
Article:
Castillo Ortiz, P. orcid.org/0000-0003-4540-1855 (2020) Constitutional review in the member states of the EU-28 : a political analysis of institutional choices. Journal of Law and Society, 47 (1). pp. 87-120. ISSN 0263-323X

https://doi.org/10.1111/jols.12210

Constitutional Review in the Member States of the EU-28: A Political Analysis of Institutional Choices

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Abstract

Literature in law and political science has suggested a number of factors explaining choices on the implementation constitutional review. However, so far little is known about how such factors combine in order to lead to different models of review. With the aid of configurational research, this article sheds light on that question for all countries of the current EU-28. In this region, the Kelsenian model of specialized courts, the system of review by the judicial branch, and the model of parliamentary sovereignty still nowadays coexist. This article shows that phenomena such as the type of legal family of the country, existence of authoritarian backgrounds or political fragmentation played a major role in choices of models of constitutional review. However, it was only when they combined that they were capable of leading to particular outcomes.

Key Words

Constitutional Review – Judicial Politics– Configurational Analysis – Law and Courts

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I want to thank Calum Young for valuable comments on an earlier version of this paper. Usual disclaimer applies.

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INTRODUCTION

By 'constitutional review' academic and political discourses refer to the capacity of judicial-type organs to overturn legislation deemed to be in contradiction with the national constitution. Although constitutional review is one of the most modern features of constitutional systems[1], in the last decades it has experienced an exponential growth world-wide and consolidated as an essential practice in most democracies. [2] Constitutional review of legislation is characterized, however, by diversity of models and approaches. In a relatively small and politically homogenous area such as the European Union, three main approaches to review of legislation coexist: the Kelsenian model of concentrated review by one specialized court, the model of diffuse review of legislation by the judicial branch, and the model of parliamentary sovereignty in which constitutional review is generally forbidden.

Constitutional review has attracted a great deal of attention, especially in the fields of law and politics. From a theoretical perspective, scholars have often debated the

[1] A. Stone Sweet, 'Constitutional Courts and Parliamentary Democracy' (2002) 25 *West European Politics* 77.

[2] F. Ramos Romeu, 'The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions' (2006) 2 *Aus. Rev. of Law and Economics* 103, at 103; S. Gardbaum, 'Separation of Powers and the Growth of Judicial Rev. in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?)' (2014) 62 *Am. J. of Comparative Law* 613, at 614; T. Ginsburg and Versteeg, 'Why Do Countries Adopt Constitutional Rev.?' (2013) 30 *J. of Law Economics and Organization* 587, at 587.

normative problems associated with the relation between constitutional review and democracy.[3] Doctrinal research has made a great effort to describe, classify and analyze the different systems of review world-wide.[4] From an empirical and causal perspective, Judicial Politics literature has made an essential contribution to the understanding of a wide range of topics, such as judicial decision-making, judicial independence, inter-court relations and so on.[5]

The question of the choices on different models of constitutional review has specific implications. In the political and sometimes academic arenas, the different models of constitutional review are usually justified through normative claims about the need to ensure the rule of law, their contribution to the achievement of better policy outcomes, or their role in the defense of constitutional rights of citizens.[6] The existence of these narratives shows the political importance of constitutional review. Systems of constitutional review are central elements of political edifices. They constraint political actors, influence political processes and affect policy outcomes. In fact, it is *a priori* paradoxical for politicians to create these systems of constitutional review that ultimately constraint their own power. By understanding the reasons behind the choices on concrete models of review that political actors make, we can shed light over this paradox and understand an important aspect of political behavior and decision-making

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[3] *Inter alia* J. Waldron, 'The core of the case against judicial Rev.' (2006) 115 *Yale Law J.* 1346; D. Kyritsis, 'Constitutional Review in Representative Democracy'. (2012) 32 *Oxford J. of Legal Studies* 297.

[4] *Inter alia*, M. Cappelletti and J.C. Adams, 'Judicial Review of Legislation: European Antecedents and Adaptations' (1965-1966) 79 *Harvard Law Rev.* 1207; V. Ferreres Comella, *Constitutional Courts and Democratic Values* (2009); M. De Visser, *Constitutional Review in Europe: A Comparative Perspective* (2014).

[5] I*nter alia*, K. Alter, 'Explaining National Courts Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context,* ed. A.-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (1997) 227; G. Vanberg, 'Legislative- Judicial Relations: A Game-Theoretic Approach to Constitutional Review' (2001) 45 *Am. J. of Political Science*. 346.

[6] See *inter alia* M. Kumm, 'Democracy is Not Enough: Rights, Proportionality and the Point of Judicial Review' (2009) *NYU School of Law Research Paper No. 09-10*; A. Dyevre, 'Technocracy and Distrust: Revisiting the Rationale for Constitutional Review' (2015) 13 *International J. of Constitutional Law* 30.

in the context of constitutional politics. Furthermore, we can complement the normative debates about the merits of each model of review with evidence about the actual reasons behind their implementation.

So far, empirical research on this topic is scarce. Some works have tried to explore the question of choices on models of review in case studies or using qualitative approaches.[7] Other authors have used quantitative approaches, in order to try to understand the variables that explain the decision either to implement constitutional review or not[8], or the option for the constitutional court model.[9] However, given the methodology employed by these articles, we do not know much yet about how different factors combine to produce particular outcomes in specific cases. Likewise, to the best of this author's knowledge, little or nothing is known about the reasons behind the adoption of the other approach to constitutional review in Europe: the model of diffuse review.

Relying on Qualitative Comparative Analysis (QCA), this research fills in that gap for the current constitutions of all EU Member States. In contrast with existing literature on the topic, which is based on correlational approaches, QCA allows for the identification of conditions which are necessary but not sufficient for the production of an outcome (in the case of this article, the implementation of a certain approach to constitutional review in a country), as well as the combinations of conditions which suffice to produce such outcome.

The article provides for a hypothetical-deductive model capable of explaining the combinations of factors that lead to the choice for the centralized form of constitutional

[7] See M. Shapiro, 'The Success of Judicial Review and Democracy' in *On Law, Politics and Judicialization* ed. M. Shapiro and A. Stone Sweet (2002) 149.; A. Stone Sweet, 'Why Europe Rejected Am. Judicial Review: And Why It May Not Matter' (2003) 101 *Michigan Law Rev.* 2744.
[8] A. Lijphart, *Patterns of Democracy* (1999).; Ginsburg and Versteeg, op. cit., n. 2.
[9] Ramos Romeu, op. cit., n.2.

review. Additionally, it inductively explains the choices for the systems of diffuse review and parliamentary sovereignty. Bridging different theories and strands of literature, it will be shown that these choices are the result of the interaction between different political and socio-legal phenomena.

The findings suggest that the Kelsenian model relies heavily in the presence of romano-germanic legal families, but only in their combination with factors such as authoritarian backgrounds or political fragmentation. Said in more precise QCA terminology, a romano-germanic legal system is a necessary but not a sufficient condition for the creation of a specialized constitutional review court. This logic of necessity, uncovered by QCA, qualifies existing knowledge about the impact of legal families on constitutional review. The analyses also showed that when the conditions leading to the creation of Kelsenian courts were not present, countries opted either for the model of parliamentary sovereignty or the model of diffuse review, depending on whether incentives to the creation of some system of constitutional review existed at all or not. For instance, so far we knew very little about the specific causation of the model of diffuse review. The analyses in this paper suggest that this model was often implemented when constitutional review had generalized in the continent, but in countries where the rest of conditions for the creation of a Kelsenian court did not concur.

The remainder of this article is structured as follows. After this brief introduction, the theoretical framework of the research and some configurational hypotheses will be presented. Next, I will explain the selection of sources, methodology and calibration, paying special attention to crisp-sets Qualitative Comparative Analysis (csQCA). Subsequently, the analyses of necessary and sufficient conditions will be showed. The last section concludes.

UNDERSTANDING CHOICES ON MODELS OF CONSTITUTIOAL REVIEW. THEORETICAL FRAMEWORK AND HYPOTHESES

Configurational research allows for an intense dialogue between theory and cases, so that the iterations followed to construct the explanatory models help complement existing theories with the empirical information available.[10] This section follows that practice. Taking into account the contributions of literature in the fields of law and politics about systems of constitutional review[11], and after reading these contributions on the light of qualitative knowledge of the cases, the next lines present empirically-informed theories to explain choices on models of review in the Member States of the EU. To do so, the section will focus on the centralized model of review, as this is the most frequent form of review in Europe, although the empirical section also discusses the models of diffuse review and parliamentary sovereignty in an inductive fashion. As the assumption in this article is that causation is configurational -it is the interaction between phenomena what usually leads to specific outcomes-, in the last part of this section the configurational hypotheses of the research are presented.

- *Post-autocratic politics*. One of the hegemonic narratives in the field suggests that the decision to create Kelsenian-type constitutional courts has to do with the

[10] See D. Berg-Schlosser, G. De Meur, B. Rihoux, and C. Ragin. 'Qualitative Comparative Analysis (QCA) as an Approach' in: *Configurational Comparative Methods* eds. B. Rihoux and C. Ragin (2009) 1, at 6 ff.

[11] *Inter alia*, Shapiro, op. cit., n.7, pp.149-208.; Stone Sweet, op. cit., n.7, pp. 2744-2780.; Ramos Romeu, op. cit., n.2; ; Ginsburg and Versteeg, op. cit., n. 2.

existence authoritarian backgrounds in young democracies. [12] However, preliminary analyses of the cases revealed that the effect of autocratic pasts is much weaker when such regimes were short-lived, and stronger in the cases of long-lasting autocracies. Existing literature has proposed a number of theories to account for this relation between authoritarian background and review by a specialized court. For some, centralized review is created in periods of transition to democracy, with the aim to avoid repeating the horrors committed by autocratic regimes and to ensure the strength of newly created democratic rule[13] and the enforcement of individual rights. [14] Ginsburg and Versteeg [15] refer to this as ideational theory, according to which the implementation of constitutional review would be culturally deemed as an appropriate institutional device to prevent the tyranny of majority and to protect the rights of minorities and individuals. Ferreres[16] and Ramos Romeu[17] provide for another explanation. For these authors, political elites in transition periods have an incentive to create new constitutional courts in order to constraint the power of the ordinary judiciary, which might at this point still be loyal the previous regime. Alternatively, the post-autocratic theory in the European context can also be explained through what Ginsburg and Versteeg called diffusion though acculturation, according to which 'states emulate foreign constitutional rules not because they are convinced by the intrinsic merits of these rules, but to gain international acceptance and legitimacy'[18]. From this perspective, the creation of Kelsenian courts could be aimed at signaling neighboring countries a clear commitment to democracy. Ramos Romeu mentions

[12] Inter alia Stone Sweet, op. cit., n.7; Ramos Romeu, op. cit., n.2, pp. 107, 110.
[13] Cappelletti and Adams, op. cit., n.4, p.1207; Stone Sweet, op. cit., n.7, p.2769)
[14] Shapiro, op. cit. n.7, pp. 153 ff.
[15] Ginsburg and Versteeg, op. cit., n. 2 p.593.
[16] V. Ferreres Comella, 'The European model of constitutional review of legislation: toward decentralization?' (2004) 2 *International J. of Constitutional Law* 461, at 470.
[17] Ramos Romeu, op. cit., n.2, p.107)
[18]Ginsburg and Versteeg, op. cit., n. 2 , p.597.

in this regard the idea of 'imitiation of similar democratic experiences'[19], which suggests that the implementation of constitutional courts is the result of the observation of successful experiences of democratic transition in other countries. This would show the importance of relationships between individual States when it comes to implementation of models of constitutional review..

- *Political fragmentation*. A number of authors have connected the dynamics of party competition with the creation of systems of review.[20] Both the hegemonic preservation hypothesis defended by Hirschl [21] and the insurance theory put forward by Ginsburg and Versteeg[22] suggest, with only certain differences, that the creation of constitutional review systems could be rational for actors in power fearing a future defeat, so that the next government cannot make unconstrained decisions.[23] In the same vein, Ishiyama and Ishiyama showed evidence that a higher number of effective parties in processes of constitution-making resulted in more powerful judiciaries.[24] In the case of this article, these dynamics of party competition are particularly relevant in constitutional moments or processes of constitutional-amendment. While theories in the field have generally suggested that political fragmentation favors the creation of constitutional review, they do not usually clarify which specific model of review is expected to be implemented. However, Ramos Romeu suggests that this factor is especially apt to explain the

[19] Ramos Romeu, op. cit., n.2, p.111.
[20] *Inter alia* R. Hirschl, *Towards Juristocracy* (2004) ; Ramos Romeu, op. cit., n.2, 107-108; Ginsburg and Versteeg, op. cit., n. 2.
[21] Hirschl, id.
[22] Ginsburg and Versteeg, op. cit., n. 2, p.594)
[23] See also Gardbaum, op. cit., n. 2, p.615)
[24] S. Ishiyama Smithey and J. Ishiyama, 'Judicious choices: designing courts in post-communist politics' (2000) 33 *Communist and Post-Communist Studies* 163.

creation of Kelsenian institutions.[25] For the author, constitutional courts are likely to arise in contexts in which the relation of forces among political elites is unknown and/or balanced, because these institutions act as an insurance mechanism. Magalhães has also suggested that high political fragmentation creates an incentive to opt for Kelsenian-type courts, while single-party hegemony creates incentives for diffuse systems of review.[26] A reason for this could lie in the fact the Kelsenian model was designed to allow 'opposition politicians, sitting in parliament or in subnational governments' to initiate review.[27] In effect, the centralized model usually includes *ex ante* and abstract control of constitutionality, which can be initiated at the request of opposition politicians. When elites in power decide to create courts to constraint future governments, it might be rational for them to set up institutions to which they will have easy access when they become the opposition, thus providing for a clear example of calculation of interests as a factor behind choices on models of judicial review.

- *Decentralization*. Literature also argues that different forms of political devolution, decentralization or federalism create the need for a neutral third party to solve disputes between actors at different levels of government.[28] As suggested by Shapiro, according to this theory, 'federalism required some institution to police its complex constitutional boundary arrangements'. [29] Ramos Romeu explains that constitutional courts are well-suit to fulfil this function for at least one reason: in decentralized systems, 'the existence of a variety of loci of power

[25] Ramos Romeu, op. cit., n.2, p.108.
[26] P. Magalhães, 'The Limits to Judicialization: Legislative Politics and Constitutional Review in the Iberian Democracies' (2003) PhD Thesis, Ohio State University.
[27]Stone Sweet, op. cit., n.7, p.2768)
[28] Ramos Romeu, op. cit., n.2, p.110; Gardbaum, op. cit., n. 2 p.614; see also Lijphart, op. cit., n.8.
[29]Shapiro, op. cit., n.7, p.148)

requires a constitutional court to authoritatively resolve issues among the organs of the federation and ensure legal certainty and predictability'[30]. In his work, however, the author does not find significant evidence to support this theory.[31] This research qualifies that finding, as showed in the empirical section

- *Institutional legacy*. In some cases, the pre-existence of a certain institution may create an incentive to its preservation under a new political regime. Thus, the existence of certain forms of constitutional review in a country can be said to be path-dependent. According to the 'strategic defection hypothesis'[32], in certain circumstances, judicial actors might opt for challenging the elites of authoritarian regimes when they perceive that a transition towards democracy might take place soon. Their aim would be to gain legitimacy in order to guarantee institutional survival under the new regime: 'by openly challenging elites in the endgame of authoritarianism, courts and judges risk the imposition of short-term costs in exchange for mid-term legitimacy'. Ishiyama and Ishiyama offer a different explanation[33]. In their study of post-communist judiciaries, they argue that the legacy of the previous regime could matter in choices in constitution-making processes, so that countries that had powerful judiciaries in the previous regime should be expected to have also powerful judiciaries in the post-communist period. Note that, in this case, the authors do not formulate hypotheses about the docile or challenging behavior of judicial actors vis-à-vis authoritarian elites, but

[30] Ramos Romeu, op. cit., n.2, p. 110.
[31] Ramos Romeu, op. cit., n.2.
[32] G. Helmke, *Courts Under Constraints. Judges, Generals, and Presidents in Argentina* (2005); G. Helmke, 'The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy' (2002) 96 *Am. Political Science Rev.* 291; see also T. Ginsburg, 'The Global Spread of Constitutional Review', in *Oxford Handbook of Law and Politics,* eds. K. Whittington and D. Keleman, (2008) 81.
[33] Ishiyama and Ishiyama, op. cit., n.24.

only about their existence and institutional strength. With regards to the centralized system of review, the idea of institutional legacy defended in this article would pose that once a Kelsenian-style court is created in a country it will be difficult for political actors to eliminate the institution even in subsequent political regimes. This is so even in the case of *façade* constitutional courts in authoritarian regimes, which in process of transition to democracy will survive and be recycled into real Kelsenian courts.

- Types of *legal family* have also been put forward as an explanation for choices on models of constitutional review.[34] A notable feature of the empirically observed models of review in Europe is the wider dissemination of Kelsenian courts in countries of romanistic and germanistic civil law families than in common law and nordic civil law countries. From theoretical perspective, choices on models of review are deemed to be dependent on the institutional and legal-cultural context in which they take place, and in particular on the features of the legal family to which the country belongs. Said in other terms, legal structures interact with legal and political actors creating incentives or constraints to the implementation of certain models of constitutional review. For some literature, certain legal families are more compatible with certain systems of review given their preexisting institutional features.[35] For instance, given their reliance on a strict separation of powers in which courts are excluded from the lawmaking function, the Kelsenian model is more appropriate for civil law countries than the diffuse model, as the latter gives powers of review of legislation to every court in

[34] Ramos Romeu, op. cit., n.2.
[35] Inter *alia*Stone Sweet, op. cit., n.7; ; Ferreres Comella, op. cit., n.16.; Ramos Romeu, op. cit., n.2.

the judicial branch.[36] Countries of the civil law tradition, which is at odds with the idea that courts should have law-making powers, will opt for centralizing review in one single court, of a Kelsenian style and a more political nature. The absence of stare decisis doctrine or the type of legal training and socialization of judges[37], which favor legal coherence and a type of judge limited to applying the law to cases, are also mentioned as reasons why civil law systems are more compatible with models of centralized review. Another explanation is that proposed by Elkins and Simmons[38], who talk about 'intra-cultural diffusion through learning', which some authors have interpreted as suggesting the existence of higher likelihood of diffusion 'of ideas and institutions to countries that have similar characteristics such as language, geographic region, legal tradition and ethnic connections'.[39] This theoretical approach shows, again, how the relationships between individual States lead to specific outcomes. Although diffusion can operate through a number of mechanisms, Ginsburg and Versteeg mention 'learning' as one of the ways through which the generalization of certain types of constitutional review in certain legal cultures may operate: 'learning entails a functional borrowing of constitutional provisions among states that share important pre-existing qualities, such as a similar legal system. Where states have information that certain constitutional features are successful in other states that they consider to be peers, they may decide to follow that example'.[40]

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[36] See Stone Sweet, op. cit., n.7.

[37] Cappelletti and Adams, op. cit., n.4, pp.1215 ff; Ferreres Comella, op. cit., n.16, p.466; Ramos Romeu, op. cit., n.2, p.109.

[38] Z. Elkins, and B. Simmons, 'On Waves, Clusters and Diffusion: A Conceptual Framework' (2005) 598 *Annals of the Am. Academy of Political Science* 33.

[39] See A. Stroh, and C. Heyl, 'Diffusion versus Strategic Action? The Creation of West African Constitutional Courts Revisited' (2013) *GIGA Research Program Working Paper 239*.;Ginsburg, op. cit., n.32, p. 93.

[40]Ginsburg and Versteeg, op. cit., n. 2. pp.596-597.

- *Cross-fertilization and imitation.* Finally, the above-mentioned theory of diffusion through acculturation[41] has as a logical pre-requisite the existence of an institution to emulate. In the case of models of judicial review, the creation of the Austrian Constitutional Court of 1920 marks a turning point. The inclusion of systems of review in European post-1920 constitutions might be explained as a process of imitation and diffusion having Austria as the first focal point, even if subsequently other courts might replace the Austrian one as the most observed and replicated model. The Austrian Constitutional Court of 1920 was the first institution of this type created in the continent. For that reason, the Austrian court legitimized the idea of constitutional review in a region in which it was at odds with traditional understandings of democracy. In so doing, it opened the door to diffusion through imitation. Additionally, the more constitutions include constitutional review of legislation, the more legitimacy for this practice, and thus higher the incentives found by subsequent constitutions to follow the path.

Some studies have tested these theories empirically. For instance, using statistical models, Ramous Romeu tested the impact of most of the factors outlined above and found evidence about their contribution to the implementation of the constitutional court model[42]. Ginsburg and Versteeg, more recently, did the same with regards to the adoption of constitutional review in general[43]. These studies, however, focused with only a few exceptions on the net effects of variables individually considered. Instead, the focus of this research is on how such factors interact in producing choices on models of constitutional review. To do so, this research uses QCA, which allows for a

[41] Ginsburg and Versteeg, op. cit., n. 2, p.597.
[42] Ramos Romeu, op. cit., n.2.
[43] Ginsburg and Versteeg, op. cit., n. 2.

comprehensive analysis of the interaction among explanatory conditions. For this reason, the hypotheses of this research are configurational: they focus on how different explanatory conditions converge in the production of a result. The usual practice in QCA research is the presentation of a small number of hypotheses that are particularly sound or relevant from a theoretical perspective.

The configurational nature of the hypotheses is particularly useful in this paper, given the theoretical framework presented. Take for instance the theory according to which the Kelsenian model of review fits the institutional features of civil law countries better than those of common law ones. While this idea seems verisimilar, it must be confronted with the fact that actually not all civil law countries opted for this model of review, and hence additional conditions are required to explain the outcome. One of these additional conditions might be the existence of an authoritarian background. The shock caused by authoritarian or totalitarian experiences, especially if these were lasting, might have created a consensus in these countries around the need for new institutional arrangements to prevent authoritarian relapses. Said in different terms, in a certain legal-cultural area -the romano-germanic civil law one- the centralized model of review was assumed as a desirable institution to deal with authoritarian pasts and to signal a commitment to democracy. The rationality of this institutional choice was 'contextually rooted', probably as a consequence of the institutional influence in this area of the Austrian Constitutional Court, and subsequently the German one.[44] For that reason, the first configurational hypothesis of the research would pose that:

[44] See Stone Sweet, op. cit., n.1, pp. 79 ff.

H_1. *The combination of a romano-germanic civil law family with a lasting and consolidated authoritarian regime is sufficient for the creation of a system of centralized constitutional review*.

An alternative path to the centralized model of review deals with political de-centralization. As suggested above, federal, devolved or decentralized political structures might create the need for an institution to mediate between levels of government. However, the implementation of a Kelsenian-style court is not universally regarded as the best solution for this problem, as exemplified by empirical cases such as contemporary United Kingdom. Therefore, the option for a Kelsenian court to deal with decentralized political systems is also contextual preference: *in a given context* this is deemed to be the optional solution. For the countries covered by this article such context is, again, that of romano-germanic legal systems, for the reasons presented above: patterns of institutional diffusion and adequacy of the institution to the underlying legal structure facilitate the implementation of this arrangement. For that reason:

H_2. *The combination of a romano-germanic civil law family with a decentralized political system is sufficient for the implementation of a model of centralized constitutional review*.

DATA AND METHODS

In his work on methodology of comparative law, Ran Hirschl rightly pointed at the fact that 'comparative constitutional law scholarship produced by legal academics often overlooks (or is unaware of) basic methodological principles of controlled comparison, research design, and case selection'[45]. Bridging comparative law and politics, this article takes such criticism seriously, and engages with a methodology that is able to make causal inferences in a social-scientific manner. More particularly, the article relies on configurational analysis with QCA, complemented with the knowledge of the cases supplied by existing academic literature. While previous works in the field[46] had approached this object of study using statistical techniques, this is to the best of this author's knowledge the first study about choices on models of constitutional review using QCA. Given its different epistemological assumptions, QCA will allow the understanding of the phenomena explored from a new perspective.

While the whole functioning of QCA cannot be explained in this short section, a few basic notions will be provided so that the reader can better understand the rest of this article.[47] QCA has three peculiarities that make it particularly useful to understand the object of study of this article in a new light. First, the configurational approach of QCA allows the systematic analysis of interactions between explanatory conditions affecting the research outcome[48], instead of their impact independently of each other. Second, QCA uses a deterministic rather than a probabilistic approach, in which cases are

[45] R. Hirschl, 'On the blurred methodological matrix of comparative constitutional law' in *The Migration of Constitutional Ideas,* ed. Sujit Choudhry (2006) 39, at 39.
[46] Ramos Romeu, op. cit., n.2; Ginsburg and Versteeg, op. cit., n. 2.
[47] Readers willing to learn more about the method can check, inter alia, C. Ragin, *Fuzzy Set Social Science* (2000); C. Ragin, *Redesigning Social Inquiry: Fuzzy Sets and Beyond* (2008); B. Rihoux and C. Ragin, *Configurational Comparative Methods* (2009).
[48] Berg-Schlosser, de Meur, Rihoux and Ragin, op. cit., n.10, p. 8.

understood as specific combinations of factors that tell us a specific story about causation in every particular instance. Third, rather than analyzing the correlations between two variables, QCA analyses the relations of necessity and sufficiency between explanatory conditions and the outcomes of the research.[49] QCA thus provides for a different approach to causation. Additionally, given those characteristics of QCA, the small number of cases for each outcome and their idiosyncratic features are not a problem when performing the analyses, since the methodology is particularly well-suited to deal with objects of study of such nature.

This research has opted for the crisp set variety of QCA, in which the explanatory conditions take dichotomous values. The outcome of the research was operationalized into three categories: review by a specialized court, review by the judicial branch and parliamentary sovereignty. A crisp set QCA analysis was performed for each of these outcomes. The use in each of the analyses of 6 crisp conditions for 28 cases minimizes the risk of randomly obtaining a contradiction-free model[50], in line with the best practices in QCA.

Methodological literature has put forward some criticisms of QCA methods, which configurational methodologists have addressed, *inter alia*, through the creation of standards of good practice. This article follows such standards of good practice. Literature has alerted about the 'case-sensitive' nature of QCA –a small variation in one case can lead to different results- and, in relation to this, about the risks involved in dichotomization in csQCA.[51] To deal with these issues, the best practices in the use of QCA recommend transparency and justification in the choice of cases and in the

[49] Rihoux and Ragin, op. cit., n.47.
[50] A. Marx, 'Crisp-Set Qualitative comparative analysis (csQCA) and model specification: Benchmarks for future csQCA applications' (2010) 4 *International J. of Multiple Research Approaches* 138.
[51] J.H. Goldthorpe, 'Current issues in comparative macrosociology: A debate on methodological issues', (1997) 16 *Comparative Social Research* 1.

operationalization of the phenomena.[52] This is provided in this article in this section and in the final Appendix. In fact, the case-sensitive nature of QCA is not a problem, but rather an advantage, for a research like this. As said by De Meur et al. "case-sensitivity allows the investigator to discover, via QCA, all possible explanations, whether frequent or not"[53]. This is especially important for this article: existing literature had put forward, through statistical analysis, general causal correlations explaining choices on models of constitutional review. These findings are essential to our understanding of this object of study. But QCA will allow the uncovering of interactions of explanatory conditions for each of the cases covered by the research.

Regarding case selection, this article identifies necessary and sufficient conditions leading to choices on models of constitutional review in all current constitutional systems of the EU-28 (including the UK). The selection of the EU Member States is justified for their relative homogeneity of background conditions. Good practices in the use of QCA require the use of cases that are as homogeneous as possible in terms of the conditions not included in the model, while at the same time diverse with regards to the conditions included.[54] Member States of the EU guaranteed such homogeneity for a number of reasons. To start with, they belong to the same world region and the same integration organization. Secondly, membership of that organization, the EU, requires the acceptance of common rules and principles, including the market economy, respect for democracy and human rights, and acceptance of a common set of legislation and judicial decisions called *acquis communautaire*. Thirdly, acceptance of the rules of the EU implies acceptance of the review powers of the Court of Justice of the European

[52] C. Schneider and C. Wagemann, 'Standards of Good Practice in Qualitative Comparative Analysis and Fuzzy-Sets' (2010) 9 *Comparative Sociology* 1.
[53] G. De Meur, B. Rihoux, and S. Yamasaki,. 'Addressing the Critiques of QCA'. in *Configurational Comparative Methods,* eds. B. Rihoux and C. Ragin (2009)147, at. 156.
[54] Id. p. 157.

Union, whose capacity to review the conformity of legislation on the light of the treaties of the EU interacts with the institutions of constitutional review of the Member States.

In QCA, the analysis of necessary conditions aims at showing which events must occur for the outcome to occur, even if they do not guarantee the occurrence of the outcome.[55] The analysis of sufficient conditions complements the former, by showing which conditions –or combinations of conditions- are sufficient to produce the outcome.[56] In the analysis of sufficient conditions the configurational nature of QCA is particularly important, as the causal paths usually display combinations of conditions which are separately insufficient but jointly sufficient to explain the outcome.[57] In order to carry out the analysis of sufficient conditions, QCA first constructs a Truth Table out of the data matrix. The Truth Table contains all combinations of explanatory conditions (see Appendix for the Truth Tables of this article), including those without empirical cases (called 'logical remainders'). Subsequently, QCA proceeds to 'Boolean minimization', by which redundant conditions are dropped in order to attain a more parsimonious solution.

This article uses the intermediate solution of the analysis of sufficient conditions, capable of providing for parsimony without over-simplifying the results through the use of only certain logical remainders.[58] In the analyses, coverage scores indicate the share of all the cases with the outcome of interest that the solution can account for[59], and consistency scores indicate the share of cases covered by the solution that actually have

[55] Berg-Schlosser, de Meur, Rihoux and Ragin, op. cit., n.10, pp.9-10.
[56] Id., pp.10-11.
[57] Id., pp.8 ff.
[58] C. Ragin and J. Sonnett, 'Between Complexity and Parsimony: Limited Diversity, Counterfactual Cases and Comparative Analysis' (2004) *Compasss Working Paper Series*:
[59] B. Rihoux, and G. De Meur, 'Crisp-Set Qualitative Comparative Analysis (csQCA)' in *Configurational Comparative Methods,* eds. B. Rihoux and C. Ragin (2009) 33, at. 64.

the outcome which the analyses aimed at explaining.[60] Higher consistency and coverage scores indicate a more solid solution. Presence of a condition is expressed with the name of a condition in lower case ('condition'), and absence of a condition is expressed with the name of the condition in lower case preceded by the symbol '~' ('~condition'). The symbol '*' represents logical 'and', meaning that two conditions must be combined.

To construct reliable models this article followed several iterations, although two main phases can be identified. In a first phase, a theoretical framework and an empirical model focusing on centralized constitutional review were constructed. The focus on this type of review was the original aim of the article. However, in a second stage it was observed that the configurational analyses could also provide for insights regarding the model of diffuse review and the model of parliamentary sovereignty, so these were added to the empirical section and consequently discussed.

[60] Id., p.47.

Table 1. Sources and calibration

Condition	Source	Calibration
Outcome 1	Official websites	1: Specialized court 0: All other
Outcome 2	Official websites	1: Parliamentary sovereignty 0: All other
Outcome 3	Official websites	1: Review by the judicial branch 0: All other
Decentralization	Regional Authority Index (UNC/VUA)	1: RAI score > 10 0: RAI score =< 10
Consolidated authoritarian regime	Transitional Justice and Memory in the EU (CSIC)	1: auth. regime > 10 consecutive years 0: auth. regime =< 10 consecutive years
Legal family	Zweigert and Kötz (1998). Research on individual cases.	1: Romanistic OR Germanic 0: Nordic OR Anglo-American
Political fragmentation	Research on individual cases.	1: No absolute majority of votes 0: Absolute majority of votes or previous to modern electoral systems
Institutional legacy	Research on individual cases.	1: CC existed in previous regime 0: CC did not exist
Imitation	Research on individual cases.	1: Constitution was enacted after creation of Austrian Constitutional Court. 0: Constitution pre-dates the Austrian CC.

Table 1 describes the conditions of the research, the source of information used and the calibration followed. As indicated, comprehensive sources of information existed for some conditions, but for others data had to be obtained after a detailed research on official websites and secondary literature. Table 1 also presents the calibration rules for the conditions. Following the best practices in QCA, calibration was based on theoretical reasons and on the dialogue with the cases, and it is transparently and exhaustively discussed in the next lines.

For the outcome, the current model of constitutional review of each country was taken into account. It is worth noting that any taxonomy of systems of constitutional review will always be based on ideal types and that definitions will always be contestable. At

the same time, note also that empirical institutions register a wide variation, including forms of institutional hybridity. For the purposes of this article, a centralized system of review will be one in which one single *ad hoc* judicial-type institution has the capacity to annul legislation *erga omnes*; a diffuse system of review will be one in which the power to annul legislation is bestowed to the organs of the judicial branch; and a system of parliamentary sovereignty will be one in which legislation of the parliament cannot be annulled by a national court.

For the rest of conditions, the moment of creation of the current model of constitutional review was generally taken into account as a reference to gather the data, unless otherwise indicated and justified. This moment is, in most cases, the moment of creation of the constitution, unless the current system of review was created afterwards. For political fragmentation, dichotomizations accounted for the existence of one party with absolute majority of votes at the time of creation of the current system of review. Those cases in which the system of review –or lack thereof- was created long before the birth of modern parliamentary/electoral systems scored 0. For legal families, the well-known classification in four families created by Zweigert and Kötz[61] was used, and a crisp set was created to account for cases which belonged to the romanistic or the germanistic family. The dichotomization point for the decentralization crisp set was of 10 Regional Authority Index points; this point theoretically marks the transition toward substantial decentralization, and allowed a sufficient variation within cases. For authoritarian pasts, a crisp set was created accounting for cases that had authoritarian regimes for more than ten consecutive years, i.e. lasting and consolidated authoritarianisms. This calibration allowed the exclusion of countries whose authoritarian regimes were short-lived or discontinuous, for which the preliminary analyses showed that the incentive to

[61] K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (1998).

implement specialized courts was notably lower. The source of information was the Database 'Transitional Justice in the EU' of CSIC,[62] although this was double checked and corrected when necessary with the 'Institutionalized Autocracy (AUTOC)' variable of Polity IV.[63] For pre-existing constitutional court, it was taken into account whether such an institution existed in the immediately previous regime, regardless of whether that was a democracy or an authoritarian regime with a *façade* constitutional court. Finally, the existence of a model to imitate was operationalized so it could reflect the impact of a specific event, the creation of the first Constitutional Court in Austria in 1920. Constitutions enacted before this event scored 0, and those enacted or deeply reformed [64] after this event scored 1, regardless of the system of review they implemented. In this way, the condition could show the importance of the existence of precedents of constitutional review in processes of cross-national institutional diffusion without creating endogeneity[65]. To allow replicability, and for the sake of transparency, the data matrix as well as the Truth Tables are provided in the Appendix.

For the outcome, although most cases were relatively uncontroversial, some countries were difficult to classify. Despite its *sui generis* nature[66], the French Constitutional Council was coded as a Kelsenian-type institution. In Malta ordinary courts can perform judicial review functions, but there exists a Constitutional Court with the last word on constitutionality matters whose decisions are binding *erga omnes*, and which has a

[62] Transitional Justice in the EU, <http://www.proyectos.cchs.csic.es/transitionaljustice/home>
[63] Polity IV Project, Political Regime Characteristics and Transitions, 1800-2018, <http://www.systemicpeace.org/inscrdata.html>
[64] Only major constitutional amendments, equating to a de facto new constitution, were taken into account here: i.e. Finland in 2000, Sweden in 2009. For Denmark, the Constitution of 1953 is taken as reference.
[65] Endogeneity would take place if the condition accounted for whether a constitutional court -as opposed to a constitution- would post-date the creation of the Austrian Constitutional Court. By taking into account the date of creation of the constitution, the problem disappears: not all constitutions post-dating the creation of the Austrian Constitutional Court included Kelsenian courts, while constitutions pre-dating it might have been amended to include a constitutional court.
[66] See A. Stone Sweet, A., *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective* (1992).

monopoly on the assessment of political issues such as the validity of elections[67] so this hybrid case was classified also as one of specialized court. In Ireland and Cyprus constitutional review is monopolized by certain institutions, but these are the higher courts of the judiciary (the Supreme Court in both countries and, in Ireland, also the High Court) so the cases were coded as cases of review in the judicial branch. The same coding was used for Finland, because the country has now abandoned the model of pure parliamentary sovereignty and recently its courts have been bestowed with certain powers of review.[68] The most difficult cases were Estonia and Luxembourg, as these were cases of complete hybridity. For these two cases there were only two options: excluding them from the sample to ensure uncontroversial results, or assigning them contestable but theoretically justified scores and, admitting their contestability, provide for additional qualitative discussion which could account for their specificity. Opting for comprehensiveness, the second strategy was preferred. In Estonia there is no constitutional court. However, like in Kelsenian systems, constitutional review is essentially centralized in a Constitutional Review Chamber of the Supreme Court, certain political actors have standing before the chamber, and the institution can exercise abstract and *ex ante* review.[69] Estonia was thus included in the group of countries with review by a specialized court. The case of Luxembourg is even more difficult. Traditionally a country based on the idea of parliamentary sovereignty, in 1996 an institution named 'Constitutional Court' was created. However, despite its name, the institution is largely dissimilar from Kelsenian-type institutions. Only ordinary courts (and not political actors or citizens) can raise questions before it, the decisions of the Constitutional Court only bind the referring court and, most

[67] CECC/Conference of European Constitutional Courts, *Report on the Constitutional Court of the Republic of Malta* (2002).
[68] De Visser, op. cit., n.4, p.77; Gardbaum, op. cit., n. 2, p.623.
[69] N. Maveety, and V. Pettai, 'Government Lawyers and Non-Judicial Constitutional Review in Estonia' (2005) 57 *Europe-Asia Studies* 93, at 99.

importantly, it has in fact no capacity to annul legislation *erga omnes*[70], which is the defining feature of Kelsenian courts. The case of Luxembourg is in fact a hybrid of Kelsenian model and parliamentary sovereignty, but in the absence of capacity to annul legislation *erga omnes* it has been coded as a very special instance of the latter. In any case, the empirical section analyses this case in more detail, acknowledging its special and hybrid nature. Take into account, additionally, that the other two countries classified as of parliamentary sovereignty are also no longer pure types of this approach; for instance, in the UK, the influence of the European Convention on Human Rights has introduced a modicum of constitutional review in the country, although the parliament continues to have the last say on constitutional matters. Additionally, the powers of abstract review of the UK Supreme Court on devolution matters[71] add an element of hybridity to the approach to constitutional review in this country. Regarding the legal families condition, it was observed that a number of countries had been influenced by different legal traditions. However, in most of these cases the two legal families converging in the same country were the romanistic and the germanistic, so the problem became irrelevant as the QCA analyses grouped these families into one single condition. The only country in which that was not the case was Malta, which had both strong civil law and common law influence. The country was classified as a romanistic country.[72] For the cases in which assignment of scores was hybrid or unclear (for any of the conditions or for the outcome), detailed explanation and analysis accounting for their specific nature is provided in the empirical section.

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[70] Ferreres Comella, op. cit., n.4, p. 168; P. Popelier, P. and W. Voermans, 'Europeanization, constitutional review and consensus politics in the Low Countries' in *European Integration and Consensus Politics in the Low Countries*, eds. H. Vollaard, J. Beyers and P. Dumont (2015) 92, at. 96.

[71] See on this topic Lady Hale, 'The UK Supreme Court in the United Kingdom Constitution' (2015) *Inaugural lecture at the Institute for Legal and Constitutional Research*, University of St Andrews.

[72] K. Aquilina, 'Rethinking Maltese Legal Hybridity: A Chimeric Illusion or a Healthy Grafted European Law Mixture? (2011) 4 *J. of Civil Law Studies* 261.

CONFIGURATIONAL ANALYSES

1. Analysis of necessary conditions

The analysis of necessary conditions shows which conditions must be always present (or absent) for the outcome to occur, even if their presence (or absence) might be alone insufficient for the occurrence of the outcome. In general, it is considered that for a condition to be 'necessary' it must have a consistency higher than 0.9, although a very strict definition of necessity would raise the threshold to 1. Table 2 indicates in bold every instance in which this requirement is met.

Table 2. Analysis of necessary conditions

	Specialized court		Judicial branch		Parliamentary sovereignty	
	Consistency	*Coverage*	*Consistency*	*Coverage*	*Consistency*	*Coverage*
decentralization	0.263158	0.625000	0.166667	0.125000	0.666667	0.250000
~decentralization	0.736842	0.700000	0.833333	0.250000	0.333333	0.050000
authoritarian	0.789474	1.000000	0.000000	0.000000	0.000000	0.000000
~authoritarian	0.210526	0.307692	**1.000000**	0.461538	**1.000000**	0.230769
romanogermanic	**1.000000**	0.863636	0.166667	0.045455	0.666667	0.090909
~romanogermanic	0.000000	0.000000	0.833333	0.833333	0.333333	0.166667
politfrag	0.894737	0.739130	0.833333	0.217391	0.333333	0.043478
~politfrag	0.105263	0.400000	0.166667	0.200000	0.666667	0.400000
postaustriancc	0.894737	0.739130	**1.000000**	0.260870	0.000000	0.000000
~postaustriancc	0.105263	0.400000	0.000000	0.000000	**1.000000**	0.600000
preexistingcc	0.210526	1.000000	0.000000	0.000000	0.000000	0.000000
~preexistingcc	0.789474	0.625000	**1.000000**	0.250000	**1.000000**	0.125000

As showed in Table 2, for the outcome 'specialized courts' the only necessary condition was membership of a case in the group of countries of a romano-germanic civil law tradition, which also has a high coverage. This seems to confirm the theory that institutional diffusion operates more easily within relatively homogeneous cultural areas, to the point that the institutional settings common to those areas are necessary for the implementation of Kelsenian courts. Note that Ramos Romeu focuses on the distinction between common law and civil law families.[73] However, the analysis in this paper shows that the results are more fine-grained if the very sui-generis Scandinavian legal tradition is separated from the other civil law families. The analysis of sufficient conditions, showed below, confirmed this finding.

For other outcomes, some conditions displayed also a high consistency score. For countries in which constitutional review was entrusted to the judicial branch there were three necessary conditions: the absence of a lasting and continuous authoritarian experience, the absence of a previous constitutional court, and the fact that the constitution of the country was enacted after the creation of the Austrian Constitutional Court of 1920. For the system of parliamentary sovereignty, conditions with a high consistency score included the absence of a preexisting constitutional court, the enactment of the constitution before the creation of the first system of review in Europe with the Austrian constitution of 1920, and the absence of a lasting authoritarian experience. However, in the case of all of these conditions, coverage scores were notably lower, which suggests that any conclusions to be drawn from these findings should be taken more cautiously.

[73] Ramos Romeu, op. cit., n.2.

2. Analysis of sufficient conditions for 'specialized court'

The analysis of sufficient conditions shows which combinations of conditions are sufficient to produce the outcome, even if separately these conditions are insufficient to cause it. Following the theoretical framework, all the conditions were expected to contribute to the outcome when present. When constructing the Truth Table (see Appendix) it was observed that there were no logical contradictions, which pointed to the robustness of the model. When asked to select prime implicants, all are marked.

Table 3. Intermediate solution for 'review by specialized court'

Causal path	**Raw coverage**	**Unique coverage**	**Consistency**	**Cases**
romanogermanic*postaustriancc* authoritarian	0.789474	0.105263	1.000000	Bul, Cro, Cz, Est, Ger, Hu, It, Lat, Lit, Pl, Pt, Ro, Sk, Sl, Spa
romanogermanic*postaustriancc* politfrag	0.789474	0.105263	1.000000	Bul, Cro, Cz, Est, Fr, Ger, It, Lat, Lit, Mt, Pl, Pt, Sk, Sl, Spa
romanogermanic*politfrag*decentralization	0.210526	0.105263	1.000000	At, Be, Ger, Spa
Solution coverage: 1.000000				
Solution consistency: 1.000000				

The model in Table 3 displayed three different causal paths, covering together all the countries with Kelsenian or similar systems of review (coverage: 1) and exclusively

countries with this type of system of review (consistency: 1). It is worth noting that the condition 'preexistence of the institution' disappeared after Boolean minimization, which means that it was not logically relevant to the model.

All the paths included as a condition the membership to romano-germanic legal families, which is consistent with the analysis of necessary conditions displayed earlier and with the theoretical framework set above.[74] Furthermore, it is telling that the main cases of hybridity in the models of constitutional review are also the cases in which other influences apart from the romano-germanic were present. In Malta ordinary courts can perform review functions, but at the same time there is a Constitutional Court whose final say is binding *erga omnes* and monopolizes some politics-related functions.[75] Revealingly, Malta had clear common law influences in addition to civil law ones, having gained full independence from the United Kingdom only in 1964. Also in Estonia, the choice for a Constitutional Review Chamber instead of a purely Kelsenian institution has been explained by some authors as a possible result of the Scandinavian influence.[76] The cases of Malta and Estonia are literally the exceptions that prove the rule, as they provide for complementary evidence that institutional diffusion within areas of influence or legal-cultural traditions is a major factor explaining choices on models of review.

However, important as it might be, it must be kept in mind that the 'romano-germanic' condition was, alone, never sufficient to produce the outcome. Said in other terms, the type of legal family matters, but only when it is combined with other factors. In the first path it had to be combined with the existing precedent of the Austrian Constitutional

[74] Ginsburg and Versteeg, op. cit., n. 2, p.591; Cappelletti and Adams, op. cit., n.4, p.1215.
[75] CECC/Conference of European Constitutional Courts, op. cit. n.67.
[76] See G. Brunner, 'Structure and Proceedings of the Hungarian Constitutional Judiciary', in *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court,* eds. L. Sólyom and G. Brunner (2000) 65, at 94; K. Kovács and G.A. Tóth, 'Hungary's Constitutional Transformation' (2011) 7 *European Constitutional Law Rev.* 183, at 184.

Court and with the transition from a lasting authoritarian regime towards democracy. This path, which is similar albeit not identical to the first research hypothesis, can explain almost 80 per cent of the cases, although its overlap with other paths is very high (unique coverage: 0.1). The most likely explanation for this combination is that constitution-makers in democratic transitions decided to follow the Austrian model because a wide-spread belief existed in the context of the romano-germanic area that this institution could signal a clear commitment to democracy and/or could be useful to prevent an authoritarian relapse. Signaling and ideational theories find further support in the work of Cappelletti and Adams[77], which suggested that post-war Italy and Germany seek the creation of a 'new high-ranking and prestigious organ' to control the government. Also referring to the German case, Schoenberger shows that the constitution drafters were overwhelmingly concerned with human rights and dignity as a reaction to the Nazi period.[78] In the Polish case, Garlicki points at the weight of the experiences in two neighboring countries: 'Germany, due to its geographical proximity and its traditional influence on Polish scholars, and Spain, due to its successful (and peaceful) departure from an authoritarian rule'.[79]

In the second path in Table 3, countries also belonged to the romano-germanic tradition and could follow the precedent of the Austrian Constitutional Court, but unlike in the first path the additional relevant condition was now the high political fragmentation and electoral competitiveness at the moment of creation of the system of review (no party with absolute majority of votes). The interaction between explanatory conditions points here at the idea that, in romano-germanic countries, political fragmentation created a

[77] Cappelletti and Adams, op. cit., n.4, p.1218.
[78] C. Schoenberger, 'The Establishment of Judicial Review in Postwar Germany' in *The Political Origins of Constitutional Courts,* eds. P. Pasquino & F. Billi (2009) 76, at 78.
[79] L. Garlicki, 'Constitutional Court of Poland' in: *The Political Origins of Constitutional Courts*, eds. P. Pasquino and F. Billi (2009)13, at 22-23.

strong incentive to the implementation of the Kelsenian model inaugurated by Austria. The combination of these three conditions, rather than their separate effect, explains the outcome. Literature on the individual cases confirms the importance of party dynamics in the establishment of centralized models of review, as suggested by this path. For the Polish case, Garlicki stated that political fragmentation and the idea of the insurance function could have played a role when, in 1997, a new Constitution was passed reforming the already existing court.[80] France is also part of this path. However, the French Constitutional Council was one of the difficult cases, since especially at the moment of its creation it was very different from typical Kelsenian courts. The *sui generis* nature of the Council might be explained by some specificities of its context of creation. Note that the general theory is that fragmented constituent assemblies have an incentive to create Kelsenian courts, but also that this theory implicitly assumes a parliamentary model in which the assembly is the actor in control of the process of constitution-drafting. Although it is true that the French parliament was fragmented in 1958, a special feature of the case might have had an important role in the design of the Council: the *de facto* hegemony of the De Gaulle and his exceptional dominance over the constitution-making process. Thus, political calculations of interests also seem to explain this case, but in a different way: precisely because of parliamentary fragmentation, De Gaulle created an institution which he could keep under his command. According to Stone Sweet 'General De Gaulle and his agents established a quasi-Bonapartist institution, the Constitutional Council, as a means of ensuring executive control over the legislature'.[81] In fact, the Council was born with very limited powers of review, and for more than a decade was tightly subject to the authority of the

[80] Id., p.31.
[81] Stone Sweet, op. cit., n.7, p.2748.

executive.[82] The powers of the Council, however, expanded over time. In 1974, the institution was reformed to give standing to 60 members of any chamber of the parliament, thus providing opposition parties with access to the institution and making the Council more similar to usual counter-majoritarian Kelsenian courts. Troper[83] and Pasquino[84] explicitly stated that the 1974 reform fully validates Ginsburg's 'insurance theory', as it was implemented as a form of protection of politicians in power against future political majorities.

In the third path, countries of the romano-germanic legal families had a sufficient level of political fragmentation and a high level of decentralization, these two later factors creating an incentive to the creation of Kelsenian courts in the context of legal families that were compatible with it. Again, this path is similar but not identical to the second research hypothesis. Unlike in the former paths, the existence of the Austrian precedent was not logically relevant for the production of the outcome in this one. More importantly, this is the only path in which decentralization plays any role at all. And tellingly, this path has the lowest raw coverage, as it has the potential to explain only 21 per cent of cases. This could be thought to confirm the findings by Ginsburg and Versteeg[85] and Ramos Romeu[86] that decentralization is not that important to explain judicial review after all. This idea should however be taken cautiously, as for at least two countries, Austria and Belgium, this condition turned out to be essential in its combination with other factors. Existing literature seems to confirm this idea in both

[82] Stone Sweet, op. cit., n.66.
[83] M. Troper, 'Constitutional amendments aiming at expanding the powers of the French Constitutional Council' in: *The Political Origins of Constitutional Courts,* eds. P. Pasquino and F. Billi (2009) 84, at 85.
[84] P. Pasquino, The debates of the Italian Constituent Assembly concerning the introduction of a Constitutional Court (1947-1948), in *The Political Origins of Constitutional Courts,* eds. P. Pasquino and F. Billi (2009) 104, at 105.
[85] Ginsburg and Versteeg, op. cit., n. 2
[86] Ramos Romeu, op. cit., n.2.

instances. Cappelletti and Adams recall that the 1920 Austrian constitution already gave the Länder governments and the federal government the capacity to raise questions before the court against each other.[87] Gardbaum explicitly claims that decentralization is a major force explaining the creation in Belgium of the Court of Arbitration, which later extended its powers and became the Belgian Constitutional Court.[88] A similar position is defended by Popelier and Voermans with regards the Belgian case.[89] Additionally, some information points at the importance of decentralization even for some cases which can be explained also by other paths. A good example is that of Germany, for which Schöenberger mentions 'the importance of federalism'[90] as one the driving forces behind the introduction of constitutional review.

3. Analysis of sufficient conditions for 'parliamentary sovereignty'

For the analysis of sufficient conditions for models of parliamentary sovereignty, the same conditions as in the previous subsection were used, although the assumptions about their causal impact were exactly the opposite: now all conditions were expected to contribute to the outcome when absent. Again, a contradiction-free Truth Table was obtained (see Appendix). When asked to select prime implicants, a conservative approach was followed and all were marked. After Boolean minimization it was obtained a model with perfect coverage (1.0) and consistency (1.0) scores, which was composed by two causal paths (Table 4).

[87] Cappelletti and Adams, op. cit., n.4, p.1220.
[88] Gardbaum, op. cit., n.2, p.619.
[89] Popelier and Voermans, op. cit., n.70, pp.95 ff.
[90] Schoenberger, op. cit., n.78, p.82.

Table 4. Intermediate solution for 'parliamentary sovereignty'

Causal path	Raw coverage	Unique coverage	Consistency	Cases
~preexistingcc*~authoritarian* ~postaustriancc*~politfrag	0.666667	0.666667	1.000000	Nl, UK
~preexistingcc*~authoritarian* ~postaustriancc*~decentralization	0.333333	0.333333	1.000000	Lux
Solution coverage: 1.000000				
Solution consistency: 1.000000				

As seen in Table 4, countries in which the model of parliamentary sovereignty survived had in common a convergence of absences: all conditions that could have led to the implementation of constitutional review are absent, interacting with each other in permitting the exceptional survival of a model of parliamentary sovereignty.

The two paths in the model have in common that in those countries a precedent of a Kelsenian institution had never existed, as in fact their constitutions preexisted the creation of the first system of constitutional review in Europe. They also have in common that they did not experience authoritarian regimes, or did only for less than ten consecutive years. The first path covers the UK and The Netherlands. Their constitutions are particularly old (in the case of the UK, according to some definitions, the oldest in the world), preexisted the creation of the first systems of review, and were enacted at a time that precedes modern dynamics of electoral competition. This explains why a system of constitutional review was not implemented in the first place. The fact that these countries did not suffer totalitarian or authoritarian regimes (UK) or did so for a short period of time and as a result of an invasion (The Netherlands) would explain

the lack of incentives to implement such system at a later stage. Note also that political decentralization is irrelevant to this path. This would explain why the process of devolution in the UK or decentralization in The Netherlands have not so far lead to the substitution of the model of parliamentary sovereignty.

The second path covers only Luxembourg, showing the very idiosyncratic nature of this case. In this country a Constitutional Court was created in 1996 but, given the fact that it had no general powers to annul legislation *erga omnes*, it was classified as a special type of system of parliamentary sovereignty. The model in Table 4 shows that this country actually met a number of conditions that theoretically should have driven to perfect (as opposed to hybrid) parliamentary sovereignty. The counter-intuitive creation of the Constitutional Court has been analyzed in detail by some literature. Everything points at it being the result of a case-specific factor: a decision of the European Court of Human Rights that questioned the impartiality of the *Conseil d'État*.[91] To deal with this decision, Luxembourg decided in 1996 to create its Constitutional Court, but in line with the general conditions of the country showed in the path, it was bestowed with very limited powers of review, no standing for political actors and, more importantly, unlike Kelsenian courts, with no real capacity to annul of legislation with a binding force for all other actors.[92]

4. Analysis of sufficient conditions for 'review by the judicial branch'

[91] Gardbaum, op. cit. 2, p.622.
[92] Popelier and Voermans, op. cit., n.70, p.96.

The last analysis of sufficient conditions explains the cases in which judicial review is entrusted to the judicial branch. When introducing the six conditions in the analysis, a contradiction-free Truth Table is obtained. When asked to select prime implicants, again a conservative strategy is followed and all are marked. All conditions are deemed to contribute to the outcome when absent. The intermediate solution displays three paths and perfect solution coverage and consistency scores (Table 5).

Table 5. Intermediate solution for 'review by the judicial branch'

Causal path	**Raw coverage**	**Unique coverage**	**Consistency**	**Cases**
~preexistingcc*~romanogermanic* ~authoritarian*postaustrian	0.833333	0.000000	1.000000	Cy, Dk, Fi, Irl, Swe
~preexistingcc*~romanogermanic* ~authoritarian*politfrag	0.833333	0.000000	1.000000	Cy, Dk, Fi, Irl, Swe
~preexistingcc*~authoritarian* ~decentralizatio*~politfrag	0.166667	0.166667	1.000000	Gre
Solution coverage: 1.000000				
Solution consistency: 1.000000				

The first two paths in Table 5 cover exactly the same countries (Cyprus, Sweden, Finland, Denmark and Ireland) which are overdetermined, although the first path seems theoretically more solid. Both paths have in common the absence of some of the key conditions leading to the implementation of a Kelsenian system: absence of a precedent of system of centralized review, absence of romanogermanic legal system and absence

of a lasting authoritarian regime. However, as suggested in the first path, the constitutions of these countries were enacted at a time when constitutional review had already some precedents in the continent. This might have created an incentive for these countries to implement a system of review, albeit different from the Kelsenian model that was spreading in romanogermanic countries.

The last path in Table 5 covers Greece. In this path we also find the absence of several of the conditions that lead to Kelsenian systems. One of them is political fragmentation, whose absence is also part of the configuration. In that regard, Magalhaes explains that for the Greek case, it was precisely the dominance of the New Democracy Party (with 70% of seats on the assembly) what lead the country to a system of concrete and diffuse review, unlike countries with a similar legal family and authoritarian legacies: 'Unlike those in Spain or Portugal, the Greek constituent process was dominated by a single party, Constantine Karamanlis's New Democracy. ND enjoyed more than 70 percent of seats in the assembly, and did not have to worry about elections following the approval of the new Constitution. The result was that Greece, with similar authoritarian and civil law legacies and involved in an almost simultaneous democratic transition, remained the only new Southern European democracy without constitutional review of legislation. Instead, it returned to the pre-dictatorship system of concrete and diffuse judicial review, and created only a Special Highest Court (SHC) in charge of settling controversies between the highest courts in the land (the Council of State, the Areos Pagos, and the Court of Auditors) concerning concrete review decisions, composed mainly of career judges enjoying reduced independence from the executive'.[93] The configurational nature of choices on models of constitutional review is, again, clear

[93] Magalhães, op. cit., n.26, p.127.

here: having a romano-germanic legal family or an authoritarian past is not enough to implement a constitutional court. The Greek case illustrates that these conditions do not suffice for this outcome, even combined, unless there is also a sufficient political fragmentation in the country.

The model, however, provides for some interesting evidence that questions the role that existing literature has attributed to party hegemony in the choices for systems of review. While the path of Greece shows the importance of lack of political fragmentation for the implementation of a system of review by the judicial branch, the second path indicates that its presence might have a similar effect. This paradox might be explained by two factors. On the one hand, cases in the second path are overdetermined, so it could simply be that the first path is a better explanation for them. On the other hand, political fragmentation (and its absence) is combined with different conditions in the different paths. In any case, the model provides for an interesting puzzle that future research will have to approach in more detail.

CONCLUSION

This article has explained institutional choices on contemporary models of constitutional review in the countries of the EU. The findings of the research point towards an interesting form of 'contextual rationality' as an explanation for these choices: a type of reasoning as to what arrangement is best which depends on specific contexts, such as specific types of legal family. Furthermore, this contextual rationality

could be comprehended thanks to the configurational approach followed by the article. In the case of Kelsenian-style systems of review, the findings suggested that these were implemented in countries with a romano-germanic legal family, but only in combination with conditions such as a high political fragmentation or a lasting authoritarian experience. This type of legal family, thus, could be understood as a fertile ground for the dissemination of the Kelsenian model, although these types of courts were only implemented in these countries when other triggering factors were also present. Such findings confirmed the research hypotheses, although adding further complexity to them.

Similar was the case of the other approaches to constitutional review, whose implementation could only be understood in configurational terms. The survival of the system of parliamentary sovereignty is explained in this paper as the result of the joint absence of the factors that could have created an incentive to the implementation of constitutional review. And the system of diffuse review, generally, as the result of a period in which constitutional review is mainstreaming in Europe, albeit in countries where the Kelsenian model was a less likely option –for instance, because they were not based on romano-germanic legal families-. The configurational approach taken by this paper, thus, complements existing research in the field and helps us see the determinants of approaches to constitutional review from a new, different angle.

While this article has focused on the current systems of constitutional review of EU Member States, its findings have the capacity to shed light over other cases in different periods or geographical locations. For instance, the model seems able to clarify the reasons behind the creation of the Tribunal of Constitutional Guarantees of the 1931 Second Spanish Republic. In line with the findings of this article, that institution was created by a post-1920 constitution in a civil law country undergoing a process of

decentralization and with a fragmented constitutional assembly. The evidence found by this article probably also has much to tell about the traditional approach to diffuse review in Iceland, which despite not being a Member State of the EU shares similar features with Sweden, Denmark and Finland. This capacity of the models to shed light on cases beyond the sample of the article points at the strength of its findings.

The normative debate on the merits of constitutional review will continue to permeate literature about these institutions. On the one hand, arrangements for constitutional review constrain democratically-elected political actors when pursuing their preferences and goals. On the other hand, these institutions are deemed to be essential for the protection of the rule of law and democracy in countries where they exist. However, the implementation of models of constitutional review is often the result of factors that go beyond these normative considerations, even if democratic concerns still play a role in their creation. In shedding light over those factors, I hope to have contributed with empirical evidence to the important debates taking place in the field about the rationales and the desirability of the different approaches to constitutional review.

Appendix

In order to meet the best practices in the use of QCA, this Appendix provide for information about the Truth Tables and data matrix used to perform the analysis.

Truth Table for Presence of Special Court										
Decent	author10	Romanger	Polit frag	Post Austrian	preexist	number	special court	Raw cons	PRI cons	SYM cons
0	1	1	0	1	0	1	1	1.00	1.00	1.00
1	1	1	0	1	1	1	1	1.00	1.00	1.00
0	0	1	1	1	0	2	1	1.00	1.00	1.00
1	0	1	1	0	0	2	1	1.00	1.00	1.00
1	1	1	1	1	0	2	1	1.00	1.00	1.00
0	1	1	1	1	1	3	1	1.00	1.00	1.00
0	1	1	1	1	0	8	1	1.00	1.00	1.00
0	0	1	0	1	0	1	0	0.00	0.00	0.00
0	0	1	1	0	0	1	0	0.00	0.00	0.00
1	0	0	0	0	0	1	0	0.00	0.00	0.00
1	0	0	1	1	0	1	0	0.00	0.00	0.00
1	0	1	0	0	0	1	0	0.00	0.00	0.00
0	0	0	1	1	0	4	0	0.00	0.00	0.00

Number of cases: 1. Consistency cutoff: 0.99

Truth Table for Presence of Parliamentary Sovereignty										
Decent	author10	Romanger	Polit frag	post austrian	preexist	number	Parl sovere	Raw cons	PRI cons	SYM cons
0	0	1	1	0	0	1	1	1.00	1.00	1.00
1	0	0	0	0	0	1	1	1.00	1.00	1.00
1	0	1	0	0	0	1	1	1.00	1.00	1.00
0	0	1	0	1	0	1	0	0.00	0.00	0.00
0	1	1	0	1	0	1	0	0.00	0.00	0.00
1	0	0	1	1	0	1	0	0.00	0.00	0.00
1	1	1	0	1	1	1	0	0.00	0.00	0.00
0	0	1	1	1	0	2	0	0.00	0.00	0.00
1	0	1	1	0	0	2	0	0.00	0.00	0.00
1	1	1	1	1	0	2	0	0.00	0.00	0.00
0	1	1	1	1	1	3	0	0.00	0.00	0.00
0	0	0	1	1	0	4	0	0.00	0.00	0.00
0	1	1	1	1	0	8	0	0.00	0.00	0.00

Number of cases: 1. Consistency cutoff: 0.99

Truth Table for Presence of Review by Judicial Branch										
Decent	author10	Romanger	Polit frag	post austrian	preexist	number	Judic branch	Raw cons	PRI cons	SYM cons
0	0	1	0	1	0	1	1	1.00	1.00	1.00
1	0	0	1	1	0	1	1	1.00	1.00	1.00
0	0	0	1	1	0	4	1	1.00	1.00	1.00
0	0	1	1	0	0	1	0	0.00	0.00	0.00
0	1	1	0	1	0	1	0	0.00	0.00	0.00
1	0	0	0	0	0	1	0	0.00	0.00	0.00
1	0	1	0	0	0	1	0	0.00	0.00	0.00
1	1	1	0	1	1	1	0	0.00	0.00	0.00
0	0	1	1	1	0	2	0	0.00	0.00	0.00
1	0	1	1	0	0	2	0	0.00	0.00	0.00
1	1	1	1	1	0	2	0	0.00	0.00	0.00
0	1	1	1	1	1	3	0	0.00	0.00	0.00
0	1	1	1	1	0	8	0	0.00	0.00	0.00

Number of cases: 1. Consistency cutoff: 0.99

csQCA Data Matrix									
Case	spec_court	jud_branch	parlm_sover	Decentralizatio	authoritarian10	Romanogermanic	politfrag	postaustriancc	prexistingcc
AT	1	0	0	1	0	1	1	0	0
BE	1	0	0	1	0	1	1	0	0
BUL	1	0	0	0	1	1	1	1	0
CRO	1	0	0	0	1	1	1	1	1
CY	0	1	0	0	0	0	1	1	0
CZ	1	0	0	0	1	1	1	1	0
DK	0	1	0	0	0	0	1	1	0
EST	1	0	0	0	1	1	1	1	0
FI	0	1	0	0	0	0	1	1	0
FR	1	0	0	0	0	1	1	1	0
GER	1	0	0	1	1	1	1	1	0
GRE	0	1	0	0	0	1	0	1	0
HU	1	0	0	1	1	1	0	1	1
IRL	0	1	0	0	0	0	1	1	0
IT	1	0	0	0	1	1	1	1	0
LAT	1	0	0	0	1	1	1	1	0
LIT	1	0	0	0	1	1	1	1	0
LUX	0	0	1	0	0	1	1	0	0
MT	1	0	0	0	0	1	1	1	0
NL	0	0	1	1	0	1	0	0	0
PL	1	0	0	0	1	1	1	1	1
PT	1	0	0	0	1	1	1	1	0
RO	1	0	0	0	1	1	0	1	0
SK	1	0	0	0	1	1	1	1	0
SL	1	0	0	0	1	1	1	1	1

SPA	1	0	0	1	1	1	1	1	0
SWE	0	1	0	1	0	0	1	1	0
UK	0	0	1	1	0	0	0	0	0

Raw data for quantitative phenomena dichotomized into crisp sets						
Case	Decentralizatio		authoritarian10		Politfrag	
	Regional Authority Index	Crisp Set	Years authoritariansm	Crisp Set	Share of votes of most voted party	Crisp Set
AT	21,00	1	7	0	40.8%	1
BE	28,95	1	4	0	19.5%	1
BUL	1	0	44	1	47%	1
CRO	1	0	46	1	Aprox. 40% (complex system)	1
CY	0	0	1	0	56% for Patriotic Front in Greek Community, but all seats in Turkish community go to CTNU	1
CZ	0	0	41	1	29.7%	1
DK	6,1	0	5	0	40%	1
EST	0	0	1+3+47	1	41%	1
FI	7,1	0	0	0	29%	1
FR	7	0	4	0	32%	1
GER	32	1	12+41(East Ger)	1	Drafted by parliamentary council, with no absolute majorities	1
GRE	1	0	Several authoritarian periods, none of them more than 10 consecutive years	0	54%	0
HU	10,9	1	45	1	52%	0
IRL	0	0	0	0	47%	1
IT	10	0	21	1	35%	1
LAT	0	0	1+3+47	1	32%	1
LIT	0	0	1+3+46	1	Majority (not absolute) for independent candidates in 1990 elections to Supreme Soviet	1
LUX	0	0	4	0	30%	1
MT	0	0	0	0	42%	1
NL	15,5	1	4	0	System created in 1848, not comparable to modern elections	0
PL	3	0	45	1	20%	1
PT	3,6	0	48	1	48%	1
RO	6	0	4+44	1	67%	0
SK	0	0	45	1	37%	1
SL	0	0	24+4+45	1	17.3%	1
SPA	12,1	1	39	1	34%	1
SWE	12	1	0	0	35%	1
UK	10,5	1	0	0	Evolutive constitutionalism.	0