

The Illiberal Abuse of Constitutional Courts in Europe

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Legal constitutionalism – Political constitutionalism – Emergence of illiberal constitutionalism as a *tertium genus* – Examination of constitutional courts under three illiberal governments: Poland, Hungary, and Turkey – Illiberal governments’ strategies to seize control of constitutional courts – Illiberal governments’ aim to secure leverage over constitutional judges and restrict the powers of review of the court – Constitutional courts under illiberal rule invert the traditional functions that were assigned to them under the original Kelsenian approach – Instead of a check on power, illiberal constitutional courts become a device to circumvent constitutional constraints and concentrate power in the hands of the ruling actors.

INTRODUCTION

Illiberal governments are on the rise in Europe. Within the European Union, executives, first in Hungary and then in Poland, have attempted to severely weaken checks and balances and accumulate power into the hands of ruling political actors. In the European Union’s immediate neighbourhood, Turkey has followed a similar path. Surprisingly, illiberalism is gaining momentum on a continent that has for decades been considered as the avant-garde of liberal democracy and human rights values, giving rise in certain countries to dramatic changes in internal political systems and processes of rule of law backsliding.¹

When they reach power, illiberal actors often engage in constitutional politics through processes of constitution-making, constitution-amendment or reform of

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¹L. Pech and K. Lane Scheppelle, ‘Illiberalism Within: Rule of Law Backsliding in the EU’, 19 *CYELS* (2017) p. 3 at p. 10.

constitutional institutions. Following Landau, we can define illiberal constitutionalism as a constitutional model in which ‘powerful incumbent presidents and parties can engineer constitutional change so as to make themselves very difficult to dislodge and so as to defuse institutions such as courts that are intended to check their exercises as power’.² Illiberalism can be understood as related to, but conceptually different from, populism. This latter term, populism, has been defined from different and sometimes conflicting angles in academia. According to Fontana, ‘populism generally refers to arguments pitting a large number of average people unjustly disempowered relative to and against some power elite’.³ Note, however, the normative element (‘unjustly’) in this account of the term. Mudde offers a different definition that has the advantage of being free of value judgements. In Mudde’s view, populism is ‘a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, “the pure people” versus “the corrupt elite”, and which argues that politics should be an expression of the *volonté générale* (general will) of the people’.⁴ Finally, Pappas defines populism as ‘democratic illiberalism’, one of whose characteristics is ‘the adherence to the majority principle, as well as a certain predilection for personalist authority over impersonal institutions and the rule of law’.⁵ In this regard, the illiberal undertones of populism can be observed in its rejection of both constitutional restrictions on state power and also the protection of the rights of minorities.⁶

Probably given their nature as a constraint on power, constitutional courts are among the institutions most frequently put under stress by illiberals in power. The political science literature on judicial actors under authoritarian regimes has suggested a number of functions that courts fulfil in these systems.⁷ Diverse authors mention pro-regime roles, such as the bolstering of administrative discipline⁸ or the cohesion of the ruling elite.⁹ However, as suggested by Moustafa, courts can also serve as sites of active resistance, giving opposition actors

²Note that Landau refers to this phenomenon as ‘abusive constitutionalism’: D. Landau, ‘Abusive Constitutionalism’, 47 *UC Davies Law Review* (2013) p. 189 at p. 191.

³D. Fontana, ‘Unbundling Populism’, 65 *UCLA Law Review* (2018) p. 1482 at p. 1486.

⁴C. Mudde, ‘Are Populists Friends or Foes of Constitutionalism?’, *The Foundation for Law, Justice and Society Policy Brief* (2013) at p. 3; C. Mudde, ‘The Populist Zeitgeist’, 39 *Government and Opposition* (2004) p. 541 at p. 543.

⁵T. Pappas, ‘Populist Democracies: Post-Authoritarian Greece and Post-Communist Hungary’, 49 *Government and Opposition* (2014) p. 1 at p. 4.

⁶Mudde (2013), *supra* n. 4, p. 3.

⁷See T. Moustafa, ‘Law and Courts in Authoritarian Regimes’, 20 *Annual Review of Law and Social Science* (2014) p. 281.

⁸M. Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981); R. Peerenboom, *China’s Long March Toward Rule of Law* (Cambridge University Press 2002).

⁹R. Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (Cambridge University Press 2002); A. Stepan, *The Military in Politics: Changing Patterns in Brazil* (Princeton University Press 1971).

opportunities to contest government policies.¹⁰ In the legal field, in addition to the study of fundamental traits of illiberal constitutionalism,¹¹ a number of works have described the changes to constitutional courts carried out by illiberal governments,¹² as well as the reactions to those changes at the level of supranational institutions such as the EU.¹³

Despite the existence of these valuable contributions, important questions of constitutional theory in relation to the latest wave of illiberalism in Europe remain unexplored. Constitutional courts are frequently understood in constitutional theory as a constraint on power and an instrument of protection of the normativity of the constitution.¹⁴ At the same time, as we have seen, illiberal actors do not readily accept the idea of limitations to their rule. Paradoxically, when they come to power, illiberals do not usually suppress constitutional courts. Instead, they carry out far-reaching reforms relating to the design and powers of these institutions which deeply mutate their nature and functions. We know that illiberal governments prefer a constitutional setting that concentrates power in their hands. We also know that they favour a type of constitutionalism that weakens opposition and favours their long-term rule.¹⁵ But if that is the case, what role does a reformed constitutional court perform with regard to the protection of the constitution and its normativity in an illiberal system?

To respond to this question, this article combines an examination of three constitutional courts under illiberal governments with a legal-theoretical analysis. The countries covered are Poland, Hungary and Turkey, which have been selected because they constitute the most prominent examples of the latest wave of illiberalism in Europe and Eurasia, as well as the instances in which processes of ‘illiberalisation’ are most complete.

At the constitutional-theoretical level, this article aims to show that illiberal constitutional courts perform functions that are incompatible with any of the main constitutional traditions in Europe. In doing so, the article seeks to advance

¹⁰ Moustafa, *supra* n. 7.

¹¹ Landau, *supra* n. 2; Mudde (2013), *supra* n. 4; L.-A. Thio, ‘Constitutionalism in Illiberal Polities’, in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) p. 133.

¹² B. Bugarič and T. Ginsburg, ‘The Assault on Post-Communist Courts’, 27 *The Journal of Democracy* (2016) p. 69.

¹³ Pech and Lane Scheppele, *supra* n. 1; C. Closa and D. Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press 2016); D. Kelemen, ‘Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union’, 52 *Government and Opposition* (2017) p. 211.

¹⁴ H. Kelsen, ‘Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution’, 4 *The Journal of Politics* (1942) p. 183; A. Stone Sweet, ‘The Politics of Constitutional Review in France and Europe’, 5 *I-Con* (2007) p. 69.

¹⁵ See Landau, *supra* n. 2.

the theoretical knowledge about such institutions and their relation to liberal forms of constitutionalism, as well as their functional role in what I call the ‘de-normativisation’ of constitutional texts. In the countries under study, constitutional courts under illiberal governments were originally presented simply as Kelsenian courts, fulfilling the same functions as their counterparts in other European countries. More recently, the argument has been put forward that the changes to constitutional courts in these countries represent a turn towards the postulates of political constitutionalism.¹⁶ I rebut such claims and instead argue that illiberal constitutional courts are irreconcilable with the standards and the *telos* of both those approaches to constitutionalism, especially when it comes to the protection of the constitution. Furthermore, given that the defence of illiberal constitutional courts from a political constitutionalism perspective is in fact rather novel, this article constitutes – to the best of this author’s knowledge – one of the first attempts at refuting such a defence.

Parallel to suggesting that illiberal constitutional courts are incompatible with both legal and political constitutionalism, I argue that such institutions fulfil a specific, *sui generis* function that is central to illiberal constitutionalism. Instead of enforcing the constitution, they are devices that allow illiberal governments to circumvent the constitutional text in the context of weakened political constraints. This results in a loss of normative force of the constitution, thus undermining the very foundations of the rule of law in these countries.¹⁷

In order to ground the constitutional-theoretical discussion, the article first makes an analysis of the cases, identifying common patterns but also identifying differences among them. As will be shown, the governments of all three countries had similar goals in mind when reforming their constitutional courts: obtaining leverage over constitutional judges while disempowering the institution. However, the strategies that they followed to do so were largely different. In this regard, the article argues that the causes underlying these different strategies are a combination of control over the constitution¹⁸ and pre-existing leverage over constitutional judges.

The remainder of this article is as follows. I begin by presenting the two most important constitutional traditions in Europe, legal constitutionalism and political

¹⁶A. Czarnota, ‘The Constitutional Tribunal’, *Verfassungsblog*, 3 June 2017, <www.verfassungsblog.de/the-constitutional-tribunal/>, visited 15 January 2019.

¹⁷See, on this argument, the case of Venezuela, A.R. Brewer-Carías, ‘El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la constitución: el caso de la sala constitucional del Tribunal Supremo de Venezuela (1999-2009)’, 180 *Revista de Administración Pública* (2009) p. 387. For Poland, see W. Sadurski, ‘How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding’, *Sydney Law School Legal Studies Research Paper* (2018) 18/01.

¹⁸See B. Bugarič, ‘A Crisis of Constitutional Democracy in Post-Communist Europe: “Lands in-between” Democracy and Authoritarianism’, 13 *I-Con* (2015) p. 219 at p. 230.

constitutionalism. Then I explain the reforms relating to the constitutional courts of illiberal governments in three countries: Hungary, Poland, and Turkey. In the following section, I return to constitutional theory and show that the cases analysed fail to meet the underlying assumptions of both Kelsenian-inspired legal constitutionalism and political constitutionalism with regard to the protection of the constitution and democracy. Instead, as I argue in the penultimate section, constitutional courts under illiberal governments become devices intended to manipulate the constitution, thus partially depriving the constitutional text of its normative force. This is followed by a conclusion.

THE GREAT DISAGREEMENT: CONSTITUTIONAL REVIEW IN CONSTITUTIONAL THEORY

The constitutional landscape in Europe has so far been mostly dominated by two different traditions: legal constitutionalism and political constitutionalism. While these two approaches share an emphasis on constraining power within liberal-democratic systems of government, they largely diverge in their approach to arrangements such as the constitutional review of legislation or the existence of an entrenched constitution. The emergence of illiberal constitutional practices in Europe has added further complexity to this scenario.

In this section, I shall present the central tenets of legal constitutionalism and political constitutionalism, with a particular focus on their views on the constitutional review of legislation and the role of judicial actors in the political process. Such a presentation constitutes the theoretical background against which the rest of the article develops one of its central claims: that the illiberal construction of constitutional courts is incompatible with both of these constitutional traditions and, instead, constitutes a new approach to constitutional review.

Legal constitutionalism: the promise of better-defended democracy

In legal constitutionalism, dominant in most European jurisdictions, legalistic checks on power play a powerful role in the functioning of the political system. This approach to constitutional design defends the idea of a normative, entrenched constitution whose provisions are to be respected by political actors.¹⁹ When necessary, a judicial-type institution, often a constitutional court, has the power to invalidate statutes on the ground that they are contrary to the constitution.²⁰

¹⁹ Stone Sweet, *supra* n. 14, p. 74.

²⁰ Stone Sweet, *supra* n. 14, p. 74-75.

The dominant approach to constitutional review in legal constitutionalism in Europe can be traced back to the thought of the Austrian jurist Hans Kelsen.²¹ As is well known, Kelsen conceived of legal systems as being constructed upon a hierarchical structure in which every rule of the system derives its validity from a superior rule. At the top of the hierarchy of positive legal norms sits a constitution, which is the ultimate source of the validity of the rest of the rules and the legal system as a whole.²²

Given the fundamental importance of the constitution in his thinking, Kelsen was concerned with the problem of the uniformity of its interpretation.²³ His response to this challenge was to concentrate these powers of constitutional interpretation in a single institution. In his view, this function could not be entrusted to a political actor since ‘if an institution is to be created at all that will control the constitutionality of certain acts of state immediate to the constitution, in particular those of parliament and government, this power of control must not be conferred upon one of the organs whose acts are to be subjected to control’.²⁴ Instead, Kelsen favoured a solution in which the monopoly of constitutional interpretation was given to a specialised court. Kelsenian constitutional courts were thus born, commanding a monopoly over the capacity to declare legislation unconstitutional, thus protecting the constitution from violation by the political branches of government while at the same time ensuring homogeneity in the interpretation of the constitutional text.

In the original Kelsenian approach, the constitutional court was also a legal-political device to guarantee the preservation of democracy against authoritarian temptations from the political branches of government. Kelsen’s debate with Carl Schmitt is of fundamental importance in this respect, given that in those writings the Austrian jurist explicitly claimed that the idea of a constitutional court was an instrument to prevent totalitarianism: ‘The turn to the “total state” is opposed to constitutional adjudication, first of all, insofar as the call for constitutional adjudication is interpreted as an attempt to impede this “turn”, and with it the process of the solidification and consolidation of the state, its victory over society’.²⁵

This idea, the protection of democracy by constitutional courts, became determinant for the adoption of Kelsenian courts in post-war Europe. After the war, in the processes of transition from totalitarian or authoritarian regimes to

²¹ See Kelsen, *supra* n. 14.

²² H. Kelsen, *The Pure Theory of Law* (The Lawbook Exchange 2009 [1967]).

²³ Kelsen, *supra* n. 14, at p. 185-186.

²⁴ H. Kelsen, ‘Who ought to be the guardian of the constitution? Kelsen’s reply to Schmitt’, in L. Vinx (ed.), *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015 [1931]) p. 174 at p. 175.

²⁵ Kelsen, *supra* n. 24, p. 202.

democracy, many European countries established Kelsenian-inspired constitutional courts as a response to the breakdown of democracy in the previous decades.²⁶ Furthermore, unlike in the original Kelsenian design, these courts were now empowered to enforce constitutional catalogues of fundamental rights.²⁷ Kelsenian-style constitutional courts were often created in countries that had experienced totalitarian or authoritarian regimes, in the hope of stabilising those young democracies. In other words, they were a mechanism for the protection of democracy from authoritarian threats. Against this background, and given that most European countries experienced authoritarian regimes at some point in the 20th century, Kelsenian-style constitutional courts became the most frequent mechanism of constitutional review on the continent.²⁸ While they remain relatively young institutions, in Europe they have already consolidated their standing as central to the political-constitutional landscape.

Political constitutionalism: defending democracy against judicialisation

Contrary to proponents of legal constitutionalism, political constitutionalists reject the idea that courts should overturn the decisions of democratically elected politicians. For political constitutionalists, a healthy democratic system is one in which political conflicts are solved by political means and in which judicial actors defer to the democratically-elected legislature when it comes to the decisions on the general rules that regulate society.

In Britain, the foundational moment of political constitutionalism as a school of thought can be traced back to J.A.G. Griffith's lecture on 'The Political Constitution'.²⁹ Griffith's approach to constitutionalism is structured around the importance of the legislature, which is the ultimate institutional seat of power and the main constraint on government action.³⁰ His is a 'thin' constitutionalism in which 'political decisions should be taken by politicians',³¹ therefore rejecting the idea of constitutional review. More particularly, Griffith argues against the idea of a judicially enforceable Bill of Rights and strong legal constraints on political power. In his view, 'those for a written constitution, a Bill of Rights, a supreme court, and the rest are attempts to resolve political conflicts in our society in a

²⁶ Bugarič and Ginsburg, *supra* n. 12, p. 72.

²⁷ A. Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why It May Not Matter', 101 *Michigan Law Review* (2003) p. 2744 at p. 2767-2768. See also A. Stone Sweet, 'Constitutional Courts and Parliamentary Democracy', 25 *West European Politics* (2002) p. 77 at p. 81-82.

²⁸ V. Ferreres Comella, *Constitutional Courts and Democratic Values* (Yale University Press 2009).

²⁹ J.A.G. Griffith, 'The Political Constitution', 42 *Modern Law Review* (1979) p. 1.

³⁰ See Griffith, *supra* n. 29, p. 15.

³¹ Griffith, *supra* n. 29, p. 16.

particular way, to minimise change, to maintain (so far as possible) the existing distribution of political power'.³² The British scholar considered rights to be no more than political claims, the corollary of this being that 'their acceptance or rejection be in the hands of politicians rather than judges'.³³

Griffith's critique of constitutional review and judicially enforceable bills of rights has been developed by subsequent scholarship on political constitutionalism, which usually shares a common approach to the relationship between public law and politics. As said by Thornhill,

'in political constitutionalism, typically, public law is expected to originate in some expression of constituent power, fixed counterweights to the exercise of popular power ... have less influence, inner-societal demands and conflicts are directed more openly through the political system, and the legislative branch of the political system is directly accountable to a represented public will'.³⁴

Additionally, in general, political constitutionalists favour legislative supremacy and oppose constitutional review, albeit for a number of different reasons and with different emphases. In Bellamy's republican strand of this constitutional tradition, constitutional review is incompatible with the idea of freedom as non-domination, given the asymmetrical power it gives to judges vis-à-vis ordinary citizens.³⁵ Tomkins, with his civil libertarian approach, salutes the 'liberty-enhancing aim of modern human rights', but follows Griffith in considering that the provisions of human rights catalogues such as the European Convention on Human Rights are 'statements of political conflict pretending to be resolutions of it', arguing that human rights protection should be secured through means other than judicial enforcement.³⁶

Scepticism of constitutional review has also found a fertile ground outside British academia. Probably the most famous instance, although not the only one, is the work of Jeremy Waldron.³⁷ While authors such as Mark Tushnet have provided a rejection of this arrangement based on versions of 'populist constitutionalism',³⁸ others such as Stephen Gardbaum have proposed

³² Griffith, *supra* n. 29, p. 17.

³³ Griffith, *supra* n. 29, p. 18.

³⁴ C. Thornhill, 'The Mutation of International Law in Contemporary Constitutions: Thinking Sociologically about Political Constitutionalism', 79 *Modern Law Review* (2016) p. 208 at p. 210.

³⁵ R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

³⁶ A. Tomkins, 'The Role of Courts in the Political Constitution', 60 *University of Toronto Law Review* (2010) p. 1 at pp. 3-4.

³⁷ See J. Waldron, 'The Core of the Case against Judicial Review', 115 *The Yale Law Journal* (2006) p. 1346.

³⁸ M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999).

intermediate approaches somewhere between the traditions of legal and political constitutionalism.³⁹ In general, the increasing dominance of judicial review across the globe contrasts with the diversity of approaches to this arrangement in academia.

Against the background of Kelsenian thought, many of whose traits are still dominant in continental Europe, scepticism of judicial review has given rise to an autonomous constitutional tradition that is dominant in jurisdictions like the UK, enriching the academic and political debate on where to draw the boundaries between judicial power and political action.

CONSTITUTIONAL COURTS UNDER THREE ILLIBERAL GOVERNMENTS

The political-constitutional systems of Poland, Hungary, and Turkey could originally be associated, to varying degrees, with the tradition of Kelsenian-style legal constitutionalism, due to the existence of entrenched constitutions and constitutional courts. Nonetheless, these three cases constitute the most prominent examples of political illiberalisation on the continent of Europe in recent years. Led respectively by Kaczynski's Law and Justice Party in Poland, Orbán's Fidesz party in Hungary, and the personalist rule of President Erdogan in Turkey, in each of the three countries the system of checks and balances has been put under stress, and the quality of democracy has rapidly eroded.

Constitutional courts have been a common object of attack by these illiberal governments. The actions against constitutional courts have followed similar patterns in each of the three countries, consisting of a combination of securing leverage over constitutional judges and restricting the powers of the court. How these two strategies have been implemented, however, has varied across the three countries. Such differences can be explained with reference to two factors: control over constitutional amendment and previous leverage over constitutional judges. Regarding the former, as suggested by Bugarič, control over constitutional amendment can lead to a specific form of democratic regression⁴⁰ which, when it exists, has rendered obtaining executive leverage over constitutional courts less problematic. Regarding the latter, pre-existing leverage over constitutional judges has facilitated a 'cooperative' attitude on the part of the institutions when governments have tried to reform them.

For illiberal governments, obtaining leverage over constitutional judges is essential: it creates the scope to influence judicial decision-making and secure more favourable judicial outcomes. In Hungary, the Fidesz party, soon after

³⁹S. Gardbaum, 'The Case for the New Commonwealth Model of Constitutionalism', 14 *GLJ* (2013) p. 2229.

⁴⁰Bugarič, *supra* n. 18, p. 230.

winning the 2010 elections, changed the rules for nominating judges from a procedure requiring cross-party agreement to a two-thirds majority,⁴¹ which the party enjoyed in parliament. It then increased the number of judges from eight to fifteen, packing the court with loyalists.⁴² Leverage over judges was thus easily secured. Additionally, the powers of the court were constricted. Fidesz replaced the *actio popularis* with a more restrictive system of constitutional complaint.⁴³ It also restricted the powers of the court in fiscal and budgetary matters⁴⁴ and then the court was forbidden from using, as precedent, decisions issued before 2012, the year in which the constitution underwent a thorough revision under the auspices of the government.⁴⁵ The supermajority enjoyed by Fidesz that allowed it to change the constitution at will and legally appoint like-minded constitutional judges, facilitated a smooth takeover of the constitutional court in Hungary. Empirical evidence supports this idea. In his work on the Hungarian Constitutional Court, Szente found evidence of a correlation between the voting behaviour of judges and the appointing party and stated that Orbán was successful in ‘court packing by appointing as many new judges as necessary to assure the standing support for government policy. This effort proved to be successful as most constitutional judges’ votes coincided to a great extent with the political views of their nominators, regardless of the particular constitutional problem or the subject matter of the case’.⁴⁶

Things were a bit trickier in Poland, where the Law and Justice government did not enjoy a constitutional majority. Securing leverage over constitutional judges in that country took place by means of more complex strategies, some of which were legally dubious. Soon after taking office in 2015, the new government managed to pack the court with five handpicked judges. To do so, it first had to refuse the swearing in of three judges that had been validly appointed by the previous government, plus two that the previous government had appointed in a legally questionable manner.⁴⁷ Additionally, the Law and Justice government retroactively voided the terms of office of the President and Vice-President of

⁴¹ M. Tushnet, ‘Authoritarian Constitutionalism’, 100 *Cornell Law Review* (2015) p. 391 at p. 434.

⁴² Bugarič and Ginsburg, *supra* n. 12, p. 73; Landau, *supra* n. 2, p. 208-209.

⁴³ Bugarič, *supra* n. 18, p. 226.

⁴⁴ Landau, *supra* n. 2, p. 208.

⁴⁵ Bugarič and Ginsburg, *supra* n. 12.

⁴⁶ Z. Szente, ‘The Political Orientation of the Members of the Hungarian Constitutional Court Between 2010 and 2014’, 1 *Constitutional Studies* (2016) p. 123 at p. 146.

⁴⁷ Bugarič and Ginsburg, *supra* n. 12, p. 73. See also T.T. Koncewicz, ‘Of institutions, democracy, constitutional self-deference and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond’, 53 *Common Market Law Review* (2016) p. 1753 at p. 1755; Sadurski, *supra* n. 17, p. 19-21.

the Polish Constitutional Tribunal.⁴⁸ The second, interrelated pattern was once again limiting the powers of the constitutional courts, and the Polish government followed an imaginative tactic to do so. By an amendment of the Constitutional Tribunal Act, a two-thirds majority was required for any court decision to be binding and the quorum needed for a case to be heard was raised from nine to thirteen judges, disregarding the fact that there were only twelve judges on the court.⁴⁹ Furthermore, the reform gave the lower house of parliament the power to terminate a judge's mandate.⁵⁰ The most interesting outcome of all this was a declaration of unconstitutionality of the amendments by the Polish Constitutional Tribunal;⁵¹ this sparked a constitutional crisis between the institution and the government.

The disruptive strategy followed by the Polish government thus contrasted with the smooth strategy followed in Hungary, but also with the exceptional developments in Turkey. There, events gravitated around the 2016 coup attempt, allegedly orchestrated by the so-called 'Gülen movement', and the declaration of a state of emergency, which gave extensive powers to the executive. Soon after the coup attempt, President Erdogan issued an emergency decree allowing the removal from office of judges for their alleged connection with the said coup. Immediately, the constitutional court itself removed from office two judges on allegations that they had connections with the coup-plotters.⁵² Olcay has questioned the constitutionality of the removals and has argued that 'by dismissing two of its Members upon the indirect order of the executive, the Court jeopardised its indispensable role in upholding the Constitution, especially under a state of emergency'.⁵³ The judges were subsequently replaced by two individuals appointed by President Erdogan.⁵⁴ Additionally, the 2017 constitutional amendment will reduce the number of constitutional judges from 17 to 15 by abolishing two high military courts once the term of office of the two judges expires. The amendment has also changed the composition of the Council of Judges and Prosecutors, giving the President of the Republic strong leverage over the election of members of the Court of Cassation and the Council of State, each

⁴⁸ Koncewicz, *supra* n. 47, p. 1754.

⁴⁹ Bugarič and Ginsburg, *supra* n. 12, p. 73.

⁵⁰ Bugarič and Ginsburg, *supra* n. 12, p. 74.

⁵¹ Bugarič and Ginsburg, *supra* n. 12, p. 74.

⁵² T. Olcay, 'Firing Bench-mates: The Human Rights and Rule of Law Implications of the Turkish Constitutional Court's Dismissal of Its Two Members. Decision of 4 August 2016, E.2016/6 (Miscellaneous file), K.2016/12', 13 *EuConst* (2017) p. 568.

⁵³ Olcay, *supra* n. 52, p. 580.

⁵⁴ M. Haimerl, 'The Turkish Constitutional Court under the Amended Turkish Constitution', *Verfassungsblog*, 27 January 2017, <www.verfassungsblog.de/the-turkish-constitutional-court-under-the-amended-turkish-constitution/>, visited 15 January 2019.

of which nominates three candidates to the Constitutional Court, two of whom are appointed by the President.⁵⁵ This shows that, although the specific strategies differed, the general aim of illiberal executives in all three cases has been to increase control over the court by securing leverage over constitutional judges. It is important to note that the idea of ‘leverage’ does not equate here to total control. Constitutional judges preserve, in these situations, a certain degree of agency, and declarations of the unconstitutionality of government legislation are not totally absent.⁵⁶ Yet, executive action against the institution is clearly intended to increase the governmental influence over judges and is therefore aimed at undermining the independence of the constitutional courts.

The Turkish case was also characterised by a reduction of the powers of the constitutional court. The most crucial changes took place in the post-coup period, during which the institution reinterpreted its own powers to monitor the constitutionality of emergency decrees, which had become a frequent instrument of governance, asserting that they would no longer be accepted for review.⁵⁷ Some academics feared that this would give Erdogan the green light to pass whatever policies he wished by emergency decree, even those that threatened democratic guarantees.⁵⁸ In the end, the constitutional amendment promoted by Erdogan did not grant the court the power to mediate in conflicts between the parliament and the president in cases in which the latter had issued a decree that fell within the scope of powers of the legislator.⁵⁹ Both the case law of the court and the 2017 amendment seemed tailor-made to facilitate presidential use of the extraordinary powers of the state of emergency.

As stated above, we find evidence of similar goals – but different strategies – of illiberal control of constitutional courts that can be explained by a combination of control over constitutional amendment and prior leverage over constitutional judges. In the case of the Turkish constitutional court, the deterioration of the role of that institution seemed to be a sort of self-inflicted injury: the constitutional court itself had accepted a downgrading of its political role. This might be explained by Erdogan’s pre-existing influence over the constitutional judges, the latter being active in the support of reforms beneficial to the President. Alternatively, the attitude of the Turkish Constitutional Court might be explained as a form of institutional self-protection, given the state of emergency

⁵⁵ Haimerl, *supra* n. 54.

⁵⁶ See for instance B Çalı, ‘Will Legalism be the End of Constitutionalism in Turkey?’, *Vergassungsblog*, 22 January 2018, <www.verfassungsblog.de/will-legalism-be-the-end-of-constitutionalism-in-turkey/>, visited 15 January 2019.

⁵⁷ Haimerl, *supra* n. 54; A. Acar, ‘The Hamartia of the Constitutional Court of Turkey: Part II’, *International Journal of Constitutional Law Blog*, 4 April 2017, <www.iconnectblog.com/2017/04/the-hamartia-of-the-constitutional-court-of-turkey-part-ii/#_edn1>, visited 15 January 2019.

⁵⁸ See Acar, *supra* n. 57.

⁵⁹ Haimerl, *supra* n. 54.

and the fact that many judges and prosecutors had been removed from office or imprisoned. In Hungary, the Fidesz government obtained a similar degree of control over the institution, although this had been secured precisely by the constitutional reform of 2012. The capacity of the executives of Hungary and Turkey to pass constitutional amendments is crucial to explaining the way they approached the capture of their respective constitutional courts. Furthermore, in these two countries, Hungary and Turkey, the review benchmarks used by the respective constitutional courts are now constitutions that have been designed and drafted by illiberal governments, which should render their constitutional rulings less dangerous and more functional to the aims of the ruling elites.

In Poland, meanwhile, the initial situation was radically different, given the constraints on the government. The strategy of the Polish Law and Justice party seems, in fact, to have been suboptimal from the viewpoint of the preferences of an illiberal government, as it created conflict with the institution. Executive control over the Constitutional Tribunal was initially precarious. Unlike in Turkey and Hungary, the Polish Constitution had undergone no reforms under the auspices of the illiberal government. The Law and Justice Party did not enjoy the two-thirds majority necessary to pass a constitutional amendment in a context in which a wide range of aspects pertaining to the constitutional court is regulated by the constitution. Paradoxically, the need of an illiberal government to control the constitutional court becomes more pressing if it lacks the capacity to amend the constitution.⁶⁰ For that reason, the government was forced to take recourse to ordinary legislation whose constitutionality was, as stated above, dubious at best.⁶¹ This allowed the constitutional court, initially, to adopt a more resistant attitude vis-à-vis the reforms. Over time, however, the relationship between the Law and Justice government and the constitutional court has evolved to the benefit of the former. Sadurski suggests that after meeting with some initial resistance, the Polish government has finally managed to secure control over the constitutional court.⁶²

ABUSING LEGAL CONSTITUTIONALISM

As said above, the constitutional systems of Poland, Hungary, and Turkey could originally be associated with the tradition of legal constitutionalism, given the

⁶⁰ J. Fomina and J. Kucharczyk, 'Populism and Protest in Poland', 27 *The Journal of Democracy* (2016) p. 58 at p. 62.

⁶¹ For the full range of reforms imposed on the court, see the exhaustive analysis by Sadurski, *supra* n. 17, p. 25 ff.

⁶² W. Sadurski, 'Judicial "Reform" in Poland: The President's Bills are Unconstitutional are as the Ones he Vetoed', *Verfassungsblog*, 29 November 2017, < www.verfassungsblog.de/judicial-reform-in-poland-the-presidents-bills-are-as-unconstitutional-as-the-ones-he-vetoed/ >, visited 15 January 2019.

existence of a normative, entrenched constitution and a constitutional court tasked with protecting it. However, as I show in this section, illiberal interventions aimed at the constitutional courts in those countries have radically altered the role of these institutions. More specifically, I argue that there are at least three reasons why the new institutional setting in which illiberal constitutional courts find themselves is incompatible with the constitutional-protection functions of constitutional courts in the Kelsenian tradition.

First, the original purpose of Kelsenian constitutional courts was the defence of the constitution, to uphold democracy in the liberal sense, i.e. as a system of limited government. For Kelsen, 'the political function of the constitution is to impose legal limits on the exercise of power. To give a guarantee of the constitution is to create an assurance that these legal limits will not be overstepped'.⁶³ This approach to constitutional review sharply contrasts with illiberal constitutional practices. Illiberal constitutionalism often removes from the constitution or weakens liberal-democratic elements that have been the bread and butter of post-war constitutionalism, such as constraints on power or the protection of the rights of minorities. A good example of this is the concentration of powers vested in the President in Turkey's newly-reformed constitution. In Hungary, the constitution 'vests so much power in the centralized executive that there exist no real checks and balances to restrain this power'.⁶⁴ When constitutions include illiberal aspects, the defence of the constitution becomes something different from the defence of liberal democracy. In these circumstances, the benchmark for constitutional review lacks the elements necessary for constitutional court action to be an effective guarantee against illiberalism. Stated in different terms, constitutional courts lack in these contexts the tools to prevent democratic backsliding. As described above, this contravenes an assumption central to both Kelsenian thought and legal constitutionalism.

Then there is the question of governmental control over the institution. In his writings on the Austrian Constitutional Court, Hans Kelsen defended the idea that constitutional judges should be appointed by the parliament.⁶⁵ But the *raison d'être* behind such an appointment procedure had to do with the maximisation of checks on the executive.⁶⁶ At one point, Kelsen suggested that the best – albeit difficult – solution would be to keep 'all party-political influences away from the judicature of the constitutional court'.⁶⁷ Illiberal constitutionalism subverts the original Kelsenian thinking on constitutional courts – also in this very important

⁶³ Kelsen, *supra* n. 24, p. 175.

⁶⁴ Bugarič, *supra* n. 18, p. 225.

⁶⁵ Kelsen, *supra* n. 14, p. 187.

⁶⁶ Kelsen, *supra* n. 14, p. 188.

⁶⁷ H. Kelsen, 'Kelsen on the nature and development of constitutional adjudication', in Vinx, *supra* n. 24, p. 22 at p. 48.

respect. As we saw in the previous section, all three illiberal executives carried out constitutional court reforms that were intended to secure leverage over constitutional judges. This has important implications for the function of constitutional courts vis-à-vis the protection of constitutional democracy. If we again go back to Kelsen, we can observe one of the reasons he feared political control over the constitutional court. His words are telling:

‘The reform of the Austrian Constitution in 1929 ... provided that its members [of the Constitutional Court] should no longer be elected by the Parliament but be appointed by the Administration ... The old Court was, in fact, dissolved and replaced by a new one almost all the members of which were party followers of the Administration. This was the beginning of a political evolution which inevitably had to lead to Fascism and was responsible for the fact that the annexation of Austria by the Nazis did not encounter any resistance’.

The paradox of illiberal constitutionalism is that in the countries under study, such governmental control has been achieved while replicating many formal traits of the original Kelsenian court, including the Kelsenian idea of parliamentary appointment of constitutional judges.

Finally, rather than guard the constitution, subjugated constitutional courts become instruments of illiberal executives able to alter the meaning of the constitution through constitutional interpretation.⁶⁸ Kelsen stated very concisely but insightfully that ‘the constitution can be violated only by those who execute it’.⁶⁹ By seizing control over constitutional courts, illiberal actors subvert the function of protection of the constitution in order to achieve the opposite. Constitutional courts become, in these contexts, tools in the hands of the government to circumvent the constitution or legitimise unconstitutional policies. In this way, illiberal governments gain the power to validate eccentric interpretations of the constitution. This, again, runs contrary to the expectations of constitutional protection that lie at the core of the Kelsenian approach. I will return to this point later on in this article.

Taken together, these three traits have an important corollary: the constitutional courts of Hungary, Poland, and Turkey can no longer be said, with any degree of legitimacy, to be Kelsenian institutions. Although they are formally modelled on the post-war constitutional court prototype, they are unable to perform the functions attributed to these institutions under legal constitutionalism. Instead, as I will show below, they perform roles that are functional to an illiberal understanding of constitutionalism, and which are more

⁶⁸ See, for the case of Venezuela, Brewer-Carías, *supra* n. 17. For Poland, see Sadurski, *supra* n. 17, p. 13-14.

⁶⁹ Kelsen, *supra* n. 24, p. 174.

closely related to the protection of executive power than to the defence of the constitution.

HIJACKING POLITICAL CONSTITUTIONALISM

A more recent defence of illiberal reforms of constitutional courts involves an imaginative use of political constitutionalism. In a comment in *Verfassungsblog*, Adam Czarnota framed the events in Poland as a revival of this constitutional tradition.⁷⁰ He claimed that '[in Poland] recently legal constitutionalism stopped to be the only game in the city and political constitutionalism slowly is recovering ground in public discourse. It is possible to look at the present constitutional crisis in Poland as a struggle between two different versions of Constitutionalism: legal and political'.⁷¹ In his comment, Czarnota referred to Poland 'and some other countries in Central-Eastern Europe' with an ambiguous reference that seems to allude to Hungary, albeit not explicitly.⁷² Although Czarnota has acknowledged that the Law and Justice government had bent the law in order to hijack the constitutional court, in his view the aim was simply to draw the country closer to the postulates of political constitutionalism.⁷³

In this section, I discuss Czarnota's approach to the illiberal courts. I try to defend the notion that any attempt to justify illiberal reforms of constitutional courts as a new form of political constitutionalism is misguided and misinterprets the central tenets of that constitutional tradition. In doing so, I will try to show why the illiberal construction of constitutional courts is also incompatible with political constitutionalism.

We can identify two aspects of political constitutionalism that Czarnota tries to mobilise in favour of the intervention in constitutional courts in the cases under study. The first is the idea of deference to elected politicians. While, in the case of Poland, Czarnota acknowledges that the ruling party has appointed judges that represent its worldview, such a worldview is, according to him, simply based 'on the principle of supremacy of the Parliament in relation to constitutional review and acceptance of a rule of judicial restraint not judicial activism which was earlier the norm'.⁷⁴ The second aspect of political constitutionalism mobilised by the author is the idea of a 'thin' political constitution. Citing Blokker, he claims that the effect of legal constitutionalism in Poland has been 'a very shallow institutionalisation of the rule of law and the creation of a closed legal system

⁷⁰ Czarnota, *supra* n. 16.

⁷¹ Czarnota, *supra* n. 16.

⁷² Czarnota, *supra* n. 16.

⁷³ Czarnota, *supra* n. 16.

⁷⁴ Czarnota, *supra* n. 16.

which excluded citizens from constitutional matters. The place of excluded citizens was taken by lawyers'.⁷⁵ Providing a quite accurate description of political constitutionalism, he notes that, according to this constitutional tradition, 'the constitution belongs to the whole nation and citizens should have the opportunity to interpret and use it in their everyday activities The constitution is not an act but a never ending dialogue and postulates greater participation of citizens'.⁷⁶ He concludes by saying

'What happened in Poland, but also in other countries of Central-Eastern Europe is that legal constitutionalism alienated the constitution from citizens (...) I interpret the present constitutional crisis in Poland and some other countries in Central-Eastern Europe as an attempt to take the constitution seriously and return it to the citizens'.⁷⁷

Czarnota's arguments are imaginative and sometimes capture the gist of political constitutionalism, but I believe there are at least two reasons to reject his analysis. The first is rather basic. Simply stated, illiberal governments do not question the capacity of a judicial-type organ – a constitutional court – to invalidate legislation passed by parliament, as an honest attempt to implement political constitutionalism in these countries would require. On the contrary, illiberal constitutional courts still preserve, *de iure*, their capacity to declare the unconstitutionality of legislation. Instead of questioning this power, illiberal governments simply seize control of constitutional courts and use such power for their own political purposes, as I will show in the next section. I believe this point would suffice to reject many of Czarnota's claims.

The second reason is more theoretically elaborate. Under political constitutionalism, the political constitution is based on demanding mechanisms of political accountability and checks on power. As put by Gee and Webber,

'legal constitutionalists sometimes present the vagaries of ordinary, everyday political life as potentially destructive of the rule of law and individual rights and which, therefore, must be constrained by judicially enforceable constitutional prescriptions. Instead, the normative turn in political constitutionalism writing offers an account of how politics serves as the "vehicle" through which to realize these same (and other) ends'.⁷⁸

⁷⁵ Czarnota, *supra* n. 16.

⁷⁶ Czarnota, *supra* n. 16.

⁷⁷ Czarnota, *supra* n. 16.

⁷⁸ G. Gee and G.C.N. Webber, 'What is a Political Constitution', 30 *Oxford Journal of Legal Studies* (2010) p. 273 at p. 281.

Modern day political constitutionalists have proposed a wide range of such political arrangements to protect democracy. In Tomkins, the prevailing mechanism is ministerial responsibility and accountability to Parliament.⁷⁹ In Bellamy, it is the democratic process and the law-making function, emphasising majority rule in addition to party competition and periodic elections.⁸⁰ Furthermore, if we go back to Griffith's original argument, we can observe a strong emphasis on accountability:

'A further advantage in treating what others call rights as political claims is that their acceptance or rejection will be on the hands of politicians rather than judges and the advantage of that is not that politicians are more likely to come up with the right answer but that, as I have said, they are so much more vulnerable than judges and can be dismissed or at least made to suffer their reputation'.⁸¹

The question is not whether political constitutionalism demands that no constraints on power should exist. Rather, it claims that such constraints ought to be political in nature. The dismantling of such constraints is, therefore, incompatible with political constitutionalism and, more particularly, undermines the very premise allowing this constitutional tradition to claim that constitutional review is unnecessary. Political constitutionalism argues that legal constraints on power and institutions such as a constitutional court are unnecessary because strict political constraints are enough to hold such power to account. However, what we see in the countries under scrutiny is precisely the slow dismantling of such political constraints. In Hungary, the Fidesz party not only took control of the constitutional court but also restructured the electoral commission so as to gain control over it.⁸² It staffed the media council with its own members and then expanded its regulatory powers over the press.⁸³ It took control of institutions such as the national audit office, the public prosecutors, and the judicial council.⁸⁴ It lowered the retirement age of judges to gain control over the ordinary judiciary and fired the data-protection Ombudsman.⁸⁵ The recent attacks on the Central European University and civil society groups⁸⁶ are only the latest episodes in the process of illiberalisation in Hungary. In Poland, the Law and Justice government has passed laws dismissing all the boards of

⁷⁹ Gee and Webber, *supra* n. 78, at p. 284.

⁸⁰ Gee and Webber, *supra* n. 78, at p. 283-284.

⁸¹ Griffith, *supra* n. 29, p. 42.

⁸² Tushnet, *supra* n. 41, at p. 434.

⁸³ Tushnet, *supra* n. 41, at p. 434.

⁸⁴ Tushnet, *supra* n. 41, at p. 434.

⁸⁵ Pech and Lane Scheppele, *supra* n. 1, p. 8.

⁸⁶ Pech and Lane Scheppele, *supra* n. 1, p. 21.

public-service broadcasters and giving their control to the Treasury Ministry.⁸⁷ In addition to seizing control of the constitutional court, the government also fired all judges of the Supreme Court and replaced the leadership of the lower courts, while taking over control over the system of judicial appointments.⁸⁸ In Turkey, over 150,000 people were detained in the aftermath of the coup, including the purge of soldiers, police, judicial officials, civil servants, academics and schoolteachers.⁸⁹ Furthermore, the subsequent constitutional amendment put even more power into the hands of the President of the Republic, placing the system of checks and balances in the country under stress. Events in the countries under study have not only undermined the legal checks on power but also eroded political constraints and accountability, which are at the core of political constitutionalism.

Let us return to Griffith. In ‘The Political Constitution’, he clearly defines the political premise upon which his view of constitutionalism is based:

‘I believe firmly that political decisions should be taken by politicians. In a society like ours this means by people who are removable. It is an obvious corollary of this that the responsibility and accountability of our rulers should be real and not fictitious. And of course, our existing institutions, especially the House of Commons need strengthening. And we need to force governments out of secrecy and into the open. So also the freedom of the Press should be enlarged by amendment of the laws which restrict discussion. Governments are too easily able to act in an authoritarian manner. But the remedies are political. It is not by attempting to restrict the legal powers of government that we shall defeat authoritarianism. It is by insisting on open government’.⁹⁰

Griffith’s view was not that granting all powers to the parliament was sufficient for the political constitution to work smoothly, but rather that this had to happen in the context of a number of political conditions that he mentions. We can refer to these as the underlying preconditions of political constitutionalism. What we have witnessed in Poland, Hungary, and Turkey is precisely the undermining of such preconditions.

Finally, all of the above also provide compelling reasons to reject one final potential claim in defence of the reforms in the three analysed countries. No such claim was made by Czarnota, but I believe it is relevant to the discussion in this section. The hypothetical argument would be that because constitutional courts

⁸⁷ Fomina and Kucharczyk, *supra* n. 60, p. 63.

⁸⁸ Pech and Lane Scheppelle, *supra* n. 1, p. 19.

⁸⁹ Freedom in the World – Freedom House, <www.freedomhouse.org/report/freedom-world/2017/turkey>, visited 14 December 2018.

⁹⁰ Griffith, *supra* n. 29.

are particularly useful for countries in transition to democracy,⁹¹ once the transition is complete those institutions become unnecessary. Although this final argument is compelling, there are at least two grounds to reject it. The first is that, although it is empirically true that constitutional courts are often instituted in new-born democracies, this does not imply that they would not also be normatively desirable in consolidated democracies. The second reason is that the events in the three countries under study seem to disprove the very idea that they are consolidated democracies. Rather, even assuming that they had been at some point in the last decades, these countries are now facing a clear risk of undergoing democratic deconsolidation. A powerful, independent and functional constitutional court is, for precisely that reason, more necessary than ever.

THE INVERTED CONSTITUTIONAL COURT: CONSTITUTIONAL REVIEW UNDER ILLIBERAL RULE

The examples of Hungary, Poland, and Turkey show that we are witnessing the emergence of a new approach to constitutional review: the illiberal constitutional court, which now constitutes a *tertium genus* beyond legal constitutionalism and political constitutionalism. These institutions can be described as inverted courts: rather than exercising constitutional checks on political actors, illiberal constitutional courts become devices used by illiberal actors to rid themselves of constitutional checks in the context of hybrid regimes.⁹² This phenomenon, at the conceptual level, challenges our very notion of constitutionalism. If, with Sartori, we define constitutionalism as ‘a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a “limited government”’,⁹³ then illiberal constitutional practice can be defined as a new (un)constitutional tradition.

This disregard for constitutional constraints has dramatic consequences for constitutional courts, and for the idea of the normativity of the constitution. The notion of a normative constitution simply implies that constitutional provisions ought to be respected by public authorities and citizens and that they should be enforced. Illiberal constitutional courts are, from a constitutional theory perspective, devices of the *de-normativisation* of the constitution. In this regard, the illiberal approach to constitutional courts displays at least four distinct traits:

⁹¹ F. Ramos Romeu, ‘The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions’, 2 *Review of Law and Economics* (2006) p. 103; Stone Sweet (2003), *supra* n. 27.

⁹² See Moustafa *supra* n. 7, p. 286.

⁹³ G. Sartori, ‘Constitutionalism: A Preliminary Discussion’, 56 *The American Political Science Review* (1962) p. 853 at p. 855.

- (i) *Opportunistic instrumentalism*. Cas Mudde asserts that populist actors tend to have an instrumental attitude towards constitutionalism,⁹⁴ as is the case regarding their approach to constitutional courts. Rather than adopting a coherent attitude towards these institutions, their discourse and political practices shift according to the political needs and opportunities of the moment. Before securing control over constitutional courts, illiberal populists often frame these institutions as elite organs that constrain the exercise of the popular will, especially when judicial decisions run counter to their preferences.⁹⁵ However, as I suggested earlier in this article, once illiberals come to power, their approach mutates. On the one hand, they tend to curb the powers of constitutional courts in all those aspects that could constrain their rule, rendering the institution innocuous. The best example of this is the ban on the use of judicial precedent in Hungary, as explained above. On the other hand, however, they tend to maintain the courts' powers to the extent that they have secured control over the institution and can exploit it to their own benefit, especially as a means of getting rid of constitutional constraints. The result is an ad hoc, tailor-made institutional design, which is not intended to protect the normative constitution but rather the political interests of the executive.
- (ii) *Transformation of a constitutional constraint into a legitimising tool*. The former point bears a very important consequence. Under an illiberal design, constitutional courts are weakened in their role as a constitutional constraint on power. While formally retaining the power to overturn government-backed legislation, the *de facto* ability of the illiberal constitutional court to do so is severely curtailed, given the leverage of the ruling party over constitutional judges,⁹⁶ the selective restriction of court powers and – if the illiberals have drafted a new constitution – the innocuous nature of the benchmark for review. However, this type of court has an important ornamental function: it creates an aspect of normalcy in an otherwise constitutionally abnormal situation. In other words, it becomes a legitimising organ,⁹⁷ which preserves for the political system of the country a democratic appearance without implementing the checks on power that are at the core of liberal conceptions of constitutionalism.

⁹⁴ Mudde (2013), *supra* n. 4, p. 3. Mudde (2004), *supra* n. 4, p. 4.

⁹⁵ See B.E. Oder, 'Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular', *Verfassungsblog*, 2 May 2017, < www.verfassungsblog.de/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular/ >, visited 15 January 2019.

⁹⁶ As evidenced, in the case of Hungary, by Szente, *supra* n. 46.

⁹⁷ Moustafa, *supra* n. 7, p. 286-287.

- (iii) *Tool of constitutional mutation.* In addition, in these contexts, the constitutional court can be used to carry out processes of constitutional mutation, in which new meaning is attributed to the constitution to meet the changing preferences of the illiberal government. This is a phenomenon already masterfully explained by Brewer-Carías in the case of Venezuela,⁹⁸ and Sadurski in the case of Poland.⁹⁹ Illiberal processes of constitutional mutation can be carried out in a variety of ways. First, the constitutional court can declare materially unconstitutional legislation passed by the ruling majority to be constitutional. Second, the court can reject the review of the merits of unconstitutional legislation, thus *de facto* giving it a green light. Third, the constitutional court can declare the unconstitutionality of materially constitutional legislation passed by a previous government. We have already seen an example of this in Turkey, i.e. the emergency decrees. In the case of Poland, Sadurski has mentioned examples including the regulations imposed on the Council of the Judiciary, the President's prerogative of granting pardons, and the statute on the Supreme Court, all of which were legitimised by the court.¹⁰⁰ As that author put it, those episodes show that the Polish Constitutional Court 'is not merely paralyzed but actually used as a positive aid in dismantling constitutional guarantees and structures'.¹⁰¹ When constitutional courts are used by illiberal governments to reinterpret constitutional texts, the latter become devoid of normative content: constitutional provisions no longer have a meaning independent of the meaning that the illiberal government, aided by the constitutional court, forces them to have.¹⁰² While political struggles over meaning have always played a role in constitutional interpretation,¹⁰³ what we see in these cases is an indirect yet strong governmental political control of interpretative activity that erodes the nature of the normative constitution as a legal constraint on power.¹⁰⁴
- (iv) *Creation of perverse constitutional incentives.* Finally, the traits mentioned above are likely to have as a consequence the creation of perverse incentives. These, in turn, further help consolidate the power of the government and hasten the loss of the normativity of the constitution. Take, for instance, Kyritsis' argument on the incentives for the legislator created by constitutional

⁹⁸ Brewer-Carías, *supra* n. 17.

⁹⁹ Sadurski, *supra* n. 17.

¹⁰⁰ Sadurski, *supra* n. 62.

¹⁰¹ Sadurski, *supra* n. 62.

¹⁰² See Brewer-Carías, *supra* n. 17.

¹⁰³ P.J. Castillo Ortiz, 'The Political De-Determination of Legal Rules and the Contested Meaning of the "No-Bailout" Clause', 26 *Social & Legal Studies* (2017) p. 249.

¹⁰⁴ See Brewer-Carías, *supra* n. 17.

review. According to that author, in a normal situation, constitutional review ‘can actually enhance the legislators’ sense of constitutional responsibility, insofar as the latter will want to avoid the embarrassment of being exposed to the criticisms that they have violated the constitution’.¹⁰⁵ By removing the threat of punishment for unconstitutional action, the illiberal construction of constitutional courts creates a perverse incentive, namely by favouring an increase in the passing of unconstitutional legislation. Furthermore, the lack of efficacy of the constitutional court can create a second perverse incentive: if opposition members deem actions brought before the institution to be useless, they will end up bringing fewer cases, thereby allowing unconstitutional legislation to pass easily.

These four traits converge in one phenomenon: the de-normativisation of the constitution, which is achieved through executive influence over the constitutional court. This does not necessarily mean that constitutions fulfil no real function in these political systems. Constitutional provisions still provide for the basic institutional setting and rules of the polity. And constitutional courts might retain, to varying degrees, a modicum of agency to enforce such rules. But executive leverage over the institution weakens constitutional constraints on power. And by giving green light to government-backed legislation, the constitutional court legitimises executive action. The constitution becomes in these contexts ‘softer’ and more amenable to instrumental manipulation. Leverage over the constitutional court allows the government to implement its political agenda with less fear of constitutional restrictions, while at the same time claiming that its actions are fully constitutional and, therefore, legitimate.

The corollary is that constitutional courts are not institutions that illiberal governments feel compelled to maintain despite a secret willingness to get rid of them. Rather, these institutions are functional to the illiberal system of governance and fulfil a central role in the illiberal form of constitutionalism. They allow a subtle transfer of constitutional power that is characteristic of illiberalism: executive control of the constitutional court indirectly gives the government an important say in how the constitution should be interpreted. In political constitutionalism, the parliament is sovereign and constitutes the ultimate source of constitutional rules. In legal constitutionalism, the constitutional court has the last say over constitutional provisions. In illiberal constitutionalism, such powers of constitutional interpretation are gradually shifted from the constitutional court towards the executive. These systems maintain the appearance of a government subject to the constitution, yet they are engineered to produce a system of

¹⁰⁵ D. Kyritsis, *Where Our Protection Lies. Separation of Powers and Constitutional Review* (Oxford University Press 2017) p. 53.

constitutionalism subject to the government. Executive control over the constitution is often not absolute in illiberal constitutionalism, though. Empirically existing illiberal systems often face constraints that force them to depart from that ideal model: constitutional courts cannot always be fully dominated, opposition politicians often cannot be fully silenced, internal and international pressure forces illiberal governments to preserve real democratic elements, etc. At a more abstract level, however, illiberal disregard for checks on powers tends to lead to a scenario characterised by the *de-normativisation* of the constitution and the granting of the last say in constitutional matters to the executive.

According to Michel Rosenfeld, illiberal constitutionalism has ‘used the language and tools of liberal constitutions to turn them against the latter’.¹⁰⁶ After exploring the cases of Hungary, Poland, and Turkey, this statement must be taken literally. Inverting their functions, illiberal governments in these countries have gained substantial leverage over the institutions that should protect the constitution, precisely in order to undermine the normativity of the latter. This has a very important implication: if the mandates of the constitution, which – from a Kelsenian perspective – constitutes the source of validity of the legal system as a whole, no longer need to be respected, then a political community cannot be said to be ruled by law, but rather by the commands of a particular set of political actors that are above the law. The idea of rule of law slowly vanishes, in direct proportion to the loss of normativity of the constitution.

CONCLUSIONS

In this article, I have argued that the institutional design and functions performed by the illiberal constitutional courts of Hungary, Poland, and Turkey are incompatible with the normative foundations of both legal and political constitutionalism. At the same time, however, the analysis of illiberal constitutionalism is instructive with regard to these two constitutional traditions. Regarding political constitutionalism, processes of constitutional illiberalisation show that the political preconditions that make democracy possible are sometimes weak and easy to erode. This is relevant; constitutional review sceptics such as Jeremy Waldron base their rejection of this arrangement on the premise that, in a polity, democracy is solid and has a sufficient degree of consolidation.¹⁰⁷ The backsliding in young democracies that seemed poised to

¹⁰⁶ M. Rosenfeld, ‘Is Global Constitutionalism Meaningful or Desirable?’, 25 *European Journal of International Law* (2014) p. 177 at p. 197.

¹⁰⁷ Waldron, *supra* n. 37.

overcome authoritarianism, like Poland and Hungary,¹⁰⁸ shows the fragility of that premise.

The relationship between illiberalism and legal constitutionalism is tenuous, yet also more straightforward, especially because the countries studied here could be said to have belonged, at some point prior to their illiberalisation, to the group of continental Kelsenian-inspired legal systems. On the one hand, the cases show that illiberal governments do fear constitutional courts, as illustrated by the fact that, once in power, achieving control over these institutions was one of their primary goals. On the other hand, however, constitutional courts have been largely unable to resist illiberal tendencies in these countries and to prevent democratic backsliding. This puts constitutional courts in a difficult position, as the protection of democracy was, as we have seen earlier, one of their main *raison d'être*. Failure by Kelsenian-inspired constitutionalism to live up to its promise to protect democracy in the event illiberal actors reach power forces us to think seriously about how to improve this approach to political democracy, in order to meet the new challenges posed by authoritarian political actors in Europe and beyond. Furthermore, these damaged constitutional courts will remain in place once the illiberal governments finally lose power. Future political majorities will have to face the task of restoring these institutions and their function in legal constitutionalism: acting like a real constraint on power and an actual guardian of the democratic constitution. Reform of constitutional courts packed with judges loyal to the former illiberal government, dysfunctional from the perspective of their institutional design, and accustomed to the inertia of the illiberal period, will prove a formidable task.

Illiberal constitutionalism constitutes a novel (un)constitutional form of legal-political practice. Instead of giving the last say on constitutional matters to the constitutional court (as in legal-constitutional systems) or to the parliament (as in political constitutionalism), in illiberal systems, the executive is the ultimate *locus* of constitutional power. Through their control of the constitutional court, actors in power gain the capacity to bend and change constitutional provisions, depriving them of actual normativity. This not only undermines the idea of power subject to checks but also the notion of power subject to the law. Far from being of minor importance, attacks on constitutional courts are central to the processes of political illiberalisation: what is at stake in these episodes is the preservation of the very idea of democracy and the rule of law.



¹⁰⁸ Bugarič and Ginsburg, *supra* n. 12, at pp. 70-71; Bugarič, *supra* n. 18, p. 220.