



STATSVETENSKAPLIGA INSTITUTIONEN

Democracy and constitutional courts

-Is the veto power of constitutional courts compatible with, or even good, for democracy?

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Abstrakt

Denna uppsats vill undersöka huruvida en författningsdomstols vetorätt är kompatibel med demokrati samt om det finns tillfällen där vetorätten är bra för demokratin den använder sig utav narrow reflective equilibrium som är en normativ metod. Metoden innefattar att undersöka värden som i denna uppsats är ansvarsutkrävande princip, legitimitetsprincip och delegerings kedjan som ramverk för folkvilja. Uppsatsen undersöker om en författningsdomstol bestrider värden, resultatet nås när alla värden har enats huruvida en författningsdomstols vetorätt är kompatibel med demokrati.

Uppsatsen finner att författningsdomstolars vetorätt kan vara kompatibla med demokrati baserat på principerna, det existerar problem som behövs hanteras och utvärderas beroende på hur författningsdomstolen är konstrukturerad. Om dessa bemötts kommer författningsdomstolen vara kompatibel med demokrati. En svagare domstol är mer kompatibel med demokrati men har mindre möjlighet att förhindra demokratisk tillbakagång vilket kan anses vara skälet till att ha en författningsdomstol. Resultatet blir att finna en balans ger kompatibilitet med nyttigheterna domstolen kan ge.

Keywords: Constitutional court, veto power, democracy, narrow reflective equilibrium, legitimacy, delegation chain theory, accountability

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Introduction

Democracy is a political system that enables people to participate politically in society and shape how society functions. Democracy could be argued to have an *instrumental* value. It allows freedom, political equality, accountability, etc. This makes democracy a system in need of protection from harm because the effects it grants are desired. Democracy allows accountability which is a means to replace current leaders when they have failed to achieve the people's will. The foundation of democracy is usually the constitution, and therefore the changes concerning the constitution must be well-founded.

Democracy, while not flawless, is the best political system so far and is worth defending from democratic backsliding, which may be a daunting task; one solution would be to make the system slower and more robust by lessening the concentration of power increasing the protection of the constitution. Checks and balances is a term denoting that the power is shared among several institutions and that all these hold power over each other, imagine a triangle. The institutions are the executive (The government/President), the legislative (Parliament/Congress), and lastly, the Judicial branch (Constitutional courts) (Holcombe, 2018, p.7); however, the latter institution is not part of the democratic system necessarily as various democracies have decided to stay with two institutions or the legislature as the sole power institution. Baranik (2008, p.78) adds that the checks and balances system is a constitutional democracy that aims to solidify the rules of the political institutions and independent courts and preserve human rights; on this account, the essay believes that a constitutional court might be compatible with democracy. The balances and checks will serve as a belief that the veto right might be compatible with democracy and, at times, beneficial. The other principles will conclude whether it is compatible.

Holcombe (2018, p.7) writes that the constitutional court's primary task is the judicial review to examine if other institutions are following the constitution, vetoing if not. This involves a limit or constraint on the executive and legislature. If a political change violates the constitution, there are tools to revert the decision, also known as vetoing. Constitutional courts can often overrule an inappropriate change, effectively hindering the violation. This ability and constraint on the other institutions are thought to protect the constitution from harmful changes in terms of democracy.

The United States Supreme Court overturned a controversial restriction regarding abortion rights *Wade vs Roe*, a decision the judges took after interpreting the abortion restriction to be against the constitution (Britannica, 2022). One side most likely felt empowered by the court's interference as they won, while the opposing side may have protested. Whenever the court steps into difficult political questions the opposite side may question the court's legitimacy due to the lack of elective process. The veto aspect of constitutional courts in are democracies not without critique, as the bureaucratisation of democracy and giving veto power to a small non-directly elected elite might seem harmful or even anti-democratic. It is not odd to have the connotation of the rule of the people with the term democracy, and how would a constitutional court be compatible with the rule of the people?

A constitutional court with veto power can affect the democratic elected representative's ability to create new laws; the question lies in whether this is compatible with democracy. The court can stop both laws that will be in tune with the people as well as stop abuse. The example of *Wade vs Roe* is to showcase the power a court might have and that it can delve into controversial topics and how does this affect democracy?

This brings forth the topic of this study, namely the veto power of the constitutional courts in a democracy, are they compatible? Are there ever moments when the courts can be good for democracy by hindering rash lawmaking or will it interfere with the democratic function all too much?

Purpose

This study wishes to answer whether constitutional courts and their veto rights are compatible with democracy and, if so, why. This research intends to examine the research question by applying the principle of accountability, legitimacy, and delegation chain theory. These principles and theories serve as essential values in a democracy. If a constitutional court does not interfere with these values, then it can be assumed that a constitutional court is compatible with democracy. Suppose these values are instead not in an agreement. In that case, an example could be that a constitutional court may have legitimacy and lack

accountability. A value will either need to be re-evaluated as all the principles should find no reason to be against the veto right or a constitutional court's veto is incompatible with democracy.

The study will be using checks and balances as a hunch that there is value to the veto right in democracies; as explained earlier, checks and balances is created to hinder legislative abuse. This is an argument for a constitutional court; therefore, the study accepts this pro-argument at face value. While accepting checks and balances as a positive trait, other principles may outweigh those benefits. It may be difficult to separate the veto right and checks and balances. The checks and balances refer to systems with shared power among several institutions, and the constitutional court is one of those institutions. It is also important to point out that many democracies with power solely invested in the parliament without checks and balances have a low risk of democratic backsliding; meanwhile, there have been democratic backsliding in systems with constitutional courts.

The study will inquire about three different constitutional court veto values deemed crucial to democracy. One from the Delegation chain theory, which essentially is a framework for the people's will, one from the principle of legitimacy, and one from the principle of accountability. The delegation chain will aim to check if the veto power of a court distorts the will of the people.

Essentially, the purpose is to test a considered judgement, in this case, are constitutional courts are compatible with democracy and apply principles to conclude the research question. To reach an answer, the applied principles need to be coherent, agreeing that constitutional courts are compatible with democracy. As an answer will be reached, there will be a justification if democracies are compatible with the constitutional courts' veto or not.

The study will reinforce the academic debate on the topic as there is currently no given answer. The study has taken inspiration mainly from Waldron's (2006) and Lever's (2009) research. Waldron considers the constitutional courts to be incompatible while Lever finds the opposite and this study will reinforce one of these sides. What makes this study unique compared to the other authors mentioned here is the method. While both authors utilise

reflective equilibrium as this study does, the principles are different, changing the analytical process and finding nuance in the topic.

Definitions and Methodology

The research will use a normative method. The aim is not to determine how a constitutional court's veto works in practice; instead, this study wishes to justify having or not having a constitutional court's veto rights in a democracy based on principles and theory. An empirical method regarding the constitutional court's actual impact on democracies is worth studying, albeit it is equally important to understand the theoretical mechanisms behind the implications of the veto on democracy hence the abstract part of normative analysis plays a crucial role. A symbolic approach to understanding this is to imagine a map; the empirical approach may tell us where we are currently and how we may traverse to the next important stop. The normative approach asks where we should go and why.

This study will now operationalise key terminology beginning with the definition of democracy and later explaining what the research means by a constitutional court.

The research will stay with one definition of democracy, there are, of course, numerous definitions of democracy, but this essay is limited to one. Robert A Dahl coined the term *polyarchy*, which is the closest thing in practice to what Dahl considers democracy. Down below Dahl proposed several institutions that must be present in a state to be categorised as a polyarchy (Dahl, 1989, p.225).

- Control over decisions regarding policy vested in elected representatives.
- The representatives are chosen peacefully and removed in periodic elections that are free, fair and with little coercion as possible.
- All eligible adults should have the right to vote.
- Majority of adults should also be able to run for public office.
- The citizens enforced the right to freedom of expression, such as criticism of the government officials, the system itself and ideologies.
- The citizens also have the right to access alternative information, that is not owned by the government or one single organisation.

- The citizens have the right to join and form autonomous organisations most notably political parties and interest groups. The organisations must be allowed to attempt to influence the government or run in an upcoming election.

Dahl's definition is quite effective at capturing a wide range of varieties of states; Dahl's definition may then increase the value of this study as more states fall under this definition than many other democracy definitions. This is what this study entails by the term democracy.

Constitutional courts also come in varieties; however, this is easier to define. There are weaker and more powerful constitutional courts with different tools. The research question is regarding the veto rights of constitutional courts, constitutional courts that do not have this veto are not considered. Powerful constitutional courts like those in the United States and Germany are in this study, albeit not exploring other tools such as lawmaking. The study will discuss how the constitutional courts may be constructed as it affects the veto right and the principles verdict. There is a difference in how the veto right works as it usually overturns the decision. Gardbaum (2014, p.309-310) forwards the possible suspension element of the veto right such as those formerly used in the Canadian and South African courts, namely that the decision is not overturned; instead, it is suspended for a time and either the legislature re-works the change, or the change is ultimately denied.

The research will now explain the principles and how they relate to democracy based on Dahl's institutions regarding polyarchy.

The delegation chain is a theory based on a principal that elects an agent to act on their behalf (Lupia, 2003, p.33). This democratic chain is that the people elect an official to the legislature, the legislature may elect the executive, or the people elect the executive, the executive elects ministers, and the ministers elect public administrators. If the chain is broken and the will is not transferred, it is an agency loss. Agency loss is when the agent does not fulfil the desired consequences, this can be due to moral hazards or adverse selection (Ibid p.35). Adverse selection will be used in the research and is when appointing an agent without knowing their interests or preferences (Ibid p.41). To minimise agency loss, there are ex-post methods of hindering damage, ex-post is a means to punish the agent diverting (Ibid p.46), as an example the accountability of an election enables the people

(principal) to punish the officials (agent). It is of importance to point out that the theory does not on its own take a stand regarding if constitutional courts are good; instead, it provides a framework on how it can be reasoned to be or not. The delegation chain needs voting equality, effective participation, and inclusion to mimic the will of the people. Alternative information may be required for the ex-post method as information regarding the usage of the power invested by the principal for the agent needs to be monitored to ensure that the principal's will is fulfilled. Control of the agenda is also crucial for the ex-post method to fulfil the principal's will.

This brings us to the principle of accountability, the aspect of stopping and punishing neglect or abuse of power. It fits quite well with the ex-post element of the delegation theory as it is the same concept of preventing abuse. Judges may be harder to punish for going against the majority than representatives. Accountability matters for the study's democracy definition as accountability is needed for several of Dahl's polyarchic institutions, such as controlling governmental decisions and the ability to remove elected officials.

To conclude the definition section, we have arrived at the principle of legitimacy. Legitimacy is the right to rule, and lacking legitimacy, the institutions may not be able to enforce political changes rightfully. There are numerous reasons an institution is considered legitimate in terms of democracy the procedural background may be the most obvious, although not the only reason. It should also be noted that there is normative and empirical legitimacy. Normative legitimacy is the right to rule, while the empirical is who the people consider having the right to rule. The principle of legitimacy considers voting equality vital which is in line with most terms of democracy, including Dahl's polyarchy. Control of the policies is critical for legitimacy as a legislature diverting away from the will of the citizens causes distrust. Inclusion matters for legitimacy as citizens may find it harder to consider the legislature legitimate if they were not included in the elective process.

Continuing to the method section. The normative analysis consists of principles or values in which to justify a premise, in simple words it means to argue for an idea or concept, whether it is inherently good or not (Badersten, 2006, p.47-48). Principles and values are

fundamentally the same concepts and can be used to express whether something is good or bad and have a goal to reach a verdict on how things ought to be (Ibid, p.21-22).

Following academic order, the research will adhere to internal validity as proposed by Badersten (Ibid, p.103-104) to remain objective. The study will be precise and have clear definitions such as democracy, what kind of constitutional court, and the principles applied. The work will be argumentative and aim to eradicate inconsistencies or ambiguous arguments. The study will be as transparent as possible, as the arguments/principles will be taken from theories and, open and clear sources. Lastly, the work will have internal relevancy to stay on topic and limit the arguments to the question.

The precise normative method will be explained as the normative method and internal validity have been brought up. This research will use narrow reflective equilibrium to structure the arguments. Reflective equilibrium is the process and state of making a judgement on a case based on reasons, principles, and values to reach a verdict (Daniels, 2020). The goal of reflective equilibrium is to conclude what should be when there is uncertainty, furthermore reflective equilibrium can be modified when a new argument can be made (Ibid). Reflective equilibrium accepts a judgment when coherence among the applied principles/theories/arguments has been achieved. It is vital to point out that reflective equilibrium is not a test of truth, instead, it is a test of justification (Ibid) which is precisely what this research aims to make.

Narrow reflective equilibrium focuses on one type of concept as a fixed point (Ibid). Other aspects other than democracy could be tested regarding the constitutional court. In a manner of wide reflective equilibrium, it could be asked if constitutional courts are good without subjecting them to a specific value such as democracy. The research which stays narrow has the weakness that it will evidently miss alternative answers due to the limitation on the democracy definition and other possible principles and it being narrow compared to wide. The research limitation makes using the wide reflective equilibrium difficult as such this paper studies democracy alone. Researching a critical value as democracy exclusively together with a constitutional court's veto may be feasible to stay narrowed compared to the wide reflective equilibrium as the space for analysis would suffer if other things were studied such as justice or moral rights of the veto power.

To illustrate reflective equilibrium in a more straightforward case, take the habit of smoking. If smoking is permissible or not, we then apply essential principles to the case to find a conclusion. The two principles that could be used are freedom and do no harm. The freedom would point out that an adult should be able to have that freedom if they so choose, although the do no harm principle would add that the smoker harms themselves and their environment. We may seem at a standstill unless we revise/modify the situation. A possible solution would be that a smoker can only smoke in an isolated section, it does somewhat limit freedom although not wholly stopping the individual from smoking and the do no harm principle may accept the solution as it is only the smoker itself being harmed and not the environment. The principles were revised in order to achieve a coherent answer where a conclusion could be made.

Analysis

The analysis will consist of the two principles, the delegation chain theory, and will start with an issue each one has with the veto power and then try to settle them, after other aspects are studied.

Principle of accountability

Whereas elections take place quite regularly the elected judges can sit for twelve years as in the case of Germany or a lifetime as in the case of the United States while constraining the elected parliament's ability to make laws (Saalfeld, p.368-369., Committee on the Judiciary). This constitutes a significant challenge to the constitutional courts. The judges can have an outdated legitimacy, the legislature changes after elections while judges do not. In the Supreme Court judges have been criticised for being controversial and enacting policy over following the constitution, and the fact that they sit for a lifetime is problematic (L, Pacelle, JR, 2021).

Is it possible that there might be ways to hinder judicial abuse even with judges on long terms? Lever (2009, p.811) finds that it is true that there is limited accountability for judges

by the democratically elected legislature. However, Lever argues that there is accountability within the judicial process itself, and the damage to the accountability is lessened. The study agrees with Lever since the constitutional court has no way to enforce its decisions, other institutions must be willing to comply out of legitimacy. It is then a dire need for the constitutional court to hinder abuse on the inside to keep the legitimacy intact. A case of this was *Dred Scott V Sanford 1857* (L, Pacelle, JR, 2021), when the United States Supreme Court went against the people's will, the court overturned a decision that enabled formerly enslaved people to become citizens. The aftermath was severe harm to the Supreme Court's legitimacy for decades and serves as a historical example that the Court needs to be wary of the impact of its decisions.

The nomination of judges might be a potential hazard for the court, as the nomination can be very political. If a constitutional court's judges are mainly from one political party, the checks and balances system might be in jeopardy as the party controls several institutions. One party dominating the legislature can cause severe party politicisation and at worst make the political election rules uneven and essentially shut the court off, risking democratic backsliding. Pacelle JR reaches the same concern and argues that when a party or coalition has a legislative majority, the nominated judges may be controversial and viewed as too political (L, Pacelle, JR, 2021). If the court is too political, the veto could see little use depending on how cohesive the party is. Suppose all the checks and balances institutions are of the same party. The system's slowness may turn into a faster system, not unlike a parliamentary democracy with monopolised power.

The fact that the judges can hold positions for a long time complicates matters further, this delves into the accountability principle as there needs to be a way to punish judges if they are to go against the will of the majority. Take if a judge with a party association decides to make a controversial decision that might be in tune with the party or the opposite, against the party, the ruling party might not like the decision but keep the judge in case they would lose the seat in the court in the nomination if the judge were ousted. The issue is that it may prove too costly for the party to oust their judge if they might lose the seat and hence the veto power, in return if the party lets the judge stay, it can have negative implications in the next election for the party. It is equally important to consider that a judge should not be

able to be ousted too quickly, as that option may be usurped by the future constitutional abuser in the government.

There should ideally be possible routes for the citizens themselves to inquire about a judge straying too far from the people's will if the delegation chain should work properly, although the people cannot oust nor elect a new judge themselves there are alternative solutions. Lever (2009, p.811) forwards the prospect of public judicial decisions which can gather public interest and cause a public debate if the judges make controversial decisions. Essentially the decisions taken by the judges should be well-known to the public which might deter judges from public hatred and if such a decision is taken then the citizens might push their representatives to act, resulting in an impeachment. Furthermore, if the court strays too far from the majority, it can cause a decrease in funding and legislature limits the judges' salaries. legislature, the most extraordinary method is simply not enacting the decisions by the court (Lever, 2009, p.812). All these methods mentioned by Lever would not cost a party their seat and therefore be more inclined to punish the judge, this would mean there are ways to punish judges for making controversial. If the current legislation does not try to hinder the current judge, then the election will see them exchanged, and then the judges can be punished. Since the veto power is strong it can tempt parties to have their judges in the court regardless of how controversial they are, adding ways to punish the judges without losing seats can increase the willingness for parties to keep the judges in line, or else the party may suffer in the next election. It is a relatively slow method, but then again as claimed earlier the checks and balances is founded to be just that. The court can also aid the people with accountability as in an upcoming election the current ruling party might try to change the rules to be more advantageous if feeling threatened to be replaced, the court can limit electoral changes close to an election.

Constitutional courts can be held accountable both by the people indirectly and by the representatives after the people's verdict on the judge has been made, it does not mean it is necessarily easy as it is possible. The people need to know how the judges decide and the will to create a public debate. The representatives may find it harder to *want* to replace a judge rather than challenging, as the seat may be too powerful to risk taking it up by a new political party if it loses the nomination. The constitutional court's judges can be replaced if they misuse the veto power even if they may generally sit for an extended period although

not easy unless the judge's party has secured the nomination beforehand. There are ways to minimise the issues brought by the constitutional court as providing easier access to judicial review and lessening the veto rights impact on lawmaking by suspending rather than overturning. The problem might be that while a very weak constitutional court may be more compatible with democracy, it will also suffer limited ability to stop harmful changes to democracy.

The principle of accountability's main issue with the veto power is that the judges need to be held accountable when needed. Judges can sit for a long time while representatives reflect the people's will through regular elections. There can be limits on the terms the judges are elected on, and the legislature can oust judges while not easy and should not be used rashly. There are mechanisms inside the court to keep the judges in check, or else the legitimacy may suffer, and then the power they wield can be lost. It is concluded that the principle of accountability can consider the veto right compatible with democracy, though term limits would significantly ease the accountability process. Having options for the parties to punish the judges without possibly losing a seat also helps, an example would be after the term is over the party will not re-nominate the judge if straying too far from the will of the majority.

Delegation chain

Constitutional courts complicate the delegation chain by not being part of the democratic chain of delegation (Strom, 2003, p.77), which is since constitutional courts are not directly part of the chain as the people do not directly elect them, instead they stay on the sideline beside the legislature, and the judges are elected by the legislature, executive or a combination of both. The constitutional courts constrain the elected representative's ability to make new laws, hence a non-directly elected institution wields veto power over democratically appointed officials. The executive in parliamentarism is also non-directly chosen due to the representative democracy, however, the difference is that the executive is still replaceable after an election, while the judges are not really considered.

Constitutional courts are not directly involved in the delegation, making the ex-post difficult, it is primarily up to the agents of the principals that can punish the judges. Lever, as

mentioned earlier, argues that there are possible routes for citizens to take against the judges, such as public debates that push the agents to act.

Whether the complication is a significant issue, or can the constitutional court make up for the downsides. A constitutional court can interfere with and slow the will of the principals which may diminish the efficiency of the legislature to follow through with promises, and therefore the values of democracy might be harmed. However, a constitutional court can also stop extraordinary un-democratic changes to the constitution and prevent unequal changes to the playfield between political parties, adds Upriminy (2017, p.47) and discusses how in times of crisis the government may go awry with the power as the case of Colombia. Baranik (2008, p.89) agree with Upriminy and adds that a constitutional court has been the main obstacle to a straying political majority in the legislature. The veto right of a constitutional court can negatively affect the will of the principals, though, the veto can also protect the principals from unwanted changes or harmful changes to democracy.

Holmström (1998, p.77) writes that there are two ways for the court to do a judicial review: *concrete review* after the law has been made, and *abstract review* before the law is in place. The abstract review might be more compatible with the delegation chain as the court has one chance to either obstruct or let the change pass, the concrete review might be more complicated. The concrete review is good that the court will see the actual implementation of the change, although how long of a period should a court be able to overturn older decisions? The overturning might be used in the concrete review when the court considers the actual implementation to violate the constitution, the issue is the judge's interpretation of the constitution might differ depending on the values of the judge, resulting in a new majority going back on older settled cases. The new majority of judges can use the concrete review to affect old decisions that may be in tune with the people, which can distort the will of the people. The concrete review can also be used to protect the will of the people by forcing the implemented law to be as promised, adding the importance of having selected the ideal judges for the court.

A constitutional court could instead act as an alarm clock staying passive until changes to the constitution occur, such as changing the political rules to favour a party before the next election. This would lessen the interference in the will of the people on regular lawmaking as it is limited to only constitutional changes. While the alarm clock type of court has an

easier time being compatible with the will of the people, it has no veto power on important regular lawmaking which can affect the constitution. An example of how an alarm court can be good would be if the legislature tried changing the constitution for elections and adding that extremist parties cannot run and then ban parts of the opposition that could have constituted a threat. The downside is that a constitutional court could become redundant as the legislature can try to circumvent changing the constitution directly to enact the changes anyhow. The alarm clock court can avoid potential debate when future lawmaking is in the hands of the legislature. The court may infringe, arguing it concerns the constitution, causing a stalemate.

The complication derived from the constitutional court is not directly elected, and the fact that the ex-post method is hard to accomplish by the people as the judges are not voted out after an election. A directly elected court would be able to be held accountable directly to the people if misusing the will of the people. The first question that arises is, would a constitutional court differ from an upper chamber in a bicameral system? It would be weaker as it would be limited to constitutional agendas meanwhile an upper chamber does not have that limit. A bicameral system may be harder to combine with democracy than one singular chamber if two widely different wills by the principals are elected, the result is a system with a distorted will of the people. As the constitutional court is less powerful it creates less distortion even if the judges might be elected without the people's interest due to the limitation on their power. It is not unreasonable to assume that voter turnout may be low on a constitutional court, while powerful it would still not be in the spotlight as the legislature is. A lower turnout of votes may weaken the court and, at worst, be appointed by a political minority, distorting the majority's will in the delegation chain. The ex-post method would be of greater use as the people can simply vote for a different judge directly in the chain if they are unhappy with the decisions made, which would be a positive change in terms of the delegation. Bicameral systems are not incompatible with democracy, it needs to be pointed out, however, they may complicate matters.

Another question is how a judge would be nominated to run for being elected. Can anyone run, or do they need legal experience, party affiliations, or a combination? The delegation chain theory has a concept of ex-ante screening (Strom, 2003, p.67-68). The screening method is to make sure citizens know that their elected has the capability and will to follow

the principal's interest before being elected. If no experience is required, how do the citizens know that their elected is competent in the field? If there are no party affiliations, how do the citizens truly know their candidates will as parties have their screening method to ensure they have the will to follow their interests. Without parties, the representatives have no constraints until the next election. This is how political parties nominate and control their candidates for the legislature, however, this could be applied essentially the same regarding the judge's nomination and elective process. This is to decrease adverse selection, namely when the wrong candidate gets elected over the ideal candidate, the screening mechanism tries to reduce it. If judges are directly elected, they may fall for making popular decisions, popular at the time, and less likely to keep the constitution intact from fast and thoughtless decision making that can be harmful to the democracy in the long run. The process of incorporating the popular decisions that can be translated as the will of the majority should be in the representative's area of responsibility; meanwhile, the constitutional court safeguards the constitution from rash change, which can be harmful.

The counterargument to the easier ex-post is that the ex-ante would be more difficult, resulting in less-than-ideal elected judges. The ex-post mechanism is strengthened when a constitutional court exists, Bassok (2013, p.171) writes that a constitutional court can keep the people's will intact when a political stance becomes popular. It may warrant quick changes in the representatives leaving the view they were initially elected upon to get good public polls by the next election. The result is that the constitutional court may keep the legislature bound by the promises made before the election to their principals which then enforces the will of the people and hinders quick changes due to popularity.

It can be concluded that directly elected judges may not be compatible with democracy based on practical issues as discussed above, hence has not been implemented in practice and is not optimal for the delegation chain theory either.

There is no straightforward answer regarding the ex-ante and ex-post methods which is more critical to the constitutional court as there are pros and cons. Because it would be a weaker copy of an upper chamber, may have low voter turnout, and the negative aspects of politicisation of the judges. it can be concluded that it is better to have the legislature elect judges with merits based on representative democracy, basically the principal's agent should elect a judge with merits.

Guardbaum's (2014, p.309-310) notion of suspending decisions rather than overturning them is interesting as this will result in less power to the constitutional court as it cannot entirely deny a change but rather tailor the implementation to fit the constitution whilst keeping the will of the principals intact as possible. With less power invested in the constitutional court, the importance of members of the party, being the judges, lessens, and therefore the possible politicisation is also decreased. Suspending rather than outright overturning decisions would reduce the distortion of the principal's will and enable the agent to make the most similar decision without violating the constitution. While this would not solve the complication of the court's effect on the delegation chain it would serve to keep the initial change as similar as possible without crossing the constitution and symbolic meaning that the courts cannot outright deny the will of the people.

Certain constitutional courts can receive a judicial review from the legislature as well as citizens can report a review, as the case of Germany (Bundesverfassungsgericht), citizens had successfully overturned decisions before (Holmberg, 1998 p.382-383) when citizens overturned a violation of citizens' rights when the citizens were wiretapped unknowingly. This would imply that constitutional courts such as the German court can act as an ex-post method for the people against the legislature, therefore increasing the influence of the principal over their agent if they turn to moral hazard by a different means than an election that takes place periodically. The other interesting element of the German constitutional court is that the court only reviews submitted applications (Bundesverfassungsgericht) which minimises the judge's influence on the daily agenda while still hindering un-democratic changes.

The delegation chain theory's main issue with a constitutional court stem from the complication the court causes the chain of delegation. This could be alleviated by having judges directly elected though this would possibly lead to adverse selection and increasing politicisation which would hurt the principle of legitimacy explained shortly. To be in coherence with legitimacy, that solution will be abandoned, instead, other changes can be made. The suspension of decisions rather than outright overruling will lessen the distortion of the people's will. The constitutional court can itself stop unpopular changes taken by the agent once elected and therefore act as an ex-post mechanism to combat moral hazard. The complication of the chain cannot be fully dealt with, again, the complication does not

necessarily mean incompatible with the theory and the veto, the complication can be reduced by adding the suspension aspect and enabling the ex-post mechanism to keep the representatives in check. The delegation chain theory may consider the veto right compatible by the account of such measures taken.

Principle of legitimacy

The procedural principle is the legitimacy of the elected, an institution elected by the people can enjoy greater legitimacy than other institutions due to the influence of the people. Constitutional courts are not directly elected and wield a great deal of power this could be challenging to combine with democracy based on the procedural aspect. Before tackling this argument, it may be good to point out that there are various reasons that a constitutional court can be considered legitimate and that there is a normative contra empirical perspective. The normative account provides why the constitutional courts have the right to rule, take as an example if the judges are chosen by merits and therefore is an expert or elite faction within the system that could offer legitimacy. The empirical aspect is why citizens admit court decisions as legitimate, and the expert argument might not be why citizens follow those decisions.

Returning to the argument, Waldron (2006 p.1387) argues that a citizen is more likely to accept a decision they disagree with if it was decided fairly, in which a democratically elected body made those decisions as the legitimacy derived from an election would outweigh a decision made by a small elite group (the judges). Waldron appeals to the empirical aspect, meaning that citizens are less likely to follow a constitutional court in practice as they consider the legislature the rightful ruler due to the electoral process. Waldron (2006, p.1394) proceeds to argue that judges, even when elected by representatives, are comparably worse in legitimacy than the legislature, this argument stems from Waldron's statement that the legislature understands the will of the people better than the judges due to the electoral process. It is quite difficult to argue that a few non-directly elected individuals that encompass veto power over elected representatives, can be equal with the directly elected regarding procedural legitimacy, however, what if the legitimacy is based on a different motive? Bassok (2013, p.160) writes that a democratic

system does need the people's consent to function, although one institution inside the system may not need popular consent, instead of adhering to competence. Competence can be interpreted as the expert role of the judges and that they have merits, there are several ways that a court can enjoy legitimacy beyond the procedural principle.

Lever (2009, p.808-809) agrees with Waldron's argument, though adds that the procedural value in democracy might be overrated as representative democracy is flawed. Lever brings up the descriptive issue in representative democracy as the elected legislature seldom matches the population in terms of gender and ethnicity and the notion that some groups are more influential in a democracy, which results in a discrepancy in Waldron's argument. Lever means that since the legislature rarely matches the population, the legislature cannot understand the people's will when an amount of people is excluded. The argument made by Lever could be understood as a descriptive value of democracy, namely that the elected body should mimic the population and the sphere of influence within the democracy. This is a normative legitimacy argument as Lever criticises the legislature as a rightful ruler when it fails to match the people that elected them and argues based on this premise that a constitutional court does not lack legitimacy any more than the legislature as they both fail to envelop the will of the people fully. This research will not study the descriptive value regarding democracy and legitimacy, however, wish to provide different perspectives that procedural legitimacy is far from the only legitimacy.

A directly elected court may have procedural legitimacy, however, as it was concluded earlier it will bring other negative aspects, these must rely on a different legitimacy. The court's legitimacy, which is based on expertise should have the decisions based on the constitution and protect principles, vulnerable groups, and the democratic rules (Bassok, 2013, p.158). That view is a normative legitimacy as this serves as why the court has the right to rule, how does the former sentence work empirically for the court? Analysing the United States Supreme Court, the Pew Research Center finds that the American people dislike politicisation within the Supreme Court (Pew Research Center, 2022) and that this is regardless of ideological affiliation or partisanship. This could be interpreted as a negative view on party politics affecting the court, although it is also brought up that the Supreme Court has low approval on staying neutral. Interestingly (L, Pacelle, JR, 2021., Bassok, 2013 p.165) the Supreme Court has a higher approval rating by the citizens than Congress and

often more than the President enjoys. Pew Research (Pew Research Center, 2022) also adds that partisanship still matters, while most citizens wish to have a neutral court, it seems that judges elected from their party have higher approval, as they believe their judges to be impartial and the opposing side to be more biased.

If returning to the normative legitimacy, the constitutional courts may enjoy such if the judges remain neutral rather than following party politics although difficult to maintain and empirically it seems the neutrality does not matter if it is their partisan judge. A critique of the expert role has been forwarded; Bassok (2013, p.167,170) writes that the public used to see the law as a natural occurrence and the judges as experts of this, in reality the judges can decide how to interpret the constitution according to their preferences. Bassok does not mean that the expert legitimacy is false, instead, it is declining due to the politicisation of the judges. Baranik (2008, p.81) argues that, for the most part, the constitutional courts have done what they have been made to do, namely interpreting laws and deciding cases, even if judicial activism may occur, and there is simply no better alternative for handling the court's responsibility. The legitimacy of the court is heavily dependent on the expert role, and politicisation may harm it, the question is when has politicisation taken place, and how common is it? How can it be reversed?

The fact that constitutional courts can have legitimacy does not mean that Waldron's analysis that the elected has higher procedural legitimacy than the courts is wrong, rather, it may simply mean that the procedural aspect is not the utmost important reason for legitimacy for the constitutional court. The procedural principle may not be as crucial for legitimacy as it may seem, of course, legitimacy itself matters, or the citizens would not follow the decisions. The mere fact that the judges are supposed to be independent and experts on the constitution is where the legitimacy is derived from, and the representatives, meanwhile, are the people's voice. Essentially the court can be the expert, and the legislature act at the people's will recalling what Baranik mentioned earlier, the balance between these two will create an efficient democracy. Efficient democracy can be interpreted as a balance between realising the people's will and hindering changes that may harm democracy.

Another aspect is that the constitutional courts can give legitimacy to a government if prior election results were uncertain or very close, the court can announce the winner of the

election as an impartial entity. It is an essential tool that the court can then enable the voters of the losing party to acknowledge the election results. Therefore, the government's legitimacy may not remain questioned throughout the entire mandate until the next election.

A constitutional court's veto can hinder mob rule, which is when the will of the majority infringes on minorities' rights, as it can protect unpopular groups from having their rights infringed upon, for example taking away religious freedom from a small minority (L, Pacelle, JR, 2021). This can give legitimacy to the court as it can be seen as the voice of the political minority. Waldron (2006, p.1396) points out that the constitutional court's veto may not always be seen as fair to the citizens and can harm legitimacy. Whenever the constitutional court takes a side, the opposing group may find it unfair that a non-elected group stops popular changes backed by the majority. Going back to the overturn of abortion restrictions, Waldron means that the pro-life side feels like the fetuses are victims of a majority rule, and if the pro-choice lost, they would feel like the women's rights are subject to the will of the majority. Political changes that a constitutional court decides may indeed cause a dislike by the political majority. However, the same could be said about a legislature as there will often be changes that not everyone will agree on. Waldron, of course, means that the procedural aspect of the legislature makes those decisions fairer and more legitimate than a constitutional court's decision, however, keep in mind that the constitutional changes during the Weimar Republic were made by the legislature which had the procedural legitimacy of the political majority at the time and the result was horrific. A constitutional court's veto rights could hinder the abuse against the elected legislature's political majority. Bassok (2013, p.170) argues that the court's legitimacy may be derived from that very aspect, to protect the rights of the citizens, as the court can be the last line of defence.

The counterargument to Waldron is based on an extraordinary historical event that can be criticised for being narrow, although powerful. While it is unlikely to occur again and hopefully so, it can happen, albeit perhaps not in the same manner. A constitutional court's veto could enforce protection against such a change. The veto power while complicating the rule of the majority can have legitimacy based on the protection for the "losing" side after an election. A constitutional court's veto can, under normal circumstances maybe, be compatible with democracy, however, in these exceptional events, the veto might provide

valuable protection, potentially a helpful shield as a last resort. Essentially a constitutional court can be constructed to slumber in regular political times and awake in times of need, an *alarm clock*. The alarm clock would serve as a watchdog for constitutional changes; the court will review the change whenever a constitutional modification is considered. If the change is deemed wrongful, the court will deny the change, using the veto power. The constitution is supposed to protect the rights of the citizens and keep the political rules equal; these are the bedrock of democracy and need special protection.

As pointed out before, the American citizens prefer the Supreme Court to be less influenced by party politics which in turn would give the judges more power without party constraints. If the judges have less control from a party, they can use their judgement and knowledge more, which would signify the expert role of the court. The downside is that the judge may drift too far without the party's constraints and keep in mind that the parties represent the people, and as such, a balance is needed. The role as an expert seems more likely to influence the legitimacy of the constitutional court than the procedural aspect via ties to the people by electoral means. The court could normatively have legitimacy as an expert role; however, if there are too many party influences, that legitimacy might suffer empirically. The study also arrived earlier that increasing the electoral ties by directly electing judges would be ill-suited. It would be hard to distinguish between an upper chamber and the increasing politicisation of the judges. This would mean that judges should not be directly elected either, as it may cause harm to the expert role and turn into a popularity contest. The party's significance is that they help find the experts, and while party politicisation is harmful, the party constraints are needed but at a moderate level.

The principle of legitimacy has been analysed; the primary argument against the court's veto lies in the procedural aspect, namely that the court is not democratically elected per se. However, the procedural part is not the only possible way to gain legitimacy; the expert role of the judges can be argued to complement the lack of an election. The danger to the legitimacy comes from the politicisation of the judges, which may harm the role of an expert.

Conclusion

All the principles will be reviewed and concluded shortly, and a model depicts different kinds of courts constructed differently. The model adds nothing new, simply showcasing what has been discussed for a more accessible overview. Then the study will go on with the results and future research.

Principle of Accountability

The principle of accountability can co-exist with a constitutional court. The court can serve the citizens when the legislature goes too far, and the legislature can punish the court in return for doing the same. It may seem that judges with powerful veto rights should hold positions for a shorter time to increase accountability and potentially term limits like the German court.

The principle of legitimacy can have numerous reasons as to why it works, the research looked at two reasons, and mentioned an alternative one, albeit still, there are more perspectives as to why. The study, which applies a narrow reflective equilibrium to look at a few cases or situations to reach a judgement, revised the legitimacy to merely mean expert institution as a reason rather than procedural legitimacy. Narrow reflective equilibrium sometimes revises a principle to achieve coherence among the principles in order to make a judgment. The principle of legitimacy may provide different outcomes depending on where the legitimacy is derived from. If legitimacy means the procedure in which the judges are elected, then the result for a constitutional court might be weakened.

Constitutional courts can be compatible with the principle of accountability, although there are issues with the term limit due to the nomination process possibly being controversial and the mighty veto power which also can harm legitimacy. There is a need for the parties to punish their judges if they abuse their seats without losing influence while simultaneously keeping controversial nominations low. Having limited terms and lessening the veto power by freezing rather than overturning the power of the judges is reduced. Reduced power invested in the judges makes the seat less essential and easier for parties to punish their appointed judges willingly.

Delegation chain theory

The court complicates the chain of delegation, though complicates does not necessarily mean incompatible, rather constitutional courts can act as an ex-post method for the theory

and therefore be seen as beneficial. The delegation chain theory may be more compatible with the directly elected court to avoid the complication of the court in the delegation chain. However, we concluded that were other issues in that regard. The temporary suspension of a decision may lessen the distortion of the will, and together with the added ex-post method, it can strengthen the delegation in that aspect. Constitutional courts take a unique position in the delegation chain; constitutional courts are not elected by the people instead it is a representative that selects them. The theory inquires that there is a need for ex-ante, ex-post, and the people's will to flow through the chain, and a constitutional court can be compatible with the delegation. There is no answer on how a constitutional court can be simplified and transitioned into the theory. Although not elected, it is currently equal to the legislature and the executive. The constitutional court can provide further ex-post control of the elected by hindering changes against the people's will. Ex-ante control is compatible with constitutional courts as there is screening by merits and parties at the cost of being freer to elect whomever. The constitutional court's veto power can be compatible with the delegation chain even with the complication it brings. In contrast, further complications utilise the ex-methods that the theory considers vital to realising people's will.

Principle of Legitimacy

The procedural principle cannot wholly be swayed to agree with a constitutional court in democracies. Legitimacy in democracy may at first give the connotation that the procedural principle must be the utmost necessary legitimacy for democracy, however, not all institutions rest upon the same legitimacy. It is vital to distinguish between legitimacy and procedural principle. Indeed, judges will never have the same amount of legitimacy based on the procedural principle, the question lies if the court needs procedural legitimacy in the same form as the legislature. Judges should be elected based on merits and stay impartial in constitutional matters, can enjoy normative and empirical legitimacy. The most important aspect is the balance of the judge being free as an expert and, at the same time, having constraints from the other institutions not to stray too far from the people's will. If the balance is met, then the constitutional court is compatible with the principle of legitimacy. It will enjoy both normative and empirical legitimacy while also not being safe to stray too far which might threaten the empirical legitimacy. The research finds that constitutional courts

have other aspects of having legitimacy. The expert role that the judges may possess is the most optimal reason for the courts to achieve legitimacy in both the normative and empirical meaning if the party politicisation remains low.

This study has demonstrated that, for the purpose of determining whether a constitutional court's veto is compatible with democracy, it is crucial to understand what kind of court we are considering. The model displays four different kinds of courts, two from reality and two theoretical. The purpose of the model is to show how the construction of courts changes compatibility and to compare the compatibility between them.

	United States	Germany	Directly elected court	Alarm court
How are judges elected?	President elected with Senate approval	Dual-Legislature	Directly elected	Legislature
How long is the term of the judges?	Lifetime	12 years with no re-election	Same term as the legislature	Lifetime
Areas of influence?	Anything regarding the constitution	Anything regarding the constitution upon application	Anything regarding the constitution	Only constitutional changes
How does the veto function?	Overturing decision	Overturing decision	Temporarily suspending decision	Overturing decision

If we look at the first court located in the United States, it has accountability issues as the judges sit for life and have powerful overturning veto power. The American citizens also

express the need for independent judges in line with the model, namely that a strong court can interfere with the daily agenda and may become a political tool for the parties. The United States have the president nominate the judge, and the Senate approves the candidate, this should somewhat lessen the politicisation as it involves several institutions with elections at different times. The United States Supreme Court is the most famous example of the checks and balances which this study considered to be a pro-argument, but the court suffers from potential politicisation, with the unlimited terms and powerful judicial review it may harm legitimacy and accountability. The Supreme Court is compatible with democracy though less so than certain other courts.

The second court, the German court, has more compatibility with no lifetime sitting, and judicial review is limited to application, meaning that the court does not interfere unless asked. It waits for cases to be reviewed. This means anyone can submit a review regardless of power status and might keep the politicisation lower when the court has less power. The court might be more compatible than the United Supreme Court due to the term limits and less interference in regular lawmaking while still capable of hindering un-democratic changes. The German court is less likely to be politicised due to how the judges are elected, half of the judges are elected by the Bundestag, and the other half is shared among the two chambers (Saalfeld, 2003, p.369). The implication is that a party or coalition will need a majority in several institutions to get a majority in the court.

The third court is the directly elected court, the model provides two unique aspects with the directly elected judges and suspending lawmaking. It was concluded that directly elected judges might aid the function of the delegation chain while increasing the politicisation and becoming a weaker second chamber in practice. The suspension aspect makes the court more compatible as it has less power to hinder popular changes while still protecting from un-democratic changes. The only drawback of suspending a decision is that laws might be slow to be enacted if the political suggestion must go forth and back between the legislature and the court until both parties are satisfied. Because the directly elected judges compromise the expert role becoming a popular vote instead and increasing adverse selection it is not compatible with democracy, albeit the suspension element is a positive trait possible good for the other courts.

Lastly, the fourth court, the alarm court. This court is perhaps the most compatible with democracy, however, it is the weakest court even with lifetime sitting judges. The fact that the court is limited to only changes to the constitution itself means that it will not hinder un-democratic changes beyond the constitution. If the constitution encompasses a lot of laws and rights, then this court would be more powerful. The less powerful court the easier it is to agree that it is more compatible with democracy than other forms of courts. The less powerful courts may be too weak to stop un-democratic changes when they do occur which would take off the possible benefit the veto power can have in a democracy.

This research finds nothing inherently wrong or disadvantageous with adopting a constitutional court with veto right in a democracy, the theory and principles did not hinder

the conclusion. Certain principles had to be slightly revised in order to reach a conclusion. The veto power can be beneficial to democracy in times of uncertainty for democratic values as it may guard the political rules and rights of minorities. However, a court that has been politicised will not hinder such changes and may even become incompatible with democracy based on these principles. In short, a constitutional court is compatible with democracy, however, it is not always the case, and having independent judges or at least non-politicized judges is key to preventing it. The weaker a constitutional court is, the more compatible it is with democracy, however, a more powerless court has less of a chance to prevent un-democratic changes without powerful tools to combat this. To have a constitutional court compatible with democracy while still adding value to the court, a balance is needed between these two. A court elected by multiple institutions and does judicial review upon application as in Germany, having the suspension mechanism as in Canada and South Africa and term limits on the changing judges periodically, maybe every two or three elections or so. This proposal on how a balanced court might look, although more research is required.

Future research

The research wishes to reinforce earlier studies' conclusions on how the constitutional court's veto power is compatible with democracy and where a constitutional court can benefit democracy. There have been several studies on the topic, yet no unified answer to this question has been made. The study will most likely not create an answer that will end the debate, however, again, wish to reinforce and support one side's result. The research using a normative method and narrow reflective equilibrium means that the value analysis will be different from former studies and may find a new principle or value in correlation to the question to justify the constitutional court. Future research could add different values or cases to arrive at new results.

There will likely never be a clear end of discussion answer to this question, as we see different kinds of institutional systems with or without implementing a constitutional

court's veto right. Democratic backsliding has occurred in institutional systems regardless of the existence of a constitutional court or not and cannot be the single variable that democratic backsliding is hindered. An interesting prospect of research could be a comparative analysis of how often states debate on adding a constitutional court versus how often states debate dismantling them in terms of democracy.

Hindering politicisations of the courts was an essential factor for several of the principles to be deemed compatible, it is then vital for more studies on the politicisation inside courts, such as in Hungary and how to revert such changes once placed.

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