論　説

Legality, Constitutionalism and the Role of Judicial Review: a Comparative Approach

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Abstract

The nature and scope of judicial power lies at the centre of contemporary constitutional debate in many countries around the world. In some jurisdictions, constitutional reform has transferred considerable power from representative institutions to judicial authorities, notably constitutional courts, which are entrusted with the task of safeguarding core values and fundamental human rights. The present work explores how countries belonging to different legal traditions approach the issue of judicial power and assesses whether New Zealand should reform its judiciary's institutional design along the lines of models adopted in other countries. Part I provides a brief overview of the constitutional role of the courts and the function of constitutional review. Part II compares centralized and diffused systems of constitutional review, with particular reference to the German Federal Constitutional Court, the South African Constitutional Court and New Zealand's constitutional review system. Part III assesses these different structures of constitutional review and their impact on judicial empowerment. Following this comparative analysis, the author's thoughts concerning the desirability and feasibility of establishing a New Zealand Constitutional Court are outlined in Part IV of the work. Drawing on Philip Joseph's notion of 'collaborative enterprise',[1] the present paper argues that the political and judicial branches should work together to safeguard democracy and the values of the rule of law.[2] Judges should respect Parliament's democratic mandate to legislate while Parliament should recognize the courts' duty to check that the political authorities do not abuse their powers and violate the constitutionally protected rights of citizens.[3] In a democratic system of government, the judiciary plays a key role in preserving the constitutional balance

1) Joseph P. A., *Constitutional & Administrative Law in New Zealand* (3rd ed., Wellington: Brookers Ltd 2007) [20. 2. 1].

and ensuring government under the law.[4] In such a system, tensions between the political and judicial branches of government are both healthy and necessary to ensure that constitutional issues are handled with due rigour and earnestness.

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I Introduction: the Role of the Courts and Constitutional Review

The courts have diverse adjudication functions, of which constitutional review is one of the most contentious. Constitutional review is a special sub-category of judicial review that allows the courts to review legislation for compliance with constitutional rights,[5] such as those enshrined in a formal Constitution or in quasi-constitutional instruments such as the New Zealand Bill of Rights Act 1990 (NZBORA). In defining the nature and extent of the state's constitutional obligations, the courts must determine

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2) There are many different theoretical approaches to understanding the relationship between the political branches and the courts. Theorists such as P. A. Joseph, T. R. S Allan and Sir John Laws promote a preference for greater judicial authority to protect the values of justice, freedom and liberty. See generally Allan T. R. S., "Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority" (2004) 63 (3) *Cambridge Law Journal* 685 and John Laws, "Judicial Review and the Meaning of Law" in C. Forsyth (ed) *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000). However, many academics counter-argue that notions of "judicial supremacy" are untenable and that parliamentary sovereignty is necessary to preserve democratic legitimacy. See generally Ekins R., "Judicial Supremacy and the Rule of Law" (2003) 119 *Law Quarterly Review* 127 and Goldsworthy J. D., *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press 1999). A thoroughgoing discussion of this issue is beyond the scope of the present paper.

3) Lord Steyn, "The Case for a Supreme Court" (2002) 118 *Law Quarterly Review* 382, 388.

4) Joseph, supra note 1, [20. 2. 2].

5) Kavanagh A., *Constitutional Review under the United Kingdom Human Rights Act* (Cambridge: Cambridge University Press 2009) 5.

where the balance of interest lies between the objectives sought to be achieved through government policy initiatives and their potential harm to the constitutional rights of affected individuals or groups. Compared to administrative review, constitutional review is concerned with the rationale and actual or potential impact of political decision-making and is not limited to grounds of review based on procedural propriety and legal reasoning and analysis standards.[6] The courts' constitutional review jurisdiction may be considered relatively intrusive on the law-making powers of the other branches of government because of the substantive nature of the values and interests at play.[7]

Although the rise and development of constitutional review systems followed different patterns depending on constitutional design and the legal tradition to which these systems belonged, they all have shared the same set of liberal democratic principles and values. The protection of the Rule of Law as relating to constitutional supremacy and fundamental human rights has been the common denominator, while differences pertain to paths of development, logistics of enforcement and the structure of the courts enforcing constitutional review. Constitutional courts are said to be the guardians of the principle of constitutional supremacy, performing the function of the supreme upholders of the constitution. Constitutional court powers are oriented in this direction. According to the classical liberal democratic political theory, as an expression of popular sovereignty, the nation-state's 'constituent power' which creates the constitution stands above legislation, the executive government and the ordinary judicial

6) Elliot M., *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing 2001) 203.

7) The differences between procedural and merits review should not be exaggerated. However, most commentators agree that constitutional review gives priority to rights and values-based analysis.

function. This constituent power assumes a 'latent' status, but springs to life and becomes active when the terms of the constitutional arrangement need to be changed or the nation and its political elites have decided to adopt a new constitution. The role of a constitutional court is to make explicit the exact meaning of constitutional provisions by interpreting within the limits set by the 'founding fathers'. A court interpretation might update constitutional provisions, but it cannot substantially alter the constitution's content beyond those limits. Constitutional development by means of judicial interpretation is not tantamount to constitutional amendment, which is a legitimate monopoly of the constituent power as an expression of popular sovereignty. Constitutional courts are not supposed to function as positive or negative lawmakers; their role is that of the executive of the constituent power.

Constitutional courts are the ultimate judicial safeguard of fundamental human rights. This position of the constitutional courts is crucial to the legitimacy of judicial review of the constitutionality of laws. In the context of liberal democracy these courts protect fundamental human rights and freedoms against undue infringement by government action and parliamentary legislation, preventing despotic aspirations of political majorities. Furthermore, constitutional courts act as harmonizers of national constitutional and supranational norms, resolving conflicts between national and supranational legal orders and institutions. They also are the ultimate arbiter on the constitutionality of political parties and the legality of election processes and may exercise criminal jurisdiction in cases involving high government officials.

II Comparative Constitutional Review

Addressing the question of how best to structure the constitutional

adjudication function of the courts requires a comparative examination of the distinct features of different institutional designs.[8] There are two principal systems of judicial review: the centralized system and the diffused system. Centralized systems of judicial review are typical of European civil law countries, in which the power of constitutional review is assigned to a single constitutional court, such as the Bundesverfasungsgericht, the German Federal Constitutional Court (GFCC). In contrast, the Anglo-American common law model gives generalist courts jurisdiction over both ordinary law and constitutional law matters and so it is described as 'decentralized' .[9] The South African Constitutional Court (SACC) offers a third model of constitutional review by combining aspects of the centralized and decentralized systems.[10] This section discusses five major aspects on which the above-mentioned systems of judicial review vary: structures of constitutional courts; their jurisdiction; the effects of their judgments; access to the courts; and judicial terms and appointment processes.

Structures of Constitutional Courts

The institutions of a country, including the structure and functioning of its court system, are shaped by historical circumstances.[11] Constitutional

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8) Zurn, C. F., *Deliberative Democracy and the Institutions of Judicial Review* (New York: Cambridge University Press 2007) 29.

9) For a comprehensive analysis of the differences between centralized and decentralized systems of judicial review see, e. g.: Cappelletti M., *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill 1971); Favoreau L., "Constitutional Review in Europe", in L. Henkin & A. J. Rosenthal (eds.), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University press 1990) 48; Dorsen N., Rosenfeld M., *Sajo* A. & Baer S., *Comparative Constitutionalism. Cases and Materials* (St. Paul MN: West Publishing Company 2003) 113 ff.

10) Ginsburg T., *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press 2003) 35.

courts have often been created after long or short periods of autocratic rule, political turmoil or civil strife.[12] These historical events have often engendered challenges to state power and fostered a desire to protect citizens' rights from arbitrary state interference.[13] As new constitutions were being drafted, the impartiality of existing judges, who had been implicated in the earlier regimes, to enforce these constitutions was called into question. Some countries therefore created constitutional courts divorced from any institutional links to the past, and also appointed new constitutional court judges, tasked with the responsibility of safeguarding the newly recognized constitutional rights. For example, the German Federal Constitutional Court was established in 1951, in the aftermath of World War II, when the memories of human rights abuses under the Nazi regime brought home the importance of safeguarding fundamental rights. Similarly, in post-apartheid South Africa, the popular reaction against arbitrary and repressive rule led to the creation of a Constitutional Court with a transformative mandate to establish a society based on democratic values, social justice and respect for human rights.[14]

The establishment of separate constitutional courts fits better with the civil law notion of the separation of powers. Traditionally, civil law systems have entertained a relatively narrow conception of the judges' role, denying them the ability to determine the constitutionality of legislation. It was believed that empowering judges to conduct judicial review would go against the idea of separation of powers and permit judges to intrude on the

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11) Chaskalson A., "Constitutional Courts and Supreme Courts", in I. Pernice & J. Kokott (eds.), *The Future of the European Judicial System in a Comparative Perspective* (Baden-Baden: Nomos Verlag 2006) 97.

12) Ginsburg, supra note 10, at 36.

13) Stone Sweet A., *Governing with Judges* (Oxford: Oxford University Press 2000) 37.

14) Chaskalson, supra note 11, 98.

legislative process. The jurist Hans Kelsen, to whom the European model of constitutional review is largely attributed, argued that a legislative role should be performed by specialist judges, who would act as 'negative' legislators by declaring laws to be unconstitutional and would therefore complement Parliament's 'positive' law-making mandate. Thus, the Constitutional court came to be seen as a 'fourth' branch of government – in addition to the legislature, the executive and the ordinary courts – charged with ensuring the supremacy of the Constitution above them all. For instance, apart from its nature as a court, the German Federal Constitutional Court is regarded as a constitutional organ having the same status as the 'other' constitutional organs based on the Basic Law, i. e. the Bundestag, the Bundesrat, the Federal President and the Federal Government. In their purest form, constitutional courts should enjoy exclusive and final constitutional law jurisdiction; however, the powers of constitutional courts in different countries vary considerably.[15]

New Zealand inherited its unitary judicial system from Britain. Unlike Continental European countries, Britain resisted the separation of public and private law, with special administrative courts exercising a parallel jurisdiction to the ordinary courts.[16] New Zealand has adopted the British system of generalist justice in the form of a single set of all-purpose courts and the country's legal structures have remained largely unified, at least in the higher echelons, despite the existence of numerous specialist tribunals and lower courts. New Zealand has not developed specialist institutions charged with resolving constitutional or administrative disputes.[17] Although judges of the superior courts have broad jurisdiction over

15) Stone Sweet, supra note 13, 33.
16) Joseph, supra note 1, [21. 2. 1].
17) Hopkins W. J., "Order from Chaos? Tribunal Reform in New Zealand", (2009) 2, *Journal of the Australasian Law Teachers Association* 47 at 48.

constitutional issues, in addition to the other areas of law, they do not exercise exclusive jurisdiction over constitutional review. The ability of generalist courts to engage in constitutional review therefore makes New Zealand's system of review a 'diffused' or 'decentralized' one.

Constitutional Courts Jurisdiction

The principal role of constitutional courts is to safeguard the constitutional framework within which government carries out its functions.[18] Although the specific jurisdictions of constitutional courts may vary, they all share a commitment to upholding their respective Constitutions. The German Federal Constitutional Court's jurisdiction was established by the Basic Law of the Federal Republic of Germany. As the 'guardian of the Constitution' (Hüter der Verfassung), the GFCC positions itself on a completely different level than all the other courts. Its jurisdiction is very broad, covering the protection of basic rights, conducting judicial review of legislation as well as deciding on issues involving electoral processes, federal-state conflicts, public appointment processes and public international law actions. Similarly, the South African Constitutional Court is the highest appellate court in all constitutional matters[19] and makes authoritative interpretations of the South African Constitution.[20] It has limited exclusive jurisdiction on matters such as review of the constitutionality of parliamentary and provincial bills, the exercise of the President's powers and disputes between organs of governance.[21] The SACC also determines whether a matter is constitutional, and therefore within its jurisdiction.[22]

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18) Zurn, supra note 8, 254.
19) Constitution of the Republic of South Africa 1996, s167 (3) (a).
20) Ibid., s167 (7).
21) Ibid., s167 (4).

The constitutional review jurisdiction of the constitutional courts carries special weight because it enables these courts to participate in governance in a more direct way than ordinary dispute resolution.[23] Constitutional courts typically exercise two forms of constitutional review: abstract review and concrete review. Abstract review is concerned with the determination of the constitutionality of legislation in the absence of a specific dispute. It usually takes place before legislation is introduced. Only particular individuals or a prescribed number of parliament members will usually be entitled to challenge a Bill before a constitutional court. In Germany, for instance, only the federal government, a regional government or one-third of the members of the Parliament (Bundestag) can file a so-called 'abstract norm petition'.[24] In South Africa, if the President or the Premier of a province is unsure about the constitutionality of a Bill put before him or her for signature, the Bill may be referred to the Constitutional Court for a decision as to its constitutionality.[25] Furthermore, within 30 days of signing an Act of Parliament, one third of the parliamentarians may petition the Constitutional Court to determine whether all or parts of the relevant Act are congruent with the Constitution.[26]

Abstract review allows constitutional courts to declare whether legislation is valid under the Constitution,[27] giving them a function akin to

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22) Ibid., s167 (3) (c).

23) Ginsburg T., "Beyond Judicial Review: Ancillary Powers of the Constitutional Courts" in T. Ginsburg and R. A. Kagan (eds.), *Institutions & Public Law: Comparative Approaches* (New York: Peter Lang Publishing 2005) 225.

24) Mayer E., "Judicial Review by the Federal Constitutional Court in Germany" in J. Sarkin and W. Binchy (eds.), *The Administration of Justice: Current Themes in Comparative Perspective* (Dublin: Four Courts Press 2004) 213 at 219.

25) Constitution of the Republic of South Africa, s79 (4) (b) and 121 (2) (b).

26) Constitution of the Republic of South Africa, s80.

27) Kommers D. P., "The Federal Constitutional Court in the German Political System", (1994) 26 (4), *Comparative Political Studies* 470, 474.

a final reading of a Bill. This type of constitutional review has several important advantages. The possibility of abstract review may contribute to the improvement of the average quality of legislation since apparently unconstitutional Bills cannot be passed. Even in the absence of a court decision, the very threat of petition by dissenting parliamentarians can affect the content and quality of parliamentary debate by drawing attention to the constitutional implications of proposed legislation.[28] Moreover, abstract review helps to emphasize that the protection of human rights is a participatory process, driven by ongoing interactions between lawmakers and constitutional court judges.[29] The court's advisory opinion on the constitutionality of a statutory enactment would require Parliament to rethink the challenged policy in light of a judicial assessment of potential rights-related issues. In Germany and South Africa, abstract review allows the courts to play an influential role in policy review. However, it is important to note that this kind of constitutional review does not render legislation immune from subsequent review in the courts.

Concrete constitutional review involves the constitutional review of legislation in connection with a specific case. In other words, concrete review is essentially fact driven. It generally arises in the context of a particular legal controversy, which is the primary cause of action pending before a court. Such reviews involve challenging a statutory enactment (or provision thereof) on constitutional grounds. The court's task is to ascertain whether, on the basis of a set of facts before it, the application of a particular statute will yield unconstitutional results. This type of review normally takes place either at trial or at the appeal level. In the latter case,

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28) Stone Sweet A., "Constitutional Politics in France and Germany" in M. Shapiro and A. Stone Sweet (eds.) *On Law, Politics and Judicialization* (Oxford: Oxford University Press 2002) 184 at 185-186.

29) Stone Sweet, supra note 13, 92.

the court's power to review may be founded on its exclusive original jurisdiction over constitutional issues or its appellate jurisdiction. Therefore, unlike abstract review, concrete review can only take place a posteriori (i. e., after the relevant statute has been passed and has effectively become part of the legal system). While concrete review appears to be an intrinsic feature of jurisdictions with a decentralized or diffused judicial review model, jurisdictions that follow the centralized review model have also adopted it. Concrete review is conducted differently in countries with centralized as opposed to decentralized models. For instance, in jurisdictions with a strictly decentralized supreme-court model, the court exercises an appellate jurisdiction when conducting concrete constitutional review, whereas in centralized system the court exercises an exclusive jurisdiction. While the supreme court in a decentralized system must wait for the case to work its way up through the judicial ladder, the constitutional court in a centralized system need not wait. By law, lower courts in decentralized systems must stay proceedings when faced with a constitutionality challenge and forward the matter to the specialized court for disposition. The same also applies in some contexts where the supreme-court model is in place but review is centralized. Differences can also exist within systems that have adopted the same model of constitutional review. In some jurisdictions that have adopted the centralized review model, such as France and Germany, the concrete review procedure is available only where constitutional rights violations form the heart of the constitutionality challenge.

The New Zealand Court of Appeal in *Boscawen v Attorney-General*[30] has strongly rejected the possibility of abstract review by the courts. In

30) *John Spencer Boscawen and Ors v The Attorney-General of New Zealand CA433/2008* [17 February 2009], [2009] NZCA 12.

deciding whether the courts could review the Attorney-General's reporting function under section 7 of the New Zealand Bill of Rights Act (NZBORA), the Court of Appeal adopted the view that abstract review of legislation was not an appropriate judicial function. O'Regan J observed that the adversarial system of court procedure prevailing in common law jurisdictions was not well suited to abstract review because evidence would be limited to what the parties put before the courts and judges would not be able to act in an inquisitorial manner. Due to this, the courts would not be able to take into account all the possible rights-related issues that may arise from a statutory enactment.[31] The judge noted that it would be undesirable to expose the courts to political disputes contrary to the principle of comity by "forcing a confrontation" between the political and judicial branches of government.[32] He concluded that giving the courts the power to request that the Attorney-General re-introduce a Bill into Parliament would be an unwarranted interference with the legislative process.[33]

Although New Zealand judges do not have the power to conduct abstract review, they share with their European and South African counterparts the power of concrete review. Concrete review allows a court to determine the constitutionality of legislation following its enactment (post-legislative scrutiny). This type of constitutional review allows a claimant to argue not only that a statute is unconstitutional on its face and purpose, but also with respect to its effects.[34] It recognises that social context can affect the constitutionality of legislation: although, prima facie, a statute may not violate anyone's rights in the abstract, it may do so after

31) Ibid., at [38].
32) Ibid., at [36].
33) Ibid., at [35].
34) Ginsburg, supra note 10, 39.

it is implemented.[35] This type of review is said to be concrete because it requires a case or controversy. As a general rule, in order to exercise jurisdiction courts in New Zealand require a 'lis', an actual controversy or dispute between litigants. It is not the courts' job to issue advisory opinions for the general guidance of the public.[36] Arguably, the German and South African Constitutional Courts exercise a greater policy-making role than New Zealand courts because they can conduct both abstract and concrete review of legislation.

Effects of Constitutional Courts' Judgments

Decentralized and centralized systems of judicial review also vary with respect to the effect of the courts' pronouncements on the constitutionality of legislation. In New Zealand, the courts do not have the power to annul laws (except for delegated legislation), including those deemed to be contrary or at odds with the rights and freedoms protected in the New Zealand Bill of Rights Act (NZBORA).[37] However, section 6 of this Act requires the courts to prefer a rights-consistent meaning, where possible.[38] By virtue of the stare decisis doctrine, lower courts are bound by the statutory interpretations given by the higher courts. In contrast, constitutional courts in centralized systems have the power to declare laws unconstitutional and immediately void. In part, the direct annulment of laws may be explained by the lack of a stare decisis doctrine in such systems. Without a rule requiring judges to follow precedent, ordinary courts could vary in their interpretation of statutes, thus undermining certainty and predictability in the legal system. To avoid such a result, the

35) Kavanagh, supra note 5, 363.
36) Joseph, supra note 1, [20. 6. 1].
37) See NZBORA, s 4.
38) Ibid., s 6.

declarations of inconsistency issued by constitutional courts have an erga omnes effect, in other words, they are binding on all future cases.[39]

constitutional courts are often cautious about invalidating statutes, aware that in a democratic system their authority to do so relies on fragile political justifications. For instance, bearing in mind the political implications of invalidating a legislative enactment, the German Federal Constitutional Court has in some cases not been reluctant to take alternative approaches in order to avoid declaring a law to be null and void. This would usually be the case, if a declaration of invalidity exacerbates or fails to remedy the violation of the Constitution or if there are different options about how to overcome a breach of the Constitution. Thus, instead of declaring legislation null and void (nichtig), the Court may issue a declaration of incompatibility with the Basic Law (unvereinbar). This means that the statute in question will remain in force but the GFCC usually sets a deadline for the legislature to amend the legislation. Moreover, the GFCC may offer guidelines and suggestions for the modification of the statute (appellentscheidung).[40] Alternatively, the Court may sustain a questionable statutory enactment but suggest conditions for the constitutional application of the statute or warn the legislature that it may invalidate it in the future. Such declarations of inconsistency are pragmatic and give the lawmakers time to adjust the content of major legislation, especially where a declaration of unconstitutionality is likely to cause political controversy. In theory at least, this approach to the matter allows the courts to play an advisory role to the legislature and preserves constitutional dialogue by granting the legislature the flexibility to devise creative solutions to the problem under judicial

39) Ginsburg, supra note 10, 41.

40) Kommers D. P., *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed., Durham: Duke University Press 1997) 53.

scrutiny.[41]

The German Federal Constitutional Court is the only court that can declare a democratically enacted law to be unconstitutional. Ordinary courts cannot usurp the GFCC's constitutional review mandate but they can refer questions on the constitutionality of legislation to the GFCC. The GFCC will consider such a referral only if the decision of the case depends on the validity of the statute submitted for review and there are compelling grounds that the statute in question may be unconstitutional.[42] In practice, however, the delineation between the jurisdictions of the GFCC and the ordinary courts is not clearly defined. Requiring ordinary courts to refer constitutional questions to the GFCC can cause unnecessary delay in litigation. The consequence may be that ordinary courts are discouraged from referring such questions to the GFCC and may prefer to address underlying constitutional issues by utilizing creative statutory interpretation. The GFCC has sought to address the problem pertaining to the unsatisfactory division of labour among the courts by encouraging ordinary courts to take into account the basic rights and freedoms enshrined in the Constitution when interpreting ordinary statutes. This shows that there are decentralizing tendencies even in centralized systems of judicial review.

Drawing on the German model, the South African Constitutional Court has adopted a hybrid system of centralized constitutional review with diffused jurisdiction. The Constitution empowers the courts to declare any statute or government act that is incompatible with the Constitution null

41) Ibid., at 54. The advisory function of the GFCC is controversial. Its advice is sometimes very extensive, to an extent which some may feel is unjustified. For example, in 1975 the GFCC controversially invalidated a statute legalising abortion and rewrote the law in such a way that Parliament felt compelled to pass it.

42) Mayer, supra note 24, 221.

and void to the extent of the inconsistency.[43] But in place of a referral system like that used by the GFCC, a 'green light' system allows the SACC to deal with declarations of invalidity made by ordinary courts. Under the latter system, the Court must confirm all declarations of invalidity. Pending such confirmation, the declaration at issue has no force.[44] This approach to the matter enables ordinary courts to deal with straightforward cases of constitutional review without interruption and allows the SACC to draw on the views of such courts before issuing a final decision on the issue.[45] In this way, the system remains centralized with respect to 'hard' cases, i. e. cases that would most require the expertise of the Constitutional Court. South Africa's centralized judicial review structure provides an adequate measure of certainty and at the same time ensures that all courts have a say on constitutional matters.

Access to Constitutional Courts

In view of the significant public implications of constitutional review, access to justice through the courts deserves special consideration. With respect to concrete review, constitutional courts have developed relatively easy-to-follow rules of standing, especially for individuals. In Germany, any citizen can file a 'constitutional complaint' (verfassungsbeschwerde) alleging that one of their basic rights has been violated by the public authorities, provided that the petitioner has exhausted all other legal remedies. The complainant must show that there is at least a theoretical possibility that one or more of his or her basic rights[46] have been violated

43) Constitution of the Republic of South Africa, s 172 (1) (a).
44) Constitution of the Republic of South Africa, s 167 (5).
45) Chaskalson, supra note 11, 105.
46) Basic Rights are those rights contained in the Basic Law for the Federal Republic of Germany, arts 1-19.

in a "direct, personal and present" way.[47] Elizabeth Mayer describes constitutional complaints as of "utmost importance to the constitutional order of Germany as they ensure the constitutional rights of individuals versus the state".[48] Although only a very small percentage of constitutional complaints are successful (around 2.5%),[49] they can have wide-ranging implications as the relevant court decision will not only apply to the parties involved in the dispute, but it will also apply to all relevant public authorities on the interpretation of the particular constitutional right.

South Africa has adopted even more extensive access rules than those applying in Germany. It has a direct access procedure requiring the South African Constitutional Court to hear any case that is "in the interests of justice."[50] Under the Bill of Rights, an individual can act not only in their own interest, but also on behalf of another person, as a member of a group and even in the general public interest.[51] Liberal rules of standing complement the ambitious scope of the South African Bill of Rights, assuring not only civil and political rights but also social, economic and cultural rights. This has allowed the SACC to develop an extensive rights-based jurisprudence to advocate the interests of the most disadvantaged.[52] Furthermore, the SACC has considerable remedial powers to do what is "just and equitable" in the circumstances,[53] allowing it to "fashion new remedies to secure the protection and enforcement of these all important rights".[54] The institutional design of the German Federal Constitutional

47) Mayer, supra note 24, 223.
48) Mayer, supra note 24, 222.
49) Ibid.
50) Constitution of the Republic of South Africa, s 167 (6).
51) Ibid., s 38.
52) Consider, e. g., *Government of the Republic of South Africa v Grootboom* (2001) 1 SA 46 (CC).
53) Constitution of the Republic of South Africa 1996, s 172 (1) (b).
54) *Fose v Minister of Safety and Security* 1997 (3) SA786 (CC), at [19].

Court and the South African Constitutional Court, with inclusive accessibility and broad human rights mandates, therefore empower these institutions with some of the most extensive judicial review mandates in the world.

As compared with the German and South African Constitutional Courts, rules of standing in New Zealand have a greater focus on personal injury, causation and redressability, rather than a general public interest. In *O'Neill v Otago Area Health Board*,[55] the High Court adopted the position that a plaintiff will have standing for judicial review if he or she has an "honest interest in a public issue". This requires the court to make a normative judgment about the merits of the case. However, the courts will also take into consideration factors such as the degree of harm suffered by the plaintiff and also the remedy sought.[56] The focus on the ability of the courts to deliver a remedy for the plaintiff and using that as central point in the inquiry concerning an individual's standing would seem to promote a culture of damages rather than one promoting the political branches' accountability for breaches of human rights and natural justice.[57] Although in the New Zealand system access to the courts does not appear to be overly-restrictive, Parliament has not mandated the judiciary with as broad a jurisdiction as that enjoyed by the German and South African Constitutional Courts.

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55) *O'Neill v Otago Area Health Board* HC Dunedin CP50/91, 10 April 1992.

56) Taylor G. D. S., *Judicial Review: A New Zealand Perspective* (2nd ed., Wellington: LexisNexis New Zealand 2010) at [7/06].

57) Rotman A., "Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights" (2004) 17 *Harvard Human Rights Journal* 281, 308. Rotman writes with reference to Benin's Constitutional Court but her comments are also relevant here.

Judicial Appointments and Tenure

Judicial appointments and tenure are among the most critical of design issues. Appointment mechanisms are intended to insulate judges from unwanted political pressure and interference, yet ensure a measure of accountability.[58] In common law jurisdictions, judges are usually appointed to the higher courts from the practising legal profession.[59] In New Zealand, the process through which judges are recruited is fairly depoliticized. The Attorney-General, in his capacity as Officer of the Crown, recommends most judicial appointments.[60] The Judicial Appointments Unit oversees and manages the actual appointments process, advertising for positions, consulting with interested groups and individuals, and compiling and presenting a list of candidates to the Attorney-General to make the final choice. The Attorney-General then announces an appointment in Cabinet and formally informs the Governor-General of the appointment.[61] Because New Zealand has a unitary legal structure, the appointments of most judges (with some exceptions) follow this standardized procedure.

In states with constitutional courts, senior judges are selected according to different criteria from those normally applied to recruit ordinary judges. In most civil law countries, there is a career judiciary so ordinary judges are generally perceived as technical bureaucrats, rather than political appointments.[62] However, in recognition of constitutional court judges' ability to influence politics, the recruitment process for these judges involves a greater degree of legislative oversight. Constitutional court judges are chosen with an eye towards both their ideological

58) Ginsburg, supra note 10, 42.
59) Chaskalson, supra note 11, 99.
60) Joseph, supra note 1, at [20. 4. 1 (1)].
61) Ibid.
62) Tushnet M., "*Marbury v Madison* Around the World" (2003-2004) 71 Tenn. L. Rev. 251, 256.

orientation and jurisprudential background and attitudes.[63] In Germany, judicial appointments to the Federal Constitutional Court require a parliamentary supermajority.[64] This norm has produced a relatively stable court manned by moderate judges and reflecting broad political preferences without over-representing either of the two principal parties in Germany. The relevant process is somewhat different in South Africa where the President appoints judges to the Constitutional Court, in consultation with the leaders of the political parties.[65] The Judicial Service Commission compiles a list of nominees from which the President selects the appointed candidate. In both the German and South African systems, there is an emphasis on broad political consensus on the appointment of Constitutional Court judges.

Centralized and decentralized systems of judicial review also differ on how they assure the independence of judges. In New Zealand, judicial independence is protected by security of tenure and life tenure.[66] Arguably, a longer term in office gives judges greater freedom to exercise their discretion as they can be more independent of prevailing political circumstances.[67] In contrast, states with constitutional courts have opted for fixed term appointments. The judges of both the German Federal Constitutional Court and the South African Constitutional Court serve a single 12 year term without re-appointment. German judges must retire at age 68 and their South African counterparts at 70. In these systems judicial independence is secured because there is no possibility of re-appointment,

63) Zurn, supra note 8, at 276.

64) Each House of the legislature (the Bundestag and the Bundesrat) both appoint an equal number of members to the GFCC.

65) Constitution of the Republic of South Africa, s 174.

66) Constitution Act 1986, s 23. Judges of the superior courts may only be removed from office on grounds of misbehaviour or incapacity to discharge their judicial duties.

67) Ginsburg, supra note 10, 46.

thus removing any incentive to give in to the political interests of judicial appointment bodies.

There are considerable advantages in having a more flexible judicial recruitment process and fixed term lengths for constitutional court judges. These judges are consciously selected from a broader field of professions and backgrounds, thus enhancing the diversity of the constitutional court's composition. Jeremy Sarkin remarks that the process of appointment to the South African Constitutional Court has had a strong influence on the composition of the court so that "the dominance of older white men has given way to diversity in age, gender, religion and outlook."[68] Furthermore, judges consistently recognize the need to prevent a stagnation of jurisprudence at the Constitutional Court. Constitutional courts have the final say on the interpretation and application of Constitutional norms and as such, their decisions can significantly affect the nation's political and moral discourse. A changing judicial bench would refresh the energy and vigour of the court and help to ensure that the court remains in touch with the society it serves.

It should be noted, finally, that a prescribed period of tenure does not necessarily go against the values of stability and continuity in constitutional interpretation. A 12 year period provides considerable stability since judges would retire at different times and the remaining judges would secure continuity. Moreover, a fixed term of appointment is necessary to balance the immense power of constitutional court judges. Tenure beyond 15-20 years may be seen as giving too much power to judges who may

68) Sarkin J, "Evaluating the Proposal to Amend the South African Constitution to Change the Length of Service of Constitutional Court Judges from a Fixed 12-year Term to an Indefinite Term Based on Age", in J. Sarkin and W. Binchy (eds.), *The Administration of Justice: Current Themes in Comparative Perspective* (Dublin: Four Courts Press 2004) 32, 39.

become isolated from society and indifferent to criticism. Although countries with constitutional courts are aware of the political influence that constitutional court judges exert, they are also careful to restrain the power of these judges by limiting their tenure. Differences in the judicial recruitment process and judicial tenure in centralized and decentralized systems reflect different societies' perceptions of the role of judges and reveal how diverse constitutional designs can both empower and constrain judges according to these perceptions.

III Evaluating Diverse Institutional Designs

Understanding different court systems requires consideration of the organisational structures that shape the judiciaries' authority and define their role within the broader system of governance. Constitutional design may broaden or narrow down the boundaries of judicial power, so diverse institutional designs may account for variations in the level of power exercised by judges in centralized and diffused systems. Judges' constitutional powers (or lack thereof) shape their interactions with other actors in the political system. This section explores how institutional design affects judicial power and authority, as well as their engagement with the other branches of government and society in general.

Judicial Empowerment

Judicial empowerment may be described as the courts' ability to influence political decision-making and to address constitutional problems, although this power should not become so extensive as to erode the democratic legitimacy of the decision-making process.[69] Specialization

69) Zurn, supra note 8, at 270.

enhances judicial power because it allows the court to speak authoritatively on constitutional matters. The distinction between ordinary and constitutional adjudication is particularly important because it allows the courts to address constitutional issues squarely, without needing to "pretend to find a formalistic and specifically juridical doctrine for its decisions, nor need it await a concrete case presenting the issue in just the right way to address evident constitutional violations".[70] In centralized systems, the public visibility and significance of constitutional court judges' contribution to public debate on constitutional matters may mean that these judges are less likely to be overly deferential to the legislature. In diffused systems, on the other hand, the tendency to assimilate constitutional matters into a formalistic model of legal adjudication may render courts unwilling to intervene where they are most needed.[71]

Constitutional courts can are also empowered due to the diversity of their benches. Scholars critical of judicial power assert that ordinary judges make poor reviewers of legislation because of their specialized training, relatively limited life experience and the general lack of diversity in their social backgrounds.[72] However, the design of constitutional courts purposely enhances judicial diversity. In both the German Federal Constitutional Court and the South African Constitutional Court, only a small number of the appointees must come from the judicial profession. In Germany, three members (out of eight) of each Senate (chamber) of the Constitutional Court must have served as a judge of a Federal Supreme Court. In South Africa, four (out of eleven) of the judicial appointees must have had a judicial career.[73] The rest of the judges may be chosen from

70) Zurn, supra note 8, at 298.
71) Ibid.
72) See on this Smillie, J., "Who wants Juristocracy?", (2006) 11 Otago Law Review 183

other professions (such as the academia, civil society organizations etc), and this permits the recruitment of non-lawyers who have special aptitude in constitutional law matters even though they might not be fit for appointment as judges of the ordinary courts.[74] It also enables appointments bodies to give greater weight to the need for professional, racial and gender diversity. The diversity of constitutional court benches therefore appropriately empowers specialist judges to address complex moral and social issues in evolving democracies.

Constitutional courts also have the power to resolve constitutional problems with authority and consistency. In diffused systems, constitutional conflicts are settled only in connection with specific cases and controversies before particular courts. Yet different courts in the national judiciary may settle constitutional issues differently, resulting in a situation where the domain of constitutional law may be quite unsettled as a whole. In centralized systems, on the other hand, constitutional law issues are settled authoritatively by a single court.[75] For example, decisions of the German Federal Constitutional Court declaring a federal or state law to be invalid or unconstitutional are published in the official *Federal Law Gazette*. This makes it easier for the legislature to respond to judicial declarations of inconsistency since these declarations are recorded in one place. The South African system of a centralized Constitutional Court with the power of constitutional review dispersed within the ordinary judiciary is ideal because it warrants consistency yet enhances judicial independence since there are multiple sites throughout the entire judiciary that could ensure the constitutional legitimacy of democratic processes.[76]

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73) Constitution of the Republic of South Africa, s 174 (5).

74) Legomsky S., *Specialized Justice: Courts, Administrative Tribunals, and a Cross-National Theory of Specialization* (Oxford: Oxford University Press 1990) 8.

75) Zurn, supra note 8, 296.

The Courts and Parliament

Centralized systems of constitutional review do not only empower constitutional court judges as independent institutions, but also influence their interactions with the political branches of government, especially the Parliament. As previously noted, the constitutional role of the courts must be understood within the broader system of governance. Cass Sunstein argues that constitutional arrangements should encourage deliberative democracy, combining notions of political accountability with a high degree of self-reflection and commitment to reason-giving.[77] Democracy ought not to be measured simply by reference to the aggregate of the majority's interests expressed by votes; rather, Sustein maintains that democracy should have an 'internal morality' concerned with the protection of constitutional rights.[78] Therefore, constitutional design should produce a 'genuine republic of reasons' not a direct democracy. Robust constitutional design ought to open up spaces for dialogue and participation, preserved by a system of checks and balances capable of ensuring that the legislature does not act without due consideration of fundamental rights.[79] To this end, Sustein proposes a creative use of judicial power that would energize democracy and render it more deliberative.[80]

Constitutional courts are more empowered than ordinary courts to engage with the political branch on issues of rights protection. Both the German Federal Constitutional Court and the South African Constitutional Court may speak strongly to Parliament when they are of the opinion that a legislative enactment may undermine a constitutional right. There are

76) Zurn, supra note 8, 297.
77) Cass R. Sunstein C. R., *Designing Democracy: What Constitutions Do* (New York: Oxford University Press 2001) 6.
78) Ibid., 7.
79) Ibid., 240.
80) Ibid., 241.

formal channels through which constitutional courts 'speak' to the political branch, in particular through declarations of inconsistency. One might say that the courts serve democratic ends by acting as 'catalysts', initiating a constitutional dialogue between the judiciary and the political branch. Institutional design should be such as to foster a complex interaction between the various legal and political actors, who are required to continually converse with each other on constitutional matters. Constitutional review should be a participatory process: constitutional courts' pronouncements can bring human rights issues to the attention of the legislature and raise awareness of these issues in the public arena. They can induce the legislative and executive branches to explain and justify their policy choices and thus encourage the careful consideration of human rights issues.

However, the power of the courts to drive the constitutional debate should not lead to the legislature's subservience to the courts, nor should judges be granted too much power to influence the political process. As commentators have observed, although it is beneficial that politicians take constitutional issues seriously when making law, over-anticipation of a constitutional risk may undermine 'social imagination' and "cripple the legislator's delight in deciding".[81] For instance, German Federal Constitutional Court judges have found their roles increasingly 'politicized' as they are required to take a stance on controversial matters of social policy, such as national military strategy and the ethics of scientific research. Jonathan Lewis has criticised the South African Constitutional Court, for "flouting the doctrine of the separation" by regarding itself as a "quasi-legislator, willing to step into the shoes of Ministers of Parliament to

81) Limbach J., "The Effects of the Jurisdiction of the German Federal Constitutional Court" (1999) EUI Working Paper LAW 99/5, European University Institute Florence, 21.

do what it considers to be a better job."[82] He argues that the SACC has diverted from its focus on resolving disputes between parties to pronouncing its own normative judgments on what it thinks the law should be.[83] The danger that the empowerment of judges may collapse into judicial supremacy should therefore not be underestimated.

An enhanced constitutional role for the judiciary need not necessarily undercut parliamentary power so long as each branch of government is aware of and respects the bounds of their authority. Parliamentarians should take judicial declarations of inconsistency seriously, but ought not to accept the court's determinations on rights issues habitually and nonchalantly for doing so would be an abrogation of their own constitutional obligation to serve the interests of their constituents. Neither should the courts misconceive their constitutional role and behave as quasi-legislators. Their role is to stimulate discussion of rights issues and to alert Parliament where a violation or potential violation is detected. As McGrath J pointed out in *Hansen v R*[84], it is the constitutional duty of the judiciary to indicate where an inconsistency with the rights and freedoms guaranteed by the New Zealand Bill of Rights Act might have occurred. Although the political branches of government do not have an obligation to defer to the court's findings, they should be expected to at least consider the declared inconsistency.[85] In this manner, the ultimate decision-making power resides with Parliament, while the courts' role is to encourage the legislature to take the protection of constitutional rights seriously.

The question about who should possess ultimate power in society –

82) Lewis J., "The Constitutional Court of South Africa: An Evaluation" (2009) 125 Law Quarterly Review 440, 449.
83) Ibid.
84) *Hansen v R* [2007] 3 NZLR 1 (SC).
85) Ibid., at [259]. See also [254].

Parliament or the courts – is misplaced. Critics of judicial empowerment may admit that neither Parliament nor the judiciary are ideally positioned to decide complex moral questions, yet maintain that Parliament's democratic mandate makes giving priority to it the lesser of two evils. Framing the debate in terms of such a dichotomy is counter-productive because it has little to say when neither Parliament nor the courts can provide satisfactory determinations of constitutional issues. It is submitted, therefore, that preference should be given to a collaborative approach to institutional design, and that both parliamentary and judicial procedures must be strengthened in order to achieve better human rights outcomes. The courts need not provide the sole, or even the most important accountability check on the political branches, but they do play a significant role in upholding the required constitutional balance.

The Courts and Society

Public confidence in the court system is crucial to judicial legitimacy. However, the role of the judiciary in influencing policy or making discretionary and value-laden determinations is questioned for, as commentators argue, judges' involvement in highly political decisions may lead to an erosion of public confidence in the impartiality of the judiciary and a loss of respect for the courts. Yet eminent representatives of the judiciary, including New Zealand Chief Justice Sian Elias, have recognized that the consideration of policy matters is inevitable in statutory interpretation. While judges are not law reform commissioners and lack the mandate to address every social or economic issue, they must speak when the legislature does not provide sufficient guidance in matters of statutory interpretation. In these situations, judges are expected to take into account contemporary social mores with which the common law must be consonant if it is to have legitimacy.[86] The public acceptability of judicial power

depends on the particular social conditions of each polity. A comparative perspective on this matter may provide useful insights into how different societies view judicial empowerment.

Designed to uphold the balance of power between the different state institutions and to interpret the rights and freedoms safeguarded by national Constitutions, constitutional courts have become symbols of constitutional authority. For example, the official website of the South African Constitutional Court declares that the 11 judges of the Court "stand guard over the Constitution and *protect everyone's human rights*".[87] This statement draws attention to the strong connection between the Constitutional Court and the public generally. In Germany, the Federal Constitutional Court is regarded not only as an important institution of the state, but also as a symbol of German society as a whole. Public opinion polls indicate that German citizens trust the GFCC more than any other state institution, and this shows that despite criticisms the role of the Court is widely accepted and approved. The GFCC is said to have breathed life into the German Basic Law (Grundgesetz) and made the rights and freedoms protected by the Basic Law seem relevant and tangible for citizens.

New Zealanders generally appear to be wary of giving too much power to the courts. This may be to some extent explained by the enduring rhetoric of parliamentary sovereignty and the prevailing consensus among the political parties that Parliament should be in charge, not the courts. Geoffrey Palmer argues that the political culture of New Zealand is remorselessly democratic: although New Zealanders like to keep politicians on a short leash, they do not believe that handing power to the judges is of great utility. He remarks that the enactment of the New

86) Dame Sian Elias "Reflections on Appellate Leadership" (2002) 33 *Victoria University of Wellington Law Review* 647.

87) https://www.concourt.org.za/index.php/constitutional-court-of-sa

Zealand Bill of Rights Act and the creation of a Supreme Court have encouraged an appetite for judicial power, yet there remains a considerable reluctance to empower judges further.[88] There is a dangerous tendency in New Zealand to portray the debate as a clash between parliamentary and judicial supremacy, when the question of institutional design is far more nuanced and complex than this dichotomy suggests. Ultimately, the debate comes down to a normative judgment about the appropriate distribution of powers among the different branches of government. According to Sir Ivor Richardson, former President of the Court of Appeal, the appropriate allocations of public power must be amenable to broad public sentiment, to whom judges are accountable, albeit indirectly.[89]

IV A Constitutional Court for New Zealand?

The purpose of the present study is to consider what aspects of centralized constitutional review systems might be relevant in New Zealand. It is submitted that that a New Zealand Constitutional Court would give greater clarity to the country's constitutional structure, provide greater constitutional scrutiny of legislation and strengthen the overall functioning and development of constitutional democracy. This section identifies potential functions of such a Constitutional Court and comments on issues relating to jurisdiction, advisory capacity, effects of judgments and personnel.

Jurisdiction

It may be difficult to conceive of a Constitutional Court in New Zealand

88) Palmer G., "The New Zealand Constitution and the Power of the Courts" (2005-2006) 15 *Transnat'l L. & Contemp. Probs.* 551.

89) Richardson I., "The Role of an Appellate Judge" (1981) 5 *Otago Law Review* 1, 10.

given the complexity of New Zealand's constitutional structure and its flexible nature. New Zealand's constitution is not written in one place, but is made up of an eclectic collection of United Kingdom and New Zealand statutes, the Treaty of Waitangi, common law (including statutory interpretations and judicial precedents), international law, constitutional conventions, parliamentary procedures and customs and prerogative instruments.[90] This is by no means an exhaustive list but one that covers the range of elements that make up the bulk of the constitution. Matthew Palmer has provided a helpful database of around 108 elements that comprise New Zealand's constitution, most of which are Acts of Parliament.[91] It is submitted that the lack of a formally entrenched constitution should not be an obstacle to the establishment of a Constitutional court. Such a court would not be empowered to extend or alter New Zealand's constitution, but only to authoritatively determine its scope and content.

Notwithstanding the existence of many significant instruments of constitutional character, New Zealand lacks sufficient sources of authority having the competency to unequivocally determine what is constitutional and what is not. Matthew Palmer notes that, due to this, the media often turn to academic and other public commentators for advice on constitutional matters. However, according to him, the pool of available commentators is relatively small and of variable quality. A constitutional court, having the final authority to determine the content and application of New Zealand's constitution, might be able to fill this void. Armed with the requisite legal knowledge and expertise, the judges of this court could debate and

90) Palmer M., "What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders" (2006) 17 *Public Law Review* 133, 135.

91) Ibid., 145.

determine the criteria by which a statute or other instrument should be regarded as constitutional.[92] Because of the judges' consistent involvement in constitutional matters, they would devote their time and expertise to expanding and strengthening New Zealand's constitutional law jurisprudence with an eye to ensuring that the country's constitutional development is coherent and consistent.

The Judges' Advisory Role

Prior to the establishment of New Zealand's Supreme Court, the Crown Law Advisory Group had pondered the possibility of granting advisory powers to the new institution. However, it finally decided against it on the grounds that New Zealand courts deal with actual cases and controversies and are not well placed to provide advice on abstract questions divorced from a factual setting. Such general and abstract propositions were considered to be too vague to have much practical value. While it may not be appropriate to enlarge the scope of the Supreme Court's jurisdiction to include an advisory function, an alternative option may be to set up a separate constitutional court with broader inquisitorial powers that would be suitable for such an advisory role.

A judicial review of the legislative process could provide an important constitutional safeguard in a system that arguably lacks sufficient accountability checks to ensure that legislative proposals do not violate important constitutional principles without due consideration. As the Parliamentary Inquiry to Review New Zealand's Existing Constitutional Arrangements has noted, New Zealand's approach of "fixing things as and when they arise means that we inadvertently alter some part of the 'big picture'."[93] Legal reform sometimes has unintended or unanticipated

92) Ibid., 152.

constitutional implications that are not adequately detected and addressed due to the lack of an overall assessment of the legislative process from a constitutional perspective. Allowing a New Zealand Constitutional Court to give their advisory opinion on the constitutionality of proposed legislation might alert Parliament to the constitutional implications of their policy choices. Such a court would be particularly suited to this role for a number of reasons. Firstly, the requisite advisory opinion would be given by experts having great depth of knowledge in constitutional matters. As such, they would be more attuned to the need to ensure that the proposed legislation is consistent with the overall body of New Zealand's constitutional law. Secondly, a Constitutional Court armed with broad inquisitorial powers would allow its members to conduct their own research and possibly to receive submissions and hear from experts. They would not be confined to analysing proposed legislation in the context of a specific legal dispute, but would be able to review the relevant Bill as a whole and with an eye on its general constitutional implications. Thirdly, Constitutional Court judges would be able to comment on constitutional issues arising from the proposed legislation from a legal perspective. Their advice would thus give Members of Parliament an idea of how the judiciary might go about applying that legislation following its enactment.

If New Zealand were to introduce a Constitutional Court with advisory powers, consideration should be given to the issue of who would have the standing to bring a petition to this court. One option would be to follow the German model and specify a particular number of parliament members who could collectively bring a petition for constitutional review to the court. Alternatively, the Governor-General might be given the ability to

93) Constitutional Arrangements Committee, *Inquiry to Review New Zealand's Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee 1 24A* (House of Representatives, Wellington, 2005) at 27.

request an advisory opinion of the Constitutional Court on the constitutionality of a legislative proposal placed before him or her for assent. More radical options could include creating a new role, such as an Officer of the Constitutional Court, who could request that the court consider a particular Bill that, in their opinion, may have significant constitutional implications. The judgment of the Constitutional Court need not be a binding one but it may encourage lawmakers to consider the constitutional consequences of a proposed statutory enactment.

The Effect of Judgments

Given the lack of entrenchment of New Zealand's constitutional sources and ongoing disputes concerning the constitutionality of certain legal instruments, it would perhaps not be appropriate to give the proposed New Zealand Constitutional Court the power to strike down legislation. However, it may be useful if the court could make declarations of inconsistency that would prompt Parliament to introduce 'fast-track' remedial legislation. The court might adopt the approach followed by the German Federal Constitutional Court and stipulate a deadline for the legislature to re-consider a proposed enactment. The New Zealand Constitutional Court might also be allowed to propose amendments to Parliament which it would be required to assess and then, endorse, amend or reject. There should not be concern that Parliament would become subservient to the court's judgment since it would only be required to review the constitutional concerns flagged by the Court and decide whether to accept or reject the relevant arguments. This would give Parliament an opportunity to rethink and clarify the meaning of a statutory enactment, especially where it intends to abrogate some constitutionally protected right or entitlement.

The proposed New Zealand Constitutional Court should be the only

court with the ability to make a declaration of inconsistency. The court may decide to adopt a 'green light' system similar to that followed in South Africa, whereby ordinary courts would be able to make declarations of incompatibility, but which would not have any effect until they are authorized by the Constitutional Court. This system is advantageous because it means that the Constitutional Court would offer a 'second opinion' on whether a particular piece of legislation is in fact incompatible with a constitutional norm or statute. It also promotes consistency in the development of constitutional law jurisprudence in the courts.

Constitutional Court Judges: Recruitment and Tenure

Like the judges of the German and South African Constitutional Courts, the judges of the proposed New Zealand Constitutional Court should be recruited according to rules different from those used to recruit ordinary judges. New Zealand may wish to adopt an appointments system that would require a parliamentary supermajority to appoint a judge to the Constitutional Court. Of the judges who would serve on the court a minimum number should be have been judges of the High Court, Court of Appeal or Supreme Court at the time of appointment. The rest of the judges could be appointed from other professions, particularly the academia. This would ensure that there is sufficient judicial expertise on the bench whilst allowing a greater variety of people to contribute diverse intellectual perspectives to the constitutional review process. The judges should be appointed for a fixed tenure of at least 10 years without the possibility of re-appointment to limit their political influence and to encourage greater diversity on the bench.

V Concluding Remarks

The system of centralized constitutional review is gaining ground across the world, making inroads from Europe to Asia, Africa and South America.[94] The institutionalization of constitutional review may be the most visible evidence of a global expansion of judicial power. This phenomenon gives cause for New Zealanders to ponder why centralized constitutional review has attracted so much attention worldwide and consider how much diffusion of judicial review authority among the judiciary is desirable. A comparative study of constitutional review such as the one presented in this article can show how certain institutional changes might improve the overall functioning of our system.[95] Although the time may not yet be ripe for the introduction of a Constitutional Court in New Zealand, it is hoped that robust civic engagement with this issue may invigorate debate on constitutional reform and the role of the judiciary in our constitutional democracy.

94) Ferejohn, J. E., "Constitutional Review in the Global Context" (2003) 6 (1) *New York University Journal of Legislation and Public Policy* 49, 50.

95) Tushnet, supra note 62, 251.