendum, for instance, overwhelmingly empowers the office of president.[219] The victory of the 2017 referendum means that Turkey will shift to a presidential form of government from 2019. It is not just the transition from one form to another, which categorizes it already as a constitutional transition, but the way in which the entire reform process has been pursued and the tremendous powers the reform enjoins in one man that rings the alarm of fear that Turkey might be sliding to autocracy… democratically.[220] In sum, since 1983, the Justice and Development Party (AKP) has had a veritable 'reform agenda', which undermines several central elements of the first Turkish revolution in the 1920 s; for instance, secularism and democracy.

2. Revolution

Where both legality and legitimacy are ruptured, *revolution* is instead the key type of democratic change. Revolution commonly relies on sovereign constituent assemblies as a corresponding form of constitution-making process.[221] In other words, the people revolt and are able to overthrow the

(October 4, 2013), http://www.publicseminar.org/2013/10/10-theses-on-constitutional-change-in-turkey/ (accessed March 18, 2019).

218 For a thorough summary of constitution-making and reforms in Turkey until 2009 cf. Ömer Faruk Gençkaya and Ergun Özbudun, Democratization and the Politics of Constitution-Making in Turkey (Budapest: Central European University Press, 2009).

219 The office of Prime Minister, for instance, is abolished and the parliamentary system of government replaced by a presidential system. The president is granted greater powers, in particular over the Constitutional Court, the parliament and the Supreme Board of Judges and Prosecutors, the self-governing body of the Turkish judiciary. In fact, the new president can appoint ministers and senior officials, dissolve parliament, declare a state of emergency, issue decrees and appoint 12 out of 15 judges of the Constitutional Court. For more on the 2017 referendum cf. Muddassir Quamar, "The Turkish Referendum, 2017," Contemporary Review of the Middle East 4, no. 3 (2017).

220 This is the only reason Turkey is used as an example here. It is however evident that, in terms of democracy levels, Turkey is sliding backwards.

221 In the case of revolutions, unlike in the round table form of constitution-making, the sovereignty of constituent assemblies maintains its Schmittian sense, as *legibus solutus*,

old regime.[222] The next step would be to create a new constitution, which commonly happens through the form of a constituent assembly. This is because the old regime is overthrown and does not have a say anymore. A constituent assembly or constitutional assembly (for example, in South Africa) is a body of democratically elected representatives gathered specifically for the purpose of writing and adopting a constitution.[223] The constitution-making process in the aftermath of a revolution is a delicate issue, since there is a risk that liberating elites try to dominate the constituent process. Revolutions are not only triggered through civil war, but can also lead to new ones with at their core a veritable legitimacy contest.

Furthermore, in recent revolutions constitutional politics has become a central element of transitions, whether it is an externally imposed one[224] – as in Afghanistan and Iraq – or an entirely internal one – namely Tunisia, Egypt, Libya and Yemen.

3. Revolutionary Reform

Where legitimacy is continuous, yet legality is ruptured, the situation would be that one of a democratically elected government or executive seeking the drafting of a new constitutional order, for whatever reason. Therefrom we can find two different corresponding constellations: the republican subtype, which Ackerman properly called 'revolutionary reform'[225], and the plebiscitary subtype:

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that is without legal limitations and therefore outside and above the legal order. Cf. Arato, Post Sovereign Constitution Making: Learning and Legitimacy, 108.

222 The circumstances can be multiple: civil war, coup or even both. The old regime can be democratic or not, but the importance is that the sociological legitimacy is ruptured, that is the people do not support the regime anymore.

223 As mentioned, being a constitution the fundamental document constituting a state, it cannot be newly made or amended by ordinary legislative procedures. Instead, the constituent power, is usually channeled through a constituent assembly, which is usually set up for the specific purpose of drafting and adopting a constitution. Once the job is done, said assembly is dissolved. A constituent assembly is a form of representative democracy, yet it is commonly set up by the 'winning' side of the civil conflict, thus often raising legitimacy concerns.

224 Cf., for instance, Arato, Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq.

225 Cf. Bruce Ackerman, We the People: Transformations, vol. 2 (Cambridge, MA: Harvard University Press, 1998).

– Arato views the republican version as the only democratic one between both, which presupposes evidently the existence of a republican government and centers on the constitution-making form of constitutional conventions. In general, a constitutional convention is a gathering or assembly for the purpose of framing a new constitution or, revising or amending an existing one. Members of such convention are often, though not necessarily or wholly, elected by popular vote; they are sometimes also referred to as 'delegates'.[226] Instead, in the case of an entirely popularly-elected constitutional convention, we would be talking about a constituent assembly. In this sense, the constituent assembly is a subtype of a constitutional convention wholly elected by the people. In other words, all constituent assemblies are constitutional conventions, but not necessarily the other way around a constitutional convention is not necessarily a constituent assembly. The main example would be the one of the U.S. Federal Convention of 1787. Even though this Convention had the purpose to revise the league of states (a confederation with a weak central government) and first system of government under the Articles of Confederation,[227] the main intention of many promoters was to create a new government rather than adapt the existing one. The result of the Convention was the creation of the Constitution of the United States with a stronger national government. A further and indeed much more recent example is the one of Colombia in the 1990 s. To put it briefly, a series of assassinations, terrorist attacks and different deficiencies of the state in the late 80 s boosted popular demands for political and constitutional reform. In the face of extreme violence, these deficiencies merely shed more light on the country's already broken political institutions. However, one of the factors that rendered constitutional change difficult was that the 1886 Constitution could only be amended by the Congress. The people demanded the rupture of legality, however the government initially rejected the possibility to embark in a process for constitutional transition. However, a national popular movement, initiated by university students, pushed for the formation of a Constituent National

226 Henry Campbell Black, "Constitutional Convention," in Black's Law Dictionary (St. Paul, MN: West Publishing Co., 1910), 254.

227 'The name of the instrument embodying the compact made between the thirteen original states of the Union, before the adoption of the present constitution.' See "Articles of Confederation," in Black's Law Dictionary (St. Paul, MN: West Publishing Co., 1910), 91.

Assembly in order to resolve the constitutional crisis. More than 50% of the voters approved the 'Seventh Paper Ballot' and the president was forced by the Supreme Court to fulfill the popular mandate.

– The other subtype would generally be the self-coup (or commonly known as *autogolpe*)[228] with (often democratically disguised) plebiscitary legitimacy,[229] which however Arato does rightly not treat as a democratic transition.[230] Instead, this subtype is what he classifies as the populist authoritarian variant, in which 'invariably the president claims to be the incarnation of the people, a claim more or less plausible depending on the amount of empirical support behind the executive'.[231] Briefly, the problem lies in the instability of plebiscitary democratic support, which rests on momentary states of will, and the weakness of its representative capacity.

4. Round-Table Form

Finally, we have the constellation of a full break of legitimacy but with continuous legality. In this regard, Arato argues that this corresponds to

228 A self-coup is a category of putsch or coup d'état in which the chief executive of a nation himself, despite having come to power through a legitimate process, launches a coup in order to unlawfully (that is in some extra-constitutional way) assume extraordinary powers not granted under the constitution. It can involve suspending the nation's constitution, suspending civil courts and having the head of government assume dictatorial powers. A modern example of autogolpe can be found in 1959 in Indonesia when President Sukarno declared that the parliamentary constitution would be replaced by a long-defunct presidential constitution, through which he acquired additional presidential powers, and of course the title of President for life. Cf. Paul Brooker, *Non-Democratic Regimes*, 3rd ed. (New York: Palgrave Macmillan, 2014), 61–62; Bruce W. Farcau, *Coup: Tactics in the Seizure of Power* (Westport, CT: Praeger, 1994), 2.

229 Arato maintains that there are cases, such as Russia in 1993 or Venezuela in 1999, where both subtypes are difficult to differentiate. A process, which starts as deformed version of the convention, and ends up in plebiscitary self-coups. See Arato, Post Sovereign Constitution Making: Learning and Legitimacy, 109.

230 Cf. Ibid., 111–12. Many of these self-coups are democratically disguised personal dictatorships. They occur through small steps and sometimes even try to keep to the constitutional rules about democratic re-elections and terms of office. Eventually, of course, the re-election process is not democratic and involves no more than what Brooker calls 'semi-competitive' elections, which are elections or plebiscites constrained either by use of force or by the voters being given an unfair choice, as in Chile and Turkey in 1982. Cf. Brooker, 225–28.

231 Arato, Post Sovereign Constitution Making: Learning and Legitimacy, 109 fn. 8.

the one constitution-making form with the major legitimating effects mentioned above: the *round-table*-led *regime-change* model (also called *two-stage process* or *post sovereign paradigm*).[232] Ideally, it is a multi-stage, democratic form of constitution-making with round table or multi-party negotiations as its core, encompassing two constitutions (one *interim* and another one definitive) with free elections in between, and an overall enforcement through an apex court.

Generally, the round table model is the product of two movements: the reform and the revolution. In most historical cases,[233] an old regime in power loses its legitimacy (or simply never had one, but the people start to 'growl') and tries and yet fails to enact comprehensive reforms on its own. Almost every case is accompanied by a revolutionary democratic movement on the side,[234] demanding the election of democratic constituent assembly.[235] Ultimately, the old regime relents, and sits at the table with all other fractions when it comes to making a new constitution.

Spurred by recent governmental transitions from dictatorships to democratic institutions, in his book *Post Sovereign Constitution Making: Learning and Legitimacy*, Arato argues that this negotiated civil society-oriented solution has an affinity for a unique form of constitution making: the one that realizes the radical change of institutions without legal rupture. Arato presents a persuasive argument supporting this method as the preferred form for generating the best amount of legitimacy.[236] He sees this model as the constitution-making form 'par excellence, since, classically, the actors at the round-table forum represent a plurality of social interests and opinions rather than a unity, and they are more or less conscious of this fact'.[237] The legitimating effect here is at its apex, and to clarify this statement by using again Arato's words:

> '[t]he great advantage of post sovereign constitution making is that it de-dramatizes conceptions of the constituent power, linked to mythological and dangerous notions of total rupture and the full embodiment of the will of the people. [...] We can speak

232 ibid., 130.

233 Exceptions to this pattern all involve legal ruptures, such as in Iraq or Nepal. In other respects, however, the process belongs to the round table form.

234 Sometimes not strong enough – or fragmentated – to carry out a revolution.

235 Arato, Post Sovereign Constitution Making: Learning and Legitimacy, 113.

236 Civil Society, Constitution, and Legitimacy.

237 Post Sovereign Constitution Making: Learning and Legitimacy, 109.

> of post sovereign constitution making where an assembly is the main agent of the final constitutional design, but without claiming unlimited powers. [...] The central mark of what is called post sovereign constitution making here is operating under the constitutional amending rules of an interim constitution, or, when unavoidable, the amendment rules of an old regime whose fictional status is transformed in a constitutionalist direction.'[238]

It is clear that in comparison with the revolutionary constituent assembly, an agreement with the former regime reduces the extent of the break with the past. However it is questionable whether a revolution has then ever produced all the social and economic goals of justice and equality, or created additional and new situations of inequality and injustice. The simple fact that the revolutionary constituent assembly form is given unlimited constituent power, and thus does not have the obligation to put on the talking table the old form of life, results in great segment of the population (including people politically opposed to the old regime or even the majority) and risks being wholly left out of the new constitution-making process. This can easily lead to new forms of repression. Constituent assemblies can claim to be fully legitimate only if they are democratically elected by the people as a whole. The round table form, instead, avoids monopolization of the constituent power by limiting it through an interim constitution and produces different answers in each of its stages to the problem of legitimacy.[239]

All in all, the round-table model enables most parties to engage in a negotiated first-phase process in which they can agree on basic guarantees entrenched in an interim constitution.[240] A second-phase process allows the generation of the necessary democratic legitimacy through free

238 ibid., 91 – 92.

239 ibid., 120 – 21.

240 In South Africa, for instance, one of these guarantees was the organization of democratically-led elections of the constituent assembly (which were the combination of both the newly elected National Assembly and Senate). In South Africa, it was terminologically re-labeled 'constitutional' assembly instead of 'constituent' assembly; this rebranding of constituent assembly is however quite fortunate, as this concept takes on a different meaning depending on the model of constitution-making. In fact, unlike the one in the typical scenario of a revolution, the constitutional assembly of the round-table model is not sovereign, as it functions under predefined (interim) constitutional rules, which are not at its own disposition. As in South Africa, it is accountable for sticking to these rules during the constitution-making process to another institution from which it is sharply separated: the Constitutional Court. Ibid., 126.

elections of a constitutional assembly, which is tasked to draft a new constitution or re-draft the one proposed (*ad interim*) in the unelected negotiating instances.[241]

Some of the characteristics of the round table model date back to the American Revolution, some experiments in more recent French history (1945–46), and even the making of the German *Grundgesetz*. Years later, it was revived in a new manner in Spain in the 1970 s, and was practiced under severe limitations in Poland in 1989, and then more widely in Central Europe in the years of regime change between 1989 and 1990 (for instance, Bulgaria and Hungary), before it was finally perfected in the Republic of South Africa in the 1990 s.[242] The constitution-making process in South Africa too, as I will explain thoroughly later, emerged from the impossibility for the old regime to save their system and status through simple reform[243] and oppositional revolutionary movements unable to carry out a revolution.

Excluding what Arato calls the 'miracle' of Spain, as it had no negotiations but a monarch willing to unforcedly yield its power to the people after Franco's death, at least legally, South Africa, Bulgaria, and Poland can be considered successes with workable final constitutions,[244] whereas Czechoslovakia and the German Democratic Republic have seen utter failure. Arato judges Hungary, instead, as an imperfect realization of the round-table model. This, because the final stage of the process, not provided for in the *interim* Constitution, was not completed in a democratic process.[245]

Consequently, we see that the round table model is not new to (recent) history and can now count on veritable successes and failures. Some of its characteristics were already witnessed in past cases, but never had this model been perfected and included all of its elements in practice as in

241 Cf. Ibid., 113. This specific part was, for instance, the one not included in the American state-ratifying conventions forms of constitution-making.

242 "Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?," *South African Journal on Human Rights* 26, no. 1 (2010): 19–20.

243 Which were tried in the 1980 s.

244 In these three countries, a final step in the constitution-building process characterized by democratic elections of non-sovereign assemblies was successfully accomplished.

245 For more on the Hungarian failure at the round-table model cf. Arato, "Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?."

South Africa in the 1990 s. South Africa is the most complete and normatively indicative example of this paradigm. The clarification of the five characteristics, or conditions, that characterize the round table model follows:

1. The first element is a two-stage process with two constitutions, where the first (interim) constitution regulates and constrains the making of the second (definitive) one.[246] The presence of an *interim* constitution is the clearest evidence of the round-table constitution-making form.[247] Important is that in this constitution-making form, at least two instances play a fundamental role in the drafting process: the one instance that drafts the interim constitution (usually a round table made of the major political forces) and the other that drafts the final constitution[248] (necessarily a democratically elected body, not to be called *constituent* assembly in the revolutionary sense, but otherwise like in South Africa, *constitutional* assembly).[249] Of course, also here it cannot be claimed that the will of the sovereign people is represented in the most absolute sense. Yet in respect to other procedures, it attempts to maximize the inclusiveness of the people throughout the entire process, and not only through, for instance, a final referendum.[250]
2. The second element is round-table negotiations with the task of making the first (interim) constitution. The first element, the interim

246 ibid., 20, 23. This solution allows for a new provisional government to be created and combines it with the requirement of subjecting it to constitutional limitations. Ibid., 23.

247 A series of successful constitution-making processes in the history of the world, such as the US Federal Constitution, the German *Grundgesetz*, as well as the Constitution of the Fifth Republic of France, involved two constitutions. However, in these cases none of the 'first' constitutions, that is the Articles of Confederation, the Weimar Constitution or the Constitution of the Fourth Republic, were meant explicitly to be *ad interim*. At the same time, none of the final constitutions of these cases were made in accordance to the rules of amendment of their predecessors. Ibid.

248 In the case of the making of the US Federal Constitution, the process involved multiple actors (the Convention, Congress and the ratifying Conventions), but, for instance, the Convention could only accept or reject the draft. Ibid.

249 Constitutional assemblies in the round table model are different from the revolutionary constituent assemblies due to the limitations of the interim constitution to which they are subjected. Ibid., 25 – 26.

250 Here the people are present in a 'plural, complex and always limited way that has neither the possibility of the absolute no of the referendum, nor the unlimited constituent power incorporated in an assembly'. Ibid., 24.

constitution, facilitates subjecting the process of constitution-making to constitutionalism, but not with starting the process democratically (or at least somehow legitimately)[251] in those cases where there is no pre-existing democracy.[252] However this problem exists also in other cases, such as revolutions and reforms, where power cannot fully be legitimated by either the credits earned in a liberating struggle (revolution) or by adherence to (reform) procedures not meant to replace one constitution with another (or included in a constitution drafted by a polity which does not represent anymore the contemporary demographics). However, the round-table model minimizes the issue and 'becomes a veritable workshop that produces much of the legitimacy it lacks in the beginning.'[253] In other words, round-table negotiations are relatively inclusive; they cannot and do not claim electoral democratic legitimacy, as 'their legitimacy turns on multi-vocal or pluralistic civil society representativeness'.[254]

Round tables, however, do not draft the final constitution, unlike the drafting assemblies of the revolutionary models. Legally, they are but mere private gatherings with no legal status. They could maybe be compared to the drafting conventions, given the co-existence with the normal legislative body, which continues to operate parallelly. Still, they are not the makers of the final constitution. However, owing to their goal of generating the maximum of legitimacy, they are politically much stronger than the drafting conventions and given the role of the old regime in the negotiations, their agreements have way more weight than mere recommendations. The ruling parliaments that have to formally legalize the interim constitution and approve it, in order to maintain continuous legality, can normally not even make small changes to it.[255]

3. Since the round tables are not the ones that make the final constitution, the third element is indeed a democratically elected assembly in the

251 To have a first stage fully legitimate is never really feasible due to the context in which the country finds itself. Someone, unelected, at some point has to determine undemocratically, for example, how to start the constitution-making process (or even which form of constitution-making to use).

252 Arato, "Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?," 24–25.

253 ibid., 25.

254 ibid., 20–21.

255 ibid., 25.

drafting of the second and final constitution.[256] As mentioned, this assembly is different from the constituent assembly in the revolutionary sense, for it is not only limited by the rules of the interim constitution,[257] but also different from the mere ratifying role of the conventions (such as the American Convention of 1787–88, which could agree or reject, yet not contribute to the drafting process).[258] As such, these *constitutional* assemblies are not sovereign, as the *constituent* assemblies of the revolutionary model, but are meant to be elected constituted bodies with the sole purpose of drafting a new final constitution. Although they are constituted, they are meant to be more than simple ordinary parliaments, hence the apposite names, such as Grand National Assembly in Bulgaria, National Assembly in Poland and Constitutional Assembly in South Africa, or the unfortunate name of Constituent Assembly in Nepal.[259]

4. Another typical element of the round table model is an emphasis on legal continuity throughout the transition. This continuity is safeguarded due to the central role played by the legislative institutions of the old regime, which are expected to ratify the initial changes and the interim constitution according to the old amendment rules.[260] No legal break between the old and the new is thus involved, and therefore we can talk about a revolutionary change through legal means. However, an important reservation needs to be made. The amendment rule used is the one of the old regime's formal constitutions. The preserved legality is fictional, or rather created *ad hoc*, since old regimes tend to be dictatorships with written constitutions constantly disregarded and thus uphold by a ritualized legality.[261]
5. Finally, the last but no less important element of this model: the significant role of apex courts, usually created by the interim document, in monitoring and policing the procedural limitations stipulated in the first (interim) constitution.[262] As we will see, in South Africa the

256 ibid., 21, 25–26.
257 These limitations can vary. They can include voting rules, the composition of the constitutional assembly, the length of time of the process, and more. Ibid., 25–26.
258 ibid., 21.
259 ibid., 27.
260 ibid., 21.
261 ibid., 28.
262 ibid., 21.

> Constitutional Court was also tasked to police the substantive limitations of the constitution-making process. The initial refusal of the CCZA to certify the definitive Constitution was in line with the idea of empowering the constitutional court. It is clear how legal continuity adopts a much less significant position in the whole process if not convoyed by the apposite enforcement mechanism for the interim and final constitutions.[263] In this round table model, instead the apex court is instituted by the first (interim) constitution and controls the rest of the constitution-making process, including logically the non-sovereign constitutional assembly.[264]

So, of course, the first stage of the round-table form of constitution-making shows legitimation problems, as such a first step is characterized by unelected leaders (or elites) negotiating and bargaining with representatives of authoritarian regimes.[265] In the situation where the first stage produces already a constitution, they should have an *interim* status for the lack of democratic legitimacy mentioned.[266] It follows that a second stage is needed in order to generate such popular legitimacy, specifically through the adoption of a definitive constitution. This second stage took place in Bulgaria, Poland, and South Africa, yet it failed to happen in Hungary in an attempt in 1995–97. Arato argues that '[w]hile constitutional development in that country was in the end completed [...] this was done in 2011 by violating all the normative desiderata of the round-table-led paradigm.'[267] Therefore, just as revolutions have been historically confronted with counter revolutions, round-table-led regime changes also has witnessed a counter process, showing that even the

263 ibid., 29. As Arato maintained, '[c]onstitutional courts played no role in the classical democratic models of constitution-making. In the classical models, French or American, constitutional courts should and, of course, do not contribute to original constitution-making. It is the role of the latter to set up the former, even if some primitive forerunner tribunal already existed.' ibid., 29–30.

264 ibid., 30.

265 *Post Sovereign Constitution Making: Learning and Legitimacy*, 162.

266 In Hungary and South Africa, against the will of the authoritarian and radical oppositions, the inherited authoritarian constitutions were entirely replaced through the round table constitution-making form. In order to deal with the legitimacy issue, at least in part, both new constitutions were labeled as *interim*, with the implicit, yet clear, promise to adopt a final definitive constitution in legal continuity with the *interim* document. Between the two cases, the promise was kept only in South Africa. Ibid., 163.

267 ibid., 301–02. For a good summary of the semi-failure of Hungary cf. "Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?."

completion of both stages in the process is no assurance of the success of the normative constitutional transition, or as Arato himself puts it 'against unlearning what has been learned'.[268] Even South Africa's results of the negotiated process are frequently challenged and will be for a long time.

268 *Post Sovereign Constitution Making: Learning and Legitimacy*, 301–02.

Chapter 2: Defining the Goal of a Constitutional Transition

Of course, transiting towards a new normative constitutional system means more than just drafting a new constitutional dispensation; it means transiting 'from one condition [...] to another; change'[269]. The launch pad from which the definition of constitutional transition took off above relied on the transiting from one condition to another: but what is this 'condition'? What is the country transiting from, and where to? In other words, what are the goals of the constitutional transition? The role of courts during a transition can only be successfully described if the purpose of the transition (or better if an end state in which courts do have a permanent place) is clear. The behavior of any entity during the transitory period is contingent on what it tries to reach. It is important to fix what the transition tries to achieve in order to assess whether or not the court has helped facilitate such process or not.

Here also, Grimm's differentiation of constitution helps define the goals of a constitutional transition and the constitutional transformation. 'Going from one condition to another' includes both sides of the medal, constitutional law and constitutional reality. The 'condition' includes the final social transformation sought for by the constitution. Therefore, it is important to clarify which side the research looks at. Social transformation takes place in the constitutional reality. However, in order to achieve such a developmental goal, a country requires the legal and institutional framework to do so: the normative constitution. Therefore, the first step is, in any case, the creation of such basic framework. The constitutional transition needs to first have goals relating to the normative constitution, which will facilitate eventually its developmental and transformative ambitions. As said, apex courts can play a role in reaching both roles. The present thesis focuses exclusively on the role courts fulfil in facilitating the establishment of the basic framework of the normative constitution, without which no social transformation can happen anyways.

269 "Transition." Oxford English Dictionary. Accessed February 21, 2019. http://www.oed.com/view/Entry/204815?rskey=YF5boD&result=1&isAdvanced=false#eid.

A. The Main Purpose: Peace

All in all, if we take a step back, the object of the constitutional transition is often a war-torn chaotic country transiting towards stability and peace. Ideally and logically, peace is (or should be) the ultimate and overall goal. Peacebuilding, however, is not an easy task. The very nature of the conflict also determines the nature of peace. This means that the factors that produce and sustain the conflict will directly impact the ensuing peace settlement, that is if the reason for conflict was a strongly centralized autocratic regime, then the criteria for peace will likely be democracy and decentralization. However, no one size fits all and each case is different. Thus, it is not easy to generalize the topic of peacebuilding without including case-to-case variations.

Peace is a concept that roughly defines the period of time during which a country is free from war or disturbance. Notwithstanding, it is not something that can be achieved from one day to another; it entails a veritable process, which might start with the negotiations of a cease-fire and the enactment of a new constitution. In its traits, it coincides with the period during which a constitutional transition takes place; specially, in the cases where constitution-making is the main tool for peacebuilding. In such cases, the one is contingent on the other; peace is attained through constitutional transition and constitutional transition is accomplished through an 'image' of peace. The first natural chronological step would be to reach a ceasefire and from there onwards negotiate peace. In the negotiations, you have to first build a 'vision of society'- the final optimum acceptable for all. From there, build the 'bridges' to get there, which are usually built in during the transition. Depending on the particular situation, such vision can be the introduction of democracy, federalism or even more in general, constitutionalism, and one of the bridges is the drafting of a new constitution and, with it, an independent apex court with the power to enforce it.

Therefore, it is figuratively easy to imagine the chronology of events. In a first moment, the ideal state has to be envisioned and consensus on such vision has to be reached. Such vision of society can be sketched in an *interim* constitution first and successively anchored in a definitive constitution, or directly in a definitive constitutional dispensation (depending on the constitution-making form chosen).

Reasonably, such vision needs time to materialize. Thus, in a second moment, a transitory period is introduced in order to – normatively – allow for the constitutional framework to be put in place (legally and institutionally) and – empirically – for the transformation of the new society to occur. The end of establishment of the legal and institutional framework of the normative constitution is usually quite clear, whereas for the attainment of the transformation of society championed by the normative constitution, but realized outside the boundaries of the law (that is in the empirical constitution), the transitory period can take many more years and is contingent to social and economic factors. Consequently, during the transitional period the country needs to take the necessary steps to help materialize the vision entrenched in the new (transformative) constitution. The first step is, evidently, to put in place the necessary framework to allow for the transformation to happen.

B. The Means: Constitutionalism through Constitutions

The means, or bridges, to be built in order to achieve the new vision of society are plenty, but are contingent on the vision itself. However, we have increasingly witnessed a common reason for internal conflict: the lack of constitutionalism and with it, to some extent, decentralization, which links quite closely to constitutionalism itself. The termination of the Cold War has opened up the opportunity for constitutionalism and modern notions of it to expand into new horizons.[270]

As simply explained by Steytler, the end of the Cold War in 1989 has deeply impacted the form of government of many countries, especially in Africa.[271] A central quest in the post-Cold War era has been to bring the untrammeled *Leviathan* to heel through constitutionalism and, to help support it,

270 For a comprehensive conception on constitutionalism as a mechanism of building consensus and as a means to solve a constitutional transition see, Veronica Federico, "Democratic Transitions and Constitution-Making Processes: The Role of Constitutionalism as Mechanisms of Building Consensus – the South African Case," in *Constitutionalism and Democratic Transitions: Lessons from South Africa*, ed. Veronica Federico and Carlo Fusaro (Firenze: Firenze University Press, 2006).

271 Nico Steytler, "Domesticating the Leviathan: Constitutionalism and Federalism in Africa," African Journal of International and Comparative Law 2, no. 24 (2016): 272.

decentralization.[272] This has stimulated the now familiar narrative of the rise of world constitutionalism.[273] The fall of the Berlin Wall triggered a constitution-making wave, where autocratic rulers, installed in their positions of authority by the Cold War superpowers, have lost usefulness for them and thus new ways of governing these countries have been propped up by popular verve. The reason being that the strong centralization of such states led to conflict among neglected diverse groups and skewed underdevelopment.[274] Consequently, the main tendency was to, as Steytler puts it, 'domesticate the Leviathan', or in other words remove the all-powerful executive, such as dictators, one-party states, life-long presidents, military or despotic regimes, and more, and give back the power to the people.

The crucial element of the introduction of constitutionalism is the adoption of a written constitutional dispensation to track and document the change that has occurred. The means therefore to reach peace pass through constitutionalism, yet are channeled through a written constitution. Therefore, before examining the concept of modern constitutionalism, it is necessary to first consider the contents of normative written constitutions.

I. Constitutions

Regardless of the distinction made by Grimm between normative and empirical constitution, which set the limit between the written constitution itself (normative constitution) and its effects (empirical

272 See ibid., 272–92.

273 Stephen Gardbaum, "The Place of Constitutional Law in the Legal System," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 169. Cf. also Bruce Ackerman, "The Rise of World Constitutionalism," *Virginia Law Review* 83, no. 4 (1997); Stephen Holmes, "Constitutions and Constitutionalism," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012).

274 After the departure of the colonizers a couple of decades before, 'new' nations were born, where autocratic regimes were justified by a promise of unification and development. Instead, all-dominant executives resulted in underdevelopment, marginalization of minorities, and consequently fragility and conflict. See James S. Wunsch and Dele Olowu, eds., *The Failure of the Centralized State: Institutions and Self-Governance in Africa* (Boulder, CO: Westview Press, 1990), passim; Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 25–27.

constitution), here I would like to briefly demarcate the boundary between a constitution – in its normative meaning – with constitutionalism.

In the textbook *Constitutional Government: The American Experience*, the word constitution was described as a 'power map'.[275] As such, it is designed to mainly regulate the distribution of powers and obligations among the various government institutions. The constitution is meant to derive its whole authority from the governed people and define the relationship between them and said institutions.[276] From another perspective, the constitution is the sum of all provisions, written or not, that limit both the government and the people. It defines what can be done and what not. It forms the source and basis of law-making. All in all, as a power map containing legal rules, it deters arbitrary rulemaking and governance, and aims at preventing tyranny and anarchy.[277] Of course, as history has shown, a constitution may not necessarily exclude arbitrary governments if it contains only weak restrictions or any restrictions at all. In the absence of said restrictions, which would be equivalent to the absence of having a constitution at all, the practice of constitutionalism would be impossible, since the restrictions themselves are the core elements of constitutionalism. So, a constitution is a pre-requisite of constitutionalism: constitutionalism implies that public power can legitimately be exercised only in accordance with the constitution. An extra-constitutional government cannot exist.[278] The provisions imposing

275 See the notion of power maps by Ivo D. Duchacek, *Power Maps: Comparative Politics of Constitutions* (Santa Barbara, CA: ABC-Clio Press, 1973), 3. Cf. also other authors that re-employ this term: James A. Curry, Richard B. Riley, and Richard M. Battistani, *Constitutional Government: The American Experience*, 3 ed. (St. Paul, MN: West Publishing, 1997), 3, 8–10; Charles M. Fombad, "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects," *Buffalo Law Review* 59, no. 4 (2011): 1012; "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa," *The American Journal of Comparative Law* 55, no. 1 (2007): 6; "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism," 180.

276 Curry, Riley, and Battistani, 3, 8–10.

277 Fombad, "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism," 180; Ben O. Nwabueze, *Constitutionalism in the Emergent States* (Rutherford, Madison, Teaneck: Fairleigh Dikinson University Press, 1973), 1–2.

278 Louis Henkin, "Elements of Constitutionalism," *International Commission of Jurists Review* 60, Special Edition: The Evolving African Constitutionalism (1998): 12.

restrictions upon public power must in some way be constitutionally entrenched. Said entrenchment facilitates a level of stability over time and is arguably a requirement to constitutionally limit government. Were a government permitted, at its own discretion, to amend the very terms of its own constitutional constraints, one might begin to question whether or not such constraints really exist. In a way, constitutions are the ark through which constitutionalism can be established (normative constitution) and thrive (empirical constitution), and this raises the question of what exactly is meant by the word constitutionalism.

II. Constitutionalism

1. Introducing the Concept

In short, constitutionalism is synonym to limiting public power by means of the law. It is a clear expression of the belief that no government should have unlimited power and thus a free ticket to arbitrary rule. In other words, it is a pivotal element of most political systems in the Western world.[279]

Constitutionalism brings however two major dilemmas with itself:

- On the one hand, the so-called 'counter-majoritarian dilemma' or the 'paradox of constitutionalism' spurs the discussion. This dilemma expresses the concern surrounding the discord between democratic majoritarian politics and constitutionalism as constitutional limitations. Within this dilemma, the questions arise as of 'why should people tie themselves to a constitution that has been entrenched as to hinder easy amendment?' and 'why should people tie themselves at all?', or the other way around 'why should government be limited at all?'. Therefore, legitimacy of constitutionalism is a core of the discussion around constitutionalism.
- On the other hand, constitutionalism in its classic view is mostly viewed as being unable to respond adequately to contemporary issues of the welfare society, and this again because of its limiting nature. Traditional

279 Carla M. Zoethout and Piet J. Boon, "Defining Constitutionalism and Democracy: An Introduction," in *Constitutionalism in Africa: A Quest for Autochthonous Principles*, ed. Carla M. Zoethout, Marlies E. Pietermaat-Kros, and P. W. C. Akkermans (Deventer: Gouda Quint, 1996), 1.

> constitutionalism was conceived as primarily protecting individual rights and freedoms negatively. However, newer developments in the world have shown that there is a need for constitutionalism, not only to provide for individual rights and freedoms, but to also include some socio-economic and even collective rights. Naturally, including positive rights entails the problem of combining both concepts of *state action* with the core idea of constitutionalism, which is *limiting state power.*[280]

When it comes to the first problem, and we take Africa as an example, for instance, the paradox of constitutionalism appears to be even more pressing here. A precondition of constitutionalism is, of course, that before a people is willing to tie itself to a constitutional system, it should have effective control over its government. In other words, before tying themselves to a constitution, people should enjoy democracy. The democratization of the political systems is therefore a core element of constitutionalism. As Okoth-Ogendo observed, in Africa there was a strong commitment to the idea of constitution, but also a rejection of the fundamentals of constitutionalism as a constraint to government power.[281] One of the reasons for this paradox rejoins us with the second dilemma described above. European political systems, which are often the model for African countries (or countries in transition), tackle the second dilemma through their conviction that substance must be given to socio-economic and collective rights through the creation of (judicial) institutions. However, as Samuel Nolutshungu remarks, the capacities that are lacking among said countries cannot be supplied by legal (i. e., constitutions) and judicial (i. e., courts) interventions only, but also and mostly in the extra-legal band. Action in political and economic life is needed, and constitutions can only play a supporting role, and limited at that.[282] Nonetheless, as this thesis states, such extra-legal action needs to follow an intense legal reconstruction process, that is constitution-making.

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280 ibid., 1–2.

281 H.W.O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox," in *Constitutionalism and Democracy: Transitions in the Contemporary Worl*, ed. Douglas Greenberg, et al. (New York, Oxford: Oxford University Press, 1993), passim.

282 Samuel Noluthshungu, "Constitutionalism in Africa: Some Conclusions," in *Constitutionalism and Democracy: Transitions in the Contemporary World*, ed. Douglas Greenberg, et al. (New York, Oxford: Oxford University Press, 1993), 369.

2. A Working Definition

Before even starting to define constitutionalism, it is clear that to attempt the development of a comprehensive definition is utterly futile, for multiple are the constitutional ideals expressed under this concept, and thus the greatest crisis of constitutionalism is precisely the lack of a universal understanding of the phenomenon.[283]

However, a working definition is needed in order to support the thesis defended in the present research. At its basis, defining constitutionalism is not hard at all. The classical notion of constitutionalism rests at the very idea of existence of constitutional law itself, when constitutions where first drafted as a social contract between the people and the all-powerful monarchs: limit the power of the *Leviathan*, who could do everything without being held responsible and sat above every concept of law.[284] Yet not only: constitutionalism means much more than the mere attempt to limit governmental arbitrariness, which is the premise of the constitution. As mentioned, constitutions can fail to limit arbitrary rule. Written limits to public power in the constitution are not constraining by themselves. In other words, oppressors will not become just and fair leaders simply because the constitution tells them to. In order to protect from violations against the constitution, a set of institutional measures needs to be assured. This is what constitutionalism adds; the guarantee that the constraints on public power will actually be enforced. As Fombad summarizes, constitutionalism encompasses

> 'the idea that government should not only be sufficiently limited in a way that protects citizens from arbitrary rule but also that such a government should be able to operate efficiently and, in a way, that it can be effectively compelled to operate within its constitutional limitations. In other words, constitutionalism combines the idea of a government limited in its action and accountable to its citizens for its actions. Two ideas are therefore fundamental to constitutionalism thus defined: first, the existence of certain limitations imposed on the state particularly in its relations to the citizens, based on a certain clearly defined set of important values; secondly, the existence of

283 Venter, 15; Curry, Riley, and Battistani, 4.

284 For instance, in 1215, the English barony forced King John to sign the *Magna Carta*. The *Magna Charta* provided, for instance, that the king could not imprison, outlaw, exile or kill anyone without first due process (cf. Art. 39 *Magna Charta*). The *Magna Charta* was a social contract originally between the king and the nobility but was gradually extended to all of the people. It was directed at delimitating the power of the king and as such it represents an early concept of modern constitutions.

> clearly defined mechanism for ensuring that the limitations on the government are legally enforceable.'[285]

So, on the one hand, constitutionalism includes elements of limitation of power, and on the other hand, mechanisms that allow said limitations to be enforced, such as an independent judiciary with the power of constitutional review. In other words, it refers to an ideal of government power, which is the limitation of such power by means of law. Its main objective is to subject state power to *constitutional elements*, molded through rules, procedures and structures, entrenched in a constitution, that create important limits on constituted public power and allow said constraints to be implemented.[286] The comparison of modern constitutions facilitated the identification of some core elements of constitutionalism, a list which is however not exhaustive. The definitional crisis of constitutionalism is expressed through the (sometimes controversial) addition of new elements to constitutionalism, such as federalism, social responsibilities of the state, institutions that support democracy, etc. All elements, which probably have close links to constitutionalism, but do not necessarily mean they represent the essential core of it. Henkin provides, among many others,[287] perhaps the most concise rationalization of this complex concept of constitutionalism. Based upon his analysis of the Constitution of the United States of America, he identifies nine elements of what he calls *essential elements of constitutionalism:* Government according to constitution, horizontal and vertical separation of powers, popular sovereignty and democratic government, constitutional review, and independent judiciary, controlling the police, civilian control of the

285 Fombad, "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism," 181.

286 Cf. broadly, for instance, Giovanni Sartori, "Constitutionalism: A Preliminary Discussion," *American Political Science Review* 56, no. 4 (1962): 854–55; Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, 17.

287 Cf. for instance, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, 17; Venter, 15. See also Fombad, who also bases his opinion on Henkin's list: Fombad, "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects," 1014; "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa," 7–8; "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism," 181. In his most recent of the cited works, Fombad even adds a 'South African' element to the notion: institutions that support democracy, referring to Chapter 9 of the Constitution of South Africa of 1996.

military, individual rights and suspension and derogation (including constitutional amendment).[288]

Apart from potentially those elements related to the police and the military, which I do deem important, although not essential, Henkin's elements broadly encapsulate a list of institutional arrangements that work together to ensure the supremacy of the constitution, the existence of limited yet strong government, and the protection of basic freedoms. On the same line, and more recently, Colón-Ríos maintains that constitutionalism is associated with the ideas of 'restrained and divided' political power,[289] adherence to the rule of law,[290] the protection of fundamental rights[291] and the principle[292] of constitutional supremacy.[293]

In order to make some order in this definitional disarray, all these features can all be allocated into three 'main' pots or elements:

– *democracy*;
– *limited government*; and
– the *rule of law*. [294]

288 Cf. Henkin, passim.

289 Richard Bellamy and Dario Castiglione, "Review Article: Constitutionalism and Democracy – Political Theory and the American Constitution," *British Journal of Political Science* 27, no. 4 (1997): 595.

290 Stephen M. Griffin, "Constitutionalism in the United States: From Theory to Politics," *Oxford Journal of Legal Studies* 10, no. 2 (1990): 202. See also Michel Rosenfeld, "Modern Constitutionalism as Interplay between Identity and Diversity," in *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*, ed. Michel Rosenfeld (Durham, London: Duke University Press, 1994), 3, 5. Originally published in the Cardozo Law Review at Rosenfeld, Michel. "Modern Constitutionalism as Interplay between Identity and Diversity: An Introduction." *Cardozo Law Review* 14, no. 3–4 (1993): 497–531.

291 Cf. 3, 5.

292 Cf., for instance, András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: Central European University Press, 1999), 39.

293 Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, 17.

294 Mostly in line with what Venter maintained, that the elements of constitutionalism 'are simply: limited, non-arbitrary government, legally enforceable rights and dominance of the law'. Cf. Venter, 15.

Together these are, in my opinion,[295] the core elements of constitutionalism. *Democracy* entails the establishment of an accountable government supported by representative and participatory mechanisms. The element of *limited government* involves necessarily separation of powers, a system of check and balances among them and enforceable fundamental rights. Finally, the *rule of law* is necessary to uphold the first two elements. It means supremacy of the constitution enforced by an independent judiciary. In other words, a government that acts under rules and not by arbitrary discretion. These three elements together seek to limit state power and thus domesticate the *Leviathan.* I truly share Colón-Ríos's opinion when he states that '[t]hese ideas although sometimes presented as equivalent to constitutionalism itself, are better understood as ways of achieving constitutionalism's main objective: limiting political power.'[296] These are the core unamendable elements of the classical – 'Western'[297] – notion of constitutionalism,[298] and as such, they have to be at the core of an apex court's agenda, especially during a constitutional transition.

295 Built on Steytler's work: Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 27 – 31.

296 Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, 17.

297 When referring to the practice in Africa, Steytler presents three different approaches to constitutionalism. The first is the classical so-called 'Western' approach, which presents the three mentioned elements. The second adds a transformative element to the Western approach and represents very much the type of constitutionalism, which is increasingly seeing an emergence in the international scenario and will be clarified later here. Finally, there is the 'Islamic' approach, which I will not include in my definition of constitutionalism, yet it is ambivalent about the very basis of the first with the addition of the *Shari'a* placed in the constitution. Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 27 – 31.

298 Of course, Venter and Colón-Ríos are not the only scholars sharing the contents of constitutionalism as mentioned. Other scholars roughly share the same consideration: cf. for instance, Nwabueze, 10; Stanley A. de Smith, *The New Commonwealth and Its Constiutions* (London: Stevens & Sons, 1964), 106; Charles H. McIlwain, *Constitutionalism: Ancient and Modern*, 2 ed. (Ithaca, NY: Cornell University Press, 1947), 141 – 46; Fombad, "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects," 1013 – 14; "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa," 6 – 8; "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism," 180 – 83. See also, Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 27 – 31.

3. The three Classical Elements of Constitutionalism, and their Variations

In order to support the belief that government should not enjoy unlimited power, three elements should be present: limited government *stricto sensu* (i. e., a written constitution, horizontal and vertical separation of powers, fundamental rights and freedoms), the rule of law (i. e., constitutional supremacy, independent judiciary, constitutional review, etc.) and, of course, democracy (in order to directly tackle the counter majoritarian dilemma mentioned above).[299]

These elements are regarded as the quintessence of constitutionalism. This does not mean that a system which does not fulfil all the elements is not to be considered a constitutional system. A system may not wholly conform to the one or another element, yet can still be referred to as constitutional. In this sense, constitutionalism should be seen as a continuum: systems that pull near the one pole are less constitutional than those that tend to the other pole. Simply put, a constitution is a necessary element, but not a sufficient element of constitutionalism; for the latter there must be the additional elements.[300]

Even though this is 'western' in general origin, it is possible to still identify significant variations between the Anglophone and Francophone notions of constitutionalism. For instance, in the Francophone version, which is based upon the Gaullist model of the Fifth Republic of France, both the separation of powers[301] and the power of the judicial review[302] are more

299 Zoethout and Boon, 4–6.

300 ibid., 6–7. So, Zoethout and Boon: 'However, it seems advisable to proclaim that a political system in which individual rights and freedoms are not being protected is *eo ipso* unconstitutional'.

301 The French version – slavishly copied in Francophone and Lusophone Africa, as well as Maghreb countries – encompasses a feeble separation of powers with a strong presidential executive that dominates both the other branches of government by legislating most of laws by decree and directly appointing judges. Cf. Fombad, "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects," 1090; "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism," 188–89.

302 In France, a Supreme Court model with constitutional review like in the US was 'a remote and alien phenomenon'. See Chibli Mallat, "On the Specificity of Middle Eastern Constitutionalism," *Case Western Reserve Journal of International Law* 38, no. 1 (2006): 14. In the French tradition, constitutional review is most often limited to an abstract pre-

alleviated than those in the other model.[303] However, all in all, the three elements of constitutionalism are present in both legal traditions, regardless of their variations, which given the unclarity of the definition of constitutionalism itself, are more than normal and cannot be deemed to remain at merely two. The common denominator in every variation is thus the three elements. Here I try to structure and define these elements of a constitutional democracy (this is my own list, and by no means exhaustive), bearing in mind however that they are interrelated and depend upon one another.

There may be a specific order. First, (a) democracy, as it forms the basis of the state; then (b) limitations on how democratic institutions use power, and lastly the above is done in terms of (c) the rule of law.

a. Democracy

The first of the elements is *democracy.*[304] We have seen how a legitimate constitution can only be a democratic one.

The explanation of democracy can be as easy as getting lost in it. As Henkin mentions: '"Constitutionalist" constitutions prescribe government by the people through representative institutions.' There is a basic and minimal consensus on the fact that democracy is based upon the fundamental ideas of popular sovereignty and collective decision making, through which those who rule are held accountable by those who are ruled.[305] However, beyond this basic conception of democracy, there are many additions to and variations of the same,[306] or as Collier and Levitsky call

promulgation review by extra-judicial institutions, that is not part of the judiciary, such as the *conseil constitutional.* Cf. Fombad, "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects," 1017–18; "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa," 18–19.

303 Cf. "The Evolution of Modern African Constitutions: A Retrospective Perspective," in *Separation of Powers in African Constitutionalism*, ed. Charles M. Fombad (Oxford: Oxford University Press, 2016), 50.

304 Henkin, 13.

305 Todd Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals* (London: Bloomsbury Academic, 2013), 26.

306 Michael Coppedge, Staffan Lindberg, and Svend-Erik Skaaning, "Measuring High Level Democratic Principles Using the V-Dem Data," *International Political Science Review* 37, no. 5 (2016). In a practical guide published by International IDEA on how to assess the

them, 'democracy with adjectives'.[307] The delineation and content of these definitions largely rest on the variable incorporation to the basic conception of democracy (that is alongside the general commitment to popular sovereignty and collective decision-making) of different fundamental freedoms and protections, and other principles. There are therefore a bunch of lines of overlap among different definitions of democracy and between such definitions and the other elements of constitutionalism.

In my opinion, leaning on Landman's theoretical set-up, there is mainly one big differentiation to be made when defining democracy:

– On the one hand, *democracy*, in its most undeveloped and basic of meanings is the reflection of a collective decision-making process based upon popular sovereignty and accountable government.
– On the other hand, there is the 'thicker' term used to define a whole political system and system of government of a country, that is as in describing a *constitutional democracy*, or a *democratic state.* This term reflects what I define here to be a country, that is labelled as democratic, as it not only embraces, more than just the 'thin' definition of democracy, but also constitutionalism in all its elements, including the rule of law and fundamental rights, such as legal equality and political freedom.[308] This 'thick' definition of democracy, combining democracy and the other elements of constitutionalism, is shared, for

quality of democracy in a country it is clear how democracy is way more than just the basic consensus of popular sovereignty and collective decision-making, cf. the table including all elements of democracy needed for such assessment at David Beetham et al., *Assessing the Quality of Democracy: A Practical Guide* (Stockholm: International IDEA, 2008), 26. Landman categorizes and lists these enhanced definitions of democracy as: procedural democracy, liberal democracy and social democracy. Cf. Todd Landman, "Democracy and Human Rights: Concepts, Measures, and Relationships," *Politics and Governance* 6, no. 1 (2018): 49 – 50; *Human Rights and Democracy: The Precarious Triumph of Ideals*, 26 – 31.

307 Cf. David Collier and Steven Levitsky, "Democracy with Adjectives: Conceptual Innovation in Comparative Research," *World Politics* 49, no. 3 (1997). Landman defines this status quo of defining democracy as 'thick' and 'thin' definitions of democracy, cf. Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals*, 26.

308 Larry Diamond and Leonardo Morlino, "The Quality of Democracy," in *In Search of Democracy*, ed. Larry Diamond (London, New York: Routledge, 2016), 34.

instance, by Diamond and Morlino.[309] Their definition explicitly includes a wide bundle of elements, such as freedom,[310] the rule of law, vertical and horizontal accountability, responsiveness,[311] equality,[312] competition and participation. Their definition is not wrong, but as said above, it is a variation that goes beyond the basic consensus.

I personally share Landman's opinion when he urges that democracy and human rights, although their conception is interrelated and overlaps, have to be regarded as two different notions. They are highly complementary to one another, but are not equivalent or perfect substitutes.[313] In fact, human rights, as well as the rule of law, as we will see, tend to overlap with every other element of constitutionalism. Here, under this section, I will use the 'thinner' definition of democracy.

1) Commonly, democracy is related to *popular sovereignty* and the provision of *collective decision-making* mechanisms. There are several forms and shapes of democracy and most concern how the whole body of all eligible citizens executes its will. Two are the basic criteria that combined (or not) produce most of the forms of democracy: *representation* and *participation.* On the one hand, in most modern constitutional democracies, even though the people remain sovereign, political power is indirectly exercised through elected representatives. After being elected, typically to one or two chambers of parliament, these representatives ought to execute the will of the people who voted for them. Electing a representative is, of course, also a form of participation. So, on the other hand, eligible citizens have active rights to participate in the political decision making, either by being elected,

309 Cf. Ibid. This is but one of the possible variants of 'thicker' definition of democracy. Another one can be found, for instance, at David Beetham et al., *Assessing the Quality of Democracy: A Practical Guide* (Stockholm: International IDEA, 2008), 26.

310 Intended as fundamental rights including political, civil, and social (or socio-economic) rights.

311 A democratic government is responsive when its democratic process actually produces policies that the citizens want and implement them. For more on this element, cf. Diamond and Morlino, 41.

312 Meant as the formal political and legal equality of all citizens. Every citizen, including minorities, should have the same rights. This dimension of democracy counts as a fundamental right.

313 Landman, "Democracy and Human Rights: Concepts, Measures, and Relationships," 49; *Human Rights and Democracy: The Precarious Triumph of Ideals*, 26.

electing or voting on policy initiatives directly. However not only, participation goes further when it also includes involvement 'in the life of political parties and civil society organizations, namely in the discussion of public policy issues, in communicating with and demanding accountability from elected representatives, in monitoring official conduct, and in direct engagement with public issues at the local level.'[314] Of course, representation and participation are two faces of the same medal, which mostly revolves around participation. The highest level of participation would point at a direct democracy, whereas the opposite would be a representative democracy.

2) The other element of the basic consensus on the definition of democracy is *accountability.* Accountability is the obligation of elected politicians to answer for their political decisions when asked by the people of other constituted bodies with the right to do so.[315] There are two types of accountability: *vertical* and *horizontal.* Vertical accountability is when the people ask their elected leaders to answer for their political decisions. In a way, this type of accountability goes 'upwards'.[316] Instead, horizontal accountability asks office holders to properly answer not only to the people, but also to other officials and state institutions that possess the legal authority necessary for such monitory role. Said institutions could be the legislative opposition, specific investigative committees, the courts, audit agencies, a central bank, counter-corruption commission, or other institutions with the task to scrutinize and limit the power of those who are in power.[317] In other words, accountability – vertical and horizontal – sees a veritable system of check and balances independent of government. The link to the element of separation of powers is self-evident.

It is clear, however, how other elements to the definition of democracy are necessary in order for it function. In this sense, Diamond and Morlino were absolutely right to include other features that support democracy, determine

314 Diamond and Morlino, 36–37.

315 ibid., 38.

316 ibid.

317 ibid., 39. See also, Guillermo O'Donnell, "Horizontal Accountability in New Democracies," in *The Self-Restraining State: Power and Accountability in New Democracies*, ed. Andreas Schedler, Larry Diamond, and Marc F. Plattner (Boulder; London: Lynne Rienner Publishers, 1999).

its quality and facilitate the functioning of its mechanisms of participation and accountability. Apart from fundamental rights and political equality,[318] competition is also elemental in a constitutional democracy for instance. A democracy with no political competition among parties or unregulated party funding resembles *de facto* to an authoritarian system of government (e.g., one-party states). All in all, the existence and quality of a democratic system is contingent on a list of principles and features that overlap with many of the other elements of constitutionalism, including the rule of law, which defends and upholds political rights and democratic procedures and reinforces accountability through ensuring that the supremacy of the law is maintained.[319] Democracy understood as rule by popular will alone does not necessarily produce constitutionalism. The reliance on popular will has not always produced constitutionalism as explained above. Examples of notorious dictators include Uganda's Idi Amin or even Germany's Adolf Hitler, all of whom were elected through popular will. However, modern constitutionalism relies on the reconciliation of the democratic rule of men with the constitutional rule of law. In other words, for a democracy to be stable and function appropriately, it needs a constitutional framework; for constitutionalism to prosper, it needs democratic pedigree.[320]

b. Limited Government

The second element is *limited government.* The limitation of governmental power mainly takes place in three ways: a (1) *separation of powers*, horizontal (between the three branches of government) and vertical (as in power-sharing between different levels of government), which provides checks and balances; an (2) *enforceable bill of rights*, which protects broad areas of the people's private lives from state interference and at the same time grants them rights that can be hold against the state; and, last but

318 For instance, political rights are fundamental rights that support democracy directly. Political equality instead hints *inter alia* at universal suffrage when it comes to fair elections.

319 Diamond and Morlino, 36.

320 Ulrich K. Preuss, "The Political Meaning of Constitutionalism," in *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*, ed. Richard Bellamy (Aldershot: Ashgate, 1996), 11–13; Fombad, "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism," 183; "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa," 8–10.

not least, an (3) amendable *constitution.*[321] The element of 'limited government' aims evidently directly at limiting the constituted power.

1) *Horizontal and vertical separation of powers:* Separating powers is a central function of a constitution and a classic feature of democratic countries. It mainly entails the distinction between the functions – or procedures – of executing (as in political measure-taking and pure administration) law-making and law-interpreting/adjudicating and proposes the division of government along the line of such functions into different branches.[322] Democracy is thus protected by separating authority into three branches. It ensures that those who make laws are not the same of those who interpret, apply and enforce them. It also serves the rule of law in as much as those who formulate laws are also themselves subject to them.[323]

   The principle of separation of powers can be justified on the ground of mainly two components that are commonly associated with it: the principles of the division of power – holding that it is unhealthy for power to be institutionally concentrated in society (i. e. principle of division of power) – and the principle of check and balances – stressing that the exercise of power has to be balanced and checked by

321 I personally see the constitution as a basic prerequisite and transversal element of constitutionalism, which touches on all of its features.

322 Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, 17; Richard Bellamy, "The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy," *Political Studies* (1996): 437; John Braithwaite, "On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republication Separation of Powers," *The University of Toronto Law Journal* 47, no. 3 (1997): 307; Nwabueze, 12. Roughly, the legislature – commonly represented by parliament, provincial or regional legislatures and local councils or governments – make laws and monitor the executive; the executive – commonly the president or prime minister and its cabinet – makes policy, proposes laws and implements already passed laws of the legislature; and the judiciary, which enforces laws and administers justice. All of this means that each branch of state power keeps watch over the power of the other branches. For instance, the legislature can make laws, but not hand down judgements or take executive action, whereas the judiciary cannot pass laws, yet it can judge executive action and strike down laws. Of course, these is just a rough presentation of the separation of powers. The powers of the three branches can present themselves in many different forms and measure. It is not easy to keep such powers in balance and contain those branches, which try to overcome the others.

323 Bellamy, "The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy," 438.

the exercise of power by other power-holders (i. e. checks and balances principle).[324] The three branches of government and their functions must refrain from interfering with each other, and the doctrine of check and balances 'seeks to make the separation of powers effective by balancing the power of one agency against that of the other.'[325] By dividing official power into three different branches and by providing mechanisms by which each organ can check the power of the other, this type of government system aims at limiting the power of anybody who seeks to empower himself with too much of it. However, Waldron maintains that the principle of separation of powers entails other elements too. He stresses that 'the separation of powers does not operate alone as a canonical principle of our constitutionalism. It is one of a close-knit set of principles that work both separately and together as touchstones of institutional legitimacy.'[326] These other principles he intends are: the separation of the functions of government (legislation, adjudication and executive administration) from one another (i. e. the principle of separation of powers), the requirement that ought to be enacted by votes in two coordinate legislative assemblies (i. e. bicameralism principle) and the distinction between powers assigned to different levels of government (i. e. the federalism principle).[327] This last principle associates decentralization (i. e. vertical power-sharing) to one of the elements of constitutionalism.[328] The division of authority between a central government and regional or local constituencies can protect from too much concentrated governmental power.[329] All of these principles together produce the idea of separation of powers in a constitutional democracy.

324 Jeremy Waldron, "Separation of Powers in Thought and Practice," *Boston College Law Review* 54, no. 2 (2013): 433.

325 See, Ziyad Motala, "Toward an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service under the New Southa Frican Order," *South African Law Journal* 112, no. 3 (1995): 506.

326 Waldron, 438.

327 ibid. Cf. also Bellamy, "The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy," 437.

328 For a comprehensive explanation on the horizontal separation of powers cf. Nwabueze, 12 – 21.

329 Henkin, 13.

2) *Enforceable Bill of Rights:* Constitutionalism implies that government has the obligation to respect and ensure individual rights for all citizens.[330] The guarantee of enjoyment of a set of fundamental rights[331] protects the people from state interference in several areas of their private lives and allows them to exercise different degrees of control over government policies through ordinary political participation. Additionally, the relationship between apex courts and fundamental rights provides individuals or minorities with a forum to express their concerns regarding government violations of their constitutionally protected fundamental rights.[332] They contribute in smoothing the harsh position minorities can find themselves in when new democracies arise. Even with the introduction of a democratic system, a transition is almost always a reaction of a major group of people uniting against oppressive regimes. In this sense, democracy is often a forum for majority rule and by protecting individual rights also, minorities can have voice in the chapter.[333]

Fundamental rights can be distinguished and ordered according to various criteria, e. g. according to their main purpose of protection or according to

330 ibid., 14.

331 Here the definition 'fundamental rights' is preferred over the more universal one of 'human rights'. The reason thereof is because human rights are internationally seen as equal, indivisible, interrelated, interdependent. Human rights reflect therefore those fundamental rights which aim at the protection of what constitutes being human and are unconditionally due to everybody. Cf. Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals*, 33; Eva Maria Belser, Bernhard Waldmann, and Eva Molinari, *Grundrechte I: Allgemeine Grundrechtslehren* (Zürich, Basel, Geneva: Schultess, 2012), 9. However, several important fundamental rights, such the political right to vote, which are necessarily linked to nationality (and age), and does therefore not always show equal treatment of every 'human' in a specific country. So, in a way, 'fundamental rights' include both 'human rights' and those, which are indivisible with the status of citizen.

332 Choudhry and Glenn Bass, 21.

333 For instance, the constitutional transition in South Africa was mainly headed by the ANC, a major party to this day. The presence of a big party has resulted in almost a one-party state. Minority parties struggle to contrast the majority rule of the ANC. In this sense, the protection and enforcement of fundamental rights by an apex court touches directly on two elements of the classic definition of constitutionalism, which are democracy and limited government. The enforcement of socio-economic rights in particular links the function of protecting fundamental rights to the transformative element of constitutionalism, which is the realization of social justice.

the area of life they concern.[334] It should be noted that the various types of fundamental rights overlap in many ways and that categorizations can only serve as orientation aids.[335] Here, I distinguish fundamental rights according to the purpose of protection, following the internationally accepted categorization, as it evidences the link some of them have with the other elements of constitutionalism: *civil and political rights* (which include civil liberties, political rights and constitutional guarantees); economic, social and cultural rights (or so-called *socio-economic rights*); and *solidarity rights*.

a. All in all, civil and political rights are the group of fundamental rights that protect people's freedom from transgression by the State. They also ensure that individuals can participate in the civil and political life of society and be treated fairly, without discrimination or oppression. Therefore, this class of rights is made of different sections: civil liberties, political rights and constitutional guarantees.
   i. *Civil liberties* seek mainly the protection of the 'personhood' of individuals.[336] Most fundamental rights are civil liberties. They protect individual actions or omissions and oblige the State to respect certain fundamentally defined areas of safety.[337] Typical civil liberties can include, *inter alia*, physical and mental integrity, life and safety; personal liberty and privacy; freedom of thought and expression (including freedom of information); freedom of assembly, association and organization; religious freedom, and freedom of movement and residence.[338]
   ii. *Political rights*, instead, guarantee certain forms of participation in political decision-making processes.[339] They include, for instance, the right to vote, to be elected and stand for office, to campaign,

334 Human rights in international context seem to follow the commonly accepted categorization of the three generations that includes, first, *civil and political rights*; second, *economic, social and cultural rights*; and finally, *solidarity rights*. Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals*, 33. The theory of the three generations of human rights was first developed by Karel Vasak in 1977, who saw Civil and Political rights as the first generation, whereas Economic, Social and Cultural Rights as second generation. Cf. Karel Vasak, "A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights," *The UNESCO Courier* 30, no. 11 (1977).

335 Cf. Belser, Waldmann, and Molinari, 15.

336 Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals*, 33.

337 Belser, Waldmann, and Molinari, 15–16.

338 Diamond and Morlino, 39.

339 Belser, Waldmann, and Molinari, 18.

and to form and organize political parties.[340] It is self-explanatory how these rights directly support democracy, allowing participation and competition in the political bustle of a country

iii. *Constitutional guarantees,* meant as guarantees descendant from the rule of law (or state of law and justice), include mainly those fundamental rights that guarantee individuals predictable, equal and fair treatment in all areas of state activity. In contrast to civil liberties, which protect certain spheres from state access, constitutional guarantees have a cross-sectional function. They are always of importance when the individual is confronted with state sovereignty and include mainly: equality,[341] non-discrimination, prohibition of arbitrariness, good faith and, last but not least, due process.[342]

3) *Socio-economic rights* provide 'individuals with access to economic resources, social opportunities for growth and the enjoyment of their distinct ways of life, as well as protection from the arbitrary loss of these rights.'[343] These rights illustrate a different dimension of fundamental rights, in as much as they pretend to be a positive action from the state.[344] These rights can include the right to education, to housing, to an adequate standard of living, to health and more. They are expected to take progressive action towards their fulfilment, and therefore they envisage a transformation of society and development. Their enforcement within the law however is widely debated.[345] So far,

340 Diamond and Morlino, 39.

341 For instance, if only men have the right to vote, the fundamental political right to vote would be violated on the basis of inequality of treatment. Universal suffrage in democracy is thus a product of the principle of equality.

342 Belser, Waldmann, and Molinari, 16–17; Kälin and Künzli, 105.

343 Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals*, 33.

344 For more on the content of some of these rights cf. Jeff King, "Social Rights in Comparative Constitutional Theory," in *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor (Cheltenham (UK), Northampton (USA): Edward Elgar Publishing, 2018), 150–52.

345 See, for instance, among many others, Carol C. Ngang, "Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take 'Other Measures'," *African Human Rights Law Journal* 14, no. 2 (2014); Aisosa Jennifer Isokpan, "The Role of the Courts in the Justiciability of Socio-Economic Rights in Nigeria: Lessons from India," *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 8, no. 2 (2017); King, 159; Upendra Baxi, "Preliminary Notes on Transformative Constitutionalism," in *Transformative Constitutionalism: Comparing the Apex*

their fulfilment takes place mostly outside of the legal constitutional transition and catch on critical importance when it comes to the empirical constitutional transformation.

4) *Solidarity rights* are in a way vaguer. They seek to assure access to public goods, such as development, a clean environment, peace or even the benefits of global economic development.[346] They have been conceived as mainly collective rights,[347] but have only found very partial entry into current international law,[348] since their legal content has only been clarified to some extent and opposition against them is growing, especially on the part of the industrialized countries.[349]

All in all, the presence of enforceable fundamental rights is elemental for the functioning of most of the other elements of constitutionalism. Self-evidently, for instance, the protection of the civil liberties, such as the freedom of speech and the right to form a political party, and political rights, including the right to vote or to hold office, is necessary for democracy to function. The rule of law is also closely intertwined with fundamental rights. For example, the fortification of constitutional guarantees that concern procedural aspects of the state, such as due process, facilitate the fight against arbitrary rule. From the other perspective, the rule of law institutionally provides for a judiciary that enforces said fundamental

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Courts of Brazil, India and South Africa, ed. Oscar Vilhena, Upendra Baxi, and Frans Viljoen (Pretoria: Pretoria University Law Press (PULP), 2013), 35–42. For several examples, cf. Varun Gauri and Daniel M. Brinks, eds., *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008).

346 Cf. Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals*, 33; Kälin and Künzli, 34; Anthony J. Langlois, "Normative and Theoretical Foundations of Human Rights," in *Human Rights: Politics and Practice*, ed. Michael Goodhart (Oxford: Oxford University Press, 2016), 22–24.

347 Human rights are traditionally conceived as individual rights, i. e., as the rights of individuals (natural or legal persons). They thus differ fundamentally from collective rights, which can only be asserted by a group and not by its members – if they can be asserted at all. Cf. Kälin and Künzli, 131; Langlois, 22–24.

348 Cf., for instance, Articles 20–24 of the African Charter on Human and Peoples' Rights (so-called *Banjul Charter*). These Articles, for instance, seek to cover: a right to self-determination (Art. 20), a right to free disposal of wealth and natural resources (Art. 21), a right to economic, social and cultural development (Art. 22), a right to national and international security and peace (Art. 23) as well as a right to a general satisfactory environment (Art. 24).

349 Kälin and Künzli, 34–35.

rights and guarantees. Without the possibility to enforce not only fundamental rights, but any right as such, the very fundaments of the supremacy of the law and therefore of constitutionalism are undermined

Amendable constitution: The presence of a constitution was treated above as a pre-requisite of constitutionalism. There cannot be constitutionalism without its elements being entrenched constitutionally, as it would be impossible to enforce them. Therefore, I will not dig deeper into this element. However, one feature was not mentioned: there has to be the possibility to amend the constitution. In the words of Henkin: 'a constitution reflecting respect for constitutionalism has to be subject to amendment if it is to reflect the sovereignly of the people contemporaneously, rather than the sovereignly of their ancestors who framed the constitution. On the other hand, too-ready amendment would threaten the character of the constitution as fundamental, supreme law. Amendments, of course, should be effected by procedures that reflect the sovereignty of the people acting in a constitutional capacity and mode. Amendments must not be such as to derogate from the commitment to constitutionalism, including respect for human rights.'[350]

c. *The Rule of Law*

The third and last classic element of constitutionalism is the rule of law.[351] Its definition and content remain unsettled[352] and contested among several authors on the matter. Authors on the rule of law have produced extensive lists of the features of incongruent kinds it comprises.[353] In fact,

350 Henkin.

351 For a book that summarizes and explains each and every aspect of the rule of law in a very clear and structured manner, cf. Thomas H. Bingham, *The Rule of Law* (London: Allen Lane, 2010).

352 Cf. Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?," *Law and Philosophy* 21, no. 2 (2002).

353 The rule of law is also a challenging ideal to define. For prominent sources on the rule of law cf., *inter alia*, Lon L. Fuller, *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969); Joseph Raz, "The Law's Own Virtue," *Oxford Journal of Legal Studies* 39, no. 1 (2019). Raz's work is a slightly updated version of his earlier opinion on the subject first published in "The Rule of Law and Its Virtue," *Law Quarterly Review* 93, no. 2 (1977); republished in "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979). For a definitional analysis of the rule of law cf. Mark J. Bennett, ""The Rule of Law" Means Literally What It Says: The Rule of the Law':

scholars disagree, for instance, on what formal or procedural arrangements it requires,[354] on whether or not it has inherent moral value,[355] and thus on whether or not it imposes substantive constraints on the content of laws.[356] Divergences on this last point mark a distinction between advocates of so-called 'formal and 'substantive' conceptions of the rule of law.[357]

These debates illustrate the complexity of defining this ideal. Therefore, below, I simply try to put together the main components of the rule of law for the purposes of this research, which can shed at least some clarity upon the concept. All in all, the rule of law comprises a number of features – formal, substantive and even procedural – which all address the way in which a society is governed. Here just the main handful:

1) First, although the rule of law is a multifaceted ideal, a central component of it is the requirement that governments should rule by law, rather than

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Fuller and Raz on Formal Legality and the Concept of Law," *Australian Journal of Legal Philosophy* 32 (2007). For some history and different approaches to the rule of law contingent on the legal tradition cf. Simon Chesterman, "An International Rule of Law?," *American Journal of Comparative Law* 56, no. 2 (2008): 333–40. For a comprehensive summary of the various doctrines on the rule of law, cf. for instance, Aleardo Zanghellini, "The Foundations of the Rule of Law," *Yale Journal of Law and the Humanities* 28, no. 2 (2017). For a collection of key essays on the rule of law cf. Richard Bellamy, ed. *The Rule of Law and the Separation of Powers*, The International Library of Essays in Law and Legal Theory (Second Series) (New York: Routledge, 2016).

354 On the fact that many authors neglect some procedural aspects of the rule of law, see Jeremy Waldron, "The Rule of Law and the Importance of Procedure," in *Public Law and Legal Theory Research Paper Series* (New York University School of Law, 2010).

355 For a great example on this disagreement see, on the one hand, Kramer denying that the rule of law has moral value and, on the other hand, Simmonds affirming such value. Cf., for instance, Matthew H. Kramer, "On the Moral Status of the Rule of Law," *The Cambridge Law Journal* 63, no. 1 (2004); Nigel E. Simmonds, "Law as a Moral Idea," *The University of Toronto Law Journal* 55, no. 1 (2005). Both opinions later replicated and developed in Matthew H. Kramer, "On the Moral Status of the Rule of Law," in *Where Law and Morality Meet* (Oxford: Oxford Unviersity Press, 2008); Nigel E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2008).

356 For the rule of law incorporating substantive limits on the content of the legal system cf., for instance, Trevor R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford Unviersity Press, 2001). Against such claim instead, cf., for instance, Raz, "The Rule of Law and Its Virtue." Cf. also his revised opinion "The Law's Own Virtue."

357 Cf. generally Paul P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Public Law* (1997). But also shortly Chesterman, 340–42.

by their own discretion and personal ideology or sense of justice.[358] It follows the familiar slogan of 'government by law, not by men', even though it must not be taken literally since, as Raz rightly noted, it is human beings who make the law and apply it.[359] In other words, the government is to rule following pre-established laws and not arbitrary discretion.[360]

2) Second, since the rule of law seeks governance under rules, it requires a predictable legal system that operates according to stable and well-defined laws, which will facilitate the protection against arbitrary rule.[361] The first feature did not say anything about how the rules need to be shaped. This formal[362] feature of the rule of law concerns thus what Fuller listed in his *The Morality of Law,* that is the generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence of the norms that govern a society.[363] In this sense, and wrapping up also point a. the rule of law does not require anything substantive, but rather 'that the state should do whatever it wants to do in an orderly, predictable way, giving us plenty of advance notice by publicizing the general norms on which its actions will be based, and that it should then stick to those norms and not arbitrarily depart from them, even if it seems politically advantageous to do so'.[364] By paraphrasing Hayek, Waldron adds something crucial to the very

358 Cf., for instance, Andrei Marmor, "The Rule of Law and Its Limits," *Law and Philosophy* 23, no. 1 (2004): 2; Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* 43, no. 1 (2008): 6; Ronald A. Cass, *The Rule of Law in America* (Baltimore: Johns Hopkins University Press, 2001), 17.

359 Raz, "The Rule of Law and Its Virtue," 212–14.

360 For more on this component of the rule of law cf. Marmor, 2–5. Cf. also Ronald Dworkin, "Political Judges and the Rule of Law," in *A Matter of Principle* (Boston, London: Harvard University Press, 1985), 11.

361 Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, 17.

362 'Formal', because it concerns the form of norms.

363 For an entertaining narrative of the eight 'ways to fail to make law', cf. Fuller, 33–94. More or less on the same line as Fuller cf., *inter alia*, Raz, "The Rule of Law and Its Virtue."; John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 270–76; Neil MacCormick, "Natural Law and the Speration of Law and Morals," in *Natural Law Theory: Contemporary Essays*, ed. Robert P. George (Oxford: Oxford University Press, 1992). For a summary of Fuller's list of conditions of how not make law cf. Marmor, 5–7, 9–38.

364 See Waldron, "The Concept and the Rule of Law," 7.

philosophy of law and its relationship to the people: 'there may be no escaping legal constraints in the circumstances of modern life, but freedom is nevertheless possible if people know in advance how the law will operate, and how they must act to avoid its having a detrimental impact on their affairs.'[365]

3) Third, the rule of law is one of the main and most entrenched ideals of our political morality. It refers to the hegemony of law as such and of the institutions it constitutes in a system of governance. It seeks to lift law above politics and every powerful person, agency or organization in the country. Constitutional supremacy is the core feature of the rule of law. This element somehow wraps up all other features of the rule of law, but also of the elements of constitutionalism. The three elements of constitutionalism are central to this thesis, as being part of constitutionalism includes their entrenchment in a normative constitution. In order to protect these constitutional principles that promote the existence of a limited government from day-to-day majorities, constitutionalism is commonly understood as mandating that they are entrenched in a constitution that is distinct from ordinary law: a constitution that is to be considered higher law and whose modification is subject to special amendment procedures. In other words, supreme.

4) There is also a procedural aspect to the rule of law, which I believe also supports all other elements of constitutionalism, just like constitutional supremacy. There is not the one without the other. The rule of law is not only about the formality of rules, but also about their impartial implementation.[366] This is the procedural understanding of the rule of law, which demands not only that rules are applied so as they are set out, but also that their application happens with the highest degree of fairness that is characterized by morals such as 'natural justice' and 'procedural due process'. Therefore, when the institutions that are supposed to embody these procedural safeguards undermine said ideals

365 See ibid., 6. Here, Waldron interprets the words of Hayek ('The rationale of securing to each individual a known range within which he can decide on his actions is to enable him to make the fullest use of his knowledge [...] The law tells him what facts he may count on and thereby extends the range within which he can predict the consequences of his actions.') in Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press, 1960), 156–57.

366 See, Waldron, "The Concept and the Rule of Law," 7.

of fairness, the rule of law is violated.[367] This procedural aspect takes shape both in principles and institutionally.

a. In principles, a constitutional democracy based upon the rule of law should include in its constitution a list of *procedural fundamental rights*, which bind the state to follow certain rules when applying the law. These are strong opposing mechanisms to arbitrary rule. Such principles might include, for instance, the right to a hearing in front of impartial and independent court that is established to administer existing legal rules on the basis of evidence and arguments; a right to be represented in said court by counsel; a right to make legal argument in the case; and a right to hear the reasoning of the court when the decision is taken. In other words, if someone is accused of violating the rules laid down, it should have the right to fight back and defend himself.[368] These are, of course, fundamental rights and overlap with the element of limited government.
b. *Independent Judiciary and Constitutional Review:* It is self-evident that the institutional procedural aspect of the rule of law seeks the establishment of an independent and impartial judiciary. Being independent means institutionally separated from the other branches of government. In this sense, this facet of the rule of law is linked with the other element of constitutionalism of the separation of powers.[369] However not only. The establishment of an apex court is a central element of the establishment of constitutionalism itself because it also touches on most of its other features, especially those listed by Henkin and mentioned above.[370] The apex court is there to enforce the supremacy of the constitution through constitutional review, and as such it upholds every single element of constitutionalism that it entrenches. The implementation of the limitation of power upon government is channeled and enforced through the judiciary. Its importance elevates it as the main object of this research and will be elucidated further later.

367 See, ibid., 7–8. Cf. also Albert V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (London, Basigstoke: The Macmillan Press, 1979), 193–95.

368 See, Waldron, "The Concept and the Rule of Law," 8.

369 See, for instance, Helaine M. Barnett, "Justice for All: Are We Fulfilling the Pledge?," *Idaho Law Review* 41, no. 3 (2005): 405; Nwabueze, 14–20. But also Waldron, "The Concept and the Rule of Law," 8.

370 Fombad, "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism," 181.

5) Dworkin also mentioned a substantive conception of the rule of law. The above features do not stipulate anything about the content of the rules that the public authorities are bound to follow. This is a complex feature of the rule of law and here I only briefly mention it for the sake of comprehensiveness. It strongly overlaps with the element of fundamental rights and the procedural conception of the rule of law. As Dworkin notes this substantive conception 'assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these [...] rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts [...].'[371] Hence the rules the authority is bound to follow need to be in line with a series of fundamental rights, which mirror the morality of society. This is also a key part of the rule of law.

Whichever definition of the rule of law one decides to adopt, one thing seems to be clear; many of the features of constitutionalism listed above are necessary for the rule of law to exist, yet also the other way around. The rule of law safeguards all features of constitutionalism and without it there can be no constitutionalism.[372]

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As mentioned above, these elements are all interrelated and depend upon one another. For instance, O'Donnell argues that the rule of law is democratic when the legal system protects and enforces not only political rights and mechanisms of democracy (that is, the representative and participatory mechanisms), but also the accountability of the government.[373] In other words, the rule of law is the base upon which every other element of constitutionalism rests. Relating to democracy, Diamond and Morlino states that '[a] weak rule of law will likely mean that participation by the poor and marginalized is suppressed, individual freedoms are insecure, many civic groups are unable to organize and

371 See, Dworkin, 11.

372 Fombad, "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism," 182.

373 Cf. Guillermo O'Donnell, "The Quality of Democracy: Why the Rule of Law Matters," *Journal of Democracy* 15, no. 4 (2004).

advocate, the resourceful and well-connected are unduly favored, corruption and abuse of power run rampant, political competition is unfair, voters have a hard time holding rulers to account, and overall democratic responsiveness is gravely enfeebled.'[374] As we will see however, the importance of these core features and elements is not necessarily their content, which is not static, but their legalization and institutionalization.

It is important to keep in mind that there is no model constitution, and no two constitutions are or even should be the same. A constitution reflects and must reflect the specific society, history, demography, geography, economy, traditions and culture. Regardless of the fact that a constitution champions a unitary or a decentralized State, a presidential or a parliamentary system, a socialist, free-market or mixed economy, a constitution must secure constitutional legitimacy through the authentic legal and institutional establishment of the three core elements of constitutionalism with all their features. These elements are the necessary ingredients; their dosage and/or quality, as well as the manner you cook them differs in each and every reality.

In the end, no constitutional document, power map, blueprint of the State, bill of rights or any other legal and institutional entrenchment of said elements suffices to guarantee constitutionalism. Constitutionalism thrives outside of the law and constitutional framework; it depends upon political, social and economic stability and culture dedicated to constitutionalism. What the constitution provides will trigger, reflect, contribute to, and help preserve such a culture of constitutionalism within the boundaries of the law, but it will be insufficient.

4. Transformative (and Transformational) Constitutionalism

As I have mentioned while introducing constitutionalism in the present Chapter, constitutionalism is a concept, which bears both values and programmatic goals. Especially in a situation of constitutional transition where the goal is, on the one hand, the creation of a state – legally and institutionally – and its domestication (that is, limit its power by exercising it in a democratic manner and executing it in a non-arbitrary way through a system of fundamental principles), and on the other hand, the veritable reconstruction of society itself (that is, to seek a purposive

374 Diamond and Morlino, 36.

employment of such limited state power for the sake of attaining programmatic goals).[375] Accordingly, a further and more contemporary approach to constitutionalism *builds on* the 'western' classical one: transformative constitutionalism. As Ghai indicates, the western notion of constitutionalism finds its roots in the arrival of capitalism, which in contrast to socialism, required the protection of property and contracts from the state.[376] However, as Steytler adds, this applies 'as far as the liberal democratic vision of constitutionalism goes: let the market-driven economy distribute social goods, rather than the state'.[377] The result of transitions witnessed in recent years has been constitutional dispensations focused not only on limiting the state, which is in any case the first legal step to take, but also on seeking overall social and political transformation – by putting the State in the position to do so –, creating a new 'breed' of constitutions, *transformative constitutions*.

In a constitutional transition, we are in a period of state-building. The transformative element is, in my opinion, an element that is not of the same nature as the other three elements. A constitution is either transformative or it is not, regardless of the other three elements of constitutionalism. In fact, traditional constitutions tend to mainly focus on the basic structure of the state, by basically providing a minimal blueprint of the division of public power; horizontally, by defining the structure and powers of all branches of government, and vertically, by allocating state powers between the different levels of government. Additionally, of course, they commonly include a list of fundamental rights aimed at limiting the decision-making power of state authorities. Apart from potentially some colorful and poetic verses in the preambles, in the constitutional text itself, little emphasis is placed on the State's social goals and obligations and ultimate vision of society.[378] These constitutions are typical of long-

375 Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 25 – 27.

376 Yash Ghai, "Chimera of Constitutionalism: State, Economy, and Society in Africa," in Law and (in)Equalities: Contemporary Perspectives, ed. Swati Deva (Lucknow: Eastern Book Company, 2010).

377 Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 27 – 31.

378 For instance, Art. 41 Constitution of Switzerland, 1999 constitutionally entrenches a series of social objectives, which guide the state in several public endeavors, such as universally accessible health care, social security, etc. However being Switzerland, a country not in

established societies, which are not seeking a deep political and social transformation.[379] Instead, transformative constitutions provide the basis for a radical transformation of the State's structure, fundamental values and governance.[380] Given the core reasons of why a country finds itself transitioning – e. g. social injustice due to conflict – the fostering of social development gains a great deal of importance in the new constitution.[381] The transformative constitution does not only seek to 'manage' public power, but also to build it up from the ashes of conflict, and therefore it needs to provide guidance towards the new vision of society, which includes social justice. Accordingly, such constitutions vest the state with a larger role than simply limiting its power, they give it obligations and goals by committing the entire state apparatus, including the judiciary, to transform society and realize social justice. All of this transforms the state, as Steytler puts it, 'from a passive regulator of power to a "developmental" one,'[382] where the constitution is one of the mentioned bridges towards the vision of society, i. e. from conflict and past injustices to an inclusive and just society.[383] Transformative constitutional texts see social

transition, these social goals are not purely 'transformative' in the very sense of the definition, but rather a standard to uphold any time the State acts.

379 Daly, "The Judiciary and Constitutional Transitions," 10.

380 For a brief, yet comprehensive, description of transformative constitutionalism cf. Baxi, 19 – 35.

381 Daly, "The Judiciary and Constitutional Transitions," 10.

382 Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 27 – 31.

383 ibid. The concept of the 'developmental state' might, however, be at odds with the key element of democratic constitutionalism, which is the limitation of the State. Championing for a developmental State might give the impression to overpower the State in order for it to reach said developmental goals. This contradiction, however, is just apparent; a developmental-driven State does not sacrifice any of the elements of classic constitutionalism. Instead, it deepens democracy and creates a deeper vision of human dignity and equality by making it a substantive goal of the State, and not simply a product of the market. In a recent article, Jan Erk mentioned how even Francis Fukuyama, known for raising liberal democracy (i. e. limited government and a strong market place) as victorious above all other practices (in *The End of History and the Last Man Standing*, 1992), recalibrated his stance on the matter in his latest book (*Political Order and Political Decay, From Industrial Revolution to the Globalization of Democracy*, 2014), where he champions a more balanced role for the State in a developmental context. Cf. Jan Erk, "Iron Houses in the Tropical Heat: Decentralization Reforms in Africa and Their Consequences," *Regional and Federal Studies* 25, no. 5 (2015): 418. Cf. also both books of Fukuyama: Francis Fukuyama, *The End of History and the Last Man* (New York:

development as the goal through,[384] and thus tend to e. g. include structural elements to limit majoritarian decision-making (such as *ombudsmen* or eternity clauses), create more inclusivity in the political system (e. g. by recognizing and allocating minorities with more powers), tackle discriminatory social disparities (such as race-based or gender-based discrimination), and also developing an expansive bill of rights that include, above-all, enforceable socio-economic rights.[385] One can, however, easily witness how all these characteristics of a transformative constitution are somehow amenable to the three classic elements of constitutionalism. This is why I ascertain that 'transformative' is an adjective describing a constitution that has already accepted the basics of democratic constitutionalism, rather than an additional element of constitutionalism itself.

Transformative goals need to be set and entrenched in the constitution. However, they – as well as the legal constitutional transition itself – can be reached only following the correct establishment of all basic elements of constitutionalism. From my point of view, the additional transformative approach of constitutionalism is a characteristic that undeveloped states – coming out of a civil war – should include in their constitution. The reason thereof is the dire need of reconstruction, not only of a state (legally and institutionally), but also of society itself. Still, I strongly believe, that – transformative constitution or not – the three basic elements of constitutionalism need to be established, legally and institutionally, no matter what. They are the basis for any transition, which in my opinion, bears transformation in any case. Said transformation can either be guided by a constitution (transformative constitution), or occurs autonomously, because the reestablishment of constitutionalism anyhow carries with it some sort of transformation of

The Free Press, 1992); *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Strauss and Giroux, 2014).

384 This is why it is not unreasonable that countries with transformative constitutions are also those which tested the enforceability of socio-economic rights. See, for instance, *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), or Supreme Court of India, *Olga Tellis and Others v Bombay Municipal Council and Others* (1985) 3 SCC 545: AIR 1986 SC 180.

385 Daly, "The Judiciary and Constitutional Transitions," 10. Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 27 – 31.

society.[386] The only difference is that in a transformative constitution, said vision is entrenched, and courts and new institutions have to simply keep in mind that transformative element when implementing and interpreting the new constitution. It will definitely influence the role an apex court plays, whilst maybe not necessarily during the legal constitutional transition itself, but rather in the empirical constitutional transformation of the entire society.[387]

386 It is therefore important to differentiate between a 'transformative' and 'transformational' constitution. In this thesis, *every post-conflict constitution is 'transformational'* (or transitional), but not all of them is necessarily 'transformative'. Every post-conflict constitution is 'transformational', as in one way or the other it aims at resolving a conflict and results in a new State to be created. In this sense, a transformation or transition takes place regardless of whether a constitution was 'transformative' in character, or not. Every post-conflict constitution seeks a transition, and thus a transformation. Instead, the word 'transformative' is meant for constitutions explicitly addressing issues of social injustice and steering the entire State apparatus towards said objective.

387 So, in my opinion, this 'transformative' element is more of an additional *transversal* characteristic that covers all other elements of constitutionalism, rather than an independent additional one to the definition of constitutionalism.

Chapter 3: The (Independent) Apex Court in Particular

One of the key features of constitutionalism is the presence of an independent judiciary. An independent judiciary is the precursor of constitutionalism. It allows the enforcement of its features entrenched in a constitution through constitutional review, and thus it upholds the constitutional dispensation.[388] Therefore, it is constitutionalism itself that indicates the need for a body and a mechanism or process that supervisions public authority for compliance to the constitution, and accordingly to consistency with its constraints. Some constitutional structures have given the power to review the constitutionality of legislation and executive action to all of its judiciary generally (e.g., the United States), some to a specialized constitutional court (e.g., the Federal Republic of Germany or South Africa), some even to a non-judicial institution (such as the French *Conseil Constitutionnel* or the Ethiopian House of Federations). Regardless of authority of the judicial branch to exercise constitutional review or not, an independent judiciary is essential to the rule of law, to preserving the entire constitutional order, to safeguarding individual rights and securing democratic governance.[389]

Several countries undergoing a constitutional transition have deemed fit to establish a new apex court. Apex courts present themselves with the advantage of demonstrating that the country is committed not only to the rule of law, but also to all elements of constitutionalism. Apex courts are increasingly widespread and considered an elemental component of new democracies. During a constitutional transition, the latest terms of the new democracy – formalized in a written constitution – are faced with pressing questions of their enforcement. Consequently, careful thought must be given to structuring the mechanism of judicial enforcement.[390] Specifically, during the drafting of the constitution (constitution-building process), an apex court can play a pivotal role, regardless of whether or not it was given a specific function or not. In the overall constitution-making process, which includes the constitution-building period, courts

388 Choudhry and Glenn Bass, 16.
389 Henkin, 14.
390 Choudhry and Glenn Bass, 20.

are also often called upon when deciding on fresh issues arising from the new constitutional provisions, which often touch on the legal and institutional establishment of the elements of constitutionalism.

This book focuses on the behavior of such a judicial (or non-judicial)[391] actor that acts as final interpreter of the new constitutional dispensation during a constitutional transition towards democratization. Therefore, it is necessary to briefly conceptualize it.

The following chapter wants to introduce and summarize the most important features of an independent apex court in order to simplify the understanding when analyzing the conclusions of the research. Every apex court has a different backstory, functions, powers and composition. These factors can all influence the behavior of said court in one way or the other.

This chapter is divided into five different sections, starting with the functions of an apex court in a very broad sense (A.) and following with a short description of how it can fulfil them (B.), that is the powers a court has. Through the fulfilment of its functions a court expresses its behavior, and therefore its role. Among the listed possible powers of an apex court, constitutional review is dominant and therefore an entire section is dedicated to its *modus operandi* (C.). Moreover, a peak into the notion of (relative) judicial independence, which entails the selection and removal of justices of an apex court, as well as the length of service, will follow (D.). Finally, a section dedicated to the possible means of accessing an apex court closes the chapter (E.).

A. What Apex Courts Do

It is not easy to generalize and categorize an apex court's activity due to their diverse characteristics. The courts' activity flows through all their powers and functions. Each one of them opens up a wide spectrum of possible further in-depth analysis, which however will not be done in the present thesis.

One can easily observe how an apex court's job goes hand-in-hand with the goals of a constitutional transition. In fact, all elements of constitutionalism are somehow shaped through the functions of the court and in this sense, the

391 For instance, in Ethiopia the power to deal with constitutional issues is vested in the House of Federations.

prominence of the courts' role is self-evident. These functions are hard to delimit and mostly intersect or fit the mold of one another.

If the constitution is one of the elements of constitutionalism and at the same time the vessel for all of them, upholding its primacy – through constitutional review – is the main role to protect it.

I. Limited Government: The Apex Judiciary and the Constitution

1. Involvement in the Constitution-Building Process

Since the constitution is the direct legal result of a constitutional transition, encompassing the elements of constitutionalism, the constitution-making and -amending process is crucial for the transition as a whole. The role played by an apex court on this specific matter is key for the success in having a functioning constitution.

Apex courts can be called upon assisting the very writing process of the constitution. For instance, a court might be summoned to ensure that a new constitutional draft complies pre-negotiated principles. The CCZA was given such a role in the specific context of constitution-building. In a way, it was given the function to oversee the creation of the new constitution. In short, during the multiparty negotiation process after *apartheid* in 1993, an interim Constitution was created to administer South Africa until a final Constitution was drafted and adopted. The interim Constitution encompassed a set of constitutional principles with which the definitive constitution, to be drafted by a Constitutional Assembly democratically elected in 1994, would have to conform. Moreover, the interim Constitution vested the newly established Constitutional Court with the task of determining whether or not the new constitutional draft actually complied with said principles set out in the interim Constitution. The first draft submitted to the Constitutional Court was sent back to the Constitutional Assembly because it did not entirely comply with the constitutional principles. Eventually however, the second draft 'passed the judicial test'.

In the South African case, the Constitutional Court was given a specific transitional mandate. This is, however, not always the case. In Nepal, for instance, the Supreme Court played a major role in the constitution-building process yet acting within its ordinary functions. When the Constituent Assembly requested an additional extension of the term to conclude the drafting of the new constitution, the Supreme Court denied it, forcing *de facto* the conclusion of the constitution-building process.

Once a constitution is concluded to have a constitution *per se* is not enough. Judicial jurisdiction may also extend to the amendment process. Amending the constitution is also a model of constitution-building and, as seen above, depending on its substance, it can even boil down to a constitutional transition. The process of amending the constitution allows the political apparatus to change, fundamentally or superficially, the constitutional framework of government. A constitution campaigning respect for the principles of constitutionalism has to be subject to amendment if it is to echo the will of the sovereign people contemporaneously, rather than the one of founding fathers who outlined the constitution. However, it must be added that too-ready amendments are a threat to the nature of the constitution as basic body of legal provisions. It is important that through amendments, the constitution does not derogate from the essential commitment to constitutionalism. Therefore to promote constitutional and political stability, amendments should be performed through prefixed procedures that reflect the democratic sovereignty of the people. In this sense, most constitutions do not advocate for easy amendment rules, but rather involve arduous amending procedures including several governmental bodies, political actors and branches of government. Sometimes even the judiciary is included. For instance, in South Africa, the Constitutional Court is given the opportunity to appraise the constitutionality of amendments.[392] Constitution builders may wish to include such a significant role for the judiciary in the amendment process, emphasizing the importance of particular constitutional principles. Indeed without judicial support, political actors may be unable to amend certain provisions, no matter how politically unpopular they are. This arrangement removes particular issues from the political process, relying instead on the judiciary to effect constitutional change; it also

392 Cf. Art. 167(4)(d) Constitution South Africa, 1996.

concentrates significant authority in the judiciary.[393] Ukraine features a similar amendment process.[394]

2. Enforcing and Implementing the Constitution

The first and most logical function of an apex court once a constitutional dispensation is enacted is the enforcement and implementation of the (new) constitution, which is the fundamental symbol of limited government. In a country torn apart from injustice, instability and oppressive rule, a new constitution represents a strong statement of the will to pursue a new path. This new path is embedded in the new constitutional document, as it includes the new values of governance and the new structure of government and reflects well the pact among political forces; in other words, all elements of constitutionalism. If the new direction points indeed towards constitutionalism, the negotiated pact would have to include the establishment of an apex court as a commitment not only to one another but also, and especially given the transitional circumstances, to the people, that they will uphold the contents of the constitution. In a sense, the presence of an apex court represents a guarantee for the people that the constitutional pact will be enforced and thus nobody is above any constitutional provision.[395]

The constitutional pact is enforced in its entirety, including fundamental rights entrenched in it and the separation of powers. Fundamental rights represent a great constraint on the power of the state and their existence are a written proof of the will to limit government power, and thus are a 'living' symbol of constitutionalism. The same goes for the separation of powers. As seen, in order to create a functioning system of government based on balanced horizontal and vertical power-sharing and mutual checks, constitutions vest all state power in different branches (horizontal) or levels (vertical) of government. For instance, the judiciary has a functional relationship to the other branches, as it is itself one of the

393 Nora Hedling, "The Design of the Judicial Branch," in *A Practical Guide to Constitution Building*, ed. Markus Böckenförde, Nora Hedling, and Winluck Wahiu (Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), 2011), 13. Art. 157 and 159 Constitution of Ukraine, 1996.

394 Cf. Henkin, 21; Hedling, 13.

395 Cf. Roderick A. Macdonald and Hoi Kong, "Judicial Independence as a Constitutional Virtue," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford Unviersity Press, 2012), 844–45.

branches. With the idea of creating a functioning system of government, constitutions vest specific powers in all branches of government. On its part, the judiciary provides the necessary checks on the activities of the other branches, and at the same time it is shaped by them. In fact, the judiciary's core function of interpreting and applying the law touches on such activities.[396] Apex courts may be called upon to determine or clarify the competences of the different branches of government championed by the constitution, i.e. they can irrevocably decide on what the different branches can do or not in situations such as when one branch is encroaching on the powers constitutionally granted to a different branch.[397] Therefore, apex courts implement the *separation of powers* championed by the constitution and at the same time provide an efficient system of *checks and balances.*[398] Both these features are central components of the element of limited government. Accordingly, with no judicial mechanism to enforce the constitutionally entrenched separation of power, limited government remains mere wishful thinking.

396 Cf. Hedling, 5 f.

397 Cf. Choudhry and Glenn Bass, 22. Similarly, apex courts determine the competences assigned to the different levels of government when it comes to vertical power-sharing. They can be called to decide whether one sphere of government (e.g., a province) is usurping the competences of another sphere (e.g., a municipality). Such disputes may take on a political character if different political parties have control over different spheres or branches of government. Cf. Ibid., 25.

398 For instance, in 2011 former President of South Africa Jacob Zuma tried to unilaterally extend the term of then-Chief Justice of the Constitutional Court Sandile Ngcobo above the constitutionally allowed maximum by relying on the Judges' Remuneration and Conditions of Employment Act. This action was brought before the Constitution Court itself, which unanimously decided that both the relevant provisions of the mentioned Act and the president's action was unconstitutional. The Court stressed that the Constitution only authorizes the Parliament to extend the Chief Justice's term, and that such action by the executive would violate the separation of powers. Of course, this judgement also aimed to shift the decision of the extension of the term from the ANC-dominated executive to the legislature, where opposition parties could also have a say on the issue. See, *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011).

II. Safeguarding the Rule of Law

In general, the interpretation and application of the constitution are fundamental tools of an apex court, and it is basic to the very notion of rule of law, which entails above all equality before the law, its fair application, and access to courts. Endorsing and institutionalizing the rule of law is listed among the broader missions of an apex court. In its most basic form, the rule of law sees no person above the law, which means that governmental authority is exercised only in accordance with fixed, identifiable, and predictable laws rather than unlimited personal discretion. Such laws are adopted and implemented on the basis of pre-established procedures, also referred to as due process.[399] By ensuring that the law is applied and enforced (fairly and equally to all) the court contributes to its predictability.

The importance of upholding the rule of law rests within the meaning of the very concept. A court which upholds it in this way also contributes to a central requirement for the rule of law: legal certainty. The legal certainty principle pretends that the law must provide its subjects with the ability to regulate their conduct. The apex court can do so by upholding the constitutional legal norms not only against the people, but especially against the State and ensuring inferior or ordinary courts do the same.[400]

In the context of a constitutional transition from an authoritarian regime towards a constitution-based society, a country shifts from being ruled by utter discretion of the authoritarian regime to a rule-bound system based upon fundamental rights and constitutional principles, such as democracy and vertical power-sharing. A rule-bound society, with a corresponding functional judiciary, contributes to the success of a transition in many ways. Apart from the main benefit of actually having a functional judiciary, a country's commitment to the rule of law, which is the first sign of stability, includes the protection of fundamental rights, one of which is the right to property. Legal certainty with regards to the enforcement of the right to property attracts international investors and thus enhances the economic potential of the country. For instance in 1979,

399 Choudhry and Glenn Bass, 21; LexisNexis, "What Is the Rule of Law?," *LexisNexis* (December 4, 2017), https://www.lexisnexis.co.za/news/rule-of-law/What-is-the-rule-of-law (accessed June 2, 2019).

400 Cf. Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997), 9.

Egypt established the Supreme Constitutional Court partly also to demonstrate to investors its commitment to the implementation of property rights.[401]

This principle is directly hostile both to dictatorships and anarchy, i. e., it is intended to be a safeguard against arbitrary governance, whether e. g., by a totalitarian regime or by mob rule. In other words, it directly contributes to the other elements of constitutionalism, which are limiting government power and democracy. Some additional functions breed out of safeguarding the rule of law:

– *Enforcement of the Primacy of the Constitution:* More specifically, the primary logic of an independent judiciary rests on its power of constitutional review, which hand in hand with the enforcement of the constitution as an element of limited governance, it is mainly keen on the safeguard of constitutional supremacy.[402] In defining constitutional law, Weinrib's 'post-war paradigm' postulates in its essential features, first, that constitutional law is the law entrenched in a written constitution, and second, that this law sits at the top of its legal system, as the supreme law of the land. It is codified to reflect and preserve its primacy, and accordingly authoritatively interpreted and applied by an independent apex judiciary with the power of constitutional review.[403] The enforcement of such hierarchy is the core ordinary function of an apex court. Stone Sweet defines an apex court as an 'independent organ of the state whose central purpose is to defend the normative superiority of the constitutional law within the judicial order'.[404] In this regard, an apex court's role is to act as the guardian of constitutional

401 Macdonald and Kong, 845 – 46; Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge: Cambridge University Press, 2007), 4 – 6.

402 In the sense, that constitutional law sits on top of a country's legal hierarchy and rules over all branches of government, including the judicial branch. Choudhry and Glenn Bass, 19.

403 Gardbaum, 169. For more on the 'postwar constitutional paradigm' cf. Lorraine E. Weinrib, "The Postwar Paradigm and American Exceptionalism," in *The Migration of Constitutional Ideas* ed. Sujit Choudhry (New York: Cambridge University Press, 2007).

404 Alec Stone Sweet, "Constitutional Courts," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 817.

law, and accordingly – being constitutional supremacy part of the rule of law – of constitutionalism.[405]

- *Dealing with past injustices:* Upholding the rule of law also means dealing with past injustices and post-authoritarian legal reforms. Without any doubts, transitional justice is a pivotal issue when transiting from authoritarian towards democratic rule. However, no matter how the transition took place, whether brought about by the popular anti-government protests, uprisings, and armed rebellions like in the Arab Spring or a negotiated transition to democracy like the one witnessed in South Africa after the *apartheid* rule was demounted, the important question remains as of what to do with the old laws of the old regime. As we will see later, apex courts are commonly vested with the power to decide upon the constitutionality of laws. Accordingly, the enforcement of the new constitutional order does not only mean upholding the rule of law in the present and future, but also in the past. The apex court represents the perfect institution, on the one hand, to strike down all those older repressive laws, which are not compatible with the new constitutional dispensation, and on the other hand, to deal with former injustices, which would otherwise be relegated to the past.[406]
- *Shaping of the apex court itself:* Of course, an independent judiciary is also part of the rule of law, and as such is bound by the constitution to fulfil its judicial mandate. The way in which it does so shapes the manner in which it will be perceived by the people.

405 Choudhry and Glenn Bass, 19.

406 ibid., 26. A great example is, of course, the creating of both the apex courts of Germany and Italy in the aftermath of WW2. Both courts played an important role in marking a legal break with the terrors of the past. Once established, they both embarked on the difficult task to evaluate and strike down the prior authoritarian legal order. For instance, in its first ruling in 1956, the Italian Constitutional Court firmly confirmed its power and authority to review laws enacted prior its establishment and also that it intended to dismantle any of those provisions, especially those of the Fascist-era that strangled the free and fair functioning of democratic political activity. Cf. judgement of the Constitutional Court of Italy: Italian Constitutional Court [*Corte Costituzionale italiana*], Decision No. 1/1956 (June 5, 1956). In its early years, the Federal Constitutional Court of Germany also worked hard to strike down the remains of the old legal order. For instance, it ruled that State officials who held office under the Third Reich were prohibited from taking office in the new Federal Republic. Cf. judgement of the Federal Constitutional Court of Germany: [*Bundesverfassungsgericht, BVerfGE*], Decision No. 1 BvR 147/52 (Dezember 17, 1953) [*Beamtenverhätnisse*].

III. Assisting the Democratic Process and Arbitrating Politically Contested Cases

The role of apex courts in a constitutional transition is closely tied to the powers and functions given to it. The difference between powers and functions is little, as in powers being the tool an apex court is endowed with in order to fulfil its functions, which are somehow more abstract.

Most of an apex court's powers are 'ordinary' in the sense that they are not transition-specific. Their fulfilment might adopt an important role in a transition, but they are part of an apex court's standard toolbox and linger on once the transition is over. Some of these powers, instead, are related to the transitional period by their own nature. They are in a way 'not-ordinary', i.e., they vanish once the constitutional transition is completed.[407] In any case, transitory periods are periods filled with political contest. In said periods therefore, courts are often called upon to decide on a country's most pressing political matters.[408] Hence, apart from the obvious overlaps of the court's functions in relation to the assistance of democracy, such as enforcing fundamental rights necessary to the popular decision-making process, the court – once established – necessarily becomes entangled in some of the tensest political matters. Of course, it is the court's job to uphold the constitutional dispensation, which may involve resolving questions about electoral laws and results, regulating the activities of political parties, reforming the legal system after a period of authoritarian rule and overseeing constitutional amendment or even constitution-drafting procedures. Unsurprisingly, in these early stages of the new State many of the disputes are between political parties. As Choudhry and Glenn Bass fittingly point out: 'even if the cases do not frame the issues in this way, constitutional interpretation is a site of partisan political conflict among political parties, which constitutional courts are called upon to resolve.'[409] This is an aspect of a court's activity,

407 For instance in South Africa, the Constitutional Court was vested with the function to certify the new constitutional dispensation once the Constitutional Assembly issued the draft.

408 Such matters can include, for example, questions about electoral laws and results, the regulation of the activity of political parties, the enforcement of the separation of powers or decentralization, the complete reform of the legal order after a period of authoritarian rule or the oversight of constitutional amendment procedures.

409 Choudhry and Glenn Bass, 9.

which I came to learn early in my research.[410] These disputes are always delicate, and never more so than in the circumstance of a constitutional transition.

- *Providing a Forum for Political Arbitration:* Seen as the broad mission of enforcing the constitutional pact conclusively, an apex court takes on the function to resolve not only veritable legal disputes, but also political quarrels among different political parties, branches of government and other state actors. The very simple fact that an apex court's decision over the determination of whether a particular act is compatible with the constitution or not is conclusive, provides the appropriate sense of finality in political disputes. This function of the court goes beyond the legal resolution of the dispute and is deemed to prevent them to become a protracted source of political contention, which could challenge the efficient functioning of political institutions, and thus of an entire governmental apparatus.[411] Of course, this is a role that a court plays in any period of time in its existence. However, stability in a constitutional transition is very fragile and therefore apex courts have to be very attentive when it comes to political tiffs.
- *Supervision of Electoral Processes:* Apex courts can also play a major role in the case of elections, where they are frequently required, for example, to determine the constitutionality of electoral laws, to supervise the elections themselves and to validate their results.[412]

410 Later confirmed by my talk with former Chief Justice of the Supreme Court of Nepal Kalyan Shrestha,ut also mentioned by ibid., 22–23.

411 ibid., 21.

412 ibid., 23. Often apex courts can influence the political process by assisting the administration of democratic elections or by regulating political parties. For instance, in France, the *Conseil Constitutionnel*, is constitutionally empowered to oversee elections and referendums (cf. Art. 58–60 Constitution of France, 1958), and if needed it can declare an election invalid. In recent times, Egypt's Supreme Constitutional Court ruled multiple electoral laws as being unconstitutional. This took place on a multiple of occasions, both during Mubarak's authoritarian rule and during the country's constitutional transition. Under Mubarak, it was alleged that the authorities had manipulated the rules in order to steer the outcome of the elections. In this case, the Court dismantled several electoral provisions that it found to be biased against independent candidates. In 2012, during the transition, the Court found that the electoral law that ruled over Egypt's first post-revolution parliamentary elections were unconstitutional for the same reasons regarding the independent candidates, and ordered to dissolve the newly elected Parliament. Cf. David D. Kirkpatrick, "Blow to Transition as Court Dissolves Egypt's Parliament," *New*

– *Political Party Regulation:* The creation and functioning of political parties can also be prone to an apex court's ruling. The rules applicable to political parties determine who is legally entitled to participate in elections and therefore have a direct impact on democracy and its structure, in both the short and the long-term. However, these rules are liable to partisan manipulation because ruling parties can use them to weaken political opponents. This is a particularly sensitive issue in a constitutional transition and especially in countries emerging from authoritarian rule, where existing political parties may be institutionally frail or closely related to the former totalitarian regime, and many new parties may quickly emerge after the introduction of democratic governance.[413]

York Times (June 14, 2012), https://www.nytimes.com/2012/06/15/world/middleeast/new-political-showdown-in-egypt-as-court-invalidates-parliament.html (accessed June 1, 2019); Moustafa, 162 – 64.

413 The constitutions of Germany, South Korea and Turkey, for instance, mandate directly their apex courts to regulate and even forbid, under certain conditions, political parties (Art. 69 Turkish Constitution, 1982; Art. 21 Basic Law for the Federal Republic of Germany, 1949, Art. 8(4) Constitution of South Korea, 1948). In this sense, the TCC has repeatedly, and controversially, made use of such mandate. Most notably it has banned political parties, associated with political Islam and the Kurdish minority in Turkey, for having adopted programs or activities, which violated the explicit prohibition to contradict the constitutional principles of democracy and secularity, or the indivisible integrity of the Turkish territory and nation (cf. Art. 68 Constitution of Turkey, 1982). Cf. Choudhry and Glenn Bass, 24. Instead, in Egypt political party regulation (i. e. ban) is statutory and the Supreme Constitutional Court has been asked many times to rule on their constitutionality. In 1986, the court struck down a law that banned many activists of the opposition from participating in politics (see, SCCE Decision No. 56, Judicial Year 6, June 21, 1986 (Official Gazette No. 27, July 3, 1986)); other judgements were issued by the Egyptian Supreme Constitutional Court striking down political isolation laws denying the right to participate in political life to various political opposition groups, see SCCE Decision No. 49, Judicial Year 6, April 4, 1987 (Official Gazette No. 16, April 16, 1987); SCCE Decision No. 44, Judicial Year 7, May 7, 1988 (Official Gazette No. 21, May 26, 1988). For further insights and details on the tackling of isolation laws, cf. discussion in Moustafa, 103 – 04. In June 2012, during the constitutional transition, the court overturned a law that forbad members of the authoritarian Mubarak regime to candidate for election, with the argument that depriving them of their political rights was against the constitution (see, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012). This last ruling allowed Ahmed Shafik – Mubarak's former Prime Minister – to run for president. However, Shafik lost to Mohamed Morsi in a run-off election. Cf. Kirkpatrick; Moustafa, 103; BBC, "Q & A: Egypt's Supreme Court Rulings," *BBC News* (June 17, 2012), https://www.bbc.com/news/world-middle-east-18463887 (accessed June 1, 2019); Richard Allen Greene, "Ahmed Shafik: Egypt's "Counter-Revolutionary Candidate"," *CNN* (June 16, 2012), http://www.cnn.com/2012/06/15/world/meast/

– *Political Insurance:* A constitutional transition is often marked by the presence of different political parties fighting over the control of the new government. In such a struggle, as democratization increases electoral uncertainty, the need for some sort of political insurance arises, i. e., each party is encouraged to create an apex court with the power of constitutional review as a form of political insurance to hedge against the risk of future electoral loss. In other words, after a future election the opposition will have the possibility to protect itself and its own interests from power abuses of the new governing party trying to entrench its newly acquired authority. Even though other institutions may also serve to protect political minorities, constitutional review has increasingly become particularly pivotal, which explains the quick spread of judicial review in recent constitutional transitions.[414]
– *Symbolic value:* The establishment of an apex court vested with the power to uphold the supremacy of the law and make sure that the constitution, and nothing or nobody else, stands above every State activity, also holds a tremendous symbolic value of a country wanting to break from its authoritarian past. As Choudhry and Glenn Bass observe: 'in countries with a history of authoritarian rule and human rights violations, establishing a constitutional court is a concrete message that the rule of law has been established and that impunity will no longer be tolerated'.[415]

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egypt-election-shafik (accessed June 1, 2019). Another interesting case took place in South Africa, where the Constitutional Court upheld constitutional provisions that forbad the so-called floor crossing, a practice which sees politicians switching party once elected (see, *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)), at 830 para. 184). This prohibition was originally enacted due to fears that the dominant ANC would recruit or 'steal' elected members of minority parties to further cement its grip on Parliament. However, these safeguards for smaller parties were later repealed through a constitutional amendment process led by the same ANC. This move was probably motivated by the ANC's wish to take over provincial legislatures controlled by opposition parties. The Court rejected any challenge to this amendment, notwithstanding its partisan connotations. See, *United Democratic Movement v President of the Republic of South Africa and Others* (*African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae*) (*No 2*) (CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 (4 October 2002), at paras. 53, 59, 115–17, 517–18 and 530–31). Samuel Issacharoff, "Constitutional Courts and Democratic Hedging," *Georgetown Law Journal* 99, no. 4 (2011): 996–98.

414 Cf. Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 33.

415 Choudhry and Glenn Bass, 22.

B. How Apex Courts Do What They Do

I. In General

Apex courts are commonly empowered with the power of constitutional review and in exercising such power, they fulfil a vast list of functions. Yet not only, for other powers can be vested in the apex judiciary to fulfil all of its functions.

In order to enable apex courts to fulfil their functions, constitutions tend to empower them with more than just constitutional review. Additional powers may include: issue advisory opinions on the constitutionality of laws, prior to or after enactment of the same;[416] to impeach the head of state or in dissolve the parliament;[417] to regulate political parties or supervise electoral processes;[418] or even to declare a state of emergency.[419] However, apart maybe from exercising final jurisdiction over constitutional questions, there are in fact virtually no powers that all apex courts have in common. Even the power of constitutional review of legislation varies in its scope and effect. Nevertheless, as Harding Leyland and Groppi neatly summarize, contemporary apex courts possess mainly the following four types of power:

416 Advisory opinions can be seen as being a non-binding version of constitutional review. Through advisory opinions, courts can advise other branches of government on the constitutionality of actions or legislation prior their enactment without forcing them to follow the advice. For instance, an advisory opinion may be sought by the legislature while it is debating a law. Since advisory opinions are non-binding, they lack legal force. They constitute political, rather than legal, safeguards of the constitution. In Canada for instance, the Supreme Court may issue non-binding advisory opinions in response to 'reference questions' posed by the government, most often regarding the constitutionality of laws (see, Art. 53 Canadian Supreme Court Act, 1985).

417 The apex judiciary may often also influence the impeachment process or of enforce legal safeguard against the executive's power to dissolve Parliament. The judiciary in Afghanistan, for instance, plays a role in the impeachment processes (see, Art. 69 Constitution of the Islamic Republic of Afghanistan, 2004).

418 Already mentioned above.

419 In order to facilitate fast responses in times of crisis, some constitutions vest the executive branch with the power to declare a state of emergency. This far-reaching power allows for the temporary suspension of constitutional provisions. In order to prevent the abuse of such sweeping power, most constitutions limit it by either putting strict conditions to its employment or by requiring the support of other branches, namely the judiciary. For instance in Thailand, the constitution endows the judiciary with the possibility of blocking the executive from declaring a state of emergency (see Art.173 Constitution of the Kingdom of Thailand, 2017).

Table IV The Powers of an Apex Court[420]

Constitution-drafting jurisdiction (*controlling the constitution itself*)	– adjudicating issues arising in the constitution-making process; and – reviewing the constitutionality of constitutional amendments
Judicial review of legislative acts (*controlling the legislature*)	– reviewing the constitutionality of laws in advance of legislation (ante factum); – reviewing the constitutionality of laws after legislation (ex post facto); – reviewing the constitutionality of decisions by the legislature; and – initiating or requiring legislation
Jurisdiction over officials and agencies (*controlling the executive*)	– reviewing the constitutionality of executive actions and decisions; – hearing impeachment proceedings against office-holders; – consideration of criminal or civil cases in respect of official corruption; – consideration of qualifications of individuals to hold or continue to hold public office; – adjudication of appointment of officeholders under the constitution; – adjudication of disputes as to the competence of organs of state; and – adjudication of disputes between organs of state
Jurisdiction over political parties and elections (*controlling elections*)	– adjudication of the dissolution or merger of political parties and control over constitutionality of their actions; – examining the legality of elections and election results at any level; and – hearing electoral petitions

II. Constitutional Review in Particular

Upholding constitutional guarantees lies at the core of judiciary activity. Yet, how does this typically occur? A codified constitution is mostly envisioned to have legally binding effects on individual rights and on political procedures, such as elections, constitutional amendments and legislative process. In order to allow the contents of a constitution to actually have such binding effects, they need to somehow be enforced in a way that allows the court

420 *Note:* No constitutional court possesses all four of these powers. The list simply denotes the range of possible choices constitutional designers may face. Andrew Harding, "The Fundamental of Constiutional Courts," https://www.idea.int/sites/default/files/publications/the-fundamentals-of-constitutional-courts.pdf (accessed May 21, 2019); Andrew Harding, Peter Leyland, and Tania Groppi, "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective," *Journal of Comparative Law* 3, no. 2 (2008): 5.

to decide if an act or decision is constitutionally valid, and provide a remedy in cases they are not. Apex courts perform such endeavor through the exercise of 'constitutional review', known also as 'judicial review'. Constitutional review can take many forms and involve different institutions, yet its purpose is the same across the world—to uphold constitutional provisions against any legislation or governmental action that might violate them.[421] In other words, constitutional review is the power of the judiciary to review the constitutionality of executive or legislative actions and laws by a process of judicial interpretation that is relevant to any case properly within its jurisdiction. Being that constitutional law generally represents the highest law in a national legislation order (international law being the exception), all other laws and government action must comply with it. In this regard, constitutional review is also synonym to the enforcement of the legal order's hierarchy, or for want of a better word, constitutional supremacy.

Through constitutional review, courts enable the protection of the constitution by preventing acts that violate them.[422] This is the reason why the image of the court is seen as a veritable guardian of the constitutional text and its principles seem to be accurate.

1. The Object of the Review

The extent of constitutional review varies across countries. Following the horizontal separation of powers, the constitution commonly extends judicial review to national legislation, administrative decisions or executive acts, but not exclusively. For instance, the Constitution of South Africa empowers the court to also review the constitutionality of the conduct of the President.[423] Other countries, such as Afghanistan, may even opt to submit international law to constitutional review, a solution which upsets the ordinary hierarchy of the law by putting (national) constitutional law

421 Hedling, 6; Harding, 1.

422 Hedling, 6.

423 See, Art. 167(5) Constitution of South Africa, 1996: 'The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.'

above international law.[424] Even government omissions, rather than actions, have been prone to constitutional review. In Uganda, for example, the Court of Appeal, sitting as the Constitutional Court, has such power.[425]

Clearly, following instead the vertical separation of powers, constitutional review applies for those laws and government actions, which are enacted and made at top level of government. However, in a decentralized or even federal country, it can extend to legislation of lower levels of government, such as provinces and municipalities.[426]

The content of constitution review can cover the entire spectrum of the constitution, including fundamental rights. An apex court may also review the constitutionality of the vertical allocation of powers between different spheres of government, for instance, between regional government and the

424 See, Art. 121 Constitution of the Islamic Republic of Afghanistan, 2004: 'At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.' On the 25.11.2018, the Swiss electorate rejected the Popular initiative 'Swiss law, not foreign judges' (Self-determination Initiative). The initiative sought to alter the way in which Switzerland applies international law if there is any 'conflict' between it and constitutional law. In such a situation, Switzerland would have had to ensure that the Constitution takes precedence over any international agreement, putting constitutional law above international law. For the results and more on this Swiss initiative, cf. The Federal Council, "The Self-Determination Initiative," admin.ch (The Portal of the Swiss Government), https://www.admin.ch/gov/en/start/documentation/votes/20181125/self-determination-initiative.html (accessed June 14, 2019).

425 Art. 137(3)(b) Constitution of the Republic of Uganda, 1995, allows an individual to petition the court that 'any act or omission by any person or authority' is inconsistent with the Constitution.

426 In South Africa, for instance, under the Constitution of South Africa, 1996, the Constitutional Court's powers of review extend to all legislation on all levels of government, including provincial constitutions, which are also required to conform with the national Constitution. Art. 143–144 and 167 Constitution of South Africa, 1996. Comparably, in Serbia, the Constitutional Court's jurisdiction extends the power to review the compliance of 'general acts of autonomous provinces and local self-government units with the Constitution and the Law', and additionally of 'general acts of organizations with delegated public powers, political parties, trade unions, civic associations and collective agreements'. See, Art. 167(4)-(5) Constitution of the Republic of Serbia, 2006. Switzerland instead, does not allow for any constitutional review of federal laws, but only of cantonal (i.e., the second tier of government) laws. See, Art. 190 Swiss Federal Constitution, 1999.

national government.[427] In a similar way, the review of activities of the legislative or executive branches of government, which raise questions related to the horizontal separation of powers, are also frequently on the constitutional 'menu' of judicial powers. Such type of constitutional review targets the settlement of quarrels between the different branches of government, and aims directly at defining their competences within their functional area; the judiciary itself is no exception.[428]

2. The Bearer of Constitutional Review Powers

The concept of apex courts vested with the power to deal with constitutional issues is roughly split between courts that are not functionally part of the ordinary judiciary and those which instead sit at the top of it.[429] Generally, the difference between them rests in the spectrum of their jurisdiction, but not only. It is also closely interlinked with the organization of constitutional review and, accordingly to the legal tradition of the country in question. Just as the extent of constitutional review varies across countries, so does the process it involves. The models of constitutional review are commonly twofold: the American model (or diffused) and the European model (or centralized). The difference between both models rests in the fact that they authorize different institutions to engage in constitutional review; however, in both cases, an apex court.[430]

427 Once again, the Constitution of South Africa, 1996, endows the Constitutional Court to 'decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state'. See Art. 167 Constitution of South Africa, 1996. Similarly, in Cameroon, the Constitutional Council is endowed with final ruling on disputes between the state and the regions, and between the regions themselves. See, Art. 47(1) Constitution of Cameroon, 2006. Similar powers of review of the division of powers among the different spheres of government, are conferred by the constitutions of India, Malaysia, Mexico, Switzerland and Nigeria, *inter alia*, to their apex court. See, Art. 232 Constitution of the Federal Republic of Nigeria, 1999; Art. 131 Constitution of India, 1950; Art. 128 Federal Constitution of Malaysia, 1957; Art. 105 Political Constitution of the United Mexican States, 1917; and Art. 189(2) Swiss Federal Constitution, 1999.

428 South Korea, among others, has extended such power to its Constitutional Court. Cf. Art. 111(1) 4 of the South Korean Constitution.

429 Supreme courts can be found labelled as 'high court, supreme federal court, etc.', whereas constitutional courts as, for instance, 'constitutional council'.

430 Of course, these are only the two main variations. Other alternatives can occur, for instance, Ethiopia vesting the power of judicial review in the House of Federations (i.e., a legislative body) and France and its *Conseil Constiutionnel* (i.e., an executive body). The

– On the one hand, under the American model,[431] all courts throughout the ordinary judiciary are endowed with the power of constitutional review, even lower courts. In this way, constitutional review is decentralized, as not only one specialized court has inherent jurisdiction to engage in constitutional review. Decisions of lower courts on the constitutionality of laws or government action remain, of course, subject to appeal, with typically a 'Supreme Court', sitting at the top of the judicial hierarchy, usually as the last court of appeal (also) in constitutional claims.[432] Therefore, in these cases, constitutional judicial authority is delegated to their new, or pre-existing, supreme court with general jurisdiction acting as courts of last instance.[433]

  Generally, under the American model, constitutional review is 'concrete', i. e., it is exercised pursuant to ordinary litigation. This can, however, be seen as an advantage of this model, which allows for the possibility of appealing against a decision of a lower court. At the same time, this is also its main drawback as the 'path' all the way to the Supreme Court takes time.[434]

French Constitutional Council, however, is just a variation of the concept of Constitutional Court. Whether the Council is a court is a subject of academic discussion. Cf. François Luchaire, "Le Conseil Constitutionnel Est-Il Une Juridiction?," *Revue du droit public et de la science politique en France et à l'étranger* (*RDP*) 95, no. 1 (1979); Michael H. Davis, "The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court," *The American Journal of Comparative Law* 34, no. 1 (1986); Charlotte Michellet, "Le Conseil Constitutionnel: Une Cour Suprême En Devenir?," *Esprit* 393, no. 3/4 (2013).

431 'American', as it was prominently developed in the United States of America.

432 As most supreme courts decide only a small fraction of all constitutional disputes made on the American model (cf. *certiorari*), lower courts hear the vast majority of constitutional challenges. Supreme courts can also refrain from dealing with constitutional matters, when at the same time the constitution establishes a constitutional court in the same country. Supreme courts tend to extend their powers to cases of ordinary law, not only constitutional claims.

433 E.g., Kenya, Switzerland, the United States of America, etc. [eventually, add the case studies of this book, and those with decentralization]. In this solution, usually the constitutional court is not part of the judicial branch as such but remains functionally independent of legislature and executive.

434 Harding, 1–2. To make just a few examples among many others: in the United States of America, evidently, constitutional review is vested both in federal and state courts at all levels. The Supreme Court of the United States is known to be the first in forming the basis for the exercise of constitutional review (Article III Constitution of the United States of America) in its landmark case U.S. Supreme Court, *Marbury v. Madison*, 5 U.S. 1 Cranch 137 137 (1803). In Estonia, instead, as in most countries, it is the constitution directly

– On the other hand, under the European model,[435] constitutional review is functionally separated from the normally operating judiciary and is centralized in a detached judicial institution, typically a 'Constitutional Court', which monopolizes exclusive jurisdiction over all constitutional matters and no other judicial body can engage in constitutional review.[436] Unlike a 'Supreme Court', such exclusive court is constrained to resolving constitutional disputes. Here, constitutional review tends to be 'abstract', i. e., that the apex court typically reacts to questions of constitutionality referred to it by others, and not following the ordinary litigation. In a way, having constitutional review outside of the ordinary judiciary better serves the separation of powers. The apex court in question takes a step aside and oversees all branches of government, including the ordinary judiciary, with the only mission of upholding the contents of the constitution. Although constitutional review is not always exclusive to a constitutional court, as of today, over 70 states have concentrated such power within one single judicial institution, court or council, and put it outside of the traditional structure of the judicial branch.[437]

Delimitations are not always as simple as depicted. Sometimes both a Constitutional and Supreme Court co-exist (e. g., Colombia and Hungary); a solution which can easily lead to friction when it comes to their competences, and so generate the urge judicial diplomacy in order to

which allows lower courts to engage in constitutional review. Cf. Art. 152 Constitution of the Republic of Estonia, 1992. Empowering courts to engage in constitutional review can be compared to a veritable devolution of such power across the judiciary at different levels of government.

435 'European', as it was conceived by the prominent Austrian legal scholar Hans Kelsen and can be found in many different European countries such as, Austria, Germany, Italy and Spain, and those which were influenced by them such as Colombia, Russia, Republic of Korea, Turkey and Taiwan. See ibid., 1.

436 Sometimes even supreme courts are called 'constitutional courts', even though they are not separate from the judicial branch and as such extends their jurisdiction not only to constitutional matters, but to any legal issue on last instance.

437 Lech Garlicki, "Constitutional Courts Versus Supreme Courts," *International Journal of Constitutional Law* 5, no. 1 (2007): 44; Venice Commission, "Constitutional Courts," Council of Europe, https://www.venice.coe.int/webforms/courts/?lang=EN (accessed March 12, 2018). Examples of constitutions, which embrace the European model of constitutional review are found in Benin, Germany, Russia, Turkey and Ukraine, among others. Mavic Arne, articles in the constitutional review (2001).

solve the disputes.[438] The line between constitutional and non-constitutional (i. e., of ordinary legislation) matters is not always clear, for constitutional law has come to permeate the entire structure of the legal system.[439]

The legal tradition has a massive influence on the model of constitutional review. Countries with a civil law approach tend to – but not exclusively – opt for the European model, whereas common law societies tend to adapt the decentralized approach to constitutional review.[440] The reason thereof lies in the political and constitutional culture of both civil and common law systems. The European model, for instance, corresponds better to the civil law idea of separation of powers and the understanding of judicial precedent.[441] In the civil law societies, judges are those who apply the law, with no power to create or destroy it, whereas in common law societies, judges are seen as one of the sources of the law, and therefore the separation of powers is less sharp than in civil law societies. This is just a rule of thumb and is not necessarily the case for every situation.[442]

3. Legal Tradition

The link between the legal tradition and the type of courts and their powers has been hinted at above. Here it is dealt with in greater detail.

A number of factors shape the choice between the European (centralized) and the American (diffused) review. Centralized constitutional courts are more typical of civil law countries. Most of the countries in Europe and Asia have adopted a civil law system, which means that most of them also have a separated specialized constitutional court. A specialized

438 Daly, "The Judiciary and Constitutional Transitions," 9.

439 For a thorough analysis of the possible jurisdiction conflicts between constitutional courts and supreme courts see: Garlicki, passim.

440 ibid., 44.

441 Cf. Choudhry and Glenn Bass, 19; Garlicki, 45. But also Alan-R. Brewer-Carias, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989), 128 – 31.

442 Switzerland, for instance, even though it does not allow constitutional review of federal statutes, is a country with a strong civil law system, yet final ruling on any matter is vested in the Federal Supreme Court, which sits on top of the ordinary judiciary. Switzerland, however, is a very peculiar example when it comes to constitutional review due to its notorious Art. 190 Swiss Federal Constitution, which prohibits the Federal Supreme Court to engage in any form of constitutional review of federal statutes and international law.

constitutional court is better suited for integration into a civil law system because it commonly includes specialized courts in other areas, such as civil and criminal law, administrative law, and more. Common law systems instead employ almost universally the diffused model of constitutional review (here, South Africa being an important exception). Here, all levels of court, including the apex Supreme Court, have jurisdiction over all questions of law, including constitutional law. In francophone West African and Middle Eastern countries, the centralized model is also used consistently. Nonetheless these are just rules of thumb, rather than absolute truths. Some civil law countries use the diffused system, while some common law countries use the centralized system.[443]

To make a few examples, on the one hand, prominent and influential countries that adopted the centralized system include France, Colombia, Indonesia, Germany, the Republic of Korea, Spain and Taiwan. These are all civil law countries. Another significant example of a centralized system of judicial review is South Africa, which displays a mix of common and civil law. However, not all civil law countries adopted a centralized system of judicial review. For instance, Argentina, Japan, Sweden, or Switzerland[444] do not. On the other hand, noticeable cases of the diffused judicial review include Australia, India, Canada, Malaysia, the United Kingdom, Nigeria, and the United States. These instead are all common law countries.[445] Myanmar would instead be an example of a common law country with a centralized system of judicial review.

4. Absence of Constitutional Review

Constitutional review as such or as a power exclusive to apex courts is not always a must. Some countries have decided to entrust the power of

443 Choudhry and Glenn Bass, 19. For more on both the differences between common law and civil law systems and their link to constitutional review cf. Public-Private-Partnership Legal Resource Center (PPPLRC), "Key Features of Common Law or Civil Law Systems," World Bank Group, https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law (accessed February 10, 2019); Victor Ferreres, "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism," *SELA* (*Seminario en Latinoamérica de Teori´a Constitucional y Poli´tica*) *Papers*, no. 39 (2004).

444 In Switzerland, however, judicial review has been limited to the constitutionality of cantonal laws (cf. Art. 190 Swiss Federal Constitution).

445 Harding, 2.

constitutional review in a body other than the judiciary or have limited it in a way that it is basically non-existent. These countries reserve such power for the legislature, preserving therefore the complete sovereignty of this branch by isolating its activity from the supervision of a separate institution such as an apex court. In such a rare system, it is e.g., the legislative branch the institution charged with ensuring its own compliance to the constitution.[446] Prominent examples are the Netherlands, Finland and to some extent Switzerland. The Constitution of the Netherlands states, that '[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts'.[447] Finland, instead, provides for the Constitutional Law Committee, a consultative body, to advise on questions of constitutionality of proposals for legislation and other matters brought before it.[448]

C. (Relative) Judicial Independence

I. Introduction to Judicial Independence

In order to gain and retain its legitimacy and public support, an apex court's first step is to be perceived as independent. In short, independent is a court, which shields itself from any political interference when it comes to the fulfilment of its functions, rather than declare its commitment to any political actor. At the same time, in order for a court to be independent, no judge should fear reprisal for any decision, which would favor or disfavor the one or the other political actor. This would negatively influence the judiciary activity of the court, which would fail in carrying out its duty to administer justice.[449]

1. Judicial Independence as an Element of Constitutionalism

Apart from being itself an important element of constitutionalism, judicial independence touches on all the functions and powers listed above: above all, it is a benchmark of the rule of law, which requires impartial enforcement and interpretation of the law and its supremacy, but also to

446 Hedling, 11.
447 Art. 120 Constitution for the Kingdom of the Netherlands, 2008.
448 Art. 74 Constitution of Finland, 1999.
449 Choudhry and Glenn Bass, 27; Harding, Leyland, and Groppi, 15.

the credible dispute resolution and judicial review, which would lose their meaning if the court would depend on the other branches of government. Accordingly, a dependent judiciary means that the separation of powers between the political branches remains unchecked opening up possibilities of corruption, but also that the protection of individual rights is undermined.

2. Judicial Independence and Its Components

a. Structural Components: Institutional and Personal Independence

On a rather structural level, judicial independence has mainly two components: functional and individual independence. The former refers to the existence of 'structures and guarantees to protect courts and judicial officers from interference by other branches of government.'[450] The latter instead refers to judicial officer's themselves acting independently and impartially. Both dimensions of judicial independence probably score almost universal support. Many are the safeguards to protect both institutional and individual independence. For instance, constitutional guarantees of the doctrine of separation of powers and non-interference in the judiciary by the other branches are pivotal. As the UN document, the *Basic Principles on the Independence of the Judiciary* (1985) endorses: 'the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.'[451] When it comes to individual independence, instead, safeguards revolve around the appointment process, tenure, removal and qualifications of the justices.

b. Substantive Component: Impartiality

Of course, structural safeguards facilitate the protection of judges from outside influences. However, even though independence is rather objective, impartiality is subjective and revolves around the ability of judges to put aside their own biases and decide cases objectively.

450 International Bar Association. "Comments on the Impact of South Africa's Constitution Fourteenth Amendment Bill and the Superior Courts Bill." (April 2006), 4.

451 UN, *Basic Principles on the Independence of the Judiciary*, 1985.

Impartiality is harder to protect because it is in the mind of the judges and cannot be influenced by law. Of course, codes of judicial conduct are useful guidelines for them, but hardly anybody can judge what drives a judge's decision subjectively. It is nevertheless no less important. Without an independent mindset, approach and attitude to the judicial activity, judicial independence is worthless because structures and constitutions cannot establish such mindset, but only deliver its framework and try to foster it.

II. The Relativity of Judicial Independence

However, *absolute* independence is very hard to attain, and in full fairness, it is not completely longed-for. An exceedingly assertive court can prove to be considerably aggravating for its political accountability. In a constitutional democracy, an independent court is expected to be also accountable to the public, which it serves, just as all other branches of government.[452] The judiciary does in no way sit on top of the other branches, and of course, on top of the governed themselves. A court empowered to strike down democratic laws must somehow be accountable to those who are affected by those laws and those who drafted them. Therefore, it is only fair to say that the public and their political representatives should have some role in appointing the members of the court. Failure in not reflecting the people's values and concerns when fulfilling its functions results in the court losing public support, and thus legitimacy.[453]

The circle thus closes and the result of trying to strike a balance between absolute independence and accountability is labelled *relative* independence. This is the balance the constitution builders should strive for: A court, which operates independently from any political interest, while remaining receptive to the public it serves.

It is indeed challenging to strike the perfect balance between judicial independence and accountability. In fact, the constituent power has to consider a series of issues, which directly affect both judicial independence and accountability. The balance is found among the right dosage of three different constitutional design options: the appointment of

452 Hedling, 16.

453 Choudhry and Glenn Bass, 28.

judges, the limit of terms they can sit on the bench and their removal. The first option, the selection and appointment of judges, is clearly an efficient manner through which the other branches of government can tamper with the judiciary. The second option, the limit of terms a judge can sit on the bench, is also an issue that can influence the judiciary. On the one hand, long terms isolate judges from political retaliation for unpopular judgements and thus convey them the right autonomy to rule on legal grounds, rather than political. On the other hand, long terms may also endanger legal development, as change would be limited and so would be progress within the law. Finally, the removal of judges, which may happen in an arbitrary or in a politically motivated manner, closes the list of constitutional design options prone to influence judicial independence.[454]

So, judicial independence starts from the appointment of the members of the institution empowered to enforce constitutional supremacy and ends with their removal; it flows from the one action to the other. Independent appointment of judges is meaningless if their removal depends on the executive or the legislative, and *vice versa.* These issues affect judicial independence and accountability directly from within the four corners of the constitution itself, however, it is not to forget that constitution builders need to remember the transitory context of their own country outside the constitutional text. Relative independence presents itself as a very important variation from absolute judicial independence, especially during a constitutional transition. The composition of the judges and the method of their selection, their qualifications, tenure and compensation, can contribute to and influence their independence, however in the end judicial independence has to be cultivated and protected as part of a political heritage and culture of constitutionalism.[455] Judicial independence is also part of the empirical constitutional transformation and not only an element of the legal constitutional transition.

1. The Appointment of Judges

The process of appointing the members of the court empowered to deal with constitutional matters directly relates with its capacity to fulfil the functions

454 Hedling, 17; Fombad, "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism," 188.

455 Henkin, 14.

vested in it.[456] Depending on who will sit behind the bench and interpret the constitution on behalf of the people shapes the values and constitutional principles entrenched in the constitutional dispensation. Organizing the way apex courts and the entire judicial hierarchy is built is crucial because it defines who amongst the entire population of a country will be vested with the judicial power. It is unlikely that 'normal' members of the population, or vulnerable members of social groups in a country, will ever be endowed with (high)[457] judicial power.[458]

As mentioned, the appointment process is deemed to strike a balance between the court's independence from political interference and the 'need to be responsive to the democratic society in which it operates'.[459] One can suggest that since apex courts cannot refrain from including a partisan dimension when adjudication disputes, political actors should somehow be involved in the appointment of judges in order to foster a broad sense of political investment in the same court. In this way, all actors involved in the appointment process have a veritable incentive to support the apex court even when it does not adjudicate a dispute in their favor.[460] If judges were to be appointed by the political branches, they would most instinctively attempt to elect individuals who share their same political view.[461] Therefore, constitutions that require the involvement of other branches of government in the appointment process, and therefore tolerate a degree of political influence on the character and

456 Choudhry and Glenn Bass, 9.

457 For instance, in Switzerland, some cantons allow their communes to freely elect their own judiciary. Apart from a sufficient knowledge of the local languages, the canton of Graubünden, for example, does not demand special qualifications for any of the judges who sit on both its civil and criminal benches. Interestingly enough, said judges have to be directly elected by the people. Cf. Art. 37 and 47 of the Court Organization Act of the Canton of Graubünden of June 16, 2010 (SR 173.000); as of January 1, 2017.

458 Baxi, 43–44. The Indian Constitution prescribes, for instance, that in order to be appointed as a Supreme Court justice, a person shall, *inter alia*, be, in the opinion of the President, a distinguished jurist (cf. Art. 124(3) Constitution of India, 1950). In South Africa, the appointment of judicial officers has to remain sensitive to the need to 'reflect broadly the racial and gender composition of South Africa' (see Art. 174(2) Constitution of South Africa, 1996).

459 Choudhry and Glenn Bass, 9 f.

460 ibid.

461 In Switzerland, for instance, judges are even members of a political party.

composition of the court, indirectly instate some sort of political check on the same.[462]

There is a series of different models, which can be witnessed around the world. The list is, of course, not exhaustive and the alternatives are plentiful. Some constitutions have allocated the power to appoint judges on the executive, others on the legislature or even to an independent council or commission. Reality, however, has shown that *sui generis* solutions, as in a combination of actors involved in the appointment process, are the most common.

1) *Models with the executive as primary actor in the appointment process:* Most constitutions around the world vest the executive branch with significant power to appoint the judges, for instance the President or the Prime Minister. However, it is uncommon to see such political actor with the exclusive power of appointment of judges. Generally, they possess such power, yet with the support, help or even approval of another body, which could be another branch or another institution, such as a special commission or council.[463]
2) *Models with the legislature as primary actor in the appointment process:* In some countries, it is the legislative branch, which is given a prominent amount of power in the appointment process. Depending on the country's political structure, either one or both chambers of parliament are empowered to select the judges. A recurring feature in countries giving such power to the legislature is the required majority needed for the appointment: a supermajority of two thirds (or even a higher

462 Hedling, 17 and 19.

463 In Zimbabwe, for instance, it is the President, who, in consultation with a Judicial Service Commission, is vested with the power to appoint judges. At the same time however, the President is also allocated the power to select and appoint most of the members of the Judicial Service Commission, which in some ways defeats the very idea of a shared appointment function in the first place. 84. As Choudhry and Glenn Bass explain in their report (Choudhry and Glenn Bass, passim.), most MENA countries have historically empowered the executive with a dominant power to both appoint and remove apex court justices. Such power gave the executive tremendous influence over the court's judgements, which resulted in a damaged court's legitimacy and a series of decisions that often protected the interests of the same executive that created the court itself. Apparently, so Choudhry and Glenn Bass note, even during the Arab Spring, 'many of the newly formed constitutional courts in the region continue to give the executive significant, or even total, control over court appointments'. Ibid., 10.

qualified majority). This feature is crucial when it comes to the inclusion of interests of a variety of constituencies. Whereas a simple majority would allow the governing party to control the appointments of judges, a supermajority guarantees the possibility for opposition or minor parties to also play a role in the process. In this sense, a supermajority promotes the need of compromise-seeking between governing and opposition powers.[464]

3) *Models with independent councils as primary actors in the appointment* process: Another common type of appointment model involves an independent and impartial body, commonly a domestic council or commission. Usually, most constitutions including domestic independent bodies in the appointment of judges, compel such bodies to usually act alongside the political branches, and rarely independently.[465] However, even an international body can be employed in the appointment process, as it was witnessed in Bosnia and Herzegovina.[466]

The deployment of impartial and independent judicial councils or commission with some degree of appointment authority is certainly a safeguard when it comes to consolidating judicial independence, as it reduces political control over the appointment process, i. e., they generate political investment in the court by opposition political parties

464 Germany, for instance, has adopted this model of appointment for its Federal Constitutional Court, and it has resulted in the promotion of a broad sense of political investment among political parties (Art. 5 – 6 BVerfGG). Other countries in which the legislature plays a central role in the appointment of judges are the Former Yugoslav Republic of Macedonia (Art. 68 and 109 Constitution of the Republic of Macedonia, 1991) and Hungary, where the legislature appoints alone all members of the Constitutional Court (Art. 1(2)(e) and 24(3)(4) Fundamental Law of Hungary, 2011). In Morocco, the new Constitution of 2011 calls for Parliament to select half of the Constitutional Court's appointees, requiring a supermajority vote to do so, whereas the other half is appointed by the King (Article 130 Constitution of Morocco, 2011). Instead, in Indonesia, both the legislative and the executive powers play a similarly important role in the appointment process, as well as the Judicial Commission. In fact, they are all involved in the appointments to the Supreme Court, the Judicial Commission, and the Constitutional Court (Art. 24 A-24C Constitution of the Republic of Indonesia, 1945). Ibid., 10 f.

465 The Constitution of Uganda, for instance, requires the Judicial Service Commission to advise the President on the appointments of judges, which are then approved by the legislature.

466 In Bosnia and Herzegovina, for instance, the European Court of Human Rights, an international body, is required to select three of the nine judges sitting on its Constitutional Court.

and reduce the risk that the governing party will capture the court through their own selection of justices. In a sense, these commissions isolate the appointments process from political interference through the creation of a body made by multiple actors, such as the political branches and, possibly, other non-political constituencies (e.g., bar associations, legal academics and even civil society actors). In other words, it is a mixed appointment model. Of course, there is no ideal formula for the composition of a judicial council, as the political context of each and every country varies.[467]

Just as their composition, their role in the appointment process varies from country to country. However, most commonly, they would be empowered to supervise the appointment process and even select possible candidates for court vacancies, review the list of candidates and filter their applications, and even present a list of possible contenders to the executive or legislature to make a final selection. Thus, frequently, they act as veritable intermediary between the executive and legislative branches and the judiciary.[468]

A leading example of this model of appointment of judges is South Africa.[469]

4) *Executive-Judiciary:* Some countries (for example, Egypt and Iraq) employ a model, in which the power of appointment of judges to the apex court is divided between both the judiciary and the executive. In this way, they

467 Cf. Nuno Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence," *The American Journal of Comparative Law* 57, no. 1 (2009): 106.

468 Cf. Choudhry and Glenn Bass, 45 f.

469 The South African Judicial Service Commission (JSC) plays a pivotal role in appointments to the Constitutional Court. It includes members of the executive and of legislature (of both chambers, including members of opposition parties), as well as members of the judiciary, legal professionals and law professors. The widespread diversity of the JSC in South Africa helps foster a deep sense of investment in the Constitutional Court in the country. Such success in encouraging judicial independence has helped develop an apex court whose decisions are broadly respected. Especially in a country like South Africa, whose history and development of the constitutional transition suggested that one political party, *in casu* the ANC, would have remained dominant for a longer period of time. However, the never-ending dominance of the ANC in both the executive and legislative branches of the country has allowed them to gather control even over the appointment of the majority of the JSC itself. Such situation may have negative impacts on the Constitutional Court's judicial independence in the long term. In any case, the creation of an independent commission that also aims to guarantee the representation of opposition forces at all times is advisable. Cf. Ibid., 11 and 55.

intentionally exclude the legislative power from the equation in an effort to safeguard the apex court from short-term political concerns. As Choudhry and Glenn Bass admit, this so-called judiciary-executive model can be seen in different variations. The most common is apparently the one in which the judiciary (commonly in the persons of senior judges of the highest courts) create a list of possible candidates from which the executive can then select and formally appoint their preferred personality. However, it could easily be the other way around, where the executive nominates one or more possible candidates, and the judiciary approves of them or not.[470]

5) *Judiciary:* Sometimes it is even the judiciary itself, which can play a role in controlling the appointment process. In the case of the judiciary exclusively managing the appointments, it would maximize the degree of judicial independence, but at the same time cumulate power within this one institution and damaging its legitimacy. Representativeness would suffer and the sense of involvement by all political constituencies and the public would be missing. Additionally, the political check on the judiciary (itself not a political institution) would be removed and some sort of countermeasure to the lack of accountability would be required.[471]

6) *Multi-constituency model:* Even though the mentioned models of appointment in a way combine different constituencies in the appointment process, when it comes to the inclusion of non-political branches so far, we have seen them play a role in the selection of judges only indirectly through an independent body. However, there is the possibility to witness a multi-constituency model, which seeks the involvement of multiple institutions, independently and not through some sort of independent commission or council. Usually, the seats on the court are distributed among the different institutions involved in

470 Choudhry and Glenn Bass, in their report, conclude that the experiences of Egypt and Iraq suggest that the apex court appointments process in a democratic structure 'requires the involvement of a broader range of actors than the judiciary-executive model permits'. Owing to the exclusion of the legislature and other political and non-political actors from the appointments process, the courts in both Egypt and Iraq 'struggle with a lack of political investment, leaving the courts vulnerable to accusations that their decisions lean on the partisan side.' ibid., 11 f.

471 In Portugal, for instance, ten of the elected judges by the legislature are authorized to appoint the remaining three of members to the bench (Art. 222(1)). The countermeasure here would be that of only a minimal part being appointed exclusively by the judiciary.

> the appointment process and, in contrast to having a judicial commission of some sort, these institutions work independently of each other during the process of selection.[472]

All in all, one can quickly see how every model seeks the perfect balance between judicial independence and accountability. Depending on the context in which the country molded its apex court, the appointment process will be different; and accordingly, depending again on the context the result of each and every model of appointment will be different as well.[473]

One thing is true however, by sharing the power and responsibility for the appointment of judges to different actors, constitution builders can mitigate the risk of having only one actor with the power to wield too much influence over the development of constitutional law. This is why, for instance, Ethiopia and South Africa chose to involve some sort of judicial council in the selection process, while Brazil delegates the appointment power to both the executive and the legislature, and Italy maximizes inclusion of opinion by involving not only the executive and the legislature, but also lower courts with the appointment one third of the judges of the Constitutional Court each.

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472 The constituencies involved may have either direct or indirect power over the appointment process: Institutions with direct power can select candidates and appoint them without any need of consulting with or seeking approval of any other actor. Those with indirect power, instead, are generally given either only the power to designate one or more candidates for the court or to approve or veto a candidate nominated by another institution, without the power to both nominate and confirm their own nomination. Two prominent examples of such concept of appointment are Italy and Turkey. Italy has adopted this model since 1953. In Italy, the multi-constituency approach has fostered a strong sense of political investment in the Italian Constitutional Court. Instead, in Turkey, the appointment process was changed through the constitutional amendments in 2010, passing from a judiciary-executive approach to a multi-constituency model. Even though it is difficult to find any assessment on the impact this change has made in Turkey due to recentness of the amendments, the move was definitely motivated by the wish to have a more inclusive Constitutional Court. Choudhry and Glenn Bass, 12.

473 The models listed here are only the most common ones. Other models can be witnessed throughout the world. For instance, in most states of the United States of America, as well as in some cantons of Switzerland, judges face popular elections. Cf. Adam Liptak, "Rendering Justice, with One Eye on Re-Election," *New York Times* (May 25, 2008), https://www.nytimes.com/2008/05/25/us/25exception.html (accessed June 1, 2019).

2. Length of Terms of Service

Judicial independence is also deeply affected by the length of time during which a judge sits on the bench, 'as job security empowers judges to decide cases without regard to considerations of personal welfare and employment'.[474] Political measures here serve no purpose and would contrast with the very idea of judicial independence.

Of course, life tenure is the strongest form of legal protection of judicial independence.[475] To a lesser degree, but still within the reign of legal safeguards of judicial independence, is the introduction of a standard retirement age, which promotes in fact said judicial independence by releasing judges from reappointment distresses.[476] Other options include pre-defined long (or short) terms, with possibility of reappointment or not.[477] Although long terms of service can reinforce judicial independence, they can also weaken judicial accountability, both towards the other branches of government and to the people. Short terms of service instead have the opposite effect, as judges will need to perform effectively in order to keep their post.[478]

3. The Removal of Judges

As already mentioned before, removal and appointment procedures are mutually supporting engagements. For instance, if a single (political) actor is empowered to remove judges, the same actor can by-pass even the

474 Hedling, 19.

475 Life tenure can be found, for instance, in the United States of America (Article III Section 1 Constitution of the United States of America), Argentina (Art. 110 Constitution of the Argentine Nation, 1994) and Estonia (Art. 147 Constitution of the Republic of Estonia, 1992).

476 For example, the cases of Chile (75 years of age) and Nigeria (70 years of age). Cf. Article 77 of the Political Constitution of the Republic of Chile, 1980; Art. 291 Constitution of the Federal Republic of Nigeria (Promulgation) Decree, 1999.

477 In the German *Bundesverfassungsgericht*, justices are appointed for 12 years without the possibility of re-appointment. This rule, however, is to be found in the federal law rather than in the Constitution (cf. Art. 4(1)-(2) BVerfGG).

478 In Guatemala, for instance, Supreme Court justices are appointed for a short five-year term. Once the term is expired, they must seek re-election by the legislature (cf. Art. 207 and 215 Constitution of the Republic of Guatemala, 1985). In Japan, instead, Supreme Court judges are appointed by the Cabinet (i. e., an executive body), but are subject to popular review after selection and every 10 years thereafter (cf. Art. 79 Constitution of Japan,1946).

best-designed appointments procedure. Alternatively if the same actors empowered with the appointment of judges are also empowered with their removal, all safeguards would be for nothing. In order to preserve their independence and impartiality when applying the law, the justices of an apex court must not fear arbitrary removal. Of course, the threat of removal is a refined (and unjust) tool of influence over the judges. To shield them against it, and because a judge's behavior may actually warrant said removal, most constitutions openly enunciate the limited conditions that would justify said dismissal or transfer.[479]

Several constitutions empower political actors to remove judges.[480] The greater the number of actors involved in the dismissal process, the more likely it is that opposing political parties will be able to prevent unjust removal. Some constitutions, therefore, demand a multi-step process to dismiss a judge, in which several different branches of government are involved and, for instance, must approve of the removal before it is imposed.[481] Although the involvement of several actors in the removal process and requiring agreement between the branches hardly wholly eliminates the potential for political abuse, it however diminishes its likelihood.[482] Other countries instead have decided to involve the judiciary when removing judges in order to protect their own judicial independence. For example, a judicial council or judicial service commission, in the very same concept of those used to appoint the judges, might also act as veritable sentry impeding politically-biased removals.[483] Another recurring way of involving the judiciary in removal

479 Cf. Choudhry and Glenn Bass, 13; Hedling, 20.

480 In Albania, for example, it is the legislature that effects the dismissal of judges (cf. Art. 128 Constitution of Albania, 1998).

481 In Gambia, the President, in consultation with a judicial council – the Judicial Service Commission – may remove a supreme court justice (Art. 141(2 Constitution of the Gambia, 1997), while the legislature – the National Assembly – is empowered to set in motion proceedings for removal 'for inability to perform the functions of his or her judicial office, whether arising from infirmity of body or mind, or for misconduct.' (cf. Art. 141 (4)-(5) Constitution of Gambia, 1997). In India, instead, the constitution demands the approval of both the legislative and executive branch in order to remove a judge from its functions (cf. Art. 124 Constitution of the Republic of India, 1950).

482 Hedling, 20.

483 Art. 123 Constitution of the Republic of Croatia, 1990; Art. 105 Constitution of the Italian Republic, 1948.

procedures is even requiring a judicial ruling supporting the judge's discharge.[484]

Other legal precautions preventing arbitrary dismissal might include vesting oversight of the process in independent bodies,[485] and introducing immunity safeguards.[486]

484 Cf. Chapter 12, Art. 8 of Sweden's Instrument of Government, 1975. Similarly, in Germany, constitutional safeguards are installed to guarantee judicial independence by requiring that the dismissal, transfer or suspension of a justice cannot be implemented without a judicial finding supporting removal (cf. Art. 97 and 98 Basic Law of the Federal Republic of Germany, 1949. Hedling, 20 – 21.

485 A typical example would be that of Croatia, which vests independent bodies to decide dismissal cases (cf. Art. 122 Constitution of the Republic of Croatia, 1990.

486 Provisions granting immunity to judges for acts within their judicial capacity also aim to support independent judicial decision making (cf. for instance Art. 134 Constitution of the Republic of Slovenia, 1991. Of course, immunity clauses are a double-edges instrument that if improperly applied, can strengthen corruption and weaken judicial accountability.

PART II:
Case Studies

Chapter 4: Turkey and the Reform Model

> 'Yeah, we should all line up along the Bosphorus Bridge and puff as hard as we can to shove this city in the direction of the West. If that doesn't work, he'll try the other way, see if we can veer to the East. It's no good to be in between. International politics does not appreciate ambiguity.'
>
> — Elif Shafak, The Bastard of Istanbul

> 'Nicht der Islam bildet die Ursache für die Krise der Türkei, sondern die gesellschaftlichen Rahmenbedingungen, die einen Diskurs über Reformen der Religion, ja überhaupt einen vorurteilslosen Gedankenaustausch erschweren.'
>
> — Gerhard Schweizer, Türkei verstehen: Von Atatürk bis Erdogan

Despite brief intermissions here and there, the constitutional history of Turkey indicates clear signs of a steady and constant evolution towards constitutionalism. With the progressive introduction of revolutionary concepts and aggressive approach to the needs of the *realpolitik*, each and every one of the Turkish constitutions in its history has been a fundamental brick in building up constitutionalism in the country. One has to take into account this historical fact as evidence of the long-lasting tradition of freedom and democracy of the Turkish people in order not to be misled by prejudices confined to only recent events.

A. Contextualizing Turkey's Case Study: Historical and Political Context before the Constitutional Transition

Turkey's constitutional path has not developed in utter harmony. It has instead been an incessant and rather tumultuous transition towards democracy – and its consolidation – before falling into a brisk descent into constitutional crisis, the outcome of which is still unclear. Its constitutional history presents a long series of reiterated reform efforts. Between 1995 and 2004, a pivotal period of time for Turkey's constitutional history, the reform process has revolved mainly around a

self-developed principle: consensual constitution-making. From 2007 onwards, instead, marked by the adoption of a more majoritarian effort in the reform process, Turkey's political regime has dropped into a major constitutional crisis. The outcome of said crisis is yet to be discovered. As Arato hazards:

> 'It could be a new form of populist presidential authoritarianism, legitimated by elections, but also the consensual completion of the process of democratization begun over twenty years ago. [...] [I]t depends on the Turkish electorate and political parties to determine which of these two outcomes is [...] realized.'[487]

Turkey has seen a series of constitutional transitions since the dawn of democratic constitutionalism in the country, both violently (i. e., through *coups*) and stealthily (i. e., through gradual constitutional reforms). This short section is to give an overview of Turkey's constitutional history, which sheds light on the role the judiciary played in this country during the transition.

I. Before the Authoritarian Constitution of 1982

Together with Germany, the Ottoman Empire was another defeated Central Power in the WW1. The signing of the Treaty of Sèvres, between the Ottoman Empire and the Allied Powers, triggered the portioning of the Ottoman territory and its dismemberment. Among the important terms agreed, the treaty comprised the renunciation of all non-Turkish territories and their cession to the Allied administration. Such terms, of course, stirred resentment and nationalist sentiment among the Turks. Mustafa Kemal Atatürk, hero of Gallipoli, did not accept this situation and by stripping the signatories of the treaty of their citizenship, it ignited the Turkish War of Independence on May 19, 1919. During the war, the new revolutionist parliament – the Grand National Assembly of Turkey (Turkish: *Türkiye Büyük Millet Meclisi,* TBMM), founded in Ankara on April 23, 1920 – ratified the first fundamental law of the new republic (hereinafter '1921 Constitution').[488] This provisional 'short' or 'framework constitution' did not suspend the re-emerged Basic Law of the Ottoman Empire of 1876

487 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 223.

488 For an unauthorized and unofficial English translation see, Ömer Faruk Gençkaya, "The 1921 Constitution (Selections)," http://genckaya.bilkent.edu.tr/1921C.html (accessed February 9, 2018).

(hereinafter 'Ottoman Constitution')[489], meaning that the country faced literally a 'double' constitutional period.[490] The main aim of the 1921 Constitution was to reformulate the basic principles regarding the organization of the state. It introduced the revolutionary idea that '[s]overeignty is vested in the nation without condition or restriction. The system of government is based on the principle of self-determination and government by the people.'[491] This meant that sovereignty belonged to the nation and not to the Empire anymore; an Article that unquestionably opened the way for a democratic republican future, even though the sultanate and caliphate were initially left untouched.[492] It officially introduced a single chamber of legislation, the TBMM, to form a unicameral system,[493] and thus literally advocated to renounce the principle of separation of powers in favor of a 'fusion of powers' embodied by the TBMM itself, i.e. the executive and legislature, as well as the

489 The Ottoman Constitution of 1876 remained in effect for merely two years, in a period known as the First Constitutional Era, after which the Sultan suspended the Ottoman parliament (known as the General Assembly of the Ottoman Empire) and restored the absolute monarchy. The Second Constitutional Era was triggered by the Young Turk Revolution of 1908. In 1909, the Ottoman Constitution re-remerged and was revised, transferring additional power from the Sultanate and the appointed Senate to the elected Chamber of Deputies, which was the lower house of the General Assembly of the Ottoman Empire. For an English translation of the Ottoman Constitution, related laws, and revisions see, Tilmann J. Röder, "The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (New York: Oxford University Press, 2012), 341–59.

490 However, the provisions of the 1921 Constitution, in accordance with the principle of *lex posterior derogat legi priori*, broke those of the Ottoman Constitution if both documents had divergent views.

491 Art. 1.

492 The main goal of this constitution was to create a more effective administrative management, with no political purpose whatsoever, awaiting the outcome of the War of Independence and the proclamation of the Republic. This is the reason why the 1921 Constitution is a short constitution, comprised of merely 23 articles, and did not include any fundamental rights, a judicial system, or any mentioning of the Sultan or president.

493 Art. 2: 'Executive power and legislative responsibility is exercised by and concentrated in the hands of the Grand National Assembly which is the sole and real representative of the nation.' Art. 3: 'The Turkish State is governed by the Grand National Assembly and its government is titled as "the Government of Grand National Assembly.' Art. 4: 'The Grand National Assembly is composed of members who are elected by people of the provinces.'

judiciary were dominated by the TBMM.[494] In other words, the 1921 Constitution envisaged a similar governmental system of the French National Convention (1792–1795), the *régime d'assemblée*, which relied on absolute domination of the National Assembly over the other two powers.[495]

After the War of Independence was won by the Turkish National Movement, led by Mustafa Kemal Atatürk, against the combined armies of the signatories of the Treaty of Sèvres, including the remainders of the Ottoman Empire, the Ottoman sultanate (including the Caliphate, all remaining traces of Islamic law, and all aristocratic titles) was abolished. A new Treaty of Lausanne of 24 July 1923[496] led to the preservation of the Turkish sovereignty and the international recognition of the new 'Republic of Turkey' as a successor state of the Ottoman Empire, and the republic was officially proclaimed on 29 October 1923, in the new capital Ankara.

The 1921 Constitution included just a few Articles, was very flexible and of transitory character. The formation of the new Republic of Turkey, however, required a more comprehensive, rigid and permanent document. Hence, the TBMM adopted a new constitution on 20 April 1924 (hereinafter '1924 Constitution'), Art. 104 of which invalidated both Law

494 For more on the 1921 Constitution cf. Yavuz Atar, "The Main Features of 1982 Turkish Constitution and Recent Constitutional Changes in Turkey," *Selçuk Law Review* 9, no. 1–2 (2001): 216.

495 Arnaud Le Pillouer, "La Notion De " Régime D'assemblée " Et Les Origines De La Classification Des Régimes Politiques," *Revue française de droit constitutionnel* 54, no. 2 (2004): 328.

496 The Treaty of Lausanne of 24 July 1923 (hereinafter 'Treaty of Lausanne') is the last treaty resulting from World War I. It specified the borders of the new state of Turkey resulting from the Ottoman Empire and organizes population movements to ensure religious homogeneity within its new borders. Art. 1 of the Treaty of Lausanne states as follows: 'From the coming into force of the present Treaty, the state of peace will be definitely re-established between the British Empire, France, Italy, Japan, Greece, Romania [*sic*] and the Serb-Croat-Slovene State of the one part, and Turkey of the other part, as well as between their respective nationals. Official relations will be resumed on both sides, and, in the respective territories, diplomatic and consular representatives will receive, without prejudice to such agreements as may be concluded in the future, treatment in accordance with the general principles of international law.' See Treaty of Peace, Lausanne, 24 July 1923, *League of Nations Treaty Series*, vol. 28, no. 701, p. 15, available from https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2028/v28.pdf.

No. 85 (i. e., the 1921 Constitution) and the Ottoman Constitution.[497] The 1924 Constitution preserved the principle of national sovereignty by indicating that Turkey is a republic and introduced the principle of constitutional supremacy. Nonetheless, it did not establish an apex court to enforce neither said principle nor the few civil and political rights recognized.[498] The 1924 Constitution conceived democracy as representative and majoritarian, and it envisaged a governmental system closer to parliamentarism and judicial independence.[499] This Constitution remained in force for 36 years, during which the document was amended several times. For instance, in 1928, the Article specifying that Turkey was an Islamic state was removed. In 1931 and 1934, amendments allowed women to acquire the right to vote. In 1937, the basic principles of *Kemalism* were also incorporated in the constitution.[500] Consequently, under the Constitution of 1924, Islamic law was repealed, and secular codes were adopted such as the Civil Code from Switzerland, the Criminal Code from Italy, and the Commercial Code from Germany. Administrative justice instead was restructured emulating France's example.[501] However, it soon became clear that the representative and majoritarian democracy of the 1924 Constitution was not appropriate for the multi-party system

497 Art. 104 of the 1924 Constitution: 'The Constitutional Law of 1878 [...] together with its amendments and the Organic Law of January 30, 1921 [...], and the amendments thereto are hereby annulled.'

498 For more on the 1921 Constitution cf. Atar, 216.

499 Courts were declared to having to decide on behalf of the nation and judges were to be independent from any outside intervention.

500 Ever since the dissolution of the Ottoman Empire in 1922 and the creation of the Republic of Turkey, Kemalism has been the founding and driving ideology of Turkey. It is named after Mustafa Kemal Atatürk and is symbolized by the so-called 'six arrows', which represent *republicanism* (as the most suitable form of government), *laicism* (i. e. the separation between religion and state), *populism* (as an expression of a policy directed towards the interests of the people, not of a class), *revolutionism* (in the sense of a steady continuation of reforms), *nationalism* (as a turn against a multiethnic and religious state concept of Ottoman design) and *statism* (with partial state economic control). Together they represent a method of utilizing political despotism in order to break down the social despotism prevalent among the traditionally minded Turkish-Muslim population. Kemalism, however, was never anti-religious, but concentrated solely on state control of religion. In other words, Kemalism is a very precise and extreme vision of the world, according to which the complete westernization of intrinsically non-Western societies is possible.

501 On the topic cf. Esin Örücü, "Conseil D'etat: The French Layer of Turkish Administrative Law," *The International and Comparative Law Quarterly* 49, no. 3 (2000): 679.

introduced in 1946.[502] In fact, benefiting from this constitutional deficiency and the distinctive threat that may accompany a majoritarian democracy, the Democratic Party government adopted an extremely authoritarian rule in the late 50's. Therefore, on the excuse of shepherding Turkey to a more operational democracy, young Turkish military officers joined together in a junta plotted and executed a *coup d'état* on 27 May 1960. Barely a year later, on 9 July 1961, the Constituent Assembly drafted a new constitution (hereinafter '1961 Constitution'), which entered in force following a referendum with 63 % of favorable votes.[503]

The 1961 Constitution was quite a long and detailed document (157 Articles and 11 transitory Articles) in comparison with the past constitutions, which reflects the will to learn from the past. This new document introduced new concepts such as the social or welfare state, positive economic and social rights, *and* the rule of law.[504] But not only, another huge change was brought onto the table: national sovereignty, which before was conceptualized as being manifested through the domination of the legislature (i. e. the TBMM) over executive and judiciary, was now going to be exercised '[...] through the authorized agencies as prescribed by the principles laid forth in the Constitution'.[505] Thereby, not only the legislature (TBMM), but also the executive (Cabinet and President of the Republic) and the judiciary (independent courts) would be perceived as the legitimate manifestations of national will. The reinforcement of the judiciary came, for the first time, with the establishment of a Constitutional Court empowered with judicial review, so that constitutional supremacy could be guarded. The establishment of a National Security Council (NSC) under the control of the military and with extensive executive powers, however, was a clear sign of a tutelary function of bureaucratic institutions, which was meant to discourage the

502 The 1924 Constitution, which was mainly employed during a period of one-party rule, provided for a majority-based democracy rather than a pluralist multi-party one. For more on the 1921 Constitution cf. Atar, 217.

503 Cf. Rona Aybay, "Some Contemporary Constitutional Problems in Turkey," *British Society for Middle Eastern Studies* 4, no. 1 (1977): 21; Atar, 218.

504 Aybay, 22. For instance, Article 2 of the 1961 Constitution defined the country as a '[...] national, democratic, secular and social state under the rule of law, based on human rights and the fundamental principles set forth in the Preamble.'

505 Art. 4 of the 1961 Constitution of Turkey.

relapse of majoritarian politics.[506] In addition, the Constitution of 1961 made the TBMM into a bicameral legislature (National Assembly and the Senate), introducing *de facto* a parliamentary system. All members of the National Assembly and most of the senators were to be elected by general ballot.[507]

Unfortunately, due to the incessant political and economic crisis (also fed by the ongoing Cold War), the 1961 Constitution failed to establish the stability and progressive principles it championed. Owing to the inability of the government to provide for public order and deal with increasing terrorism, in 1971 a military memorandum was issued to demand a solution. In the period of time between 1971 and 1973, the constitution was amended twice in a way that contrasted radically with the basic philosophy of the 1961 Constitution. The general idea of protecting constitutional fundamental rights and freedoms was shaped into more restricting measures.[508] Among the various restrictions, the most prominent concept was to strengthen the executive, which was apparently a weakness of the 1961 Constitution. Despite this, the restrictions placed on the independence of the courts and fundamental rights and freedoms meant a step backwards from what the 1961 Constitution championed.[509] After a while, once again, the Turkish Armed Forces intervened and orchestrated another coup on 12 September 1980.[510]

506 See Ioannis N. Grigoriadis, *Democratic Transition and the Rise of Populist Majoritarianism: Constitutional Reform in Greece and Turkey*, ed. Ioannis N. Grigoriadis, Reform and Transition in the Mediterranean (Cham, CH: Palgrave Macmillan, 2018), 32.

507 Article 114 of the 1961 Constitution of Turkey. For a summary of the 1961 Constitution's content, cf. Atar, 218.

508 For a list of the restrictions added by these amendments cf. Ibid., 219.

509 Cf. Ibid.

510 Cf. Metin Heper and Menderes Çınar, "Parliamentary Government with a Strong President: The Post-1989 Turkish Experience," *Political Science Quarterly* 111, no. 3 (1996): 489. Life in the Republic of Turkey in the late 1970 s was marked by a lack of political stability, unresolved economic and social problems, growth of religious fanaticism, strikes and violence by left- and right-wing extremist groups (expression of a conflict that was not openly warped between the United States and the Soviet Union). All these elements taken together demonstrate that the authority of the State is in decline since it is unable to maintain public order (terrorism and violent social movements) and to effectively combat the economic crisis. The government of Prime Minister Süleyman Demirel did not enjoy the support of the military, which since the establishment of the Republic of Turkey in 1923, had taken on the role of guarantor of the state. Violence came to an abrupt halt after the coup, and it was accepted by some as helpful in restoring public order.

II. The Authoritarian Constitution of 1982

1. An Undemocratic Constitution-Making Process

Turkey's 1982 Constitution is the result of the military coup of September 12, 1980, plotted by the military in the body of the unelected NSC, which professed its intention from the start to restore democracy and thus bring some stability by passing said Constitution.[511]

The NSC did not intend, however, to return to the *status quo ante* with regards to democracy. Rather, it aimed at enacting a radical reform of Turkish democracy, so as to avert the repetition of the crises that had afflicted Turkey in the past recent years.[512]

Despite the officially declared intention to lead a *super partes* role to restore order and unity in the country, the military acted totally in accordance with the logic of the Cold War. The aim of the coup, as well as the attitude of the army in the run-up to it, was to ensure that Turkey remained firmly within the Western framework.[513] Additionally, among other reasons, the idea behind the drafting of a new constitution was to have a less permissive and a more rigid constitution,[514] which would enable more powerful governments to emerge.[515]

With even more Articles than its predecessor (177 Articles) and some of them non-amendable, the 1982 Constitution is the more detailed and rigid of the Turkish constitutions. The three classical branches of a state – executive, legislature and judiciary – were attributed to three different state organs respectively: the executive to the President, the legislature to the TBMM and the judiciary to independent courts.[516] In true presidentialist nature,

511 For a comprehensive narrative of Turkey's constitutional history up until the 1982 Constitution, see Osman Can, "The Turkish Constitutional Court as Defender of the *Raison D'etat?*," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (New York: Oxford University Press, 2012), 260–69.

512 Ergun Özbudun, "Democratization Reforms in Turkey, 1993–2004," *Turkish Studies* 8, no. 2 (2007): 179–80.

513 Cf. Carlo Pallard, "Turchia: Il Colpo Di Stato Del 1980 E Le Sue Conseguenze," *East Journal* (September 24, 2014), https://www.eastjournal.net/archives/47811 (accessed July 19, 2019).

514 Atar, 221.

515 For a concise summary of the factors, which contributed to the need for a new constitution cf. Ibid., 22.

516 Cf. Ibid., 221.

the figure of the President was given more power than the TBMM (the Senate was abolished).[517] Through the introduction of a unicameral legislature the reduction of the quorum requirements, it has simplified the parliamentary procedures. Yet, while preserving the main principles of the 1961 Constitution, such as the welfare state, the rule of law, equality, secularism, supremacy of constitution, separation of jurisdictions, independence of judges, legality and liability of administration, the makers of the 1982 Constitution drafted a less participatory democracy and a depoliticized society. In fact, from a democratic point of view, the 1982 Constitution is regarded as an authoritarian constitution, and rightly so, starting from the process of its making.

Why was the process of constitution-making democratically pathological?[518] Unlike the 1961 Constitution, this time the military played a greater role in the constitution-making process.[519] The main plotter of the coup, the NSC – the same agent that overthrew the government in 1960 and originally an organ of that Constitution – comprised mainly the heads of military services, led by General Evren. Once it was time to draft a new Constitution, the NSC chose not to nominate a Constituent Assembly, as it had already happened in Turkey in the past.[520] Instead, it basically decided to exercise the constituent power itself, through a 160-member Consultative Assembly, by way of appointment, and a smaller 15-member Constitutional Commission within said consultative body (also under the supervision of the NSC), which drafted the final text.[521] 'In typical Bonapartist fashion,'[522] this draft was submitted to a popular referendum,[523] which was itself strongly limited and undemocratic: 'discussion was forbidden, only the *yes* side had media access, non-participation was fined and most importantly, it was clear that a shift to any kind of electoral politics could follow only in the case of a *yes* vote.' For the people, there

517 For a detailed summary of the functions and powers of the three branches of government at this point in time, cf. Ibid., 221–24.

518 Mehmet F. Bilgin, "Constitution, Legitimacy and Democracy in Turkey," in *Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran and Afghanistan*, ed. Saïd A. Arjomand (Oxford and Portland, OR: Hart Publishing, 2008), 132–41.

519 Cf. Heper and Çınar, 489.

520 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 224.

521 In other words, the constitutive power was composed of the NSC and the Advisory Assembly.

522 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 224.

523 With a favorable vote of 91.37 per cent.

was no other option; a military authoritarian (emergency) regime was the only default choice. As Arato suggests: 'if the referendum failed direct military rule would continue indefinitely, and whenever the next constitution was offered it could be even worse.'[524]

Moreover, the election of the president was not entrusted to consequent elections. Instead, in similar Bonapartist style, the constitutional draft implied the election of 'an officeholder (the Chair of the NSC),' which meant that a *yes* vote on the referendum disguised the election of General Kenan Evren as president (for seven years).[525]

The 1982 Constitution was thus an internally imposed constitution by a military dictatorship, and as such established undemocratic structural and substantial features, which touch upon areas such as civil and political rights, ethnic and religious discrimination, due process, as well as other particular features such as military reservations.[526] However not only, in the view of Özbudun, the 1982 Constitution prefigured a progressive transition from parliamentarism to presidentialism, especially if one looks at the fact that key powers were vested in unelected bodies, such as the NSC and other military institutions, and the president.[527] Therefore, the 1982 Constitution, although no one would really mistake it for a fully authoritarian one, its democratic credentials are at least questionable.[528]

524 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 224.

525 Cf. Provisional Art. 1 of the 1982 Constitution of Turkey. For the details, cf. Gençkaya and Özbudun, 19–26. Cf. also il Fatto Quotidiano, "Turchia, I Tre Colpi Di Stato Riusciti Dal 1960 Al 1980: Militari Custodi Laicità Per Tre Volte Al Potere," *il Fatto Quotidiano* (July 16, 2016), https://www.ilfattoquotidiano.it/2016/07/16/turchia-i-tre-colpi-di-stato-riusciti-dal-1960-al-1980-militari-custodi-laicita-per-tre-volte-al-potere/2910922/ (accessed July 29, 2019); Giulio Gambino, "La Storia Dei Cinque Colpi Di Stato in Turchia," *The Post Internazionale* (July 16, 2016), https://www.tpi.it/2016/07/16/tutti-i-colpi-di-stato-in-turchia/ (accessed July 19, 2019).

526 Undeniably, many of these features were subsequently reformed as we will see. Cf., for instance, Özbudun; Levent Gönenç, "The 2001 Amendments to the 1982 Constitution of Turkey," *Ankara Law Review* 1, no. 1 (2004); Seyla Benhabib and Türküler Isiksel, "Ancient Battles, New Prejudices, and Future Perspectives: Turkey and the Eu," *Constellations* 13, no. 2 (2006); Bilgin.

527 Ergun Özbudun, "The Status of the President of the Republic under the Turkish Constitution of 1982: Presidentialism or Parliamentarism," in *State, Democracy and the Military: Turkey in the 1980 s*, ed. Metin Heper and Ahmet Evin (Berlin, New York: De Gruyter, 1988), 37–40.

528 Jill I. Goldenziel, "Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendance of Courts," *The American Journal of Comparative Law* 61, no. 1 (2013): 35.

More criticism in this sense was made, for instance: the state was protected against the individual (and not the other way around), it involved official ideology, it was a very rigid constitution, it was poorly worded, it strongly restricts fundamental rights and freedoms without guaranteeing enough enforceability, strong limitations on political parties and associations, the office of the President was too strong and thus incompatible with a parliamentary system.[529] Last but not least, the – by the 1961 Constitution – protected balance between the different branches of government was disturbed in favor of a tutelary regime, commonly known in Turkey as the 'deep state'.[530]

2. Turkey's 'Deep' State

Most importantly though, the 1982 Constitution generated what Arato indicates as 'a state within a state, or a dualistic state'.[531] Its definition varies, but most often it refers to the gathering of a group of people in an informal entity that secretly holds the decision-making power of the State, beyond the legal power of government. It is constituted either by the core of the ruling class or by representatives of interests within a bureaucratic state. It is the smallest, most active and secret component of the *establishment.*[532] The term 'dual state' was, however, first coined by Ernst Fraenkel in 1941 to define the duality of the state, in which there co-existed a 'regular' legal or normative state (i. e., a – possibly democratically elected – government) with a parallel 'prerogative' or 'security' (in Turkey known as 'deep') state. In other words, an autocratic (paramilitary) emergency state entity or *Machtstaat*, that operated outside or 'above' the legal government structure.[533] Certain fragments of the state's activity are

529 See all elements of criticism at Atar, 225 – 26.

530 See Grigoriadis, 34.

531 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 225.

532 Serge Halimi, "L'etat Profond," *Le Monde diplomatique*, no. May (2017), https://www.monde-diplomatique.fr/2017/05/HALIMI/57492 (accessed July 20, 2019).

533 Fraenkel, found that the Nazi regime consisted actually of two seprarate states, one 'normative', the other 'prerogative'. In the first, the whole administrative and judicial bureaucracy functioned according to constitutional rules. In the second, instead, the Nazi Party, and in particular the Gestapo (German: *Geheime Staatspolizei*; English: Secret State Police), operated free of any legal constraint. In other words, the prerogative state has complete arbitrary power to supersede the first state any time. Cf. Robert G. Woolbert, "Review: The Dual State," Foreign Affairs, https://www.foreignaffairs.com/reviews/capsule-review/1941 – 10 – 01/dual-state (accessed July 20, 2019). reviewing Ernst Fraenkel, *The*

constitutionalized – but not democratized – while other more important ones are left outside the constitutional framework.[534] Hans Morgenthau (1971) instead later described this as an entity in which the democratic state structure functions according to the law while a parallel *hidden* security structure exists whose purpose it is to control the former.[535]

Commonly in a dualist state structure, the democratic government is sidelined in case of existential threat (identified by the prerogative state). This means that – with support from concurring civilians – democracy is typically interrupted by the military elite whenever it finds necessary to do so to protect its interests.[536] However in Turkey, such direct military interference would conflict with the EU's pressures of democratization and plea for civilian control over the armed forces. Therefore, a parallel and less visible state structure (more in line with Morgenthau's conception of 'dual state') would provide a tool for the Turkish military to preserve their influence over the government 'stealthily', in order to preserve the existing

Dual State (Oxford: Oxford University Press, 1941)., which should be considered as the formative work on this type of state.

534 This point is most clearly seen by Metin Heper, "State and Society in Turkish Political Experience," in *State, Democracy, and the Military: Turkey in the 1980 s*, ed. Metin Heper and Ahmet Evin (Berlin, New York: De Gruyter, 1988), 5 – 6. In his notion, talks of a 'mixed constitution'. Similarly, in the same volume, Evin describes the phenomenon as supremacy of the state over politics in order to indicate the concept of dualism just described. Cf. Ahmet Evin, "Changing Patterns of Cleavages before and after 1980," ibid., 208.

535 Logically, it is easy to think that Morgenthau's conception of 'dual state' is the same as Fraenkel's. However, Fraenkel, when typifying the Nazi regime, the duality was described as overt, combining the 'regular' legal state with a parallel 'prerogative' one. In other words, an autocratic military emergency state or so-called *Machtstaat* operating outside (or above) the law. Instead, even if he draws a parallel between Nazi Germany and the US dual state, Morgenthau sees the autocratic 'security state' as less visible and less arbitrary in democratic societies. In fact, in 1955, Morgenthau applied the dualistic notion of state to describe the United States of America. Cf. Hans J. Morgenthau, "The Impact of the Loyalty-Security Measures on the State Department," *Bulletin of the Atomic Scientists* 11, no. 4 (1955). Cf. also "Power as a Political Concept," in *Approaches to the Study of Politics*, ed. Roland Young (Evanston: Northwestern University Press, 1971). For a thorough analysis of Morgenthau's dualistic concept of power cf. Felix Rösch, "Pouvoir, Puissance, and Politics: Hans Morgenthau's Dualistic Concept of Power?," *Review of International Studies* 40, no. 2 (2014).

536 In other words, while a 'democratic state' produces legitimacy to the politics of security, the 'security state' intervenes where necessary, by restricting the scope of democratic politics.

structure of power.[537] This phenomenon is not unknown to history and is likely to happen in all cases of internally imposed constitutions: for instance, the *Charte constitutionnelle* of 1815, the (Bismarck) Constitution of the German Empire of 1871 or the more recent Pinochet Constitution of 1980.

In order 'to check the powers of elected agencies and to narrow down the space for civilian politics',[538] 'tutelary institutions' are created that would exercise said control over the democratically elected bodies.[539] This scenario is also labeled as 'tutelary democracy'. As Przeworksi explains: 'tutelary democracy [is] a regime which has competitive, formally democratic institutions, but in which the power apparatus, typically reduced by this time to the armed forces, retains the capacity to intervene to correct undesirable state of affairs.'[540] In Turkey, said tutelary institutions were concentrated mainly in the NSC and the presidency. On the one hand, the NSC, whose majority comprehended uniformed officers, was vested with the power to influence, control and even dictate the agenda of the cabinet.[541] On the other hand, as mentioned, a robust empowerment of the position of the president was integrated, and for example, was given significant power of appointment including that one

537 Peace Research Institute Oslo (PRIO), "The Dual State: The Turkish Case," https://www.prio.org/Events/Event/?x=7835 (accessed July 20, 2019).

538 Ergun Özbudun, "Democracy, Tutelarism, and the Search for a New Constitution," in *Turkey's Democratization Process*, ed. Carmen Rodríguez, et al. (London, New York: Routledge, 2014), 297.

539 To make a parallel example, in Chile, in roughly the same period, such institutions were called 'authoritarian enclaves'. For more on the Chilean case study cf. Kirsten Sehnbruch and Peter M. Siavelis, eds., *Democratic Chile: The Politics and Policies of a Historic Coalition, 1990–2010* (Boulder, CO: Lynne Rienner Publishers, 2013); Rex A. Hudson, *Chile: A Country Study* (Washingston D.C.: Federal Research Division, Library of Congress, 1994).

540 See Adam Przeworski, "Democracy as a Contingent Outcome of Conflict," in *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988), 61. For a thorough analysis of the Chilean case as tutelary democracy cf. Rhoda Rabkin, "The Aylwin Government and 'Tutelary' Democracy: A Concept in Search of a Case?," *Journal of Interamerican Studies and World Affairs* 34, no. 4 (1992–1993); Goldenziel, 35.

541 Furthermore, the extensive limits with regards to party regulation were involved. In short, the NSC made sure to regulate the memberships and activities of political parties. This was indeed one of the core objectives of the coup: to radically modify the nature of political party competition, even though it eventually only partially succeeded. On the political party restrictions actuated after the coup by the military regime refer to fn. 543.

of the Constitutional Court, where he could directly select three justices, and eight from proposals from lower courts.[542]

In short, owing to some preferences of the same military and also the influential pressure of Turkey's allies, the 1982 Constitution was not purely authoritarian, but literally a dualistic one, in which authoritarian features (at least initially) clearly dominated. Therefore, as it was not a purely authoritarian constitution, but rather a dualistic one, an important democratic (at least to some extent) feature was included: partially free elections.[543] Notwithstanding violations of fair democratic procedures and political and civil rights, the simple fact that there were to be elections was essential. Certainly, the first elections in 1983 generated an unpredicted outcome (a majority for Turgut Özal's Motherland Party), unpredicted because the results went against the recommendation and

542 Cf. Gençkaya and Özbudun, 22–23. The presidency, both as the head of the state, but also as part of the government's executive branch, was conceived as the cornerstone over which all state powers and functions would be structured. In fact, let us also not forget that it was the president who sat at the top chair of the most powerful and influential state institution, namely the NSC. With regards to the empowerment of the presidency, cf. Özbudun, "The Status of the President of the Republic under the Turkish Constitution of 1982: Presidentialism or Parliamentarism." Clarifying with regards to the empowerment of the presidency, Heper added that the fact 'that as compared to France the regime in Turkey under the 1982 constitution is closer to parliamentarism rather than a presidential system […] may be explained by the fact that the state elites in Turkey, when necessary, "act" not through the executive, but the National Security Council.' Cf. Metin Heper, "Conclusion," ibid., 253.

543 'Partially', as all the traditional parties were banned, and merely newly allowed parties were permitted to partake. Right after the coup, the military regime arrested most of Turkey's leading politicians, dissolved the bicameral TBMM, all while declaring martial law and banning all political activity. Before the elections of 1983 of a one-chamber Assembly, all political parties banned and the NSC issued regulations for the formation of new political parties, which of course, could have no ties to the disbanded parties. Subsequently, the ban on political activity was lifted, yet the hundreds of politicians active before the coup were still forbidden to participate. Many of them (about 500) were barred from political activity until 1986, while the rest (about 200) until 1991. In addition to these restrictions, each party had to submit its list of candidates for NSC approval in order to participate in the elections. Although an astonishing number of fifteen parties was established by the time of the elections in 1983, the NSC disqualified all but three of them on the grounds that they had ties to banned political leaders or parties. For a series of other political reasons, the NSC even vetoed several proposed candidates on the lists presented by the three approved parties. About this and more cf. Helen C. Metz, *Turkey: A Country Study* (Washington D.C.: Federal Research Division, Library of Congress, 1996), 254–56.

exposed pressure of the NSC and the President.[544] All in all, this shows that whereas *politically*, the 1982 Constitution only partially brought the state under the constitution, *legally* it provided tools by which that could potentially happen in the future. In other words, as Arato accurately points out: 'parliament, together with the electorate, had legal *Kompetenz-Kompetenz* as the Germans would say, though the military through the state retained what could be called political *Kompetenz-Kompetenz*. […] At the same time, [however], the political *Kompetenz-Kompetenz* of state power holders […] retained significant parts of the informal constituent power […] in the form of vetoes[545] over the formal process of constitutional revision.'[546]

In short, the 1982 Constitution, despite being dualistic, left enough leeway (i. e., through the tight combination of partially free elections and the possibility to amend the constitution) that could be employed to steer the entire state apparatus towards a more democratic direction.[547] The 'normative' state saw this loophole, exploited it and triggered what is seen as a constitutional transition by reform.

B. The Turkish Constitutional Transition

As noted, the 1982 Constitution was established undemocratically and neglected the citizen's fundamental rights and in doing so it revealed the military authoritarian and statist ideals behind it. In fact, one can easily assess that behind all declared motives, its prime intention was to reinstate the authority of the State and to preserve public order rather

544 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 226 – 27.

545 For instance, the president was always in a position to veto any policies that might displease the military. Nicely documented with regards to the negotiations over the 2001 amendments, cf. Ömer Faruk Gençkaya, "Politics of Constitutional Amendment in Turkey 1987 – 2002," in *Constitutions of the Countries of the World. Turkey*, ed. Gisbert H. Flanz (Dobbs Ferry, NY: Oceana, 2003).

546 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 227 – 28.

547 Due to this leeway quality, Arato does rather not qualify the Turkey of the 1982 Constitution as a pure 'dual state' in Fraenkel's (or Morgenthau's) sense, where there is always a clear dominance of the 'prerogative' hidden state over the 'legal' one, even though that might have been the intention of the constitution-makers yet succeeded only initially. A pure dual-state is a dictatorship, yet Turkey was not one. Cf. Ibid.

than to protect individual rights and freedoms.[548] Therefore, of course, the 1982 Constitution became pretty soon the subject of much debate and controversy. This is the reason why, as we will see, parallel to the extra-legal – social and political – developments following the reestablishment of democracy in 1983, it was heavily amended several times. Said amendments mainly aimed at bolstering the guarantee of fundamental rights and freedoms, to reinforce the rule of law, and to border the military's privileges in government.[549] Thus, despite the fact that the 1982 Constitution is technically the current constitution of Turkey, a series of fundamental amendments have changed it in a way that it does not reflect the original version of it. In fact, nearly twenty amendments have been passed, which put together amount to almost a total revision of the original document.

I. A Process of Democratization

Constitutional amendments have played a fundamental role in the country's transition. Behind such amendments, three different political projects (or movements) steered the transition process. All three are related because all of them want to move from the authoritarian 1982 Constitution, and to do so all presuppose the need for democracy, yet they are different in their motives and sometimes content:[550]

548 Many of the fundamental rights to be found in most democratic constitutions were actually recognized by the 1982 Constitution, yet were defined in very restrictive terms.

549 On top of these constitutional adjustments, a vast amount of ordinary laws were also amended following the same objectives. Özbudun, "Democratization Reforms in Turkey, 1993–2004," 179–80. Particularly important are the so-called 'harmonization laws', passed between February 2002 and July 2004 in nine distinct reform packages with the background idea of accessing the EU. 'Harmonization laws' came to be the term of reference of a group of amendments to several different laws, designed to modify more than one code or law simultaneously, and which were approved or rejected in a single voting session by the legislature. This approach mainly targeted legislation that was not in line with EU standards. Cf. Turkish Ministry of Foreign Affairs, Political Reforms in Turkey, (Ankara: Republic of Turkey (Ministry of Foreign Affairs, Secretariat General for EU Affairs), 2007), https://www.ab.gov.tr/files/pub/prt.pdf.

550 Arato lists these three political projects in order to better explain the different drivers of Turkey's reform processes. Cf. Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 229. When it comes to the content, the first and second strategy are similar, but they differ in the form, whereas the third differs in content of the constitutionalizing process.

- The first project is the politics of pure democratic transition akin to most movements of democratic oppositions under dictatorships in the 70 s and 80 s;
- The second project is fueled by the politics of entering the EU, and having to adapt to the EU's demands; and
- The third project entails the politics of redefining Turkey's identity and secularism.

Therefore, unlike South Africa, the transition is substantially fragmentated at roots. Since all strategies presupposed the need for democracy, at the beginning they all had to rely on structural reform (because authoritarians still retained significant support). Therefore, even though all three strategies were present at the beginning, they were originally difficult to distinguish. At later stages however, the parties advocating each one of them distinguished themselves in a clearer manner, triggering today's constitutional crisis.

The beginning of the constitutional transition through reform is not easy to identify. Arato warns from putting the transition too early, as it would mistake the enactment of the 1982 constitution with the establishment of a democratic order.[551] It is true, however, that from the very start, the 1982 Constitution was threatened with reform projects from its opponents rather than its framers.[552]

551 Cf. Ibid.

552 Arato explains how even though it was clear that the framers intended a dualistic constitutional document, 'with the non-democratic and not fully constitutionalized state penetrating democratic governmental mechanisms' (ibid., 230, fn. 22), they had no other option but to keep the constitution vague as to the political agenda they had in mind. Being open about it would have otherwise meant exclusion from the political process for a long time. Therefore, Arato continues, '*democratization* of government (meaning more democracy, more individual rights, less state in the governmental process) and *constitutionalization* of the state (meaning less of the state, fewer and fewer of its spheres and operations outside the constitution) initially remained the only passable road for political reasons. Unsurprisingly, the three political projects, not identical but originally allied, and not always clearly distinguished even among their partisans, availed themselves of the same path' that is seeking democratization through constitutional reform. Cf. Ibid., 230.

II. Democratic Reiterated Incremental Reforms between 1987 and 2004 and the Strive for European Acceptance

As in many situations of democratic transition, the first tool to change is a series of structural amendments. In Turkey, the 1987 amendment package aimed at modifying the amendment rule itself. The amendment procedures were simplified in two respects: in case of the majority in a popular amendment, the two-thirds requirement was reduced to three-fifths, whereas the prerequisite for the ratificatory referendum dropped from two-thirds to a simple majority.[553] Now the process for amending the constitution requires the following: a three-fifths majority to be put forward to a referendum and a two-thirds majority to be ratified directly.[554] This move was clear evidence that the government was laying down the markers for a path of amendments that could be followed to democratize the Turkish government and constitutionalize the state. Subsequent large amendment packages in 1995 and later in 2001 were to do just that.[555]

There is no doubt that the amendment packages managed to democratize and constitutionalize an authoritarian and dualistic regime, even if they did not eradicate it completely. The amendments accomplished to remove many of the coup's results, such as the constraints on establishing and forming associations, trade unions, and public organizations, as well as their relationships to political parties. Among other things, many restrictions on political activity were removed. Most notably perhaps, the conditions for banning political parties were made more difficult with the 1995 package.[556]

The same conditions were made even harder with the 2001 amendments adding that hereafter three-fifths of the Constitutional Court would be

553 ibid.

554 See, Article 175 of the 1982 Constitution.

555 Let us not forget that the figure of the president was very strong and in order to pass any amendments, despite the simplified amendment procedure, the alliance of the president with the parliamentary majority was key. It was crucial that these amendment packages would be discussed and negotiated among all parties in parliament before brought to a vote, in order to avoid presidential vetoes and referenda (also due to the support the framers of the 1982 Constitution still had). Although this hints at a consensus-seeking strategy, the format of how the structural amendments of 1987, 1995 and 2001 were performed was mainly one: a consensual process driven by the government in power

556 For a summary of the 1993 and 1995 amendments cf. Gençkaya and Özbudun, 36–40.

needed to rule a party out.[557] The same 2001 amendments package did not stop there and, among other things, attempted to reinforce the status of rights, eliminating or reducing particularly administrative meddling with assemblies and demonstrations, it improved the status of the banned languages,[558] and strengthened hitherto banned citizenship rights. Apparently, there were also attempts to weaken the tutelary institutions, if not to entirely eradicate them.[559] Although the NSC survived all the reform as a garrison of state power in the government, an amendment increased the civilian members of the NSC to a majority, thus weakening the military influence slightly. Additionally, the Constitutional Court was now empowered to review the laws of the early NSC regime.[560] All in all, the 2001 amendments can be seen as a critical step towards the elimination of non-liberal and non-democratic elements from the 1982 Constitution.

With regards to the three strategies of reform, the main one at the beginning was the first, that is incremental democratic reform, with pure democratization as its main goal. A brief parenthesis between 1995 and 2001 opened up with regards to the third strategy of politics, the one of renegotiating Turkey's secular identity in favor of a more Islamic view of the state, before disappearing against the second European strategy, which became stronger beginning of 2000's. The third strategy, however, slew down the initial transition strategy that reached its culmination with the amendments of 1995. In fact, both the difficulties presented by the Islamist Welfare Party (WP) insisting on its own particular issues[561] and its election as leading party of government, triggered a last major Turkish military involvement in 1997 (the so-called *soft* or *post-modern coup*)[562] and the

557 ibid., 58.

558 With the new amendment, the concept of a 'language prohibited by law' was deleted from the Constitution.

559 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 231.

560 The laws and decrees (i. e. law-amending ordinances) passed by the NSC regime in the interim phase between 1980 – 1983 were up until now exempted judicial review by the Constitutional Court. Ibid.; Gençkaya and Özbudun, 23. For a comprehensive analysis of the 2001 amendments cf. Gönenç. For a summary of the amendments cf. Ibid., 99 – 108.

561 Cf. Gençkaya, xv-xviii. One of the issues, for instance, was that the WP focused on Art. 24 of the 1982 Constitution with regards to freedom of religion and conscience. In this sense, the WP hindered other changes unless it could have its way on Art. 24.

562 The so-called '28 February' (Turkish: *28 Şubat*), also known as the 'post-modern or soft coup' (Turkish: *post-modern darbe*), was a political intervention by the Turkish military leadership against the elected government under Necmettin Erbakan of the Islamist

outlawing of the WP, all of which led to an impasse of the first phase of the transition (that is, incremental amendments and reforms). In this sense, this first appearance of the third political strategy of transition helped to inhibit rather than foster the process of democratic transition.[563]

On the other hand, instead, when the role of the EU-oriented politics intensified, the process of democratic transition was again encouraged and fueled. Following the judgement that the European Court of Human Rights (ECtHR) delivered on the WP case in 2001,[564] the EU took more interest in Turkish matters. After the ECtHR's ruling on the WP case, and probably influenced by it, Turkish politicians aimed at amendments restricting the extent of party banning. At the same time, and most likely for the same reason (i. e. the ECtHR's decision), Islamic descendant parties progressively reshaped themselves on the grounds of European legally-acceptable criteria.[565] This external European influence was perceptible during the talks for subsequent amendments.[566] After a long span of talks on Turkey's accession question to the EU, newly elected Turkish Prime

Welfare Party. It was initiated by a memorandum of the Turkish military leadership adopted during a meeting of the NSC on 28 February 1997, which contained a bundle of measures directed against the Islamist movement. As a result of the conflict with the military and increasing pressure, Prime Minister Erbakan and his government were forced to resign four months after coming to power. For more on the topic, cf. Judith Hoffmann, *Aufstieg Und Wandel Des Politischen Islam in Der Türkei* (Berlin: Verlag Hans Schiler, 2003), 76 – 79; Bülent Küçük, *Die Türkei Und Das Andere Europa: Phantasmen Der Identität Im Beitrittsdiskurs* (Bielefeld: transcript Verlag, 2008), 95, 178; Esra Sezer, "Das Türkische Militär Und Der Eu-Beitritt Der Türkei," *Aus Politik und Zeitgeschichte* (*APuZ*) 43 (2007): 28; Brigitte Moser and Michael Weithmann, *Landeskunde Türkei. Geschichte, Gesellschaft Und Kultur* (Hamburg: Helmut Buske Verlag, 2008), 112; Tanja Scheiterbauer, *Islam, Islamismus Und Geschlecht in Der Türkei: Perspektiven Der Sozialen Bewegungsforschung* (Wiesbaden: Springer VS, 2014), 98.

563 Cf. Gençkaya and Özbudun, 36 – 38.

564 In 1998, the Welfare Party was banned from any political activity by the TCC for violating the principle of secularism championed by the constitution. The ban was upheld by the ECtHR on 13 February 2003, most likely encouraging the banning of the Virtue Party, despite the warnings by the European Parliament. The ECtHR's decision was criticized above all by the Human Rights Watch for inconsistency, as in all but one case, the ECTHR has ruled against the decision to ban (the WP case), finding Turkey in violation of Art. 10 and 11 of the ECHR. Human Rights Watch, "Turkey: Party Case Shows Need for Reform – Ruling Party Narrowly Escapes Court Ban," Human Rights Watch, https://www.hrw.org/news/2008/07/30/turkey-party-case-shows-need-reform (accessed August 12, 2019).

565 Clearly, one of these parties was Erdoğan's strong, and to this day in power, AKP.

566 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 232 – 33.

Minister of the Justice and Development Party (Turkish: *Adalet ve Kalkınma Partisi*, AKP) Recep Tayyip Erdoğan, since 2003, pushed in place several reformist measures to bring the Turkish state within the parameters imposed by the EU. Therefore, the 2004 amendment package included the abolishment of the death penalty and with it the State Security Courts, equal rights for women were asserted, and it established that in case of conflict between domestic laws and international agreements concerning fundamental rights and liberties, international agreements should take constitutional precedence. In this way, Turkey clearly responded to European pressure and the EU agreed to open accession negotiations.[567] As head of government, at this point, Erdoğan was clearly surfing the democratization wave of the second political strategy of transition.[568]

However, even after the amendment package of 2004, Europe was no longer content with the Turkish progress. On the one hand, the closer Turkey got to accessing the EU, the more fearful many Europeans seemed to become.[569] On the other hand, the European constitutional concerns on Turkey were becoming more and more meticulous, eventually targeting not only the 1982 Constitution, but also the amendments and the reform process itself.[570] In fact, even though the modus operandi of Turkey and its reiterated amendments were somehow based upon the fake presumption that the 1982 Constitution was some kind of democratic constitution,

567 Kaya Özlem. "On the Way to a New Constitution in Turkey: Constitutional History, Political Parties and Civil Platforms." *Friedrich Ebert Stiftung.* (2011); Gençkaya and Özbudun, 66–67.

568 Erdoğan is, to this day, the leader of the AKP.

569 This fear rested mainly on the grounds of religion and the continuity of a European identity. As Göle states: 'the question of Islam is also addressed to Turkey, not only because it is a Muslim-majority country but also because the party in power, the AKP, is related to the Islamist movements of the 1980 s that were contesting Western notions of democracy.' Göle, among other things, nicely describes the parallels between France and Turkey in relation to the tension between democratic secularism and Islam. Cf. Nilüfer Göle, "Europe's Encounter with Islam: What Future?," *Constellations* 13, no. 2 (2006): 249, 60–62.

570 For a summary of the European arguments cf. Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 233. But cf. also specifically the entire report of Arie M. Oostlander, (rapporteur), "Draft Report on Turkey's Application for Membership of the Eu (Com(2002) 700) – C5–0613/2000–2000/2014(Cos))," European Parliament (Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy), http://www.europarl.europa.eu/meetdocs/committees/afet/20030428/484772EN.pdf (accessed August 12, 2019).

despite being a deficient one (a circumstance that deep structural reforms could fix), the EU's standpoint was that the constitutional document entirely needed to be replaced by a new civilian one, rather than merely punctually improve it.[571] In other words, the EU did not believe that the constitution-making model of constitutional reform, the teleology of which should culminate in the making of an entirely new constitution, was the right strategy to eradicate the dualistic structure and allow Turkey to enter the EU.[572]

In any case, Turkey responded to the European demands when in the AKP governmental program of August 31, 2007, the plan of adopting a 'new and civilian constitution' was revealed.[573] The EU Parliament unequivocally saluted this among other measures of the Turkish government, such 'as having held free and fair elections.'[574] The 2007 amendment package was in my opinion the culmination of the reform process, and thus the transition towards democracy. As I will explain, shortly after the 2007

571 For instance, in Oostlander's draft report on Turkey's application for membership of the EU, the European Parliament (in the shape of the Committee on Foreign Affairs, Human Rights, Common Security and Defense Policy) expresses, among other things, that '[…] the Constitution adopted in 1982 under a military regime does not form an appropriate legal basis to guarantee the rule of law and fundamental freedoms, [that] […] Turkey can express its choice of a democratic constitutional model by establishing a new Constitution based on European values; [and that] […] the deepest structures of the State and style of government are at issue here'. See 6. With regards to this question, Arato expresses that the European opinion of having an entire new constitution was not entirely wrong, for if something is right is 'that serial amendment processes tend to be open ended, that they may likely involve too many compromises with de facto powers, and that in fact after several waves it was only a part (even if now a significant part) of the authoritarian heritage that was removed. The most important authoritarian institution, the NSC, in fact survived, and the Constitutional Court and other judicial bodies remained in part outposts of state power, allowing ultimately both formal and not completely formal undemocratic procedures to influence some of the most important political processes. Thus constitutional dualism survived, and with it the original constitutional identity.' Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 234.

572 Of course, theoretically, one might also argue that regardless of whether the European critics were right or wrong, it is entirely possible that a sequential reform process can in principle eliminate the old dualism, while an entirely new constitution could still contain traces of it. *Post Sovereign Constitution Making: Learning and Legitimacy*, 234.

573 ibid., 235.

574 European Parliament, "European Parliament Resolution of 24 October 2007 on Eu-Turkey Relations," http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007–0472+0+DOC+XML+V0//EN&language=EN (accessed August 12, 2019).

amendments a crisis over the presidency ensued, which basically put any reform or constitution-making project on stand-by.

III. The AKP and the End of the Consensual Process

In 2002, the AKP won the elections. The AKP developed from the tradition of political Islam and 'conservative democracy',[575] and was one of those Islamic parties that sought restructuring in the wake of the WP case. As of today, it is the largest Turkish party, with 295 members of the Turkish Parliament, and has controlled the majority since 2002. Its former president, Binali Yıldırım, is the leader of the parliamentary group, while its founder and leader Recep Tayyip Erdoğan is the President of Turkey. Founded in 2001 by members of various Islamic conservative parties, the AKP won more parliamentary seats than any other party in the last five rounds of the 2002, 2007, 2011, 2015 and 2018 elections, with 34.3%, 46.6%, 49.8%, 49% and 42,6% of the votes respectively. Shortly after its formation, it presented itself as a pro-Western and pro-American party,[576] campaigning for a liberal market economy and Turkey's accession to the European Union.[577] The party has been described as a 'broad right-wing coalition of Islamists, reformist Islamists, conservatives, nationalists, center-right, and pro-business groups'.[578]

As mentioned at the beginning, and for some time, the objectives of democratic Islamic parties (and their successors) and other democratic forces converged. This was obvious given that the many undemocratic features of the 1982 Constitution and how they were implemented went

575 Burhanettin Duran, "The Justice and Development Party's 'New Politics': Steeringtoward Conservative Democracy, a Revised Islamic Agenda Ormanagement of New Crises?," in *Secular and Islamic Politics in Turkey: The Making of the Justice and Development Party*, ed. Ümit Cizre (London, New York: Routledge, 2008); Yalçın Akdoğan, "The Meaning of Conservative Democratic Political Identity," in *He Emergence of a New Turkey: Democracy and the Ak Parti*, ed. M. Hakan Yavuz (Salt Lake City: The University of Utah Press, 2006).

576 See, for instance, Aysegul Sever, "'Turkey and Eu' Vis-a`-Vis Us Policy on Iraq," *EU-Turkish Relations Dossier* (*EUTR*) 4 (2003), https://web.archive.org/web/20131112123854/http://www.iuee.eu/pdf-dossier/12/VsjcpWMGTq1zMjSMgwnh.PDF (accessed August 12, 2019).

577 Cf. Turkish Daily News, "New to Turkish Politics? Here's a Rough Primer," *Turkish Daily News* (July 23, 2007), https://archive.is/20120708151459/http://arama.hurriyet.com.tr/arsivnews.aspx (accessed August 13, 2019).

578 Cf. Soner Çagaptay, "Popularity Contest – the Implications of Turkey's Local Elections," *Jane's Islamic Affairs Analyst* (2014), https://www.washingtoninstitute.org/uploads/Documents/opeds/Cagaptay20140507-Janes.pdf (accessed August 12, 2019).

clearly against the Islamic party in its many manifestations. This meant that it was the AKP that – following its electoral victory in 2002 through 2004–5 – managed to successfully pass some important reform packages and amendments, and thereby both continuing the democratic transition and meeting the EU's demands.[579] It must also be said, however, that the biggest changes took place from 1995 to 2001 and not after 2002.[580] Therefore, the AKP was actually an inheritor and continuator of the democratic transition process, rather than an initiator of a process that it was actually going to seriously interrupt.[581]

Despite its big electoral wins in 2004 and 2007, the AKP could still not hope to gain the reforms it preferred without both allies and a friendly (or at least neutral) president.[582] The AKP found its partner with the secular opposition of the Popular Republican Party (CHP). An example was the 2004 amendment package negotiated and implemented consensually with the CHP.[583] In 2007, however, with the end of President Sezer's term, the crisis over the presidency ensued. The AKP wanted to elect one of its leaders, foreign minister Abdullah Gül. In a first instance, the AKP failed in the face of a well-organized boycott of the same CHP and a relevant Constitutional Court decision.[584] Yet, in a second moment, in a new and more representative parliament, with the support of some independents and the third party, the Nationalist Movement Party (alternatively translated as Nationalist Action Party; Turkish: *Milliyetçi Hareket Partisi*, MHP),[585] as well as a slight majority of the Court, the AKP managed to pass, by the thinnest possible majority, the 2007 constitutional amendments package. A package that touched on elements

579 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 235.

580 Cf. Benhabib and Isiksel, 224.

581 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 235–36.

582 Having a president on its side would at least discard the possibility that he would call for a referendum by vetoing a constitutional amendment.

583 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 236.

584 Since, according to the 1982 Constitution at that time, the President was to be elected by the TBMM, this was due to take place before the expiration of Sezer's term on 16 May 2007. However, the election failed after the Constitutional Court judged the first round of voting invalid due to the failure to reach a quorum of two thirds, which was not reached because of said boycott of opposition parties.

585 The 'second' party was the previously allied CHP.

such as the presidency,[586] the quorums,[587] and the parliamentary elections,[588] and that after a veto[589] by President Sezer was confirmed in a popular referendum.

However, highly relevant in the present subject, as Arato points out, 'is the shift of the AKP to a majoritarian constitution-making strategy, whether constrained or voluntary. Thus, during the 2007 elections when the AKP announced its intention to produce a new "civilian" constitution, it was already practicing an antagonistic constitution-making method significantly different from the consensual one used before.'[590] In all those cases before, amendments were adopted through broad inter-party agreements in the TBMM because in none of the amendment procedures one party held the two-thirds majority of the TBMM seats needed for the approval of a constitutional amendment without a popular referendum. This consensus seeking strategy was seen in particular with the 2001 amendments, which were the result of intense negotiations and concessions within the so-called All-Party Parliamentary Accord Committee composed of members of all parties present in the TBMM.[591] Yet, this was not the case anymore. Now the AKP was able to gain control over a majority of the TBMM and steer the reform wherever it pleased it.

As we have seen, since the 2004 amendment package, Europe pressured Turkey on the fact that the step from partial amendment packages to an entirely new, civilian constitution would be the only measure that would satisfy their requirements. Yet subsequently, as Arato again rightly states, 'the appointment of a governmental "extra-party" commission by the AKP alone to draft such a document was probably a mistake in a country where the responsibility was previously and rightly understood as that of parliament and not the executive. The illogical passing of (the so-called headscarf) amendments to Art. 10 and 42 of the old constitution at a time

586 The President was now to be elected by popular vote instead of by the TBMM, the presidential term was reduced from seven years to five and he be re-elected for a second term.

587 The quorum of lawmakers needed for parliamentary decisions was reduced to 184.

588 Parliamentary elections were held every four years instead of five.

589 On May 11, Parliament had passed the amendments, even though Sezer vetoed them over worries that the change could set a president with a strong popular mandate against the prime minister and thus create instability.

590 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 237.

591 Özbudun, "Democratization Reforms in Turkey, 1993–2004," 179–80.

when one intended to replace it entirely, on the basis of an alliance between the nationalist MHP and the AKP, was an even greater error.'[592] Additionally, having now the President on its side and over two-thirds of support of the TBMM behind, the AKP government did not have to go through a popular referendum or any further negotiations with other parties, even though the plausible victory in such procedure may have reinforced its position against the Constitutional Court. Anyhow, the CHP, at this point not an ally anymore, appealed to the Constitutional Court asking it not only to judge against the amendments, but also to put a halt to the entire non-consensual constitution-making process. This action, as we will see, represented an additional and significant challenge to the AKP's effort to weaken or redefine secularism, and of course, to the majoritarian project.[593]

IV. The Head-To-Head between the AKP Government and the Constitutional Court

What Arato figuratively describes as 'the horse race between [the AKP] government and constitutional court', marks a series of legal (and political) challenges and clashes between the two entities, which clearly exposed the stance of the constitutional court in the constitutional transition as a whole.[594] Arato sets the beginning of the horse race in 2008, which marks the beginning of a timely close series of cases that sees the constitutional court directly racing against the plans of the AKP in government.[595] He even leaves out the two presidency cases of 2007 because the court supported both sides of the controversy.

1. The First Round: The Headscarf Case

Taking a step back, as already mentioned, a part of its re-election campaign in 2007 the AKP included a thorough constitutional reform on the basis that the authoritarian 1982 Constitution, even if repeatedly amended, was no longer adequate to meet the needs of the Turkish people. While work on

592 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 238.

593 ibid.

594 ibid., 238 – 47.

595 It probably started even before the AKP came to power, it would intensify once it seized leadership of the government and could even be used to roughly describe most of the constitutional court's performance throughout the reform process.

the new document started, a subject very rapidly came to dominate public debate: the prohibition on wearing the Islamic headscarf in universities and other public institutions. At some point, in early 2008, the AKP's began focusing on amending the existing constitution so as to lift the headscarf ban, rather than drafting up a new one. The constitution-amending law was passed by the TBMM, with the AKP backed in part by a key opposition party, the MHP.

The legality of the amendments was immediately challenged by the CHP and the Constitutional Court annulled the government-backed constitution-amending law on the grounds that it infringed on the constitutionally entrenched principle of secularism.[596]

Regardless of the details of the case itself, which will be laid out below, the Court showed a clear inclination towards the defense of secularism, not only as a constitutional principle as such (which would make the Constitutional Court a real positivist institution), but mostly as clear evidence of pro-state (state, in the sense of the deep and hidden version of it) and dualistic stance. The Constitutional Court, as outpost of the deep state, was able to uphold a basic principle at heart of the authoritarian 1982 Constitution. The issuing of such decision marks a clear win of the first round against the AKP government.

2. The Second Round: The AKP Closing Case

The second round of the horse race came with the opening of the party closing case against the AKP. Just after the headscarf case, the Chief Public Prosecutor of the Supreme Court of Appeals requested the Constitutional Court to dissolve the AKP, mainly because it had championed and passed the headscarf amendments and arguing that the party had become the focus of activities against secularism.[597] Unlike its

596 See, TCC Decision 116/2008, (decision released June 5, 2008; legal reasoning released October 22, 2008) [*Headscarf Decision of 2008*]. See also Yaniv Roznai and Serkan Yoclu, "An Unconstitutional Constitutional Amendment – the Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision," *International Journal of Constitutional Law* 10, no. 1 (2012): 175–76.

597 See, TCC Decision 2/2008, (decision released July 30, 2008; legal reasoning released October 24, 2008) [*Justice and development Party* (Adalet ve Kalkınma Partisi – AKP) *Dissolution case*]. See also, Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 246; Can Yeginsu, "Turkey Packs the Court," *The New York Review of Books* (*NYR*

predecessor party, the WP, which was banned in 1998 by the Constitutional Court on the very same charge, the AKP narrowly escaped the ban. And thankfully so. The outcome of another decision would have been destructive. Back then, the 2001 amendment required that to dissolve a party three-fifths of the members was required. In this case, the AKP was saved by an embarrassing narrow 6:5 majority.

This outcome shows how the Constitutional Court was perhaps evolving from being a true guardian of the State power to the guardian of the Constitution.[598] But the reality was different. The many supporters of the AKP acted as if the party had indeed been banned. They focused on the six votes out of eleven who in favor of closing the party, and of course, the ten members who voted for fining the AKP for having become 'a center of anti-secular activities.' These votes just validated what was anyhow in the head of many, namely that the Constitutional Court was in fact still an outpost of the old authoritarian regime and as such it embodied a tutelary institution. These critics validated the evidence that even though the AKP government won the second round of the horse race, the results of the first round were still present; the race was still alive.[599]

3. The Third Round: The 2010 Amendment and the Packing of the Court

What happened after the second round is evidence of the AKP choosing the path of confrontation and majoritarian imposition (which was its method in constitutional politics ever since the presidency crisis in 2007) rather than the one of consensual politics. Clearly, the AKP was now surfing the wave of other populist leaders and governments in attacking the supreme and constitutional courts that stood in their paths.[600]

To explain the AKP's next move, let us steer the attention towards an unlikely example: the New Deal and former U.S. President Roosevelt. In

Daily) (September 22, 2010), https://www.nybooks.com/daily/2010/09/22/turkey-packs-court/ (accessed August 12, 2019).

598 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 246.

599 ibid., 246–47. For a good section on the AKP closing case, see Bâli, 688–90.

600 Among others, on the democratic side, we would count America's *Franklin D. Roosevelt* and India's *Indira Gandhi*, while on the undemocratic side probably Argentina's *Juan Domingo Perón*, Peru's *Alberto Fujimori*, Venezuela's *Hugo Chavez* or Hungary's *Viktor Orbán*.

1937, Roosevelt grew unsatisfied by a series of Supreme Court judgements that ruled his New Deal plans as unconstitutional.[601] In response, Roosevelt proposed in a legislative initiative the Judicial Procedures Reform Bill of 1937 (frequently called the 'court-packing plan'), which even though it aimed at modernizing the whole federal courts system, it also included provisions that would have allowed the President to appoint an additional Justice to the U.S. Supreme Court (up to a maximum of six) for every member of the court over 70 and 6 months. Of course, the purpose behind the Bill was that if a majority of the Supreme Court wanted to oppose the President's political agenda, then the President would have the power to simply expand the number of Justices to create a favorable majority on the bench. This is what 'packing the Court' means. However, the bill never passed.[602]

Facing back to Turkey, in 2008, Erdoğan found himself in a similar situation as Roosevelt in 1937, that is facing a powerful apex court that is adamantly opposing his political agenda. Just as Roosevelt in 1937 responded with the Judicial Procedures Reform Bill, Erdoğan replied with the September 12 referendum on the 2010 amendments package. Although the procedure was different, the strategy remained the same: he would simply expand the number of justices in the Constitutional Court. So, this was Erdoğan's court packing plan: The proposed amendments package would change the

601 The New Deal program implemented by Roosevelt from 1933 to 1939 in response to the great depression, aimed at promoting reform of the entire economic system as to allow a fairer distribution of wealth and greater stability. The program, which also aimed at achieving forms of direct and socialized economy without compromising the foundations of capitalism, was met with considerable resistance probably due to its advocating interventionism. The Supreme Court, for instance, ruled that two of the main provisions were unconstitutional: the *National Industrial Recovery Act* (NIRA) in 1935 and the *Agricultural Adjustment Act* (AAA) in 1936. See, U.S. Supreme Court, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and U.S. Supreme Court, *United States v. Butler*, 297 U.S. 1 (1936). The obstacle was overcome in the first case by a new law and in the second by a series of amendments to the legislative text. Cf. Treccani (Enciclopedia Online), "New Deal," in *Treccani* (*Enciclopedia Online*) (http://www.treccani.it/enciclopedia/new-deal/accessed on August 20, 2019).

602 Cf. Michael E. Parrish, *The Hughes Court: Justices, Rulings, and Legacy* (Santa Barbara, CA: ABC-CLIO, 2002), 24; Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints*, 9th ed. (Washington, DC: CQ Press, 2016), 1170–75. For even more details on Roosevelt's court packing plan cf. William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York, NY: Oxford University Press, 1995), 82–162.

composition of the Constitutional Court. The number of members of the Court would increase from 11 to 17. At this point, no matter how these judges would have been appointed (either by the President or by the Parliament) the AKP had control over both: the President was Abdullah Gül, a high member of the AKP, and in the TBMM the AKP held a solid majority.

When on September 12, 2010, 58% of the population accepted the 2010 amendment package, the international community, including the EU and the U.S., saw this result as a triumph for democracy in Turkey. In fact, from a strictly institutionalist point of view, some of the changes brought by the 2010 amendments can actually be considered improvements over the former status quo. However well-meant, that enthusiasm is based upon the grounds of a great misapprehension of what was truly at stake in that referendum: the Constitutional Court's packing.

Apparently, however, this did not stop the people to vote to pass this amendment package. Why? Can Yeginsu, in an article written in the aftermath of the referendum, lists three reasons.[603]

First, the referendum was shaped in the form of an all-or-nothing vote. That is, the people had the possibility to vote yes or no for the reform package, which, however, included not one, but 25 very distinct constitutional amendments. For instance, most of the amendments aimed at aligning Turkey's system with the EU's requirements: special protections for people with enhanced needs in the form of affirmative action, the introduction of an ombudsman system, the creation of an Economic and Social Council, collective-bargaining rights for public servants and data protection.[604] Therefore, it was clear how a citizen, who was in favor of these pro-EU amendments would have to vote in favor of all other amendments included in the package, such as the expansion of the Constitutional Court, which, as Yeginsu rightly points out, 'bore no relation whatsoever to Turkey's accession to the European Union.'[605]

603 Cf. Yeginsu.

604 For a summary, see Andrew Arato, "The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition," *Constellations* 17, no. 2 (2010); *Post Sovereign Constitution Making: Learning and Legitimacy*, 249.

605 The Turkish referendum clearly infringed on the Code of Good Practice on Referendums of the European Commission for Democracy through Law (Venice Commission), an advisory body to the Council of Europe of which Turkey is a member, which, among

Second, one of the amendments advocated the annulment of the temporary Art. 15 Constitution of Turkey, 1982, which banned the prosecution of the culprits of the 1980 military coup. Even though, as Yeginsu reminds, it represented 'a welcome takeover to many at the time, the 1980 coup and its immediate aftermath have become profoundly divisive subjects in Turkey. It is fair to say that even those who supported a military takeover then would not condone one now. It is equally fair to say that the AKP used the proposed annulment of temporary Art. 15, together with several concomitant amendments regarding the relationship between the military and civilian courts, as the principal basis for their "yes" campaign. Voting "yes" in the referendum meant bringing the coup plotters to justice, among them prominent generals, all now retired. Certain senior members of the AKP party went one step further: voting "no" in the referendum meant that you were a "*darbeci*"—someone who perpetrates or supports military coups. It was crude, and perhaps irresponsible, but a remarkably effective strategy.'

Last but not least, apparently, there was little to no political campaigning nor media coverage aimed at educating the population on the contents of the amendments. Instead, the public focus was steered towards constructing support either for Erdoğan or for Kemal Kiliçdaroğlu (the new leader of the CHP and opposer of the amendments). The CHP, often seen as an extension of Turkey's deep state and as such as a guardian of secularism, has been one of the main opposition parties against the reform agenda with roots in political Islam (the third democratization strategy mentioned above) put forward by the AKP in government.

Hence, these three reasons combined contributed to obfuscate the real matter behind the 2010 referendum on which the Turkish people should have been asked to vote: The Constitutional Court's packing plan.[606]

In the light of the horse race between the AKP and the Constitutional Court, there is no question about the fact that the AKP's main goal was to neutralize future potential interference by the Constitutional Court in their

other things, says, that 'Electors must not be called to vote simultaneously on several questions without any intrinsic link, given that they may be in favor of one and against another.' Cf. European Commission for Democracy Through Law (Venice Commission). "Code of Good Practice on Referendums." *Council of Europe.* Study No. 371; CDL-AD(2007) 008rev-cor (2006), 21.

606 For yet another insight in the Court's packing plan, see Bâli, 691–95.

constitutional agenda. The aim of the Constitutional Court's packing was the immediate change of the majority within the same Constitutional Court that had invalidated two amendments in 2008, almost banned the AKP and fined it for anti-secular activities. Along with a series of retirements, this move led to basically replace entirely the old Constitutional Court's composition, in a process utterly under control of the AKP government. Most importantly, however, because of the combination of both the expansion of the number of judges and the method of appointment, the relevant majority would be immediately changed, so that once the amendment entered into force, no Constitutional Court would rule any future constitutional amendment unconstitutional. Of course, the risk that the AKP would be dissolved also vanished.

V. The 2017 Referendum and the Path towards Presidentialism

The majoritarian procedure through which the 2010 amendment took place could serve as a precedent for how constitutional reform would take place in the future. At this point it was clear: the prize of the race between Constitutional Court and AKP was the control over constitutional change.

With the 2010 constitutional amendments, the AKP won the horse race, and the old Constitutional Court's composition did not represent a threat to the government's constitutional agenda. At this point, the constitution-making process for a new constitution, which was put on a halt at the beginning of the horse race, could be resumed. Both constraints which interfered with the AKP's constitutional plans were now canceled: the one was the presence of eternity clauses and the second a hostile Constitutional Court. With the Constitutional Court neutralized, eternity clauses could not be enforced and therefore the AKP had now a blank constitutional score to compose on it whatever it wanted.[607] While the making of a new constitution was a suitable request due to the incompatibility of the 1982 Constitution with a liberal democratic system, the constitutional debate eventually shifted towards the introduction of presidentialism without sound checks and balances, boosting majoritarianism.[608] This all led eventually to the 2017 amendments, but that is just skipping important steps.

607 See Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 252.
608 Grigoriadis, 53–54.

Of course, the liberation from the military tutelary regime had been a gradual and rather throbbing process, and while it was not over yet, it was important that the next steps to be taken by the AKP would not expose Turkey to even the slightest possibility of another authoritarian threat.[609] The AKP's plan for what was to come, however, could have been foreseen if one was willing to read between the lines of history and what was happening. Arato did just that and observed how in 2007 the CHP had already campaigned against the introduction of the direct election of the president of Turkey, claiming that such move would open the path towards presidentialism in a country where parliamentarism was a custom. Despite this, there had been previous attempts in the same direction by Presidents Demirel and Özal.[610] It is true that with Gül as president back when the 2007 amendment package including the direct election was passed, and the fact that he was still elected by parliament, nobody really feared the possibility of the introduction of presidentialism. However, the same Arato refers to a 'confusing and rambling' interview of then Prime Minister Erdoğan, in which 'he spoke of the introduction of a presidentialist system of the American type that would supposedly make legislation easier and would not have to deal with the recalcitrant constitutional review he had faced in the previous two years.'[611] The way to presidentialism, however, still had obstacles in the way.

The first obstacle, the opposing Constitutional Court, was overcome. The second one, however, was far more difficult to prevail over: the electorate. The TBMM of 2010 was in fact composed of a three-fifths AKP majority yet was merely one year away from new elections. That meant that it was too late for yet another constitutional amendment or the ratification of a whole new constitution by referendum. Of course, Erdoğan's main goal in the 2011 elections was to reach the two-thirds needed to gain the

609 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 253.

610 See ibid. citing Gençkaya and Özbudun, 47.

611 This information was picked from Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 253. The same cites an article of the former English-language daily newspaper based in Turkey: 'PM Warms to Presidential System Switch' *Today's Zaman* (April 19, 2010). The newspaper was shut down by an executive decree of President Erdoğan, on July 20, 2016, five days after the military coup attempt, on the grounds that it represented the 'flagship media organization' of the Gülen-led movement. Cf. Chris Johnson, "Turkey Coup Attempt: Arrest Warrants Issued for Former Newspaper Staff," *The Guardian* (July 26, 2016), https://www.theguardian.com/world/2016/jul/27/turkey-discharges-1700-officers-from-military-after-coup-attempt (accessed August 20, 2019).

constitution-making power without the need to constantly having to rely on the ratification through a referendum, or at least retain the three-fifths majority. Even though the AKP won the elections increasing its share of the vote, from 34,28% in 2002, and 46,58% in 2007, to 49,83%. However, despite the increase in the vote, the seats gained dropped from 363 to 341 in 2007 and to 327 in 2011, which resulted in the AKP not reaching the three fifths needed to amend the constitution,[612] even with the support of a referendum.[613] Despite the results, the AKP had no difficulty in forming a government since it had 59% of the seats. However, the loss of the constitution-making majority strongly interfered with the AKP's plans for a presidentialist regime.[614] In this sense, and despite the 2010 amendments, the second hurdle to the AKP's constitutional agenda towards presidentialism took a difficult turn.

Therefore, unsurprisingly enough, consensus instead of majoritarian politics became an actual solution again. In October 2011, a couple of months after the elections, the four main political parties elected in the TBMM (the

612 At that time, the number of seats in the TBMM was 550. The number of seats later increased to 600 with the 2017 amendments.

613 It is important to clarify that to avoid a hung parliament and an excessive political fragmentation, since 1982 a party must win at least 10 per cent of the national vote in order to even only quality for representation in the TBMM. Most countries use an electoral threshold of around 4 or 5 per cent. See Electoral Reform Society, "Crossing the Threshold – the Turkish Election," *Electoral Reform Society* (June 11, 2015), https://www.electoral-reform.org.uk/crossing-the-threshold-the-turkish-election/ (accessed August 15, 2019). As a result of this rather high threshold, only two parties won seats in the legislature after the 2002 elections (the AKP and the CHP) and three in 2007 (the AKP, the CHP and the MHP). Independent candidates may also run and can be elected without needing to reach any threshold. The AKP was able to maintain a single party government from 2002 until 2015, when it lost its absolute majority of the seats. In relation to the 2002 elections see BBC, "Turkey's Old Guard Routed in Elections," *BBC News* (November 4, 2002), http://news.bbc.co.uk/2/hi/europe/2392717.stm (accessed August 13, 2019).In the 2011 elections, the AKP did not lose support, but simply citizens learned how to not throw away their vote by using it either on a 'big' party or on independent candidates, and at the same time Kurdish constituencies and other parties learned that by running independent candidates they could circumvent the 10 per cent threshold. For instance, many Kurdish politicians bypassed the threshold by contesting the election as independents and forming proper factions in parliament once elected. In 2011 it was the CHP and independents that gained the most. See Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 256.

614 This unlike the *Fidesz* party in Hungary, where the increase in support was (more naturally) linked with the gaining of the constitution-making majority.

AKP, the secularist or Kemalist CHP, the nationalist MHP and the Kurdish Peace and Democracy Party (BDP)) formed a new parliamentary Constitutional Conciliation Commission (CCC) based on equal representation (three members each).[615] Even though it was a fair compromise, the CCC deadlocked on both procedural and political issues and failed by 2013. On the one hand, the CCC showed strong procedural weaknesses, such as the requirement for unanimity and the lack of constitutional entrenchment of the new rules.[616] On the other hand, political issues lay at the bottom of the failure of the CCC. Apparently, the CCC could not reach an agreement on issues regarding basic rights and freedoms, such as the definition of citizenship, secularism, sexual orientation, and more, because the parties tended to dislike drifting from their core ideologies. Nevertheless, one of the biggest deadlocks at the CCC was created by the AKP's proposal of a switch to presidentialism.[617]

After the failure of the CCC in 2013, there was no real intention to resume the constitutional amending reform, nor the constitution-making process. However, even after the neutralization of the Constitutional Court, the struggle over the control over the constitution amending power continued. Even though the AKP was starting to show some loss in support countrywide,[618] and because of his own strong plebiscitary support combined with a rather insipid candidate jointly backed by the CHP and the MHP, in 2014 Erdoğan was elected president of Turkey with a convenient 52% of the vote. Erdoğan (willingly) interpreted this apparent high level of support as a mandate to transform the presidency and

615 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 257.

616 This unlike the also failed consensual effort in Hungary, 1996–1997. In addition, the consensus requirement in Hungary was five out of six, which was attained for draft. See ibid.

617 In 2007, the AKP had achieved a direct election of the president, but previous constitutional reforms had deprived the figure of the president of many powers. The aim at this point was to increase such powers, and of course, to reach Erdoğan's election as president in the next elections.

618 As indicated by the using of old discredited methods of the dualistic state when repressing the peaceful Gezi Park mobilization, the imprisoning of journalists, the mass purges of police and judiciary personnel, the conflict with former allied Fetullah Gulen, as well as the decrease in support from 50 per cent to 43 per cent in the 2014 local elections, among other things. See Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 261.

successively started to use the remaining dualistic and authoritarian powers of the 1982 Constitution.[619]

At the same time, Erdoğan took the strong performance at the presidential elections by the Kurdish People's Democratic Party (HDP)'s candidate, Selahattin Demirtaş, as a threat even though for some time after the 2011 elections it seemed that the AKP and the Kurds settled for some political cooperation.[620] A series of little challenges and statements on both sides helped fire up the tension between both sides. Regardless of who threw the first punch, one thing is true: the relative success of the HDP in the 2015 June elections (13% of the vote) was the clear reason for the weakening of the AKP (going from 49.83 to 40.86%); a dramatic blow to the AKP, since it did not reach enough seats to form a single-party government.[621] Consequently, the 2015 June elections resulted in a hung parliament, a result which instantly raised rumors over an early general election,[622] also because the ruling AKP could not find a coalition partner within the prescribed 45-day period.[623]

619 For instance, he treated his prime minister, as merely one of his ministers, as is common in many presidential regimes, with Erdoğan presiding over all important sessions of the cabinet. This was permitted by Article 104b of the 1982 Constitution, an authoritarian residue. Instead, against the Constitution, which required the President to be neutral (see Article 101: 'If the President-elect is a member of a party, his/her relationship with his party shall be severed and his/her membership of the Grand National Assembly of Turkey shall cease),' he played an active role in the electoral process and campaign as the AKP's leader leading to the 2015 elections. Ibid., 262.

620 Numbers at hand, the AKP lacked four or five parliamentary votes to be able to resume a constitutional reform process after the 2011 elections. The Kurdish parliamentarians had other issues than the prospect of presidentialism and could, under certain circumstances, yield some votes to the AKP in exchange of some concessions to their cause. Ibid., 258–60.

621 ibid., 262.

622 According to Article 77 of the 1982 Constitution, the regular election should not have taken place until June 2019.

623 The formation of a government after the June elections was considered difficult by political observers because the four parties represented in parliament (AKP, CHP, MHP and HDP) are either hostile to each other or ideologically too opposed to form a stable coalition. Many commentators also expressed the view that President Erdoğan had deliberately allowed the negotiations to fail in order to bring about a new election. Erdoğan, as I mentioned before, was pursuing the further the political goal of the restoration of at least one element of the old regime, which was the president, both at the head of the state and of the executive branch as a veritable fulcrum around which the entire state power would turn. To do so, a constitutional amendment was necessary,

President Erdoğan therefore prematurely dissolved parliament on 21 August 2015 and called for a new election. He even refused to offer the CHP, which was the runner-up party of the elections to try to form a collation, as is traditional in every parliamentary system. Instead, he insisted on a new election paradoxically facing again the will of the people, even though they had already spoken in June. Simplistically said, Erdoğan did not like what they said, so it called upon them to speak again, this time however, a new factor was introduced: *national security.*[624]

Since the blame of AKP's weakening fell on the HDP and the HDP had links with the PKK guerrilla, Erdoğan's strategy steered against the HDP indeed. The HDP was denounced of cooperating with terrorism and the armed conflict with the PKK was re-opened.[625] In doing so, Erdoğan managed to generate a new basis for electoral support, given that a bloody retaliation on the side of the Kurds did not fail to arrive. Accordingly, this, combined with Erdoğan's claim that no coalition government would ever be able to deal with political emergencies, facilitated the strengthening of the AKP's footing in the 2015 November elections, where the AKP regained the majority required to form a single party government.[626]

On the night of July 15 to 16, 2016, there was a failed coup by parts of the Turkish military aimed at overthrowing the Turkish government with President Erdoğan and the cabinet of Prime Minister Yıldırım (also of the AKP). In the days following the coup, the Turkish authorities undertook a series of arrests and deportations within the country's military, gendarmes, police, but also in education, justice, the health sector, the media and the private sector. Since the coup attempt, Turkey has been in a state of

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which requires a two-thirds majority of the TBMM to be adopted directly without a referendum. And as we witnessed in the 2015 June elections the AKP did not reach said majority. Such a majority for the AKP would have been attainable only if the HDP had missed the 10 per cent threshold. See Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 263.

624 See ibid.

625 I am well aware that these steps in the narrative lack details, yet they do not represent pivotal events in the context of the present thesis. However, one clarification by Arato needs to be added: 'under the partial deception of entering a war against so-called ISIS, the pliant Turkish government has begun an air campaign against PKK in Iraq, openly disregarding the fact that the PKK along with its allies and affiliates was currently the major ground force fighting ISIS.' See ibid., 264.

626 See ibid.

emergency,[627] which was however not used for anti-terrorist purposes, but for the removal of anti-government and anti-Erdoğan critics (and also because it lingered on even during the 2018 elections).

Without insisting on details at this point, given that the Constitutional Court was already out of the games and its role being the subject of this thesis, the crisis led again to a referendum on a package of constitutional amendments in 2017. On 16 April 2017, the voters decided that the 18-point constitutional amending law No. 6771 would essentially enter into force with the elections in June 2018, thus amending a total of 69 Articles of the constitution. With these amendments, the parliamentary system of government gave way to a presidential system of government, as they aim to abolish the post of Prime Minister, with his powers being vested in the President who would become the Chief Executive, so as to bundle executive powers and to exert more influence on the judiciary in the hands of President Erdoğan.[628]

There is no better way to explain the deterioration of the democratization process in Turkey in recent years than to directly cite Grigoriadis:[629]

> 'The failure of the Kurdish peace process, the June 2013 Gezi demonstrations, the rising confrontation and eventual all-out war between the AKP government and its former ally, the Gülen movement, the domestic effect of collapse of the regional order in the Middle East following the 2011 Arab uprisings, in particular in Syria, all contributed to the derailment of the democratic consolidation process. The direct election of Recep Tayyip Erdoğan to the presidency in August 2014 underscored his dominant role in Turkish politics and accelerated the majoritarian shift of Turkish politics, as he intended to concentrate the executive power to the office of the president, even before a constitutional reform was held. Turkey started resembling again the model of "delegative" or "plebiscitarian democracy" that O'Donnell had developed for Latin America. It ceased to be the role model for political and economic reform in the Mediterranean and the Middle East, and pluralist gains seemed to recede in favor of a religious conservative narrative of Turkish history and view of Turkish society. Populism and majoritarian views dominated the government discourse, and constitutional reform was now framed in terms of introducing a strong presidential system. Nevertheless, especially in the aftermath of the abortive coup of 15 July 2016 and the declaration of a state of emergency, the debate moved beyond the realm of majoritarianism. Under these circumstances, scholars started interpreting developments as Turkey's drifting towards a competitive authoritarian system.'

627 It will be lifted on July 18, 2018.

628 For more details on the AKP's initiative to introduce a presidential system and the constitutional debates of 2016 through the 2017 referendum, see Grigoriadis, 58–67.

629 ibid., 36–37.

Unfortunately, even though most of the past amendment packages were directed towards a process of democratization, in the subsequent years, through the AKP's political strategy of transition, an opposite path had been taken. At the beginning, the 1982 Constitution predicted a parliamentary system of government with a strong president, who was to be elected by the TBMM.[630] By referendum held in 2007, it was accepted that the President would have to be elected directly by popular vote, transforming the system into actual semi-presidentialism. Eventually, by referendum held in 2017, the 1982 Constitution was amended in a way that it would allow the President to dominate both the legislature and the judiciary, converting Turkey into a system of hyper-presidentialism[631] However, as mentioned above, one has to take into account the big picture: despite some momentary intermissions, the last couple of centuries of Turkey's history show a gradual and constant development towards modern and progressive conceptions of both legal institutions and the perception of justice. Turkey's 1876, 1921, 1924, 1961 and 1982 each played a pioneering role by introducing innovative concepts and meeting the needs of *realpolitik*. One's judgement about Turkey does not have to be influenced and misled by the happenings confined to only contemporary developments. Instead, it is crucial to consider the big picture and the whole historical evolution of the country, always remembering that Turkey has a long experience of freedom and democracy. These latest reform packages advocated by the AKP are part of a constitutional crisis that is hitting Turkey in the present years. Before it, Turkey aimed at democratizing. And it is precisely during this period that the Constitutional Court played a peculiar role as we will see. This is why a quote by Friedrich Nietzsche coupled with the AKP evolution since 2002 is more than fitting: 'he who fights with monsters should be careful lest he thereby become a monster. And if thou gaze long into an abyss, the abyss will also gaze into thee.'[632]

630 Heper and Çınar, 501.

631 For a list of the last constitutional amendments of 2017, see European Commission for Democracy Through Law (Venice Commission). "Turkey: Unofficial Translation of the Amendments to the Constitution." *Council of Europe.* Opinion No. 875; CDL-REF(2017) 005 (February 2, 2017).

632 Friedrich Nietzsche, *Beyond Good and Evil*, Chapter IV.

C. The Constitutional Court of Turkey (TCC)

I. Development and Functions

Before jumping into what is my opinion on the role of the TCC during this time of transition up until the moment of its packing, I would like to summarize a couple of things about this institution, the nature of which is strongly linked to its role.

When in 1960, the military seized power and ordered the drafting of a new constitution, there was a broad consensus on the need for a Constitutional Court to control parliament and its decisions on constitutionality, but there were numerous discussions between politicians and jurists on what powers the future Constitutional Court should have and how it should be organized and staffed. Finally, the constitutional drafters agreed, and the newly ratified 1961 Constitution, included for the first time a Constitutional Court.[633] It was established as a counter-majoritarian institution to safeguard the interests of the secularist interests of the military-backed CHP, in the case an anti-secularist party would gain power in the future. In other words, the Court was built in accordance with Hirschl's 'hegemonic preservation' theory.[634]

It developed into an effective instrument for reviewing the constitutionality of the laws, although it was initially not empowered to hear individual constitutional complaints. When on September 12, 1980, the military couped again, the new 1982 Constitution largely took over the provisions on constitutional jurisdiction from the 1961 Constitution.

At the beginning, the Constitutional Court was composed of eleven members. Three of them were directly appointed by the President, and eight of them also by the President, but from among candidates nominated by the other high courts and the Council of Higher Education,

633 Goldenziel, 35.

634 ibid., 36. Hirschl's theory is extensively explained in *Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. The term will be explained further later on, however Arato, manages to clarify the concept in one sentence: 'the idea is basically that constitutionalism in the sense of limits on majority power emerges where previous power holders pessimistic about the future seek to guard important advantages against future majorities and/or try to give their future policy choices judicial cover.' See Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 143.

also a tutelary institution.[635] Its fundamental task was the one of constitutional review, but also had other tasks, such as the legal and financial review of political parties, and the review of some decisions of the parliament. Constitutional amendments could only be reviewed in respect of their form (that is whether the amendment bill is debated twice and whether the quorum rules for the proposal and adoption of the amendment bill are complied with), but not on substantive grounds.[636] Laws, instead were reviewed in respect to both form and substance.[637] The way of 'constitutional complaint', however, was not opened to those whose rights were violated by public institutions.[638] The laws and law-amending decrees passed by the NSC regime (that is between the coup of 1980 and the enactment of the 1982 Constitution) were exempted from the constitutional review by the Constitutional Court.

Without already releasing a judgement on the role the TCC played during the years of constitutional reform, it is fair to say that at this point, and as already mentioned, the Court was conceived as a tool to protect the fundamental principles and interests of the deep state, rather than protecting the rights of citizens. Before even releasing leading cases, the Constitutional Court was seen as a protector of the basic ideology of Kemalism, reflected already in the 1961 Constitution.[639]

On top of a significantly strengthening of the constitutional guarantees for political parties with the constitutional amendments of 1995 and 2001,[640] the 2001 amendments also brought another important change to the Constitutional Court. With the 2001 amendment the Constitutional Court was empowered to review the constitutionality of laws and decrees enacted during the NSC rule between 1980–1983 and thus to contribute to the liquidation of the authoritarian legacy of the NSC regime.[641]

635 Gençkaya and Özbudun, 22.
636 ibid., 33.
637 See, Article 148 of the 1982 Constitution.
638 Atar, 224.
639 Esin Orucu, "The Constitutional Court of Turkey: The Anayasa Mahkemesi as the Protector of the System," *Journal of Comparative Law* 3, no. 2 (2008): 256–57.
640 Gençkaya and Özbudun, 58.
641 Even though it would take years to do so because the Constitutional Court was only allowed to exercise constitutional review by way of concrete norm control and not abstract norm control. See, ibid., 61.

With the 2010 amendments, the number of judges at the Constitutional Court was increased from the 11 to 17, while their term of office was to be limited to twelve years. Three of the judges would no longer be appointed by the President of the Republic, but by Parliament. This move (within all other amendments of the 2010 package) was made in order to allocate some kind of democratic legitimacy to the Court, but also to conceal the obviosity of the packing scheme of the same. Of course, whoever has the required majority in Parliament (the AKP had it at the time) and controls the President is in full control of the Court. In relation with the Court's packing scheme, even if the 2010 amendment package had many random liberal and progressive features, here their purpose was entirely instrumental.

With the 2017 amendments, the Constitutional Court was again slightly modified. The number of judges in the Constitutional Court fell from 17 to 15. Those appointed by the President fell from 14 to 12, while the Parliament continues to appoint 3.[642]

II. Most Debated Powers

The decisions that I will briefly present afterwards all triggered intense debates on the powers and role of the Constitutional Court and eventually culminated in the packing of the same. The issues boiled down to three main powers of the Court: whether and to what extent the Court can review the constitutionality of parliamentary decisions and constitutional amendments, and the third concerned the system of political party banning.

1. Constitutional Review of Parliamentary Decisions

Art. 148 Constitution of Turkey, 1982, maintains that the TCC 'shall examine the constitutionality, in respect of both form and substance, of [...] the Rules

642 For more detailed information on the composition and powers of the TCC, see Art. 146 – 153 Constitution of Turkey, 1982 (amendments included). These articles lay down in detail the composition, duties, working methods of the Constitutional Court and other issues concerning, including constitutional review. For a detailed narrative of the Court's development, see Stefan Höjelid, "Headscarves, Judicial Activism, and Democracy: The 2007 – 8 Constitutional Crisis in Turkey," *The European Legacy* 15, no. 4 (2010): 470 – 72. See also, Cenap Cakmak and Gengiz Dinç, "Constitutional Court: Its Limits to Shape Turkish Politics," *Insight Turkey* 12, no. 4 (2010): 70 – 72; Bâli, 667 – 73; Can, 269 – 71.

of Procedure of [Parliament].' Therefore, when it comes to the review of parliamentary decisions the Court's powers are limited to the changes in 'the Rules of Procedure,' that is, bylaws of Parliament. Nevertheless, the Court has shown a tendency in its case law to review parliamentary decisions deemed as de facto changes in parliamentary bylaws. In this sense, the Court widens its scope of jurisdiction, which has a direct influence on the democratic decision-making processes, as I will show specially in the first case of the presidency crisis cases.[643]

2. Constitutional Review of Constitutional Amendments

A crucial doctrine of the Constitutional Court was the constant attempt (and success in its attempts) to broaden the scope of its functions when it came to substantive review of constitutional amendments. According again to Art. 148 '[c]onstitutional amendments shall be examined and verified only with regard to their form.' This restriction of the Court's powers is further enhanced by Art. 148(2), which outlines the meaning of 'form': 'the verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with.' Even though a textual interpretation of this provision is quite clear, the Court has repeatedly persisted in finding ways to overcome these constraints. As I will explain in the headscarf case of 2008, the Court was able to transform (whether legitimately or not is another question) a matter of substance into a matter of form so as to seize the power to review constitutional amendments also in its substance. The Court has done this by interpreting the concept of republican government in a way that relying on Art. 4 which promulgates that '[t]he provision of Art. 1 of the Constitution establishing the form of the state as a Republic, the provisions in Art. 2 on the characteristics of the Republic, and the provision of Art. 3 shall not be amended, nor shall their amendment be proposed,' one should assume that constitutional amendments violating with any of the principles of Art. 1–3 violate a procedural matter as such 'shall not be proposed.'[644]

643 Köker, 329–30.
644 ibid., 330.

3. Constitutional Power to Dissolve Political Parties

In a constitutional framework based upon the notion of militant democracy, a typical measure would be the closure of political parties. I will explain what militant democracy is and how the power to dissolve political parties differs from the classical power of judicial review. Art. 68 Constitution of Turkey, 1982, establishes constraints on party statutes and curricula, as well as their activities. Art. 69 provides for the standards, conditions, and procedures for their closure. In order to adapt more and more to the EU standards, which criticized the high number of party closures in Turkey the concerning Articles were amended several times in order to make the banning of political parties harder.[645]

D. The Court's Role in the Constitutional Transition: Key Decisions

Thus, now we know that the constitutional transition failed, or stalled, while plunging the country into a constitutional crisis, and we briefly assessed the reasons (at least the apparent ones) of why that happened. The question now is the role of the Constitutional Court in all of this.

Under the Constitution of Turkey, 1982, and the tutelary regime of the deep state, even though the legislature was recognized by all earlier constitutions as the leading power holder in the country, *de facto* power had shifted to the executive and the judiciary, in particular the Constitutional Court.[646] Since its creation, the court has often been used by Kemalists as a shield to slow down separatist (PKK Kurds) or Islamist (AKP) attempts by civil society and maintain the founding principles of the secular Turkish republic. The TCC is itself a dualistic body and was probably the main agent of military democracy, having closed about 26 parties by 2008.[647] A distinctiveness of

645 ibid.

646 Grigoriadis, 34.

647 See, Hootan Shambayati, "The Guardian of the Regime: The Turkish Constitutional Court in Comparative Perspective," in *Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran, and Afghanistan*, ed. Saïd A. Arjomand (Oxford and Portland, OR: Hart Publishing, 2008). The ECtHR rejected the closure of some political parties, but upheld others, such as the Welfare Party (WP). See, Dicle Kogacioglu, "Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of

the dualistic system of the 1982 Constitution is that said political *Kompetenz-Kompetenz* of state power holders, i. e., political control over constitutional change, was exercised frequently by the Constitutional Court. The Constitutional Court could have either performed in a purely legal capacity, or in a political one. Depending what path the Constitutional Court would take, structurally, it could have turned itself into either a guardian of the constitution (protecting the rights and liberties of the constitution), or one of state power. The possibility of being the guardian of the constitution was expressed by the power to invalidate statutes,[648] as well as formally unconstitutional constitutional amendments. Instead, the possibility of becoming the guardian of state power, and thus of the military autocracy, was expressed by the power to close political parties.[649] I will try to explain how the Court chose to roughly follow the path of the guardian of state power, yet this not only through political party closures, but also through constitutional review.

The TCC has been quite active within the scope of its powers (and sometimes outside of them). Hence, it is interesting to go through a couple of cases, which in my opinion marked the role it played during the constitutional transition. As briefly mentioned, once the AKP came to power in 2002, the transition turned into a political-constitutional crisis, which as far as the Court is concerned, resulted in a series of disputes, which can be sorted into three different categories: the crisis over the presidency, the headscarf issue, and cases regarding the banning of political parties. Again, as far as the Court is concerned, all these matters culminated eventually in the packing of the same by the AKP in 2010, and thus in my opinion it is during these sets of disputes (mostly in the second and third one) in which the Court showed its true colors.

The cases within these disputes allegedly played a great role in Turkey's political-constitutional crisis. The political-constitutional crisis in Turkey

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the Political Domain," in *Constitutionalism and Political Reconstruction*, ed. Saïd A. Arjomand (Leiden, NL: Brill, 2007).

648 Even though it was not vested with the power to review constitutional amendments of their constitutionality in their substance, the TCC ended up usurping such power and using it anyways, as argued below, both under the 1961 and 1982 Constitutions as forms of struggle against both authoritarian measures (in the 70 s under the 1961 Constitution) and majoritarian imposition (in the 2000 s under the 1982 Constitution). I will comment on the latter below.

649 See, Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 228.

originated in a country with a new national identity finding itself caught in a system dominated by an older firmly entrenched authoritarian constitutional identity defined in the late 20 s or 30 s. New movements sought democratization of the constitutional identity, creating a veritable constitutional transition characterized by a consensual process of reiterated reforms. The transition entered a crisis once one of these political movements, the AKP, shifted from a consensual process of reform to a majoritarian one, creating a veritable crisis-ridden situation in which the TCC – as one of the most powerful protectors of the old authoritarian constitutional identity – plays an important role.[650]

Since it is impossible to analyze all important decisions of the Court, only a few key judgements will be discussed.

I. The Crisis over the Presidency

1. Contextualizing the Crisis over the Presidency

In order not to diverge too much from the narrative path, even though some of these issues include several cases which overlap chronologically, I would like to start briefly with the crisis over the presidency. 'Briefly' because in 2007, the Constitutional Court released two ruling with regards to the presidential ambitions of the AKP, yet even though both judgements were very important within the frame of the transition, the fact that the Court supported each side in the controversy does not really show the true face of the Court.

The crisis over the presidency ensued because even though the AKP scored great electoral wins in 2004 and 2007, it could still not pass the reforms it pursued without both allies form other parties in parliament and an (at least) impartial president. In 2007, President Sezer's term was coming to an end and the AKP saw the opportunity to elect one of its leaders, Gül.

At that time, the 1982 Constitution described, at Art. 102, the procedures for the election of the president as follows: first, the President had to be elected by Parliament; second, a maximum of four parliamentary rounds of voting were foreseen; and third, the decisional quorum was two-thirds of the full

650 Köker, 329.

parliament and the first two rounds, and the absolute majority on the last two rounds.[651] This means that the parliamentary arithmetic gave the AKP the power to elect the president alone on the third and four rounds, yet not in the first two.

At this point, the speculations of a struggle between those who supported the secular idea of the Republic, the insisting maneuvers of the AKP and its previous parties allegedly wanting to Islamize the country were alive. Many secularists harbored real doubts with regards to the genuineness of the AKP's intentions and seemed unwilling to cede the principles circumscribed by the 1982 Constitution.[652] The crisis over the presidency clearly marked not the beginning, but at least the persistence of convinced secularists to engage in maneuvering of dubious validity in order to support their Kemalist views. In fact, a retired chief prosecutor[653] of the Republic advanced an argument that the quorum rule to even open the session to elect the President was also two-thirds, just like the decisional quorum. The 1982 Constitution did not contain any specific quorum rule for the opening of the session, in which case it meant that Art. 96 applied and thus one third of the full membership of parliament sufficed. However, the CHP (at this point the main opposition party), embraced the argument and boycotted (that is, 'no show') the next first round of voting.

The first round took place anyhow on April 27, 2007, and Gül was not elected because the required decisional quorum of two-thirds was not reached. This first round was followed by a challenge by the CHP to the TCC seeking support in the argument of the former chief prosecutor and a declaration of nullity in relation to the first round of voting. In a very controversial decision, the TCC decided by 9 votes out of 11 to cancel this first round.[654] The subject of this challenge was the minimum number of elected officials participating in the vote. The Court upheld the argument of the CHP and decided that the minimum threshold for participants was to be 367 (two-thirds of the total membership of the parliament); in the first round 6 participants were also missing thanks to the 180 members of parliament who boycotted the vote. The Court clearly took a stance in favor of the

651 Cf. Gençkaya and Özbudun, 97.

652 Cf. Grigoriadis, 55–56.

653 Sabih Kanadoğlu.

654 See, TCC Decision 54/2007, (decision released May 1, 2007; legal reasoning released June 27, 2007) [*Constitutionality of the first round of voting over Gül's candidacy*].

secularists in pushing the boundaries of the interpretation of the Constitution.[655]

On May 6, 2007, the first round was repeated, yet the boycotting of the opposition continued, and the necessary number of members was not reached again. Both first rounds were thus almost completely boycotted to incapacitate the voting to even start. As a result of this political impasse over the presidency, the TBMM decided almost unanimously to call new elections, which were subsequently fixed on July 22, 2007.[656] This time however, before the elections, the AKP proposed the 2007 amendment package, which consisted in the shortening of the legislature period from five to four years, the direct popular election of the President, and the amendment to Art. 96 according to which the opening quorum of Parliament be of one third of the full membership of the same for every matter including elections. Except Art. 1 of the amendment package concerning the shortening of the legislature period, all Articles of the amendment were adopted by more than the two thirds required (also to a minor support of the opposition party the Motherland Party).[657] Art. 1 of the amendments only received 366 votes (of the 367 needed), leading to a debate on the constitutionality of the proceedings of the vote and eventually to a judicial challenge by President Sezer (and the CHP) in front of the Constitutional Court. This time, it was argued that 'under Article 175 of the Constitution, the required quorum for the bill upon its being returned to the parliament by the president for reconsideration is the two-thirds of its full membership, and that this requirement is valid for every article of the bill, as well as for its whole. Therefore, according to the [CHP] deputies, the fact that Article 1 of the bill received only 366 votes made the adoption of that article unconstitutional, it also made the final vote on the whole of the bill (which received 370 votes) unconstitutional, since the rejected Article 1 was not dropped from the bill. President Sezer went further, arguing that the adopted bill should be considered "null and void" (in Turkish law it is different from annullability

655 On May 6, 2007, the first round was repeated, yet the boycotting continued, and the necessary number of members was not reached again.

656 Cf. Gençkaya and Özbudun, 98.

657 Gençkaya and Özbudun rightly recall how during the debates the CHP argued how these amendments would introduce a semi-presidentialist system of government, as popular elections would increase the political strength of the president, which is already vested with broad powers. Cf. Ibid., 99.

[*sic*]), since the quorum rules for constitutional amendments were not complied with. Both claims were ultimately based upon Article 148 of the Constitution which allows the Constitutional Court to review constitutional amendments from a strictly procedural point of view, that is, whether the amendment bill is debated twice and whether the quorum rules for the proposal and adoption of the amendment bill are complied with.'[658] This time, the TCC rejected all claims of unconstitutionality in its ruling on July 5, 2007.[659]

In any case, the 2007 amendment package did not come into force in time to change the ongoing process of election, under which the newly elected parliament had the obligation to elect the president within 45 days.[660] The parliamentary elections of July 22, 2007, gave the AKP a strong 46.7% mandate, with 340 seats out of 550. Even though, of course, the first item on the list was the election of a president, the same problem as before persisted, since the AKP did not reach the necessary quorum. The AKP had the required votes to elect their candidate on the third and fourth rounds, yet not in the first two, and since the required quorum to even open a session for the election of the president had been fixed by the Constitutional Court at two-thirds, the boycotting of other parties would make the election of the president basically impossible. However, this time, the AKP managed to secure the attendance of some opposition deputies, especially those of the second largest opposition party, the ultra-nationalist *Milliyetçi Hareket Partisi* (Nationalist Movement Party; MHP), which decided to attend the parliamentary sessions in order to avoid a second constitutional crisis. The MHP's lead was followed by some other minor parties. On the third round of the presidential election, on August 28, 2007, Gül was duly elected President.[661]

The crisis over the presidency, won by the AKP once Gül was finally elected, marked the overtaking of one of the last ballyards of the secular deep state, the presidency. The fear often expressed by secularists that an Islamist president could help eventually Islamizing and packing the Court, as we

658 See, ibid., 100.

659 See, TCC Decision 68/2007, (decision released July 5, 2007; legal reasoning released August 7, 2007) [*Constitutionality of the proceedings of the vote on constitutional amendments*]. I will not enter the details of the case, as it would go beyond the scope of this study. For a brief summary of the Court's response see, ibid.

660 Cf. Ibid., 101.

661 Cf. Ibid.

have seen, was well-based. The presidency was in fact already a very strong office, with broad appointive powers and tutelary qualities. This crisis started a head-to-head between the AKP government and the Constitutional Court, which somehow resembles to the last strikes of a lone soldier without really any chance of surviving the battle.[662]

2. Comments on the Court's Role

The first case of the Constitutional Court was very controversial. Some scholars, such as Gençkaya and Özbudun, claim that the Constitutional Court breached the limits on its constitutional competences and thus delivered a legally invalid judgement.[663] They claim that the 'the Constitution of 1982 (Art. 102) clearly described the procedures for the election of the president, according to which a maximum number of four parliamentary rounds are foreseen for the election. The decisional quorum is two-thirds of the full membership of the Assembly on the first two rounds, and the absolute majority of the full membership on the third and fourth rounds [...]. The Constitution contains no special quorum rule for the meeting of the Assembly, in which case the general rule in Art. 96 should apply, that is, the quorum should be one-third of the full membership.'[664] The Constitutional Court's judgment instead, based upon a different interpretation of the same provisions of the Constitution, ruled that the requirement to begin the election process was of two-thirds of the full membership. As Köker maintains, the Constitutional Court probably based its reasoning on a scholar of the Turkish Constitution, Yüzbaşıoğlu, which had previously argued 'that the first clause in Art. 102 of the Constitution should be understood as an exception to the general rule (Art. 96) stipulating the minimum quorum required for the convention of the Assembly. According to the first clause (Art. 102), "the President shall be elected by at least two-thirds majority of the full membership of the Turkish Grand National Assembly and by secret ballot." Yüzbaşıoğlu interprets this clause as interconnected with subsequent clauses as an exception to the general rule set in Art. 96.'[665] Gençkaya and Özbudun claim that this alternative interpretation by the Constitutional Court was the result of 'maneuverings of dubious legal

662 For yet another insight into the crisis over the presidency, see Bâli, 674–79.
663 Cf. Gençkaya and Özbudun, 97–103.
664 Cf. Ibid., 97.
665 Köker, 333.

validity started in order to "save the last citadel of the secular republic" from the occupation of an alleged "Islamist".'[666]

Leaning on Köker's assessment, both these interpretations have almost identical positivistic approaches to law, yet reached two different conclusions, each with a different vision and claim on legality.

In the bigger picture, the positivistic approach is, in my opinion, blind to the context of the history of Turkey. Especially now looking back at the judgments the Court released in the years afterwards. In a more socio-political approach, I tend to believe that the Constitutional Court chose the second interpretation in an attempt to contrast the Islamization powers in the country. In this sense, I would have rather opted for the first positivistic interpretation and thus supported Gençkaya and Özbudun's claim that the Court acted beyond the limits of its competence. I believe that the Court's interpretation was quite far-fetched, particularly in view of the future behavior of the Court. Looking at how the Court behaved later, especially in the headscarf case of 2008 and the AKP closing case, one can see how it took a clear stance: the one of protecting the old regime. One can clearly observe this the more it got closer to 2010. The Court gradually showed more and more its true colors once it got nearer to its own packing. Thus, I tend to believe that the Court chose the second positivistic interpretation on purpose, and this even though it does not seem so within the crisis over the presidency. The fact that the crisis over the presidency is important is because, even though not clearly, the Court started to reveal what its sociological and political aim lay behind its positivist interpretations.

II. The 'Headscarf Issue'

1. The Roots of the 'Headscarf Debate'

The second major matter was the headscarf issue, which culminated with the headscarf case of 2008.

The origins of the headscarf ban in universities is to be traced back to the 80 s. On December 10, 1988, the then majority party, the Motherland

666 Cf. Gençkaya and Özbudun, 97.

Party, passed a law[667] that allowed students to wear headscarves if it complied with their 'religious conviction'. This law was passed in order to contrast the practices of university administrations, which prohibited female students to wear headscarves. This law, however, was immediately challenged before the Constitutional Court by the then president of the Republic Evren. On March 7, 1989, in its first decision concerning the wearing of headscarves in public, the Constitutional Court annulled the aforementioned provision on the grounds that it was contrary to the Art. 2 (secularism), Art.10 (equality before the law), and Art. 24 (freedom of religion).[668] The Constitutional Court found that in a secular political system, laws cannot be based upon the preference of any religion.[669]

This was just the first judicial taste of the headscarf issue in Turkey. In a second moment the Motherland Party made a second attempt at allowing students to wear a headscarf in universities by passing another law[670] on October 25, 1990. The new law provided that '[c]hoice of dress shall be

667 See Law no. 3511, that added Art. 16 to the Higher Education Act (Law No. 2547). Article quoted in *Leyla Sahin v. Turkey* [GC], No. 44774/98, ECtHR 2005-XI (November 10, 2005), 37.

668 See TCC Decision 12/1989, (March 7, 1989) [*Headscarf Decision of 1989*]. See also Gençkaya and Özbudun, 106.

669 As Roznai and Yolcu summarize: '[t]he Constitutional Court explained that secularism had acquired constitutional status by reason of the historical experience of the country and the particularities of Islam compared with other religions; that secularism was an essential condition for democracy; and that it acted as a guarantor of freedom of religion and of equality before the law. Secularism also prohibited the state from showing a preference for a particular religion or belief. [...] The Constitutional Court explained that, once outside the private sphere of individual conscience, the freedom to manifest one's religion could be restricted on public-order grounds to defend the principle of secularism. According to the Constitutional Court, everyone was free to choose how to dress, as the social and religious values and traditions of society also had to be respected. However, when a particular dress code was imposed on individuals by reference to a religion, the religion concerned was perceived and presented as a set of values that were incompatible with those of contemporary society. [...] The Constitutional Court also said that students had to be permitted to work and pursue their education together in a calm, tolerant, and mutually supportive atmosphere without being deflected from that goal by signs of religious affiliation. It found that, irrespective of whether the Islamic headscarf was a precept of Islam, granting legal recognition to a religious symbol of that type in institutions of higher education was not compatible with the principle that state education must be neutral, since it would be liable to generate conflicts among students with differing religious convictions or beliefs.' See Roznai and Yoclu, 179–80. In this paragraphs Roznai and Yolcu cited, *inter alia*, Gençkaya and Özbudun, 106.

670 Law No. 3670.

free in institutions of higher education, provided that it does not contravene the laws in force.' Again, the law was challenged before the Constitutional Court, which ruled on April 9, 1991, that the law was in fact not unconstitutional, but it had to be interpreted in light of the Court's earlier decision, which implied that wearing a headscarf in university is contrary to the law. The Constitutional Court argued that the term 'laws in force' also comprised the Constitution itself, and since it was already decided that the wearing of a headscarf was against secularism, the new law could not and did not annul the prohibition.[671]

In 2004, a case was brought against Turkey by Leyla Sahin, a medical student challenging the law which prohibits wearing the Islamic headscarf at universities and other educational and state institutions. The ECtHR accepted the Turkish government's arguments focusing mainly on the need to protect two important principles: secularism and women's equality.[672]

2. The 'Headscarf Case' of 2008

As already mentioned, as part of its re-election campaign in 2007, the AKP aimed at thoroughly reforming the inadequate 1982 Constitution. Although at first the idea was to draft a completely new Constitution, quickly the public debate shifted towards the ban on wearing the Islamic headscarf in universities and other public institutions. This is why, in early 2008, the AKP focused on passing amendments to the Constitution regarding the principle of equality and the right to education in order to abolish the headscarf ban in universities, rather than drafting up a new Constitution. The constitution-amending law was then passed by parliament, with the AKP backed in part by a key opposition party, the MHP, but was immediately challenged by the CHP.[673] In a very controversial decision (on June 5, 2008), the Constitutional Court annulled the government-backed

671 See, TCC Decision 8/1991, (decision released April 9, 1991; legal reasoning released July 31, 1991) [*Headscarf Decision of 1991*]. For more details on this second judgement see also Roznai and Yoclu, 180–81.

672 See, *Leyla Sahin v. Turkey* [GC], No. 44774/98, ECtHR 2005-XI (November 10, 2005). For a summary of the case, see ibid., 181–82. Interestingly enough, in the elections of November 2015, Leyla Sahin became a member of Parliament for the AKP.

673 Cf. Gençkaya and Özbudun, 107.

constitution-amending laws.[674] The constitutional court released said ruling mainly on the basis that the implicated law violated the constitutional provision mandating a secular state: '[*t*]*he Republic of Turkey is a democratic, secular and social state governed by the rule of law* [...].' The headscarf issue in Turkey is contentious,[675] and has become as veritable symbol of the clash between popular Islam and secularism,[676] as the country finds itself in constant crisis based on the tension between its vast majority of Muslims and its constitutional aim to preserve the modern republic's secular nature.

As of today, the principle of secularism is reflected in the 1982 Constitution, along with a series of other principles. According to the 1982 Constitution the '[t]he State of Turkey is a Republic' (Art. 1) and its characteristics are 'a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble' (Art. 2). What is meant with secularism here is the idea of separation between state and religion.[677] According to Art. 4, both the Art. 1 and 2 of the Constitution of Turkey, 1982, are not only unamendable, but an amendment may not even be proposed.

When the CHP challenged the new law of February 23, 2008,[678] allowing the wearing of headscarves in universities came into force, they did so on the grounds that the law infringed on the 'prohibition to propose' rule and thus that the parliament was not even competent to propose said amendment. At the same time, they also claimed that the amendments

674 See, TCC Decision 116/2008, (decision relasead June 5, 2008; legal reasoning released October 22, 2008) [*Headscarf Decision of 2008*]. See also Roznai and Yoclu, 175–76.

675 Cf. Ayşe Saktanber and Gül Çorbacioğlu, "Veiling and Headscarf-Skepticism in Turkey," *Social Politics: International Studies in Gender, State & Society* 15, no. 4 (2008).

676 On the topic of the meaning of the headscarf in modern Turkey cf. for instance, Elizabeth Özdalga, *The Veiling Issue, Official Secularism and Popular Islam in Modern Turkey* (Richmond, UK: Curzon Press, 1998); Yael Navaro-Yashin, *Faces of the State: Secularism and Public Life in Turkey* (Princeton, NJ: Princeton University Press, 2002).

677 See also the Preamble when it states that 'sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism.' For the meaning of secularism in Islamic countries, see Ergun Özbudun, "Secularism in Islamic Countries: Turkey as a Model," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (New York: Oxford University Press, 2012).

678 See Law No. 5735, Official Gazette No. 26796.

affected the irrevocable provisions of the Constitution. In other words, the headscarf case of 2008 boiled down to two main claims: a *formal review* and a *substantive review.*

The *formal review* was based upon the claim that the parliament was not competent to even propose said constitutional amendments because they infringe on the principle of secularism, which is entrenched in Art. 2 Constitution of Turkey, 1982, and is protected from even a proposal of its amendment by Art. 4. Arato maintains that this claim can be reduced to a mixture of elements of *legitimacy* and *legality.*[679]

– On the side of *legitimacy*, the AKP would imply that parliamentary majority, as being elected democratically, expresses the will of the majority of the Turkish people, who have the right to give themselves any constitution they please. In other words, the AKP claimed that Turkish public law did not distinguish between constituent and ordinary parliament, and thus that the parliamentary majority embodied the sovereign people. Arato lists a series of things which weakened such claim. First, it was presumed in Turkey that, even though the president did not make use of it and even if it was not a requirement, significant constitutional amendments had to be submitted to a referendum. This would have strengthened the legitimacy of the constitutional amendment, yet it was not done here. Second, even though the AKP had the parliamentary majority, there was always the issue of the 10 % threshold, which actually eliminated many otherwise viable parties from parliament. Finally, and this is philosophically what counts the most, 'no body, institution, or person should be able to claim to fully embody the sovereign people, whose place must remain "an empty place".'[680] According to this philosophy, Arato considers the two multi-staged forms of constitution-making (i. e. the American and the South African) as the best models to favor an anti-usurpation interpretation of popular sovereignty, due to the constant search for consensus. In Turkey, this has been the case for important constitutional changes between 1983 and 2004, from which moment the AKP left the consensual path and joined a more majoritarian one. Before, important constitutional reform

679 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 238 – 41.
680 See ibid., 239. In this statement, Arato picks from the works of Lefort.

packages were the result of important stages of negotiation and drafting, seeking generally an all-party consensus. This was not the case anymore.[681]

– On the side of *legality*, the notion that no body, institution or person can fully embody the sovereign will of the people is actually also implied by the Turkish law. Art. 4 of the Constitution provides that said Art. 2 cannot be amended, much less even the proposition of an amendment can be made. Art. 4 is a clear entrenchment clause, rather like Art. 89 of Title XVI of the French Constitution, which prohibits any constitutional amendment that seeks to change the republican form of government in France or Art. 79(3) Basic Law for the Federal Republic of Germany, which establishes that certain 'basic principles' of Art. 1 and 20 can never be removed, even by parliament. In other words, the combination of Art. 2 and 4 have the effect that, short of a revolution, secularism within the state is a non-amendable and not even negotiable fundamental principle in Turkey. In sum, the Turkish parliament cannot be legally seen as a constituent assembly because of the presence of provisions, which are unamendable through the ordinary amendment provision of Art. 175 Constitution of Turkey, 1982. A full and real constituent power would be allowed to amend eternity clauses, which *in casu* could only be altered as a result of the drafting of a totally new constitution.[682] From a perspective of legality, the argument of the AKP government was thus trumped by the existence of eternity clauses.

On the side of *substantive review*, the Constitutional Court deemed the amendment inconsistent with the constitutional principle of secularism, and thus had to be annulled.[683]

3. Comments on the Court's Role

The headscarf case is, in my opinion, the leading case when it comes to the assessment of the role of the Constitutional Court within the constitutional transition of Turkey. As aforementioned, the claims of the case split in a formal and a substantive one. The formal was based on whether the parliament was actually competent to even propose such amendments, and thus touched upon the issue of the limitation on the constitution

681 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 239 – 40.

682 Cf. Ibid., 240.

683 For a comprehensive summary of the substantive review of the Constitutional Court in the headscarf case of 2008 cf. Roznai and Yoclu, 186 – 89. See also, Bâli, 681 – 88.

amendment power), and the substantive one was whether in fact secularism was indeed violated (which – apart from the substantive question itself – it raised the issue of whether the Court had in fact power of substantive judicial review of constitutional amendments).

a. Comments on the Formal Claim: Limitation on the Constitutional Amendments Power

The first point made by the Court concerned a highly abstract academic topic, yet no less practically important: the definition of the nature of the constitutional amendment power and the question of its limits. I have already shared my opinion on the matter (see, Chapter 1. C. I.) and it roughly complies with the one expressed by the Constitutional Court. The question mark lies in the legal status of the parliament, a constituted power, versus that of the constituent power, generally the people. Without entering into details again on the topic, I agree with Roznai and Yolcu when they claim that 'the constitutional amendment power is neither an expression of the original constituent power nor a legislative power. It is a special power, weaker than the former but greater than the latter.'[684] Accordingly, one can only agree with the Court when it considers the parliament's amendment power as being a constituted power and not a constituent power, and as such it is subject to all constitutional limits placed by the very constituent power. So, this power must be exercised constitutionally according to the methods and limits of the Constitution. In Turkey, the areas that lie outside the scope of the amendment power established in Art. 175 are explicitly listed in Art. 1 – 3, made unamendable by Art. 4. Therefore, the following provisions need to be considered together: Art. 175, which is the amendment competence provision; Art. 4, which limits said amendment competence; and Art. 148, which grants the competence to determine whether the use of said competence of Art. 175 crossed the limits set in Art. 4. Thus, if the constituted power (the parliament) ever tried to even propose an amendment that would in any way violate Art. 1 – 3, the amendment should be declared invalid.[685] The reason lies within the fact that amendments to any single provision that could deviate from the characteristics of Art. 1 – 3 could cause changes and transformations in the constitutional and political system created by the

684 Roznai and Yoclu, 193.
685 Cf. Ibid., 184 – 85.

original constituent power, thus evading the constitutional limits aforementioned.

So far so good. There is not much to comment with regards to the Court's opinion on this matter and the role it played in the transition.[686] The more attention-grabbing issue for the sake of this study is, however, whether the Constitutional Court had the competence to review the constitutionality of a constitutional amendment's content, or in other words, to define whether or not the amendment power employed breached said limits.

b. Comments on the Substantive Claims (I.): Judicial Review of Constitutional Amendments

A full analysis of the Constitutional Court's headscarf decision is beyond the scope of this study. However, what is interesting when it comes to assessing the role of the Constitutional Court within the constitutional transition is to see how the Constitutional Court actually seized the power to review substantially any constitutional amendment despite Art. 148: '[…] constitutional amendments shall be examined and verified only with regard to their form. […] [T]he verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed.'[687] Thus, Art. 148 explicitly limits the jurisdiction of the Constitutional Court with regards to review of constitutional amendments. Therefore, one might ask, how did the Constitutional Court establish a basis for judicial review of the substance of the amendments despite Art. 148?

If there were legal limits to the amending power, the limits of the Court's jurisdiction were even bigger. This weird combination leads, at first sight, to the statement that actually there are limits to the amending power, but

686 For a thorough analysis on the matter of the differentiation in constituent power, see Abdurrahman Saygili, "What Is Behind the Headscarf Ruling of the Turkish Constitutional Court?," *Turkish Studies* 11, no. 2 (2010): 130–32.

687 The only dimensions of the procedural review of a constitutional amendment of the Constitutional Court were: the quorums for the proposal (the proposal must be signed by at least one-third of the full Parliament) and for the adoption (the proposal must be adopted by at least a three-fifths majority), and the requirement that the proposal be debated twice. See Gençkaya and Özbudun, 108.

they are unenforceable. Art. 4 cannot be invoked as a basis for widening the competence of the Court also because Art. 148 is the special provision relevant to this specific event and thus the rule *lex specialis derogat legi generali* applies.[688] The Court however, managed to turn this question of substance into one of procedure, establishing hence its jurisdiction. Arato manages with little words to explain an otherwise very complex thing to elucidate: 'as already said, the case begins with the existence of the three unchangeable articles, whose revision cannot even be proposed according to the fourth article of the constitution. Thus, no procedure that amends them or even proposes such an amendment can be valid. This step is uncontroversial. Moreover, no procedure to alter any other part of the constitution that would derogate from Articles 1–3 could be valid either. Thus, if changes to […] any other article actually attacked secularism or the republican nature of the state, the procedures used would be unconstitutional. Otherwise, an Islamic state and a monarchy could be established in some other part of the constitution, derogating from Articles 1 and 2. Finally, […] the Court very cleverly has noted that the only way to decide whether the right procedure was used is to see if the substance of the amendment in question attacked the substance of Articles 1–3. So, substance could not be off limits, in an epistemological sense, in the case of amendments that have relevance to the unchangeable provisions. In such cases, one can only decide whether the procedures were unsatisfactory by looking at substance. This is what turning substance into procedure means.'[689] In other words, when the Constitutional Court proceeded to review the parliament's competence to propose constitutional amendments, it had to know whether or not Art. 1–3 were actually violated, otherwise it could not have even taken this procedural decision. In order for this to make sense, it is important to add that the Court further held that Art. 148 did not only permit it to review whether the requisite majority was obtained as of the proposal and adoption of the proposal, but also whether the majority was sufficiently competent to propose a constitutional amendment.[690]

Seizing substantive judicial review of the constitutional amendments is very revealing when it comes to the role the Court played in the transition. I have

688 Cf. Ibid.

689 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 241–42.

690 Cf. Goldenziel, 39–40; Roznai and Yoclu, 185–86.

just explained the way the Court asserted and widened its own jurisdiction by transforming the question of substance into one of form,[691] yet this assertion remains dubious.

aa) Positivistic Motives

There are a couple of positivistic reasons for which I do not agree with the Court's decision to widen its jurisdiction.[692]

– First, the Court's conception of 'form' is inaccurate. The meaning of formal review is that it should ignore the substance, 'that is, the judicial review must be content-neutral.'[693] The text of Art. 148(2) Constitution of Turkey, 1982, leads to the conclusion that constitutional amendments may only be reviewed with regards to their form, that is the procedural aspect of their adoption. For instance, the simple fact that Art. 148(1) explicitly allows the judicial review with regards to the form and substance of ordinary legislation[694] implies that the omission of substantive review with regards to constitutional amendments was intentional and thus there should be no space for a broader interpretation.[695] The 1982 Constitution had no (and has still not) explicit or implicit rule endowing the Constitutional Court to review the constitutionality of a constitutional amendment, especially with regards to the unamendable Art. 1–3.[696] It is important to add that under the Constitution of Turkey, 1982, the Constitutional Court refused three demands (one in 1987 and two in 2007) for such substantive review, explicitly citing the scope of its review powers from Art. 148. In other

691 For a thorough explanation on the matter see 195–202.

692 Since I share the same opinion, I lean on the same reasons Roznai and Yoclu listed in their article ibid., 197–98.

693 See ibid., 197. Here, Roznai and Yoclu cite Saygili.

694 Art. 148(1): 'The Constitutional Court shall examine the constitutionality, in respect of *both form and substance* [emphasis added], of laws, presidential decrees and the Rules of Procedure of the Grand National Assembly of Turkey, and decide on individual applications. Constitutional amendments shall be examined and verified only with regard to their *form* [emphasis added].'

695 Cf. Roznai and Yoclu, 198.

696 The dilemmas an unconstitutional constitutional amendment can bring are a complex and highly theoretical issue and are beyond the scope of this study. Nevertheless, for more on the topic, see for instance the very comprehensive book of Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017).

words, the Court showed that it knew what its constitutional limits were, making its move intentional.[697]

– Secondly, and to me it would already be sufficient to deny the Court's jurisdiction *in casu*, there is another element of criticism. The Constitution of Turkey, 1982, Constitution represents an act of the original constituent power explicitly constraining the power of judicial review with regards to constitutional amendments. The Constitutional Court must thus act within these limits. 'Ironically, in establishing parliament's limited amendment power, the Constitutional Court states that the legislature, as a constituted power, must remain within the constitutional limits provided by the primary constituent power and, as [A]rticle 6 of the Constitution states, "no person or agency shall exercise any state authority which does not emanate from the Constitution." Yet it seems that the Court has forgotten that it is itself a constituted power bound by the limits imposed upon it by the original constituent power. Therefore, the Court itself is bound not to use its power in violation of its stipulated authority.'[698] Köker is of the same view, when he maintains 'that in the continental tradition of public law, it is a general principle that institutions of government, especially the executive and the judiciary are deemed incompetent unless they are so authorized by the constitution or the statute law. What follows from this principle is that the rules providing for governmental authority are exceptional and thus cannot be interpreted in ways that extend the scope of authority, rendering the general principle meaningless. In the decisions mentioned above, it may be argued that the TCC did this in a manner that contradicts the principle about the sources of authority.'[699] I must, however, concur with Köker, about the fact that there might be a positivistic counter argument to defend the Court's move: 'This time the argument would be based upon a Kelsenian understanding of legal positivism conceiving law as a normative hierarchy in which every norm gets its validity from its superior. If this conception of law is adopted, then, it may be argued that the constitution is the supreme norm, and it is the Constitutional Court who has the final authority in establishing

697 Additionally, the Constitutional Court had already widened its review powers of constitutional amendments to substantive review back in the 70 s.

698 Cf. Roznai and Yoclu, 198.

699 Köker, 335.

> the meaning of the constitution so as to judge the validity of laws in a legal system.'[700]

However, both reasonings remain theoretical because in the specific case in Turkey, the ECtHR accepted the TCC's interpretation and ruled that the Court's judgment did not infringe upon the ECHR.[701] Therefore, the idea that constitutions gain their validity from their compliance with higher norms, including international law, does not facilitate the justification of the Court's extension of constitutional amendment review powers.

bb) *Sociological and Political Motives*

These were mainly positivistic reasons for which I did not agree with the Court's decision on this particular issue. Allowing judicial review of constitutional amendments carries with it also a series of sociological and political problems (but also advantages). In other words, this also had consequences that go beyond the simple positivistic (mis)interpretation of a clause.

Naturally, allowing a Constitutional Court to engage in judicial review with regards to constitutional amendments can bring advantages, such as contrasting the abuse of power of the majority in legislative branch. Judicial review can thus be used as an antimajoritarian tool to protect minorities and prevent human rights violations.[702]

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700 ibid.

701 See, *Leyla Sahin v. Turkey* [GC], No. 44774/98, ECtHR 2005-XI (November 10, 2005).

702 In India, for instance, the 'basic structure' doctrine was adopted by the Supreme Court of India, *Kesavananda Bharati Sripadagalvaru and Others. v. State of Kerala and Anr.* (1973) 4 SCC 225: AIR 1973 SC 1461, which states that 'the power to amend the constitution does not include the power to alter the basic structure, or framework of the constitution so as to change its identity.' This doctrine was adopted in response to the abuse of the constitutional amendment power by the legislature. This move of the Indian Supreme Court proved that the judicial enforcement of limits on the constitution amending power may facilitate the preservation of democracy. See Elai Katz, "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment," *Columbia Journal of Law and Social Problems* 29, no. 2 (1996). For a description of the basic structure doctrine, see Virendra Kumar, "Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance [from Kesavananda Bharati to I.R. Coelho]," *Journal of the Indian Law Institute* 49, no. 3 (2007). For an even more complete description of the basic structure doctrine and its development, see Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford: Oxford University Press, 2009).

However, endowing the Constitutional Court with the competence to declare an amendment unconstitutional can also create a set of issues.

– Firstly, there is the issue of democratic legitimacy of the Turkish Court. The question arises of how can a small group of appointed judges replace the democratic decision of the elected legislature to amend the constitution? Especially in the Turkish case where the Court seems to push its limits because of its *judicial activism.*
– Secondly, there is problem of separation of powers. Allowing the Court to review constitutional amendments can lead to an imbalance and elevating the judiciary above the other two branches. This issue probably led to the packing of the Court in 2010.
– Finally, in the case the Court blocks a constitutional amendment, the supporters of such amendments might pursue it through violent means, threatening thus the country's stability.

All of these socio-political issues, together with the positivistic arguments, become real especially when combined with judicial activism, that is, especially when the Constitutional Court actually uses its power of review of constitutional amendments. Even more when the existence of such substantive review power is dubious from the beginning and it is employed to follow a precise role, which in Turkey was the protection of the old authoritarian regime. Thus, the combination of the *intentional* widening of its jurisdiction to substantive judicial review with regards to constitutional amendments and *judicial activism*, results, in my opinion, in a clear exposure of the role of the TCC in the transition.

When the Constitutional Court delivered the headscarf decision in 2008, it was thus fully conscious of invalidating the acts of the elected representatives of the people. The typical answer from the judges against the AKP's accusations that the Court was putting itself in the place of the constituent power was often based on the preservationist argument that they were acting to preserve the will of the original constituent power against the acts of the constituted powers.[703] However, as Arato points out: 'the work of the founding fathers of the Indian Republic and even the

703 Cf. Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 242–43.

consensual actors at Chiemsee who enacted the *Grundgesetz* were worthy of protection. The work of General Evren's junta is not.'[704]

Therefore, the headscarf judgement of 2008 was not only inconsistent with its precedent decisions, but it also amounted to a veritable 'usurpation of power' since it was literal violation of the clear Art. 148. This move results in the Constitutional Court having almost total control over constitutional amendments altogether. On top of this, given that the contents of Art. 1–3 are somehow vague and wide, almost every text of a constitutional amendment could be interpreted so that it is in one way, or another linked to one of the characteristics of Art. 1–3. All this, amounts thus to a clear example of 'hegemonic preservation'.[705]

c. *Comments on the Substantive Claims (II.): The Amendment's Content*

Once the Court asserted its own jurisdiction to review constitutional amendments in their substance, it reviewed it. The Constitutional Court held that the constitutional amendments were contrary to the principle of *secularism*, and because they indirectly modified the basic characteristics of the republic, they infringed upon the prohibition to amend or even propose said amendment, as indicated by Art. 4, which had thus to be annulled.[706] In other words, the Court led that the wearing of a headscarf in a university goes against the principle of secularism, and thus adopt a fundamentalist approach to the principle: one that assumes that religion is only a private issue and outer manifestations of the same do not have a place in the public sphere. The reasons of the Court were listed above.[707]

704 Cf. Ibid., 243. It is fair to admit, however, that by widening the judicial review power as the Court did was a clear stance against the text of the 1982 Constitution, and thus the Constitutional Court, acted against the intentions of the original constituent power.

705 Gençkaya and Özbudun, 109. For 'hegemonic preservation', see fn. 634 above.

706 Roznai and Yoclu, 202. For a thorough summary of the constitutional aspects of secularism, see Höjelid, 472–74.

707 Roznai and Yoclu claim that the constitutional amendments did not infringe upon the principle of secularism: 'the Constitutional Court's decision perpetuates the very situation that the amendments aimed to change, that is, the situation that caused discrimination based on religious belief, limited women's liberty, violated people's right to freedom of religion, and harmed the democratic process by not enabling a significant part of the population to obtain higher education, which is an important condition for political education and participation. If the values of equality and liberty are the ones the judges

Briefly, in my opinion, I reject the Court's substantive ruling, as I think that allowing a student to wear a headscarf does in no way affect the neutrality of the state with regards to religious matters. In fact, the wearing of religious symbols in the public realm reflects the choice of individuals to adhere to their religious or even cultural identity and has no bearing on the secular character of the constitution, that is, on the separation of state and religion. To seek an improbable connection between the wearing of a headscarf in universities and the principle of secularism is in my opinion far-fetched and again shows the insistence of the Court to protect an old regime. Going further deep in the substantive details of this case is nevertheless beyond the scope of this study.

One thing is however important to reject (and goes hand in hand with the Court's seeking of a link between secularism and the wearing of a headscarf in universities), which is the claim of the Constitutional Court – within its substantive reasoning – according to which an amendment 'cannot involve the *smallest deviation or change* [emphasis added] to the Preamble and the principles laid down in Article 1 and 2 of the Constitution.'[708] This approach can only be accepted if one interprets very narrowly the unamendability of Art. 1–3 of the Constitution, which was however not always the interpretation of the Court. For instance, back in 1971, in a previous case,[709] the Court widely interpreted the passage 'republican form of state' to preclude other characteristics of the state, such as secularism, rule of law, democracy, and social state. According to the Constitutional Court, it was enough that constitutional amendments would be *conformed with the coherence and system of the Constitution.* Or even later, in the second attempt by the Motherland Party[710] to pass a law allowing the wearing of headscarves, the Court interpreted the provision in Art. 2 of the amendments 'any reason not explicitly written in the law' to mean an

wanted to preserve, then, in our view, they should have promoted women's equal right to education by upholding abolition of the headscarf ban. For Muslim women, wearing the headscarf enables them to be present in the public sphere in a manner consistent with their Islamic beliefs, allowing them to study in universities and pursue professional careers.' See Roznai and Yoclu, 202.

708 See, TCC Decision 116/2008, (decision released June 5, 2008; legal reasoning released October 22, 2008) [*Headscarf Decision of 2008*], at para 137; due to lack of a translation of the case in English direct quotation taken from ibid., 204.

709 TCC Decision 37/1970, (April 3, 1971) [*Protection of certain principles from amendment*]

710 See, TCC Decision 8/1991, (decision released April 9, 1991; legal reasoning released July 31, 1991) [*Headscarf Decision of 1991*].

active act of the legislature.[711] In an earlier decision of 1965, the Constitutional Court instead stated that constitutional amendments had to conform to the spirit of the Constitution and, therefore, the power of amendment could not abolish the *essence* of the Constitution.[712] In the Headscarf decision of 2008, however, the Court suddenly took on a very narrow interpretation of the same notion. From the broad requirement of not abolishing the *essence* of the Constitution, the Court shifted to requiring refraining from even the 'smallest deviation or change' not only to the Art. 1–3, but also the Preamble. I agree with Roznai and Yoclu, leaning on the previous jurisprudence of the Court in 1965,[713] when they say that 'even if the Constitutional Court continues to follow what we believe is a mistaken path and reviews a constitutional amendment's content for conflict with the immutable characteristics of the republic, then the annulment of an amendment on the grounds that it contradicts an immutable principle should be undertaken only in extraordinary circumstances, such as when the amendment changes or modifies the *essence* [emphasis added] of the republic's characteristics, leaving them utterly different from what they had been. The power to amend the constitution is extraordinary indeed. The power to declare a constitutional amendment "unconstitutional" is no less remarkable and should be used carefully.'[714] Once again, I agree with Roznai and Yoclu in terms of what is meant with 'essence': 'the amendment's content must have a broad impact on the essence of the principle. After such an amendment, if allowed to stand, the constitutional principle would no longer be the same—it will have been essentially modified. The change would not be a mere deviation affecting a certain matter, period, or sector, which only limits the constitutional principle but leaves the principle the same as it was before the amendment. This test is one of degree and extent. For example, consider the constitutional principle of free speech. An amendment prohibiting flag burning surely infringes the freedom of speech. However, such an amendment ought to be viewed as carving out an exception to the protection and not as

711 See Roznai and Yoclu, 180.

712 See, TCC Decision 40/1965, (September 26, 1965) [*Protection of certain principles from amendment*]. See also ibid., 195.

713 See, TCC Decision 40/1965, (September 26, 1965) [*Protection of certain principles from amendment*] where the Court stated, that constitutional amendments had to adapt to the spirit of the Constitution and, therefore, the power of amendment could not abolish the *essence* of the Constitution.

714 See, Roznai and Yoclu, 206–07.

modifying the constitutional principle of free speech itself. An amendment prohibiting political expressions, on the other hand, would modify the previously existing norm. With regard to secularism, an amendment declaring a certain religion as a state religion, or establishing a state system of religious education, would change the essence of the principle of secularism. In other words, changes to unamendable principles which do not severely alienate substantial groups in society, and which preserve the state's constitutional identity, do not justify the annulment of constitutional amendments. Such a test for evaluating conflicts of constitutional amendments with unamendable principles does not gravely impair the efficacy of the constitutional amendment process and is compatible with principles of separation of powers, since it ensures that the extreme power of judicial review of amendments would be undertaken only in the most aggravated cases.'

The headscarf case is particularly important because even though the Court had previously already shown some traits of dualistic nature, it went a step further in order to assert its position. It exposes the role of the Court in two ways: on the one hand, it shows its support of the Kemalist content of the 1982 Constitution, a typical feature of the deep state; on the other hand, and most importantly, in my opinion, it demonstrates how the Constitutional Court was actively engaging and interfering with the constitutional transition. The intentional widening of its own jurisdiction combined with the strict interpretation in its decision demonstrates strong judicial activism. All of this assessed together suggests the presence of a veritable practice of hegemonic preservation.[715]

III. The Banning of Political Parties

Turkey is a "heaven" of party closures.'[716] By 2008, the TCC had banned over 26 parties and thus, in this sense its role is quite clear. As mentioned, the power to shut down parties by the Constitutional Court was an expression of its role as guardian of state power, rather than the protector of the rights and freedoms of the Constitution.

715 For 'hegemonic preservation', see fn. 634 above.

716 Köker, 338.

Of course, party closure cases are of a different nature from other cases. For instance, in both the crisis over the presidency and the headscarf case, the TCC acted within the typical judicial function of constitutional review. Party closure was not of the same nature as reviewing the constitutionality of the legislature. The power to close parties is a typical characteristic of a militant democracy, which is a democracy that allows certain undemocratic measures (such as party closures) in order to save democracy itself. Political party closure bear more of the characteristics of a criminal law procedure, which helps to reveal how the combination of these functions result in the TCC not only being a protector of the Constitution, but was also conceived to be the guardian of state institutions. In other words, 'the TCC has a dual function, the function of protecting the rights and liberties of the individuals, on the one hand, and the function of protecting the Republic against the ills of the political parties, on the other. These two functions of the TCC can be contradictory at times, for the Constitution has been the product of an authoritarian mindset, as reflected in the problematic case of party closure.'[717]

1. Introducing the Issue

Art. 68 and 69 of the 1982 Constitution, which relate to the regulation and banning of political parties, had been already extensively amended in 1995. Prohibitions on political activities of civil society institutions were revoked and their political cooperation with political parties allowed. At the same time, university teachers as well as students were permitted to become members of political parties, the age of party membership was lowered from 21 to 18, and political parties could finally establish women's and youth branches, or even foundations and organizations abroad.[718] The same articles were amended again regarding political parties and their activity in 2001, with the aim of strengthening the protection of political activity, that is to make the banning of political parties harder. According to the amended Art. 69(5), the banning of a political party 'shall be decided when it is established [by the Constitutional Court] that the statute and program of the political party violate the provisions of the fourth paragraph of Article 68', and this 'only when the Constitutional Court determines that the party in question has become a center for the

717 ibid., 336.

718 Gençkaya and Özbudun, 39.

execution of such activities.'[719] Said activities are listed in Art. 68(4), which states that '[t]he statutes and programs, as well as the activities of political parties shall not be contrary to the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to promote or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.' A political party can be deemed to have become a center of such activities when they 'are carried out intensively by the members of that party or the situation is shared implicitly or explicitly by the grand congress, general chairpersonship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Grand National Assembly of Turkey or when these activities are carried out in determination by the abovementioned party organs directly.'[720] At the same time, Art. 69 was amended in a way that the Constitutional Court could now, instead of banning a party, 'rule the concerned party to be deprived of state aid wholly or in part with respect to intensity of the actions brought before the court.'[721] A third and final change with regards to the banning of political parties was made to Art. 149, according to which the Constitutional Court could now decide to prohibit a party merely by a three-fifth majority of its members instead of the previous simple majority. All in all, both amendments of 1995 and 2001 strengthened the constitutional guarantees for political parties.[722]

Following strong criticism from the EU and some cases of the ECtHR, in 2004 a constitutional amendment changed Art. 90 in order to make the Court more sensitive the EU standards, hence more open minded for the development of pluralist politics in Turkey. The amendment read '[i]n the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.' With this change, it was hoped that the Court would ban parties only as a last resort and mainly in extraordinary cases of pure violence. However, as I will explain, this did

719 Art. 69(6) 1982 Constitution after Amendment of October 3, 2001; Act No. 4709.
720 Art. 69(6) 1982 Constitution.
721 Art. 69(7) 1982 Constitution; this paragraph was added on October 3, 2001; Act No. 4709.
722 Gençkaya and Özbudun, 58.

not happen, and the Court tried to sustain its powerful position in Turkey's political structure.[723]

2. Parties Violating the Secularist Principle of the 1982 Constitution

Even though the TCC was very active within the issue of banning political parties, here I present a list of merely a couple of cases, which in my opinion visibly expose the Court's role when it comes to the transition. All in all, the alleged threats posed by the majority of the parties dissolved can be grouped as either being parties against the *secularist* features of the 1982 Constitution or pro the Kurdish cause, and thus labeled as *separatists* (that is, violating from the constitutional principle of 'indivisible integrity with its territory and nation').[724] These two principles are both part of the unamendable characteristics of the Republic protected by Art. 4 Constitution of Turkey, 1982. The cases related to secularism, however, fit better together with the narrative of the Turkish case with regards to the constitutional transition, as they directly tamper with parties strongly committed to the process of democratization.

a. The WP Case

First and foremost, the so-called 'WP case' on January 16, 1998. The *Refah Partisi* (Welfare Party; WP) case was the culmination of the first important appearance of the third transitional strategy of democratization, that is the one of redefining the secular identity of Turkey. The WP was a center-right Islamist party, which in 1994 won several local elections and scored a great victory in the 1995 elections, allowing it to become the biggest party in parliament and thus join the national coalition. This rise of political Islam soon led to extreme polarization in the country and eventually frictions with the secularist (military) establishment were inevitable. These

723 Köker, 330.

724 These were often either left-winged parties and/or parties advocating a separate homeland and/or autonomy for the Kurdish people. Among the many parties prohibition cases tried (yet here not analyzed), we can find, for instance, the DP-Case of 16.06.1994, in which the Court ruled to close the Democracy Party, a pro-Kurdish party, on the grounds that it violated the principle of territorial/national integrity and indivisibility. See, TCC Decision 2/1994, (June 16, 1994) [*Democracy Party* (Demokrasi Partisi – DEP) *Dissolution case*].

tensions came to an end when the military, with the support of opposition parties and civil society organizations, forced the WP to resign from government through the so-called 'postmodern coup'.[725] Three months later, in May 1997, the WP-Case was opened, and the WP was banned and closed by the Constitutional Court for 'work against the laicity principle of the national-state.'[726]

Even though the WP cautiously desisted from disobeying the basic principles of democracy and always sustained that democratic elections were the only way to political power, it was impossible to see how its Islamist tendency marked by apparent desire to gradually Islamize the Turkish society could somehow concur with the secularist pledge of the establishment of the current 1982 Constitution.[727] Against the WP, it was referred that it supported the wearing of headscarves in schools (which was prohibited at that time) and intended to introduce Islamic principles and Sharia Law, which would alter the Turkish secular order and undermine democracy.[728]

The case was then referred to the ECtHR on the grounds of the violation, among others, of Art. 11 ECHR (freedom of association). On February 13, 2003, the ECtHR unanimously ruled in favor of the banning of the WP and found no violation of Art. 11 ECHR, which protects the right to freedom of assembly and association, as well as the right to form trade unions, all subject only to restrictions which are 'prescribed by law' and 'necessary in a democratic society'. The ECtHR considered that the acts and speeches of the WP had revealed a long-term policy strategy of setting up a regime based on sharia law and that the WP had not excluded violence in order to pursue said policy. Given that those plans were incompatible with the notion of a 'democratic society,' the ECtHR deemed the judgement of the Constitutional Court reasonable and to have met a 'pressing social need.'[729] In other words, the ECtHR agreed that the

725 On 28 February 1997, the army issued a declaration on the urgent need to protect the laicity of the State. Cf. Kogacioglu.

726 See, TCC Decision 1/1998, (January 16, 1998) [*Welfare Party* (Refah Partisi – RP) *Dissolution case*]. A thorough and detailed analysis of this case is beyond this study's scope. For a very elaborated and detailed analysis of the Court's arguments, see ibid., 367–71.

727 Gençkaya and Özbudun, 24.

728 For a detailed summary of the technicalities of the WP Case and the way it was argued in front of the Constitutional Court see Kogacioglu, passim.

729 Cf. *Refah Partisi* (*Welfare Party*) *and Others v. Turkey* [GC], Nos. 41340/98, 41342/98, 41343/98, 41344/98, ECtHR 2003-II (Feburary 13, 2003).

Constitutional Court was justified in prohibiting not only a party, but the governing party. The ECtHR was not shy in admitting that secularism constituted 'one of the fundamental principles of the state which are in harmony with the rule of law and respect for human rights and democracy.'[730] In the ruling, the ECtHR stated that 'in the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.'[731] This case brought the idea that religious principles could be a threat to democracy on the table, as the WP was seeking to permit the application of religious law to areas of family relations and in this sense, the ECtHR identified Sharia law as being contrary to '[p]rinciples such as pluralism in the political sphere or the constant evolution of public freedoms.'[732]

b. The VP Case

The *Fazilet Partisi* (Virtue Party; VP) was formed in December 1997 and is seen as the successor of the WP, as many former members of the WP joined the VP after the WP's dissolution.[733] In the 1999 elections the VP scored a great result in becoming the biggest opposition party. However, the VP met the same fate as its predecessor. The ECtHR's ruling against the WP on February 13, 2001, probably encouraged the Constitutional Court to proceed with the dissolvement of the VP.[734] In addition,

730 See, *Refah Partisi* (*Welfare Party*) *and Others v. Turkey* [GC], Nos. 41340/98, 41342/98, 41343/98, 41344/98, ECtHR 2003-II (Feburary 13, 2003), at para 93.

731 See, *Refah Partisi* (*Welfare Party*) *and Others v. Turkey* [GC], Nos. 41340/98, 41342/98, 41343/98, 41344/98, ECtHR 2003-II (Feburary 13, 2003), at para 123. Cf. also Howard Schweber, "Text and Textualism: Religious Establishment in the United States Supreme Court and the European Court of Human Rights," in *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor (Cheltenham (UK), Northampton (USA): Edward Elgar Publishing, 2018), 423.

732 See *Refah Partisi* (*Welfare Party*) *and Others v. Turkey* [GC], Nos. 41340/98, 41342/98, 41343/98, 41344/98, ECtHR 2003-II (Feburary 13, 2003), at para 123. Cf. also ibid., 259.

733 In October 1998, an appeals court upheld a State Security Court judgement to sentence the WP's Mayor of Istanbul, Erdoğan, to 10 months in prison for reading a religious poem at a rally in December 1997. Erdoğan was rightfully seen as a future leader of Turkey's political Islam.

734 In addition to that, and even though the VP seemed to take a more cautious path than the WP, after the 1999 parliamentary elections, a VP deputy, Merve Kavakci, tried to wear a headscarf in the opening session. However, this was against the code of conduct for

suspecting the party to be the legal successor of the already banned WP, the public prosecutor initiated the dissolution procedure. On 22 June 2001, the TCC ordered the dissolution of the political party for the same reasons as the WP, that is for violating the principle of secularism.[735] The VP was banned later in 2001 as the sixteenth political party to be outlawed in Turkey since 1983. The decision of the Constitutional Court, however, did not consider the VP to be the continuation of the WP, but cited the Islamist policies followed by the party as the main reasons behind the closure.[736]

Just as for the WP, the reason for the banning of the VP is the formation of a focal point of unconstitutional activity; in the case of the VP, it was also about violations of the principle of secularism by hand of high functionaries and members of the party; these violations were attributed to the party. Within the framework of this 'focal point theory', the Constitutional Court has a relatively wide scope of assessment and interpretation when filling in the term 'focal point' and in the question of whether the violations can actually be attributed to the party. The ECHR in particular, as a treaty binding on Turkey with – almost – constitutional status, as well as the case law of the ECtHR, can and must also be taken into account.

c. The AKP Case

In a more limited sanction than was demanded by the public prosecutor, the Constitutional Court decided to expel only two VP deputies from parliament. Most of the remaining 100 joined two successor parties which were formed only weeks later – the *Saadet Partisi* (Felicity Party; FP) and the AKP, which was the more reform-oriented wing of the VP, with Erdoğan and Gül. As I have already explained, the AKP officially declared its support for Kemalist principles and Turkey's pro-Western orientation and distanced itself from

public servants. This was taken as evidence that the VP was already diverging from its cautious path. Kavakci was later stripped of her Turkish citizenship after applying for a U.S. citizenship and never took place in parliament. This was probably an unwise and confrontational move by Kavakci, which possibly contributed to the initiation of the prohibition of the VP.

735 Again, meant as the principle of laicism and the separation between state and religion.

736 See TCC Decision 57/2001, (June 21, 2001) [*Virtue Party* (Fazilet Partisi – FP) *Dissolution case*].

demands for an Islamic order, which however changed over the years and again lately brought the AKP closer to Islamic conservatism. Therefore, it took a much more moderate course in comparison to its predecessors. It won the elections in 2002 and has ruled Turkey ever since. In fact, the AKP's political agenda was far from being religious. It endorsed secularism and contained no suggestion of any Islamist agenda. It always remained respectful of religious beliefs and practices, which is however an element of religious freedom and thus compliant with human rights.[737] A certain section of the Turkish people is highly suspicious of the AKP and believes that there is a hidden agenda to transform Turkey into a *sharia*-based Islamic state.[738]

The Chief Public Prosecutor, Yalçinkaya, soon opened a case against the AKP, probably because it had advocated the headscarf amendments and thus had become a center for anti-secular activities.[739] This time (on 30 July 2008), however, the Court ruled not to dissolve the AKP. Nevertheless, the decision was not so sharp. In fact, under the 2001 amendments the Court needed three-fifths of its members to declare a political party dissolved. The AKP case was decided with a very narrow 6:5 majority, that is, 6 out of 11 judges still decided to close the AKP. The banning of the AKP fell short of one vote. However, 10 out of 11 justices agreed that the AKP had become a center for anti-secular activities and decided to cut state funds for the party. [740] Although the result of not dissolving the AKP could be seen as finally the Constitutional Court evolving into the guardian of the Constitution, rather than the protector of the State, the narrow result of 6:5 and the cut of funds eased to validate the view of some critics who claimed that the Court still represented the old regime. Therefore, the decision was used by the AKP's supporters to strengthen the idea that the Constitutional Court was a dualistic body, which put the AKP in a straitjacket, making it almost incapable of any constitutional innovation. Regardless of whether the intent of the justices that voted for the closure of the AKP was indeed directed at protecting the old regime or because

737 For a comparison of the AKP with its predecessor Islamist parties, see Ergun Özbudun, "From Political Islam to Conservative Democracy: The Case of the Justice and Development Party in Turkey," *South European Society and Politics* 11, no. 3–4 (2006).

738 Some also think that rather than a sharia-based state, the AKP intends to introduce an Islamic way of life. Cf. Gençkaya and Özbudun, 24–25.

739 See Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 246.

740 See ibid.

they saw a veritable threat of the AKP to parliamentarism (the 2007 amendments had introduced direct election of the president and had transformed the country into a semi-presidentialist state), the AKP case brought the party back to the problem that was presented by the headscarf case only some month before: the Constitutional Court's limitation on constitutional amendments and their view of the constituent power. Therefore, even though the AKP won this round, but lost with regards to the headscarf issue, the concern of having a Court with the power to influence the constitution-making process persisted.[741]

3. Comments on the Court's Role

Both principles of secularism and territorial integrity were included in the unamendable Articles of the Constitution, that is, Art. 2 and respectively Art. 3. It is clear how the continuous closing of political parties was closely linked to threats especially to the eternity clauses. As mentioned, both Islamist and Kurdish parties were the main victims of the wave of political parties closing. In a very detailed article concerning, among others, the WP case, Kogacioglu elaborates the reasoning of the Constitutional Court and explains how the Court, by arguing that the separation of state and religion contributes to transforming the country from a religious community into a nation, was actually guided by the principle of unity of the nation rather than merely the bare principle of secularism. He explains how the Court acknowledged the social traits (such as that Islam or pro-Kurdish stances) some political parties were trying to introduce into the political domain, yet it managed to relegate them to the domain of everyday life and culture, and thus reproducing the assimilationist tendencies of the Kemalist ideology. After framing the issue as a threat to national unity, the WP was accused of abusing the democratic system to damage the existing political order. In other words, the Court established the idea that democracy should not be used to be a recipe of self-destruction. In this sense, the Court became an agent of militant democracy.[742]

741 ibid., 247.

742 See, Kogacioglu, 370–71. For more on this, see Shambayati; Kogacioglu.

a. Militant Democracy

Arato draws also the attention to the notion of *streitbare Demokratie* (that is, militant democracy), which entails 'the legal restriction of certain democratic freedoms for the purpose of protecting democratic regimes from the threat of being subverted by legal means,'[743] or better 'the idea of a democratic regime which is willing to adopt pre-emptive, prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime.'[744]

The first person to have coined the definition of militant democracy was Karl Loewenstein in 1937[745], at a time when many European countries were being taken over by authoritarian movements prone to abolish or at least decisively weaken liberal democracy.[746] Loewenstein's notion of militant democracy became highly dominant after WW2 in the Federal Republic of Germany, where the country's new Basic Law contained a number of Articles meant to guarantee liberal democracy in eternity. The eternity clause of Art. 79(3) specified that some features of the German state, such as its federal and democratic nature, could not be amended. At the same time, the German Basic Law allowed for the banning of parties deemed unconstitutional by hand of the German Federal Constitutional Court. The fact that only the Federal Constitutional Court could rule a political party banned, was a provision made to ensure that majority parties would not simply start outlawing their competitors.

Yet is militant democracy justifiable? The approach of the German Federal Constitutional Court with regards to democratic self-defense has been

743 See, Carlo Invernizzi Accetti and Ian Zuckerman, "What's Wrong with Militant Democracy?," *Political Studies* 65, no. 1S (2017): 183. It is a term to describe the German political system, which implies the allocation of extensive powers and duties to all branches of government to defend the liberal democratic order against those who wish to abolish it. The idea behind it is the notion that even a majority rule of the people cannot be allowed to establish an autocratic regime, such as what happened in 1933 with the coming to power of the Nazi regime, which would go against the unamendable clauses of the German Basic Law at Art. 1 and 20 together with Art. 79(3).

744 See, Jan-Werner Müller, "Militant Democracy," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 1253.

745 See, Karl Lowenstein, "Militant Democracy and Fundamental Rights, I," *American Political Science Review* 31, no. 3 (1937); "Militant Democracy and Fundamental Rights, Ii," *American Political Science Review* 31, no. 4 (1937).

746 Müller, 1253–54.

mainly anti-extremist, meaning that the Court deemed the threats to democracy not to be *exclusively* correlated with Nazism, but rather, with *any* (right *and* left) extreme movement.[747] In Turkey, instead, the approach has been that of what Niesen labels 'negative republicanism.'[748] Negative Republicanism is based upon the grounds of the society's history and the concrete negation of the past wrongs in the name of democracy; in other words, it describes an approach that aims at contrasting any possible attempt to reinstall a previous authoritarian or totalitarian regime, be it fascism in Italy, Francoism in Spain, partly even Nazism in Germany,[749] but also religious rule in Turkey.[750] In this sense, militant democracy and its measures can be justified by a negative past experience.[751] Therefore, menaces to national or constitutional identity (arguably, the latter in the case of Turkey) facilitate the understanding (not necessarily the justification) of militant democracy, especially in new fragile democracies, where a big part of the population seemed actively willing to support or at least tolerate a non-democratic regime.

From WW1 until the end of the Cold War, it was easier to spot the enemies of democracy, as they were often explicitly totalitarian or extremist. With the end of the Cold war the interest of militant democracy somehow faded. Today, the enemies of democracy have become much more difficult to establish. However, in recent years new threats have been established in order to explain militant democracy activities. The first would be populism, which remains a very vague concept and even here it is unclear whether or not it justifies militant democracy measures. Second, and related to the first, the appearance of new forms of authoritarian regimes, which do not officially break with democracy and linger on holding more or less free and fair elections, such as Russia and Turkey. Finally, religion.

747 In other words, the German Court's approach to democratic militancy emanated mainly from the threat of totalitarianism.

748 For more details on both anti-extremism and negative republicanism, see Peter Niesen, "Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties," in *Europe's Century of Discontent: The Legacies of Fascism, Nazism and Communism*, ed. Shlomo Avineri and Zeev Sternhell (Jerusalem: Magnes Press, 2003).

749 Since Nazism, was the regime against which the political identity of the Germany defined itself.

750 Müller, 1260.

751 "Militant Democracy and Constitutional Identity," in *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor (Cheltenham (UK), Northampton (USA): Edward Elgar Publishing, 2018), 424.

It is not clear whether religious actors are in fact organizing themselves to overthrow democracy, yet the perception (or rather, the prejudice) has conquered the mind of many people that some non-violent forms of behavior, such as wearing a *burka* in public or a headscarf in university, equals to an attack on democratic values.[752]

Militant democracy has thus been repeatedly summoned to justify constraints to constitutional rights, such as the banning of political parties, the prohibition of wearing of certain religious garments, the restriction of free speech, and more. Historically, of course, the typical measure of militant democracy was the banning of political parties.[753]

Militant democracy is thus established to protect democracy from different possible threats, which loiter within the democratic system. It seems therefore only logical that the various criteria that seek to protect democracy (such as secularism, republicanism, federalism, and more) should be entrenched into the constitution indefinitely (think of eternity clauses and other types of constitutional entrenchment, such as limits to constitutional amendments).[754]

In the same sense, it seems also only reasonable to empower an apex court to rule on allegedly unconstitutional constitutional amendments. While justifying the restriction of constitutional rights remains in disputed territory, there is quite general understanding that if militant democracy is justifiable at all, it ought to be employed by independent and impartial institutions.[755] By this of course one principally means the judiciary. Even

752 ibid., 415. The threats of religiously based terrorism might have helped in taking such stances. This is however a new and complex terrain for militant democracy, so much so that it is unclear whether it is acceptable to practice democratic self-defense at the slightest possible hint of a threat against anything that slightly deviates from the narrow interpretation of the concept of secularism. See, "Militant Democracy," 1253–56. For a contemporary analysis of 'militant democracy' and the place it has in today's political scenario, see the exemplary article by Ruti Teitel, "Militating Democracy: Comparative Constitutional Perspectives," *Michigan Journal of International Law* 29, no. 1 (2007).

753 Müller, "Militant Democracy and Constitutional Identity," 415.

754 Of course, it is arguable where the limits to trigger militant democracy measures ought to be set. We live in an era where hate speech is interpreted very narrowly, the wearing of a headscarf is seen as a threat and freedom of expression is limited to its minimum. See extensively, Teitel.

755 See, European Commission for Democracy Through Law (Venice Commission). "Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures." *Council of Europe.* CDL-INF (2000) 1 (1999).

the Venice Commission, which is the Council of Europe's advisory body on democracy and the rule of law maintains in its *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, that 'rights cannot be restricted other than by a decision of a competent judicial body in full respect of the rule of law and the right to a fair trial.' Especially when it comes to party closures, which are the core measure of the traditional idea of militant democracy, the Venice Commission stresses that 'legal measures directed to the prohibition or legally enforced dissolution of political parties shall be a consequence of a judicial finding of unconstitutionality and shall be deemed as of an exceptional nature and governed by the principle of proportionality.'[756] The *ratio legis* here lies in the worry that, if put in the hands of the other two branches of government, militant democracy might be abused into a tool for certain individuals to outlaw their competitors, or to gather support with the electorate by attacking unpopular and defenseless minorities.[757] Both worries are legitimate, yet when it comes to the former, if we look at Turkey, the packing of its Constitutional Court and the fact that the Court was not independent, we see that also the judiciary is not spotless.

b. The Paradox of Militant Democracy

All in all, it is very difficult to create a proper legal theory that would help to address militant democracy's biggest dilemma, that is, the democratic paradox. The democratic paradox entails the possibility of a democracy destroying itself in the process of defending itself.[758] Constitutional scholars[759] extensively explain what militant democracy is and what the drawbacks of such notion are, yet most stop short of evaluating the deep constitutional dilemmas of exactly which values are most relevant to the constitutional protection of democracy. A theory would depend on the different historical experiences of several case studies and especially their

756 ibid., 5.

757 Müller, "Militant Democracy and Constitutional Identity," 421.

758 ibid., 418.

759 Kathleen Cavanaugh and Edel Hughes, "Rethinking What Is Necessary in a Democratic Society: Militant Democracy and the Turkish State," *Human Rights Quarterly* 38, no. 3 (2016); Invernizzi Accetti and Zuckerman; Müller, "Militant Democracy and Constitutional Identity."; "Militant Democracy."; Teitel; Hans-Jürgen Papier and Wolfgang Durner, "Streitbare Demokratie," *Archiv des öffentlichen Rechts* 128, no. 3 (2003); Ludvig Norman and Anthoula Malkopoulou, "Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives," *Political Studies* 66, no. 2 (2018).

divergent lessons learned from each past of authoritarianism. For instance, as Müller well exemplifies: 'an experience with authoritarianism could give rise to a heightened willingness to engage in party bans—but it could also have the opposite effect, that is to say, a demand to be exceptionally tolerant even vis-a`-vis potentially extremist parties, as banning parties is itself seen as a typically authoritarian measure: an example of the first is Germany; Spain by and large constitutes an instance of the second.'[760] This is the reason why the justification of militant democracy has often been much contested within individual countries, and this because of the democratic dilemma. The idea of militant democracy on its own is, as I have shown, justifiable and so is the empowerment of an apex Court as the agent of said militant democracy, and thus takes on the role of the guardian of democracy. The entire topic could be the subject of a separate study on its own. Yet let us simply look at the Turkish case of militant democracy.

c. Turkey's Militant Democracy

In a combination of the threat of populism and religion over democracy and secularism, Turkey displays typical traits of a militant democracy. The precursor of militant democracy was clearly the Constitutional Court and the threat posed by the AKP government. The challenge here was, however, not merely the justification of political party bans, but rather assessing whether political actors were in fact trying to pass unconstitutional constitutional amendments. Today, after the packing of the Constitutional Court of 2010, we can confirm that the threat was real.

In Turkey, the recurring criteria when justifying party bans were secularism and territorial integrity, and we have often seen how prohibitions of political parties in Turkey were mainly based upon alleged violations of exactly these criteria. Accordingly, I would believe that the TCC was not engaging in a general anti-extremist practice, but rather a negative republican perception, that is, contrasting any possible attempt at restoring the religious based regime of the Ottoman Empire. While all religions were potentially a threat to secularism in Turkey, the precise worry of the Court was the *return* to the pre-republican (and accordingly, pre-Kemalist) state in which religion and its leaders exercised state power. Said religion was the one included (explicitly or implicitly) in the political agenda of most recently banned political parties, that is, Islam. Hence, the banning of the

760 Müller, "Militant Democracy," 1254.

WP, the VP and the attempt at banning the AKP, among others. In my opinion, when it comes to the AKP case, I must add that the Constitutional Court was not only concerned with the protection of the secular identity of the Republic, but possibly also with the growing fear that Erdoğan was planning to grow its power and turn the country to presidentialism by slowly parting with parliamentarism.

It is hard to assess whether or not in Turkey the use of militant democracy measures was justified or not. One needs a careful examination of particular legal and political situations in order to make such decision. Here are some thoughts:

– Firstly, I lean on the opinion of Teitel, when she rightly states that 'militant democracy' should be a notion linked to transitional constitutionalism and 'associated with periods of political transformation that often demand closer judicial vigilance in the presence of fledgling and often fragile democratic institutions; it may not be appropriate for mature liberal democracies.'[761] Turkey was (is) in fact a fragile democracy and as such 'militant democracy' could be a reasonable reaction to its constitutional history. However, I believe it is clear that militant democracy should be employed (if one support the concept of militant democracy) only when defending an actual democracy, and not – as in the Turkish case – trying to protect an old undemocratic regime... even if the alternative is the AKP. One can fight the increasingly lurking threat of presidentialism and anti-democratic tendencies without supporting itself undemocratic values.
– Secondly, giving the monopoly of dissolving political parties to an institution relatively isolated from political pressures still seems the most justifiable arrangement, unless we found ourselves in a situation where the Constitutional Court risks its own packing *or/and* has a clear political stance. In Turkey, both risks were real. The risk of militant democracy being abused of was self-evident. So, the problem here lies, as mentioned, in the way the nature of the Court itself, which I believe should be neutral and independent in order to employ militant democratic measures 'justifiably'. This was not the case in Turkey. The risk here was to foster judicial activism. The employment of militant democratic measures to pursue a specific goal – as it was the case in

761 Teitel, 49.

Turkey and the Constitutional Court – are yet another hint at 'hegemonic preservation'[762].

– Third, from a positivistic approach, cases of political parties' closure can result in entirely opposite conclusions within the legal framework of the Turkish public law, just as it was for the previous cases analyzed. Positively, the Court could choose whichever interpretations it pleased. Socio-politically however, we have seen how that cannot be entirely true. By this I mean that in the AKP case, for instance, the Court sustained that trying to lift the prohibition to wear a headscarf at universities leads to the conclusion that the AKP had become a center for anti-secularist activities. Despite the criticism this conclusion might encounter, it is positively a valid interpretation. This, of course, on the grounds still provided by legal positivism, if we close an eye on the fact 'that since Turkish positive law gives priority to international human rights agreements, the TCC must adapt its way of treating party closure cases to the requisites of international law.' Nevertheless, the ECtHR has upheld on several occasions party closure decisions of the TCC, and this not without criticism. But I will elucidate on this later. Hence, on the grounds of legal positivism, one has a rather large margin of appreciation. Socio-politically instead, the closure of the biggest party in parliament (such as the WP or the AKP) might encounter a different opinion.
– Finally, the fact that the ECtHR upheld the WP case confirms that 'militant democracy' is in fact being justified in practice, even on an international level. However, I believe that the very concept of militant democracy might have lost some pertinence in the eyes of recent developments. Both the Germany Basic Law and the ECHR are post-war documents, and therefore embody a view of constitutional rights typical of that political generation. It is a view strongly molded by the experience of weak or fragile democracies characterized by deep mistrust in populist democratic politics when said movements were not restrained by any of the elements of constitutionalism. In this situation, militant democracy is easy to justify by the very close constitutional scrutiny of political parties and the placing of constitutional limits upon their activity. The ECtHR's justification for the banning of the WP is based on this idea, which itself is based on the way the ECHR is actually designed, that is, the possibility

762 For 'hegemonic preservation', see fn. 634 above.

to restrain certain rights for the sake to save other rights. Of course, in the ECHR, the limits on constitutional rights are both internal and explicit within the rights-granting provisions themselves, and are bound by basic principles, such as proportionality or the protection of the rights and freedoms of others, public order, and public safety.[763] The ECtHR's interpretation touchstone is based upon the approach of 'necessity in a democratic order', which recalls the idea of the origins of the ECHR, that is, that what happened in WW2 should never to be repeated. This is why it is unsurprising when the ECtHR upholds the WP case and concludes that it is 'not all improbable that totalitarian movements, organized in the form of political parties, might do away with democracy [...].'[764] It seems to me that a lack of understanding of the place Islam takes in Turkey, and possibly a reaction to the fear of religion, is at the basis of similar interpretations nowadays. If the fear of totalitarianism is used to justify militant democracy, in the case of Turkey (and many other countries nowadays), it cannot be said the same. I concur with Teitel when she opposes the idea of *liberal democracy* to *militant democracy*, 'by which persons are urged to make their diverse multicultural claims within an equal individual rights model. In one conception, there is space contemplated for minorities, whether political, religious, or otherwise, to make a collective claim, with the potential of shaping national culture; in the other, there is simply no analogous space. In the militant democracy scheme, the individualist rights claim, and its related group differences remain outside the space of political and juridical negotiation and its potential consensus.'[765] Furthermore she writes: 'the European Court's approach tends to narrow or limit the possibilities for adjustment or modification of the prevailing model of militant democracy. When it upholds the prohibition of the veil or the preemptive dissolution of a political party, the Court tends to dis-empower altogether certain forces or groups in today's European society, thus precluding a compromise that is integrating or inclusive. Hence an approach conceived to restrain social conflict may, applied to today's Europe, end up sharpening or

763 Teitel, 64.

764 *Refah Partisi* (*Welfare Party*) *and Others v. Turkey* [GC], Nos. 41340/98, 41342/98, 41343/98, 41344/98, ECtHR 2003-II (Feburary 13, 2003). Even the keenest supporters of secularism will deny that a complete separation of church and state is a precondition for liberal democracy, yet secularism is clearly an essential part of some democracies' particular constitutional identity, Turkey being a prime example.

765 Teitel, 68.

> exacerbating volatile social cleavages. The measures upheld by the European Court of Human Rights, whether of preemptive party dissolution or of the prohibition of the veil, are extreme: as judicial remedies, they are zero-sum, establishing winners and losers, allowing little room for compromise. Given that these are profound issues involving the parameters of political and religious tolerance in the forging of European identity, the European Court's judicial strategy here does not necessarily advance the building of needed tolerance in the region.'[766] I believe that the TCC has also fallen short to move on to a more liberal democracy approach, and by not even trying to adapt its jurisprudence to its country's national identity, it failed it with its strict enforcement of the Kemalist constitutional identity. Despite the historical merits of 'militant democracy' as a reaction to the various challenges of transition and constitutional transformation, demographic variations and multi-cultural development may well indicate that there is a pressing need to reconsider the methods of protection of constitutional values and national identity and thus come up with an alternative to post-war vigilance.[767]

These are the reasons why, short of a theory on militant democracy in general, I understand the employment of militant democracy (again, not justify) depending on the particular case, but do not support it in the case of Turkey. Thus, just as in South Africa, cases concerning the devolution process of powers were a core issue in the transition, whereas in Turkey the question, and indeed control, over political activity was in fact one of the reasons for the reform process itself. We can see a clear stance of the Constitutional Court when it comes to these cases. The Court is clearly on the side of the military establishment, as it pushes towards the protection of the secular identify of the State. The Court does this by 'militantly' defending the position of the establishment, rather than fighting against a possible Islamization of the country, which even though one might dislike, it was the democratic will of the majority of Turks (at least allegedly).[768]

766 ibid., 69.

767 ibid., 70.

768 In addition to this democratic problematic of secularism v. religion also stands a possible violation of religious freedom. Yet, this would go beyond the scope of this study.

IV. Comments on the Court's Role in its Own Packing, and Thereafter

The Court's packing scheme is the culmination of the head-to-head between the Constitutional Court and the AKP. Being the AKP, the successor of a list of Islamic parties, one could almost say that this 'race' probably goes even further back as the AKP, the ruling party at present and a successor to the closed VP (closed by the Court in 2001), which was a successor to the closed Welfare Party (closed by the Court in 1998), which was a successor to the closed National Salvation Party (banned after the 1980 coup), which was a successor to the closed National Order party (closed by the Court in 1971). However, with the presidency crisis, the true colors of the Constitutional Court started to show. The headscarf case revealed what happens when an apex court acts outside the limited territory in which judicial independence is permitted. After the headscarf ruling of 2008, which made basically every constitutional amendment subject to the endorsement of the Constitutional Court, the gate for a radical constitutional reform seemed to be shut. By wanting to oppose the usurpation of the constituent power by the parliament, the Court became the usurper of the very power it wanted to protect. The only possible way out of this deadlock with regards to the constitutional transition would have been the drafting of an utterly new constitution by a Constituent Assembly clearly mandated from the people. A new constitution would have probably established a much more democratic order which, *inter alia*, would have probably redefined the structure and functions of the Constitutional Court. With a new constitution, a new constitutional identity could have been created, consequently eliminating once and for all the dualistic nature of the constitutional order of Turkey (it would have also been the only way to change the eternity clauses). The reason why the AKP did not embark on a comprehensive and inclusive constitution-making process is probably the fact that the party aims at continuing on its line of majoritarian constitution-making rather than consensual. The recent developments, including the 2017 amendments, indicate that the AKP is in fact drafting a new constitution… unilaterally.[769]

So, if the people and the AKP wanted neither a coup nor a revolution, they would have to tolerate a frozen Constitution… as long as the Constitutional

769 Oya Yeğen, "Constitutional Changes under the Akp Government of Turkey," *Tijdschrift voor Constitutioneel Recht* (*TvCR*) 8, no. 1 (2017): 70.

Court was its guardian.[770] The AKP had never attempted to influence the Court's composition, yet with the headscarf case especially, the Court directly attacked a core issue of the regime interests, and therefore went too far. Hence, the Court's packing plan.

Yet, did the Court defend itself from the packing plan? The main opposition party at the time, the CHP, challenged the 2010 amendment package on mainly the ground that the package included unconstitutional contents, as certain changes especially to the Constitutional Court's structure would violate the principle of separation of powers, which under the rule of law was supposedly permanently entrenched by Art. 2 and 4 of the Constitution. The CHP claimed in other words that the AKP was trying to amend one of Turkey's unamendable constitutional Articles. With this, the CHP demanded therefore the amendments be reviewed in their content.

Formally this argument was quite weak, but one could think that the TCC would at least try to resist its own packing. First, it could have invalidated the entire package as a whole, since the amendment was made out of many different amendments. Second, as Arato admits, 'the Court could have made the argument that significantly weakening its own powers in amendment review, the limits concerning Art. 1–3 became unenforceable.'[771]

However, the Court had never annulled amendments that were about to be submitted to a popular referendum and if one recalls correctly, back in 2007 during the crisis over the presidency, the Court had already not interfered in the case involving the amendment enacting the direct election of the president in 2007. This served as an important precedent for the Court.[772]

Hence, on 7 July 2010, the TCC delivered its final verdict on the package of constitutional amendments,[773] which was going to be subject to a popular referendum on 12 September and that would have packed the same Court. Instead of trying something more, the Constitutional Court adopted a rather unsuccessful strategy. It claimed (again) the jurisdiction to review the substance of the amendments while avoiding invalidating the

770 This is apparently the major point made by the critics of the Court's power to review constitutional amendments; the prospect of a frozen constitution. Cf., Can, 276; Gençkaya and Özbudun, 109.

771 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 254–55.

772 ibid.

773 TCC Decision 87/2010, (decision released July 7, 2010; legal reasoning released August 1, 2010) [*Constitutionality of Constitutional Amendment Package of 2010*].

substance involved. It did so by invalidating a few, rather technical parts of the large amendment package, for being contrary to the principle of 'democratic [...] [S]tate governed by the rule of law' provided in the Art. 2 Constitution of Turkey, 1982, while explicitly asserting the power to do so, resulting in the whole rest of the package (including the court packing plan) to go to a referendum, probably with the hope that the people would not allow the Court to be packed. Instead, the package was ratified in the referendum by a striking 58% majority. As already mentioned, the international community saw this result as a triumph for democracy in Turkey. However well-meant, it was all based upon a great misapprehension of what was truly at stake in that referendum: the Constitutional Court's packing.[774]

The case of Turkey's Court packing shows how judicial independence can be limited in a dualistic regime. When a judicially active Court goes too far in opposing the interests of the governing party, it is likely to be disciplined or packed. When it came, for instance, to the headscarf case, the headscarf issue was of high political salience. Therefore, with the Court's decision, the TCC defied the wishes of the ruling party and at the same time those of which roughly represented the majority of the people. By doing so its legitimacy was undermined and thus the packing of the Court, and accordingly the constraint on its independence, was not even such a critical measure in the eyes of the public.[775] Probably, I would add, many of those who actually figured what it was all about in the referendum still saw the Court as an agent of the dualistic establishment and thus were incomprehensively in favor to have their Court packed.[776]

Arato offers a good comment on the Court's role in its own packing:

> 'In spite of its pedigree of a strategy in comparative constitutional history, in Turkey it was, I think, mistaken if the Court was still interested in remaining an important actor in constitutional politics. The purely legal argument that it did not have

774 See above in the section explaining the third round of the horse race between Court and AKP government for a list of reasons why the people tended to vote *yes* in the referendum.

775 See, Goldenziel, 43.

776 It is true that the Turkish judiciary has never been really independent or impartial. The hegemony of the old secularist legacy constantly prevented the embracing of pluralism and offered only limited expansion of fundamental rights. Yet, little did they know that one form of ideological favoritism would simply be replaced by another one that rests on the executive power.

> jurisdiction over the substance of amendments was already previously disposed of by turning substance into procedure. If the lack of connection to the eternity clauses was the main factor in the decision, that connection was even less relevant in the case of the parts declared unconstitutional than with respect to the court packing provisions. Moreover, the strategy of deference while at the same time asserting jurisdiction was not going to work with new constitution making on the agenda. Even if the aim was to be able to protect the eternity clauses against future amendment packages or a new constitution, these did not necessarily come under threat in the emerging constitutional plans of the AKP. The project of presidentialism was less obviously in violation of clauses on the integrity of the republic, or secularism, or even rule of law, than the attacks on the Court itself. More importantly, there was going to be little chance to undertake strong amendment review subsequently. Once the 2010 amendment was ratified, it would be a packed court that would inherit the jurisdiction thus saved, one that was also made more difficult to exercise by the new two-thirds vote needed to invalidate amendments. At least that hurdle should have been disposed of or rather invalidated. The strategy of combining assertion of jurisdiction and substantial deference might have been appropriate in 2008 in the headscarf case, when the Court chose instead to confront the government more directly on an issue of very much arguable substance. In the changed context of 2010, the strategy amounted to an act of surrender by the Constitutional Court.'[777]

In the moment the Court needed the most to stand up for itself, it chose instead to take a more deferential approach, which de facto resulted in the Court letting itself overtake.

Unsurprisingly, after the 2010 amendments, the Court has gradually started to support the legislative decisions of the government in key critical cases. Nevertheless, this new (active) deferential approach was different from the restrained (passive) deferential approach the Court took on after the 2010 packing amendments. This time the Court would offer unequivocal judicial support for controversial policy choices of the government. This shift in the behavior of the Court was expected. It required not only an ideological change, but also major alterations in the Court's established doctrines and jurisprudence. One of the major areas that clearly experienced said shift is the interpretation of secularism. For instance, when in 2012 reviewing the educational reform, a benchmark for populist policies promoting the majority the Muslim identity, the Court upheld the law providing for Islamic courses in middle and high schools programs.[778] The law did not prescribe the same for any other religion other than Islam. In contrast to its previous Kemalist jurisprudence, this paradigm

777 Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 254–55.

778 TCC Decision 128/2012, (September 20, 2012) [*Example of TCC's Packed Jurisprudence*].

change is not a surprise, but still striking, and is hardly deducible from the current 1982 Constitution and its neutral guarantees for freedom of religion and the secularism.[779]

E. Preliminary Conclusions

Upon the perceptions provided by the aforementioned case law of the TCC, and based on both positivist and socio-political legal perspectives, it seems I can roughly draw the following conclusions.

I. Summary

1. Did the TCC Play a Role in the Transition?

It can be clearly stated that before its packing and the contemporary constitutional crisis, and thus during the constitutional transition, the TCC was a powerful institution in Turkey's constitutional-political system because it managed to influence the constitutional transition as it slowed down a process of democratization, which seemed to be taking up a certain speed in the early 90 s. The fact that the AKP entered a veritable head-to-head with the Court in the early 2000 s, and that these cases of the Court characterized the politics of Turkey by even driving it into a constitutional crisis, shows the relevance of this institution. Even though I do not agree with the packing scheme, the mere fact that it had to be packed shows how much of a problem it was for the governing forces.

2. What Role Did It Play?

The TCC established itself as a very powerful and independent institution capable of checking the executive power and the legislature. In fact, it struck down more than half the acts referred to it between 1962 and

779 See, Bertil E. Oder, "Populism and the Turkish Constitutional Court: The Game Broker, the Populist and the Popular," *Verfassungsblog* (Mai 2, 2017), https://verfassungsblog.de/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular/ (accessed 8 September, 2019).

1999.[780] At the same time however, the Court was a central actor in protecting the old, secular, regime against the new democratic forces; both with a legal-positivistic and in a socio-political approach.[781] Especially in the last years before its packing, it was mainly Islamist forces.[782] The Turkish scenario seems to coincide with Hirschl's theory of 'hegemony preservation',[783] which, using Hirschl's words, 'may also explain the key role the Turkish Constitutional Court has played in preserving the strictly secular nature of Turkey's political system, by continuously outlawing antisecularist popular political movements in that country.'[784] However, whoever stresses that the role of the Constitutional Court was limited at being merely a tutelary or guardianship institution tends to overlook the behavior of the Court before the constitutional transition, that is, before the 1980 Coup. For instance, one should recall the recurrent attempts to constrain the amendment review jurisdiction of the Court by military-controlled governments in 1971 and 1982. These facts are often mentioned, yet not explained.[785]

Turkey's Constitutional Court has taken upon a pivotal and controversial play in Turkish politics and within Turkey's legal system. The role it played and the functions it has employed have attracted mainly two different reactions. On the one hand, those in favor of secularism praise the role the Court has played in overseeing and protecting the old Kemalist regime. On the other hand, others harshly criticize the Court's actions in this sense.[786]

3. How Did It Play Its Role?

The Court has revealed its role through a judicial active behavior. The Court has taken on a very strong and political role, which to many is a sphere that

780 See, Goldenziel, 36; Ceren Belge, "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey," *Law & Society Review* 40, no. 3 (2006): 654.

781 For a concise article on the Court's role as protector of the old secular regime, see Cakmak and Dinç.

782 See, Goldenziel, 37.

783 For 'hegemonic preservation', see fn. 634 above.

784 See, Ran Hirschl, "Preserving Hegemony? Assessing the Political Rights of the Eu Constitution," *International Journal of Constitutional Law* 3, no. 2–3 (2005): 382.

785 See, Gençkaya and Özbudun, 23; Köker, 328–44.

786 Cakmak and Dinç, 69.

can only be shaped by political parties.[787] The Court's dualism is often distinguished when one looks at its powers: on the one hand, the constitutional (review powers), that is, protecting rights and liberties and, on the other hand, the criminal law powers (party closings), that is, guarding the state against the political parties. However, in the Turkish case, the Court followed with both powers mainly the same objective ending up being a guardianship institution, penetrating thus both the legal-positivistic and the socio-political approach of the Court. In other words, the TCC followed its role of protecting the old regime by using both a very legal-positivistic approach as well as a socio-political one.

– The former was revealed by a very strict positivistic interpretation of the Constitution. It used an instrument (constitutional review) typical of constitutional guardianship in an extreme narrow way in order to protect the establishment (especially in the cases of the crisis over the presidency and the Headscarf Case). It could be said, in the first presidency case, that the Court was defending against the silent text both the consensual principles behind the regulation of voting for the presidency and the interests of the state bureaucracy. In the headscarf case, the Court moved from a very wide interpretation of 'republic' and secularism, to a very narrow one. Doing this facilitated it to seize and usurp the power of amendment because since then almost every amendment could deviate a little from these principles, and thus vest the Court with the power to review it.
  Additionally, the positivistic interpretation in the substance also used in the headscarf case probably triggered the AKP's idea to pack the Court in the future. The headscarf issue was at the core of many political discussions in Turkey. In this sense, when the Court used secularist grounds to oppose the AKP's objective to overturn the headscarf prohibition, it overplayed its hands.[788]

– The latter, instead, was exposed by actively fighting against Islamization through the closure of political parties. The TCC was, in fact, the main agent of militant democracy: it embraced its militant democratic powers of political party closure in a way that clearly hints at fighting against Muslim parties. Repeatedly. One could imply that denying the Court of

787 ibid.
788 Goldenziel, 61.

the power to review constitutional amendments in their substance would leave the eternity clauses undefended and unenforceable. Quite the contrary. The fact that the powers to close political powers were amended repeatedly shows that this was not the intention, but rather allow the Court to protect the values of the eternity clauses by banning political parties. This meant that although legally the Court could not substantively review constitutional amendments, it could close political parties that tried to enact such amendments which threatened the eternity clauses. This in typical militant democratic style. Militant democracy is thus the idea of a democratic regime which is willing to adopt pre-emptive, prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime. In fact, they could even be closed down pre-emptively for even only advocating them. In other words, the usurpation of the review power that we have seen before with regards to the review of constitutional amendments by the Court made the entire idea of militant democracy (which was allowed by the Constitution) without function. This because the goal to pursue an active protection of the old regime would have been possible through the constitutional powers of militant democracy (regardless of whether they were justifiable or not) and not by necessarily having to widen its scope of judicial review. This makes the usurpation of such power even more evidence that the Court was attempting to block any challenge to the old regime's values with every measure possible.

All of this shows the degree of judicial activity of the Court. This behavior of interference with politics is even more exposed when the parties to be closed are not merely Islamic parties, but also majority parties, such as the WP or the AKP. In addition to its legal function, the Court has also played a very pivotal role affecting the outcome of Turkish politics and steering it in a direction it pleased it.[789] This is a clear sign of active judicial delimitation of politics. The closure of such parties is thus not a small deed.

The power to ban political parties is an undemocratic measure, which was constitutionalized in the name to *save* democracy, in cases of emergency. In Turkey, the Constitutional Court has overused its power to ban political parties and, even though militant democracy is in some cases justifiable, in Turkey it seems the Court has overstepped the basic idea of such measure.

789 Cakmak and Dinç, 72.

> So, first, the fact that it employed the power to dissolve political parties for its own objective to protect the old regime. Secondly, let us not forget that militant democracy is hard to justify in Turkey because the democratic system it aimed at protecting was undemocratic to begin with. In sum, if in the case of Turkey, the justification of militant democracy was the dissociation of the polity from a negative past, that is, from being ruled by religious leaders under the Ottoman empire, the regime that the 1982 Constitution installed was (despite the partly valid Kemalist values) itself 'negative'. The invocation to protect the constitutional identity of country by the Court might be a noble cause, yet not when the constitutional identity however has itself dubious origins and basic principles. Accordingly, just as a simple repugnance of the Ottoman Empire cannot legitimate restrictions on what to wear in Turkish universities, nor can (in lack of proper evidence) justify the banning of a governing party such as the WP.[790]

Of course, when it comes to the banning of political parties, one could almost admit that political calculations could not be avoided here at all and might even be desirable for the preservation of political and legal peace. Furthermore, as a Constitutional Court is not only a blind user of the wording of legal texts, but should also be a guardian of the constitution, it bears responsibility above all for maintaining constitutional peace. Or at least, that is what a Court in a fair democratic context would do. However, owing to the dualistic nature of the Court, it cannot be equally said for Turkey. As the activism of the Court intensifies, as it has been the case during the recent political-constitutional crisis, before its packing, its legitimacy erodes accordingly.[791]

Another feature of the Court's behavior has been its inconsistency. The narrative of the Turkish Court's decisions suffers from what I would call *judicial inconsistency* as far as the coherence in its performance is concerned, which makes it a less legitimate institution than ever. The Court used a legal bypass to steer the cases the way it wanted: even though it could only review a constitutional amendment by their form, the court went around this clause and widened its competence. Apart from the fact that it did usurp such power, it is also interesting *when* it did so. The 1961 Constitution, prior to its 1971 amendment, did not include

790 Cavanaugh and Hughes, 628–29.
791 Köker, 342.

any provision on the judicial power review of constitutional amendments whatsoever. However, in 1970 and 1971, the Court declared itself competent to review both the substance and the form of constitutional amendments to the 1961 Constitution.[792] The Parliament responded by going through with the 1971 amendment package to the 1961 Constitution, where it was finally specified that the Constitutional Court was competent to review the constitutionality of constitutional amendments, but only with respect to their form. Parliament left, however, the meaning of 'form' unclear.[793] In any case, in 1975 and several times thereafter, the Court held that in fact it did have the power to review the substance of constitutional amendments based on Art. 9, which stresses that Parliament could not amend, or propose to amend Turkey's republic form of government.[794] In other words, it stated that the prohibition to amend the republican nature of the state was a condition of form and not substance, and therefore admitted that it only had the competence to review the form of constitutional amendments.[795] Therefore, in the 1982 Constitution, the requirement of form was specified. In fact, prior to 2008, and here is the interesting move, the TCC ruled three times on the constitutionality of constitutional amendments under the 1982 Constitution.[796] In all three decisions, however, the Court declined its power to review either the substance of the amendments or their compatibility with the eternity clauses of the 1982 Constitution.[797] In these decisions, the Court basically

792 Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Bursa (TK): Ekin Press, 2008), 40 – 42; Roznai and Yoclu, 195. See, TCC Decision 31/1970, (June 16, 1970) [*Protection of certain principles from amendment*].

793 Goldenziel, 36. See Article 147 of the 1971 Constitution of Turkey.

794 See, TCC Decision 87/1975, (April 15, 1975) [*Protection of certain principles from amendment*]; TCC Decision 19/1976, (March 23, 1976) [*Protection of certain principles from amendment*]; TCC Decision 46/1976, (October 12, 1976) [*Protection of certain principles from amendment*]; TCC Decision 4/1977, (January 28, 1977) [*Protection of certain principles from amendment*]; TCC Decision 117/1977, (September 27, 1977) [*Protection of certain principles from amendment*]. See also, ibid.; Gözler, 42 – 46.

795 Roznai and Yoclu, 196.

796 See, TCC Decision 15/1987, (decision released June 18, 1987; legal reasoning released September 4, 1987) [*Constitutionality of constitutional amendments under the 1982 Constitution*]; TCC Decision 68/2007, (decision released July 5, 2007; legal reasoning released August 7, 2007) [*Constitutionality of the proceedings of the vote on constitutional amendments*]; TCC Decision 86/2007, (decision released November 27, 2007; legal reasoning released February 16, 2008) [*Constitutionality of constitutional amendments under the 1982 Constitution*].

797 See, Gençkaya and Özbudun, 109.

held that it did not have the jurisdiction to review any application for annulment relying on any grounds other than those set in Art. 148(1) Constitution of Turkey, 1982, thus declaring the petitions inadmissible because there were no procedural faults.[798] In other words, up until the 2008, when the head-to-head with the AKP became real, the Court followed the Constitution as it should have, but not thereafter. To add to the Court's inconsistency, and to be fair, let us not forget that, in the conflict over the presidency, the same Court allowed the referendum on direct elections to take place, at that time taking again a narrow position on its power to review amendments.

The contradictory conclusions of the TCC judgments reflect in an interesting manner the political polarization between AKP supporters and their opponents in the Turkish society. At the risk of oversimplification of an otherwise more complex social reality, it can again be said that the supporters of the AKP see the TCC as an establishment institution acting as the bearer of tutelary power over democratic processes, while the secularists praise the TCC for defending the secularist Republic against its enemies in a veritable militant democratic manner. At a time when democratic consolidation actually required a reinterpretation of Turkey's fundamental principles in order to enable a more liberal democratic and pluralist politics, the Court's stance represented a veritable challenge to the democratization forces.[799]

4. Why Did It Play That Role?

The power of the TCC did not derive from its democratic legitimacy, as it is the case in most democracies, but mostly from its allegiances with the power centers of the establishment, making it more of a guardian of the deep state rather than a constitutional court protecting the rights and freedoms of the Constitution. Thus, its behavior can be traced back at its nature and the way the Court was constructed: it was mainly appointed and structured as a dualist institution. The TCC was a highly independent, yet elite-aligned judicial body.[800] This reveals a tension between independence and

798 See, ibid., 2–5, 47–49.
799 Bâli, 690.
800 ibid., 666–67.

dependence, because while being highly independent from the other branches of government, it shows great dependence from the establishment.

This diagnosis about the role of the Constitutional Court protecting an old undemocratic idealism is supported by the 1982 Constitution, which reinforced the institutions of establishment and their tutelary character,[801] most of which had been removed or weakened following the reiterated reforms aimed at democratizing the regime. However, up until its packing, the TCC seemed not to be touched by these reforms and as mentioned, persisted with quite a resilient judicial activism in protecting the old regime. Of course, the days of the Court's dualistic character were counted, also because Turkey shifted being an overwhelmingly agrarian and illiterate population in the 20 s to a highly urbanized and educated population today. This change and the prospect of Turkey's joining the EU corresponded with the global renaissance of democratic principles, and contributed to the difficulty of the Court to justify the active defending of the old dualistic and tutelary values.[802] This brings me to the conclusion that apex courts, in order to avoid being captured by a deep hidden state, should be established in ways that somehow connect them to the political public, otherwise they tend to lose their legitimacy. Theoretically, this means that the justices e. g., should have been elected by the citizens or their representatives. However, this goes as long as the representative of the people do it in a democratic way. In Turkey, as we now know, this is not entirely the case. The AKP, through the president and the parliament, controls the appointment of all the members of the Court. So, in the case of Turkey, the packing of a dualistic institution meant the shift from being a Court attached to old autocratic values to a populist one (and not necessarily democratic at that).[803]

II. Closing Thoughts

In sum, the Constitutional Court clearly played the role of the protector of the deep state, by hiding behind the pretext of being protecting the values of the constitution. It used its powers of militant democracy to defend the

801 On tutelarism and the 1982 Constitution, see Gençkaya and Özbudun, 22 – 23.
802 Köker, 340.
803 ibid., 342.

principles of the deep state and by doing this, it exposed even more the true goal behind the usurpation of the power to review constitutional amendments, that is, to defend and protect an old secular regime.

In combination with the Court supporting the Kemalist past, there is the issue of the same rejecting of the possibility to adapt its constitutional identity to its national identity, which is one colored with pluralism. Looking back at the Court's behavior, we can clearly state that it did not trust the AKP's willingness to adapt to the EU rather than the will to Islamize the country, given the introduction of hyper-presidentialism. The Court clearly chose the path of selective activism in protecting the still undemocratic establishment and the strong conservatism shown in the protection of individual rights and freedoms. Whilst recognizing the significance of the Court's role, Benhabib, for example, makes the following statement with regards to the headscarf case:

> 'We could say that all this is now ancient history, given that both amendments were rescinded and the status quo ante reestablished by the Turkish Constitutional Court. But it is important to note that between February 2008, when the new legislation was passed, and June 2008, when it was overturned, Turkey missed the chance to create a new demos and a new political identity for a truly pluralistic society. It missed the chance to recognize the cleavage between observant and nonobservant Muslims as only one, and by no means the principal one, among the many differences and divisions in Turkish society.'[804]

With party banning, the Court was not only trying to go against Islamization and thus protecting the old values, but also fighting against the political agenda of Erdoğan, as well as trying to change the parliamentarist system of government. The Court's militant democracy here was about protecting a particular constitutional identity against a particular threat (which some might argue represented the national identity) and had to be understood in light of the country's history. This particular constitutional identity was the one of the deep state at this point, for if we start from the presupposition that constitutions are expressions of national identity, this was no longer the case in Turkey. National identity and constitutional identity did not coincide and this is what was wrong with the Constitutional Court's performance with regards to the banning of political parties. The Court sought to defend an undemocratic regime, which did not represent the real national identity anymore. One can try to justify the

804 Seyla Benhabib, "Turkey's Constitutional Zigzags," *Dissent* 56, no. 1 (2009): 27.

fact that the court was acting in favor of the deep state because it was acting in a militant democratic way to fight against the threats of populism and Islamization. It is difficult to judge whether the Court acted correctly in paddling against the AKP by supporting the old regime. In my opinion, it was wrong, because the Court did not only move against the AKP, but also supported the undemocratic autocratic old regime's values... and this in a very clear way. If the aim of the Court was only to act as a guardian of constitutionalism and fight against the growing power of the AKP, one might have understood (not necessarily justified) the Court's fierce support of secularism. The question of whether the 1982 authoritarian Constitution was better or worse than the contemporary situation of hyper-presidentialism under the AKP is complex and beyond the scope of this study. I would rather not enter into such a confusing and complicated detail, yet I would like to cite a polish writer Andrzej Sapkowski, when in his book *The Last Wish*, he states that

> 'Evil is Evil. Lesser, greater, middling... Makes no difference. The degree is arbitrary. The definition's blurred. If I'm to choose between one evil and another... I'd rather not choose at all.'

The TCC is a court protecting the institutions of the State, rather the rights and freedoms of the constitution: employing militant democracy to protect the institutions of the state rather than adapting to the social reality of Turkey and adopt a more liberal democratic approach. It would have done so and it would probably have not been packed in 2010.

Chapter 5: Egypt and the Revolutionary Model

> 'Egypt's judges are the guardians of the rule of law. It is our duty to enforce the law consistently and fairly among citizens and the government. We also have a duty to protect the rights of Egypt's citizens [...] after decades of performing these duties with dedication and courage, we have become the conscience of the nation. For this reason, we have an obligation to participate in public discussions over laws and the judicial system.'
>
> — Judge Zakaria Abd al-Aziz[805]

The events that took place in late 2010 and early 2011 in the Middle East and North Africa are widely known as the 'Arab Spring'. They showed a tendency to represent cases that occurred in a compressed period of time of countries moving from authoritarian towards constitutionalist ones in a similar way that it happened in Latin America in the 1970 s or in central and Eastern Europe after the fall of the Soviet Union in 1989. It would be very intriguing to compare performances of apex courts in different cases of countries involved in the Arab Spring. This could be the subject of further studies.[806] In the present study, however, Egypt was *inter alia* chosen for being a great example of an active apex court in a recent revolution (as in representing a case where both legality and legitimacy were interrupted).

A. Contextualizing Egypt's Case Study: Historical and Political Context before the Constitutional Transition

Although Egypt's history as such goes way back more than just a couple decades, Egypt as a modern Republic is short of being seventy years old. From the time of the Romans onwards, there are 2000 years of

805 Quoted by Rutherford at Bruce K. Rutherford, *Egypt after Mubarak: Liberalism, Islam and Democracy in the Arab World* (Princeton, NJ: Princeton University Press, 2008), 32. I was not able to pinpoint the original source of the quote, which Rutherford indicates as follows: 'Zakariyya 'Abd al-'Aziz, "Istiqlal al-Quda," *al-Quda,* Special Issue, June 2005, 2.'

806 One Ph.D. thesis in particular was concluded in this sense, comparing both cases of Egypt and Tunisia, see: Setzer.

submissions in which they follow one another: Byzantines, Arabs from 642 to 1512 who brought Islam, Armenians, Kurds, Turks (that is, Ottomans) until 1914 with a parenthesis of Napoleon in 1800 and the British until 1952. In 1922, it became an independent Monarchy, yet always under British control and only in 1952 with a revolution and a coup d'état, it became a Presidential Republic with Nasser as president.

Egypt has experienced three major core-changing revolutions in less than a century. The first one happened in 1919, which started the process of decolonization against British rule, and culminated with the establishment of the first Egyptian constitutional regime. The second one was the military coup by Gamal Abdel Nasser in 1952. The last one, of course, happened within the waves of the Arab Spring in 2011 and is the subject of this case study.[807] None of these revolutions were similar in their motives, but the last one is the one that has brought the most change within the Egyptian political spectrum, as well as hope. But first, some context.

I. The First Revolution and the Kingdom of Egypt

To have a complete picture of contemporary events, we need to briefly go back and analyze the decolonization process in Egypt. Egypt had been a formally Ottoman territory under British occupation from 1882 to 1914, and from 1914 to 1922, it had become a British protectorate.

Previously, Egypt was invaded by the British Empire in 1882 to support the Khedive regime (viceroy)[808] to substantially secure control of the Suez Canal, a sea route of primary importance on the British-India route. This marked the beginning of a long period of British military occupation of Egypt, even though it was formally part of the Ottoman Empire.

Later in 1914, during WW1, Britain declared Egypt their Protectorate after four centuries of Ottoman sovereignty, in which Egypt had had a certain degree of autonomy, and replaced the viceroy (of pro-Ottoman tendencies) with another member of his family, proclaiming him Sultan of Egypt (who was

807 Antoni Abat i Ninet and Mark Tushnet, *The Arab Spring: An Essay on Revolution and Constitutionalism* (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2015).

808 ..., who acted as governor of Egypt and Sudan, and vassal of the Ottoman Empire.

then a sovereign placed on the throne by the British themselves and was de facto a facade figure).[809] Britain occupied Egypt for both strategic and financial reasons, gaining a decisive voice in all areas of Egyptian life.[810] Britain's occupation was much tighter than the Ottoman one and soon Egyptians started to bitterly resent foreign domination and in reaction a nationalist movement developed.[811]

This nationalist movement, which sought the independence of Egypt into a secularist nation, culminated with the nationwide revolution in 1919, when the British started using force to suppress the movement.[812]

Between 1919 and 1922, negotiations for the attempt at creating a constitutional monarchy in Egypt failed, and so, in order to suppress the effects of the revolution and the steady growth of nationalism, it unilaterally granted independence. Hence, in 1922, the Kingdom of Egypt (a constitutional monarchy) was founded. It was the first real modern Egyptian state as an independent nation.[813] Of course, the British reserved some privileges over Egypt, such as the defense of the country against foreign aggression or interference and the safeguard of minorities and foreign interests in Egypt. Hence, the independence was far from absolute, but somehow a variation of protectorate. The British ensured their military presence in Egypt and could still decide upon its foreign policy. At the same time, however, it was a big step forward because for the first time in

809 See, Selma Botman, *Egypt from Independence to Revolution, 1919–1952* (Syracuse, NY: Syracuse University Press, 1991), 25.

810 See, Abat i Ninet and Tushnet, 188; Botman, 18. Of course such strategic and financial reasons, such as securing the Suez Canal were not officially declared, instead the Declaration of the Protectorate steered the attention on the defense of Egypt: '[...] in view of the state of war arising out of the action of Turkey, Egypt is placed under the protection of his Majesty [...]', who would 'adopt all measures necessary for the defense of Egypt and the protection of its inhabitants and interests.' See, the Declaration of the British Protectorate of 17 December 1914 (*London Gazette,* Nos. 29010, 29011, 29012) quoted in Editorial Comment, "Egypt a British Protectorate," *American Journal of International Law* 9, no. 1 (1915): 202. For more on the subject of the British Protectorate, see John Darwin, "An Undeclared Empire: The British in the Middle East, 1918–39," *The Journal of Imperial and Commonwealth History* 27, no. 2 (1999).

811 See, Botman, 19.

812 See, ibid. For more on the 1919 Revolution and its backstory, see Robert L. Tignor, "The Egyptian Revolution of 1919: New Directions in the Egyptian Economy," *Middle Eastern Studies* 12, no. 3 (1976).

813 See, Botman, 29.

centuries, the sovereign could be defined as legitimately Egyptian.[814] Moreover, this event was strictly connected to the idea of constitutionalism, even if it included a monarchy. On April 19, 1923, the first Egyptian Constitution was enacted.[815] Nevertheless, the British favored a constitutional monarchy because they were hoping that a legitimate and stable government would facilitate their relations with Egypt.[816] In other words, they chose to monitor Egypt's independence for their own interests.

The 1923 Constitution of the Kingdom of Egypt was based upon a parliamentary monarchy system of representation, that is with multi-party elections, separation of powers and a charter of fundamental rights. In other words, the aim was the creation of a constitutional regime akin to of many other constitutional systems at the time. Art. 149 confirmed Islam as being the religion of the state and thus constitutionalized Islam for the first time in Egypt's history. This has had enormous influence on Egyptian constitutionalism henceforth. Although the Penal Code was inspired by the Italian one and the Civil Code had clear influences by the French one, Shari'a remained the primary source for Muslim personal status law. The Constitution itself, as well as the understanding of constitutional law, maintained European influence despite the declaration of Islam as the state religion.[817] The 1923 Constitution was based on the Belgian constitutional model of 1831, that is a bicameral parliament, with a senate and a chamber of representatives, but a King with extensive legislative and executive powers. Even though the distribution of power was clearly based in favor of him, the monarch (at the time it was King Fuad) opposed this constitution, expecting that a successor text would give him all those powers denied by the British. Therefore, he used its constitutional powers to mainly undermine the constitutional process and

814 See, Abat i Ninet and Tushnet, 190.

815 As such, the 1923 Constitution though was not the first text seeking to organize political power in Egypt. Before it, similar dispensations were created in 1866, 1883, 1909 and 1913. None of them, however, were proclaimed on the grounds of independence. Therefore, I would not call them 'constitutions'. See more at Nathalie Bernard-Maugiron, "Les Constitutions Égyptiennes (1923–2000): Ruptures Et Continuités," *Égypte/Monde arabe* 4–5, no. 1–2 (2001): 107.

816 See, Abat i Ninet and Tushnet, 190; Bernard-Maugiron, 107.

817 Abat i Ninet and Tushnet stress how '[t]he constitution of 1923 served as a model for further constitutions, inspiring constitutional change within and outside Egypt. (The model used in 1923 to conciliate Islam and constitutionalism was used in the Tunisian draft of June 2013).' See Abat i Ninet and Tushnet, 192.

oppose the nationalist movement. Whilst he passed a new constitution in 1930 conferring himself even more powers at the cost of other public institutions and thus creating basically an autocratic system, due to large scale dissatisfaction of the people, he was compelled to restore the 1923 Constitution in 1935, which would remain in force until the 1952 revolution.[818]

The death of King Fuad in 1936 and the fact that his son Faruq's popularity was quickly eroded through his personal indulgences, combined with the fact that politicians devoted themselves more and more to their own interests, a gap between represented and representatives was generated. This gap was soon to be filled by many organizations, among which the most important to for the sake of this study, the Muslim Brotherhood.[819] Among other things, the Muslim Brotherhood pushed for the re-implementation of Shari'a, blaming the replacement of Qur'anic principles with secular legal and political institutions for the problems Egypt was suffering.[820] It was also active in the field of basic services delivery, such as education. In other words, it substituted the Egyptian state with the provision of basic social and educational needs – in the form of concrete political and religious program – where the state failed to do so. This still has an effect to this day. The Muslim Brotherhood and its ideology could expand because Egyptian politics neglected the people. With time, the Brotherhood even started participating in the secular institutions, and this brought them into conflict with secularist parties.[821] In 1948, the imposition of martial law allowed the Muslim Brotherhood to be outlawed and violence rose quickly with the murder of the Egyptian prime minister in retaliation. Al Banna was subsequently also murdered by the political police.[822]

The Kingdom was anyway soon plagued by corruption and seen by the Egyptian subjects themselves as a puppet country in British hands. This, in conjunction with the defeat in the 1948 Arab-Israeli war, which ended with the occupation by Israel of territory described in the UN General

818 See, ibid., 192 – 93.

819 See, ibid., 193; William L. Cleveland and Martin Bunton, *A History of Modern Middle East*, 5th ed. (Westview Press: Boulder, CO, 2013), 183 – 85.

820 Hassan al Banna, the founder of the Muslim Brotherhood, stressed that restoring Shari'a law would entail the requirement to subject it to interpretation in order to make it fully compatible with modern society's needs. See, , 185.

821 See, Botman, 121 – 23.

822 See, Abat i Ninet and Tushnet, 194 – 95.

Assembly Resolution 181 (II) on the Partition Plan for Palestine, led to a military coup on July 23, 1952, led by Nasser. In 1953, the monarchy was formally abolished, the King and his family sent into exile and the Arab Republic of Egypt was proclaimed.[823]

II. The Second Revolution and the Republic of Egypt

1. Nasser's Term of Office

The military coup's objective was apparently, on the one side, to restore the damaged image of the Egyptian army after the defeat in the war against Israel, and on the other side, to end the monarchy, which was still a remain of colonialism, and had been disloyal to the people it represented and bore primary responsibility for the economic crisis.[824]

In 1956, Nasser was elected president and a constitution was drafted by a technical bureau and subsequently submitted to the Council of the Revolution and the Council of Ministers. Eventually, the draft was presented to the Cairo assembly and finally accepted through referendum by the people on June 23, 1956.[825] As Abat i Net and Tushnet summarize:

> 'The constitution was in force in two different stages, first from 1956 to 1958, when the UAR [that is, the United Arab Republic] was founded, but after failure of the new state and the re-establishment of the Egyptian sovereign state, the text was restored in 1961 until its replacement by the constitution of 1963.'[826]

The same scholars came up with the question of whether a popular referendum, which is undeniably a democratic step forward, but with less than 40% of electorate voting, legitimizes retroactively the military intervention. This very same question can be asked in the 2014 military intervention.[827]

823 See, ibid.

824 See, ibid., 195–96; Anthony McDermott, *Egypt from Nasser to Mubarak: A Flawed Revolution* (London; New York: Routledge, 2013), 19.

825 For more on the 1956 Constitution, see Curtis F. Jones, "The New Egyptian Constitution," *Middle East Journal* 10, no. 3 (1956).

826 See, Abat i Ninet and Tushnet, 197.

827 See, ibid.

In any case, the 1956 Constitution was a victory for Arab nationalism. The main change in comparison to the 1923 Constitution was the proclamation of a Republic and the ending of bicameralism. The constitutional text gives extensive powers to the president in a similar way the 1923 Constitution did with the King and maintained Islam as the state religion. However, the chapter of fundamental freedoms grew and included a strong socialist character.[828] Therefore, in the years that followed, there was a socialist orientation of the government and the construction of a one-party state with Nasser as president and chief of the military junta that ruled the country until 1970.

However, the desired land reform and the fight against poverty did not lead to the hoped-for successes. In order to finance the construction of the Aswan dam, the Suez Canal was nationalized in 1956, which led to the Suez crisis in October 1956 when Great Britain, France and Israel attacked Egypt and occupied the Suez Canal zone and the Sinai. Under pressure from the great powers, namely the USA and the Soviet Union, the interveners had to withdraw. Thus, Nasser could convert the military defeat into a political victory. This increased Nasser's popularity in the Arab world and led to Nasser advocating the formation of the United Arab Republic (UAR) in 1958, as well as the enactment of a new constitution (Unity Constitution of 1958) for the formation of the new state. The same, however, failed in 1961 and so the 1956 Constitution was reinstated until 1964, when the 1964 interim Constitution was enacted. This interim constitution was defined as provisional pending the adoption of a final one, but ended up staying in force until 1971.[829]

During this period of time, under this provisional constitution, Egypt maintained the name UAR. The constitutional text defined the country as a socialist democratic state. At the same time, oddly, it maintained Islam as the state religion and private property was constitutionally guaranteed. This showed something completely different form the role religion and property had in other socialist republics. Still, it recognized many social

828 See, ibid., 197 – 98.

829 For more on the UAR, see Eugene Cotran, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States," *The International and Comparative Law Quarterly* 8, no. 2 (1959).

rights, such as the right to work, to free public education, free public healthcare, and more.[830]

In the years to come, further nationalization programs in the economy led to the end of foreign investment in Egypt. The defeat of Egypt in the Six-Day War (1967)[831] and the occupation of Sinai by Israel led to an even closer affiliation with the Soviet Union.[832] In his years as president, Nasser rose as a symbol of Arab resistance against imperialism and colonization, moved strongly in the direction of the Soviet Union and constitutionally speaking, his era was characterized by constitutional instability.[833]

2. Sadat's Term of Office

After the death of Nasser in 1970, Sadat, who was also a military official, took power as a president and proclaimed a new revolution. The revolution consisted in the elimination of Nasser's left majority. Sadat modified Nasser's political and economic direction by forming an alliance with the USA, and thus reintroducing capitalism.[834] In order to formalize this paradigmatic change, Sadat announced the adoption of a new constitution, which was passed on September 11, 1971. It was drafted by a parliamentary committee and adopted by referendum.[835]

The 1971 Constitution thus superseded the 1964 provisional Constitution. However, it was similar in content as its predecessor, but was applied differently. So even though Sadat spoke of a revolution, the constitution maintained the socialist institutions and character, as well as the catalog of freedoms. Islam remained unchanged as state religion, but included for the first time, the principles of Shari'a (Islamic law) as principal source of legislation. Of course, this provision created a tension with the fundamental right of belief and religion. The role, eligibility and powers of the President remained roughly unchanged, maintaining also the two-term

830 For more on the provisional Constitution of 1964, see Abat i Ninet and Tushnet, 202.

831 See, Moshe Gat, "Nasser and the Six Day War, 5 June 1967: A Premeditated Strategy or an Inexorable Drift to War?," *Israel Affairs* 11, no. 4 (2005).

832 See the overwhelmingly detailed account on the relations between the Soviet Union and Egypt at Mohrez Mahmoud El Hussini, *Soviet-Egyptian Relations 1945–1985* (New York: St. Martin's Press, 1987).

833 See, Abat i Ninet and Tushnet, 203–04.

834 See, Cleveland and Bunton, 369; Abat i Ninet and Tushnet, 205.

835 See, Bernard-Maugiron, 1907.

limit. A major change was the return to a sounder parliamentary life and correct democratic practice with the reappearance of political parties. Until 1971, Egypt was mainly a one mass single party, the Arab Socialist Union. Another major addition was, of course, the creation of an Egyptian Supreme Constitutional Court (SCCE). Chapter five of the 1971 Constitution established the SCCE as independent and autonomous with a system of concentrated constitutional review. A referral was made to an external law as for the regulation of the competences, rules of procedure, accountability, rights and immunities of the members. As for the qualifications of the judges, the presence of Shari'a a principal source of law forced the judges to have at least some knowledge of religious principles and their interpretation.[836]

On October 6, 1981, Sadat was assassinated by Islamic extremists. Two were the possible reasons thereof. The first could be the peace agreement signed in 1979 following Sadat's visit to Israel (back on November 19 to 21, 1977) and the Camp David Accords in 1978, which gave Sadat and Menachem Begin the Nobel Peace Prize (in 1978), leading to the evacuation of Sinai by Israeli troops. Some Islamic factions might still have had some resentment for such a peace treaty. This paradigmatic change towards the USA and peace with Israel, however, led to Egypt's isolation from the Islamic world and eventually to the exclusion of Egypt from the Arab League in 1979. The second reason for his assassination is probably even more likely and is linked to the 1980 constitutional amendment. In 1980, the 1971 Constitution was amended. Sadat proposed the amendment of just a few clauses of the 1971 Constitution, which however impacted greatly the future of the country. The amended sought to extend the now two-terms limit of presidency to a presidential term without limit. The second amendment, which was used as a distraction to pass the presidential term extension, confirmed the supremacy of Shari'a, as in henceforth Shari'a would not be *a* principal source of legislation among others, but *the* principal source of legislation. This was a similar strategy to that we would see in Turkey for the packing scheme of the TCC. Only five months later, Sadat was assassinated.[837] Another important constitutional amendment in 1980 was the introduction of a bicameral parliamentary system. The amendment created the *Shura* Council, that is the upper

836 See, Abat i Ninet and Tushnet, 205–06.
837 See, ibid., 206–07.

house of Parliament, whereas the People's Assembly remained the lower house. It was a consultative parliamentary body that effectively constituted a senate, or House of Representatives of the Governorates in the Egyptian constitutional order.[838]

3. Mubarak's Term of Office

a. Wide Public Dissatisfaction

After Sadat was murdered by Muslim extremists (6 October 1981), Hosni Mubarak took over the government. He was the third consecutive president belonging to the military. As Cleveland and Bunton summarize:

> 'Scholarly accounts on Egypt in the 1990 s and 2000 s frequently use such words as stalemate, stagnation, corruption, and authoritarianism to describe the Mubarak regime.'[839]

Although popular dissatisfaction was already present in 1980 s, it intensified over the following years and decades and, accordingly, popular organizations (like the Brotherhood) stepped in to reorder society in the way the government should have, but was not willing or able to do.[840]

Mubarak's era was filled with rigged elections and political frauds, also when it came to constitutional amendments. In the 1990 s, he eradicated liberal democracy and reorganized the election laws in a way that no popular opposition party could even play the slightest political role. These maneuvers resulted in the 1995 elections won at 94 % of the seats by the ruling party, the National Democratic Party.[841] In 2005, instead, at the presidential elections, Mubarak was elected again with 89 % of the votes.

So, all in all, the popular mood was absolutely not positive with regards to Mubarak's regime. In fact, in the 90 s, the regime's strategy was to establish almost a dual state and maintain a distance between, on the one side, the main party (the National Democratic Party), the main public institutions including the army, and on the other side, parish-pump politics consisting mainly of religious organizations, such as the Muslim

838 For more on the *Shura*, see ibid., 207; Rutherford, 117 – 19.
839 See, Cleveland and Bunton, 525.
840 See, ibid.
841 See, ibid., 527.

Brotherhood.[842] Among other things, terrorism was a result of such strategy. Since the beginning of the 1990 s, terrorist activities attributed mainly to the Brotherhood had increased. Assassinations of Mubarak failed in 1994 and 1996. The terror was also directed against tourism, which is the most important economic sector in Egypt. After the attacks in Luxor and Cairo, in which several tourists lost their lives, tourism suffered considerable setbacks, which led to major economic difficulties.

In the wake of the Arab Spring, protests in Egypt led to Mubarak's resignation. The National Democratic Party was dissolved, and Mubarak sentenced to life imprisonment.

b. Mubarak's Regime in Constitutional Terms

In constitutional terms, Mubarak was clearly less active than Nasser, probably because he was comfortable with the 1971 Constitution, including its 1980 amendment. As in its predecessors' era, no other public institution could really provide real checks on the president. Not even the SCCE, which can easily be regarded as one of the most influential apex courts in the Muslim world, could fully escape the president's powers.[843]

Influential in the sense that despite a strong executive, it was able to develop quite an independent (and liberal) practice: for instance, it has rejected a piece of legislation that banned the establishment of political parties that opposed the Camp David accords.[844] As Rutherford nicely recalls:

> 'The judiciary has also been active in attempting to improve the quality of elections. Egypt has long suffered from electoral malfeasance of myriad forms, including flawed voter registration lists, voters casting multiple ballots, manipulation of vote counting, and the use of government security forces to block opposition voters from reaching the polls. The judiciary has issued a large body of decisions that seek to address these and other problems. The SCCE voided the parliamentary electoral law on two occasions (1987 and 1990) on the grounds that it failed to provide independent candidates with an equal opportunity to run for office.[845] Each of these rulings led to

842 See, Abat i Ninet and Tushnet, 209.

843 See, ibid., 208.

844 See, SCCE Decision No. 44, Judicial Year 7, May 7, 1988 (Official Gazette No. 21, May 26, 1988). This judgement was influential in the sense that it allowed the establishment of three parties that criticized the accords. See, Rutherford, 71.

845 See, SCCE Decision No. 131, Judicial Year 6, May 16, 1987; SCCE Decision No. 37, Judicial Year 9, May 19, 1990.

> the dissolution of the sitting Parliament and the convening of new elections. In 1989, it voided the laws governing Shura council elections and municipal elections on the same grounds.[846] The SCCE also ruled in July 2000 that parliamentary elections must be fully supervised by the judiciary. This decision ended a long-standing procedure whereby representatives of the Ministry of Interior supervised elections.[847] It marked a significant step toward reducing electoral fraud, although flaws in Egyptian elections remained.'[848]

At the same time, the SCCE contributed greatly to incorporate Shari'a in a contemporary notion of constitutionalism. It did so by trying to elaborate a rather liberal interpretation Shari'a as principal source of legislation in light of basic human rights and freedoms.[849] So even though other courts in Egypt adopted a more restrictive and conservative approach, their decisions were corrected by the SCCE through its judicial review. Sherif remarks how:

> '[t]he Court's jurisprudence has to a great extent liberated the judicial literature from subscribing to traditional formats and in fact has restored many sound interpretations of Islamic notions, putting them back on track, in a way that helps us understand how a constitutional system in a religious country could accommodate everyone without any discrimination against anyone on the basis of religions.'[850]

Therefore, the activity of the SCCE in this period shows how constitutionalism is not simply textual, but also contextual. The concept of constitution depends on constitutional practice. The SCCE has been often accused of judicial activism, and that even if the constitutional text asserted its own supremacy, what finally really counts is the interpretation of the same, its everyday application.

I have mentioned how Mubarak's government was constantly accused of being corrupt and fostering rigged elections and political frauds. Under Mubarak, the 1971 Constitution was amended twice, in 2005 and 2007.

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846 See, SCCE Decision No. 14, Judicial Year 8, April 15, 1989; SCCE Decision No. 23, Judicial Year 8, April 15, 1989.

847 SCCE Decision No. 11, Judicial Year 13, July 8, 2000.

848 See, Rutherford, 71–72. See also, Jason Brownlee, "The Decline of Pluralism in Mubarak's Egypt," *Journal of Democracy* 13, no. 4 (2002).

849 See, Omar Adel Sherif, "The Relationship between the Constitution and the Shari'a in Egypt," in *Constitutionalism in Islamic Countries, between the Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (Oxford: Oxford University Press, 2012), 127.

850 See, ibid.

Both constitutional amendments contributed to the already wide popular dissatisfaction.

The 2005 amendment influenced the provisions regarding the election of the President of Egypt. This reform removed the role of the People's Assembly (the lower house) in the election of the president. The president would now be elected by direct public vote, yet the standard for eligibility was so strict that it left the ruling party without serious competition in the next elections. These reforms, in connection with a highly rigged political system, resulted in an easy re-election victory of Mubarak as president, on September 7, 2005, with 88% of the votes.[851] In these elections, turnout was very low (between 15 and 23%). Some believe that this is a result of political apathy, with most of the population perceiving the political process as corrupt.[852]

In these years, as a consequence of this popular disappointment towards the government, the support of the Muslim Brotherhood grew. In reaction to this popular support of the Brotherhood, Mubarak proposed another constitutional amendment in 2007. He heralded such proposal as an important democratization step. Thirty-four Articles were amended to increase the power of the lower house and purge the constitution of the socialist language.[853] The strategy was to blame the Nasser regime for the contemporary issues, and exalt Mubarak's regime.[854] For instance, the constitutional definition of the state was now at Art. 1: 'the Arab Republic of Egypt is a democratic state based on citizenship.' The national economy was defined on the grounds of 'the development of economic activity, social justice, guarantee of different forms of property and the preservation of laborers' rights."[855] These, and further little changes that should have revealed a more democratic constitutional order, were included. However, the main goal of the reform was clearly to stop the Muslim Brotherhood, which was seen at this point as a veritable threat to the regime. In fact,

851 See, Abat i Ninet and Tushnet, 209–12.

852 See, Jeremy M. Sharp. "Egypt: 2005 Presidential and Parliamentary Elections." *Congressional Research Service Report for Congress.* Order Code RS22274 (January 15, 2006).

853 See, Nathan J. Brown, Michele Dunne, and Amr Hamzawy, "Egypt's Controversial Constitutional Amendments," *Carnegie Endowment for International Peace* (March 23, 2007), https://carnegieendowment.org/files/egypt_constitution_webcommentary01.pdf (accessed September 20, 2019).

854 See, Abat i Ninet and Tushnet, 212.

855 Art. 4 1971 Constitution of Egypt.

the new Art. 5 aimed at stopping this popular organization. It allowed basically a multi-party political system and thus the 'right to establish political parties,' but at the same time prohibited the exercise of any political activity or the founding of any political party 'on a religious referential authority, on a religious basis or on discrimination on grounds of gender or origin.' In other words, this provision allowed Mubarak to ban a political party like the Muslim Brotherhood and protect a specific political configuration. The provision prohibited not only any political activity on religious grounds, but within any religious frame of reference. Hence, this reform tied the hands of the Muslim Brotherhood or any other parish-pump movement or party, by basically eliminating *de facto* the possibility of the very multi-party electoral democracy that it advocated.[856]

Another important change was made in the name of the fight against terrorism. From now on the president could refer terrorist crimes to any judicial body. He could even order civilians to be tried in military courts, and of course, this could also be used against the Muslim Brotherhood. The provision also allowed the prosecution of offences related to terrorism so as to circumvent certain fundamental procedural safeguards such as arbitrary arrest, search without warrant, and violation of privacy.[857]

All in all, the 2007 amendment affected more than thirty Articles. As Abat i Net and Tushnet point out:

> 'This exemplifies the constitutional understanding of Mubarak, who considered the constitution as a mere façade [...]. The text established an illusory model of liberal respect of human rights that clearly differed from the reality on the ground.'[858]

Importantly, situations when, as happened in Egypt, Turkey and probably many other countries, governments in power misuse the term 'democracy' in their constitutions. At the same time however, they twist its meaning in everyday politics. The distortion of the term 'democracy' and other principles of the state upsets the entire basis of the political system. Together with popular dissatisfaction and frustration, and the lack of people's participation in politics, the risk of self-organization outside the 'law' and state channels increases. Of course, this risk is even greater in countries like Egypt where many popular organizations opposing the

856 See, Abat i Ninet and Tushnet, 213–14.
857 See, ibid.
858 See, ibid., 186.

ruling government already openly partake and act in those 'extra-legal' channels. As, once again, Abat i Net and Tushnet maintain:

> 'It is convenient, but at the same time paradoxical, that once these political organizations are allowed to participate in politics, they are required to respect and attach democratic principles of a system that has been labeled and misinterpreted to forbid their involvement in the political process.'[859]

B. The Egyptian Constitutional Transition

Before plunging into the Egyptian revolution and the resulting constitutional transition, it is important to create a context around it, which *in casu* was expressed by the wave of revolutions that invaded the Middle East in 2010, the so-called 'Arab Spring'.

I. The Arab Spring as a Precursor of the Egyptian Constitutional Transition

1. The Arab Spring: The Concept

In December 2010, a street vendor named Mohamed Bouazizi set himself on fire in a desperate act of immolation against the authoritarian and despotic power of the Tunisian police force. No one could have foreseen that such an isolated gesture would so quickly cross the Tunisian national borders and then trigger a series of events destined to upset the entire Middle East. An overwhelming wave of protests and revolutionary movements that first developed in Tunisia, and progressively throughout the region, modified the characteristics of countries that only a few years before seemed destined to maintain a stagnant and passive *status quo.*

The so-called 'Arab Spring', a term coined in reference to the revolt movements that occurred in Prague in 1968 or even earlier in Europe during the 19th century, exploded throughout the region toppling the governments of Egypt, Yemen, Libya and Tunisia, shaking many others, showing that Mohamed Bouazizi was not alone in his indignation, as the

859 See, ibid., 214.

revolutionary slogan 'we are all Bouazizi' confirmed. In sum, the term covers 'the massive mobilizations, strikes, and upheavals that occurred in the Middle East and North African countries from December 2010 to early 2011.'[860]

2. Reasons for the Arab Spring

The 'Arab Spring' is known for embracing similar claims of social justice, political stability, economic development and prosperity, and, above all, democracy, and not only the way such claims were channeled (that is, through revolutions, uprisings, or massive demonstrations).[861] Ramadan stresses on some of the commonalities of these events, mostly centered around social and economic conditions, the rejection of authoritarianism as form of government, and of course, the fight against corruption.[862] Democracy, as a prime element of constitutionalism, must also be included in the objectives, and possible an unexpected emergence of decentered politics.[863]

The idea of democracy in the Arab world was not very different from the Western one, because it was based on principles that we can all recognize as the basis for any democratic system: guarantee of freedom, civil and political rights, justice and equality, a democratic system of government legitimized by the people, division of powers, political pluralism, an improvement in the economic situation, stability and social security. All these elements point to constitutionalism. Recalling that every (Arab) country is different in history, traditions, political and economic systems, such a shared impulse towards democracy was originated by another element in common among the different Arab countries: an increased and long-lasting discontent with the existing systems of power. In fact, if we analyze the systems of governance adopted in Arab countries before the Arab Spring, we can see how their salient characteristics clash with the idea of democracy described above: a strongly centralized State, absence of political pluralism, lack of legitimacy, strong barriers to participation in political life, social repression and corruption. The tension between the

860 See, ibid., 37.

861 See, ibid., 39.

862 See, Tariq Ramadan, *The Arab Awakening: Islam and the New Middle East* (New York: Penguis Books, 2012), 2.

863 See, Abat i Ninet and Tushnet, 39.

unfulfilled democratic ambitions and these authoritarian regimes emerges clearly through the analysis of some of the main countries where the Arab Spring has exploded. Tunisia, Egypt, Yemen and Libya, to name a few, were formally republics, but in practice they were autocracies, since the power held by leaders, such as Ben Ali, Mubarak and Gaddafi was absolute and totalitarian.

All in all, beyond the democratic ambitions of the Arab world, there were at least two factors that triggered the Arab Spring and led the region to a rapid and contagious spread of revolts: economic difficulties and social problems.

The economic condition of these countries is fundamental to understand the origin of the Arab Spring. Despite their important position in international trade, unparalleled basic resources and a large youth labor market, the economic performance of these countries has been very disappointing: corruption, unequal distribution of wealth, subsidies to non-oil unproductive sectors and impressive unemployment were some of the causes of great concern and discontent among the population. Despite promises of a better life from propaganda, assurances of reforms, liberalization and general economic growth, the majority of the population lived in poverty. The global economic crisis has further aggravated the conditions of these populations, in fact, although these countries have been somehow protected because of their closed financial system, managing to survive the direct impact of the crisis, they have not been able to survive the consequences of the economic recession in other states, such as the European ones, to which they were strongly linked for the export of agricultural and manufacturing products. This has exponentially worsened the standard of living of the majority of the Arab population, triggering revolts, despite the fact that the economic crisis was not the direct cause of the Arab Spring. Poverty and discontent characterized the Arab world even before the global recession, which, therefore, had the role of aggravating an already rather unstable and precarious situation.

Therefore, the anger of the young unemployed turned to the political and economic sphere: the political system was static, authoritarian and corrupt; the economic system appeared unequal, stagnant and generally

unable to offer a perspective for the future.[864] As Abat i Ninet and Tushnet remark:

> 'The need for liberty, both individual and collective, the awareness and trust in achieving a political change are characteristics that have driven the revolutions in Tunisia, Egypt and Libya. Again, this is not to say that those revolutions have, or inevitably will, produce liberal constitutions, but rather that liberal themes are now an inextricable component of post-revolutionary efforts to create new constitutions.'[865]

II. The Egyptian Crisis within the Arab Spring in Constitutional Terms

Ever since Mubarak was pushed to give up his position, constitutional law has been at the center of hearty debates in Egypt. This has often led to reiterated constitutional change and instability. This constant constitutional roller-coaster has been characterized by many constitutional declarations, amendments and two different constitutions, one in 2012 and the other in 2014.

In January 2011 protests in Egypt against government corruption, apathy and inefficiency began. On January 25, the day of a national holiday to commemorate the police forces, huge numbers of people took to the streets in several places across Egypt (starting from Cairo's main Tahrir Square to the cities of Alexandria, Mansrua, Tanta, Aswan, Assiut, and more). Police and demonstrators inevitably collided. These clashes eventually resulted in several deaths and thousands of injured. Immediately the new technologies, such as Facebook, Twitter and Blackberry Messenger were disrupted, yet the news station *Al-Jazeera* continued broadcasting for the world.

At some point, the army was ordered onto the streets in Cairo, Suez and Alexandria, but did not obstruct the clashes between police and protesters. In the following days, hundreds of thousands continued to protest and collide with the police throughout Egypt. On February 3, demonstrations in Alexandria turned violent and demonstrations continued until February 6, when opposition groups (including the by now banned Muslim Brotherhood) demanded that Mubarak resign immediately. A couple of

864 For more on the roots of the Arab Spring, see ibid., 46 – 52.
865 See, ibid., 36 – 37.

days later, about 6000 public workers went on strike in Suez and on February 11, Mubarak finally agreed to step down. Hence, after eighteen days of street protests, demonstrations, and strikes peaceful in origin, the revolution of January 25, 2011, produced violent confrontations resulting with more than 800 deaths and 6000 injured, yet the protesters were successful in their intent: Mubarak's resignation.[866]

Before explaining the constitutional transition in Egypt as a result of the Arab Spring, it is important to clarify some things on one of the most important actors in the transition: the Muslim Brotherhood. It is thus appropriate to dwell briefly on the Muslim Brotherhood.

1. The Muslim Brotherhood within the Context of the Egyptian Crisis

While Egypt has always been a deeply religious country, modern political Islam only appeared on the national scene in 1928, with the creation of the Muslim Brotherhood by Hassan al-Banna.

The Brotherhood was created as a pan-Islamic social and political movement, partly as a response to the fall of the Ottoman Empire and the abolition of the caliphate in Turkey by Moustafa Kemal Ataturk. This suppression was considered by many Muslim devotees, including al-Banna, as a setback, as he considered the caliphate a necessity for Islam. At the beginning, it taught the illiterate and supported the community. Later it advanced to the political scene.

The Muslim Brotherhood is based on two important principles. The first is the adoption of the Shari'a as a legislative platform for the management of the State and society. This implies that secular ideas are intrinsically non-Islamic and therefore Muslims who demand a secular state could be considered non-believers. The Brotherhood has very conservative views on gender equality and the role of women in society. In addition, they support the separation of the sexes in schools and workplaces. They also believe that cultural expressions should reflect the Islamic nature of society, so they have often invoked censorship for books and films considered contrary to Islam; given this position, the Muslim Brotherhood has always disagreed with the cultural and artistic elite of Egypt. The

866 See, ibid., 26–27.

second principle of the Brotherhood is to unify the Islamic states and free them from foreign imperialism.

The history of the Muslim Brotherhood is marked by violence. During WW2, they were accused of collaborating with the Axis Powers with the aim of helping to free Egypt from British imperialism. They have been involved in several attacks and murders. As a result, the Egyptian government banned the Brotherhood and arrested many of its leaders in 1948. The Brotherhood responded by killing the Prime Minister, demonstrating that they were as powerful as the Egyptian state and that they could also kill the Chief Executive. Al-Banna himself was later assassinated, most likely in retaliation. The Muslim Brotherhood was also accused of taking part in the great fire that devastated Cairo in 1952, when some 750 buildings, mainly nightclubs, restaurants, bars and hotels in the city center, burned.

Subsequently, after another attempt at assassination of Nasser in the mid-1960 s, the state began to crack down on the Brotherhood, banning it again, arresting and condemning many of its leaders to death. Nasser has always been considered the nemesis of the Muslim Brotherhood. Even today, opponents of the Muslim Brotherhood often carry images of Nasser, whose statements against the Brotherhood are widely publicized on social media.

When President Anwar al-Sadat came to power following Nasser's death in 1970, his main concern was to recover the Sinai Peninsula occupied by Israel after the 1967 Six-Day War. This required him to move Egypt from the Soviet side, approaching the West (in particular the USA), while facing tough resistance from the left-winged parties, which he tried to neutralize by opening to the Muslim Brotherhood, allowing them to carry out certain activities, while remaining officially banned.

Sadat was a devout Muslim, but also a military and a nationalist, therefore, it was almost inevitable that he would anyhow clash with the Brotherhood. This happened after the signing of the Camp David Agreement in 1978 and the Peace Treaty with Israel in 1979. Sadat was murdered by an Islamist, a member of a branch of the Brotherhood.

The Brotherhood has officially announced that it supports democracy and rejects violence, yet its detractors think that it is difficult to have a truly democratic system in the context of a religious state governed by Shari'a law, as well as to have a reasonable political debate when the other side

insists on the use of Qur'an quotations to affirm its position. It is also noted that many members of the Brotherhood continue to use violent means against their opponents and are often armed.

The revolution of 2011 gave the Brotherhood a more legal status and substantial power by winning several elections. Though it suffered severe setbacks ever since, starting with the overthrow of the Muslim Brotherhood's elected president of Egypt, Morsi, to the banning of the organization in 2013 due to a series of unrests following Morsi's fall and label of terrorist organization.

2. Provisional Constitution of the Arab Republic of Egypt

On February 11, 2011, Mubarak stepped down as president voluntarily in what was defined as a 'quiet military coup'[867] (but a coup nonetheless).[868] When Mubarak resigned, he transferred his powers to the Supreme Council of the Armed Forces (SCAF), which was the ruling body of the Egyptian army. According to the 1971 Constitution in force at the time, it should have been the President of Parliament who assumed this position ad interim. The transfer of power to the Council had no legal basis, but had a clear political motivation; in fact, the military institution is the most respected in the country, while the Parliament was considered corrupt and illegitimate. For this reason, the Egyptians were pleased to see the SCAF, led by Field Marshal Mohamed Hussein Tantawi, take the lead in the transition. With the transition entrusted to the Council, Tantawi became the de facto head of state.

Two days later, by constitutional proclamation, the SCAF dissolved the parliament elected under Mubarak (People's Assembly and *Shura* Council) and suspended the previous 1971 Constitution. It was necessary to quickly repeal the previous constitution; otherwise, new elections would have had to be held within 60 days of the President's resignation according to Art. 84 of the 1971 Constitution valid up to then. The military leadership

867 See reference by ibid., 216 at fn. 580.

868 As for Mubarak himself, on June 2, 2012, he was sentenced to life imprisonment. On January 13, 2013, Egypt's highest court of appeal, the Court of Cassation, overturned the sentence and ordered a retrial. Mubarak was then sentenced to prison for corruption on May 9, 2015. He was retained in a military hospital due to health issues. On March 2, 2017, he was acquitted by the Court of Cassation and released a couple of weeks later.

set up an eight-member committee (the Egyptian constitutional review committee) to draft constitutional amendments to the suspended 1971 Constitution, which (in addition to other transition-related provisions) once amended would serve as a transitional constitutional document. Within ten days, the committee was to submit a draft for said amendments, which would then be put to a referendum. The amendments are intended to ensure fair and democratic presidential and parliamentary elections. New parliamentary and presidential elections were to be held in 6 months at the latest. After the elections, a constituent assembly was to draw up a fundamental revision of the constitution or a completely new constitution.

During the transitional period, the SCAF assumed internal and external representation, and assumed legislative powers until new elections were held. Of course, questions on the legitimacy of the SCAF as governing body during the transitional period were raised.[869]

However, the possibilities of the committee were severely limited from the outset by the military leadership. No completely new constitution was to be drafted. Only a couple of Art. (of the previous constitution) were to be revised. Five Art. (Art. 76, 77, 88, 93 and 189) dealt with the modalities of the presidential election (among others, the new Art. 77 re-instated the pre-Sadat presidential term limit of two consecutive periods). Art. 179 was to be amended/deleted because it would allow basic civil rights guaranteed in the constitution (Art. 41 – Individual freedom, protection against arbitrary arrest, involvement of a judge, Art. 44 – Inviolability of the home, Art. 45 – Protection of privacy, protection of the secrecy of letters, post and telecommunications) to be suspended in the name of the fight against terrorism.[870] Art. 189 instead established the basis for a constituent process and even included provisions on the appointment of the *Shura* and the Assembly of the People. The SCCE was then to be responsible for ensuring the accuracy of the elections of the Assembly members.[871]

The amendment was published on February 26, 2011, and submitted to a referendum, on March 19, 2011. The amendment was accepted at the

869 See, Abat i Ninet and Tushnet, 215.
870 See, ibid., 216–17.
871 See, ibid., 217.

referendum with strong support at 77%. Turnout was also very high at almost twice (41%) the typical one in previous elections or referendums.[872]

These results provided serious arguments in support of the legitimacy of the transitional period ruled by the SCAF. As a consequence of the strong outcome of the referendum, the SCAF felt more legitimated to perform its role within the transition, and thus, merely eleven days later, on March 30, 2011, the SCAF issued a constitutional Declaration (also known as the Provisional Constitution of the Arab Republic of Egypt, that is an *interim* Constitution).[873] So we see that an *interim* constitution is not necessarily a component for only the round-table model of constitution-making, but rather a solution when legitimacy in general was ruptured. Of course, the difference is exactly where the legitimacy of those who draft the interim constitution, that is the rules for the transition. In South Africa, legitimacy was drawn from the fact that the negotiating parties represented more or less the big majority of all represented people. Here in Egypt, the SCAF cannot be said to be legitimized to decide such procedure. This is linked to the nature and way of the rupture. In the event of a legitimacy rupture, somebody (in South Africa the ANC) has to take on the job to deliver the most democratic constitution-making process possible. In South Africa, it worked. In Egypt, instead, a clash between the military and the Muslim Brotherhood would hinder such solution.

The Provisional Constitution would serve as the fundamental law of Egypt pending the enactment of a permanent and definitive constitution. Opinions are split on whether the rest of the provisions of the 1971 remained suspended, or not. Brown's opinion was clear:

> 'The amended [A]rticles—most of them governing presidential and parliamentary elections—are now clearly in effect. But the rest of Egypt's constitution remains suspended. Egypt's military rulers have suggested that they will very shortly issue a declaration indicating how authority will be exercised while Egypt's parliament and president are elected, which parts of the 1971 constitution will be brought back into effect, and what their own role will be.'[874]

872 See, ibid.

873 See, ibid.

874 See, Nathan J. Brown, "Next Steps in Egypt's Transition," *Carnegie Endowment for International Peace* (March 22, 2011), https://ceip.org/sada/43193 (accessed September 12, 2019).

The Carter Center, instead, stressed that the provisional declaration was broad enough to support the contrary because it defined the country, the role of Shari'a, it included a charter of fundamental freedoms and rights, set out the structure of the main political institutions, such as the SCAF, the presidency, the bicameral parliament, the SCCE and the government cabinet. The Provisional Constitution also paved the way for the 2011 parliamentary and 2012 presidential elections and required that the newly elected parliament create a constituent assembly, to draft a new definitive constitution.[875]

With regards to the Provisional Constitution, the SCAF acted as a constituent power. This role and the legitimacy of the provisional constitutional document could easily be doubted. The document gave the SCAF quite an important role: it included the ability to legislate, to adopt general policies of the state and appoint the Prime Minister, as well as members of the Assembly of the People. In other words, during the transitional period, the SCAF had veritable ruling power over the country, even though the transitional nature of the document was recognized in Art. 61, which stated that the SCAF would continue directly with its limited responsibilities following the enactment of the provisional constitution, 'until a time at which the People's Assembly and *Shura* Councils assume their responsibilities and the president of the republic is elected and assumes his position.'[876]

3. Early Confrontations between Islamists and the Judiciary towards a New Constitution

a. The 2011/2012 Parliamentary and Presidential Elections

Egypt's political picture was very unstable, in fact, after the dissolution of Mubarak's National Democratic Party, the Muslim Brotherhood was the only organized group and therefore they would win in any round of elections, so they pressed for a vote before the drafting of a new Constitution. The nationalists, the Nasserian and left-wing parties, instead,

875 See, The Carter Center, "Final Report of the Carter Center Mission to Witness the 2011 – 2012 Parliamentary Elections in Egypt," *The Carter Center* (2012), https://www.carter-center.org/resources/pdfs/news/peace_publications/election_reports/egypt-2011-2012-final-rpt.pdf (accessed September 19, 2019).

876 See, Abat i Ninet and Tushnet, 218.

asked for time to prepare and organize their bases, pressing for an agreement on a new Constitution before the elections. At this point, the Brotherhood promised not to field more than 50% of the seats available in Parliament, so that it could only rule with a coalition, and not present a candidate to the Presidency. The SCAF supported the Brotherhood's proposal and began preparations for elections before the Constitution was drafted.

At the end of March 2011, the governing SCAF announced the election dates. The elections for the People's Assembly were to be held in three stages at different times in nine of Egypt's 27 governorates, beginning at the end of November 2011 and ending at the beginning of 2012.[877] The elections of the *Shura* Council, instead, would take place right after the People's Assembly's elections, in January and February 2012.

Without dwelling on the details of a complex and long elections period, the final results saw roughly the coalition led by the Muslim Brotherhood party (the *Freedom and Justice Party*), the Democratic Alliance for Egypt, win 44.9% of the parliamentary seats (37.5% of the votes). For the *Shura* also, the Freedom and Justice Party won 45% of the seats (that is, 58% of the votes).

So, with the victory of the Islamists in the parliamentary elections, they conquered the legislative power. The executive and the judiciary would be next. The executive would be conquered later with the election of the Muslim Brotherhood's candidate, Morsi. Instead, the first confrontation with the judiciary came with the appointment of the Constituent Assembly by parliament. There was already a feeling in the air that the judiciary would be next on the line. Parliament started to adopt anti-judiciary rhetoric, calling for its cleansing and even the sacking of the attorney general. Of course, these were just non-binding speeches or

877 On 28 and 29 November 2011, elections were held in the nine governorates of Cairo, Fayoum, Port Said, Damietta, Alexandria, Kafr asch-Schaich, Assiut, Luxor and al-Bahr al-ahmar. The runoff elections of the first round took place on 5 and 6 December 2011. On 14 and 15 December 2011, the nine governorates of Giza, Beni Suef, al-Minufiyya, ash-Scharqiyya, Ismailiya, Suez, al-Buhaira, Sohag and Aswan voted. On 3 and 4 January 2012 the last nine governorates finally elected Minya, al-Qalyubiyya, al-Gharbiyya, ad-Daqahliyya, Schimal Sina, Dschanub Sina, Matruh, Qena and al-Wadi al-dschadid. See, The Carter Center.

recommendations, yet it created a feeling of confrontation with the judiciary.[878]

b. The Constituent Assembly

The main focus of the new elected parliament would be the selection of the members of the Constituent Assembly of Egypt for the drafting of a new constitution for Egypt. In late March, the newly elected Islamist-led parliament appointed the 100-member Constituent Assembly to draft a constitution to be than later approved by a national referendum. Due to the strong victory of Islamist parties in the parliamentary elections (more than a two-thirds majority including Islamist parties other than the Muslim Brotherhood's *Freedom and Justice Party*), Islamists were selected to the majority of the seats in the Constituent Assembly. Opposition members of the assembly (mostly liberal, secular, and Christian factions), fearing that the Islamists' dominance in that body would produce a constitution that neglected secular concerns and gave Shari'a a strong role, staged walkouts, boycotts and even filed lawsuits challenging the legality of the assembly.

Shortly thereafter, in April, the first direct confrontation between the Islamists and the judiciary took place, and the Supreme Administrative Court dissolved the Constituent Assembly on procedural grounds.[879] The reasons thereof were that the Constituent Assembly did not reflect the diversity of Egyptian society and for including members of parliament in its membership. According to the Provisional Constitution, members of parliament were responsible for electing the Constituent Assembly, but could not appoint themselves.[880]

878 See, Ahmed El-Sayed, "Post-Revolution Constitutionalism: The Impact of Drafting Processes on the Constitutional Documents in Tunisia and Egypt," *Electronic Journal of Islamic and Middle Eastern Law* 2 (2014): 53.

879 See, BBC, "Egypt Court Suspends Constitutional Assembly," *BBC News* (April 10, 2012), https://www.bbc.com/news/world-middle-east-17665048 (accessed September 2, 2019).

880 See, Mohamed F. Fahmy, "Court Disbands Egypt's Constitutional Group," *CNN* (April 11, 2012), https://edition.cnn.com/2012/04/11/world/africa/egypt-constitution/index.html (accessed September 9, 2019); Ahmed Aboul-Enein, "Constituent Assembly Carries On," *The Daily News Egypt* (June 28, 2012), https://web.archive.org/web/20120702234933/http:/thedailynewsegypt.com/2012/06/28/constituent-assembly-carries/ (accessed September 3, 2019); Paul Danahar, *The New Middle East: The World after the Arab Spring* (New York: Bloomsbury Press, 2013), 109; El-Sayed, 53.

Paradoxically, when parliament again appointed a second Constituent Assembly, this once again included members of parliament, which is why the Constituent Assembly faced a possible second dissolution, which was however delayed by the same court by referring the lawsuit to the SCCE. This might give the Constituent Assembly enough time to finish drafting the constitution before that moment and rendering a dissolution decision moot.[881]

c. The SCCE's Ruling Dissolving Parliament

Meanwhile, on June 14, 2012, a couple of days after the first round of the presidential election was over, the SCCE declared the 2011/2012 parliamentary elections for the People's Assembly unconstitutional. Upon this ruling, the SCAF decided to dissolve parliament.[882] The SCCE ruled unconstitutional several legal provisions on which elections had been based.[883] In other words, it issued a decision that resulted in the disbandment of the Lower Chamber due to the unconstitutionality of the parliamentary electoral law.[884] The SCCE ruled that the electoral law violated Art. 38 of the Provisional Constitution, which stated that:

881 See, Aboul-Enein. 54; Nada H. Rashwan, "Egypt's Constituent Assembly Convenes Tuesday with Future Still in Doubt," *Ahram Online* (June 27, 2012), http://english.ahram.org.eg/NewsContent/1/64/46274/Egypt/Politics-/Egypts-constituent-assembly-convenes-Tuesday-with-.aspx (accessed September 2, 2019); Ekram Ibrahim, "Adminstrative Court Non-Decision Gives Assembly Ample Time to Finish Constitution," ibid. (October 23, 2012), http://english.ahram.org.eg/NewsContent/1/64/56348/Egypt/Politics-/Referral-to-court-buys-more-time-for-Egypts-embatt.aspx (accessed September 20, 2019); William Partlett, "Constitution-Making by 'We the Majority' in Egypt," *Brookings* (November 30, 2012), https://www.brookings.edu/blog/up-front/2012/11/30/constitution-making-by-we-the-majority-in-egypt/ (accessed September 20, 2019); Al Arabiya News, "Egypts Constitutional Assembly Case Referred to Supreme Court," *Al Arabiya News* (October 23, 2012), http://english.alarabiya.net/en/News/2012/10/23/Egypts-constitutional-assembly-case-referred-to-Supreme-Court.html (accessed September 20, 2019); El-Sayed.

882 See, Le Monde, "Egypte: La Justice Exige La Dissolution De L'assemblée Et Maintient La Candidature De Chafiq," *Le Monde* (June 14, 2012), https://www.lemonde.fr/afrique/article/2012/06/14/egypte-la-justice-maintient-la-candidature-de-chafiq-a-la-presidentielle_1718689_3212.html (accessed September 20, 2019).

883 See, Decision of the SCCE of Egypt dissolving Parliament of June 14, 2012. Summary available in English at Right to Non-violence,

884 See, Bassam Tibi, *The Sharia State: Arab Spring and Democratization* (London; New York: Routledge, 2013), 141.

> 'The law shall organize the right of nomination to both Councils of People [Lower Chamber] and Consultation [Upper Chamber, the Shura] pursuant to an electoral system that combines closed parties lists and individual system with two-thirds percentage [reserved] for the first and the remaining one-third for the second."[885]

Contrary to this constitutional provision, the electoral law in question allowed instead political parties to run for all the seats, including the one-third reserved for individual candidates. Therefore, according to the SCCE, and actually a neutral and positivistic interpretation of the article, the law violated in fact the constitutional Article. The SCCE justified its decision by the fact that one third of the seats were reserved for independents, outside the parties, but a very large number of candidates from, for instance, the Muslim Brotherhood were elected in that one third of seats.[886]

This decision, which came two days before the second round of presidential elections, thus resulted in the dissolution of Egypt's Islamist-dominated parliament and was seen as a veritable blow for the Muslim Brotherhood. This decision of the SCCE, whose justices were still appointed by Mubarak, really brought into sharp focus the power struggle between the Islamists of the Brotherhood, on the one side, and the military (that is, the SCAF) and the judiciary, on the other side.[887] For the Islamists, the decision was like a stab in the back for a number of valid reasons. First, the decision could have invalidated the election for only the one third of the seats, for which the electoral law was unconstitutional. Instead, it also invalidated the result of the elections for the other two thirds. The invalidation of the entire election with the resulting dissolution of the entire parliament seemed to be a judicial encroachment on the legislative power, especially given that the SCCE's reasoning behind nullifying also the other two-thirds was largely based on logic not law.[888] Secondly, the decision came against a backdrop of rising tension between the Muslim

885 Originally this Article gave the legislature enough leeway to decide any electoral system for the parliamentary elections. Nevertheless, on December 25, 2011, the SCAF issued an amending constitutional declaration to modify this Article.

886 See, El-Sayed, 53–54.

887 See, Abdel-Rahman Hussein and David Hearst, "Egypt's Supreme Court Dissolves Parliament and Outrages Islamists," *The Guardian* (June 14, 2012), https://www.theguardian.com/world/2012/jun/14/egypt-parliament-dissolved-supreme-court (accessed September 2, 2019).

888 In sum, the SCCE maintained that the political parties' competition on the one third, which was devoted to individual candidates, had basically affected the formation of the political parties' lists for the other two-thirds. See also, El-Sayed, 54.

Brotherhood, on the one side, and the SCAF and judiciary, on the other side.[889] Consequently, the SCCE's ruling seemed largely reactive and thus strongly politicized.[890] Third, we must not forget that the 2011/2012 parliament was the first sincerely democratically elected legislature in Egypt. Therefore, even if the electoral law was unconstitutional, overruling the first genuine spoken will of the Egypt people (in the aftermath of a massive revolution) due to a procedural 'hiccup' could be considered activist and undemocratic. Be that as it may, the People's Assembly was dissolved and the same fate was expected for the *Shura* Council, which was formed pursuant to the same unconstitutional electoral law.[891]

d. Morsi's Election and his Constitutional Decrees

Acting on its own, on the eve of the final day of the presidential election, on June 17, 2012, the SCAF came with another constitutional declaration. Given that the parliament was dissolved, the declaration amended the previous one and it mainly reassigned the legislative power to the SCAF until the election of a parliament and provided immunity for SCAF's officials.[892] This would be understood not only as a way of determining the voting, but also participation in politics and the elections.[893]

The same day, on June 17, 2012, the candidate of the Muslim Brotherhood's Justice and Freedom Party, Morsi, was elected as president.[894] Only weeks later, on July 8, 2012, he issued a constitutional decree cancelling the dissolution decision of the SCAF with regards to parliament.[895] By doing

889 See, Zeinab El Gundy, "Mps Inch Closer to Vote of No-Confidence in El-Ganzouri Government," *Ahram Online* (March 29, 2012), http://english.ahram.org.eg/NewsContent/1/64/38042/%20Egypt/Politics-/MPs-inch-closer-to-vote-of-noconfidence-in-ElGanzo.aspx (accessed September 20, 2019). See also, El-Sayed, 54.

890 See, Danahar, 109.

891 See also, El-Sayed, 54.

892 See, Nael Shama, *Egyptian Foreign Policy from Mubarak to Morsi: Against the National Interest* (London; New York: Routledge, 2014), 222.

893 See, El-Sayed, 55; Abat i Ninet and Tushnet, 221.

894 See, El-Sayed, 55; Abat i Ninet and Tushnet, 221–22.

895 See, Le Monde, "En Rétablissant Le Parlement, Morsi Provoque Un 'Séisme Politique' En Egypte," *Le Monde* (July 8, 2012), https://www.lemonde.fr/afrique/article/2012/07/08/egypte-le-president-annule-la-dissolution-du-parlement_1730814_3212.html (accessed September 20, 2019). See the full text of the decree at Ahram Online, "Presentation and Full English Text of Morsi's Decree Restoring Parliament," *Ahram Online* (July 9, 2012), http://english.ahram.org.eg/News/47250.aspx (accessed September 20, 2019).

so, he basically linked his mandate to the revolution of January 25, 2011. Some felt, instead, that the decree was an Islamist hijacking of the revolution.[896] Now that the presidency was 'packed' by the Muslim Brotherhood, Morsi aimed at taking back the Islamist-led parliament, which was dissolved based on the SCCE's ruling. The decree is a veritable authoritarian document, as for instance, it also eliminates the possibility of appealing against constitutional declarations, laws, and decrees.[897] The main goal, however, was clearly the re-establishment of the Constituent Assembly.

Of course, this created further tensions between the presidency and the judiciary. Two days later, the SCCE suspended the application of Morsi's constitutional decree.[898]

However, almost like a child's whim, on August 12, 2012, Morsi employed again his constitutional authority and 'constituent power' and issued yet another constitutional declaration, which repealed the previous constitutional declaration of the SCAF of June 17, 2012, but basically still aimed at re-instating the Constituent Assembly. In other words, it comprised a provision that allowed the president to create a Constituent Assembly, 'if any "obstacle" (mainly judicial intervention) prevents the completion of the Assembly.'[899] Let us remember that the second

896 See, Edmund Blair, "Fury as Morsi Decree 'Hijacks Revolution'," *The Irish Examiner* (November 24, 2012), https://www.irishexaminer.com/world/fury-as-morsi-decree-hijacks-revolution-214910.html (accessed September 20, 2019).

897 See Article II of the Decree, at Ahram Online. See also Abat i Ninet and Tushnet, 223.

898 See, Le Monde, "Egypte: La Justice Annule Le Rétablissement Du Parlement," *Le Monde* (July 10, 2012), https://www.lemonde.fr/afrique/article/2012/07/10/egypte-la-justice-annule-le-retablissement-du-parlement_1731877_3212.html (accessed September 20, 2019); BBC, "Egypt Court Challenges Mursi's Reopening of Parliament," *BBC News* (July 9, 2012), https://www.bbc.com/news/world-middle-east-18765947 (accessed September 20, 2019); Al Jazeera, "Egypt's Top Court Rebukes President's Decree," *Al Jazeera* (July 10, 2012), https://www.aljazeera.com/news/middleeast/2012/07/201279124421528560.html (accessed September 20, 2019); Ivan Watson, "Court Overrules Egypt's President on Parliament," *CNN* (July 10, 2012), https://edition.cnn.com/2012/07/10/world/meast/egypt-politics/index.html?hpt=iaf_c2 (accessed September 20, 2019).

899 See, Abat i Ninet and Tushnet, 223. See also Article 2 of the August 2012 Constitutional Declaration: 'Previous constitutional declarations, laws, and decisions made by the president since he took office on 30 June 2012, until the constitution is approved and a new People's Assembly is elected, are final and binding by themselves and cannot be appealed by any way or before any entity. Nor shall they be suspended or cancelled, and all lawsuits related to them and brought before any judicial body against these decisions are

Constituent Assembly's dissolution was still pending. In other words, after two declarations, Morsi wanted to retain undisputable constitutional, legislative, and executive powers. Without going into further details, this last declaration was the remedy for all the fears of political Islam, especially the one of seeing the second Constituent Assembly also dissolved because it again contained members of parliament,[900] and the 6-month period given by the SCAF's first constitutional declaration for drafting a constitution was about to elapse.[901] Accordingly Art. 5 of Morsi's August 2012 declaration came to stem these fears by shielding his decisions against any review or scrutiny: 'no judicial body can dissolve the Consultative Council [*Shura*] or the Constituent Assembly.' This shield was construed, of course, as a pretext to, at the least, re-instate the dissolved People's Assembly, given that his earlier attempt (on July 8, 2012) to do so, failed.

4. The 2012 Constitution

Morsi's constitutional declaration of August 2012, which amongst others prohibited – pending the drafting of a permanent constitution – any judicial challenge to his decisions, effectively barred any form of judicial review of the second Constituent Assembly that had been established with Morsi's support. This decision paved the way for the assembly's draft to go to referendum. However, shortly under the pressure of popular protests, Morsi issued his third and last constitutional decree that complemented

expired.' Cf., Ahram Online, "English Text of President Morsi's New Egypt Constitutional Declaration," *Ahram Online* (August 12, 2012), http://english.ahram.org.eg/News/50248.aspx (accessed September 2, 2019).

900 Which, as already mentioned, was the same reason for dissolving the first Constituent Assembly to begin with.

901 See, Daniel L. Tavana, "Party Proliferation and Electoral Transition in Post-Mubarak Egypt," in *North Africa's Arab Spring*, ed. George Joffé (London: Routledge, 2013), 55. Art. 60 of the March 2011 Constitutional Declaration stated that: 'the members of the first People's Assembly and Shura Council (except the appointed members) will meet in a joint session following an invitation from the Supreme Council of the Armed Forces within 6 months of their election to elect a constituent assembly composed of 100 members which will prepare a new draft constitution for the country to be completed within 6 months of the formation of this assembly. The draft constitution will be presented within 15 days of its preparation to the people who will vote in a referendum on the matter. The constitution will take effect from the date on which the people approve the referendum.'

the previous one.[902] This last constitutional decree, of November 28, 2012, declared 'final' and 'binding' all presidential decrees and decisions since its election giving him full powers. The decree reinforced the president's already almost dictatorial powers and was basically seen as a demonstration of strength and fearlessness by Morsi. On the following December 9, the decree was scrapped by the same Morsi following riots.[903]

Going back to the SCAF's constitutional declaration of June 2012,[904] we could see how it gave several parties, including the head of SCAF, the right to veto any clause the Constituent Assembly would draft if it conflicted with the 'goals of the revolution' or constitutional principles from Egypt's previous constitutional texts.[905] If the assembly would not end drafting the constitution in time for the court date and is dissolved, then according to Art. 60B of the decree, the SCAF would appoint another assembly.[906]

Therefore, failing to impose the dictatorial edict, and given the contents of the SCAF's constitutional declaration, Morsi and the Muslim Brotherhood followed a different two-pronged approach; the threatened Constituent Assembly had to finish the draft constitution as soon as possible and the judiciary had to be quieted. Probably to avoid judicial interference once again, the Constituent Assembly acted as swiftly as possible. To this end, seeking consensus was neither Morsi's nor the Muslim Brotherhood's way; therefore, members of opposing forces of the assembly were quickly discouraged by the process of drafting and withdrew from the Constituent

902 See, David D. Kirkpatrick, "Citing Deadlock, Egypt's Leader Seizes New Power and Plans Mubarak Retrial," *New York Times* (November 22, 2012), https://www.nytimes.com/2012/11/23/world/middleeast/egypts-president-morsi-gives-himself-new-powers.html (accessed September 20, 2019).

903 See, Abat i Ninet and Tushnet, 224. See also, Agence France-Presse (AFP), "Egypte: Le Président Mohamed Morsi Annule Le Décret Renforçant Ses Pouvoirs," *Libération* (December 9, 2012), https://www.liberation.fr/planete/2012/12/09/egypte-le-president-mohamed-morsi-annule-le-decret-sur-ses-pleins-pouvoirs_866196 (accessed September 20, 2019); Abdel-Rahman Hussein, "Egypt: Mohamed Morsi Cancels Decree That Gave Him Sweeping Powers," *The Guardian* (December 9, 2012), https://www.theguardian.com/world/2012/dec/09/egypt-mohamed-morsi-cancels-decree (accessed September 24, 2019).

904 See, Ahram Online, "English Text of Scaf Amended Egypt Constitutional Declaration," *Ahram Online* (June 18, 2012), http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Egypt-Constitu.aspx (accessed September 20, 2019).

905 Articles 60B and 60B1.

906 See, Ahram Online, "English Text of Scaf Amended Egypt Constitutional Declaration".

Assembly.[907] Instead of pursuing and find a compromise, the withdrawn members were quickly replaced by compliant ones and a draft constitution was ready before the deadline. No attempt was made to guarantee that the plurality of civil society was represented and participated in the drafting process.[908] To instead silence the judiciary in order to stem the fear of undesirable judicial rulings, Islamists' supporters literally besieged SCCE to prevent its justices from even entering the court until the new constitution was adopted.[909]

All in all, the drafting process of the 2012 Constitution was stained by the exclusion and physical transgression on public institutions. Nevertheless, the draft was signed into law by Morsi on December 26, 2012, following the approval by the Constituent Assembly on November 30, 2012. Finally, it was approved with 63% in a popular referendum on December 15–22, 2012 (the turnout was 33%).[910]

The 2012 Constitution included 236 Articles divided in one Preamble and five parts. The first part was on the elements of state and society. The second one contained a large bill of fundamental rights and freedoms. The third structured the public powers of the state. The fourth was about the independent bodies and supervisory organs of the state and the fifth regulated the transitional provisions and constitutional amendments.[911]

On the positive side, it represented a departure from the presidential system by restricting the president's power in favor of parliament (even though parliament was in the hands of the Islamists). It also curtailed the military's powers, strengthened the freedom of assembly and the press, and banned detention without a court order.[912]

907 See, El-Sayed, 56.

908 See, Abat i Ninet and Tushnet, 224.

909 See, Joel Gulhane, "Supreme Constitutional Court Besieged Again," *The Daily News Egypt* (December 16, 2012), http://www.dailynewsegypt.com/2012/12/16/supreme-constitutional-court-besieged-again/ (accessed September 20, 2019).

910 See, BBC, "Egyptian Constitution 'Approved' in Referendum," *BBC News* (December 23, 2012), https://www.bbc.com/news/world-middle-east-20829911 (accessed September 20, 2019).

911 See, Abat i Ninet and Tushnet, 225. For an unbiased and comprehensive description of the 2012 Constitution's content, see ibid., 225–29.

912 See, Rainer Hermann, "Neue Ägyptische Verfassung: Mehr Grundrechte Und Mehr Religion," *Frankfurter Allgemeine* (December 23, 2012), http://www.faz.net/aktuell/politik/

On the negative side, instead, the 2012 Constitution itself was accused numerously of creating a theocratic state. It was met with some harsh criticism from the opposition and abroad (e. g. by human rights organizations such as the Human Rights Watch)[913] for being strongly Islamic and for failing to adequately protect some fundamental rights (such as women's rights or the rights of religious minorities), which were basically neutralized by restrictions and vague language.[914] Among other things, the new constitution gave religious scholars at al-Azhar University an important position in the legislative process, guaranteeing religious freedom only for Muslims, Christians and Jews.[915] In addition, a passage from the 1971 constitution that declared Sharia law the most important basis of law was retained.[916] However, an unbiased reading may reveal that its articles exhibited a 'stronger emphasis on religion than the 1971 constitution, yet its character is [was] largely secular.'[917] At the same time, at a first glance, the 2012 Constitution revealed a high democratic pedigree. This first impression was probably due to the fact that it was unexpected to see so many secular Articles in a constitutional document drafted mainly by Islamists. Despite fundamental deficiencies, it was not

ausland/neue-aegyptische-verfassung-mehr-grundrechte-und-mehr-religion-12005405.html (accessed September 24, 2019).

913 See, Zeit Online, "Human Rights Watch Kritisiert Ägyptischen Verfassungsentwurf," *Zeit Online* (October 8, 2012), https://web.archive.org/web/20130102141722/http://www.zeit.de/news/2012–10/08/aegypten-human-rights-watch-kritisiert-aegyptischen-verfassungsentwurf-08192604 (accessed September, 20, 2019).

914 Süddeutsche Zeitung, "Ägypter Geben Sich Islamisch Geprägte Verfassung," *Süddeutsche Zeitung* (December 25, 2012), https://www.sueddeutsche.de/politik/nach-referendum-aegypter-geben-sich-islamisch-gepraegte-verfassung-1.1558672 (accessed September 23, 2019).

915 See, Hermann.

916 See, Zeit Online, "Islamisten Stimmen Für Scharia Als Rechtsgrundlage in Ägypten," *Zeit Online* (November 29, 2012), https://www.zeit.de/politik/ausland/2012–11/aegypten-verfassung-entwurf-abstimmung (accessed September 20, 2019).

917 See, Holger Albrecht. "Egypt's 2012 Constitution: Devil in the Details, Not in Religion." *United States Institute of Peace* (*USIP*). Peace Brief No. 139 (January 25, 2013), 1. Brown commenting on the already wholly adopted draft of the 2012 Constitution said that '[t]his document does not establish a theocracy or anything close to it, but if there is a clear majority party it will enable it to pass a wide range of laws and probably slowly reshape parts of the state apparatus.' See, Nathan J. Brown and Eric Trager, "Have We Lost Egypt? A Dialogue on Islamists, Reactionaries, and American Diplomacy," *The New Republic* (December 14, 2012), https://newrepublic.com/article/111095/have-we-lost-egypt-islamists-reactionaries-american-diplomacy (accessed September 23, 2019).

designed to turn the state overnight into a theocracy. Nevertheless, the Constitution was conservative, perhaps patriarchal, and, as mentioned, failed to meet important fundamental rights protection. The new constitution contained some of the passages taken from the 1971 Constitution, but was substantially amended in some respects.[918] Finally, concerns were expressed that the mention of vaguely formulated moral and social principles to be protected by the state could be misused to justify constitutional restrictions on fundamental rights.[919]

But, arguably, its main problem for Egyptians was its creation process and the political performance that followed its genesis.[920]

5. Constitutional Challenges under Morsi's Regime and the Military Intervention

So, in a way, the Islamists won the battle against the military and the judiciary, but did they win the war? Maybe not, as it turned out soon.

Transitions require stability and strong respect of the constitution during the institution building phase. Morsi however could reach the constitutional transition through presidential authoritarianism.[921] He stressed though, for instance, that his constitutional declaration of November 2012 granting him almost unlimited powers,[922] was necessary to guarantee the constitutional transition, the implementation of the Constitution, as he sought the protection of the mostly Islamist-led Constituent Assembly from a planned dissolution by judges appointed during the Mubarak era.[923]

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918 See, Hermann.

919 Christian Achrainer, "Ägypten: Kein Kompromiss in Sicht – Nach Dem Verfassungsreferendum Stehen Sich Islamisten Und Oppositionskräfte Weiter Unversöhnlich Gegenüber," *Deutsche Gesellschaft für Auswärtige Politik* (*DGAP*) (December 19, 2012), https://dgap.org/de/think-tank/publikationen/fuenf-fragen/ägypten-kein-kompromiss-sicht (accessed September 20, 2019).

920 See, El-Sayed, 56 – 57.

921 See Abat i Ninet and Tushnet, 229 and fn. 597.

922 See, Egypt Independent, "Morsy Issues New Constitutional Declaration," *Egypt Independent* (November 22, 2012), https://www.egyptindependent.com/morsy-issues-new-constitutional-declaration/ (accessed September 20, 2019).

923 See, David D. Kirkpatrick, "Egypt's Government Shows Rift over Morsi Decree," *Boston Globe* (November 26, 2012), https://www.bostonglobe.com/news/world/2012/11/26/egypt-government-shows-rift-over-morsi-decree/ig8fRNgkfMhBYozmG1xIGN/story.html (accessed September 20, 2019).

Thus, soon it was clear that the democratic constitutional commitment was not real. Egypt's new 2012 Constitution endured for around a mere six months. Many sectors of the Egyptian society resisted the increasing hold of the Islamists on the state and Morsi's consolidation of his already extensive executive powers, and protestors took the streets following Morsi's November 2012 declaration.[924]

During the anniversary of the 2011 revolution on January 25, 2013, clashes erupted between pro- and anti-Morsi supporters. Violence progressively increased as society gradually became more and more polarized between the ruling Islamists and the secularists who resisted and contested their rule. The protests escalated as on June 30, 2013; millions took to the streets requesting the resignation of Morsi. On July 1, 2013, the military gave Morsi 48 hours to reach a compromise (that is, to respond to the *demands of the people*) or it would intervene. A political solution was not found and hence the military deposed Morsi on July 3, 2013, in a military coup.[925] The SCAF's military intervention included the provisional suspension of the 2012 Constitution and the installment of a provisional government headed by the president of the SCCE, Adly Mansour, until the election of a new president and the formation of a new democratic government.[926]

The SCAF used the wording 'will of the people' to call Morsi to intervene based on the number of demonstrators on the streets, and not the votes that Morsi and the Muslim Brotherhood had received in the previous elections. By doing so, the SCAF willingly overlooked the fact that voting citizens are entitled to express their democratic opinion, and that thus Morsi and the elected government had to do something about the political crisis Egypt was facing. A country paralyzed by thousands of demonstrators is an ungovernable state. At the same time, however, Morsi had little room of maneuver at this point because of the institutional battle he was having with the military and the judiciary. The military

924 See, Stephanie McCrummen and Abigail Hauslohner, "Egyptians Take Anti-Morsi Protests to Presidential Palace," *The Independent* (December 5, 2012), https://www.independent.co.uk/news/world/africa/egyptians-take-anti-morsi-protests-to-presidential-palace-8385721.html (accessed November 1, 2019).

925 See, BBC, "Egypt Crisis: Army Ousts President Mohammed Morsi," *BBC News* (July 4, 2013), https://www.bbc.com/news/world-middle-east-23173794 (accessed September 20, 2019).

926 See, Abat i Ninet and Tushnet, 230–31.

coup was therefore an opportunity for the military to take the lead again in the constitutional transition they seemed to have lost before to the Islamists.[927]

Of course, the appointment of a Supreme Constitutional Court justice by the minister of defense, perfectly revealed the alliance of the two state institutions endangered by the Islamists.[928]

Abat i Ninet and Tushnet perfectly describe the overall picture:

> 'A democratically elected political party but ruling undemocratically, drafting a biased constitution that opened the possibility of establishing a theocracy, putting at stake the other institutions of the state and taking progressively complete political control.'[929]

Therefore, the SCAF had respectable reasons to advance with its intervention in a militant democratic manner.[930] Once again, on this, Abat i Ninet and Tushnet write:

> 'In a failed and extremely polarized state, which is in a state of transition, where the institutions are facing intense rivalry, an intervention might be justified not only because of the need to defend democracy but also to reset the country's direction. In this sense, the proposal of the army and to president in the [...] warnings, consisting in the presidential dismissal and the celebration of a new parliamentary and presidential elections, could be assessed somewhat positively. A different, but important question is whether the military intervention was the proper way to address the situation. [...] They did not have political, constitutional, or democratic legitimacy to intervene, but they were in pragmatic terms, the only institution of the state capable of redressing the situation.'[931]

Against Morsi's overthrow, his supporters staged large protests as a reaction in many Egyptian cities.[932] This time, the military did not merely look, but also intervened. So, despite seeming reasonable, the military intervention lost any justification in what can easily be labeled as a 'massacre,' where

927 See, ibid., 231.
928 See, ibid.
929 See, ibid., 234.
930 See, Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006), 21.
931 See, Abat i Ninet and Tushnet, 234.
932 See, BBC, "Egypt Clashes: Divided Views," *BBC News* (July 9, 2013), https://www.bbc.com/news/world-middle-east-23233963 (accessed September 3, 2019); Trend News Agency, "Morsi Supporters Stage Demonstrations in Alexandria, Other Cities," *Trend News Agency* (July 16, 2013), https://en.trend.az/world/arab/2171108.html (accessed September 23, 2012).

many pro-Morsi supporters were killed and injured during clashes between them and the army.[933]

6. A Second Transitional Period and the 2014 Constitution

A couple of days following his rise as president of the provisional government, Mansour issued a new Constitutional Declaration for a transitional period; another *interim* constitution (on July 8, 2013). It demarcated a new process of transition and provisional governing structures.[934] In other words, Mansour opened a new (second) constitutional transition within the revolution of 2011.

Without entering the details of the *interim* Constitution, interesting is Art. 16, which stresses that the judiciary is independent and cannot be removed unless for wrongdoing. In other words, there would be no authority except the law, which remains above the judiciary and no other authority or institution would be able to interfere in judicial affairs. This was probably included to prevent what happened under Morsi, when he attempted to immunize his actions from the SCCE's control.[935]

With regards to the process for drafting a new constitutional document, the declaration provided for the creation of a panel of legal experts (it would be a ten member-committee comprising of six top judges and four constitutional lawyers) to propose amendments to the 2012 Constitution. This proposal would then be submitted to another committee of fifty members that

933 See, Kim Sengupta and Alastair Beach, "Cairo Massacre Eyewitness Report: At Least 51 Dead and More Than 440 Injured as Army Hits Back at Muslim Brotherhood Supporters," *The Independent* (July 9, 2013), https://www.independent.co.uk/news/world/africa/cairo-massacre-eyewitness-report-at-least-51-dead-and-more-than-440-injured-as-army-hits-back-at-8694785.html (accessed September 20, 2019); Yasmine Saleh and Matt Robinson, "With Dozens Dead, U.S. Tells Egypt to Pull 'Back from the Brink'," *Reuters* (July 27, 2013), https://www.reuters.com/article/us-egypt-protests/with-dozens-dead-u-s-tells-egypt-to-pull-back-from-the-brink-idUSBRE96O11Z20130727 (accessed October 20, 2019); Al Jazeera, "Scores Killed in Clashes at Pro-Morsi Rally," *Al Jazeera* (July 27, 2013), https://www.aljazeera.com/news/middleeast/2013/07/201372774215454742.html (accessed September 20, 2019); "Thousands Rally in Dueling Protests in Egypt," *Al Jazeera* (July 23, 2013), https://www.aljazeera.com/news/middleeast/2013/07/20137251794889595.html (accessed September 23, 2019).

934 Mansour was allocated most legislative and executive powers, which Morsi and the Brotherhood had sought all along.

935 For more on this and the *interim* Constitution in general, see Abat i Ninet and Tushnet, 235–36.

should represent all categories of society. On September 1, 2013, Mansour issued a decree forming the latter committee, which eventually included members of all sectors, which comprised the major components of the Egyptian society such as women, military, youth and more, except the Muslim Brotherhood and the political party of the al-Jama'a al-Islamiya, considered a terrorist organization. Other members of the religious community were nevertheless included, just not of those two political factions. The inclusion of religious members in the committee seemed to confer more legitimacy to the process and attract more support of people in the popular referendum for the new amendments. In other words, this move was a good diversion for the isolation of the Muslim Brotherhood.[936]

The panel of legal experts finished this task in August 2013 and submitted a draft to the second committee. The constituent committee had now, according to the *interim* Constitution, to produce a final draft. From the start, the constituent committee declared it would not limit itself to the amendments specified in the first committee's draft, but would add additional changes to the 2012 Constitution- and in fact, it did so. The 2014 Constitution is not the result of a mere amendment to the 2012 Constitution, but almost entirely a new one. It has 247 Articles, of which 40 are entirely new and 100 were amended from the previous one. Abat i Ninet and Tushnet nicely summarize the characteristics of the 2014 Constitution: 'it is an extremely large document, very pragmatic and aspirational.'[937] The Egyptian Constitution of 2014 was presented as a revolutionary text, a model for the protection of human rights and a

936 See, Atlantic Council, "Top News: Egypt's Constitutional Declaration Issued; Interim Prime Minister Named," *Atlantic Council* (July 9, 2013), https://www.atlanticcouncil.org/blogs/menasource/top-news-egypts-constitutional-declaration-issued-interim-prime-minister-named/ (accessed September 20, 2019); Muhammad Mansour, "Members of Constitutional Committee of 50 Announced," *Egypt Independent* (September 1, 2013), https://ww.egyptindependent.com/members-constitutional-committee-50-announced/ (accessed September 23, 2019); Ahram Online, "50-Member Committee Bans Torture, Guarantees Freedom of Belief," *Ahram Online* (November 30, 2013), http://english.ahram.org.eg/NewsContent/1/64/87891/Egypt/Politics-/UPDATED-member-committee-unanimously-approves-st–.aspx (accessed September 23, 2019); "Egypt's Constitution Committee Is Balanced: April 6," *Ahram Online* (September 3, 2013), http://english.ahram.org.eg/NewsContent/1/64/80667/Egypt/Politics-/Egypts-constitution-committee-is-balanced-April–.aspx (accessed September 20, 2019); Yoram Meital. "The "Revolutionary Parliament" and the New Governmental Order in Egypt." *Institute for National Security Studies.* Research Report No. 311 (February 2, 2012).

937 See, Abat i Ninet and Tushnet, 238.

significant step towards a genuine democratic transition. It ended a particularly chaotic constitutional transition. Though a comparative analysis of the 2014 Constitution with its two predecessors (2012 and 1971), and in particular the provisions relating to human rights and dealing with the identity of the State, it is possible to see how this text, which was intended to constitute a break with the past and rectify the 2012 Constitution – presented as the Islamic Constitution of a theocratic State – is more in continuity than in the rupture of the Egyptian constitutional order and reinforces power rather than frames it. The security sector, in particular the military and the police, were strengthened, as well as the judiciary.[938]

On December 1, 2013, the constituent committee approved their draft and on January 14–15, 2014, it would be submitted to the people in a referendum.[939] With a turnout of 38.6%, higher than the 33% of the 2012 referendum, the 2014 Constitution was approved with an incredible 98%.[940]

However, the results show how the Egyptian society is still polarized. Such polarization could create similar governability problems as those faced by Morsi.

The military coup was a paradigmatic change for Egypt. If before, too many Islamists in power trying to consolidate their power more and more was the problem, now it was the military. This was confirmed when Field Marshal Sisi stepped up as a candidate for the next presidential elections. On December 25, 2013, the *interim* government declared the Muslim

938 For a comprehensive analysis of the 2014 Constitution, see Nathalie Bernard-Maugiron, "La Constitution Égyptienne De 2014 Est-Elle Révolutionnaire?," *La Revue des Droits de l'Homme* 6 (2014), http://journals.openedition.org/revdh/978 (accessed September 23, 2019). See also, Abat i Ninet and Tushnet, 238–44.

939 See, Europe1, "Egypte: Référendum Constitutionnel Mi-Janvier," *Europe1* (December 10, 2013), https://www.europe1.fr/international/Egypte-referendum-constitutionnel-mi-janvier-749062 (accessed September 23, 2019); Le Monde, "Egypte: Le Projet De Constitution Approuvé Avant Un Référendum," *Le Monde* (December 1, 2019), https://www.lemonde.fr/afrique/article/2013/12/01/egypte-le-projet-de-constitution-approuve-avant-un-referendum_3523479_3212.html (accessed September 23, 2019).

940 See, Agence France-Presse (AFP), "Egypte: La Constitution Sur Mesure Des Militaires Adoptée," *Libération* (January 18, 2014), https://www.liberation.fr/planete/2014/01/18/egypte-le-oui-l-emporte-avec-98-au-referendum-constitutionnel_973866 (accessed September 23, 2019); Patrick Kingsley, "Egypt's New Constitution Gets 98% 'Yes' Vote," *The Guardian* (January 18, 2014), https://www.theguardian.com/world/2014/jan/18/egypt-constitution-yes-vote-mohamed-morsi (accessed September 23, 2019).

Brotherhood, the only possible opposition to Sisi, a terrorist organization in reply to a suicide bombing of a police headquarters in Mansoura.[941] On May 26–27, 2014, Sisi was elected president, following a repressive political campaign.[942] This was the culmination of a strengthening campaign of the 'forces of restauration' (with the military as the main figure), which started with the ousting of Morsi in July 2013, reached a high point with enactment of the 2014 Constitution in which their the privileged status is reflected and culminated exactly with Sisi's election.[943]

941 See, BBC, "Egypt's Muslim Brotherhood Declared 'Terrorist Group'," *BBC News* (December 25, 2013), https://www.bbc.com/news/world-middle-east-25515932 (accessed September 23, 2019).

942 See, Democracy International. "Observing Egypt's Roadmap Elections: Democracy International's Statements and Reports, 2013–2015." *Democracy International.* (2016).

943 See, Cilja Harders, "Revolution I Und Ii – Ägypten Zwischen Transformation Und Restauration," in *Arabellions: Zur Vielfalt Von Protest Und Revolte Im Nahen Osten Und Nordafrika*, ed. Annette Jünemann and Anja Zorob (Wiesbaden: Springer VS, 2013), 30; Nathan J. Brown and Michele Dunne, "Egypt's Draft Constitution Rewards the Military and Judiciary," *Carnegie Endowment for International Peace* (December 4, 2013), https://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary-pub-53806 (accessed September 23, 2019).

C. The Supreme Constitutional Court of Egypt (SCCE)

The SCCE was established under Anwar al-Sadat and started functioning in 1979. At all times, it was mostly loyal to the regime, presenting 'reluctance to challenge the core interests of the regime.'[944] At the same time, the SCCE and its justices developed a distinct self-consciousness, rather than demonstrating utter allegiance to the regime. In fact, during the 90 s, which are regularly indicated as the 'golden age' of the SCCE,[945] it ruled a high number of laws unconstitutional, regularly counteracting the strong executive. In order to limit the SCCE's increasing judicial activism, Mubarak 'packed' the SCCE from 2001 onwards. With its packing, in its new composition, together with subsequent constitutional and legal amendments introduced by Mubarak, the SCCE became a judicial body mainly working on legitimizing the regime's measures.[946]

I. The SCCE between 1971 and 2011

1. Establishment and Jurisdiction

In Egypt, the legal system is based upon a combination of Shari'a law and Napoleonic civil law, which Napoleon introduced in Egypt following his occupation of Egypt.

The Egyptian judiciary is multi-jurisdictional, in the sense that the judicial branch is comprised of several bodies independent from each other, each with its own jurisdiction and functions. As Auf describes:

944 See, Moustafa, 106.

945 ibid., 192; Nathalie Bernard-Maugiron, "Legal Reforms, the Rule of Law and Consolidation of State Authoritarianism under Mubarak," in *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran*, ed. Saïd A. Arjomand and Nathan J. Brown (Albany: State University of New York Press, 2013), 197.

946 See, Clark B. Lombardi, "Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian Aspirationally 'Islamic' State," in *Constitutional Courts: A Comparative Study*, ed. Andrew Harding and Peter Leyland (London: Simmonds & Hill, 2009), 238–39.

> 'The constitutional judiciary, represented by the Supreme Constitutional Court, exclusively addresses constitutional cases. The administrative judiciary, also named the State Council and headed by the Supreme Administrative Court, considers cases stemming from decisions made by the executive branch. Finally, the general judiciary, headed by the Court of Cassation, takes up all other types of disputes, including criminal, civil, family, commercial and labor cases.'[947]

In sum, on top of the Egyptian judiciary sits the SCCE, which has exclusive jurisdiction over constitutional questions, that is over the constitutionality of laws and regulations.[948] As already mentioned, the SCCE was established within the 1971 Constitution, yet started functioning only in 1979 following the coming into force of the SCCE law No. 48/1979.[949] According to Moustafa, Sadat created the SCCE in order to attract primarily international investors in the country, but also domestic ones, who kept billions in assets overseas. This was still an effect of Nasser's socialist politics of nationalizing a broad fraction of the private sector, which convinced many investors to keep their money abroad. In this sense, Sadat established an apex court as a strategic economic measure designed to guarantee investors that executive actions would be legally constrained.[950] Thus, the establishment of the SCCE was a clear statement from Sadat that the country needed to move towards a new direction. It represented the centerpiece of a new paradigmatic political change in the country focusing more on the rule of law and the *tries politica*, or 'a state of institutions.'

2. Appointment and Composition

Despite Sadat's will to create a judicially independent institution to foster both foreign and domestic investments, he still preferred to keep decisive power over the SCCE by controlling the appointment process. He went for a so-called 'judiciary-executive model', in which the selection process and

947 See, Yussef Auf, "The Battle over Appointing Judges in Egypt," *Carnegie Endowment for International Peace* (January 16, 2018), https://carnegieendowment.org/sada/75274 (accessed September 23, 2019).

948 See, Awad El-Morr, Omar Adel Sherif, and Abd-El-Rahman Nossier, "The Supreme Constitutional Court and Its Role in the Egyptian Judicial System," in *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt*, ed. Kevin Boyle and Omar Adel Sherif (London: Kluwer Law International, 1996), 37.

949 Available at Moustafa, 275–87.

950 See, ibid., 4–5, 77.

eventual appointment was legally dominated by the executive, yet informally left largely under the control of the judiciary. This model typically sees the executive select a candidate or approve the selection made by the judiciary, and formally appoint the judge, or the other way around, where the executive nominates either one candidate or a list of candidates, and the judiciary must approve the appointment. By trusting on the joint consent of the judiciary and the executive power, the model deliberately excludes the legislature, in an effort to insulate the court from short-term political concerns.[951] At the same time:

> '[b]because the model excludes many political actors from the appointments process, especially opposition political parties, the courts in [countries like Egypt or Iraq are often left] [...] vulnerable to accusations that their rulings are based on political loyalties.'[952]

In Egypt, the president kept the formal authority to appoint the chief justice. Yet, despite this power, in mainly the first two decades since its establishment, the president always selected the most senior justice already serving on the SCCE to the position of chief justice. Instead, other new justices were formally appointed by the president from among two candidates; one chose by the General Assembly of the Court and the other by the chief justice. In practice, the Chief Justice and the General Assembly of the Court always nominated the same person, and not one each, whom the President would then appoint.[953] In this sense, 'the SCC operated for over twenty years as a self-contained and self-renewing institution in a way that few other courts in the world operate.'[954]

As briefly mentioned before, even though the SCCE was designed to mainly support the regime, during the 'golden age' of the same, that is under Mubarak in the late 90 s, the SCCE progressively issued several rulings curtailing somehow the autocratic regime. Hence, at the end of the 1990 s, the informal judiciary-controlled appointments stopped, and he reasserted his formal appointment authority over the Chief Justice and appointed one Justice who was loyal to him and his regime. The Chief Justice is a very powerful member of the SCCE because he controls the court's docket and oversees the process of writing the SCCE's decisions. Additionally,

951 See, Choudhry and Glenn Bass, 11–12.
952 See, ibid.
953 See, ibid., 56–59.
954 See, Moustafa, 78–79.

since the SCCE legislation did not specify the number of justices on the SCCE, the Chief Justice immediately increased the SCCE's size by 50%, appointing new judges who were affiliated with the executive. In this sense, the SCCE was 'packed'.[955]

3. Jurisdiction

In Egypt, the SCCE is the only court vested with the power (and task) to review the constitutionality of laws. According to Law No. 48/1979 (cf. Art. 25), the SCCE has three main tasks:

> '(Firstly) the exercise of the power of judicial review in constitutional issues with respect to laws and regulations. (Secondly) the settlement of conflicts on competence by specifying the competent body among different judicial bodies or other judicial forums [...] (Thirdly) the determination of a final judgment in cases where two or more other judicial bodies have produced contradictory judgments.'

The law specifies that the SCCE is only empowered to perform judicial review when it receives cases transferred from any court of merit, which if in the course of deciding a concrete case finds that a law being applied might be unconstitutional, it can suspend the current procedures and forward the case to the SCCE for review. In sum, constitutional review in Egypt is centralized in the SCCE and the timing of said review is *a posteriori* (that is, a concrete review).

4. The SCCE's Performance Pre-Revolution: From a Self-Empowering to an Instrumentalized Institution

It is important to briefly present the SCCE's role and character before the revolution, especially in the Egyptian case, because eventually the SCCE's was never substituted with the suspension of the 1971 and 2012 Constitutions. Therefore, the historical baggage the SCCE carries influenced its role during the transition.

The presence of favorable appointment legislation and jurisdiction in combination with an informal (yet deferential) presidential practice resulted in a court progressively building up more and more autonomy and boldness. Especially in the 1990 s (again, the 'golden age' of the

955 See, Choudhry and Glenn Bass, 58–59.

SCCE), the SCCE developed a firm jurisprudence in several areas of the law (such as, press freedom, operations of NGOs and electoral laws at the local and national level).[956] During this period, the SCCE certainly curtailed the executive to some extent, yet it always showed unwillingness to challenge the 'core interests' of the autocratic regime. To this end, it often upheld key elements and principles of the autocratic regime, as well as its politically repressive practices.[957] Rutherford maintains that such judicial deference to the executive represented not only an 'instrumental tactic of survival',[958] but also an expression of a rational judicial philosophy and the justices' true notion of the state: 'In [their] view, a powerful state plays the pivotal role in creating liberty. [...] rights do not exist outside the framework of the state.'[959] Linked to this conception of the state, and according to the same Rutherford, the SCCE's justices are very aware of their role:

> 'Egypt's judges do not see themselves as simply enforcers of state-drafted law. Rather they consider themselves the guardians of the public interest. They seek to ensure that the state uses its formidable resources to serve this interest.'[960]

This firm conception and understanding of state and their role are also the main reasons why the SCCE has also had no fear over the years to curtail the executive's powers, and thus become a model in the Arab world of a sturdy court rejecting any breach of their independence. In the mid-1990 s, even though many rulings were falling in favor of the regime in numerous areas,[961] the government started to grow gradually uncomfortable with the

956 Areas of the law, such as constraints on state power, rule of law, protection of civil and political rights, as well as public participation in politics. See more on the topic at Kevin Boyle and Omar Adel Sherif, *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt* (London; Boston: Kluwer Law International, 1996), 231–80; Rutherford, 49–76. See also, Omar Adel Sherif, "Unshakable Tendency in the Protection of Human Rights: Adherence to International Instruments on Human Rights by the Supreme Constitutional Court of Egypt," in *The Role of the Judiciary in the Protection of Human Rights*, ed. Eugene Cotran and Omar Adel Sherif (London: Kluwer Law International, 1997).

957 See, Moustafa, 105–06.

958 See, Rutherford, 57.

959 See, ibid.

960 See, ibid., 60.

961 See, for instance, with regards to privatization Baudouin Dupret, "A Liberal Interpretation of a Socialist Constitution: The Egyptian Supreme Constitutional Court and Privatization

SCCE judicial activism. For example, by accusing the SCCE of imposing divergent interpretations of the Constitution, disregarding and neglecting the interests of the nation and undermining the state's legal framework, Fathi Sorur (Speaker of the People's Assembly) proposed the introduction of *a priori* constitutional review of legislation.[962] El-Morr, the then Chief Justice, replied fervidly to these attacks addressing the risks of *a priori* review at nearly every public lecture, during and after his tenure as Chief Justice. He insisted that *a priori* review would be unsuitable because courts often do not and cannot know the implications of legislation until laws are actually applied. Yet more troublesome, he asserted, is how the regime would abuse a system of prior revision.[963] Eventually, *a priori* review was not introduced due to public protest by the SCCE and its judicial support network.[964] Sherif, himself a prominent member of the SCCE, clarifies how

> 'The Court had raised constitutional awareness among the people. It especially raised popular consciousness of the necessity of maintaining the democratic process and respecting individual rights and freedoms, and these two elements were behind the defeat of this attack on the Court.'[965]

His view is clear as to how the public needs to 'play an active role' in the protection of judicial independence, so that it can 'be alert to, and

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of the Public Sector," in *Politics from above, Politics from Below: The Middle East in the Age of Economic Reform*, ed. Eberhard Kienle (London: Saqi, 2003).

962 See, Moustafa, 170–71.

963 See, ibid., 170. When asked about the *a priori* review proposal during a lecture at Cairo University he answered: '[…] Do you know what the Egyptian Prime Minister would do? He would send you 20 bills on the same day, saying that the cabinet approved these laws, which might be of different years, and ask our opinion in the constitutionality of them all. Every bill would be of 200 articles or so, and the Constitutional Court would be required to decide in 30 days on four, five, or six thousand articles. It took us a year to decide on one article. Imagine if we were asked to decide in six months on all the bills approved by the executive authority before they were signed by the President. They will dump all bills on us to get the seal of approval of the Constitutional Court, and the result would be that the constitutionality of these bills could not be challenged later on. […] If you want to destroy the Constitutional Court, let's shift to prior revision.' See, Lecture by al-Murr at Cairo University, September 25, 2000; cited in ibid., 170–71.

964 See, ibid., 171.

965 Omar Adel Sherif, "Attacks on the Judiciary: Judicial Independence – Reality or Fallacy?," in *Yearbook of Islamic and Middle Eastern Law, Vol. 6*, ed. Eugene Cotran (The Hague: Kluwer Law International, 1999–2000), 18.

consequently defeat, any attempts to detract from this highly important constitutional guarantee.'[966]

The straw that broke the camel's back came with yet two other SCCE decisions opposing the executive's interests in 2000. Without going into details, in one, it found the NGO-law unconstitutional and, in the other, it demanded judicial supervision of elections.[967] In reaction to this, the informal judiciary-controlled appointment process was interrupted by Mubarak. He reasserted his formal power of appointment as president and instead of promoting, as usual, the most senior SCCE justice, he selected an external chief justice known for his allegiance towards the government. Given that the number of justices was nowhere specified, this Chief Justice packed the SCCE with five additional government-loyal justices.

Ever since its packing, the SCCE was progressively instrumentalized. For instance, during the constitutional amendments in 2005, a Presidential Election Commission (PEC) was created to supervise the electoral process. The chief justice was also amongst the PEC-members. The elections were marked by massive manipulations. Soon, in public the SCCE was associated with fraudulent elections.[968] Moreover, the SCCE completed *a priori* review for the presidential election law, a competence that the SCCE had always rejected. As Moustafa rightly asserts:

> 'The Supreme Constitutional Court once the most promising hope for political reform in Egypt, was now being used as a rubber stamp in the manipulation of elections.'[969]

This image of the SCCE persisted also after the 2011 revolution. It was well known to the public that the SCCE was composed mainly of Mubarak appointed judges.' 'Mainly', because many justices were not appointed by Mubarak, but were there even before the SCCE had been packed by the autocrat.

966 See, Moustafa, 171; Sherif, "Attacks on the Judiciary: Judicial Independence – Reality or Fallacy?," 21.

967 See an analysis of the rulings at Moustafa, 188–92.

968 See, ibid., 210–16.

969 See, ibid., 214.

II. The SCCE after the 2011 Constitution

Unlike the Tunisian case, in Egypt, in the aftermath of Mubarak's fall in 2011, the SCCE has continued to work, even if the 1971 Constitution, under which the SCCE had been established, had been suspended. The SCCE thus continued to function, first under the rule of the SCAF, then under President Morsi, under the interim authority appointed by the SCAF (that is, Mansour), and now under the Sisi. Egypt has operated under a series of constitutional frameworks during the constitutional transition, yet the authority of the SCCE to adjudicate on constitutional disputes remained untouched: The Constitutional Declaration of March 30, 2011 (cf. Art. 49), the 2012 Constitution of Egypt (cf. Art. 175), the Constitutional Declaration of 8 July 2013 (cf. Art. 18) and finally the 2014 Constitution (cf. Art. 192). A very significant matter throughout this period has been the appointing procedure. In response to Mubarak's previous packing of the SCCE and the changing political landscape, at the beginning of the constitutional transition, the SCCE tried to reclaim its control over judicial appointments by pressuring the SCAF to do something about it. The idea was to reinstate a procedure akin to the informal one that was respected prior Mubarak's exercise of formal authority over the selection of judges. While it is impossible to find out what the details of the interactions with the SCAF were all about, the SCCE won an important concession from SCAF with the decree law on SCCE appointments in June 2011, which gives SCCE justices an important role in appointments decisions and limits the president's choices regarding the candidates. The decree law maintained that the General Assembly of the SCCE would select the Chief Justice from among the SCCE's three most senior members, and the president would then formally appoint him. Additionally, the decree also required priority be given to the SCCE's 'Commissioner's Body,' a group attached to the SCCE that assists in preparing cases and opinions for appointment to the SCCE's main bench. The result was again, of course, the creation of a system that would have allowed a remarkably self-perpetuating SCCE to develop and one that may be very difficult to check.[970] According to

970 See Nathan J. Brown, "Egypt's Judges in a Revolutionary Age," *Carnegie Endowment for International Peace* (2012), https://carnegieendowment.org/files/egypt_judiciary.pdf (accessed September 23, 2019); "Quick Reactions to Egypt's New Draft Constitution," *Blog of the International Journal of Constitutional Law* (August 22, 2013), http://www.iconnectblog.com/2013/08/nathan-brown-quick-reactions-to-egypts-new-draft-constitution/ (accessed September 23, 2019); Nathan J. Brown and Clark B. Lombardi, "The Supreme

Brown, allowing the SCCE's with such a high degree of autonomy during a constitutional transition was a reasonable move:

> 'The effect was to insulate the SCC[E] from all other actors though also perhaps to inculcate however subtly a sense that the SCAF [...] was the best protector of the judiciary.'[971]

Under the 2012 Constitution, instead, the SCCE was finally given a closed composition of 11 judges, including one Chief Justice. Strangely enough, the 2012 Constitution did only say that the president appointed the SCCE justices by decree, yet no other appointment regulations were mentioned. The 2012 Constitution deferred the procedure for appointments to future implementing legislation (cf. Art. 176). However, while the 2012 Constitution was in force for a short period of time, no new legislation regarding the SCCE's appointments procedure was passed. Therefore, the appointments procedure outlined in the June 2011 SCAF decree law remained in force until further legislation with the 2014 Constitution.[972]

The new 2014 Constitution, in its Art. 193, gives the SCCE a very independent role. Under this provision, the SCCE itself determines how many justices it deems to be 'sufficient.' Further, the SCCE's justices appoint themselves, without any other parties' encroachment. The president eventually issues the appointment decision, yet he/she does not have the power to reject the choice made by the general assembly of the SCCE. This makes the president's role merely a formality. Hence, Moustafa's characterization of the SCCE until 2001 as 'a self-contained and a self-renewing institution'[973] This makes the SCCE an institution, which is institutionally incredibly independent, but lacks 'relative judicial independence', in the sense that there is no balance between structural independence and political

Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)," *American University International Law Review* 21, no. 3 (2006): 441 fn. 7. See also, Sahar F. Aziz, "Revolution without Reform: A Critique of Egypt's Electoral Laws," *George Washington International Law Review* 45, no. 1 (2013): 54.

971 See, Nathan J. Brown, "The Egyptian Political System in Disarray," *Carnegie Endowment for International Peace* (June 19, 2012), https://carnegieendowment.org/2012/06/19/egyptian-political-system-in-disarray-pub-48587 (accessed September 23, 2019).

972 See, Choudhry and Glenn Bass, 59–60. The Constitutional Proclamation of July 8, 2013, also left these matters to legislation (cf. Article 18) that had yet to be implemented.

973 See, Moustafa, 78–79.

accountability.[974] Nevertheless, on April 20 – 22, 2019, following a referendum, the 2014 Constitution was amended, allowing, inter alia, the president to again appoint the chief justice.[975] A move, which clearly sees Sisi wanting to take control over the judiciary. In sum, the current situation is far from stable.

D. The Court's Role in the Constitutional Transition: Key Decisions

Newly established apex courts are often noticed as key players in constitutional transitions. The SCCE differs from typical newly established apex courts, as it was created under authoritarian rule in 1971 and, unlike the Tunisian Constitutional Council, was not dissolved in the aftermath of the revolution. It has thus played a significant, albeit ambivalent role in Egypt's transition to constitutionalism. As briefly mentioned, following the ousting of Mubarak, the SCCE has not been abolished despite the suspension of the 1971 Constitution. Examining and, as it turns out most importantly, contextualizing two central rulings issued during the constitutional transition, this section tries to assess the court's performance within the constitution-making process and to assert itself in the politically problematic, 'unconstitutional' setting of Egypt's constitutional transition. Especially, it reveals that the SCCE's pre-revolutionary jurisdiction and practice and its justices' conceptions of office in particular have influenced its transitional role significantly.

Once the revolution hit, the country has been literally torn by mighty rifts and conflicts about the emerging constitutional order between mainly two forces: the secularist of the SCAF and the judiciary, and the Islamists of

974 See in general on this, Choudhry and Glenn Bass.

975 See, TIMEP, "2019 Constitutional Amendments," *The Tharir Institute for Middle East Policy* (*TIMEP*) (April 17, 2019), https://timep.org/reports-briefings/timep-brief-2019-constitutional-amendments/ (accessed October 20, 2019); Gamal E. El-Din, "Frequently Asked Questions About Parliament's Proposed Amendments of Egypt's 2014 Constitution," *Ahram Online* (April 15, 2019), http://english.ahram.org.eg/NewsContent/1/64/330089/Egypt/Politics-/Frequently-Asked-Questions-about-parliaments–prop.aspx (accessed September 30, 2019); Human Rights Watch, "Egypt: Constitutional Amendments Entrench Repression," *Human Rights Watch* (April 20, 2019), https://www.hrw.org/news/2019/04/20/egypt-constitutional-amendments-entrench-repression (accessed September 20, 2019).

the Muslim Brotherhood. This power struggle reflected in the constitution-making process and hence in the role of the SCCE within such process. Thus, the constitutional transition described above has not seen a veritable stable constitutional development.

Within the constitutional transition, we can thus differentiate, in a similar (yet not identical) way Abat i Ninet did in one of his works assessing the SCCE's performance in the constitutional transition,[976] specifically three different periods: first, *during the first transitional period until the ousting of Morsi*; second, *during the second transitional period until the enactment of the 2014 Constitution*; and finally, *in the aftermath of the military regime.*

I. The SCCE during the First Transitional Period

1. Key Decisions

a. The Decision on Parliamentary Election Law with Regards to the People's Assembly

On July 21, 2011, the SCAF announced the dates for the parliamentary elections of both chambers and that they would be held in three rounds with an interval of at least fifteen days between each round. The elections for the People's Assembly took place from November 2011 to January 2012, and for the *Shura* Council in January and February 2012. From a population of around 82 million, 50 million of them were entitled to vote. With a turnout close to 55%,[977] the Muslim Brotherhood's *Freedom and Justice Party* won 43.78% of the seats, while the even more hardline Islamist group, the *Islamist Bloc*, captured 24.9% of the seats.[978] A huge victory therefore for political Islam.

976 See, Abat i Ninet, 214–15.

977 See, Al Jazeera, "Muslim Brotherhood Tops Egyptian Poll Result," *Al Jazeera* (January 22, 2012), https://www.aljazeera.com/news/middleeast/2012/01/201212112595858026 4.html (accessed September 23, 2019).

978 See, EISA, "Egypt: 2011/2012 People's Assembly Elections Results," *Electoral Institute for Sustainable Democracy in Africa* (*EISA*) (2013), https://www.eisa.org.za/wep/egy2012results1.htm (accessed September 21, 2019).

However, on June 13, 2012, the SCCE declared unconstitutional several legal provisions on which the elections had been based.[979] In a nutshell, according to the court, these provisions were unconstitutional in this sense that they destabilized the entire electoral system, both with regards to the two-thirds part reserved to political parties' closed list and to the one-third reserved to the independent candidates. According to the SCCE, the idea to force independent candidates into the one-third positions had an improper effect on the two-thirds portion assigned to the closed party list.

aa) The Electoral Law at Issue

Before analyzing the case in greater detail, it is important to clarify the nature of the electoral law, on which the SCCE eventually based its decision. Electoral laws before the ousting of Mubarak had been instrumental in shaping the electoral results in the interest of the governing NDP.[980] Hence, since the Constitutional Declaration of March 2011 did not specify the rules under which the new parliament would be elected and thus the older law No. 38/1972 was still in force, a demand for a new electoral law was in the air. Law No. 38/1972 was accordingly modified three times by the SCAF (cf. Decree 108/2011, 120/2011, 123/2011), which had vested itself with the legislative power in the Constitutional Declaration of March 2011.

The SCAF's first attempt at an electoral law would have split the seats both chambers 50–50 between members of political parties and independents. After opposition was again voiced also to this proposal, believing that it would allow too many NDP remnants to reemerge in the new parliament as 'independents,' the SCAF opted for a new solution that would see two-thirds of the seats in both chambers reserved to members of political parties, and only one-third open for candidates unaffiliated with any party. In the following weeks, however, the many major parties and coalitions threatened to boycott the elections due to Art. 5 of the electoral law which maintained that only independents were allowed to actually run for seats reserved for independents. The political parties argued that Art. 5 would allow for the NDP remnants to remerge to parliament as

979 See, SCCE Decision No. 20, *Anwar Sabah Darwish Mustafa v. Chairman of the Supreme Council of the Armed Forces*, Judicial Year 34, June 14, 2012.

980 See, in general, Amel Ahmed, "Revolutionary Blind-Spots: The Politics of Electoral System Choice and the Egyptian Transition," *Middle East Law and Governance* 3, no. 1–2 (2011).

independents. Accordingly, the SCAF annulled Art. 5 by Decree No. 123/2011. As a result, the third and final version of the electoral law saw parties, which were allowed to bring candidates both on the party lists and also through the individual voting channel, thus restraining the chances of 'real' independents. In other words, independents could run for one-third of the seats, but even for those seats, candidates affiliated with political parties could still compete, providing they did so as individuals and not under their party's banner.[981]

This last modification made the law incompatible with some past SCCE rulings; in the 80 s and 90 s the SCCE had declared unconstitutional a number of electoral laws, always stressing how important it was to protect those independents seats.[982] The amendment of Art. 5 provided the basis of the present SCCE's decision on the unconstitutionality of the parliamentary election law.

bb) *The Content of the Case*

This case questioned the validity of the electoral law permitting candidates affiliated with organized political parties to contest seats that had been set aside for independent candidates.

The applicant, an independent, had run for an independent seat at the parliamentary elections in a certain district of the governate of *Qalubia*, yet he did not manage to reach enough votes to make it to the runoff, which took place between two candidates affiliated with political parties (one of the Freedom and Justice Party and the other of the *Al-Nour* party). He challenged the constitutionality of the newly amended electoral law (including Art. 5) which allowed candidates affiliated with political parties to run against candidates unaffiliated with political parties for seats actually reserved for independents. He argued that several Articles of the electoral law were incompatible with Art. 7 of the Constitutional

981 In sum, the SCAF did actually not issue new legislation but rather amended the pre-existing Law No. 38/1972 (with regards to the selection of parliamentarians to the People's Assembly) and Law No. 120/1980 (with regards to the selection of members of the *Shura*) using two ordinances, Ordinance No. 120/2011, and Ordinance No. 123/2011. Art. 5 of Ordinance No. 120 was the one providing that only individuals unaffiliated with political parties could run for the seats reserved for independents. No. 123, nevertheless, repealed Art. 5 of No. 120, thereby allowing persons affiliated with political parties to also run for the seats reserved to independents.

982 See, Moustafa, 94–104.

Declaration in force (that is, the principle of equality) and contradicted former decisions by the SCCE.[983]

On June 14, 2012, the SCCE issued its judgement stating that the formation of the People's Assembly took place in violation of the constitutional order in force, violating Art. 7 and Art.38 of the constitutional provisions.

After stressing that electoral laws organizing elections were fully justiciable, the SCCE claimed that the validity of the disputed provisions needed to be understood in the broader context of Law No. 38/1972 (modified by the SCAF) in order to establish the law's *ratio legis.* After interpreting the letter of the provisions, the SCCE concluded that the ordinary legislator voluntarily intended to permit candidates affiliated with political parties to compete for independent seats. However, this concession to political parties, it resolved, influenced the outcome of not only the one third part of the assembly, but also of the other two-thirds system insofar as it allowed political parties to follow a strategy that would optimize their chance to win seats by designating its members to run for both sections, and thus allow them to attain more seats than they otherwise would. In this sense, the SCCE concluded that the amended electoral law violated, among other things, the constitutional principles of equality and popular sovereignty, and of constituting a discrimination by allowing independents only access to some seats (that is, one third), but consenting political party affiliates to run for the entirety of parliament, therefore discriminating against the former. However not only, this also breached the goal of the constitutional lawmaker because it destabilized the new idea of pluralism of Egyptian society of Art. 38 of the Declaration by arbitrarily favoring candidates affiliated to political parties in the political process over those without any affiliation.[984] The constitutional lawgiver,

983 See, SCCE Decision No. 20, *Anwar Sabah Darwish Mustafa v. Chairman of the Supreme Council of the Armed Forces*, Judicial Year 34, June 14, 2012, 3–9.

984 The above-mentioned electoral law amendments appeared to have been consistent with the provisions of the Constitutional Declaration of March 2011, the SCAF then released yet another new constitutional declaration on September 25, 2011, amending article 38 of the Constitutional Declaration of March 2011 so that it newly stated as follows: 'the law shall organize the right to be elected to the People's Chamber and the Consultative Chamber in accordance with an electoral system that combines the closed-party list system and the individual candidate system in the proportion of two-thirds for the first and one-third for the second.' Article 38 before stated that law should regulate the electoral system. Now, following the amendment the SCAF instituted the mixed system

which *in casu* was the SCAF, had defined the electoral system in Art. 38 of the Declaration as a pledge of an 'intellectual and political diversity within the People's Assembly.'[985] By annulling Art. 5, the electoral law contradicts the constitutional legislator's will entrenched in Art. 38. Therefore, and in line with its precedents, the SCCE concluded that:

> 'The formation of the whole Assembly [was] null and void since it was elected, with the its [sic] resulting dissolution by the power of the law as of the indicated date, and without the need for any other measure, as a result of ruling the aforementioned provision unconstitutional.'[986]

In its conclusion, the SCCE finds the provisions at issue unconstitutional, yet without directly requesting the dissolution of parliament; the decision to dissolve Parliament was taken by the SCAF based on the SCCE's ruling.

cc) Comments on the Case

This first analyzed case surely revealed some interesting traits of the SCCE in relation to the constitutional transition:

– *Political activity of the Court:* It is true in fact that the SCCE is a clear example of an apex court enmeshed in politics, much more than the Turkish or South African ones. When it comes to the SCCE's main reasoning behind its ruling, which consisted in arguing that allowing political parties affiliates to run for the one-third of the seats reserved for independents would have an effect on the parties' considerations and electoral strategies, Naeem has a point of criticism. He defines this reasoning as clearly 'political,' arguing that the SCCE did not deliver any evidence that allowing political parties affiliates to run on the independent system would have influenced the party lists. He criticizes thus that the SCCE centered its decision on a supposition rather than

in the Declaration in order to make it compatible with the new electoral law negotiated among political forces.

985 See, SCCE Decision No. 20, *Anwar Sabah Darwish Mustafa v. Chairman of the Supreme Council of the Armed Forces*, Judicial Year 34, June 14, 2012, 12.

986 See, SCCE Decision No. 20, *Anwar Sabah Darwish Mustafa v. Chairman of the Supreme Council of the Armed Forces*, Judicial Year 34, June 14, 2012, 14.

on facts, thereby becoming entangled in politics.[987] Yet this was not the only reason one would deem the SCCE as political. The success of political Islam in the elections questioned not only the estrangement and polarization between the religious and the secular, but also the correlation and balance between the branches of government. The timing, for instance, raised some doubt in this sense; the judicial ruling came only a couple of days prior to the second round of the presidential elections. This can easily be interpreted as a way to tamper with the electoral process. Such 'political' intrusion, however, was not abnormal in Egyptian politics, as I have tried to summarize briefly before. At the same time, this declaration of unconstitutionality affected eventually not only the People's Assembly itself, but also the Constituent Assembly, which was chosen by a democratically elected legislature despite the procedural hiccups. As such, it makes the intrusion even more worthy of attention and criticism. Ottaway and Brown also affirm that there was no doubt that this was a highly political maneuver to stop the rise of political Islam. The timing of the decision, the superficial support behind some of the conclusions of the SCCE, and its context (that is, *after* knowing the results of the elections) placed the whole transitional process at stake.[988]

– *Protecting fundamental rights and upgrading the SCAF's declaration:* During a constitutional transition it is sometimes crystal clear what the constitutional status of the country is; for instance, in South Africa there was no doubt about the fact that once the *interim* Constitution was enacted in 1993, that was the valid constitutional law for the country upon which the CCZA could base its activity. This clarity in the system allowed the CCZA to focus on the transition itself without having to voluntarily intrude itself in the political spectrum as the case was in Egypt.

While underlining the argument of unconstitutionality, the SCCE referred to the political rights such as the right to candidacy and suffrage and the importance of the principle of equality, discussing the legislative

987 See, Naseef Naeem, "Verfassungssystem Am Abgrund: Wie Die Ägyptische Justiz Die Kunst Der Rechtswissenschaft Missachtet," *Journal of Law and Islam* (*Zeitschrift für Recht und Islam, ZRI*) [*originally labeled 'GAIR-Mittleilungen'*] 4 (2012): 105.

988 See, Marina Ottaway and Nathan J. Brown, "Egypt's Transition in Crisis: Falling into the Wrong Turkish Model?," *Carnegie Endowment for International Peace* (March 30, 2012), https://carnegieendowment.org/2012/03/30/egypt-s-transition-in-crisis-falling-into-wrong-turkish-model-pub-47696 (accessed October 20, 2019). See also, Abat i Ninet, 217.

limitations regarding the infringement of these rights. In this sense, it applied a typical tool by constitutionally defining the conditions under which a right can be restricted by courts (mostly by the use of the concept of proportionality).[989] Apart from the not unimportant fact that the SCCE was eager to implement fundamental rights, which is not always a given in transitional settings, by doing so it referred to the political rights as provided in the Constitution Declaration. This had the indirect effect to 'upgrade' the SCAF's military Constitutional Declaration, which as mentioned above was not in the clear when it came to its legitimacy.[990] In the whole decision, the SCCE does neither directly define the status of the Constitutional Declaration nor clarifies clearly which document it deems the highest norm in the country.[991] Of course, due to the manner of how the Constitutional Declaration had been enacted and the legitimacy issues that it brought with it, this cautious approach by the SCCE is understandable, as the current 'military constitutionalism' conflicted with the political positioning the SCCE justices found themselves, including their professional understanding of their role underlined above.

dd) Concluding on the Case

In this very important SCCE ruling, the SCCE's dilemma within the constitutional transition is self-evident.

On the one hand, the SCCE justices were keen on doing their judicial job according to their own understanding of their role, and in line with the transitional need of being perceived as independent and *neutral* judicial actors within the fragile period of transition.[992]

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989 See, David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton: Princeton University Press, 2010), 282. See also, SCCE Decision No. 20, *Anwar Sabah Darwish Mustafa v. Chairman of the Supreme Council of the Armed Forces*, Judicial Year 34, June 14, 2012, 9–11.

990 Thereby the SCCE created a bridge to the previous 1971 Constitution, since the mentioned rights that form the basis of the multi-party system were established with the 1971 Constitution and were merely confirmed by Art. 4 Constitutional Declaration. See, SCCE Decision No. 20, *Anwar Sabah Darwish Mustafa v. Chairman of the Supreme Council of the Armed Forces*, Judicial Year 34, June 14, 2012, 10.

991 See, SCCE Decision No. 20, *Anwar Sabah Darwish Mustafa v. Chairman of the Supreme Council of the Armed Forces*, Judicial Year 34, June 14, 2012.

992 See more on the acceptance of a court's decision and its authority at Alexander Blankenagel, " Statement: Das Russische Verfassungsgericht Und Der Russische Konstitutionalismus – Can the Russian Constitution Court Build the "Russia" in the Open

In this sense, they admit the risk there is of politicizing the judiciary and tampering with the other branches' area of competence when dealing with 'political questions.' They do so by referring to their previous jurisprudence and jurisdiction, applying traditional tools of judicial interpretation, such as proportionality or the unity of the Constitution and avoiding clearly stating that the Constitutional Declaration serves currently as the highest norm in the legal order of Egypt.

On the other hand, the SCCE showed a clearly defined intent to defend its judgement to declare the formation of the whole People's Assembly to be invalid, as it perceived its position and status to be threatened by the proposed changes of the People's Assembly regarding the SCCE's composition and competences. As a reminder, there were talks that the People's Assembly was seeking to change the SCCE's composition and competences, by especially introducing an *a priori* review – something the SCCE had always opposed during Mubarak's regime. In this sense, the SCCE intended to go through with this decision also as a direct confrontation with the legislature as a way to defend their status. Although all other countries with party list systems of various kinds do not consider the Egyptian situation of ballots an infringement on the rights of independents who lacked party affiliation, the ruling of the SCCE is justifiable. This decision had a history behind it, for on two different occasions during the Mubarak regime, the SCCE had ruled to strike down electoral laws on similar grounds and therefore the SCCE's decision should not have been a surprise.[993] Still, the SCCE's argument that the invalidation of Art. 5 of the electoral law influenced unconstitutionally the entirety of the election of the whole People's Assembly, is one that is based upon a mere assumption. This shows how the SCCE not only decided in a certain way, but it *sought* it, demonstrating a strong political character.

Sea?," in *Verfassungsrecht Und Verfassungspolitik in Umbruchsituationen. Zur Rolle Des Rechts in Staatlichen Transformationsprozessen in Europa*, ed. Joachim J. Hesse, Gunnar F. Schuppert, and Katharina Harms (Baden-Baden: Nomos, 1999), 261.

993 See, El-Morr, Sherif, and Nossier; Nathan J. Brown, "Egypt: A Constitutional Court in an Unconstitutional Setting," Paper prepared for the Constitutional Transitions and Global Comparative Law Colloquium, University of New York (School of Law), http://constitutionnet.org/sites/default/files/brown-egypt-a-constitutional-court-in-an-unconstitutional-setting.pdf (accessed October 20, 2019).

b. The Decision on Disenfranchisement Law

aa) The Disenfranchisement Law at Issue

Having of course full legislative power, parliament could pass any law it deemed necessary and since the presidential elections had not yet taken place, parliament indeed delivered a political exclusion law prohibiting certain members of the previous regime to run for president. So, before the presidential elections, the new parliament passed Law No. 17/2012, which amended Law No. 73/1956 (that is, Law on Regulating the Exercise of Political Rights) by adding a provision suspending the political rights of 'anyone who, in the ten years preceding February 11, 2011, served as President of the Republic, Vice-President of the Republic, or Prime Minister of the Republic, or served as Chair of the National Democratic Party, one of its General Governors, was a member of its Policy Office or its General Governance Board, for a period of ten years from the date specified herein.'[994] In other words, it excluded certain senior members of the old regime from the right to hold public office for a period of 10 years.

This legislation, of course, was intended to prevent senior figures from the old Mubarak regime from retaking positions of power and influence in the new Egypt.

bb) The Content of the Case

Art. 28 of the Constitutional Declaration postulated that an *a priori* constitutional review of the presidential election law would be made. When the amended Law on Regulating the Exercise of Political Rights No. 73/1956 was transferred to the SCCE for constitutional review the SCCE rejected the appeal, arguing that it could only review the 'presidential election law' *a priori*, and not any other law.[995] In any case,

994 Law No. 17/2012 quoted in Mohammad H. Fadel, "The Sounds of Silence: The Supreme Constitutional Court of Egypt, Constitutional Crisis, and Constitutional Silence," *International Journal of Constitutional Law* 16, no. 3 (2018): 944. See also, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012.

995 Egypt Independent (translated from Al-Masry Al-Youm), "Court Rejects Reviewing Draft Law on Exercise of Political Rights," *Egypt Independent* (April 22, 2012), https://www.egyptindependent.com/court-rejects-reviewing-draft-law-exercise-political-rights-nehal-news-1/ (accessed June 20, 2019).

ten out of 23 candidates running for president were disqualified right after applying. Even though many appealed, only Ahmed Shafiq's appeal was accepted (for reasons that go beyond the scope of this study). Shafiq had served as Minister of Civil Aviation from 2002 to 2011 and even as Prime Minister from January 31, 2011, until March 31, 2011. In fact, once the law was put into force, the PEC,[996] which was the body empowered to implement the exclusion law and had initially accepted Shafiq's candidacy, annulled it retroactively. Shafiq appealed against this decision of the PEC and demanded a transfer of the matter to the SCCE on the basis that his political rights were breached. The PEC did so.[997]

When Shafiq brought a suit against the law's validity, there was no dispute regarding the meaning of the relevant portion of the legislation. The only issue was whether the law was 'constitutional' or not. The SCCE ended up ruling that it was not constitutional. In short, it stressed that the principle of separation of powers, which was recognized in the Constitutional Declaration, intended that parliament could not use its legislative powers to tamper with matters vested in one of the other branches of government, in this case, the judiciary. Art. 19(2) Constitutional Declaration provided that 'there is neither a crime nor a punishment except in accordance with a law, and no punishment may be administered except as a result of a judicial ruling.' On the grounds of this provision, the SCCE gave a particularly extensive interpretation of the term 'punishment,' concluding that excluding somebody from the right to run for a political office is, in fact, a 'punishment'. As such, it requires a prior judicial ruling. Hence, since the challenged law determined a legal consequence without a judicial ruling, it breached the constitutional principle of the separation of powers and of judicial independence. The SCCE also ruled that said law infringed the most basic of political rights, which stands at the basis of democracy, by denying voters the opportunity to elect whoever they want. It even violated the constitution's principle to equality by depriving one specific group of Egyptian citizens of their

996 Back in the 2005, constitutional amendments, a Presidential Election Commission (PEC) was established, which had the task to supervise the electoral process. Members of this body controversially included the chief justice as well as another member of the SCCE. Up until 2011 the composition of this body was regulated by law, yet after 2011, the PEC was now instituted under the Constitutional Declaration.

997 SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012, 17.

political rights without acceptable justification. Finally, the retroactivity of the PEC's application of the law was also questioned; the law allowed punishment for a behavior that was legal at the time, and so it also violated Art. 8 of the Constitutional Declaration.

Shafiq ended up winning the case against the PEC, even coming dangerously close to winning the presidential election, narrowly losing to Morsi in the runoff election.

cc) Comments on the Case

If the first case represented a first direct clash between the SCCE and the Islamic-led parliament, this case was just a continuation (and escalation) of the conflict between these two branches of government. Unlike the first case, however, this time the SCCE is much more explicit and to the point, probably realizing the importance of the cases, and the issues treated therein, in the transitional setting.

– *Asserting its jurisdiction upon the case:* One of the first issues the court dealt with in the preliminary examination of the case was the asserting of its own jurisdiction. When the PEC decided to transfer the case to the SCCE, this did not come without problems. Art. 29 of the Law on the Constitutional Court No. 48/1979 stated that 'a court, or *any other judicial forum* [emphasis added]'[998] was permitted to forward a case to the SCCE. At issue was the meaning of 'judicial forum'; in particular, the question landed on whether the PEC was in fact a 'judicial forum' or simply an 'administrative body', and thus whether or not it was allowed to transfer the review of the law to the SCCE.[999] The SCCE ended up interpreting the PEC as a 'judicial forum'. *In casu*, to come to this conclusion, the SCCE examined a series of the features that institutions and their members had to satisfy in order to be classified 'judicial

998 Art. 29 of Law No. 48/1979, quoted in Moustafa, 281.

999 Before reaching the SCCE, lower instances had annulled the PEC's decision arguing that the PEC was an 'administrative body'. See Mona El-Nahhas, "Judicial Wrangling," *Al-Ahram Weekly* (May 17, 2012), https://www.masress.com/en/ahramweekly/29799 (accessed September 23, 2019). See also, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012, 20. In the present case, the SCCE discusses in great detail the issue, thus resolving the conflict among the other courts.

forums', such as a judicial background of its members, an own budget or enough opportunities for candidates to appeal.[1000] The SCCE could have easily rejected the case by defining the PEC as an 'administrative body' and avoid the hustle and risk of even more friction with the legislature. Yet, the SCCE ruled on the case, and thus revealed its move as deliberate intervention into the political power-struggle in the run-up to the elections. In any case, by deliberating on this issue of admissibility in great detail, the SCCE showed a pronounced will to rule on this particular law taking up the opportunity to make its stand against the Islamists.

– *With regards to separation of powers and judicial independence:* In the same case, the SCCE emphasizes how the provisions at issue breach the principle of the separation of powers. Accordingly, the Constitutional Declaration of March 2011, as typical constitutions do, guarantees basic rights and regulates state organization. For instance, Articles 33 and 46 respectively regulate the competences and powers of the legislature and those of the judiciary. As the principles of the separation of powers commonly states, and according to these constitutional provisions, one branch should not encroach the other; that is, the legislative power is not permitted to intrude in the area of competence of the judiciary. At the same time, in Art. 19(2) it is specified that: 'all crimes and all penalties shall be based on the law; penalties shall only be imposed by virtue of a legal verdict […].' In other words, a penalty or punishment in general can only be imposed by virtue of a legal ruling. Issuing legal verdicts is clearly a competence of the judiciary. In this sense, the SCCE stressed how this was valid not only for criminal punishments, but also other penalties, such as the deprivation of specific rights and freedoms. Accordingly, *in casu*, the SCCE deemed the deprivation of the exercise of political rights as a penalty without legal verdict, ensuing a violation by the legislative authority of the power of the judicial authority, and an undue supposition of those powers from the legislation. This thus resulted in a violation of Art. 19 and 46 of the Constitutional Declaration. As mentioned before, the SCCE's judges reject any breach of their independence, not only guarding their professional domain, but rather judging this infringement against the background that they are

1000 See, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012.

the only institution with the public's interests at heart.[1001] In this sense, the SCCE rejected the amended law as it considered it to be a veritable encroachment onto the judiciary's area of competence. In other words, the SCCE regarded the amended law as evidence that the Islamic-led People's Assembly clearly disregarded the position and status of the SCCE.

– *Upgrading the Constitutional Declaration* (*legitimizes the SCAF*)*:* In this decision, unlike the previous one, the SCC explicitly asserts that the 1971 Constitution is not in force anymore, making it 'judicially official' that the Constitutional Declaration is the highest norm the SCCE bases its jurisdiction on:

> 'Accordingly, this court performed its judicial oversight of this text in light of the contents of the provisions of the Constitutional Declaration issued on 30th of March 2011, considering this the constitutional document governing the affairs of the country during the transitional period through which the country is currently passing after the suspension of the provisions of the Constitution of 1971, by virtue of the first Constitutional Declaration issued on 13th February 2011.'[1002]

The difference in reasoning on this matter between the two cases is most likely related to the fact that this time the court does not have any legal source it can refer to, whereas in the first case, there were legal precedents the SCCE could resort to. In other words, the SCCE's only legal basis available for the constitutional review was the Constitutional Declaration.

– *Protecting fundamental rights:* Moreover, in the judgement, the SCCE turns to emphasize the importance of safeguarding fundamental rights of the Constitutional Declaration, for many were also protected by all previous Egyptian Constitutions. The SCCE briefly assesses the possible violation of both the political rights of the Egyptian citizens and the principle of equality before the law.[1003] Without going into details, first, when it came to the political rights guaranteed in the Declaration, the SCCE maintained that their suspension had occurred 'without an expediency or justification accepted by the provisions of the Constitutional

1001 Rutherford, 64.

1002 See, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012, 21.

1003 See, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012, 23–25.

Declaration.'[1004] When it came instead to analyze the principle of equality, as established in Art. 7, the SCCE admitted that the principle of equality could be restricted under certain circumstances according to 'logical standards.'[1005] However, also here, the SCCE finds that the disputed provisions contain an 'arbitrary discrimination which is not dependent on or justified by a subjective basis. It also adopts a legislative division between citizens, which is not based upon logical principles [...].'[1006] Accordingly, the SCCE maintained that the disputed provisions violated Articles 7 and 8 of the Declaration. In any case, the SCCE further brought the above-mentioned assessment under the light of the notion of the 'state of law', maintaining that the disputed provisions also breached said notion, as they did not specify a requirement to prove that the citizen holding any of said public offices took any actions that could justify this restriction of political rights. In this sense, the SCCE stressed how:

> 'The State's subjugation to the law, determined in light of the concept of democracy, ensures that it does not violate legislation on the rights received in a democratic state, assuming firstly the existence of a state of law and its essential guarantee to uphold the rights and dignity of the people and their complete personhood [...]'.[1007]

At the same time, the SCCE added the following:

> 'It contradicts the concept of the state of law if the State should decide upon a punishment, either criminal, disciplinary or of a civil nature, with retrospective force, which is implemented for actions which were not considered to constitute a criminal offence, an administrative wrong or a violation requiring compensation at the time when they were committed.'[1008]

1004 See, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012, 23.
1005 See, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012, 24.
1006 See, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012, 24.
1007 See, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012, 25.
1008 See, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012, 25.

In other words, the imposition of a retrospective penalty was in any case an enough reason to declare the disputed law unconstitutional, on the basis that it violated the 'state of law'.

In sum, according to the arguments briefly elucidated above, the provisions violate the Constitutional Declaration on a number of issues. But the SCCE did not stop there; finally, it openly condemns the parliamentary attitude in the drafting of the amendments:

> 'If each constitutional violation distorted this text as shown, this in itself would be sufficient for it to be annulled, even without considering the total of all these constitutional defects and without the matter being concealed from the members of the legislative council, as revealed in the relevant minutes of the People's Assembly, and the inclination of the majority of the council to ignore the issue and its adoption of the draft law which deliberately shuns the purposes which the legislation must intend, a matter which loses in its public character and neutrality, and which tarnishes it with the disgrace of legislative distortion.'[1009]

In other words, the SCCE clearly considers the deliberate choice of the parliament to ignore the law's constitutional flaws a colossal blunder and flagrant overstepping of competences by the legislature.

dd) Concluding on the Case

Again, here, the dilemma of the SCCE lurking between politicization and the necessity of being perceived as independent and neutral is revealed, and is even more apparent than in the first ruling. Particular attention is paid to the discussion of the PEC's nature as 'judicial forum', indirectly admitting that this decision is political (even though it is embodied as legal interpretation) and represents a great threat to its own authority. Rejecting the case would have undermined its own status and independence, whereas by admitting the case, the SCCE risked the direct clash against the legislative power.[1010]

1009 See, SCCE Decision No. 57, *Ahmad Muhammad Shafiq Zaki v. Presidential Election Committee*, Judicial Year 34, June 14, 2012, 25.

1010 This evokes Ginsburg's 'strategy of case selection', according to which apex courts need to strategically pick their cases carefully in order to avoid clashed with other branches, and thus noncompliance with their rulings. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 86 – 89.

In comparison to the first case, here the SCCE is not shy in admitting that the Constitutional Declaration served currently as the 'highest norm' in the Egyptian legal system. The reason thereof is probably the fact that this time, the only legal source the SCCE could resort to was the Constitutional Declaration. Only by relating to this constitutional document could the SCCE justify why disenfranchisement legislation represented a breach of the separation of powers, the principle of equality and of the 'state of law'.

Considering these facts, and the arguments depicted above (especially the keenness in defining the PEC as a 'judicial forum'), it is evident that the SCCE was very eager to take on the case. At the same time, the tone at the end of the judgment that the SCCE uses in communicating the People Assembly's activities as illegal infringements of the competences of the judiciary, helped to reveal even more how the decision was used as a *Kommunikationskanal*[1011] to transmit the message that the SCCE reputes the legislative behavior of the parliament as intolerable, and this not only with regard to the disputed disfranchisement legislation, but especially with regard to the envisioned amendments to the SCCE's law itself.

2. Preliminary Conclusions on the SCCE during the First Transitional Period

To correctly assess the position of the SCCE, I believe one must look at the decisions from both angles: legal and political.

In my opinion, the SCCE's legal position in both cases is justified. In the first case, the parliamentary election law allows independent candidates to take part in the elections, but then discriminates against them.[1012] In the second case, the disfranchisement law can also be condemned for affecting only certain specific candidates and for the timing of the law; the retrospective character of the amendments and the breaching of the principle *nulla*

1011 German for 'communication channel'. In his extensive study on the decision-making and objective-developing process of the German Federal Constitutional Court, Kranenpohl also examines the challenges of the court to produce legitimacy through different communication channels. See specifically parts of the results of its research at Uwe Kranenpohl, *Hinter Dem Schleier Des Beratungsgeheimnisses: Der Willensbildungs- Und Entscheidungsprozess Des Bundesverfassungsgerichts* (Wiesbaden: VS Verlag, 2010), 499–501.

1012 Naeem, 104.

poena sine lege both embody significant challenges for legal systems in constitutional transitions.

The political position of the SCCE is, in my opinion, also justified. The SCCE sees its capability to perform as an apex court, but even its own survival, genuinely threatened by the legislature's behavior also within other political events, such as Morsi's candidacy to the presidency, the Constituent Assemblies dominated by Islamists, and this within a transitional context in general. The SCCE does actually an outstanding job in developing its own authority and acceptance within a fragile and unclear constitutional framework. Maintaining a high standard of authority within the community without really having 'hard' legal power resources in the transition was a great achievement of the SCCE, the lack of which would have possibly meant the end of its existence. As this source of authority is only weak, the SCCE needed to take also on a more political attitude, which other apex courts in transitional settings did not have. The SCCE had to wield additional influence on politics in order to guarantee its own survival, and this of course, requires extra-judicial means.

The SCCE's dilemma is thus revealed in both cases, yet the way the SCCE approaches it is different. A clear difference rests in the way the court defines the legal basis for the case: in the first case, it tends to avoid defining the Constitutional Declaration as the highest norm in the legal system probably because here the SCCE can rely on its previous jurisdiction, whereas in the second case, no other legal resource is available.

Another element revealed differently in both cases is the way in which the SCCE saw its own role within the transition. In the first ruling, the SCCE seems more confident about its own role because its dilemma can be solved by relying to its former precedents. In this sense, the decision in the first case was not surprising for anybody, even though despite the legally justifiable arguments of the court, a core segment of the reasoning of the judgement assumes rather than factualizes. In the second decision, instead, the SCCE lacks an alternative legal basis other than the Constitutional Declaration and thus it can only refer to this 'hard source of legality' in order to make its argument. With this in mind, the SCCE has no other choice than to reveal its nature. Its perception of the transition becomes evident. The SCCE's tone at the end of the decision is proof that it is not hiding behind the SCAF, but rather it is showing the

teeth in order to develop its authority and make a stand in the transitional setting.

Additionally, what could also be an indication of the SCCE's political spirit revealing itself, is the rapidity of the judgements. As Brown rightly reminds with regards to the first case:

> 'What was extremely startling in the case even for such observers was the rapidity of the ruling. On the two previous occasions, it had taken several years for a case to find its way to the SCC and for the SCC[E] to decide. On this occasion, the SCC[E] issued its ruling hours after hearing the arguments. [...] Thus, as thoroughly as the ruling might have been grounded in legal precedent, its timing was inexplicable outside of the political context in which it was issued.'[1013]

II. The SCCE under Morsi's Regime and the 2012 Constitution

1. Under Morsi's Regime

These were not the only cases of the SCCE, of course. Unfortunately, however, the SCCE's rulings are only rarely translated and thus their analysis from a non-Arabic speaker relies almost entirely upon other resources. Yet, the SCCE's has shown its face in other occasions. For instance, once Morsi was elected president, the friction between presidency and the SCCE (on top of the one that existed with the legislature before its dissolution) increased. First, Morsi tried right after his election to repristinate the dissolved parliament. His attempt was blocked by the SCCE, which invalidated Morsi's decree.[1014] In October 2012, a first constitutional draft was published, which provided for an *a priori* review for all election laws,[1015] as well as a decrease in the number of SCCE justices to eleven. In using *Kommunikationskanäle*[1016] other than judicial

1013 Brown, "Egypt: A Constitutional Court in an Unconstitutional Setting" 7.

1014 See, Aziz, 5.

1015 See, Democracy Reporting International, "Draft Constitution of the Arab Republic of Egypt (Unofficial Translation)," *Democracy Reporting International* (2012), http://democracy-reporting.org/wp-content/uploads/2016/03/egypt_draft_constitution_unofficial_-translation_dri.pdf (accessed September 20, 2019).

1016 See, (fn. 1012) above.

decisions (that is, for instance, a press conference), the SCCE publicly declared in response that these provisions would be 'a step backwards and a flagrant intervention in the court's affairs.'[1017] In doing so, the SCCE tried to gain more influence on the topic, the same as it had done back during the Mubarak regime on a similar issue.

As already mentioned, in November 2012, expecting a negative ruling of the SCCE with regards to the second Constituent Assembly, Morsi issued another Constitutional Declaration with the aim to try to protect the constitution-building process from judicial review. At the same time, it pressured the second Constituent Assembly to finish the constitutional draft as fast as possible before the famous six months deadline would expire. These steps increased friction between the presidency and the SCCE, but also in general between the Islamists and the secularists, and triggered severe demonstrations.[1018] When the SCCE came together to rule on the second Constituent Assembly as well as the *Shura* Election Law beginnings of December 2012, pro-Morsi supporters protested in front of the SCCE and even barred the justices from entering the building. In response, the SCCE declared it 'the blackest day in the history of Egyptian judiciary'[1019] and officially announced an indeterminate suspension 'of the court sessions until the time when [the justices] can continue their message and rulings in cases without any psychological and material pressures. [...] The court registers its deep regret and pain at the methods of psychological assassination of its judges.'[1020]

Arriving to such 'political' measures was probably the only way for the SCCE to secure its own existence. Morsi's and its supporters' acts against the SCCE, such as the Constitutional Decree, the blockade of the SCCE's building, as well as the noncompliance with its rulings had rendered the court incapable to fulfill its main function of constitutional review. This

1017 Maher al-Beheiry quoted in Egypt Independent, "Maher Al-Beheiry to Lead Constitutional Court in Troubled Political Scene," *Egypt Independent* (May 30, 2012), https://egyptindependent.com/maher-al-beheiry-replace-sultan-head-constitutional-court/ (accessed October 23, 2019); "Scc President: Court's Status in Draft Constitution 'a Step Backwards'," *Egypt Independent* (October 16, 2012), https://egyptindependent.com/scc-president-court-s-status-draft-constitution-step-backwards/ (accessed October 23, 2019).

1018 Brown, "Egypt: A Constitutional Court in an Unconstitutional Setting" 2.

1019 BBC, "Egypt Court Halts All Work Amid Islamist 'Pressure'," *BBC News* (December 2, 2012), https://www.bbc.com/news/world-middle-east-20571718 (accessed October 23, 2019).

1020 SCCE quoted in ibid.

situation created a situation, which fundamentally endangered the existence of the SCCE as it marginalizes.[1021]

2. Under the 2012 Constitution

Under the 2012 Constitution, the SCCE actually moved to stabilize constitutional life and accept the constitutional document. Such behavior was not taken for granted; in fact, many observers, particularly those who saw the SCCE as a garrison of the old regime, questioned how the SCCE would approach the new constitutional environment.[1022] For instance, in an almost undetected ruling at the end of 2012, the SCCE gave a strong signal that it was backing away from confrontation. In November of that year just as the head-to-head between the Islamist president and the opposition was taking place on the streets, the SCCE issued a decision upholding a ban on diplomats marrying foreign citizens that marked a drastic departure from its past line of jurisprudence.[1023]

This was, not because it had changed its mind however. As the SCCE's main function was to adjudicate constitutional disputes, it had basically no choice but to rule on what the constitution actually contained, remaining thus within its judicial competence and not itself encroaching on other branches' functional areas. This did not mean that objectively the SCCE's performance lost its political character with the new 2012 Constitution; as Brown correctly asserts:

> 'In a sense, the task that the SCAF had tried to assign the SCC[E] in June 2012—allowing it to review the draft constitution before it was submitted to voters—lived on in spirit because after promulgation, the new constitution could only be implemented if the SCC[E] treated it as an authoritative document. And that was an intensely political task because many within the opposition regarded the constitution as illegitimate. And the SCC[E] also had the legacy of the al-Murr years to carry as well—a series of clear precedents on political matters that had become a core part of the Court's self image and therefore difficult both jurisprudentially and institutionally to repudiate.'[1024]

Eventually, this practice resulted nevertheless in playing in favor of the Islamists: their constitution was acknowledged by the highest court of the

1021 See, Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 73–74.

1022 Brown, "Egypt: A Constitutional Court in an Unconstitutional Setting" 11.

1023 ibid.

1024 ibid., 15.

country, the *Shura* Council was retained (even though the electoral law for it had been deemed unconstitutional for the People's Assembly), and here and there, some of their constitutional disputes were upheld.[1025] Still, the SCCE did not hide its true character and occasionally used 'a tone that might best be described as deeply annoyed'[1026] in its rulings. A set of three judgements of the SCCE revealed these traits on June 2, 2013: one overturning the electoral law for the *Shura* Council (yet tolerating it to continue operating until a new People's Assembly was elected),[1027] another invalidating the law governing the (second) constituent assembly, and one overturning a provision of the country's emergency law.[1028]

a. Case Overturning the Electoral Law for the Shura Council

The first case was the one everybody was expecting given that the SCCE had ruled unconstitutional the electoral law on which the People's Assembly election was based.[1029] Here, the SCCE also invalidated the electoral law for the *Shura* Council, basically on the same argumentation used for the People's Assembly election law ruling. At the same time, however, it allowed the *Shura* to continue in operation until the new Lower Chamber was seated. What changed from the last decision on the parliamentary law was that the 2012 Constitution included a specific provision (Art. 230), which halted the invalidity of the *Shura* Council. In fact, Art. 230 provided that the Consultative Assembly (that is, the new designation for the *Shura* Council], as constituted as of the date of the constitution's approval, would not only continue acting within its previous functions, but would assume all legislative powers until such time as the new House of Representatives (that is new designation for the People's Assembly] could be elected and seated, at which point all legislative powers would be transferred to it. Only after a new Consultative Chamber would be elected,

1025 ibid.
1026 ibid.
1027 Which would eventually only take place at the end of 2015 under the new 2014 Constitution. In other words, Egypt remained without a full parliament for basically three years.
1028 Brown, "Egypt: A Constitutional Court in an Unconstitutional Setting" 15–16.
1029 SCCE Decision No. 112, *Adnan Mukhtar 'Uthman Muḥammad v. The Chair of the Supreme Electoral Commission*, Judicial Year 34, June 3, 2013.

would the legislative authority be exercised jointly by both chambers in accord with the legislative provisions of the 2012 Constitution.[1030]

b. Case Overturning a Provision of the Emergency Law

A second case overturned a provision of the country's emergency law, which had little short-term effect, but potential impact in the future.[1031] Indeed, when it issued the ruling, the law was suspended since there was no state of emergency in effect (there were admittedly some lingering effects of Egypt's past state of emergency, which lapsed in 2012, still in effect, such as trials and imprisonment of individuals charged at that time). The provision struck down was minor, but this is an area the SCCE had not dared to step on in the Mubarak years.[1032] This revealed how possibly some justices were still annoyed by Egypt's emergency regime, yet were never daring enough to question it under Mubarak. Now, in 2013, the emergency law was not such a 'hot potato' anymore for the SCCE.

c. Case Overturning the Law Governing the (Second) Constituent Assembly

Instead, on the (second) Constituent Assembly, the SCCE was faced with an intertwined issue indeed. The simple question before the SCCE was whether the law by which the Constituent Assembly had been elected was constitutional or not. Whilst the problem to solve seemed to be technically straightforward, in fact that legislation had been enacted *after* the assembly itself had been appointed. In this sense, it was not clear what an invalidation of the law would result into (especially now that the new Constitution had already been drafted and accepted in a popular referendum).

In its ruling, the SCCE *invalidated the law but at the same time it endorsed the 2012 Constitution and implicitly stressed how the matter should never have been brought before it in the first place.* This ruling fits perfectly in the new era the SCCE court finds itself and the way it felt about the new order.

1030 See, Fadel, 949.
1031 Brown, "Egypt: A Constitutional Court in an Unconstitutional Setting" 17.
1032 ibid., 17–18; Moustafa, 8.

Without having to search for other words, Brown nicely explains how the SCCE untangled the issue:

> 'In March 2011, the SCAF issued its constitutional declaration which provided for parliamentary elections. The elected members of both chambers of parliament were supposed to elect a constituent assembly. This they did. But the administrative courts dissolved the assembly because they claimed it was not representative and because parliament had named some of its own members to the body. The administrative courts claimed jurisdiction by saying that the parliament was acting in an administrative capacity when it elected the constituent assembly. To comply with the ruling, the parliament elected a second constituent assembly. But the deputies still named a few of their own members to the body. Worried that the administrative courts would dissolve the second Constituent Assembly, the parliament then passed a law justifying what it had done. The purpose of the law was to keep the matter out of the administrative courts because now the parliament was acting in a legislative rather than administrative capacity (a distinction that only years of Egyptian legal training could help one make). It might perhaps be up to the SCC[E] to rule on the constitutionality of the law, but that would take time while the assembly carried out its task. That draft law was passed by the parliament sent to the SCAF for approval, but the SCAF did not act. In June 2012, shortly after passing the law, the parliament was dissolved. And Muhammad Morsi [...] was elected president. After taking office, Morsi approved the law. When a lawsuit was filed against the second constituent assembly in administrative court, the judges there decided to send the matter of the law over to the SCC[E]. The question before the [SCCE] centered then on the law passed by the parliament to justify what it had done. In its ruling, it was up to the [SCCE] to decide whether this was an administrative or a legal matter—or perhaps something different, a "political act." The idea of "political acts" is the SCC[E]'s preferred term for what had been called "acts of sovereignty." These are acts that are not ones subject to judicial oversight. While accepting that there are such acts, the SCC[E] insists that it alone has the authority to decide what is a political action. In this case, the SCC[E] reasoned that the constitutional declaration meant to make the entire procedure of electing the Constituent Assembly something special, outside of regular channels. It was not a normal administrative act. Nor should the parliament be passing laws, restricting or defining the process because the body that elected the Constituent Assembly (that body was not the parliament acting normally but a special assembly of all elected members of the two chambers) was not subject to parliamentary laws; it had been called into being by constitutional text and the voters' will. So the law on the subject was unconstitutional. But that did not remove the legitimacy of the Constituent Assembly, it affirmed it. The SCC[E] did not specifically declare that the election of the Constituent Assembly was an act of sovereignty, but the Court seemed to be drawing on that mode of thinking. The implication was that no court should be reviewing what the parliamentary deputies did when they elected the second constituent assembly. Rather than throwing the second Constituent

> Assembly under a cloud, the ruling might easily be taken to imply that the first one never should have been dissolved.'[1033]

Hence, the ruling was a clear exoneration of the Islamists' actions when it came to the validity of the Constituent Assemblies. Yet, on this particular issue of recognizing the legitimacy of the Constituent Assemblies, and even though the SCCE ended up affirming such legitimacy, it also maintained its line and stressed how the law was unconstitutional. Additionally, the SCCE explicitly expressed how the 'revolutionary period' was one that ended with the elections of both chambers of parliament and the president. Accordingly, Morsi had no authority or power whatsoever to issue constitutional declarations, and the consequences thereof would have been theoretically far-reaching. In fact, Morsi's constitutional declarations had removed the SCAF's political role and also had secured the constitutional process. As Brown states: 'reversing those declarations would throw the entire constitutional process and structure of Egypt into doubt' if, of course, the SCCE simultaneously was not making it clear that the 2012 Constitution was an accomplished fact.[1034]

Eventually, all that Morsi received was the equivalent of a 'stern scolding'.[1035] The SCCE showed clear discomfort at the emerging Islamist rule and its actions and displayed this resentment also on other occasions. For instance, in the earlier judgments, it had simply implemented the 2012 Constitution without comment, yet by 2013 it added more than just 'loud silence'. In general, it respected the 2012 Constitution as the one in force, but the tone of some judgements revealed that justices were upset:

> 'Their attitude sometimes came off as institutional modesty (judges have to respect the clear will of the voters), sometimes as resignation (the 2012 constitution was a fait accompli [emphasis added]), and sometimes as barely muffled outrage.'[1036]

In sum, these decisions definitely ended the discussion over whether the 2012 Constitution was the highest norm in Egypt, and as we have seen, even if it did not seem like it, it was a highly political task because many within the opposition considered the 2012 Constitution to be illegitimate. In any case, despite the SCCE's character, it seemed that the SCCE had accepted that

1033 Brown, "Egypt: A Constitutional Court in an Unconstitutional Setting" 16–17.
1034 ibid., 17.
1035 ibid.
1036 ibid.

the 2012 Constitution was now the valid Constitution, yet it did not really matter much, as the SCCE did not have so much time to develop its jurisdiction based on the 2012 Constitution. On 3 July 3, 2013, the 2012 Constitution was suspended.

III. The SCCE during the Second Transitional Period and in the Aftermath of the Military Regime

By asking the SCCE to rule on political controversial laws, it only enhanced the polarization between the Islamists and the secularists, and confronted the court even more with its dilemma, that is, on the one hand, accepting the validity of the constitutional law at hand (first the Constitutional Declaration and then the 2012 Constitution) and having to accept it as the basis for its judicial authority and, on the other hand, the SCCE's wish to obstruct the Muslim Brotherhood's increasing seizure of power, which can be traced when the SCCE argues in the Parliamentary Electoral Law case by using an assumption rather than facts and the irritated tonality at the end of the Disenfranchisement Law Case. As a consequence of the SCCE's decisions, the polarization augmented and the conflict between the judiciary and the legislature and executive, that is between 'old' and 'new' elites, worsened into an extended constitutional crisis ending with the overthrowing of Morsi.

If we deem the two above-mentioned cases as 'political' in their nature, in the second transitional period, the SCCE indirectly was given a central political role. Mansour, a justice from the 'golden age', was instated as *interim* president. The chief justice was usually not in line of succession under the 2012 Constitution, but he had been under the 1971 Constitution (cf. Art. 84). Thus, for the first time after the fall of Mubarak, a member of an old institution of the suspended 1971 Constitution attained the essential political role to supervise the new process of constitution-making. Under Mansour, the SCCE accelerated the drafting of a legislation on parliamentary elections and the forming of a committee to advance with the constitution-making process. Apparently, it even requested that a 'pact of honor' would be made with the media as to ensure their professionalism during the constitution-making process. This period of the second transitional period was characterized by a union between the

judiciary and the military both symbolizing the secularists.[1037] It goes without saying that the Court here took on a veritable primal role in the constitutional transition

Instead, after the military regime, that is once the 2014 Constitution was enacted, the SCCE took on a slightly different role than it did before. If during the constitutional transition its performance was characterized by rulings marred with political activism, in the new regime, the SCCE somehow 'quietened down'. It almost appears as if the SCCE realized that the danger to its existence had vanished and it could finally breathe. For instance, no judicial opposition was raised to the law No. 107/2013 restricting peaceful political demonstrations and regulating public gathering of more than ten people. The law facilitated the government to ban popular demonstrations and dissolve protests on rather ambiguous grounds. Judicial opposition was also lacking in the case of the flagrant restraint of the freedom of speech, freedom of information and press as a consequence of the detention of many journalists for issuing opinions against the new regime. Death penalty sentences have even increased ever since Sisi came to power. Hence, we cannot talk of mere judicial inactivity, but rather active connivance and participation in the repression of the new regime.[1038]

E. Preliminary Conclusions

The constitutional transition of Egypt has been marred by constitutional instability, and uncertainty. This has resulted in the transition being literally split into different periods, during which the SCCE has adopted slightly, if not completely, different behaviors. 'First, during *the transition* the court was actively trying to diminish the effects of the Islamist victory in the first democratic elections in Egypt (the Decision of 14 June 2012 of dissolving Parliament is a good example of this political strategy); second,

1037 See, Abat i Ninet, 220.

1038 See, ibid., 221 – 22. On the possible contemporary role of the SCCE as a tool of repression, see International Commission of Jurists (ICJ), " Egypt's Judiciary: A Tool of Repression – Lack of Effective Guarantees of Independence and Accountability," *International Commission of Jurists* (*ICJ*) (2016), https://www.icj.org/wp-content/uploads/2016/10/Egypt-Tool-of-repression-Publications-Reports-Thematic-reports-2016-ENG-1.pdf (accessed September 30, 2019).

during *Morsi's mandate* and following the military intervention, the focus shifted to the strategy of stopping any political initiative of the President;' and finally, in the *aftermath of the military regime* the decisions and omissions of the judiciary resulted in the SCCE being the precursor of Sisi's repression.[1039] In other words, the SCCE's behavior in Egypt' constitutional transition has been more like a biased roller-coaster, trying to survive the radical constitutional change Egypt was going through, adapting to the political arena. This, without counting the completely different way of acting *before Mubarak's ousting*, when the SCCE was first established as a rather hegemonic preserver by Sadat, but soon under Mubarak, it developed a strong judicially independent line of jurisprudence (the golden age), which however culminated with its packing by the same Mubarak. Even though this did not happen during the constitutional transition, it adds a couple of 'loops' to the SCCE's behavioral roller-coaster.

This case study is a paradigmatic example of the difficulties that appear when trying to understand the role of the apex courts in transitional periods. No matter how an apex court is structured, composed or even what legal tradition the court is based on, it is bestowed upon it to uphold its crucial role and prestige within the state institutional framework. This pre-existent prestige of the SCCE helped assessing its own role in the transition because it already had one. The SCCE therefore did not have to assert its stance from scratch. The SCCE had a high level of independence for an apex court placed in an authoritarian regime and it was a model for other apex courts in the Muslim world. The role that the highest court in the Egyptian judiciary played in the constitutional transition was congruent with its historical struggle against political Islam. It was also consistent in the defense of its own political and institutional power and the complicity with the SCAF and the presidency. To expect a judicially restrained court in the transitional period was unrealistic, but the judiciary jumping on the political bandwagon of Sisi's repression has been astonishing and has affected the prestige of the Egyptian judiciary.[1040] In Egypt, the same SCCE that during the golden age had 'developed to become a progressive guardian of some human rights, a [*Hüter*] *der*

1039 See, Abat i Ninet, 214–15.
1040 See, ibid., 222–23.

Verfassung (guardian of the constitution) is now, under Sisi, the guardian of the regime.'[1041]

I. Summary

1. Did the SCCE Play a Role in the Transition?

It did not only play one role, but rather stepped into different shoes throughout the transition. The journey of the SCCE during the constitutional transition is mainly one of survival, at least until Morsi's demise. Finding itself in a polarized political context and not being an utterly new institution, the SCCE ended up having to side naturally with one or the other political forces. As seen, the history of the SCCE unsurprisingly made the apex court lean against political Islam. Soon into the transition it got entangled in a political power struggle with political Islam. This conflict with the emerging political Islam is not to be seen as the court playing a role trying to protect the old regime, but rather as a very independent institution that, probably due to this independence, was uncomfortable for every new power that threatened its independence.

After the SCCE had been instrumentalized for a decade primarily for the legitimization of electoral laws and election results, once Mubarak had departed, the SCCE had the prospect of once again being able to play a more important role in the political system. The decisions analyzed in this chapter reflect the contradictions and major challenges faced by the court in the face of political and constitutional developments in the upheaval: on the one hand, the court's interest in the validity of the law and its attempt to argue legally, which is significant against the background of the particular logic of constitutional authority. On the other hand, the desire of the judges to use the decisions to legitimize the seizure of power of the Islamists.[1042] Within this one broad context, the court's role was shaped.

1041 See, ibid.
1042 Naeem, 106.

2. What Role Did It Play?

a. The Roles of the SCCE throughout the Constitutional Transition

In the first transitional period the SCCE seemed to mainly adopt a protective behavior for itself. The political struggle between religious factions and the secularists was clear in the two first cases analyzed above and represented the main issue that characterized the Egyptian constitutional transition. In the Parliamentary Electoral Law case, the SCCE showed signs of trying to defend itself from changes that the Islamic led legislature was attempting to adopt with regards to the composition, status and competences of the SCCE. If we read it this way, this case showed a face-to-face between mainly two branches of government, the legislature and the judiciary, backed by the SCAF in the form of the executive. The Disenfranchisement Law Case was even more a direct clash between the two powers. Here, the secularist tried to defend the executive to fall also in the hands of the religious parties. Once elected, the Islamic-led People's Assembly tried right away to steer the transition in a clear direction, that is in consolidating the power of political Islam in the future of Egypt. The powers of parliament in influencing the transition were great, and thus it was not surprising that the Parliament Electoral Law Case ended up as it did. Apart from having the power to enact any law the way it deemed necessary (as for instance, the Disenfranchisement Law), the new parliament also had other powers which somehow facilitate the understanding (not necessarily the justification) of the SCCE's attitude mainly against the legislature during the transition. Among other powers, with regards to the transition, parliament was empowered with appointing the members to the Constituent Assembly tasked with drafting the new constitution of Egypt. Article 60 of the Constitutional Declaration of March 2011 defined the process by which Egypt would make a new constitution. The provision specified that, upon invitation by the SCAF, the elected parliamentarians of both chambers, would need to meet within 60 days of their election to appoint a 100-person Constituent Assembly. The Constituent Assembly would be tasked with the drafting of a new permanent constitution and was asked to do so within six months of its establishment. Once drafted, fifteen days thereafter, the constitution

would then be submitted to a popular referendum.[1043] The provision, however, did neither specify how the parliamentarians should select the members of the Constituent Assembly, nor did it stipulate their qualifications. Elections for the People's Assembly took place in November 2011, and the *Shura* Council in February 2011, with the religious parties winning over 70% of the seats in both chambers (given the domination of the Islamists).[1044] Moreover, several parliamentarians themselves were elected as members of the Constituent Assembly. For this last very reason, the Supreme Administrative Court dissolved this Constituent Assembly, stating that that even though the Constitutional Declaration gave parliament the power to appoint the members of the Constituent Assembly, it did not allow them to elect themselves.[1045] A second Constituent Assembly was then assembled with fewer Islamists, yet it still included some members of parliament, triggering thus another judicial challenge. This shows the power of the legislature in the constitution-making process and, of course, the significance of the first case analyzed.

Under Morsi's regime this survival role increased, yet the strategy of the SCCE did not: protecting its own status by hindering every constitution-making effort of political Islam. Once the president was in the hands of political Islam, and even though the SCCE tried again to invalidate Morsi's efforts to finish a new Constitution as soon as possible, this period is characterized mainly by the use on both sides of extra-legal measures to fight the opposing forces. The SCCE tried to push their disdain of the new constitutional draft via public speeches and press conferences, yet this friction culminated with the SCCE being sieged in its own building and resulting in the SCCE's own suspension. This was probably the lowest point of the SCCE's journey in the constitutional transition. It was the closest the court got of being completely lost. So, once the 2012 Constitution was enacted, the SCCE dismissed the suspension and even

1043 See, Fadel, 943–44.

1044 See, ibid.

1045 The Supreme Administrative Court had based its ruling on the ground that parliamentarians who also served as members of the Constituent Assembly would have a conflict of interest that excluded the possibility for the to act as objective members of the Constituent Assembly. There are various theories concerning the best establishment and composition of a constituent assembly, see, for instance, Jon Elster, *Securities against Misrule: Juries, Assemblies, Elections* (New York: Cambridge University Press, 2013), 206–15; Tom Ginsburg, "How to Study Constitution-Making: Hirschl, Elster, and the Seventh Inning Problem," *Boston University Law Review* 96, no. 4 (2016): 1355–56.

though, as explained above, it did not esteem the new constitutional text, it played along and accepted it as the highest norm in the Egyptian legal system. In my opinion, this is yet another piece of evidence that the SCCE was trying to survive. Of course, technically speaking, the SCCE did not really have any other legal source to draw from in order to fulfill its judicial review function.

During the second transitional period, that is during the military regime, the SCCE somehow lived its own renaissance. With Morsi's demise also came the paradigmatic change in the court's behavior. Now that political Islam was basically out of the picture, the aggressive survival attitude of the SCCE was not necessary anymore, at least until Sisi's election. Instead, hand in hand with the military, the judiciary was now ruling the country. This was emphasized by the Chief Justice being thrust into the role of interim president during this new period of constitution-making. With no real opposing forces in sight, the constitution-making process ran rather smoothly this time. This is a clear example of the non-judicial roles (meaning the overstepping onto the political spectrum rather than remaining within the boundaries of the legal practice) required of judges sometimes during constitutional transitions.

A new behavior started to develop *once Sisi came to power*. In the first years of the new Sisi regime, the judiciary has been used to rather support the repression. Yet maybe it is still too early to understand why. Possibly because it preferred to remain prudent in order not to risk an instable situation as under Morsi. Consequently, it is still hard to see what position the judiciary will take in time. In time of crisis, even more than usual, the judiciary should act as a check on the arbitrary exercise of power by the state, that is the other branches of the government. In particular, it should ensure that the laws and measures that the new government adopts in order to address the transformation of society, comply with all elements of constitutionalism, in particular the rule of law and human rights.

One thing is clear; instead of respecting and reinforcing this role, during the constitutional transition since 2011, Egyptian governing authorities, no matter from which side, have tried to steer and use the judiciary for their own political gain (let us remember the expansion of the jurisdiction of military and emergency courts, the unilaterally dismissal the General Prosecutor, as well as Morsi's effort to immunize his decrees from constitutional review). All these moves, from one side to the other,

eventually have served to undermine the independence of the SCCE and corrode the elements of constitutionalism, instead of moving together towards their establishment and consolidation. The SCCE, by having to act politically during the transition for survival reasons, ended up failing to do its most important job in the transition: to facilitate it and consolidate the elements of constitutionalism. It failed to fulfil its indispensable role in upholding the rule of law and guaranteeing basic human rights throughout the transitional period.[1046]

In sum, the analysis in this case study shows how the SCCE started off as a veritable independent institution trying to survive a very fragile and instable constitutional transition, and ended up transforming itself more and more (especially ever since the overthrow of Morsi) as a primary tool in the repression of political opponents, journalists and human rights defenders.

b. The Role of the SCCE in Light of the Normative Constitutional Transition in Particular

The role the SCCE played in facilitating or not the normative constitutional transition, that is transiting from the 1971 Constitution to either the 2012 Constitution or the next one, the 2014 Constitution, really depends on the perspective.

From an internal judicial perspective, that is from its own view, I believe that the SCCE did not really play a role of facilitating the transition. In defending itself, it went against the political Islam in order to avoid being packed by them. In this sense, it ended up hindering the constitutional transition, yet it did so *mainly* not on the basis of hegemonic preservation. The SCCE did not really care about protecting old values, but was simply trying to protect its own status. That meant siding against the emerging political Islam, which, let us not forget, had won the popular support. This brings me, of course, to the ruling forces' perspective: political Islam had won the majority of the votes from the population. In this way, they had democratic legitimacy and thus, strictly legally speaking, the SCCE's behavior obstructing the Islamists efforts (good or bad they might have been) did not put the court under the role of facilitator of the constitutional transition, but rather the other way around.

1046 See, International Commission of Jurists (ICJ). 7.

In any case, the behavior of the SCCE in the constitution-making process for the 2012 Constitution did mostly show an obstructing performance not at all in light of establishing the elements of constitutionalism, apart from maybe protecting its own independence as a core feature of the rule of law. In the period leading up to the 2014 Constitution, the SCCE's played the dominant role, in the form of the Chief Justice as *interim* President of the country for the transitional period, of supervising and leading the entire second constitution-making process. A written Constitution, the central element of constitutionalism, was successfully drafted and passed in a referendum. In this sense, its facilitating role within the constitution-building process is confirmed. However, the role of facilitating the normative constitutional transition in establishing and consolidating the elements and features of modern constitutionalism (which in the case of Egypt would include the task to include Islam in the equation) has so far not shown positive signs, but rather frightening ones. The role the SCCE has taken on in the years after the enactment of the 2014 has probably undermined the entire transition to constitutionalism and is possibly one of the factors for its failure. However, it might be too early to assess its role in the last years.

3. How Did It Play Its Role?

The SCCE is not an exception to what I believe is a constant of the performance of apex courts in constitutional transitions: judicial activism. In fact, the SCCE was an apex court that could almost be seen as a paradigm of political behavior of the judiciary. Apart from the role given to the Chief Justice during the second transitional period, which is the most political an apex court can get, that is, stepping into the shoes of a political branch all together, the SCCE has been a very active institution within its role.

This judicially active behavior can be seen especially when, in the beginning of the transition, the SCCE needed to claim jurisdiction in an unclear constitutional panorama. This constitutional instability was given by the fact that the Constitutional Declaration of the SCAF, of March 2011, was lacking democratic legitimacy. A legitimacy that the SCAF thought it had earned after the people accepted the amendments to the 1971 Constitution in a referendum proposed by the SCAF itself. Hence, it was not self-evident that an apex court could claim jurisdiction over constitutionally reviewing laws promulgated *during* a constitutional transition (especially in cases where the impugned legislation established the procedures for

formulating a new constitution), which is a paradox in itself. This dilemma did not stop the SCCE from claiming jurisdiction. Hence the active label I would put on it. From a formal standpoint, the SCCE solved this potential issue, not by claiming that some sort of unwritten *Grundnorm* ruled the constitutional transition and gave it the right to supervise it, but rather by asserting that the SCAF's Constitutional Declaration of March 2011, was in fact Egypt's (*interim*) constitution. In other words, it acted as if its provisions granted it the power of constitutional review of all Egyptian laws, even those promulgated during the transition period. Often, in the aftermath of a revolution, a country remains under the rule of an older constitution until a new one is enacted or is governed under a state of emergency (often by the military). Instead, in the Egyptian case, the SCCE contributed to filling the transitional vacuum with the Constitutional Declaration of March 2011. In other words, it operated as though it were a regular apex court operating in a constitutionally stable period, implementing and interpreting a text that was both comprehensive and clear. Therefore, the activism of the SCCE during the constitutional transition was constantly based on the allegation that at all times it was exercising ordinary jurisdiction explicitly granted to it under a constitutional order that was fully legitimate and operative. For instance, the SCCE implied directly that the Constitutional Declaration of March 2011 was the highest norm in the country when it cited Art. 49 for the basis of its own jurisdiction over the case concerning the validity of the Parliamentary Electoral Law. Yet not only, in fact, also during the constitutional transition, the SCCE relied on several provisions of the Constitutional Declaration of March 2011 to rule 'unconstitutional' the Disenfranchisement Law. Using the exact same reasoning, later on, the SCCE even maintained clearly how it would have invalidated the law at issue with regards to the election of the *Shura* Council, but could not do it because the 2012 Constitution, which had been accepted by popular referendum in December 2012, had superseded the Constitutional Declaration of March 2011 by the time of its ruling, and thus had no choice but to reject the lawsuit. This is an incredibly subtle behavior from a constitutional law perspective. Furthermore with this in mind, Fadel's analysis facilitates the technical-legal understanding of this particular move and the consequences of the SCCE's behavior, in particular with regards to the moment the country switched to the 2012 Constitution:

> 'The irony, of course, is that the body responsible for the March 30 Constitutional Declaration was the very body responsible for the laws which the SCC[E] concluded violated, or would have violated, the March 30 Constitutional Declaration. The SCC[E], however, failed to account for how the drafters of the interim constitution could have so badly misunderstood the intent of their own document. The inescapable conclusion is that the label "constitutional" has a magical effect in the reasoning of the SCC[E]. Insofar as the SCC[E]'s decision in the third case endorses the notion that the illegality of the Consultative Chamber's election was irrelevant because the 2012 Constitution effectively ratified the result, it suggests that any rule, regardless of its content, if labeled "constitutional," acts as a supra-norm, even effectively ratifying previously illegal conduct. The consequence of such an approach to constitutional law is that any norm can function as a supra-norm as long as it is given the magical label "constitutional." The magical effects of the word "constitutional" in Egyptian legal discourse may help explain why, in debates surrounding the 2012 Constitution, many critics insisted on an ever-lengthier list of provisions replete with ever-increasing detail: when a constitution is interpreted entirely as an artifact of the arbitrary will of the sovereign, bright-line rules are the only plausible means available for limiting the arbitrary use of state power.[1047] An affirmation of constitutional silence, on the other hand, combined with an explicit reference to extra-constitutional norms, even if they are controversial, would at least have the virtue of making clear the constitutional values that a constitutional court believes are central to a legitimate constitution. When a court makes those "silent" norms explicit, it makes it possible to have public debates around the state's constituent values. When a court pretends, however, that it is simply following the commands of a sovereign, it instead encourages conflicting parties in society to take over the state and write a constitution that enshrines their own preferences explicitly into the constitutional text. In such a case, instead of mediating political conflict, a constitution enshrines it.'[1048]

Yet another evidence of the court's pro-active behavior during the constitutional transition was revealed at the beginning of the Parliamentary Electoral Law Case, during the court's preliminary examination. One of the objections made against the possible invalidation of the law at issue consisted in claiming that such measure would constitute an alteration of the design of electoral laws, which would be a

1047 See, for instance, Mohammad H. Fadel, "Khaled Fahmy's '32 Reasons to Vote No' for the Draft Constitution," *Shanfaraa* (December 2, 2012), http://shanfaraa.com/2012/12/khaled-fahmys-32-reasons-to-vote-no-for-the-draft-constitution/ (accessed September 20, 2019); Kyle Anderson, "Translation: Khaled Fahmy Offers 32 Reasons to Vote 'No' on the Proposed Constitution," *Blog: Occasional Musings on Egypt, the Middle East, and Matters of Varying Importance* (December 11, 2012), https://kylejanderson.wordpress.com/2012/12/11/translation-khaled-fahmy-offers-32-reasons-to-vote-no-on-the-proposed-constitution/ (accessed September 24, 2019)..

1048 Fadel, "The Sounds of Silence: The Supreme Constitutional Court of Egypt, Constitutional Crisis, and Constitutional Silence."

'political' rather than a 'constitutional' question. On this point, the SCCE rejected the claim by exposing its own standpoint over 'political questions.' It agreed that it is not an apex court's job to deal with political questions '[…] due to the nature of such actions and their close linkage to the political order of the state or its domestic or international sovereignty – [they] must be kept outside the scope of judicial supervision in order to preserve the state, defend its sovereignty, and uphold its higher interests.'[1049] In this sense, it rejects a judicial encroachment of the other two government branches. An apex court does neither possess the required information nor the 'scales of assessment' to review measures taken in such matters.[1050] Hence, in its reasoning, the SCCE shows that it is aware of a latent politicization of the judiciary in political questions. Nevertheless, *in casu*, it discards said politicization by defining the present issue in the case as non-political:

> 'The Supreme Constitutional Court alone is entrusted with examining the nature of the issues regulated by the appealed provisions. If these provisions are political actions, then they fall outside the Court's competence to conduct judicial supervision of constitutionality; if they are not, then the Court is free to oversee them. […] [I]n light of the fact that said stipulations specify the nature, framework and content of the legal system adopted and enacted by the legislator to regulate the entire electoral process, which according to its legislative nature and aforementioned content is not among the political issues that fall outside judicial supervision over constitutionality.'[1051]

This was not the first time the SCCE took this stance. Moreover, in the 90 s, it rejected similar claims that questions on the unconstitutionality of electoral laws were 'political questions'. With this case in mind, Adel A. Khalil also stressed how '[t]he court took a bold act of judicial activism when it rejected the government defense of "political question".'[1052] Therefore, signs of judicial activism were present even before the constitutional court, a factor that probably helps understand the even higher intensity of activism during a period of political instability, such as the constitutional transition.

1049 SCCE Decision No. 20, *Anwar Sabah Darwish Mustafa v. Chairman of the Supreme Council of the Armed Forces*, Judicial Year 34, June 14, 2012.

1050 SCCE Decision No. 20, *Anwar Sabah Darwish Mustafa v. Chairman of the Supreme Council of the Armed Forces*, Judicial Year 34, June 14, 2012.

1051 SCCE Decision No. 20, *Anwar Sabah Darwish Mustafa v. Chairman of the Supreme Council of the Armed Forces*, Judicial Year 34, June 14, 2012, 5 – 6.

1052 See, Adel Khalil, "The Judicial Review on the Constitutionality of Legislative Apportionment in Egypt: A Comparative Study," in *Democracy, the Rule of Law and Islam*, ed. Eugene Cotran and Omar Adel Sherif (Den Haag: Kluwer Law International, 1999), 306.

4. Why Did It Play That Role?

The present chapter has tried to delineate the Court's effort to assert itself in a politically complex and constitutionally 'silent' setting. Let us not forget that the Court found itself in an utterly polarized political situation, to which of course it contributed. The role of the SCCE can be explained by referring to a series of factors. Nevertheless, one cannot explicate the SCCE's role simply by referring to the fact that it was the same institution packed by Mubarak and thus picture them as *feloul* (that is, remnants of the ousted regime), which was the justification some critics have used.[1053] It would be too simplistic. The SCCE's situation is way more complex and pages over pages of possible factors would still not reveal an unbiased report of it all.[1054] In my opinion, as I have tried to expose in this chapter, what characterized most the SCCE's role in the constitutional transition was strictly linked to the fact that it was not a newly established court. As such, as the contextual analysis of the decisions shows, its legacy and previous jurisdiction and practice, and not necessarily the appointment by Mubarak, influenced the court's role, especially in taking a stance in the power-struggle against the Islamists.

Hence, the most important factor that helps understand the court's behavior is to be found in its history. In a constitutional transition, where an apex court exists, it can logically be either newly established (cf. South Africa or Tunisia) or pre-existing (cf. Turkey). The latter would also be the case of Egypt. The SCCE was not a newly constituted apex court. This is very surprising, especially in the context of a revolution, where you would expect a clean cut of legality and legitimacy, as well as institutionally. The reason in Egypt that the pre-existing court subsisted is most likely to be found in the way the revolution culminated. In a situation where the revolutionaries overthrow the government by force (for instance, by storming the state institutions), it is most likely that the new government will be rebuilt from scratch, unilaterally. This is typical of a case where legitimacy was broken like in South Africa, which adopted the roundtable

1053 See, Ahmed Aboul Enein, "Mubarak-Era Judges Retire Leaving a Legacy of Controversy," *Daily News Egypt* (July 2, 2012), https://wwww.dailynewssegypt.com/2012/07/02/mubarak-era-judges-retire-leaving-a-legacy-of-controversy/ (accessed September 23, 2019); Ahmed Taher, "The New Egyptian Constitution: An Outcome of a Complex Political Process," *Insight Turkey* 15, no. 1 (2013).

1054 See, Harders, 31.

form of constitution-making. The difference rests on the manner in which legitimacy is broken. A revolution would naturally be the paradigmatic contrary to the reform form of constitution-making, where legitimacy is normally not interrupted. This was evidently not the case in Egypt, where legitimacy was clearly interrupted, yet by passing its power 'voluntarily' to the military, it artificially forged a legitimacy bridge between the old regime and the military. Legitimacy was shattered, but the wounds were somehow dressed by handing power to the military. The military did not see the need to rebuild an institution like the SCCE, despite the 2001 packing of the SCCE by Mubarak. In any case, allowing a pre-existing court (with no new judge) to survive, the military left into an already polarized transitional situation a judicial institution with an already built idea of their country. In this sense, it probably just added more spark to an already unstable situation. In the South African case, instead, a newly established Constitutional Court was fully committed to the transition, rather than being still attached to older grudges, such as the conflict with the Islamists.

Ran Hirschl's thesis on 'hegemonic preservation', which sees judicial review also as a tool employed by once dominant political elites to safeguard their endangered status in transitional times against opposing elected majorities,[1055] facilitates the understanding of why the SCAF did not dissolve the SCCE. The military saw the SCCE in particular as an appropriate institution to preserve its financial interests (!)[1056] and political status in the future order and to help, of course, gain some legal legitimacy (because 'democratic' legitimacy would be only reachable through elections) to its rule after the suspension of the 1971 Constitution. Accordingly, the Islamic-led (conservative) People's Assembly perceived the SCCE as a 'bastion of the old regime and as an obstacle to their legislative

1055 See, Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 10–16.

1056 It is basically impossible to find the exact percentage of the economy of Egypt (or any other country) owned by the military. It is estimated to be at around 40 per cent. 'As theories of authoritarianism suggest, protecting the financial interests of the armed forces is one of the main endogenous factors behind increased military intervention in politics. A closely guarded national secret, the size of the army's economic assets can be gleaned from the vastness of its commercial holdings.' See, Safah Joudeh, "Egypt's Military: Protecting Its Sprawling Economic Empire," *Atlantic Council* (January 29, 2014), https://www.atlanticcouncil.org/blogs/menasource/egypt-s-military-protecting-its-sprawling-economic-empire/ (accessed Septembr 23, 2019).

agenda'[1057] This was not entirely wrong, in fact, history speaks for this liberal (rather moderately secularist) legacy of the SCCE, for instance, the establishment of judicial review 1979 amidst a resurgence in Islamic fundamentalism, but also the crucial role of the SCCE in advancing a liberal interpretation of Islamic *Shari'a* rules, before the revolution.

In my personal opinion, I believe that even though the SCAF had the intention to keep the SCCE as its own bastion for the protection of older values, and despite the fact that the SCCE's behavior ended up somewhat defending said values and being an agent of hegemonic preservation throughout the transition, it was not the SCCE's main intent. The SCCE ended up trying to survive a situation which was probably created by the fear of political Islam against the court being in fact a hegemonic preserver. In this sense, in the Egyptian case, hegemonic preservation is not the core role of the SCCE, but rather the factor that explains its performance. It certainly did not rule directly against the military, although the repealed legislation of the Parliamentary Electoral Law case was promulgated by the very military, which shows evidence actually against the idea of protecting the military's interests. Yet, its roughly pro-secularist behavior did not derive necessarily from wanting to protect the country against Islamists forces because it believed in secularism, but mostly because those anti-secularist forces saw the SCCE as an agent of hegemonic preservation and thus acted against it. The SCCE defended itself. So yes, there were elements of hegemonic preservation, but in my opinion those elements did not surface as much as they did in the Turkish case.

II. Closing Thoughts

In the present conclusions, I have basically assessed the SCCE as an apex court performing mainly a survivalist role for itself, by leaning on the side of the secularists within a polarized country during a constitutional transition. With regards to the normative constitutional transition, I have considered how such behavior has resulted in a court not really focusing on the constitution-making process, and as such ended up by being more of an obstructer of the transition at hand rather than a facilitator. One

1057 Brown, "Egypt: A Constitutional Court in an Unconstitutional Setting" 6.

can argue whether the constitutional transition at hand, led by an emerging political Islam, was eventually leading to democratic constitutionalism, or not. It is possible to believe that it is an apex court's duty, under certain circumstances, in the case of a country in transition taking the wrong turn concerning the process of democratization, to intervene and take a stance in order to shepherd said country towards the right direction. However, it is not easy to depict whether this was the case in Egypt. The political power-struggle between secularists and religious, forced both side to 'militantly' defend their positions. One cannot say whether the Islamists would have created a better Constitution than the 2012 one, were the secularists forces not interfering in the transition and putting pressure onto the constitution-making process as they did.

Chapter 6: South Africa and the (Model of) Regime Change with Legal Continuity

> 'The last time I appeared in court was to hear whether or not I was going to be sentenced to death. Fortunately for myself and my colleagues we were not. Today I rise not as an accused, but on behalf of the people of South Africa, to inaugurate a court South Africa has never had, a court on which hinges the future of our democracy.'
>
> — Nelson Mandela[1058]

A. Contextualizing South Africa's Case Study: Historical and Political Context before the Constitutional Transition

The current South African Constitution, of 1996, is the final result of a transition to democracy triggered by the abolishment of the *apartheid* system.[1059] However, it is not the first Constitution of the country. Since the *South Africa Act 1909*, which was the Act of the British Parliament granting independence to its former colonies, and thus creating the Union of South Africa, several Constitutions have taken the stage.[1060] The Constitution of South Africa, 1996, is the first in its name to be adopted by a democratically legitimate constituent body.

The history of South Africa and its quest towards constitutional supremacy is well documented. [1061] Therefore, the gestation and birth of its exceptional

1058 Statement the day the new CCZA was opened, February 14, 1995.

1059 See Anthony Lewis, "Revolution by Law," *New York Times*, 13 January 1995, A00031.

1060 The first was the *South Africa Act, 1909*, which established the Union of South Africa, followed by *the Republic of South Africa Constitution Act, 1961*, which gave birth to the Republic of South Africa, only to be replaced by the *Republic of South Africa Constitution Act, 1983*, and eventually, after the *Act No. 200 of 1993* (*interim* constitution) managed the transitory period for roughly 2 years, the current *Constitution of the Republic of South Africa, 1996*, took over.

1061 See e.g. Heinz Klug, *The Constitution of South Africa: A Contextual Analysis*, Constitutional Systems of the World (Oxford, Portland: Hart Publishing, 2010), 6; Bertus de Villiers, ed. *Birth of a Constitution* (Cape Town: Juta, 1994), passim; Iain Currie and Johan de Waal,

constitution will not be extensive in this chapter. However, a brief contextual description of the remarkable South Africa's quest for constitutional supremacy facilitates the understanding of some of the features of the unique constitution-making process and its curious constitution's features, including, *inter alia*, the process of decentralization. The constitutional history of South Africa is marked by several events, which left a mark in the characteristics of today's Constitution and play an important role in understanding and interpreting its features.

South Africa has been plagued by several decades of Dutch and British (1652–1910) colonialism and the legal segregation of races *apartheid* (1948–1991). An ill-famed legacy, which represents an unneglectable burden to take into consideration in the new constitution-making and devolution process, which accompanied the new constitutional dawn.[1062]

To shorten the entire journey of South Africa, this paragraph jumps on the history train at the moment when the British set foot in the region.[1063] South Africa gained some autonomy from Britain in 1910, and additional autonomy in 1931, while becoming fully independent on May 31, 1961. It is essential to understand that today's South Africa is basically an artificial entity created by the British Empire through its period of colonialism. The British found a region in the hands of the Dutch East India Company, the Dutch Cape Colony (Dutch: *Kaapkolonie*). They took over the Cape of Good Hope area in 1795. The idea was firstly to prevent it from falling under control of the French,[1064] and secondly, Britain would use this Colony as a middle port for its merchants' voyages towards other British colonies in India and other parts of Asia. The British annexed the Cape Colony in 1806 after defeating the Dutch and continued to expand towards other regions in the East of southern Africa. Britain acquired most of the territories in today's South Africa in the second half of the 19th

The New Constitutional and Administrative Law: Volume 1 – Constitutional Law, 2005 ed. (Cape Town: Juta, 2005), passim.

1062 Klug, *The Constitution of South Africa: A Contextual Analysis*, 6.

1063 Before the Dutch and the British had arrived, Portugal had a major presence in the southern part of Africa. The Portuguese did extensive trading and dominated the area, but never set up an actual colony in the region.

1064 In 1795, back in Europe, France had occupied the Netherlands, the mother country of the Dutch East India Company; an action which prompted Great Britain to occupy the Cape Colony as a way to better control the maritime routes in order stop any potential French attempt to get to India.

century after conquering native polities such as the *Xhosa*, the *Zulu* Kingdom, the *Afrikaners* or the *Boers* (original Dutch, Flemish, German, and French settlers), and others.[1065]

After the Anglo-Boer War of 1899–1902, the shaping of the White dominion took the stage culminating in the formation of the Union of South Africa in 1910. The now four British colonies[1066] were for the first time under a common flag and created a *British Dominion*[1067] of the British Empire. This made the creation of a common structure feasible and the territorial boundaries we know today as South Africa took shape.[1068] The British

1065 The first major people conquered by the British were the Xhosa, who were pushed by the British expansion in the Western Cape towards the Eastern Cape. The next were the Zulus, a dominant kingdom in South-eastern Africa (today's Natal provinces). The third people that the Brits conquered were the Afrikaners or the Boers. These were Dutch settlers living in South Africa since 1652. They disliked British rule and so in the 19th century, they retreated into the interior founding two republics, the Republic of Orange Free State and the Republic of Transvaal. Unfortunately, one can say they found misfortune in good fortune. The people in the Free State of Orange discovered the biggest diamond load in history at Kimberley, and in the Transvaal Republic, the biggest gold bearing body in the world, resulting in the British wanting to annex these two regions. Thus, we see that the power over natural resources was, as it is today, the main pretext for war. The reaction of the British was brutal, placing Afrikaners in concentration camps and killing 26,000 of them. The so-called Anglo-Boer Wars created great Afrikaner resentment towards the British, which influenced the history of South-Africa later on. Years later, these two White groups would negotiate control over South Africa. Extensively on the British occupation, see Rodney Davenport and Christopher Sounders, *South Africa: A Modern History*, 5th ed. (Houndmills, Basingstoke, Hampshire, London: Palgrave Macmillan, 2000), 40–44, 101–25. On the Anglo-Boer War of 1899–1902, see ibid., 223–32.

1066 The Cape Colony, the Natal Colony, the Transvaal Colony (former Republic of Transvaal) and the Orange River Colony (former Free State of Orange)

1067 'British Dominion', from Encyclopædia Britannica: 'Dominion, the status, prior to 1939, of each of the British Commonwealth countries of Canada, Australia, New Zealand, the Union of South Africa, Eire, and Newfoundland. Although there was no formal definition of dominion status, a pronouncement by the Imperial Conference of 1926 described Great Britain and the dominions as "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations."' "Dominion." Encyclopædia Britannica. December 07, 2011. Accessed November 27, 2018. https://www.britannica.com/topic/dominion-British-Commonwealth.

1068 The united colonies would not run successfully without peace between the British and the Afrikaners. Some compromises were proposed and eventually the internal conflict between these two groups of Whites were solved. This tolerance laid out the groundwork

included other polities, such as the *Zulus* and the *Xhosas* in the new society, but they gave control of the Union of South Africa to the Whites.[1069] During this period, Blacks did not have political rights and even though the so-called *apartheid* policies[1070] were not formally put into force until 1948, several informal actions became the foundation for setting up the notorious segregation system. Gradually, acts were passed that slowly but surely shrunk the rights and freedoms of non-Whites.[1071] After the unification in 1910, constitutional law in South Africa was shaped on the British Westminster Model, where the legislator was all-powerful, and no supreme law existed against which the validity of legislation could be tested.[1072]

With the passing of the *Statute of Westminster of 1931*, which abolished the last powers of Britain over South Africa,[1073] the union became fully independent, and was followed by two laws – the *Status of the Union Act* and the *Royal Executive Functions and Seals Act* – both of 1934, which were passed to confirm South Africa's sovereignty and mark the beginning of South Africa's constitutional independence.[1074] The Union of South Africa realized they were now free to pass any laws they desired and started to envision the creation of a formal segregation system.[1075]

In 1934, the *South African Party* and most of the *National Party* (NP) merged into the *United Party*, in order to find a compromise between Afrikaans and

for a White-supremacist future in South Africa. On the shaping and consolidation of a White dominion, see Davenport and Sounders, 233 – 374.

1069 I.e., a mix between the English-speaking and Afrikaans-speaking (i.e., the *Boers*) Whites.

1070 I.e., the system of institutionalized racial segregation and discrimination that existed in South Africa between 1948 and 1994.

1071 For instance, the Natives' Land Act of 1913, which drastically thinned the land property for Blacks (at this stage non-Whites controlled only 7 per cent of the country's territory), or the Native Affairs Act of 1920, which created a system of 'tribally based, but still government-appointed, district councils'. See Jacqueline Drobis Meisel, *South Africa at the Crossroads* (Brookfield (USA): The Millbrook Press, 1994), 23.

1072 See, Leonard Thompson, *A History of South Africa*, 4 ed. (New Haven and London: Yale University Press, 2014), 477.

1073 Basically, it removed the ability of the British parliament to legislate for the Dominions. This effect also required the repeal of the *Colonial Laws Validity Act 1865* in its application to the Dominions.

1074 John Dugard et al., *International Law: A South African Perspective* (Cape Town: Juta, 2005), 19.

1075 Right after the independence from Britain, the government passed the *Native Representation Act of 1936*, which permitted Blacks to vote only for White Parliament members and forced them to separate voters roll. Cf. Meisel, 23.

British South Africans, or simply, White South Africans. However, in 1939 the party dissented over the entry of South Africa into World War II as an ally of the United Kingdom.[1076] In 1948, a reunited and radicalized NP was elected to power and dethroned the United Party. The NP's goals were now mainly dual: on the one hand, promote Afrikaners in the state (over e.g., the British)[1077] and, on the other hand, secure White supremacy over non-Whites.[1078]

Nevertheless, resistance broke out as soon as the segregation policies were put into force. Anti-*apartheid* organizations started to form and would come to be the core of the resistance.[1079] One of these anti-*apartheid* organizations was the ANC.[1080] As the most prominent of all anti-*apartheid*

1076 A move which the Afrikaners strongly opposed, also due to the scars still tangible by the Anglo-Boer Wars. The British had been brutal with the Afrikaners during these conflicts and the Afrikaners of the former National Party were not yet ready to support the British in World War II.

1077 I.e., secure its leading position as an Afrikaners party over the English-speaking Whites. Strict immigration policies for the British were created and even a number of immigrant ships from Britain were cancelled.

1078 See, Davenport and Sounders, 344–74. The second goal was to strengthen the racial segregation already informally instated under colonial rule by legalizing positive discrimination. People were classified into different races (Whites, Blacks and Coloured) and for each of them rights and limitations were developed. The legally institutionalized segregation became known as *apartheid*. Realizing that the country's population consisted mainly of Blacks and in order to ensure a successful segregation and White supremacy over the majority, the government decided to divide Blacks into smaller regions, so-called Bantustans or homelands. These were established by the *apartheid* regime, were areas to which the majority of the Blacks population was moved to prevent them from living in the urban areas of South Africa and to prevent them from uniting and strengthen a possible revolt. They were organized in line with ethnic and linguistic groupings and thus giving shape to the grand scheme of legal segregation. People forced into these areas were regarded by the South African government as citizens of these Bantustans, not of South Africa. Despite the efforts of the *apartheid* government, no foreign government ever recognized any of the Bantustans as independent states. For more information visit: South African History Online (SAHO), "The Homelands," South African History Online (SAHO), http://www.sahistory.org.za/article/homelands (accessed 4 June, 2018).

1079 The National Party, of course, swiftly silenced any opposition in order to defend the existence of their system of legal discrimination. However, these Black political organizations made the idea of power in numbers very real and the National Party started to see difficulties in eliminating the opposition.

1080 The ANC was formed in 1912 as a way of improving the living conditions of the Black majority in South Africa. Its main goal was the equal status for Black citizens. In the

organizations it would be the spoke in the National Party's wheel, and it would eventually seek an end to South Africa's unjust governmental rule. The ANC was successful in its struggle for freedom and managed to improve the position of non-Whites, even if only slightly. However, they lacked a strong leader to organize them. Nelson Mandela would take on the leadership of the movement and would later become the symbol of the resistance.[1081] As one of the leaders of the ANC, he took a more radical approach to the fight against *apartheid* by increasingly taking risks the ANC had never taken before. Soon enough, this boomeranged on him and after being arrested several times and released on bail, Mandela was sentenced to life in prison on 12 June 1964, charged with a number of illegal acts.[1082] This did not weaken the fight against *apartheid.* Instead, it motivated even more Blacks in South Africa to fight against the oppression. Several leaders of the National Party's Government baulked at the idea of releasing Mandela and unbanning the ANC, also due to the growing domestic and international pressure. The fear for unexpected consequences was however very high. By the end of the 70 s, the National Party and the *apartheid* system were in a crisis. Economically, after the boom of the 60 s and the 70 s, inflation started to rise and skilled labor to diminish. The entire *apartheid* system was extremely expensive; the Black population was increasing much faster than the White minority and due to the economic crisis, many Whites were becoming poor. Being the only White state among other southern countries, South Africa had become isolated.[1083] Even though the NP, under Pieter Willem Botha,[1084] tried to

beginning, the ANC believed in the use of non-violent protesting and civil defiance for its fight against segregation and in time it continued to grow and was often looked upon as a leadership organization

1081 Not wanting to live in a world where his dreams would never come true due to unjust policies, Mandela became involved in the fight against segregation first in the ANC's Youth League, of which he was elected president in 1951. Soon later, he became president of the Transvaal branch of the ANC.

1082 See, Davenport and Sounders, 423.

1083 Other European colonies around South Africa had become independent, which led to South Africa being boycotted by its neighbors not wanting to trade with a segregated country. See, John Edward Spence, "Introduction," in *Change in South Africa*, ed. John Edward Spence (London: The Royal Institute of International Affairs, Pinter, 1994), 1f. Even the United Nations, in 1977, passed a mandatory embargo on the sale of arms to South Africa. See UN Security Council, *Security Council resolution* 418 (1977) [*South Africa*], November 4, 1977, S/RES/418 (1977), available at: https://www.refworld.org/docid/3b00f16e30.html [accessed 3 December 2018]. The embargo was tightened and extended

soften *apartheid* policies,[1085] international pressure became stronger.[1086] A combination of several events (*inter alia*, the end of the Cold War) and a debilitating illness, led Botha to resign his post and a more flexible Frederik Willem de Klerk was assigned as State President in September 1989.[1087] For the *apartheid* regime, this meant literally 'the beginning of the end' and a democratic future started to take shape in the horizon. On 2 February 1990, de Klerk unexpectedly declared the unbanning of the ANC and the liberation of Mandela, finally filling the anti-*apartheid* movement with hope and confidence for change.[1088]

South Africa's first democratic elections took place on 27 Aril 1994. It was the event which erased *apartheid* from South Africa's legal and political scenario. They were based upon universal franchise and proportional representation.

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by UN Security Council, *Security Council resolution* 591 (1986) [*South Africa*], November 28, 1986, S/RES/591 (1986), available at: https://www.refworld.org/docid/3b00efa017.html [accessed 3 December 2018] and eventually lifted by UN Security Council, *Security Council resolution* 919 (1994) [*Termination of the arms embargo and other restrictions related to South Africa imposed by resolution 418*], May 25, 1994, S/RES/919 (1994) , available at: http://unscr.com/en/resolutions/919 [accessed 3 December 2018].

1084 Prime Minister and subsequently President of South Africa.

1085 For instance, segregation laws in the social sphere were relaxed, the policy of job reservation was gradually eased.

1086 'Private' and public sanctions drew investors away from the country and a variety of international organization (including the European Community, the Commonwealth and the United Nations), together with several Western governments attempted to put pressure on Botha's government to accelerate the reform process.

1087 Spence, 2 f.

1088 Cf. Vincent Ferraro, "Nelson Mandela: The Driving Force," http://www.mtholyoke.edu/~shafi20k/nelson%20mandela.html (accessed 4 June, 2018). The incentive for change was, as de Klerk himself stated later on, not the fact that he felt the *apartheid* system or what he called the possibility of polities with same culture, same language and identity to live in separate national states was an unjust system, but rather the economic crisis caused mainly, yet not only, by the international pressure. De Klerk saw the solution of Black enfranchisement via a process of a new constitutional indulgence. The international economic blockade caused by the West led to the economic crisis. In order to bring back trade with the West and therefore to recover from the crisis, South Africa needed to put on the table a political reform. The population of South Africa was growing and with it the need of economic development. Maintaining the *status quo* would have been self-defeating. Hence, a more favorable international climate and a variety of domestic issues, which could no longer be ignored, were the decisive factors for allowing change. It was a matter of *carpe diem:* rather negotiate with the Black majority while still in a position of relative strength, instead of waiting for the opposition to overthrow completely the White Government and eliminating consequently all possibility for compromise. Cf. Spence, 2 ff.

The election marked the culmination of three-and-a-half years of tortuous negotiation between most notably President F.W. de Klerk's governing NP and the ANC led by Nelson Mandela.[1089]

B. The South African Constitutional Transition

I. The Making of the Constitution of South Africa, 1996

1. Negotiations (CODESA) and the MPNF

The liberation of Mandela triggered a chain of events that would allow negotiations to open.[1090] In order to tackle the first stage of negotiations, Mandela called for an all-party congress (i. e., the Convention for a Democratic South Africa, or simply, CODESA),[1091] which was mainly tasked with the drafting of the *interim* constitution. The negotiated transition was thus formally opened with CODESA, although intense negotiations took place before to try to reach agreement on the basic premises that would guide the negotiating process.[1092] However, both de Klerk and Mandela had to face significant obstacles inside their own factions to make the transition happen. The context and political situation, in which they found themselves was unpredictable, and the ground, on which the negotiations took place, was almost untenable.[1093]

1089 See, 1.

1090 Mandela insisted that there would have to be a climate for negotiations, which would have to precede negotiations themselves. In this sense, the ANC and the Government came to an agreement (so-called *Groot Schuur Minute*) meant to release political prisoners, to lay down the conditions for safe return of exiles, and more.

1091 The acceptance by the Government of such congress is seen as a welcome breakthrough, also because the Government still asserted its own legitimacy as the legal holder of power. However, the Government started to prepare for such get-together by systematically repealing all remaining segregationist laws in order to allow CODESA to be called on 20 December 1991.

1092 Davenport and Sounders, 559 f; Pierre de Vos and Warren Freedman, eds., *South African Constitutional Law in Context*, Public Law (Cape Town: Oxford University Press, 2014), 19.

1093 Spence, 6 ff. Without the willingness of a negotiating partner, de Klerk's initiative would have hastily plunged. Both leaders took considerable risks during the negotiation, mutually showing the willingness to go through with the process. Throughout the entire course of negotiation, both were faced, as it typically happens during transition, with divided constituencies. A big chunk of the White community remained bitterly opposed to the concept of losing their exclusive White rule. When in February 1992, the Con-

The first session of CODESA (henceforth CODESA 1) was convened on 20 – 21 December 1991 and followed the goal to clarify the mechanisms and technicalities of the transition, including the changeover of the political leadership. At the end of the conference, this objective was achieved, as we can witness with the Declaration of Intent (the 'Declaration') signed to mark the participating parties' commitment to negotiate. The Declaration was intended 'to create a climate conducive to peaceful constitutional change by eliminating violence, intimidation and destabilization and by promoting free political participation, discussion and debate' and 'to set in motion the process of drawing up and establishing a constitution', which would ensure, *inter alia*, a united and non-racial South Africa, a multi-party democracy, separation of powers, acknowledgement of diversity, universally accepted human rights, and specifically, 'an independent, non-racial and impartial judiciary', that would guard the supremacy of the Constitution.[1094]

After the Declaration was signed, five working groups, each assigned with different tasks, were established.[1095] All these tasks would boil down eventually to the drafting of the *interim* constitution at the second session of CODESA (i. e., CODESA 2). However, CODESA 2 failed when the plenary convened on 15 – 16 May 1992 and a deadlock was declared on a major issue.[1096]

servative Party won the elections, de Klerk was forced to call an all-White referendum on whether to continue with the negotiations or not. With a total of 68,5 % of the Whites endorsing the negotiation process, the White right wing kept his voice strong throughout the entire process. Likewise, Mandela was facing difficulties in transforming the ANC from a liberation movement into a political party. Among the Blacks, there were still many who remained skeptical and were scared that their interests were not being defended properly. The negotiation process did not go as smoothly as it would seem today knowing what the outcome was. Several ups and downs, periodic breakdowns, mutual recrimination and profound uncertainty about its result symbolized the entire constitution-building process.

1094 Cf. *Declaration of Intent of 21 December 1991*; de Vos and Freedman, 19.

1095 The working groups focused on the following issues: the new constitution (i. e., constitutional principles and constitution-making body), the setting up of an interim government, the future of the homelands, the time period for the implementation of the changes and the electoral system (i. e., the creation of a climate for free political participation and the role of the international community).

1096 I.e., on the percentage required for the constituent body to make decisions was blocking the way.

The deadlock, and thus the failure of CODESA 2, were received with dismay both inside and outside South Africa, unleashing instability especially on the streets, where violence started to reappear, making it imperative to resume negotiations urgently. The relationship between Mandela and de Klerk, which started off quite well in the beginning, deteriorated after the breakdown of CODESA. However, they both realized that the alternative to negotiation was civil war. They mutually recognized that their disagreements could be continued only at unacceptable costs. The role of their leadership and their commitment to find a solution was key to resume negotiations. Mandela and De Klerk once again made attempts to meet, in private, using so-called informal diplomacy ('talks about talks') and managing crisis hastily and jointly before the situation could get out of hand.[1097]

The private dialogues and bilateral negotiations culminated in a *Record of Understanding*[1098], signed by Mandela and de Klerk on 26 September 1992 and brokered by negotiators Cyril Ramaphosa, for the ANC, and Roelf Meyer, for the government. The close working relationship between these people facilitated the process. The Record of Understanding marked the replacement of CODESA by the Multi-Party Negotiating Forum/Process (MPNF or MPNP) and thus the resumption of formal multi-party negotiations, which came about on 1 April 1993. The Record of Understanding included concessions on both sides agreeing upon issues, which would then need to be discussed and negotiated further during the MPNP.[1099] All in all, the Record of Understanding provided for the resumption of the formal bilateral negotiations, the establishment of a constituent body and the acceptance of a transitory period, including a

1097 Spence, 8 and 22 ff.

1098 Record of Understanding, State President of the Republic of South Africa – President of the African National Congress, 26 September 1992, available at: http://web.archive.org/web/20061012064901/http://www.anc.org.za/ancdocs/history/record.html [accessed on 3 December 2018] ('*Record of Understanding*').

1099 They agreed upon the establishment of a democratic elected constitution assembly/constitution-making body, which would draft and adopt the new constitution, be bound only by agreed (in the MPNF) constitutional principles, have a fixed time frame, have adequate deadlock mechanisms in order to prevent a failure of the negotiations during a crisis, as had happened during CODESA 2, function democratically i. e. arrive at its decisions democratically with certain agreed-upon majorities and be elected within an agreed predetermined time period. Cf. Spence, 25.; *Record of Understanding*, Art. 2)a).

transitional government and *interim* constitution.[1100] The MPNP was intended to pursue the issues that CODESA had failed to resolve and accordingly two tasks were given to the MPNP. On the one hand, it had to draft an *interim* constitution, which would bind the future constituent body. On the other hand, the MPNP had to prepare the terrain for a future election, which was later set to happen on 27 April 1994.[1101]

The process of negotiation was stained by a series of obstacles, for the negotiating parties had substantial different visions about the transition to democracy. Throughout the negotiations, the fundamental issue that kept the process at an impasse was the manner in which the permanent constitution was to be adopted. The NP wanted the agreement on the new constitution to be reached by the elite representatives of the negotiating parties (i. e., by the unelected MPNP) and by an Act of the existing Parliament (still controlled by the NP), followed by a long transitional period ruled by a coalition government. The ANC instead, opposed this idea for being fundamentally undemocratic, and championed the solution to surrender the constitution-making process to an elected Constitutional Assembly.[1102]

The impasse culminated with a three-component compromise: opting for a two-stepped constitution-making process (instead of an outright transferal of power from the old order to the new),[1103] agreement on a list of 34 uninfringeable Constitutional Principles (henceforth 'CP')[1104] with which the

1100 ibid.

1101 ibid., 27.

1102 Lourens W. H. Ackermann, "The Legal Nature of the South African Constitutional Revolution," *New Zealand Law Review*, no. 4 (2004): 635 f; Nico Steytler, "Judicial Neutrality in the Face of Ineptitude: The Constitutional Court and Multi-Level Government in South Africa," in *Judge Made Federalism?: The Role of Courts in Federal Systems*, ed. Hans-Peter Schneider, Jutta Kramer, and Beniamino Caravita di Toritto, Föderalismus – Studien (Baden-Baden: Nomos, 2009), 27.

1103 In its *Second Certification* judgement, the CCZA said that the first component of such compromise was 'that the Constitutional Assembly [had] to adopt the new constitutional text by a two-thirds majority' (see, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at para. 1). The compliance with a set of Constitutional Principles probably implied that the constitution-making process would in any case take place in two steps.

1104 They are to be found in Schedule 4 IC, which is incorporated by a reference under Art. 71(1)(a) IC.

final constitution had to comply, and an arbiter in the form of the Constitutional Court to certify that the provisions of the new constitutional dispensation complied with the CP.[1105] The Preamble of the IC highlights the importance of the deadlock-breaking agreement characterizing the CPs as 'a solemn pact'.[1106]

2. The Two-stage Transition

Basically, the two-stage transition required the adoption of two consecutive constitutions. The first step consisted in the unelected MPNF negotiating and drafting of the *interim* Constitution[1107], which legally had to be adopted by the *apartheid* legislature in terms of the 1983 Constitution and became binding immediately after the first democratic election of April 1994.[1108] In the second step, a democratically elected Constitutional Assembly was to draft the definitive constitution.[1109]

The IC originated from the MPNP in 1993 and was the fundamental law of South Africa from the 27 April 1994 (first general elections) until it was superseded by the definitive constitution on 4 February 1997. It was an extensive basic document, which included among its major features: an extensive catalogue of fundamental rights,[1110] a bicameral parliamentary system (National Assembly and Senate),[1111] which together made the Constitutional Assembly or Constitution-making body,[1112] an electoral system based on proportional representation,[1113] and an independent and impartial judiciary.[1114] The main goal of the IC was the constitutional transition itself, which puts Chapter 5 of the same, labelled 'The Adoption of the New Constitution', at the core of the document. This chapter of the

1105 Cf. Ackermann, 636.
1106 See Preamble IC: 'And whereas in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles.'
1107 Constitution of the Republic of South Africa of 1993, Act No. 200.
1108 Cf. de Vos and Freedman, 20; Christina Murray, "A Constitutional Beginning: Making South Africa's Final Constitution," *University of Arkansas at Little Rock Law Review* 23, no. 3 (2001): 813.
1109 Cf. Ackermann, 636; de Vos and Freedman, 20; Choudhry and Glenn Bass, 47.
1110 Art. 7–35 IC.
1111 Art. 36 IC.
1112 Art. 68(1) IC.
1113 Art. 39 IC.
1114 Art. 96 IC.

IC prescribed the basic framework and rules for the exercise of drafting the final constitution.[1115] Initially, the ANC disagreed on the use of an IC, championing instead for rule by decree during the constitution-building period while a permanent constitution was written. In this regard, the IC was a reluctant concession reached during informal talks to break an impasse in the negotiations.[1116] Being the product of a political settlement, the IC was basically a peace agreement, and was the result of peace negotiations between the ANC and the NP. Thus, on top of being the IC itself the result of a compromise, the document included a veritable picture of all the arrangements reached during the negotiations. On the one hand, the ANC championed a democratically based constitution, a demand which was met by tasking a democratically elected Constitutional Assembly with the drafting of a definitive constitution within two years.[1117] On the other hand, the NP feared that the results reached in the negotiations would be swept aside by a probable elected ANC majority. Therefore, it demanded that the new constitution would have to comply with a list of negotiated constitutional principles, which had to be inserted in the IC. They solicited broadly for constitutional supremacy, separation of powers, three tiers of government, power-sharing between the tiers, an independent judiciary, etc.[1118] Finally, as an important safeguard mechanism, the IC required the CCZA to certify the permanent constitution's compliance with all of the 34 CP.[1119]

1115 See, *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 16; de Vos and Freedman, 21.

1116 Dion A. Basson, *South Africa's Interim Constitution: Text and Notes* (Cape Town: Juta, 1994), preface; Celia Davies. "Interim Constitutions in Post-Conflict Settings." *International Institute for Democracy and Electoral Assistance* (*IDEA*). (2015), 23 f.

1117 In Art. 68(1), the IC established the Constitutional Assembly, which consisted of the National Assembly and the Senate sitting jointly, and in terms of Art. 68(2), read with Art. 68(3) IC and 73(1) IC, it was given the task to draft and adopt a new constitutional text within two years. See, *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), para. 16; de Vos and Freedman, 21.

1118 Ackermann, 637; Nico Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," in *Courts in Federal Countries: Federalists or Unitarists?*, ed. Nicholas Aroney and John Kincaid (Toronto, Buffalo, London: University of Toronto Press, 2017), 330.

1119 Cf. Davies, 23 f.

Table V The two-stage constitution-making process[1120]

Interim Constitution	Final Constitution
Negotiated before the first democratic election by unelected MPNF	Drafted after first general election by democratically elected Constitutional Assembly.
Includes power-sharing agreement allowing the ANC and the NP to share power.	No power-sharing agreement – the winner of the 1999 elections (i.e., the second democratic elections) governs the country.
Contains 34 Constitutional Principles[1121] and provisions to regulate the constitution-making process, including the provisions for the certification of the final constitutional by a newly created Constitutional Court.	Certified by the Constitutional Court as complying with the 34 Constitutional Principles of the IC (rejected once).

3. Drafting, Adoption and Certification of the Constitution of South Africa, 1996

a. Drafting and Adoption

The task of drafting and adopting the permanent Constitution was given to the Constitutional Assembly, which resulted from the 1994 general elections and was the combination of the National Assembly and the Senate.[1122] The IC required a two-thirds majority of all the members of the Constitutional Assembly for the passing of the final Constitution. This meant that providing a party managed to reach the two-thirds majority, it would have been possible to draft and adopt a new constitution without the support of other political parties. However, the ANC commanded the general vote with 62,25%, which meant that its negotiators were inclined to seek consensus among other parties, especially its long-standing opposition in the negotiating process, the NP.[1123]

1120 *Note:* The table summarizes the main traits of both the interim Constitution and the Constitution of South Africa, 1996. *Source:* de Vos and Freedman, 21.

1121 The text of all 34 Constitutional Principles can be found in Schedule 4 IC or in Annexure 2 in *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

1122 Cf. de Vos and Freedman, 23.

1123 Which itself had reached 20,39 per cent of the seats and became the second biggest force in the Constitutional Assembly, the Inkatha Freedom Party (IP) being the third with 10.54 per cent. Cf. Spence, 28f; Murray, 832.

b. The Process of Certification

The CCZA was given as a first, and unique in the annals of constitution-making, task to certify the adopted draft of the final Constitution. Art. 71(2) IC set in stone that '[t]he new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the [CC] has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(*a*) [Constitutional Principles].'[1124] In other words, the CCZA, established in Art. 98 ff. IC, had to certify that the draft of the permanent Constitution complied with the basic structures and premises contemplated by the Constitutional Principles anchored in Schedule 4 of the IC itself. They presented themselves as being quite extensive and written in a relative open-ended language; a feature which provided the CCZA with significant interpretation power when it came down to the certification of the draft. The certification function aimed at making sure these principles were included in the final Constitution, yet it logically did not include a verification of their (future) implementation, which is another function completely and takes place in a second time. The function of certification, however, shows at least the first role the CCZA was allocated in the constitutional transition.

Thus, after the adoption of the final Constitution by the Constitutional Assembly, the document was sent to the CCZA to be certified.[1125] Art. 71(3) IC determined that the certificating decision of the CCZA would be binding and final, i. e., the non-compliance of the final Constitution with the Constitutional Principles could not be raised in any court of law again. This provision, as the CCZA itself observed in the *First Certification* judgment, casts 'an increased burden [on the CCZA] in deciding on certification. Should we subsequently decide that we erred in certifying we

1124 See also *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at paras. 16 – 19.

1125 A majority of 86 per cent of the members of the Constitutional Assembly adopted the new Constitution. See, *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at paras. 20 – 21 for more information concerning the adoption of the new Constitution.

would be powerless to correct the mistake, however manifest'.[1126] In an attempt to share the burden and responsibility, the CCZA invited notices of objection, written arguments and representations, oral opinions from political parties and private parties. In the event, these objections and opinions were submitted on behalf of five political parties and 84 private parties. Many were granted the possibility to express their arguments in front of the CCZA. The audiences started on July 1, 1996, and continued until 11 July 1996.[1127]

On 6 September 1996, in its *First Certification* judgement, the CCZA found that the draft did not comply with the Constitutional Principles on nine grounds.[1128] While pointing out the details of the non-compatible elements of the draft, it also considered quite directly the needed changes necessary for a positive certification.[1129] The *First Certification* basically marked a unique process of constitution-making, in which a newly created CCZA declared unconstitutional a constitution drafted by a democratically, and thus legitimate, elected constitution-building body, based on the compliance with provisions negotiated by an unelected MPNF.

The Constitutional Assembly, pursuant to Art. 73 A(2) IC, reassembled and adapted the first draft, not only to comply with the CCZA's grounds for non-certification, but also adding many minor changes. On 11 October 1996, an amended text was thus passed and referred to the CCZA for certification.[1130] The second draft was finally certified to be compatible

1126 *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 18.

1127 *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 24.

1128 However, the CC added what follows: 'the first is to reiterate that the [Constitutional Assembly] has drafted a constitutional text which complies with the overwhelming majority of the requirements of the [Constitutional Principles]. The second is that the instances of non-compliance [...] although singly and collectively important, should present no significant obstacle to the formulation of a text which complies fully with those requirements.' See *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 483.

1129 See *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 482.

1130 Again, political parties and privates were given an opportunity to be heard. The CC started hearing the matter on 18 November 1996. See *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at paras 3ff.

with all 34 Constitutional Principles on 4 December 1996.[1131] The final Constitution was signed by the President, Nelson Mandela, on 10 December 1996 and came into effect on 4 February 1997,[1132] superseding the IC.[1133]

II. The Objectives and Nature behind the Constitution of South Africa, 1996

Once the Constitution of South Africa, 1996, was made, a period of implementation of its contents was the self-evident next step in the process. Said period of implementation, which is a veritable part of a constitutional transition, envisaged all new parts of the new constitutional dispensation. This section is dedicated to the contents of the new constitutional document which encapsulates the vision of the new South Africa and thus characterizes the implementation period of the constitutional transition. Among these, decentralization played a pivotal role in the South African transition, similarly to party banning in the Turkish constitutional transition.

1. The Vision: Seeking Unity through a Process of Transformation

Typical of a transformative constitution, in the Constitution of South Africa, 1996, all eyes are on the 'prize', the vision. Which objectives the new Constitution tries to nurture in the specific case, always depends on the historical context on a case-by-case basis. In the introductory chapters, it was argued how the obvious need for a constitutional transition derives from objectively pursuing peace. Peace can be achieved through different means, yet increasingly we have witnessed transitions towards peace through the introduction of constitutionalism, and how decentralization cultivates such idea of governance by acting itself as an instrument of conflict-resolution. South Africa would be the leading example when it comes to this.

1131 See *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996).

1132 Constitution of the Republic of South Africa, 1996.

1133 In a sense, the IC was similar to one big sunset clause, with which once the new constitution came into force the IC seized to exist.

In the new Constitution of South Africa, 1996, it mainly sought the establishment of a *united and racially integrated country.* In introducing such goal, both the Preamble of the interim Constitution (and its Epilogue) and the one of the Constitution of South Africa, 1996, can help us further. Preambles are the opening statement of a constitutional document that explain its purpose and original philosophy. Being the constitution, the direct legal product of the normative constitutional transition, the preamble introduces its main objective. Even retrospectively, the preambles of a constitution can help define what the original goal of the transition was, and play an important role in reminding what that objective was at the beginning, i. e., the reason why a constitutional transition took place.

The preamble, considered as one of the factors of integration of modern constitutions, constitutes one of the fundamental parts of material integration. The Preamble of the Constitution of South Africa, 1996, defines the integrative content of the Constitution, above all through the reference to unity, the meaning of which derives from the historical reality of South Africa. The historical foundations of the constitutional order of South Africa are highlighted in the Preamble not in a static way, but in a dynamic and progressive way; the content of the Preamble reflects the history and the need to push towards a future, which is radically different from the one the country had up until that moment.[1134] The Preamble offers many ideas in this sense where, in its initial part, the ordeal of the past is highlighted alongside reconciliation:[1135]

> 'We, the people of South Africa, [r]ecognize the injustices of our past; [h]onor those who suffered for justice and freedom in our land; [r]espect those who have worked to build and develop our country; and [b]elieve that South Africa belongs to all who live in it, united in our diversity.'

The preamble, in the following passages, indicates the interpretative criteria and the aims of the new text in strict contrast with the previous authoritarian and racist regime, which had openly denied any fundamental right to the majority of the population, starting from dignity

1134 See, Smend, *Costituzione E Diritto Costituzionale*, 106 – 07, 80, 241.

1135 The historical narrative in preambles, in general, is a typical feature of societies most divided by ethnic causes. See, Liav Orgad, "The Preamble in Constitutional Interpretation," *International Journal of Constitutional Law* 8, no. 4 (2010): 717.

and equality, both formal and substantial. The objectives indicated in the Preamble are thus identifiable with the new mission of the Constitution:

> 'We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; [i]mprove the quality of life of all citizens and free the potential of each person; and [b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.'

So, the South African Constitutional transition sought explicitly a veritable *transformation* of its society in order to become a country based on *unity* and *integration.*[1136]

The concept of unity, understood as political unity, of the people is strongly underlined in the Preamble and 'the constitution is expected to unify the society that it has constituted as a polity, regardless of the difference of opinions and conflicting interests that exist in all societies'.[1137] The Preamble, thus, presents the integrative function of the Constitution and expresses the need for social cohesion to be achieved with the aspirations and values of the Constitution, taking up a common expression in federalist theory, 'united in our diversity'. 'We the people of South Africa' indicates the purpose of the constitutional design, shaping the identity of society through the foundations of the new text. In this sense, Grimm's

1136 The Epilogue of the interim Constitution also shapes the new mission of the country: 'this Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization.'

1137 See, Grimm, *Constitutionalism: Past, Present, and Future*, 144.

statement of the existence of an integrative function alongside the normative one, is revealed.[1138]

Precisely owing to the social and economic consequences of *apartheid*, the South African Constitution has been considered one of the best examples of *transformative constitutionalism* because of its numerous aspirational principles and objectives of 'transformation', in the opposite direction to the dismantled regime; the political project of 'transformation' is a substantial social change through a non-violent political process guided by a rule-bound government, distinguishing itself from what is expressed by the terms reform and revolution.[1139]

1138 For Grimm, the Constitution does not paint a social reality, but acts as an instrument that tries to model such reality; it distances itself from reality and from such reality, it derives its essence as 'standard for behavior and assessment in politics'. Grimm adds that the integrative function may not be decisively connected with a constitution, since it takes place in the real world, a social process linked to the Constitution, but not always controlled by it. Other integrative factors are identified in religion, history and culture and in the external enemy and can have a greater integrative effect than the Constitution. See, ibid., 18, 143–48.

1139 This concept has been used in numerous declensions, but it appeared, precisely in relation to the South African reality, in a writing by Klare, in 1998, which with these words described the concept of transformative constitutionalism: 'by transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word.' Cf. Klare, 150. This, in accordance with J. Langa's opinion that the Constitutional Court and the other South African Courts consider(ed) the Constitution as transformative; J. Langa, referred to the words of the Epilogue of the IC to best exemplify the concept. In the terms of J. Langa: 'this is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future. For me, this is the core idea of transformative constitutionalism: that we must change'. See, Langa, 352. This concept has also been often associated with the activism, in this direction, of some Courts of the Global South, including that of South Africa. See, for instance, Eric Christiansen, "Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice," *Journal of Gender, Race & Justice* 13, no. 3 (2010); Wessel le Roux, "Descriptive Overview of the South African Constitution and Constitutional Court," in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*, ed. Oscar Vilhena, Upendra Baxi, and Frans Viljoen (Pretoria: Pretoria University

Justice Langa's words are the best to underline the importance of the concept of transformation within the South African legal system: 'transformation then is a social and an economic revolution. South Africa at present has to contend with unequal and insufficient access to housing, food, water, healthcare and electricity'.[1140] Recently, it has been rightly pointed out that 'transformation', although a prevalent aspect in the 'Global South', is a common feature of contemporary constitutionalism, especially in the latest constitutions, where socio-economic inequalities are greater.[1141] It is no coincidence, therefore, that the Preamble of both the interim Constitution and the Constitution of South Africa, 1996, have had great relevance in the judgments of the Court, which from the beginning considered these paragraphs in a substantial sense and not only as aspirations. In the words of Albie Sachs in *Mhlungu and Others v. The State*[1142], in relation to the interim Constitution: 'the Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes'; the relevance given by Justice Sachs also stands out in a later step, where he states that 'these [...] are worthwhile and uncontroversial objectives totally consistent with the goal set out in the Preamble to provide for the restructuring and continued governance of South Africa'.[1143] Again, in relation to the interim Constitution, the Court, in *Du Plessis and Others v. De Klerk and Another*[1144], stated that Art. 7(2) IC should be interpreted in a teleological

Law Press (PULP), 2013). Recently, Fowkes called for greater attention to the constitutional experiences of Latin America and Africa, in relation to transformative constitutionalism and beyond, because of similar conditions in terms of socio-economic inequalities. See, James Fowkes, "Transformative Constitutionalism and the Global South: The View from South Africa," in *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*, ed. Armin von Bogdandy, et al. (Oxford: Oxford University Press, 2017).

1140 See, Langa, 352.

1141 See, Michaela Hailbronner, "Transformative Constitutionalism: Not Only in the Global South," *The American Journal of Comparative Law* 65, no. 3 (2017).

1142 *S v Mhlungu and Others* (CCT25/94) [1995] ZACC 4; 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) (8 June 1995).

1143 *S v Mhlungu and Others* (CCT25/94) [1995] ZACC 4; 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) (8 June 1995), at paras. 112 and 132.

1144 See, *Du Plessis and Others v De Klerk and Another* (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658 (15 May 1996).

sense and 'in conjunction with the pre-amble, which proclaims "a need to create a new order"'. The prescriptive 'force' of the Preamble (and Epilogue) in the interim Constitution is also emphasized by J. Mahomed when he states, before citing the interim Constitution, that the content of the Preamble and Epilogue consists in the construction of a free and equal society.[1145]

The jurisprudence that saw a substantial inclusion of the Preamble in the reasoning of the Constitutional Court was expanded and confirmed once the Constitution of South Africa, 1996, came into force. For instance, in *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*[1146], the Court notes, in the person of Justice Ngcobo, the exact task of both constitutions, and highlights the combined provisions of the preambles of the constitutions. It highlights the 'transformative' nature of the texts and above all the new values and new rights of the new Constitution; reading the paragraph is useful to understand the new order according to the indicated profiles:[1147]

1145 Art. 7 IC concerned the application of the Bill of Rights and paragraph 2 stated that such rights 'apply to all law in force'. The Court expressed its views on the application of fundamental rights in private party disputes, stating that this was absolutely legitimate, but also that statutory, common and customary law should be included. *Du Plessis and Others v De Klerk and Another* (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658 (15 May 1996), at paras. 75 and 159. Similarly, the Preamble is quoted in *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997).

1146 See, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004).

1147 See, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004), at para. 73. See also, *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211; [2000] 12 BLLR 1365 (CC) (28 September 2000); *Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) (4 August 2004); *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC) (29 July 2004); *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005). See also, Justin O. Frosini, *Constitutional Preambles: At a Crossroads between Politics and Law* (Santarcangelo di Romagna (I): Maggioli Editore, 2012), 133–35; Wim Voermans, Maarten Stremler, and Paul Cliteur, *Constitutional Preambles: A Comparative Analysis* (Cheltenham: Edward Elgar, 2017), 142–46. Finally, the Constitutional Court did not fail to mention the Preamble, albeit in-

> 'South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed "to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms". This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution "recognizes the injustices of our past" and makes a commitment to establishing "a society based on democratic values, social justice and fundamental rights". This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.'

The doctrine converges in stating that the Preamble has been used by the Court as a support tool in the reasoning of the Court and never used as the only and genuine parameter for the construction of its judgments.[1148]

The concept of reaching unity by drafting a non-static constitutional text, but rather an aspirational one, can be seen already in the preamble of the

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directly and in a footnote, even in its recent and important ruling on the non-disclosure of party funding. The Court ruled that the secrecy of political parties regarding their funding was unconstitutional and declared the *Promotion of Access to Information, Act 2 of 2000* (*PAIA*) null and void, where it did not provide for publicity in relation to the funds used by independent parties and candidates. This was seen as a breach of Art. 19 on voting rights, as a lack of knowledge on the origins of funding would undermine the real ability of voters to choose, improving transparency and accountability of parties to the electorate. See, *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* (CCT249/17) [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (21 June 2018), at para. 26.

1148 It should not be forgotten, moreover, that the same Court has confirmed in numerous judgments, as De Vos reminds us, the transformative nature of the South African Constitution. See, Pierre de Vos, "Between Promise and Practice: Constitutionalism in South Africa More Than Twenty Years after the Advent of Democracy," in *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, ed. Ernst Hirsch Ballin, Anne Meuwese, and Maurice Adams (Cambridge: Cambridge University Press, 2017), 228–31. The author cites the following cases: *Mkontwana v Nelson Mandela Metropolitan Municipality* (CCT 57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (6 October 2004), at para. 81; *Soobramoney v Minister of Health* (*Kwazulu-Natal*) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997), at para. 8; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors* (*Pty*) *Ltd and Others In re: Hyundai Motor Distributors* (*Pty*) *Ltd and Others v Smit NO and Others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) (25 August 2000), at para. 21.

interim Constitution. The preamble of the interim Constitution begins by stating the following:

> 'There is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'.

In a way, it sets the core philosophy the country strives for. It finishes off by asserting:

> 'Whereas it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution'.

2. The Role of Decentralization in the South African Case Study

Decentralization has increasingly seen the light as a distinguished feature of modern constitutionalism within the element of limited government (i.e., separation of powers).[1149] I would not say that decentralization is a *conditio sine qua non* for the functioning of constitutionalism, but just like most features of its three elements seen above, for sure it backs their establishment and consolidation. Due to its relevance in modern constitution-making, it deserves a section on its own.

Yet, how does it fit in? Apart from being a structural feature of a state, decentralization is value-laden and idealistic, and as such it links transversally (like transformative constitutionalism) to all three elements of constitutionalism. Decentralization deepens democracy, enhances development, tackles the abuse of centralized power, and accommodates minorities. Likewise, Steytler admits that:

> 'If the notion of limited government is a practice rather than a paper declaration, then tolerance of the vertical limitation of central powers should follow. If democracy is a reality, then local democracy is merely the deepening of it. If the rule of law is the praxis, then decentralization as a rule-driven system of division of powers should thrive. If transformative development is the national goal, then decentralization is a

1149 See the table 1.2 under the third column in Beetham et al., 26.

> primary agent. In this scenario, decentralization would provide a secure encasement of the national project of constitutionalism.'[1150]

In the introduction, decentralization was given a working definition, but why is it here the discussion about decentralization? Decentralization was chosen as a basis for measurement *where an assessment of an apex court's role in a constitutional transition was not yet done or proves otherwise difficult.*[1151] Since in those cases where nothing on the role of courts was written, decentralization is prone to produce indicative behavioral traits when it comes to transitional matters. Here are some of the reasons:

- Decentralization has a firm relationship to all elements of constitutionalism. Therefore, in a constitutional transition, cases on the implantation of decentralization often display an issue substantially related to constitutionalism, and its establishment.
- Decentralization creates by its own nature a period of transition, and thus generates a veritable period of exposure keen for the investigation of an apex court's behavior.
- In cases where the apex court was particularly active, such as South Africa, the implementation of decentralization allows to limit the analysis of a huge number of cases during the transitional period.
- Decentralization has proven a very important tool for conflict-resolution in an increasing number of cases around the world.

a. Decentralization as 'Transitional Matter'

Transitional matters, among the wide activity of an apex court, are those that aim at realizing the end-goal of the normative transition, i. e., the establishment, legally and institutionally, of constitutionalism. During a constitutional transition, the court already starts dealing with ordinary constitutional matters, so where do we look for transitional matters? In South Africa: within the process of decentralization. Decentralization

1150 Cf. Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 27 – 31.

1151 Possibly because of the huge amount of material produce by a particularly active apex court.

creates by definition a transitory period and with it a veritable exposure period for the analysis of the role of courts.[1152]

The purpose for specifically looking at decentralization can be summarized in *content-related reasons* and *practical ones*.

– Within the content-related reasons, we can discern two explanations. On the one hand, the relationship between decentralization and constitutionalism pushes to specifically focus on it. The notion of decentralization touches upon all elements of classic constitutionalism, so it is the most indicative area from which to draw the information needed. As such, its intrinsic link to constitutionalism makes it the perfect Guinea pig for measuring and assessing an apex court's behavior during a constitutional transition. Decentralization cements a deeper foundation for democracy, at a national as well as at a sub-national level, by limiting centralized power, and plays an effective role as an important arm for the (social) transformation of the state. Broadly, it is a combination, which can bring peace, democracy, good governance and development.[1153] Decentralization has been thus of great importance in recent peace-building and constitution-making developments. On the other hand, often the cause of conflict in the first place is lack of devolution.[1154] Decentralization has increasingly seen the light as a common tool for conflict-resolution in the modern world. This also allows a certain comparativeness/coherence between all the cases selected. Hirschl's reasons for transition – mentioned above – manifest themselves through several societal deficiencies, which indicate that the demand for transition is at the very least increasing. Indicators for imminent transitions are, *inter alia*, the utter absence or malfunctioning of human rights enforcement, the lack of decentralization represented by strong and non-functional unitary system, followed by high corruption due to the non-existent check and balances between levels of government, or even to the absence of the government levels

1152 By creating a transitory period, decentralization allows one to explain the court's activity trough a chronological narrative, in which the court works its way up to affect the elements of constitutionalism.

1153 Nico Steytler, "The Symbiotic Relationship between Decentralisation and Constitutionalism in Africa," in *Decentralisation and Constitutionalism in Africa*, ed. Charles M. Fombad and Nico Steytler (Oxford: Oxford Unviversity press, 2019), 543–45.

1154 E.g., the current internal conflict in Syria.

themselves. At the end of the day, in most (recent) cases, it boils down to a lack of inclusiveness and autonomy of certain religious, ethnical or minority group.[1155] Therefore, among the various tools for peace-making used in recent history,[1156] *decentralization* seems to have accordingly seen the light in various new constitutions.[1157] Better specifications on the content-related reasons follow in the next sections.

– When it comes to the practical related reason, the key element is measurability. Among the functions an apex court might be allocated in a constitutional transition, the implementation and interpretation of the new constitution undoubtedly sit on the top shelf of importance. A constitution, however, is divided in several parts in need of implementation: e. g., a new bill of rights, the instalment of a legislature, the separation of powers, and amongst others, also the vertical devolution of functions towards lower levels of government (in the case that the new dispensation includes such feature). Human rights, for instance, tend to be enforceable from one day to the other.[1158] There is no clear role the court can play within the enforceability of human rights, unless it simply refrains from enforcing them. However, when it comes to decentralization, one can effectively assess whether a function has been transferred or not to the sub-levels of government.

1155 E.g., Ethiopia and Iraq.

1156 Most of which took form through 'international intervention' (successful or not), for instance: the delayed international military responses to the Rwandan genocide, the ethnic cleansing in Bosnia, as well as the repressions in East Timor; but also, the unprecedented military intervention of NATO in Kosovo; the establishment and enforcement of no-fly zones in Iraq; and the use of economic sanctions against South Africa and (former) Yugoslavia. This last type of intervention might be effective as a conflict resolving tool, however includes heavy collateral damage to the people of the envisaged country. See Committee on International Conflict Resolution, "Conflict Resolution in a Changing World," in *International Conflict Resolution after the Cold War*, ed. Paul C. Stern and Daniel Druckman (Washington, D.C.: National Academy Press, 2000), 2 ff.

1157 Just to mention a few, e. g., Ethiopia, Iraq, South Sudan, South Africa, Nepal, India, Kenya, the DRC, etc.

1158 See, *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995). In this case, the CCZA ruled that capital punishment was non-compliant with the commitment to human rights expressed in the *Interim* Constitution. The decision invalidated Art. 277(1)(a) of the Criminal Procedure Act 51 of 1977, which had provided for use of the death penalty, along with any similar provisions in any other law in force in South Africa.

aa) Decentralization as a Tool for Conflict Resolution

Decentralization is only but one possible tool for the resolution of conflicts. It is fair to admit that national and regional contexts[1159] have a deep influence on the positive (or negative)[1160] effects of decentralization over a conflict situation, and therefore other possible tools could be deployed for the sake of peace.[1161] However, the causes for recent domestic conflict point towards decentralization as an important tool to restructure the state in order to achieve peace. Decentralization has demonstrated to be an effective instrument of action for addressing current typical reasons for internal conflicts: for instance, social injustice, fragile and insufficient governance capacity, lack of political integration, use of violent and/or political force and repression, and unfair allocation and exploitation of natural resources. In this sense, it is no coincidence that a wave of decentralization is underway together with the increase in domestic conflicts and their peace processes masked as constitution-making processes.[1162]

Steytler summarizes the main reasons[1163] for 'federalism',[1164] which in my opinion correspond with the beneficial effects of decentralization upon

1159 Such as history, dimension and concentration of minority groups, socio-economic patterns or even the institutional shape of local/regional authorities, among others. Cf. Eva Schrottshammer and Uwe Kievelitz. "Decentralization and Conflicts: A Guideline." *Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH.* (2006), 7.

1160 Adverse effects of decentralization can be manifold, for instance: increased opportunities for corruption, patronage and endorsements (in the sense of 'jobs-for-pals'; limited technical capacity, which can have negative effects on the overall efficiency of governance; higher costs caused by a logical loss of 'economies of scale'; a general disregard of national macroeconomic stability; and over-bureaucratization and its consequent costs. Cf. Andrew Feinstein, "Decentralisation: The South African Experience," Global Partners Governance, http://www.gpgovernance.net/wp-content/uploads/2015/07/Decentralisaion-the-south-african-experience-feinstein1.pdf (accessed 6 June, 2018). For other examples of adverse effects of decentralization, see Schrottshammer and Kievelitz, 7 f.

1161 Most often, it depends on what specifically caused the transition to be triggered. It is true though that decentralization enhances most features of constitutionalism, and thus helps the development of peace. Other tools might be the introduction of enforceable fundamental rights, the recognition of socioeconomic rights, electoral democracy, and more. Decentralization would facilitate most other tools of conflict-resolution.

1162 Schrottshammer and Kievelitz, 5.

1163 These to show the importance of decentralization in the current world panorama. Other reasons, such as efficiency, accountability, good governance, and others, are interrelated with the main reasons.

conflicts: the maintenance of unity of a state by accommodating minority and marginalized groups, the limiting of the abuse of centralized power, the enhancement of development and democracy:[1165]

– Decentralization aims to prevent and settle conflict by keeping the state united and intact, and accommodating minority and marginalized groups. A guideline published by GTZ shows how more than 90 % of all conflicts since 1945 have taken place in developing countries. In the 1990 s, a decrease of international disputes has been measured, while more recently there has been a marked rise in internal conflicts.[1166] A common pattern in these wars has been a deep and heartfelt sentiment of injustice felt by one or more groups of the population. This sentiment has triggered popular revolutions, which have left many polities without a legitimate government.[1167] War has almost always been waged over access to state power, claims of autonomy and secession, and thus on differences among groups of the population. This is the reason why peace can be achieved if a solution is found which somehow allows all groups, minorities and majority, to coexist. So, the key element when confronted with the resolution of a civil conflict is 'coexistence'. How to transform a divided and conflicting polity into a diverse, yet united, functioning and organized society? By allowing the different groups and regions a certain level of autonomy, and this can be done by

1164 See in the introduction of this thesis the definition of federalism and its collocation within the scope of decentralization. In this case, the reasons for federalism roughly correspond to the main reasons for vertical power-sharing in general.

1165 Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 32 – 34.

1166 Schrottshammer and Kievelitz, 5.

1167 The quest towards a fair and representative democratic form of government is never smooth. For instance, South Africa managed to negotiate the process of democratization of its government structure without falling into utter turmoil. Directly responding to the end of the Cold War, South Africa's autocratic minority regime announced the dismantlement of the *apartheid* structure and initiated peace talks, triggering the country's transition towards a representative democracy. The transition has not been spotless, yet all in all it remains one of the models of relatively peaceful transitions towards democracy. Instead, in other countries, like for instance Syria, popular revolts have triggered a struggle for power, which counts more than 80 armed groups on all sides. Most of these groups represent different faiths, ethnicities and/or languages.

decentralizing state power.[1168] Handing more power over to local or regional levels of government allows minorities to have more say; they can participate politically directly in matters that concern only them, preserve their local ethnic identity and culture better, and even have a better representation at the center. All this can also operate as a safety valve for local tensions and avert demands for autonomy and secession.[1169]

– By devolving some of the state powers from the center to subnational governments, decentralization aims at limiting the abuse of centralized governments, which is often completely in the hands of an authoritarian and illegitimate regime.[1170] In a devolved country, the assignment of powers is not exclusively in the hands of the central government, but shared with the constituent units. In a decentralized State with federal traits, this means that the central government cannot recentralize power unilaterally as it pleases and enhances the protection from abuses of powers by the central government, making the federal variation of decentralization an important notion in post-conflict state-building.
– Decentralization reproduces democracy at lower levels of government, allowing local and regional communities to have a more direct say in matters which concern them more closely. Bringing the government closer to the people, decentralization allows all in all greater democratization through enhanced accessible participation and greater accountability.[1171] Decentralization and democracy institute an intricated relationship to the point that no contemporary decentralized model of governance would be taken seriously unless it was introduced in the context of democratization. This is witnessed in all those cases, such as

1168 Cf. also Liam D. Anderson, *Federal Solutions to Ethnic Problems: Accomodating Diversity* (London: Routledge, 2013). On the accommodation of ethnic diversity in both South Africa and Ethiopia, cf., for instance, Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Burlington, VT: Ashgate, 2010). For a more detail summary of the possible general national policies for the accommodation of ethnic diversity cf., *inter alia*, Irwin Deutscher, *Accomodating Diversity: National Policies That Prevent Ethnic Conflict* (Lahnham, MD: Lexington Books, 2002).

1169 Schrottshammer and Kievelitz, 6.

1170 Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 32–34.

1171 For a great introduction of the relationship between decentralization (*in casu*, as in *federalism*) and democracy cf. Michael Burgess and Alain-G. Gagnon, "Introduction: Federalism and Democracy," in *Federal Democracies*, ed. Michael Burgess and Alain-G. Gagnon (London: Routledge, 2010). Specifically for the definition of *federal democracy* see ibid., 11–13.

Bosnia (1995), Iraq (2005) and Nepal (2007), where the attempt to build a federation has gone hand in hand with efforts to forge a democratic political culture.[1172]

– By bringing government closer to the citizens, decentralization results in an enhancement of development. In this sense, regional and local governments ensure that development projects reflect regional and local needs and preferences, and accordingly spread resources more equitably across the territory (especially where it is mostly needed).[1173] In other words, regional and local governments improve local service delivery, for they are more efficient (e.g., cost saving) and more effective (e.g., proximity to local needs) in such activity, and thus improve public service delivery. All of this increases the satisfaction of the people with the state and with it, of course, stability, which eventually will bolster the legitimacy of the political system. A closer government is better familiarized of the local causes of conflict and reconstruction of the state can start solidly from the bottom up.[1174]

By considering decentralization as a tool for conflict-resolution, it is easy to sense the direct link between it the transformational character of all post-conflict constitutions. However, decentralization closely relates to all elements of constitutionalism.

bb) *The Interlocking Connection between Decentralization and Constitutionalism*

As already mentioned, it is fair to admit that decentralization is not the only solution to every conflict and by far not the panacea. Whether a new country achieves the beneficial effects decentralization can have on its governance or not, depends on many factors and not only on the simple design of the provisions of a constitution. Reality shows that every experience of decentralization is unique in its implementation and results, and will have diverse beneficial and adverse effects on the people of the newly decentralized region.[1175] However, what is as important as the institutional or constitutional building in decentralized models, is the acceptance of its

1172 ibid., 18.

1173 Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 32–34.

1174 Schrottshammer and Kievelitz, 6.

1175 Feinstein, 1.

logic. The will to share power at different levels and amongst different groups. For the success of a country in achieving the beneficial effects of decentralization, Watts indicates a list of 'significant characteristics of federal processes',[1176] within which the interlocking links between them and the three elements of constitutionalism is immediately evident. Steytler uncovered this close relationship and comments on each characteristic:[1177]

– 'A strong disposition to democratic procedures since they presume the voluntary consent of citizens in the constituent units.'[1178] Self-evidently, this characteristic exposes the commitment to the first element of constitutionalism which is *democracy*. As Steytler utters: '[i]n well-established federations, multiparty democracy is regarded as axiomatic; federalism without democracy is a contradiction in terms.'[1179]
– 'Non-centralization as a principle expressed through multiple centers of political decision-making.'[1180] This is a direct reference to the element of *limited government*. The establishment of numerous centers of political decision making – unlike one mere center – each drawing its authority from its own constituency, is a reminder of how decentralization acts as limiting the power of the center as a safeguard against its totalitarianism. As Steytler stresses:

> 'The legitimate construction of the government of constituent units is predicated on the expressed free will of the population in multiparty elections. Consequently, whoever captures power at the ballot box should be recognized as the legitimate government of the constituent unit, even if it is politically opposed to the elected government at the center. It thus requires tolerance by the central government of oppositional political forces. In particular, the constituent units' right to make final decisions in

1176 See the full list at Ronald L. Watts, "The Federal Idea and Its Contemporary Relevance," in *The Federal Idea: Essays in Honour of Ronald L. Watts*, ed. Thomas J. Courchene, et al. (Montreal & Kingston, London, Ithaca: McGill-Queen's University Press, 2011), 16 – 17. See also *Comparing Fedederal Systems*, 18; "Comparing Federal Political Systems," in *Understanding Federalism and Federation*, ed. Alain-G. Gagnon, Soeren Keil, and Sean Muellller (Burligton, VT: Ashgate, 2015), 13.

1177 Cf. Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 32 – 34.

1178 Watts, "The Federal Idea and Its Contemporary Relevance," 16 – 17.

1179 Cf. Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 32 – 34.

1180 Watts, "The Federal Idea and Its Contemporary Relevance," 16 – 17.

areas of exclusive jurisdiction must be tolerated. Likewise, the constituent units must respect the center's sphere of competencies.'[1181]

- 'Open political bargaining as a major feature of the way in which decisions are arrived at.'[1182] This is another link to limited government, as the mutual tolerance of each group and political opinion opens the way for unrestricted political negotiation on issues of common interest. This 'open political bargaining' comes to the fore especially when the institutions of shared-rule (for instance, the upper house in a federal legislature, representing the sub-units) limit the power of the center, even though they become part of the center.[1183]
- 'A respect for constitutionalism and the rule of law since each order of government derives its authority from the constitution.'[1184] This last element refers to the rule of law as described above, which is a core feature of constitutionalism. First, when a constitution sets the powers of all governments established by the same, the principle of constitutional supremacy allows such parameters. As Steytler adds: 'central to this respect is the notion of limited government; the central government's powers are confined to the four corners of a constitution.'[1185] Second, and this is elemental in a 'federal' structure, the constitution, as the solemn pact between the (at least two) different levels of government, cannot be unilaterally amended by the center. Third, there must be a general respect, not only for the constitution, but also for the laws authorized by it. All governments of all levels of government are bound to act in terms of predetermined clear rules. Finally, in order to validate what is said, trust in the constitution and

1181 Cf. Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 32 – 34.

1182 Watts, "The Federal Idea and Its Contemporary Relevance," 16 – 17.

1183 For Woodman and Ghai, when it comes to autonomy systems, 'a spirit of consultation and negotiation in good faith is vital […]'. See Yash Ghai and Sophia Woodman, "Comparative Perspectives on Institutional Frameworks for Autonomy," in *Practising Self-Government: A Comparative Study of Autonomous Regions*, ed. Yash Ghai and Sophia Woodman (Cambridge: Cambridge University Press, 2013), 466. Cf. also Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 32 – 34.

1184 Watts, "The Federal Idea and Its Contemporary Relevance," 16 – 17.

1185 Cf. Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 32 – 34.

laws must be enforced by an independent apex court, respected by all governments at all levels.[1186]

This shows how the intertwined connection between decentralization and constitutionalism is tangible and not far-fetched. It facilitates the understanding of why many countries are turning towards a decentralized solution of governance in order to tackle the issues arising from despotism-driven civil wars.

b. Decentralization as a South African Key Transitional Matter

Where does decentralization fit in the above-mentioned vision of the South African transition? Transformationalism sets the socio-political aim, but legally it needs specifically designed mechanisms to seek it. Decentralization is a tool for the reaching of the above-mentioned vision; one of the means for the resolution of the South African conflict. J. Chaskalson reminds us that the interim Constitution 'itself makes provision for the complex issues involved in bringing together again in one country, areas which had been separated under *apartheid*, and at the same time establishing a constitutional state founded on respect for fundamental human rights, with a decentralized form of government in place of what had previously been authoritarian rule enforced by a strong central government.'[1187] In introducing an article, which examines how federal arrangements were used during South Africa's transition to democracy to deal with a conflict posed by two significant ethnic-based groupings, right-wing Afrikaners and Zulu nationalists, Steytler and Mettler remind us that:

> 'Federal arrangements are often used as a way of keeping deeply divided societies together. In particular, where divisions, be they ethnic, linguistic, or religious, develop in violent conflict or the threat of civil war, constitutional arrangements for self-rule and shared-rule have been put forward as a key for peace. The federal distribution of power is the used to satisfy sectoral demands for self-determination.'[1188]

1186 Cf. Ghai and Woodman, 471. See also Steytler, "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses," 32 – 34.

1187 *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 7.

1188 Nico Steytler and Johann Mettler, "Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy," *Publius: The Journal of Federalism* 31, no. 4 (2001): 93.

Without trivializing *apartheid*'s inequities by attempting to list them, one can depict the core of the problem by looking at the big picture. This text does not wish to belittle many of the sins, which accompanied South Africa's pathology, such as murder, torture or many other brutalities, but rather focuses on what eventually was the main reason which led to such spites: a broad and persistent effort to deny to the majority of the population all meaningful participation in the political process. Although decentralization as such was not directly the reason for the constitutional transformation, which, as seen, was the introduction of democratic constitutionalism, it has a close link to it. The Constitution of South Africa, 1996, for instance, is clear about the role of local government in the new constitutional order, i. e., 'to provide democratic and accountable government for local communities'.[1189] Accordingly, one of the aims of decentralization in South Africa was diminishing the gap between democratic institutions and the people. How to achieve this? Decentralizing state power, especially if the polity in question is extensively diverse. Therefore, decentralization is the main tool for the seeking of political inclusion, which is by definition the idea of democracy.

aa) *The Roots of South African Federalism*

The nature of South Africa's federal constitutional elements finds its origins, *inter alia*, in its demographic assortment. The turbulent history of South Africa, branded by a frequent shift in power, has resulted in a very unique and diverse polity. In 2016, out of the roughly 55.6 million people, Black Africans reached 80.66 % of the population, whereas 8.75 % was covered by Coloureds, 8.12 % by Whites and 2.47 % by Indians and Asians.[1190] These races can be categorized into eleven constitutionally recognized languages, the major ones being the following: *IsiZulu* (22.7 %), *IsiXhosa* (16.0 %), *Afrikaans* (13.5 %), English (9.6 %), *Sepedi* (9.1 %), *Setswana* (8.0 %) and *Sesotho* (7.6 %).[1191] Numbers at hand, South Africa is regarded as a middle-income country settling at 13,700 US$ GDP per capita in 2017. However,

1189 See, Art. 152(1)(a) Constitution of South Africa, 1996.

1190 Statistics South Africa. "Community Survey 2016, Statistical Release P0301." (2016), 21 (table 2.2). To the total population a number of undocumented inhabitants (precise number remains unknown) coming from neighboring countries should be added.

1191 "Census 2011: Census in Brief." Report No. 03 – 01 – 41 (2011), 24 (figure 2.3).

the levels of income inequality are quite high (Gini coefficient 0.634), with 53.8% of the population living in poverty.[1192]

Decentralization as we know it today in South Africa is the negotiated solution to the ethnic based legal segregation and the resulted therefrom low-intensity civil war. Before the interim Constitution was enacted, South Africa was *de facto* a strongly centralized system, in which a small White minority had control over every aspect of governance.[1193] Accordingly, despite the existence of the *Bantustans* or homelands, the formation of the nine provinces marked a strong process of devolution in South Africa.[1194]

The formation of a decentralized form of government was the product of a tug of war between different forces and was regarded as key compromise in the negotiation process between the ANC and the incumbent NP regime. Some homeland leaders advocated for a solid federalized system of government as solution for ethnic accommodation and limitation of power at the center, whereas the ANC pushed towards a strong centralized government in order to transform a racially oppressed society. This battle resulted in a weak form of federalism, showing a *de jure* federal system with strong unitary elements.[1195]

Constitutional design within multi-ethnic states must consider the best constitutional engineering with regard to ethnic or minorities management. In South Africa, the debate on this issue was very intense during the negotiations: the main question was precisely on the structure of the state, whether to configure it as a type of unitary or federal state. In short, whether and how to introduce forms of decentralization in the future Constitution. Political and constitutional theory and political preferences were closely linked to the needs of the various parties, also seen from a historical point of view. In this sense, the debate was very intense even before the start of the negotiations and, not by chance,

1192 OECD, "Oecd Economic Surveys: South Africa 2017," (2017), https://www.oecd.org/eco/surveys/2017-OECD-Economic-Survey-South-Africa-overview-2017.pdf (accessed

1193 '*De facto*', for under the *apartheid* regime, four 'independent' homelands and six self-governing territories reflected the organization of governance in the country. However, this was just a face, and control was entirely in the hands of the White minority.

1194 Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 330. Although the idea was not to recreate similar ethnic based areas, seven of the nine provinces have a linguistic majority.

1195 Ronald L. Watts, "Is the New Constitution Federal or Unitary?," in *Birth of a Constitution*, ed. Bertus de Villiers (Cape Town: Juta, 1994), 86.

coincided with the decline of *apartheid.* Theorists of the unitary and non-racial system[1196] were opposed by others who highlighted the need to incorporate forms of vertical power sharing,[1197] and the debate could not but be 'hegemonized' by the thoughts of Horowitz and Lijphart, who also agreed on the need to find ways and means in the field of vertical power sharing.[1198]

As is well known, Lijphart, the theorist of consociative democracy, envisaged substantial autonomy for each group, both through federalism and in other types of decentralization. At the central level, the option fell on a form of representation based upon a proportional electoral system, with blocked list voting; in this way, all ethnic groups would have decision-making power within the central institutions. On the contrary, Horowitz, the promoter of integrationism, considered consociativism to be a worsening element, in that he fomented inter-ethnic divisions. Its objective was to prevent the centrifugal forces from being strengthened and an appropriate electoral law would have important consequences in favoring integration or not. Therefore, Horowitz indicated in the vote pooling with the single transferable vote, the overcoming of the ethnic division, which would take place through the transferable vote precisely because the various groups

1196 See, Philip Mayer, "Class, Status and Ethnicity as Perceived by Johannesburg Africans," in *Change in Contemporary South Africa*, ed. Leonard Thompson and Jeffrey Butler (Berkeley: University of California Press, 1975); Michael Macdonald, "The Siren's Song: The Political Logic of Power-Sharing in South Africa," *Journal of Southern African Studies* 18, no. 4 (1992); Roger J. Southall, "Consociationalism in South Africa: The Buthelezi Commission and Beyond," *The Journal of Modern African Studies* 21, no. 1 (1983).

1197 See, Hermann Giliomee and Lawrence Schlemmer, *From Apartheid to Nation Building*, 2nd ed. (Oxford: Oxford University Press, 1992); Frederik van Zyl Slabbert and David Welsh, *South Africa's Options: Strategies for Sharing Power* (New York: St. Martin's Press, 1979).

1198 See, Christina Murray and Richard Simeon, "Recognition without Empowerment: Minorities in a Democratic South Africa," in *Constitutional Design for Divided Societies: Integration or Accomodation?*, ed. Sujit Choudhry (Oxford: Oxford University Press, 2008), 419–20; "Recognition without Empowerment: Minorities in a Democratic South Africa," *International Journal of Constitutional Law* 5, no. 4 (2007). This chapter (and paper) is very relevant to the whole debate on the theories that were then discussed 'on the field', that is, during the negotiations between the parties of South Africa on the center v. rural basis. So, the reference to those authors who debated well before the fall of *apartheid* is reported in this chapter (and paper).

would have to find a compromise, precluded by the blocked proportional list.[1199]

Contrary to the two scholars cited, authoritative doctrine opposed vertical power sharing, as it was considered a tool to maintain the privileges of Whites: democracy, in the South African case, was reconcilable only with the majority rule.[1200]

bb) The Opposed Visions of ANC and NP on the Structure of the State

The issue of federalism, decentralization and the level of decentralization has been a central theme since the second half of the 1800 s. Given the growing importance of the federal option within the British colonial empire, starting

1199 In Horowitz's words: 'voters cast their ballots for candidates, not parties, in order of preference. In a multimember constituency with four seats but ten candidates, a voter might cast up to ten preference votes. This at least opens up the possibility that some of a given voter's votes might be cast for candidates across the ethnic divide. By contrast, list-system PR requires that votes be cast for a single party list. Where parties are ethnically based, there is no way to transfer votes across ethnic lines. A voter is locked wholly within his ethnic party [...] That is why STV is so different from a winner-take-all system and so conducive to proportionality. Once a candidate receives a quota and is elected, his "surplus vote" that is, his vote above the quota is "transferred in proportion to its size to the candidates who stand next in preference among his supporters. Once this is done, the candidate with the lowest total of votes is eliminated, and his votes are transferred to those ranking next in the preference of his supporters [...] In this respect, STV permits a measure of interethnic vote pooling that list-system (proportional representation) PR completely precludes. Voters of one group could provide the margin of victory for a candidate of another group, who might then be responsive to their concerns. If vote pooling of this kind occurred as a result of agreements between parties, the basis would be laid for interethnic policy compromise.' See, Donald L. Horowitz, *A Democratic South Africa?: Constitutional Engineering in a Divided Society* (Berkeley: University of California Press, 1991), 172–73. Of course, also referring to Lijphart: Arend Lijphart, *Power-Sharing in South Africa* (Berkeley: University of California Press, 1985).For the debate between the two, please refer to Andrew Reynolds, "Constitutional Engineering in Southern Africa," *Journal of Democracy* 6, no. 2 (1995); *Electoral Systems and Democratization in Southern Africa* (Oxford: Oxford University Press, 1999). In support of Lijphart: John McGarry and Sidney John Roderick Noel, "The Prospects for Consociational Democracy in South Africa," *The Journal of Commonwealth & Comparative Politics* 27, no. 1 (1989). A good text comes also from the Italian doctrine: Francesca Romana Dau, *Costituzionalismo E Rappresentanza: Il Caso Del Sudafrica* (Milano: Giuffré Editore, 2011), 184–87.

1200 Anna Maria Gentili, ed. *Sudafrica: Processi Di Mutamento Politico E Costituzionale. Atti Del Convegno* (*Bologna, 1–3 Aprile 1992*) (Rimini: Maggioli Editore, 1992), 123–29.

with Canada and Australia, federalism and autonomy were discussed in the decades preceding the formation of the Union of South Africa.[1201] Although the Anglo-Saxon doctrine of the period pointed out the perplexities and problems of the Union, the 'third Federation' should have followed the examples of Canada and Australia; in this regard, it notes the position of Mogi, who described the Union as a 'highly decentralized unitary government'.[1202] Mogi's formula is contradictory and, in reality, the 1909 Constitution did not introduce federal 'elements'. The need for state-building and nation-building between the former English colonies and the former Boer republics necessitated a strong central union with the provinces which, although represented in the Senate, were subject to strong central constraints.[1203] Subsequently, in the course of the consolidation of *apartheid* and its affirmation, the idea of federalism was associated with policies of racial segregation of Whites, made operative by means of homelands, nothing more than territorial delimitation (*gerrymandering*) with the aim of racial exclusion, according to the strategy of divide and rule. In the same way, the consociativism experienced in 1983, was misunderstood precisely to try to marginalize even the Coloureds and Asians from the fate of the Blacks.[1204]

1201 Read the words of de Labillière on South Africa: 'its growing value to South Africa has already been seen; so that even the people of the Orange Free State, and the Boers in the Transvaal, may well come to recognize that it will be best for them to become self-governing Provinces of our great British union.' See, Francis Peter de Labillière, *Federal Britain; or, Unity and Federation of the Empire* (London: Sampson Low, Marston & Company, 1894), 238. See also, Thomas Alfred Spalding, *Federation and Empire: A Study in Politics* (London: H. Henri & Company, 1896); Edward John Payne, *Colonies and Colonial Federations* (London: Macmillan, 1904), 188; Sobei Mogi, *The Problem of Federalism* (London: G. Allen & Unwin Limited, 1931), 263–64.

1202 See, James Brown Scott, *Autonomy and Federation within the Empire: The British Self-Governing Dominions* (Washington, DC: Endowment, 1921), 244; Mogi, 264.

1203 The provinces did not have residual power and their legislation could easily be overtaken by the national legislator. See, Heinz Klug, "Historical Background," in *Constitutional Law of South Africa*, ed. Matthew Chaskalson, et al. (Cape Town: Juta, 1999), 2–6; Nico Steytler, "Republic of South Africa," in *A Global Dialogue on Federalism: Constitutional Origins, Structure, and Change in Federal Countries*, ed. John Kincaid and Alan G. Tarr (Montreal, Kingston: McGill-Queen's University Press, 2005), 313.

1204 See, Bertus de Villiers, *Democratic Prospects for South Africa* (Cape Town: HSRC Publishers, 1992), 27–39. The "F" word was avoided, but regionalism and forms of autonomy became central. This was also observed by doctrine in the first phase of negotiations. See, Gentili, 212–13.

Not only were federalism and devolution central problems during the course of the negotiations, but also according to important doctrine, was this probably the most important problem of the internal negotiation process and it was noted that 'both the structure of the state and the quality of democracy [...] is dependent upon a resolution of this debate'.[1205] From here, the divergent positions of the ANC and the NP, as a matter of priority, are noted.

Examining the official documents, the ANC promoted a 'united, democratic, non-racial and non-sexist South Africa, a unitary State [...]', specifying that, with 'united South Africa, we have in mind, in the first place, the territorial unity and constitutional integrity of our country [...] as a single, non-fragmented entity [...].' The ANC also promoted regional and local institutions, but 'truly non-racial and democratic'. Therefrom a very important passage for the discussion about ethnic federalism: for the ANC, the unitary state did not mean a centralized state and did not preclude the inclusion of forms of decentralization. These, however, had to be integrated, excluding autonomous territorial entities: it was stated, in this regard, that 'the boundaries of local and regional districts will be determined with due regard to economic and development considerations and without regard to race, color, ethnic origin, language or creed'. Therefore, they saw the solution in opting for a not strong form centralism with excessive bureaucratization, as the devolution was recognized as a tool for more efficient administration, but specially to encourage the participation of local communities.[1206]

The ANC only considered federalism as a means by the NP to counter its future majority which it would acquire at the parliamentary level and, in subsequent documents, was reluctant to address the issue of autonomy. In fact, the ANC aimed to keep under the control of parliament the powers

1205 See, , 133.

1206 See, (ANC) African National Congress, "Constitutional Guidelines for a Democratic South Africa," ed. ANC (Lusaka, 1989); "Constitutional Principles and Structures for a Democratic South Africa," ed. Dullah Omar Institute University of the Western Cape (1991). Reflections in this sense also of Karthy Govender, "The People Shall Govern!," in *The Freedom Charter and Beyond -Founding Principles for a Democratic South African Legal Order*, ed. Nico Steytler (Plumstead: Wyvern Publications, 1992), 97. See also Heinz Klug, "South Africa's New Constitution: The Challenges of Diversity and Identity," *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 28, no. 4 (1995): 424–25.

of the regions and local authorities, which had to be 'harmonized' with the central government; in the event of conflict, national legislation would prevail.[1207] From a diachronic reading of these documents, some considerations can be drawn: the position of the ANC became, in the course of negotiations, more conciliatory than regional or decentralized requests. In fact, initially, the ANC was strongly opposed for purely historical reasons (the homelands), while later, it became evident that a form of decentralization would be necessary, since the varied social and ethnic composition of South Africa could not be ignored.[1208] The ideological and political reasons behind the ANC's preference for the type of unitary state were essentially three: the first was due to the socialist and Marxist nature of the party, since over the years in exile it developed a strong centralized party apparatus influenced by Marxist ideology; the second, linked to *apartheid* and the need to unite the territory according to a single citizenship, thus explaining the words 'united', 'democratic' and 'non-racial' alongside 'unitary State'; the third was purely economic because, given the economic disparities, it required economic planning and a fair and centralized tax system.[1209] Nevertheless, as mentioned above, the ANC began to accept that strong regional and local governments would favor better efficiency in terms of service allocation and, in this sense, was influenced by the German model, which combined strong leadership at the central level with forms of regional autonomy.[1210]

1207 On the positions of the ANC until 1992, see Bertus de Villiers, "Federalism in South Africa: Implications for Individual and Minority Protection," *South African Journal on Human Rights* 9, no. 3 (1993): 374–75.

1208 David Welsh, "Federalism and the Divided Society: A South African Perspective," in *Evaluating Federal Systems*, ed. Bertus de Villiers (Cape Town: Juta, 1994), 244.

1209 Derek Powell, "Fudging Federalism: Devolution and Peace-Making in South Africa's Transition from Apartheid to a Constitutional Democratic State (1990–1996)," in *Kenyan-South African Dialogue on Devolution*, ed. Nico Steytler and Yash Ghai (Cape Town: Juta, 2016), 40. The author also points out that many administrative departments, as well as *think tanks*, called for the definition of new national standards in the field of public services. In essence, economic planning was necessary because the aim of the new economic and social order was to progressively reduce social disparities. See also Richard Humphries, Thabo Rapoo, and Steven Friedman, "Shape of the Country: Negotiating Regional Government," in *The Small Miracle: South Africa's Negotiated Settlement*, ed. Steven Friedman and Doreen Atkinson (Johannesburg: Raven Press, 1994), 157.

1210 See, de Vos and Freedman, 269; Nicholas Haysom, "Federal Features of the Final Constitution," in *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Johannesburg: Witwatersrand University Press, 2001), 504. In addition, a further aspect that led to the preference of a form of decen-

The NP was in favor of strong decentralization, but not for purely ethnic reasons. In fact, being the White minority, except in the provinces of the Western and Northern Cape, dispersed in a heterogeneous way for the rest of the territory, federalism or decentralization was considered a clear anti-majority instrument. For the NP, the central government remained the essential element, and this was demonstrated when the NP and the ANC reached agreement on this very issue: a government of national unity. Precisely on this issue, and not on the creation of the provinces and their limited devolution of powers, the negotiations had a real turning point between the two parties.[1211] Having said that, the positions of the NP on decentralization deserve more attention, as can be seen from the initial proposals of the NP. In fact, it provided for a model of consociative democracy based on three levels of government within which the regional and local authorities were 'not merely administrative extensions of the central government [...] On the contrary, every tier is "government" in its own right'. The justification lay in the ethnic diversity of South Africa and in the principle of proximity to the citizens, which would have favored a better inclusion of the local communities in the decision-making. Concretely, at the central level, the proposal was the institution of the Senate based on the US model, with equal representation, to which was added the power of veto for each of the minorities. But what aroused the greatest interest was what was proposed on the subject of local government: within the third level of government, the intention was to guarantee the 'recognition of free and autonomous fields of interests of communities'. The objective was therefore to guarantee minorities not only in the cultural and religious sphere, but also in 'business and professional life, trade union affairs'. As Klug well points out, it was a 'proposal' aimed at guaranteeing the properties of Whites, since the segregationist geographic pattern would not have undergone many changes without intervention in this sector. The NP well understood that, through ownership of land, the White minority would continue to

tralization was the inclusion, during the negotiations, of the leadership of the Bantustans, in the ranks of the ANC. In return, on top of the inclusion of the prominent elements of the Bantustan bureaucracy within the central administration, the ANC ensured them a sort of continuity within the new provincial entities. See, Martin Wittenberg, "Decentralization in South Africa," in *Decentralization and Local Governance in Developing Countries: A Comparative Perspective*, ed. Pranab Bardhan and Dilip Mookherjee (London: MIT Press, 2006), 335.

1211 See, Steytler and Mettler, 94.

maintain its privileges 'providing local self-government based on the one hand on local property rights, and on the other on the erection of a constitutional firewall between public and private activity'.[1212]

In any case, the establishment of decentralized entities was legitimate and met the needs of the democratization of the future South Africa, a reality highly diversified by the ethnic composition that welcomed federal structures, especially as a result of the segregationist experience. In this regard, the demands of the Zulu ethnic group revealed the importance of ethnically-based decentralization in the construction of the new South Africa.[1213]

cc) The Nature of South African Decentralization: Ethnic Accommodation and Weak Federalism, or Centralized Federation

In fact, the reality of South Africa after the end of *apartheid* was much more complex than the opposition between ANC and NP; alongside the opposition between Blacks and Whites, there were other claims of 'minor' parties with more ethnic bases. In fact, violence and opposition arose within the Black community, between the ANC and the *Inkatha* Freedom Party (IFP) of the Zulu movement and other formations, the Conservative Party (C-P), the Afrikaner *Volksfront* (AVF) and the governors of the homelands of *Ciskei* and *Bophuthatswana*.[1214]

The ethnic composition of South African society could not have supported a type of unitary state, despite the legitimate claims of the ANC. While the NP

1212 National Party, "Constitutional Rule in a Participatory Democracy: The National Party's Framework for a New Democratic South Africa," (September 4, 1991), https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01584/05lv01594.htm (accessed September 20, 2019). These positions were defended by Fanie Jacobs, "Constitutional Proposals of the National Party – a Critical Analysis," *Monitor* (1991), https://omalley.nelsonmandela.org/omalley/cis/omalley/OMalleyWeb/03lv01538/04lv01584/05lv01596.htm (accessed September 20, 2019). Klug's remarks are acceptable, given the profound differences in socio-economic terms: See, Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, 96 – 97.

1213 See, Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge: Cambridge University Press, 2017), 245.

1214 Murray and Simeon, "Recognition without Empowerment: Minorities in a Democratic South Africa," 422.

therefore concentrated its claims on forms of local control, other political forces promoted ethnically-based decentralization at the provincial level. In fact, the C-P, the AVF and the IFP formed a common political platform, the Freedom Alliance, with the aim of introducing federalism into the future South African constitutional order.[1215] The most delicate issue was the claims of the Zulu minority, of which the IFP party was the promoter, which essentially aimed to counterbalance the ANC, into which the Xhosa ethnic group had merged and, with this aim, to introduce forms of autonomy that, in particular, guaranteed them a form of autonomy in the KwaZulu-Natal region. In this case, the question was linked to the need to provide ethnic accommodation to the Zulu ethnic group, but without the future South African order being pervaded by ethnicism as the only political dimension.[1216]

The demands of the IFP and the Freedom Alliance were reflected in the demand for provincial autonomy, i. e., legislative and fiscal autonomy. The IFP, in particular, made, in addition to what was said, two other proposals, specifically related to the ethnic dimension: the change of the name of the province of Natal in KwaZulu-Natal and the constitutional recognition of the monarch Zulu. Moreover, as Klug identifies, the interpretation of the term federalism, applied to the South African reality, meant for the IFP to introduce autonomous regions whose constitutions would dictate the interpretation of the federal constitution.[1217] The IFP proposed in its Constitution, in the wake of the *Indaba*,[1218] a strong

1215 Steytler and Mettler, 94.

1216 See, Welsh, 246 ff.

1217 The IFP proposals were contained in the Constitution of KwaZulu-Natal, 1992. See also, Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, 97 – 98.

1218 The aspirations of the Zulu ethnic group towards forms of autonomy were not new in the South African political game. The proposal for federalism in South Africa has its roots in the 1980 s, in the descending phase of *apartheid*. In 1986, representatives of Whites from the province of Natal, those of the Blacks from the homeland KwaZulu and 35 other political groups met in Durban to discuss a regional solution to two national problems: *apartheid* and the strong centralization of the state. In this regard, the negotiators agreed on the importance of the federal solution in South Africa consisting of future autonomous provinces. The roots of the negotiation renamed *Indaba* (English: *serious negotiation*), come from the *Buthelezi* Commission, which met constantly between 1980 and 1982. Among the various components, academics and political figures, there was also Lijphart: in fact, much emphasis was placed on the rights of the minorities and a consociational cabinet was proposed, associated with the power of veto of the minorities, which would

regional autonomy in the face of limited powers of the federal government.[1219] This 'strongest demand for federalism as an instrument to protect territorially based ethnic interests',[1220] as noted by careful doctrine, was contained in the constitutional document promulgated by the Legislative Assembly of the homeland KwaZulu which, rather than a regional Constitution or 'Statute' was closer to a secessionist document.[1221] The intent was clear: regional (provincial) autonomy in a system that guaranteed the Zulu traditions, which, outside the KwaZulu-Natal province, had no electoral consensus. However, it was also stated that the objective of *Mangosuthu Buthelezi*, leader of the IFP, was not only concerning the territorial articulation of the State, but to be considered the third politically relevant actor during the negotiations. In any case, the proposal of the Zulu, in a comparative perspective, cannot but arouse interest for the attempted re-proposition of a model of a 'member State' totally based on ethnicity. In this confederal intent, one could see an equal tendency towards the application of models

have the task of favoring intra-racial alliances, as well as multiracial parties, to avoid that the ethnic element would become the identifying trait of each individual party. The discussion that took place within the *Indaba* is relevant for a better understanding of the post-*apartheid* negotiations, since already at that time it was stated that the political leaders of KwaZulu and Natal had much to lose if the South African post-*apartheid* political context became polarized around the ANC, which in fact did not participate in the negotiations. Already during these discussions, what happened afterwards was foreshadowed, i. e., the contrast between the centralist tendencies of the ANC and those devoted to the decentralization of the future IFP. For more information see, Lawrence Schlemmer, "Constitutional Perspectives (Kwazulu-Natal)," *Clarion Call* 1 (1986): 40 – 46; Edward A. Lynch, "The Kwazulu/Natal Indaba: A Federalist Proposal for South Africa," *Publius: The Journal of Federalism* 17, no. 3 (1986 (Summer, 1987)): 231 – 48; Suzanne Francis, *Institutionalizing Elites: Political Elite Formation and Change in the Kwazulu-Natal Provincial Legislature* (Boston: Brill, 2011), 51.

1219 See, Klug, "South Africa's New Constitution: The Challenges of Diversity and Identity," 427.

1220 See, Fessha, 75. The strong Zulu identity and the need for a form of decentralization is highlighted in Mary de Haas and Paulus Zulu, "Ethnicity and Federalism: The Case of Kwazulu/Natal," *Journal of Southern African Studies* 20, no. 3, Special Issue: Ethnicity and Identity in Southern Africa (1994).

1221 See, Stephen Ellmann, "Federalism Awry: The Structure of Government in the Kwazulu/Natal Constitution," *South African Journal on Human Rights* 9, no. 2 (1993). The author points out that the Zulu Charter had the precise intention of configuring itself in a system similar to that of the US "Articles of Confederation", far removed from the South African reality. See also, Nico Steytler, "South Africa," in *Federalism and Civil Societies: An International Symposium*, ed. Jutta Kramer and Hans-Peter Schneider (Baden-Baden: Nomos Verlag, 1999), 297.

partly close to the theories of Wheare, which influenced the construction of the First Nigerian Republic, and which failed miserably precisely because of the exasperation of ethnicism in terms of opposition between 'ethnic regions'.[1222]

These were the demands of the IFP and the Freedom Alliance, whose dissatisfaction led them to abandon the negotiations: in fact, ANC and NP were the only two parties to complete the negotiations, and to approve the interim Constitution because the political formations mentioned above did not participate in the negotiations. The difficult task of the ANC and NP was therefore to include the other formations in the political arena, so as to make it possible for them to participate in the elections of 29 April 1994 as widely as possible. At this specific stage of the constitution-making process, the discussion of federalism became central precisely in terms of ethnic accommodation. In this sense, they note the words of one of the protagonists of the negotiations, De Villiers, according to whom 'the decision to create provinces was not taken lightly. It was preceded by intense political debate and compromise, as well as by extensive research and consultation at both local and international level. It was arguably the most contentious part of the negotiating process'.[1223]

The Zulu question must consider the genesis of the territorial articulation of South Africa. Alongside those who believe that the ethnic element was not the basis for demarcating the boundaries of the provinces, given the ethno-linguistic heterogeneity, it cannot be said that it is irrelevant. In fact, on closer inspection, most of the provinces are inhabited by a predominant ethnic group, with the exception of *Gauteng* and *Mpumalanga.*[1224] As Fessha states, 'the majority of ethnic groups in South

1222 See, Marina Ottaway, *South Africa: The Struggle for a New Order* (Washington, D.C.: The Brookings Institution, 1993), 64–72; Hugh Corder, "Towards a South African Constitution," *The Modern Law Review* 57, no. 4 (1994): 500. See also, Steytler, "South Africa," 304–05.

1223 See, Klug, *The Constitution of South Africa: A Contextual Analysis*, 30; Bertus de Villiers. "The Future of Provinces in South Africa – the Debate Continues." *Konrad-Adenauer-Stiftung.* (2007), 4.

1224 In the Eastern Cape, isiXhosa is the first language 78.8 per cent , in Kwazulu-Natal isiZulu is 77.8 per cent, in the Northern Cape Afrikaans 53.3 per cent, in the North West seTswana 63.4, in the Free State Sesotho 64.4 per cent, in the Western Cape Afrikaans 63.4 and in Limpopo siPedi 52.9 per cent. In Gauteng and Mpumalanga, there is no predominance of a language group. See, Statistics South Africa, "Census 2011: Census in Brief."

Africa thus have a "mother province" with pockets of their "cousins and nieces" scattered in other provinces'.[1225] Dersso also points out that it would not correspond to a reality to deny the ethnic criterion in the demarcation of internal borders because, if on the one hand this certainly did not constitute the primary element, on the other hand almost all the provinces show a wide linguistic homogeneity.[1226] Further observations on the South African case were made by Anderson: if it is clear that the ethnic criterion was not the guiding principle in the formation of the 'internal borders', at the same time, a division of the ethnic groups into different territorial entities was not carried out, even when opposing to the ANC in reference to KwaZulu-Natal. According to Anderson, the approach of the South African constituent fathers was neutral in the input phase, but given the concentration of ethno-linguistic groups in certain territories, the outcome led to an ethnoterritorial federation (in the case of KwaZulu above all), due to ethnic homogeneity.[1227]

In fact, still relying on the direct experience of De Villiers, among the various reasons in favor of the creation of the provinces, there is the need to 'allow informally for cultural, regional and language diversity', constituting the best instrument to guarantee national unity 'while at the same time recognizing diversity and the rights of minority political groupings'.[1228] Consequently, it could be affirmed that the actions of the South African constituents have been as close as possible to the so-called rational action with respect to the purpose.[1229] In constitutional and juridical terms, it has been translated into a system of de facto multilevel governance of ethnic management that has not exacerbated the concept of ethnicity, but has mitigated and incorporated it into a political system that had and has as its objective the progressive elimination of the differences identified not in ethnic terms, but as socio-economic needs and change in the fundamental values of society, starting from the equality of political rights.

1225 See, Fessha, 113.

1226 See, Solomon A. Dersso, *Taking Ethno-Cultural Diversity Seriously in Constitutional Design: A Theory of Minority Rights for Addressing Africa's Multi-Ethnic Challenge* (Leiden: Brill, 2012), 169.

1227 See, Anderson, 252.

1228 See, de Villiers, "The Future of Provinces in South Africa – the Debate Continues," 5.

1229 The reference is to Max Weber and his known work: Max Weber, *Wirtschaft Und Gesellschaft* (1922).

The system of the demarcation of the provinces has had the function of meeting the demands of self-government of the minorities and, in these terms, has had considerable importance in relation to the existing multiculturalism in South Africa, that is, what was 'welcomed' by the Constitution of 1996.[1230] The structure of multilevel government in South Africa has provided ethno-linguistic groups with a territory within which to develop and maintain their cultural identity, but without this becoming a threat to the unity of the nation. In essence, the ability of the negotiators, that is, of the parties involved, has been that of being able to reconcile the two opposing tendencies; this, above all, in the light of the other African experiences, in which ethnicism has always been a source of conflict and strong institutional instability. Ultimately, the ability of the representatives of the parties has been that of knowing how to bring together, within a democratic-representative system, the ethnic instances, but without these becoming the ideological bases of the parties themselves. Claims based not on ethnic identity, but on ideological/political and economic differentiations.[1231]

The events in what became KwaZulu-Natal showed that, to a certain extent, ethnicity, as well as the legal traditions and customs of indigenous peoples, are always elements that must necessarily be considered. The important upheavals and violence that trailed the period following the approval of the interim Constitution made it clear that reaching an agreement on the claims of the 'excluded' political forces was not only necessary, but vital for the entire Constitution-making process. In this sense, it is compelling to claim that the debate about federal arrangements as a peace-making device had a strong impact in bringing South Africa peacefully to the first democratic elections in its history.[1232]

1230 See, Dersso, 169.

1231 See, Fessha, 114–15; Jaap De Visser, Nico Steytler, and Yonatan Tesfaye Fessha, "The Role of Ethnicity in the Demarcation of Internal Boundaries in South Africa and Ethiopia," in *Federalism, Regionalism and Territory*, ed. Stelio Mangiameli (Milano: Giuffré, 2013), 280; Yonatan Tesfaye Fessha and Jaap De Visser, "Drawing Non-Racial, Non-Ethnics Boundaries in South Africa," in *Kenyan-South African Dialogue on Devolution*, ed. Nico Steytler and Yash Ghai (Cape Town: Juta, 2015), 94.

1232 Steytler, "Republic of South Africa," 317; Steytler and Mettler, 93 ff. The importance of the 'negotiated concessions' on federalism and decentralization is constantly recognized, even in the most recent works, as in Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa*, 120.

dd) South Africa's Current Structure: Cooperative Federalism

South Africa's decentralized government has been labelled differently over the years, and it is indeed a difficult creature to define. The legislature on the national level encompasses two houses, the National Assembly and the National Council of Provinces, in which all provinces are represented. Each province has a provincial legislature, while local governments turn themselves to local councils.[1233] It would be the case of a federal state if the constitution had awarded the provincial legislatures with exclusive and autonomous powers. However, should the Parliament have a final word on the exercise of this legislative autonomy and the provincial law should in this regard be subordinated to the central law of the Parliament, this would be a sign of a unitary state.[1234]

A federal element can be found in the protection of the existence of decentralized tiers, their nature and functions, by the Constitution itself. The central government cannot simply abolish any of them, nor can it unilaterally change the nature of a particular province or municipality. All this would require a constitutional amendment, which in turn would be subject to review by the Constitutional Court. Additionally, a majority of provinces in the National Council of Provinces (NCOP) is required for any legislation to be passed, while six of them are needed for constitutional amendments.

However, being the South African decentralized system of government a veritable compromise to facilitate the transition, the ANC never fully embraced this solution, and has been trying to review this system since 2007.[1235] The ANC's political dominance in most levels of government, forming a *de facto* one-party rule, results in the undermining of the constitutionally-anchored principle of public participation, along with the alleged independence of every sphere, with national policy, loyalty and concerns often trumping provincial or local matters.[1236]

1233 Feinstein, 1.

1234 See, Basson, 185.

1235 Cf. (ANC) African National Congress, "Legislature and Governance for a National Democratic Society," in *52nd National Conference* (Polokwane 2007). For further insights see Nico Steytler, "The Politics of Provinces and the Provincialisation of Politics," in *Law, Politics and Rights*, ed. Tiyanjana Maluwa (Leiden: Martinus Nijhoff, 2014).

1236 Feinstein, 2.

Hence, South Africa presents a system, which is per se federal, yet through a very strong concentration of functions at the center and a political dominance of one party becomes quite fragile.

South Africa's decentralized government shows the characteristics of an intertwined and complementary system. The constitutional principle of devolution, included in the interim Constitution, read as follows: 'one sovereign state structured at national, provincial and local levels, each of such levels being allocated appropriate and adequate powers to function effectively'.[1237] In a first moment, a system of two spheres of government was established by the interim Constitution – the national government and the nine provinces. The IC recognized a third sphere, local government, yet its powers did not derive from the Constitution itself, but were rather determined by provincial legislation.[1238] In this regard, the third sphere dwelt within the provincial sphere of government. In a second moment, however, the Constitution of South Africa, 1996, elevated local government alongside both the other two spheres and thus creating a three-ordered government.[1239]

– The national sphere of government comprises parliament and the presidency. The legislative function is given to the National Assembly and the NCOP, which represents the interests of the provinces in the

1237 See, *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 45(f), summarizing CPs I, XVIII, XIX, XX, XXI and XXI, not paraphrasing them.

1238 Cf. s. 174(3) and 175(1) read with Schedule 6 IC.

1239 See Art. 40(1) Constitution of South Africa, 1996: 'In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.' For further background, see Steytler, "Republic of South Africa," passim; Christina Murray, "Republic of South Africa," in *Legislative, Executive, and Judicial Governance in Federal Countries*, ed. Katy Le Roy and Cheryl Saunders (Montreal, Kingston: McGill-Queen's University Press, 2006), passim; Jaap De Visser, "Republic of South Africa," in *Local Government and Metropolitan Regions in Federal Systems*, ed. Nico Steytler (Montreal, Kingston: McGill-Queen's University Press, 2009), passim; Chris Tapscott, "Republic of South Africa: An Uncertain Path to Federal Democracy," in *Political Parties and Civil Society in Federal Countries*, ed. Klaus Detterbeck, Wolfgang Renzsch, and John Kincaid (Don Mills: Oxford University Press, 2015), passim; Derek Powell, "Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations," in *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics*, ed. Johanne Poirier, Cheryl Saunders, and John Kincaid (Don Mills: Oxford University Press, 2015), passim.

national legislative process. The executive branch, instead, is allocated to the president, which is elected by parliament yet is not a member of it, and a cabinet of ministers, which are members of parliament appointed by the president.

– The provincial order is made of nine provinces with their respective elected governments, which consist in a premier, vested in the executive authority, and a provincial legislature, with legislative power. The status and appointment procedures of the provincial executives correspond to the national procedures, whereas the provincial legislatures are elected on the grounds of proportional representation.

– Finally, the third sphere of government, local government, consists in more than two hundred and fifty municipalities. Their municipal councils are elected through a mixed system of proportional representation and direct elections.

In short, as of today, the national sphere of government is the most powerful of the three tiers. It is vested with exclusive legislative competences over any matter not listed in the Constitution as a provincial or local government function, concurrent competence with the provinces over most of the latter's functions, as well as full control over the main tax tools and vertical revenue-sharing between the three orders.

Of course, the status and nature of the provincial and local government orders are constitutionally entrenched and protected, yet the scope of their powers is limited to those matters enumerated in schedules that form part of the Constitution of South Africa, 1996. On the one hand, most of the competences vested in the provinces are concurrent national functions, and consist in major social services, such as education, health, and social welfare. On the other hand, municipalities are vested with the provision of basic services, such as water, electricity and sanitation, directly to households.[1240] As Powell adds:

> 'The constitution sets out principles of cooperative government that protect the status and functional integrity of the spheres, but bind them to obligations to work together openly and in good faith, resolve their disputes through political dialogue not court action, and coordinate their activities in the interests of coherent government for the country as a whole. The constitution requires mandatory national legislation to

1240 See, "Transition to Cooperative Federalism: The South African Experience," in *Occasional Papaer Series* (Forum of Federations, 2010), 8–9.

> provide a framework for the conduct of intergovernmental relations and the resolution of intergovernmental disputes.'[1241]

In the first stage of the transition, the interim Constitution did not yet establish a 'federal' system.[1242] Some exclusive powers were given to the provinces under the sway, however, of extensive powers by the (central) legislature to override them.[1243] In the situations listed at Art. 126(2 A) IC read with section 126(3) IC, an Act of parliament prevails over provincial law, even though it regulates within the functional areas in competence of the provinces. Therefore, it is clear that the autonomous powers of the provincial legislatures over their designated areas of competences were not exclusive. In this regard, the provincial powers were not protected by the interim Constitution itself. In other words, the IC has to be considered as a unitary constitution with some decentralized tendencies.[1244]

1241 See, ibid.

1242 Using Devenish's words, 'the interim constitution introduced a quasi-federal dispensation. This model was to be further developed and refined in the Constitution of South Africa, 1996, which to a lesser or greater extent was based on the German exemplar, expressly involving co-operative federalism.' See, George E. Devenish, "Federalism Revisited: The South African Paradigm," *Stellenbosch Law Review* 17, no. 1 (2006): 129.

1243 Under the IC, a province had the power to regulate all matters within the functional areas listed in Schedule 6 (see, Art. 126(1) IC). However, Parliament was empowered to write laws with regard to matters in the competence of the provincial sub-unit when, *inter alia:* 'the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation' (see, Art. 126(3)(a) IC); 'the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or coordinated by uniform norms or standards that apply generally throughout the Republic' (see, Art. 126(3)(b) IC); 'the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services' (see, Art. 126(3)(c) IC); 'the Act of Parliament is necessary for the determination of national economic policies, the maintenance of economic unity, the protection of the environment, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labor, or the maintenance of national security' (cf. Art. 126(3)(d) IC); or 'the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies' (cf. Art. 126(3)(e) IC).

1244 In *Government of the Republic of South Africa v Malevu 1995 (8) BCLR 995 (D)*, the sitting judge of the Supreme Court held that even though the IC, according to s. 61, 62, 125, 126 and 159, stipulated a system of power-sharing between the national and provincial government resembling to that of a federal system, it created what is fundamentally a centralized state where the national government remained supreme and the parliament retained sovereignty over the provinces.

Roughly two years later, the newly drafted and certified Constitution of South Africa, 1996, stated that '[…] government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated."[1245] This provision established South Africa's current multilevel government, in which powers are shared vertically between three levels of government: the national government, the provincial governments and the local government.

Most provincial functions are concurrent with the national government (sch. 4), although the national government may easily trump concurrent provincial powers through a qualified override clause (Art. 146), which sets an easy obstacle for national legislation. Even exclusive provincial powers are deemed to be trumped by national legislation on more limited grounds (Art. 44(2)). Exclusive provincial powers (sch. 5) remain thus very limited, with the adoption of a provincial constitution being the only veritable exclusive power (Art. 142). Their exclusive responsibility spreads to basic economic matters and tourism, while they share some functions with the national government when it comes to health, education, housing, transport, agriculture and policing.[1246] The local government's sphere is constitutionally entrenched, but is not exclusive (Art. 156). They are responsible for basic service delivery.[1247] Both national and provincial governments may regulate local governments legislature (Art. 155(7) read with schs. 4B and 5B).[1248] Entrenched in the Constitution of South Africa, 1996, is the principles of cooperative governance between the different layers of government.[1249]

In the years after the transition up to today, the CCZA has narrowed provincial functional areas to the clearest definition in the national Constitution. On top of it, provincial powers are squeezed from below by an expansive interpretation of local government's functions, and from above by the long list of competences of the national government. Accordingly, to use Steytler's words, the Constitutional Court has

1245 Art. 40(1) Constitution of South Africa, 1996.
1246 Feinstein, 1.
1247 ibid., 2.
1248 Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 332 f.
1249 See, Art. 41 Constitution of South Africa, 1996.

incentivized the formation of an 'hourglass federation', where provinces are crammed thin between the national and local governments.

However, opposed to the parsimony shown by the Constitutional Court concerning the substance of provincial powers, it has given full protection to the provinces' procedural rights to shared rule institutions.[1250] For instance, via their representation in the NCOP, the provinces form part of the national legislative process and have an essential voice in the passage or rejection of national legislation affecting provinces.[1251] The NCOP is a paramount institution that gives effect to integrative federalism.[1252] It is a council of provinces (and local government representatives)[1253] that participates in the process of national legislation by representing 'the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting provinces."[1254]

1250 Steytler argues that '[i]t may well be that the courts are more comfortable enforcing procedural rules than dealing with substantive matters, particularly the complex issue of carving out a space for provincial self-government These developments have hardly raised a public eyebrow. With most provinces not fulfilling their constitutional mandate of service delivery of education, health, and housing, more public trust is placed in the national government to remedy the ills of the provinces'. See Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 361 f.

1251 See, Art. 76 Constitution of South Africa, 1996.

1252 The NCOP is composed of a ten-member delegation from each province (see, Art. 60(1)): six permanent delegates (indirectly elected by the provincial legislatures) and four special delegates (three members of the provincial legislature and the premier of the province) (see, Art. 60(2)).

1253 Art. 67 Constitution of South Africa, 1996 basically gives veritable recognition to local governments as a sphere of government. Local government has ten part-time representatives in the NCOP to represent the different categories of municipalities, and who may participate, but may not vote, in proceedings when their interests are at stake.

1254 See, Art. 42(4) Constitution of South Africa, 1996. Additionally, a constitutional amendment effecting the boundaries of the provinces must also be passed by six of the nine provinces in the NCOP as well as, of course, with the assent of the affected provincial legislatures. See, Art. 74 Constitution of South Africa, 1996; Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 359.

C. The South African Constitutional Court (CCZA)

With the agreement on an IC, which also meant the adoption of a democratic constitutional state based on fundamental rights and freedoms, South Africa set a major milestone given the complex and horrific history of the country. However, the establishment of constitutional democracy cannot happen by fiat. It needs a vast series of measures and implementations, which together make the constitutional transition. One of these measures was the creation of social and institutional structures necessary for the enforcement and implementation of the new constitutional values. First among others, a constitutional court. The CCZA was installed on 14 February 1995 and was vested with the pivotal task of laying the jurisprudential groundwork for the new society envisioned by the IC and the Constitution of South Africa, 1996.[1255] But before that, the establishment of the three pillars of constitutionalism, without which no transformation can be reached.

The creation of a CCZA was a core element of the political compromise that facilitated eventually the constitutional transition. It was in other words, a veritable political insurance for the outgoing regime and a check institution on the dominance of the ANC.[1256]

I. Establishment

Once attention shifted to the negotiation of a new constitution, the debate commenced over the role the judiciary would embody in the new South Africa. While there was not really a doubt about the fact that there should be a competent, impartial and independent apex court that should have the 'power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights',[1257] it was not always clear what structure and function this new court should adopt. Although there seemed to be not really a problem insofar as the appointment process of new judges

1255 Hoyt Webb, "Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law," *Journal of Constitutional Law* 1, no. 2 (1998): 205 f.

1256 *Daly, The Alchemists: Questioning Our Faith in Courts as Democracy-Builders.*

1257 See, Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid," 176. Klug quotes the Third Report to the Negotiating Council, Kempton Park, May 28, 1993, 2.

concerned (that is, a more representative of the population), several other issues continued to divide the politicians, including in particular, whether the apex court would act parallelly with other courts or integrated into the existing court system.[1258]

Both the IC and the Constitution of South Africa, 1996, did not bother to alter the pre-1994 judicial structures, as well as the judges which held office before the constitutional transition; the judicial structures remained unchanged, and all judicial officers kept their position undisturbed.[1259]

Before the constitutional transition, the CCZA was not existent and at the superior court level, no more than two or three Black judges and one female judge were holding office. Indeed, this composition was inadmissible to the liberation movements, given the lack of diversity and, of course, the judicial performance of the senior officers holding office during the *apartheid.* Even though leaving the existing courts intact was part of the negotiation compromised, criticism increased when it came to entrust the task of constitutional review to those same *apartheid* courts. Back in 1994, the judiciary was overwhelmingly White (and male) and thus lacked legitimacy and capacity to produce a sense of justice in all communities and sexes. It followed that the establishment of a new Constitutional Court, more presentative of the diverse South African population, would therefore be the right choice when it came to the protection of the new Constitution and the values it entrenches.

At the same time, questions arose during the negotiating process regarding what sort of institution could fulfil the role a protector of the new Constitution, a specialist Constitutional Court, the existing judiciary, or a hybrid solution? Many English-speaking countries have adopted the idea that ordinary courts can engage in constitutional review. However, their credibility and respect are a needed component for such a system to work. In South Africa, there was skepticism on whether the Supreme Court and the other courts could be transformed in such respected institution. The feeling was that the best solution would be to create a new judicial body, untainted by the past. These were the main reasons an

1258 On a more detailed description of the discussion on the establishment of the CCZA, see ibid., 175–79.

1259 See, Schedule 6 Art. 16 Constitution of South Africa, 1996: 'Every court [...] continues to function and to exercise jurisdiction in terms of the legislation applicable to it [...]'.

entirely new court, with new functions and new composition, was introduced at the apex of the judiciary; the Constitutional Court.[1260]

On October 1994, the members of the new CCZA met for the first time. Interestingly enough to be mentioned, at the end of the same year, the justices undertook a study visit to Germany, whose constitution – alongside with those of India, Canada and Namibia – had apparently had a deep influence on the drafters of the interim Constitution. Formally, the CCZA was opened by the President on 14 February 1995. The Court was formally opened by President Nelson Mandela on the morning of 14 February 1995.[1261]

II. The Judiciary System in South Africa

In South Africa, the judicial authority is vested in independent and rule-bound courts.[1262] In fact, the Constitution of South Africa, 1996, dedicates an entire Chapter to the courts and justice administration,[1263] which is a piece of evidence of the determination to establish separation of powers between the judiciary and the other branches of government.[1264] However, under the new constitutional order, the judiciary falls under exclusive national competence. Accordingly, the new Constitution does not entrench any provision for provincial or local courts,[1265] and thus provinces and

1260 See, Ackermann, 639.

1261 https://www.sahistory.org.za/article/establishment-constitutional-court-south-africa-1994

1262 See, Art. 165(1) and (2) Constitution of South Africa, 1996; Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 338.

1263 See, Art. 165 ff. Constitution of South Africa, 1996.

1264 The Constitutional Principles of the IC pretended a 'separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness' (cf. Constitutional principle VI Schedule 4 IC). The relationship between the courts and the other branches of government is thus clearly fixed. The CC insisted on the significance of the separation of powers when, in *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others* (CCT 120/12) [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC) (11 July 2013) it invalidated Art. 2 and 3 of the Performing Animals Protection Act, 1935, as it assigned to magistrates an administrative function (i.e. the power of issuing licenses for exhibiting, training or using animals) utterly unrelated to the judicial capacity.

1265 This can be seen, for instance, in Art. 166(c) Constitution of South Africa, 1996: 'The courts are [...] (c) the High Courts, including any high court of appeal that may be established

municipalities play almost no role in their functioning. However, the Constitution of South Africa, 1996, requires national legislation to further regulate the judicial authority and its system.[1266] On top of the judicial authority sits the Constitutional Court,[1267] followed by the Supreme Court of Appeal (SCA)[1268]. For every province, a High Court division is created, with their jurisdiction coinciding with provincial precincts.[1269] The entire judiciary works in an integrated appellate system, where appeals from lower courts end up to the High Court of the province and from there to the SCA. Eventually, the final appellate is the CCZA, although on constitutional matters, the appeal can either end up directly to the CCZA or via the SCA. In the situation where a High Court declares a national or provincial Act, or presidential conduct, unconstitutional, and invalidates it, there is an 'automatic' referral to the CCZA for review.[1270]

III. The CCZA's (Relative) Judicial Independence

The landmark of constitutional supremacy and the rule of law is the independence of the judiciary. In this regard, the Constitution of South Africa, 1996, proclaims that '[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice' (Art. 165(2)). This preached judicial independence is entrenched through the usual techniques: the appointment process, the qualifications needed to sit on the bench, and the removal process.

1. Composition and Model of Appointment

Having seen the reasons for the creation of a new judicial body tasked with the protection of the new Constitution, it is clear that the decision to create a

by an Act of Parliament to hear appeals from High Courts' or in Art. 166(e) Constitution of South Africa, 1996: 'The courts are [...] (e) any other court established or recognized in terms of an Act of Parliament'.

1266 For instance, Art. 166(c) read with Art. 169, 166(d) read with Art. 170, Art. 166(e), Art. 171, etc.

1267 See, Art. 166(a) Constitution of South Africa, 1996.

1268 See, Art. 166(b) Constitution of South Africa, 1996.

1269 See, Art. 166(c) Constitution of South Africa, 1996.

1270 See, Art. 167(5) Constitution of South Africa, 1996. Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 336.

Constitutional Court was a political one. Accordingly, the process of appointment to the Constitutional Court was the product of a negotiated political compromise.[1271] During *apartheid*, the appointment process was fully in the hands of the executive, that is the President. In order to provide the entire process with a greater degree of integration and democratic accountability, a Judicial Service Commission (henceforth 'JSC')[1272] was established in order to assist the President in appointing and removing justices.[1273] Without entering too much into detail, the President still appoints all Constitutional Court judges. However, when appointing the Chief Justice and the Deputy Chief Justice, the President must consult the JSC and the leaders of all parties represented in the National Assembly.[1274] When it comes to the rest of the judges, the President has a narrower discretion. He/she has to select the judges from a shortlist of suitable candidates presented by the JSC and must still consult with Chief Justice, as well as the leaders of all parties represented in the National Assembly.[1275]

Of the 11 judges, one was the President of the Constitutional Court (today renamed 'Chief Justice'). The first President of the Constitutional Court was J. Arthur Chaskalson, who was appointed by the President of the Republic,[1276] Mandela, under the provisions of the IC.[1277] In 2001, he

1271 https://www.sahistory.org.za/article/establishment-constitutional-court-south-africa-1994

1272 As of today, the JSC is a 23-person body, which stands in terms of Art. 178 Constitution of South Africa, 1996 read with the Judicial Service Commission Act 9 of 1994. It is composed of representatives of all three branches of government, as well as the organized legal profession and academia, and plays a pivotal role in screening judicial candidates for their appointment and removal. The primary functions of the Commission are to interview possible candidates for judicial positions and recommend them for appointment, to deal with complaints brought against the appointed judges and, inter alia, advise national government on matters relating to the judiciary. Originally, the JSC was a 17-person body, established by Art. 105 IC. *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 19. Initially, the JSC performed its work without much disturbance, until it fell into public controversy in 2008, thus tarnishing its public image. For more on this controversy and further sources, see le Roux, 153 f.

1273 See, Art. 178(5) Constitution of South Africa, 1996. Chapter 7 of the interim Constitution established both the Constitutional Court and the JSC.

1274 See, Art.174(3) Constitution of South Africa, 1996.

1275 See, Art. 174(4) Constitution of South Africa, 1996. For a detailed narrative of the appointment process and how the JSC works see le Roux, 154 f.

1276 Cf. Ackermann, 639 f.

became the second Chief Justice in South Africa after the passing of Ismail Mahomed, who was the first Chief Justice of the country. Chaskalson held the position of Chief Justice until his retirement in 2005.[1278] Four of the Constitutional Court justices were appointed from among judges of existing superior courts by the President in consultation with his Cabinet and with the Chief Justice, who back then was still presiding the Supreme Court.[1279] The remaining six were appointed again by the President in consultation with the Cabinet and after with the President of the Constitutional Court.[1280] However, the candidates were first nominated, then interviewed and finally 10 of them recommended for appointment by the JSC.[1281] The JSC was a creature of the transition and constituted a sign of decisive break with the past. The first JSC, under the IC, was composed by representatives of the superior courts, practicing legal field, university law scholars, as well as representatives of the other two branches of government, the legislature and the executive.[1282] In submitting its recommendations, the JSC had to take into account 'the need to constitute a court which is independent and competent and representative in respect of race and gender', in the idea of creating a diverse and

1277 I.e., he had to consult with the Chief Justice and reach an agreement with his Cabinet. See, Art. 97(2)(a) IC.

1278 Mahomed had held the position of the Chief Justice after the positions of Chief Justice and President of the Constitutional Court were fused into one single one of Chief Justice. This happened under the Sixth Amendment of the Constitution of South Africa. Hence, the first Chief Justice of the new South Africa was Ismail Mahomed, appointed by Mandela in 1997 and entered in office in 1998. Following his death in 2000, he was replaced by Arthur Chaskalson in 2001. The position of Chief Justice in South Africa was originally a member of the Supreme Court of Appeal (a position inherited from *apartheid*; Art. 168(1) Constitution of South Africa, 1996 before its said amendment, when the positions merged). The merger took place as a step in the direction of rationalizing the judiciary and moving towards the establishment of a single apex court. The Chief Justice of South Africa is not only the head of the Constitutional Court, but also 'the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts' (see Art. 165(6) Constitution of South Africa, 1996). Cf. le Roux, 147 f.

1279 See, Art. 99(3) IC.

1280 See, Art. 99(4) IC.

1281 See, Art. 99(5) IC.

1282 See, Art. 105(1) IC; Ackermann, 640; Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 338 f. Four members of the JSC are chose from the upper house of Parliament, the NCOP. See Art. 178(i) Constitution of South Africa, 1996 (see Art. 105(1)(h) IC or Art. 178(1)(i) Constitution of South Africa, 1996).

representative Constitutional Court.[1283] By October 1994, the Constitutional Court was established and all judges were appointed. It comprised of three Black males,[1284] one Black female,[1285] one White female,[1286] and six White males[1287].

South Africa is the leading example of the judicial council model of appointment, where the JSC was given a pivotal role. The JSC was established with the enactment of the IC (cf. Art. 105 IC) and confirmed the needed sharp break in the new constitutional order with the long-lasting practice of executive appointments, under which a Black justice was chosen only in 1991.[1288] During the *apartheid* era, judges were directly and unilaterally appointed by the executive branch, i. e., the President. There was no transparency in this process and accordingly most candidates were chosen for their pro-*apartheid* views, connections and, of course, skin color. In 1983, a new Constitution even stripped the courts of constitutional review powers over the legislature's acts. The establishment of the JSC, along with the creation of a powerful CC as final arbiter on constitutionality, was a move, which sought to transform the judiciary in a diverse, transparent and trustworthy branch.[1289] Limiting the influence of specific actors, especially the executive, in the selection and appointment of judges was a way to hinder the manipulation of the process, and thus jeopardize the independence of the Constitutional Court. Despite the will to clearly limit the influence of the executive in the appointment of top curial positions through the JSC, the executive branch has still kept a strong hand in the process of appointment, thereby promoting the idea of judicial accountability to the public.[1290] All in all, as Choudhry observes,

1283 See, Art. 99(5)(d) IC.

1284 Pius Nkonzo Langa (in office from 1994 – 2009), Ismail Mahomed (1994 – 1998) and Tholakele 'Tholie' Madala (1994 – 2008).

1285 Yvonne Mokgoro (1994 – 2009).

1286 Catherine 'Kate' O'Regan (1994 – 2009)

1287 Lourens W. H. Ackermann (1994 – 2004), Arthur Chaskalson (1994 – 2005), Albert 'Albie' Louis Sachs (1994 – 2009), Johann Christiaan Kriegler (1994 – 2003), Richard Joseph Goldstone (1994 – 2003) and John Mowbray Didcott (1994 – 1998).

1288 Yvonne Mokgoro, "Judicial Appointments," *Advocate* 23, no. 3 (2010): 44.

1289 Choudhry and Glenn Bass, 46 f.

1290 For instance, the President of the Republic 'after consulting the [JSC] and the leaders of parties represented in the National Assembly, appoints the President and Deputy President of the [CC] and, after consulting the [JSC], appoints the Chief Justice and Deputy Chief Justice' of the Supreme Court of Appeal (cf. Art. 168(1)). See, Art. 174(3) Constitution of South Africa, 1996.

the inclusion of several actors in the selection of top curial players has fostered a sense of investment in the Constitutional Court across the political spectrum. This circumstance has facilitated the creation of an independent and widely respected Constitutional Court, which could be disrupted by the continuing dominance of the ANC. In fact, the dominant presence of the ANC in both the executive and the legislative branches allows them to have a decisive hand in appointing the majority of the JSC's members and the judicial officers. This could negatively impact the Court's independence in the long term.[1291]

2. Terms of Office

Under the interim Constitution, the first Constitutional Court consisted in 11 judges holding office for a non-renewable period of seven years.[1292] Under the new Constitution, the term was extended to 12 years, with an absolute age limit of 70.[1293] In 2001, a constitutional amendment was proposed which would have allowed judges to sit on the bench permanently. The proposed amendment was rejected, and the 12-year limit retained, yet it was made subject to the qualification that 'an Act of Parliament may extend the term of office of a Constitutional Court judge'. Soon thereafter, a parliamentary Act was passed, and the term of Constitutional Court justices extended to a maximum of 15 years.[1294] Le Roux identifies three advantages in limiting the term of office:

> 'It ensures a dynamic, responsive and vibrant constitutional jurisprudence; it enables greater gender and racial participation and representation on the Court; and it allows judges to channel their experience on the court into other areas of service after the completion of their term as Constitutional Court judges'.[1295]

3. Qualifications

Both the IC and the Constitution of South Africa, 1996, say that any appropriately qualified person, female or male, who is fit and proper to be

1291 Choudhry and Glenn Bass, 11.

1292 Art. 97(2)(b) IC and Art. 167(1) Constitution of South Africa, 1996, read with Art. 4(1)(a) of the Superior Courts Act.

1293 See, Art. 176(1) Constitution of South Africa, 1996.

1294 See, Art. 15 of the Constitution Sixth Amendment Act of 2001 read with Art. 4 Judges Remuneration and Conditions of Employment Act (Act No. 47, 2001).

1295 le Roux, 148.

a judge, can be appointed as justice of the Constitutional Court.[1296] Steytler reminds us how '[t]he tradition of appointing judges from the ranks of senior advocates only has been tempered; a number of attorneys (solicitors), magistrates, and a few law professors have been elevated to the bench'.[1297] Additionally, the candidate must be a South African citizen, unlike other courts in the country.[1298] Given the multi-cultural polity and the integrative ambitions of the new Constitution, all appointments of judicial officers composing the judicial branch are done in pursuing 'the [constitutional] need for the judiciary to reflect broadly the racial and gender composition of South Africa'.[1299] Irrelevant of whether, or not, and how this demand of racial and gender plurality is applied by the JSC when appointing the judges, le Roux admits that even a greater challenge is to ensure a diversity of opinions in the Constitutional Court.[1300]

4. Removal

Judges of the Constitutional Court have tenure until reaching 70 years of age.[1301] Otherwise, every Constitutional Court judge stays in office until the end of its term.[1302] During his or her term, a judge is subject to the disciplinary authority of the JSC and may be removed if the JSC finds that a judge 'suffers from an incapacity, is grossly incompetent, or is guilty of gross misconduct'[1303]. This finding must be supported by a two-thirds supporting majority in the National Assembly.[1304]

1296 Cf., Art. 99(2)(b) IC and Art. 174(1) Constitution of South Africa, 1996.

1297 Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 339.

1298 Cf., Art. 99(2)(a) IC and Art. 174(1) Constitution of South Africa, 1996.

1299 Cf. Art. 174(2) Constitution of South Africa, 1996. Cf. also le Roux, 156.

1300 In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others – Judgment on recusal application* (CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999), at paras. 42–43, the Constitutional Court described diversity of opinion (opposed to absolute neutrality) on the bench as an asset and not as a problem. The Court also rejected the idea of undermining the background experiences of judges. Cf. Ibid., 156 and fn. 90.

1301 Art. 176(1) Constitution of South Africa, 1996.

1302 Art. 176(2) Constitution of South Africa, 1996.

1303 Art. 177(1)(a) Constitution of South Africa, 1996.

1304 Art. 177(1)(a) Constitution of South Africa, 1996. For more on the removal procedure see le Roux, 155 f.

IV. The CCZA's Judicial Mandate, Institutional Design and Functions

1. Ordinary Mandate, Jurisdiction and Powers

On 27 April 1994, the IC of South Africa had commenced and the CCZA was established, and given the overall function as court 'of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution.'[1305] The CCZA was thus given the power of constitutional review; the relevant passage in the IC read as follows: 'in the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency.'[1306] On 11 October 1996, South Africa's new Constitution was a little clearer, but encompassed the same core, for it gave the eleven judges of the Constitutional Court the power to invalidate any 'law or conduct' inconsistent with it, underlying therefore again the concept of constitutional supremacy.[1307]

Entrenched in the new Constitution of South Africa, 1996, are its foundational principles: fundamental human rights and thus limited public authority,[1308] the '[s]upremacy of the constitution and the rule of law',[1309] and democracy[1310]. Although present in the Preamble and the first articles of the Constitution, throughout the entire text, one can find statements and provisions mentioning the establishment, protection and enforcement of all elements of constitutionalism. All these elements were reflected from the CCZA itself in its *First Certification* judgement, when identifying the basic structures and premises of the new constitution in accordance with those contemplated by the CPs.[1311]

1305 See, Art. 98(2) IC but also Art. 167(7) Constitution of South Africa, 1996.
1306 See, Art. 98(5) IC.
1307 Art. 2 and 172(1)(a) Constitution of South Africa, 1996.
1308 See, Art. 1(a-b) Constitution of South Africa, 1996.
1309 See, Art. 1(c) and 2 Phrase 1 Constitution of South Africa, 1996.
1310 See, Art. 1(d) Constitution of South Africa, 1996.
1311 The CC identified the basic structures and premises of the new constitutional text contemplated by the CPs, *inter alia*, as the following: a constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary (cf. CPs IV, VII and XV); a democratic system of government founded on openness, accountability

Both the entrenchment of the fundamental principles of constitutionalism in the constitutional text and the establishment of an apex court with the power of constitutional review (that is, interpreting, protecting and enforcing the Constitution), the main mandate of the same CCZA was set. This mandate stands to this day, however, during the constitutional transition, the CCZA was tasked to make sure that the legal and structural establishment and institutionalization of these values would not be jeopardized by the fragility of the period.

In the first years of its existence until 2013, the CCZA showed some degree of specialization. In fact, it operated concurrently next to the SCA[1312] and the High Courts, but retained a final say in constitutional matters.[1313] Additionally, it had (and has still as of today) exclusive jurisdiction when it came to a list of constitutionally subtle matters. For instance, only the

and equality, with universal adult suffrage and regular elections (cf. CPs I, V, VIII, IX and XVII); a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness (cf. CP VI); the need for other appropriate checks on governmental power (cf. CP XXIX); enjoyment of all universally accepted fundamental rights, freedoms and civil liberties protected by justiciable provisions in the NT (cf. CP II); one sovereign state structured at national, provincial and local levels, each of such levels being allocated appropriate and adequate powers to function effectively (cf. CPs I, XVIII, XIX, XX, XXI and XXIV); the recognition and protection of the status, institution and role of traditional leadership (cf. CP XIII); a legal system which ensures equality of all persons before the law, which includes laws, programs or activities that have as their objective the amelioration of the conditions of the disadvantaged, including those disadvantaged on grounds of race, color or creed (cf. CPs I, III and V); representative government embracing multi-party democracy, a common voters' roll and, in general, proportional representation (cf. CP VIII); the protection of the NT against amendment save through special processes (cf. CP XV); adequate provision for fiscal and financial allocations to the provincial and local levels of government from revenue collected nationally (cf. CPs XXV, XXVI and XXVII); the right of employers and employees to engage in collective bargaining and the right of every person to fair labor practices (cf. CP XXVIII); a non-partisan public service broadly representative of the South African community, serving all the members of the public in a fair, unbiased and impartial manner (cf. CP XXX); and security forces required to perform their functions in the national interest and prohibited from furthering or prejudicing party political interests (cf. CP XXXI). See, *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 45.

1312 Before 1994, it was called the Appellate Division and functioned as the highest court in all matters.

1313 Let us not forget in this context, that the demand for legal continuity during the constitutional transition included that the *apartheid* judiciary was retained.

CCZA could decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;[1314] decide on the constitutionality of any parliamentary or provincial Bill;[1315] hear disputes about the constitutionality of an amendment to the Constitution;[1316] decide that Parliament or the President has failed to fulfil a constitutional obligation;[1317] or certify a provincial constitution.[1318] To this day, the CCZA has exclusive jurisdiction on constitutional matters and a final say vis-à-vis, among other things, the constitutionality, and thus its validity, of national legislation and the other delicate matters mentioned before. Therefore, the SCA has retained final appellate jurisdiction on all matters which do not resort to any constitutional character.

In the first years after the enactment of the new Constitution of South Africa, 1996, the need to develop a post-*apartheid* discourse free from the dominant *apartheid* jurisprudence was so strong that the IC and the Constitution of South Africa, 1996, promoted the concept of a specialized apex court. However, in time, the SCA's jurisdictional area was increasingly thinned as the CCZA went on deciding what is constitutional, and what is not.[1319] In

1314 In this regard, the CCZA was specifically tasked by the Constitution to 'decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers and functions of any of those organs of state'. See Art. 167(4)(a) Constitution of South Africa, 1996. Having constitutional supremacy, a basic principle of the Constitution of South Africa, 1996, the CCZA's jurisdiction extends to all aspects of the federal arrangement. However, Steytler admits, that '[e]ven though the system of multilevel government has operated for two decades, the Constitutional Court has not had a dominant hand in shaping the system; at best, its role can be described as middling'. Cf. Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 332.

1315 Art. 167(4)(b) Constitution of South Africa, 1996.

1316 Art. 167(4)(d) Constitution of South Africa, 1996.

1317 Art. 167(4)(e) Constitution of South Africa, 1996.

1318 Art. 167(4)(f) Constitution of South Africa, 1996.

1319 Before 2013, often a key question raised in court was whether a specific issue brought before the Constitutional Court was in fact a 'constitutional matter' or not. Art. 167(7) Constitution of South Africa, 1996, recalls that a constitutional matter is 'any issue involving the interpretation, protection or enforcement of the Constitution'. A clearly defined line between what is and is not a constitutional matter was thus almost impossible to draw. See, for instance, *Mankayi v AngloGold Ashanti Ltd* (CCT 40/10) [2011] ZACC 3; 2011 (5) BCLR 453 (CC); 2011 (3) SA 237 (CC); [2011] 6 BLLR 527 (CC); (2011) 32 ILJ 545 (CC) (3 March 2011), at paras. 117–126, in which Froneman J discusses the issue and

the wake of the Constitution Seventeenth Amendment Act of 2012, the CCZA became also the final appellate in any non-constitutional matter that 'raises an arguable point of law of general importance'[1320]. With this amendment, the separation of jurisdiction, which was necessitated by the *apartheid* past, has thus ended and the CCZA has become an apex court of general jurisdiction in *all legal matters*.[1321] However, as mentioned before, it has retained its exclusive constitutional jurisdiction.[1322]

2. Extra-ordinary Mandate, Jurisdiction and Powers

The Constitutional Court was put in a powerful position during the constitution-making process and was given the extraordinary task to certify that the final Constitution was in conformity with the Constitutional Principles entrenched in the IC: '(1) A new constitutional text shall (a) comply with the Constitutional Principles contained in Schedule 4; [...] (2) The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect *unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles* referred to in subsection (1)(a)'.[1323] In a sense, the Certification process was a special function within the power of the Constitutional Court of constitutional review. It was an extraordinary mandate, as it was relevant only during the constitution-making process. In fact, this was an internal step to the constitution-making process, without which the process would not have continued. We will see the importance of such a certification task later.

points out that the mere fact that a case involves the interpretation of a rule of common law, customary law or even statute law meant that it raised a constitutional matter.

1320 Cf., Art. 167(3)(b)(ii) Constitution of South Africa, 1996; the entire Art. 167(3) Constitution of South Africa, 1996 reads as follows: 'The Constitutional Court is the highest court of the Republic; and may decide constitutional matters; and any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court, and makes the final decision whether a matter is within its jurisdiction.'

1321 For a practical example of the implementation of the Constitution Seventeenth Amendment Act of 2012, see *Mbatha v University of Zululand* (45/13) [2013] ZACC 43; 2014 (2) BCLR 123 (CC); (2014) 35 ILJ 349 (CC); [2014] 4 BLLR 307 (CC) (5 December 2013). With regard to the evolution of the jurisdictional area of the CC cf. Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 336 and 42.

1322 le Roux, 159 f.

1323 Cf. Art. 71 Constitution of South Africa, 1996.

Hypothetically, this task could have been given to another branch and institution. However, giving it to a Court enhances its impartiality and the independence of The Court in this task was part of the constitutional assembly. It was an internal body of the constitution-making process, and not separated.

Up until the moment the new constitution was certified in the *Second Certification* judgement,[1324] South Africa was functioning under the IC, which, inter alia, prescribed how the country's final constitution was to come into existence. In its *First Certification* judgement, the CC concluded that the new constitutional text could not be certified due to several respects in which there has been non-compliance with the CPs.[1325]

D. The CCZA's Role in the Constitutional Transition: Implementing and Defining Local Government

Having received in the constitutional transition, the mandate to, first, certify the new constitutional dispensation, and subsequently, to strike down any law or conduct found inconsistent with the certified constitution, the Constitutional Court found itself in the position to deal with a number of transitional matters, one of which was indeed the decentralization process. We have seen how decentralization prominently fits within the transitional history of South Africa and what it means in the constitutional transition. The close link between decentralization and constitutionalism helps to identify relevant transitional matters, and thus cases of the Constitutional Court. A prominent transitional matter within the history of the constitutional transition of South Africa is the establishment of local government. I will argue why I believe local government is one of the core elements of the South African transition, just as secularism was one in Turkey (see *supra* the banning of parties). In a similar way, cases concerning local government as a transitional matter best reveal the character of the Constitutional Court in the transition

1324 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996).

1325 See *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 31 and Chapter VIII.

itself. In a narrative on the establishment of local government and the transitional matters related to it encountered by the Constitutional Court, the idea is to show how the Constitutional Court was able to shape and facilitate the establishment of all elements of constitutionalism, facilitating thus the establishment of the normative constitution and the end of the normative constitutional transition. As we will see, the CCZA touches upon all such elements in its practice when dealing with the decentralization process in the new constitutional democracy.

I. Introducing the Narrative: Transiting from Unitarism to Cooperative Federalism

Mirroring most transitions, the South African constitutional transition was no different in its main purpose: peace. However, the means as to how to seek this fundamental goal is shared over a couple of other aims. South Africa's main goal was in fact the seeking of peace through the introduction of democracy, and above all unifying the country in its diversity. South Africa's past has been characterized by a deep-rooted segregation of races and therefore the means to overcome the hurdles of *apartheid* was without doubt: unity. Even though it sounds like a paradox, especially in South Africa with its history of *Bantustans*, federal arrangements are often used as a way of keeping deeply divided societies together. South Africa was no exception. In light of these ambitions of the South African constitutional transition, it is not shocking that one of the thorniest and fiddliest transitional matters, which the Constitutional Court had to confront itself with, was the process of devolution. During the constitutional transition, the process of decentralization uncovered several issues in which the Constitutional Court was asked to intervene. These issues included the establishment of local government, the allocation of powers between the different tiers of government, etc. The interim Constitution itself made provision of the complex and deep issues, which emerge when trying to unite again a country separated by racial segregation, by promoting all elements of constitutionalism with the help of a decentralized form of government in place of what before was an authoritarian regime enforced by a strong central government. The words of Chaskalson give a closer insight into the nature of the (normative) constitutional transition, which resulted from no break in the chain of validity:

> 'On the day the Constitution came into force fourteen structures of government ceased to exist. They were the four provincial governments, which were non-elected bodies appointed by the central government, the six governments of what were known as self-governing territories, which had extensive legislative and executive competences but were part of the Republic of South Africa, and the legislative and executive structures of Transkei, Bophuthatswana, Venda and Ciskei which according to South African law had been independent states. Two of these States were controlled by military regimes, and at the time of the coming into force of the new Constitution two were being administered by administrators appointed by the South African authorities. The legislative competences of these fourteen areas were not the same. Laws differed from area to area, though there were similarities because at one time or another all had been part of South Africa. In addition the Constitution was required to make provision for certain functions which had previously been carried out by the national government, to be transferred as part of the process of decentralization to the nine new provinces which were established on the day the Constitution came into force, and simultaneously for functions that had previously been performed by the fourteen executive structures which had ceased to exist, to be transferred partly to the national government and partly to the new provincial governments which were to be established. All this was done to ensure constitutional legislative, executive, administrative and judicial continuity.'[1326]

The complex framework and mechanism for this process was set out in the IC and later in the Constitution of South Africa, 1996. For instance, it can be found in Chapter 15 of the Constitution of South Africa, 1996. Chapter 15 of the Constitution of South Africa, 1996, includes a list of complex transitional provisions dealing with many transitional matters such as the carryover of laws, and the transitional arrangements for executive and legislative authorities, public administration, the courts and the judiciary, the ombudsman, local government, etc.[1327]

Once the Constitution of South Africa, 1996, was enacted, decentralization as a tool to push through the transformation of society needed to take shape even though, as seen, its molding started before, during the multi-party negotiations prior to 1996. The difficult political deals with regards to power-sharing, which were eventually entrenched in the 34 principles of

1326 See, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 7.

1327 See, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 8.

the IC, were struck during this time, including the agreement on a second tier of government.[1328]

As I will try to explain shortly, and as Powell nicely clarifies:

> 'The implementation of a federal system of government was not managed according to a single over-arching plan, nor through a single all inclusive process, nor by one agency. The broad framework for the transition was set out in the constitution. There were separate plans, processes, phasing and timelines for the establishment of provincial government and local government respectively. In other words, there were separate transitions for each order, with each more or less following its own path. Both transitions were already well underway long before the 1996 constitution had even been written. This meant there was an iterative relationship between these processes of transition and the final constitution-making process.'[1329]

For both the establishment of *provinces* and *local government*, there were thus different processes and phases, which resulted in literally having separate transitions for each order:

– On the one hand, the *provincial* transition (including the implementation) took place between 1993 and 1996. The nine provinces were established by the IC in 1993, the first provincial governments elected in 1994 and all nine provinces were preserved by the final Constitution of South Africa, 1996. In sum, the transition to the contemporary provincial government order involved different segments, such as: the demarcation of the nine provinces to create new electoral regions and geographic boundaries of the provincial governments; the dissolution and closure of the *apartheid* structures while instituting provincial administrations under a new legal framework; and the allocation of laws, powers, functions and competences to the new provinces. The number, appellations and geographic boundaries of the provinces established in the IC (1993) were preserved in the final Constitution of South Africa, 1996. Of course, establishing the nine provinces required considerable restructuring. The core element of the provincial transformation was thus strongly linked to the reorganization of their territories, competences and administrations. The establishment of provinces as a second tier of government was not politically uncontroversial. It was seen as a veritable breakthrough in the constitutional negotiations and a major

1328 See, Powell, "Transition to Cooperative Federalism: The South African Experience," 10.
1329 See, ibid.

concession to minority parties. However, their functions were only settled in the Constitution of South Africa, 1996, whereas under the IC, provincial governments had merely concurrent functions with the central national government. That means, no exclusive competences were vested in the provincial governments during the interim period. The Constitution of South Africa, 1996, instead, provided also for limited exclusive functions, even though concurrent functions are still preponderant.[1330]

– On the other hand, the establishment of *local government* saw a rougher path, which stretched between 1993 and 2000. The transition towards a new democratic system of local government, which would further and crucially consolidate all elements of constitutionalism, saw a detached negotiations process which took place in parallel but, as we will see, fed into the MPNP in 1993.

II. The Prominence of the Establishment of Local Government

Local government, as seen in the structural description of the South African model of decentralization above, is the third and lowest sphere of government and thus it is the closest to the citizens and the communities. As such, local government is 'an integral part of the constitutional system of decentralized government'[1331] introduced by the first non-racial general election of 27 April 1994, which corresponds to the day the interim Constitution was commenced. In *Executive Council of the Western Cape v. the President*, Chaskalson reminds how the interim Constitution made:

> 'Provision for the complex issues involved in bringing together again in one country, areas which had been separated under apartheid, and at the same time establishing a constitutional state based on respect for fundamental human rights, with a decentralized form of government in place of what had previously been authoritarian rule enforced by a strong central government'.[1332]

1330 For more details on the implementation of provincial government, see ibid., 15–20.

1331 Nico Steytler and Jaap De Visser, "The Development of Local Government," in *Local Government Law of South Africa* (Durban: LexisNexis, 2017), 1.

1332 *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 7.

Local government connects intimately with these objectives of the South African constitutional transition, especially when it comes to unity and transformation. The constitutional transition brought about the novelty of constitutionally recognizing for the first time a local government 'as an institution of governance in the furtherance of democracy and development'.[1333] Adding to its relevance, J. Chaskalson recalls that the establishment of local government 'is widely seen as being necessary for reconstruction and development to proceed at a grass root level'.[1334] The Constitution of South Africa, 1996, further helped in entrenching local government as a veritable key institution of fostering constitutionalism and transformation of society.[1335] The Constitutional Court indirectly reminds us of the importance of local government in the transformation of South Africa at the beginning the *Fedsure* judgement:

> 'The transformation of South Africa from a society rooted in discrimination and disparity to a constitutional democracy founded upon freedom, dignity and equality posed, and continues to pose, particularly profound challenges at local government level. It is here that acute imbalances in personal wealth, physical infrastructure and the provision of services were and are often most patent.'[1336]

Apartheid profoundly damaged the spatial, social and economic environments in which the South African people lived and worked. Local government played thus a serious role in rebuilding local communities and settings as the core element for the prosperity of a democratic, integrated and truly non-racial society.[1337] When explaining the irregular development of local government in the *apartheid* era, and thus demonstrating the importance of realizing all elements of constitutionalism from the bottom-up, the Constitutional Court described the areas as follows:

1333 Steytler and De Visser, 3.

1334 *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 109.

1335 Steytler and De Visser, 3.

1336 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 2.

1337 See, White Paper on Local Government, Ministry of Provincial Affairs and Constitutional Development, Pretoria, March 9, 1998, Introduction/Executive Summary.

> 'Those in historically "White" areas were characterized by developed infrastructure, thriving business districts and valuable ratable property. Those in so-called "Black", "Coloured" and "Indian" areas, by contrast, were plagued by underdevelopment, poor services and vastly inferior rates bases."[1338]

Being these areas amongst the majority of the population, it seemed pretty clear that local government was the key towards a new democratic South Africa. The IC sought to tackle this disparity in local government by establishing a new framework for local government. It did not, though, prescribe the specific manner in which this transformation was to occur. Instead, it stipulated in section 245 that the complex restructuring of local government should take place in accordance with the Local Government Transition Act 209 of 1993 (henceforth 'LGTA').[1339] So, the meticulous phased plan of local government establishment was encoded in a specific LGTA, which counts as one of the last formal acts of the *apartheid* legislature and remained in force until 2000.[1340] The IC, and later the Constitution of South Africa, 1996, in its Chapter 15, incorporated this

1338 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 2. See also the remarks by Langa DP in *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998), at para. 46: 'White areas in general were affluent and black ones were in the main impoverished. Many privileges were dispensed by the government on the basis of race, with white people being the primary beneficiaries. The legacy of this is all too obvious in many spheres, including the disparities that exist in the provision of services and the infrastructure for them in residential areas.'

1339 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 3.

1340 A 'phased plan', as the LGTA indeed contemplated that the transformation of local government would take place in three stages. So, the Constitutional Court: 'during the "pre-interim" phase, negotiating forums were established and charged with appointing temporary councils to discharge local government responsibilities. This period extended from the commencement of the LGTA, on 2 February 1994, until the first democratic local government elections. The "interim" phase commenced on the date of such elections and witnessed the introduction of a series of transitional local government structures. The third phase, to be initiated and regulated by new legislation [...].' See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 4.

legislation as a transitional arrangement.[1341] Transitional local councils were elected in 1995/6 under the interim Constitution, whereas the definitive form of local government was consolidated in the Constitution of South Africa, 1996. The policy and legislative frameworks for local government were developed from 1996 until 2000, the year the new system of local government came into operation, i. e., when the second local government elections were held.[1342]

As Steytler and De Visser point out, the establishment of local government was 'the product of a long and painful history'.[1343] If one would take a picture of what local government was the moment right before the constitutional transition, the image in front of you would have been the result of many years of development.[1344] At this time, local governments 'were subordinate creatures of statute [1], comprising a multiplicity of fragmented institutions [2] and racially segregated [3], which, as a result, provided massively unequal services to the different communities'.[1345]

1) Dönges and van Winsen note that local governments were 'exclusively the creatures of statute and possess no rights or powers except such as are either expressly or by necessary implication conferred upon them by a competent legislative authority'.[1346] Cameron JA, while sitting on the Supreme Court of Appeals, observed that

> '[...] municipalities owed their existence to and derived their powers from provincial ordinances. Those ordinances were passed by provincial legislatures which themselves had limited law-making authority, conferred on them and circumscribed by Parliamentary legislation. [...] The provinces in turn could largely determine the powers and capacities of local authorities. Municipalities were therefore at the bottom

1341 In other words, the interim Constitution and the Constitution of South Africa, 1996, recognized that the transition of local government was to be made in terms of the LGTA (see, e. g., Art. 245 IC) and the LGTA recognized that the transition had to be carried out in accordance with the requirements of the Constitutions.

1342 Powell, "Transition to Cooperative Federalism: The South African Experience," 11 f.

1343 Steytler and De Visser, 3.

1344 For more about the history of local government before 1994, see ibid., 3–10.

1345 See, Nazeema Ismail and Chisepo Mphaisha, *The Final Constitution of South Africa: Local Government Provisions and Their Implications*, Occasional Papers Series (Johannesburg: Konrad-Adenauer Stiftung, 1997), 7.

1346 Theophilus E. Dönges and Louis d. V. van Winsen, *Municipal Law with Special Reference to the Cape Province*, 2nd ed. by L. van Winsen, Lionel F. Dawson, and P. J. Coetsee ed. (Cape Town: Juta, 1953), 2.

> of a hierarchy of law-making power: constitutionally unrecognized and unprotected, they were by their very nature "subordinate members of the government vested with prescribed, controlled governmental powers".'[1347]

In other words, it is meant as local governments deriving their powers from national and provincial legislatures, and serving the latter, predominantly, as a mere administrative arm.

2) Depending on the size of the community concerned, the provinces established a multiplicity of categories of local authorities. This resulted, for instance, in an area like the one which today has become a single metropolitan municipality of Cape Town to consist, in 1994, of 60 different local authorities.[1348]
3) As seen above, the application of the segregation laws of *apartheid* on local communities over the years resulted in severe inequalities in services and development.

During the negotiations for an inclusive South Africa, against a deeply segregated and repressive one, the transformation of local government was one of the key elements of discussion. It was one of the most difficult features of *apartheid* to change given the fact that, *inter alia*, it was close to the Whites and their bestowed interests. [1349]

The transformation of local government was a very important step towards the removal of a racial-based system of government. Local government was the vehicle through which society could integrate and a redistribution of municipal services could take place. The establishment of local government needs by its own nature the presence of a 'process', or period of transition. The devolution of powers and the formation of, for instance, municipalities cannot take place from one day to the other like the enforcement of human rights; such system of decentralized powers, no matter the structure, takes time for establishment and implementation. The process of transition towards democratic local government can be

1347 See, *CDA Boerdery (Edms) Bpk en Andere v Nelson Mandela Metropolitan Municipality* (526/05) [2007] ZASCA 1; 2007 (4) SA 276 (SCA) (6 February 2007), at para. 33 (footnotes omitted).

1348 Steytler and De Visser, 9.

1349 Cf. Ibid., 10. It took over ten years to see full transition to democratic local government, from the liberation of Mandela until 5 December 2000. On that date, the first fully-fledged democratic elections ushered in the new local government dispensation, marking therefore the last imprint of local government development. Cf. Ibid., 3.

divided into four phases.[1350] All phases of transition were underpinned by the interim Constitution, as well as the Constitution of South Africa, 1996. Accordingly, even if the word 'interim' was used to label some of the phases, it does not have any connotations to the interim Constitution or the timeline of the constitution-making process.

III. The CCZA's Role and the Establishment of Local Government

In order to measure the performance of the Constitutional Court in this transitional matter, a narrative of the transition towards democratic local government is outlined. Since the establishment of local government presented relevant transitional traits in its process, and in order to give the narrative a structure, this section follows its traits in four phases, even though some cases are not strictly related to local government, but decentralization in general.

The first phase, called the pre-interim phase, starts from the commencement of the LGTA until the first local government elections of 1995/1996.[1351] The second phase was short; it picked up where the pre-interim phase finished and stretched until the certification of the new Constitution of South Africa, 1996. This was a time of constitution-making. However, to adapt and structure the narrative to the broader transitional context, this thesis splits the interim phase advocated by the LGTA into two different phases: the interim phase (from the first elections of 1995/1996 until the certification of the final constitution) and the implementation phase (from the certification of the final constitution until the local government elections of 5 December 2000). The reason for this division will be explained later. The 'interim phase' by means of the LGTA meant the period of time from the first elections of 1995/1996 until the local

1350 ibid., 10.

1351 The first local government election took place on 1 November 1995, however, in the province of KwaZulu-Natal and the Cape Metropolitan Area on 29 May 1996. The reason for this delay, was the result of the constitutional challenge, seen above (*Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), to powers of the President to amend the LGTA by mere proclamation. The challenge was partially successful.

government elections of 5 December 2000.[1352] The last phase was also the final phase, which started with the local government elections of 2000.

The cases analyzed are those, which in my opinion, show the clearest behavior of the Court in relation to the realization of constitutionalism. They deal with transitional matters, and most of them with disputes over transitional arrangements. As such, they were important to the transition. However, they do not represent the entirety of the cases of the Constitutional Court in this matter.

Table VI Chronology of the Case Law Chosen and Analyzed[1353]

Pre-interim phase
– *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995)
Interim Phase
– National Certification Judgements: o *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) ('*First Certification*'); and o *Certification of the Amended Text of the Constitution of The Republic of South Africa, 1996* (*CCT37/96*) [*1996*] *ZACC 24; 1997* (*1*) *BCLR 1; 1997* (2) *SA 97* (*4 December 1996*) ('*Second Certification*') – Provincial Certification Judgements* o *Certification of the Constitution of Kwazulu-Natal* (*CCT15/96*) [*1996*] *ZACC 17; 1996* (*11*) *BCLR 1419; 1996* (*4*) *SA 1098* (*6 September 1996*); and o *Certification of the Constitution of the Western Cape, 1997* (*CCT6/97*) [*1997*] *ZACC 8; 1997* (*4*) *SA 795* (*CC*)*; 1997* (*9*) *BCLR 1167* (*CC*) (*2 September 1997*)
Implementation Phase
– *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998) ('*Fedsure*')

1352 Cf. Art. 1 LGTA.

1353 *Note:* * The *Certification of the Western Cape Constitution* judgement was chronologically decided during the Implementation Phase. However, its content firmly relates to the *Certification of the KwaZulu-Natal Constitution,* and it would just confuse the reader to handle them separately. ** These cases are analyzed together', as they have the same relevance to the transition.

Final Phase
– 'Hiccup' Judgements** o *Member of the Executive Council for Local Government and Development Planning Western Cape and Another v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm* (CCT38/01) [2001] ZACC 7; 2002 (2) BCLR 133; 2002 (3) SA 1 (CC) (14 December 2001) ('*Poultry*'); o *eThekwini Municipality v Ingonyama* Trust (CCT 80/12) [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) (28 March 2013) ('*Ingonyama Trust*'); and o *Liebenberg NO and Others v Bergrivier Municipality* (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) (6 June 2013) ('*Liebenberg*')
– *City of Cape Town and Other v Robertson and Other* (CCT 19/04) [2004] ZACC 21; 2005 (2) SA 323 (CC) (29 November 2004)

1. The Pre-interim Phase

a. The Narrative of the Pre-interim Phase

The *pre-interim phase* means the period commencing on the day when the LGTA was enacted (2 February 1994) until the first local government elections 1995–1996, which corresponds to the beginning of the *interim phase.* Interestingly enough, the negotiation for the transformation of local government took place separately from the main negotiation process of the constitutional transition. Accordingly, the National Local Government Negotiating Forum (NLGNF), which was established in March 1993, started negotiating a new local government dispensation while the MPNF was wrestling with the constitutional transition as a whole.[1354]

The NLGNF operated separately from the MPNF[1355] and produced three documents by November 1993:[1356] an Agreement on Local Government Finances and Services (ALGFS), the LGTA and the provisions of Chapter 10 of the IC dealing with local government. Through these transitional

1354 See, Fanie Cloete, "Local Government Transformation in South Africa," in *The Birth of a Constitution*, ed. Bertus de Villiers (Kenwyn: Juta, 1994), 297; Gideon Pimstone, "Local Government," in *Constitutional Law of South Africa*, ed. Matthew Chaskalson, et al. (Cape Town: Juta, 1999), 5 A3.

1355 See *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 181 fn. 45.

1356 See, Cloete, 295; Pimstone, 5 A3.

documents, the idea was to dismantle racial segregation from the bottom-up and also to unify cities and towns under one tax base.[1357]

aa) *The ALGFS*

The ALGFS was no more than a statement of intent concerning the future financing and service delivery to be implemented during the pre-interim and interim phases.[1358] The priority of local governments was the provision of basic health and functional services, hoping to reach in the long-term equal service provision in all municipalities.[1359] The LGTA was going to give effect to this agreement and the whole process of transition towards democratic local government. These three documents formed the transitional 'package' and were ratified by the MPNF with little amendments.[1360]

bb) *The LGTA*

The LGTA was a transitional act and was intended to manage the reconstruction of local government from scratch. Assented on 20 January 1994, i. e., approximately three months before the IC came into force, the LGTA provided 'the machinery for the transition from a racially based system of local government to a non-racial system. It establishe[d] the process to be followed in order to reach this goal, a process which was to commence when the Act came into force on 2 February 1994, and to continue until the holding of the first non-racial local government elections […]'.[1361] These elections would eventually take place in 2000.[1362] It

1357 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 157.

1358 See, Cloete, 301.

1359 See, Pimstone, 5 A3.

1360 See, Cloete, 298.

1361 *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 6.

1362 Do not confuse the 2000 local government elections with the 1995/1996 local government elections. The 1995/1996 local government elections sought the election of the so-called transitional councils, whereas the 2000 local government elections were the first elections held in South Africa after the reorganization of local authorities formalized by the Municipal Demarcation Act of 1998.

is often even referred to as 'Transition Act'. The relevance of this act in the context of the constitutional transition can be summarized by paraphrasing Kriegler J:

> 'The Transition Act was intended and drafted to govern the reconstruction of local government from A to Z. (In many areas of the country "reconstruction" was a euphemism for creation.) Its principles and terms were separately negotiated. It was then passed by the "old" Parliament as part of the statutory scaffolding agreed upon by the negotiating parties as necessary before, during and after the transition of national and provincial government. The Transition Act represents a "turn-key operation", commencing with tentative negotiating forums for local councils, continuing with temporary local government structures and carrying on until new structures have been democratically elected and put in place.'[1363]

Prior to the national elections of April 1994, the first step championed by the LGTA was then the establishment of *negotiating forums* tasked 'to provide the vehicles for the creation of the embryonic transitional local structures',[1364] which were to function *ad interim* up until the first local government elections in 1995/1996.[1365]

cc) Chapter 10 of the IC

While the LGTA was dealing with the transition towards a democratic system of local government, the IC provided at Chapter 10 the permanent characteristics and requirements of the future system of local government.[1366] A series of transitional arrangements curtailed the

1363 See, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at paras. 162(e) and (f).

1364 Pimstone, 5 A-5 f. Cf. Art. 7(a-b) LGTA.

1365 Pimstone, 5 A-6. The elections were held on November 1, 1995, in most of the country, yet they were delayed to May 29, 1996, in the Western Cape and June 26, 1996, in KwaZulu-Natal due to boundary demarcation disputes.

1366 Some of these characteristics follow. Local government was for the first time in the constitutional history of South Africa constitutionally recognized. A level of autonomy was given to local government, which however, remained subject to national and provincial legislation. Art. 174(3) IC states: 'A local government shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs.' At the same time Art. 175(1) IC adds: 'the powers, functions and structures of local government shall be determined by law of a competent authority.' An important feature of local government was, of course, that it had to be elected democratically (cf. Art. 179(1) IC), with an electoral system including both proportional and ward representation (cf.

application of the IC,[1367] which made sure that the transformation of local government would take place only following the LGTA until the first elections were held (in 1995/1996).[1368] Once the elections of 1995/1996 took place, the transformation of local government could carry on following the new legislation, which had to comply with the Constitutional Principles of the interim Constitution.[1369] The elected councils of the 1995/1996 elections, so-called 'transitional councils',[1370] would govern in terms of the LGTA until the next elections would be held in terms of the final constitution, which was not yet drafted.

b. The Role of the CCZA

aa) The Activity of the Court

It was exactly in relation to the establishment of local government, and specifically with the interpretation of some of the transitional provisions mentioned above, that the Constitutional Court made its first important mark in the normative constitutional transition.

The first case regarding the transitional matter of establishing local government was *Executive Council of the Western Cape*; a case which came quite early in the transitory period, i.e., while the constitutional law of the country was still the interim Constitution. It was delivered on 22 September 1995, before the first local government elections of 1995/1996 were held.

In this case, a dispute arose between organs of state of different levels of government concerning the validity of amendments to the LGTA. The implicated amendments had been effected by the President of the Republic (the executive) by mere proclamation, who claimed to be acting

Art. 179(1) IC). See, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 153.

1367 Cf. Art. 245 IC.

1368 Art. 245(1) IC; *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 162; and *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 356.

1369 Art. 245(2) IC.

1370 See Art. 1 LGTA.

in terms of powers vested in him under the LGTA itself. Challenged on the grounds of unconstitutionality was, indirectly, the validity of the said amendments to the LGTA made by the President, and directly, previous amendments to the LGTA made by Parliament, which apparently allowed the President to amend the LGTA by mere proclamation.[1371] Let it be explained: on 23 November 1994, Parliament amended the LGTA by inserting Section 16 A.[1372] This new Section of the LGTA gave the President the power to amend and adapt the LGTA by mere proclamation.[1373] This he did and a series of proclamations were passed thereafter.[1374] However, no challenge was ever made to the validity of the parliamentary amendment or these proclamations until June 1995. In *Executive Council of the Western Cape*, the parliamentary amendment was challenged after a couple of proclamations by the President were passed, which, in a nutshell, sought to transfer control over the local government delimitation and demarcation process from the provincial governments to the national government.[1375] Eventually, the Constitutional Court pointed out how the main problem was in fact the constitutionality of the parliamentary amendment (i. e. 16 A LGTA), on which the proclamations were based, and thus indirectly the constitutionality of the proclamations was also affected. The challenged amendment and the proclamations by the President made thereafter were eventually all declared invalid by the Constitutional Court.[1376]

Everything originated from Art. 235(8) IC, which allowed the President to assign the administration of certain categories of laws to 'competent authorities' within the jurisdictions of the provinces. When it came to the administration of the LGTA, the president assigned it to Members of the

1371 See, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at paras. 2 and 5.

1372 The empowerment of the President to promulgate the proclamations derives from Art. 16 A LGTA, which was inserted by Art. 1 Act 34, 1994.

1373 See, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at paras. 9–10.

1374 *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 10.

1375 *In casu* the Constitutional Court was dealing with the Province of the Western Cape.

1376 *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 124(3).

Executive Council (MEC)[1377] (designated by the Premiers of each of the provinces). The duties of the provincial administrator in terms of the LGTA were, *inter alia*, 'the demarcation and delimitation of the Western Cape into areas of jurisdiction of transitional councils and transitional metropolitan sub-structures for the purposes of the local government elections anticipated to be held on 1 November 1995'.[1378] This power conferred to the MEC had to be exercised in concurrence with the Provincial Committee, a body which also included representation of local government. Due to a series of resignations and replacements within the Provincial Committee of the Western Cape,[1379] the situation presented itself, in which two of its members (out of six) opposed the MEC's demarcation proposal. Rigorous negotiations followed. Eventually, no common ground was found and therefore the national government reacted with the President stepping in and using its powers under Section 16 A LGTA to issue proclamations and amend the LGTA.[1380] The combination of the two proclamations by the President had the effect to nullify the appointment of a couple of members of the Committee and also the demarcation proposal previously approved. Shortly thereafter, another two members were appointed to the Committee by the central government.[1381] Everything eventually boiled down to the applicants challenging the validity of Art. 16 A LGTA, i. e., the parliamentary amendment allowing the President to amend the LGTA through simple proclamation, and the

1377 That is 'Member of Executive Council', who is responsible for local government in the province concerned. See s. 1 LGTA.

1378 *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 11.

1379 See details at *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 12.

1380 See, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 12.

1381 See the details of the proclamations at *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 13.

initial assignment of the administration of the act itself to the provincial administrator.[1382]

bb) *Comments on the Court's Contribution to Realizing Constitutionalism*

The demarcation of the boundaries of the transitional councils to be elected later that same year was a necessary step in order for the elections to take place. This is the reason why this case classifies as dealing with a transitional matter. In addition, the transitional nature and character of the LGTA adds to the transitional relevance of this case. It being a transitional act, every dispute evolving around it is transitional. In *Executive Council of the Western Cape*, the Constitutional Court had to decide upon an urgent dispute, the outcome of which could have impacted the transition towards democratic local government as a whole. After having seen the link between local government and democracy, the hindrance of the 1995/1996 local government elections would have negatively influenced the transformation towards a democratic local government, and therefore of democracy as a whole.

Art. 245(1) IC stated that local government should not have been restructured otherwise than in accordance with the LGTA until its elections in terms of the LGTA. Therefore, the LGTA and indirectly the IC were clear on the allocation of powers on this matter. The dispute in the case arose when it came to pass a new demarcation proposal in the Western Cape; the MEC of the LGTA and the Provincial Committee had to decide upon it concurrently following the process under the LGTA. However, both entities tripped over a couple of disagreements over the new proposal. This series of events resulted in the President stepping in and handing the power of demarcation to the national government through simple proclamations. In short, the incriminated proclamations made by the president stripped the provinces of their power to restructure local government under the LGTA before the elections of local government.

In a way, this disrupted the process of transition towards local government championed by the LGTA and was protected by the IC (cf. Art. 245(1) IC).

1382 Cf. *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 14.

Consequently, the Constitutional Court, by not allowing the executive to amend the LGTA, it not only implemented and preserved the separation of powers entrenched in the new constitutional order, but in doing so, it also protected the ongoing decentralization process. The power of the executive to simply amend the LGTA by proclamation could potentially have impacted this transitional process and thus disrupted the principles and provisions of the IC itself. Hence, by invalidating the amendment to the LGTA by Parliament and the proclamations of the President, the Constitutional Court upheld the original vertical power-sharing arrangement championed by the IC. The case shows a (strong) Court committed to uphold the new constitutional dispensation, also if it means going against the other two branches of government. In other words, it saw the opportunity to enforce the separation of powers in a very independent manner, as well as the constitution itself. At this early stage of the transition, the separation of powers was not yet delineated. The Constitutional Court enforcing the separation of powers in a moment in history, in which the state was fragile and still under construction, proved to be a sign of strength of the Court. At the same time, enforcing the separation of powers is sign of a Court which is ready to take on its role as guardian of the constitutional agreement, and at the same time, actively shape the way up to the realization of the normative Constitution.

In this judgement, Justice P. Chaskalson's argument, supported by quite an extensive comparative study on the matter, consisted mainly in defining the power of the Parliament under the new constitutional order by denying it the principle of parliamentary supremacy common in the Commonwealth countries.[1383] The Constitutional Court fostered protection of the LGTA from undemocratic and unconstitutional ways of changing and shifting the separation of powers both vertically and horizontally. By tackling the principles of parliamentary supremacy, it also consolidated the position of the new constitutional order, based on constitutional supremacy, within the new hierarchy of the law. The transition may not be an excuse for riding over the essentials of a new dispensation, *in casu,* the separation of powers.

1383 See, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at paras. 50 ff.

2. The Interim Phase

a. The Narrative of the Interim Phase

The interim phase commenced with the first local government elections of 1995/1996, stretching all the way until the certification of the final Constitution of South Africa, 1996, on December 4 of that year. This was mostly a period of constitution-building. For the first elections of 1995/1996, a local government board in each province demarcated a total of 842 municipalities.[1384] The elected council would have the authority to govern in terms of the LGTA until the next local government elections under the final Constitution in 1999,[1385] not yet drafted.[1386]

Seen the IC was just a transitional document, the final constitutional dispensation had to be drafted by a newly elected Constitutional Assembly. The Constitutional Assembly was bound by a list of negotiated principles entrenched in the IC at Schedule 4. Some of these principles shaped local government in different ways, bringing changes to the same from what it looked like during the phase when the IC was in force. CP XVI recognized local government as a level of government alongside the provinces and the national government: 'government shall be structured at national, provincial and local levels.' Stemming from this recognition, '[e]ach level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognizes the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.' Another very important, if not the most important, provision for Local Government was CP XXIV: 'a framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government

1384 See, Robert Cameron, *The Democratisation of South African Local Government: A Tale of Three Cities* (Pretoria: Van Schaik, 1999), 90 ff.

1385 This date was then extended of one year, until 2000, due to the long time taken for the drafting of local government legislation.

1386 Steytler and De Visser, 13.

shall be set out in parliamentary statutes or in provincial legislation or in both.'[1387]

During the negotiations for the IC and drafting of the Constitution of South Africa, 1996, local government was not the core of discussions.[1388] However, even during the constitution-making process, significant changes were made to the initial concept of local government of the IC, following the guidelines of the Constitutional Principles. This is the reason why this phase, although short, deserved its own section.

Here are some of the changes:

- The most important was the shift in approach as of what was the nature of local government within the structure of multi-level government. Local government was now a third 'distinctive sphere of government', not subject to national and provincial legislatures, but alongside them.[1389] Therefore, there was not only a substantive change, but also a shift in terminology.[1390] Their functions were not defined by the provinces anymore, but a list of powers and functions were now embedded in the Constitution and protected by it.[1391]
- The autonomy of local government was affirmed and increased.[1392]
- A specific character and function were newly given to local government. Now, local government was not concerned anymore (at least not only) with service delivery, but adopted a developmental function.[1393] Local government had now also the objective of socially and economically

1387 Eventually, such framework had to provide 'for appropriate fiscal powers and functions for different categories of local government' (see, CP XXV). However, local government taxes are not the only source of revenue: 'each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.' (See, CP XXVI).

1388 See, Rudolf Mastenbroek and Nico Steytler, "Local Government and Development: The New Constitutional Enterprise," *Law, Democracy and Development* 1, no. 2 (1997): 238.

1389 For the political reasons for such change in the nature of local government, see ibid.; Jaap De Visser, *Developmental Local Government: A Case Study of South Africa* (Antwerpen, Oxford: Intersentia, 2005), 66–68.

1390 Steytler and De Visser, 15.

1391 Art. 156(1) read with sch. 4B and 5B Constitution of South Africa, 1996.

1392 For more about the extent of the increase of the local government's autonomy see, for instance, Steytler and De Visser, 15.

1393 Cf. Art. 152 IC.

developing its community, which fostered the idea of transformative constitutionalism and the transformation of society from the bottom-up. The aspect of increased autonomy of local government, and the new status as a third distinctive sphere of government, was featured prominently in the *First Certification* judgement, discussed below.[1394]

b. The Role of the CCZA

aa) The First and Second National Certification Judgements

1) <u>The Activity of the Court</u>

This second (interim) phase was the core of the transition towards democratic local government. During this period of time, the CCZA had a strenuous work to do, which saw it embracing its extra-ordinary function of certifying the new constitutional text. Even though the Constitution of South Africa, 1996, was adopted on May 8, 1996, it was not certified by the CCZA until December 4, 1996, by its *Second Certification* judgement. The Constitution of South Africa, 1996, was promulgated by President Mandela on 18 December 1996 and came into effect on 4 February 1997, superseding the IC.

As mentioned before, the CCZA was extraordinarily tasked with the certification of the new constitutional draft for compliance with the Constitutional Principles of the IC. In the *First Certification* judgement, decided on 6 September 1996, when it came to the reviewing of local government provisions, three issues were raised.

a) One issue was raised against the new constitutional draft for its alleged failure to set a framework for local government powers, functions and structures as required by CP XXIV. CP XXIV required that a framework for local government powers, functions and structures had to be set out in the new text. Accordingly, Art. 155(1) of the new text provided that '[n]ational legislation must determine (a) the different categories of municipalities that may be established; (b) appropriate fiscal powers and functions for each category; and (c) procedures and criteria for the

1394 For a peek into the link between the legitimacy of the CCZA and the certification judgements, see Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid," 183–85.

demarcation of municipal boundaries by an independent authority. With regards to the complying of Art. 155(1) of the new text with CP XXIV, the CCZA expressed the following opinion:

> 'At the very least, the requirement of a framework for LG [Local Government] structures necessitates the setting out in the NT [New Text] of the different categories of LG that can be established by the provinces and a framework for their structures. In the NT, the only type of LG and LG structure referred to is the municipality. In our view this is insufficient to comply with the requirements of the CP [Constitutional Principle] XXIV. A structural framework should convey an overall structural design or scheme for LG within which LG structures are to function and provinces are entitled to exercise their establishment powers. It should indicate how LG executives are to be appointed, how LGs are to take decisions, and the formal legislative procedures demanded by CP X that have to be followed. We conclude, therefore, that the NT does not comply with CP XXIV and CP X."[1395]

The failure of the new text to establish different categories of possible types of local government led the CCZA to find that the new text did not comply with CP XXIV, but not only. The same absence in delineating the different structures was also the reason for the lack of compliance of the new text with CP XXV, which required appropriate fiscal powers and functions in respect of different categories of local government, which were *in casu* not present.[1396]

b) Another issue related to whether the provision of the new constitutional text about municipalities being allowed to impose 'excise taxes' was an appropriate fiscal power.[1397] The CCZA explained that the ordinary meaning of 'excise taxes' normally includes a retail tax targeted at specific commodities such as alcohol, tobacco and fuel. At the same time, it rejected the argument by the Constitutional Assembly that the term could be limited to 'municipal' excise taxes referring to excess charges on utilities such as water and electricity provided by the same municipalities. Given this vague nature of the term, which would 'lead

1395 *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 301.

1396 *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 302.

1397 See, *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), at para. 299, and Steytler and De Visser, 16.

to a tyranny of uncertainty and litigation',[1398] the CCZA found that such expression included taxes that were 'inappropriate for municipalities to impose'.[1399]

c) Finally, the primary quarrel was about the accusation of a diminution of provincial powers and functions as a consequence of the enhanced status of local government. It was claimed that the powers of the provinces had suffered a substantial reduction, due mainly to the removal of local government from their competency. When it came to the assessment of the new status of local government, this complaint went to the heart of the discussion,[1400] and in such regards the CCZA was straightforward:

> 'It was correctly pointed out by counsel for the CA [Constitutional Assembly] that LG [Local Government] structures are given more autonomy in the NT [New Text] than they are in the IC [Interim Constitution]. But it needs to be borne in mind that the IC contemplates that LG will be autonomous, though it does not delineate the boundaries of the autonomy as clearly as the NT does. Whereas in the IC the potential concurrency of powers in Parliament and the provincial legislatures is in respect of the whole field of LG, power will now be allocated to specific areas of competence. It is in this process that the local authorities are afforded greater autonomy at the expense of both Parliament and the provincial legislatures. There is a corresponding diminution of the powers in respect of LG in respect of both the national and provincial legislatures.'[1401]

The CCZA understood the provisions in the new text in this regard as having 'the consequence that the ambit of provincial powers and functions in respect of LG [Local Government] is largely confined to supervision, monitoring and support of municipalities'.[1402] Of course, this was not the only power and function of provincial governments with regards to local government, for they also had, for instance, the competence to 'establish

1398 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 304.

1399 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 305.

1400 See, Steytler and De Visser, 17.

1401 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 364.

1402 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 367.

municipalities'.[1403] It is also true that the new role of local government did affect the provincial powers and functions, but the extent of such reduction depended on what precisely was contemplated by supervision, monitoring and support.[1404] The CCZA analyzed such terms and found that these were indeed substantial powers.[1405] In fact, when compared to the powers and functions of the provinces under the interim Constitution, the new set of power and functions were substantially diminished.[1406] Additionally, provinces did not *only* lose powers to local government, but also to the national government. In fact, the CCZA found that in a number of provisions of the new text,[1407] the national government was allocated regulatory powers over the local government, thereby excluding or restricting provincial powers.[1408] All in all, the CCZA weighed all the instances where there was a diminution of provincial powers and concluded that they were substantially less now in the new text than those in the interim Constitution. Furthermore, on these grounds the CCZA withheld certification of the new constitutional text.[1409]

On October 11, 1996, the amended text of the new constitution was adopted and submitted to the CCZA for the *second certification process.* In addressing the CCZA's *First Certification* judgement, the Constitutional Assembly effected three changes regarding local government.

Firstly, the new text was expanded to provide for three categories of municipalities – A, B and C.[1410] Secondly, Art. 160 was expanded to deal

1403 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 368, and Art. 155(2)(a).

1404 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 369.

1405 See *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 370 ff.

1406 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 374.

1407 See, Art. 139, 155(1), 159, 160(3), 163 and 164 Constitution of South Africa, 1996.

1408 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 380.

1409 From the judgement: '[t]he provisions relating to the powers and functions of the provinces fail to comply with CP XVIII.2 in that such powers and functions are substantially less and inferior to the powers and functions of the provinces in the IC.' *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 482.

1410 Cf., Art. 155 Constitution of South Africa, 1996.

more in detail with the functioning of municipal councils.[1411] Thirdly, the levying of 'excise taxes' was replaced with the power to impose 'surcharges on fees for services provided by or on behalf of a municipality'.[1412]

These changes were found to be sufficient by the CCZA as addressing two of the quarrels regarding local government seen in the *First Certification* judgement, even though there were still complaints about a lack of detail in the framework for local government powers, functions and structures, as required by CP XXIV.[1413] The CCZA disagreed, as the Constitutional Principles required no more than a framework, whereas the details would have been a matter of legislation.[1414]

Furthermore, when it came to the primary issue regarding the significant reduction of provincial powers, the Constitutional Assembly did not alter the relationship between local government and the provinces. In fact, only a few little changes were effected, yet not to the relationship local government-provinces, but provinces-national government.[1415] The CCZA confirmed this by admitting that the diminution of provincial powers in relationship with local government showed the same degree as before, and therefore no alteration was detected.[1416] Hence, the question whether the new amended text complied with Constitutional Principle XVIII (that there should be no substantial diminution of provincial powers) had thus to be decided with reference to the bigger picture, i. e. the other changes effected by the Constitutional Assembly to the amended text, which did

1411 It now contained provisions dealing with the election of governing structures of a council, the decision-making process, the legislative process, and so forth.

1412 See, Art. 229(1)(a) Constitution of South Africa, 1996. For additional details on the fiscal changes made for local government see, Art. 229 Constitution of South Africa, 1996, as a whole.

1413 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at para. 79.

1414 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at para. 80.

1415 Steytler and De Visser, 18.

1416 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at paras 171 f. and 175.

not concern necessarily decentralization.[1417] The Constitutional Court eventually decided that the Constitutional Principles had been indeed met.[1418]

2) Comments on the Court's Contribution to Realizing Constitutionalism

a) An Active Court

It goes without saying that apart from the importance of the certification judgements within the context of local government, the certification function itself presents a strong transitional value exactly because it is transitional in its nature. It gave the opportunity to the CCZA to show its character, to set the tone, while simultaneously making sure things were going in the right direction. Additionally, it could do so by facing not only one or two specific issues in a case – which would be typical of a court case – but it was given the opportunity to express itself on the entirety of the new constitutional dispensation. The CCZA of South Africa was not shy in this regard and jumped at the opportunity. In this sense, the certification process gave the CCZA the perfect stage to enhance and enforce at such an early stage all elements of constitutionalism. By fulfilling its certification function seriously, and independently, the CCZA asserted its own position within the political spectrum; it showed independence from the legislature and the executive, it pressed upon the importance of the constitution and thus of constitutional supremacy, and above all it started shaping its role not only within the constitutional transition, but also as a respected Court within the judiciary of the country.

b) Upholding the Horizontal Separation of Power Arrangement

The two Certification judgements demonstrate the CCZA's desire to maintain a dignified distance above the political fray.[1419] The CCZA

1417 Steytler and De Visser, 18.

1418 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at paras. 204–205.

1419 In South Africa, the dominance of the ANC on all levels of government might have resulted in a restricted number of judicial challenges and disputes than normal; especially when it comes to transitional and federal matters. Where disputes arise between, for instance, ANC-controlled institutions and sub-governments, they are likely to be resolved politically within the party structures, and not in court. Steytler, "Judicial Neutrality in the

shows in its *First Certification* judgement, right from the beginning, a commitment to staying outside of the political debate when it came to the certification exercise itself. The CCZA stated that in this unprecedented certification process, it had to measure the compliance of the new constitutional draft with the Constitutional Principles 'irrespective of the attitude of any interested party'.[1420] Moreover, a little deeper in the judgement, while clarifying the nature of the certification function, it emphasized that the certifying exercise is 'a judicial and not a political mandate [...], a legal exercise. [...] [T]his Court has no power, no mandate and no right to express any view on the political choices made by the [Constitutional Assembly] in drafting the [New Text] [...]'.[1421] It then also added that it does not have the 'power to comment upon the methodology adopted by the [Constitutional Assembly]', unless and to the extent that, of course, it may amount to a breach of Chapter 5 of the interim Constitution, headed 'The Adoption of the New Constitution', which fixes the basic framework and rules for the drafting practice.[1422] All this already points out at the CCZA settling in in its independent position among the other branches of the state. In this regard, it contributes to the shaping of the horizontal separation of powers in the aftermath of the conflict and to the consolidation of its own independence, and thus its own position within the state structures.

Related to the upholding of the horizontal separation of powers, the CCZA also assured that 'its power is confined to such certification'.[1423] This also shows already an early commitment of the CCZA to constitutional supremacy, by not empowering itself with more powers than those vested in it by the IC.[1424] Therefore, the CCZA explicitly

Face of Ineptitude: The Constitutional Court and Multi-Level Government in South Africa," 29.

1420 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 2.

1421 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 27.

1422 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 28.

1423 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 17.

1424 At the same time, the CC adds that 'certification means a good deal more than merely checking off each individual provision of the NT [New Text] against the several CPs [Constitutional Principles]'. See *Certification of the Constitution of the Republic of South*

upholds the rule of law, or at least shows this intention.

The nature of the second certification exercise remained the same as in the first one. The CCZA did not enter into details as to the extent and limits of its functions and the way in which it had previously fulfilled the task. However, the CCZA thought it would be advisable to repeat and emphasize paragraph 27 of the *First Certification* judgement,[1425] which sounded as follows:

> 'First and foremost, it must be emphasized that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC 71(2): to certify whether all the provisions of the NT comply with the CPs. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs. Subject to that qualification, the wisdom or otherwise of any provision of the NT is not this Court's business.'[1426]

The urge to repeat and emphasize this paragraph in the *Second Certification* exercise made it clear that the CCZA did not want to position itself in the middle of a political debate. The certification process was a legal exercise and was an integrated part of the constitution-making process, a legal one. Not political.

Moreover, on another point, and also related to the horizontal separation of powers, in its *First Certification* judgement, the CCZA showed a strict will to enforce it. The concerned principle (CP XXIII) required that precedence should be given to the national government when a dispute over concurring legislative power between the provinces and the national government cannot be solved by a court.[1427] The CCZA admitted that this

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Africa, 1996 (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 17.

1425 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at para. 12.

1426 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 27.

1427 CP XXIII: 'In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.'

CP was unusual because the resolving of such disputes on the allocation of powers among spheres of government is inherent to the judicial function, and a court can hardly be in the position where it is unable to make a decision. However, the CCZA looked past the content of the IC and focused strictly on its function of addressing the compliance of the new text with the CP, which *in casu* was satisfied.[1428] This was a very strong example of the CCZA, a judicial institution, separating itself from the politics; from the debate about the content of the constitutional text. It was not the CCZA's job to appraise the contents of the IC, which was the result of a political negotiation, but only to certify the new constitution's compliance with it. In this sense, the CCZA has enforced the separation of powers in the early stages of the transition.

It is clear here how many of the elements of constitutionalism are related to each other. In fact, by exposing such a strong will to enforce the horizontal separation of powers, the CCZA revealed a sturdy practice of judicial independence.

c) Upholding the Vertical Separation of Power Arrangement

The new constitutional text gave an important weight to local government, enhancing its status and entrenching its functions and powers in the Constitution itself. By certifying the constitutional text without any amendments to the initial draft with regards to such status of local government, the CCZA has confirmed the importance of local government in the reconstruction of the new South Africa. It upheld the vertical power-sharing arrangement reached by the Constitutional Assembly and therefore consented to the limitation of power at the expense of the provinces and the national government. By defending the strong structure of local government, the CCZA indirectly supported the idea of a state that needs to build up again from the bottom-up; from the communities. This is the best start when attempting to tame the *Leviathan* at the center. In this sense, it strengthened the idea of limited government within the broader concept of constitutionalism.

Of course, in this sense, the CCZA upheld the rule of law in its constitutional supremacy form by strictly working on not touching the

1428 The contents of CP XXIII were reflected in Art. 148 of the new constitutional dispensation, which stands to this day: 'If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.' See Art. 148 Constitution of South Africa, 1996.

content of the decentralization agreement whatsoever. It limited its job to what the IC's instructions dictated, which is to review the new constitutional text with their compatibility with the CPs; never, has it however tried to manipulate or change the substance of the decentralization system installed in the new constitutional dispensation by the CA. Here an example:

Example
In its First Certification judgement objections were raised as of a series of CPs and several provisions of the new text were said to be impairing the establishment of the 'legitimate provincial autonomy'.[1429] What 'legitimate provincial autonomy' really is, was a question the CCZA had to address first. It clarified that the province's powers derive from the new constitutional text only and as long as the new constitution complies with the CPs set in the IC, what legitimate provincial autonomy is, has to be determined with due regard to that framework.[1430] In two succeeding paragraphs the CCZA uses clear words as of what legitimate provincial autonomy means within the new order: 'the CPs do not contemplate the creation of sovereign and independent provinces; on the contrary, they contemplate the creation of one sovereign state in which the provinces will have only those powers and functions allocated to them by the NT. They also contemplate that the CA will define the constitutional framework within the limits set and that the national level of government will have powers which transcend provincial boundaries and competences. Legitimate provincial autonomy does not mean that the provinces can ignore that framework or demand to be insulated from the exercise of such power. What is important is that the provinces be vested with the powers contemplated by the CPs and be able to exercise such powers effectively. If this is done the requirement of CP XX relating to legitimate provincial autonomy will have been met.'[1431]

With these affirmations, the CCZA takes a very protective stance on behalf of the decentralization system championed by the Constitutional Principles. It does not show will or need to change the principles regarding the allocation of powers within the spheres, instead, it shows great loyalty towards the new constitutional dispensation and decentralization. One after the other, the CCZA rejects the objections made for each and every provision said to be

1429 In particular, CPs XXI, XIX and XX, as well as Art. 44(2), 100, 125(3), 146 and 147(1) NT, including certain provisions of chapters 10 and 13 of the new text. The CC took these objections seriously and dedicated an entire subsection of Chapter V to them, i. e., Section B.

1430 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 258.

1431 *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 259 – 260; Further on, the CC confirms the very nature of the provinces in the new constitutional order: 'The provinces are not sovereign states They were established by the IC and derive their powers from it.' See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 270.

violating the legitimate provincial autonomy,[1432] and in doing so, it protects the decentralization system.

An additional important example concerns one of the primary issues in the certification process mentioned above about the powers of the provinces:

Example
Amongst the chapters of the judgement, which deal with decentralization, Chapter VII focuses on the

1432 See the CC's opinions for CP XXI at *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 251 ff.; for CP XIX at *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 254 ff.; for CP XX at *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 258 ff.; for s. 44(2) at *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 262; for s. 100 at *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 265 ff.; for s. 125(3) at *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 267; for s. 146 at *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 268; for Art. 147(1) at *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 269 ff.; for Chapter 10 at *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 273 ff.; and for Chapter 13 at *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 279 ff.

1433 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 308.

1434 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 317.

1435 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 443.

1436 Important to know, is that the CC delivered a judgement on a weighting of all these items; i. e. although it analyzed and compared each and every one of them separately, the final decision as of whether or not, the powers and functions of the provinces could be said to be 'substantially less or inferior to' the ones which the provinces enjoy under the IC, was the result of a 'weighing of the baskets' *as a whole.* See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 443.

1437 Further items of the new constitutional text were assessed as of whether they complied with CP XVIII.2 or not, e.g., provincial service commissions (see, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 381 ff.), policing powers (see, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 391 ff.), powers with regard to traditional leadership (see, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 402 ff.) as well as fiscal powers (see, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 410 ff.).

1438 See analysis at *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 313, 318 ff. and in particular paras 331 f.

1439 For instance, where for amendments to the powers and functions of the provinces the Senate would require two-thirds majority of the National Assembly (i.e. the lower chamber) and of the Senate, the new constitutional text requires a two-thirds majority of the National Assembly and the votes of 6 of nine provinces; where the Senate had a veto in respect to certain bills, the new text provided that a dissent in the NCOP could be overridden by a two-thirds majority of the National Assembly; in certain matters, where joint sittings of both houses were required, the new text empowered the National Assembly to decide on its own; and more. Therefore, an in-depth analysis would show that in some respects the Senate had greater powers than the NCOP, and in other respects it had less.

1440 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 333.

1441 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 447.

1442 See analysis in *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 334 ff.

1443 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 457.

1444 See analysis in *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 342 ff. and 449.

1445 Compare Art. 160 IC with Art. 142 f. NT.

1446 See analysis in *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 354 ff.

1447 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 364 and 462.

1448 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 462 – 463

1449 Art. 174(3) IC.

1450 Art. 175(2) IC.

1451 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 364 and 462 ff.

1452 The CC classified the powers and functions of four mains areas of the NT as being less than or inferior (not 'substantially') to those contained in the IC. The four areas were: provincial police powers, tertiary education, local government, and traditional leadership. See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 478.

1453 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 443.

1454 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 479.

1455 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 480. The need for override clauses was not at stake, yet the problem were the grounds upon which national legislation could override provincial legislation, and this in two ways. First, the NT (at 146(2)(b)) stated that national legislation could override provincial legislation in the case the interest of the country as a whole required uniformity of legislation, whereas previously the IC at s. 126(3)(b) provided merely that the norms and standards were required for the 'effective performance' of the issue (see also, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 480 and *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at para. 153). Second, NT 146(4) prioritized clearly national legislation by establishing the presumption that when national legislation dealt with any matter referred to in NT 146(2)(c) and it had been passed by the NCOP, it had to be presumed necessary for the purposes of NT 146(2)(c), which included national security, economic unity, etc.

1456 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 481.

1457 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at paras. 145 ff.

1458 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at paras. 171 ff.

1459 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at paras. 179 ff.

compliance of the new text with CP XVIII.2, which says: 'the powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.' This Chapter does not deal with provincial autonomy, but with a guarantee that the provinces' powers and function provided by the IC are not substantially reduced in the new constitutional text.[1433] In this regard, this Chapter represents a clear exploit of the CC living up to the CP XVIII.2's expectations and, accordingly, it is the veritable embodiment of the CC's quest to protect the decentralization agreement contained in the IC. Here, the CC had to compare the powers of the provinces in the IC and those provided for in the new constitutional text by answering mainly two questions: Are the powers, functions and status of the provinces inferior or less? And if yes, can it be said that they're substantially inferior or less?[1434] Both the IC and the new constitutional text assign, define and qualify several powers and functions of the provinces.[1435] Hence, to answer both questions, the Constitutional Court had to analyze every item of the new constitution giving powers, functions and status to the provinces and evaluate whether or not they are, as a whole,[1436] substantially less or inferior to the provincial powers vested by the IC.
To make just a few examples of such items:[1437]

– An important item involved in the *upper chamber* of Parliament, which consisted in the Senate under the IC, and the National Council of Provinces (NCOP) under the new constitution. These are the institutions through which the provinces would express their powers and functions on the national level. The powers, functions and status of the institutions of the Senate had to be distinguished from the corresponding ones of the NCOP under the new text. The items to be compared were e.g., the method of appointment of their members, the different methods of voting, the different procedures to be followed, and other details.[1438] Even though the analysis resulted in the demarcation of a series of differences,[1439] these were not deemed 'substantial'.[1440] Therefore, the

1460 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at para. 199.

1461 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at para. 148.

1462 S. 146(2) replaced the criterion to justify uniformity 'in the interest of the country as a whole' with a stricter one, which provides that national legislation must deal 'with a matter that, to be dealt with effectively, requires uniformity across the nation', and s. 146(4), which previously created a presupposition in favor of national legislation, was now replaced by the following: 'when there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.' The CC confirm (*Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at para. 157), that NT 146(2) and NT 146(4) were materially different from the corresponding AT 146(2) and AT 146(4). The removal of the presumption and the addition of justiciability were enough for the CC to definitively reject the renewed objections made in this matter and to remove 'substantiality' of the principal power's reduction successfully.

1463 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at paras. 203–204.

relatively extensive assessment of the CCZA did not yield a veritable measurable diminution of the provincial powers and functions.[1441]

- The lists of *provincial legislative powers* of Schedules 4 and 5 of the new constitutional text had to be compared with the list of functional areas of Schedule 6 of the IC.[1442] The comparison yielded that on both lists, a number of functional areas were added or scrapped. After balancing the differences in the lists, the CCZA concluded that the provincial powers in terms of the new constitution were 'marginally' less than or inferior to those enjoyed under the IC, yet not 'substantial'.[1443]
- Each provincial legislature has the *competence to adopt an own constitution.* The comparison of this competence in both the IC and the new text, resulted in the CCZA finding to have been neither enhanced nor reduced.[1444] No difference, save for the wording, was observed.[1445]
- An interesting look was taken at the *powers with respect to local government.* In this regard, allocating powers and functions to local government would also constitute a reduction of those of the provinces, only this time the curtailment would come from the bottom sphere of government and not form the national sphere.[1446] The CCZA admits that in the new constitutional text, local government was given more autonomy then they were in the IC.[1447] To this extent, there is therefore a reduction of provincial powers insofar as they are affected by the role of local government.[1448] However, the IC provided that local government 'shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs'[1449] and in this sense, it 'shall be assigned such powers and functions as may be necessary [...]'[1450]. This means that local government had the right to be autonomous in some regards, yet at the same time no boundaries of such autonomy was set by the IC. The new constitutional text simply clarified these boundaries and the CCZA concluded that the boundaries were acceptable and did not result in a 'substantial' reduction of the provincial powers.[1451]

The Constitutional Court answered both questions, first, whether the powers and functions of the provinces in the new text were less than or inferior to those in the IC, and second, whether their reduction was 'substantial' or not, as follows:

- The individual analyses of these items resulted in some of the provincial powers under the new constitutional text being less than or inferior to those given under the IC,[1452] some were extensively the same and others even enhanced.[1453] The CCZA evaluated that the *individual* reductions of the provincial powers were not 'sufficient in themselves to lead to the conclusion that the powers of the provinces taken as a whole' were substantially less or inferior to those allocated in them under the IC.[1454] So, individually *and* globally less and inferior, but not 'substantial'.
- However, the CCZA added that these punctual reductions in provincial powers were not the only relevant considerations in the global evaluation. In fact, on top of the curtailment of powers, the CCZA saw the addition in the new constitutional text of a series of override clauses, which favored national legislation in the entire field of concurrent powers should there be conflict between competing national and provincial legislation, giving a non-negligible strength to the national legislature in such matters and, at the same time, weakening the position of the provinces.[1455] Therefore, the CCZA concluded its analysis as follows: 'if the curtailment of powers and the override provisions [...] are taken together, their combined weight in the context of the [New Text] as a whole is sufficient to be considered substantial. It therefore follows that the [New Text] does not satisfy CP XVIII.2.'[1456]

This as far as the *First Certification* concerned. In the *Second Certification* judgement, some of the items concerning CP XVIII.2, which were analyzed in the *First Certification*, were mentioned again by the CCZA.[1457] With regards to local government, the CCZA stated that both the amended text and the new text reduced the powers and functions of the provinces to the same extent. No great changes were made, even though the powers and functions of the provinces in terms of local government were less than those the provinces enjoyed under the IC.[1458] The same trend of no significant changes in the AT was confirmed by the CCZA, also with regards to the powers of the NCOP[1459] and provincial constitutions.[1460] However, again, vigorous objections were raised contending that the changes made by the CA in the AT, in particular with regard to the override clauses, which were the main reason the CCZA tilted the balance against the provinces in the *First Certification* judgement, and which still did not constitute compliance with CP XVIII.2.[1461] The CCZA, nevertheless, judged the changes in the AT

concerning the override clauses to be adequate to deduce that the curtailment of the provincial powers and functions, even though it was still present in the AT, was not 'substantial' anymore and thus complied with CP XVIII.2.[1462] In other words, the CA avoided amending the NT with regards of those items, which individually (but also collectively) did diminish the provincial powers and functions, yet not 'substantially'. This would have been the conclusion of the *First Certification* judgement were it not for the provisions on the override clauses which tilted the balance against the provinces, marking the curtailment as 'substantial'. The CA amended specifically these, so that the CCZA had to confirm that the balance was now effectively restored.[1463]

The CCZA puts together an extensive analysis when it comes to the assessment of the principal powers, especially if we compare it with the less extensiveness and intensity of analysis of other parts of the new constitutional text and CPs of the IC. In doing this exercise of comparison between the provincial powers under the IC and the new constitution, the CCZA has shown a fearless defense towards the decentralization agreement of the IC and hence protected it. Under no circumstance did the CCZA criticize the system of decentralization portrait by the IC; instead, it defended it. CP XVIII.2 was really looked into thoroughly and intensively; every little change made from the IC to the new constitutional text was assessed and weighed against each other. This shows how the CCZA was trying to avoid the certification of a substantial alteration of the decentralization system championed by the IC, which could have proven fatal for the provinces and thus for the 'solemn pact' made at the beginning of the constitutional transition. Let us not forget that a big part of the *First Certification* judgement is dedicated to the compliance of the new constitutional text with those CPs dealing with decentralization.[1464] This strict protection of the decentralization form of government reveals how the CCZA sees itself attached to the new order, and thus upholds constitutional supremacy. This is a strong message to all other branches of government to show that the rule of law in the new South Africa is real, and not merely words in the Constitution.

Of course, an important characteristic of a decentralized system is that it has to be efficient and functioning. The simple word 'decentralization' or 'federalism' in a constitution will not automatically bring it to life. Naturally, the functioning and success of a decentralized system of

1464 See e.g., *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*); *1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at Chapter V, which deals with provincial government issues; Chapter VI, which deals with local government issues; and, Chapter VII, which deals with provincial powers. All of these Chapters make roughly 130 pages out of the 291 of the entire judgement.

government goes beyond the mere spectrum of the law, however, the law can foresee concerns, which might appear in the future and prevent them from arising. In this next example, the CCZA did not only protect the shape of decentralization system, but also tried – through legal safeguards – to ensure that parts of it would actually work in the future.

Example
Functional areas are usually allocated, in one way or the other, between the several levels of government. It is almost impossible for the constitution-makers to deliver an exhaustive catalogue of powers. The constitutional order of a decentralized system constantly deals with the problem of functional voids which are created by either a non-allocated functional area or the failure by a level to fulfil an allocated obligation competence. The former is usually resolved by what is commonly called a residuary clause, a blanket clause that determines which level shall receive those non-allocated powers (or new powers, which might appear in the future). The latter instead is commonly dealt with through an override clause, which allows another level (usually higher) to take appropriate steps to ensure the fulfilment of the obligation. This is a very important clause that is needed to allow the functioning of decentralization. The failure to do so would create a loophole in the fulfilment of state powers and a public service would end up not being provided.
At the First Certification exercise, objection was made with regards to such clause in NT 100 on the grounds that it allegedly interfered with provincial autonomy.[1465] NT 100 provided that when a province

1465 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at paras. 263 ff.

1466 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 265.

1467 See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 266.

1468 The words of the CC: 'NT 100 serves the limited purpose of enabling the national government to take appropriate executive action in circumstances where this is required because a provincial government is unable or unwilling to do so itself. This is consistent not only with CP XXI.2 but also with CP XX, which requires the allocation of powers to be made on a basis that is conducive to effective public administration. Any attempt by the national government to intervene at an executive level for other purposes would be inconsistent with the NT and justiciable. NT 100 does not diminish the right of provinces to carry out the functions vested in them under the NT; it makes provision for a situation in which they are unable or unwilling to do so. This cannot be said to constitute an encroachment upon their legitimate autonomy.' See, *Certification of the Constitution of the Republic of South Africa, 1996* (*CCT 23/96*) [*1996*] *ZACC 26; 1996* (*4*) *SA 744* (*CC*)*; 1996* (*10*) *BCLR 1253* (*CC*) (*6 September 1996*), at para. 266.

1469 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at para. 118.

1470 See, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at para. 119. Those circumstances are the maintenance of essential national standards, economic unity, national security or to prevent a province from taking prejudicial action against the interests of another province or the country as a whole.

could not fulfil an executive obligation the national executive might take appropriate steps to ensure its fulfilment. The CCZA rejected the objection on the grounds that such intervention was authorized and required by the CP XXI.2,[1466] was consistent also with CP XX, which required the allocation of powers to be made so that it would allow for an effective public administration,[1467] and did not diminish the right of the provinces to carry out the functions allocated to them.[1468] In a way it worked as a safeguard clause. At the Second Certification exercise, the objection to the same provision (this time 'AT' 100) was reformulated and represented. The CCZA took once more the opportunity to emphasize that in such a situation, where a province fails to fulfil its executive obligations, the national executive is fully entitled, if not obliged, to make sure that such obligation is fulfilled and therefore directly ensure that the Constitution, including the decentralization system, is adhered to.[1469] Additionally, the CCZA reminds that the intervention is only legitimate to the extent necessary for the purposes referred to in AT 100(1)(b)(i)-(iv).[1470]

Without wandering into details that would derail this text into yet another summary of the certification process, this example shows how the CCZA protected decentralization as such and its efficient functioning. It confirmed such override clause and contextualized its position in the clockwork of decentralization; not once, but twice.

d) The Practice of Allocating Powers among the Different Spheres of Government

A recurring conflicting item in a decentralized country is the distribution of powers among the different spheres of government. To the extent the courts are independent and vested with a duty to guard the Constitution, they might be expected to uphold the constitutional allocation of powers against political forces determined on altering that distribution in either a more centralist or decentralist course.[1471]

The question of the stance of the court in allocating power during the implementation period indicates whether or not the court is protecting the new constitution or shaping it by its own will. At the same time, depending on what stance the court takes, and given the fact that in the cases selected for this study, decentralization was the paramount element of conflict-resolution, non-centralist courts could indicate a facilitating behavior within the transition. For example, when it comes to the allocation of powers among the different spheres of government, the sub-indicator will suggest that a court is either centralist, non-centralist or neutral. This, however, does not necessarily indicate whether the court is facilitating the constitutional transition or not, but it can stipulate

1471 Nicholas Aroney and John Kincaid, "Introduction: Courts in Federal Countries," in *Courts in Federal Countries: Federalists or Unitarists?*, ed. Nicholas Aroney and John Kincaid (Toronto, Buffalo, London: University of Toronto Press, 2017), 4.

whether the court follows the decentralization process championed by the new constitution or rather pushes towards shaping it by its own hand.
In the First Certification, the task of the CCZA was rather to certify on the basis of judicial review that the new constitutional text complied with the CPs included in the IC. A veritable allocation of powers on behalf of the CCZA was not to be seen. The CCZA focused rather on protecting the allocation of powers championed by the IC, instead of following the functional approach it would employ later on. At this moment, it was more difficult to assess whether or not the provinces were fulfilling their functions effectively. In this regard, as we will see further in this research, the CCZA concentrated its efforts in defending the decentralized idea presented in the IC. If one really wants to categorize the behavior of the CCZA in its certification exercise with regards to its stance on vertical power-sharing, we could almost conclude that at this stage it supported the very basis of it all, which is a decentralized form of government in the new South Africa. The CCZA took thus a neutral position in the defense of the decentralized system, which ends up taking the shape of a decentralized stance being the decentralized system pressing for the introduction and maintenance of the provinces.
All in all, the certification judgements are a veritable assertion to constitutionalism as a whole. They touch on most elements of constitutionalism and as such are a perfect stage for the CCZA to stress on the process of transformation taking place in the country.

bb) *The Provincial Certification Judgements* (*KwaZulu-Natal and Western Cape*)

1) <u>The Activity of the Court</u>

Within the context of transition, and with it the process of decentralization, it is necessary to dwell upon the Provincial Constitutions[1472] and their certification by the CCZA. Having certified the new Constitution, the CCZA could not but have the same task with respect to the provincial

1472 For further information on provincial constitutions, see Rassie Malherbe and Dirk Brand, "South Africa: Sub-National Constitutional Law," in *International Encyclopaedia of Laws*, ed. André Alen, Alan G. Tarr, and Robert Williams (Deventer: Kluwer, 2001), 1, 13–23, 75–116. In comparative terms, see Michael Burgess and Alan G. Tarr, *Constitutional Dynamics in Federal Systems: Sub-National Perspectives* (Toronto: McGill-Queen's University Press, 2012).

constitutions (Art. 160(4) IC), since these had to respect the fundamental principles of the Constitution of South Africa, 1996, and the functions attributed to the provinces therein. At this stage of the transition, the certification of the provincial constitutions adopted a transitional relevance, as it strongly defined the nature of provinces and their autonomy. Within this function, the CCZA gave effect to such provincial autonomy.

Among the exclusive, and arguably the most important, provincial powers, there is the adoption of an own provincial constitution,[1473] which is subject to certain requirements (Art. 142 and 143 Constitution of South Africa, 1996). Before the provincial constitution comes into force, the CCZA has to certify it.[1474] However, a provincial constitution may differ from the national Constitution with regard to 'legislative and executive structures and procedures.'[1475] A provincial constitution has to be consistent with the national Constitution,[1476] and to know, to what extent, the Province of KwaZulu-Natal premiered in feeling the ground.

In 1996, on the same day of the *First Certification* judgement, the CCZA declined the certification of the KwaZulu-Natal Constitution, when the KwaZulu-Natal provincial legislature sought to pass a provincial constitution which claimed to give powers to the province above and beyond those allowed by the IC and, in this sense, it did not meet the criteria set in the IC.[1477] The KwaZulu-Natal Constitution gave the province powers not found in the national Constitution. The CCZA confirmed what had been previously held by the CCZA in *The National Education Policy Bill* case, that '[u]nlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states. They were created

1473 See, Art. 104(1)(a) Constitution of South Africa, 1996.

1474 See, Art. 160(4) IC.

1475 See, Art. 143(1)(a) Constitution of South Africa, 1996.

1476 See, Art. 160(3) IC.

1477 See *Certification of the Constitution of Kwazulu-Natal* (CCT15/96) [1996] ZACC 17; 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996) following s. 160(3) IC: 'A provincial constitution shall not be inconsistent with (a) a provision of this Constitution, [...] and (b) a provision of the new constitutional text'; and Art. 160(4) IC: 'The text of a provincial constitution passed by a provincial legislature, or any provision thereof, shall be of no force and effect unless the Constitutional Court has certified that none of its provisions is inconsistent with a provision referred to in subsection (3)(a), and if the new constitutional text is then already passed, also with a provision of the new constitutional text'.

by the Constitution and have only those powers that are specifically conferred on them under the Constitution'.[1478] Not being an independent state, KwaZulu-Natal did not have original legislative or executive powers, and thus did not have the power to regulate its own status by giving itself powers not conferred by the national Constitution. In this regard, any power or function has to be placed within the Constitution.[1479]

In addition to the KwaZulu-Natal case, the CCZA also rejected the proposed Provincial Constitution of the Western Cape, which came almost exactly a year later.[1480] The CCZA did not find unconstitutional provisions to the same extent as KwaZulu-Natal, on the contrary, it largely considered the provincial Constitution in line with the final Constitution.[1481] Whilst the Provincial Constitution of KwaZulu-Natal never sought to comply with the criteria set in the IC, and was thus effortlessly rejected by the CCZA, the Western Cape's Provincial Constitution attempted to stay within the boundaries of the national Constitution of South Africa, 1996. Among the different points of objection, one related to the attempt by the Western Cape province to introduce an electoral system based mainly on the representation of geographic multi-member constituencies. The province considered that the electoral system was modifiable because Art. 143(1)(a) Constitution of South Africa, 1996, allowed changes with respect to the structures and procedures outlined by the same. The Constitution of the Western Cape provided for a division of the province into constituencies by allocating provincial assembly seats according to population. The CCZA considered the electoral system to be contrary to the constitutional

1478 See, *Certification of the Constitution of Kwazulu-Natal* (CCT15/96) [1996] ZACC 17; 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996), at para. 14, quoting Chaskalson in, *In re: National Education Policy Bill No 83 of 1995* (CCT46/95) [1996] ZACC 3; 1996 (4) BCLR 518; 1996 (3) SA 289 (3 April 1996), at para. 23.

1479 Nico Steytler, "South Africa: The Role of the Constitutional Court in Defining Subnational Governments' Powers and Functions," in *Animating Devolution in Kenya: The Role of the Judiciary*, ed. Conrad M. Bosire and Wanjiru Gikonyo (Rome: International Development Law Organization (IDLO); Nairobi: Judiciary Training Institute (JTI) and Katiba Institute: 2015), 212; "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 351 f.

1480 See, *Certification of the Constitution of the Western Cape, 1997* (CCT6/97) [1997] ZACC 8; 1997 (4) SA 795 (CC); 1997 (9) BCLR 1167 (CC) (2 September 1997).

1481 *Certification of the Constitution of the Western Cape, 1997* (CCT6/97) [1997] ZACC 8; 1997 (4) SA 795 (CC); 1997 (9) BCLR 1167 (CC) (2 September 1997), Media Summary.

dictates,[1482] which did not allow the province to be divided into further constituencies, as it would have been the only one to do so. Moreover, the legislation on elections was the responsibility of the national legislator alone.[1483]

In question was the interpretation of the scope of 'legislative and executive structures and procedures' (Art. 143(1)(a) Constitution of South Africa, 1996, and whether the electoral system fell within this phrase. The CCZA held that when Art. 143(1)(a) Constitution of South Africa, 1996, allows a provincial constitution to provide for a provincial legislative structure different from the one of Chapter 6 of the national Constitution, 'it permits no more than a difference regarding the nature and the number of the elements constituting the legislative structure. An electoral system not only does not constitute one of these elements but also has no effect on the nature or the number of such elements'.[1484] Hence, according to the CCZA, the system of election to the legislature was not covered by the phrase, or in other words, an electoral system is not an aspect or part of a legislative procedure or an executive structure or procedure.[1485]

This is a very strict decision[1486] by the CCZA, which put an end to much experimentation with provincial constitution-making.[1487]

1482 The Constitution of South Africa, 1996, prescribed a closed party-list proportional representation system (Art. 105(1)(d)).

1483 See, *Certification of the Constitution of the Western Cape, 1997* (CCT6/97) [1997] ZACC 8; 1997 (4) SA 795 (CC); 1997 (9) BCLR 1167 (CC) (2 September 1997), at paras. 48–49. See also, Jonathan L. Marshfield, "Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the Kwazulu-Natal Constitution," *Vanderbilt Journal of Transnational Law* 41 (2008): 595–96; Christina Murray, "Provincial Constitution-Making in South Africa: The (Non)Example of the Western Cape," *Jahrbuch des Öffentlichen Rechts der Gegenwart* 49 (2001).

1484 See, *Certification of the Constitution of the Western Cape, 1997* (CCT6/97) [1997] ZACC 8; 1997 (4) SA 795 (CC); 1997 (9) BCLR 1167 (CC) (2 September 1997), at para. 48.

1485 See, *Certification of the Constitution of the Western Cape, 1997* (CCT6/97) [1997] ZACC 8; 1997 (4) SA 795 (CC); 1997 (9) BCLR 1167 (CC) (2 September 1997), at para. 49.

1486 Characterized by a very narrow interpretation of Art. 143(1)(a) Constitution of South Africa, 1996.

1487 Rassie Malherbe, "The Role of the Constitutional Court in the Development of Provincial Autonomy," *Southern African Public Law* 16, no. 2 (2001): 352 f; Murray, "Provincial Constitution-Making in South Africa: The (Non)Example of the Western Cape."; Robert Williams, "Comparative Subnational Constitutional Law: South Africa's Provincial Constitutional Experiments," *South Texan Law Review* 40, no. 3 (1999); Steytler, "The Con-

2) Comments on the Court's Contribution to Realizing Constitutionalism

Given the signs of independence during the negotiations in KwaZulu-Natal, it was not unexpected that the CCZA rejected its constitution.[1488] Approving such constitution could have set a dangerous precedent during a fragile national constitutional transition. There is a risk that provincial secession could upset the balance between the success or failure of national constitutional change. The CCZA had to judge several provincial constitutional provisions, yet it is thought-provoking how it repeated numerous times that the content of said provincial constitutions must be in accordance with the Constitution in force (the IC) and the CPs.[1489] Not only, the CCZA reiterated that despite the relative freedom to design 'the structure and procedure' of the legislative and executive bodies (Art. 160(3)), the provincial legislator was also not entitled to distance itself from the nature and substance of the democratic state, as well as from the legislative and executive body prescribed by the IC. The CCZA further strengthened this approach, recalling that the concept of sovereignty did not belong to the South African Provinces, unlike the United States.[1490] Moreover, it defined the attempts of the Constitution of KwaZulu-Natal as a real 'usurpation' of the fundamental principles of the same, one of which defined the provinces as *self-governing* within South Africa. In this case, the CCZA took the opportunity to remind how even though provincial autonomy is an important element of the decentralized system of government in the new South Africa, such autonomy cannot be given effect at the expense of fundamental principles of the national Constitution. The CCZA makes a strong argument here on behalf of the rule of law and its concept of constitutional supremacy.

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stitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government."

1488 See, *Certification of the Constitution of Kwazulu-Natal* (CCT15/96) [1996] ZACC 17; 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996).

1489 See, Marshfield, 585 ff.

1490 See, *Certification of the Constitution of Kwazulu-Natal* (CCT15/96) [1996] ZACC 17; 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996), at paras. 4–8 and 14. In the last one, an earlier judgment of the Court is referred to: *In re: National Education Policy Bill No 83 of 1995* (CCT46/95) [1996] ZACC 3; 1996 (4) BCLR 518; 1996 (3) SA 289 (3 April 1996), at para. 23.

The same argument flows into the aiming of a more general objective of the South African transition: the reaching of a united South Africa. If one takes both provincial certification judgements together, it can easily be spotted how the severity of the CCZA in not allowing much leeway to the provinces when drafting their own constitution, is a manner to prevent provinces to experiment in this regard. In this way, the CCZA seeks uniformity in the constitutional frameworks of the provinces.

Example
This can be seen, for instance, when the careless KwaZulu-Natal Constitution presented the so-called *suspensive conditions* or *sunrise clauses.*[1491] The provincial legislator inserted provisions that suspended substantial portions of the provincial constitution until certain conditions were met, which would give them full implementation. In particular, when the IC would be replaced by the final constitution and in the case that these provisions were not contrary to it. This was laid down in Chapter 4 (Art. 1, par. 2),

1491 A sunrise clause is a constitutional provision which determines that a part of it shall enter into force only later, after a specific date or on the occurrence of certain conditions. In essence, the entry into force is 'delayed' and conditioned over time. The dormant clauses of the KwaZulu-Natal Constitution were conditional clauses, i. e., the entry into force of the Constitution of South Africa, 1996, which should have given wider powers to the provinces. In general, on the sunrise clauses, although relative to the American constitutional experience, see, Akhil R. Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2012). However, the sunrise clauses have not been targeted by the doctrine and the case of KwaZulu-Natal is very relevant, since it is inserted in a phase of constitution-making process in a post-conflict reality; not only fundamental was the role of the Court in strengthening the supremacy of the Constitution, where, in fact, there was a serious risk that the constituent process could derail. Sofia Ranchordás, "Constitutional Sunrise," in *The Foundations and Traditions of Constitutional Amendment*, ed. Richard Albert, Xenophon Contiades, and Alkmene Fotiadou (London: Hart Publishing, 2017), 177 – 86.

1492 The Constitution also contained its own Bill of Rights (Chapter 3), which, the Court stated, did not find any explicit correspondence in Art. 160(1) Constitution of South Africa, 1996. See, *Certification of the Constitution of Kwazulu-Natal* (CCT15/96) [1996] ZACC 17; 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996), at para. 17.

1493 Moreover, the Court pointed out that private and contract law could not be referred to either: 'without wishing to extend private law analogies too far, it is well established that in the field of contract an agreement subject to a suspensive condition is already a binding agreement, that its terms are clearly established and that, for example, a provisional creditor may, even before the condition precedent has been fulfilled, institute proceedings to protect such creditor's provisional right. But what is clear is that merely to suspend part of the text of a provincial constitution that is inconsistent with the interim Constitution, cannot save the constitution from the consequence of such inconsistency'. See, *Certification of the Constitution of Kwazulu-Natal* (CCT15/96) [1996] ZACC 17; 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996), at para. 42.

1494 See, Ranchordás, 186.

insofar as it provided for the entry into force of Chapter 5 (allocation of legislative powers) and Chapter 8 (establishment of the Provincial Constitutional Court).[1492] The logic was responded to in the hope that the final constitution would confer greater autonomy to the provinces, such as to validate the suspensive or dormant conditions. The CCZA overturned these provisions, stating that 'a suspended provision is part of the text, and it does not cease to be such simply because its operation is suspended until a future date, or is made contingent upon the happening of a future event. The text of the provincial Constitution is to be evaluated and certified as an integrated whole, for the meaning and effect of one particular clause can be crucially dependent on that of another'.[1493] Sunrise clauses were used by the provincial legislator to try to 'circumvent' the IC, as it was expected by the province that the final Constitution would have been much more favorable in terms of self-determination.[1494]

KwaZulu-Natal and the Western Cape were the first to approve their own constitution most likely because they were controlled by two parties in opposition to the national government, led by the ANC. Provincial legislatures attempted to regain greater autonomy by drafting provincial constitutions that differed, much in the former case less in the latter, from what was prescribed by the Constitution. If one submits this internal challenge against the federal dynamics to the filter of Elazar's words, that is, that the subnational constitutions are part of the federal structure where they play a vital role within it, one obtains that in South Africa they have had little margin to play such role.[1495] If then, to this filter, one adds the particularly restrictive – in this context, quite centralistic – interpretation of the CCZA in both cases, the leeway of the provinces to vest such important role in the provincial constitutions diminishes. Accordingly, if one considers that the creativity of each of the individual subnational constitutions depends on the 'space' left by the national Constitution, in this case it has been meagre; it could hardly have been otherwise, given the centralistic structure of the South African decentralization led by ANC.[1496]

1495 Daniel J. Elazar quoted by Williams according to whom, sharedly, 'subnational constitution-making can, as was demonstrated in the United States particularly during the Civil War, but also as part of Jacksonian Democracy, and the Populist and Progressive eras, reflect elements of national politics'. The author, despite what has been said above, hypothesized that the subnational constitutions could have an important role in the South African federal dynamics. See, Williams, 625 ff. and 41 ff.

1496 On the constitutional space left to subnational constitutions, see, Malherbe, 255 ff; Alan G. Tarr, "Explaining Sub-National Constitutional Space," *Penn State Law Review* 115, no. 4 (2011): 1133 ff.

3. The Implementation/Transitional Phase

a. The Narrative of the Implementation Phase

With the CCZA's certification judgements, the interim phase had thus ended and the laborious process of implementing the provisions of the new Constitution of South Africa, 1996, for local government commenced. With the certification judgements, the CCZA had powerfully jumped onto the transitional stage and made strong points in the role the elements of constitutionalism would play in the future South Africa. The implementation phase started with the certification of the amended text of the Constitution and stretched all the way until the local government elections of 5 December 2000.

This was the period of implementation of the structure of local government championed by the Constitution of South Africa, 1996, which mandated, *inter alia*, to provide democratic and accountable government for local communities, ensure the delivery of services to communities in a sustainable manner, promote social and economic development, as well as a safe and healthy environment, and encourage higher participation and involvement of communities and community organizations in local government matters.[1497] It is clear how a big portion of these goals are part of the broader extra-legal concept of constitutional transformation. Nevertheless, as mentioned, legal implementation was the prosecutor of such empirical transformation.

Therefore, once the Constitution of South Africa, 1996, was certified and came into effect, the Ministry of Provincial Affairs and Constitutional Development started the development of comprehensive policy that would give effect to the new constitutional vision of local government. So within these parameters of the Constitution of South Africa, 1996, in March 1998, Cabinet adopted the *White Paper on Local Government*, which sought to spell out a framework and program that would radically transform the existing local government system.[1498] The *White Paper* is literally seen as a

1497 See, White Paper on Local Government, Ministry of Provincial Affairs and Constitutional Development, Pretoria, March 9, 1998, Introduction/Executive Summary.

1498 White Paper on Local Government, Ministry of Provincial Affairs and Constitutional Development, Pretoria, 9 March 1998, Foreword by Pravin Gordhan: 'the process for developing a new policy for local government was done against the backdrop of globalization and the redefinition of the nation state as well as a new emphasis on de-

small Constitution for local government and would affect all South Africans.[1499] It was premised on the idea that the democratic state of South Africa has the obligation of meeting developmental objectives in a manner that enhanced community participation and accountability. The keystone of the *White Paper* was exactly this notion of developmental government, which reconnects to the relevance of the establishment of local government within a transformative framework in the first place. In other words, transformation of society should start from the bottom-up, and through local government the state is the closest one can get to the people. In the words of the *White Paper*, developmental government was defined as 'local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives.'[1500] It laid the policy framework for the legislation that followed shortly thereafter, even though, unfortunately, in the words of Steytler and De Visser, 'not all the enabling local government legislation enacted in its wake reflected the coherence of the *White Paper*'s vision of developmental local government'.[1501]

Due to the slow progress in the development of legislation for the implementation of local government, the constitutional time limit of 30 April 1999 had to be extended to 30 April 2000. This was the date on which all the provisions of the Constitution of South Africa, 1996, (i. e., Chapter 7) would come into force, the term of the transitional councils would expire and the first local government elections would take place. In other words, the life of the LGTA was extended by one year.[1502]

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centralization. The White Paper is the expression of the belief that our decentralization of a special type can work. South Africa has developed a unique form of decentralization in the context of the creation of three spheres which are required to govern in a cooperative manner.'

1499 White Paper on Local Government, Ministry of Provincial Affairs and Constitutional Development, Pretoria, 9 March 1998, Foreword by Mohammed Valli Moosa: 'local government is the sphere of government that interacts closest with communities, is responsible for the services and infrastructure so essential to our people's well-being and is tasked with ensuring growth and development of communities in a manner that enhances community participation and accountability.'

1500 White Paper, 1998, 17; For more on the developmental characteristics of local government through the White Paper, see Steytler and De Visser, 19 – 21. See also *De Visser, Developmental Local Government: A Case Study of South Africa.*

1501 Steytler and De Visser, 21.

1502 See Constitution Second Amendment Act of 1998.

The first piece of legislation on local government was the *Municipal Demarcation Act* of 1998,[1503] creating the Municipal Demarcation Board and charting the process of demarcating the outer boundaries of local governments. The second Act drafted was the *Municipal Structures Act* of 1998[1504], which included, *inter alia*, the criteria for the demarcation of the three categories of municipalities. Other Acts followed too: the *Municipal Electoral Act*,[1505] and the *Municipal Systems Act.*[1506]

b. The Role of the CCZA

aa) The Activity of the Court

The activism of the Court also manifested itself in defining the powers of local government. The *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* judgment constitutes the bedrock through which one should analyze the powers of local government.[1507] The dispute was based on an action brought by the insurance company Fedsure against the Johannesburg Metropolitan Council, which had increased the rates of property tax. According to the applicant, the power exercised by the Council was considered to be *ultra vires* in that it had exercised legislative power, instead of administrative power.[1508]

1503 Local Government: Municipal Demarcation Act 27 of 1998 (referred to as Demarcation Act)

1504 Local Government: Municipal Structures Act 117 of 1998 (referred to as the Structures Act)

1505 Local Government: Municipal Electoral Act 27 of 2000 (referred to as Electoral Act).

1506 Local Government: Municipal Systems Act 32 of 2000 (referred to as Systems Act).

1507 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), Explanatory Note.

1508 With this regard, the Constitutional Court (per Chaskalson P, Goldstone J and O'Regan J) explains how '[i]n addressing this question it is important to distinguish between the different processes by which laws are made. Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be "legislation", the process by which the legislation is made is in substance "administrative". The process by which such legislation is made is different in character to the process by which laws are made by deliberative legislative bodies such as elected municipal councils. Laws made by functionaries may well be classified as administrative; laws made by deliberative legislative bodies can seldom be so described.' See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 27.

The CCZA maintained that the rates imposed by the transitional metropolitan council in terms of the powers conferred to it by the IC, read with Premier's Proclamations 24 of 1994 (Gauteng), 35 of 1995 (Gauteng) and 42 of 1995 (Gauteng), which were enacted in terms of Art. 10 LGTA, did not constitute 'administrative action' under Art. 24 IC. The CCZA rejected the appeal because the status of local government was now different from before: there was no longer parliamentary supremacy, but constitutional supremacy.[1509] Under the new order, the local sphere was no longer a public body with mere delegated powers, but one whose Council 'is a deliberative legislative assembly with legislative and executive powers recognized in the Constitution itself'.[1510] Therefore, 'the enactment of legislation by an elected local council acting in accordance with the Constitution is [...] a legislative and not an administrative act'.[1511]

The reasoning behind this judgement is important in order to grasp the CCZA's contribution to the realization of constitutionalism. For the sake of a better understanding, one has to start from the basics, and so did the CCZA: 'the interim Constitution recognizes and makes provision for three levels of government – national, provincial and local. Each level of government derives its powers from the interim Constitution although, in the case of local government, the powers are subject to definition and regulation by either the national or the provincial governments, which are

1509 'The introduction of the interim Constitution has radically changed the setting within which administrative law operates in South Africa. Parliament is no longer supreme. Its legislation, and the legislation of all organs of state, is now subject to constitutional control.' See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at paras. 25 and 32.

1510 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 26.

1511 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 42. For a commentary on the judgement, see Jonathan Klaaren, "Redlight, Greenlight: Fedsure Life Assurance V Greater Johannesburg Transitional Metropolitan Council, Premier, Mpuma-Langa V Executive Committee, Association of State-Aided Schools, Eastern Transvaal," *South African Journal on Human Rights* 15, no. 2 (1999).

the "competent authorities" for enacting such legislation."[1512] This 'competent authority, however, has the obligation, under the interim Constitution,[1513] 'to establish local government, which has to be "autonomous and, within the limits prescribed by or under law [...] entitled to regulate its affairs".[1514] The interim Constitution further specifies that 'Parliament or a provincial legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government'.[1515] At the same time, the interim Constitution also provides that the competent authority must assign to a local government '[...] such powers and functions as may be necessary to provide services for the maintenance and promotion of the well-being of all persons within its area of jurisdiction'.[1516] Again, the IC specifies that a 'local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law.'[1517]

Local government is also given a taxing power subject to certain conditions, which will not be discussed here.[1518] After having cited these articles of the IC, the CCZA picks up here: 'the constitutional status of local government is thus materially different from what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local government have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates.'[1519] Even if, as the IC points out,

1512 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 35.

1513 Art. 174(1) IC.

1514 Art. 174(3) IC.

1515 Art. 174(4) IC.

1516 Art. 175(2) IC.

1517 Art. 175(2) IC.

1518 Art. 178(2) IC.

1519 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 38.

'the powers, functions and structures of local government shall be determined by law of a competent authority',[1520] this does not mean that such powers are 'delegated' powers. The CCZA is clear in this regard: 'the [local] council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influences by political considerations for which they are politically accountable to the electorate. Such decisions must of course be lawful[1521] [...].'[1522]

The CCZA concludes by stating what follows:

> '[W]hen a legislature, whether national, provincial or local, exercises the power to raise taxes or rates [...] it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation. There is no dispute that the rate [...] under consideration in this case was determined in such a way. It does not seem [...] that such action of the municipal legislatures, in resolving to set the rates [...] can be classed as administrative action.'[1523]

bb) Comments on the Court's Contribution to Realizing Constitutionalism

The *Fedsure* judgement was not only an important case as such for South Africa, but also a key one in the transition. It did not include the interpretation of a transitional Act, but involved the CCZA in asserting important transitional realities, such as the new status of local government, linked to the transformation of South Africa. Through the assertion of the new status of local government, the CCZA took the opportunity to state an important reminder: constitutional supremacy is now the new base in South Africa. At the same time, enhanced local

1520 Art. 175(1) IC.

1521 'Lawful', in the sense that legislative procedures have to be held as prescribed by the Constitution (Art. 175 f. IC), the empowering legislation and the rules of the council in question. See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 41.

1522 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 41.

1523 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 45.

autonomy resulted in a consolidation of democracy, since decentralization, and especially local government, is a deepening of it. Given the fact that local government no longer exercised delegated powers to it by the national and provincial governments, their councils were now democratic assemblies exercising original legislative authority.[1524] It is here where the CCZA strongly asserts the constitutional supremacy of the new South Africa: '[...] Parliament is no longer supreme. Its legislation, and the legislation of all organs of state, is now subject to constitutional control."[1525] Therefore, the powers of local government cannot simply be taken away from local government; it would infringe upon the Constitution.

The supremacy of the Constitution has a close link to democracy because it establishes the Constitution as the supreme law of the land, especially in a country with an authoritarian past and parliamentary supremacy. This means that everyone – individual, national, provincial or local government and every institution – have to obey the constitution, no matter what conflict is arising. It is important to leave disputes up to the Constitution and its protector, the CCZA, instead of allowing authority to fall into a power-concentrated entity.

This case showed a typical dispute in a country with a past of parliamentary sovereignty. The CCZA had to strongly remind of the new nature of the South African constitutional order. In other words, the Court stressed how South Africa no longer acts under a system of parliamentary supremacy, but one of constitutional supremacy, in which there is constitutional review of acts and actions, and especially of the separation of powers, which – as an element of constitutionalism – feeds into the concept of democracy.[1526] Hence, this case is a veritable assertion to the process of democratization.

1524 Steytler and De Visser, 26.

1525 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 32.

1526 Concepts again stressed by the Constitutional Court: 'it seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a

4. The Final Phase

a. The Narrative of the Final Phase

The final phase commenced with the local government elections of 5 December 2000, the day in which the current democratic municipalities were established.

Right before the local government elections of 2000, the Municipal Demarcation Board was appointed and started its mandate in 1999. By middle of 2000, it had demarcated the entire land of South Africa. This meant that the entire landmass of the country was going to be subject to democratic local government for the first time in history.[1527] Thus, on the day of the elections, the new municipalities came into being and the 'long and arduous process of integrating the preceding administrations into the newly formed identities commenced'.[1528] However, in a way, on this day the (normative) constitutional transition ended. Local government was legally and institutionally established. Whether the system of local government shaped during the normative constitutional transition would henceforth be a success or not, is not entirely up to the law, but to a series of extra-legal factors, which can influence the success of the transition as mentioned in the introductory chapter of this thesis. The CCZA however, even though one can argue that a CCZA is actually constantly in the process of enforcing and consolidating the elements of constitutionalism, was still active in certain remaining transitional issues.

b. The Role of the CCZA

The establishment of the new local government sphere in December 2000 did not entirely produce the reaching of the goals of 'developmental local government' articulated in the *White Paper*. Although some of the municipalities were doing relatively well, by 2009 the poor health of others was acknowledged, as many were presenting strong signs of distress and dysfunctionality. In 2009, a report by the Department of Cooperative Government and Traditional Affairs on the performance of each and every

principle of legality.' See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 58.

1527 Steytler and De Visser, 22.

1528 ibid.

283 municipalities all over the country showed how this poor health of local government could be traced back at *governance* (that is, political infighting, conflict between senior management and councilors and human resource management issues), *finance* (that is, inadequate revenue collection, ineffective financial systems, fraud, misuse of municipal assets and funds), and *service delivery* (that is, breach of Art. 152 and Art. 153 Constitution of South Africa, 1996, which outline service delivery obligations of municipalities). Continuing the same pattern, five years later, in 2014, the Minister of Cooperative Governance and Traditional Affairs, Pravin Gordhan, made his own the assessment of the performance of local government and divided municipalities into three categories: one third of the municipalities was fulfilling their functions satisfactorily, one third was just managing, and the last one third was 'frankly dysfunctional' because of *poor governance and weak allocation of powers*, *inadequate management of their finances*, and last but not least, *poor accountability mechanisms*.[1529] Hence, these three issues were the obstacle, which stood between the successful establishment of local government (and thus the realization of the constitutional transition) and failure. This shows how even though the process of normative transition prescribed by the LGTA was concluded in 2000, as a uniform system of law applies to all local governments, the constitutional transformation as such was just at the beginning. Of course, one can argue that a lot of the implementation to be completed starting in 2000 fell mostly into the extra-legal field, as a system of 'wall-to-wall' local government democracy was also new in the culture and mentality of the people. However, I believe that the CCZA played a pivotal role in knocking the corners of a legal structure of local government, which still had to be legally adapted in a way that could function in the future, regardless of the socio-political approach their development could have.

So, during this period after the legal establishment of local government in 2000, the three issues identified by Pravin Gordhan were reflected in the activity of the CCZA. The CCZA responded to the first two issues in a straightforward manner, while with respect to the third, the outcome is complex and unclear. Here an insight, without following any chronological logic and unnecessary technical details.

1529 See, Jaap De Visser and Nico Steytler, "Confronting the State of Local Government: The 2013 Constitutional Court Decisions," *Constitutional Court Review* 6 (2016): 1. See the entire paper for a thorough analysis of the issues and the CCZA's activity.

aa) Empowerment of Local Government over Land Use Planning

1) The Activity of the Court

The first issue arose around governance and concerned the empowerment of local government to control local space. In a series of very important judgments, including *Lagoonbay*,[1530] the CCZA took a clear stance in the strengthening of local governments by protecting constitutional powers over land use planning. These judgements dealt with the delineation of municipal powers over land use planning.[1531] 'Municipal planning' is a competence, over which the national and provincial authorities only have limited powers in terms of Art. 155(7) Constitution of South Africa, 1996,[1532] hence the nature of the dispute is here easily foreseeable: it concerned the typical federal dispute of allocation of powers among spheres of government.

a) The first judgment in the quartet came in 2010 when the CCZA struck down parts of the Development Facilitation Act (DFA).[1533] The case came about when the City of Johannesburg opposed some provincial tribunals rezoning land and determined the establishment of townships/subdivision of land in its own jurisdiction. The City of Johannesburg claimed that these powers fell under the constitutional competency for 'municipal planning' and thus provinces could not encroach on those powers and matters.[1534] In *Gauteng Development Tribunal*,[1535] the CCZA sided with the local government, that is, the City

1530 See, *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* (CCT 41/13) [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) (20 November 2013).

1531 The other three judgements were: *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (18 June 2010); *Maccsand (Pty) Ltd v City of Cape Town and Others* (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) (12 April 2012); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* (117/13) [2014] ZACC 9; 2014 (5) BCLR 591 (CC); 2014 (4) SA 437 (CC) (4 April 2014).

1532 See N Steytler & J de Visser *Local Government Law of South Africa* (2013) Chapter 15. 24(11) – 24(13).

1533 Act 67 of 1995 (DFA).

1534 See, De Visser and Steytler, 5.

1535 *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (18 June 2010).

of Johannesburg, and struck down those parts of the DFA that allowed those provincial tribunals to rezone and determine the establishment of townships/subdivision of land. As De Visser and Steytler opine, '[t]his was a victory for municipal autonomy and cast doubt over the strong role hitherto played by provinces in land use planning matters.'[1536]

b) The second judgement came about in 2012, the so-called *Maccsand case*,[1537] and the argumentation of the CCZA was built on the previous case *Gauteng Development Tribunal*. This time the CCZA ruled on the need to obtain, on top of a mining license granted by the national Minister for of Minerals and Energy,[1538] also a license (that is, municipal land use approval) from the municipality under the Land Use Planning Ordinance Act 15 of 1985 (LUPO). *In casu*, the municipality was the City of Cape Town, which appealed to the CCZA because the area concerned was a public area and had to be rezoned before Maccsand, a mining company, could exercise the right acquired with the license obtained from the competent Ministry. Maccsand claimed that the conceding of a mining license trumps municipal competence over 'municipal planning'; or else, the national sphere's exclusive competence over mining would be usurped by the local government sphere. The CCZA, however, stated that both national and provincial legislation had invaded local jurisdiction over municipal planning, as mining activities have a clear impact on municipal spatial planning. The result was the obligation for mining activities to have a double license: one from the Ministry and another from the municipality, with implicit re-zoning.[1539] Again, quoting De Visser and Steytler: '*Maccsand* was an important marker in the development of a better understanding of the division of powers between spheres of government.'

c) In *Lagoonbay*, the dispute came about because a development in the jurisdiction of George Municipality, which included two golf courses, a hotel, a private park and a gated residential community, was deemed

1536 See, De Visser and Steytler, 5.

1537 See, *Maccsand (Pty) Ltd v City of Cape Town and Others* (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) (12 April 2012).

1538 Granted on the basis of the Resources Development Act 28 of 2002.

1539 See, *Maccsand (Pty) Ltd v City of Cape Town and Others* (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) (12 April 2012), Media Summary. See also, Steytler, "South Africa: The Role of the Constitutional Court in Defining Subnational Governments' Powers and Functions," 219; De Visser and Steytler, 5.

to have an impact that stretched beyond the boundaries of George. Thus, on the basis of certain provisions of provincial legislation LUPO, the provincial MEC had reserved the right to approve the rezoning and subdivision necessary to carry on with the development project. The argument was that 'the location and impact of the proposed development constitutes "Regional and Provincial Planning",' not 'municipal planning."[1540] George approved the application for rezoning and subdivision made by the developer, Lagoonbay, and referred the matter to the MEC. The MEC, however, refused the application. Of course, the decision was challenged by Lagoonbay, who claimed that the municipality's authorization was sufficient in order for the development to happen. Lagoonbay argued on the grounds of *Gauteng Development Tribunal*, as that only municipalities could decide on rezoning and subdivision. Lagoonbay also argued[1541] that the sections of LUPO (a provincial law from 1985) relied upon by the MEC were impliedly repealed with the coming into force of the Constitution of South Africa, 1996. Without having to look for other words, in response to the developer, 'the MEC accepted that, in a large majority of cases, municipalities must consider land use applications as their impact is limited to the geographical area of the municipality. However, he argued that there is a category of planning decisions which have an impact beyond the area of a single municipality, and that therefore fall within the ambit of 'provincial planning' and/or 'regional planning and development,' as contained in Part A of Schedules 4 and 5 of the Constitution."[1542] This argument was first accepted by the Western Cape High Court,[1543] whereas the Supreme Court of Appeal rejected it by holding that rezoning was local government and not provincial.[1544] Once

1540 See, *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* (CCT 41/13) [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) (20 November 2013), at para. 4.

1541 With reference to *CDA Boerdery (Edms) Bpk en Andere v Nelson Mandela Metropolitan Municipality* (526/05) [2007] ZASCA 1; 2007 (4) SA 276 (SCA) (6 February 2007).

1542 See, De Visser and Steytler, 6.

1543 See, *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* (10751/2011) [2011] ZAWCHC 327; [2011] 4 All SA 270 (WCC) (31 August 2011).

1544 See, *Lagoonbay Lifestyle Estate (Pty) Ltd v Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* (320/12) [2013] ZASCA 13 (15 March 2013), at para. 8.

again, without having to look for any particular reformulation, with what was said before:

> '[T]he scene was thus set for a constitutional argument on the reach of the municipality's constitutional authority with regard to "municipal planning" and provincial powers with regard to the same functional area. However, the constitutional argument fell flat as the developer – Lagoonbay – did not attack the provisions of LUPO the MEC relied upon. Instead, it argued that these sections had been "impliedly repealed" by Art. 8 of the Local Government: Municipal Systems Act[1545] and Art. 83(1) of the Local Government: Municipal Structures Act[1546] because these provisions no longer empower provinces to rezone and subdivide. The Constitutional Court did not accept this argument because these Acts do little more than restate the Constitution. They do not provide for any alternative for the intricate and critically important scheme set forth by LUPO and there is no neatly identifiable provision that can be removed to address the unconstitutionality.'[1547]

In other words, since the MEC's actions relied on provisions of the LUPO, which were however not challenged by Lagoonbay, the CCZA was basically forced to limit its review to whether the MEC acted *ultra vires* LUPO (and not whether LUPO was in fact unconstitutional or not). Therefore, the MEC acted in accordance with LUPO, the existing legislation which had not yet been examined by the CCZA, but which remained valid in the absence of any appeal to the same CCZA.[1548] On this point, De Visser and Steytler write:

> 'In essence, the judgment emphasizes the rule of law. A validly enacted provincial law remains valid until set aside by the Constitutional Court. Decisions taken in terms of those laws are valid, no matter how incompatible they may be with the Constitution.'[1549]

However, and this is why this case falls anyhow under the above-mentioned quartet. Even though the CCZA decided in favor of the MEC, it did admit that it was tempted to follow the Supreme Court's judgement by even explaining, through developing five straight points, what its argument would have been had it yielded to that temptation.[1550] The five points led

1545 Act 32 of 2000.
1546 Act 117 of 1998.
1547 See, De Visser and Steytler, 6.
1548 David Borgström and Uday K. Naidoo, "Playing with Power: The Competing Competencies of Provincial and Local Government," 6 (2014): 68–69.
1549 See, De Visser and Steytler, 6.
1550 'First, national and provincial spheres are, in principle, not entitled to usurp the functions of local government. Secondly, the constitutional vision of autonomous spheres of go-

the CCZA to the conclusion that 'there is therefore a strong case for concluding that, under the Constitution, the Provincial Minister was [actually] not competent to refuse the rezoning and subdivision applications.'[1551]

a) Finally, the last case, *Habitat Council*,[1552] was decided in 2014. In this case, the CCZA could complete the reasoning, which it was forced to abandon in *Lagoonbay*. This fourth sentence in the series saw Art. 44 of LUPO declared unconstitutional and invalid. This provision gave the province of the Western Cape the power to judge on appeal cases against municipalities' land planning decisions and to replace them with its own. Unanimously, the CCZA confirmed that Art. 44 of LUPO was unconstitutional, because in terms of the Constitution's separation of competences, the local government is responsible for the planning decisions with which LUPO deals. Provinces are not.

2) Comments on the Court's Contribution to Realizing Constitutionalism

Leaning on the opinion of De Visser and Steytler, it can be said that '[t]he quartet of Constitutional Court decisions, with *Lagoonbay* as the awkward middle one, establishes a firm and consistent trend on municipal powers, most eloquently expressed in the Court's five-point confession in

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vernment must be preserved. Thirdly, while the Constitution confers planning responsibilities on each of the spheres of government, those are different planning responsibilities, based on 'what is appropriate to each sphere'. Fourthly, '"planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships'. Lastly, the provincial competence for 'urban and rural development' is not wide enough to include powers that form part of 'municipal planning'.' Summarizing the five points from *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* (CCT 41/13) [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) (20 November 2013), at paras. 45–46. See also, ibid., 7.

1551 See, *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* (CCT 41/13) [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) (20 November 2013), at para. 46.

1552 See, *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* (117/13) [2014] ZACC 9; 2014 (5) BCLR 591 (CC); 2014 (4) SA 437 (CC) (4 April 2014).

Lagoonbay.'[1553] In these cases, the CCZA took a strong stance in favor of the protection of local government powers. This stance was also confirmed in other cases, which do not necessarily deal with the transition from a unitary system of government to cooperative federalism, but rather to a common issue in established federal systems, that is, the allocation of powers between different spheres of government.[1554]

The result of this series of four cases is that local government, still under the bondage of old and national legislation, are finally given expansive scope of powers in the field of land planning. It is also a further indicator that the CCZA is generous and accommodating in its interpretation of local powers (especially against the provincial ones).[1555]

bb) *The 'Hiccup' Judgements regarding the Extraction of Revenue*

1) <u>The Activity of the Court</u>

As mentioned, due to the slow process in the development of legislation for the implementation of local government, the constitutional time limit of 30 April 1999 had to be extended to 30 April 2000. So, since the process of establishing local government was delayed, the life of the LGTA was extended by one year. This also because the establishment of all the institutions of local government was protracted and strict adherence with the various procedures did not always happen. This posed a dilemma for the CCZA. On the one hand, a strict compliance to legal requirements is necessary to uphold the rule of law. On the other hand, however, tackling every little infraction with invalidity could be highly disruptive to the realization of the constitutional transition itself.

1553 See, De Visser and Steytler, 8.

1554 For more on the issue of allocation of powers between different levels of government and the trend mentioned above, see, for instance, Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government."; Robert Williams and Nico Steytler, "'Squeezing out Provinces' Legislative Competence in Premier: Limpopo Province V Speaker: Limpopo Provincial Legislature and Others I and Ii'," *South African Law Journal* 4, no. 129 (2012); Patricia Popelier, "Federalism Disputes and the Behavior of Courts: Explaining Variation in Federal Courts' Support for Centralization," *Publius: The Journal of Federalism* 47, no. 1 (2016).

1555 See, De Visser and Steytler, 8.

A series of cases, amusingly labeled by Steytler as 'hiccup cases' in a private conversation,[1556] show how the CCZA was hesitant to apply an overly strict review of the government's efforts to build a new local democracy.[1557]

In 1997, when the Western Cape MEC did not give effect to an amendment of the LGTA concerning the election of district councils, a company called Paarl Poultry Enterprises claimed that the district councils did not have the authority to levy taxes during the period of time that they were composed according to the old unamended LGTA. Thus, according to the company, all decisions of the district councils, including all taxes imposed and collected, had to be invalidated accordingly. The CCZA ruled in the *MEC for LG and Planning of the WC v. Paarl Poultry Enterprises*,[1558] that the district councils did not become unlawful simply because the MEC did not give effect to the LGTA amendment and rejected the claim. In words of the CCZA, this conclusion 'accords with the spirit, purport and objects of the Constitution, and particularly with its founding value, the rule of law. The spirit, purport and objects of the Constitution and the rule of law contemplate "a purposive ordering of social relations" in communities regulated by law.'[1559] By the time of the CCZA's judgment in 2001, the relevant provisions of the LGTA had fallen away, yet the decision reveals how the CCZA still approached challenges after the end of the establishment of local government that could be extremely disruptive for the local government structure. The CCZA showed high sensitivity towards

1556 The term was previously coined by the Supreme Court of Appeal of South Africa in *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others* (518/09) [2010] ZASCA 128; [2011] 2 All SA 46 (SCA) (30 September 2010), at para. 14. It was the also quoted by the Constitutional Court in *Liebenberg NO and Others v Bergrivier Municipality* (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) (6 June 2013), at para. 24. The term was then also employed by De Visser and the same Steytler in ibid., 13.

1557 Steytler, "South Africa: The Role of the Constitutional Court in Defining Subnational Governments' Powers and Functions," 222.

1558 *Member of the Executive Council for Local Government and Development Planning Western Cape and Another v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm* (CCT38/01) [2001] ZACC 7; 2002 (2) BCLR 133; 2002 (3) SA 1 (CC) (14 December 2001).

1559 *Member of the Executive Council for Local Government and Development Planning Western Cape and Another v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm* (CCT38/01) [2001] ZACC 7; 2002 (2) BCLR 133; 2002 (3) SA 1 (CC) (14 December 2001), at para. 45.

local government's transition and stressed how important it was for courts to be mindful of the potentially disruptive effects of their decisions.[1560]

MEC for LG and Planning of the WC v. Paarl Poultry Enterprises
The case was brought up because a company in Paarl (Paarl Poultry Enterprises) attempted at resisting against its district council for taxes. Paarl Poultry Enterprises relied on a previous High Court decision, which stated that the district councils in the Western Cape province had been incorrectly elected during the period in which the taxes were claimed. Initially, the LGTA did not demand district councils to be elected on the basis of proportional representation, yet an amendment in 1996 to the LGTA required newly that district councils be elected in that manner starting from July 1997. By that date, however, district councils in the Western Cape were not elected on that basis and no one created any regulations in terms of which they could be reorganized to comply with the amendment.
As a consequence to this situation, a case was brought to the Cape of Good Hope High Court, which held, in July 1998, that these district councils had been in fact 'improperly elected' since July 1, 1997. Accordingly, the High Court charged the Member of the Executive Council (MEC) responsible for Local Government in the Western Cape province to fix the issue within sixty days of the judgement. Through proclamation (Proclamation 52 of 1998), the MEC laid down detailed provision for district councils to be elected according to the amended LGTA by the end of January 1999. On top of it, however, it included a special section in the Proclamation (that is, Section 10), a savings provision, which sought to legalize all acts and decisions of district councils during the period between July 2017 and January 1999, that is the period of time when they would have been 'improperly elected'.
During the first half of 1998, the Winelands District Council sued Paarl Poultry Enterprises for the retrieval of certain taxes. Paarl Poultry Enterprises defended itself by claiming that it did not have to pay those taxes because certain procedures linked to the case took place whilst the district council had not been properly elected in terms of the High Court's decision. Of course, the district council replied by relying on Art. 10 Proclamation, which meant that all acts and decisions during that period were valid anyway. Paarl Poultry Enterprises argued that Art. 10 was invalid because it sought to transform an illegally elected district council into a lawful one. In a judgment delivered in 2001, the Cape of Good Hope High Court ruled in favor of Paarl Poultry Enterprises. The MEC and the district council took the case to the CCZA.
The CCZA in its judgment began its analysis by broadly describing the way in which non-metropolitan or rural local government had developed from 1993 until the end of 1996, and concluded that the MEC did have the authority to make regulations by which district councils in the Western Cape were to be reconstituted on the basis of proportional representation.
The CCZA stated that even though the MEC had the full authority to release regulations by which district councils were to be reorganized on the basis of proportional representation, the same might have fallen beyond the scope of its powers when it made Art. 10. However, the CCZA agreed with the High Court's decision of July 1998, when it meant that the MEC had to make new regulations to ensure that district councils were elected according to the new amended LGTA. Accordingly, it also rejected Paarl Poultry Enterprises' claim that the councils had been unlawfully constituted from the beginning of July 1997. In fact, the CCZA decided that since district councils remained elected in terms of the only regulations applicable to them, they stayed lawfully elected after 1 July 1997, and hence even if Art. 10 were to be invalid, there would have been persuasive reasons 'to attach conditions to the order to enable councils to recover rates and taxes levied in good faith [...] to avoid the consequence that would

1560 See, Steytler, "South Africa: The Role of the Constitutional Court in Defining Subnational Governments' Powers and Functions," 222–23.

1561 See, *Member of the Executive Council for Local Government and Development Planning Western Cape and Another v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm* (CCT38/01) [2001] ZACC 7; 2002 (2) BCLR 133; 2002 (3) SA 1 (CC) (14 December 2001), at para. 47.

> otherwise follow from an unconditional order declaring that all the district councils [...] were unlawfully constituted [...].'[1561]

A similar stance and approach became more visible later in *Liebenberg,* which dealt with the roll out of property rates by municipalities of areas which were not formerly rated. This judgment dealt with the imposition of property taxes, which is a key source of income for local government, and thus of its functioning. Just as the CCZA pointed out in *MEC for LG and Planning of the WC v. Paarl Poultry Enterprises*, 'the failure to collect sufficient revenue threatens the sustainability of many municipalities.'

In *Liebenberg*, the issue at stake was the empowerment of municipalities to collect rates.[1562] Before the establishment of local government in 2000, rural property owners were not required to pay property taxes. However, the introduction of the wall-to-wall system of local government meant that the entire country was now under local democracy, and that put all landowners – including rural landowners – under the obligation to pay property taxes. In the case of *Liebenberg*, the municipal efforts at tax collection were met with significant opposition of land-owning farmers objected to paying newly imposed property taxes when they were first rolled out by the Bergrivier Municipality in 2001 and refused to pay them for the following eight years. Since the Constitution of South Africa, 1996, and local government legislation empowered municipalities to levy taxes on all properties, the legal argument of the farmers was based on a few procedural flaws, which allegedly made the imposition of property taxes invalid. They grabbed at every little non-compliance of the law the municipalities may have committed during the process of implementing a system which was already highly complex.[1563] Said infraction would be for instance, the failure to publicly give notice of its rates resolution as required by the LGTA.[1564]

Without going into details of the case, which would fall beyond the scope of this research, the CCZA affirmed its general approach already revealed in *MEC for LG and Planning of the WC v. Paarl Poultry Enterprises* of

1562 For a full analysis of the case, see De Visser and Steytler, 9–13.

1563 The system was controlled for a period over ten years by provincial ordinances, the LGTA, and, eventually, the Municipal Property Rates Act of 2004. Steytler, "South Africa: The Role of the Constitutional Court in Defining Subnational Governments' Powers and Functions," 223.

1564 See De Visser and Steytler, 10.

exposing what the consequences would be when a municipality does not comply with the relevant provisions, as follows:

> 'A failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.'[1565]

On behalf of the majority, Mhlantla AJ quoted the Supreme Court of Appeal with approval:

> 'To nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the Legislature could have intended it'.[1566]

Of course, this is a very accommodating approach to local government by the CCZA. The CCZA emphasizes how local government relies heavily on the revenues they levy themselves and therefore it is crucial that those who can pay should do so. In fact, Mhlantla AJ indicated a previous CCZA decision, in which Langa DP clearly stated that '[a] culture of self-help in which people refuse to pay for services they have received is not acceptable.'[1567] This quote came hand in hand with the following passage:

> 'Effective cooperation between citizens and government at local level is a foundational building block of our democracy. The State must of course uphold the rule of law and ensure its obligations are discharged. But, at the same time the culture of non-payment for municipal services has, as this Court has said before, "no place in a constitutional State in which the rights of all persons are guaranteed and all have access to the courts to protect their rights."'[1568]

1565 See, *Liebenberg NO and Others v Bergrivier Municipality* (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) (6 June 2013), at para. 26.

1566 See, *Liebenberg NO and Others v Bergrivier Municipality* (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) (6 June 2013), at para. 24, with reference to *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others* (518/09) [2010] ZASCA 128; [2011] 2 All SA 46 (SCA) (30 September 2010), at para. 14.

1567 *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998), at para. 93.

1568 See, *Liebenberg NO and Others v Bergrivier Municipality* (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) (6 June 2013), at para. 80, quoting *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998), at para. 92.

As De Visser and Steytler assert that '[w]hile the outcome is surely correct – not every hiccup should invalidate a revenue raising measure – it does raise questions of legal certainty and the faithful adherence to the principle of legality.'[1569] In fact, it is not surprising that the decision was not unanimous. The CCZA split on this exact question. For instance, Khampepe J disagreed harshly on the principle of legality in her minority judgment:

> 'Where the State purports to extract taxes from its citizens – conduct that goes to the very heart of the social contract between government and its people – that extraction must be done in a lawful manner. Where a local authority purports to impose rates, that imposition must be done in accordance with the constraints that Parliament has imposed. If we are to give cognizance to the fact that the Constitution now empowers municipalities to exercise original legislative powers, we must also accept that municipal authorities may no longer adopt an informal approach to the exercise of their powers."[1570]

Even though it is easy to agree with the judge when she says that 'the principle of legality [lies] at the heart of our modern constitutional dispensation,'[1571] an excessively formalistic approach for, especially in this particular case, and overall complexity of local government renders development vulnerable to every little procedural challenge, which could result in potentially severe consequences for municipalities. De Visser and Steytler again stress how the CCZA's 'approach of requiring only substantial compliance with rules as long as the objects of the legislation are achieved, is appropriate for a context in which new municipalities are trying to find their feet."[1572]

The CCZA, however, does not always tolerate violations of basic legal principles. In *eThekwini Municipality v Ingonyama Trust,*[1573] for instance,

1569 See, De Visser and Steytler, 12–13.

1570 See, *Liebenberg NO and Others v Bergrivier Municipality* (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) (6 June 2013), at para. 164.

1571 See *Liebenberg NO and Others v Bergrivier Municipality* (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) (6 June 2013), at para. 165.

1572 See, Steytler, "South Africa: The Role of the Constitutional Court in Defining Subnational Governments' Powers and Functions," 224.

1573 See, *eThekwini Municipality v Ingonyama Trust* (CCT 80/12) [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) (28 March 2013). For a full analysis of the case, see De Visser and Steytler, 13–14.

the CCZA refused to allow municipalities to retrieve taxes retro-actively.[1574] This decision does not cancel out the CCZA's general understanding approach of strengthening and protecting municipal revenue raising competences, but at the same time, it does not tolerate rough transgressions of basic legal principles, such as the rule against retrospectivity.[1575]

2) Comments on the Court's Contribution to Realizing Constitutionalism

All in all, in this approach, the CCZA chooses its severity on the upholding of the rule of law with close regards to the end goal of establishing local government. These are important decisions, which show how the CCZA was keen on concluding the transition.

Due to the complexity of the local government transformation, the CCZA protected throughout the years local government's revenue streams, and thus displayed quite a strong understanding of this financial matter as an essential platform from which to exercise a developmental mandate.[1576] Sustainable financial revenue lies at the core of a well-working local government that delivers the services it is mandated to deliver by the Constitution. In the transition years of local government, many municipalities have struggled to find their stability in fulfilling their task,

1574 In *eThekwini Municipality v Ingonyama Trust* (CCT 80/12) [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) (28 March 2013), the municipality approached the High Court in 2009, seeking a declaration that the land of the Ingonyama Trust, which fell within the boundaries of the municipality, was taxable land as from May 1996, when the first election of transitional councils were held, until June 2005 when the Rates Act came into force and subjected all land to taxes. The Ingonyama Trust argued that the land was state property which was exempt from being rated in terms of the Rating of State Property Act (Rating Act), which was repealed by the Rate Act. Even though the High Court deemed the Rate Act applicable also for the period between 1996 and 2005, the Supreme Court of Appeal reversed the decision of the High Court. The Supreme Court's opinion was then confirmed by the CCZA, which held that the land held by the Ingonyama Trust was state property as of the Rate Act, and thus was exempt from taxes. For a full analysis of the case, see ibid.

1575 See, ibid., 14. It should be added that the Court was not overenthusiastic in equipping local governments with every imaginable and extensive taxing power. The *Ingonyama Trust* case is clear evidence of this (*eThekwini Municipality v Ingonyama Trust* (CCT 80/12) [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) (28 March 2013)).

1576 ibid., 11.

especially due to difficulties created by revenue extraction dysfunctionalities. In *Liebenberg*, the CCZA tried to help struggling municipalities by taking a rather soft approach to regulatory compliance. While stressing the importance of revenue extraction in the transitory context, the CCZA admitted that a strict application of the law (especially in the formal procedural sense) would just be a 'hiccup' within the grand scheme of the transition and as such, it cannot be that the entire transition stumbles into so little matters. In other words, the CCZA weighed the interests of the success of the constitutional transition (and as such of the establishment of constitutionalism) against the principle of legality. Even though in the balance of both interests, the CCZA eventually took a stance for the former, it is on this very point that its opinion split. This dilemma can be (and is) hypocritical in its very nature because the adherence to the principle of legality is equivalent to adherence to the rule of law, which is an element of constitutionalism itself. Even though this is true, one has to interpret the situation by looking at the bigger picture. The CCZA is still applying the principle of legality, yet it takes a soft approach in doing so in order to facilitate the establishment of constitutionalism in the broad sense. So, yes, it will always be a difficult path to tread between, on the one hand, shielding local government from attacks that would hinder their establishment and functioning, and, on the other hand, weakening adherence to the rule of law.[1577]

cc) The Withdrawal of Accountability for Spending

1) <u>The Activity of the Court</u>

To show the width of judicial implementation needed for a constitutional transformation to take place, I need to turn the attention briefly to another important issue, which concerned the holding of municipalities accountable. This issue called the CCZA up for instance in *Rademan v Moqhaka Municipality*.[1578] Here, the CCZA was met with efforts of citizens to hold their municipalities accountable.

Rademan v Moqhaka Municipality concerned a matter relating to a municipality's right to end electricity supply to a citizen who failed to pay

1577 See, ibid., 13.

1578 See, *Rademan v Moqhaka Local Municipality and Others* (CCT 41/12) [2013] ZACC 11; 2013 (4) SA 225 (CC); 2013 (7) BCLR 791 (CC) (26 April 2013).

property taxes. Ms. Rademan, among others, declared a dispute with her municipality related to her dissatisfaction with the municipality's apparent failure to provide efficient services to its citizens. In sign of protest, Ms. Rademan and others, withheld the payment of property taxes. The same Ms. Rademan, however, kept on payment the full amount of her electricity bills. Nevertheless, the municipality disconnected her electricity supply following her failure to pay the taxes. The CCZA dismissed Ms. Rademan's appeal.

2) Comments on the Court's Contribution to Realizing Constitutionalism

Entering the realm of socio-economic rights and their enforcement, we step into a very complex and unclear realm of the law. Just as any other type of fundamental right, positive delivery of services is crucial for the success of constitutional transition. When it comes to the implementation of these rights, a mere legal point of view is not sufficient. Extra-legal factors step in and facilitate the understanding of how the constitutional transformation is doing. In *Rademan*, we witnessed how *in casu* a specific type of protest for the failure of service delivery, the withdrawal of property taxes, was not a solution for the CCZA, yet it was not taking a clear stance on what remedy is acceptable for a citizen to take in case a municipality is dysfunctional in its delivery of services.[1579] De Visser and Steytler conclude their analysis of the case as follows:

> 'What is to be done when the national and provincial governments fail to act? The Constitutional Court has recognized in Joseph the rights of residents to basic municipal services and was willing to enforce it against a municipality.[1580] Residents should be able to argue that the right to basic municipal services includes the filling of potholes in roads, the cleaning of public spaces, and the fixing of street lights. They could further argue that they have a right to the provision of 'accountable government',[1581] including having auditable financial statements which enable the Auditor-General to find out whether or not residents' taxes and paid fees were misspent or stolen. If self-help is not an option, a court should be willing to impose a

1579 On the very complex matter of what the remedy is when Local Government fails, see De Visser and Steytler, 16 – 22.

1580 See, *Joseph and Others v City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) (9 October 2009).

1581 Art. 152(1)(a) Constitution of South Africa, 1996.

> structural interdict compelling a dysfunctional municipality to report on progress made with clearly set targets for better administration.'[1582]

With regards to this issue, the CCZA evaded somehow the issue of municipalities' dysfunctionality and the legal remedies therefor that desperate citizens lack and who cannot therefore hold their municipalities to account. With this regard, the CCZA did not come out strongly in favor of the partnership of municipality accountability with the citizens it serves. In another case regarding the accountability of municipalities, *Brittania Beach v Saldanha Bay Municipality*,[1583] the applicants failed to exact accountability, not because the CCZA rejected the notion of democratic accountability, which is a constitutionally entrenched principle, but because 'they leapfrogged the applicable statutory instruments to extract accountability and instead wanted to rely directly on constitutional principles. [...] However, the Constitutional Court held that these do not give rise to independent rights and that the Constitution, statutes, and court proceedings provide specific rights and remedies that could have been pursued. Since the claim for a duty to account was not located within any statutory framework, it failed.'[1584]' Using the statutory tools may have brought success to the applicants. This is what happened in *Rademan*, where the complaining taxpayer, Ms. Rademan, indeed followed the statutory route to hold the municipality accountable for its failure to provide services, yet she also failed. The simple reason however was that the statutory tools at her disposal were not in the position to provide remedy for her issue – 'the municipality's failure to provide basic services because of deep systemic problems resulting in a dysfunctional municipality.'[1585] Even though the issue was not appropriately argued, the CCZA failed to provide any guidance whatsoever as of how to approach the obstinate problem of dysfunctionality local government. In the absence of any statutory remedies, and despite *Brittania Beach v Saldanha Bay Municipality*, for De Visser and Steytler:

> 'The only route to success is to go directly to the Constitution and seek to enforce the right to basic municipal services. Although the Court may have hinted that self-help is

1582 De Visser and Steytler, 22.

1583 See, *Britannia Beach Estate (Pty) Ltd and Others v Saldanha Bay Municipality* (CCT11/13) [2013] ZACC 30; 2013 (11) BCLR 1217 (CC) (5 September 2013).

1584 See, De Visser and Steytler, 15–16.

1585 See, ibid., 23.

> a possibility when services are not forthcoming, it is unlikely that avenue will find ultimate judicial sanction. The only other option is, relying directly on the Constitution, to fashion judicial remedies that may protect residents governed by dysfunctional municipalities."[1586]

c. Comments on the Role of the CCZA in the Final Phase

In the years following the 2000 establishment of local government, a series of issues have arisen that challenged its well-functioning. Of course, the reasons thereof lie within several factors. Some were extra-legal and others legal. Where the CCZA could intervene and facilitate the well-functioning of local government, it did so. Although the constitution was already enacted, the jurisprudence abovementioned contributed still to the normative constitutional transition. The state of local government presented particular challenges for the CCZA and will also in the future. Nevertheless, the challenges it presented in the years from 2000 until today can still be deemed to be part of those transitional matters that characterize a constitution-making process.

Leaning on De Visser and Steytler, I have mentioned how for local government to fulfill its constitutionally entrenched developmental mandate, it needs to have the appropriate powers, have access to sustainable financial revenues and do so in an accountable manner vi-à-vis the communities they attend. The CCZA was clear on all issues, but the last, and made sure that they would not impede the constitutional transition any further. Firstly, the CCZA has been supportive of the incremental expansion of local government competences over the local land use planning both in *Lagoonbay* and later in *Habitat Council,* where it properly asserted the competences of local government against the ones of provinces. Second, and very important, the CCZA made special efforts to ensure the financial sustainability of municipalities by assuring their access to limited revenues.[1587] Finally, the third issue regarding the

1586 See, ibid.

1587 To do this, the majority of the CCZA (in *Liebenberg NO and Others v Bergrivier Municipality* (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) (6 June 2013)) gave a wide interpretation of the LGTA by allowing the municipality the more municipal-friendly set of provisions for the collection of property rates. In a second moment, it went quite soft on compliance requirements by following a line of rulings dealing with akin situations. Merely substantial compliance was needed. Some judges in the dissenting opinion criticized this solution because it came at the cost of legality (both

accountability of the municipality, the issue remains unclear, and in my opinion this is also due to the fact that enforcing the service delivery of local government touches on the realm of the enforcement of socio-economic rights, the implementation of which is strongly reliant on extra-legal factors.

In an earlier case of the CCZA ('early' in the final phase), in 2004, *City of Cape Town v. Robertson*,[1588] the CCZA declared the extent of local government's transformation, when it affirmed that:

> 'The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, "inviolable and possesses the constitutional latitude within which to define and express its unique character" subject to constraints permissible under our Constitution. A municipality under our Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial and national legislation. A municipality enjoys "original" and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of the municipality is not always invalid only for the reason that no legislation authorizes it. Its powers may derive from the Constitution or from legislation of a competent authority or from its own laws.'[1589]

This jurisprudence of the CCZA in the years following 2000 are very revealing in what the CCZA's behavior might have been during the transition. They are evidence of how a constitutional transition is far from complete at the enactment of the new constitutional dispensation. In no way these are the only cases regarding local government during this period of time after

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in keeping the LGTA alive and being soft on compliance). However, even though legal certainty is important in a state of law, some reasonable solution must be found through the thicket of South African overregulation. The CCZA did this even though it was never overenthusiastic in giving municipalities every possible taxing device (e.g., in *eThekwini Municipality v Ingonyama Trust* (CCT 80/12) [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) (28 March 2013) it was not willing to empower the eThekwini Metropolitan Municipality to levy property rates retrospectively).

1588 See, *City of Cape Town and Other v Robertson and Other* (CCT 19/04) [2004] ZACC 21; 2005 (2) SA 323 (CC) (29 November 2004).

1589 See, *City of Cape Town and Other v Robertson and Other* (CCT 19/04) [2004] ZACC 21; 2005 (2) SA 323 (CC) (29 November 2004), at para 60. A closer interpretation of *City of Cape Town v Robertson* suggests that municipalities can do anything to foster the constitutional objectives provided that such activity is not illegal. See, Oliver Fuo, "Role of Courts in Interpreting Local Government's Environmental Powers in South Africa," *Commonwealth Journal of Local Governance*, no. 18 (2015): 32.

2000, yet the ones analyzed here are in my opinion sufficient to show what the role of the CCZA was.

E. Preliminary Conclusions

It is nearly impossible within the confines of a chapter to elaborate on the nuanced settings in which the CCZA addressed the issue of preventing constitutionalism from collapsing before even being fully established. Upon the perceptions provided by the aforementioned jurisprudence of the CCZA based on mostly the establishment of local government, however, it seems I can roughly draw the following conclusions.

I. Summary

1. Did the CCZA Play a Role in the Transition?

The CCZA played one of the main roles during the constitutional transition in steering and creating the new legal constitutional framework the objective of which was to ensure a successful transition through the establishment of a series of basic principles that coincided with the elements of constitutionalism. The case of the South Africa is even more incredible if one thinks that the CCZA itself contributed directly to the creation of the new Constitution which certainly embodied a rare example of such a role of a judicial institution in the whole process of the constitutional construction of a country.

The CCZA has to be seen as an important apex court in comparison to others, because it has never been shy of taking strong stances in many matters of great importance. On the one hand, some of these matters, such as the establishment of local government, relate strongly to the normative side of a constitutional transition, as their acceptable (or inacceptable) establishment influences the legal structural character of the constitutional order and it would impede the empirical constitutional transformation to even begin.[1590] The CCZA on this matter:

1590 For instance, a completely dysfunctional system of local government does not facilitate the provision of basic services for the people.

> 'The transformation of South Africa from a society rooted in discrimination and disparity to a constitutional democracy founded upon freedom, dignity and equality posed, and continues to pose, particularly profound challenges at local government level. It is here that acute imbalances in personal wealth, physical infrastructure and the provision of services were and are often most patent.'[1591]

On the other hand, other matters, such as the enforcement of socio-economic rights or the abolishment of capital punishment, are strong statements in the context of an empirical constitutional transformation, yet they represent the 'garnish' (and the evidence) of a social transformation, which is taking place in the country and do not necessarily have an impact on the legal constitutional transition itself.[1592] The CCZA has been strong and active in both processes. This study has focused on the former and especially on the establishment of local government. The CCZA, however, has played an important role also in the latter, that is, the empirical transformation of the country. For instance, in what has been described as the CCZA's 'first politically important and publicly controversial holding,'[1593] on June 6, 1995, the death penalty was

1591 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 2.

1592 For instance, in the constitutional transition of South Africa, the enforcement of socio-economic rights represents a strong measure in the direction of fulfilling the vision of the new Constitution. It is evidence of seeking the transformation in the long term. However, it does not matter whether enforcing socio-economic rights happens five, ten or fifteen years after the enactment of the Constitution. The sooner the better. Yet, the constitutional transition, in the legal sense, is not affected by this measure. The goal of the legal constitutional transition would instead be the entrenchment of socio-economic rights in the Constitution and the possibility to enforce them. On this regard, Yacoob J, on behalf of the CCZA itself: 'I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognized by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realize these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.' See, *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000, at para. 94.

1593 See, John C. Mubangizi, "Some Reflections on Two Decades of Human Rights Protection in South Africa: Lessons and Challenges," *African Journal of International and Comparative Law* 22, no. 3 (2014): 516.

abolished by a ruling of the CCZA in the case of *S v Makwanyane*[1594] following a more than five-year long moratorium since 1990. The CCZA declared that the provisions of the Criminal Procedure Act 71 of 1977, which concerned the death penalty were inconsistent with the IC. To mention another highly important case in 2000, *Government of the Republic of South Africa and Others v Grootboom and Others*,[1595] the CCZA held that the government failed in its obligation to provide for adequate alternative housing for the residents of an informal settlement in Cape Town, who were about to be evicted.[1596] The decision provided clear legal support for housing-rights campaigns in South Africa, even though Ms. Grootboom was still living in a shack when she passed away in August 2008.

Let, however, what was just said not confuse you. I do not mean that the enforcement of fundamental human rights of any kind, or that other cases outside the scope of the establishment of local government, did not influence the legal constitutional transition. *S v Makwanyane*, for instance, was a clear statement of the CCZA emphasizing 'that the transitional constitution established a new order in South Africa, in which human rights and democracy are entrenched and in which the Constitution is supreme. The court's declaration of a new order based on constitutional rights was forcefully carried through in the adoption of a generous and purposive approach to the interpretation of the fundamental rights enshrined in the Constitution.'[1597] This case was a strong stance by the justices of the CCZA for the introduction of constitutional review and its

1594 See, *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

1595 See, *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

1596 The following passage of the judgement of the CCZA reveals the relevance of the issue within the scope of the constitutional transformation and the transformative character of the Constitution of South Africa, 1996: 'this case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.' See, *Government of the Republic of South Africa and Others v Grootboom and Others*, at para 93.

1597 Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid," 179.

assortment as an independent judicial body in contrast to South Africa's parliamentary sovereignty past.[1598]

2. What Role Did It Play?

Unlike the Egyptian case, in South Africa the constitutional transition was a steady process of constitutionalization, and the CCZA's role accordingly. The CCZA is a newly established court empowered both with an ordinary and extra-ordinary mandate. Following these two sets of competences, I would like to synthetize the role of the CCZA.

a. The Role in Its Extra-ordinary Mandate

Without trying to be too ambiguous, with 'extraordinary mandate,' I intend the function vested in the CCZA in certifying the new constitutional draft as part of the constitution-making process. Exactly in this sense, the certification process was an internal element of the constitution-making process and not an external verification.

During this period of time before the certification of the new constitution, the CCZA enshrined a period of what Ackerman labeled 'constrained democracy.'[1599] The CCZA was established as a core institutional protector of the orderly constitutional transition. The certification process represented the guarantee that 'order be itself established so as not to yield to complete majority preferences, something the powerful White minority could never cede to the oppressed majority.'[1600] The CCZA was given a fundamental role in this specific context of constitution-building supervising the creation of the new South African Constitution. The particularity of this mandate was that the CCZA was catapulted into the role of either facilitating the normative constitutional transition or obstructing it. In one judgement, the court could have literally decided the fate of the entire process and steer it the way it would have preferred.

1598 For an overall analysis of the CCZA's role in many different matters, including the allocation of powers between spheres of government and the enforcement of fundamental rights, see ibid., passim.

1599 Bruce Ackerman, "Meritocracy V Democracy," *London Review of Books* (March 8, 2007), https://www.lrb.co.uk/the-paper/v29/n05/bruce-ackerman/meritocracy-v.-democracy (accessed July 23, 2020).

1600 See, Samuel Issacharoff, "The Democratic Risk to Democratic Transitions," *Constitutional Court Review* 5 (2013): 1.

The judgement kept at bay the emerging consolidation of the ANC majority rule that might have endangered minority interests and, probably democratic governance itself.[1601] The scene of an apex court capable and willing of obtaining limitation on pure majoritarian power 'was an instrumentally critical factor in facilitating the transition to democracy through negotiation.'[1602]

The decision was to be made in the form of determining whether the draft of the new constitution faithfully adhered to the negotiated basic principles set out in the IC. We have seen how the judgment was very broad and resembled more of a report than an ordinary judicial ruling. Having to decide upon the entire new draft and its compliance with a long list of basic principles, the CCZA would have had every possible technical chance to obstruct the enactment of the new constitution.

Instead, in July 1996, the CCZA received the draft Constitution for review and issued a ruling two months later in what is known as the Certification Decision. Despite being adopted by 86% of the democratically elected Constitutional Assembly, the CCZA ended up rejecting the draft in its First Certification Judgment. According to the CCZA, the draft did not fully comply with the IC principles. 'This sent a strong message that the post-*apartheid* judiciary's only duty was to uphold the rule of law, even when doing so was politically inconvenient or unpopular. However, the Court was also aware of the political implications of its decision and made sure to issue a narrow ruling that endorsed the overwhelming majority of the [draft] and clearly identified the few issues that needed to be addressed to satisfy the [IC's] principles. These issues included better safeguards for the independence of the auditor-general and public protector (ombudsman), a more stringent process for amending the Constitution's Bill of Rights, and *more clarity on the structure and functions of the provincial governments* [emphasis added].'[1603] The insufficiencies of the constitutional draft identified by the CCZA were linked with the fear that the ANC would control most legislative majorities, and therefore abuse its power against opposition parties, which would be exposed without sufficient constitutional safeguards. By supporting in detail, the vertical

1601 See, ibid., 1–2. See also, "Constitutionalizing Democracy in Fractured Societies," *Texas Law Review* 82 (2004): 1874–82.

1602 For more on this thesis, see "Constitutional Courts and Democratic Hedging."

1603 See, ibid., 994–95. See also, Choudhry and Glenn Bass, 27.

decentralization agreement and insisting on certain deficiencies during the certification process, the CCZA made sure that these safeguards would be included in the Constitution of South Africa, 1996. As mentioned in the previous chapters, decentralization is a key instrument against power-abuse. Eventually, the draft was amended and the CCZA finally approved it in its favorable second review.

b. The Role in Its Ordinary Mandate: The Shepherd of Constitutionalism

I have already clarified the reasons for choosing decentralization as the core element for the measurement of the CCZA's performance. However, I just wanted to add here that my hypothesis on the fact that by choosing decentralization would have allowed for a thorough assessment of the court's role, was fulfilled.

A lot has already been said about this court's role. With the CCZA's being role so clear and straightforward in facilitating the normative constitutional transition, it is hard to find other words to summarize it. There is little to no doubt that the CCZA is probably the most successful institution to emerge in the constitutional transition of South Africa. Not only was it the guardian of the constitutional agreement once it was enacted, but it also shepherded post-*apartheid* South Africa through all phases of the transition. There was not one phase throughout the years during which the CCZA somehow obstructed the constitution-building process or the institutional establishment of constitutionalism. In this sense, it not only protected the transition's most explicit symbol (that is, the Constitution of South Africa, 1996), but unlike all other branches of the new government the CCZA was established as a brand new institution, the justices largely untainted by *apartheid*, and its most clear function was to uphold and endorse the vision of rights 'that embody the hopes and aspirations of those who struggled against *apartheid*.'[1604]

As the extensive analysis of the CCZA's jurisprudence shows, the entire process of establishing local government has a close link to instituting each and every element of constitutionalism. Every decision or measure taken by the CCZA in the direction of protecting, steering, fostering or

1604 Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid," 182–83.

shaping local government is a step closer to the consociative, democratic principle championed by the Constitution of South Africa, 1996, and the whole package of other basic principles the Constitution of South Africa, 1996, was armed with. The CCZA does this in a series of cases, which were extensively analyzed above. Without entering again into the details of each and every case, let me just sum up some of their constitutionalist implications.

For instance, in *Executive Council of the Western Cape,* the CCZA held that certain amendments to the LGTA were unconstitutional.[1605] This decision has been described as being 'particularly significant' given that its effect was 'to cause a postponement of the local government elections in the [Western Cape] province and in KwaZulu Natal.'[1606] This case touched upon all elements of constitutionalism: among others, the delegation of powers between branches of government (horizontal separation of powers), the protection of the constitutional vertical power-sharing arrangement (vertical separation of powers), the postponement of democratic elections in the name of the rule of law against the rule of parliament (rule of law and democracy).

The Certification mandates are, of course, a cradle for the assertion of all elements of constitutionalism. Within these judgements, the CCZA played a direct role in the constitution-building process as such, unlike the other cases which influence the role of the court in the legal constitutional transition maybe implicitly. They reveal how the CCZA was in fact created not only to interpret a constitutional document, which was evidently not yet in existence, but firstly 'to guarantee that the structures and limits of democratic rule would be honored.'[1607] These rulings are instructive. Here, in the words of Issacharoff, the CCZA 'was particularly attentive to structural restraints on the centralization of power, stressing limitations on government and striking down provisions that may be termed an excess of majoritarianism. Specifically, the Court reaffirmed the importance of checks and balances across the branches of government and rigorously

1605 See, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995).

1606 See, Hugh Corder, "South Africa's Transitional Constitution: Its Design and Implementation," *Public Law*, no. 2 (1996): 306.

1607 Issacharoff, "Constitutional Courts and Democratic Hedging," 994.

enforced the commitment in the principles to federalism, ensuring that the national government would not encroach on the powers of the provinces. The Court also strictly construed the requirement of "special procedures involving special majorities" for constitutional amendments. According to the Court, the purpose of this provision was to secure the Constitution "against political agendas of ordinary majorities in the national Parliament".'[1608]

The *Fedsure case* is, in my opinion, a pivotal case for the affirmation of the rule of law. When asserting the constitutional status and powers of local government under the provisions of the new Constitution of South Africa, 1996, the CCZA clearly stated that under the rule of law 'the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law."[1609]

Furthermore, the hiccup cases are veritable evidence of how the CCZA was eager for certain mechanisms of the transition to a democratic local government to speed up their functioning.

In sum, the overall fact that the CCZA was so active in the enforcement of the constitutional system of decentralization, and this combined with the links between decentralization and constitutionalism, confirms the broad picture of how the CCZA was actually not only a guardian of the Constitution, but also an active consolidator of constitutionalism and, most relevant to this study, a shepherd of the constitutional transition. In this sense, the CCZA was a precursor of the installment of most legal mechanisms to ensure that constitutionalism would be enforced in the time to come.

3. How Did It Play Its Role?

I have given away the answer to the question of *how* the CCZA played the role in facilitating the establishment of constitutionalism. The CCZA adopted definitely a very active behavior within the process of transition. This answer was revealed to me even before starting writing this case

1608 ibid., 995.

1609 See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), at para. 56.

study; just by having to choose a realm of activity, such as decentralization to limit the charge of analysis within this study, is evidence that the CCZA did not pull back when it had the chance to push the transition a little further.

Within its active behavior, however, I would not characterize the CCZA's performance as being political. Unlike the cases of Egypt and Turkey, the CCZA was not confronted with a power-struggle between political forces. To describe the CCZA as political for having, for instance, rejected the first draft of the new constitution because it did not include sufficient safeguards against a possible future abuse of power by the ANC is, in my humble opinion, far-fetched. The decision in itself had political implications, but the question it treated was constitutional in nature. At the same time, I do not think I need to emphasize the standing link between constitutional law and politics. Most constitutional questions have political influence, yet there is a gap to be bridged before labeling the CCZA (or any other apex court for that matter) as judicially activist.

4. Why Did It Play That Role?

There are many factors which might have influenced the strong facilitating role of the CCZA. Nevertheless, one that is probably the most important is related to the fact that the CCZA was an integral part of the political compromise, which helped the democratic constitutional transition to take place smoothly, or even at all. Its establishment and the empowerment with the Certification mandate have projected the CCZA in the middle of the stage of the constitutional transition. The central role was assumed nicely by the court itself, which did not retract when it came to facilitate the legal constitutional transition, yet it did not elevate itself to such spot; it was done so through the political negotiations before the drafting of the constitution. So, first and foremost, the CCZA *was given an important transitional role* already, with the potential of strongly facilitating the normative constitutional transition. This extraordinary mandate of the court to certificate the constitutional draft elevates the CCZA to a level of transitional influence comparable only (maybe) to the role it was allocated to the Egyptian Chief Justice Mansour during the Egyptian second transitional period.

A second, crucial factor for the CCZA's behavior relates to it being a *newly established* institution, rather than an old one. The new composition of the court, as well as the net detachment from the *apartheid* past, has

propelled the court in the advantageous position of not having to be constraint by the old regime's interests. When a court is newly established, it has an additional task to fulfill: assert its own legacy. In a constitutional transition, older apex courts also have to do it, but often there are still some strings attached to the past, which could possibly contribute to the role it eventually plays.

Another factor was the *knowledge* of the CCZA about what needed to be done in order for the transition to be successful. The CCZA never really showed signs of lacking the know-how on how to proceed and facilitate the transition. It understood in different occasions how local government was crucial to the establishment of constitutionalism and contributed significantly to its well-functioning.

Fourth, and for the sake of this study most importantly, the *form of constitution-making*. South Africa was coming out of an incredibly dark period of its history, and it did come out, together. The roundtable form of constitution-making was crucial in bringing everybody together and create what South Africans proudly call 'The Rainbow Nation.' Through this negotiated form of constitution-making, the court was given a role and supported by the IC; and hence, it did not encounter the same problem as the Egyptian apex court in having to create its own jurisdiction. In South Africa, the IC was clearly the highest norm in the country during the transitional period and empowered the CCZA explicitly.

This factor leads to another important one, which is *context*. Moreover, in South Africa the political context was pivotal. Since the constitution-making form used in the transition allowed all political interests to be negotiated and included in the new constitutional dispensation, the CCZA did not have to be 'political' and could concentrate on the constitutional transition itself. This because there was contextually no power struggle. The fact that the ANC, representing most of the oppressed people in South Africa during the *apartheid*, was the majority of course helped.

These are by far not all factors that possibly influence the behavior of the CCZA during the transition. However, for the sake of this study, I believe these ones relate the most to the normative constitutional transition and thus are worth mentioning.

II. Closing Thoughts

Due to the large amount of activity of the CCZA during the constitutional transition, the fact that it facilitated the normative constitutional transition is and remains my personal deduction. Even though it is possibly arguable that the CCZA played other roles within the normative constitutional transition, one thing is clear, all in all, it did not hinder it. Under no circumstances have I somehow detected activity aimed at pulling out from a process of transition in full swing of a country committed to it in every possible way. It did more. The CCZA is definitely a country, which not only did not hinder the process of transition, but actively contributed to facilitate it, constantly over the years. In this sense, the CCZA played the role of precursor of the transition; more than a simple guardian of the Constitution. If the TCC, in Turkey, actively hindered the constitutional reform, in South Africa, CCZA did the exact opposite.

Before concluding this case study, I would like to add a brief afterthought on the role of the CCZA in the empirical constitution transformation. Now, a lot has been said on its role in the normative constitutional transition, but the CCZA was a very active court altogether. In seeking the transformation of society, as mentioned, the CCZA has also already presented encouraging measures in favor of the empirical constitutional transformation, if we think back about the abolishment of capital punishment in *S v Makwanyane* or the enforcement of socio-economic rights in the *Grootboom* case.[1610]

However, the contemporary pathologies that South Africa as a society might display are not necessarily linked to a failure of the CCZA to act. In fact, in a book Chapter published in 2013, former Justice of the CCZA Yacoob, argues 'how limited the role of the Court is in effecting transformation and achieving the order contemplated by our Constitution. I think it is important to elaborate on how very limited and sometimes irrelevant

1610 But not only; also, on a very recent case concerning the lawfulness of the conduct of both the President and the National Assembly, and accordingly an analysis on the implications of such case with the rule of law and the Separation of Powers. Cf. Neil Parpworth, "The South African Constitutional Court: Upholding the Rule of Law and the Separation of Powers," *Journal of African Law* 61, no. 2 (2017). See also the case itself, *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017).

court decisions are to the achievement of real social transformation. Our Constitution provides for the achievement of equality; for the prohibition of racial discrimination; for the elimination of discrimination against women, gay and lesbian people, older people, and people with disability. [...] Courts are virtually irrelevant to the achievement of the social transformation which is essential to the survival of constitutional values and constitutional morality. All of us have an obligation [...] to develop and grow social movements that will aim at instilling constitutional values in the hearts and minds of ordinary people. If we do not achieve this soon, our Constitutions will fall down and die."[1611] The present study, instead, proves how the CCZA was a facilitator of the legal constitutional transition, that is, of the legal establishment of constitutionalism. In this process, the CCZA was a main actor. Even though, the empirical transformation of South Africa was not the main core of this study, I would like to disagree slightly with Yacoob, and lean instead on Roux's and Daly's opinion, when they suggest that the CCZA has instead explored in depth the meaning of constitutional democracy with regards to the Constitution of South Africa, 1996, which is not merely a system of government, but a value system based on the will of the citizens, but also the principle that every person is protected by law. 'Human dignity, equality, freedom, and individual rights, repeatedly proclaimed within the text, are viewed not as subtracting from the democratic principle, but rather lying in 'constructive tension' with majority rule."[1612]

1611 See, Justice ZM Yacoob, "Reflections of a Retired Judge," in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*, ed. Oscar Vilhena, Upendra Baxi, and Frans Viljoen (Pretoria: Pretoria University Law Press (PULP), 2013), 614.

1612 See, Theunis Roux, "The Principle of Democracy in South African Constitutional Law," in *Constitutional Conversations*, ed. Stuart Woolman and Michael Bishop (Pretoria: Pretoria University Law Press (PULP), 2008).

PART III:
Comparative Exercise

Chapter 7: The Outcome of a Constitutional Transition

At the beginning of this thesis, among the multiple hypotheses developed, three were formulated with regards to the concept of constitutional transitions. The first one to be tested (i.e., *When one or more of the elements of constitutionalism is not established, the normative constitutional transition fails*) is more like a steppingstone over which the rest of the thesis rests. Understanding the link between the process of transition towards constitutionalism and its elements (i.e., democracy, limited government and the rule of law) facilitates the testing and understanding of the other hypotheses formulated in the thesis.

The second related hypothesis that will be tested in this chapter is the one coupling the failure or success in a normative constitutional transition with the impact of the apex court (*The performance of the apex court is a decisive factor in the failure or success of the normative constitutional transition*). The goal is to confirm the importance of the apex court's performance in a normative constitutional transition.

Later in another Chapter, the idea is to test whether the constitution-making form adopted in a normative constitutional transition can influence the role courts play (and vice versa). With this in mind, for the present Chapter, a third hypothesis (*The constitution-making form is a key factor in the failure or success of the normative constitutional transition*) is formulated with regard to the impact the constitution-making form on the outcome of the normative constitutional transition.

The goal is to eventually understand the triangular link between the role of courts, the outcome of a constitutional-transition and the constitution-making form. In this sense, the three hypotheses are interrelated and there is no real need to treat one before the other.

In order to tackle the hypotheses, this Chapter measures the outcome of a normative constitutional transition in the case studies. In this sense, the structure of the Chapter mirrors three sections related to the three case studies. Within these three sections, the three hypotheses will be tested: did the normative constitutional transition succeed or fail? Was there a link between the success (or failure) of the normative constitutional

transition and the establishment of all three elements of constitutionalism? Did the apex court and the constitution-making form specifically play a role in facilitating the success or failure of the normative constitutional transition? The last section will summarize the results of the testing of the hypotheses.

A. Assessing the Success or Failure of a Normative Constitutional Transition

There is a myriad of methods to measure whether one of the elements of constitutionalism was established or not. If this assessment is not easy in an established democracy, it becomes even harder in a country in transition. Due to the high diversity of the case studies, the complexity of the elements of constitutionalism, and many factors that can influence their legal and institutional establishment, I opted for a rather objective assessment of the outcome of a constitutional transition. With 'outcome,' it is intended to determine whether a normative constitutional transition failed or succeeded. It would be the product of an entire thesis to analyze every single factor and element that contributed to the success or failure of *one* specific normative constitutional transition, let alone several (and in addition try to carve out some sort of possible pattern). In this sense, objectively assessing the outcome of a normative constitutional transition means to evaluate whether one or more elements of constitutionalism were not somehow distorted or mangled when being established, i. e., whether in the constitutional transition some of their features deviate from what is universally accepted by academia as being their gist.

To set the right indicators for the failure or success of a constitutional transition is very hard, as there are too many. Danica Fink-Hafner and Mitja Hafner-Fink, for instance, identified, among others, mainly four factors to indicate the success or failure of a transition: the involvement or non-involvement in a war; presence or absence of a predominant party after the first multi-party elections; whether the political system was parliamentary or not; and the presence or absence of foreign forces in the country (the problem of full sovereignty).[1613] However, the basis of the

1613 See, Danica Fink-Hafner and Mitja Hafner-Fink, "The Determinants of the Success of Transitions to Democracy," *Europe-Asia Studies* 61, no. 9 (2009): 1616.

assessment needs to take into account the definition of constitutional transition. They approached the issue by looking at the bigger picture, the empirical constitutional transformation, rather than the narrower definition employed in the present research of normative constitutional transition. As already thoroughly explicated, the main goal of a legal constitutional transition needs to eventually be *sustainable peace* (as in a violent conflict or political) through (in my opinion) the establishment of constitutionalism and mainly its three elements. This section aims at testing whether we can actually measure the outcome of a constitutional transition based on the three elements of constitutionalism. Eventually, the hypothesis was formulated exactly to make the point that the best indicators are actually the full establishment or missing of the three elements of constitutionalism.

At the end of the transition, was authoritarianism eradicated? Is there peace? Were the three elements of constitutionalism established, so that constitutional democracy can thrive?

I. Turkey

1. The Turkish Constitutional Transition: A (Consensual) Reform

As we have seen, the narrative in Turkey's constitutional history is not easy to characterize and catalog.[1614] The constitutional transition probably started with the enactment of the 1982 Constitution, which marked the culmination of authoritarianism in Turkey at that time. From there, the democratization movements already started to simmer behind the scenes. What came afterwards made it clear that the transition strategy was going to be one of reform, also due to the dualistic nature of the State, which did not allow other forms of constitution-making: with the army siding with the old regime, revolution was a risky maneuver whereas the roundtable form of constitution-making requires the negotiating parties actually accepting the idea of compromise-seeking and the sharing power. The same goes for the revolutionary reform form of constitution-making. A consensual reform

1614 For a remarkable summary and analysis of the Turkish constitutional transition, including every amendment package, see Yeğen.

was therefore the only strategy the democratization forces had, and so they took it.

The amendment process through which the legally governing part of the dual State initiated did not break neither legality (the 1982 Constitution is still in force as of today in its amended form), nor legitimacy. Democratic legitimacy was never really interrupted, even though one could argue that some recent constitutional amending moves sponsored by the AKP could be in contrast with the constituent power's will, and thus legitimacy could be on the way of rupturing (if it has not done it already). This characterizes the contemporary crisis Turkey is still going through, while the focus here rests on the period of time until which the process of democratization was in full swing up until the Constitutional Court's packing plan. Of course, it also coincides with the fact that once the Constitutional Court was packed, there was no more role the Constitutional Court could play in a transition, that at this point seemed to be stalling.

2. The Turkish Constitutional Transition and the Core Elements of Constitutionalism

During the process of constitutional reform, unfortunately, Turkey has found itself in the hands of a political movement that was at first in line with several political strategies of democratization, but that found itself in the latest years to have switched to reverse with regards to constitutionalism. I have mentioned in the Turkish case study how one of these strategies was to redefine Turkey's Kemalist identity through a process of democratization. This strategy however turned into a power-seeking one by the AKP, and its top leader Erdoğan. The new strategy of seeking a presidentialist system of government and who knows what the next steps will be, was marked – as I will show – by the damaging of all of the three elements of constitutionalism:

– democracy, by insisting on majoritarian politics;
– the rule of law, by packing the Constitutional Court; and
– the separation of powers, by introducing a system of hyper-presidentialism.

As of today, the constitutional transition has stalled, or from the looks of it, we could even say it failed. One could linger on the factors of this failure for a

long time, yet I believe it relates to the simple fact that Turkey was not able to implement all three elements of constitutionalism sufficiently. Of course, it is arguable, yet I believe the contemporary crisis Turkey is going through has a lot to do with the inconsistency and instability of constitutionalism's main pillars. Turkey is the perfect example to prove one of my initial hypotheses.

a. *Majoritarianism and Presidentialism Tackling Constitutionalism*

The situation in Turkey during the 90's was that of consensual parliamentarism, where usually the distinction between the majority and opposition parties in parliament is more fluid and thus consensus-seeking is more common. Consensual style parliamentarism, however, – at the AKP's hand – gradually left its place to majoritarian style parliamentarism. In the context of parliamentarism, majoritarianism is usually characterized by a clearer division between the parliamentary majority (in casu, the AKP) and the opposition. It also shows itself usually through the dominance of the government over parliament and adversary style politics. Majoritarian parliamentarism is probably one of the reasons that allowed the AKP's recent move towards a presidentialism.

In a very remarkable book chapter about the comparison between the merits of parliamentarism and presidentialism and the policy and economic consequences both forms of government can have, Saiegh rightly pointed out that 'the organization of power and authority affects democratic stability."[1615] It is not easy to define both forms of government and I will not dwell on this topic too long, but just enough to show how easy it is to confuse both terms and vest them – rightfully or not – with merits or demerits. Parliamentarism is commonly understood as being a form of government in which there is a head of state and a head of government. The former usually only plays a protocolary role and the latter is the veritable chief executive of the country. He is elected by and owes accountability to the legislature. Presidentialism, instead, is defined as a form of government in which the president is both head of state and the chief executive of the country. The president would then be elected by the

1615 Sebastian M. Saiegh, "Policy Differences among Parliamentary and Presidential Systems," in *The Oxford Handbook of Public Choice*, ed. Roger D. Congleton, Bernard Grofman, and Stefan Voigt (Oxford: Oxford University Press, 2019), 380.

people (or an electoral college chose by the voters).[1616] Both forms seem to be compatible with the idea of democracy. That however is contingent on the powers vested in, for instance, the president. Both presidential and parliamentary regimes may both have features that favor majoritarian decision-making, and others that shield minority parties. Majoritarianism[1617] claims that a majority (for instance: linguistic, religious or any other identifying factor) of the people of a particular country is entitled to rule over the rest and can accordingly make decisions that affect the entire country. Of course, as such, majoritarianism can easily be criticized, as it tends to leave out the inclusion of minorities in the political will-building of the entire population. As such, '[n]ot only must public authority be exerted within general rules, but citizens are deemed to be entitled to fundamental rights, whose exercise must remain outside the will of the majority.'[1618] There are thus several variations of both forms of government. In order to catalog the different types of presidentialism and parliamentarism, one has to take into consideration the link between constitutional structure, party systems and electoral rules. For instance, if one looks at the electoral rule, one would see contrasting majoritarian and proportional electoral systems, combined with both the regime types, presidential and parliamentary regimes. The result would be four different types of regimes: majoritarian presidentialism, majoritarian parliamentarism, proportional representation presidentialism, and proportional representation parliamentarism.[1619] This, just to show that the classification is often complex and confusing.

aa) Democracy and the Majoritarian Project of Constitution-making

Constitution-building in the late Ottoman Empire and republican Turkey mainly has been a top-down process. Apart from the 1961 Constitution, which is the typical exception confirming the rule, constitution-making processes have most usually materialized as a result of revolutions and

1616 ibid., 381.

1617 Majoritarianisms in the sense intended here should not be confused with a majoritarian electoral system, which is simply an electoral system that gives the majority of the seats to the party that reaches the most votes.

1618 Carlo Guarnieri, "Courts as an Instrument of Horizontal Accountability: The Case of Latin Europe," in *Democracy and the Rule of Law*, ed. José M. Maravall and Adam Przeworski (New York: Cambridge University Press, 2003), 223.

1619 Saiegh, 382–83.

military coups and have not relied whatsoever upon collective deliberation, participatory debate or inclusive institutions. The lack of such democratic legacy facilitates the elucidation of why a majoritarian understanding of democratic politics has become a prevailing feature again in Turkey's republican constitution.[1620]

In contrast with the amendment processes of 1995 and 2004, the ones of 2007 and 2010 especially, were the result of a majoritarian rather than consensual procedure. In addition to this *modus operandi*, the results of the referenda were often manipulated by their very structure, that is by the way they were presented. For instance, in 2010 consensus was actually not such an impossible prospect and this is indicated and confirmed by Deniz Baykal's (the then leader of the CHP) proposal to pass most of the amendments of the package if the AKP was willing to postpone the ones dealing with the Constitutional Court's restructuring plan until the next elections.[1621] Erdoğan's rejection of said proposal was proof that the AKP was mainly pushing for the amendment package for other reasons rather than democratizing the system and thus thrusting forward with the constitutional transition. The fact that the AKP preferred opting for confrontation with the dualistic powers rather than embark on a comprehensive constitution-making process for a new constitution just shows how the AKP was not intentioned to draft a constitution consensually, but rather unilaterally through reiterated reform packages, such as the 2017 one based on majoritarian constitution-making.[1622]

So clearly, even though the democratization process post 1980 coup was in full swing during the 90's, the entrance of the AKP onto the political scene in the early 2000's resulted in a gradual shift towards majoritarianism. Even though the 10% threshold is already a big majoritarian mark, the first signs of the shift manifested only later with the constitutional amendments advocated by the AKP in 2007 and 2010.

1620 Grigoriadis, 27.

1621 This information was picked from Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 250. The same cites an article of the former English-language daily newspaper based in Turkey: 'Premier Erdoğan Describes the Proposal of Baykal as Too Diluted and Unserious,' *Today's Zaman* (April 18, 2010). The newspaper was shut down by an executive decree of President Erdoğan on July 20, 2016, five days after the military coup attempt, on the grounds that it represented the 'flagship media organization' of the Gülen-led movement. Cf. Johnson.

1622 Yeğen.

However, everything happened in a way that might induce some people to think that this move was legitimate, and I personally share such opinion to some extent. The popular election of president Gül was followed by measures, which restricted the institutional autonomy of the judiciary and the military, along with their dualistic nature. In this particular sense, these specific moves in the face of what transpired in 2007 and 2008 seemed reasonable, because both the military and the Constitutional Court were clearly moving their pieces in the way of obstructing the AKP's consolidation of power, yet in a way that did not always seem to be within the limits of democracy and the rule of law. Of course, today we know what angle the consolidation of power of the AKP turned out to produce, and today we can look back at this political and institutional struggle as two undemocratic forces clashing over apparent democratic power, without always showing fair democratic legitimacy. The manner the military and Constitutional Court interfered in fundamental constitutional and political issues had revealed that on their agenda was not the process of democratization or its protection, but rather the preservation of their tutelary role and privileges. Just as the real intention of the AKP was no longer democratization, but rather to get ahold of power and consolidate it through presidentialism.

The shadow of military tutelage over the government apparently threatened enough people and thus simplified the alignment of democratic forces on the side of the AKP. Thanks to this support, the AKP government managed to secure the parliamentary majorities in the elections of 2007 and 2011, as well as a strong *yes* in the 2010 constitutional referendum, which comprised the Constitutional Court's packing plan. However, despite providing important assistance to the cause of democratic consolidation in the country during its first term as elected party in government, the AKP started fading its commitment to democracy by the end of the 2000's and shifting away from the project of introducing a new constitution which would live up to the expectations of a consolidated liberal democracy. The AKP started concentrating its attentions towards the introduction of a system of presidentialism, so to also damage the separation of powers, while reinforcing the majoritarian project of the AKP within Turkish democracy. This shift in direction of Turkish politics started intensifying fears about a reappearance of authoritarian inclinations.[1623] To emphasize

1623 For a great article on the tendency in Turkey to shift towards tyranny of majority and soft

the growing tendency of majoritarianism, the AKP also added and reinforced populist elements in its political agenda, presenting itself constantly as the true expression of the interests of the Turkish people against the establishment (let us not forget that the AKP is an Islamist political party, and that Turkey is in its majority a Muslim country). Meanwhile, the democratization project characterized by reiterated constitutional reforms stalled and instead a series of repeated domestic and international crises started entangling the country to this day.[1624]

A second argument about the damaging democracy suffered in Turkey is indicated by its failure of Huntington's 'two-turnover' test. According to this test, 'a democracy may be viewed as consolidated if the party or group that takes power in the initial election at the time of transition loses a subsequent election and turns over power to those election winners, and if those election winners, then peacefully turn over power to the winners of a later election. Selecting rulers through elections is the heart of democracy, and democracy is real only if rulers are willing to give up power as a result of elections. The first electoral turnover often has symbolic significance. The 1989 transition in Argentina was the first turnover since 1916 from an elected president of one party to an elected president from another party. The 1985 and 1990 Peruvian elections marked the second and third times in the twentieth century in Peru that one elected president has transferred power to another. A second turnover shows two things. First, two major groups of political leaders in the society are sufficiently committed to democracy to surrender office and power after losing an election. Second, both elites and publics are operating within the democratic system; when things go wrong, you change the rulers, not the regime. Two turnovers is a tough test of democracy. The United States did not clearly meet it until the Jacksonian Democrats surrendered office to the Whigs in 1840. Japan was universally

despotism, see Cengiz Çağla, "Turkish Politics: Raison D'etat Versus Republic," *International Review of Sociology-Revue Internationale de Sociologie* 22, no. 3 (2012).

1624 See Grigoriadis, 36; Ilter Turan, *Turkey's Difficult Journey to Democracy: Two Steps Forward, One Step Back* (Oxford: Oxford University Press, 2015), 206–32. For more on the role of the AKP and democratization, see E. Fuat Keyman, "Modernization, Globalization and Democratization in Turkey: The Akp Experience and Its Limits," *Constellations* 17, no. 2 (2010); Ziya Öniş, "Conservative Globalism at the Crossroads: The Justice and Development Party and the Thorny Path to Democratic Consolidation in Turkey," *Mediterranean Politics* 14, no. 1 (2009); William M. Hale and Ergun Özbudun, *Islamism, Democracy and Liberalism in Turkey: The Case of the Akp* (New York: Routledge, 2010).

and properly viewed as a democratic nation after World War II, but it did not meet this test and, indeed, effectively never has had even one electoral turnover. Between 1950 and 1990, Turkey had three military interventions and several first turnovers but never a second one.'[1625] Turkey clearly did not pass the 'two-turnover' test and that makes for additional evidence of how democracy was never consolidated in Turkey constitutional transition. In the Muslim world, a model of democracy post-Arab Spring would probably be Tunisia, and not Turkey. In fact, in 2014, Tunisia went a step closer to passing Huntington's 'two-turnover' test when secularist party Nidaa Tounes won the first democratic parliamentary elections since the 2011 Arab Spring. Despite the rising extremism and weak economy of the country, Tunisia has shown sturdy commitment to democratic values. At the parliamentary elections of October 6, 2019, the Nidaa Tounes party lost the majority to the Ennahda Movement.

bb) *Sabotaging the Separation of Powers through Presidentialism*

As seen, the enactment of the 1982 Constitution and the return to civilian politics created the basis for the propagation of populism and majoritarianism through the idealization of the state and the people. Yet, this was merely the first step. In recent years, majoritarian constitution-making has caused the putting yet another step ahead towards authoritarianism with the allocation of excess powers to the head of the executive branch and the absence of check and balances mechanisms.[1626] Through the seeking of presidentialism '*à la Turque*' by way of a politics of majoritarianism, not only democracy and the rule of law are touched, but especially the separation of powers. The president has become both head of state and head of government (i. e., the executive), and the office of prime minister has been abolished.

Supporters of the 2017 change towards presidentialism see the more independent position of the president as a way to ensure greater stability and continuity of government, and point out that other states, such as the

1625 Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 266 – 67.

1626 For more on the Turkish version of majoritarian politics, see Paul Kubicek, "Majoritarian Democracy in Turkey: Causes and Consequences," in *Democratic Consolidation in Turkey: Micro and Macro Challenges*, ed. Cengiz Erisen and Paul Kubicek (Oxford and New York: Routledge, 2016).

U.S. or France, also have a head of state with similar government powers.[1627] I consider such assessments or comparisons to be ludicrous. In the U.S., the constitution designs indeed a democracy with a president both as head of state and head of the executive, but whose power is constraint and controlled by a marked system of checks and balances. In Turkey, no pronounced system of check and balances would be installed. In addition, in the U.S., federalism ensures additional protection against overgrowing presidential powers. In France, instead, there is a system of semi-presidentialism in which the president appoints the government (i. e., the cabinet), but it needs the confidence of parliament. In the presidentialism '*à la Turque*', there is no longer a Council of Ministers (i. e., the Turkish Cabinet) reporting to Parliament, but directly to the President, and the only remaining parliamentary control will be the so-called investigation procedure. However, since the system offers the possibility that the president is also the leader of the strongest party in parliament, which is likely to be the case regularly, it is improbable that such proceedings will be initiated. The separation of powers cannot be considered guaranteed any more if the president is in too strong a position. The only possible corrective could be the power of the president to set up new elections, in which case, he must also make his own office vacant. Parliament can also decide on new elections, but only with a qualified majority of three fifths of all members. In addition, this is a very unlikely event given that the parliament is regularly in the hands of the AKP.

b. The TCC's Packing Plan: Game Over for the Rule of Law

With the 2010 amendment package and the packing of the Constitutional Court, the Turkish people opted for a monolithic form of government and one that at this point even absorbed and weakened the highest institution of its judiciary power.

With the Constitutional Court's packing scheme, we witnessed a veritable instrumentalization of an amendment procedure, which deceptively displayed liberal, progressing, democratizing and pro-European features, but at the core rested the key to the AKP's path towards a majoritarian

1627 Orhan Coskun and Nick Tattersall, "Turkey Shifts to Presidential System, Even without Constitutional Change," *Reuters* (May 23, 2016), https://www.reuters.com/article/us-turkey-politics/turkey-shifts-to-presidential-system-even-without-constitutional-change-idUSKCN0YE1M3 (accessed August 20, 2019).

form of politics. However, even though Turkey's existing constitution very much needed a boost with regards to liberal and progressive elements, the reality shows that the intended elements may not have the same effect and meaning when enacted and implemented in the context of a constitutional crisis and above all in the middle of a struggle between two branches of power, the executive and the judiciary. Furthermore, as Arato rightly points out, 'what may be good and fair in one democratic setting may be unfair and authoritarian in another.'[1628] In fact, what was also problematic was not only the expansion of the number of justices from eleven to seventeen, but also its combination with how they were to be appointed: through majoritarian parliamentary vote (similar to Hungary under Orbán's reform).[1629] Since the AKP had the required majority to appoint the justices even from the legislature, this move allowed to somehow conceal the packing plan from the people, therefore making it seem like the new amendment was somehow more democratic, yet it was the AKP who was still in control. In any case, combining a favorable appointment procedure with the increase of the number of judges simultaneously is typical of a court packing plan.[1630]

Packing the Court was not only a blow to the rule of law, as the judicial independence of the Court was indefinitely compromised, but also affected dramatically the separation of powers; now, after essentially controlling the executive and the legislature, the AKP would also control the judiciary. Judicial independence appears to be a very difficult feature to achieve in Turkey. In sum, the court packing was only a first step towards damaging the element of separation of powers. The presidentialist project helped deepen the sword into the wound.

3. A Failing Constitutional Transition

This section reflects upon the testing of the hypothesis regarding how the three elements of constitutionalism ought to be established and implemented in order to judge the constitutional transition as a success. Turkey had started off democratizing a system without breaking neither legality nor legitimacy. Democratization from a dualistic setting is no easy

1628 See, Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 251.
1629 See, Provisional Art. 18 Constitution of Turkey, 1982.
1630 See, Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, 251.

task and yet Turkey was up to it. The reform process, however, after the 2017 referendum can now be officially marked as stalled. Even though the first 'enemy' of democracy in Turkey, the deep state, seems to be fading, the insurgence of the AKP and its shift towards hyper-presidentialism has not solved the problem, but rather just replaced it with a new one; and this time, however, authoritarianism is not hidden between the lines of the 1982 Constitution. Hence, even though figuratively, Turkey was filling the three 'fluids' of the engine of constitutionalism at the beginning, it stopped midway, and thus the engine of the car (i. e., the State) started, but was not strong enough to drive Turkey out of authoritarianism, and instead it reversed back at it.

4. Was the TCC's Role a Factor in the Failing of the Normative Constitutional Transition?

The fact that Turkey's democratization process failed the way it did, has no direct connotation to the TCC's behavior. The TCC did not actively push for this outcome to happen unlike the Egyptian case, where the SCCE was a non-neglectable actor in the failure of the 2012 Constitution. The TCC was a hegemonic preserver and as such it did not indeed facilitate the ongoing constitutional transition. Instead, it stuck to the undemocratic values of the 1982 Constitution and constantly hindered the democratization forces. If the TCC would have succeeded in hindering the democratization forces and thus obstructing the constitutional transition, it would have created direct causality to the failure of the constitutional transition. However, the way the transition failed is directly linked to one of this 'democratization' forces (the AKP) turning into a populistic power, packing the same court, and *then* definitely distorting all elements of constitutionalism.

So, indeed, the TCC did not directly steer the transition the way it eventually went, yet it still had some influence. Can maintains to this regard how '[i]n a state where all basic laws are products of periods of dictatorship, single-party regimes, or military rule after a coup, the exclusion of judges from democratic legitimacy and prevention of the establishment of pluralism can lead to a single outcome: the undemocratic system that prevails in Turkey until today.'[1631] In a system like this, the legal system cannot be said to be the result of a democratic process; mentions to the elements of

1631 Can, 276 – 78.

constitutionalism by the TCC, or the judiciary in general and other administrative bodies, are mostly empty of any substantive liberal democratic content. 'The reference to "the rule of law" by a judicial mechanism isolated from democratic legitimacy would inevitably serve the purpose of protecting a bureaucratic-elitist hegemony, which is based on suspicions against democracy, pluralism, freedoms, and universal values. Considering the ideological background of the system, this is not implausible.'[1632] In Turkey, the path towards democracy has constantly been conducted as a struggle against the elitist bureaucratic hegemony, and not only during the period of transition. Within the context of this struggle, the TCC has never deviated from the purpose of its establishment, which is the protection of said hegemony. The TCC regularly took a negative stance when freedoms and democracy were at issue in the political discourse; in fact, it is barely common to stumble upon a ruling in which the TCC defines and praises both these concepts. Therefore, it is very hard to come across comprehensive studies on the TCC's behavior in relation to democracy, the rule of law or any other feature of constitutionalism. We know, however, that the TCC expressed its concerns explicitly when the political discourse attacked 'Kemalism,' 'secularism,' 'the indivisible unity of the Turkish state with its nation and territory,' and 'the military and civilian bureaucracy.' These concepts were constantly included into the TCC rulings and treated almost as if they were sacred and indisputable. The TCC's activism during the transition emphasizes this constant need to struggle with legislation not on the protection of human rights or democracy, but rather on the ideology of the state, that is, the defense of the *raison d'e´tat.*

The TCC has protected the Turkish *raison d'e´tat* throughout the reform process on mainly two elements: 'the unitary state idea and the basic political constituent element of this idea, the principle of secularism.'[1633] These two elements are *per se* not motives for the failure of a constitutional transition, yet they were often combined with the neglect of the concepts of freedom and democracy or even labeled as dangers.

In sum, in Turkey the state did not derive its legitimacy from its democratic majority, but rather it was built on the ideology and hegemony of a non-democratic minority. This situation revealed how the *raison d'e´tat* in

1632 ibid.
1633 ibid.

Turkey aimed at defending the interests of a political minority, and such defense was implemented by the TCC.[1634]

II. Egypt

1. The Egyptian Constitutional Transition: A Revolution

Just as any undefined notion, in characterizing what is commonly known as 'revolution,' there are many theories that one can come across. The starting point for many contemporary accounts on revolutions is Hannah Arendt's essay *On Revolution*.[1635] Arendt's definition is the following: 'only where change occurs in the sense of a new beginning, where violence is used to constitute an altogether different form of government, to bring about the formation of a new body politic, where liberation from oppression aims at least at the constitution of freedom can we speak of revolution.'[1636] She builds on the idea that experiencing freedom should coincide with a new beginning and this only through revolutionary violence.[1637] Arendt's definition somehow lacks contemporaneity and legal understanding. Abat i Net and Tushnet point out reasons why Arendt's definition has some flaws, especially by making examples of how revolutionary events (as in new beginnings) can take place without violence and how truly new beginnings are no longer possible, but rather new beginnings for specific nations.[1638]

Her definition of revolution is not incorrect, yet is not utterly flawless or clear either from a legal point of view. Without entering again into the theoretical details of defining a constitutional transition, this study sees as one when a fundamental change of the previous constitution has taken place, which would correspond to a change in the material constitution. This constitutional transition can take place in roughly four different ways on the grounds of intersecting both concepts of legality and legitimacy of the change. Therefore, based on this study's definition, as well as Arato's conception of constitution-making, a revolution is simply when a

1634 ibid.
1635 Hannah Arendt, *On Revolution* (New York: Penguin Press, 2006 [1963]).
1636 ibid., 25.
1637 ibid., 19.
1638 Abat i Ninet and Tushnet, 4–6.

constitutional transition takes place in which both legality and legitimacy are interrupted. This is a revolution, regardless of whether such change took place in violence or not.[1639]

In this sense, the Egyptian constitutional transition was clearly a revolution. With the ousting of Mubarak, legitimacy has definitely been broken even if the legitimacy of Mubarak's rule can be questioned. In any case, legitimacy was interrupted once the revolution took place.

The same goes with legality; the 1971 Constitution was suspended and a provisional constitution was created out of the blue without following the constitutional rules of the old 1971 Constitution. Within the constitutional transition, the Egyptian crisis has shown two different transitional periods. The first one culminated in the 2012 Constitution and the second one in the 2014 Constitution. Thus, since the fall of Mubarak, the Egyptian constitutional landscape has seen vigorous constitutional debates, which led to constant constitutional change and confusion. In the time since Mubarak's fall, Egypt's constitutional order consisted of manifold constitutional declarations, amendments, and even two different constitutions in 2012 and 2014. I would not characterize both constitution-making processes as being separated. Actually, I think they are both part of the same transition altogether. Egypt was clearly caught in a net of power struggle between mainly two forces; secular forces and Islamist forces, and this contributed to the constitution-making wheeling and dealing within the same transition.

It is peculiar how the Egyptian constitution-making process developed. At the beginning, when Mubarak handed his power over to the SCAF, the military dissolved the parliament elected under Mubarak and suspended the previous 1971 Constitution. The military leadership set up an eight-member committee (the Egyptian constitutional review committee) to draft constitutional amendments to the suspended 1971 Constitution, which (in addition to other transition-related provisions) once amended would serve as a transitional constitutional document. The amendments are intended to ensure fair and democratic presidential and parliamentary elections. After the elections, a constituent assembly was to draw up a fundamental revision of the constitution or a completely new constitution. The referendum to these constitutional amendments passed and that

1639 An alternative to this approach to the notion of revolution can be found at ibid., 2–10.

would have opened the doors to a constitution-making form closer to the roundtable form rather than the revolutionary one (as the legality continuum of the process is concerned). The only problem is that so far no 'round-table negotiations' took place, not even for the transitional rules. The military monopolized the process. In any case, once the referendum passed, the SCAF felt that the people had legitimized their military rule and thus never implemented said constitutional amendments. Instead, it chose to draft a completely new interim document, without consultation of the diversity of the Egyptian people and not even confirmed by a popular referendum. This meant a clear break of the chain of legality. This move confirmed the assessment that the constitutional transition of Egypt was characterized by the constitution-making form of a revolution.

The constitutional transition of Egypt, especially the first one from 2011 to 2013, has been marred by constitutional instability, and uncertainty. Instead of a negotiated handing-over of power in the round-table sense, in Egypt the power was handed over to the military and no veritable negotiation took place between them and the other forces of the transition, such as the Muslim Brotherhood. Therefore, instead of a constitutional framework commanding legitimacy as demanded from day one of the revolution, there were different actors all taking their own direction, assuming and claiming to represent the 'people'. In this sense, in reaching a consensus on one common constitutional project, each one ended up using its constituent power imposing 'constitutional declarations and decrees' by force, resulting in an increasing polarization ending in a second military coup. Again, when Morsi of the Muslim Brotherhood was ousted, the military once more took power and through the appointment of the Chief Justice as interim president, power shifted again from the political Islam to the secularists.

This is evidence of the real problem of the Egyptian constitution-making process: a lack of acknowledgement of pluralism. Throughout the entire constitutional transition, the constitution-making process was marred by a lack of inclusiveness. Instead of embracing the polarity of the political spectrum as an element of strength and be an example of plural community (especially religious) in the Middle East, Egypt fell in the similar trap of the Turkish reform process: unilateral (majoritarian) constitution-making.

2. The Egyptian Constitutional Transition and the Core Elements of Constitutionalism

The military coup of 2013 symbolizes the failure to transit towards constitutionalism in the aftermath of one of many uprisings that took place in the Arab Spring. That revolution gave birth to remarkable hopes that Egypt (but also the Middle East in general) might see the shaping of a new political era; one 'in which those wielding power would find themselves held accountable by the people acting through regular free elections; in which official actors would safeguard rather than trample human rights; and in which the long-over-due reform of numerous political institutions could take place in a manner both systematic and in keeping with societal needs and international norms."[1640] Yet, did this take place in Egypt? Just like in the Turkish case, in one way or the other, every element of constitutionalism was somehow distorted in a way that it could never really fully develop and function properly. This caused the constitutional transition to fail.

a. A Democratic Failure

If the political landscape at the beginning of the transition saw a wide division, each step along the path towards democracy, and constitutionalism as a whole, ended with the opposing segments of the Egyptian society driven even farther apart.[1641] During the Arab Spring, a common demand of the protesters was a democratic system. It was thought that through democracy, some of the social and political issues, which triggered the revolutions, would somehow be resolved.[1642]

aa) The Lack of Democratic Legitimacy in the Constitution-making Process

If democracy failed to develop in the Egyptian transition, it is clearly not for a lack of voting. The Egyptian people were called to the polls many times, over and over, for a total of five national elections and referenda, some with several rounds. However, every time the people voted on something, it

1640 Nathan J. Brown, "Egypt's Failed Transition," *Journal of Democracy* 24, no. 4 (2013): 45.
1641 ibid., 45–46.
1642 Abat i Ninet and Tushnet, 52.

contributed to disparities between the two forces, secular and religious, being redefined and amplified rather than managed or resolved.[1643]

Egypt's transition needed mainly two points in order to develop democracy, or at least give it a shot: a broad consensus among the ruling elite on the transition rules, and the possibility for the people to express their will before a possible referendum without having most important issues settled by backroom politics. Without general consensus on the rules, the general elections could end up being marred by spoilers;[1644] without popular participation in the process of finding these rules (and not merely the results of the transition), we might witness a stable outcome, but it would nevertheless not be democratic. With the military being handed over power at the beginning of the transition and making the rules of the transition on its own, Egypt's faith in obtaining either one of the points mentioned above faded. If we take a look at every time the people were called up to vote, we can perceive how democracy's path was marred by many false starts. For instance, the first time they were called to vote during the transition was in March 2011, when the military sought to approve a series of constitutional amendments to the 1971 Constitution as to illustrate the process to enact a new constitution. Therefore, despite the illegitimate coming to power of the military, at least this vote aimed at giving legitimacy back to the process of transition: a consensus over the rules of transition and the seal of popular vote over them. This first balloting, however, also marked the beginning of the division of revolutionary forces. The Islamists embraced the constitutional amendments because it allowed for a quick transition and accordingly the swift return of an elected parliament and president (they were confident of their chances of winning over both branches). Non-Islamists, instead, pushed for first writing a constitutional text, 'but they were too slow in laying out a coherent alternative plan for a transition.'[1645] In fact, when the people accepted the constitutional amendments the military decided not to go along with them, instead 'hiding behind the cloak of what they called "revolutionary legitimacy," the generals opted to write a new, temporary "constitutional declaration" that inserted the clauses voters had

1643 Brown, "Egypt's Failed Transition," 45–46.

1644 In political science, the spoiler effect is the effect whereby a minority candidate withdraws votes from a candidate who is (politically) closer to him, thereby helping the candidate who is further away to victory.

1645 Brown, "Egypt's Failed Transition," 47.

approved into a forest of other articles on how the state would be run during the transition. That document was issued by military fiat, thus setting the dangerous precedent of insisting that the constitution was whatever those in power said it was."[1646] This was just the first of many votes that the people had to take in the constitutional transition, but these votes remained vaguely unauthoritative. Therefore, the issue at stake was not that Egypt hurried to elections, but rather that the elections did not always convey authoritative results that compelled those who wielded real power. Just as worryingly, every time the people voted their outcomes were laid out under conditions that the eventual losers often ended up declining and rejecting. That is the reason why popular votes seemed only to intensify rather than alleviate the differences between the revolutionary forces. The entire constitutional transition went on progressively like this: a shifting of power from one force to the other, with the democratic authority of the people being utterly ignored.[1647]

bb) An 'Undemocratic' Democratic Choice and Behavior

A further issue that entangled with the development of democracy can be traced back to the choices of the main political actors and their behavior. First, the Muslim Brotherhood's behavior was far from being democratic. The issue at stake was not that the Brotherhood was antidemocratic, but that its idea of democracy was superficial and often illiberal. Let us also not forget that at this point Egypt had no real record of accepted democratic behavior. An example can be drawn from the forming of the constituent assembly; the Islamic-led parliament agreed that half the members of the constituent assembly would be independent representatives of various institutions and organizations in Egyptian society, but also chose numerous formally 'independent' people with Islamist predispositions. But not only, the Brotherhood also pressured institutions, such as the SCCE, that was supposed to stay out of partisan politics, for instance by sending its followers to prevent it from meeting by sieging its building, filing lawsuits against critical journalists, and forcing legislation that would have pushed all senior justices into retirement. To add to this undemocratic behavior, the opposition could also be accused for the same reason: 'major opposition actors not only tried to stave off or

1646 ibid.

1647 For more on this, see ibid., 46–50.

boycott several elections; even when they found one they could like [...], they ended up seeking to overturn its results with street protests. Oppositionists complained about the make-up of the constituent assembly but did little to articulate their own constitutional vision, instead simply pressing non-Islamists to withdraw from the body. And virtually every sin with which the opposition charged the Brotherhood—using force against protestors, trying to purge judges, denying and even applauding security-force abuses, harassing media—was a sin that the opposition embraced with unseemly enthusiasm in July 2013."[1648] In other words, Islamists reasonably accused that non-Islamists were declining to accept opposing election results, while non-Islamists reasonably accused Islamists with employing those same election results to destabilize 'the development of healthy democratic life."[1649]

Hence, without having to get into all the activity of both sides, it can be said that each force entered democratic politics 'with unrealistic expectations regarding what it could achieve and exaggerated suspicions of the motives of all rivals. It was not so much that Egypt's political actors lacked democratic commitments (though some did), but more that they deeply distrusted their adversaries and regarded real democratic processes as full of potential pitfalls."[1650] In my opinion, this was a result of decades of dishonest rulers who delivered tons of democratic promises and sought to hide behind democratic processes while suppressing democracy's true substance. In other words, during the constitutional transition, Egyptian politics was filled with distrust towards every promise and procedure until its benefits were proven right in practice. In short, everyone doubted democratic promises since they had been made and neglected so often previously.[1651] In the aftermath of the 2013 military coup, this air of mistrust culminated in the Muslim Brotherhood being banned. Hence, the most representative political force in the country was put out of the games. This was probably the finishing blow of democracy in the transition.

1648 See, ibid., 51.
1649 See, ibid.
1650 See, ibid., 53.
1651 See, ibid.

cc) *A Non-consensual, Non-inclusive and Uncoordinated Transition Plan*

If a functional democracy is to be the goal at the end of the transition, then the process of transition needs to be as democratic as possible to give it the democratic legitimacy it requires. This unfortunately was not the case. A series of bad choices with regards to the process of transition contributed to its own failing. The main problem of the transition plans is that there was no plan at all. Brown describes this situation as follows: 'its original failing lay in a series of shortsighted decisions made by generally well-meaning but myopic actors who found themselves thrust into positions of limited authority in February and March 2011.'[1652]

The first issue, and the most basic one, was the huge control that was given to the military for no other reasons than the military claimed it and nobody really stood in their way or could come up with a timely alternative. As Brown recalls: 'the soundest idea heard was a call for a presidency council capable of compelling the main political forces (assuming that they could be identified and could manage their differences) to move forward by consensus. But revolutionary groups did not unify around this notion until it was too late.'[1653] So, the military was free to do whatever it wanted and what it did was simply the next mistake. Basically, the military vested a tiny ad hoc committee to outline the transition path by amending the 1971 Constitution. This committee's work was eventually folded into the Constitutional Declaration of March 2011, a document whose authors have never been revealed. Also, many details of the Constitutional Declaration and the reasons some elements from the suspended 1971 Constitution but not others were borrowed, were never explained. Additionally, the Constitutional Declaration included a huge loophole concerning the amendment procedure: 'if a change needed to be made to the constitutional text (and various actors quickly came to feel that some were necessary) first the military and then the president (once elected) would have to assert the constitutional power to do so. Had a process of broad and careful consultation been used to adjust the basic law, the results might have been made palatable. But the generals were predictably bad at consultation, and later the first freely elected president turned out

1652 See, ibid.
1653 See, ibid., 54.

to be even worse.'[1654] In other words, all of Egypt's rulers during the constitutional transition took turns declaring unilateral amendments with eventually devastating results.

Distrusts emerging from the cloudiness of the process were already raised as early as the March 2011 referendum. Islamists questioned that the real agenda of their revolutionary counterparts was to delay elections for fear of how well Islamists would score. Non-Islamists instead believed that Islamists pressed for a vote as soon as possible so that they could 'elbow their way into the most seats at the table,'[1655] and push for their own transitional agenda. Political rivalries in a transition are per se not bad. The stability of democracy is often based on plurality of opinions, but also on consensual decision-making, the last of which was the biggest problem in Egypt. The way of settling the political struggle at issue was approached through pressuring, nagging, and bargaining with the generals, instead of negotiation, compromise, and consensus.[1656] A more consensual process could clearly have been designed given that disputes on how the process had to look like were not that vast in early 2011. Almost the entire political spectrum agreed on most of the ground framework for constitution-making, that is, a weaker presidency, stronger guarantees for freedoms, more democratic procedures, and judicial independence. Yet, the little *ad hoc* committee, which was definitely acting in haste, had created several procedural land mines.[1657] One of them, for instance, was the specification that a new constitution would be drafted by a commission of a hundred members chosen by parliament, which eventually ended up being Islamic-led. In other words, this way of proceeding with the appointment of the constituent Assembly offered no guarantee that everyone would have a voice,[1658] and eventually that is what happened.

Everything boils down to the political power struggle being so intense that no coordinated revolutionary movement could bring the country out of a dysfunctional system. In Egypt, the military claimed power without trying consensual constitution-making. In South Africa instead, even though the

1654 See, ibid.
1655 See, ibid.
1656 See, ibid.
1657 See, ibid.
1658 See, ibid., 55.

ANC was representing the majority, a multi-party round table was organized on which consensus on the rules of transition could be negotiated.

b. Limited Government (Separation of Powers)

When it comes to the horizontal separation of powers, the Egyptian case study is a paradox on its own: Egypt shows a separation of powers, yet not the required interdependence of the different political branches. Let us not forget that checks and balances (that is, rights of mutual control and influence) allow the three powers to interact in an equitable and balanced manner. However, Egypt demonstrated institutions competing to rule or interfere with each other and the state. The acts of the military, the president and the judiciary did not allow for an institutional balance to settle the democratic deficit that Egypt was suffering. Everybody was encroaching on the other branch's powers and empowering itself as much as they could. In Egypt, the division of the sovereign power in the common *trias politica* model, which is not separated in ways that inspire the required collaboration among political institutions. Therefore, behind a political struggle between religious and non-religious forces, an institutional struggle hid.[1659] This is a veritable problem, because for constitutionalism to succeed, it must first settle in institutionally and structurally. This unbalance of the three powers did not allow for this, and thus constitutionalism as championed in this study was never really possible. As mentioned in the section above, there is a need for political openhandedness and flexibility in constitutional transitions. The search for consensus and compromise not only between the political actors in a transition, but especially the institutions, was something we had witnessed working in South Africa. None of the political institutions should impose their own agenda to steer the transition in the direction it deems fit, especially when most political actors in a transition have no democratic legitimacy *per se* and all have great political influence and power. This could be a mistake that alone may condemn the transition to failure. As mentioned above, Egypt did not necessarily fail because of a lack of voting, but rather because of the bad choices and behavior of the main political actors,[1660] who are all accountable for the democratic and constitutionalist failure within the transition.[1661]

1659 Abat i Ninet and Tushnet, 229.
1660 Brown, "Egypt's Failed Transition," 50.

c. Rule of Law

aa) Accepting Constitutional Supremacy without Clear Constitutional Law

Ever since Mubarak was overthrown, Egypt was filled with vigorous constitutional debates. This led to reiterated constitutional breaks and renewals, which brought instability and disorder. This continuous constitutional shifting consisted of several constitutional declarations, amendments, decrees and even two different constitutions in 2012 and 2014. So, on the one hand, it shows how Egyptian politics was well-aware of the importance of constitutional supremacy, and it evidenced the 'popular need to place both the political transition and the post-transitional scenario on a constitutional footing."[1662] On the other hand, it produced somehow the opposite. By wanting to reach political stability through constitutional law, Egyptian politics throughout the constitutional transition ended up leaving the country with not always a certain constitutional basis in place. In those cases where the constitutional basis was certain, it might not always have been liberal, as in reflecting the principles and values modern constitutionalism seeks. Instead, every constitutional change was like the result of a tug-of-war struggle, which reflected the political polarization of the country.

bb) An Independent yet Partial Apex Court

An independent judiciary rests in the core of the principle of the rule of law; constitutional supremacy cannot be enforced if there is no independent and impartial judiciary to do so. The polarization of the political spectrum in Egypt during the transition was emphasized by the judicial activism of the SCCE. The SCCE was a very independent institution, yet we have seen how it embraced quite the partisan behavior in order to follow its own stance.

1661 Abat i Ninet and Tushnet, 230.
1662 See, Abat i Ninet, 215.

3. A Failed Constitutional Transition

In Egypt, after the spring, instead of summer coming, the country almost directly jumped again into winter. With the military intervention and later Sisi's election, constitutional democracy seemed to fail: political repression and suppression of the opposition ended the possibility to make the transition succeed.

As mentioned earlier, the wave of the Arab Spring finally brought with it the overthrow of some Arab regimes, yet it did not start a process of true democratization, but rather a confused and unstable process of transformation capable of triggering civil wars with difficult solutions, as in Syria, Yemen or Libya. Despite the glowing expectations of many scholars and politicians (especially from the Western world) on the progressive democratization movements of the Middle East, in the years after the Arab Spring we have witnessed an even more dramatic development opening up for many of those countries. Egypt's case, for instance, as paradigmatic, it could seem to describe the phenomenon of revolution, it can also become a paradigm in the constitution-making choices and behavior not to follow when it comes to recover from a revolution through a constitutional transition.

This section has revealed how one or more elements of constitutionalism were not properly filled by the transitional forces of Egypt. On top of democracy being completely snubbed, the separation of powers utterly dysfunctional and the rule of law unstable, at a still deeper level, we must not forget to reckon how Egyptian politics persisted with underlying authoritarian patterns, as well as a transitional process that was, in reality, neither a real transitional process nor anything that provided for a true and stable transition. In other words, all choices and behavior of the transitional actors led to constitutionalism being partly formally entrenched in the new constitutions, but also being deeply neglected in the substance by them. Therefore, the institutional and structural establishment of a new constitutionalist Egypt was never fulfilled completely. This meant the failure of the transition, with no new developments in sight.

Of course, Egypt was just one of several revolutions that took place during the Arab Spring. Analyzing only the Egyptian case within the phenomenon of the Arab Spring is simplistic. The Arab Spring has shown how the people of the Middle East have begun to share something beyond their

language and religion; in fact, they have begun to share a common feeling of frustration towards their political, socio-economic system and their own existence. Thus began a journey that should have led these people towards freedom, equal rights, political participation and economic justice; in reality, the Arab Spring did not lead to these goals. Seven years after the beginning of the revolts, it is widely believed that the Arab Spring was not a homogeneous phenomenon; in fact, unlike other historically relevant revolts, such as those of the former Soviet bloc from which the Arab Spring romantically borrowed its name, the Arab countries do not belong to a consolidated and institutionalized empire, being autonomous entities that share at most some common transnational characteristics.

This key property emerges clearly from the analysis of the Arab Spring itself, from the diffusion of the revolts and from the different effects obtained in the various Arab countries. It would be completely wrong, therefore, to examine the effects of these revolutionary movements through a great regional lens, given that the result would hardly reflect a true representation of the specific dynamics that have taken place in each Arab State. Although the Middle East is often treated as a single reality, especially in the context of global geo-political analysis, the specificities of local societies and institutions differ from country to country, requiring, therefore, a much more contextualized approach, at least as far as the analysis of the consequences of the phenomenon is concerned. It is interesting to note how while the effects of the movements have been multi-directional, the original causes have appeared from the beginning transnational. One could say that the nature of these revolutionary movements was forged through the friction between a strong transnational impulse towards an idealized democracy and the presence of conditioning forces whose main characteristics were identical in each country.

4. Was the SCCE's Role a Factor in the Failure of the Normative Constitutional Transition?

Even though, when justifying its rulings, the SCCE's arguments appealed to liberal values, such as the rule of law, human rights, and a horizontal separation of powers, meticulous assessment shows that the SCCE's appeal to some of these principles was empty of any real substance. Instead, supporting a practice of veritable constitutional despotism, these judgements were utterly submissive to a positivist view of law 'grounded

in what is, ultimately, unlimited deference to what is identified as the will of the sovereign lawgiver.'[1663] In fact, the SCCE's behavior was a true paradigm for an apex court performing in a constitutionally 'silent' order. With constitutional silence, I mean high indeterminacy of constitutional law during the constitutional transition. As I will later show, this setting influences the behavior of a court significantly. In the Egyptian case, the SCCE believed this 'silence' needed to be filled. Seeking to fill the constitutional silence in the transition, and linked with the commitment to positivism, the SCCE ended up overreading and overdetermining its cases. Overdetermination is a feature of constitutional despotism. Constitutional despotism leads to a court substituting the will of the constituent power and acting as a political actor.

This said, the SCCE was instrumental in the failure of the constitutional transition. Whether or not it was a *conditio sine qua non* of said failure is hard to decipher and goes beyond the scope of my findings. However, on every damaged element mentioned above, the SCCE somehow put its own stamp: by suggesting the dissolution of the first elected parliament it clearly disrupted democracy and by taking part itself in the political power struggle between religious and non-religious it contributed to the dysfunction of the separation of powers and the instability of the rule of law. One thing is clear, despite its biased activism the SCCE in denying the results of the first democratic elections and influence the Presidential elections, it still did not succeed in dodging the Islamist political victory. It did however obstruct the smooth outcome of the transition and eventually acted as the right hand of the military, losing thus not only its impartiality, but its independence too. In fact, the SCCE was able at the beginning to exercise significant autonomy within its own area of competence and did in fact resist the newly elected institutions (that is, the president and the parliament). In fact, the SCCE had the means not only to protect itself against infringements on judicial turf, but also to undermine both parliament and the presidency by striking at their legal basis. However, I believe that under Sisi, the SCCE has lost most of its independence and has become a tool for repression. In this sense, Egypt stands almost worse than it did right after the revolution.

1663 See, Fadel, "The Sounds of Silence: The Supreme Constitutional Court of Egypt, Constitutional Crisis, and Constitutional Silence," 945.

Through its activism, the SCCE shaped its character in a way that it fostered the already dramatical polarization of politics in the country. Accordingly, the role of the SCCE in the Egyptian constitutional transition is clearly embedded in the process of constitution-making itself. That said, it is clear how during the transitional periods, the SCCE substantially undermined the transition to constitutionalism, and thereby culminated in restoring authoritarian rule when the military ousted Egypt's first (and only) democratically elected president Morsi.

III. South Africa

South Africa has been labelled as success story when it comes to constitutional transition,[1664] and I would agree. But I am not the only one. On the particular topic of South Africa's transition from *apartheid* to a constitutional democracy, and in particular on the constitution-building process, many scholars have already assessed their opinions, and all seem to boil down to success.[1665]

In the other two cases of Egypt and Turkey, where constitutionalism was never really fully established, we have seen how that has possibly influenced the negative outcome of the normative constitutional processes. Unlike the Egyptian and the Turkish case, South Africa has shown instead a fulfillment of constitutionalism's elements, legally and institutionally. This, among other factors, has contributed to the normative constitutional transition to develop correctly and foster the social transformation contained in the vision of the constituent power.

1664 See, for instance, Andrew Arato and Ertug Tombus, "Learning from Success, Learning from Failure: South Africa, Hungary, Turkey and Egypt," *Philosophy & Social Criticism* 39, no. 4–5 (2013).

1665 See, for instance, Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa*; Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*; Veronica Federico and Carlo Fusaro, eds., *Constitutionalism and Democratic Transitions: Lessons from South Africa* (Firenze: Firenze University Press, 2006).

1. The South African Constitutional Transition: Round-table Negotiations

South Africa came from a long tradition of parliamentary supremacy. The dawn of constitutionalism, and with it democratic rule in 1994, meant a shift towards constitutional supremacy and the rule of law. In an early case concerned with defining the separation of powers in the new South Africa, Chaskalson J, the first president of the newly established Constitutional Court summarized the South African transition and transformation as follows:

> 'The Constitution itself makes provision for the complex issues involved in bringing together again in one country, areas which had been separated under apartheid, and at the same time establishing a constitutional state based on respect for fundamental human rights, with a decentralized form of government in place of what had previously been authoritarian rule enforced by a strong central government."[1666]

South Africa's quest to constitutional supremacy was characterized by a negotiation process, which resulted in no interruption of the legal continuity; the operational laws of the pre-1994 timespan continued to be applied to the extent that they were compliant with the new constitutional dispensation.[1667] Therefore, this radical constitutional change would not qualify as a constitutional transition procedurally; Kelsen's break of the legality chain did not occur in South Africa as no intermittent legal fracture with the old legal order took place. The constitutional transition was triggered and managed by a parliamentary act of the older order (namely, the IC); the same act, which created the CCZA.[1668] The first step consisted in the unelected MPNF negotiating and drafting an *interim* constitution, which legally had to be adopted by the *apartheid* legislature in terms of the 1983 Constitution and became binding immediately after the first democratic election of April 1994.[1669] In the

1666 See, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 7.

1667 Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," 335 f.

1668 Ackermann, 646.

1669 de Vos and Freedman, 20; Murray, "A Constitutional Beginning: Making South Africa's Final Constitution," 813. The interim constitution was the picture of the compromises reached during the negotiations: it established a transition government of national unity, made of a collation with both the ANC and the NP represented in the executive.

second step, a democratically elected Constitutional Assembly was to draft a definitive constitution.[1670] Ergo, South Africa witnessed a constitutional transition indeed, yet one achieved constitutionally, with all the accruing benefits.

Hence, South Africa is the typical example of a constitutional transition, which took place without a break in the chain of validity, but rather a profound change of the material constitution of the country. That the constitution-making process in South Africa resulted in a substantive constitutional transformation, cannot genuinely be challenged. On 27 April 1994, the supremacy of the South African legislative branch ceased to exist at all levels of government and the IC became the supreme law of the 'Rainbow Nation'. The new constitutional text bound 'all legislative, executive and judicial organs of state at all levels of government, and resulted in 'any law or act inconsistent with its provisions' being of 'no force and effect to the extent of the inconsistency'.[1671] Accordingly, the CCZA was empowered and mandated to invalidate any law or conduct inconsistent with the new constitutional text to be to the extent of such inconsistency.[1672] Simultaneously, fourteen structures of government also ceased to exist: the six so-called 'self-governing' territories, and the four so-called 'independent' states, imploded and, together with the previous four provinces South Africa, all became part of a united national territory and re-divided into nine new provinces.[1673] Additionally, the new constitutional order presents a set of fundamental legal principles – especially human rights – that are not merely hortatory but define it in a substantive way. This is inherited by the *apartheid* state, which did not only deny all meaningful participation in the political process to a big majority of the population, but also sought to legislate the lives of those people on the sole criterion of race. It is therefore not surprising that fundamental human rights, from human dignity and quality to a long list of freedoms, laid at the heart of the new constitutional order.[1674]

1670 de Vos and Freedman, 20.

1671 See, Art. 4 IC, compare with Art. 2 Constitution of South Africa, 1996.

1672 See, Art. 98(5) IC, compare with Art. 172(1) Constitution of South Africa, 1996.

1673 See the words of Chaskalson at *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), at para. 7.

1674 See, Art. 1 Constitution of South Africa, 1996.

2. The South African Constitutional Transition and the Core Elements of Constitutionalism

As said, a lot of ink could be spilled on the factors that contributed to South Africa's success in the transition. I believe that factors for the failure of a normative constitutional transitional are much easier to identify than the reasons for success. The reasons thereof are, in my opinion, related to the fact that when things work, it means everything functions the way it should and therefore the factors for the success would probably surface through comparison with failures. In this section, instead of listing how everything worked in South Africa, I would like to make a brief comparison with Egypt and Turkey and see where South Africa got it right.[1675]

a. An Inclusive Form of Constitution-Making

When it came to the element of democracy, Turkey failed through the adoption of a majoritarian form of constitution-making. The process was not inclusive anymore and thus democracy could not thrive under such circumstances. Similar circumstances were to be seen in Egypt, where both the 2012 and the 2014 Constitutions were drafted in a way that not all opinions were represented. South Africa instead adopted a completely different form of constitution-making: the round table form. The round table form of constitution-making allows for almost the entirety of the polity to be heard and to have a voice for the drafting of the new constitution. South Africa is to this day the paradigm of such form of constitution-making.

The inclusiveness of the constitution-making form and the presence of a strong system of political rights that strengthen the democratic system during the transition and beyond, facilitated the acceptance and thus the efficaciousness of the new Constitution of South Africa, 1996. Therefore, if democracy was a core element of the new South Africa, the first step was taken in the right direction unlike Turkey and Egypt, where the political struggle poisoned the entire transition process.

1675 For a more schematic account on the success of South Africa in the fulfilment of the main features of constitutionalism, see Federico, 69–77.

b. Decentralization as the Basis for Constitutionalism

In South Africa, a big difference from Turkey and Egypt was the strong footprint that the entire process of transition put on devolution. It is clear how one of the most significant reasons for South Africa's success was the introduction of a decentralized system of government in a pluralistic country.

If tension between different political forces is a common denominator in a constitutional transition, South Africa tackled it by thinking of a decentralized system of government to allow an even more inclusive democratic process. A brilliant article by Inman and Rubinfeld goes beyond the democratic benefits of decentralization in a politically tense transition and explains how 'South Africa's transition from *apartheid* to democracy has been successful because its federal governance has provided protection for the economic elite from maximal redistributive taxation. Federal governance creates a "hostage game" in which the majority central government controls tax rates, while elite-run provinces control redistributive services. South Africa has found an equilibrium that has improved the welfare of the White minority and the Black majority. However, the success of the federal structure depends on the patience of the majority and their demands for redistributive public services. An impatient and more radical majority party threatens the current equilibrium.'[1676] Devolution deepens democracy and allows for party competition to take place on different governmental levels. South Africa is the perfect example for how federalism can be employed to fix certain societal deficiencies in countries undergoing a constitutional transition.

c. Constitutional Supremacy Enforced by an Independent and Impartial Apex Court

In both cases of Turkey and Egypt, there was never the feeling that the constitution, or constitutional law as such, was 'governing' the country and limiting politics. Constitutional supremacy was mostly overstepped. The constituent power was mostly misused to a point that one cannot think that the rule of law was utterly respected and upheld. In South Africa instead, one of the most important elements of the new constitutional democracy was indeed constitutional supremacy. Constitutional supremacy

1676 See, Robert P. Inman and Daniel L. Rubinfeld, "Understanding the Democratic Transition in South Africa," *American Law and Economics Review* 15, no. 1 (2013).

appeared in South Africa with the introduction of the IC and lingered on with the enactment of the Constitution of South Africa, 1996. Before this, South Africa was a system of parliamentary supremacy, which meant that parliament could pass every legislation it liked, as long as the right procedure was followed, regardless of any violation of the constitution.[1677] Accordingly, no court had the power to scrutinize and overrule constitution-violating legislation. However, this all changed with the introduction of the IC, which became the highest source of authority in the country. The same goes for the Constitution of South Africa, 1996, which is the benchmark by which all legislation is judged. This means that any legislation that breaches the Constitution can be disputed and struck down by the judiciary. Constitutional supremacy basically granted the White minority from any threat or fear of revenge by the majority, because it assured rights and protections on both sides.[1678] These functions in a country like South Africa, as power is effectively shared by the three branches of government in terms of a proper doctrine of horizontal separation of powers. The enforcement of it all is in the hand of the independent CCZA.

In order to uphold all elements of constitutionalism which are supposed to be entrenched in constitutional law, an independent and impartial apex court is essential. The reasons thereof were already laid out in the theoretical chapter. In Turkey, following a series of constitutional amendments in 2010 the ruling party AKP, managed to pack the court and thus turn the TCC into a 'dependent' apex court. This move basically tore down the wall that separated the legislature (and, in Turkey, also the executive) and the judiciary. In Egypt, the SCCE had instead a big legacy of independence, yet it got entangled in the political struggle that marred the Egyptian constitutional transition. This has turned eventually the SCCE into a partisan apex court occupied first with being hostile against political Islam and later with being the tool of Sisi's repression. Instead, the CCZA was a symbol of the transition, both institutionally independent and politically impartial. Despite being an active court, the CCZA never encroached into politics in a way that damaged the balance between

1677 Before the transition to constitutional supremacy, the constitution was 'tricameral', which basically established separate legislatures for Whites, Coloureds and Indians and denied Blacks any say in government whatsoever. Therefore, this constitution was subject to the impulses of parliament, which in that case was not a representative one.

1678 See, Federico, 69–70.

judicial activism and judicial restraint, or more than constitutional law already does on its own.

3. Was the CCZA's Role a Factor in the Success of the Normative Constitutional Transition?

I have already explained in the case study how the CCZA was instrumental in facilitating the normative constitutional transition. Here, I want to clarify whether it was a significant factor in the success of said transition.

In the South African normative constitutional transition, this question can be easily answered due to the direct constitutional empowerment the CCZA was given within the constitution-building process. The CCZA was constitutionally thrusted into a transitional role, without itself having to itself seek its own jurisdiction (unlike the SCCE when it had to convert a political question into a legal one in order to secure jurisdiction). The CCZA was elevated above the political skirmish from the beginning and therefore the significance of its role was already entrenched in the IC.

Most importantly, however, is whether the CCZA actually lived up to the degree of importance of its allocated role. Of course, the CCZA's certification function was a fundamental piece of the constitution-building puzzle. Just the fact that it embraced said function was already a piece of evidence that the court was up for facilitating the transition. I have already explained how the certification process was part of the constitution-building procedure itself; a *conditio sine qua non.* The fact that it refused to certify the first draft just shows how serious the CCZA was taking the function. In addition to that, its refusal was well-argued and did not appear like a threat to the transition. The deficiencies of the first constitutional draft identified by the CCZA were related with the fear that the ANC would control legislative majorities for the predictable future, and therefore could become a threat, as it could abuse its power against opposition parties without adequate constitutional safeguards.[1679] Reiterated refusal to certify the constitution combined with a lack of supporting reasoning would have instead shown a clear obstructing behavior. This was definitely not the case.

1679 Cf. Choudhry and Glenn Bass, 27; Issacharoff, "Constitutional Courts and Democratic Hedging," 994–95.

The rest of the CCZA's performance analysis I have framed around the establishment of local government. The CCZA was a key factor for the legal and institutional establishment of local government, and this alone would emphasize the importance of its performance. The CCZA delivered key cases with regard to local government, which given the importance of devolution within the South African transition, speaks for itself as for the contribution of the court in the transitional success. A failure to establish a functioning system of local government would have probably turned (in time) the transition around. Devolution was the only way to accommodate all struggling forces following *apartheid*, including the White minority. It was *the* one condition that allowed all colors of the Rainbow Nation to have their characteristics and traditions respected in the new South Africa.

B. Preliminary Conclusions

I. Constitutionalism as Ideal Indicator for the Positive or Negative Outcome of a Transition

With this chapter, I did not pretend to demonstrate the viability of theories of 'peace through constitutionalism' as a universal and absolute solution. Too many are the different conceptions of constitutionalism and too many are the political and social contexts within which a country finds itself when in a constitutional transition. Instead, my idea was to make the measurement and assessment of success or failure of a normative constitutional transition an easier endeavor by attaching the transitional outcome to quantifiable elements.

I believe this exercise has proven right and the first hypothesis confirmed: *When one or more of the elements of constitutionalism are not established, the normative constitutional transition fails.* The research has shown how constitutionalism can be used as a sure indicator for the measurement of the outcome of a constitutional transition. Of course, the establishment of the three elements of constitutionalism is surely not all that must be fulfilled for a constitutional transition as a whole to succeed. However, it allows the normative constitutional transition to reach is maximum potential for success. 'Success' as in the full empirical constitutional transformation. The hypothesis is thus confirmed: the establishment of the

three elements of constitutionalism are indeed an indicator that a constitutional transition is either failing or succeeding. Hence, their non-establishment means that the transition is surely going to fail, their establishment instead means that the transition has the best chances of succeeding. Of course, nothing is absolute and further case studies might prove some exceptions.

II. Pluralism as Key Factor for the Building of Consensus and Transitional Success

Thus, the first hypothesis has shown how constitutionalism is an effective tool for the reduction of political and social violence during a constitutional transition, including the constitution-building process. Exactly during the constitution-building process I think rests the first key for success: transitions failed where pluralism was rejected, especially during the process of constitution-building.[1680] This research finding alone confirms the following hypothesis: *The constitution-making form is a key factor in the failure or success of the normative constitutional transition.*

Of course, many are the factors that contribute to the failure or success of a constitutional transition on top of the apex court's performance. The constitution-making form is however a logical factor due to the pertinence of constitution-building in a constitutional transition. The four types of constitution-making that were introduced in the theoretical chapter were: reform (constitutional amendments), revolution (Constituent Assembly), roundtable (two-stepped transition) and revolutionary reform (constitutional convention). The three case studies all adopted three different forms: Turkey found itself in a process of reform, Egypt is an important case of revolution, whereas South Africa is the paradigm for the roundtable form of constitution-making.

The research revealed very quickly an evident factor of the failure or success of the transition: inclusiveness or pluralism. In other words, the importance of building consensus.

1680 Abat i Ninet and Tushnet included political pluralism as one of the requirements for democracy to function with universals passive and active suffrage, and a representative electoral system. 'Pluralism becomes effective when distinct political forces contribute to the formation and expression of the popular will. Competing political parties are an essential tool for political participation.' See, Abat i Ninet and Tushnet, 56–57.

Building consensus in the constitution-making process has proven pivotal in the South African case, and constitutionalism provided a means to appease bitter political disputes that otherwise tend to degenerate into violent confrontations. When only one segment of the polity takes unilateral control of the process of constitution-making, democracy weakens. Van Zyl Slabbert identified two fundamental operational principles emerging in the early years of the transition as standards to be enforced if a country wished to be called democratic: on the one hand, *contingent consensus*, meaning that the first party or coalition to win the first elections should not use said victory to entrench their power and never allow the opposition the chance to one day win, and the opposition should accept the right of the winner to take control of the country for the time being; on the other hand, *bounded uncertainty*, meaning that some basic rights (such as freedom of expression) are left untouched by politics.[1681] In a country where the interests of all are represented, democracy can thrive. The possibility to at least regain a certain majority needs to exist; in South Africa we would have the example of the DA, whereas in Turkey and Egypt, this possibility was annihilated. All this demonstrates, of course, a clear connection between democratization and constitutionalism. As Sunstein also argues, the constitutional democracy does not necessarily guarantee a good and fair life for the people, nor does it guarantee justice. In other words, it does not guarantee that the empirical transformation of society would take place as the initial vision advocates. Yet, it does a great deal in responding, for instance, to the pervasive threat of deliberative trouble 'partly by reducing the likelihood of group polarization and partly through embodying and promoting incompletely theorized agreements—making it possible for diverse people to reach agreement where agreement is necessary and makes it unnecessary for people to reach agreement when agreement is impossible. The result is a significant victory for both mutual respect and social stability.'[1682] All of this reflects itself in the most important collective decision that a country needs to make officially in a constitutional transition: building a constitution.

1681 See, Frederik van Zyl Slabbert, "Dilemmas for Democracy in South Africa," *South Africa International* 23, no. 1 (1992): 6. This approach reminds of Huntington's 'two-turnover' test. See, Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 266 – 67.

1682 See, Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001), 242 – 43.

South Africa has demonstrated that participation and inclusiveness in the constitution-building process become essentials in reaching peaceful settlements of potentially disruptive civil struggles by assuring democratic consolidation and sustainability. In Africa, constitutions without constitutionalism have proved being unsuccessful tools of reducing the level of conflict,[1683] and the South African case has shown how constitutionalism needs to be instead an integral element of constitutional transitions. Constitutionalism grants fundamental rights, protects people from arbitrary rule, promotes human dignity, provides judicial instruments for conflict resolution, and invites the people to be integral part in the decision-making processes of the country. All of this is introduced by constitutionalism through constitution-making. In an interview to Justice A. Sachs carried out by Veronica Federico, and in parts quoted in a chapter of a book she co-edited,[1684] the former Justice revealed that:

> '[T]he constitution making for [South Africa] was more than just giving a basic law to the country. It was a peace treaty, it put to an end more that [sic] 50 years of armed struggle, it was an independence document bringing the African people into sovereignty for the first time. It was a social pact out of people who had been trying to kill each other, now trying to live together in one country on a secure basis. The solution lied in the way the problems were solved, the way the two sides tried to accommodate the other. I always draw a distinction between a compromise and an accommodation: accommodation is a principled attempt to create a space, a country, a territory, a set of values that people can share. It requires understanding the other, looking into the eyes of the other, and appreciating all sorts of things that make them fearful, anxious. So, the majority looking into the eyes of the minority could see not just the fact that they had contributed enormously to the atrocities of the past, but that they were people, they were part of the nation, and the question was how to bring them in, into a shared common society. The minority had to accept that the majority were tired to be dominated, tired to be told what was good for them and what was bad for them, and the very principle of self-determination meant that your views had to be listen [sic] to and taken in account. So [South Africa] had very, very bitter struggles conducted ideologically, intellectually over the basic contents of the constitution. But the way was to accommodate each-other, to create a new political space where people could dialogue.'[1685]

This confirms how constitutionalism played an important role in appeasing apparently irreconcilable frictions and still offered the opposing parties to

1683 See, Okoth-Ogendo.

1684 Cf., Federico.

1685 See, Interview carried out in Johannesburg, South Africa, on February 28, 2005, and quoted at ibid., 50–51.

the ANC a political scenario in which they could still make their voices heard. Constitutionalism can guarantee the success of a normative constitutional transition, yet not necessarily of an empirical constitutional transformation. At the same time, at least it represents a good initial step in that direction and assures a peaceful transition.

Additionally, inclusiveness becomes a very important feature of democracy and as core element of constitutionalism, for it guarantees that diversity becomes an advantage and not a dragging phenomenon. Whether constitutionalism, constitutions or constitutional law in general can induce social change needs to be proven over more case studies, yet the law remains the primary means available to a country undergoing change to intervene in society, and all of the cases analyzed in this study confirm this. But not only. Mahomed J, in a dissenting reasoning of the *S v Makwanyane* case, explains his inspiring vision on the role of the constitution in the constitutional transition:

> 'All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.'[1686]

Arato has produced a compelling and extensive argument in his book, *Post Sovereign Constitution Making: Learning and Legitimacy*, in favor of the round-table constitution-making as a paradigm when it comes to constitutional transitions by comparing the cases of Turkey and Hungary. However, he also considers how the round table model of constitution-

1686 See, *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), at para 262.

making can fail, as in Hungary, and conversely, how insufficient learning from it can lead to a severe constitutional crisis like in Turkey.[1687] In this sense, the round-table model of constitution-making serves the most pluralist version of the polity, but at the same time, evidently, is *not* infallible.

This part of the thesis has demonstrated how constitutionalism (and constitutional law) plays an active and influential role in a normative constitutional transition, as the constitution-making process provided with the right scene to accommodating diversity and the political vision of all parties involved in the negotiations. The challenge for constitutionalism is then, once it is established legally and institutionally, to facilitate the social transformation that takes place outside of the law.

In sum, both first hypotheses (i. e., *When one or more of the elements of constitutionalism are not established, the normative constitutional transition fails; The constitution-making form is a key factor in the failure or success of the normative constitutional transition*) are confirmed.

III. Apex Courts Apt to Influence a Constitutional Transition

The last hypothesis instead was only partly confirmed: *The performance of the apex court is a decisive factor in the failure or success of the normative constitutional transition.* This hypothesis is, in my opinion, and within the limits of the cases analyzed, only partly confirmed in the sense that apex courts do play a 'significant' role in either facilitating or obstructing a normative constitutional transition, but I do not believe this role is 'decisive' in its success or failure. With 'decisive', I mean a *conditio sine qua non* for the normative constitutional transition to either fail or succeed. This does not mean that an apex court cannot play a decisive role in the normative constitutional transition. For instance, I believe that that the CCZA was key in the establishment of local government and the shaping of the decentralization process in general, yet this is the case mostly because decentralization was itself a core solution for the change.

The problem in testing this hypothesis is that nobody knows how a transition would respond were an apex court not being established.

1687 See, *Arato, Post Sovereign Constitution Making: Learning and Legitimacy.*

I think that an apex court *can* play a decisive role in the normative constitutional transition if the same is *empowered* to play such a role (as it was the case in South Africa) otherwise the court can play a 'significant' role indeed, as it did in Egypt and Turkey, yet I cannot be sure that said role would be 'decisive'. In other words, the hypothesis should be corrected as follows: the apex court *can play* a decisive role in the failure or success of the transition.

Both the second and third hypothesis support the first one, because apex courts and the process of constitution-making are part of the same elements of constitutionalism. Moreover, the confirmation of this hypothesis regarding the apex courts as factors in a constitutional transition was instrumental for the continuation of the thesis. Had this hypothesis not been confirmed, seeking their role would have been redundant. In other words, had the case studies revealed that the apex courts actually do *not* play any role in the success or failure of a transition, the rest of the thesis would have proven superfluous.

Chapter 8: The Role of Apex Courts in a Normative Constitutional Transition

A lot of ink has been used on comparative judicial politics, which reveals a broad diversity of roles that apex courts adopt during a process of constitutional transition. The rapidly expanding comparative doctrine on courts applies diverse methodologies and intersects a variety of contextual and strategic factors to their analysis.[1688] Of course, many scholars review the role of apex courts in the transitional setting by looking beyond the mere role they play in the strict legal constitution-building setting. In fact, it is very common to bump into contributions with regards to the role of apex courts within the context of the great trend in much of the developing world: democratization. Democratization is a very broad concept and includes both notions of constitutionalism introduced in this study: the normative constitutional transition and the empirical transformation. I have mentioned how difficult it is to clearly draw a line between the two when it comes to the performance of the Court, but also how the role played within them is usually similar in nature. It is theoretically possible to think of an apex court facilitating the strict legal transition from one constitution order to another, but then neglecting completely the transformation of society, but in most cases an apex court would be coherent in its activity, and it coincides.

However, for this study, democracy is only but one of the elements of constitutionalism, and this is the reason why I cannot draw too much data from all these studies, as I think a constitutional transition is more than just democracy.[1689] However, in order not to mislead anybody in thinking that I came up with the structure of this chapter, this section *does* build on the conclusions of such authors like Daly and Ginsburg, who unavoidably took a similar stance when it came to categorizing the roles in the process of democratization. 'Unavoidably', as one can think of

1688 See, for instance, Helmke and Rios-Figueroa; Hilbink; Couso, Huneeus, and Sieder; Meierhenrich; Trochev; Harding and Nicholson. All of which were reviewed in Ginsburg, "Courts and New Democracies: Recent Works."

1689 Of course, one can adopt either a broad or a narrow interpretation of the term democracy. But I will argue upon the definition laid out in this study.

no alternatives to categorize the role of courts in a constitutional transition and when it comes to their role with regards to the constitutional transition itself, then it can only boil down to a handful of roles anyhow. Ginsburg applies a temporal categorization by 'analyzing the role of courts at different stages of the democratization process.' His analysis includes courts from non-democratic regimes, democracies in transition and established democracies. This study instead focuses mainly on the cases analyzed, which are only courts in constitutional transitions. However, for the sake of comprehensiveness, a brief section on the role of apex courts in non-democratic (pre-transitional) settings is included. What the role of apex courts is in established constitutional democracies instead, was already laid out in the theoretical chapter of this study.

When it comes to a constitutional transition and the role of apex courts, one has to basically divide this period of time between *upstream* roles and *downstream* roles. The former roles are those that ensue going towards the path of transition before it occurs. In other words, they involve actions that occur either still during the authoritarian regime or in the early stages of the transitions. The latter roles, instead, are those that befall once the normative constitutional transition has been triggered, yet not complete. For each phase, we can differentiate two alternative developments: upstream, apex courts serve primarily as either tools of repression or (very rarely) as triggers for the transition (or at least unlock a blocked constitution-building process); downstream, apex courts serve mainly as obstructers of the transition or as facilitators, where they follow the primary decision to constitutionalize and facilitate the process in different manners. Additionally, another possibility is *judicial irrelevance*, in which courts play no visible role, is utter apathic in the transition and takes on an inerratic stance. With this outline in mind, let us inspect the evidence presented by the case studies and otherwise literature.

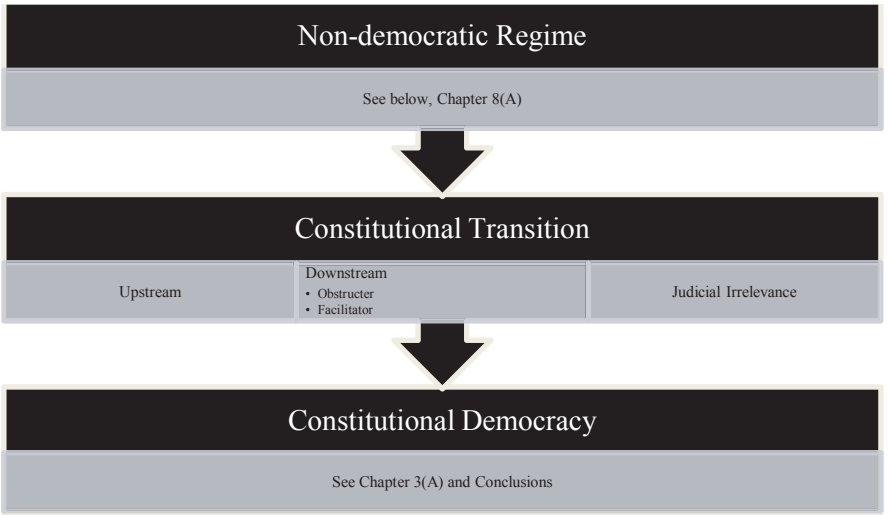

Figure 7 Framework of the Role of Apex Courts

A. A Court under a Non-Democratic Regime

I. A Non-Democratic Regime

A non-democratic regime is the *status quo ante* of a constitutional transition in the sense of this study. Simply put, the definition of non-democratic regimes is 'rule by other means than democracy', which derives from a play by Brooker on the famous quote of Clausewitz '[w]ar is the continuation of politics by other means.'[1690] In a very interesting book, the same Brooker shows why and how a modern states might be ruled by other means than representative democracy.[1691] In his words, non-democratic regimes 'display a bewildering diversity: from monarchies to military regimes, from clergy-dominated regimes to communist regimes, and from seeking a totalitarian control of thought through indoctrination to seeking recognition as a multiparty democracy through using semicompetitive elections'[1692]

1690 Carl von Clausewitz, *On War*, trans. J. J. Graham (London: N. Trübner & Company, 1873 [1832]), 12.

1691 See, Brooker.

1692 See, ibid., 1. See also, "Authoritarian Regimes," in *Comparative Politics*, ed. Daniele Caramani (Oxford: Oxford University Press, 2008), 133.

Of course, monarchies are not that common as a form of government nowadays. It was, however, the prevalent way of ruling for centuries before representative democracies appeared, and a few ruling monarchies still endure in the Arab world, for instance. Military regimes, instead, emerged in the nineteenth century as a largely Latin American singularity (so-called *caudillos*, following the collapse of Spanish colonial rule), yet spread in the twentieth century in its own version to Africa and parts of Asia. Brooker points out the following:

> '[B]y the 1960 s, military dictatorships had become so common that the study of military coups and countercoups, reforms and repressions, juntas and civilianizations, became a growth area in political science. New areas of study and new concepts were also required to study the communist regimes, which emerged in the twentieth century and pioneered a new range of dictatorships in which one political party, such as the communist party, would have some kind of monopoly and would be the regime's 'official' party. By the 1960 s, political scientists were describing these regimes with the new concept of a one-party state and its subsidiary concept of an African one-party state. The latter clearly distinguished the examples emerging in decolonized Africa from the communist examples and from the two defunct fascist regimes, which in the 1930 s–40 s had shown what horrors dictatorships were capable of domestically and internationally."[1693]

To depict the dictatorships of early twentieth century, such as Franco's, Hitler's or Mussolini's regimes, the concept of *totalitarianism* was forged, which emphasized these respective regime's craving for total control of state and society through ideological propaganda and indoctrination and enforcement of the same by political police. The concept of *authoritarianism* appeared in the 60 s, when scholars were trying to describe the many new models of non-totalitarian, less ideological and less custom-made varieties of modern dictatorships, such as rule by the military through a *junta* (that is, council) of its senior commanders.[1694] Typical examples of those years are again the Latin American ones, such as the Peruvian Military Junta (1968 – 1980), the Bolivian military juntas (1970 – 1971 and 1980 – 1982), the Government Junta of Chile (1973 – 1990), the National Reorganization Process in Argentina (1976 – 1983), the Junta of National Reconstruction in Nicaragua (1979 – 1985), Noriega's regime in Panama (1968 – 1989) or the Revolutionary Government Junta of El Salvador (1979 – 1982), among (many) others. More recently, examples are

1693 See, *Non-Democratic Regimes*, 1.

1694 See, ibid., 1 – 2.

the State Peace and Development Council in Myanmar (former Burma; 1988 – 2011) or the Council for National Security in Thailand (2006 – 2008). Turkey's military rule between 1980 – 1983 would also be an example, yet to make a comprehensive list of all worthy mentions would require a lot of ink.

Of course, between the 70 s and the 90 s, the global wave of democratization significantly reduced the number of non-democratic regimes on the one hand, but on the other hand amplified their assortment. The advent of such great wave of democratization produced not only functioning democracies, but also many cases of *democratically camouflaged dictatorship*, or less-than-fully-democratic governments, which scholars now tend to term *democratic/authoritarian hybrids.*[1695] Such hybrid cases are very hard to distinguish from the democratically camouflaged dictatorships, because the latter's democratic disguise of allegedly competitive multiparty politics can be employed by personal, one-party or even military dictatorships.[1696] Despite being very thought-provoking, this distinction is not the subject of this study.[1697]

II. The Role of Apex Courts under a Non-Democratic State

It is not an easy section to fill, because as mentioned, I believe this could represent a subject for an entire study. Especially, it includes different factors to consider than a constitutional transition. Yet, this does not mean that it was not already studied.

In analyzing the role of the Constitutional Court of the Russian Federation, Trochev makes the point that in authoritarian settings (as well as in democratic ones), apex courts can take on a supportive role of the same regime. In his words: 'rulers – regardless of their authoritarian or democratic pedigree – create and tolerate new constitutional courts as long as the latter: (a) provide important benefits for the new rulers, and

1695 See, ibid., 2.

1696 See, ibid.

1697 Every other analysis of the concept of non-democratic regimes and their development is beyond the scope of this study. For a very substantive and comprehensive work on the matter, see the following full study on non-democratic regimes: ibid. For more on authoritarian regimes, see also, "Authoritarian Regimes."; *Non-Democratic Regimes: Theory, Government and Politics* (Basingstoke: Palgrave Macmillan, 2000); *Twentieth-Century Dictatorships: The Ideological One-Party States* (Basingstoke: Palgrave Macmillan, 1995).

(b) do not interfere too much with public policies.'[1698] These important benefits can be manifold, in his own paper on the role of apex courts in new democracies, Ginsburg relates to Moustafa's lists of a series of roles that courts might play in non-democratic regimes: '(1) establishing social control and sidelining political opponents, (2) bolstering a regime's claim to "legal" legitimacy, (3) strengthening administrative compliance within the state's own bureaucratic machinery and solving coordination problems among competing factions within the regime, (4) facilitating trade and investment, and (5) implementing controversial policies so as to allow political distance from core elements of the regime.'[1699]

Many are the roles of apex courts already analyzed in such a setting, that is a static non-democratic setting. As Ginsburg mentions, there is a progressively enriching literature on the field.[1700] Most notably, we can count cases such as Russia,[1701] China,[1702] Vietnam,[1703] *apartheid* South Africa,[1704] the Arab world,[1705] Chile,[1706] Latin America,[1707] Egypt (pre Arab Spring),[1708] and on the post-Soviet

1698 Trochev, 6.

1699 See, Ginsburg, "Courts and New Democracies: Recent Works," 722. For Moustafa's categorization, see Tamir Moustafa and Tom Ginsburg, "Introduction," in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tamir Moustafa and Tom Ginsburg (Cambridge: Cambridge University Press, 2008).

1700 See, Ginsburg, "Courts and New Democracies: Recent Works," 722–24.

1701 On Russia's courts, see Trochev; Peter H. Solomon, *Soviet Criminal Justice under Stalin* (Cambridge: Cambridge University Press, 1996).

1702 On China, see, for instance, Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 106–57; Connie Carter, "Specialized Intellectual Property Courts in the People's Republic of Chine: Myth or Reality?," in *New Courts in Asia*, ed. Andrew Harding and Penelope Nicholson (New York: Routledge, 2009); Randall Peerenboom, ed. *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (New York: Cambridge University Press, 2010).

1703 See, Penelope Nicholson and Minh Duong, "Legitimacy and the Vietnamese Economic," in *New Courts in Asia*, ed. Andrew Harding and Penelope Nicholson (New York: Routledge, 2009).

1704 See, Meierhenrich.

1705 See, for example, *Brown, The Rule of Law in the Arab World: Courts in Egypt and the Gulf.*

1706 See, for example, Robert Barros, "Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile," in *Democracy and the Rule of Law*, ed. José M. Maravall and Adam Przeworski (New York: Cmabridge University Press, 2003).

1707 See, for example, Anthony Pereira, *Political (in)Justice: Authoritarianismand the Riule of Law in Brazil, Chile, and Argentina* (Pittsburgh, PA: University of Pittsburgh Press, 2005).

1708 See, for example, Moustafa.

world in general.[1709] As the same Ginsburg points out, '[t]he literature demonstrates a surprisingly diverse set of regime-enhancing roles.'[1710]

Without opening the door to further questions on the topic, a common theme that arises in most analyses of the role of courts in authoritarian contexts is that they tend to serve the interests of the regime. This is probably a must-do, aspired or not, in order to survive a packing, or because they are packed to begin with.[1711] This is however quite a generalized assertion, and a case-to-case analysis of some of the cases in the above-mentioned literature might show that in some context, courts are not exclusively a tool of the regime to be used for their own interests, but 'a forum that is established for strategic reasons with the potential to facilitate activities that undermine the regime. This "two-sided' feature may dis-incentivize the use of courts in some circumstances, or be thought of as a necessary price [...] in other contexts.'[1712] Meierhenrich's book shares an account on the role of the apex court in *apartheid* South Africa, making it an example of what just said. Basing its thesis on Ernst Fraenkel's notion of the dual state, he shows how law was a tool of the hidden state, but also a source of legal limitation on the regime. *Apartheid* used the law as a tool to effectuate oppressive practices, even as courts kept on constraining the regime at its outer edges.[1713]

Of course, in certain situations, like the one of reiterated reform in Turkey, the country is never really in a constitutional 'vacuum' as in a situation where legality and/or legitimacy are broken. In this situation, one can think of the TCC as an apex court being active under an authoritarian regime; due to the dual character of the Turkish state, this is actually true. Hence, strictly legally we can subsume the Turkish case under this section, as well. Still, in this case, the political context of the country indicates clearly how a constitutional transition in the direction of constitutionalism is *de facto* underway. In other words, the situation of Turkey is that

1709 See, for example, Armen Mazmanyan, "Constrained, Pragmatic Pro-Democratic Appraising Constitutional Review Courts in Post-Soviet," *Communist and Post-Communist Studies* 43, no. 4 (2010).

1710 See, Ginsburg, "Courts and New Democracies: Recent Works," 722.

1711 See, ibid., 723.

1712 See, ibid.

1713 See, Meierhenrich. See also a summary of Meierhenrich's account at Ginsburg, "Courts and New Democracies: Recent Works," 723–24.

democratization is more or less proceeding, whereas in other countries, such as Russia or China, it is not.

B. Upstream Roles

I. Triggering a Constitutional Transition or Kick-Starting a Stalled One

This section depicts those cases where the autocratic regime is not seeking to withdraw, but still it is met with a consistent or rising opposition. In these types of situation, courts can play a central role in the transition decision, where they can either trigger a transition or kick-start a stalled one. We are thinking of moments before a possible transition, in which democracy is not yet the only feasible outcome and this is the reason why an apex court can be the one enabling the needle to tip the balance towards constitutionalism.

1. Trigger of a Constitutional Transition

In such politically instable situations, activist movements mobilize around the court as a focal point to trigger the transition. Ginsburg nicely presents these contexts:

> 'In these models, a ruler conspires with some citizens to dominate other citizens, using a combination of repression and selective incentives for regime insiders. The dominated group can be very large, but can only limit the ruler if it can coordinate to overturn the narrow ruling coalition. Coordination is very difficult to achieve, because citizens may not agree on what exactly constitutes a violation of the rules, and may not know whether other citizens will join in an effort to take power. Any subset of citizens thinking of rising up to challenge the regime can only succeed if others join them. Otherwise, the opponent ends up in jail—or worse—and the regime maintains power. The contrast between the 2011 democratic revolts in Egypt and Syria illustrates the stakes. Since any particular citizen is uncertain as to what other citizens will do, the prospective mobilizers will likely stay quiescent and authoritarianism will be sustained. Only when there is agreement on what constitutes a violation and mutual expectations that citizens will in fact enforce the rules will democracy emerge and be sustained.'[1714]

1714 See, "Courts and New Democracies: Recent Works," 724. The same Ginsburg cites both Weingast and Law: Barry Weingast, "The Political Foundations of Democracy and the

Schelling stresses how in order to achieve said coordination, a movement needs focal points, and a court's decision can indeed serve as one of these points to coordinate efforts to overthrow a regime.[1715]

As per Ginsburg, there are three reasons why an apex court's decision might be the focal point which could help citizens to coordinate their efforts against the regime and thus trigger a constitutional transition.

1) The first one *would* be the fact that 'a court decision against the government can provide clarity as to what constitutes a violation of the rules."[1716] A decision by the highest court in the country constitutes an authoritative pronouncement of the fact that a regime is violating the practices of good governing. This can facilitate the discordant regime opposers to agree and coordinate their efforts against the violating regime.
2) Secondly, a decision against the government is an information transmission device, communicating the standpoint that the government apparatus is not completely unified on policy. Ginsburg adds that this 'also indicates, at a minimum, that judges do not believe their personal safety is in jeopardy from challenging regime rules, and this may allow opponents to update their own assessments of the risks of challenge [against the regime].'[1717]
3) Finally, 'a court decision is a resource that can be used by activists to rally supporters to their cause; it legitimates regime opposition and raises the costs of repression."[1718] In other words, it is an exceptional propaganda tool for those willing to coordinate their efforts against the regime. Of course, a court decision against the regime is not a guarantee that the constitutional transition will be triggered, but it does with no doubt facilitate mobilization in that direction. Thanks to a court decision, repression costs would increase exponentially.

In sum, such trigger decisions facilitate the coordination of opposition efforts against the autocratic regime by signaling and providing them with

Rule of Law," *American Political Science Review* 91 (1997); David Law, "A Theory of Judicial Power and Judicial Review," *Georgetown Law Journal* 97, no. 3 (2008).

1715 Thomas Schelling, *The Strategy of Conflict* (Cambridge, MA: Harvard University Press, 1960), 57.

1716 See, Ginsburg, "Courts and New Democracies: Recent Works," 725.

1717 See, ibid.

1718 See, ibid.

information about the imminence of decline. Why would courts do this? The main reason why courts might decide to take such trigger decisions goes beyond the mere idealistic one and stays as to preserve their position under the new future regime.[1719] New regimes tend to come in and change the composition of the apex court. By triggering a constitutional transition that was anyways upcoming, the judges hope to maintain their position once the transition is over.[1720]

Yet, it is easier said than done. One could think of a series of issues that may arise when an apex court gathers to make a decision aimed at triggering a constitutional transition. First, it is not always easy to identify a *court's incentive* in taking such a trigger decision. Such type of judgement is institutionally very risky for the court itself because attempting to provide a focal point for the anti-regime movements around which to focus can result in the authoritarian regime turning against the court. This is the reason why trigger decisions are contingent on the fact that the opposition movements need to actually respond to calls for change once they are delivered. Otherwise, the court is left alone in the line of fire. The authoritarian regime can respond in a variety of ways, such as the packing of the court. This is why courts would probably only provide trigger decisions when they are either confident for whatever reasons that the opposition movements follow it, or when they have strong institutional and political links to outside institutions that stand and protect the court from being punished. These conditions are not always a given. Second, *transparency* is a very important factor in such type of decisions. Since the trigger judgement is a clear statement of the court's intentions, it needs to be, well…, clear. The court cannot allow itself to deliver an unclear trigger decision that generates confusion and political tensions within the regime. It needs to have the judicial ability to produce clarity around the fact that the authoritarian regime is violating the rules, as so to produce information to facilitate the coordination of the opposition and higher the cost of repression. Finally, transparency comes hand in hand with *publicity.* In an authoritarian regime, publicity is not always a given factor. Even though the court might take such an important decision, in order for it to serve as a focal point the court does have to make sure that the

1719 See, ibid., 725–26.

1720 Helmke provides with a set of conditions under which courts might decide to provide a trigger decision. See, Gretchen Helmke, *Courts under Constraints: Judges, Generals and Presidents in Argentina* (New York: Cambridge University Press, 2004).

regime is not influencing the publicity of their judgements through formal and informal means.[1721]

So, sometimes it has happened that an apex court has facilitated the triggering of a constitutional transition. For instance, in Ukraine, during the 2004–2005 Orange Revolution, the Supreme Court ordered that incumbent Prime Minister Victor Yanukovych hold new elections after finding irregularities in the recent ones. This judgement is a paradigm of helping coordinate the opposition, as it strongly helped the people to require Yanukovych to step down in a time of protests. These remonstrations originated from President Kuchma's seeking to endorse the candidacy of his chosen successor Viktor Yanukovych, by using his position and a broad variety of methods, including the poisoning of opposition candidate Viktor Yushchenko. To rig the outcome of a run-off election in November 2004, Yushchenko's supporters took to the streets pursuing among other things a court ruling annulling the election results. On December 3, 2004, the Supreme Court loosened the political impasse by ordering a revote for the presidential election later the same month. The revote was held under strict international scrutiny and Yushchenko was elected. In this setting, the court became a core force to the power-change and overturning reiterated authoritarianism. This ruling encouraged the opposition and repressed the dictatorship. This shows how courts can unlock certain clogged political situations, which would have otherwise not evolved into a possible transition to democracy. Of course, the Ukrainian case (as any case) is more intricated than what I just presented. In fact, the independence of the court was debated, and it was even assumed that the court's ruling came only after the major political segments had reached an agreement on the fact that a revote was the appropriate course of things. Regardless of whether this was true or not, without the court's intervention, the outcome may not have been the same.[1722]

1721 See, Ginsburg, "Courts and New Democracies: Recent Works," 725.

1722 For more on the role of the Ukrainian Supreme Court see, Alexei Trochev, "Fragmentation? Defection? Legitimacy? Explaining Judicial Roles in Post-Communist "Colored Revolutions"," in *Consequential Courts: Judicial Roles in Global Perspective*, ed. Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (New York: Cambridge University Press, 2013); Ginsburg, "Courts and New Democracies: Recent Works," 726.

In the same category, but without a similar outcome, was the SCCE in Egypt. In this case, the indirect attempts of the SCCE to provide a focal point to Mubarak's opposition triggered a backlash. I have described how the SCCE dealt with Mubarak's regime; the SCCE, originally established to enforce administrative discipline and to indicate to foreign investors the reliability of property rights, started engaging in a series of progressively bold rulings that questioned Mubarak's government policies. When these rulings went beyond and started to give an ear to Mubarak's political opponents, it was packed by having its jurisdiction restructured and its key appointments made to guarantee a pro Mubarak line.[1723]

Another example, which I find it fits this category, is the Chilean Constitutional Court. While during the first years of its existence, the Constitutional Court was complacent and duly recognized the rules of the regime as constitutional, in September 1985, it issued a decision that had profound implications for the structure of political competition.[1724] The 1980 Constitution required a plebiscite to approve or reject the first civilian president, who was going to be nominated by the military. In casu, Pinochet was of course the candidate. Accordingly, the relevant organic constitutional law proposed that this referendum be supervised by an *ad hoc* electoral court. The Constitutional Court, however, maintained that the plebiscite required a complete structure of electoral supervision, including a voters list and an independent count. This reduced the military's ability to fix the plebiscite in their way.[1725] This was, of course, largely a constitution-reinforcing decision. It induced the opposition to participate rather than boycott the referendum, while the military, even though dissatisfied at this decision, were reluctant to dismiss it outright (considering the investment made in the entire structure of the constitutional scheme). The Constitutional Court then proceeded with this series of decisions by virtue of which it demanded that the *junta* allow a fair structure for the political process, including free and equal access to means of communication and rules on political organizations. In other words, the process set up by the *junta* ultimately constrained the *junta*

1723 See, "Courts and New Democracies: Recent Works," 726–27.

1724 See, Constitutional Court of the Republic of Chile [*Tribunal Constitucional de la República de Chile*], Decision No. 33 (September 24, 1985).

1725 See, Tom Ginsburg, "¿Fruto De La Parra Envenenada? Algunas Observaciones Comparadas Sobre La Constitución Chilena," *Estudios Públicos* 133 (2014): 14–16.

itself through these Constitutional Court rulings. The opposition won the plebiscite and paved the way for a return to democracy.

2. Kick-Starting a Stalled Constitutional Transition

Some apex courts, instead, do not necessarily find themselves serving as a focal point to opposition forces directly triggering a constitutional transition, but as predominant actors in an already started yet stalled or uncertain one. In this sense, the apex court could play the role of the kick-starter, meaning it can quickly take a course of action to start a process that has stopped working or progressing going again.

In Egypt, for example, as mentioned above, the Chief Justice of SCCE was thrust into the role of interim president in 2013 after the military ousted President Morsi.[1726] In this sense, the SCCE was not only an 'appearance' in the constitution-making process, but also a central political actor. In a similar, yet different way, Nepal is another example of a Chief Justice taking the non-judicial role of interim head of state. When the constitution-making process, which started in 2008, did not produce a foreseeable constitution, the Supreme Court denied a third extension of the deadline to draft a new constitution in a fundamental ruling. The Constituent Assembly was thus unable to meet the last deadline, and in line with the Supreme Court decision, was automatically dissolved. This caused a political deadlock. Maoist Prime Minister Baburam Bhattarai attempted ineffectively to call new Constituent Assembly elections for November 2012, but was forced to step aside in March 2013. Hence, an interim government was set up under the guidance of the Chief Justice of the Supreme Court, Khil Raj Regmi. Under his leadership, a new constitution was then finally drafted by a new Constituent Assembly and enacted in 2015.

These were two examples where the solution to the stalling was to fusion the judiciary with the executive power for a limited period of time. The reasons thereof could be the level of authority and respect that the court enjoys in a specific country. Certain countries deem the level of judicial independence of its apex court so great to the point of entrusting them with great extra-judicial powers during the transition.

1726 See, Daly, "The Judiciary and Constitutional Transitions," 20.

Kick-starting a stalled constitutional transition or impasse in the negotiations could easily be categorized under downstream roles because a *stalled* transition requires by definition that a transition already exists. Were this role to be categorized as a downstream role, it would likely be categorized as a facilitator of the normative transition, as it would help unlock it and make it happen. However, I believe this role fits better here under upstream roles because the court ends up freeing a stuck and inert situation with regards to whether or not go on with the transition or fall again into authoritarianism. In this sense, the action of freeing a stalled transition is very close to the act of triggering a constitutional transition because it actually concerns the *transition decision*. I thus believe that this role should be categorized as mainly an upstream role, even though it is acknowledged that putting it under the downstream roles would not be a mistake either.

With this in mind, one could imagine different scenarios of an apex court kick-starting a stalled constitutional transition or impasse in the negotiations, yet the boundaries with other roles are not always clear.

Provided it exists, an apex court could arbitrate on the impasse. The negotiations on the transition decision and on the process of transition are highly political. It is rarely a situation in which a stable judiciary system is in place and empowered to mediate, especially when there is a break in either legality or legitimacy. This reveals the uncertainty of transitional period and the importance of informal talks between the negotiating parties during the transition. For instance, in South Africa, the CCZA was established only with the enactment of the IC. This left the negotiating process without a mediating judicial body. In a country instead where an apex court already exists, such as Turkey or Egypt, apex courts tend to be politically partial and to add to this, a constitution-making process without the accurate inclusion of all parties involved in the transition does by definition not even embrace the idea of negotiation.

Moreover, as I will explain later, the establishment of an apex court itself in combination with the promise to safeguard certain rights (e.g., property rights and promises of immunity from persecution) of the withdrawing autocrats can allow for a transition or deadlock to be freed without a violent struggle. In this sense, the apex court is part of an exit bargain, which acts as a concession or a price to pay in order for the transition to

advance. I will show later how South Africa and Chile were examples of such a solution.

II. Repressor of a Constitutional Transition

If the role as a trigger is a very rare one, I cannot think of one example of a repressor role played by any court. Theoretically, an apex court could however play such role. If we find ourselves in the same situation as the section before, that is, cases where the autocratic regime is not seeking to withdraw, but still it is met with a consistent or rising opposition, the court could play as a supportive actor to the authoritarian regime and repress any spark of a constitutional transition. In this sense, the constitutional transition would be imminent, but the result of the court's actions does not result in a constitutional transition. Hence, we find ourselves *de facto* in the category of the role of courts in a non-democratic regime and not fully in an upstream constitutional transition role.

C. Downstream Roles

Many are the ways to categorize and analyze the role of courts in a constitutional transition, especially when it come to the downstream roles, that is roles played once a transition has been triggered. We know already how a constitutional transition can be described to include two faces of the same medal: the normative constitutional transition and the empirical constitutional transformation. I have already mentioned how the transformation of society can also pass through the apex court, yet I strictly believe in the separation between the legal and extra-legal realm. The veritable transformation of society comprises not only a new legal setting (which is however commonly the first step), but also a cultural conversion, which goes beyond the legal realm. The judiciary is a branch by definition attached to the realm of law and only through law it can act. The extent of its judicial rulings, however, have effects that can go beyond the law. Those rulings effects are complex and require an analysis of an extra-legal eye. Facilitating a *normative* constitutional transition, instead, is literally a straighter forward role. If an apex court is not obstructing the normative constitutional transition by either protecting

one specific (often old authoritarian) hegemony or for any other specific reason, the same court is likely facilitating it.

In any case, in a normative constitutional transition, downstream roles include mainly two different periods of the constitutional transition:

– *The Process of constitution-drafting* or constitution-building up until the enactment of a new constitutional text (including the substantive decisions about the design, form and content of the new or amended constitution), that is, the period when a new written constitution is drafted; and
– The period (*after* the enactment of the new constitution) of *legal and institutional consolidation of constitutionalism*, as in contributing (or not) to the well-functioning of the new constitutionalist order. In this latter period, a written constitution is enacted, but 'mechanically' it still needs some of its 'screws to be tightened'.

I believe that this temporal categorization of the downstream role allows a precise account on the role of courts in a normative constitutional transition, because the substantive distinction between the two periods is substantively self-evident. On the one hand, the *constitution-building process* mainly seeks the drafting of a *written constitution*. A written constitutional text is the main element of constitutionalism and is also the place where all other elements are entrenched. This is why its drafting period is the first and most crucial step in the normative constitutional transition.[1727] On the other hand, the period of *constitutional consolidation* instead, includes an even greater list of factors which influence the court's role in *upholding all other elements of constitutionalism* that are entrenched in the written constitution.

With this temporal distinction of the period of normative constitutional transition in mind, research has revealed that eventually apex courts act along the lines of basically *two* unambiguous roles when dealing with the process of transition:

– *obstructers* of change and of the new democratization movements, or

1727 During this period of time, an apex court can play a role provided that an apex court exists and a valid constitutional text from which the court can extract its legitimacy and powers is in force.

– *facilitators* of the constitutional transition playing along the same movements.

An apex court eventually ends up either facilitating or obstructing a normative constitutional transition, and apart from utter irrelevance, these two are the definitive roles it can embody.

The problem of this temporal classification of the downstream roles is that their delimitations are not always clear, especially in constitutional transitions where no break of legality is visible like in Turkey. Additionally, more than often, the case studies revealed how a court in a specific setting would maintain the same overall stance throughout the entire transition, without really making a difference between the two periods. For instance, the Egyptian case is evidence of how the court can adapt its role depending on the specific time within the transitional period. I have categorized the SCCE as being mainly an obstructer of the normative transition as a way to survive through the revolution. If we think of the Egyptian revolution as a whole, as a movement from authoritarianism towards constitutional democracy, the transition has definitely failed. The SCCE never played along the elected parliament and even contributed eventually to install a new authoritarian regime under Sisi. Of course, if one looks at the role it played in the constitution-building process, we would specifically see two different roles; for the 2012 Constitution the SCCE contributed to try and repress the constitution-making process, whereas for the 2014 Constitution, it was on the front to facilitate the constitution-building process. Therefore, it is clear how the court played specifically two distinct roles in the constitution-building process. However, it is not arguable that the two roles were played in the constitution-making process of two different constitutions and none of both (especially the second one) was showing the necessary inclusivity to reach a respectable degree of democratic legitimacy. In other words, facilitating an undemocratic constitution-drafting process basically boils down to the apex court obstructing the overall march towards constitutionalism. In fact, it is not even easy to really comprehend whether either of both constitutions had even the slightest chance to be democratic from the beginning. This example shows clearly how this way of characterizing the role of courts exposes many analytic complexities, even though the case study revealed clearly how at the end of the day the SCCE was overall an obstructer of the transition.

I. Role in the Constitution-Drafting Process

With the information gathered in the case studies, I attempted to come up with a practical framework to assess the role of courts in either obstructing or facilitating the constitution-drafting process. This will allow further research to fill the framework in the future. Constitution-drafting is a complex process, in which many factors influence the short-term outcome, as well as the long-term effect on the new constitutional democracy. Three are the major elements within this process that an external institution, like a judicial body, can influence: subject, process and object.

1. Subject

The subject of the constitution-drafting process is the constituent power. I have already mentioned the dispute around the concept of constituent and constituted power. However, when it comes to the role of an apex court in obstructing the constitution-drafting process, one pregnable element is clearly whoever is drafting the constitutional text.

This reminds of the Egyptian case, where the fate of the second Constituent Assembly was probably going to be the same of the first one by hand of the SCCE, were it not for the swift drafting of the 2012 Constitution and the repressive politics of Morsi's government and supporters against the well-functioning of the court itself.

An even better example is Turkey and the TCC's politics of political party banning. Especially in a process of reform, banning the ruling party is basically like attacking the constitution-making subject. In this sense, the TCC tried to suppress the AKP's reforms by attempting to ban it.

Attacking the foundations of the constitution-drafting process is an effective strategy to obstruct it; a defensive stance towards the constituent power can instead facilitate the entire process.

2. Process

Indeed, the next element that obviously allows an apex court to influence the constitution-drafting process is the procedure itself.

The previous chapter has proven how pluralism and the seeking of consensus among the diversity of a country is key (among other factors) for the peaceful transition and ultimate success of the same. This indicates the importance of

a hypothetical role that an apex court could play when it comes to making sure that the process of transition allows for said inclusiveness to be facilitated.

The constitution-drafting process is commonly decided unilaterally by the revolutionary forces, multilaterally at the round table through negotiation, or by parliament and/or government in the case of a reform or revolutionary reform. Depending on the constitution-making form, the outcome of these talks (that is, the outline of the transition process) is typically entrenched in transitional documents, *interim* constitutions or constitutional amendments. Hypothetically, these could be contested in court provided that a court exists and that the constitutional order in force allows for it. In order to facilitate the transition an apex court can try and uphold the rules of transition, provided they allow for inclusiveness, and reject any challenge that could possibly arise.

In Turkey, for instance, the year 2007 saw the AKP win a majority, and its alliance with the MHP allowed them to reach the two-thirds needed to pass constitutional amendments without having to go through a referendum. This situation opened the doors for almost unrestricted constitution-making; one that was almost clearly *not* inclusive. The same year saw Gül of the AKP being elected president, which meant that the power to constitution-making of the AKP was basically incontestable. In other words, the rules for constitutional revision laid down in Art. 175 of the1982 Constitution (following the 1987 constitutional amendments) made it theoretically possible for powerful parties (*in casu*, the AKP) to gain unilateral constitution-making power. This is not unproblematic. In an interview with Al Jazeera, Levent Korkut, a law professor for Istanbul's Medipol University, said that '[t]o be able to take action against the president and his ministers, the parliament needs a two thirds majority, and this is practically impossible if the majority in the parliament and the president are from the same party.'[1728] The same goes for the constitutional amendments procedure. Allowing majoritarian constitution-making instead of consensus-seeking reveals a faulty system from the start. Opposition (including the judiciary) does not have the possibility to contrast the amendments procedure if no challenge is brought before it.

1728 Birce Bora, "Turkey's Constitutional Reform: All You Need to Know," *Al Jazeera* (January 17, 2017), https://www.aljazeera.com/indepth/features/2017/01/turkey-constitutional-reform-170114085009105.html (accessed September 20, 2019).

In South Africa, pluralism proved to be a key factor in the success of the constitution-building process. The fact that during the negotiations for the IC (and the process of transition), no apex court was yet established made it impossible to challenge any result the Multi-Party Negotiating Process would have come up with. Instead, would the representative formation of the Constitutional Assembly not have been rightly composed (i. e., following the IC's provisions), we could have imagined that the CCZA would have been competent to deal with a challenge made in this sense.

3. Object

Self-evidently, the last element of a constitution-drafting process that a court could hypothetically confront is the product of the process before it comes into force. This is more common, as many courts around the world are empowered (or empowered themselves) to review, *inter alia*, constitutional amendments. This reminds me, for instance, of the TCC reviewing entire constitutional amendment packages and trying to interfere with the reform process by declaring certain constitutional amendments 'unconstitutional'. This raises question on the review of unconstitutional constitutional amendments. The CCZA instead was empowered to certify the constitutional draft and in this sense, it was given a front row seat to contribute to the object of the constitution-drafting process. This is a unique chance for a court to act either obstructing or facilitating the normative constitutional transition.

II. Overall Role of the Apex Court throughout the Normative Constitutional Transition

What I have witnessed in the short list of case studies is that it is not common to see an apex court play two distinct roles in both the constitution-drafting process and the period of constitutional consolidation. This study has produced clearer results when the temporal distinction (between before and after the enactment of the constitution) was not made, but rather when both periods of the normative constitutional transition were fused, and the overall role of a given apex court throughout the entire process was assessed. Such role throughout the normative constitutional transition has proven to always coincide with

the role a court plays after the enactment of a constitution, but not always with the role a court plays before it.

1. Downstream Obstructer of the Normative Constitutional Transition

This research has revealed that obstructing the normative constitutional transition means in any case safeguarding interests that are against the success of the transition. Analyzing the case studies, I could find that interests other than the facilitation of the normative constitutional transition boiled down to at least two categories: on the one hand, the safeguard of interests that are not of the court itself, but of the former (or still present) hegemony, and on the other hand, interests that are the court's own, such as the preservation of its own status or political interests.

a. Safeguarding the Old Regime's Interests: A Hegemonic Preserver

This is the typical scenario of an authoritarian regime seeking to withdraw from active involvement in politics, but does not disappear completely. Rather than trying to maintain power indefinitely, which could end up in an upfront civil war, or because the authoritarian power sees an imminent transition and all of its political power vanishing, it might try to maintain some of it through the apex court (among other institutions). This reminds us directly of the dual state scenario. This can thus be a rational solution once an autocratic regime realizes it cannot survive. In such cases, it can be that the autocrat seeks to have the core policies or principles of its regime not overturned in the transition. A typical example would be Turkey. This would require an unbiased apex court that acts as a *hegemonic preserver*. This shows how apex courts can be empowered in a way that they would support the autocratic regime once it is gone as the *protector of older values* of the autocratic regime. This role of safeguarding the old regime's interests was labeled by Hirschl as 'hegemonic preservation', in which a declining power employs courts to secure its principles and policies by, for instance, limiting downstream actors.

Due to their function of maintaining a political order, constitutional justices sometimes serve certain groups as 'allies.' This is shown by Hirschl in his hegemonic preservation thesis. Sociopolitical elites and their political

representatives try to maintain their status in a situation in which a loss of their 'hegemony' towards aspiring new social groups threatens. Under this theory, together with economic elites, who see in the constitutionalization of rights the possibility of limiting the new government and pursuing a market-friendly agenda, as well as the judiciary, who want to expand their influence and reputation through constitutional control, these actors form a 'strategic alliance': through the constitutionalization of certain rights and the establishment of a constitutional control, their status or interests are to be protected from changes through normative constitutional transition.[1729] In authoritarian regimes, the function of securing power and institutionalizing domination is the reason why apex courts are established, even if they can limit the regime's exercise of power as was the case of the SCCE under Mubarak's regime. Ginsburg and Moustafa point out that courts serve, among other things, to legitimize the regime, function as instruments of social control, or are established to strengthen regime cohesion and present investors with a credible guarantor of property rights.[1730] However, these functions can only be performed credibly by apex courts if they are granted a certain degree of autonomy. Thus, apex courts can make decisions that are contrary to the interests of the regime. This can be justified by the judges' professional understanding of their office, as well as by an institutional interest in extending their mandate and their significance in the political system. However, the constitutional judges usually do not touch the core interests of the regime. An exception would certainly be again the SCCE under Mubarak's regime. The same regime has many options at its disposal, such as changes in competence and procedures to limit the influence of the court.[1731] This was the case in both Turkey and Egypt when the courts were then packed.

Considerations of apex courts as a means of securing power and an obstacle to political change can be illustrated using the examples of the Turkish and Chilean constitutional courts.

According to Belge, the establishment of the TCC after the military coup with the 1961 Constitution can be explained by the fact that the Kemalists had tried with the apex court to protect their interests against elected

1729 Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 10–16.

1730 See, Moustafa, 21–40; Moustafa and Ginsburg, 4–12.

1731 See, 14–21.

majorities.[1732] Belge attributes this founding context to the 'selective activism' of the court, which often opposes parliament with its decisions and at the same time does not protect the rights of certain social groups, especially Islamic and Kurdish. Especially since the establishment of the authoritarian constitution in 1982 (after another military coup in 1980) up to its packing in 2010, the court has been characterized as an institution that often stands in the way of political change.[1733] The 1982 Constitution in fact, seemed to envisage a similar role for the TCC, which served to discipline political Islam for many years.

After it was established in 1970 and abolished after the military coup in 1973, the Chilean Constitutional Court was re-instated in 1980 with the new constitution of Augusto Pinochet.[1734] The new constitution and the *Tribunal Constitucional* were primarily intended to institutionalize the political and economic order established by the military on a permanent basis confirming thus the thesis of hegemonic preservation.[1735] The *Tribunal Constitucional* lingered on playing this role in the course of the transition to democracy after 1990: 'in the vast majority of cases, the constitutional court remained faithful to the mission assigned to it by its designers […].'[1736] At the same time, the *Tribunal Constitucional* also stepped in to the shoes of the guarantor of the exit bargain and fulfilled with the ousting of Pinochet and the constitutional amendments of 1989.

1732 See, Belge, 656–57, 63.

1733 See, Asli Ü. Bâli, "The Perils of Judicial Independence: Constitutional Transition and the Turkish Example," *Virginia Journal of International Law* 52, no. 2 (2012): 320. See also extensively, Haimerl. 14–15.

1734 Norbert Lösing, *Die Verfassungsgerichtsbarkeit in Lateinamerika* (Baden-Baden: Nomos, 2001), 278.

1735 Elisabeth C. Hilbink, "The Constituted Nature of Constituents' Interests: Historical and Ideational Factors in Judicial Empowerment," *Political Research Quarterly* 62, no. 4 (2009): 791; Javier A. Couso, "Trying Democracy in the Shadow of an Authoritarian Legality: Chile's Transition to Democracy and Pinochet's Constitution of 1980," *Wisconsin International Law Journal* 29, no. 2 (2011): 398.

1736 See, Javier A. Couso and Elisabeth C. Hilbink, "From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile," in *Courts in Latin America*, ed. Gretchen Helmke and Julio Rios-Figueroa (New York: Cambridge University Press, 2011), 105.

b. Safeguarding Interests Other than the Old Hegemony's: Opportunism and Idealism

I believe there might be more sub-roles for an apex court as obstructer of the constitutional transition other than protecting an elite social group's interests and the Egyptian case might help explicate at least another one.

Even though, in my personal opinion, the Egyptian case does not fairly represent an example of hegemonic preservation, this theory allows to understand the reason why the SCCE was not dissolved. It does however not fully explain the comportment of the court itself. There is a difference between being created as an agent for hegemonic preservation and actually acting like one, and I think that the SCCE did not act as one. Still, it did not facilitate the normative constitutional transition. So, what role did it play? In my opinion, if we look at the motives and strategy to obstruct a normative constitutional transition, an apex court can do so, either by preserving the old hegemony, or by supporting anything that is not the old regime. Generalizing, this will most likely end up being the following:

- Acting autonomously for the safeguard of its own status or interest (*autonomous opportunist or idealist*), or/and
- in the case of a politically polarized transitional setting, siding with one of the revolutionary forces (such as the military in Egypt), instead of acting for the entire diversity of the polity (*ally-seeking opportunist or idealist*).

In the months following the fall of Mubarak, various forces struggled to shape the social and political order, and to draft a new constitution to replicate and anchor it. The SCCE, an organ of the 1971 (suspended) Constitution, has played the role of an actor opposed to a profound change in the political system, which was the wish of many Egyptians, especially the activists of the Tahrir Square.[1737]

Once Mubarak handed power over to the military, the SCCE was vested with an important concession from the SCAF. In June 2011, the SCAF amended the law on the constitutional court by decree. On the one hand, the Egyptian president should in future only be allowed to choose the president of the court from the three longest serving members of the court. On the other

1737 Haimerl. 60 – 62.

hand, the plenary assembly of the court had to confirm the election.[1738] With this provision, the SCAF prevented a later elected president from appointing a Chief Justice from the outside. This almost formalized the informal norm that had been in force until 2001 and according to which the most senior judge had always been appointed. In other words, the SCCE had worked as a self-perpetuating body more by custom than by law until 2001. This was now legally formalized. Brown describes the legislative amendment as a strategic but also symbolic step of the SCAF: 'the effect was to insulate the SCC[E] from all other actors though also perhaps to inculcate however subtly a sense that the SCAF [...] was the best protector of the judiciary."[1739] This did not necessarily make the SCCE an ally of the SCAF, but surely it played in their favor.

Hirschl's hegemonic preservation thesis, which establishes constitutional courts to protect the status and rights of certain elites from change by electoral majorities, the non-dissolution of the SCCE and the amendment of the law of the SCCE by the SCAF can be understood. The Egyptian military saw the SCCE as an appropriate institution to preserve its economic and political position in the new order and to give legal legitimacy to its rule after the repeal of the Constitution.[1740]

Instead, the new Islamic-led People's Assembly considered the SCCE as a potential adversary and an institution of the old regime. Therefore, again, in May 2012, SCCE law amendments were discussed: Brown therefore sees the discussions on the amendments to the law as a means of exerting pressure on the SCCE.[1741] The planned legislative changes were interpreted by the court as an attempt by parliament to limit its control function.[1742] In other words, Parliament was trying to frighten the SCCE in order to serve its own interests. To put it in a nutshell, with the first amendments of the SCCE's law, the SCAF positioned itself as best defender of the judiciary by insulating the SCCE from other branches of government. Instead, the People's Assembly sought to change the SCCE's composition and functions. These events boiled down to the SCCE eventually issuing

1738 See, Aziz, 54.

1739 See, Brown, "The Egyptian Political System in Disarray".

1740 Naeem.

1741 See, Nathan J. Brown, "Cairo's Judicial Coup," *Foreign Policy* (June 14, 2012), https://foreignpolicy.com/2012/06/14/cairos-judicial-coup/ (accessed September 20, 2019).

1742 See, El-Nahhas.

its rulings of the parliamentary election law and the disfranchisement law against the parliament and the presidency.

So, even though the SCCE was thought to be given a large amount of autonomy in order to protect the SCAF's interests (not those of the old Mubarak regime), during the transition, the SCCE seemed to take on more of a lone survival mission and fight its own battle. Even though it ended up fighting for a similar stance as the military, it did so probably more for a sense of opportunistic survival choice against an increasingly growing Islamic political power, rather than defending the military's interest. In certain cases, both were one and the same, but not always. The parliamentary election law case, in fact, saw the SCCE striking down legislation initially enacted by the same SCAF. Additionally, in comparison with the TCC, which explicitly defended the Kemalist's values and thus took a more autonomous idealistic stance (but still preserving the hegemony), the SCCE did not explicitly defend the military's interests, even though obstructing the Islamic-led transition was for both a core objective (even if the motives differed). Of course, this opportunistic survival tactic reveals itself especially when the political spectrum is polarized, and the court can stand with the one or the other power in order to safeguard its own position.

In sum, the Egyptian case has revealed both alternatives of safeguarding interests other than the old hegemony's: it started by acting rather autonomously against the elected transitional powers (both opportunistically and idealistically) and ended up siding with the military.

There are also arguments against my idea of strategic opportunist or idealistic roles; or rather, there are courts that made the wrong strategy choice. In Egypt, there was a commonality with the TCC: during the transition, both were apex courts struggling against a new political movement. Probably, a better survival strategy would have been to play along the new uprising political forces. In both cases, there is a possible explanation for having chosen the opposition strategy: in Turkey, hegemonic preservation as such; in Egypt, partly hegemonic preservation as the reason for his non-dissolution, but mostly a long tradition of strong judicial independence and an irreparable friction with political Islam, and thus a slight indication of idealism.

2. Downstream Facilitators of the Normative Constitutional Transition

I do admit that the boundaries between roles can overlap. The performance of apex courts in transitions is a complex matter and one can merely try to add some structure to it. Courts will, however, possibly end up changing strategy and role within the constitutional transition depending on a myriad of factors, especially when it seeks to obstruct the transition.

I did not add the above-employed motive-based division to categorize the downstream facilitators roles. Of course, it is theoretically possible to think of a court facilitating the transition for different motives other than supporting new ideals and principles, such as survival in the case of an already established court, like in the case of the obstructer of a transition. However, I did not find this distinction to be relevant in the case of a downstream facilitator, and here is why.

To explain this phenomenon, I would like to use a metaphor: a transition is like a river that flows constantly in one direction once it is triggered. To obstruct it, an apex court can come up with different strategies, such as paddling against the flow or reaching the sides of the river and hold tight, whereas to facilitate it a court can basically either be simply deferential and/or paddle in the direction of the flow. The destination going with the flow (no matter how, pro-actively or passively) will be constitutionalism. The destination going anywhere other than where the flow goes is *not* constitutionalism; what it is, can be manifold.

A facilitating apex court will end up upholding, consolidating and interpreting the new constitutional order, without exceptions. The role itself would be the same no matter the motives. Instead, when it comes to the obstructer role, the difference between hegemonic preserver and safeguard of its other interests or status changes the entire strategy and role of the apex court.

Of course, in politically polarized setting, apex courts can side with the democratizing forces by for instance becoming the trigger of a constitutional transition. Nevertheless, if they indeed triggered a transition to constitutionalism, the same nature of facilitating constitutionalism will show that no matter what the motives were, the interests defended are always the same and so is the role they play: to facilitate the process of constitution-drafting and uphold and consolidate the new constitutional

order. Whether or not the apex court seeks allies in facilitating the constitutional transition is here a question of behavior and not of role.

a. Downstream Guarantor of the Exit Bargain

It can happen that the autocrat may also be preoccupied for the property rights and liberties of its followers, which are probably threatened by the transitional movements. Looking from this point of view, the very establishment of the CCZA (and the certification processes) was a compromise reached by the autocratic regime so as not to completely lose their political power in the new South Africa and, of course, to facilitate the protection of property rights for the White minority. In other words, the apex court can act as a guarantor of the exit bargain, providing some sort of security once the autocratic regime withdraws.

I admit, this role fits the description of hegemonic preservation, yet hegemonic preservation is more absolute in obstructing the transition through the protection the old regime's interest, while the guaranteeing the exit bargain represents a compromise or concession to facilitate the constitutional transition. Hegemonic preservation goes way beyond the mere guarantee of the exit bargain.

Sometimes it might be necessary for a constitutional transition to take place as peacefully as possible, so that the departing autocracy and the democratization movements reach some sort of agreement. The departing autocracy might need to give up some of its power first, and the democratization movements must guarantee the departing autocracy that they will maintain a certain amount of power in the new country (or at least have a shot at the elections without being banned). Under these circumstances, the autocracy might accept the handing over of power with less irritation.

Ginsburg argues in support of this role by focusing on minorities in general (which can include departing autocratic minorities, like the White minority in South Africa) and suggests 'that courts provide political insurance to prevent policy reversal and minimize the risks of the future. [...] But the court plays a basically conservative role of preserving a bargain against future disruption."[1743]

1743 See, Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*; "Courts and New Democracies: Recent Works," 728.

Two examples come to mind when thinking of this scenario and role. On the one hand, Chile, as some accounts of Chile's negotiated transition under Pinochet fit this description. The Constitutional Court of Chile, which was established by 1980 Constitution under Pinochet, was initially specifically designed to protect the military's privileges in the event of a switch to democratic rule.[1744] On October 14, 1988, 9 days after the triumph of the 'No' option in the plebiscite on the continuity of Augusto Pinochet in power, the *Concertación de Partidos por la Democracia* (English: *Coalition of Parties for Democracy*) indicated that they would initiate dialogues to achieve a 'National Agreement for Democracy and Constitutional Consensus,' aimed at generating reforms to the 1980 Constitution. Among the sought changes, for instance, property rights and an institutional veto for the departing autocrats were entrenched in the Constitution following extensive constitutional amendments in 1989.[1745] The same Ginsburg stresses how '[*l*]*os tribunales fueron, entonces, durante mucho tiempo un efectivo mecanismo de refuerzo inferior de la amnisti´a y desempen˜aron un papel crucial para la constitucio´n autoritaria transformadora, un garante.*'[1746] This passive guarantor of the exit bargain stance started to fade away in the early 2000 s, when the Constitutional Court finally began to relativize the effects of the amnesty laws, which was one of the bases of Pinochet's transition.[1747]

1744 See, Daly, "The Judiciary and Constitutional Transitions," 22.

1745 Abraham F. Lowenthal, "Chile Prepares for Yes-or-No Vote That Could Send Pinochet Packing," *Los Angeles Times* (September 18, 1988), https://www.latimes.com/archives/la-xpm-1988–09–18-op-3102-story.html (accessed September 21, 2019).

1746 See, Ginsburg, "¿Fruto De La Parra Envenenada? Algunas Observaciones Comparadas Sobre La Constitución Chilena," 14–15. In English: 'the courts were an effective downstream enforcer of the amnesty for a long time. They were thus a crucial mechanism of the transformational authoritarian constitution, a guarantor.'

1747 So, in recent years the Constitutional Court of Chile started changing its mantra of avoiding politics and maintaining a conservative approach even after the return to democracy. The key factor, which contributed to this paradigmatic shift, is apparently mainly ideological and institutional: 'ideologically, regional trends toward greater prominence for rights-oriented constitutional discourse have changed the views of Chile's legal academy and thus its judges. On the institutional side, the transfer to the constitutional court from the supreme court of the *recurso de inaplicabilidad*, which allows lower courts and litigants to challenge legislation for unconstitutionality, greatly expanded judicial standing and caseload. See, "Courts and New Democracies: Recent Works," 736. For a comprehensive record of this evolution of the Chilean Constitutional Court, see Couso and Hilbink.

On the other hand, South Africa as a guarantor of some rights of the old regime.[1748] The CCZA was not designed to protect the old regime, but rather during the political negotiations concerning the transition, its establishment acted as a safeguard of the previously ruling NP's interests (and of the White minority in general). The NP negotiated a wide-ranging list of judicially enforceable rights as a requirement of handing over power to the ANC. As Hirschl argues, there was a 'near miraculous conversion to constitutionalism and judicial review among South Africa's White political and business elites during the late 1980 s and early 1990 s, when it became clear that the days of *apartheid* were numbered and an ANC-controlled government became inevitable.'[1749] A miracle because for decades in South Africa's history, the White elite had rejected the concept of judicially reviewable human rights, as law would have then functioned as rather a restraint than an instrument of repression. However, then it became soon obvious that *apartheid* could not be sustained and therefore the White authoritarian regime changed views and proposed its own idea of a bill of rights, which consisted not only in preservation of their rights as a probable minority given the most certain electoral loss, but also to preserve their economic influence.[1750] The idea was that said interests would be respected under the new constitutional order. In this sense, this role of the CCZA was necessary for the very success of the constitutional transition, so as to give the old regime some security in the new order and thus the *apartheid* regime was more willing to give up its power. Ginsburg's insight is very helpful to understand this role:

> 'Crucially, the existence of a tradition of autonomous law that had operated even during apartheid made it possible for the [ANC] to make a credible commitment to the [NP]. Without a tradition of law, the [NP] might not have been willing to trust the new majority to uphold its promises. But the existence of courts that upheld the law in the authoritarian phase, even when it conflicted with the regime's demands, made law a viable solution for the postauthoritarian commitment problem.'[1751]

1748 See, Daly, "The Judiciary and Constitutional Transitions," 22.

1749 See, Hirschl, "Preserving Hegemony? Assessing the Political Rights of the Eu Constitution," 281.

1750 See, Meierhenrich, 202 – 05. After *apartheid* where would be inevitably pressures to redistribute once the Black majority took over. Hence, securing property rights during the constitution-building process and establishing a new apex court to guard them were ways of entrenching the power and especially the wealth of the old White elite.

1751 See, Ginsburg, "Courts and New Democracies: Recent Works," 729.

In fact, we have seen how the CCZA ended up overseeing the transition throughout the entire transitional period and also facilitating it when it played a variety of roles helping to shape the new constitutional vision to integrate global human rights discourse. However, the same CCZA arguably would not have been established without its capability to function as a downstream guarantor of the exit bargain. In this regard, Ginsburg remarks:

> 'The core elements of this bargain—democratic rule in exchange for security of property rights and limited transitional justice—have remained intact against great political pressure, and the country's courts have been part of the reason. This has led to criticisms, to be sure, but all in all has garnered respect for the [CCZA]. And it would not have been possible without a long tradition of law as both sword and shield in the predemocratic period."[1752]

These examples reveal how an apex court playing the role of guarantor of certain rights of the withdrawing regime can actually mean the contrary to obstructing the normative constitutional transition, and that without it, the transition might have failed at its birth. In other words, the very existence of the CCZA played this role; the fact that the CCZA was established was done so that it could facilitate the reaching of a consensus in the constitution-making process. The reason thereof is simple: in this case apex courts are designed to uphold certain safeguards for the departing autocrats, which are a requirement for a peaceful handing over of power, a necessity for the constitutional transition to take place in the first place, especially if one does not want a break of legality for a series of reasons like in South Africa. On this last point, Ginsburg recalls a classic and fascinating example of the judiciary playing this role in order to avoid a revolutionary break:

> 'The classic account of French judicial politics traces fear of gouvernement des juges back to the French Revolution, in which the Magistrates served as a reactionary force and thus could not guarantee even their own heads. The judges' political decision is believed to have continuing institutional con sequences two centuries later. One can imagine, however, an alternative French history in which the judges induced the King to step down through guarantees that his property would remain intact. In such an instance, French attitudes toward judges (and much else) might be different. Regardless of whether the particular counterfactual story here is credible, the basic point is that

1752 See, ibid.

> judges can serve democracy by upholding the rights of the former dictators because such institutional guarantees can induce resignation without revolution."[1753]

Of course, this role is not easy to categorize, because allowing a court to be the guarantor of the exit bargain could easily be categorized as a court playing an upstream role, such as kick-starting a stalled transition. In this sense, the promise of an exit bargain can unlock a deadlock in the negotiations indeed, yet the constitutional entrenchment of said promise is not made at the hand of a court. The court is part of the bargain itself as a guarantee that the bargain is uphold. Therefore, the veritable court's role is actually played downstream *after* the enactment of the constitution.

b. Upholding, Consolidating and Interpreting the New Constitutional Order

Legally and institutionally consolidating the new constitutional order once it is established and contributing to its well-functioning is a far more 'ordinary' function, or common, yet it becomes crucial in a transition. Within this period, the constitution has already been enacted, so courts can become crucial actors to the structuring of an environment where the new constitution can function now and in the future. The enactment of the new constitution (that is, the constitution-building process) is only the first step of the transition, and a step in which courts can play a limited role as the transition decision is mostly in the hands of politics. In the period of time after the constitution was enacted, the constitutional transition is fragile, as all elements of constitutionalism are newly established and thus there is neither institutional nor cultural consistency of these elements. The transition can easily still fail, and therefore the court still has an important role to play.

Of course, this can happen in many ways. Ginsburg reviewed a series of books on the role of courts in new democracies, and highlights how:

> '[S]cholars are using a variety of methodologies to understand the wide range of roles of courts in democratic consolidation. [His] account of the different roles courts play over time through democratic transition suggests that the consolidation function, in which courts work in support of various conceptions of democracy, is predominant. Scholars seem to be attracted to stories of judicial empowerment, and the consolidation of democracy involves an expansion in judicial power and relevance, in a wide range of

1753 See, ibid., 728.

> arenas. The full effect of the positive literature is to put to rest the idea of the countermajoritarian difficulty. Myriad judicial roles are consistent with vigorous democratic governance, as judges both complement and supplement other political institutions.'[1754]

In a transition, a court can thus become important sites of contestation between elements of the old regime and new, in other words, important devices for facilitating transitional justice allies of the new order, or even systematic dismantlers of the legal infrastructure of the old regime.[1755] This to say that courts are not typically in the center of the transition decision, nor in the one of constitution-building, but are strongly involved in the phase of consolidation of the new constitutional dispensation. In this sense, apex courts serve as a tool of the newly democratic constitutional regime.

The judiciary does so almost exclusively by *upholding and interpreting the new constitutional text*, including calibrating the new horizontal and vertical separation of powers and addressing the scope of constitutional rights, while tackling authoritarian-era legislation and practices that are incompatible with the new constitutional order.

Of course, which function reveals the most transitional character of an apex court depends on the case-to-case basis; which matter is most important for the constitutional transition to succeed is reflected by the character of the authoritarian regime. Naturally, identifying the transitional matter is not always straight forward or easy. In South Africa, in my opinion, and as already explained, the main tool of *apartheid* was repressive policies based upon the segregation of races. For this reason, the element of establishing of local government within the bigger context of a strong decentralization process (if not even a federalization process) was in my opinion the core transitional matter of the transition (and transformation) from *apartheid* to South African democracy. The mix of cases that defines a court's role has much to do with its ultimate success or failure. The diversity of the cases and the wide scope of possible methodologies to employ in order to assess the role of courts in a constitutional transition makes this subject even more complex and difficult, but at the same time fascinating and intriguing. Understanding the role of courts in a transitional context probably requires a synthetic approach that involves first a thorough and

1754 See, ibid., 735.
1755 ibid., 729.

deep study of each and every case involved. Factors that might influence the performance of each court could be infinitive and therefore, a knowing the institutional and cultural accounts of every case study is paramount.

With this in mind, the outline of the apex courts' role of upholding the new constitutional dispensation in facilitating the normative constitutional transition boils down to two (non-exhaustive) categories:

– *institutional structure* of the new constitutional order (that is, a court dealing with the establishment of the new constitutional structure) and
– its *legal foundation* (that is, a court dealing with the consolidation of constitutional rights and principles in the new order).

aa) *Calibrating the Institutional Structure*

Frequently, constitutional allocations of powers are imperfect and unclear, especially right after the enactment of a new constitution. Therefore, there is a necessity for an institution to resolve various political conflicts among either branches or levels of government. Hence, an important role of an apex court can be to serve as the archetypal 'third party' to adjudicate inter- or intragovernmental disputes over powers and competences.

Several works have been published on federal disputes and the role of courts in calibrating the federal structure of a state.[1756] I have however demonstrated the enhanced importance this practice takes on in a transition to constitutionalism. I will not linger any further on the importance of decentralization in the process of constitutionalizing a former authoritarian state and the South African case study, which shows a far-reaching example of this role. The CCZA contributed greatly both to establishing local government and defining the contours of the South African federal system.[1757]

1756 See, for instance, Popelier; Nicholas Aroney and John Kincaid, eds., *Courts in Federal Countries: Federalist or Unitarists?* (Toronto, Buffalo, London: University of Toronto Press, 2017).

1757 See, for instance, Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government." For a brief overview of the South African (quasi) federal system, see Fabrizio E. Crameri, "South Africa's Quest for Power-Sharing," *50 Shades of Federalism* (2019), http://50shadesoffederalism.com/case-studies/south-africas-quest-for-power-sharing/#more-1009 (accessed November 15, 2019).

bb) *Consolidating the Legal Foundation*

1) Addressing the Scope of Constitutional Rights

Courts facilitating the normative constitutional transition have proven to be major actors in addressing the scope of constitutional rights in order to create a new culture of such rights in the new era. This role encroaches greatly on the empirical constitutional transformation and has great effects outside the boundaries of the law. Still, it can allow also the normative constitutional transition to get ahead. This thesis has shown how an apex court can be a precursor for human rights enforcement, and sometimes even the tip of the spear when it came to upholding the values and principles of the new constitutional order. I have also shown how constitutional rights, as elements of limited governance, are instrumental in the working of democracy (especially political rights) and the safeguard of the rule of law through the enforcing of the vision of constitutional transformation (especially civil and socio-economic rights).

The Colombian Constitutional Court is an exceptional example for an apex court being a consolidator of constitutionalism, especially through the adjudication of constitutional rights. The establishment of the Constitutional Court in 1992 introduced a deep institutional change. The court was vested with far-reaching review powers as the protector of the new constitution and ended up adopting a firm stance from the beginning. Very flexible standing meant that the Court's docket sprouted rapidly: by mid-90 s, an average of 800 rulings were delivered yearly. Two matters in particular I would like to present in order to reveal the Colombian Constitutional Court's contribution to facilitating the transition.

– On the one hand, the Constitutional Court of Colombia was a pioneer of the implementation of socio-economic rights. Above all, its articulation of an unenumerated right to *minimo vital* (that is, a subsistence minimum). The subsistence minimum is a right of the social state, which is classified as a social right to enjoy benefits and minimum income, which ensure everyone's subsistence through a decent standard of living, as well as the satisfaction of basic needs. As it is not expressly recognized in International Law or in the constitutional order of most Latin American states, it is called a *derecho innominado* (that is, a 'constitutionally unspoken right') and is developed mainly from jurisprudence and doctrine. With respect to the jurisprudence, the Constitutional Court of

Colombia made important contributions to this concept through several sentences.[1758] In Colombia, this right was introduced by ruling T426/92, in which the Constitutional Court ruled as follows:

> 'Toda persona tiene derecho a un mi´nimo de condiciones para su seguridad material. El derecho a un mi´nimo vital – derecho a la subsistencia como lo denomina el peticionario – es consecuencia directa de los principios de dignidad humana y de Estado Social de Derecho que definen la organizacio´n poli´tica, social y econo´mica justa acogida como meta por el pueblo de Colombia en su Constitucio´n."[1759]

In the first years, this right was outlined as a right accessible for specific vulnerable individuals, but it progressively expanded to new classes of people, eventually turning into a general socio-economic right available also to the middle class in the aftermath of an economic crisis. This entailed a cautious development of the court's role in a context of political instability and economic insecurity, eventually protecting more and more classes of the people through the exercise of abstract review. In other words, '[t]he court, in short, created its own demand."[1760]

– On the other hand, the Constitutional Court of Colombia protected the democratic process when it invalidated the referendum that would have allowed incumbent president Alvaro Uribe to bypass term limits and be

1758 See ruling of the Constitutional Court of Colombia Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-426/92 (June 24, 1992); Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-011/98 (January 29, 1998); Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-384/98 (July 30, 1998); Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-1002/99 (December 9, 1999); Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-148/02 (March 1, 2002); Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-391/04 (April 29, 2004); Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-249/05 (March 17, 2005), among others.

1759 See, Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision T-426/92 (June 24, 1992). Translation: 'everyone has the right to a minimum of conditions for his material security. The right to a vital minimum – the right to subsistence as the petitioner calls it – is a direct consequence of the principles of human dignity and the rule of law that define the just political, social and economic organization embraced by the people of Colombia as a goal in its Constitution.'

1760 See, Ginsburg, "Courts and New Democracies: Recent Works," 733.

reelected for a further time. With this sentence that declared unconstitutional the referendum seeking the second re-election of the president, the Constitutional Court untied the knot that was holding back the start of the next presidential campaign in Colombia and thus served arguably an important role in preserving political competition.[1761]

2) Addressing Authoritarian Era Laws and Practices

Frequently, the rule of law suffers when the judiciary ignores demands of transitional justice and the holding accountable elements from the past regime. However, from a political perspective, such a role can be helpful in furthering the consolidation of democracy and the legitimation of the new regime in the eyes of those who suffered under the old one.[1762] Hence, a consolidation function particular to new democracies involves dealing with the legacy of the past. This is mostly relevant when the old legacy still retains some powerful positions in the new state.[1763] When this happens, demands for transitional justice are likely to be repressed (and appropriately so, since pushing too hard can undo the democratic turn). On the other hand, if the old forces are overcome, there will be substantial requests for coming to terms with the harsh past, and this often, but not always, involves the law.[1764]

The switch from authoritarianism and democracy entails the removal of constraints on the legal system. Once a new constitution is enacted, a long period of transitional justice begins. Laws from the old regime are not necessarily invalidated from one day to the other, because that would mean a collapse of the legal structure of a country. In fact, unconstitutional laws are commonly struck down one by one.

1761 See, Ruling of the Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision C-141/10 (February 26, 2010). See also, El Tiempo, "La Corte Constitucional Le Dijo 'No' Al Referendo Reeleccionista: Era Uribe Terminará El 7 De Agosto," *El Tiempo* (February 26, 2010), https://www.eltiempo.com/archivo/documento/CMS-7304227 (accessed September 23, 2019).

1762 See, Ginsburg, "Courts and New Democracies: Recent Works," 735.

1763 It is not uncommon to find information on 'lustration, judicial rehabilitation, truth commissions, and retroactive justice. When courts and the legal process are involved, complex technical issues arise involving, *inter alia*, the proscription on *ex post facto* law, statutes of limitations, and command responsibility.' See, ibid.

1764 See, ibid., 734–35.

For instance, in Italy the Constitutional Court was not necessarily empowered with any specific transitional role. Yet the Court was able to empower itself to release the legal system of any constraints that the fascist regime might have left behind. After World War II, the situation was peculiar, because Italy was amongst the winners and that meant that there was no real need for a hasty and complete transition, but at the same time it was transitioning from fascism. Therefore, many of the old fascist laws and policies remained on the books. The Constitutional Court of Italy was therefore put in the situation, in which it had to strike down fascist laws one at a time and thus clean up the country from its autocratic legacy. In this sense, it had to build up its own role within the transition, but as Ginsburg adds: 'the timing was one of follower rather than leader in democratization'.[1765] The transitional matter here was that of removal of constraints on the legal system.

This example does not aim at insinuating that courts and laws do not play an important role in a constitutional transition. On the contrary, 'courts become crucial to structuring an environment of open political competition, free exchange of ideas, and limited government. It is only to point out that, in most instances, legal actors are not at the very center of the transition decision but are involved in the phase of consolidation. In that phase, they can play a central role in ensuring accountability and transparency.'[1766]

D. Judicial Irrelevance

Ginsburg adds an additional role to its research: judicial irrelevance. He maintains that an apex court can stay on the sideline and do nothing for either facilitating the transition or obstructing it. In this sense, the court takes on an 'irrelevant' role in the transition and Ginsburg explains it by referring to Hilbink on the Chilean case:

> 'The courts in Chile had internalized an ideology of "apoliticism" along with a hierarchical, self-reproducing institutional structure that rendered judges unequipped and disinclined to take stands in defense of liberal democratic principles before, during, and after the authoritarian interlude. Nor have courts been particularly effective enforcers of the policies put in place at the end of the Pinochet regime,

1765 See, ibid., 729.
1766 See, ibid.

> failing to strike infringements in property rights as well. This seems to be a case where the courts were agents neither of the past nor the future. To be sure, after two decades they began to play a role in transitional justice, indicting General Pinochet before his death in 2006, but overall, the story seems to be one of general irrelevance."[1767]

I only partly agree with this conclusion. While I do agree that there can be courts that stay on the sidelines during a transition and that the Chilean one did indeed not play a major pro-active role, I struggle to accept that their role was 'irrelevant'; the more so in a transitional setting.

Going back to the Chilean case again, I agree that the Chilean Court was indeed one that generally played a regressive role unlike the CCZA, for instance, which was very active and not shy politically, but still a role it is.

The Chilean Constitutional Court was formally created in 1970 under the 1925 Constitution, but was dissolved by Pinochet after the 1973 coup d'état. Nevertheless, the 1980 Constitution reinstated it, and was explicitly designed to guard the military junta's privileges in the event of a transition. Chile's transition to democracy took place in a very peculiar way, that is under the rules established by Pinochet's military dictatorship of 1973–90. Therefore, the 1980 Constitution was adopted by the military government, and it sought to embody a 'protected democracy,' which constraint political pluralism and, of course, safeguarded military tutelage over civilian authorities. This constitution secured property rights, banned political (communist) parties, gave the military a *de facto* veto translated into the power to appoint senators, and established, among other institutions, a Constitutional Court empowered to review legislation prior to its enactment, as a safeguard for the conduct of political actors in the future. Nevertheless, beyond these veto aspects, the 1980 Constitution shows some democratic aspects in form. It contains more fundamental rights than the predecessor 1925 Constitution and it configures the principle of judicial independence, among other characteristics linked to electoral democracy. The distinctive aspects of the 1980 Constitution are those that regulate time and processes rather than substance.[1768] It

1767 See, "The Politics of Courts in Democratization," in *Global Perspectives on the Rule of Law*, ed. James Heckman, Robert L. Nelson, and Lee Cabatingan (London; New York: Routledge, 2009), 183–84. See also, Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*, 735; Ginsburg, "Courts and New Democracies: Recent Works."

1768 See, "¿Fruto De La Parra Envenenada? Algunas Observaciones Comparadas Sobre La Constitución Chilena," 14–16.

especially contained temporary provisions that sought to rule the transition to democracy by explicitly providing for a first eight-year presidential term (1981–1989) for General Pinochet and required the ruling *junta* to submit a presidential nominee for a new second eight-year term to a referendum in 1988. The candidate chosen was, of course, Pinochet again, who then lost the plebiscite in 1988, thus triggering elections in 1989.[1769] In other words, all in all, the *junta* of Pinochet approved the 1980 Constitution seeking the return to power of democratic forces through an orderly transition, but of course, without wanting to lose grip on privileges.

The question arises, within this political context and constitutional framework, was the downstream role of the Chilean Court really irrelevant?[1770] Scholars point out that the Chilean judiciary as a whole played a generally downstream regressive role in the transition to democracy,[1771] even though as noted in the previous sections, the Chilean Constitutional Court indirectly played important upstream roles by helping trigger the transition and was also used as a guarantor of the exit bargain. In this sense, it did play a role in the early stages of the transition. The Constitutional Court of Chile facilitated the transition greatly by helping *trigger* the shift to democracy. In sum, this demonstrates how apex courts, even under an authoritarian regime, are capable of exercising a certain autonomy and allowing space for opposition forces. Chile's Constitutional Court never really played the role it was designed for of hegemonic preserver, but more like a guarantor of the bargain exit. At the same time, thanks to its relative judicial independence, it facilitated the constitutional

1769 See, Claudia Heiss and Patricio Navia, "You Win Some, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy," *Latin American Politics and Society* 49, no. 3 (2007): 163.

1770 Let us not forget that the Chilean court indirectly helped trigger the transition and was also used as a guarantor of the exit bargain. In this sense, it did play a role in the early stages of the transition.

1771 See, Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*; Ginsburg, "¿Fruto De La Parra Envenenada? Algunas Observaciones Comparadas Sobre La Constitución Chilena."; Javier A. Couso, "The Politics of Judicial Review in Chile in the Era of Democratic Transition 1990–2002," *Democratization* 10, no. 4 (2003); "Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970–2010," *Texas Law Review* 89, no. 7 (2011); Barros; Druscilla L. Scribner, "Distributing Political Power: The Constitutional Tribunal in Post-Authoritarian Chile," in *Consequential Courts: Judicial Roles in Global Perspective*, ed. Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (New York: Cambridge University Press, 2013).

transition by allowing the plebiscite to take place fairly and thus triggering the general elections for the new first civilian president and legislature.[1772]

In any case, Daly used the word 'inertia' to describe the court's downstream performance in Chile, a term that I prefer to 'irrelevance':

> 'Under military rule from 1973–90, the judiciary was generally viewed as a passive accomplice of the regime, which respected judicial independence only because judges posed no obstacle to its authority. [...] After the state's transition to democratic rule in 1990 the judiciary initially played a very minor part in consolidating democracy. In particular, due to its deferential posture towards the other branches of government, the Constitutional Court in the post-transition period acted neither as a guardian of the authoritarian elements of the 1980 Constitution nor as a defender of fundamental rights and other democratic values. The Constitutional Court and the Supreme Court remained largely inert [emphasis added], taking a narrow approach to policing legality (e.g., upholding private property rights). In this way, as under the military dictatorship, the courts protected judicial independence at the cost of undermining the integrity of the judiciary.'[1773]

In this sense, an 'inert' court is not an altogether 'irrelevant' court.

In other words, I prefer to distinguish between these two different aspects of the court's performance: the role (judicial irrelevance) and the behavior (judicial inertia or passiveness), although these two aspects do not necessarily coincide. I struggle to accept that a court, especially in a constitutional transition, plays no role whatsoever. This is why I believe that 'judicial irrelevance' is a role that in my opinion remains hypothetical if not impossible. In fact, an inert (or passive) apex court can still play either the role of obstructing or facilitating a normative constitutional transition. It really depends on the context. For instance, non-interventionism during the autocratic regime greatly plays for the autocratic regime, as the apex court does not threaten the status of the regime. Instead, (political) inertia or passiveness during the constitutional transition can mean that the court is indirectly playing in favor of the constitutionalization process, as it refrains from intervening politically, and thus it indirectly respects the separation of powers. Of course, non-intervention in a situation where maybe an intervention would be welcomed to facilitate the transition or to kick-start a stalled one, could

1772 See, Ginsburg, "¿Fruto De La Parra Envenenada? Algunas Observaciones Comparadas Sobre La Constitución Chilena," 14–16.

1773 See, Daly, "The Judiciary and Constitutional Transitions," 17.

maybe implicitly mean the other way around, that the court is willing to let the constitutional transition fail and thus supports anti-democratization movements. In other words, in my opinion, judicial inertia never means judicial irrelevance. The non-performance of a passive or apolitical court theoretically has to surely play in favor of one or the other roles, especially in the context of a constitutional transition. It really depends on the context of the situation. A new democratic regime might dislike a highly interventionist court, whereas another might appreciate and need the help. All this to say that even when a court is passive, it ends up playing one or the other role.

E. Preliminary Conclusions

This chapter attempted to provide an evolution and refinement of Ginsburg's temporal framework for the assessment and categorization of the role of apex courts in a constitutional transition.[1774]

Overall, this study identified several roles that an apex court can play in a normative constitutional transition. Occasionally they act as instruments of the past, preserving the old authoritarian regime's interests, obstructing the new political forces for its or other interests (by acting autonomously or siding with a particular transitional force within a politically polarized environment), or even guaranteeing that an exit bargain is upheld. Sometimes, instead, they serve as agents of the future, upholding the new constitutional dispensation and consolidating the constitutionalist features of the new order. In a tense political situation, apex courts can (rarely) trigger a constitutional transition or repress one; it can also serve as a resolving agent in a stalled political impasse. Finally, an apex court can hypothetically play an irrelevant role, neither facilitating nor obstructing the transition, even though I believe this would be more than rare.

1774 See Ginsburg's framework at Ginsburg, "Courts and New Democracies: Recent Works."; "The Politics of Courts in Democratization." Haimerl hinted at a similar framework at Haimerl. passim.

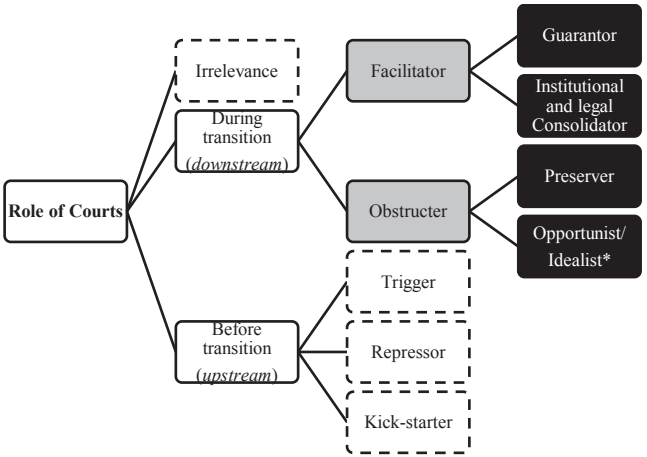

Figure 8 The Role of Apex Courts in the Overall Normative Constitutional Transition

In sum, the initial hypothesis on the role of courts is being confirmed. The roles apex courts play in a normative constitutional transition boil down to mainly two (or three) parts: *facilitating the transition*, *obstructing the transition* and *irrelevance.* This chapter used this framework to understand and analyze specific scenarios of constitutional transition in a series of prominent cases. However, the nature of the analysis is exploratory, and a more in-depth assessment of the cases is expected to refine and expand the framework.

The second hypothesis saw the possibility of the normative constitutional transition being divided into two different phases: the constitution-drafting phase and the one after the enactment of the constitution: *The role an apex court during the constitution-drafting period and after the enactment of the new constitution is possibly different.* This hypothesis is partly confirmed. This research has revealed how it is rare to find apex courts that change attitude once the new constitution is enacted. Commonly, if a court was obstructing or facilitating the constitution-drafting process, it will persist with the same role and behavior once the constitutional document is in force. Nevertheless, this is true when we think of the overall role a court plays throughout a transition. If we look closely, both phases of the normative constitutional transition do have slightly distinctive goals. Whereas the constitution-drafting period focuses on the democratic 'production' of a written constitutional document (i. e., the subject, process and object of the process), once that document is

enacted, the aim shifts towards consolidating the end-product. In this sense, even though courts might in both phases act, for instance, as facilitators, the target of its behavior will roughly differ.

To conclude, the key to legitimize this framework is the understanding of the relation between law and democracy. Law should not be understood exclusively as a product of democracy, but rather democracy that legitimizes the legal system. This is confirmed by the existence of judicial systems in authoritarian regimes. As the political spectrum tenses, an apex court is invested with countless demands for democracy, often dictated by their position within the authoritarian setting.[1775] Hence, as demands for reform or revolution increase, apex courts find themselves in one of the positions already mentioned above.

1775 Ginsburg, "The Politics of Courts in Democratization," 191.

Chapter 9: The Behavior of Apex Courts in a Normative Constitutional Transition between Law and Politics

When explaining the role of judicial irrelevance, I hinted at the difference between role and behavior. The latter is the embodiment of *how* a court played a given role. It is not always an easy (or even necessary) task to assess a pattern of how specifically a court can either obstruct or facilitate a normative constitutional transition. One could probably list several different manners a court could behave in order to pursue its chosen role. However, it all boils down to two: either *active* or *passive.*

Judicial activism, sometimes more than others, is at the core of the performance of apex courts in a constitutional transition. Yet, why is an apex court commonly judicially active during a transition? It was mentioned above how Lassalle maintained that all law eventually, is about the exercise of power.[1776] Therefore it should not be a revelation that in circumstances where the struggle for power is most exposed, that is in constitutional transitions, that also the façade of the law's neutrality (an apex court) exposes itself. I have explained how there are various ways to understand the broad range of the roles courts can play in a constitutional transition. The results of my temporal account suggest that the downstream consolidation function, in which courts work in support of the various elements of constitutionalism, is leading. Within this role, countless judicial sub-roles are consistent with vigorous constitutionalism, as apex courts both complement and supplement other political institutions and the transitional process itself. In this sense, it seems only logical that a common trait of courts in transitional settings is judicial empowerment, and the consolidation of constitutionalism involves an increase in judicial power and relevance.

1776 See, Ferdinand Lassalle, "ÜBer Verfassungswesen: Ein Vortrag, Gehalten in Einem Berliner Bürger-Bezirksverein Am 16. April 1862," in *Ferdinand Lassalle: Reden Und Schriften*, ed. Hans-Jürgen Friederici (Leipzig: Philipp Reclam jun., 1987).

A. Constitutional Review between Law and Politics

The idea of judicial constitutional review was long regarded in Europe as incompatible with the parliamentary form of government. It was first implemented in the USA.[1777] In 1803, in the *Marbury v. Madison* ruling,[1778] John Marshall, Chief Justice of the United States Supreme Court, claimed for his institution the right to examine whether state action was constitutional or not. Since then, it has exercised the task of constitutional review in civil and criminal cases, in addition to its function as the Supreme Court. In this diffuse model, all courts have the power of constitutional review, and the Supreme Court is the final instance responsible for making a binding decision on the constitutionality of a law.[1779] In addition to the USA, this model is primarily to be mainly found in former British colonies (including Canada, Australia and India).[1780]

At the beginning of the 20th century, the idea of a concentrated constitutional jurisdiction developed primarily as a result of the influence of Hans Kelsen.[1781] It differs from the diffuse form in that constitutional review is exercised by the specially designated constitutional courts.[1782]

After WW2, constitutional review in Europe was no longer regarded as incompatible with the principle of parliamentary sovereignty. Rather, as a result of the experience that democratic constitutional orders had been undermined by parliaments and replaced by fascist regimes, a legal and

1777 Silvia von Steinsdorff, "Verfassungsgerichte Als Demokratie-Versicherung? Ursachen Und Grenzen Der Wachsenden Bedeutung Juristischer Politikkontrolle," in *Analyse Demokratischer Regierungssysteme*, ed. Klemens H. Schrenk and Markus Soldner (VS Verlag für Sozialwissenschaften: Wiesbaden, 2010), 479.

1778 See, U.S. Supreme Court, *Marbury v. Madison*, 5 U.S. 1 Cranch 137 137 (1803).

1779 See, Martin Schulz, "Verfassungsgerichtsbarkeit Im Globalen Kontext," *GIGA Focus Global*, no. 5 (2010), https://www.giga-hamburg.de/en/system/files/publications/gf_global_1005.pdf (accessed November 21, 2019).

1780 See, Mauro Cappelletti, Paul J. Kollmer, and Joanne M. Olson, *The Judicial Process in Comparative Perspective* (Oxford; New York: Clarendon Press, 1989), 133–35.

1781 See, Robert Chr. van Ooyen, "Der Streit Um Die Staatsgerichtsbarkeit in Weimar Aus Demokratietheoretischer Sicht: Triepel – Kelsen – Schmitt – Leibholz," in *Das Bundesverfassungsgericht Im Politischen System*, ed. Martin Möllers and Robert Chr. van Ooyen (Wiesbaden: Springer VS, 2006), 101–11.

1782 Andrew Harding, Peter Leyland, and Tania Groppi, "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective," in *Constitutional Courts: A Somparative Study*, ed. Andrew Harding and Peter Leyland (London: Wildy, Simmonds & Hill Publishing, 2009), 3–4; Cappelletti, Kollmer, and Olson, 133; 36.

institutionalized protection of the constitution was considered a necessity. In the countries where these experiences had been made, Germany, Italy and Austria, constitutional courts were established. Since then, the constitutional courts have appeared all over the world.[1783] Constitutional courts have appeared in most European countries and in some Latin American, Asian and African countries.[1784]

In short, the presence in a country, especially in a period of transition, of a strong and independent apex court with the power to review the constitutionality of actions and legislation, has increasingly been considered to be one of the most meaningful qualities of functional rule of law systems since '[c]onstitutional courts are often called upon to decide on a country's most pressing political issues [...].'[1785] However, as this thesis has showed, the exact description of the role of apex courts in a constitutional transition remains disputed. In order to be effective once enacted, constitutions need to be interpreted, consolidated and enforced. In this sense, constitutional review by apex courts constitutes a veritable (constitutional) political control of political powers by means of the law. Therefore, one thing is certain: the role of an apex court in times of transition needs to be looked for somewhere between law and politics.[1786]

B. Finding the Balance between Judicial Activism and Judicial Restraint

The acknowledgement of the constitutional judiciary trespassing on politics could seem to be paradox on its own. The idea that apex courts engage in the political arena departs from the conservative viewpoint that they are entirely bound by the law, and do not (or *should* not) engage in strategic practices or political scheming. The most traditional account of this idea—Montesquieu's

1783 See, von Steinsdorff, 479.

1784 Harding, Leyland, and Groppi, "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective," 5; Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 7–8.

1785 See, Choudhry and Glenn Bass, 9.

1786 See, Hans Vorländer, "Deutungsmacht – Die Macht Der Verfassungsgerichtsbarkeit," in *Die Deutungsmacht Der Verfassungsgerichtsbarkeit*, ed. Hans Vorländer (Wiesbaden: Springer VS, 2006), 14.

depiction of the judge as the only 'mouthpiece of the law'—[1787] has been clearly surpassed by a general recognition and acceptance that apex courts, on occasion, tend to venture outside the boundaries of their legal framework and enjoy significant power of discretion when it comes to constitutional review; and this, no matter what the legal tradition of the country is. But where does the idea of apex courts intruding into the realm of politics originate from and is it legitimate?

The answer can be found by answering the question as to where the power of the apex courts originates from. The power of the courts originates from the constitution, and as we have seen in the theoretical chapter of this study, the constitution originates from the people. In other words, if the power of the courts stems from the people, would that automatically mean that they are legitimate in their rulings?

This question can be answered by looking through the well-known theory of the separation of powers. In the French Revolution, the judiciary was considered as a rather minor branch of government, because it was vested with a rather mechanical task in the face of the laws, which are expressions of the public will. This is why Montesquieu said that the judges were basically regarded as functionaries who have no function other than being the 'mouth of the laws'.

As we see it today, however, the function of the apex court has grown together with the ever-evolving understanding of constitutional law, and its task is that of bringing the constitution to life rather than just being the 'mouth of the laws'. This research has shown how through the increasing constitutionalization of many states in the world, constitutional law has grown in importance and accordingly apex courts have progressively gained in power. There is now an additional branch that represents the public will against the legislative branch that itself represents the majority of the people. It is a devil's circle. While in parliamentary sovereignties the law is the manifestation of the people's will to the extent that it was written following the formal contents of the constitution, in constitutional democracies, the law is the manifestation of the people's will to the extent that it respects the entirety of constitution.

1787 See, for instance, Céline Spector, "The "Mouthpiece of the Law"? The Various Figures of the Judge in the Spirit of Laws," *Montesquieu Law Review*, no. 3 (2015).

The judiciary power has thus now become strong enough to challenge the amending constituent power in emerging and established democracies.[1788]

Being the constitution, as Lassalle notes about the exercise of power,[1789] which is the object of politics, apex courts inevitably encroach on the political arena. So, as already mentioned, the idea of a 'mechanical' judiciary was superseded by it becoming stronger in the face of the other two powers. According to the common knowledge, however, it cannot do so by putting itself in the legislator's place. On the contrary, 'the constitutional judge is a reminder that draws the legislator's attention to the meanings of constitutional norms that may be misinterpreted. These reminders do not have the right to act as free as masters nor as restrained as servants in interpreting the constitutional text."[1790] Failing to do so and the apex court loses its authority. Hence, only by finding the true balance between law and politics can judicial activism be accepted by the other political parties.[1791]

However, even though constitutional review constitutes political control of political powers through law, the boundaries between constitutional law and politics are blurred, and finding this balance is not easy, especially in a transitional setting. There is a risk of either politics becoming 'judicialized' or constitutional justice 'politicized'. This has created the fear of a *government of judges* or juristocracy.

Whether and to what extent there could be a judicialization of politics depends on institutional factors (that is, selection procedures, internal rules and procedures, etc.), but above all on the judges and the political actors (and their interaction).[1792] The importance of judges results from the indeterminacy of the constitution, which can be filled by the great power of discretion it gives rise to. I mentioned how the boundary between law and politics is vague: it is not possible to determine where the sphere of

1788 Saygili, 128–30.

1789 See, Lassalle, "ÜBer Verfassungswesen: Ein Vortrag, Gehalten in Einem Berliner Bürger-Bezirksverein Am 16. April 1862."

1790 Saygili, 128–30.

1791 On a wide discussion of this topic, see Dominique Rousseau, "The Constitutional Judge: Master or Slave of the Constitution?," *Cardozo Law Review* 14, no. 3–4 (1993).

1792 See, Ran Hirschl, "The Judicialization of Politics," in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, Daniel R. Kelemen, and Gregory A. Caldeira (Oxford; New York: Oxford University Press, 2008), 129–38.

activity of constitutional jurisdiction ends and the sphere of action of politics begins.[1793] The judge's power of discretion of finding the right balance between law and politics in their jurisdiction is discussed in the legal studies under the terms of 'judicial activism' v. 'judicial restraint'.[1794]

In recent years, it is not uncommon to see in political science discussions on *how* the constitutional courts influence the political process while seeking this balance.[1795] The dominant perspective is that of 'judicialization', according to which the influence of the constitutional courts increases and leads to a transformation of political content and style.[1796] While Stone Sweet takes a rather positive view of this judicialization, since the democratic quality of political decision-making processes is improved by the mutual influence of politicians and constitutional judges,[1797] Hirschl warns against a risk of juridification of central political controversies, such as questions of collective identity and the shaping of the political and social order, for which there are no guidelines in the constitution.[1798]

In times of transition, the search for this balance and subsequently the apex court's attempts to define the new constitutional democracy with its judicial interventions, is even more tangible. The TCC, for instance, failed in finding such balance and was eventually packed by the other branches. The degree of power of an apex court to scrutinize and even invalidate acts of the legislature can be found in the reaction against the attitude of authoritarianism, which commonly rejects the separation of powers and the protection of human rights. In the case of Turkey, while the TCC was authorized to review constitutional amendments that were considered to be in breach of the basic principles of the Republic only with regards to their form, it has often gone beyond its authority, reviewing and annulling constitutional amendments with regards to their content. This attitude of judicial activism was a response to the authoritarian practice of the AKP. However, while the TCC exercised this activism in order to establish above-mentioned balance, it ignored long-term repercussions that may have emerged between it and the other branches of government were it to

1793 See, Vorländer, "Deutungsmacht – Die Macht Der Verfassungsgerichtsbarkeit," 14.

1794 See, Haimerl. 11.

1795 See, von Steinsdorff, 480.

1796 See, ibid.

1797 See, Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford; New York: Oxford University Press, 2000), 194–204.

1798 See, Hirschl, "The Judicialization of Politics," 123.

exaggerate with its activism. Such models of behavior have led to the tendency of apex courts disrupting the balance between law and politics and thus being packed. So, at the end of the day, seeking this balance between law and politics is the justification and reason for acceptance of judicial activism.

In Egypt, before Mubarak decided to pack the court because of its increased assertiveness, the court's power to check the executive was not unrestricted. While it produced liberal rulings in the area of human rights, the SCCE was careful not to rule on matters that struck at the heart of Mubarak's regime. For instance, the SCCE never denied the constitutionality of Egypt's emergency state security courts, which were vested with the competence of treating all cases indicted under the emergency law. The SCCE often postponed (even for years) ruling on politically delicate matters (e. g., on electoral laws), so as to evade direct disagreement with the regime. In this way, the SCCE tried to maintain a balance between law and politics by adopting a rather cautious approach: it expanded fundamental rights and freedoms in marginal matters but preserved (or avoided to strike down) the core apparatuses of state repression. This balance allowed the SCCE to maintain its institutional security under Mubarak's authoritarian regime. After a while, however, the balance between law and politics that the SCCE managed to maintain proved to be a too much a judicial exercise than the regime was willing to accept, and so Mubarak ended up packing it.[1799]

Besides the above-mentioned institutional factors, due to the blurred boundaries between judicial activism and judicial restraint, their balance is also dependent on the judge's perception and understanding of their role as judicial officers. The power of discretion of apex courts is limited by the fact that the courts themselves cannot determine their influence on the political process. On the one hand, because they are reactive institutions, so they can only exert influence if cases are brought to them, and on the other hand, they depend upon other political actors for having their decisions implemented.[1800] The acceptance and authority of such decisions depend on the judges' perception of their role and neutrality.[1801]

1799 See, Choudhry and Glenn Bass, 60 – 61. See also, Moustafa, 104 – 05; 81.
1800 See, von Steinsdorff, 492 – 93.
1801 See, Blankenagel, 261.

C. Apex Courts Asserting Their Own Behavior

I. Acceptance through Trust and Authority

Of course, acceptance of the rulings of an apex court can clearly be influenced by the selection procedure of the judges.[1802] Above all, however, the case law itself and its argumentation is significant: every decision of the court can be understood as a suggestion of interpretation (*Deutungsangebot*) or as a channel of communication (*Kommunikationskanal*).[1803] With this, the court uses its reasoning in the judgement to seek acceptance from the parties of the dispute and compliance by society and politics.[1804] In order to seek the right degree of authority and acceptance, in its decisions, an apex court must show the right balance between judicial restraint and judicial activism depending on the situation.

The judges must think long-term and proceed strategically cautiously in order to productively transform their structural weakness vis-à-vis the other political actors into authority, which can for instance arise precisely from the lack of clear political power sources in a constitutional transition (meaning a constitution).[1805] A court can thus build *trust* and *authority* in the institution of constitutional review by means of producing accepted judgements. If these trust and authority exist, acceptance no longer depends on individual decisions. The court can establish thus confidence in itself as an institution, but also vis-à-vis the people and the political actors, which end up implementing their rulings. Vorländer defines this type of conduct as 'interpretative authority' (*Deutungsmacht*).[1806]

II. Challenges of Acceptance in Times of Transition

The debate about the role of constitutional courts in the area of conflict between law and politics is particularly explosive in transformation

1802 See, von Steinsdorff, 489 – 92.
1803 See, Haimerl. 11; Kranenpohl, 500.
1804 See, Vorländer, "Deutungsmacht – Die Macht Der Verfassungsgerichtsbarkeit," 15.
1805 See, von Steinsdorff, 494. The structural weakness would be the limited power a court has vis-à-vis the other branches of government to assert its own authority. The court has to go through indirect communication channels, such as interpretation and argumentation in its judgements, to reach a specific degree of acceptance.
1806 See, Vorländer, "Deutungsmacht – Die Macht Der Verfassungsgerichtsbarkeit," 15.

processes and especially when no new institutional system has (yet) been established. At the same time, the special functional logic of constitutional authority that has just been described of issuing decisions in line with their understanding of their role and which are accepted and implemented by other political players, poses great challenges to the courts in these situations.[1807] In other words, judges 'determine themselves whether something is constitutional or not but are only free to make this determination inside a complex web of legal and political restrictions'.[1808]

The political environment clearly poses a major challenge to apex courts during periods of transition, since during this period, disputes at the border between law and politics are bundled and attract attention as if under a microscope. Transitional times are not pleasant times for apex courts: the acceptance of their rulings requires a high degree of democratic maturity and lenience. In transitions, resistance against the apex court's judgements can often be strong and political actors have a vast selection of possibilities to limit the court's jurisdiction: for instance, they can simply ignore the ruling or overrule it, remove cases from the court's jurisdiction, restrain its budget, and more.[1809] The apex courts must keep these options for action of the other actors in mind and try to avoid possible non-compliance with their decisions.[1810] In Kenya, for instance, despite improvements introduced with the 2010 Constitution and the reform of the judiciary, which has produced some excellent rulings, enforcement of the decisions remains an issue. The reason thereof is partially due to a lack of willingness on the part of some significant state institutions empowered with guaranteeing enforcement, and consequently it boils down to a lack of authority of the court. Another example of problematic implementation is Nepal. In Nepal, the issue is not merely the lack of political willingness to ensure enforcement of the rulings, but mainly because of a coordination deficiency among government organs.[1811] Non-compliance with their decisions can lead to them no longer being able to exercise their function, since actors have no incentive to bring

1807 See, von Steinsdorff, 480.

1808 See, Robertson, 34.

1809 See, Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 77 – 81; von Steinsdorff, 492 – 96.

1810 See, Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 86 – 89.

1811 See, Daly, "The Judiciary and Constitutional Transitions," 20.

cases before the court or see no reason to comply with the court's rulings. This can be fatal for courts. Hence, as we will see later, the political context can therefore influence the role and behavior of a court, no matter all other circumstances, such as composition or constitution-making form.

Furthermore, there are other factors which pose a challenge to the acceptance of apex courts in transitional times: the lack of a constitution or the presence of an incomplete, unclear or contradictory constitutional text. In such situation, constitutional review as the main function of apex courts becomes very challenging, especially when it comes to the 'presentation' of its reasoning, because it has to refer to former jurisdiction or other judicial sources.[1812] The essential basis for the exercise of their function is missing or does not represent a suitable basis for the reasoning. Personal attitudes and political preferences of the judges, which always play a role, can then come to the fore even more strongly. The danger of a politicization of the judges exists here to a superior degree. Under these circumstances, it is difficult to be perceived as a neutral institution and court, to gain acceptance and to build authority.[1813]

The case studies of Russia and South Africa show how courts have dealt with the challenge of a missing or inconsistent constitution. In addition to the relevance of other available legal sources, the political environment and the resulting power of discretion of the courts, it is above all the importance of the understanding of the office and the strategic skills of the judges that is revealed in order to master this difficult situation.[1814]

I have already widely explained how in South Africa, the CCZA was vested with the extraordinary function of certifying the new constitutional draft on the basis of a series of political principles agreed upon by the political actors. In this sense, the CCZA did not have a constitution, but at least a series of clear principles on which it could draw as a yardstick and basis for its arguments. The CCZA fulfilled its task allowing the Constitutional Assembly a wide margin of interpretation of the constitutional principles

1812 See, Margareta Mommsen and Angelika Nußberger, *Das System Putin: Gelenkte Demokratie Und Politische Justiz in Russland* (Bonn: Bundeszentrale für Politische Bildung [Lizenzausgabe], 2007), 118.

1813 See, Haimerl. 13.

1814 See, ibid.

and explicitly defining its own role as a legal, not a political role.[1815] Although it was given a legally, methodologically, and politically extremely difficult task in reviewing the constitutional draft, the court managed to establish its authority and reputation as a court.

In Russia, the constitution available to the new court represented a politically controversial and legally inconsistent basis, which as a patchwork, reflected the uncontrolled evolution of political and constitutional ideas of the last years of Soviet rule and constantly changed.[1816] Even though the newly amended constitution stipulated that the Constitutional Court should limit itself to purely legal questions, the Constitutional Court and in particular its Chief Justice, Valery Zorkin, saw itself from the outset as an important political actor and arbitrator.[1817] In the years from 1992 to 1993, during which the disputes between the Supreme Soviet of the Soviet Union (the highest legislative body) and President Boris Yeltsin intensified, the Constitutional Court was consulted and courted by both political sides.[1818] The Constitutional Court's Chief Justice and some judges then openly took sides with the parliament in the 1993 state crisis, during which the power struggle between President Yeltsin and parliament escalated into debates of a new constitutional order. Several decrees of the President were declared unconstitutional without detailed examination.[1819] After Yeltsin had won the power struggle, he published a decree in which he determined that no more sessions of the court should be convened until a new constitution had been passed.[1820] The court thus acted as a political actor in an already politicized situation. Due to an inconsistent, controversial constitutional basis and a Chief Justice who wanted to interfere in political events, the court could not gain acceptance as a court and could not establish itself as a new institution.

1815 See, Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, 154–58.

1816 See, Mommsen and Nußberger, 118.

1817 See, Angelika Nußberger, "Das Russische Verfassungsgericht Zwischen Recht Und Politik," in *Russland Heute: Rezentralisierung Des Staates Unter Putin*, ed. Matthes Buhbe and Gabriele Gorzka (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007), 216.

1818 See, Uwe Steingröver, *Anfänge Der Verfassungsgerichtsbarkeit in Russland: Die Erste Phase Des Verfassungsgerichts Der Rußländischen Föderation 1991–1993 – Erfahrungen Und Konsequenzen* (Frankfurt am Main; Berlin: Peter Lang, 2000), 293.

1819 Mommsen and Nußberger, 120.

1820 Nußberger, 217.

In Egypt, the SCCE has also played a significant role during the transition before the enactment of a new constitutional order as in the cases of Russia and South Africa. However, unlike the newly established courts of Russia and South Africa, the SCCE had been established under an authoritarian regime many years before.[1821] So, the SCCE's initial status differs from the other two: the SCCE did not have to assert itself in the emerging order, rather it has to ensure its survival as the apex court of Egypt's political system. In this sense, existing apex courts have an already developed a judicial practice and a perception of their own role as judicial actors when arguing and presenting the reasoning of their ruling.[1822] It can thus be expected that the apex court will attempt to maintain its status in the legal system and that the justices will execute their functions according to their already developed understanding of their role. We have seen how as clear constitutional power sources are not existing in times of transition, it has to refer to other judicial sources of legislation in its reasoning to develop authority and acceptance. Although the SCCE was an already established institution, we have seen in the Egyptian case study how in order to survive the transition, it still needed to perform its functions, so as to maintain authority and acceptance. Since this source of authority (that is, constitutional law) was only weakly developed in the early stages of the transition, the SCCE has to exercise additional influence on the political process in order to ensure its survival. This required resorting arguably to nonjudicial means, such as acting like a constitutional basis for its functions was indeed existent (which it was not). In this sense, a politicization of the apex court in a transitional setting seems inevitable.

1821 I will tackle the influenting factor over the role of courts in constitutional transitions of a newly established apex court against an already existent one in the following chapter in a more comprehensive manner. Here, I use the Egyptian example to prove a difference with Russia and South Africa when it comes to this particular challenge an apex court can face in asserting its own status.

1822 See, Christian Boulanger, *Hüten, Richten, Gründen: Rollen Der Verfassungsgerichte in Der Demokratisierung Deutschlands Und Ungarns* (Dissertation zur Erlangung des akademischen Grades Doktor der Philosophie (Dr. phil.) am Fachbereich Politik- und Sozialwissenschaften: Freie Universität Berlin, 2013), 24.

III. Strategic Behavior in Times of Transition

1. Strategic Engagement between Assertiveness and Deference

I have shown how it is not uncommon to encounter, in a constitutional transition, new power systems resisting the changes that a transition brings with it. To tackle the above-mentioned challenges that an apex court faces against other political forces in order to gain acceptance and authority, judicial actors tend to adopt a strategic behavior.

> 'There is no uniform strategy that makes sense for all courts in all times and places. [...] [C]ourts exercise interdependent law-making power. Judicial review does not exist in a political vacuum, but rather courts are constrained by the positions of other political actors. In new democracies, one of the key variables for the performance of judicial review is the power configuration of political forces. Other things being equal, a strong military or dominant party will hinder judicial power. On the other hand, divided government, or equally balanced political forces, will expand the court's room for interpretation and will help make it a natural arbiter to resolve political conflicts that arise. Political diffusion, either in the structure of the constitutional order or in the party system, allows courts the freedom to expand judicial power, build up legitimacy over time, and deepen the constitutional order.'[1823]

For instance, in South Africa, once the new constitution was certified and enacted, the attributes given to the CCZA by the new Constitution of South Africa, 1996, as a guarantor of the constitutional vision, did still not guarantee acceptance or authority given the typical inherent institutional (i. e. a court institutionally outside of the political arena) and functional (i. e. a court with the power to act 'merely' through the law) limits of an apex court. Instead, the CCZA has used its figurative constitutional authority to openly engage in what has been labeled 'a rejection of the negative past, a generous interpretation of rights'[1824] and a pledge to 'inducing large-scale social change through nonviolent political processes grounded in law.'[1825] At the same time however, again Klug stresses how the CCZA:

1823 Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 88 – 89.

1824 Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid," 183.

1825 Klare, 150.

> 'Has always wielded this power with a strategic eye to its own role, in what may be paradoxically viewed as a form of judicial pragmatism rather than the symbolic judicial activism that the Court's rights jurisprudence has led most international observers to applaud. [...] Asserting a constitutional patriotism and declaring a culture of rights is all very well, but at the same time the Court has always been concerned about its own role in the new political order. Aware of their unique status within the new constitutional order, the justices of the Constitutional Court have been careful to define its role as upholding the law and have denied claims that they might be substituting their own political decisions in their role as interpreters of the Constitution. The Court has in fact had to manage a number of quite explicit challenges to its role, including the demand in one case that all the justices recuse themselves because they were appointed by President Mandela, but at the same time it has been quite conscious of the different ways in which it is responsible for ensuring the transition to democracy. As a result, the Constitutional Court of South Africa has managed to become a central institution in the management of conflict in post-apartheid South Africa, whether between regions of the country, among branches of government, or between the government and civil society."[1826]

Strategically engaging in times of transition can entail several approaches, but above all a court can strive for an assertive or deferential behavior. A court's choice to engage in an assertive (i. e., rather autonomous vis-à-vis the central government) or deferential (i. e., submissive of the regime in power) role varies on a case-to-case basis. Assertiveness can be defined as the degree to which a court overturns or otherwise challenges the exercise of power by the ruling government. It includes the scope to which the court takes over policy-making or governance functions.[1827] A deferential strategy instead is the opposite; it is the acceptance of another branch's action. Constitutional review is usually an instrument to put checks on the government's actions and legislation. Research has shown that judicially active courts tend to be more assertive, but that is a mere conclusion based on this thesis' research and does not mean it is a rule. A court's role is usually designated and entrenched in the constitution. Whether to play such role or not, and how to play it (i. e., with what behavior) however, is usually a decision of the court itself. Hence, the strategic engagement.

An example of assertive apex court, which ended up facilitating the normative constitutional court by upholding especially fundamental rights

1826 Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid," 183.

1827 See, Manoj Mate, "Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India," *Temple International & Comparative Law Journal* 28, no. 2 (2014).

and freedoms, is Colombia. At the same time, the role of the Constitutional Court of Colombia in consolidating the new democracy following the enactment of the 1991 Constitution shows the range of activities in which apex courts can be invested in when engaging strategically. Before adopting the new 1991 Constitution and establishing the Constitutional Court, the Supreme Court had never really challenged the tendency of governments to rule by 'constitutional dictatorship' in the sense of habitually proclaiming states of emergency. The Supreme Court also never succeeded in protecting fundamental rights. Daly describes this as follows:

> 'The establishment of the nine-member Constitutional Court in 1992 introduced a profound institutional change. The Court was accorded sweeping review powers as the guardian of the new constitution, and adopted an assertive stance from the outset. A very open petition system meant that the Court's docket grew rapidly: an average of 800 decisions were issued annually by the mid-1990 s. The Court quickly built up an expansive and assertive jurisprudence aimed at vindicating constitutional rights, placing constraints on political powers and addressing inequality. Landmark judgements curtailed the presidential power to declare states of emergency; defended congressional autonomy from the encroachment of presidential power; enhanced the protection of indigenous peoples' rights, collective rights, and social and economic rights; and intervened in economic governance, for example by implementing a minimum wage. These judgements have led to significant public support for the Court.'[1828]

The Colombian Constitutional Court's assertive strategy has, of course, triggered resentment from the government, and basically every government since 1991 has reacted to the Constitutional Court's rulings by threatening constitutional reforms to reverse them or restrict the Constitutional Court's jurisdiction. When the Constitutional Court directly clashed against President Uribe (in 2009–2010) by rejecting a constitutional amendment authorizing additional presidential terms, the public support that the Constitutional Court enjoyed ensured acceptance for the ruling.[1829]

1828 See, Daly, "The Judiciary and Constitutional Transitions," 21.
1829 See, ibid.

2. Strategy of Case Selection

What is clear from what said above is that apex courts should avoid noncompliance with their rulings from other political bodies at all costs. Ginsburg expresses as follows:

> 'This can be fatal for courts by leading to counterattacks or marginalization. If a court is unable to convince parties that other parties will comply with its decisions, there is little incentive to bring disputes to court. Furthermore, there is little reason for a losing party to comply if it believes others will not comply. The perception of noncompliance becomes self-fulfilling.'[1830]

In such cases, it can be helpful to apply a 'strategy of case selection'.[1831] Widely speaking, courts can focus their attention on three different kinds of cases:

- The first category includes what may be labelled *vertical separation-of-powers* cases: those concerning the division of power between local governments and the national government.[1832]
- The second category of cases may be called *horizontal separation of powers,* and it refers to the relationship among institutions in the central government. Typically, democratic governments set up multiple political bodies, whose jurisdictions and responsibilities are divergent. Jurisdictional disputes will often arise wherein one body questions whether another has the power to undertake a certain type of action. The judiciary is a natural third party to turn to. In these kinds of disputes, the court is most clearly serving in its role as dispute resolver rather than policymaker. However, these same kinds of cases are replete with danger for the court. As Ginsburg writes:

> 'The minute the court decides the case, the situation shifts from triadic dispute resolution to two-against-one, upsetting the losing party. The trick of constitutionalism is to induce the losing party to comply. If the court sides with the more powerful body, then the decision may be self-enforcing. If the court sides with the weaker body, then its rhetorical strategy will be particularly addressed to the need to secure compliance

1830 Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 73–74.
1831 Cf. broadly at ibid., 86–89.
1832 ibid., 88.

> from the stronger or to communicating the possibility of repeated play with a long-run distribution of benefits in favor of the more powerful constitutional actors."[1833]

– A third category of cases is that concerning *constitutional rights*. Like the second category, these cases may often involve challenging the powerful center on behalf of somewhat marginal actors, namely individuals. Ginsburg sees an interest facet of such cases when it comes to the role of the courts:

> 'Such cases, however, often advance policy goals of the center. For instance, a revenue-maximizing state will find it in its own interest to set aside a realm of private property that cannot be easily expropriated as a way of encouraging investment and the production of tax revenues. Furthermore, rights cases offer great legitimacy benefits to the court. Although the court will be deciding against a hypothetical majority represented by the government, the court provides a victory to an interest group likely to have intensely held preferences. Populism can provide a bulwark against counterattack; a court can cultivate it by broadening standing and encouraging litigation by a range of rights-seeking interest groups. Which kind of cases should courts concentrate on? The strategy will be based in large part on what allies the court seeks to protect it from the fundamental problem of institutional weakness. Courts face a tension between this weakness and the need to expand institutional power to advance whatever policy goals judges may have. Therefore, it will make sense for courts to seek allies to minimize the threat of collateral harm."[1834]

3. Strategically Seeking Allies

This study has revealed how apex courts necessitate external support to carve out an effective role for themselves in the new era, so that it can expect other political bodies to accept and implement its rulings.

In many states, such alliances are key to reinforce the apex court's fragile status and shield them from confrontation. Apex courts engage in strategic behavior by taking into consideration the 'spectators' and reception of their rulings by building up alliances with other political powers (for instance, other branches of government), with societal actors (for instance, the media and NGOs), as well as the people more widely. This may involve aligning with the new regime against the old one (or the other way around) or siding with 'the people' against the new or old regime.

1833 ibid.
1834 ibid.

In Egypt, the SCCE was overtly siding with one side of a political conflict, the military power, by attempting to weaken the influence of the Muslim Brotherhood. We have witnessed in the case studies how in moments when elites see their status threatened, they resort to courts as allies in order to maintain some sort of influence in the new regime. The SCAF did not dissolve the SCCE and changed the law to prevent an elected president from appointing a Chef Justice from the outside. With its two decisions, the one on the parliamentary election law and the other on the disenfranchisement law, the SCCE gave the SCAF space to secure its power and thus entered into a *strategische Allianz*[1835] with the most important *Akteur der Restauration.*[1836] Due to the heterogeneous composition of the SCCE, it can be said that even the judges, who have been members of the court for many years (and appointed by Mubarak), have come to terms with the SCAF. This alliance is symbolically reflected in the interim presidency of Chief Justice Mansour (who was a judge form the golden era), which lends the rule of the military a more civilian mask.[1837]

Depending on the political and transitional context, apex courts need to be careful when selecting their allies. The Hungarian case fits as an example. The history of the Hungarian Constitutional Court, from the 1990 s to the present, emphasizes the significance for an apex court to seek allies. From the beginning, the Constitutional Court was intensively busy in carving out its own role and reputation. It soon gained global consideration for its surprisingly strong jurisprudence, which placed substantial restraints on the other branches of government; the Constitutional Court frequently declared both new legislation and old authoritarian-era laws invalid by striking down almost one-third of the laws disputed before it between 1990 and 1996.[1838]

All this contributed, of course, to create a robust role for itself within the new constitutional era. By trying to carve out a strong role so however, the Constitutional Court seemed to isolate itself from potential allies. Despite the close collaboration with international judicial actors and by frequently

1835 German for 'strategic alliance'. See, Haimerl. 61.

1836 German for 'actor of the restoration'. See, Harders, 31.

1837 Haimerl. 60 – 62.

1838 See, Gábor Halmai and Kim L. Scheppele, "Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past," in *Transitional Justice and the Rule of Law in New Democracies*, ed. James McAdams (Notre Dame, IN; London: University of Notre Dame Press, 1997), 180.

mentioning foreign case law in its rulings, it failed to cultivate domestic relationships. For instance, it constantly mismanaged its relationship with the Supreme Court, leading to open conflict with that institution. The people were alienated by the Constitutional Court's focus on abstract review to the detriment of individual applications with regards to specific rights violations, and on reinforcing middle class economic entitlements to the detriment of economic claims by poorer individuals.[1839] In 2010, a new government came to power (headed by the right-winged, conservative and populist *Fidesz* party) with the two-thirds supermajority necessary to amend the Constitution. The Constitutional Court's practice of isolation resulted in the Constitutional Court not having enough 'friends' to call on to resist the new legislature's extensive revision of the Constitutional Court's jurisdiction and powers. The constitutional (judicial) reform included a court 'packing' plan by raising its composition from 11 to 15 justices. The new Fundamental Law of Hungary of 2012 entrenched even more this situation and a constitutional amendment in 2013 invalidated all of its pre-2011 decisions.[1840] However, frequently apex courts tend to try and reach out to a vast network of possible allies.[1841]

Strategies on how to seek alliances are multiple. As Daly briefly summarizes:

> 'Indirectly, a court can indicate its shared aims with other societal actors through its judgements, and it can reach out to international actors, for example, by translating key judgements. More directly, a court can engage in outreach strategies, such as the Kenyan Chief Justice's visits to civil society organizations and rural communities. Media strategies also play a part: courts can disseminate summaries of their judgements, or, as in Mexico, even televise their deliberations in important constitutional cases. Such strategies can be risky, by appearing to politicize the judiciary. Tunisia provides an extreme example: apparent attempts during the constitution-drafting process to subordinate the judiciary to the executive were met with street demonstrations by judges, aimed at seeking public support. The demonstrations facilitated greater respect for judicial independence in the new constitution. Access to the courts can also play a significant role in building public

1839 Daly, "The Judiciary and Constitutional Transitions," 19.

1840 ibid.

1841 An extreme example of a court (in casu *not* an apex court) being helped by another actor is the intervention of the Inter-American Court of Human Rights in Venezuela in 2008, when it ruled in *Juan Carlos Apitz Barbera and Others* (*'First Court of Administrative Disputes'*) *v. Venezuela*, IACHR Series C No. 182, IHRL 3056 (IACHR 2008), August 5, 2008, that the action to remove three judges from an important administrative appellate court of Venezuela had violated the judges' right to an impartial hearing and other due process guarantees under the American Convention on Human Rights. See, also ibid., 18.

> support. A lack of individual access, as seen in states such as Nepal, is viewed as having impeded the development of public support. Public support is best strengthened by providing meaningful redress to individuals, rather than simply increasing the number of petitions to the courts."[1842]

D. Preliminary Conclusions

With regards to the behavior of courts in constitutional transitions, the hypothesis developed was the following: *The role played by apex courts in a normative constitutional transition can either be played pro-actively or passively* (*i.e., reactive*). *As judicial bodies, which act according to the law and within its framework, apex courts need sometimes to step over the political realm in order to overcome temporary crisis such as transitional periods.* Following the reasoning laid out above, which tested this hypothesis, I can conclude that it was fairly fulfilled.

Research has shown that it is very hard to work around the concepts of active and passive behavior. Their behavior is limited by their function of constitutional review, which still empowers them greatly, as it often gives them great power of discretion, especially when the constitutional basis is new and in need of interpretation. Still, it is institutionally limited to this function. At the same time, apex courts are reactive institutions, so they can only exert influence if cases are brought to them. In this sense, the approach of a court being either pro-active or reactive does not really hit the mark. Instead, this study has revealed how, especially in times of transition, apex courts are not seen as bodies exclusively acting as guardians of the constitutions anymore (i.e., as in acting within its functions and constitutional framework) but tend to step out of their legal boots and encroach on the political realm. So, the hypothesis should have rather talked about judicial activism v. judicial restraint, rather than pro-active v. reactive behavior.

The second part of the hypothesis already considered the idea of judicial activism, yet I initially believed that courts would engage in such behavior *only* in times of crisis. This was only partly true. This study has shown how it is common for an apex court to perform politically partly from the outset. The main reason thereof is a *mutual ratio* between both the

1842 ibid., 18–19.

development of constitutional law and the judiciary over the years. Whereas constitutions were seen as mostly structural frameworks of the state, judiciaries were accordingly seen as their mechanical enforcers. Over the years however, the idea of constitutional law has evolved and the role and behavior of apex courts with it. Constitutional law is today more than just a picture of the state's structures, and so more in transitional periods; it often includes a vision, an ambitious (transformative) aim to constitutionalize the new order. This tends to place a great burden on apex courts to act as an engine of change, which (even by acting through the lenses of constitutional review) inevitably end up stepping out of their strictly judicial boots. This proves how constitutional law can transform the behavior of the judiciary and how the judiciary can transform the constitution. In this sense, apex courts end up engaging in judicial activism constantly and not only in transitional periods. It is true, however, that the intensity of judicial activism tends to be higher in times of transition and constitutional crisis. This is due to the fact that apex courts are on the front line when it comes to decide on a country's most pressing political (and nowadays often also 'constitutional') issues and in transitions there are plenty of them, and at the same time they have to assert their own role in the new constitutional order. One of the reasons I left the part on the assertion of the court's behavior in this chapter rather than in the next one on the factors which influence the roles played by the courts, is because I believe that having to find one own place in the new constitutional order greatly influences the behavior of a court in playing whatever role it eventually will play, and not necessarily the role itself. Understanding how an apex court needs to find its spot in the transition helps explain the positioning of the court's behavior between activism and restraint and justifies in part judicial activism.

Therefore, if it is inevitable and necessary for apex courts to sometimes engage in judicial activism, the key in carving out his place rests in finding the right balance between judicial activism and judicial restraint. If a court fails to find this balance, especially in a transition, it can be fatal for it, because it would probably not reach the right degree of trust and from other political bodies and the people, which would then result in the court losing its judicial authority. No authority over political bodies, for instance, can trigger noncompliance with their rulings, and a court that does not have the authority to have its rulings *accepted* and implemented is practically irrelevant. Thus, when asserting their own role, apex courts

tend to engage in a *strategic* behavior by seeking the balance between law and politics. This includes either adopting an assertive or deferential behavior vis-à-vis the ruling government and negotiating alliances with the other branches of government (i.e., the executive and legislature), other sites of power (e.g., the military) and building relationships with other state organs (e.g., ombudsmen), civil society actors (e.g., the media, non-governmental organizations), the people or even international actors.

Did the apex courts in the case studies of the present thesis find this balance? Not always. In Turkey, the confrontation between the TCC and the ruling AKP party resulted in reiterated disputes between the two. Eventually, following the umpteenth attempt of the TCC to obstruct the passing of Islamic-led constitutional amendments and the close call on the banning of the ruling party, the same AKP ended up packing the TCC. The TCC probably went too far towards judicial activism and the balance, which had been tolerated by the AKP for many years, was no longer right. The packing scheme turned the TCC into a 'dependent' apex court. This move basically tore down the wall that separated the legislature (and, in Turkey, also the executive) and the judiciary.

In Egypt, the SCCE had instead a big legacy of independence, yet it got entangled in the political struggle that marred the Egyptian constitutional transition. I have already explained largely how the SCCE behaved with regards to this political struggle. I believe the SCCE never really found the balance advocated by this chapter, but managed to survive the transition by finding a powerful ally: the military. This has turned eventually the SCCE into a partisan apex court occupied first with being hostile against political Islam and later with being the tool of Sisi's repression.

Instead, the CCZA was a symbol of the transition, both institutionally independent and politically impartial. Despite engaging in judicial activism (also because it was empowered to do so), the CCZA never encroached into politics in a way that damaged the balance between judicial activism and judicial restraint, or more than constitutional law already does on its own.

In sum, the research has shown that, in transitional settings, an apex court needs to assert its own role (when it is a newly established one) or try to safeguard an already developed status (when it is an already established one). In any case, one of the biggest challenges a court faces in new democracies is the gain acceptance from other actors of the political arena

(especially those who eventually end up implementing their ruling). Noncompliance with its rulings can be fatal for an apex court. Consequently, in order to reach acceptance, an apex court needs to gain trust and authority. Due to the nature of constitutional law, which reflects the power resources in a country, politics is often at the core of an apex court's activity. So, gaining trust and authority from other political actors, but at the same time having to deal with political questions impartially, poses a dilemma for the courts. The key is to find a balance between judicial activism and judicial restraint. To find this balance an apex court needs to behave strategically. Strategy is directed at the avoidance of specific challenges that might arise in the quest for acceptance (especially in a transitional setting), for instance: resistance from the other political bodies or the lack of a clear constitutional basis from which drawing its authority. In sum, despite the various challenges that a court faces when seeking a balance between politics and law, it is above all the importance of the understanding of the role as judges and their strategic skills that are exposed in order to overcome difficult transitional situations.

Chapter 10: Factors Affecting the Role and Behavior of an Apex Court during a Normative Constitutional Transition

It has now been explained in this research so far how one apex court can play several roles within the same constitutional transition, and it can do it by engaging in a strategic behavior that rests somewhere between law and politics. Of course, 'it is possible that playing a range of roles can maximize the institutional power of courts, since there will be a wide range of social forces with a stake in the courts as viable institutions, even if they are not happy with every decision the courts make."[1843]

The next logical step in comparative constitutional law is to understand roles and behavior of the apex courts, which varies according to a myriad of factors. Many of these factors represent variables about which there is still little rational knowledge or are very difficult to analyze, such as the process of decision-making of individual judges. Still, also other factors can influence their role and this chapter is an attempt to list at least some of them on the grounds of what the case studies of this thesis have revealed. The capacity of apex courts to play either the facilitator or obstructer role by asserting its own role and engaging in strategic behaviors is fundamentally shaped by these factors.

This chapter seeks to test the following hypothesis: the role of the apex court is influenced by a myriad of factors, but especially those, which revolve around three main elements of the transition:

—the nature, structure and composition of the apex court (*institutional factors*);

—the end-product itself, i. e., the constitution and what it advocates (*constitutional factors*); and

—the transitional process and context (*transitional and political factors*).

1843 Ginsburg, "The Politics of Courts in Democratization," 184.

In other words, the ability of an apex court to play a specific transitional role by engaging in strategic behavior is deeply shaped by the country's overall constitutional (constitution), political/transitional (process) and institutional (courts) context. As mentioned, I believe that there are many other factors that can influence the role of a court. What I have tried to sum up are those that in my opinion distinctly surfaced in the case studies.

The outline of the chapter mirrors the hypothesis. First, I will test the factors surrounding the apex court as a judicial institution itself. Second, I will take a look at the influence the content of the constitution with regards to the apex court and the final vision of transition might have had over the role and behavior. Finally, I will try to understand what could have influenced the role and behavior of the apex court in the process of transition as a fragile and extraordinary period of time.

A. Institutional Factors

In the theoretical chapter, we have found how a (relatively) independent apex court is a key feature of the rule of law, an element of constitutionalism. In this sense, on top of the presence of a newly established or old apex court, said institution needs to be independent. The same chapter taught us how independence needs to be relativized. An exceedingly assertive court can prove to be considerably aggravating for its political accountability. Therefore, a balance between absolute independence and accountability needs to be struck: a court, which operates independently from any political interest, while remaining receptive to the public it serves. In order to find such balance, constitution-drafters need to be careful when deciding whether to keep the old apex court or establish a new one. If the latter is the case, they need to take into consideration how it is structured and composed, and how its judges are selected and removed. The nature, structure and composition of the court can be a strong factor for an apex court playing a specific role or behaving in a determined manner.

In other words, the first question to ask oneself is: *does it matter that the apex court is newly established or not?* The second, would then be: *does it matter how it is designed and how the justices are selected and removed?* This latter is

about whether the degree of judicial independence can also have an impact on the role and behavior of the court.

I. Newly Established v. Pre-Existing Apex Courts

In countries undergoing a transition, the first question that the constitution-drafters probably need to ask themselves is: do we keep the pre-existing apex court, or do we establish a new one? This question should not be taken lightly, as the repercussions on the role and behavior could be pronounced.

In the case studies, only South Africa established a new apex court. Both Turkey and Egypt did not dissolve the pre-existing one. The case of non-dissolution of an apex court differentiates it from many other apex courts established in the transitional years and decades after World War II in Europe and elsewhere. As we will see, a very functional and positive role is often attributed to these newly established constitutional courts, whereas in pre-existing ones, a rather negative and anti-transition role is attached to the court.

1. Pre-Existing Apex Courts

This research has shown, in the Turkish and Egyptian cases, that pre-existing apex courts tend to paddle against the democratization's tide and obstruct the normative constitutional transition.

The reasons thereof are mainly twofold: pre-existing apex courts tend to be instruments of the old regime and they often already have an established judicial stance.

The ambivalence of a court's history (i. e., the establishment under an authoritarian regime, the oscillation in its role, and the non-dissolution under the new one) is often decisive for its transitional role.

Pre-existing apex courts have usually a hard time dealing with a fundamental change in the state structure, because they were originally established to uphold the old constitutional order, which for years that has been the resource of their institutional power. The strategy of using apex courts to entrench policies is effective in an extensive variety of settings, but there is also no assurance that it will be fully effective, particularly if courts are tainted as tools of the earlier regime. With old courts, the risk that they might be attached to older principles remains. Self-evidently, in a

constitutional transition, an apex court maintains the constitutional order in which it sees its position and status most secured and defends itself against attempts to limit its jurisdiction. This is possibly the reason why pre-existing apex courts are therefore commonly opposed to a radical change in the political and constitutional order.

This was clearly the case in both Egypt and Turkey. In Egypt, for instance, the military saw the SCCE in particular as an appropriate institution to preserve its interests and political status in the future order, and to facilitate the gaining of some legal legitimacy (because 'democratic' legitimacy would be only reachable through elections) to its rule after the suspension of the 1971 Constitution.

On top of often being instruments of the old regime, pre-existing apex courts have an established judicial practice and are thus – to some extent – judicially and politically biased. The SCCE did not have to assert itself in the emerging order like newly established courts commonly have to, rather it sought to ensure the safeguard of its own stance and position as the apex court of Egypt's political system. In this sense, existing apex courts had already developed a judicial practice and a perception of their own role as judicial actors when arguing and presenting the reasoning of their rulings.[1844] The justices have developed a judicial understanding of their role in the system, and they have developed norms and routines in their jurisdiction. It can thus be expected that the same court will attempt to safeguard its status in the legal system and that the judges will execute their functions of constitutional review according to their already developed understanding of their role. This often creates a judicial and legal discrepancy between their already established practice and the presence of new judicial sources upon which it has to refer in its reasonings. Making the jump and trying to link the two things, the apex court has to wield additional influence on the political process in order to ensure its existence. This commonly involves resorting to extra-judicial means. In this sense, a politicization of pre-existing courts in times of transition seems inevitable.

So, if the rule is that a pre-existing apex court obstructs the normative constitutional transition because of its attachment to the old order, then the exception is one that embraces the new regime. Hypothetically, this

1844 Boulanger, 24.

could mainly happen under very precise conditions: if the political actors agree on a constitution that reflects and anchors a new democratic, pluralistic order without opposing the institutional interest and above all, official understanding of the judges. Only then will a pre-existing apex court be interested in enforcing and protecting their own position, and thus the new constitutional order and thus possibly contribute to democratization.[1845] Frequently this scenario would probably result in a reinvention of the judicial role of the court during the transition. Formerly inactive courts could become more powerful if they wanted to, and clever judges can adjust to the new order. Moreover, as the justices change, they are likely to become more audacious and to express principles other than those of the authoritarian regime. All of this might be true, yet this switch in attitude might take time that a transition does not always allow. This was the case in Chile, where only years after the constitutional transition the apex court started to reject former autocrat's immunity, which were part of the exit bargain in the first place.[1846] Therefore, it is not shocking, for instance, that during the South African negotiations the establishment of a new constitutional court was called for, rather than trusting institutions still affiliated with *apartheid.*

Nevertheless, 'in general, new elites lack the breadth and depth of personnel to staff a full judiciary after transition, so that of necessity low-level judicial staff may remain who have been appointed by the previous regime. This can have significant downstream effects at low levels of policy conflict, in which judges can hamper the new regime."[1847]

2. Newly Established Apex Court

Support of the new constitutional order is instead often assumed for newly established apex courts.

Legal systems serve the maintenance of the existing constitutional order. A newly established constitutional court in a young, democratic order can work for the protection and enforcement of the new constitution, which has become the decisive source of its institutional power. Even if judges

1845 Haimerl. 63.
1846 Ginsburg, "Courts and New Democracies: Recent Works," 730.
1847 ibid.

have been trained and socialized in the old system, they can contribute to democratization in this way, as it was the case in South Africa and Colombia.

In the previous section, I have briefly explained how pre-existing courts tend to resort to nonjudicial means in order to allow its previous practice to fit with the new constitutional order. This pushes apex courts to encroach on the political realm. The degree of politicization of newly established courts is commonly lower because their status and stance are usually entrenched in the new constitutional order. Not having a previous stance, they do not have to try and save anything from the time before the transition. They tend to be adequately empowered by the new constitutional order to assert its own position. In other words, for newly established apex courts, their role is better defined, and it is often the one of upholding the new constitutional order. Of course, we have seen how even newly established courts need to resort to political means in order to assert their own position. The degree of politicization will however not be as high as the one with pre-existing apex courts, lowering thus the risk of juristocracy.

In this sense, the establishment of new courts provides an opportunity to comprehend the dynamics of institutional design and the political incentives behind judicialization. Often new apex courts are established because pre-existing courts are not trusted to carry out the transitional task of upholding the new constitutional order due to corruption, incompetence, or political preference. At times, old apex courts may not even want the task and thus paddle against the transition. The establishment of special jurisdictions to fight corruption (for instance, in Indonesia and the Philippines), to engage in administrative adjudication (Indonesia), or to practice exclusive jurisdiction over previously immune royals (Malaysia) are all consequence of old apex courts not wanting to do their transitional job.[1848]

The establishment of, for instance, a constitutional court can be also the extreme consequence of the risk of having an untrustworthy apex court (for instance a supreme court) during a period of transition. Thailand makes the perfect example of such situation. The establishment of the Constitutional Court in Thailand did not come without debate during the 1996–1997 drafting of the 1997 Constitution of Thailand. Senior judges of the Supreme Court opposed the idea of establishing a constitutional court

1848 See, ibid.; Harding and Nicholson.

on the grounds that constitutional review should stay a prerogative of the Supreme Court and that a constitutional court would produce a fourth branch of government even more powerful than the executive, legislature, or judiciary. Thailand's Constitutional Court, up until the coup d'état of 2006, found itself playing a role of settling major political cases involving elections, corruption, and economic regulation, whereas in human rights cases it was rather deferential toward government. The role of political adjudicator was a risky one, given the politically contentious state of Thailand's politics back then, and the Court found itself oscillating between the rising political forces of Thaksin Shinawatra and the Bangkok elite. Eventually, oscillation turned out not to be a good strategy: the Constitutional Court was dismantled on the occasion of the military coup against Thaksin's government in 2006 and was replaced by a Constitutional Tribunal within the framework of Thailand's interim Constitution. Wanted by the military, a new Constitutional Court was established by the 2007 Constitution and in the following years increased its influence on the political events of the country. These decisions have raised serious criticism of the role of the Constitutional Court, which is accused of supporting the military and conservatives by influencing national policy. The 2017 Constitution wanted by the military junta further increased the powers of the Constitutional Court to prevent the return to government of the Shinawatra allies. These moves of dissolution and re-establishment aimed at siding the apex court with the military; in other words, a packing scheme.[1849]

1849 See, Ginsburg, "Courts and New Democracies: Recent Works," 730; Khemthong Tonsakulrungruang, "The Constitutional Court of Thailand: From Activism to Arbitrariness," in *Constitutional Courts in Asia: A Comparative Perspective*, ed. Albert H. Y. Chen and Andrew Harding (Cambridge: Cambridge University Press, 2018); James R. Klein, "The Battle for the Rule of Law in Thailand: The Constitutional Court of Thailand," in *The Constitutional Court of Thailand: The Provisions and the Working of the Court*, ed. Amara Raksasataya and James R. Klein (Bangkok: Constitution for the People Society, 2003). See also, Oliver Holmes, "Thailand's King Signs Constitution That Cements Junta's Grip," *The Guardian* (April 6, 2017), https://www.theguardian.com/world/2017/apr/06/thailand-king-signs-constitution-path-polls-election (accessed November 21, 2019); Raimondo Bultrini, "Thailandia, Destituita La Premier Per Abuso Di Potere," *la Repubblica* (May 7, 2014), https://www.repubblica.it/esteri/2014/05/07/news/thailandia_destituita_la_premier_per_abuso_di_potere-85442304/?ref=HREC1–21 (accessed November 21, 2019); Kevin Hewinson, "Thailand's Conservative Democratization," in *East Asia's New Democracies: Deepening, Reversal, Non-Liberal Alternatives Politics in Asia*, ed. Yin-wah Chu and Siu-lun Wong (New York: Routledge, 2010).

Nevertheless, establishing a new apex court could also bring disadvantages, especially when it comes to the relationship between it and old institutions, jealous of their prerogatives. Ginsburg in this regard writes:

> 'Indeed, the idea of roles emphasizes that it is not just possible, but likely, that different courts will assume different roles in the political and legal system—if one court is already occupying a particular political space, the other may have to take an opposing view to maintain relevance. Conflicts between supreme and constitutional courts have become commonplace [...]. A supreme court may play a role of downstream guarantor even while its counterpart constitutional court tries to play a transformative role.'[1850]

These conflicts between new and old institutions can influence the performance of courts in transitional periods as each struggle to define its own role.

3. Relating Legacy with Role and Behavior

Interestingly enough, even though a pattern is always hard to make with only three case studies, the present research's case studies have demonstrated how maintaining a pre-existing apex court heightens the potential of having a court obstructing the normative constitutional transition, whereas newly established ones tend to facilitate it.

The implicit argument laid out above is that some judicial legacy of a pre-existing apex court amplifies the chances of it playing the obstructer role; but which one, is hard to tell. Ginsburg offers some speculative thoughts:

> '[T]he greater role of courts in the authoritarian regime, the more likely they are to serve as guarantors or triggers. In apartheid South Africa, for example, the courts operated with a long transition of strict positivism, applying the law neutrally notwithstanding its immoral character. This stance no doubt served the institutional interest of the judiciary, and also made it a more trustworthy body to play the role of downstream guarantor. Weak courts will be less likely to serve as credible guarantors of policies against downstream reversals.'[1851]

1850 Ginsburg, "Courts and New Democracies: Recent Works," 731.
1851 See, "The Politics of Courts in Democratization," 189–90.

II. The Degree of Judicial Independence

Whether a court was pre-existing or newly established needs to be understood in combination with another key factor for the role and behavior of apex courts in times of transition, i. e., *relative judicial independence*. It all boils down to judicial independence. Independent courts are more likely to generate compliance with the new regime, as they are less expected to be attached to any element of the old regime. In this sense, it is more likely that pre-existing apex courts will struggle more to remain independent due to their pre-transitional legacy. At the same time, a newly established constitution might encounter challenges when striving for independence, especially when asserting their own role.

In sum, the quest for judicial independence is important for both a pre-existing and a newly established apex court. The logical rule of thumb would then be that independence heightens the potential of an apex court being a facilitator of the constitutional transition.

Yet, regardless of the difference between pre-existing apex courts and newly established ones, the way the apex court is designed during the constitutional transition can influence the ultimate role the court will play in it. What nurtures independence and impartiality are factors such as selection procedures, qualification and race of the justices, security of tenure, structural safeguards, education and many other more intangible qualities including judicial traditions, internal decision-making procedure, concern for legitimacy, and integrity.

1. Lessons from the Case Studies

To assess whether the structure and composition of courts, which is the cradle for judicial independence, influence the role of courts, we need to take a look again at the case studies, and in particular at their appointment and removal procedures.

In Egypt and Turkey, both apex courts were not sufficiently independent to ensure a fair commitment to the constitutional transition. Their past led them to be apex courts safeguarding the old regime's interests and values, not only because they were pre-existing courts as such, but because this legacy also left them institutionally still bound to the old regime's constitutional order.

South Africa instead, with its newly apex court, faced the challenge to design the right court to face the transformation ahead; a deep-seated social transformation from *apartheid* to constitutional democracy.

a. Egypt

aa) Appointment Process: The Judiciary-Executive Model

During the 1980 s and 1990 s, the so-called golden-era, the SCCE was able to exercise a high degree of independence against the ruling Mubarak regime, representing one of the only public institutions during the authoritarian era that presented any real challenge to Mubarak's regime.[1852]

Nevertheless, the court's power to check the executive power was not unlimited; even though it released independent liberal judgements in the area of fundamental liberties, it was well aware of the balance that it needed to keep between politics and law, in other words it was very careful not to rule on matters that touched on the core of the regime. In order to try to avoid direct clashes with Mubarak's regime, the SCCE often delayed, even for years, ruling on politically sensitive topics. By adopting a cautious approach, the SCCE was able to preserve its institutional security and independence under a Mubarak's authoritarian regime. In time, the balance between law and politics that the SCCE managed to maintain, proved to be a greater exercise of judicial power than Mubarak was willing to tolerate. In 2001, Mubarak interrupted the long-lasting informal tradition for appointments, choosing himself as new Chief Justice a loyal member of his regime, M. Fathi Naguib. Mubarak stunned many by ignoring decades of SCCE appointment rules; the President has always had the formal authority to appoint the Chief Justice, but he had never asserted that power before. The tradition was that the most senior sitting SCCE judge was promoted to Chief Justice.[1853]

In any case, Mubarak had lost his patience, and Naguib's appointment indicated a clear shift in the balance of power between the executive and the SCCE; the SCCE was packed. Among other arguments, Naguib also claimed that his appointment as Chief Justice did in any case not threaten

1852 For examples of such resistance, see Choudhry and Glenn Bass, 60 – 61.
1853 ibid., 61; Moustafa, 198 – 99.

the independence of the SCCE because a majority of the quorum was always anyways required to decide.[1854]

Once appointed, Naguib moved rapidly to alter the ideological composition of the SCCE by appointing more justices who were loyal to Mubarak. Since neither the Constitution nor the SCCE's Law specified a total number of justices, Naguib immediately appointed five extra justices on top of the existing nine, realizing the packing scheme.[1855] In sum, a once powerful and independent court changed almost overnight to one controlled almost wholly by the executive.[1856]

The impact that Mubarak's assertion of control over the SCC had on its independence can be clearly seen in its subsequent rulings. After Naguib, Mubarak persisted in selecting Chief Justices who had not previously served on the SCCE; especially Farouk Sultan in 2009, who not only had not served on the SCCE, but also had no constitutional law background, for he came from military and state security courts.[1857]

Once Mubarak was overthrown in 2011, the SCCE tried to reclaim its control over its appointments. While the details of its exchanges with the SCAF are impossible to know, it did win an important concession with the constitutional declaration on SCCE appointments, which gives SCCE justices again an important role in appointing the judges and limits the President's powers concerning candidates. According to said declaration, the General Assembly of the Court selects the SCCE's Chief Justice from among the Court's three most senior members, and the President formally appoints the Chief Justice.

During the constitution-drafting process for the 2012 Constitution, however, the SCCE was scared that said appointment power was going to be once more changed by the Islamic-led Constituent Assembly. The SCCE indicated its displeasure with proposed articles in this sense by even calling a press conference. It is hard to know what influence this had on the Constituent Assembly, but the final draft of the 2012 Constitution said little about the SCCE, delegating key questions about the Court to

1854 Choudhry and Glenn Bass, 61–62.

1855 ibid., 62.

1856 Moustafa, 205–08.

1857 ibid., 210–13; Kristen Stilt, "'Islam Is the Solution': Constitutional Visions of the Egyptian Muslim Brotherhood," *Texas International Law Journal* 46 (2010): 83.

impending legislation.[1858] Under the 2012 Constitution, the SCCE was composed of 11 judges and, as said, the procedure for appointments was not specified, deferring that question and many others to future implementing legislation (Art. 176). While the 2012 Constitution was in force, no such further legislation regarding the SCCE's appointments procedure was passed making the appointments procedure outlined in the June 2011 SCAF constitutional declaration the law in force.

The new 2014 Constitution, instead, in his Article 193, has given the SCCE a very independent role by letting the SCCE determine how many justices it deems to be 'sufficient.' Further, the SCCE's justices appoint themselves, without any other parties' encroachment. The president eventually issues the appointment decision, yet he/she does not have the power to reject the choice made by the general assembly of the SCCE. This makes the president's role merely a formality. Nevertheless, on April 20 – 22, 2019, following a referendum, the 2014 Constitution was amended, allowing, inter alia, the president to again appoint the chief justice.[1859] A move, which clearly sees the executive wanting to take some control over the judiciary again.

Egypt has seen a continuous change in the appointment procedure over the years. Throughout the years of the transition, the model shifted from the judiciary-executive model to the only judiciary-model and then again to involving the executive in the appointment process. The tension has mostly been between the judiciary and the executive. In sum, the current situation is far from being stable.

bb) Effect of the Appointment Process on the Role and Behavior of the SCCE

During the transition and under the 2012 Constitution, the SCCE has issued several politically provocative decisions regarding the parliamentary election law and disenfranchisement law, which drew attention to the barriers between the SCCE and other political actors. The ruling on the parliamentary election law basically left post-Mubarak Egypt without a

1858 Brown, "Egypt's Judges in a Revolutionary Age"; Tarek Radwan, "Egypt's Return of the Judiciary," *Foreign Policy* (October 18, 2012), https://foreignpolicy.com/2012/10/18/egypts-return-of-the-judiciary/ (accessed November 21, 2019).

1859 See, TIMEP; El-Din; Human Rights Watch, "Egypt: Constitutional Amendments Entrench Repression".

fully functioning legislature (even though the upper chamber, the *Shura* Council, was not affected by this ruling) and triggered strong public criticism from major political factions, such as the Muslim Brotherhood, which had won a majority in the dissolved parliament. The ruling was thus perceived as politically motivated in favor of secular political factions. Supporters of the SCCE's decision instead argued that its ruling simply fulfilled the mandate to uphold the current constitutional order.[1860]

After the passage of the 2012 Constitution, the SCCE was again called upon to review, among other things, on the electoral law under which the *Shura* Council was elected and found that said law was also unconstitutional. However, this time, the SCCE did not order the dissolution of the *Shura*, ruling that the 2012 Constitution granted the *Shura* the power to legislate until new parliamentary elections were held.

While the SCCE's decisions on parliamentary election laws were commonly considered whole and sound in terms of their legal reasoning, the SCCE was consistently criticized because its rulings seemed to increasingly favor secular interests over those of political Islam, which had gained major public support during the transition. Regardless of its motives (opportunism or idealism), many perceived the SCCE as being politically biased. In other words, as Choudhry and Glenn Bass point out:

> 'In a transitional political environment that is radically different from the authoritarian regime under which the SCCE was created, the vulnerabilities that result when a court's members have been selected without any participation by a broad cross-section of political parties from across the spectrum or the public became clear.'[1861]

This role of a one-sided positioning on the side of the SCAF and the secular idealism cannot only be explained by the judges appointed under Mubarak, such as Tahani al-Gebali or the Chief Justice Faruk Sultan. The latter was only involved in the one critical decision (the one on the parliamentary

1860 See, Kirkpatrick, "Blow to Transition as Court Dissolves Egypt's Parliament".

1861 Choudhry and Glenn Bass, 64. See also, Brown, "Cairo's Judicial Coup"; Gamal E. El-Din, "Egypt's Shura Council to Continue Exercising Legislative Powers," *Ahram Online* (June 3, 2013), http://english.ahram.org.eg/NewsContent/1/64/72969/Egypt/Politics-/Egypts-Shura-Council-to-continue-exercising-legisl.aspx (accessed November 21, 2019); Nathan J. Brown and Mokhtar Awad, "Egypt's Judiciary between a Tea Ceremony and the Wwe," *Foreign Policy* (May 14, 2013), https://foreignpolicy.com/2013/05/14/egypts-judiciary-between-a-tea-ceremony-and-the-wwe/ (accessed November 21, 2019).

election law) and was only in office until the end of June 2012.[1862] The former was present at neither judgment. The composition of the SCCE reflected the ambivalent legacy of the institution. Due to the amendments to the law on the SCCE made by the SCAF at the beginning of its rule, even two justices of the 'golden era' were appointed Chief Justices after Faruk.[1863] Little is known about the internal decision-making processes in the SCCE. However, due to the heterogeneous composition of the staff and the importance of the Chief Justice in the decision-making process,[1864] the thesis can be formulated that even the judges, who have been members of the court for many years, have come to terms with the military. This agreement is symbolically reflected in the interim presidency of Mansur – a judge from the 'golden era' – after Morsi's ousting, who has provided the rule of the military with a civil-law concealment.[1865]

b. Turkey

aa) Appointment Process: From the Judiciary-Executive to the Multi-Constituency Model

Before the packing plan of 2010, the 1982 Constitution postulated an appointment procedure following a variation of the *judiciary-executive*

1862 Aboul Enein.

1863 For a detailed list of the Justices present during both critical rulings on the parliamentary election law and the disenfranchisement law, see Haimerl. 66.

1864 When a case is referred to the SCCE, it is first examined by the commission of the Court. It prepares the case and makes a recommendation. This is followed by the Court's examination. The Chief Justice decides on the date of the hearing. Cf. Mahmoud M. Hamad, "The Politics of Judicial Selection in Egypt," in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, ed. Peter H. Russell and Kate Malleson (Toronto; Buffalo: University of Toronto Press, 2006), 271. The Constitutional Court Act does not establish a fixed number of judges to hear the case. There is only one quorum, that at least seven judges must decide the case. Once a majority is found, an opinion must be written. If the Chief Justice is part of the majority, he writes the opinion, otherwise he chooses a judge to do it. Cf. Omar Adel Sherif, "The Freedom of Judicial Expression, the Right to Concur and Dissent: A Comparative Study," in *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt*, ed. Kevin Boyle and Omar Adel Sherif (London: Kluwer Law International, 1996), 145. There is no provision for dissenting opinions. The Chief Justice shapes the jurisprudence of the SCCE on the basis of these provisions, in conjunction with the right to nominate judges and the competence to determine the members of the commission. Cf. Hamad, 271; Lombardi, 226.

1865 Haimerl. 62.

model, which is a typical model seen in the Middle East in countries such as Egypt and Iraq, in which the executive appointed candidates nominated by the judiciary. The President would then appoint all 11 permanent justices and four substitutes to the TCC (cf. Art. 146 prior the 2010 amendments). The idea is that in this way the judges appointed would share a 'relative ideological conformity,'[1866] and eventually created a Court perceived as disengaged from public opinion and democratic will.[1867]

In 2010, however, Turkey switched to the multi-constituency model. The 2010 constitutional amendments altered the number of judges on the court, their term length and the procedure for appointing them. Before, there were 11 permanent justices and four substitutes and no set term limit, even though retirement was instructed at 65 years and the minimum age at 40 (Art. 146, 147).[1868] The 2010 amendments augmented the number of justices to 17, all of whom are permanent and may serve one non-renewable term of 12 years. The mandatory retirement age stayed at 65 (Art. 147, amended 2010).

On top of adding a broader pool from which TCC justices could be selected, the 2010 amendments introduced a role for the legislature in the appointment process. In short:

> 'The President selects 14 of the 17 TCC judges from specific institutions and professional categories. Seven of these 14 come from Turkey's high courts: three from the High Court of Appeals (Court of Cassation), two from the Council of State, one from the Military High Court of Appeals (Military Court of Cassation) and one from the Military High Court of Administration. For each of these seven positions, the President appoints a candidate from a list of three judges nominated by the courts' plenary assemblies. The President appoints three of the 14 from candidates nominated by the Council of Higher Education; the Council nominates three candidates for each seat from a pool of legal academics, economists and political scientists. Finally, the President appoints four of the 14 from among lawyers, prosecutors and judges from the lower courts, and senior administrative officers (Article 146, amended 2010). The [TBMM] appoints the remaining three judges according to the following guidelines. The Court of Accounts submits a list of three candidates, selected from among its President and members, for each of two seats on the [TCC]. The heads of Turkey's bar associations submit a list of three candidates (who are self-employed lawyers) for the third seat. The [TBMM] then votes to elect a judge to each of the three seats. In the first round of voting, a candidate must win a two-thirds majority to be appointed. If a candidate does not

1866 Choudhry and Glenn Bass, 78.
1867 See, Bâli, "Courts and Constitutional Transition: Lessons from the Turkish Case," 694.
1868 Choudhry and Glenn Bass, 78–79.

prevail in the first round, there is a second round of voting, in which a candidate must win an absolute majority. If no candidate succeeds in winning an absolute majority in the second round, there is a run-off between the two candidates who received the most votes; the winner of that run-off vote is appointed."[1869]

bb) Effect of the Appointment Process on the Role and Behavior of the SCCE

The fact that before the 2010 amendments the appointments were mostly in the hands of the president and the judiciary itself, in combination with the fact that the president has been a secularist up to the election of Gül of the AKP, has definitely contributed to maintaining the Kemalist stance of the TCC throughout the reform.

It is hard to assess whether the new the multi-constituency model has had an impact on the role or on the TCC due to the short time it has been employed. Even though these changes can lead to a more inclusive institution, it is also a veritable packing scheme on the part of the AKP. A change in the role the court plays in the future of the reform is foreseeable. Evidence is a 2012 ruling of the TCC that former President Abdullah Gül of the AKP could remain in office for 7 years (i.e., until 2014) and then could run for a second term.[1870] This ruling proves that the TCC is now clearly under the influence of the AKP. In any case, the Turkey shows how judicial independence is fragile and can easily be manipulated.

c. South Africa

As an element of constitutionalism, judicial independence is both precursor of the transformation and element of it. In South Africa, where transformation from a racially segregated society to a representative constitutional democracy was on the menu, judicial independence played

1869 ibid., 79.

1870 See, Hürriyet Daily News, "Turkish President Gül to Serve Seven Years, May Run Twice: Constitutional Court," *Hürriyet Daily News* (June 15, 2012), http://www.hurriyetdaily-news.com/turkish-president-gul-to-serve-seven-years-may-run-twice-constitutional-court-23261 (accessed November 21, 2019); "Court Clears Way for Gül to Re-Run Top Post," *Hürriyet Daily News* (June 16, 2012), http://www.hurriyetdailynews.com/court-clears-way-for-gul-to-re-run-top-post-23315 (accessed November 21, 2019).

a crucial role and the question over the designing of the structure and composition was even more paramount with a newly established apex court.

In South Africa, *apartheid* was the main evil; a lack of representativeness and equal rights is what triggered the transition in the first place. In this respect, if the CCZA had to be the guardian of the new constitution and one of the precursors of the transition, it needed to reflect the new values. In this sense, a first concern was the appointment procedure.

aa) The Appointment Process: The Judicial Council Model

The CCZA is comprised of 11 justices including the Chief Justice and the Deputy Chief Justice,[1871] all of which are commonly appointed for a non-renewable term of 12 years, or until they attain the age of 70, whichever occurs first.[1872] Appointments to the CCZA are administrated by the JSC, which also expedites disciplinary matters and the management of justice in general.[1873]

Thus, in order to tackle the transformation from legal segregation towards inclusive democracy properly, the Constitutional Assembly opted for the judicial council model of appointment. Choudhry and Glenn Bass explain it:

> 'Judicial councils are created to insulate the appointments process from political actors by forming a council involving multiple political branches and, often, non-political groups such as bar associations, legal scholars and other civil society actors. This council oversees the appointments process, soliciting applications for court vacancies, interviewing candidates, and then either selecting a candidate or presenting a shortlist of candidates to the executive or legislature to make a final selection.'[1874]

The composition of the judicial council in question is almost as important as the composition and structure of the apex court that is supposed to appoint. 'Compared to judicial councils in other countries, the JSC has a relatively large number of members, because it is intended to represent "a wide section of the South African legal and political establishment" and to include as many different interest groups as possible.'[1875] In total it comprises twenty-three members, eleven of which are appointed by the

1871 See, Art. 167 Constitution of South Africa, 1996.
1872 See, Art. 176 Constitution of South Africa, 1996.
1873 See, Art. 178 Constitution of South Africa, 1996.
1874 Choudhry and Glenn Bass, 11.
1875 ibid., 49.

President.[1876] Six of the residual twelve members are selected from among members of the lower house of Parliament, i.e. the National Assembly, and at least half of those six have to be members of opposition parties.[1877] Another four are appointed from among the permanent delegates to the upper house of Parliament, i.e. the National Council of Provinces.[1878] The remaining two members must be law professors selected by their peers at South African universities, and one judge president, also designated by his or her judicial peers.[1879]

When a judge of the CCZA needs to be appointed, the JSC publishes a call for nominations. Prospective candidates have to submit an application, which comprises the resume, a statement confirming that he or she is a member in good standing in his or her profession, and a questionnaire that 'solicits information about the applicant's personal and professional life, including the applicant's contribution in the struggle against *apartheid*, commitment to the principles underlying the Constitution, financial interests, practice, and other relevant experience'.[1880] The applications are circulated among JSC members, some of which are appointed to a subcommittee charged with examining them and select a list of candidates to interview.[1881]

When determining the list of candidates to interview, the Constitution requires that '[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed' in the interest of creating a diverse and inclusive judiciary."[1882] The JSC has indicated that 'the stated goals of diversity and representation are more than just the exercise of increasing the numbers of Black individuals and women on the bench. The JSC has required that the values and visions of the appointed individuals must also comport

1876 '[T]he presiding Chief Justice of the Constitutional Court, the President of the Supreme Court of Appeal, the Minister of Justice, two practicing advocates and two practicing attorneys (who are appointed by the President after being nominated by their respective professions) and four laypersons selected after consultation with the leaders of all parties represented in the National Assembly (Article 178(1)).' See, ibid.

1877 See, Art. 178(1)(h) Constitution of South Africa, 1996.

1878 See, Art. 178(1)(i)) Constitution of South Africa, 1996.

1879 See, Art. 178(1)(g) and (c), respectively of the Constitution of South Africa, 1996. See also, Choudhry and Glenn Bass, 49.

1880 Penelope Andrews, "The South African Judicial Appointments Process," *Osgoode Hall Law Journal* 44, no. 3 (2006): 568.

1881 Choudhry and Glenn Bass, 49.

1882 See, Art. 174(2) Constitution of South Africa, 1996 as well as ibid.

with the explicit social justice commitments embodied in the *Constitution* [...].'[1883] The moment the list of candidates to interview is ready, it is distributed to the entire JSC, which approves it and publishes it. Interviews are then conducted publicly.[1884]

The formal appointment is made by the President, who also selects the Chief Justice and Deputy Chief Justice after consulting with both the JSC and the leaders of the political parties represented in the lower chamber of parliament. As for the remaining nine members of the CCZA, the President's appointment power strongly limited due to the political importance of the CCZA. The JSC prepares a list of candidates for the President with three names above than the overall number of appointments to be made. The President has to select from this list, but may also reject the first list of candidates or individual candidates, giving motives for the refusal. In this case, the JSC make another list with extra candidates. The President *must* then choose from this additional list. Before definitely appointing a candidate, the President has to consult with the Chief Justice and the leaders of all parties represented in the lower chamber of parliament.[1885]

bb) *Effect of the Appointment Process on the Role and Behavior of the CCZA*

In the years of the transition, the CCZA was able to play a key role as an effective check on the executive and legislative branches, as well as in facilitating the transition itself. In a short period of time, the CCZA has developed a lot of respect as an apex court and this also thanks to the high degree of judicial independence established by an inclusive appointment procedure, and to the prominent jurists who were the first appointees after its creation.[1886]

1883 Andrews, 567.

1884 See, Choudhry and Glenn Bass, 49.

1885 See, ibid., 50. See also, Hugh Corder, "Judicial Authority in a Changing South Africa," *Legal Studies* 24, no. 1–2 (2004): 198.

1886 See, Choudhry and Glenn Bass, 50. See also, Penelope Andrews, "The Judiciary in South Africa: Independence or Illusion?," in *Judicial Independence in Context*, ed. Adam Dodek and Lorne Sossin (Toronto: Irwin Law, 2010), 483–85.

By facilitating the transition, the CCZA has shown commitment to the new constitutional order. In some cases, it was even clear how it was commitment to the rule of law by contrasting ANC-supported laws and policies. Choudhry and Glenn Bass draw attention on the *Treatment Action Campaign*[1887] and *Glenister*[1888] rulings, which stand out for the international attention they received and their impact on the government.

- In 2001, the *Treatment Action Campaign*, a South African HIV/AIDS activist organization, advanced a legal challenge against the government on the grounds 'that it had an obligation to implement a more effective strategy to fight against HIV, and that the government program in place was in breach of South Africans' constitutional rights for limiting access to 'nevirapine,' a drug indicated to prevent mother-to-child diffusion. Apparently, several citizens had died prematurely of HIV during the term of former President Mbeki, and many of these deaths could have been prevented by timely supply to mentioned anti-HIV medicaments. Apparently, the government had abundant supplies of said drug, but contended that further research was required to determine the safety of the medicine before it was made publicly available. In a very important ruling, the CCZA maintained 'that the government's restrictions on the distribution of nevirapine did not fulfil its constitutional obligation to provide reasonable measures within available resources for the progressive realization of the right to health."[1889] The ruling was a humiliation to former President Mbeki and his Ministry of Health, who 'had already been widely criticized by public health specialists for its insufficient response to the HIV/AIDS epidemic in South Africa."[1890]
- The *Glenister* case, instead, was about South Africa's new anti-corruption unit (so-called 'Scorpions'), which had been created by the same government in 1999 as a special investigative unit focused on corruption and organized crime. Nevertheless, their work received both praise and criticism. The latter especially after several investigations into high-

1887 See, *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002).

1888 See, *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011).

1889 See, Choudhry and Glenn Bass, 51.

1890 Chris McGreal, "Mandela Attacks Mbeki's Aids Policy," *The Guardian* (February 18, 2002), https://www.theguardian.com/world/2002/feb/18/aids.nelsonmandela (accessed November 21, 2019).

ranking ANC members. The government quickly accused the Scorpions of overstepping their area of competence and replaced them with a new unit called the Hawks.[1891] Supporters of the Scorpions criticized the ANC's move of closing the unit, for it was seen by them as a highly effective investigative team, and claimed that it was closed rather due to the embarrassment it had caused the ANC. Hugh Glenister, a businessman, challenged the law that shut down the Scorpions and replaced them with the Hawks over its constitutionality. Thus, in 2011, the CCZA asserted the unconstitutionality of the law on the grounds that the Constitution mandates the government to establish an effective anti-corruption mechanism, yet the structure of the Hawks did not fulfill the necessary requirement because of a lack of independence. According to the CCZA, its structure rendered the unit vulnerable to government pressure; the ruling required remedies to these defects.[1892]

These 'attacks' on the ruling party's policies and actions have sparked criticism from the ANC towards the CCZA and calls for reforms of the judiciary have been made. No serious steps have been taken towards changing the structure and/or composition of the CCZA or the JSC. In any case, despite the high level of respect, the CCZA cannot enjoy full support of the people and just like any other court in the world, it has no possibility to resist amendments to its structure, powers or appointments process. The ANC's persistent dominance of both the executive and legislative powers in the country highpoints the vulnerability the CCZA against any possibly initiative of the ANC in case it would decide to modify the structure, powers or appointment process of the court or apply more influence over the selection of members to the JSC.

Additionally, the Court's appointments procedure has already drawn criticism on the grounds of an increasingly loss of independence in said process, chiefly due to the ANC's dominance of the JSC and a perceived lack of transparency in the selection process.[1893] So, on the one hand, the

1891 Joey Berning and Moses Montesh, "Countering Corruption in South Africa: The Rise and Fall of the Scorpions and Hawks," *South African Crime Quarterly* 39 (2012); Pierre de Vos, "On the Disbanding of the Scorpions," *Constitutionally Speaking* (January 24, 2008), https://constitutionallyspeaking.co.za/on-the-disbanding-of-the-scorpions/ (accessed November 21, 2019).

1892 See, Choudhry and Glenn Bass, 51.

1893 See, ibid., 51–52. For more on the support for the CCZA within South Africa and its complicated relationship with the political branches, see in general Roux, *The Politics of*

one-party dominance of the ANC may have a serious impact on the CCZA's appointments through the JSC and long-term implications for the court's independence.[1894] On the other hand, despite the JSC's process for selecting judicial appointees being decidedly more transparent than the *apartheid*-era appointments procedures, the review of applications and decision about which candidates to shortlist for interviews are still not completely transparent. The JSC does not publish a list of all applicants for a judicial post, which makes it hard to understand how they select the shortlisted group to interview. Moreover, the JSC's post-interview deliberations on which candidates to recommend for appointment are also not publicly shared. The JSC defends this practice by arguing that it protects the privacy of those who are not shortlisted and adds that making deliberations public would make Commission members more unwilling to express their factual opinions of candidates' qualifications, and that little would be gained by disclosing its private deliberations. The JSC has also made public the criteria it looks for in judicial candidates, which sheds some light on the focus of their private deliberations; these criteria include 'characteristics such as intellectual ability, fairness, independence, perceptiveness, courage and integrity.'[1895]

In other words, these accounts on the CCZA have fueled fears of the ANC trying to exercise excessive influence over the CCZA, even though it is too early to evaluate the legitimacy of those fears. As Choudhry and Glenn Bass also maintain: 'it is not yet clear whether these issues will affect the

Principle: The First South African Constitutional Court, 1995–2005; James L. Gibson and Gregory A. Caldeira, "Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court," *The Journal of Politics* 65, no. 1 (2003); James L. Gibson, "The Evolving Legitimacy of the South African Constitutional Court," in *Justice and Reconciliation in Post-Apartheid South Africa*, ed. François du Bois and Antje du Bois-Pedain (New York: Cambridge University Press, 2008).

1894 Kate Malleson, "Assessing the Performance of the Judicial Service Commission," *South African Law Journal* 116, no. 1 (1999): 38–39; Helen Zille, "Zille Disappointed over Zuma's Final Jsc Choices," *Politics Web* (July 19, 2009), https://www.politicsweb.co.za/news-and-analysis/zille-disappointed-over-zumas-final-jsc-choices (accessed November 21, 2019); Pierre de Vos, "Anc Trying to 'Load' the Jsc?," *Constitutionally Speaking* (July 10, 2009), https://constitutionallyspeaking.co.za/anc-trying-to-load-the-jsc/ (accessed November 21, 2019); Hugh Corder, "Appointment, Discipline and Removal of Judges in South Africa," in *Judiciaries in Comparative Perspective*, ed. Hoong P. Lee (Cambridge: Cambridge University Press, 2011), 100.

1895 See, Choudhry and Glenn Bass, 54–55. See also, Malleson, 44–47.

Court's independence, and at present the Constitutional Court continues to be one of the most admired in the world.' [1896]

However, these are future developments, which would probably influence the post-transitory period of South Africa. The facilitating role the court has played in the transition has clearly been influenced by the diversity and qualification of the judges sitting on the bench of the CCZA during the transition. Although judicial independence is a complex matter, and its effects can be influenced by a myriad of secondary factors, diversity allows for greater depth and variety of perspectives to judicial rulings. As said, diversity is but one secondary factor of the effects of judicial independence over the role and behavior of the court, but in the South African case it was certainly crucial.

The racial composition of the apex court has effects not only on the role and behavior of the court, but also on the public perception of judicial independence. Public perception is crucial for the acceptance of the court's rulings and thus to its existence, therefore one cannot ignore the impact of racial representation on judicial independence and the outcome of the transition itself. As former Chief Justice Chaskalson maintained when opening the 2003 National Judges' Symposium, '[t]he impartiality of the judiciary is more likely to be respected by the public if it is seen to be drawn from all sectors of our community than will be the case if it is drawn from one race and one gender [...]'[1897] According to a 2015 (August and September) survey of 2400 South Africans, 54% of respondents 'believe that [...] the courts [...] "always" or "often" treat people differently based on their race [...]'[1898] In a previous survey in 2005 of '2000 South Africans, 52 [per cent] of respondents, with no difference between race

1896 See, Choudhry and Glenn Bass, 55. See also, Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid," 285; Mamphela Ramphele and Zohra Dawood, "South African Courts at Risk," *Project Syndicate* (June 5, 2012), https://www.project-syndicate.org/commentary/south-african-courts-at-risk?barrier=accesspaylog (accessed November 21, 2019); Emsie Ferreira, "South Africa: Minister Denies Manipulation of Judicial Service Commission," *All Africa* (April 26, 2012), https://allafrica.com/stories/201204270309.html (accessed November 21, 2019).

1897 See, Arthur Chaskalson, "Address at the Opening of the Judges' Conference: National Judges' Symposium," *South African Law Journal* 120, no. 4 (2003): 662.

1898 Rorisang Lekalake and Sibusiso Nkomo. "South Africans Generally Tolerant but Report Racial Discrimination by Employers and Courts." *Afrobarometer/The Institute for Justice and Reconciliation.* Dispatch No. 84 (April 20, 2016).

groups, agreed with the statement that a judge's race influences how he or she judges a case."[1899] In other words, these surveys are evidence of how the racial composition of courts impacts on public perception of judicial independence.

As with racial inclusiveness, judicial independence also goes hand-in-hand with the underlying attitudes, principles and motivations of the single judges. Among other things, Budlender argued that '[t]he judiciary must be transformed in its underlying attitudes – it must embrace and enforce the principles of a fundamentally new legal order', such as human dignity, the achievement of equality, and the advancement of human rights and freedoms.[1900] In other words, the judges sitting on the bench of an apex court of a country with a newly established transformative constitutional order need to be committed, ideologically, to the social vision of transformation. Thus, to produce this type of facilitating jurisprudence, the justices of the CCZA must be free to interpret the Constitution of South Africa, 1996, without outside restriction and to nullify government action that violates on the transformative constitutional principles. Accordingly, to compose a court eager to appraise each case objectively and impartially, when appointing judges, it is sensible to consider a candidate's attitude toward and dedication to the transformative character of the transition. In this sense, being a hegemonic preserver in the transition for the CCZA, of course, would be odd in a situation where the same is a fully new institution, and the people sitting behind the bench are, as in the case of South Africa, mostly people who were active in the struggle against the old regime.

Moreover, the independence of courts is crucial for another feature of the rule of law: the guarantee of access to justice for all members of society against individuals, but especially against the other branches of government. Of course, we have seen how judicial independence is actually relative, in the sense that it needs to strike a balance between independence of the court and its accountability. Yet, this does not restrict the leeway a court has in playing its role if the same court does not tilt

1899 See, *Do South Africans trust the judiciary?*, Research Surveys, Press release 17 July 2005. Account cited from Amy Gordon and Bruce David. "Transformation and the Independence of the Judiciary in South Africa." (2007), 30.

1900 See, Geoff Budlender, "Transforming the Judiciary: The Politcs of the Judiciary in a Democraitc South Africa," *The South African Law Journal* 122, no. 4 (2005): 716.

the balance between law and politics by thus overstepping its competences. This would be the limit of the court's independence. However, alternatively, the court is also the tool to ensure a check on the other branches of government, which is also a feature of constitutionalism. Courts ensure that all citizens, especially the poor and vulnerable, have the guarantee to be run by a government that can be called accountable and be compelled to justify its action, especially when breaching the constitution.[1901] The rule of law and the principle of separation of powers require that those who hold public power are also subject to the law that gives them such power, and are held accountable for using it. This check is provided by an independent judiciary, which is itself an element of constitutionalism. In order to do this, courts need to be independent, also because individuals often face financially and politically influential entities in court. In this sense, the apex court need to be perceived by both parties as impartial.

In sum, judicial independence, itself an element of constitutionalism, facilitates the achievement of many interrelated transitional goals.[1902] In South Africa, judicial independence was a true precursor of the transformation of society. Being the CCZA and its judicial independence, a key element of constitutionalism, the composition of the CCZA mirrored the values and motivations for change of the South African population and political spectrum. South Africa is thus a great example to illustrate the influence and impact that judicial independence can have on the role and behavior of an apex court.

2. Effect of Judicial Independence on Role and Behavior

Due to the dark past of *apartheid* and the weight of the role the CCZA would have to play in the transformation of the country, the question of judicial independence was of great importance also in South Africa, despite the newly established court. Where an apex court is already existent, the issue rests in the reinvention of its role and the composition of the court influences greatly how it responds to transitional matters. Instead, when an apex court is newly established, like in South Africa or Colombia, the issue rests in designing the best possible court to face the problems of the country.

1901 Gordon and David, 30.
1902 ibid., 30 – 31.

Judicial independence, being itself an element of constitutionalism, is a fundamental factor in the transformation, especially in South Africa. It is a typical factor, which has thus not only an effect on the outcome of the transition, but also facilitates the assertion of its own role.

The three case studies showed three different appointment procedures: Egypt the *judiciary-executive* model, Turkey the judiciary-executive model, as well as the *multi-constituency* one, and finally South Africa the *judicial council* model.

a. The Judiciary-Executive Model

In Egypt, and in Turkey before the packing of the TCC, a judiciary-executive model had been adopted. This model can see several variations of the model, all on the axis between the executive and the judiciary. In most variations, for instance, only the judiciary (mostly even only the highest ranks of the judiciary) and/or the executive are involved in the judicial appointment decision-making. This model disregards many political players from the appointments process (for instance, the legislature, legal academia, civil society, etc.). Accordingly, the judiciary-executive model makes it hard to generate a sense of political investment in the court among all those that are excluded. This is even more true for opposition parties, given the partisan and sensitive character of the transitional periods and the disputes resolved during that period, as Egypt and Turkey have illustrated.

Of course, the judiciary-executive model may be fit for certain political context. The assessment of apex courts in authoritarian settings reveals how insulating the apex court from the ordinary politics could be a way to protect judicial independence. This strategy was successful in Egypt for many years, where the model (combined with an informal practice that allowed the judiciary to basically control the entire appointments procedure), allowed the SCCE to safeguard its independence under Mubarak. As Choudhry and Glenn Bass add:

> 'This model may also be attractive in countries with weak legislatures that are prone to extreme polarization and fragmentation. Legislative politics tend to be dominated by party rivalries and short-term political concerns. The judiciary-executive model specifically excludes the legislature from appointing judges to the constitutional court, which may help to ensure that judicial appointments are not delayed by legislative

> deadlock and that political parties will not use appointments to pack the constitutional court with sympathetic judges.'[1903]

At the same time, the cases of Egypt and Turkey also show the challenges of the judiciary-executive model. Due to Mubarak's disregard for the informal practice in the appointment process resulting in the packing of the SCCE, and the fact that the judiciary remained mostly intact during the transition, many political parties and members of the public viewed the judiciary as a relic of the old former regime. In this sense, the judiciary-executive model does not grant the necessary inclusiveness that the appointment process would require to reinstate a certain trust in the SCCE. In Turkey, up until the packing of the court and the switch to a multi-constituency model, the judiciary-executive model also insulated the TCC from the political mood of the country. At the same time, being a hegemonic preserver, this isolation has resulted in the court not evolving and adapting to the new political context. In this sense, just like it happened with Egypt during the Mubarak era, the TCC tilted the balance between law and politics too much until the AKP could not tolerate it anymore. The results were a packing plan and a switch of appointment model.

In both countries, the employment of the judiciary-executive model has resulted in apex courts that are exposed to accusations of hegemonic executive capture. While the SCCE was seen as rather effective, independent and successful under an autocratic regime, it has lost trust and accountability during the transition; 'the changing political landscape has created new demands and public expectations of democratic accountability and transparency in the judiciary.'[1904] Therefore, in politically transitional settings, it may be sensible to assume a different appointments model that allows the full diversity of post-authoritarian political constituencies to be included in appointing apex court justices.

b. The Multi-Constituency Model

In order to regain trust, especially in times of transition or following a period of biasedness on the part of the apex court, a multi-constituency model should provide perhaps a greater opportunity than the judiciary-executive

1903 Choudhry and Glenn Bass, 71.
1904 ibid., 72.

model to promote a judiciary with judges who represent a diverse cross-section of the political spectrum. A multi-constituency model can include as many different constituencies as constitutional drafters prefer, including (but not limited to) elected and unelected branches of government, educational councils, bar associations, legal academia and NGOs. Moreover, this model can be designed to guarantee that each constituency successfully places candidates on the apex court, either indirectly or directly.[1905]

In Turkey, the switch to a multi-constituency model came in 2010 and was part of the packing scheme implemented by the AKP. Adding a multi-constituency model as an appointment process was more of a way to convince the population at the referendum that the change was actually for the good of the accountability and representivity in the judiciary. Now, the various constituencies produce lists of nominees, from which the President or the parliament must choose the judges to appoint to the TCC. Of course, if both parliament and presidency are in the hands of the same party, the final word remains 'dependent'.

Nevertheless, Choudhry and Glenn Bass, draw the attention to the Italian experience:

> 'In Italy, each branch of government is constitutionally guaranteed the right to appoint one third of the Italian Constitutional Court's judges. This is in stark contrast to the judicial council model, in which various constituencies are represented on the council that selects judicial candidates, but no constituency is guaranteed that a nominee of their choice will be appointed to the court.'[1906]

This model in Italy 'has created a strong sense of political investment in the Constitutional Court [...].'[1907]

The involvement of more constituencies has the potential to bring several encouraging effects on the stability of the constitutional order, especially in a new democracy. The normative conclusion of pluralism and inclusiveness in the constitution-making process can be positively replicated in the court-designing procedure. It makes sense as minor political parties or minority interests can be better be considered when composing the court. It gives the court a head-start when having to assess

1905 ibid., 85.
1906 ibid., 86.
1907 ibid., 12.

its own role in a transition, given that at least its appointment mechanism cannot be said to be biased. More actors may be more disposed to accept the court's authority, even when the court rules against their interests because of their high political investment in the court through the appointment procedure. A diverse apex court is likely to 'foster moderate viewpoints and decisions since compromise among many different opinions will be necessary to issue a final decision in a case. Furthermore, the public is likely to perceive a diverse constitutional court as more independent and less influenced by any one political actor or ideology.'[1908]

Of course, just as the judiciary-executive model, the multi-constituency model can see several variations. For instance, Turkey's new multi-constituency appointments process is sometimes criticized for not including enough constituencies. I have mentioned how the switch of appointment process was in Turkey part of a packing plan. I have also revealed in the case studies how a packing scheme does influence drastically the role a court plays in a transition. Thus, it is not a shock to see that despite the introduction of the multi-constituency model in Turkey, it does allow a wider array of actors to be included in the appointments process; in Turkey, that range is still somewhat narrow. The presidency selects 12 of the TCC's 15 justices from a pool of candidates mainly drawn from the judiciary, whereas parliament appoints three. Even though this seems to be not much different than the judiciary-executive model, the pool of candidates now qualified to be appointed is much wider and diverse than before. Again, Choudhry and Glenn Bass rightly maintain a critical opinion of this change and stress how, in addition to the still solid influence of the executive over the appointment process, 'the three judges selected by Turkey's legislature are also drawn from a relatively narrow pool of nominations from the Court of Accounts and Turkey's bar associations.' [1909] Thus, it might be suggested that the new appointments process may not seriously alter the TCC's composition and will preserve executive control over TCC appointments. The inclusion of two military justices has also been controversial; it raises questions regarding whether the military should play any role in the judiciary in a democracy and whether such judges can be unbiased, given that they may choose to return to the military justice system after their term on the

1908 ibid., 86.
1909 ibid., 87.

court.[1910] For similar reasons, countries in the MENA region should consider insulating the constitutional court appointments process from military influence, given the controversial role that some military forces in the region play in political issues.[1911]

c. The Judicial Council Model

The judicial council model is the model that the South African Constitutional Assembly deemed to produce the highest level of political investment. In short, judicial councils are made to shield the appointments process from political groups by creating a council involving several political branches and, frequently, non-political actors such as bar associations, legal scholars and other civil society actors. Such council supervises the appointments process, petitioning applications for court posts, interviewing candidates, and then either selecting a candidate or presenting a shortlist of candidates to the executive or legislature to make a final selection.[1912] The greatest advantage of the judicial council model is its potential to include an extensive range of the transiting society in the procedure of appointments. In other words, it adds an additional isolation layer from the multi-constituency model. Where the multi-constituency model directly gives the different constituencies to appoint one or more judges, the judicial council model allows said constituencies to indirectly appoint them. I have already mentioned how pluralism of membership on the council promotes a broad sense of political investment and at the same time, it neutralizes the risk of one actor dominating the appointment process.

In addition to the multi-constituency model, the judicial council model usually also includes anon-governmental member, such as legal scholars and professionals. For instance, in South Africa, the JSC includes members of the legislature (even members of opposition parties), the judiciary, legal professionals and law professors. In this way, many different interests can be represented on the council and thus in the appointment process; especially, like in South Africa, 'if a country's history suggests that one political party may remain dominant for long periods of time, creating

1910 ibid.

1911 ibid., 85–88. See also, Bâli, "The Perils of Judicial Independence: Constitutional Transition and the Turkish Example," 301–03.

1912 Choudhry and Glenn Bass, 11.

constitutional requirements that aim to guarantee opposition party representation on the judicial council at all times is advisable."[1913]

We have witnessed in the other models how the biggest enemy of an inclusive appointment process is the domination of both the executive and the legislature, especially in those models that do not provide for non-governmental actors to contribute to the process. The same goes for the judicial council model; party dominance in the two branches other than the judiciary can clearly have a negative effect on the long-term end composition of the court. So, even though we have seen this type of domination in both the other two cases of Egypt and Turkey, 'few democracies in the world feature one political party that is as consistently dominant in both the executive and legislative branches as the ANC.'[1914] Thus, despite the creation of the JSC, designed to include the widest range of political constituencies as possible, South Africa's account confirms that a judicial council is not invulnerable from political capture. In fact, South Africa's President is empowered to select and appoint almost half of the JSC, which added to the appointments by the parliament (clearly dominated by the ANC), and the same ANC ends up appointing a strong majority of the JSC.

So far, due to the history of South Africa, the ANC was clearly the one party most committed to the constitutional transition. In this sense, during the transition, the dominance of the ANC, as for the facilitation of the transition is concerned, did not pose a great problem. The CCZA has been a strong precursor for the transition to democracy and the composition mainly made of justices committed to the cause was of great significance.

In the future, this may lead to complete control of the ANC over the JSC. Therefore, when designing the judicial council for the appointment of apex court justices, constitution-makers should make sure that no single player or political entity can control a majority of the council. The risk of ANC control has not yet fully materialized, also due to the fact that the interests of the ANC and those of the transition were aligned, but there is still the risk that it could in the future.

1913 ibid., 55.
1914 ibid.

d. Excursus: The Legislative Supermajority Model

In their very comprehensive paper on the appointment procedures in the aftermath of the Arab Spring, Choudhry and Glenn Bass add a further model that did not show itself in the case studies of the present research: the legislative supermajority model.

As the label already gives away, the legislative supermajority appointments model provides the legislature with primary control over the process. A fundamental element of this model 'is the required majority that a candidate needs for election: a supermajority.'[1915] Being a mono-constituency model of appointment, the supermajority is needed to avoid that a party holding a simple majority in parliament can dominate the appointment process. A qualified majority of two thirds (or an even higher one) instead guarantees that opposition parties can also play a role in the process of selecting judges. The same Choudhry and Glenn Bass stress how '[b]y requiring a supermajority vote to approve candidates, the judicial appointments process is intended to foster a process of negotiation and compromise between government and opposition leaders.'[1916]

This model is successfully employed in Germany, where the model has successfully promoted a widespread sense of political investment among the political parties in the Federal Constitutional Court. Nevertheless, this mono-constituency model of appointment is not flawless. The fact that only the legislature is included in the appointment process allows only a sense of political investment to a certain point. It lacks non-governmental actors and possibly the involvement of the other two branches of government. Additionally, the supermajority requirement can lead to legislative deadlock in countries with a high level of political party fragmentation, or where the political tension in parliament can make the negotiation process and reaching of a compromise difficult. Moreover, hypothetically, a very dominant party could still take control of the system, despite the qualified majority requirement.[1917]

1915 ibid., 10.
1916 ibid., 10–11.
1917 See more on the legislative supermajority model and the German case at ibid., 34–44.

III. Lessons Learned

All in all, this section revealed the importance of the structure and composition of the very institution object of this research.

On the one hand, the basic strategy of keeping a pre-existing apex court or establishing a new one in times of transition can be crucial. Research has shown that with pre-existing apex courts, the risk of having a court still attached to old values and possibly obstructing the normative constitutional transition is higher. New establishment of the country's apex court creates the opportunity to structure and compose a court fully committed to the transition.

The role of apex courts in transition is also drastically influenced by its composition. A court composed by supporters of the old regime will most likely end up obstructing the constitutional transition, whereas a court where judges represent a broad spectrum of interests in the new political context tends to be a facilitator of the transition. The process of appointment plays a crucial role in all of this. It is through the appointment process that judicial independence is fostered and the balance between independence and accountability can be influenced. In this sense, to facilitate the assertion of the right balance between independence and accountability, the highest level of political investment possible is needed. Both the multi-constituency model and the judicial council model create the highest level of investment, whereas the legislative supermajority model only under certain circumstances. Finally, the judiciary-executive model tends to foster little political investment.

Nevertheless, understanding all these notions probably requires an *ad hoc* approach for each and every case study that involves both institutional and cultural accounts.

B. Constitutional Factors

The constitutional order has self-evidently a direct impact on the role and behavior of courts in a constitutional transition due to its function. An apex court is a constitutionally-made institution, i. e., it is an institution established by constitutional law and empowered by constitutional law. Constitutional law defines not only the degree of structural judicial independence (i. e., design and composition of the court) but also the

extent of its powers and functions. An apex court can hardly do anything if it is not empowered by the constitution or some sort of constitutional provision to act. A court usually does not have coercive tools to impose its judgements on other actors and people, and therefore relies on the constitutional setup and other actors (e.g., like the military in Egypt) to assert its own role and behavior.

This section revolves basically around the *constitution* as an element itself of constitutionalism and a fundamental resource of an apex court's institutional power. The analysis is divided between, on the one hand, constitutions that are *explicit* about the way they empower the judiciary and what they seek, and on the other, constitutions that are widely *silent.*

I. A Rather Explicit Resource of a Court's Institutional Power: Judicial Empowerment

1. An Increasingly Common Practice of Judicial Empowerment

It is clear that the first thing that can have an impact on the court's role and behavior is the amount of power and the type of functions that it is allocated. A court can only be as powerful as the constitutional order allows it to be, unless the court goes beyond the right balance between law and politics and enhances its jurisdiction, like it did in Turkey for instance, when the TCC interpreted its way into the substantive judicial review of constitutional amendments.

The concept of constitutionally allocating more or less power to courts is elementary and undisputed in a constitutional democracy. An apex court draws the scope of its powers from the constitution. In a period of transition, however, as a reaction to a dark past such empowerment can sometimes be elevated. This is what Hirschl describes as being lately a phenomenon that he calls 'juristocracy'.[1918] With the word juristocracy, he intends the 'unprecedented amount of power from representative institutions to judiciaries.'[1919]

1918 *Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.*
1919 ibid., 1.

The increase in this practice was one of the elements of importance of this present research. Looking at the role and behavior of courts in times of transition is a matter of actuality due to the very increased level of empowerment seen around the world.

Most of the countries in transition have a recently adopted constitution or constitutional revision that includes individual rights and aim at a transformation of society; at the same time, they establish some sort of form of constitutional review. The conviction that judicially enforceable rights are a precursor and force of social transformation untouched by political actors has attained worldwide acceptance. At the same time, the other way around, we have seen how the idea instead of judicial actors encroaching on the political arena is also increasingly seen recognition amongst scholars and apex courts have accordingly become progressively significant political decision-makers. Furthermore, as Alexis de Tocqueville's observes – with regards to the USA – how there is now barely any moral or political dispute in modern constitutionalism that does not eventually convert into a judicial one.[1920]

Hirschl maintains how in accordance with this unquestioned view, 'the crowning proof of democracy in our times is the growing acceptance and enforcement of the idea that democracy is not the same thing as majority rule; that in a real democracy (namely a constitutional democracy rather than a democracy governed predominantly by the principle of parliamentary sovereignty), minorities possess legal protections in the form of a written constitution, which even a democratically elected assembly cannot change.'[1921] In this sense, under this vision of democracy and constitutionalism, enforceable individual rights, as well as a social transformation, are part of the fundamental law of the country, and an apex court empowered to uphold said constitutional dispensation is a core element of the transitional endeavor.

So, this notion of juristocracy has rapidly surfaced around the world, South Africa being one of the main examples in Hirschl's book. The South African case also facilitates the understanding of why such empowerment all around the world is happening. In South Africa, the rejection of any form of

1920 Alexis de Tocqueville, *On Democracy* (New York: Knopf, [1835] 1945), 280. Concept and reasoning paraphrases and widely reprised in the present thesis from Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 1.

1921 *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 1–2.

despotism and the embrace of rights were a commonsensical reaction to *apartheid* and the systematic breaching of such rights. Still, even though this alone could start giving hints as of why judicial empowerment is 'trending', it does not necessarily clarify why a particular society would choose to turn to the judiciary as the ultimate guardian of such rights. This is especially the case when the judiciary and the legal system in general were closely related with the establishment and preservation of the prior oppressive *apartheid* regime. Therefore, South Africans turned the very same legal system around that was employed to segregate their people to introduce and foster constitutionalism and pluralism with it. There was, however, a very important difference: constitutional review. In South Africa, constitutional review of legislation had historically been clearly rejected due to the legacy of parliamentary supremacy. In the period just before the transition to constitutional supremacy, all the major political parties actually stayed devoted to the notion of democracy based on parliamentary sovereignty. It is true, in fact, that the battle against the legal segregation of *apartheid* was always understood as a struggle against racial oppression and *minority* rule, and contrariwise, as a dispute *for* majoritarian democracy. As Klug rightly points out: 'this history makes the empowerment of judges in a democratic South Africa not just unnecessary to the goals of democratization, but a rather unexpected outcome of the democratic transition.'[1922] Therefore, as the focus shifted to the negotiation of a new constitutional dispensation, constitutional supremacy quickly became a core of the transition. We know now as a fact that the establishment of a system of constitutional review was in fact one of the many concessions between the old regime and the ANC. Accordingly, discussions quickly moved also onto the role of the judiciary in a new South Africa, which is an untenable element of constitutionalism. Even though the legacy of parliamentary supremacy rejects the idea of an apex court with the power of judicial review, the origins of the CCZA, as well as the pluralism of the judges appointed by President Mandela, brought an extremely high degree of legitimacy to the new court.

1922 Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid," 175. See also, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction.*

2. Constitutionally Empowering an Apex Court and Designating its Role

Of course, the difference between the role and behavior reflects the difference between the 'what' and the 'how', but at the same time the role can somehow be designated constitutionally, whereas the behavior is more likely to be defined by the court itself, depending on its composition.

a. Constitutional Adjudication as Main Tool

When going through a constitution-building process and designing a new or reinventing an already pre-existing apex court, a very common move is to assign to it the pivotal task of constitutional adjudication.[1923] Constitutional adjudication, however, is just the tool; what is important is the jurisdiction over which the court can employ it. Thailand's Constitutional Court from 1997 to 2006, for instance, found itself allocated the role of political adjudicator, resolving major political disputes including elections, corruption, and economic regulation, whereas in human rights cases, it was rather deferential toward government. The Thai court was thus designed to play both the roles of political adjudicator and rights enforcer, yet it adopted two different behaviors: assertive for the former and deferential for the latter. In a climate of transition, such as it was back then in Thailand, is a very risky one to play the assertive political adjudicator, because of the contentious state of Thailand's politics. In this sense, the Court found itself vacillating between the rising political power of Thaksin Shinawatra, on the one side, and the Bangkok elite, on the other side. This strategy resulted in the Court being disbanded following the coup in 2006. However, this case shows how it is the mix of cases that defines a court's role and behavior, but eventually it is the court's decision that states its ultimate success or failure.[1924]

Assessing and understanding the type of case in which courts employing judicial review have an impact is the subject of Helmke and Rios-

1923 See, for instance, Stafanus Hendrianto, "Institutional Choice and the New Indonesian Constitutional Court," in *New Courts in Asia*, ed. Andrew Harding and Penelope Nicholson (New York: Routledge, 2009); Andrew Harding, "A Turbulent Innovation: The Constitutional Court of Thailand, 1998–2006," ibid. (London); Tom Ginsburg, "The Constitutional Court and the Judicialization of Korean Politics," ibid.

1924 "Courts and New Democracies: Recent Works," 730.

Figueroa's edited book.[1925] The book revolves around the classification of Latin American courts' constitutional adjudication objective between *rights* and *structure*, meaning 'the extent to which constitutional courts are willing to protect individual rights and the extent they are willing to arbitrate interbranch disputes in the political system. These categories are, of course, not mutually exclusive."[1926] So, in Latin America, some apex courts have played a pro-active assertive role in both rights adjudication and interbranch structure conflict (see, for instance, Costa Rica), whereas others have focused more on the set of issues related to the structure of the constitutional order instead of individual claims (e.g., in Brazil and Mexico). The reason thereof seems to be very simple: federalism. Both Brazil and Mexico are federal states and as such federal disputes tend to dominate constitutional adjudication. In South Africa, the CCZA's activity also revolved strongly on federal disputes and the allocation of powers between the different levels of government, yet South Africa was also on the front when it came to the adjudication of rights, especially socio-economic rights. Colombia, instead, was a court primary focus on individual rights.[1927]

b. Role Designation

Empowering a court with the instrument of constitutional review is a key feature of constitutionalism; it represents the sword of a court to enforce constitutional supremacy, without which constitutionalism cannot be enforced and thrive.

The designation of the role itself, instead – i.e., the direction towards which the court swings the sword – is trickier and as mentioned above, depends on several other factors, such as the composition of the court. Still, a court that takes its position of constitutional enforcer seriously, will definitely follow the contents of the new constitution. In other words, the contents of the new constitution are the map of court's role; what role it eventually will play (i.e., whether to stay on map or wander off of it) is up to the court.

For instance, in Germany and Italy, the judges of their respective apex courts understood themselves as committed advocates in the service of the new

1925 See, Helmke and Rios-Figueroa.
1926 Ginsburg, "Courts and New Democracies: Recent Works," 730.
1927 ibid.

democratic order.[1928] In this sense, these courts, just as the South African one, can be cited as being examples of 'functional courts'; functional in the interests of the transition and the new constitutional order. In Turkey, instead, the TCC is seen as a rather 'dysfunctional court' in the eyes of the transition,[1929] designed to safeguard and uphold the status, influence and interests of the old regime. The TCC was a clear example of a court playing the role of hegemonic preserver. According to this concept, developed by Hirschl,[1930] constitutional review can also be an instrument of the once ruling political elites to protect their endangered status in transitional times against elected majorities that might want to engage against them. In this case, the constitutional justices are selected so as to preserve as much of the status quo ante as constitutionally feasible in order to attend the old regime's interests, rather than guard the new democratic principles.[1931] Accordingly, the establishment of the TCC after the military coup in 1960 can be understood as an effort to preserve the hegemony of the dominant leaders over a likely hostile parliamentary majority.[1932]

The court's constitutional role designation as a hegemonic preserver does not alone indicate the reason for the court's obstructing role, but it was certainly the biggest of factors, along with a structure and composition made of sympathetic judges towards the elite and the idealism of secularism.

In South Africa, instead, the CCZA was empowered from the outset to protect the transitional course. This is a great case to show how the IC allocated specific functions to the court and how the CCZA embraced them. Here, the South African case of judicial empowerment goes hand in hand with the two-stepped constitution-making form chosen. The fact that the CCZA was empowered with the certification process shows direct constitutional involvement for the Court constitutionally given to it by the negotiating parties. The CCZA embraced said empowerment and committed itself to the transition.

1928 See, von Steinsdorff, 483.

1929 See, Boulanger, 47.

1930 See, *Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.*

1931 See, ibid., 11–12.

1932 See, Belge.

The South African case exemplifies how judicial empowerment can derive from the constitution. The Italian case instead, shows how empowerment can also be reinvented by the court itself and has much to do with the assertion of its own role. In Italy, after World War II, the Constitutional Court was not necessarily empowered with any specific transitional role. Yet the Court was able to empower itself to release the legal system of any constraints that the fascist regime might have left behind. The situation was peculiar, because Italy was amongst the winners, but at the same time it was also transitioning from fascism. This meant that there was no real need for a hasty and complete transition. Therefore, many of the old fascist laws and policies remained on the books. The Constitutional Court of Italy was therefore put in the situation, in which it had to strike down fascist laws one at a time and thus clean up the country from its autocratic legacy. In this sense, it had to build up its own role within the transition, but as Ginsburg adds: 'the timing was one of follower rather than leader of democratization'. The transitional matter here was that of removal of constraints on the legal system, rather than affirmative empowerment of the Court.

Role designation may thus be a crucial factor in determining when and how apex courts activate themselves, but eventually it is up to the court to define the role it wants to play. To this regard, Ginsburg recalls the Costa Rican court's creation of a constitutional chamber in 1989, when it was hardly expected to emerge as the most powerful and active court in the region:

'But the new chamber, created as a technical improvement to the constitutional adjudication system rather than as a result of any drive for political insurance, took its designated and exclusive role seriously, abandoning formalism and empowering new claims from various actors. As the party system transformed, smaller political parties began to use constitutional adjudication to challenge government policies, in turn strengthening the court. The phenomenon of judges who were expected to be quiescent engaging in a broad spectrum of political issues goes to the central issue of the self-articulation of the judicial role, and the ability of judges in certain circumstances to greatly alter their operating environment'.[1933]

1933 Ginsburg, "Courts and New Democracies: Recent Works," 731.

II. An Unclear Source of a Court's Institutional Power: Constitutional Silence

1. Constitutional Silence

When an apex court is judicially active it can, of course, use this behavior in different forms. I admit that the SCCE acted mainly as a manifestly self-interested political actor during the constitutional transition. It used its moral power as constitutional court to fight against an Islamic-led constitutional transition until such time as a new regime would appear, in the Egyptian case it was Sisi's authoritarian secular regime. At the same time, its status as an apex court, imposed limitations on how it could chase those interests; as most of the cases analyzed above, when confronted with a provision that is formally constitutional, even the SCCE had no choice but to yield to it. This is why judicial empowerment – as explained above – has a huge impact on the court's role. Depending on what power and limitations the constitution allows the court to have, its role will mainly remain within the constitutional framework. Yet, in Egypt such clear empowerment was not there anymore. To understand the judicially active behavior of the SCCE, one has to remember that a constitutional basis for its activity had been repealed. As an apex court, the SCCE was thus bound by the fact that for every decision it took, it needed to provide a legal basis and explanation, which however was no longer there. Even if such cases related to political considerations, it was still required that it provide some sort of legal justification meaningful within the limits of the formal legal system in which it operates. To fulfill its political goal, the SCCE embraced judicial activism and acted as though most political decisions during the constitutional transition were ruled by a clear constitutional provision, essentially vesting the court with a veto power over the entire transitional process. In this sense, the SCCE transformed important political issues during the constitutional transition into legal ones that did not consider the outcomes of the democratic political process whatsoever.

In other words, the SCCE's radically denied the so-called 'constitutional silence' or, for want of a better definition, the lack of constitutional resource or basis for its activity. As Fadel clarifies:

> "'Constitutional silence," conceptually, might be understood as a unique subset of the problem of legal indeterminacy, but one that is especially salient in connection with constitutional documents, and especially pressing in a condition of constitutional transition. There are very good reasons for constitutional drafters to adopt "silence" as a mode of drafting: the high cost of securing the agreement of all relevant constituencies, time constraints in drafting a constitution, limits on information available to constitutional drafters, and uncertainty about how institutions will function post-adoption of the constitution.'[1934]

When it comes to approach constitutional silence, the SCCE offered an important dissimilarity to other apex courts authoritarian settings, such as Chile. In Chile, constitutional silence created a judicial culture that was both utterly apolitical and deferential to their authoritarian regimes.[1935] When an apex court recognizes and accepts constitutional silence, then it ought to be reflected in its approach to understanding the constitutional text: 'while constitutional silence would not disable it from policing clear violations of constitutional text and principle, recognition of constitutional silence would presumably lead a court to adopt a deferential attitude toward the political process, and lead it to view the other branches of government as playing an equally important role in giving effect to constitutional norms through their own, autonomous lawmaking activities.'[1936] All the more so, normative recognition of constitutional silence would probably lead an apex court to be particularly deferential and passive towards *whichever* government is in power, even during a normative constitutional transition.

Instead, when an apex court refuses to accept constitutional silence, just as it happened in Egypt, it likely leads to judicial activism, because the court needs to reach outside its constitutionally allocated powers in order to fill the silence.

So, this as far as the behavior goes, but when it comes to the role in a situation of constitutional silence, it will all depend on other factors, such as which transitional government is in power.

1934 Fadel, "The Sounds of Silence: The Supreme Constitutional Court of Egypt, Constitutional Crisis, and Constitutional Silence," 938.

1935 See, for instance, Elisabeth C. Hilbink, "Agents of Anti-Politics: Courts in Pinochet's Chile," in *Rule by Law: The Politics of Courts in Authoritarian Regimes* ed. Tom Ginsburg and Tamir Moustafa (Cambridge: Cambridge University Press, 2008), 103–04.

1936 Fadel, "The Sounds of Silence: The Supreme Constitutional Court of Egypt, Constitutional Crisis, and Constitutional Silence," 938.

2. Pre-Existing Courts and the Tendency to Assume Constitutional Silence in Times of Transition

A newly established constitutional court in a new democracy can work for the safeguard and enforcement of the new constitution, which is the decisive source of its institutional power. We have seen how if a court is established under an authoritarian regime, apex courts often stand in the way of democratization, as can be seen in the democratization processes in Turkey, Chile and Egypt to some extent. In Chile, systemic change was initiated in 1990 by a referendum 'from above'; the 1980 constitution remained in force and is still in force despite several amendments.[1937] In Turkey, the 1982 constitution was extensively amended, especially during the EU accession process, but has not yet been replaced by a new constitution. Accordingly, the constitutional orders established after or in the course of a military coup still exist in both Turkey and Chile and remain to this day the decisive resource of institutional power for the respective apex courts. Therefore, the apex courts during the transition were institutionally largely still the same as when they were under the authoritarian regime. A newly established court clearly draws its institutional empowerment from the new constitution, whereas in transitions such as Turkey or Egypt, this constitutional basis is not always as clear. This influences greatly the role and behavior of the courts.

There have been extensive political and constitutional changes in both Turkey and Chile; but no such break as in Egypt with the revolutionary mass mobilization, Mubarak's resignation, and the invalidation of the constitution. If no new institutional system has yet been established, apex courts face particular challenges. On the one hand, they operate in a difficult political environment; on the other, they have no or only an inconsistent, controversial constitution at their disposal. What role the courts then play and whether they manage to gain acceptance as new institutions and establish themselves in the system depends in particular on the judges' understanding of this situation and their strategic skills. Even before the establishment of a new constitutional order – in a situation of political upheaval – the SCCE had exercised its function as an instance of constitutional control. However, it is not new, as in Russia or South Africa, but was established decades earlier in an authoritarian

1937 Couso, "Trying Democracy in the Shadow of an Authoritarian Legality: Chile's Transition to Democracy and Pinochet's Constitution of 1980," 413.

system. The initial situation here is different: the court did not have to establish itself anew in the system, but had to strive for its continued existence as an institution. Established apex courts have developed a working practice and an official understanding that judges within the institution fall back on. The judges have thus developed an understanding of their office, an idea of their role in the system, and routines and norms in previous jurisprudence. They will want to maintain and protect this position in the system.

Hence, pre-existing apex courts may have a difficult time dealing with a fundamental change, because the courts have been established to maintain the current constitutional order, which was the key resource of their institutional power. If, in a transition, no clear constitutional basis is still there, for example because the old constitution has been repealed and no other clear constitutional basis is drafted, the continuity of the apex court or at least its ability to act is at risk. Egypt is a significant example of the influence of a lacking power resource of an apex court on its role and behavior. When the old 1971 Constitution was repealed and replaced by a transitional military constitutional order, the SCCE tried to maintain its ability to act and its status in the new system. The SCCE did so by relating to its previous working practice and the judges' understanding of their office. In its rulings, it relied on its earlier case law, but at the same time also on the SCAF's newly adopted constitutional declaration. When the SCCE did this, it basically legitimized the SCAF's power, which (based on the SCCE's rulings) was able to dissolve parliament and expanded its powers. In this sense, the SCCE ended up being more a political actor than as a judicial one. The SCAF used the SCCE for its own interest, but the SCCE also deliberately allowed itself to be associated with it in order to preserve its own status and position.

3. Risk of Constitutional Despotism

Constitutional silence can (in some cases) lead to a constitutionally despotic behavior, which would be the case when it sees law purely as an artifact of the arbitrary will of the supreme legislator. Insofar as the law is the product of an arbitrary will, only the country's apex court is in a position to understand that will and give it effect: it can empower itself to exercise autocratic power over politics simply by claiming that it is doing no more

than interpreting' the constitution.[1938] We have seen how during the transitional period, the SCCE treated several constitutional declarations and decrees of the military 'as binding commands of a "constitutional lawgiver" that pre-empted the commands of all inferior lawgivers, including the military, when acting as a legislator."[1939] This is a very hierarchical conception of the law, which reminds of Kelsen's idea of a chain of legality. Here, legality is determined merely by reference to a specific law's place in this hierarchy, without real concern to the content of the 'command.' In this conception of law, there is no place neither for *ius naturale* or any other interpretation of the law than a positivist one. The legislature and the judiciary as a whole are seen as merely puppets carrying out commands of the constitution-maker. The SCCE's constitutional jurisprudence 'lends itself to constitutional despotism insofar as it is prepared to accord legitimacy to arbitrary rule so long as it has sufficiently formal credentials.'[1940] In this sense, constitutional despotism is disrupting, as it reduces constitutional law to merely a set of final commands whose only function is to determine conflicts among these commands within the law.

Consequently, there is a high risk in a situation of constitutional silence that a court lends itself to constitutional despotism. In such a situation of constitutional despotism, the apex court can act either excessively deferential towards the government in place, by for instance drastically reading down or out completely, substantive provisions of the law that seem to limit the executive, or in excessive assertiveness and judicial activism, by drastically overreading constitutional provisions with the intent of obstructing the transition towards constitutionalism. The SCCE sought this second strategy during the transition.[1941]

In other words, constitutional despotism adopted by an apex court refuses to see a joint constitutional project. Fadel sees at least two negative consequences that constitutional despotism carries with it when it comes to the normative constitutional transition:

1938 Fadel, "The Sounds of Silence: The Supreme Constitutional Court of Egypt, Constitutional Crisis, and Constitutional Silence," 938 – 39.
1939 ibid., 936.
1940 ibid., 950 – 51.
1941 ibid., 939.

– The first is related to constitutional drafting. Since repressive interpretation disguises its exercise of naked power as an act of neutral interpretation, constitutional writers are bound to draft constitutional dispositions with ever-increasing detail in an attempt to control future decisions of the court. This not only makes it harder to reach constitutional agreement, at least if constitutional writers genuinely represent the diverse constituencies of the people, but it also has the unwanted result, if carried out effectively, of depriving the constitutional text of any potential flexibility in application.[1942]
– Second, it has unwanted political effects of worsening political conflict because it creates an incentive for competing political groups to use the constitutional text to engrave their policy preferences into the constitution, or even use it to banish their opponents from the political spectrum in its totality.[1943]

An example of this constitutional despotism by the SCCE can be found when it declared unconstitutional the electoral laws that the SCAF itself had promulgated. This ruling was consistent with constitutional despotism's indifference to reaching a substantive understanding of the law within a constitutional transition. It shows exactly how these commands by the SCCE are utterly disconnected from any substantive conception of justice. Accordingly, the SCCE's constitutionally despotic behavior allows politics to constitutionally entrench substantially basically whatever they want. This results in political activity, which no matter what its content preaches, it is constitutional. As Fadel adds:

> 'Constitutional despotism [...] transforms what could be contested, but peaceable political competition, into existential politics insofar as it tempts political rivals to use the power inherent in a constitutional norm to eliminate its rivals, something which, in fact, took place in Egypt subsequent to the July 3, 2013, military coup and the 2014 amendments of the December 2012 Constitution.'[1944]

In other words, in order to fill constitutional silence, the SCCE – due to the vagueness of the transitional constitutional texts and the court's forced commitment to legal positivism – produced overdetermined opinions which interpreted the constitutional documents, as though they spoke clearly to every conceivable constitutional issue. In doing so, it basically

1942 ibid., 939 – 94.
1943 ibid.
1944 ibid., 950 – 51.

turned general and ambiguous constitutional provisions into clear commands. It did so by giving these provisions one single clear meaning that produced an incontestably right answer. As Fadel points out:

> 'This approach to deciding cases negates the possibility that "silence" may be filled by other lawgivers through a deliberative political process. By refusing to accept a place for constitutional silence, the SCC[E]'s jurisprudence enshrines a kind of "constitutional despotism" which exacerbates constitutional conflict, rather than mitigating it, by creating incentives for constitutional drafters to write ever more specific constitutional rules to enshrine particular outcomes rather than creating a framework for shared governance.'[1945]

One strategy to fight constitutional despotism is to rethink the approach towards constitutional silence. Instead of simply rejecting or accepting it, an apex court should work around it in order to facilitate the normative constitutional transition. Instead of understanding the constitutional text as a series of pre-emptory commands from a high lawmaker to the people, it would rather be understood as a manifestation of a set of political ideals binding both the people and public authorities. Rather than generating a crisis, as the SCCE seemed to believe, constitutional silence invites common deliberation. The role of the apex court in these circumstances would simply be to determine whether the result of public deliberations, as objectively manifested in a law, are not clearly outside the fundamental boundaries of the written constitution and the unwritten political norms which shaped the written constitutional text. Fadel again states:

> 'Recognition that a constitution will inevitably be silent on even important issues would position the court to recognize that a constitution works best as a master rule that creates a process for a people to settle its disputes, including disputes about the ultimate meaning of their shared political values, using legal means rather than naked force.'[1946]

III. Lessons Learned

This section has revealed how the presence of a clear constitutional basis during the transition can have a direct impact on the court's role and

1945 ibid., 936.
1946 ibid., 950 – 51.

behavior. A clear constitution empowers the court to play specific roles, whereas the lack of a clear constitutional basis during a transition, i. e., constitutional silence, makes the entire assessment of the court's role trickier.

When it comes to clear constitutional empowerment of a court, the role is pretty straight forward. In a constitutional democracy, apex courts are commonly empowered with the tool of constitutional review. With this tool, courts can follow a specific role related most often to the upholding of the new constitution. So, depending on what the new constitution says (and the composition of the court), the role and behavior of the court can vary. In constitutional transitions, courts tend to be constitutionally empowered to review more than simply ordinary legislation. It has been observed how courts are empowered to resolve political interbranch disputes, enforce fundamental rights and implement vertical power-sharing.

Instead, it is way more complex in cases of constitutional silence, i. e., when the resource of a court's institutional power is not very clear or is lacking. In these instances, courts need to sharpen the strategy depending on what role they want to play. A court can either accept or reject constitutional silence, which depending on transitional powers, are ruling it can lead to either obstruct or facilitate the transition.

The presence or not of constitutional basis influences greatly both the role and behavior of the courts:

– *Role:* A lack of constitutional basis during a transition can mean 'no guidance'. It means no clear basis for the transition and thus a court that probably ends up siding with the strongest in the transition in order to survive. No clear constitutional basis also hints at an upcoming failure of the transition because an element of constitutionalism is clearly lacking. In this sense, an unclear constitutional transitional path leads almost certainly to a court playing an obstructive role. There is no data in this thesis to reject the possibility that a court might still try and facilitate the democratization process in the case of constitutional indeterminacy.
– *Behavior:* Constitutional silence can also have an impact on the behavior of a court. Should the court accept such situation, in order to safeguard its position, it will probably adopt a rather passive deferential attitude towards the ruling government, whereas if it rejects the situation (for instance, because the constitutionally silent constitutional order steers

the transition towards an unwanted direction, like it happened with the Egyptian case), it tends to activate itself and adopt a more assertive behavior.

The acceptance or rejection of constitutional silence defines the behavior of a court; the role itself will depend in which direction such behavior is steered.

In a situation of constitutional silence, constitutional despotism is always behind the corner. When an apex court simply accepts or rejects constitutional silence, the risk of constitutional despotism rises and with it does the chance that the apex courts obstruct the transition. Constitutional despotism entails the need of an apex court to eliminate ambiguity from the realm of constitutional questions and instead read and interpret the constitutional text as though its *ratio legis* is always well-defined and undisputable. Constitutional despotism abandons the mission of seeking the true meaning and spirit of a text, and pursues the imposition of a single *ratio legis* on the text exclusively by appeal to its higher position in the judicial hierarchy as an apex court. In a specific case, the court's interpretation of the text, which in itself may be an admissible one, is distorted by way of interpretative despotism, into the only possible one. Fadel's research has shown that the best solution to confront constitutional despotism is thus not to simply accept or reject constitutional silence, but rather to embrace and work with it. In other words, the court needs to find also here the right balance between law and politics.

In sum, on the basis of the previous considerations, assumptions can be formulated about the role of (established) apex courts in situations of transition, which can be examined especially on the basis of the Egyptian case study.

First, if in a situation of transition, the old constitutional order is maintained, which represents the decisive resource for its institutional power, a constitutional court will maintain this order and it is likely that a court will thus stand in the way of political change.

Second, if a new constitutional order is established, which corresponds to the institutional interest of the court and the official understanding of the judges, then the probability increases that the judges will stand up for the new constitutional order. This is because it represents their basis of existence and the decisive resource for their institutional power in a changing

system or political context. There is thus the possibility that such a court will thereby support the new order.

Finally, if there is (still) no constitution in a situation of transition, the continued existence or at least the capacity of the court to act is also endangered. The court will try to maintain its position in the system, as it corresponds to its previous working practice and the official understanding of the judges. Since it has no constitution at its disposal, it must resort to other/previous legal sources in order to act as a court and to be able to justify its decisions legally. It must try to argue legally within the framework of its jurisdiction in order to maintain its authority and acceptance as a court. This authority is the central source of the court's institutional power due to the lack of tangible power resources. But precisely because this source of its authority is weak due to a lack of a constitution, it must exert additional influence on the political process to ensure its continued existence. This makes it necessary to resort to non-judicial means as well. Politicization is therefore inevitable. This creates a dilemma for the court that can hardly be resolved, if not by seeking the right balance between law and politics.

C. Transitional and Political Factors

Here the attention shifts from the structure and composition of the apex court and the way such court is empowered during a transition to the very process of transition, and the political and historical context it finds itself performing. What role a court plays and the behavior it adopts can be influenced by a myriad of factors that concern the process of transition, yet the two that mainly struck me as being evident and significant were: the *constitution-making form* employed by the transitional forces and the *historical/political context* in which the transition takes place. In other words, these are two factors with distinctive nature: the constitution-making form can be chosen, whereas the political and historical context cannot. This has an impact on the final policy implications because no transitional power can change history, but it still can try to amend it through the right constitution-making form.

I. Type of Transition and Constitution-Making Form

In her contribution to the book *Cultures of Legality*, Kapiszewski provides a convenient framework to assess what role courts play by integrating ideas and institutions.[1947] She argues that 'considering *both* their external institutions and internal culture – can help us to explain why and how they become engaged in politics."[1948] Using the Brazilian Supreme Federal Court as an example, she stresses 'how the Court's external institutions helped to shape its internal culture.'[1949] Her chapter in *Cultures of Legality* 'sought to demonstrate both how internal culture influenced the way the [Brazilian Supreme Federal Court] got involved in politics and how culture conditioned the effect that external judicial institutions had on the Court's political engagement.' She believes that [e]xamining these dynamics cross-nationally could help explain variation in "judicialization" across the region."[1950] The 'region' meant as Latin America.

Instead, I would like to place emphasis on another approach, which is much closer to and contingent on the genesis of the constitution itself: the constitution-making form.

This section should close circle of the understanding of the triangular link between the outcome of a constitutional-transition (Chapter 8), the role and behavior of courts (Chapters 9 and 10), and the constitution-making form. Chapter 8 allowed us to confirm the hypotheses that both the constitution-making form and the performance of the apex courts can influence the outcome of a constitutional transition. The question here instead is: can the constitution-making form influence the role and behavior of an apex court during the normative constitutional transition? Among the numerous other variables that contribute to judges' decisions to play one role or another in a transition, the type of constitution-making form (or the type of democratic transition) certainly makes a difference. The role of facilitator implies a deal or agreement to be upheld, and therefore we should accept courts to play this role more frequently in

1947 See, Diana Kapiszewski, "How Courts Work: Institutions, Culture, and the Brazilian Supremo Tribunal Federal," in *Cultures of Legality: Judicialization and Political Activism in Latin America*, ed. Javier A. Couso, Alexandra Huneeus, and Rachel Sieder (Cambridge: Cambridge University Press, 2010), passim.

1948 See, ibid., 74.

1949 See, ibid.

1950 See, ibid.

constitutionally uninterrupted transitions, or at least transitions where transitional rules are clear.[1951]

In order to structure the chapter in a coherent manner, I will test this question by reviewing one constitution-making form at a time through the case studies: reform, revolutionary reform, roundtable and revolution. The constitution-drafting process is commonly decided unilaterally by the revolutionary forces, multilaterally at the round table through negotiation, or by parliament and/or government in the case of a reform or revolutionary reform. Depending on the constitution-making form, the outcome of these talks (that is, the outline of the transition process) is typically entrenched in transitional documents, *interim* constitutions or constitutional amendments. The nature of the talks, whether consensual or unilateral, peaceful or violent, inclusive or exclusive, defines the role a court could play in the transition to come. The form of constitution-making and transition defines these features and thus has a direct impact on the court's performance.

1. The TCC and the Reform

The reform type of transition was represented in this research by Turkey, which is a paradigm when it comes to an apex court obstructing the transition. The TCC unequivocally acted against any movement that sought to change the old Kemalist values of the country. Not only did it confront the constitutional amendments in question, but it was also very active in party closure cases.

The constitution-making form of reform through constitutional amendments has a direct impact on the performance of the apex court. In a reform, there is neither legitimacy nor a legality break. The lack of revolutionary break creates a problem in combination with the constitutional role of the apex court. The apex court is commonly empowered to review the constitutionality of legislation, and in Turkey in particular, it can also review the constitutionality of constitutional amendments (in its form). In the case study, I have already explained how the TCC managed to interpret its way to basically also reviewing the substance of the amendments and how it constantly balanced them with the Kemalist values. In this sense, it raised the issue of unconstitutional constitutional

1951 Ginsburg, "The Politics of Courts in Democratization."

amendments. Anyhow, in a reform the idea of transition is not always present in the media or political speeches. It is a progressive and reiterated process. In this sense, the reform form of constitution-making does not clearly signal to the apex court that a legitimated constitutional transition is ongoing and so the court tends to stick to the old constitution. In my opinion, rightly so. Even though constitution-making through constitutional amendments can happen through consensual decision-making, including most political parties, it is still controversial whether the parliament can avail of the constituent power. A parliament is a constituted power, and as such it usually does not have constitution-making sovereignty, in the sense of a deep change of the material constitution.

In Turkey, for instance, the year 2007 saw the AKP win a majority, and its alliance with the MHP allowed them to reach the two-thirds needed to pass constitutional amendments without having to go through a referendum. This situation opened the doors for almost unrestricted constitution-making; one that was almost clearly *not* consensual. The same year saw Gül of the AKP being elected president, which meant that the power to constitution-making of the AKP was basically incontestable. In other words, the rules for constitutional revision laid down in Art. 175 of the 1982 Constitution (following the 1987 constitutional amendments) made it theoretically possible for powerful parties (*in casu*, the AKP) to gain unilateral constitution-making power; and the AKP took it without question. Despite the possible criticism that a referendum can legitimize a constitutional amendment due to the various possibilities to trick the voters and limit the political rights of the people, now not even that was necessary. Allowing majoritarian constitution-making instead of consensus-seeking reveals a faulty system from the start. The apex court is almost compelled to obstruct a transitional movement in that direction. In Turkey, however, the TCC obstructed a democratization movement from the start, when consensual constitution-making was already on the table. Later, obstructing the AKP might have seemed acceptable due to the argument that at this point it was not a transition towards constitutionalism anymore, but simply towards another form of authoritarianism.

After a transition, we have seen the importance of reestablishing legitimacy and how legitimacy combined with legality ups the chances of success of a transition. Recalling Lassalle, he maintained that constitutional disputes are

essentially problems of power rather than of law. Accordingly, written constitutions can only be valid as long as they are a truthful image of the power relations of that particular society.[1952] In a country like Turkey, which was trying to reform its constitutional order into a civil democratic one, additional attention had to be given to whether it was adequate to base the new text simply on power relations, which were always tense in the country, or if it is also necessary to ensure its democratic legitimacy. This last point is exactly the problem of the reform form of constitution-making. Even though there is no break in the legitimacy and legality of the constitutional order, it is clear that a certain discontinuity exists, and thus needs to be reestablished. 'Whether the *raison d'e´tat* refers to a state enjoying social approval, or the implementation of a political system that is established around the interests of a single group and legitimized through ideology, is directly related to what the constitutional court is designed to protect."[1953]

In sum, constitutional transitions that take place through reform are harder to spot; they are disguised by ordinary (yet extensive and reiterated) constitutional amendments, and often take place in combination with tense political struggles. In this thesis, Turkey was selected as a contemporary example of the (almost successful) shift from autocracy to democracy. Nevertheless, it is not the only example of reiterated reforms over years to change a country's political system into a more democratic one. A good example would be Sweden; Sweden's autocratic monarchy started to transform into a democracy (in Sweden, so-called *crowned republic*) with the introduction of the first constitutional Instrument of Government of 1719, and culminated probably in 1974 when the Instrument of Government of 1974 came into force.[1954] Thus, Sweden exemplifies the length of time the constitution-making form of reform can involve.

1952 See, Lassalle, "ÜBer Verfassungswesen: Ein Vortrag, Gehalten in Einem Berliner Bürger-Bezirksverein Am 16. April 1862," 147.

1953 See, Can, 259.

1954 The Swedish constitution consists of four basic laws, so unlike the ideal type of the modern constitution, it is not a single document. The Instrument of Government (Swedish: *Regeringsformen*) is one of them. The others are the Freedom of the Press Act (Swedish: *Tryckfrihetsförordningen*), the Fundamental Law on Freedom of Expression (Swedish: *Yttrandefrihetsgrundlagen*) and the Act of Succession (Swedish: *Successionsordningen*).

What is important in all this, is that also during a reform, an apex court acts usually on the grounds of a still valid constitution, and in the absence of a clear revolutionary break, the apex court is not newly established. In combination with what was said in the previous section, this heightens the potential of a court established under a specific authoritarian regime and not wanting to move away from it. The reform form of constitution-making, of course, does usually not foresee the establishment of a new court. Additionally, in Turkey, the TCC kept on defending the Kemalist values because there was not necessarily a new constitution to defend. The court was still focused on the 1982 Constitution, which even though it was under reform, was still in force.

2. The SCCE and the Revolution

The constitutional transition of Egypt, especially the first one from 2011 to 2013, has been marred by constitutional instability, and uncertainty. Instead of a negotiated handing-over of power in the round-table sense, in Egypt the power was handed over to the military and no veritable negotiation took place between them and the other forces of the transition, such as the Muslim Brotherhood. Therefore, instead of a constitutional framework commanding legitimacy as demanded from day one of the revolution, there were different actors all taking their own direction, assuming and claiming to represent the 'people'. In this sense, in reaching a consensus on one common constitutional project, each one ended up using its constituent power imposing 'constitutional declarations and decrees' by force, resulting in an increasing polarization ending in a second military coup and a second constitutional transition leading up to the 2014 Constitution. In this sense, Egypt was a clear case of revolution where both legitimacy and legality were broken. The revolutionary transition type combined with the ambivalent institutional history of the SCCE has contributed to shape the SCCE's behavior.

On top of finding itself in a country where both legitimacy and legality had to be reinstated, the SCCE found itself in a power-struggle, which influenced its role. The power-struggle is closely linked to the constitution-making form. Had the military opened up a round table and invited all political forces to negotiate an inclusive way out of the revolution, the outcome might have been different. Instead, power was illegitimately handed over to the military, which initially seemed to allow for democracy to regain legitimacy, yet once the results of the parliamentary elections were out

and political Islam had gained more power, it was clear that the SCAF and the SCCE did not accept the outcome. The Constituent Assembly was led by Islamists and the power struggle ensued.

Egypt is a clear example of different entities in a transition not meeting together at a table to negotiate a common future, like in South Africa. The fact that institutions still related to the old times had substantial power in the transition certainly did not help. In such situations where there is a lot of resentment between different political forces, *tabula rasa* could be the best and only solution. Democratic acceptance, of course, also needs to be present. Accepting the victory of the political Islam movements could have facilitated a future consensual constitution-making process. Instead, the actions of both the military and the judiciary just intensified the struggle.

Hence, the choice of the form of constitution-making fostered a political struggle that needed instead to be suppressed. Opting for the typical form of constitution-making in revolutionary breaks, that is through a Constituent Assembly, can work if:

– all political forces accept the results of the first democratic elections after the revolution, and
– the new parliament (no matter the party ratio) selects a Constituent Assembly inclusive of the entire diversity of political interests in the country (including minorities).

This did not happen in Egypt. The military and the SCCE did not accept the fact that the elections were widely won by political Islam and the new Islamic-led parliament did not select a widely representative Constituent Assembly. This situation was at the core of the motives for the failure of the transition to constitutionalism and for the obstructing role of the SCCE.

3. The CCZA and the Round-Table Form

The roundtable form of constitution making advocates for the continuance of legality. Seeking to maintain legality unbroken pushes the political parties to have to find consensus on most issues starting from the transitional rules.

Accordingly, in South Africa, the CCZA found itself being a product of political compromise.[1955] It was a result of the negotiated settlement and hence a court was put there to facilitate the constitutional transition from the beginning. Thus, the two-stepped roundtable form of constitution-making was indirectly a key factor for the court playing the facilitator role, because it fosters the seeking of compromises for the sake of going forwards with the transition. The very nature of this constitution-making form is the facilitation of the transition. This is also the reason why it is no surprise that South Africa is also a great example for a court being the guarantor of the exit bargain. This scenario is only possibly in certain types of transitions, typically round-table ones without a break of legality. The reason thereof is that the autocrat is given a seat at the negotiating table too. These are scenarios in which the autocrat manages to contribute to write the rules of the transitional game and negotiates the terms of exit. This cannot happen in the case of a revolution where the autocrat is usually completely repressed and not given the chance to contribute to the future of the country.

Of course, the establishment of a new court helps and can possibly outweigh the constitution-making form factor. At the same time, I believe the importance of the constitution-making form rests on the fact that the round table one with a legitimate *interim* constitution allows for the court to detach itself from having to assert its own legitimacy and focus on the transition itself. In a two-stepped transition, we will accordingly see a court being more vigilant when it comes to the transitional matters, rather than playing a major part in a political struggle. In Egypt for instance, the legitimacy of the *interim* constitution was not really there since it was enacted by the SCAF, so the SCCE ended up having to struggle more for legitimacy itself and ended up politicizing its performance. It ended up being at the core of a political power struggle, which is not necessarily the best role a court should play in the middle a constitutional transition. Instead, we have seen how the court needs to find the right balance between law and politics. This balance is contingent on many contextual and local factors and is hard to both generalize and theorize.

1955 For more on this, see Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 101.

II. Political and Historical Context

The decision over which constitution-making form to employ and the way it rolls out depends on the context, in which the transition takes place. The same goes eventually for the role and performance of a court. For instance, the reason a court plays the role of an obstructer of the transition can be found in the fact that it is a pre-existing one still attached to old values, or that the constitution-making form employed fosters the political polarization in the transition. In other words, context clouds all other factors. This factor reveals how all factors are somehow intertwined and dependent on each other. Context, however, somehow levitates above the rest; this is the reason it closes the chapter.

A court's choice to engage in an assertive (i. e., autonomous) or deferential (i. e., submissive of the regime in power) role varies on a case-to-case basis, especially in reaction to changes in the wider political context like a constitutional transition. Due to political context, courts can even change and adapt its behavior during a transition.

For instance, in India between 1949 and 1964, the judiciary was generally deferential, 'given that Prime Minister Nehru respected constitutionalism by only overturning judicial decisions through properly enacted constitutional amendments.'[1956] These were the first years of the 1950 Constitution, which demarcated the establishment of the Republic of India in the decolonization process. The same constitution created the Supreme Court of India. In this sense, the apex court was newly established, and as predicted, it played a deferential or facilitator role within the transition. The judiciary started to become more assertive in the middle of the 60 s when Indira Ghandi was elected with a much smaller majority, culminating in the world-wide famous 1973 *Kesavananda* ruling,[1957] in which the Supreme Court claimed its jurisdiction to assess the validity of constitutional amendments against the 'doctrine of the basic structure of the Constitution'.[1958] The court was then repressed under the state of

1956 "The Judiciary and Constitutional Transitions," 16.

1957 Supreme Court of India, *Kesavananda Bharati Sripadagalvaru and Others. v. State of Kerala and Anr.* (1973) 4 SCC 225: AIR 1973 SC 1461.

1958 'The Indian Supreme Court's arrogation of powers not expressly accorded to it under the 1949 Constitution highlights the fact that the constitutional framework is not definitive regarding the judiciary's capacity to take assertive action. Courts tend to have significant discretion concerning the scope of their own jurisdiction, access to the court and re-

emergency between 1975 and 1977, and from that moment until 1990, it turned into a much more populist institution with the goal to restore its reputation, 'with a strong focus on public interest litigation."[1959]

In Latin America, instead, the regional political context played a significant part in the role of courts. Common to certain waves of democratization, the Latin American one also has developed practices to prevent backsliding. A great example is Honduras and the 2009 backlash against the *golpe de estado* and the ousting of former President 'Mel' Zelaya. Zelaya, a president elected as a liberal politician, joined the region's turn toward populist leftism just as Hugo Chavez, Evo Morales, and Daniel Ortega, and attempted to follow that path by adding more terms to the presidency.[1960] On June 28, 2009, after proposing a referendum that, through an amendment of the Constitution, should have made possible an extension of the four-year mandate and its re-election (despite the opinion of the Supreme Court against such a constitutional amendment), Zelaya was arrested by the Honduran army and expatriated to Costa Rica. The arrest order was issued by the Supreme Court itself, as it is the supreme body defending the Constitution. The Supreme Court maintained that the mere suggestion that a referendum might be held on the unconstitutional issue was sufficient to trigger the arrest on the grounds of the Honduran Constitution.[1961]

Even though it is not strictly an example of constitutional transition, the discussion over term limits is a good illustration of a recurring issue across many contexts, not only in Latin America, that gives us clues and

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medies for constitutional violations. For instance, the Indonesian Constitutional Court has much narrower jurisdiction than the Kenyan Supreme Court, but this has not prevented it from taking robust stances; both courts, irrespective of jurisdiction, are still required to make strategic choices about how they exercise their power.' See, Daly, "The Judiciary and Constitutional Transitions," 18.

1959 ibid., 17.

1960 Ginsburg, "Courts and New Democracies: Recent Works," 732.

1961 See, The Economist, "The Coup in Honduras: Defying the Outside World," *The Economist* (July 2, 2019), https://www.economist.com/the-americas/2009/07/02/defying-the-outside-world (accessed November 20, 2019); Público, "Golpe De Estado En Honduras: Los Militares Deportan a Zelaya," *Público* (June 26, 2009), https://www.publico.es/actualidad/golpe-honduras-militares-deportan-zelaya.html (accessed November 24, 2019). See also, *Corte Suprema de Justicia de la Republica de Honduras.* 'Comunicado especial a la comunidad nacional e internacional. Tegucigalpa: Corte Suprema de Justicia, 29 junio de 2009'.

evidence into the political role of apex courts.[1962] Moreover in Colombia, the Constitutional Court rejected Alvaro Uribe's attempts to bypass term limits through constitutional referendum.[1963] In this sense, the Constitutional Court of Colombia arguably served a significant role in preserving political competition and thus consolidating democracy. In these cases, the courts of Colombia and Honduras played a more systemic role by arguably aligning with the constitutional order. Instead, in Nicaragua, the Supreme Court maintained that term limits as such were unconstitutional, obviously aligning itself with Daniel Ortega's populism.[1964] Incredibly, in Costa Rica, the Supreme Court of Justice, issued two rulings on Oscar Arias's attempt to dispute that a 1969 constitutional amendment forbidding reelection was in fact a violation of the Inter-American Convention on Human Rights. In the first judgement,[1965] the court rejected his argument, but in the second,[1966] the constitutional chamber was composed of new justices and astoundingly upheld the argument, paving the way for Arias to resume the presidency in 2006.[1967]

1962 See generally, Tom Ginsburg, James Melton, and Zachary Elkins, "On the Evasion of Executive Term Limits," *William & Mary Law Review* 52 (2011).

1963 See, Constitutional Court of the Republic of Colombia [*Corte Constitucional de la República de Colombia*], Decision C-141/10 (February 26, 2010).

1964 See, Supreme Court of Justice of the Republic of Nicaragua [*Corte Suprema de Justicia de la República de Nicaragua*], Constitutional Chamber [*Sala de lo constitucional*], Decision No. 504–09 (October 19, 2009).

1965 See, Supreme Court of Justice of the Republic of Costa Rica [*Corte Suprema de Justicia de la República de Costa Rica*], Constitutional Chamber [*Sala constitucional*], Decision No. 7818–00 (September 5, 2000).

1966 See, Supreme Court of Justice of the Republic of Costa Rica [*Corte Suprema de Justicia de la República de Costa Rica*], Constitutional Chamber [*Sala constitucional*], Decision No. 2771–03 (April 4, 2000).

1967 Ginsburg, "Courts and New Democracies: Recent Works," 732. See also, Bruce M. Wilson, "Enforcing Rights and Exercising an Accountability Function: Costa Rica's Constitutional Chamber of the Supreme Court," in *Courts in Latin America*, ed. Gretchen Helmke and Julio Rios-Figueroa (New York: Cambridge University Press, 2011), 66–67. On the cases of Nicaragua and Costa Rica, see Elena Marti´nez-Barahona, "Las Cortes Supremas Como Mecanismo De Distribucion De Poder: El Caso De La Reeleccion Presidencial En Costa Rica Y Nicaragua," *Revista de Ciencia Poli´tica* 30, no. 3 (2010). On Costa Rica, Nicaragua and Honduras, see Elena Marti´nez-Barahona and Amelia Brenes-Barahona, ""Y Volver, Volver, Volver...". Un Análisis De Los Casos De Intervención De Las Cortes Supremas En La Reelección Presidencial En Centroamérica," *Anuario de Estudios Centroamericanos* 38 (2012).

Returning to the Honduran case, it is a great example of how the perception of the role of the court (and not necessarily the role itself) was influenced by the political context of the entire Latin American continent. Ginsburg maintains that '[i]t seems to have been, from one perspective, an example of hegemonic preservation or downstream guarantor. It helped ensure that the conservative elites would not be pushed aside by a new rising competitor. However, the regional dimension came into play. The Organization of American States reacted quite strongly, characterizing Zelaya's forced removal in the middle of the night as a coup. Memories of military intervention thus affected the framing of the incident by external actors, and this led to a long period of uncertainty in Honduran politics.'[1968]

The political context was also a factor in Egypt and Turkey. The tensions between secularists and Islamists have raised the potential of the apex courts siding with one or the other political forces resulting in them obstructing the normative constitutional transition. Whether siding with one or the other for reasons of idealism (e.g., Turkey) or opportunism (e.g., Egypt) does not change the fact that the political context in which the transition took place indeed shapes the role of a court.

The South African political context was much different from the other two case studies. The political friction between mainly the Whites and the Blacks/Coloured was tamed by constitutional compromise through the choice of an inclusive constitution-making process. This allowed the CCZA to not have to take a direct political stance in the transition process, because there was contextually no power struggle. A calm political context facilitates the depoliticization of the judiciary.

Therefore, the CCZA was able to play a distinct role in facilitating the democratic transition and to create its own highly assertive role. Thanks to the independence from other branches and the politics of the country, the CCZA focused on promoting the new constitutional order and became a symbol of a transformed justice, which goes beyond the more traditional role of mere judicial dispute resolution. While the initial conditions of its establishment and its composition allowed the CCZA to build significant legitimacy among most constituencies, including the people, the end of the transition and with it the changing conditions of the country, will reshape the landscape upon which the judiciary functions.

1968 Ginsburg, "Courts and New Democracies: Recent Works," 732.

As mentioned before, the political tension between the different political forces was only 'tamed' and not completely neutralized. While South Africa's experience with constitutionalism is still very new, the conditions which gave rise to the new constitutional order, such as the typical problems of a post-colonial society and above-all inequality, has somehow kept domestic political tension afloat. The CCZA, in its function of precursor of the empirical social transformation, was caught in the crosshairs of political struggles for the realization of the extensive vision of the new Constitution. The CCZA has acted as trying to find the balance between law and politics by walking a careful path, that is avoiding easy assertion of rights, but still continuing to question government shortcomings:

> 'At the same time, the courts themselves are undergoing transformation and tensions over this process continue to simmer. The challenge facing the Court, as its composition changes and it becomes increasingly part of a "normal society" will be whether it is able to continue to strike a balance between the need to address the legacy of apartheid, including the historic exclusion of the indigenous legal systems, and continue to uphold the claims of individual freedom and dignity which have become the hallmark of its first decade and a half.'[1969]

III. Lessons Learned

As we know, the Court can play different roles in different moments of the transition. Said moments of the transition are also dependent of the constitution-making form. Courts can be involved in the constitution-drafting process, in the constitution-making process as a whole (influencing the procedures), in the implementation of the new constitution, etc.

In the Turkish case, the Court played a role both in the constitution-writing, constitution-making and even in the implementation. This is due to the fact that the constitution-making form was one of a reform and therefore each reform package included constitution-writing, constitution-making, as well as implementation of the same packages. The Turkish Court was especially active in the first two. Of course, in Turkey, the constitution-drafting part of the transition was marked by punctual interruption because of the nature of the constitution-making form, which was gradual and reiterated

1969 Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid," 192–93.

reform. This constitution-making form allowed the Court to assess its position differently than in a transition with legal or legitimacy rupture. In a reform, the Court actually tends to remain the same as before. Therefore, it is possible that this influenced a lot the role of the Court in the transition. Since the court was unreformed, it was the same as before and thus in the hands of the old regime. It is therefore unsurprising that the Court tended to protect that old regime and tried to undermine the newer democratization movements.

The Egyptian case, with two transitions within one, shows instead how a revolution, i. e., a complete break of both legitimacy and legality, represents a much more unstable case. The round table form shows from the beginning that the parties are looking for a compromise between the former autocratic parties and the new forces. A compromise which is not always present in the case of a revolution, especially in Egypt where the new forces were split. The Egyptian case is quite atypical, as in a revolution, you would probably see more often a new court being established, rather than keeping an old regime's institution. The problem of Egypt's revolution, however, was that Mubarak handed the power over to the military and the military did not seem fit to dismantle the SCCE.

This section has revealed how the more a constitution-making form allows for consensual constitution-making and reduces the chances of political tension and struggle during the transition- the role a court plays is more likely to be the one of a facilitator. Constitution-making forms that allow for unilateral majoritarian constitution-making instead foster a sentiment of political tension, in which the apex court is often dragged into. In other words, the constitution-making form and the political context in a transition are somehow connected, just as the constitution-making form is connected to the establishment of a new apex court or the non-dissolution of a pre-existing one.

In other words, the question I asked myself here answers as follows. The role of the apex court *is indeed* influenced by the constitution-making form adopted in a constitutional transition. The form of constitution-making determines whether a court is newly established or not, determines the composition of the apex court and also the contents of the constitutional draft. Therefore, the research also revealed that the hypothesis was too simplistic and that the constitution-making form as such *can* influence the performance of a court, but factors related to the court itself or the final

constitution might be even more directly influential. In other words, the constitution-making form is almost like an umbrella factor that impacts most other factors and not only the performance of the court directly.

This is confirmed by also looking at cases other than the three of the present research. Colombia revealed a constitution-making form very close to the reform. However, the Colombian constitutional court is known for its strong support of human rights and progressive jurisprudence.[1970] The key factor would be here the political context and the fact that a new court was established. The Hungarian case, instead, reveals how the roundtable form of constitution-making and the establishment of a new court do not always guarantee success. More comparisons can be made, and more theories can be formulated, yet in the end one thing is clear: every case is contingent of a myriad of factors and those factors are themselves influenced by yet other factors.

The choice of constitution-making form and the way it is implemented throughout the transition is contingent on the historical and political context in a specific country. But not only. The historical and political context has a direct influence on most other factors that impact the role and behavior of an apex court. At the same time, political and historical circumstances are often those that – unlike the constitution-making form – cannot always be shaped by the parties involved in the transition. This, and the fact that it can influence most of the other factors as well, makes the political and historical factor the most important of them all.

D. Other Conceivable Factors

There is probably an infinite list of factors that could influence and have a major impact on the role and behavior of apex courts during a constitutional transition. Here, I thought it would be interesting, in relation also to the peculiarities of the case studies, to take a brief look at least at the different types of constitutionalism (form the classic form to the transformative and Islamic alternatives), the presence of a process of decentralization during the constitutionalization period (given that it was an pivotal issue in South Africa), the influence of supra-national legislation

1970 See, for instance, Nicolás Figueroa García-Herreros, "Counter-Hegemonic Constitutionalism: The Case of Colombia," *Constellations* 19, no. 2 (2012).

and judicial authority, and finally the choice between either the diffused system of constitutional review and the centralized one (given that the present study has revealed a trend to increasingly empower apex courts in the aftermath of a constitutional transition.

I. Type of Constitutionalism

A very important factor is also the type of constitutionalism that the new constitutional order envisions. Depending on the historical and cultural context, different versions of constitutionalism can be adopted which influence the entire process of transition.

As I have tried to introduce in the theoretical chapter, constitutionalism is a typical legal definition, and as such it requires an interpretative approach to define it. I have chosen the Western or classical version of constitutionalism for this research because it reflected Grimm's split definition of constitution: the normative constitution and the empirical constitution – two sides of the same medal. I have applied Grimm's notion of constitutional law on constitutional transitions, developing the differentiation between normative/legal constitutional transition and empirical transformation. The modern version of constitutionalism adds to the three elements of classic constitutionalism (democracy, limited government and the rule of law) an element of transformation. This element of transformative constitutions, such as the Colombian or the South African one, have a great impact on the entire manner *all* state institutions of all government branches implement it. I have explained how the veritable empirical transformation of society passes through the legal constitution – as a legal instrument – as a first stepping stone, but then needs extra-legal influence to happen. I will not simply deny that the element of transformation does not influence the normative constitutional transition at all; the way the courts perform in order to establish institutionally and legally each, and every element of constitutionalism is definitely influenced by the final constitutional vision. Nevertheless, it is incredibly difficult to analyze, and different methodological approaches are required; above-all, the transformative element has great effects on the empirical transformation and interdisciplinary notions would help further in this assessment. A common alternative to this version of constitutionalism is Islamic constitutionalism. Islamic constitutionalism entails the integration of Shari'a in the constitutional order. Shari'a can have a direct impact on the

jurisprudence of the apex courts, especially in countries in the Middle East, where political polarization between religious and secular movements characterized the transitions.

A thorough and fair analysis of the impact of the different types of constitutionalism requires additional research and detailed cultural accounts from each case study. This brief section serves to remind, however, that the type of constitutionalism can play a great role in the behavior of a court, as it shapes the final constitutional vision and goal.

II. Decentralization as Constitutional Structural Feature

Clearly one of the most important justifications for apex courts is to provide finality of interpretation on the competences of and among courts, and legislative and executive agencies, a factor which is particularly pressing in federal states. The need for uniform interpretation of the law means that in federal systems, there should be no conflicting judgments in the same matter in different state jurisdictions. This is also important where there is a clear (that is, autonomous) division between central and regional (and local) governments.[1971] The CCZA, for instance, despite South Africa only being a 'quasi-federation', has exercised a significant allocation of powers function, facilitating immensely the consolidation of constitutionalism through decentralization in the ears after the enactment of the IC in 1993.[1972] The relationship between federalism and the courts passes through the exercise of constitutional adjudication, where (usually) apex courts interpret constitutional provisions linked with decentralization. 'These norms most prominently concern the distribution of powers between the federation and its constituent polities, but they also often concern interpretation of the structural features of the federal system, such as the representation of the constituent polities within the federation's political institutions. Courts can shape a federal system through their authoritative interpretation of these and other aspects of the constitution.'[1973]

1971 Harding, Leyland, and Groppi, "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective," 7–8.

1972 See in general Heinz Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid," ibid.

1973 Aroney and Kincaid, "Introduction: Courts in Federal Countries," 10.

Decentralization is a constitutional arrangement in which competences or powers are shared vertically, i. e., they are divided between at least two levels of government. For this reason, apex courts – as enforcers of the constitutional contents – potentially play a fundamental role in arbitrating and policing, for instance, such allocation of competences. To the extent the apex court is independent and bestowed with the function of maintaining the constitution, this includes the protection of the constitutional arrangement on the distribution of competences against any political force determined on changing it either a more centralist or decentralist tendency.[1974]

Dicey once asserted that federalism essentially implies a combination of 'legalism' and the 'predominance of the judiciary'.[1975] He assumed that the proper preservation of the vertical division of power required both a supreme constitution and courts with the authority to interpret it.[1976] Dicey's conception has been under the spotlight of criticism for being overly legalistic.[1977] However, Wheare treated the role of courts as less essential. Required, he maintained, is that 'some impartial body, independent of the general and regional governments, should decide on the meaning of the division of powers.'[1978] Wheare, just like Bryce before him,[1979] stresses that that while in many other countries, this legalistic function is in fact performed by courts, Switzerland instead has an apex court, the Federal Supreme Court, which lacks the competence to determine the constitutionality of federal laws.[1980] This does not mean that Wheare rejects a role of courts in a federal system; he still sees that the role of courts, like the Swiss one, as well as in the other federal systems he examines, is highly significant.[1981] One thing is clear though, federalism has a significant impact on the development of constitutional adjudication. As Auer maintains, federalism 'was first in bringing the constitution to the courts, long before civil rights and liberties did the

1974 ibid., 4.
1975 Dicey, 175.
1976 ibid., 144.
1977 See, for instance, Michael Burgess, *Comparative Federalism: Theory and Practice* (New York: Routledge, 2006), 21.
1978 Kenneth C. Wheare, *Federal Government* (New York: Oxford University Press, 1947), 66.
1979 James Bryce, *The American Commonwealth*, 2nd ed., vol. 1 (London: Macmillan, 1889), 253–54.
1980 Wheare, 64–68.
1981 ibid., 72–78.

same,' and it 'has contributed much to the evolution of the constitution from a political recipe to a legal norm.'[1982]

In sum, I do agree that decentralization ordinarily needs a written constitution, which itself requires interpretation, usually however not necessarily exclusively, by apex courts.

Hence, there is a connection between decentralization and the role of courts in mature democracies. Probably, if the role of courts can be influenced by decentralization in mature democracies, I can only imagine the magnitude of impact on courts that the fresh introduction of decentralization in a country undergoing transition can be. Allowing a court to have authority over the allocation of powers between the different spheres of government is certainly one way of significantly empowering an apex court, given the importance of decentralization in many transitions to constitutionalism.

III. Supra-National Influence and Impact of Regional Courts

Another important factor which affects the trajectory of apex courts in constitutional transitions is external influences, whether they be supra-national (in the sense of an additional sphere of government above the national one) or judicial regional (in the sense of the presence of an additional judicial body above the national apex court).

The former is probably less of a pressing issue for courts in countries undergoing a transition, even though the acceptance of the state in supra-national organizations, such as the United Nations Organization or the European Union (EU), can be crucial for the success of being accepted as a state at the international level. Usually, however, the pressing issue (for an apex court) in a transition is rebuilding the country itself without having to worry too much about supra-national organizations. Courts would have to reconcile the laws of the new national constitution with obligations originating beyond the constitution, such as in the European Union. For instance, Sadurski and Lach maintain that '[t]he constitutional courts have become European courts, which not merely apply European law but also, as the guardians of the respective national constitutions,

1982 Andreas Auer, "The Constitutional Scheme of Federalism," *Journal of European Public Policy* 12, no. 3 (2005): 419–31.

have been vested with the role of telling the constitutional story of European legal integration."[1983]

The former instead is probably more pressing for apex courts in countries undergoing a constitutional transition, although it relates to the judicial side of supra-national organizations. In this sense, it is interesting to observe in some cases (such as Turkey) a tension between national and international rulings (in this case decisions under the ECtHR). In a similar tone, 'there is no doubt that constitutional court decisions themselves have effects going beyond national borders, litigators taking notice, particularly in the field of human rights, of the manner in which foreign constitutional (and supreme) courts have dealt with particular issues.'[1984] Daly dedicates an entire section of his book, The Alchemists, to regional democratization jurisprudence, i. e., the shaping of democracy from the outside. He stresses the importance of regional courts on the shaping of the behavior of apex courts in countries undergoing transitions.[1985]

IV. Type of Apex Court: Constitutional Court v. Supreme Court

When it comes to a constitutional transition, many countries establish a new constitutional judicial body (be it a constitutional or a supreme court) as one of the measures to establish constitutionalism, because the existing courts are mostly inept to offer adequate assurances of structural independence and intellectual assertiveness.[1986] The ordinary judiciary risks to bear a dubious reputation given its role under the former regime. Even though such suspicion is proven unfounded, the new constitution-makers, and indirectly the people, might feel more comfortable endowing constitutional review powers to a new body. This confirms the symbolic function a new apex court is prone to assume in a constitutional transition. The

1983 Kasia Lach and Wojciech Sadurski, "Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity," *Journal of Comparative Law* 3, no. 2 (2008).

1984 Andrew Harding, Peter Leyland, and Tania Groppi, "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective," ibid.: 8. See also, Kasia Lach and Wojciech Sadurski, "Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity," ibid.

1985 See, Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 216 – 45.

1986 Garlicki, 45.

protection and enforcement of constitutional supremacy remains the *raison d'être* of constitutional review, especially during the transition. In this sense, the presence of a new apex court with the power of constitutional review signals the country's commitment to constitutionalism, and particularly the rule of law.[1987] It indicates a clear break with its authoritarian past. The establishment of the German *Bundesverfassungsgericht* after WW2, as well as the creation of the Spanish Constitutional Court after the fall of dictator General Franco, are clear examples of such reasoning.[1988] Between the years of the post-Soviet era and up to the Arab Spring, constitutional courts have been increasingly seen as a key element of democracy. The reason is simple: regardless of the role an apex court might play in the constitution-building process, in a constitutional transition, a new constitution also needs to be implemented. There is a pressing need for 'a good start'. Almost immediately, the new State faces pressing questions on how to implement the new constitution. Therefore, it has increasingly become standard practice to vest an apex court with the responsibility of enforcing it.[1989]

Most states with a new constitutional court (rather than a supreme court within a diffused system of judicial review) have established it (or have thoroughly reshaped and reformed an existing judicial body, as in Taiwan) as part of a constitution-making process. An apex court, be it a constitutional court or a supreme court, is often seen as an essential mechanism to achieve and entrench constitutionalism, because the court is deemed being a necessary guardian of democratic institutions and fundamental rights following a period of autocratic rule. Accordingly, unlike the generality of courts in a diffused system, constitutional courts are specifically charged with deciding constitutional (and logically political) questions – although, obviously, they have to do so with great care and judgement in a transitory period.

As constitutionalism has spread globally, many constitution-builders have preferred the centralized model judicial review with a constitutional court

1987 Choudhry and Glenn Bass, 9.

1988 An example, which instead disclaims the rationale of an exclusive constitutional court as a symbol of break from the authoritarian past of a country would be Kenya, where the judges of the new supreme court, (re-)established in 2010, have been carefully selected and vetted in order to make sure that they are utterly committed to the newly enacted constitutional order.

1989 Issacharoff, "Constitutional Courts and Democratic Hedging," 963–64.

to the diffused model of judicial review with a supreme court. Accordingly, in the 1990 s, the centralized model spread quickly from Western Europe (where it was already quite established) across the world in transition.[1990] The main reason in establishing a constitutional court is 'to create a strong and specialized judicial-type body capable of enforcing a new constitution or a new constitutional deal'.[1991]

Constitutional courts reveal several *advantages* in a transitional scenario. First, the creation of a specialized court empowered with the authority to interpret the constitution and ensure its supremacy indicates that the country is committed to the rule of law, and seeks a clear break with its authoritarian past. Second, in a constitutional transition, the ordinary judiciary is commonly considered suspect, given its probable deferential behavior under the former regime. Constitution-builders may prefer entrusting the power of judicial review to a newly established court, just like it happened in Germany and Spain in the aftermath of both Hitler's and Franco's dictatorships. Third, a constitutional court delivers the simplest way to reach finality and uniformity in the interpretation of the constitution, unlike in a diffused system, where different courts at many levels may interpret the constitution differently. Finality and uniformity are thus rarely achieved in a diffused system; the only way to reach them is to have the highest court hearing an appeal and ruling in a way that binds every other (lower) court according to the 'doctrine of precedent'. Finally, a constitutional court provides for a more specialized composition of the court; judges are focused on constitutional law and become thus specialized. In this sense, they are thought to bring more general expertise and judicial independence to the bench. Harding expresses an important thought:

> 'It [...] raises a question whether, in terms of the separation of powers, a constitutional court is in essence a fourth branch of government distinct from the legislature, the executive and the ordinary judiciary. It can act as a powerful facilitator in maintaining, or transition to, democracy and constitutional government. The constitution, in this model, would not be exposed to the will of a parliamentary majority or a ruthless president.'[1992]

1990 Harding, "The Fundamental of Constiutional Courts" 2.
1991 ibid.
1992 ibid., 6–7.

There are also *disadvantages*, of course. For instance, since a constitutional court exercises functions that are often very political, there is a danger that it might exaggerate in encroaching onto the political realm, tilting the balance between law and politics, and thus be threatened by the political branches with retaliatory action, such as reduction or abolition of its powers, its packing or even dismissal.[1993]

All in all, however, the advantages outweigh the disadvantages. Constitutional courts are increasingly predominant and considered a core component of constitutionalism in young democracies. During constitutional transition processes, politics negotiate the terms of the new constitutional democracy and entrench them in a written constitution. The new country consequently then faces the significant question of how to enforce and implement said terms. The clear tendency is to establish a new constitutional court to do so.[1994]

E. Preliminary Conclusions

I. Summary

We have seen that the role and behavior of apex courts in a normative constitutional transition can be greatly influenced by a myriad of factors. The capacity of judges to engage in strategic behavior in order to fulfill their role is deeply shaped by the country's overall institutional, constitutional, and transitional/political context.

1. Institutional Context

At the institutional level, a very significant matter is whether the apex court vested with upholding the new constitution through constitutional review is new or old. Legal systems serve the maintenance of the existing constitutional order. It is much more typical for a newly established apex court in a new democratic order to work for the protection and enforcement of the new constitution, which is the decisive source of its institutional power, even if judges have been trained and socialized in the

1993 ibid., 7.
1994 Choudhry and Glenn Bass, 20.

old system, they can facilitate the transition in this way, as it was the case in South Africa and Colombia. Judges in these two countries did definitely not step into the shoes of justice for the first time. We have seen how if a court is established under an authoritarian regime and/or in order to protect the interests of certain elites, apex courts often stand in the way of the transition, as can be seen in the democratization processes in Turkey, Chile and Egypt to some extent.

Highly important, in relation to the new establishment of a court or the maintenance of a pre-existing one, is the composition of the same. Judges need to be carefully selected as to be individuals committed to the new cause. A good example to show the importance of the judges sitting on the bench was pointed out by Daly and is Indonesia and the Indonesian Constitutional Court's activity in the past decade. The changing attitude of consecutive chief justices of the Indonesian Constitutional Court over the past decade reveals how no matter if the court is new or old, the behavior can depend on its members:

> 'The first Chief Justice focused on developing a high-quality and assertive jurisprudence that was largely respected by the government. The second Chief Justice did not prioritize well-reasoned opinions, even when invalidating legislation, which led to criticism that the Court was usurping the legislative function. The third Chief Justice was found guilty of accepting bribes in electoral disputes, which badly damaged the Court's standing. This damage has been repaired somewhat under the current Chief Justice by the Court's professional handling of disputes arising from the 2014 legislative and presidential elections, particularly its rejection of authoritarian presidential candidate Prabowo Subianto's challenge of the election result. At the extreme, individual judges may focus on building their reputation in order to secure a non-judicial role. Examples include the second Chief Justice of Indonesia seeking nomination as a presidential candidate after he left the Court, judges being appointed to cabinet posts during President Morsi's short administration in Egypt, or Chief Justice Puno of the Philippines campaigning for political office while carrying out his judicial functions. The non-judicial roles required of judges during constitutional transitions— to lead commissions of enquiry, or even to act as interim presidents between elections (e.g., in Egypt and Nepal)—also raise the risk of politicizing the judiciary."[1995]

2. Constitutional Context

At the constitutional level, we have seen how it is highly important that for a court to fulfill its facilitator duty during a transition, it needs to be at least

1995 Daly, "The Judiciary and Constitutional Transitions," 16.

empowered to do so. The tool of constitutional review is the main instrument for the court's activity. Without it, a court is basically 'toothless'. Empowerment is not only related to the power itself to engage in constitutional review, but also to the fact that the new constitution declares openly that the apex court is not merely an instrument of legality, but also an instrument of transformation, and as such it needs to be the precursor of the transition by guarding the new values and principles of the constitution.

This message is, however, not always well-defined, and in times of transition, it is possible to *not* find a clear and determined constitution. This type of indeterminacy is called 'constitutional silence' and can lead to an overpoliticization of an apex court or to constitutional despotism.

3. Transitional/Political Context

Regardless of what the constitution says or how the court is composed and appointed, the transitional, political or historical context in which a court finds itself shapes a court's role. In other words, the terrain on which the court will act defines its role and behavior.

The constitution-making form chosen is pivotal. Depending on what form the transitional forces chose to employ in their transition can deeply influence how a court will respond. The constitution-making form defines also the other two contexts (institutional a constitutional). The same goes for the political or historical context. They define how a court is or will be composed and the level of empowerment that it will be allocated to it. The political spectrum of the transition defines all the rest.

II. Conclusion

One can barely imagine the high number of other factors that can have an additional impact on the role and behavior of courts and can fit in one of the three contexts above (institutional, transitional/political and constitutional). Just to make a couple of examples: decentralization as such and the nature and degree of decentralization of the federal structure; the extent of subnational representation in federal policymaking; degree of integration of the party system; the role of states in the appointment of judges and

composition of the court; the type of law system and legal tradition; the number of cases brought to the court, and more.

The combination of many roles with many factors results in a several possible outcomes. One has to keep in mind that not every categorization is always spot-on, as judges find themselves challenged with different issues, audiences, and restrictions in different contexts. Many factors might influence the role of a court and within these factors different courts in different context can have some aptitude to shape their own role accordingly in different ways.

I believe that it will be only through the aggregation of many more accounts from all over the world that we will be able to arise with generalized theories about how and why courts shape normative constitutional transitions and their own environments. However, we do have a wide range of accounts of judicial roles ebbing and flowing over time, in a progressively diverse array of contexts outside the core of established democracies.[1996] The problem remains nonetheless that no common framework was employed, resulting thus in a myriad of inconsistent source materials.

1996 Ginsburg, "Courts and New Democracies: Recent Works," 739 – 40.

Conclusion: Normative and Policy Implications

I would like to conclude this thesis by jumping ahead from the 'is' to the 'ought'; by trying to gather arguments for what apex courts could do in a normative constitutional transition. Even though the entire thesis has already scattered normative implications in each and every lesson learned, here I would like to take a more explicitly normative track in trying to gather together possible best practices needed to reach the desired role.

The main question that remains to answer in this concluding section is the one formulated inquiringly in the introduction: *What role and behavior should or could an apex court play in the normative constitutional transition? And what can constitution-builders do to foster such role and behavior* (*policy implications*)*?* About this question, Daly wrote an incredible book labeled *The Alchemist*,[1] which attempts to describe the role courts *should* play in a young democracy. I will fetch several arguments made in his book, yet the present research focuses not on the role of courts in a young democracy as such, but mostly in the normative constitutional transition. So, I will ty to adapt some of his arguments to my thesis and add my own insights. As in any properly theoretical work, I build on and debate with the conceptions of others. Daly's book is an outstanding account on the role courts play in young democracies as a whole. It is the closest work of generalization on the role of courts that can be found among scholars. Instead, my approach is pointed at the constitution-making process as such, that is the making of a new constitutional order, rather than focusing on democracy. This is the reason why I differentiated between normative constitutional transition and empirical transformation. The support and help in making democracy work are something that goes beyond constitution-building and more into the extra-legal support of transforming the authoritarian regime. I look at the first step in this endeavor and therefore the role courts should play is less theoretical, and goes more to the point of the normative constitutional transition: the constitution.

1 *Daly, The Alchemists: Questioning Our Faith in Courts as Democracy-Builders.*

A. Normative Implications: The Role and Behavior Apex Courts Ought to Play in a Normative Constitutional Transition

One thing is crystal clear from the previous chapter and needs to be kept in mind; despite the complexity of making order in a field of the law that depends on a myriad of external and internal factors, every case is different. Every case has its own peculiarity and too many factors have an impact on the role of apex courts. For instance, one can say that the two-stepped constitution-making process is the best one in times of transition. It does indeed produce the highest level of political investment, yet at the same time, cases have shown that other factors may have an effect on its success. Therefore, the normative implication would not be to suggest the round-table model as *the* constitution-making form to employ, yet the key would be pluralism and the attempt to have the highest level of inclusivity in the constitution-making process, no matter the form.

I. The Role of the Apex Court: Facilitating the Establishment of Constitutionalism and Consolidating its Elements

It is self-evident that the starting point would be the acceptance of the apex court playing the role of facilitator of the normative constitutional transition. In the case that a new legitimate democratic government is in place, the apex court should definitely help facilitate the transition. One of course can expect an apex court to obstruct an ongoing transition if the ruling government was not elected democratically or a democratically elected government does not proceed with an inclusive and consensual constitution-making process, but rather a majoritarian one. In these cases, it could be argued that assertive courts probably ought to intervene and maybe try and hinder an ongoing transition. Then again, such a transition would be a failing one and thus could not really be defined as a democratic transition, but rather a transition from one form of authoritarianism to another.

It is clear that under the label 'facilitator,' the idea of a court actually hindering an ongoing non-democratic transition should also be included. In this sense, it would actually be facilitating the actual democratic

constitutional transition, and hence, we have it again; the apex court should always play the role of facilitating the installment legally and institutionally of the elements of constitutionalism. How? By either obstructing an authoritarian regime or upholding and fostering a new democratic one. It truly all depends on the political context the transition finds itself.

Facilitating the legal and institutional establishment of constitutionalism takes place on two levels: during the constitution-building process and after the enactment of the new constitutional dispensation. Courts should focus on these two phases in order to allow the normative constitutional transition to succeed and give a chance to the empirical constitutional transformation.

I will not try to focus on each and every element of constitutionalism when assessing possible normative implications of a facilitating apex court in transition, but rather try to generalize the most important traits it needs to invest its resources in. This is due to the overlapping and imbricate effect of the elements of constitutionalism with each other; it will never be conclusive to try and isolate the role the apex court plays for each and every separate element. Another reason to treat the facilitator role of the apex court as a whole, instead of seeking out sub-roles for each and every element of constitutionalism, lies in the fact a court would be focusing its energies where it is most needed; and given the transitional setting, this could mean different roles depending on the context. For instance, if South Africa did not have issues with the establishment of local government, the court would not have intervened in the certification process on this issue and later after the enactment of the Constitution of South Africa, 1996, would not have been repeatedly called upon to intervene. Instead, the problem arose and so the CCZA played a great role in establishing a pivotal element of the new South African constitutional order. At the same time, the CCZA played an important transitional role by also defining the decentralization system and the allocation of powers between the national government, provinces and local government; it introduced a strong human rights jurisprudence; made sure the principles of the democratic process would be respected; and more. In any case, it would all boil down to protecting and upholding the elements of constitutionalism entrenched in the new written constitution.

Due to their function of enforcing and protecting the constitutional order, apex courts are considered important actors in transition processes. They

are therefore sometimes referred to as 'form of insurance to protect the constitutional bargain'[1997] Especially in European countries in which new courts were established *after* a democratic institutional system had already been anchored, such as Germany, Italy or Spain, it became apparent that the constitutional judges from the outset saw themselves as committed advocates in the service of the new democratic order.[1998] This role can be attributed primarily to the fact that judges, even those trained and socialized in the old system, have an interest in enforcing the new, democratic constitutional order, for it represents the decisive resource for the institutional power and legitimacy of its institution. Over the years, the courts in Western Europe have managed to build up authority and establish themselves firmly in the respective democratic institutional systems.

But how do apex courts act when no new institutional structure has yet been anchored (that is, during a normative transition), and especially when they do not obstruct the transition? Many apex courts in Central and Eastern Europe, as well as South Africa, played an important role in the immediate phase of systemic change.[1999] However the most common, paradigmatic, role for the judiciary is as a *downstream facilitator of the constitution-building process and consolidator of each one of the elements of constitutionalism.*

In South Africa, this split role between, on the one hand, the period of constitution-building and, on the other hand, the one after the enactment of the new constitution, was evident.

1997 Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 19.

1998 See, von Steinsdorff, 483.

1999 According to Wojciech Sadurski, a positive influence of the constitutional courts in constitutional transitions in Central and Eastern Europe was assumed without question after the experiences in Western Europe. See, Wojciech Sadurski, "Constitutional Justice, East and West: Introduction," in *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, ed. Wojciech Sadurski (Den Haag; New York: Springer, 2002), 4. Sadurski does not question constitutional control by courts per se, but rather the optimistic bias of academic research and the naturalness with which they analyzed the court's performances in deciding central transitional questions. See, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2008), 289.

– In South Africa, the former role was embodied by the certification judgements. They represented a role that the court was empowered to play and was played as a constitution-building component. The certification function was part of the constitution-building process, and not simply a stamp you put on a house sale. It is really rare to see a court stepping up and influence the constitution-building process positively, often because this process is highly political and therefore other branches of the government have little to do with it. But not only. The constitution-building time is of course a period of time where not always an apex court is existent. The fact that the CCZA played an integrated role in the constitution-building process in South Africa has to be thanked to the presence of an IC and the fact that the IC established an apex court.
– The latter role, instead, was represented by a practice of institutional and legal consolidation of the elements of constitutionalism. It is something like a period when you build a new car and you run it for the first time; you need to assess what works and what screw instead needs some tightening. So, the CCZA also played a massively important role in consolidating all elements of constitutionalism in years after the enactment of the Constitution of South Africa, 1996. The CCZA willingly wrapped most of the disputes in the early years after the constitution-building process around the reestablishment and institutional and structural consolidation of all elements of constitutionalism.

So, if facilitating the constitutional transition is the paradigmatic role an apex court plays in the constitutional transition, then South Africa is definitely the paradigmatic example of such role. South Africa was the crown jewel of this thesis, as the CCZA hit almost every facilitating role mentioned in this study. In other words, it facilitated the constitutional transition in three different time spans:

– it played a role as a guarantor of the exit bargain during the negotiations,[2000]

2000 This role was played by its very existence, because of course before it was established, it could not have an own decision-making soul. The Court, however, showed through its protection of all elements of constitutionalism later in the constitutional transition to be a protector not only of the new democratizing movements, but also of basic human rights, decentralization and minorities (including the White minorities).

– it certified the new constitutional dispensation within the process of constitution-building, and finally;
– it went on to take the place at the table of the main player of the South African long walk to constitutionalism in the years after the enactment of the court.

In any case, the role in facilitating the drafting of the constitution as a direct and integrated actor of the constitution-making process, is not always a given. The judiciary is usually *not* the embodiment of the constituent power and the certification process in South Africa represents an exceptional function of a judicial body in the building of a constitution. This does not mean that courts do not influence such process. In Turkey, the reiterated reviewing of constitutional amendments and the attempts to influence the politics of the ruling party has revealed a court trying to steer a constitutional reform process in a different direction. Additionally, in Egypt, the various cases against the parliamentary election law or the disenfranchisement law aimed at manipulating the constituent power.

1. Normative Implication during the Constitution-Drafting Process: Fostering Pluralism and Democratic Legitimacy

In light of what was said above and what Part III of the thesis has output, it has been revealed how the success and failure stories of the case studies were prejudiced strongly by the fostering (or respectively lack thereof) of pluralism in the constitution-making process.

A key role of the apex courts therefore should be making sure that during the constitution-building process, the highest level possible of inclusiveness is ascribed and ensured. Through effective inclusion in the constitution-making process, democratic legitimacy can be reached. Democracy legitimacy is the first step of re-establishing or reinforcing legitimacy in a constitutional transition. The process of constitutional transition, as seen in the theoretical chapter, can be categorized by combining the two elements of legitimacy and legality. No matter what happens in a constitutional transition, it is important that in the end both elements are present or at least reinforced. An inclusive constitution-building process nurtures both of them.

The research has revealed how apex courts can end up protecting one specific political force throughout the transition, instead of fostering a

more impartial and pluralistic performance. Taking one particular political stance is not always the right choice, but we saw that it can be a choice of survival. At the end of the day, it all depends on what the political force defended by the court is; that would indicate the modus operandi to play the facilitator role. The court itself should push for the inclusion of all possible factions in the constitution-making process. Once the new political force or coalition is democratically elected, the court should support the elected power as the people has spoken. Of course, a dilemma arises as whether the new constitution is constitutionalist or not and whether the democratically elected government is actually democratically elected. In this case, the goal of the court is to strive for constitutionalism by all means necessary. Should the new constitution miss on the elements of constitutionalism, including maybe democratic legitimacy for the way it was drafted, the court should possibly engage in an obstructing behavior with however eventually the intention of facilitating the normative constitutional transition from whatever authoritarian regime is in place at the moment, whether the original or the transitional one.

In any case, the period of constitution-drafting is highly political, and a court does not always leave a big imprint on the process. It is however clear, that due to the importance of pluralism and democratic legitimacy in the constitution-drafting process, the apex court should try and protect these principles as the most important ones during the process.

2. Normative Implication after the Enactment of the New Constitutional Order: Upholding, Consolidating and Interpreting the New Constitutional Order

What the role of courts is once a new constitutional order is enacted passes through the deficiencies or key pathologies of a country in transition, and of course through the end-point of a constitutional transition; its goal (or vision).

a. Key Deficiencies of a Country in Transition

In order to know what role a court should play in facilitating the constitutional transition, it is sensible remembering the key pathologies that tend to emerge in countries undergoing a transition, and which

severely distinguish them from established democracies. Such deficiencies can be found on different levels: *constitutional*, *political* and *societal.*

First, at the *constitutional* level, we are faced with a new constitutional order in dire need of intense interpretation. In a new constitutional order, the legacy of authoritarianism (especially in the form of authoritarian-era laws) needs to be progressively stroked down due to their incompatibility with the new constitutional order. At the same time, courts will find in the new constitutional order certain compromises or bargains that it is required to uphold; i. e., counter-majoritarian elements aimed at facilitating the balance of power between the old and new regime (e. g., amnesty laws, or even electoral quotas for members of the old regime). Therefore, compared to the situation in mature democracies, in young democracies, the constitutional basis is different and includes peculiarities.

Second, at the *political* level, there is commonly no clear established opposition. Typically, during a constitutional transition, the political spectrum is utterly fragmentated. The lack of two clear political groups or alliances, with openly defined agendas, which together represent the majority of the polity, is a political reality of young democracies. So, it is typical to have a very fragmentated political arena, but not only; oligarchical party politics, where existing parties do not represent substantial percentages of the electorate, one-party dominance, or even the decrease in importance of party-politics due to hyper-presidentialism, and more.

Finally, at the *societal* level, 'commitment to rights and the [R]ule of [L]aw tends to be underdeveloped, and civil society is usually weak owing to repression of non-state actors and popular movements under undemocratic rule.'[2001] Young democracies also need to reconstruct an entire economy, which strongly influences the process of democratization.[2002]

b. The End-Point of a Constitutional Transition

Having seen the above-mentioned key pathologies of a young democracy and given the output of the case studies of the present research, it is clear how the central priorities of a court are when facilitating a normative

2001 See, Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 278.
2002 See, ibid., 277 – 79.

constitutional transition is the protecting of the elements of constitutionalism, especially against a return of authoritarianism. These deficiencies show where the need of an institution, such as an apex court, to intervene is higher: *ensuring that authoritarianism does not come back by consolidating and enforcing democratic structures.*

The end-point of a constitutional transition is not necessarily to reach a democratization level comparable to a mature democracy, that would be too much. Instead, the question here is the role that courts can play, in the aim to develop the political community into a consolidated democracy, where the essentials of a democratic system are established and are functioning. In other words, a regime which 'allows for the free formulation of political preferences, through the use of basic freedoms or associations, information and communication, for the purpose of free competition between leaders to validate at regular intervals by non-violent means their claims to rule [...] without excluding any effective political office from that competition or prohibiting members of the political community from expressing their preference'.[2003]

Daly makes the argument that the main roles constitutional courts could play in facilitating the reaching of such level of democratic development entailed eight core activities across three dimensions:[2004]

- Facilitating the creation of a democratic public sphere
  - Upholding core democratic rights
  - Shaping an inclusive electoral system
  - Curbing the re-emergence of authoritarianism
- Mediating the shift from an undemocratic to democratic order
  - Articulating the relationship between the old and new constitutional order
  - Addressing/eliminating authoritarian legislation
  - Addressing key transitional justice questions
- Carving out a role for the court in the new democratic order
  - Delineating the Court's jurisdiction
  - Addressing crises.

2003 Carsten Q. Schneider, *The Consolidation of Democracy: Comparing Europe and Latin America* (New York: Routledge, 2008), 10.

2004 See, Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 157–60. See also, ibid., 279–80.

In sum, Daly's eight elements seek the reinforcement of most elements of constitutionalism. Thus, the initial assumption that apex courts should focus on the institutional and legal establishment of all three elements of constitutionalism (democracy, limited government and the rule of law) stands. Despite the differentiation in defining the various elements, it all boils down to roughly the same content. Democracy needs to be reinforced and supported in a way that it does not allow autocracy to be reborn. This is done by a sturdy sustenance of the principles of limited government and the rule of law, the last of which includes, of course, an independent apex court with the power of judicial review. How courts should approach the above-mentioned eight activities, i.e., how strong judicial review needs to be, is a clear policy implication that will be treated in the next section.

So, if the main role is to act as agents of the future, helping to transform the political process and encouraging the consolidation of democracy, these critical junctures characterize and shape the role and performance of an apex court once a constitution is enacted. What they specifically do during this period of the normative constitutional transition depends ultimately on a myriad of things one of which is, of course, the decisions of individual judges, a variable about which we still have too little systematic data.

II. The Behavior of the Apex Court: Asserting its Own Role and Finding a Balance

Apex courts in transition find themselves having to deal with their own status and nature. I have shown how the court engages in a strategic behavior to find the right balance between judicial activism and judicial restraint, and thus assert its own true role.

Again, the degree of pro-activeness or assertiveness that an apex court ought to adopt is context-dependent. The constitutionalization process and its trajectory necessitates a reiterated and constant reassessment of the suitability of pro-active and passive, or assertive and deferential behavior at each phase. In a transition, the intensity of constitutionalization and

democratization varies according to the phase and the political context. The quest for the right behavioral balance puts a lot of pressure on the apex court in staying aware of the overall political and transitional context of the new developing state, and in evaluating when to intervene in a timely and appropriate manner.

However, Daly raises the question as to whether we can realistically expect courts to display such sensitivity and perceptiveness: 'it must be borne in mind that judges are not, by and large, well trained for engaging in such strategic and broad cultural thinking. Although all courts show some ability to address highly important cases from a strategic perspective, courts with large dockets in particular are so busy simply dealing with the day-to-day business of keeping pace with their workload that to expect them to chart a fully-fledged philosophical, cultural, transnational, and legal framework for their decision-making, appears somewhat unrealistic. We end up again at risk of setting the bar too high for courts.'[2005] I can only but agree with Daly's reasoning, because all theories – including the ones presented in this research – remain easier said than done.

B. Policy Implications for Constitution-Makers

The role of a court includes, *inter alia*, the understanding of judges as members of an institution and the working practice of a court. They are influenced by many factors and are neither static nor uniform. Although little is known about judges and internal decision-making processes, through primary and secondary sources on the judiciary and its jurisprudence, this study tried to outline and structure certain insights about recurring patterns of the court's roles. These can serve as indicators for the working practice and the official understanding of the judges as members of this institution.

So, if the role a court ought to play is the facilitator of the normative constitutional transition, what can the constituent power do to increase the potential of such role being played? This is the issue this section wants to tackle and with which I would like to conclude this thesis: policy implications.

2005 Alchemist, 285–286.

When confronting with a constitutional transition, and in this thesis the core of the research was the *normative* constitutional transition, a constituent power's power stretches especially to the establishment or restructuring of the court (institutional elements), the empowerment of the same through the new constitution (constitutional elements) and the decision of constitution-making form (transitional elements).

I. Institutional Elements

1. Establish a New Apex Court or Reinvent a Pre-Existing One?

In Part III, we have discovered how the establishment of a new apex court enhances the chances of having a court committed to the constitutional transition. Or better, a pre-existing court enhances the possibility that some members of it could still be involved with protecting the old hegemony. Of course, the establishment of a new court needs to come hand in hand with according empowerment and guiding lines of upholding and consolidating the new constitutional order. A newly established court specifically designed to protect the old regime's interests, of course, would not do it. Actually, it would mean that the constitutional transition has high probabilities of failing, for an independent judiciary is a key element of constitutionalism. If a court is not impartial, then this would miss the fulfillment of the rule of law.

2. How to Best Design the Appointment Process of the Apex Justices

We know from the theoretical chapter that *absolute* independence is very hard to reach, and truly, it is not really longed-for. An apex court, in a constitutional democracy, is expected to be also accountable to the people it serves; the same people who gave it its existence and the power to enforce the same constitution they made. The judiciary does not have to sit on top of the other branches, and of course, on top of the governed themselves. In this sense, a juristocracy is not longed for, nor is constitutional despotism. A court empowered to strike down democratic laws must somehow be accountable to those who are affected by those laws. Constitution-builders should therefore strive for the balance between

independence and accountability, or for want of a better word, *relative* independence. In other words, a court, which operates independently from any political interest, while remaining receptive to the public it serves.

However, a basic element of the functioning of such balance is the acceptance that constitutional interpretation is a site of partisan political struggle, for which apex courts are deployed to resolve. In other words, apex courts cannot avoid adjudicating disputes without a partisan dimension and it would be naïve to assume that they will be isolated from political pressure. Even if judges attempt to play by their political or personal views when fulfilling their functions, their previous experiences and perceptions of the dispute will unavoidably affect their decisions. Judges will, of course, attempt to interpret the law fairly and impartially, yet they are only human, and a judge's personal and political ideology will intuitively play some role in how he or she issues a decision. Especially during a constitutional transition, apex courts are institutions called upon to resolve a country's most severe political cleavages. During such a period, the judges composing the first court after the enactment of the constitution are frequently people who were politically active prior and during the transition itself.[2006] This reality is reflected by the content of functions vested in an apex court listed above,[2007] which are enough proof of how their fulfilment is influenced directly by how, for instance, judges are appointed. At the same time, a sense on the part of all politically involved actors that they are indirectly involved in the activity of the court, helps the public accept their decisions rather than undermine the courts legitimacy.[2008]

It is indeed challenging to strike the perfect balance between judicial independence and accountability. In fact, the constituent power has to consider a series of issues, which directly affect both judicial independence and accountability. The balance is found among the right dosage of three different constitutional design options: the appointment of judges, the limit of terms they can sit on the bench and their removal; but above all, on the appointment process. These issues affect judicial

2006 Among many others, a typical example would be one of Albie Sachs, former anti-*apartheid* activist and later justice of the Constitutional Court of South Africa.

2007 These functions recalled many politically sensitive affairs, such as elections or the process of constitution-building.

2008 Choudhry and Glenn Bass, 9 and 28.

independence and accountability directly from within the four corners of the constitution itself. The composition of the judges and the method of their selection, their qualifications, tenure and compensation, impacts their independence, however in the end, judicial independence has to be cultivated and protected as part of a political heritage and culture of constitutionalism.[2009]

The process of appointing the members of the court empowered to deal with constitutional matters directly relates to its capacity to fulfil the functions vested in it.[2010] Depending on who will sit behind the bench and interpret the constitution on behalf of the people shapes the values and constitutional principles entrenched in the constitutional dispensation. As mentioned, the appointment process is deemed to strike a balance between the court's independence from political interference and the 'need to be responsive to the democratic society in which it operates'.[2011] One can suggest that because apex courts cannot refrain from including a partisan dimension when adjudication disputes, political actors should somehow be involved in the appointment of judges in order to foster a broad sense of political investment in the same court. In this way, all actors involved in the appointment process have a veritable incentive to support the apex court even when it does not adjudicate a dispute in their favor.[2012] In this sense, if judges were to be appointed by the political branches, they would most instinctively attempt to elect individuals who share their same political view.[2013] Therefore, constitutions that require the involvement of multiple constituencies in the appointment process, and still tolerate a degree of political influence on the character and composition of the court, indirectly instate some sort of political check on the same.[2014]

Accordingly, in order to identify the best model for the appointment process, the research has revealed how constitution builders need to take into account some basic principles when designing the appointment procedure of an apex court.

2009 Henkin, 14.
2010 Choudhry and Glenn Bass, 9.
2011 ibid., 9 f.
2012 ibid.
2013 In Switzerland, for instance, judges are even members of a political party.
2014 Hedling, 17 and 19.

a. Principles of Appointment

All countries around the world undergoing a constitutional transition have to contemplate a range of important issues concerning the designing of an apex court and the appointment process for its judges. The last wave of democratization, including the Arab Spring and other regional waves of transition, sparked a universal debate on constitution-making and the creation of an apex court with strong judicial review in order to promote constitutionalism in countries plagued by decades of authoritarianism. In an inspiring paper, Choudhry and Glenn Bass assess the importance and variety of the different models and principles of appointment on the grounds of the cases from the Arab Spring.[2015] They discovered two regional trends emerging in the region: 'countries such as Tunisia have proposed a procedure for appointing constitutional court judges that will involve many different political actors, thus fostering a broad sense of political investment in the court and helping to protect its independence. This sense of political investment will provide an incentive for all political actors to continue supporting the court even when they are on the losing side of its decisions. In contrast, Jordan, Morocco and Syria have all granted the executive branch an enormous amount of power over constitutional court appointments. If court judges fear that angering the executive may cost them their positions, their decisions may be influenced more by the need to please the executive than by the law's requirements. Without establishing procedures and rules that will allow a constitutional court to withstand political pressure, the court will serve as mere window dressing for rulers who wish to give the appearance of respect for the rule of law without creating real checks on their power.'[2016]

Thus, from their findings, one can quickly depict the pattern of relative judicial independence mentioned above: that the appointment process should strike the right balance between the absolute essential need to safeguard the court's independence and shield it from political encroachment, and its necessity to be reactive and accountable to the society it serves.

With this in mind, when constitution builders commit to the appointment process, they may shape it in a variety of ways, which might give to many

2015 Choudhry and Glenn Bass.
2016 ibid., 13–14.

different political constituencies a role to play. The constitutional design of the apex court appointments process is piloted by mainly three principles:[2017] (1) the appointments process should inspire extensive inclusion from various sectors of politics and society; (2) different constituencies should be involved in the appointment and removal processes; and (3) specific qualifications should be set for the selection of judges with high legal expertise.[2018]

1) *The appointments process should inspire extensive inclusion from various sectors of politics and society;* The first principle entails the need of widespread participation from different political constituencies in the appointment process. The inclusion of different actors in the appointment process creates a veritable sense of political investment in the apex court. This contributes to a higher acceptance of the court's decisions and the establishment of its legitimacy.[2019] If only one political actor takes on the appointment of the judges, the risk of them being unduly influenced by that same actor increases. By having only one, or a few, actors involved in the appointment process a wide range of other segments of the political spectrum of the country would be excluded, contributing negatively to the creation of a sense of political investment in the court, which the reason of the inclusion of different political actors in the appointment process in the first place. Instead, engaging different branches of government, political parties, civil society organizations, legal scholars, bar associations and other groups can be best solution for the creation of a court that represents all interests of society. The inclusion of so many constituencies in the appointment process can take many different forms, for instance: the organization of public consultation processes, inviting candidates from various sectors or even allowing a particular group to appoint a certain number of judges, or even allowing a group to veto appointments made by others, and more.[2020] Exactly what form the constitution builders will choose

2017 These principles are a broad reformulation of the outstanding work and conclusions Choudhry and Glenn Bass reached in their paper.

2018 Choudhry and Glenn Bass, 10 and 32.

2019 In their report on 'Constitutional Courts after the Arab Spring', Choudhry and Glenn Bass observe how most of the Middle Eastern and North-African countries (henceforth 'MENA'), that have adopted a new apex court, have faced serious challenges in determining a fair appointment procedure deemed to strike a *relative* judicial independence. For more on the report see ibid., passim.

2020 See ibid., 32 for more examples.

will depend on the unique political and social context of the country.[2021] Therefore, it is only fair to say that the public and their political representatives should have some role in appointing the members of the court. Failure in not reflecting the people's values and concerns when fulfilling its functions results in the court losing public support, and thus legitimacy.[2022]

2) *Different constituencies should be involved in the appointment and removal processes;* The second principle requires a certain division between the powers of appointment and those of removal of judges. The appointment and removal processes together work like a double-edged blade. If the same political actor responsible for the appointment of judges also has the power to remove them, it would easily be able to influence the court. Self-evidently, the best situation would be to have different actors or institutions responsible for the appointment process, on the one side, and the removal process, on the other.[2023]

3) *Specific qualifications should be set for the selection of judges with high legal expertise;* Finally, the third principle requests the establishment of specific qualifications to ensure that the judges selected will be of high legal proficiency. For a country to establish constitutionalism and keep the rule of law as the operative standard, impeccable precaution must be taken in the election or appointment of impartial judges. If law is to rule and the constitution to find acceptance among the people, courts must practice loyalty to justice, which implies, for instance, providing the people subject to their jurisdiction the utmost assurance of elevated legal culture of their judges within the framework of the law. In order to help ensure diversity of opinions, to encourage a professional, rather than a pure political, judiciary and thus guarantee a relatively independent apex court, which issues decisions on firm legal grounds, constitution builders can define specific qualifications that judges must hold. Some countries require that apex court judges must have served a minimum amount of years as a judge already and have reached a certain level of legal proficiency.[2024] Other countries also require judges

2021 Choudhry and Glenn Bass, 32.

2022 ibid., 28.

2023 ibid., 32 f.

2024 Cf. for instance India, where the Constitution prescribes that '[a] person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and has been for at least five years a Judge of a High Court or of two or more such Courts

to be of a minimum age, and in some cases even a maximum age beyond which they might not be appointed anymore.[2025] Finally, in some countries, judges are not eligible when they already hold particular offices or professions, such as political positions, as this might be seen as incompatible with judicial independence.[2026] Stipulating the required qualifications that apex court judges must fulfil, ensures that the judges appointed will have the expertise necessary to deal with the complex and politically relevant legal constitutional questions that will be presented before them.

b. *Best Model of Appointment: Judicial Council and Multi-Constituency Models*

According to what said above, the best model of appointment is the one that a*ssures a high degree of political investment in the apex court by including multiple constituencies in the process.* In this sense, the judicial council and multi-constituency models are both the best ones as far as the provisions of inclusion of a high number of political interests are concerned. Both models include in the process different political parties, civil society organizations, as well as judicial and legal organizations, scholars, lawyers, and more.

There are however other reasons why these two models and, accordingly, the high level of investment, are the best solution is for constitution builders:

– Both models allow you *avoid party dominance*, i. e., empowering a single political constituency with the power to appoint a majority of the apex

in succession; or has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or is, in the opinion of the President, a distinguished jurist.' See, Art. 124 Constitution of India, 1950.

2025 For example, countries such as Egypt (no younger than 45 or older than 70), Germany (no younger than 40 or older than 68) or Turkey (no younger than 45 or older than 65) all have minimum and maximum age restrictions for the appointment of judges. See, Law 48 of 1979 Governing the Operations of the Supreme Constitutional Court of Egypt; Art. 2 – 4 of the German Federal Constitutional Court Act (1951), Original: *Bundesverfassungs-gerichts-Gesetz* (BVerfGG); Art. 146 – 147 of the Constitution of the Republic of Turkey, 1982 (amended 2010).

2026 For instance, in Italy '[t]he office of judge of the Court is incompatible with that of member of Parliament, or of a regional Council, with the exercise of the legal profession or with any other position and office established by law.' See, Art. 135(6) Constitution of Italy, 1948.

court's composition. Avoiding one-party dominance in the appointment process protects the apex court from unjustified political pressure. Additionally, it facilitates a better acceptance by the public, because it helps avoiding the perception that it is an impartial and partisan judicial institution. This is why, in particular, the judiciary-executive model is not generally recommended, for 'it gives the executive too much power over court appointments and excludes many other political actors from the process.'[2027]

- This brings us to the next point; both models contribute to *isolate and shield the apex court from partisan politics.* This promotes and consolidates judicial independence. In addition to the multi-constituency model, the judicial council, for instance, even forms a wall between the process of selecting judges and the often tense environment of partisan politics. So, even though the executive and legislature often select members of the council, they are still not directly involved in the appointments process of most of the justices (in South Africa, for instance, the executive still appoints the CCZA's Chief Justice). This also improves the public acceptance and trust of the court, especially in those countries emerging form authoritarianism, i. e., countries in which the judiciary was often captured by the ruling government. The public would less likely accuse judges of ruling politically motivated.[2028]
- *Giving too much power to the legislative branch in the appointment process creates the risk of stalemate.* Many countries, such as Germany, South Africa, Italy or even Turkey, give the legislative branch some kind of role in selecting some justices. This is not a problem per se, but constitution builders need to be cautious in assessing exactly how big this role should be. 'Italy, like Germany, has developed an informal agreement among the parties represented in the legislature to allow parties to 'control' a certain number of seats on the court, in proportion to their representation in Parliament. The Italian case shows the risk inherent in such informal agreements. In 1994, when the balance of power in Parliament shifted dramatically, the informal arrangement collapsed, resulting in years of deadlock as the new parties represented in Parliament fought over appointments to the Constitutional Court.' This means that countries with either a legacy of weak political parties or

2027 Choudhry and Glenn Bass, 98.
2028 ibid., 55 – 56.

those transitioning away from authoritarian settings – and therefore also with weak and fragmented political parties – empowering the legislature to select some or all of the justices, carries the potential danger that the appointment process may be delayed by the politicians' incapacity to reach a consensus on possible candidates. These are the reasons why a country with a high level of political instability should not adopt the legislative supermajority model of appointment, for it requires political parties to reach a compromise and cooperate on the grounds of strong relationships of confidence and reciprocity. For parties in a transitional setting, this could be a difficult task to do and can result in substantial delays in filling the positions. This does not mean that it is not a good thing to involve the legislature in the appointment process: in South Africa, for instance, the system allows members of parliament on the judicial council.

– *Exposure to executive capture:* Of course, not only the legislature can be a threat to the appointment process, but also the executive. In an authoritarian setting, for instance, the judiciary-executive model provides only restricted protection against a court's packing scheme. A court that is not in line with the ruling government's policies risks to be captured by the same. For a long time, the SCCE relied upon an informal practice that gave it the control of its own appointments. Thanks to this informal agreement, the SCCE could control and measure its own independence, rather than following a formal legal procedure. Once the SCCE became too assertive in its rulings, Mubarak availed of his power to discard this informal practice as soon as he felt that the SCCE's jurisprudence could not be tolerated anymore. In this sense, the SCCE was easily captured. In Turkey, the AKP also managed to pack the TCC when it almost banned the powerful emerging party; this time whoever through constitutional amendment.

Executive appointments, where the executive unilaterally selects a certain number of judges to the respective apex court, can be seen, for instance, in Italy and Turkey. 'Allowing the executive to select constitutional court judges without any consultation or oversight from the other branches of government carries an obvious risk, as the executive has a strong interest in selecting judges who are inclined to uphold its policies. In Italy, this danger has been mitigated by the fact that the President's role is to act as a figure of national unity, and because he or she is not popularly elected.

In other nations, this may not be the case.'[2029] Given the risk of executive capture, constitution builders should consider limiting the executive's role in a multi-constituency model, rather than a judiciary-executive one, 'either by allowing a different political actor to review and ultimately approve its nominations to the court or by requiring the executive to make its allotted appointments from a shortlist of candidates selected by a different political actor.'[2030]

In sum, the appointment process is crucial when it comes to the potential role the apex court can play in the transition. Constitution builders should focus on the judicial council or the multi-constituency models of appointment because they provide the highest level of investment by many actors and players during the transition and moderately limits the influence of both the executive and the legislature in the appointment process. While negotiations during the constitution-building process can be strenuous, it provides a great opportunity to find a consensus on the critical questions surrounding an apex court, especially its composition and the appointment process. During the constitutional drafting process, all parties involved are aware of the need to find compromise, and the deadline for producing a draft constitution may help push them toward an agreement. Instead, the environment in a legislature is quite different: party representatives are more concerned with short-term needs and protecting the interests of their party and constituents than they are with the broader interests of the state or the people in general. As Choudhry and Glenn Bass point out: 'no single party in a legislature has a strong incentive to reach an agreement on the court, and there is no firm deadline for doing so, which may lead to long delays in the court's implementation [...].'[2031]

II. Constitutional Elements

We have witnessed how the presence or lack of a clear 'hard' constitutional basis can have a strong impact on how a court eventually performs in a normative constitutional transition. Clear must the constitution be not

2029 ibid., 87.
2030 ibid.
2031 ibid., 73.

only with its substance, but also, and especially, when it comes to its institutional contents; above all, the empowerment (and the degree thereof) of the apex court. Judicial review, in particular, as main instrument of a court to enforce constitutional supremacy, is at the core of the discussion.

Daly starts his normative chapter by clarifying the role of judicial reviews and accordingly the one of courts in mature democracies. In a second moment, he dwells on the role of judicial review in young democracies. I believe this is a good way to normatively approach the matter of judicial empowerment.

1. Judicial Review in an Established Democracy

I particularly admired Daly's analysis of the 'core' debate on the role of courts in an already established, mature, democracy. The debate revolves around judicial review. I have already mentioned in the theoretical chapter how strong judicial review has surfaced in the past years as an almost untouchable component of constitutionalism. The true role of courts has been at issue ever since the US Supreme Court issued the ruling *Marbury v. Madison* (1803), introducing the concept of strong judicial review.[2032]

The proper role of courts in an established democracy has already been outlined at the beginning of this thesis, yet here the aim is to depict the possible role, that is the degree of judicial power that a court should have at the beginning and during a transition. In this sense, briefly analyzing the role in an established one is pivotal. The theoretical chapter of this thesis has merely emphasized how strong judicial review is a common constant in modern constitutional democracies. This however has sparked a big debate among scholars.

The core debate about strong judicial review is split between 'political constitutionalists' (such as Jeremy Waldron, Jeffrey Goldsworthy and Mark Tushnet) and 'legal constitutionalists' (such as Ronald Dworkin and John Hart Ely). Both opinions share the idea that government powers should in fact be limited, yet disagree on the institutional form such restrictions should take:

2032 See, Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 249.

– On the one hand, political constitutionalists 'place their faith in the political process and the capacity of individuals in a political community for moral judgment, and thus perceive a fundamental conflict between democratic principles, such as the political equality of individuals in a political community, and the enjoyment of constitutional supremacy by unelected judges.'[2033]
– On the other hand, legal constitutionalists claim that 'justiciable constitutional limits on governmental power and action, embodied in the judicial power to invalidate unconstitutional laws, are necessary to counter dangerous majoritarian impulses and to provide sufficient protection for fundamental rights.'[2034]

The debate rests on several points. First, it seems clear that legal constitutionalists see the role of courts in a mature democracy as having stronger judicial review, whereas political constitutionalists believe that political issues and constitutional choices need not to be made by courts, but rather by politics.

Second, as Daly points out, the debate tends to be a common law one. Scholars of common law countries, especially the United States where the Supreme Court has strong judicial review, use the United States to create the debate. As Daly remarks:

> 'This US-centered debate, though often couched in universal language, tends to speak in many ways to the very particular development of strong judicial review in the United States as a polity, and betrays acute concerns regarding the crucible of that power and its enduringly slim constitutional basis.'[2035]

With a lacking 'hard' constitutional basis, a legitimacy problem is evidently born and thus explains to some extent where the debate comes from. In other countries, such as Germany and Italy, strong judicial review is vested in the courts by the constitution and thus creates a less contested environment on the issue; especially in countries, in which strong judicial review facilitated the aftermath of authoritarianism.[2036]

2033 See, ibid.
2034 See, ibid., 249–50.
2035 See, ibid., 250.
2036 See Erin Delaney, "Analyzing Avoidance: Judicial Strategy in Comparative Perspective," *Duke Law Journal* 66, no. 1 (2016); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York: Bobbs-Merrill, 1962). See also, Jeremy

Third, the fact that the United States, as main source of the debate, never accepted the jurisdiction of any regional court with strong judicial review powers, such as the Inter-American Court of Human Rights, helps understand why the discussion never really left the state boundaries. In fact, in his book, Daly extensively borrows from regional constitutional court's accounts to support its theses. This is very important, since the legitimacy of regional human rights courts is not undisputed, but this debate is mainly led by European countries and scholars where regional strong judicial review is widely developed.

Finally, the debate revolves eventually on the implementation of rights, and which form of constitutionalism is more effective in this sense. Political constitutionalists will argue that 'claims for courts as better moral reasoners can be countered with a claim for moral reasoning of at least equal, if not better, quality in parliaments,'[2037] whereas legal constitutionalists 'will assert the democratic credentials of strong judicial review, on the basis that courts are merely enforcers of a bill of rights adopted by the people, and that judicial decisions can be overturned by amending the bill of rights. The response is that bills of rights are merely focal points for disagreements concerning rights rather than settling them, and that amending a bill of rights tends to be a rather difficult process.'[2038]

Daly presents several arguments for or against strong judicial review from both political and legal constitutionalists. A part of its summary depicts clearly where the issues stand: '[…] [p]olitical constitutionalists such as Mark Tushnet argue that the very practice of strong judicial review can operate to reduce the sensitivity of both the people and their representatives to the importance of respecting rights, and their very capacity to engage in moral reasoning and deliberation concerning the meaning and scope of rights issues.[2039] Legal constitutionalists assert the opposite. Irwin Stotzky, for example, opines that a constitutional court can

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Waldron, "The Core of the Case against Judicial Review," *Yale Law Journal* 115, no. 6 (2006): 1351.

2037 See, Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 254. See also, Waldron, "The Core of the Case against Judicial Review," 1382–84.

2038 See, Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 254. See also, Waldron, "The Core of the Case against Judicial Review," 1386–91.

2039 See Richard S. Kay, "Rights, Rules and Democracy," in *Protecting Human Rights: Instruments and Institutions*, ed. Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone (New York: Oxford University Press, 2003), 271.

help "to create a moral conscious- ness in the citizenry through the process of rational discourse".[2040] Joseph Goldstein characterizes judicial opinions as a means of maintaining an informed citizenry in accordance with the principle of popular sovereignty on which a (republican) democratic system rests.'[2041]

All this is evidence of how assessing the best role of a court in a mature democracy is complex and context-specific. None of the arguments above, for or against strong review, are easy to assess and verify, and require extremely refined sociological research to measure and evaluate. One can thus only imagine the difficulties to assess what role an apex court should have in a transition.

2. Judicial Review in a New Democracy

When it comes to a young constitutional democracy, there is no clear debate about strong judicial review as above between political and legal constitutionalists. Instead, there is multiple normative academic opinions, even though the majority still tends to support a role for strong judicial review.

a. Five Different Arguments and a Brief Assessment

In his book, *The Alchemist*, Daly describes five different approaches of different scholars concerning the role of strong judicial review in young democracies:

– *Mirror Argument:* This argument wants an apex court to mirror the role played by courts in mature democracies with systems of strong judicial review, that is, 'they are expected to play an active part in democratic governance, but to evince a clear respect for the constitutional role of

2040 Irwin P. Stotzky, "The Tradition of Constitutional Adjudication," in *Transition to Democracy in Latin America: The Role of the Judiciary*, ed. Irwin P. Stotzky (Boulder, CO: Westview Press, 1993), 349.

2041 See, Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 254. See also, Joseph Goldstein, "The Opinion-Writing Function of the Judiciary of Latin American Governments in Transition to Democracy: *Martinez V. Provincia De Mendoza*," in *Transition to Democracy in Latin America: The Role of the Judiciary*, ed. Irwin P. Stotzky (Boulder, CO: Westview Press, 1993), 300–03.

the other actors in the system, and to avoid trenching upon their sphere of action.'[2042] The only difference with a mature democracy is, of course, the transitional setting, during which an apex court needs to carve out its own role itself and thus it might tend to act a little more pro-actively than a court in a mature democracy would. Given the negative Hungarian case, among others, where the court became too quickly too assertive and pro-active, there is a tendency to recommend caution and restraint as the best way to effectiveness, as opposed to too much assertiveness and judicial activism. Lach and Sadurski maintained: 'In the long run, doing less and in a more restrained manner might prove more effective than an excessive pro-activity'.[2043] In this sense, apex courts need to seek a strategic behavior to avoid an over judicialization of politics, which would bring courts into conflict with the other branches of government and increase the risk of being captured.[2044]

This approach, however, overlooks context. Mirroring the role of apex courts in a mature democracy can work for certain courts rather than for others:

> 'Courts endowed with the power of abstract review are more easily "politicized", some courts have no control over their dockets, some courts are required to interpret particularly badly drafted constitutions, or constitutions which enjoy very weak legitimacy, some courts must grapple with constitutions that provide for an enormous raft of justiciable fundamental rights, especially social and economic rights, and so on'.[2045]

In this sense, it is important not to forget that some courts may actively seek a stronger role by expanding their jurisdiction on purpose, while others, by way of constitutional design, are constitutionally pulled into the political skirmish.

– *'Global South' Argument:* This argument acknowledges that courts in transitional settings are challenged by different matters and contexts than their counterparts in mature democracies. Apex courts in transitional settings are faced with much different political and social contexts than those of mature democracies. This needs to be considered when assessing the role of courts in constitutional transitions. Skeptical

2042 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 258.
2043 Lach and Sadurski, 232.
2044 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 259.
2045 ibid., 268.

people about strong judicial review might tolerate the idea when it comes to the transitional setting a court finds itself in. In these cases, strong judicial review is somehow more logical as the court needs to face deep political questions. Bonilla Maldonado has spoken of a 'constitutionalism of the Global South' when assessing the jurisprudence of apex courts in South Africa, Colombia (for instance, the assertive approach towards socio-economic rights) and India (for instance, the basic structure doctrine).[2046] These courts had to address political violence, high levels of poverty and inequality, cultural and religious diversity, long legacy of neglect towards the rule of law. In other words, their transitions all sought a veritable 'transformation' of society, in the sense that their constitutions involved deep transformative traits.

In constitutional transitions with transformative traits, apex courts tend to be elevated to a higher position than usual. The different problems and goals a court might have in such a setting allows people to tolerate such empowerment, yet courts need to be careful and not become 'a victim of its own success' and end up being excessively judicializing politics.[2047] So this approach wants to accept that the transitional setting brings with it different context in which the court performs.[2048]

– *'Surrogate' Argument:* This is an extreme view of the role of courts in young democracies and is pointed out by Scheppele in her account on the Hungarian Constitutional Court's dominant role in Hungary's young democratic governance.[2049] There are no better words to explain it: '[…] where the elected organs are unable to fulfil their functions in the same manner as their counterparts in mature democracies, a constitutional court can act as a substitute for deliberation and reflection of the

2046 Daniel Bonilla Maldonado, "Introduction: Toward a Constitutionalism of the Global South," in *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, ed. Daniel Bonilla Maldonado (Cambridge: Cambridge University Press, 2013), 11, 22–24.

2047 Raul A. Sanchez-Urribarri, "Constitutional Courts in the Region: Between Power and Submissiveness," in *Comparative Constitutional Law in Latin America*, ed. Rosalind Dixon and Tom Ginsburg (Northampton, MA: Edward Elgar Publishing, 2017).

2048 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 259–61.

2049 Kim L. Scheppele, "Democracy by Judiciary (or Why Courts Can Sometimes Be More Democratic Than Parliaments)," in *Rethinking the Rule of Law in Post-Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses*, ed. Wojciech Sadurski, Martin Krygier, and Adam Czarnota (Budapest: Central European University Press, 2005).

popular will, with strong judicial review thus recast as a democratic process'.[2050] In other words, the argument sees the separation of powers as a 'contact sport',[2051] a more conflictual interaction model than we are otherwise used to when exemplifying the 'separation' of government powers. In the particular case of Hungary, mainly two are the key particularities that contributed to the constitutional court adopting a strong assertive behavior:

> 'First, political parties, as the main vehicles of representative democracy, were unable and unwilling to reflect the wishes of the electorate due to slim or non-existent electoral manifestos, and shifting alliances and formations. Second, a hard-pressed electorate, saddled with onerous workloads to stay financially afloat in a very difficult economic climate, had little time to build and take part in the vigorous civil society viewed as essential to a functioning democratic order in the Western would'.[2052]

These two particularities of the Hungarian context, however, paved the court's road towards excessive assertiveness. Again, the political context was decisive. In this sense, Scheppele's argument – learning from the Hungarian case – builds on the fact that, the court's facility to be called upon by citizens has contributed for it becoming an alternative forum for the mobilization of the people's will. It became a 'surrogate' for democratic politics.[2053] Of course, this type of governance arrangement and political *status quo* cannot last long. One of the elements of constitutionalism – horizontal separation of powers within the element of limited government – is not fully and rightly implemented, and following this thesis' test, when not all elements of constitutionalism are correctly installed the transition is bound to fail. In Hungary, the German model of *Rechtstaat* was twisted into a model of *über-Rechtstaat*, and inevitably failed because of its instability and not sustainability.

This approach of 'democracy by judiciary' is therefore not fully flawless.

2050 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 257.

2051 Kim L. Scheppele, "Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe," *University of Pennsylvania Law Review* 154, no. 6 (2006): 1760.

2052 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 262. Here, Daly gathers the information on Hungary from Scheppele, "Democracy by Judiciary (or Why Courts Can Sometimes Be More Democratic Than Parliaments)," 8, 32.

2053 Scheppele notes how from a population slightly higher than 10 million people, an estimate of 1500 – 2000 challenges were brought before the court, contesting most major law enacted by the legislature. "Democracy by Judiciary (or Why Courts Can Sometimes Be More Democratic Than Parliaments)," 32 – 34.

Democracy is here transformed from a process by which political and moral drive is fed into governance to one that feeds democratic will-building into the judiciary. This approach serves the interests of the rule of law, not those of democracy.[2054]

– *'Scaffolding' Argument:* The surrogate view of apex courts is quite extreme. Some scholars see the role of apex courts as a more targeted one, rather than a general one. They believe that a court should be empowered, yet such empowerment needs to be specifically 'scaffolded' and directed at actively alleviate the worst deficiencies of new democracies, and not substituting electoral actors as in the previous argument. Two scholars argued for this idea: Gargarella and Isaccharoff.
  Gargarella's notion of 'democratic justice' suggests that apex courts in new democracies should work at counteracting two dangerous tendencies of such fragile periods: on the one hand, the gradual restrictions imposed on basic and political rights (such as due process or the freedom of expression), and on the other hand, the tendency of the ruling executive to expand its powers towards hyper-presidentialism and distort or even overcome democratic check and balances.[2055] Gargarella's research was based on Argentina's difficult democratization process from 1983 to 2002, yet both dangerous tendencies can be seen, for instance, in Turkey. At the same time, Gargarella's notion of the court's role does not reach the level of empowerment of the one seen in mature democracies, where apex courts' powers are expanded on all constitutional matters. Instead, '[t]he result should be, in [Gargarella's] view, not an expansion of judicial power as compared to that seen in mature democracies, but a necessary *refinement* and redefinition of the role of constitutional adjudication in a different empirical context. It does not, [Gargarella] emphasizes, necessitate the court to have the final say on all matters.'[2056]
  Similarly, Isaccharoff in his 'law of democracy' conception, concentrates on the idea of apex courts moderating specific possible democratic flaws of

2054 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 267.

2055 ibid., 263. See also, Roberto Gargarella, "In Search of a Democratic Justice – What Courts Should Not Do: Argentina, 1983–2002," in *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*, ed. Siri Gloppen, Roberto Gargarella, and Elin Skaar (New York: Routledge, 2004), 182–83.

2056 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 264. See also, Gargarella, 184.

new democracies.[2057] Similarly to Gargarella, his theory is based on empirical observation, in particular the apex courts, which have apparently acted in filling the cracks in the structure of democratic governance during the third wave of democratization, such as South Africa or Colombia. The apex courts in these countries ended up ruling on basic and 'foundational' matters.[2058] For Issacharoff, the most crucial role courts can play is protecting the 'vitality of democratic competition for electoral office and the ability of the political process to dislodge incumbents', to avoid an only brief transition towards democracy only to see it quickly turn newly into authoritarianism, including one-party dominance by packing all state powers, and control of the entirety of the democratic process.[2059] The role of these apex courts is probably the most important during a transition 'because of the immaturity and likely weakness of not only political institutions, but the ancillary civil-society participants in democratic life – most notably, program-based political parties.'[2060]

Daly properly distinguishes both Gargarella's and Issacharoff's conception of the 'scaffolding' role of apex courts in a transition:

> 'Where Gargarella focuses on excessive concentration of power in the form of hyperpresidentialism, Issacharoff's particular focus is the ability of a court to limit distortion of democratic governance in a state, such as South Africa, where a single party dominates governance following the transition to democracy.'[2061]

Due to the fact that newly established courts in young democracies tend to respect the framework of the fresh constitutional order, Issacharoff proposes that for an apex court to effectively protect democracy from partisan capture is the adoption of an alternative of the Indian 'basic structure' doctrine, allowing thus courts to regulate the validity of constitutional amendments. In this way, courts would be empowered to protect the basic foundations and principles of democratic governance, such as *pluralism.* In this sense,

2057 See the works of Issacharoff and his 'law of democracy' at Issacharoff, "Constitutional Courts and Democratic Hedging."; "Constitutional Courts and Consolidated Power," *The American Journal of Comparative Law* 62, no. 3 (2014); "The Democratic Risk to Democratic Transitions."; *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015).

2058 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 264.

2059 Issacharoff, "Constitutional Courts and Democratic Hedging," 992–93.

2060 ibid., 1003.

2061 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 265.

we see how the scaffolding argument is already molding into the most convincing one (and connects with the next section) as it seeks to protect specifically a key element of constitutionalism.
Issacharoff's reasoning was built on the fact that the establishment of an independent apex judiciary (including an explicit constitutional basis for the exercise of strong judicial review) is an integral part of the constitutional agreement facilitating the transition to constitutional democracy.[2062]
Even though this approach might seem to make the most sense among the others, it also has one significant flaw. 'Scaffolding' might appear to be a good approach, yet the issue remains that this argument has insufficiently defined boundaries. Even if we assume that the best empowerment for a court in a transition is to be scaffolded, it is hard to know how far the court can go beyond the constitutional text to fulfill this function.[2063] This, as in most approaches, is a problem of context.[2064]

– 'Weak Review' Argument: This approach diverges from the other four as it does not envisage a strong judicial review. Instead, Gardbaum argues for a weak judicial review, which from his point of view, could be a better alternative in transitional periods, allowing them to review 'in a bold and creative manner and maintain the coherence of the constitution without the cost, seen in the strong judicial review systems of new democracies across the world, of antagonizing the other State powers

2062 Issacharoff, "Constitutional Courts and Democratic Hedging," 964, 80 – 92.
2063 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 268 – 69.
2064 Theounix Roux also criticized Issacharoff's approach for failing to understand how the democratization context puts the apex courts in a very difficult position: '[t]hey are assumed [by Issacharoff] to be in a position roughly equivalent to that of courts in mature democracies, with little threat to their independence and consequently free to focus their efforts on developing the required constitutional law doctrines. The problem with this assumption is that it ignores the fact that a constitutional court's capacity to act as a hedge against authoritarianism may be inhibited by the same political conditions that interventions of this sort are aimed at addressing. Not just that, but a court's intervention to protect the democratic system necessarily has an effect, either positive or negative, on its capacity to intervene in future cases.' See, Theunis Roux, "The South African Constitutional Court's Democratic Rights Jurisprudence: A Response to Samuel Issacharoff," *Constitutional Court Review* 5 (2014): 12.

and undermining the principle of judicial independence'.[2065] In this sense, judicial independence and the separation of powers are at risk in a system of strong review, because it vests the court with a more central governance role, almost as a veto player. Gardbaum's argument against a system of strong review does not coincide with the Western normative argument that courts should not be allocated too much strong review powers because of its democratic illegitimacy, but rather draws from a more pragmatic approach that strong review can impede rather than facilitate the effectiveness of courts 'where they are unlikely to be able to withstand political attacks or unable or unwilling to exercise the self-restraint required in a febrile political atmosphere'.[2066] So, where Barak views inter-branch disputes as natural and desirable,[2067] and Scheppele sees separation of powers as necessary contact sport when the court is trying to assert its own role in the new order,[2068] Gardbaum sees it as unnecessary and even damaging confrontation that is altogether entirely avoidable.[2069]

Unlike most of the other approaches, which lack appreciation for context, for Gardbaum context is everything. The problem with the argument of weak review, however, rests in a more institutional and practical issue:

> 'It is hard to see how political actors who refuse to submit to strong judicial review would submit to the softer touch of weak review. Surely, where courts and such actors have divergent views, the latter would easily discard any weak review constraints.'[2070]

These different approaches can help constitution-builders identify the best level of empowerment an apex court should enjoy in a constitutional transition; from weak judicial review, to substituting the court for the elected institutions, to mirroring review in mature democracies, to a general expansion of the 'normal' Western boundaries of adjudication to address particular societal problems, or even actively moderating the worst

2065 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 265–66. See also, Stephen Gardbaum, "Are Strong Constitutional Courts Always a Good Thing for New Democracies?," *Columbia Journal of Transnational Law* 53, no. 2 (2015): 303–06.

2066 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 266.

2067 Barak, 216.

2068 Scheppele, "Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe," 1760.

2069 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 266.

2070 ibid., 269.

deficiencies of new democratic structures. All of these approaches remain however opinions, and as such, they can be criticized on a series of points:

– *No appreciation for context:* These approaches do not represent absolute effective solutions in each and every case. This is possibly the first and most important critic to every theory, especially in transitional constitutional law: the lack of appreciation for context. Depending on the context, each approach might be the better one or the worse. Failing to consider context is why most theories, not only the ones just presented, are hard to combine with policy implications, which demand a straight answer. Theory does not always provide such straightforwardness.
– *No end-point for the transition:* None of the approaches thoroughly define the temporal limits of the transitional period; all approaches advocate for the one or other role for apex courts in young democracies, yet they fail to address the end-point beyond which the transitional role may no longer be needed.[2071]
– *No consideration for different approaches interrelating:* In most democracies, apex courts have a mixture of strong review power alongside weak ones. Apex courts often calibrate the use of both powers depending on the specific circumstances of the case before them.[2072]
– *No consideration for the role of regional human rights courts:* Daly has extensively argued for the importance of considering the influence of the role of regional human rights courts.[2073]

b. Policy Implication with Regards to Constitutional Review

First, looking at the role of adjudication for apex courts in mature democracies, followed by the role of adjudication for apex of courts in young democracies, facilitates finding out what that role should be. The range of positions analyzed above reveal the extent to which this debate can go and emphasizes how different the discussion about the role in transitions is in comparison with the same role in mature democracies.

2071 ibid., 270–71.
2072 ibid., 271–72.
2073 ibid., 273–76.

Before jumping to conclusions with regards to policy implications on constitutional adjudication, it is important to consider the main deficiencies of young democracies[2074] and the end-point of a transition mentioned above.[2075]

Key deficiencies in young democracies exist on a constitutional, political and even societal level. The constitutional deficiency rests on the fact that the new constitution is commonly in dire need of interpretation due to the often still existing authoritarian-era laws and often entails counter-majoritarian elements aimed at protecting a possible exit bargain for the old regime. At the political level, young democracies are often marred with fragmented political opposition with no clear agenda, or even inexistent opposition. Finally, new democracies tend to face societal deficiencies due to a possible economic drop during, or right before, the transition linked with yet to be developed fundamental rights jurisprudence.

These deficiencies, seen hand-in-hand with the end-point of the transition of having a consolidated and functioning democracy, show where the need of an institution, such as an apex court, to intervene is higher: guarding the new order from a backlash to authoritarianism, respectively, ensuring that authoritarianism does not come back by consolidating and enforcing democratic structures.

This, however, does not automatically mean that strong review powers of apex courts are the solution; it is, however, a solid hint, that strong judicial review might attenuate these deficiencies. In relation to these deficiencies, Daly expresses an important point, especially with regards to the methodological difficulty that scholars encounter when dealing with transitional periods due to their polarized contexts:

> 'It is simply to recognize [the deficiencies'] existence to enable a clear-eyed approach to the evils constitutionalism and the law may play a role in alleviating. It is also important to recall that these are not permanent nor static conditions; the hallmark of the democratization context [...] is inordinate flux, compared to the relative stability of a mature democracy or authoritarian state. The key question, then, is how adjudication can operate so as to mitigate the pathologies of a new democracy without also actively undermining the democratization process by preventing the very civic virtues, culture of constitutionalism, and respect for others' views and widespread

2074 The main deficiencies of young democracies were nicely summarized in ibid., 277–79.
2075 The end-point of the transition was also nicely summarized in ibid., 279–80.

> commitment to rights that is required for a democratic system, as we understand it, to function'.[2076]

With the above points in mind, and the normative implication of the role of courts after the enactment of a new constitutional order, the 'scaffolding' argument emerges as the most convincing and universal one, because it seeks an apex court that supports the democratic mechanisms and facilitates the consolidation of democracy; it thus justifies strong judicial review during a transition, without placing an impracticable burden on the apex court. Gargarella's conception especially reveals a certain degree of sensitivity to the particular necessities of a country in transition:

> 'While acknowledging that we must make certain adjustments to our adherence to standard theoretical accounts of the proper role of strong judicial review developed in the Western context, it also avoids using these contextual differences to abandon all concerns regarding not only the legitimacy of strong judicial review, but also the capacity of judges to carry out the task of democratic transformation on their own'.[2077]

Both Gargarella and Issacharoff's opinions merge with the observation that apex courts in new democracies should act to disentrench the old autocratic constitutional order, while entrenching the new democratic one. However, in line with Daly's opinion, 'given the criticisms of Issacharoff's [emphasis added] approach in particular, [mentioned] above, and the generally state-bound nature of the scaffolding argument, it is merely a starting point.'[2078]

A small parenthesis needs to be opened as of the Global South argument. The Global South argument has strong affiliation with the concept of empirical transformation, whereas the 'scaffolding' is more attached to the normative constitutional transition. The Global South argument requires a new constitution to entail a transformative vision. If the new constitution does not empower the court to directly tackle societal issues, such as poverty and disparity, the court cannot and should not do so, as it would step onto the extra-legal realm, and in some way that would mean that the court would assume a 'surrogate' role instead of elected institution or civil-society actors. What the Global South argument advocates goes beyond the judicial role of a court, and, in my opinion, I believe that that

2076 ibid., 277–79.
2077 See, Daly explaining Gargarella's approach at ibid., 277.
2078 ibid.

would tilt the behavioral balance negatively. An apex court can still adopt a transformative attitude when adopting a more 'legal' approach, which is the scaffolding one. Constitutionalism entails the respect of the separation of powers and the rule of law; even though we can justify an apex court to leave the constitutional framework to some extent, this should not be abused. The Global South approach can only be accepted as far as the apex court enforces all fundamental rights, including socio-economic rights and equality rights, equally to the democratic rights. Still, the enforcement of such socio-economic rights and equality rights (unlike democratic rights), has effects in the empirical transformation, rather than the normative constitutional transition.

The problem of the scaffolding argument, and in particular of Issacharoff's standpoint, was the undefined boundary of the court's empowerment. The idea of directly alleviating the worst deficiencies of democracy by allowing some basic democratic structures to be unamendable is justifiable, yet what should the extent of it be? Scholars tend to be vague on this behalf. Sadurski indicates that rights protection is the primary way, yet fails to indicate any particular rights. Scheppele encourages a rather wide role for apex courts in transitions, but is also vague as to what courts should prioritize in order to foster constitutionalism. Bonilla Maldonado is on the same page as Scheppele, yet his theory of the Global South implies that the enforcement of socio-economic rights, for instance, might be a priority. Issacharoff and Gargarella are the ones that get closest to a universal solution, focusing in particular on core democratic rights (for instance, rights of free speech, assembly, association, and due process; in addition, the disentrenchment function of restricting the accumulation of excessive power at any one site, whether by an executive or a dominant party).[2079]

Of course, courts cannot do everything. Daly's argument is that apex courts should concentrate on the eight core activities aimed at reaching a consolidated democracy set out above and utilize their institutional capital on judicial review that furthers these key objectives. I strongly agree with Daly and would even add that not only should apex courts focus on the eight core activities, but also round them up to the three elements of constitutionalism. In this sense, the scaffolding approach is the most conclusive one to reach these goals, because it seeks the take direct action on grave deficiencies of young democracies which incredibly coincide with

2079 ibid., 281.

Daly's eight core activities, or – in my eyes – even to the three elements of constitutionalism as a whole. Basic structures to support democratization are embedded in all elements of constitutionalism. In this sense, the apex court would facilitate the normative constitutional transition, as it would actively uphold and consolidate the constitutional (i.e., legal) and institutional establishment of constitutionalism; within a span of time, it would allow for the creation of a constitutionalist structure that can then have the potential to develop into a mature constitutional democracy. The question here, as mentioned above, is the role that apex courts should play, not in the aim to transform society the political community right away into a full-working democratic state comparable to the mature democracies of the Global North, but rather consolidate the democratic mechanisms where the essentials of democratic order are in place and have the potential to transform society. Here again, the difference between normative constitutional transition and empirical transformation. Hence, this approach helps both faces of the constitutional transition medal; it allows democratic progress to rely on judicial review in order to open progressively a societal space in which other actors, such as civil society organizations, the media, the politics, and even individual citizens can act as actors of transformation and pursue their conception state, their vision.

With this in mind, we can almost say that this approach advocates for a court's robustness on the very same issues that strike to the core of the constitutionalization process.

Focusing on the very legal activity of judicial review by supporting the establishment and consolidation of the three elements of constitutionalism within the normative constitutional transition allows for a court to find the right balance between law and politics, since it grants other actors the possibility to mainly deal with the extra-legal issues. In this sense, I argue that apex courts should remain as far as possible within the activity spectrum of the law, without having to move onto extra-legal chores, which should fall within the realm of political branches or civil actors and players.

III. Transitional Elements

This study has already revealed how the constitution-making form that produces the greater potential for success of the transition is the one that

allows for the highest level of inclusivity. Pluralism in the making of a constitution is thus key. Depending on the form chosen by the transitional forces the role of a court can drastically change.

Arato has produced a compelling and extensive argument in his book, *Post Sovereign Constitution Making: Learning and Legitimacy*, in favor of the round-table constitution-making as a paradigm when it comes to constitutional transitions by comparing the cases of Turkey and Hungary. However, he also considers how the round table model of constitution-making can fail, as in Hungary, and conversely, how insufficient learning from it can lead to a severe constitutional crisis like in Turkey.[2080] In this sense, the round-table model of constitution-making serves the most pluralist version of the polity, but at the same time, evidently, it is *not* infallible.

Pluralism and consensual constitution-making is what the constitution builders should seek. This form of constitution-making allows for a calmer political context to develop during the negotiations. It is a constitution-making form that pushes the negotiating parties to seek compromise and thus avoid reiterated conflict. Avoiding additional conflict during the transition and thus not having a polarized political context is pivotal, because it allows the constitution builders to focus on the best solutions for the new constitutional order. Constitution builders do not have to engage in a partisan battle within the constitutional transition and as thus can embark on a most inclusive constitution-building process.

In order to reach the highest level of inclusivity, the round-table model of constitution-making commonly includes a two-staged process. The negotiated interim constitution will be a document based on true compromise and will be enforced by an apex court. The apex court will have clear 'hard' constitutional resource from which draw its authority, legitimacy and power. It can focus on facilitating the constitutional transition rather than worrying too much about first asserting its own role within the new constitutional order. Its role is usually already clearly established and entrenched in the interim constitution. This form of constitution-making also allows a court to actually be present at and be part of the constitution-building process. Many times, during a constitution-building process, an apex court does not even exist; the

2080 See, *Arato, Post Sovereign Constitution Making: Learning and Legitimacy.*

roundtable form of constitution-making instead requires a court to oversee the process of constitution-building and even integrates it as an indispensable part.

But why are pluralism and consensus constitution-making a key element for constitution builders to seek? I want to reply by stating a metaphor. Let's say there are 10 individuals (the people of a country) who have to share a house (a state). The setting, in order to make this situation clear is that each and every one of these people reacts in a similar way as the other to specific behavior and events (i. e., that if I take away their resources one of them, they would probably all react will anger. If I give them wealth, they would probably react with gratitude. So, these 10 people need to sit at a table and decide how to come up with a set of rules to allow them to live together peacefully. The exercise now is easy: if 9 of them have similar ideals and one not (a minority), they can either accommodate him/her or put him/her out of the negotiations. Let us say that they choose the second one, so now he/she is outside the house waiting for the other 9 to decide. Once they decide, now he/she can come in. He/she will most likely not agree with what they decided and so he/she will react. The way he/she reacts is not a legal question, but an extra-legal effect. But the legal effect is that you put him/her in the position to deviate from the others' reactions. In this sense, the legal setting will bring instability and unpredictability, because we do not know how the person will react; the result of such instability and unpredictability is thus an extra-legal question. Hence, the exclusion of one minority out of the negotiations can lead to an unsecure political context, most likely polarized.

Let us say that instead 6 out of 10 have one opinion and the other 4 have all different ones. Here again. The 6 can either put the other 4 outside the house, or somehow listen to them and accommodate them. This is an interesting setting which makes you understand that the solution here is of course the second. The reason thereof is probably the size of the minority, which could become a greater threat than if only one deviates from their opinion. This shows a similar setting of the Egyptian case study, where the political context was polarized mainly between a slight majority of Islamists and secularist.

In reality, of course, there are many more opinions and interests that deviate from each other, but this exemplifies how important it is to include the

entire polity in the negotiations process in order to at least allow the transition to take place in a peaceful political setting.

Once you decide to include everyone in the negotiations, how you decide to accommodate everybody is another question.

Decentralization for starters could be a solution that is every individual with similar interests live in the same corner of the house. Now, the issue at stake here, in this study, is not whether decentralization or other types of systems are the solution to pluralism of opinions, but rather the evidence that pluralism and the quest for consensus is of paramount importance for the political stability of the transition and increases the potential of success.

During the negotiations and once the rules of the house are put down, an impartial and neutral arbiter is needed to make sure everybody is included in the negotiations and uphold the rules once they are enacted; an apex court. The arbiter would probably be taken into play by the parties, which have to first decide to adopt this way of drafting the rules of the house and consent on a way of dealing with the negotiations (i. e., interim constitution). They need to want pluralism and consensual constitution-making to be the modus operandi and an arbiter to enforce it; if not, the arbiter might not yet exist and if it does, because it was pre-existent, it would not have rules to enforce. Thus, making sure that consensual constitution-making implemented can become impossible from a legal perspective. The arbiter would lack a 'hard' institutional power resource to draw from. Provided that an arbiter exists, but no rules for the negotiations (i. e., interim constitution) are in place, the arbiter is left with the only choice to become 'judicially active' and step out of its rule-bound functions.

The bottom line is that even though the roundtable form of constitution-making is the best possible modus operandi for the drafting of a new constitutional order, it all still depends on the parties' will to engage in a consensual constitution-making way. The court can in no way influence this transitional decision if it is not existent and only limitedly if it pre-exists. Still, on the one hand, the role the court would play in the transition will very much depend on the institutional empowerment of the court vested in them by the constituent power. Whether or not the roundtable form of constitution-making will be chosen is, on the other hand, contingent on the composition of the same constituent power.

C. Closing Thoughts: Apex Court as Precursor of Change – Not the Messiah

> 'I remember seeing an elaborate and complicated automatic washing machine for automobiles that did a beautiful job of washing them. But it could do only that, and everything else that got into its clutches was treated as if it were an automobile to be washed. I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.'
>
> — Abraham H. Maslow[2081]

Thinking about apex courts from a broader governance perspective swings the focus from empirical assessment of what courts actually do toward abstract theory of what courts should do. This is possibly a wrong move. While the normative literature on law has tended to treat democracy and the judiciary as in some tension, casual empiricism suggests that democratization and constitutionalization have been escorted by constant empowerment of the judiciary in many countries. This has led to a new diversity in the domains in which courts are operational, with many new roles and behaviors; making it even harder to find a true generalization of the role of courts in transitions.[2082] Actually, I believe it is not only impossible to find a general role for every case, but also wrong. One can only try to find some sort of role and behavior that apex courts *could* adopt in order to allow for constitutionalism to thrive. There is no universally predetermined role for constitutional courts and the judiciary in transitional periods upon which all scholars agree. No matter how an apex court is designed, composed or even what legal tradition it is founded on, it is bequeathed upon it to carve out its own role within the state institutional framework. Still, to conclude, let us suppose we need to advise a country on how to proceed when a constitutional transition is triggered. The aim of this book was not to provide a fully-fledged solution, but to point the way toward significant core questions in approaching success in transition, that is, what courts *could* do – rather than *should* do – in allowing constitutionalism to bloom.

First, three points need to be kept in mind throughout the explanation: (1) one has to remain cognizant of the fact that apex courts cannot be the

2081 Abraham H. Maslow, *The Psychology of Science: A Reconnaissance* (New York: Harper & Row, 1966), 15.

2082 Ginsburg, "Courts and New Democracies: Recent Works," 721.

sole engines of transition (other actors will come in play and what courts can do is try strategically to work with them, not against them); (2) the concept of constitutional transition needs to be divided between normative constitutional transition and empirical constitutional transformation (the one takes place within the realm of the law, whereas the latter is an extra-legal effect; apex courts should focus on the former); and finally, context (each and every case is different and depending on what the cultural, political and transitional context looks like, courts need to adapt; there is no universal solution).

We have seen how the role of courts can roughly be split between two phases: the one during the constitution-building process and the period of constitutional consolidation thereafter. Both periods seek slightly different matters, yet the same end goal: consolidated democracy, or in other words, a democratic structure that allows democracy to thrive and to endure in the future. One key element for the reaching of such end-point is pluralism. Pluralism is the key to democratic success and the introduction of constitutionalism. With democracy being an element of constitutionalism, so pluralism is key for its establishment. The roundtable form of constitution-making allows for the most inclusive process, and is thus the one that creates the highest potential for transitional success. The apex court needs to make sure that said functional democratic structure is upheld in both phases of transition. This is a very legal and structural endeavor, since I believe that a court can play its upmost important role in institutionally and legally establishing all elements of constitutionalism. Again, this means the creation of a structurally sustainable and lasting governmental system that neutralizes common deficiencies in young democracies. This role can be played in the normative constitutional transition, rather than the empirical constitutional transformation. During the empirical constitutional transformation, a court can certainly play a huge role, yet it steps out of the constitutional framework, risks to encroach too much on the political branches and thus is a research field with many variables that requires further interdisciplinary research and a role that courts can definitely not play on their role; neither should they. As Daly also mentions:

> 'Arguments as to the transformational capacities of courts come together most clearly in arguments for and against the increasing tendency to enshrine justiciable social and economic rights in the new democratic constitution. [...] For some, the protection of such rights is perhaps the most important role a court can play in the context of a

> young democracy where existing levels of socio-economic development and income equality are low, or where economic restructuring alongside democratization takes a significant toll on the economic well-being of individuals. However, [...] the role has a significantly greater potential to bring a constitutional court into conflict with the political branches than adjudication on civil and political rights, and to undermine popular support for the court."[2083]

So, outside the normative constitutional transition, apex courts can be purveyors of social justice, but not only. In transforming society, and in this sense also fostering the consolidated system of democracy, scholars like Stozky and Goldstein argue that courts can also educate the people on the principles of democratic governance. Daly again disputes their arguments rather simply:

> 'As well as being difficult to verify, such claims appear to make a serious error of overlooking reality. They appear to assume, surely incorrectly, that individuals in a political community pay particular attention not just to the outcome, but also to the content, of judicial decisions; as though key judicial decisions are to be found on every kitchen table in a young democracy. Beyond practical realities, such as the often extremely poor analysis of judgments in the media, such arguments also place the court in a rather tutelary role, with the individual citizen reduced to a passive recipient of its teachings. This overlooks the basic fact that democratic governance, like dance, can only be learnt through active practice.'[2084]

We see thus that apex courts can be seen as actors within several developments in a constitutional transition, yet it would be naïve to think that apex courts can do all of what was just said on their own. I believe courts have a considerable responsibility to establish a legal and institutional democratic structure that allows constitutionalism to thrive. Yet, this is just one piece out of many of the puzzle that need to be placed in order for a transition to succeed. It appears foolhardy, or even malicious, to believe that apex courts – to the exclusion of all else – can or even should do it all. If wide and flexible design choices are 'at heart of the constitutionalist's pharmacopeia',[2085] as Andrew Reynolds wittingly maintains, 'strong judicial review alone is clearly no panacea'.[2086]

2083 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 288.
2084 ibid., 291.
2085 Andrew Reynolds, "Building Democracy after Conflict: Constitutional Medicine," *Journal of Democracy* 16, no. 1 (2005): 57.
2086 Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, 293.

> 'Post-war constitutionalism has tended to set up the constitutional court as the sole guardian of the constitution, leading other actors in the political order to eschew any role in this regard. A post-authoritarian constitution should attempt to spread this role. [...] The overall aim, then, in designing a post-authoritarian constitution, should be to seek a 'joined up' settlement, in which different elements work together, rather than a wilderness of single institutions, whose values and operation are considered in isolation from one another, and which reflects the particular aberrations of the new democracy.'[2087]

This is the reason why I believe that apex courts should adopt a more 'mechanical' role in making sure that at least the democratic machinery and the state apparatus (including itself) allow further development and fostering of constitutionalism. The very transformation towards constitutionalism needs to take place in co-ordination with other actors and not exclusively within the law, but outside of it.

The lesson learned in this research is that there are clear restrictions to what any institution can do in a constitutional transition; and rightly so. The obstinate obsession in the contemporary years to cram written constitutions with promises, rights and principles puts an almost unbearable burden upon apex courts. It basically sets them up with the impossible task to deliver a successful transition. Instead of attempting to reach perfection, apex courts should focus on what they are universally seen and designed to do; make sure that the constitutional and transformational vision *has a chance to thrive outside the judicial realm* and not think that they should be the ones that have to deliver such transformation; contemporary written constitutions tend to advocate for such task.

In sum, I believe the existing model of constant empowerment of apex courts throughout the transition has deep limitations and depends on a myriad of factors. This is the reasons why the 'mechanical' role of the apex court can probably be reached by the scaffolding approach. The research has shown that the 'scaffolding' judicial empowerment is the best way to approach: create a functioning democratic structure in order so that the state can work, only to allow extra-legal effects to take place outside the law, outside of its competence. Otherwise, separation of powers breaks. An apex court should seek the legal and institutional establishment and reinforcement (before and after the enactment of a new constitution) of

2087 ibid., 296 – 97.

the three elements of constitutionalism. A court should facilitate a normative constitutional transition by building and consolidating these three elements of constitutionalism, without worrying too much about having to charge on its shoulders the entire pressure of transforming society. In doing so, it should find a behavioral balance between law and politics, since an encroachment onto the political realm is unavoidable, yet there is a tolerance limit. Apex courts rest on top of the judiciary and are themselves an element of constitutionalism that should function accordingly; the risk would be otherwise 'juristocracy'. Courts should be the *precursor of change*; they should focus on building the right environment for constitutionalism to thrive. If constitutionalism does not thrive despite all steps a court has done roughly right, it is probably because of external factors, extra-legal ones, possibly political.

This study, ultimately, boils down to what we expect constitutional law, and the apex courts, to do in their efforts to reach meaningful and consequential democratic governance and constitutionalism from the ashes of an authoritarian past. As seen, it is a question no one can really answer in the abstract. Rather than endlessly creating theoretical disputes that try to find *one* post-conflict solution for every case and fail to distinguish the difference between what happens within the law and outside the law, the immediate challenge for a court is instead to marshal its efforts at allowing for the right environment for constitutionalism to thrive and, in practical ways, to adapt to the empirical context of each and every case. Constitutionalism, and democracy with it, will thrive outside the law, yet supported by the law. This can provide sustenance to societies that seek to escape authoritarian rule, while still assigning meaningful independent value to the central meaning of democracy as self-government by the people, and not by the judiciary. In this endeavor, we are only kept back by the boundaries of our constitutional imaginations

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