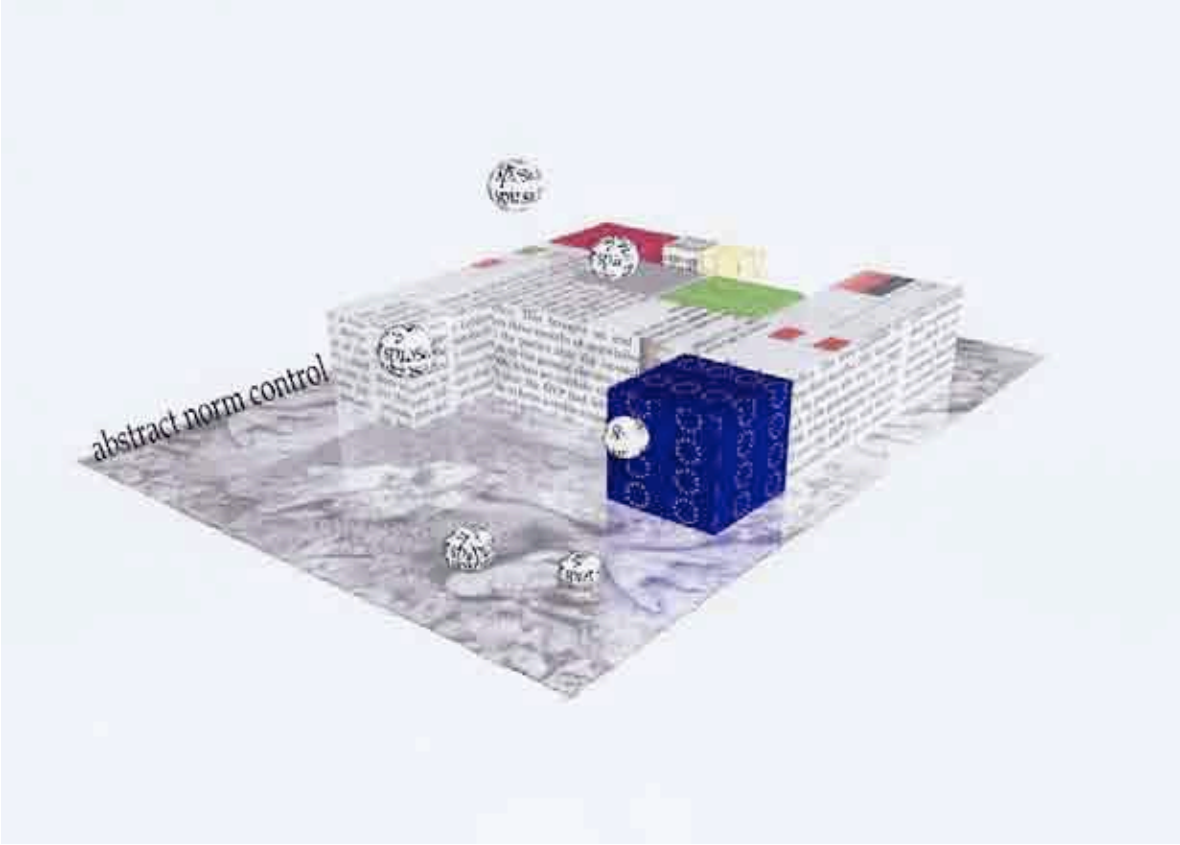
Developments in Abstract Judicial Review in Austria, Italy and Germany

by

Nicola Christine Corkin

A thesis submitted to
The University of Birmingham
for the degree of
DOCTOR OF PHILOSOPHY



Department of Political Science
Muirhead Tower
The University of Birmingham
Birmingham
B15 2TT
March 2010

DEDICATION

I thank Professor Anand Menon for all the patience and humour whenever I did something stupid and Professor Simon Green for all the laughter when I planned something extremely stupid. This thesis does not live up to all the help and advice I have received from both of you.

I thank Philip Pogge von Strandmann for my sanity, my parents for a link to reality and the Kids and Bratz for helping me to increase my coffee intake.

For
Ilse Editha Irmgard de Gruyter
and
Dagmar Maria Corkin-Nonnenmacher

"No written law has ever been more binding than unwritten custom supported by popular opinion."

Carrie Chapman Catt, Women's Rights Activist

TABLE OF CONTENTS

LIST OF TABLES

INTRODUCTION

Over the last 20 years, the study of courts has received considerable attention in the political science literature (Tate 1995; Jackson 1992; Harding 2009). In particular, the jurisprudence of the European Court of Justice (ECJ), its rise in power and its influence on policy creation and European integration have become the centre of many studies (Weiler 1994, Alter 1996, Wincott 1995, 1999, 2000 and others). The role national courts have played in the development of the powers of the European Court of Justice through preliminary ruling procedures, as well as the impact of international courts on private litigants, have been investigated (Alter 2001; Ward 2007). Increasingly there is also a growing field of literature relating to newly created courts, especially in Eastern Europe (Harding 2009; Solyom 2009). Much of this literature concentrates on the independence of courts and their increased, or decreased, affect on policy-making. In the field of comparative politics scholars have payed increasing attention to the similarities and differences in the development of power-relations between courts and the political branches in different national contexts (Vanberg 2000; Stone 1992, Jacob 1996, Jackson 1992 and others). Between all these aspects lies one area which has yet received little scholarly attention. The quiet changes wrought within the national jurisdictions of the courts through EU membership remain, even within jurisdiction let alone in comparison to others, have mainly been ignored. In the end, a preliminary reference is a conscious decision by a court to refer to the European Court of Justice. What remains is the question if there are other changes brought on by EU membership in the national jurisdictions of the courts when the court does not have to make the decision to involve the ECJ? This thesis concentrates on the very specialised power of abstract judicial review in its attempt to discover these changes and their possible explanations. Before outlining the presented argument, this introduction will consider the different definitions of abstract judicial review and the development of this legal power in courts in Europe. The argument of the thesis will then be outlined and a rudimentary summary of each sections will be presented. Thirdly, and lastly, this introduction will outline the contributions this thesis makes to the literature.

Many modern democracies have invested their courts with the power of abstract norm review (Vanberg 1998:300). Abstract judicial review is the power of a court to decide on the

constitutionality of legislation without a concrete case, and thus stands in contrast to concrete judicial review, the power of a court to review legislation as it applies to a particular case. In 2003, Austrian news-agencies reported that the constitutional court had declared 70% of laws, referred to it under abstract review, unconstitutional in the previous year (Ladstaetter 2003). This number presents a significant increase when compared to the 20% observed in the early 1980s (Stone 1992:62). Other countries, such as Germany, Spain, Italy and Portugal, have also noted an increase in abstract judicial review proceedings and subsequent unconstitutionality rulings (Magalhaes 2003). Academically, this increase has gone widely unnoticed (Vanberg 1998:301). The cause for this omission is the comparative low profile of abstract norm control compared to the high profile of concrete review (Stone 1992:62). A further contributing element is the interdisciplinary character of abstract norm review. Its character is neither fully political nor fully legal and, therefore, is often ignored by researchers from both fields. It is therefore necessary to take account not only of the scholarly works produced in context of national courts in political science, but also law, economics and sociology, to develop an argument. For this purpose a concentration on the jurisdictions of the Austrian, Italian and German constitutional courts has been chosen in this thesis due to their high level of comparability.

The argument developed by this thesis is as follows: harmonisation of EU/EC law with national law has created an environment in which it is more likely for a law to be declared unconstitutional, partially or as a whole. The reason for this can be found in two distinct factors:

a) the increased difficulty in creating laws that will not contravene any national or EU/EC laws leaves judges with the perceived necessity of making clear and strict decisions and
b) the higher level of complexity of the law-making process also allows for a more reckless attitudes of politicians to the necessity to remain *intra vires*, within their constitutionally given powers.

Both of these factors then lead to today's situation in which increased numbers of laws see review, with other words are declared unconstitutional by national constitutional courts.

A further aspect of the thesis relates to the format of review decisions rendered in the three countries by the constitutional courts. All display an increase in laws being declared unconstitutional in some form. However, the format these unconstitutionality declarations take

differ. In Italy and Germany, the increase can be traced back to a rise in complete unconstitutionality rulings. This means that in these two countries there is an increased probability of the court striking down entire norms rather than simply parts thereof. The Austrian court, on the other hand, is less likely to rule a norm unconstitutional, if it has the opportunity to review it only partially. With other words, the Austrian constitutional court is more likely to declare only parts of legislation as unconstitutional and let the other parts stand uncorrected. No conclusive explanation for this development has been found in this thesis. However, there are indications that it might correlate with the development of public confidence levels in Austria, in comparison to those in Germany and Italy. Public confidence is higher in the German and the Italian court and it can be argued that this might lead to less constraint in their decision making.

1.What is abstract norm review?

As many of the concepts and terms within this thesis have slightly differing meanings in different academic disciplines, it is necessary to present a short summary of their development within the European academic context, before presenting a detailed outline of the thesis and its originality and contribution to the literature. Norm review, or judicial review as most Anglo-American academics term it, is the power of a court to decide on the legality of a rule or norm which has been referred to the court for that purpose (Stone Sweet, 2004:9). A legal norm is a rule of any kind, passed and enforceable by a public body (e.g. ordinances, statutes, administrative rules, common law, precedent and international and supranational treaties) (Kalyvas, 2006:575). This legal definition is the most basic way to construe the meaning of the term norm. Arguably, its simplicity hides the complexity of the term. Other academic disciplines are more aware of the potential intricacies in presenting a definition. For a sociologist, a norm is anything which is socially enforced. This includes enforcement by courts and the police, but also less formal enforceability by social groups. The difference in meaning therefore lies in the enforceability by public bodies, i.e. courts, as well as in the perceived source of the norm. A sociological norm need not be based on a piece of legislation, it can also be a socially held belief. So for a sociologist, the German custom to clean the pavement in front of your house on Saturday morning, is a norm. There is no legal requirement for doing so - however most communities enforce it through social pressures. In the legal definition this would not be a norm, the legal definition denies any social or ethical aspect.

In philosophy, a norm is commonly understood as a reason to act, believe or feel - such as commands or permissions. Norms are not descriptively true or false, since they do not purport to describe anything, but they prescribe, create or change (Stone Sweet, 2000:8). This definition leaves room for both the social and the legal norm, but is too broad for this thesis which is only concerned with legally enforced norms. The term norm, as used in this study, therefore denotes a rule which commands or permits a certain action and is passed by a public body and enforced by a court. This definition is a combination of political, sociological, and philosophical concepts to form a legally acceptable rule of how to describe a norm. This definition is compatible with the definitions by the courts, the legal definition, without denying that each norm has an ethical and social dimension. Most importantly, this definition allows for the realisation that each norm is enforced in the social and ideological context of its place, time and environment.

This point can be best illustrated by an example. In our own jurisdiction, the British Sexual Offences Act 2003 (development of the Sexual Offences Act of 1957) lends itself to the clarification of the definition. This act, due to its nature in dealing with socially highly sensitive and personal matters, is especially well suited to elucidate the distinction between a minimalist legal and a more encompassing political definition of a norm as used in this thesis. The Act contains 143 parts. Section 1.1 defines rape in a basic way as sexual penetration without consent of the partner. Section 1.2, 1.3 (referring to Section 75/76), and 1.4 give further insight into the conditions under which penetration is rape, and the possible legal consequences of the action. The norm, in this case, is not “Rape is punishable”, but rather the Sexual Offences Act contains many norms. Norm 1: Penile penetration without consent is punishable. Norm 2: Penile penetration, in situations where the partner cannot give consent (such as unconsciousness, disability....), is punishable as rape (Section 75). Norm 3: Penile penetration, or sexual touching, if consent has been obtained by deception regarding nature, purpose or identity, is punishable as rape or sexual assault (Section 76). In the legal definition of a norm, each of these stand as they are written in black ink on the paper, denying the interpretative dimension of each term. Each of these sections is a rule passed and enforceable by a public body. However, there is a social and ethical dimension in the interpretation of the norm. The legal definition would like us to believe that this is now a rational statement, which can be applied directly to a case without consideration of ethical or social aspects. But each of

these norms contain a wide range of differing interpretations, concepts and terms whose meaning rests on the social and ideological surrounding of the interpreter.

The case of *Linekar*[1] illustrates this application of a social dimension to the purely legal definition. A prostitute tried to sue for rape as her client had not payed, and furthermore, admitted to never having had the intention to pay. It was held that she was not deceived to the purpose of the act, because the purpose of the act was sexual gratification, not monetary compensation. However, in *Piper*[2] a girl allowed a man to measure her breasts for the purpose of measuring her modelling qualities. He was held to have committed sexual assault, as he did not have a modelling agency and therefore deceived her. It can be argued that the two cases are inconsistent in their interpretation. In one case it was held that payment for a sexual act is not changing the nature of the act, in another, striving for a modelling career did change the nature of the act (Le Roux 1997:13). This illustrates that a norm also has a social and ethical dimension, hidden behind the words. This dimension has an impact on the treatment of norms by judges and therefore the minimalist legal definition falls short in presenting a comprehensive image. To allow for the additional aspect of norms, the legal definition has to be adapted. This is easiest achieved by incorporating the sociological and philosophical definitions, as has been done above. A norm is not simply a rule passed and enforced by a public body but it is also recognised that it permits or commands a certain action within society by members of the same society. What does it therefore mean if a norm is reviewed?

Two distinct forms of norm review proceedings can be observed in the design of constitutional or supreme courts across the world – concrete and abstract norm review. Concrete norm review is based on an actual case and, therefore, is a judgement on the constitutionality of the application of a particular law or norm to an individual case (Currie, 1994:162). In this, the litigant has to have legal standing. In other words, the litigant's rights have to have been directly infringed upon before he or she can take the injury up with the appropriate court and ask for a ruling on the application of a law leading to the right's infringement to his or her circumstances. The litigant then has to follow the customary route through the ranks of the courts by means of appeal. The end of this travel through the court system is the highest court of the land, most often the Supreme or Constitutional Court. These courts give a final and

[1] [1995] 2 Cr App R 49, [1995] Crim LR 320

[2] [2007] EWCA Crim 1251

binding decision[3]. In many most jurisdictions, lower courts can, if they belief there to be a constitutional issue, refer the case directly to the constitutional court. In other jurisdictions, only constitutional courts allow for the individual plaintiff to contact the court without rising through the ranks. Concerning the above example of *Linaker,* this would signify that the prostitute would have taken the interpretation of the norm relating to the nature of the sexual act to a constitutional court and asked the court to review whether the interpretation by the lower court is compatible with the law or constitution[4].

In the case of abstract review a court decides on the text of a law without a concrete case, hence without the limitations on concentration on the application to an individual case. Here the litigant does not have to have his or her individual rights infringed upon, before he or she can ask the constitutional court to decide and, furthermore, the law does not necessarily have to be legally binding at the time of the case. If it is an individual citizen who asks for the ruling[5], then the constitutional court does not have to accept the case. Whereas if it is an official, such as the head of state, a political institution or a number of parliamentarians, who ask for the ruling, the court is constitutionally obliged to consider the case. To apply this to the above example, in a different jurisdiction, one allowing for abstract judicial review, the opposition or another public body could have asked the constitutional court to decide on the constitutionality of Section 76 of the Sexual Offences Act 2003. It can then either declare the whole section constitutional, leaving it unchanged, or review the whole section, therefore voiding it and necessitating a change of the section by the legislature through new or additional legislation. It can also review parts of the norm, for example declare only "deception of the nature of the sexual act" as unconstitutional, whilst leaving deceit by identity and purpose intact. This is called a partial unconstitutionality ruling.

The application of the above example to both concrete and abstract judicial review illustrate conditions which have to be present in a legal system allowing for judicial review of primary

[3] The courts can always refer to the highest court directly if they feel it is necessary but it remains the choice of the individual judge

[4] The UK does not have a constitutional court or judicial review of primary legislation and therefore this is only a hypothetical possibility

[5] In most countries this is not possible at all but, rather, in many countries abstract norm review is limited to officials. However, for the purpose of explaining the difference between abstract and concrete judicial review this simplification seems excusable as countries such as Hungary do allow for abstract review initiated by individuals.

legislation, may this review be either abstract or concrete in nature. Supremacy of parliament, one of the founding stones of the British constitution, clearly does not allow for judicial review of norms directly created by the legislature in a constitutional way. Especially the concept of abstract norm review contains the idea that the constitution is sovereign, not the legislature. As a result it is almost exclusively found in civil law systems with codified constitutions. In abstract judicial review, the court is equal to the political branches.

1.1 Constitutional Courts, Constitutions and abstract judicial review

Therefore, abstract judicial review is an important power for a court to hold within the political system. It involves the courts closely with law-making (Shapiro, 2002:185). To look at it from a political perspective allows us to see that abstract norm review permits an unelected body, a court, to decide if a law, passed by the elected, political body, can stand unchallenged and be applied within the state. Furthermore, the court can make this decision before the law is legally binding or even after – depending on the court model. In this function, the court is an important part of the separation of powers model embedded in most codified constitutions in liberal democracies in Europe. The court ensures that the elected body adheres to the fundamental rules of the state. Within the perceptions and common representations of academic legal scholarship these rules are presented as forming the borders of power the public body legitimately holds and the court's duty and obligation to act as a safeguard and to ensure that the public body remains within these borders – that all the norms passed by the public body are *intra vires*, when passing a decision. The court ensures that the use and extent of power by a public body is legitimately within its power to pass (Barnett, 1999:736).

However, only certain courts have this power of abstract judicial review. The courts in most legal systems were created with distinct and differing specialisations. Different species of norms are applied by different courts. So for example a court specialising in tax or business law decides on different norms than a court specialising in family law. Trade law is applied in Trade courts, such as the Dutch Trade Tribunal. Criminal law in Spain finds its final interpretation in the criminal chamber of the Supreme Court. Britain adjudicates employment matters in an employment tribunal. Constitutional law is generally applied in a specialised constitutional court, such as the constitutional courts of Italy, Germany, Austria, Spain, Greece or Portugal. These constitutional courts make a decision not only as to which legal rules are

compatible with the constitution, but also decide applicability between conflicting norms. The way the court system has divided the court areas is very much system-specific even if there are common traits between individual countries.

Norm review of legislation therefore takes place at a court specialising in constitutional matters. This court weighs whether a norm, passed by a public body, can legally be applied by other courts within the same system. In essence, the constitutional court judges if it was in the power of the public body to pass this norm and if the norm was passed in accordance to previously passed norms. If it is not, then the court has to decide which norm is more important and therefore if the norm under consideration is unconstitutional. To do this the court requires a guideline what the powers of the public bodies are, and which norms supersede other norms. This guideline can be found in the constitution, a set of rules which supersedes all other rules (Jacque, 2000:56). This concept forms a distinct difference between most common and civil law countries. Civil law countries, based on the philosophical tenets of Roman and Napoleonic law, consider legislation as a hierarchy based on natural laws. In this view, natural law theory posits the existence of laws which are set by nature. With other words, there are laws within nature, which can be discovered, and are therefore valid everywhere and to everyone. These laws are above all other laws and any legislation has to fit into the borders these natural rules create.

The assumption that there are self-evident laws in nature, which simply have to be discovered, gives a justification to a hierarchy of laws. From a philosophical point of view the concept of inalienable, natural laws embedded in our mere humanity, has been discussed throughout the centuries. Aristotle bases them on the idea of natural justice whilst more recent thinkers, such as Hegel, root them in their basic “person-ness”. Historically, the idea of natural law and rights finds its expression in a wide range of system and occurrences. When the Romans and later, in the 18th and 19th century, other European rulers codified laws into constitutions, they used the argument of natural laws and rights. The first successful attempt, and the one still forming the basis of most legal systems in Europe, was the Napoleonic Code of 1804. In Civil Law countries, the constitutions are the highest level of laws. Any rule passed has to conform with the rules contained in the constitution. If the rule does not conform to the constitution then it was obviously passed without a public body having the right to pass it, as nothing can be

passed to counter the rules contained in the constitution[6]. It therefore was *ultra vires*, outside of the power of the public body to pass the law. If it is *ultra vires* then it can be declared as either wholly or partially unconstitutional by the constitutional court under abstract norm review.

One of the most significant and extensive impacts on constitutions in the last 50 years has been membership of the European Union. Scholars have recognised that EC/EU law influences national jurisprudence (Craig 2003). Interaction with the European Court of Justice changed concrete judicial review and the jurisdictions of national courts (Alter 2001). However, the assumption has been, as yet, that there is no effect on abstract judicial review (G1,2,3,5; A 1,2,5,6; I1,2,6,7). This thesis shows that this assumption is not warranted.

2. Outline of the thesis

The decision-making patterns in abstract norm review have changed in Austria, as well as Italy and Germany. In all three countries the number of laws being declared at least partially unconstitutional has increased from approximately 30% to 70%. Chapter I will describe this development over the last three decades in detail. Chapter II and III set out the possible explanations for the change in decision-making patterns as found in the literature. The literature is very heterogenous and distinctly split between legal and non-legal scholars. A distinction can be drawn when concentrating on the perception of what law is. Legal scholars see the law as a closed system, where legal rules exist as they are written down on paper, and can be used without true interpretation, Black letter law. Black letter law is the idea that a decision can be made only based on the words as they are written in the text of the law. It assumes that a judge can come to one true decision if he takes the definitions of each word and distills the meaning of the law through this. The only other aspects with possibility of affecting the decision, which exist within this closed system, are precedent and considerations of the intent of the law-makers. Black Letter Scholars recognise that, if a law can be defined through its letters only, then past decisions have to have meaning, as there is no need to go through the same process repeatedly. The necessity to give interpretative value to the intent of the law-maker is, in this view, just as obvious. The legislature has made the law. Therefore their definition of a term has to hold over other definitions, as it was this definition which decided

[6] I am ignoring the possibility of constitutional amendments here in order to simplify the argument for intra vires and ultra vires interpretations.

the law. So if there ever were any doubt about the definition of a word used in a law then, and only then, considerations of the intentions of the law-maker when making the law can come into play. Therefore, when a judge makes a decision, in this view of the law, he enters this closed system and acts within it. He makes use of the words as they are written in the legislation, possibly precedent and considerations of the intent of the law-maker, to decide a case. No outside influences come to weigh on the decision. Political Science, Economics and Sociology scholars describe the law as an open system. They do not deny that the text of the law, precedent and intent are determining factors but they argue that many other outside influences are just as influential. Many scholars argue that judges' political and professional allegiances, pressure by political institutions and power considerations, judgement of the viability of the decision, public approval and international considerations all might play a role in the decision-making process of the judge.

From these variables identified by the literature it is then possible to crystallise out the most probable hypothesis based on court design and the structure of the judicial and political systems. This hypothesis can be summarised as follows: European Union membership has necessitated an increased levels of academics on the bench of constitutional courts and changed, partially through this alteration in membership patterns, the style in which courts interpret law. It has also changed the way political elites treat the courts. Through lack of transparency in a political system in which supranational sources of legislation have to be harmonised with national ones, in which new laws now have to be developed, it has become more likely for a new law to be ultra vires and therefore be unconstitutional. This introduces the temptation to pass laws which are less well prepared and more in line with what the executive wishes to achieve in the hope that it will not be noticed, nor challenged before the court. The court reacts in two ways to the problem of a) increased levels of insecurity in the legal system and b) higher willingness of political bodies to pass unclear laws by making clearer decisions, explaining the increased levels of unconstitutionality rulings. The court also employs a more interpretative style in its decisions exemplify clearly teleological reasonings.

Chapter IV then presents a first exploration of the data which lend credibility to the suggested hypothesis. There is no clear single area of law relating to the higher levels of review. Rather the change in levels of review is evenly distributed across all categories. On the other hand, statistics on style of decisions, sources of law (national or international) and membership show

a parallel change to the altered decision-making patterns of constitutional courts. However, it is not able to exclude without doubt the possible influence of the other variables, such as public trust levels and pressure by political institutions. It therefore is still necessary to test each variable separately, to ascertain not only the explanatory power of the hypothesis, but also the other two variables of public trust and political influence. Public trust, as shown in the literature review, has mainly been a normative approach whilst testing the influence of political attitudes and institutions is a common feature of the study of courts. The next Chapter (V) establishes a more detailed image of the influence of Black letter law, and style. This chapter supports the findings in Chapter IV regarding the change in style observed in the first exploration of the data, and tries to develop possible explanations. Whilst Chapter V therefore identifies a change in the style decisions are written in, it also fails to connect the changed pattern of decision making with the change in style as a potential cause. They develop alongside each other.

Chapters VI,VII,VIII and IX will then examine the other possible explanations identified by the literature, namely political attitudes of judges, influence of political institutions, changes in popular opinion or Europeanisation of legal provisions, in more detail. Chapter VI tests the influence of attitudes of judges on the decision-making patterns of all three courts. Traditionally, attitudes have been measured through party affiliation of judges and their voting patterns. In Europe, most appointment procedures to constitutional courts have made it impossible for one single political party to dominate the court with its appointments. Therefore, an analysis of the courts in order of party affiliation is fruitless. Furthermore, as voting records in Europe are secret, it is impossible to analyse the courts based on voting records, as has been performed frequently in the American literature. Other analytical methods are possible, however. Indications that professional background, for example the number of academics in comparison to professional judges, affect the style and levels of interpretation have been identified in Chapter IV and V. Other potential background “attitudes” are imaginable: regional loyalties, academic loyalties as well as political loyalties.The following hypotheses are therefore tested in Chapter VI:

1. Higher levels of academics change the decision-making patterns of a constitutional court
2. Concentration of regional loyalties on the same court affect the decision-making patterns of the court

3. Concentration of party loyalties on the bench affect the decision-making patterns of the court
4. Concentration of philosophical stances, expressed through academic loyalties, on the bench affects the decision-making patterns of the court.

None of these hypotheses hold. Quantitative analysis shows that there is no statistical correlation between any of the sub-variables and the change in the decision-making patterns. Therefore the most likely variable according to predominance in the literature, and the one with the most power to undermine the hypothesis of this thesis has proven to lack explanatory power in respect to the change in decision-making pattern.

With the most likely explanation dismissed, and the assurance that the decision-making patterns are not due to a radical development in only one area of law, but are universal (Chapter IV), it is now possible to test the hypothesis of this thesis in Chapters VII, VIII, IX directly: Harmonisation of EU law with national law has increased the likelihood of politicians using courts for political means and has decreased the quality of legislation being passed. This leads to the court being more decisive and definite in its decisions, causing them to increase levels of unconstitutionality rulings. This hypothesis can be broken into three main parts:

1. Influence of the ruling elite on the courts in respect to decisions
2. Viability of the court in the face of opposition
3. Influence of the “European” on the courts in respect to format of decisions rendered

Chapter VI ascertains the link between politicians and the courts by testing for the likelihood of the government seeing its laws overturned and what form these decisions take. The analysis emphasises that the courts are today more likely to rule a law unconstitutional in Germany and Italy, non-regarding the origin of the law or the challenge to the law. In Austria, on the other hand, the current government is less likely to have its laws overturned and if the law sees review, the current government is more likely to face only partial unconstitutionality rulings. Chapter VII tries to explain this difference in behaviour with the use of popular constitutionalism. The theory developed in the literature argues that the ability of a court to oppose the ruling elite is linked intimately with the level of public trust the court enjoys. It is shown here that in Austria the level of trust in the court is decreasing, whilst it is increasing in Germany and Italy. It is therefore argued that the increase of unconstitutionality rulings, in relation to partial unconstitutionality rulings, is due to the higher level of independence of the court in both Germany and Italy. The Austrian court lacks this development, as it did not enjoy

the same levels of increased trust over the last three decades. Chapter VIII then tests the influence of the "European" on the decision-making pattern of the court. It finds that those a link to the "European" can be statistically correlated with a higher probability of a law seeing review and even this decision to be rendered as a definite unconstitutionality ruling, and not a partial ruling.

In the end, the argument of this thesis can be summarised as follows: the harmonisation of national with EU law has had two main consequences for abstract review: 1) it has made it harder for political institutions to pass constitutional legislation and 2) it has made it easier for politicians to transfer vote-costing decisions to the courts. The result is a changed decision-making pattern of courts. On the one hand more laws see review because these legislations are less well designed and on the other hand the court tries to clarify legal rules by increasing unconstitutionality rulings vis-a-vis partial unconstitutionality rulings. This decision-making pattern clarifies the rules under which new legislation is decided upon as well as sending a signal to the political institutions that the courts are unwilling to be forced to make political decisions.

Traditionally, the literature on courts has been open to quantitative and qualitative methods but rarely to a combination thereof. Moreover, the literature is firmly split into political science and economics, where quantitative analysis of the voting behaviour of judges is relatively common place, and law, where only recently empirical methods such as interviews and content analysis have been chosen as tools for analysis. This strict separation of methods is logical when considering only one possible influence on the decision-making process of the court. However, in a comprehensive empirical study such as presented in this thesis a more varied approach has to be taken. As a result, a combination of interviews, content analysis and statistical analysis, namely correlation analysis, is being employed. All three are logical choices for this form of analysis. The mixed methods data, and high levels of nominal data combined with interval or ordinal data, requires forms of quantitative analysis minimising the difficulties inherent in nominal/ordinal data. Regression analysis therefore is less useful than Cramer's V, Phi or Spearman Rho correlations. Combining these with content analysis and interviews circumvents the common problem with quantitative analysis of superficiality and possible ignorance of missing variables. The weakness of qualitative content analysis, the selectivity of preserved and archived data, does not apply to court documents as for the time

period they are complete. As they are formal and only concentrated with each single case, interviews aid in clarifying the larger image and adding a less formal aspect. A detailed analysis of the methods and the reason for the choice can be found in Chapter III.

3. Originality and contribution to the literature

The originality of the thesis is therefore two-fold: in its contribution to the socio-political literature and in its contribution to the methodological considerations in the study of courts. The Socio-Political literature is wide ranging but also very diverse and specialised regarding variables and methods. Little interaction between the fields of study is apparent. Moreover, this extreme level of specialisation within the literature also leads to an over-emphasis of certain influences, systemic factors and variables in the literature, whilst others are very rarely considered, analysed and discussed. This thesis examines five possible factors within three separate systems. Possibly the most significant contribution this thesis presents to the socio-legal field is its concentration on abstract judicial review. A standard search of a bibliographic database such as IBSS, Web of Knowledge or even Google Scholar results in one single article on the topic of abstract judicial review from 1998 (Vanberg 1998). In comparison, this a search for the more commonly used concrete judicial review returns 474,000 articles.

3.1 Socio-Political field

Abstract judicial review has been considered either as a negligible power of courts (Stone Sweet 2000:64) or as only theoretically approachable due to scarcity of data. Certain recent developments allow for a better and more extensive research of courts - namely the publication of all cases online. This makes it possible to research abstract review over large time periods and increases the accessible data. It is irrefutable that in many countries abstract judicial review is negligible in numbers, but the severity of the discrepancy in the literature might be slightly skewed by the fact that the study of constitutional courts has for a long time concentrated on only a small number of courts, among which only Germany had the power of abstract judicial review. In Germany abstract judicial review levels are below 5% of the total of cases. However, in many other countries, such as for example Italy, the level lies at around 20%. Even though, the importance of abstract judicial review does not lie in the number of cases, or its percentage of the total jurisprudence of the courts, but rather of the types of cases reaching the courts under it. In abstract judicial review the court does not decide on the application of a law but on the constitutionality of the law itself. As such it is not only the last

port of call for oppositions to hinder the promulgation of legislation but it is also the area of highest tension between the courts and the political institutions. Across Europe cases relating to abortion, euthanasia, special powers of the police such as terrorist laws, church state relations, and equal rights find their last challenge under abstract judicial review alongside every budget and major taxation legislation. So abstract judicial review might be negligible in numbers in some countries but its de facto importance lies in the types of cases and conflicts in which it is invoked. The scarcity of literature on the topic seems therefore not only surprising but intriguing in its absence. This thesis begins to remedy the scarcity of analysis on abstract review by presenting an overall image spanning three decades.

Furthermore, because analyses of the decision-making processes of courts have been highly concentrated on proving the importance of one factor over the other, much possible influence by other environmental factors have been neglected. This is especially true as over 90% of the literature on courts has as its research subject the US Supreme Court. Many typically European systemic influences are therefore underrepresented or entirely absent in research designs. This thesis further adds to the literature by considering European courts within their systemic surrounding and evaluating the applicability of variables derived from the US literature within a European context. This also relates to the influence of EU membership on courts. There is a wide and diverse literature on the interaction between national courts and their interaction with the European Court of Justice (ECJ) as well as on the influence the European Court of Justice has on integration (Alter 2001; de Burca 2001, Wincott 2000). There is little literature on the influence European Union membership has on the jurisprudence of the courts overall when they do not choose to involve the ECJ.

The academic scholars considering courts tends to be highly disparate and segregated. There is a wide range of research concentrating on the use individual plaintiffs make of International and European, as well as national, courts to further their individual goals and how courts make use of these cases to increase their own power in respect to political actors (Ward 2007; de Burca 1998; Kilpatrick 1998). It has also been researched how principles developed by the ECJ have an impact on national jurisdictions as well as how these principles were developed on the European level (Wincott 1999; Slaughter 1998; Tallberg 2000). What has not been researched is the way in which national court have reacted within their own jurisprudence. Moreover, the impact EU membership has on the actual decision-making process has not been

studied either empirically or theoretically in respect to national constitutional courts. This thesis provides an insight in these changes.

3.2 Methodological contributions to the literature

Concerning the methodological considerations the originality of the thesis lies especially in its mixed methods approach to the study of courts. Quantitative analysis of courts is not unknown or uncommon. Most of the literature on the influence political attitudes of judges on their voting behaviour is based on quantitative analysis of the votes cast (Segal and Speath 1995, 2002). Other forms of quantitative analysis, in respect to origin of plaintiff, amicus briefs and time periods are also common. All of these are however based on the US Supreme Court. In Europe, quantitative analysis is exclusively concentrated on the political side of the interactions between courts and political institutions. Collective bargaining and decision strategies by political actors trying to avoid the court have been analysed quantitatively in Germany (Vanberg 1998, Vorlaender 2006). However, a comprehensive statistical analysis of the abstract judicial review cases does not exist in either Italy, Germany or Austria. Most importantly, there is no analysis combining statistical analysis with a thorough textual analysis of the cases or interviews. Ordinarily, statistical analysis methods have been chosen to present an overall picture of large numbers of cases. Clearly in these instances content analysis of the texts was inefficient. Whereas the relatively small number of cases in abstract judicial review (below 2000) does allow for this. As such this thesis can present the first overall image of abstract judicial review in Germany, Austria and Italy, and is able to do this without having to resort to a sample or exclusively analysing the cases quantitatively.

Moreover, the interviews and content analysis in this thesis extended to considerations of the media in form of media reports but also interviews with the media representatives of the courts and their view of their role. This was supplemented with taking account of the impression the judges, civil servants and politicians have of the role of the media and the media representative. Increasingly, the literature has commented on the influence media and public image creation have on courts (Kramer 2007) but there has been no empirical data for this aspect. No other study to this date has included views and concerns regarding the media representative, the active creation of a public image of the court by the court and the interaction between judges and the media.

CHAPTER I

THE DEVELOPMENT OF ABSTRACT NORM REVIEW IN EUROPE

The purpose of this first chapter is to present a detailed overview of the development of abstract judicial review in Europe. The number of abstract judicial review cases has doubled over the last three decades in most European countries. More importantly, the number of times a law has been declared unconstitutional have surged. This increase is of historical, philosophical and political importance and has, as yet, remained unexplained. The research undergone in this thesis offers some possible explanations for the increase in levels of unconstitutionality rulings in abstract judicial review proceedings. The exact definition of abstract judicial review is dependent on the national context of the constitutional court undertaking the proceedings and it therefore needs to be ascertained if these differing legal concepts are comparable.

1.1 The process of abstract judicial review - a definition spanning the different jurisdictions in Europe

The purpose of this section is to give a historical as well as philosophical understanding of the status of abstract judicial review in Europe before presenting the statistical evidence for a change in the position of abstract review in the political system. A theoretical definition of the term has already been presented in the Introduction. However, it remains a necessity to apply the definition to the different jurisdiction and ascertain the comparability. Judicial review is the “judicial oversight over the validity of norms” (Creifelds and Meyer-Grossner 1990:801). Each court, regional or national, has the duty and power to oversee the legality of norms, as long as the norm in question is not the providence of a specific court, for example a tax court. This is especially the case in countries with a constitutional court where all cases of constitutional validity have to be ultimately decided. The majority of norms will be dealt with by the constitutional court, as the constitutional courts specifically decide on the compatibility

of legal norms with previously passed norms (Jackson and Tate 1992:6). The term abstract norm review applies when the court considers a law for its unconstitutionality without a concrete case to base it on. Abstract norm review is always undertaken by the national constitutional court. Over the last three decades constitutional courts have increased the number of laws they find unconstitutional (Vanberg 1998). In this chapter the significance and the possible consequences of this change in court behaviour will be discussed.

Abstract judicial review is a characteristic of courts originally only found in Europe[7]. As a reaction of the political misuse of courts before the Second World War, constitutional courts were endowed with the power to review laws passed by the legislators in the absence of an actual case or controversy (Jackson and Tate 1992:7). When this is the case then the court is engaging in abstract judicial review. The exact form this review takes differs slightly from country to country (See Appendix 7 for the exact legal provisions governing abstract review). In some countries, such as France, abstract judicial review can only be undertaken by the court in a set period prior to promulgation, a priori (Hirschl 2008:130). In other countries, which includes the majority of European states, such as for example Austria, Germany, Italy, Spain and Portugal, the constitutional courts review laws at any time after promulgation (Koopmans 2003).

The difference in provisions of abstract review across Europe lies in differing philosophical views of courts and their position in society as will be discussed below in relation to the importance of abstract review. A comprehensive definition of abstract norm control has to be wide enough in its scope to allow for national differences without loosing coherence and meaning. Vanberg defines it as the power which "allows certain constitutionally identified actors to initiate judicial review against legislation in the absence of any concrete case…"(Vanberg 1998:300). It therefore is the power of the court to judge if a body was within its constitutionally given right when it passed a law. Or, with other words, if a body violated the boundaries set by the constitution when passing a law or regulation. The court therefore has to decide if the law is unconstitutional. Cases under abstract judicial review all necessarily represent a conflict between political organs, the constitutionally appointed bodies who initiate judicial review, as all countries discussed in this thesis, limit the ability to approach the court under abstract review to political institutions.

[7] For a selection of the legal provisions for abstract norm review in Europe see Appendix 7

In all European countries abstract norm control can be initiated by the cabinet and the head of state such is the case in France. Additionally, most other European countries, for example Italy, Spain, Greece and Lithuania, allow parliament and regional units to initiate abstract norm review as well. In the minority of countries, groups of parliamentarians, in the case of Austria and Germany, and single citizens, in the case of Hungary, also share into the process of initiating abstract judicial review (Table 1). The variation in the constitutionally appointed bodies with the power to initiate abstract review has its roots in the historical and philosophical development of abstract review in Europe. An understanding of this development also highlights the importance of abstract review for the political process in European nations.

Country	Who can initiate abstract review?	Can initiate before or after promulgation
Austria	Federal Government Federal Parliament 1/3 of Federal Parliament 1/3 of State Parliament	A priori/ a posteriori
Bulgaria	President Government 1/5 of parliament	A priori/a posterior
Czech Republic	President 41 Deputies 10 Senators	A priori/a posterior
France	President Prime Minister President of the Assembly President of the Senate 60 Members of the Senate 60 Members of the Assembly	A priori
Germany	Federal Government State Government 1/3 of Parliament 1/3 of state Parliaments	A priori/ A posteriori
Hungary	Anyone including the court	A priori/a posterior
Italy	President Government State parliaments	A priori/a posterior

Country	Who can initiate abstract review?	Can initiate before or after promulgation
Poland	President Prime Minister Marshalls 50 Deputies 30 Senators Local governments Trade unions Employers' organisations Occupational organisations Churches Religious organisations Certain lower courts	A priori/a posterior
Portugal	President Prime Minister President of the Assembly 1/10 of national parliament Presidents of regional governments Presidents of regional Assemblies 1/10 of regional assemblies	A priori/a posterior
Romania	President President of the Assembly and the Senate 50 deputies 25 Senators	A priori
Russia	President President of the Duma 1/5 of the federal council 1/5 of the Duma The court	A priori/a posterior
Slovakia	President Government 1/5 of deputies	A priori/a posterior
Slovenia	Governments Local Governments 1/3 of national Parliament	A priori/a posterior

Country	Who can initiate abstract review?	Can initiate before or after promulgation
Spain	President Government President of Parliament 50 deputies 50 senators Local government Local Assemblies Defender of the People	A priori/a posterior

Table 1: Table of abstract judicial review proceedings in Europe
(Disputados 2003; Network 2009; Republica 2008)

A comprehensive definition of the process of abstract judicial review therefore can be expressed as follows: abstract judicial review is the power of a court of a country to examine the actions of the legislative and executive bodies of government and to determine if these actions are in accordance with the country's constitution before or after promulgation. These actions are examined in the form they take on paper, not in their application to single cases, as would be the case with concrete judicial review. Actions judged inconsistent with the constitutions are declared unconstitutional and, therefore, null and void. Initiation of abstract judicial review proceedings is the right and duty of national political entities. It is therefore an integral part of the checks and balances between the political entities of a nations political establishment.

1.2 Development of abstract judicial review 1980-2009

Originally, norm review was considered as a negligible influence on legal norm creation – even if today at least one third of norms see some form of review (Stone Sweet, 2000:64). This is because abstract judicial review only composes between 3% (Germany) to 17% (Italy) of the court's jurisdiction. However, under abstract review the most controversial laws are being challenged. It is a part of the political process, as only political institutions, parliamentarians or heads of state can initiate proceedings. As a result everything from abortion, religions in schools and budgets reaches the court through abstract review. Over the last three decades three developments in abstract norm review can be observed across Europe:

1. The number of abstract judicial review proceedings have increased by up to 50%
2. The number of laws seeing review has increased by up to 50%

3. The number of norms being declared void has increased by up to 50%

1.2.1 The development of the number of abstract judicial review proceedings

It has been noted widely that the number of concrete judicial review has increased all over the world (Jackson and Tate 1992; Neal Tate and Vallinder 1995; Shapiro and Stone Sweet 2003). This observation also applies to abstract review, even if the development is less uniform across the nations of Europe in respect to abstract review proceedings. Whilst the number of concrete review cases reaching the courts has increased by 50-200%, the number of abstract review proceedings has doubled in the same time period as well. Two trends can be observed across the European continent. The former Eastern states initially saw a high number of abstract judicial review cases per year in the early 1990s, just after the formation of these new courts. The numbers of abstract judicial review proceedings in this time was higher in the new courts than at the courts in the western states. The late 1990s saw a decrease of abstract judicial review proceedings in the eastern part of Europe. The cases fell to a level below that of the older courts. Since 2000 the number of cases per year has again steadily increased, but never exceeded the levels observed in the older courts. This is partially due to the latter having faced a steady increase of abstract judicial review proceedings spanning the last thirty years, rather than the up and down registered by the newer courts (see Table 2).

	Development of abstract judicial review proceedings		
Country	1980-1990	1990-2000	2000-2009
Austria	+	-	+
Bulgaria	N/A	-	+
Czech Republic	N/A	-	+
France	+	+	+
Germany	+	+	+
Hungary	N/A	+	-
Italy	+	+	+
Poland	N/A	-	+
Portugal	+	+	+
Romania	N/A	-	+

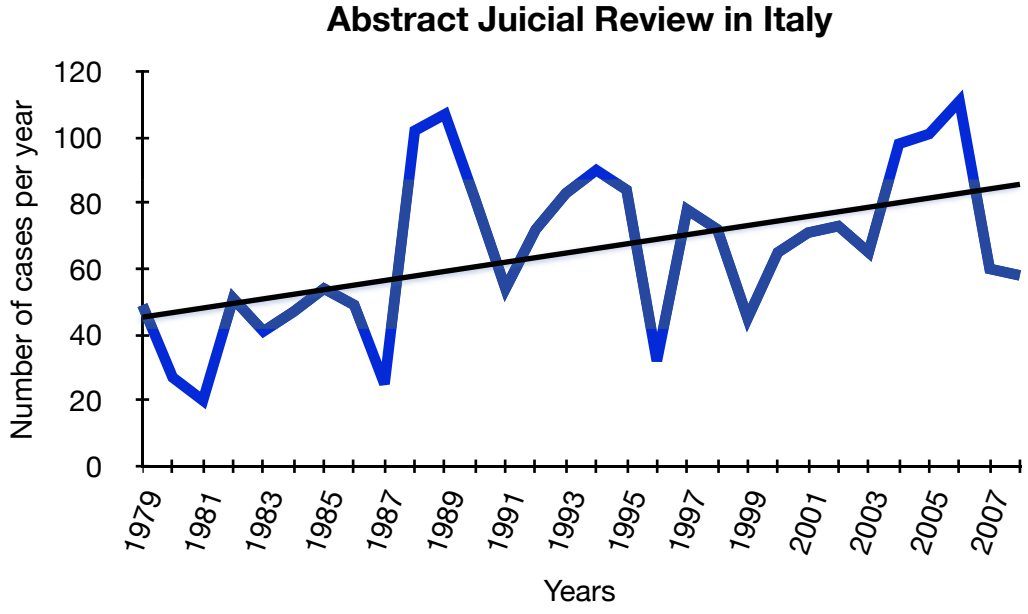
	Development of abstract judicial review proceedings		
Country	1980-1990	1990-2000	2000-2009
Russia	N/A	=	+
Slovakia	N/A	-	+
Slovenia	N/A	-	+
Spain	+	+	+

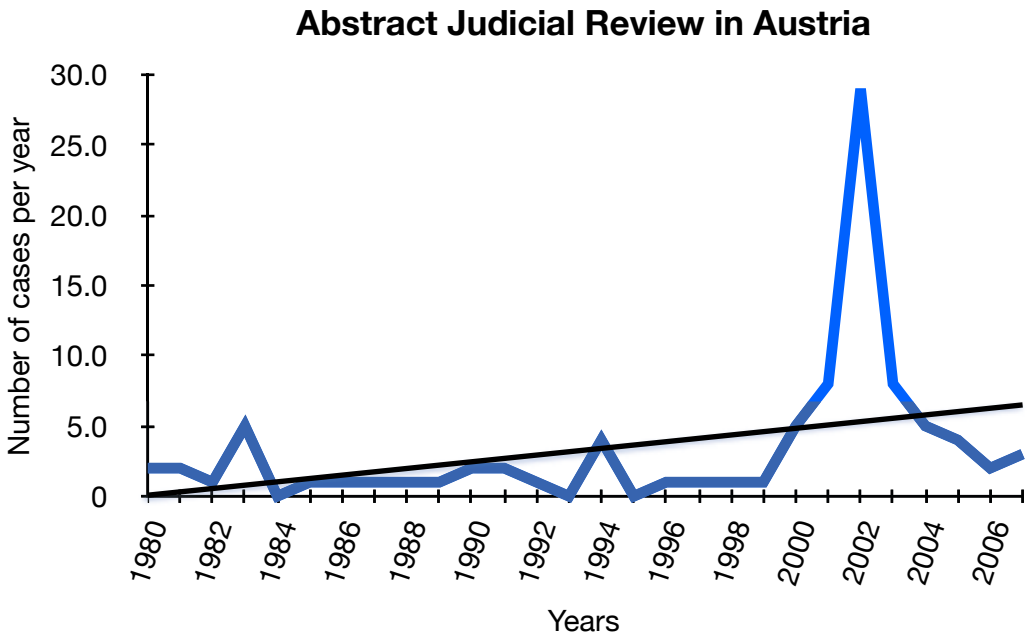
Table 2: Development of abstract judicial review proceedings 1980-2009 (Network 2009)

There are various possible explanations for the initially high number of cases of abstract judicial review in the Eastern European States. It has been theorised that there are three possible reasons for the differing development in Eastern and Western Europe:

1. Laws decided under the previous regime

Due to the circumstances surrounding the court's creation following a regime change, many previously enacted laws were open to challenge. Moreover, many of the newly passed laws were promulgated in an atmosphere of change and by legislators without experience. As a result the scope for revision under abstract judicial review is higher. With this theory the decreasing numbers of abstract judicial review proceedings in the late 1990s are accounted for. Legislators have become more versed in passing laws, and the backlog of old laws has been dealt with. This explanation fails, however, to account for the rising numbers of abstract judicial review proceedings in Western Europe (Figure 1).





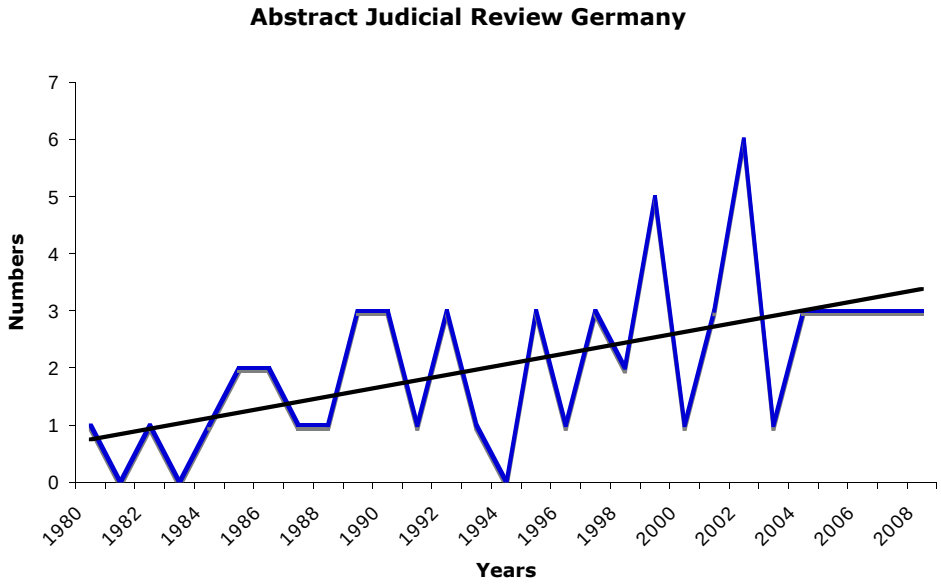


Figure 1: Abstract Judicial review in Italy, Germany and Austria. Trend-lines (Regression lines) indicate development over time assuming linear growth (Formula contained in Appendix)

2. Adjustment period to the new constitutional situation - the European Union

This is an argument that has been raised especially in relation to Hungary. Here the court itself argued that in face of the desired EU membership certain laws and regulations have to be

declared unconstitutional as they contravene EU law, even if they are not against the national constitution (Solyom 2003:145). Evidence for this has been found in the theories relating to other courts. However, it falls short from explaining the increased levels of abstract judicial review proceedings in the Western European states.

3. Legitimacy perception of the courts

It has also been noted that all over Europe the trust in governmental institutions is decreasing whilst, at the same time, the trust in the constitutional courts is unwavering[8] (Bumin 2007). In this theory, the public see the court's duty in the preservation of democracy and safeguarding the core values. The court's share this view of their own position within the political system. As a result courts in the Eastern states take a more active role and are more willing to engage in abstract judicial review. This indicates that the increased levels of abstract review proceedings are based on a differing perception of the role of the judge. The argument can be made that the perceptions of the court as the ultimate guardian started in the Eastern European countries and then spread. If this change in perception took root all over Europe then the increase in abstract judicial review proceedings might be explainable Europe-wide.

As seen from Figure 1, the Italian and German constitutional court have seen a steady increase of cases over the last 30 years. The Austrian court also registers a rise in cases of abstract judicial review - but the trend is mainly accounted for by the increasing trend displayed in the last ten years. Before that the court's numbers varied commonly only between zero and three cases a year, whilst the last ten years see this number increase to levels between 2 and 29 cases annually. Accordingly, the numbers of cases reaching the court in the three countries differ extensively. Germany only saw 60 cases within the last 30 years, Austria 112 and Italy 1965. The difference between the countries is deceptive, however. In the German and Austrian case, the constitutional courts will subsume various cases on the same norm under one decision. This makes comparison difficult and requires the separation of cases contained within decisions. Only separation will allow for the analysis of abstract review across countries in this thesis. The Austrian court saw 173 separate cases reaching the court, leading to the 112 decisions, within the time period between 1979 - 2008. The German court's abstract review

[8] Constitutional courts are often seen as more trustworthy than political institutions, as the population perceives them as less influenced by politics. The little information the general public has on the workings of constitutional courts might help this perception and preserve the mysticism of independent courts.

cases number 134 if counted separately. This remains to be a large difference to the 1965 cases reported by the Italian court. However, it also needs to be considered that the Italian court sees a huge number of inadmissible cases and therefore the political culture in Italy might be more confrontational. It might therefore be argued that challenging a law in front of the constitutional court is a more common tool used by actors in the Italian political arena. Although Figure 1 shows that the increasing trend of abstract judicial review cases holds true in Austria and Germany when accounting for the combined cases as well. If the comparatively high number of cases in Italy can been attributed to Italian political institutions being more combative in nature (Merryman 1965; Volcansek 2000), then the increase in abstract judicial review proceedings in Austria and Germany might hint at a change in the political culture here. In this case the political culture on Austria and Germany would seem to become more confrontational accounting for the increase in abstract judicial review cases.

1.2.2 Developments in the decisions patterns in abstract norm review

The increased numbers of abstract review proceedings across Europe are not the only change in abstract review patterns observable. Today almost two thirds of abstract review proceedings result in the review of a law, this is an increase from between 20 to 50% all across Europe. This development is not limited to Eastern Europe alone but is observable across the whole of the continent. In 2005 the Austrian president of the court reported in an interview with the newspaper “Der Standard” that the level of unconstitutionality and partial unconstitutionality rulings has reached two thirds of all laws (Standard 2005). This is considerably more than the one fifth of laws seeing review which was reported in the 1980s (Stone 1992). Table 3 displays the development of abstract judicial review cases, partial and unconstitutional rulings, in Austria, Italy and Germany. Clearly an increased number of laws see review today in comparison to the early 1980s.

	1980-1990	1990-2000	2000-2010
Italy	25%	35%	45%
Austria	27%	52%	42%
Germany	53%	60%	75%

Table 3: Development of percentage of laws reviewed in abstract norm control across the time period 1980-2010

However, these are not the only countries displaying a trend towards an increase in levels of review brought under abstract norm control proceedings. Figure 2 shows the development in Poland, but the same can be observed in Spain and Portugal as well as Latvia and Lithuania. This illustrates that a change in the levels of abstract judicial review proceedings reaching courts across Europe and the outcome of these proceedings has occurred. Almost two thirds of laws reaching the courts see review, either being declared unconstitutional or at least partially unconstitutional.

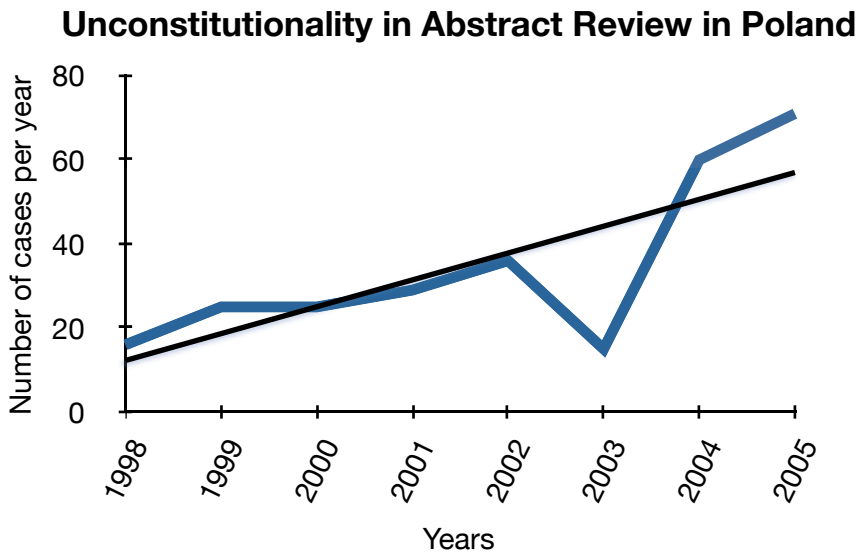


Figure 2: Development of review in Poland

1.2.3 There is an increase in norms being declared unconstitutional

Additionally, the pattern of review has altered all over Europe. It has been widely noted, in relation to constitutional courts in general, and the German and Austrian court in particular, that the courts are more likely to render partial unconstitutionality rulings rather than clear constitutional or unconstitutionality declarations (Kommers 1997; Landfried 1984, 1988, 1992). In essence, the theory behind this argument is that the court is unwilling to anger the current, or possible future ruling elite, and therefore is more likely to pass a judgment which will leave both sides equally the winner or looser. This is exceptionally important in abstract review whereby the simple rules of access determine that the only participating parties are political institutions. Therefore, to ensure future viability of its decisions, the courts are expected to render more partial constitutionality rulings than either constitutionality or unconstitutionality rulings. Research all over Europe has shown this to be accurate for the period between the formation of the courts until the early 1980s (Becker 2000; Beyme 2003; Stone Sweet 2000). However, already throughout the 1990s, an increase in unconstitutionality

rulings has been marked across Europe (Beatty 2004; Neal Tate and Vallinder 1995; Rogowski and Gawron 2002). The courts seem to be more willing to rule a norm unconstitutional in its entirety. Fewer conciliatory rulings, partial rulings, are passed in comparison to the decade previously and more clear rulings, such as declaring a norm unconstitutional or constitutional entirely, are passed.

Examples for this can be found in the distribution of rulings passed by the German court as seen in Figure 3 and 4 below.The first graph describes the development of abstract judicial review in Germany in terms of absolute numbers combined. The three next graphs, Figure 3 b, c and d, present a more detailed picture of the development of different formats of decisions. The increase of unconstitutionality rulings is clearly visible in Figure 3c). Throughout the 1980s and 1990s 13 years register without any unconstitutionality rulings and at no time does the number of unconstitutionality rulings rise above 2 cases per year. In the last decade, on the other hand, there are only three years without any unconstitutionality rulings and each other year registers a number of cases between 3 and 8. The low number of cases of abstract judicial review in Germany result in a single case affecting the graphs excessively much. However, as the graph denotes a development over thirty years a general increasing trend can be observed. In the period before 1980 only around 16 cases were ruled unconstitutional (Stone 1992:231). Since then another 29 cases were ruled unconstitutional, 21 of these in the last ten years. This is also evidenced in Figure 3e), the distribution of decisions in percentage between 1980 to 2008.

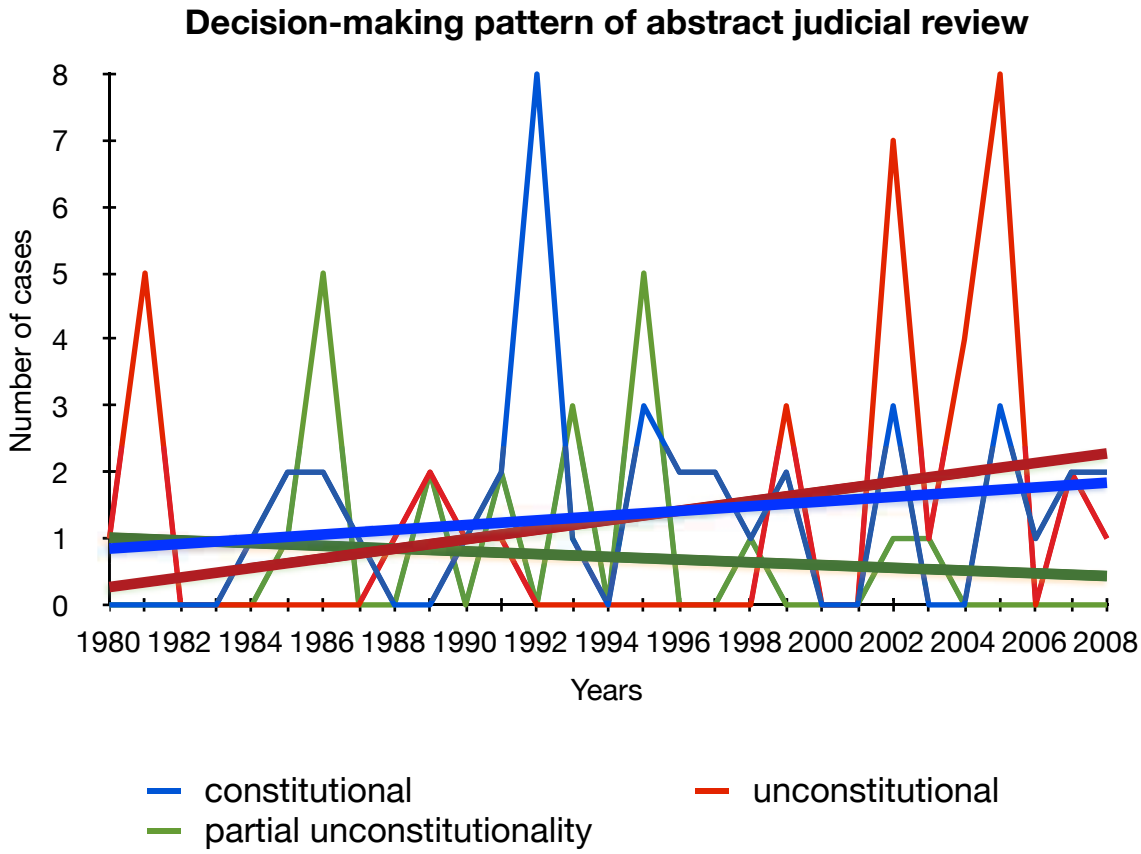


Figure 3a): Decision-making pattern of abstract judicial review in numbers

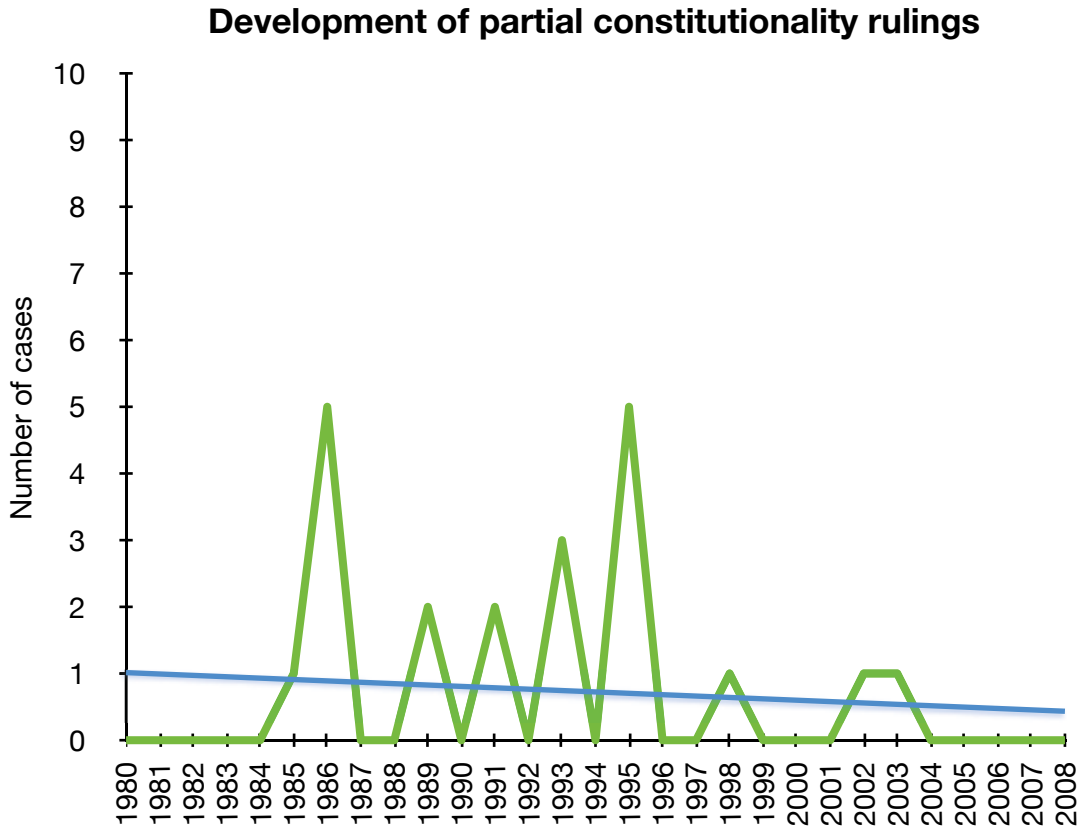


Figure 3b): Development of partial unconstitutionality rulings

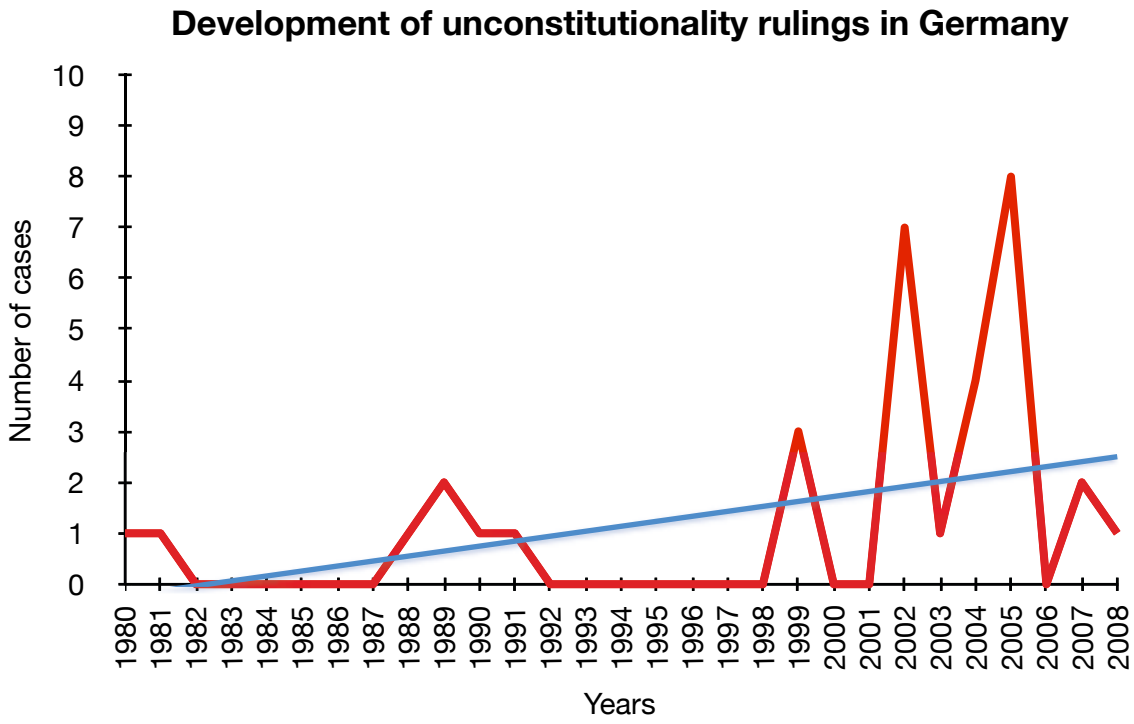


Figure 3c): Development of unconstitutionality rulings

Figure 3d): Development of constitutionality rulings

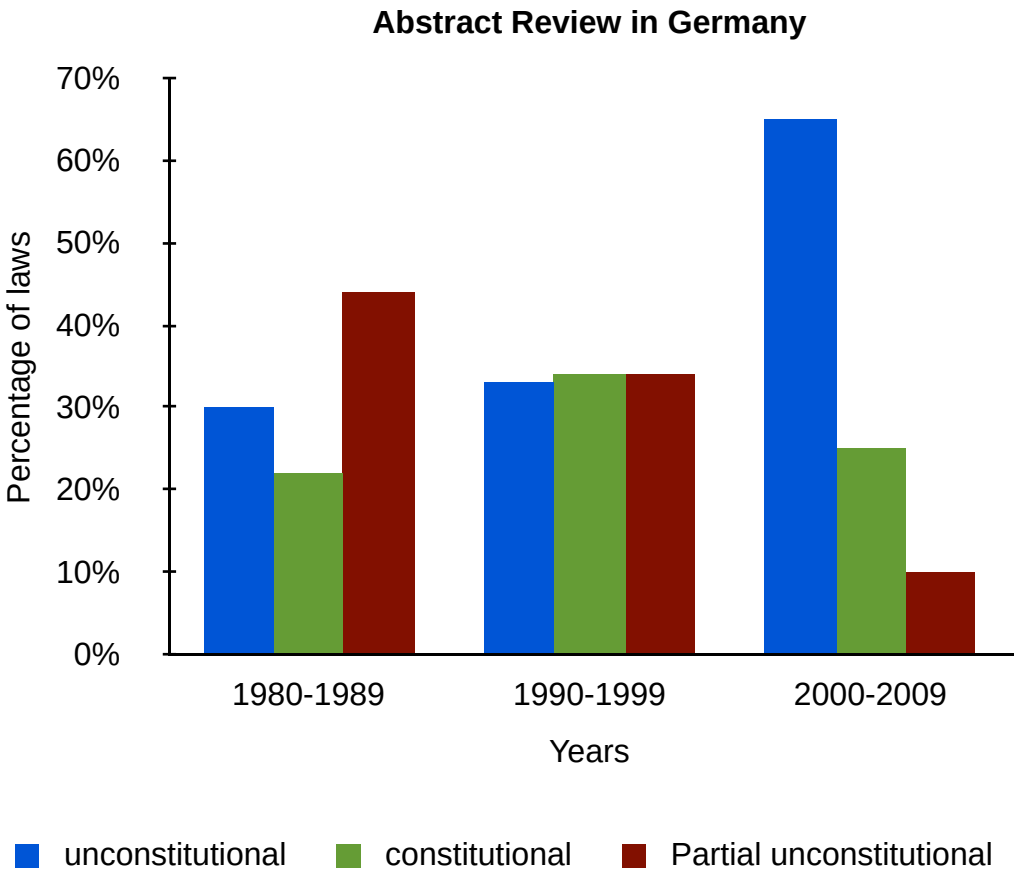


Figure 3e) Development if rulings in Germany in % over three decades

Figure 3: Distribution of rulings in Germany in numbers and %

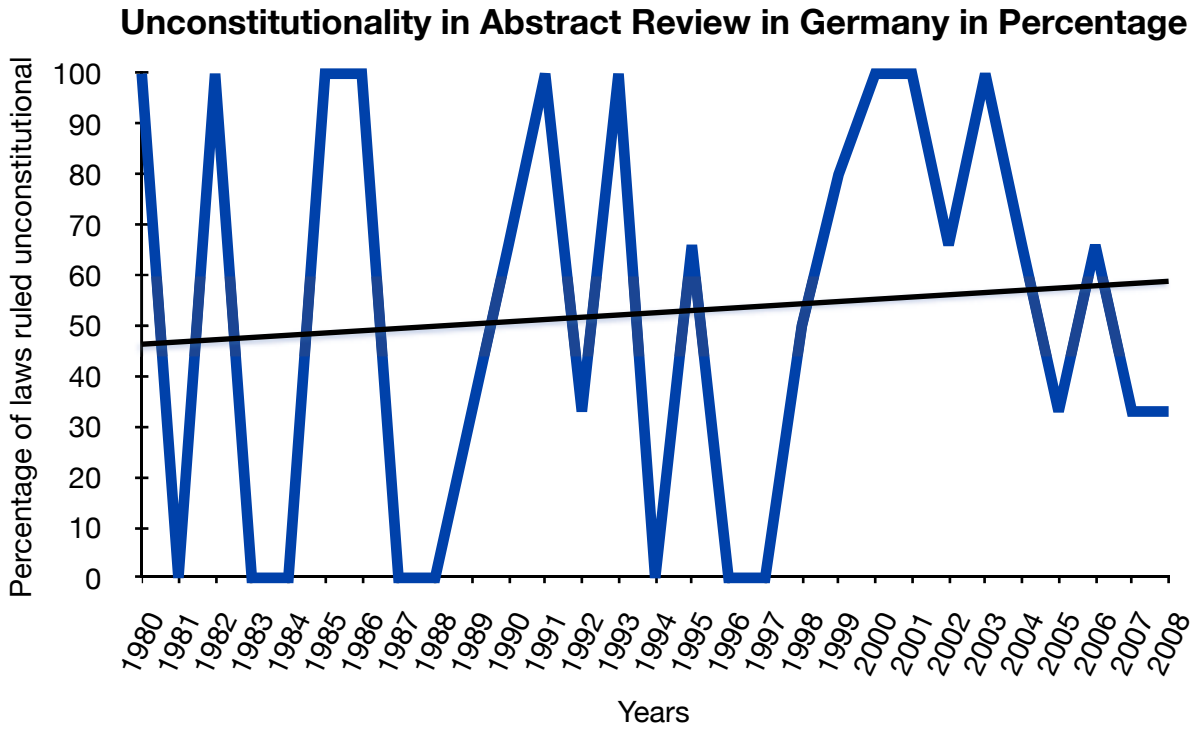
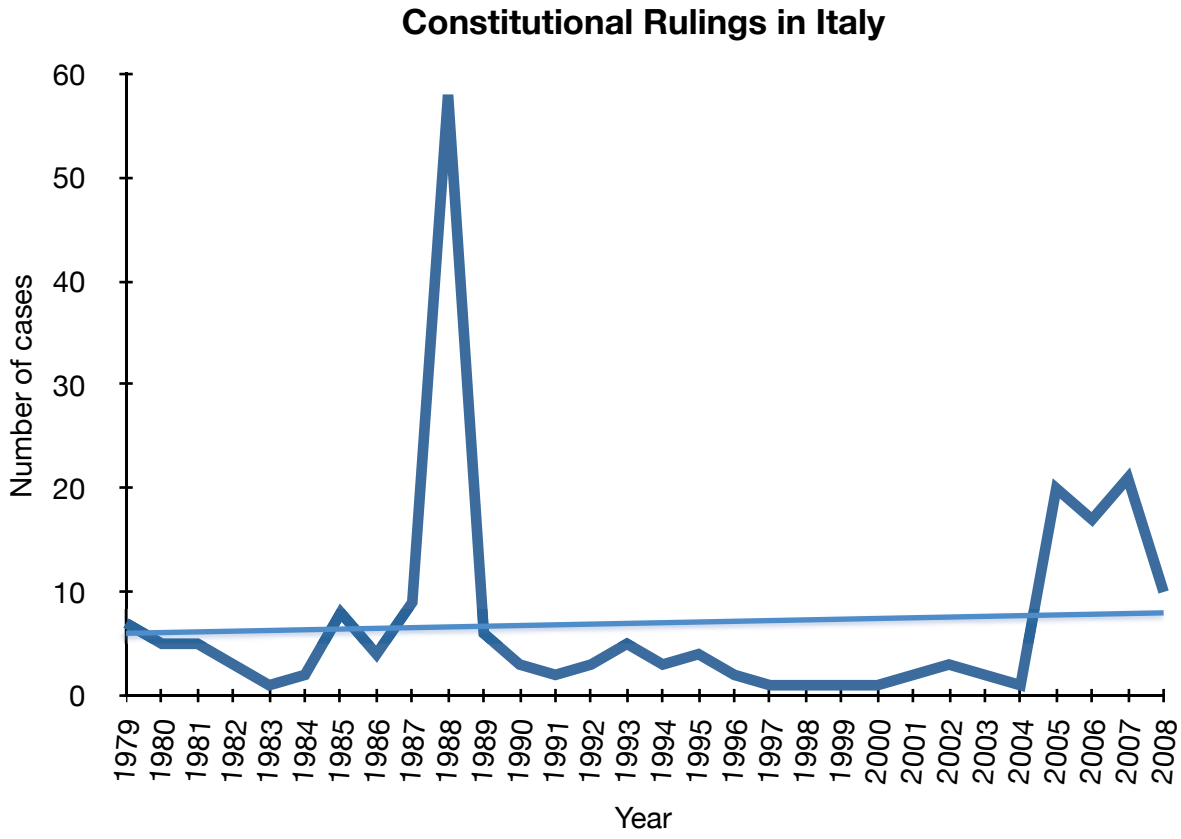
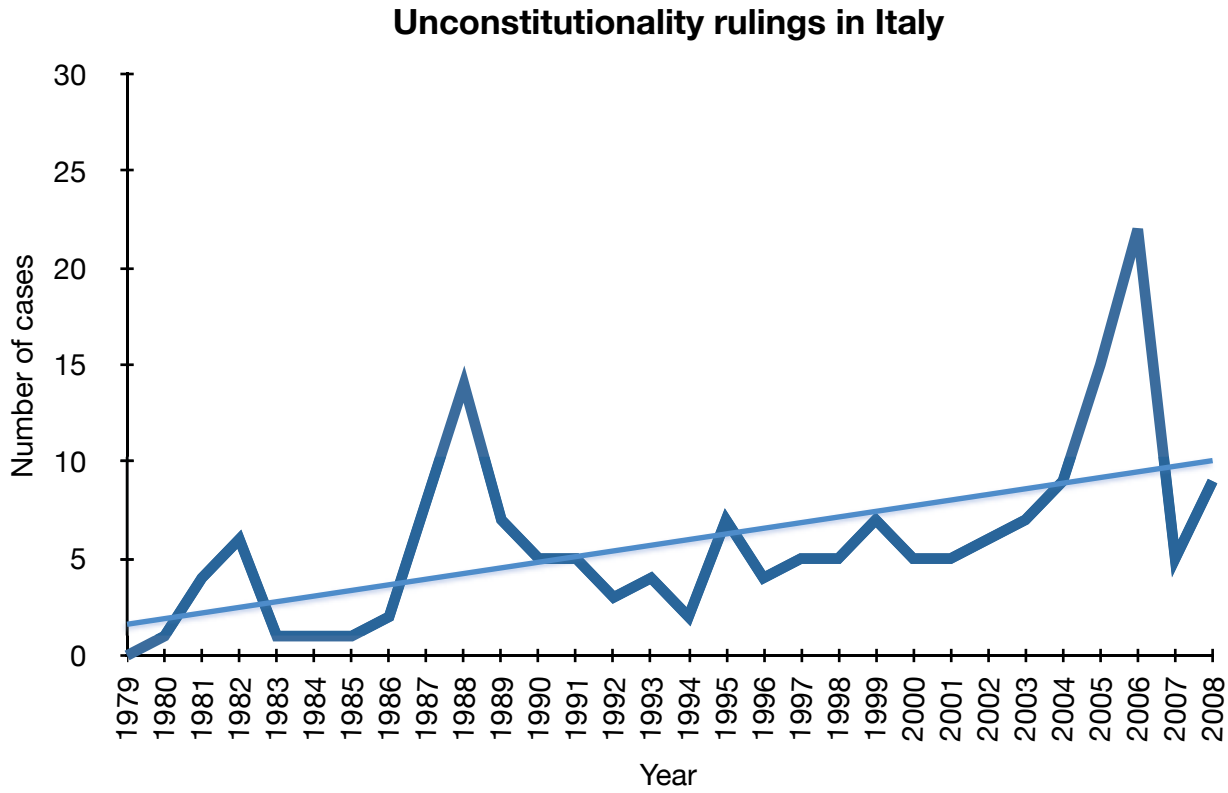


Figure 4: unconstitutionality rulings in Germany

In the 1980s the number of partial rulings rendered lies only slightly below the value of the constitutional and unconstitutional rulings combined. In the 1990s the court rendered as many rulings of declaring a law constitutional as it rendered partial rulings and almost as many unconstitutionality rulings. Since the year 2000 the number of unconstitutionality rulings is more than twice that of constitutionality and five times that of partial rulings. It is therefore not only the case that the number of cases seeing review in Germany has increased from one third to two thirds over the last thirty years, but also within these cases seeing review, the number of clear unconstitutionality rulings has more than doubled when compared to partial rulings.

The Italian case is even more interesting. In Italy, the image is similar in respect to unconstitutionality rulings, though partial rulings have also increased (Figure 5,6). Originally the Italian court was not designed to render any partial rulings at all, and until the 1970s it typically decided either unconstitutional or constitutional - with the vast majority (70%) being constitutional. The idea of a constitutional court being able to render partial rulings was inconceivable for the Italian legal elite, as they feared the power this would give the court. Nonetheless, Figure 5 shows a decrease of constitutionality rulings and an increase of both partial and complete unconstitutionality rulings. Again it is the percentage of laws being declared unconstitutional which is most interesting in relation to this inquiry. The development is best seen in Figure 5b) and Figure 6 which displays the percentage of laws seeing review, rather than the absolute number. The display by percentage is more reliable in this case due to the distortion the two outliers in 1988 and 2005 present on the absolute numbers of cases. The outlier off 2005 can be linked to the extensive reform of the Italian constitution between 2001 and 2006. In this time period, the cases increased in number, for the reason that laws were taken to the court for clarification purposes. 1988 also saw a reform of the penal codes in Italy (Onida 2007). These reforms explain why the numbers spike in 1988 and 2005 in all graphs. What they fail to explain is the general increasing trend of review shown in Figure 6. So Italy as well shows an increase of cases seeing review as well as an increase of unconstitutionality rulings.


Constitutional Rulings in Italy
Number of cases
60
50
40
30
20
10
0
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
Year


Unconstitutionality rulings in Italy
Number of cases
30
25
20
15
10
5
0
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
Year

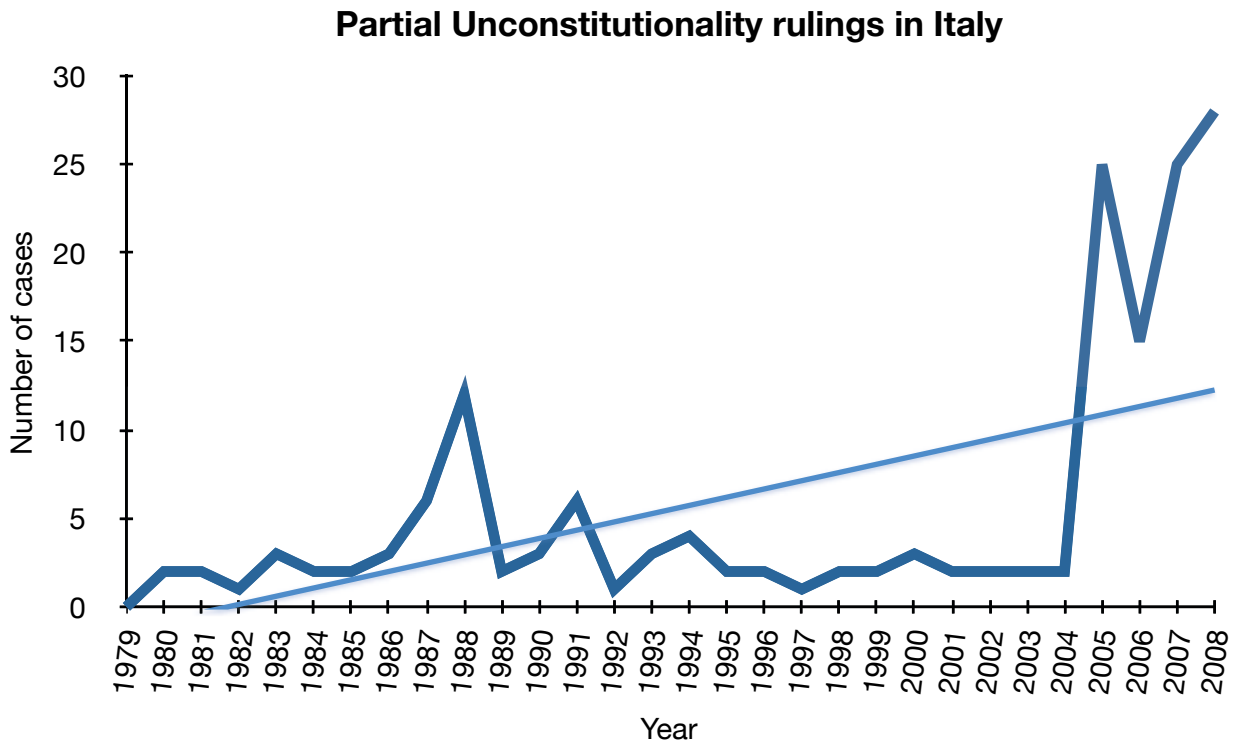


Figure 5a): Distribution of rulings in numbers across the three decades in Italy

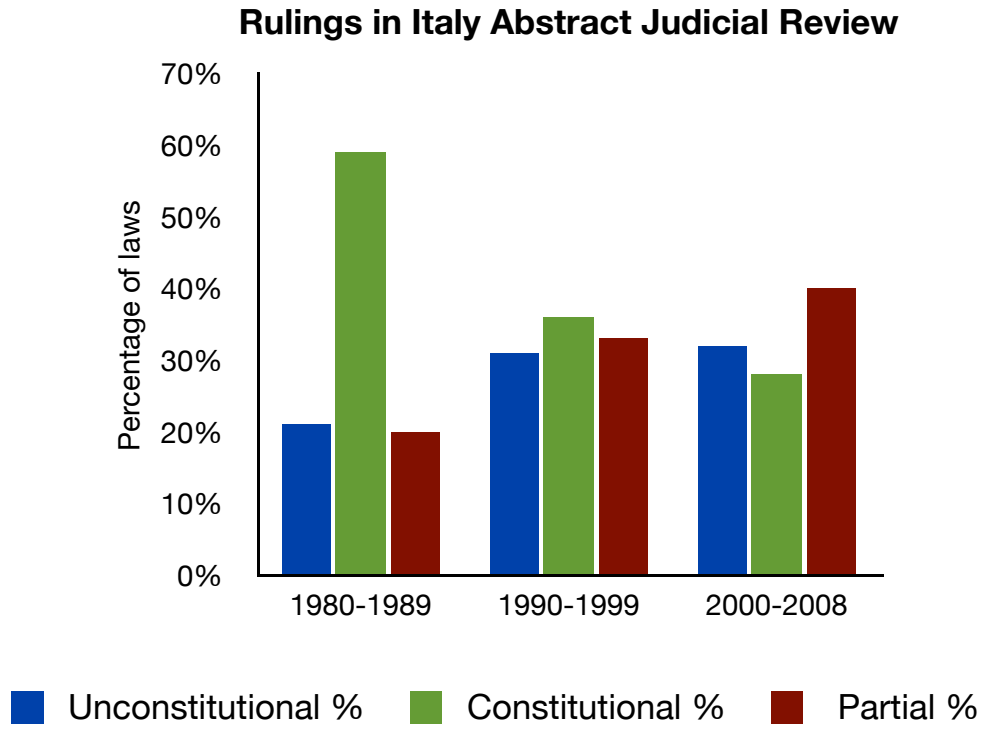


Figure 5b): Distribution of rulings in percentage in Italy

Figure 5: Distributions of rulings in Italy

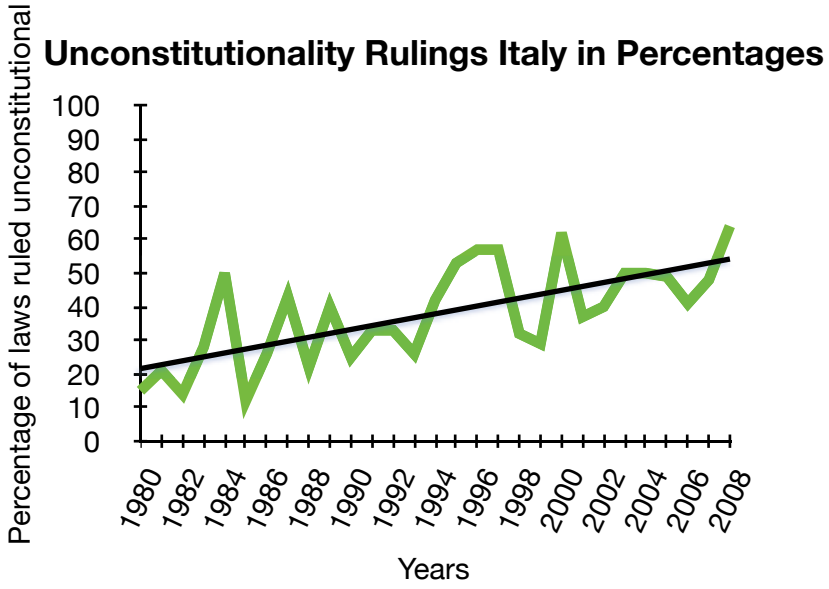


Figure 6: Italy unconstitutionality rulings

The picture alters further when turning towards Austria. Here the number of cases being ruled unconstitutional is in actuality on the decrease (Figure 7, 8). The graph shows that whilst Austria had a relatively high ratio of straight unconstitutionality rulings in the early 1980s the number is on the decrease since then.

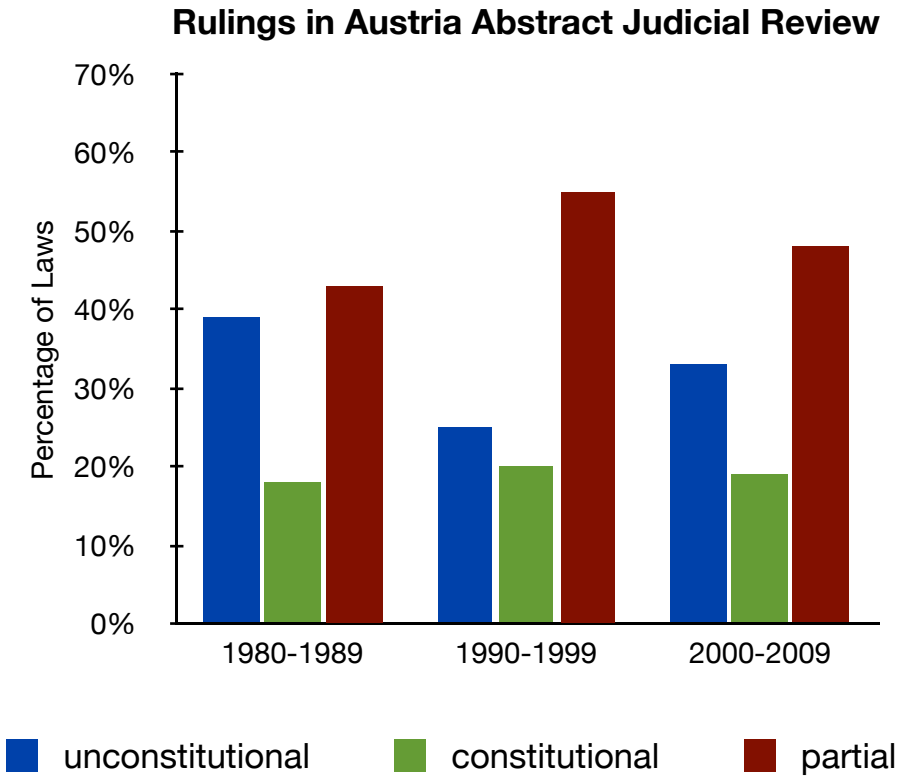


Figure 7: Distribution of rulings in Austria

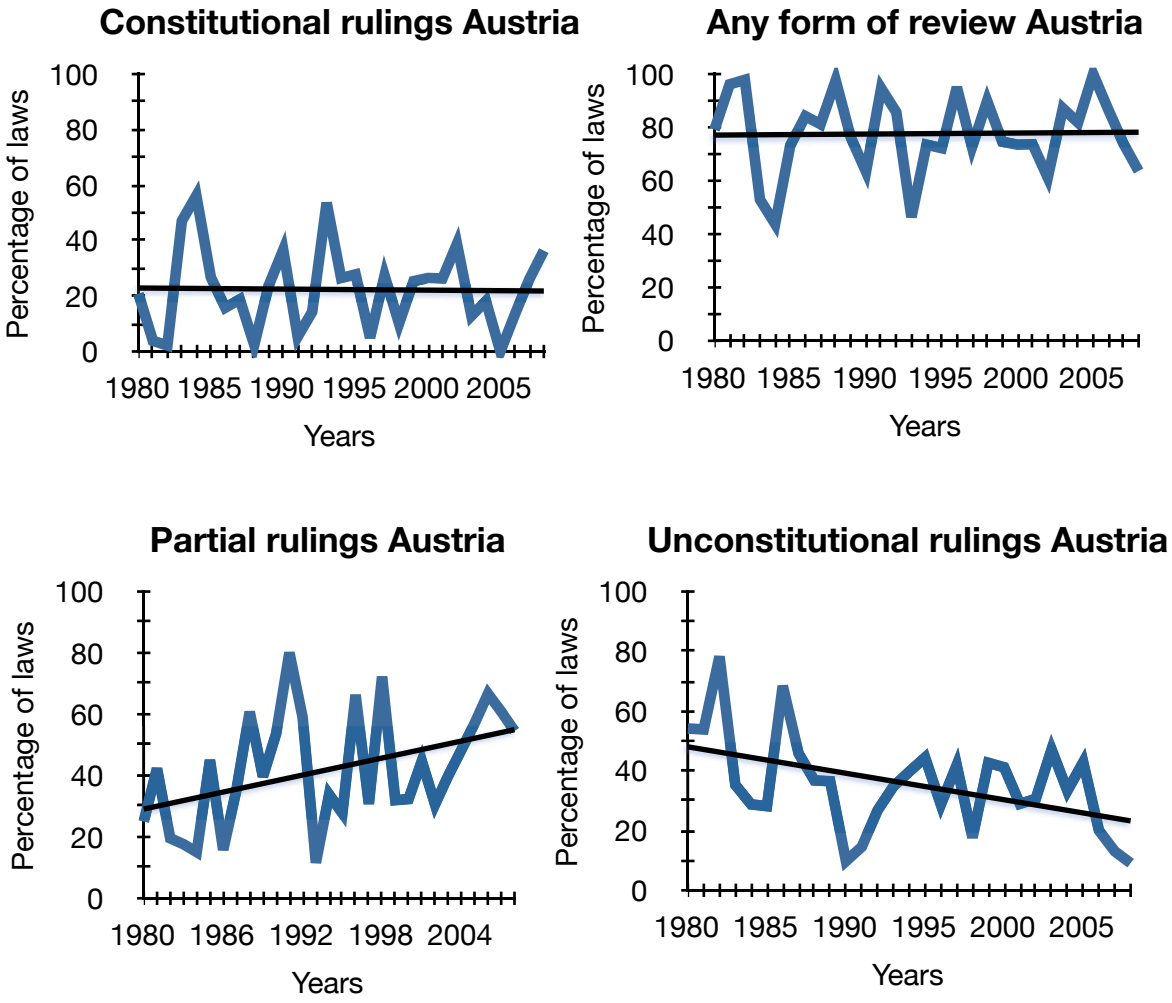


Figure 8: Development of rulings in Austria

From the above analysis three main trends become obvious:

1. The number of laws being challenged under abstract review is on the increase
2. The number of laws being ruled unconstitutional in some way is on the increase
3. Less laws which are ruled unconstitutional, and are declared to be only partially unconstitutional in Germany and Italy.

Theories on early court behaviour can provide some explanation for the change in decision making patterns. Concerning Eastern Europe it has been argued that the increase in unconstitutionality rulings in countries with newly formed constitutional courts can be explained through the court's need to establish itself in the political sphere before it can effectively rule laws unconstitutional without political opposition. This leads to courts slowly increasing their ratio of unconstitutionality rulings - however, this cannot apply to the German and Italian court, the oldest courts in Europe. The number of unconstitutionality rulings are increasing, as seen on the example of Germany and Italy, and no theory can explain this

development sufficiently. Moreover, the ratio of laws in abstract norm control seeing any kind of review, partial or unconstitutional, is on the increase all across Europe. Combining these two premises leads to the assumption that the increase in review of laws has to be mainly based on increased levels of norms being declared unconstitutional as a whole rather than in part. It is therefore an expression of the courts rendering less conciliatory rulings, at least in Germany and Italy. In Austria on the other hand the court seems to render more partial rulings and we can therefore assume from these numbers that it has become less confrontational. Further research is necessary into the reasons for the changed behaviour of courts as expressed through the changes in rations of unconstitutionality and partial unconstitutionality decisions. It therefore needs to be asked:

What causes the changes in the decision patterns of abstract judicial review proceedings?

A question this thesis is attempting to answer.

Why would the answer to this question be of importance to social life? The importance of abstract judicial review is more political than judicial and this might explain why the legal scholarship has not concerned itself extensively with these changes. In pure numerical terms the percentage abstract review comprises of the jurisdiction of the courts is negligible. In many countries less than 5% of all cases reaching the courts are under abstract judicial review proceedings, the largest percentage of abstract review is Italy with slightly over 20% of cases. However, the importance of abstract judicial review for the theoretical and practical workings of the state cannot be underestimated.

1.3 Political importance of Abstract Judicial Review

Throughout the 20th century, across Europe courts had been used by governments to further their own policy goals. In Germany and Italy this was the case before the Second World War and in Eastern Europe after. When the political institutions were rebuilt after a regime change, the creators of the new political systems wanted to ensure that the judiciaries could not be used for political means. Abstract judicial review was designed as an answer to this problem. The different approaches to abstract judicial review across Europe are based on the different approaches nations took to insulate the courts from political influences. Whereas the idea of

abstract judicial review as a power of a court is the natural continuation of the theoretical understandings undermining the perception of government in many continental European states.

Abstract judicial review embodies the idea of checks and balances in a democracy. A law passed by the legislative branches has to be weighed against a set of previously established conditions before it can be legal. The judges in turn are appointed by the legislative or executive powers but these do not retain power over them in their time in office. Certain philosophical ideas contain concepts contrary to the understanding of common law, as it exists in Great Britain, but which find their antecedents in Roman Law, underpin this relationship between political and legal institutions (Merryman 1965). For once it assumes the existence of a set of laws which are inviolable and given by nature. It assumes natural law - but not a human propensity to act according to it. There is no understanding that the human being when left alone would automatically follow and support natural law. Rather, natural law has to be enshrined into a codified document to which all other laws and regulations are subject: a constitution. In consequence, if certain laws stand above others then an independent body needs to be charged with the protection of these laws. This body is commonly a constitutional court. To ensure the inviolability of the constitution, Constitutional courts differ from other courts in certain ways. They are independent and set apart from all other political and judicial institutions. There is no review of their decisions and no body is exempt from these decisions.

When the first new European constitutions and the political systems where designed after the Second World War, the designers of these systems were aware of the dangers inherent in giving judges oversight over laws in an abstract way, as well as, applied to a concrete case (Murphy and Pritchett 1961). When constitutional courts make decisions they are final and binding to all. This ensures the unity of the legal system – all laws apply to all in the same way in the same circumstances (Zoller, 1999:31). To make sure that newly passed laws fit into the previously decided upon laws and do not upset the structure courts are often asked to consider laws before they have become legally binding or in their raw form instead of an application of a law (Haase, 1989:37). Judges decide if the law can be applied without danger to the system or if there needs to be changes to its text or content. In this, abstract norm review, a court can substitute its own interpretation of a law for that of the law-maker (Barnett, 2004:911) and can be seen as a political institution. So whilst a constitutional court has a position in the political

system of most western democracies - the exact definition and legitimacy of this position is in philosophical trouble. If the court is a law-maker when dealing with abstract judicial review then it is so without clear and direct democratic mandates. It therefore is very important to understand the mechanisms of abstract judicial review.

CHAPTER II
LITERATURE REVIEW AND RESEARCH DESIGN

To find an explanation for the change in the decision-making pattern in abstract judicial norm control in Europe it is necessary to first explain why Germany, Austria and Italy are appropriate choices for a case selection. It is then necessary to look at the five variables identified in the literature review (attitudes, political institutions, public opinion, legal factors and Europeanisation) and the methods they employ, and adapt, these methods to the European model of courts.

2.1 Court models across the world

The format of constitutional courts differs in the countries of Europe in important ways, however these courts can also be grouped in "families" according to which similarities they display (Shapiro, 2002:342). The different court models allow for differing judicial review procedures and only the European model is designed around the power of abstract judicial review. This is based on the historical development after the Second World War as abstract review was seen as a major safeguard against undemocratic rule. Following the collapse of the Soviet Union many former east block states chose the European court model due to the same reasons. Whereas court systems differ further in respect to the possibilities of individual complaint procedures, the training of personnel, access to the courts and constitutional jurisdiction.

The courts following the example set by the Austrian court and its main theoretical founder, Hans Kelsen, allow both abstract and concrete norm control to be undertaken in the same court. A rule can therefore be judged on its constitutionality before and after it has become legally binding, with a concrete case or without. Any decision over the meaning and scope of a constitutional rule has to be taken at the constitutional court; any high court has to refer any case questioning the coherence of the constitutional structure to the constitutional court (Koopamns, 2003:64). The French model officially only allows for a priori abstract norm review, a decision taken before the rule has become legally binding, and for a long time there has been a rivalry for competencies between the constitutional council and the administrative

high court of France. Whilst the constitutional council has found a way to include concrete rights review into its jurisdiction, the majority of concrete judicial review occurs at the high court. Accordingly, cases of constitutional norm review cannot only be found in one court but in both (Jacque, 2000). The American model, on the other hand, only allows for concrete norm review, a review of norms where a rule is challenged through a concrete case in a lower court and referred to the Supreme Court. This system does not provide for a constitutional court in its own right but gives the Supreme Court constitutional jurisdiction (Duxbury, 1995). It is therefore only the Austro-German model which brings all norm review cases, abstract and concrete, together in the same court.

The feature of the Austro-German model often researched and commented on is individual complaint. In an individual complaint any citizen who feels in some way disadvantaged by a rule can lodge a complaint with the constitutional court. The court then considers if the complaint has reason and needs to be judged upon. It differs from abstract review in so far as it relates to rules that are legally binding and is filed by a citizen rather than an official. It is different from concrete review by not being based on a case that has been referred upwards from a lower court. Individual complaints are lodged with the Constitutional Court directly and only occur in the Austro-German model (Dohr, 2001).

The court models also differ widely on their training and advancement procedures. Whilst selection of justices plays a large and important role in the political arena in all three systems the American system is strongest in its controversy on judicial appointments. The Head of State suggests the judicial appointment which then has to be accepted by the legislative chambers. This often causes extensive political struggles and the outcome is always a judge who is, at least somewhat, on the same ideological level as the Head of State. The French model is very similar in this aspect as the judges are appointed by the President and the Presidents of the two assemblies. In the Austro-German model appointment is undertaken through votes in the houses of parliament. As this means that the major parties have toagree to pass this hurdle the practice of rotation of appointments has developed. Parties in the German Houses of Parliament (including FDP and Greens) take turns in electing a judge with the large parties (SPD, CDU-CSU) having more frequent turns than the smaller parties (Meny 1998:332). Whilst this is a highly politicised process the outcome is a, more or less, politically neutral court which is weighed slightly towards the two major parties (Mueller, 1996).

Access to the courts is regulated in a wide variety of ways by different courts. All systems allow for governmental institutions and representatives of these institutions to refer a case to the court. In Germany, for example, the first case on legalising abortion occurred when one third of representatives of the Bundestag sent the law providing for a legalisation of abortion to the constitutional court for it to be checked on its compatibility with the German constitution. In 1981, the opposition in France referred an election law to the council to have its constitutionality decided (Stone Sweet 2000:106 - 109). Also the head of the state is, in general, able to refer cases to the court. The Hungarian president, for example, did just that with the Boskos package and referred the case to the court to decide (Schwartz 2001). Concrete review, as already discussed above, is an original feature of the Austro-German and American System. Lower courts refer cases to the constitutional/supreme court and ask the court. These cases involve a rule that might be incompatible, in certain interpretations, with the rest of the constitution. The constitutional court therefore ensures the coherence of the constitutional structure by deciding on constitutional interpretation or appliance in concrete norm control cases (Vorlaender, 2006:13). Citizen direct access to the constitutional courts is also possible in most of the Austro-German model. The individual has access to the constitutional courts by way of an individual complaints procedure. In Italy and Spain the requirements are that the citizen is in some way disadvantaged by the rule in question whilst other countries, such as Austria and Hungary, allow any citizen to lodge such a complaint.

	Austro/German	**French**	**American**	**Mixed**
Separate constitutional court (constitutional jurisdiction)	X	X		
Abstract review	X	X		sometimes
Concrete review	X	X	X	X
Individual complaint	X			sometimes
Judges appointed by consent	X			sometimes
Presidential appointments		X	X	sometimes
Dissent	X		X	sometimes

Table 1: the models in comparison

Taking Europe to span from the United Kingdom to Russia and from Iceland to Cyprus, the Austro-German Model can be identified as the predominant constitutional arrangement in Europe (Figure 1).

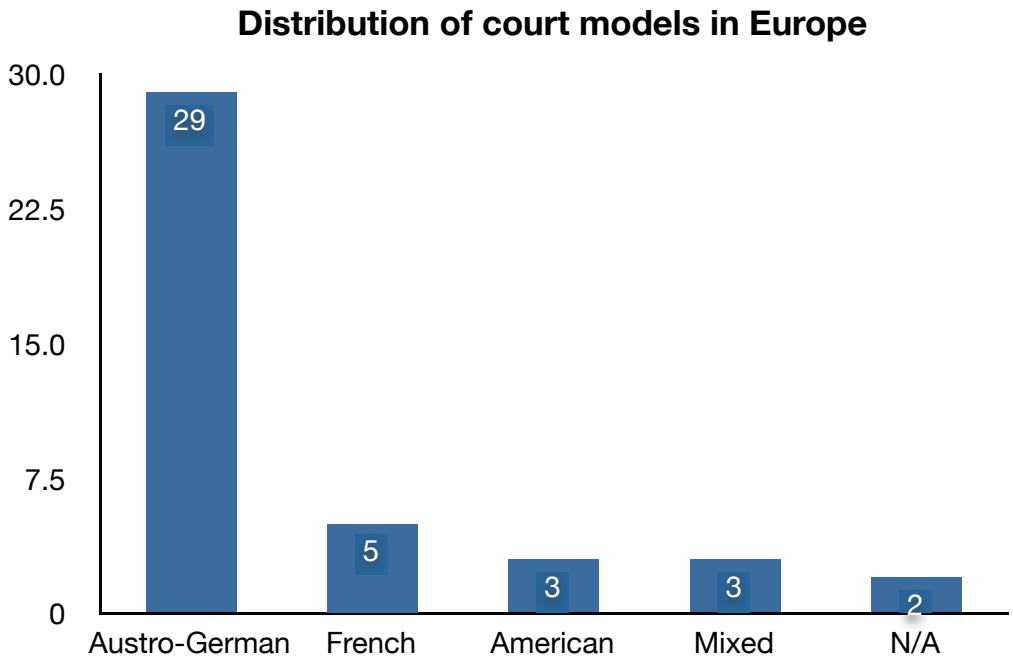


Figure 1: distribution of constitutional court models in Europe

The change in the ratio of unconstitutionality rulings in abstract judicial review documented in Germany, Austria, Italy, Romania, Poland, Spain, Portugal, France and Slovenia is therefore of special importance as they are court systems closely related to the majority of court systems in Europe.

In all countries with a court which has the power to undertake abstract norm review this court procedure is not seen as a form of litigation. Abstract norm review procedures therefore do not contain litigants and their representatives in the common sense. However, this formality is slightly misleading. Whist there are no formal litigants in abstract norm review there is the possibility of giving an opinion. This is reserved for all those with the right to start an abstract norm control procedure, namely the government, opposition, legislature, heads of state, groups of MPs, or a representative (Sachs, 2004:58). The above can be summarised simply as the steps through which an abstract norm control case has to pass before the ruling is rendered. First, depending on the court system, there is a formal limitation on the period of time after a law has been decided upon when an abstract norm procedure can be started in front of the constitutional court. In France abstract norm control always takes an a priori form – it therefore can only be started before a law has formally become legal but after parliament has

passed it (Zoller, 1999:190). In other countries such as Germany, Austria, Poland or Turkey there is no limitation on when a law can be challenged through abstract norm control procedures. The second step is the same in all forms of abstract norm control. A party with legal standing, such as the government, parliament or groups of MPs, submits a written request to the constitutional court asking it to test the constitutionality of a norm. The court then invites the party who requested the procedure to comment before a judgement is handed down. Whilst the procedure is free of charge and it can therefore be argued that financial means are not influencing the quality of the legal provisions. The quality of the comment might still be connected to the legal means in question (Dohr, 2001:341). The judgement rendered is then binding to all and cannot be overthrown by another court – as the constitutional court is the highest court of the country in constitutional matters. Whilst abstract norm control is not a normal litigation in so far as the applicant is not represented in the normal legal form, he or she still hands in a formal opinion and is bound by the decision, as is the case in every other form of litigation. However, he or she does not have to pay for the procedure or adhere to the strict formalities concerning time periods and formulas of other courts (Sachs, 2004).

2.2 Case Selection

It is impossible to engage in a thorough analysis of all the countries showing a change in the ratio of cases seeing review in abstract judicial norm control. Moreover, it has been argued in the past that a comparison of court system would be fruitless as they differ so extensively. The above description has shown that this might be the case across court systems but that within the same court system many characteristics are shared or at least comparable. Nevertheless, following the argument of incommensurability of different constitutional courts it seems necessary to look for those courts with the highest degree of shared factors. Abstract norm control adds another component to this problem as not all court models have formal powers of abstract norm control. Those countries with court models with these powers of abstract norm control can be split into a three groups with one allowing for norm control only before a law is legally binding, one group of countries with abstract norm control only after a law is legally binding and another group which combines both approaches. It is therefore necessary to look at the dependent variable, changing decision-making patterns in abstract norm control, and see in which countries this variable exists in a comparable format, i.e. either only before the law is

binding, after it is binding or a combination of both. Case selection for this study will come from the third group. The reasons for this are twofold: first, whilst it seems prudent to make sure it is the same kind of abstract norm control which is being compared, choosing cases from the systems which combine the aspects of both a priori and a posteriori allows for some tentative conclusions which can be used in the other systems. Second, many of these countries in the third group share common historical characteristics as they are modelled on each other. Table 2 shows the list of those countries allowing for both forms of abstract norm review:

Country	Review
Austria	A priori/a posteriori norm review
Germany	A priori/a posteriori norm review
Hungary	A priori/a posteriori norm review
Italy	A priori/a posteriori norm review
Poland	A priori/a posteriori norm review
Russia	A priori/a posteriori norm review
Spain	A priori/a posteriori norm review
Portugal	A priori/a posteriori norm review
Turkey	A priori/a posteriori norm review

Table 2: List of countries with similar forms of judicial review

It is then from these countries that a choice has to be made. It has been argued that in the case of limited observations, as in the case of abstract norm review, random selection might increase the problem of selection bias rather than solve it (King, Keohane, Verba 1994:112). It will therefore be necessary to use intentional selection according to predetermined guidelines. King, Keohane and Verba advise that any selection should allow for variations on the dependent variable, in this case abstract norm control, and that selection based on the key explanatory variables does not cause inference problems (1994:129,137). It will therefore be necessary to consider the possible presence of the explanatory variables identified in the literature in Chapter I as legal factors, attitudes of the judges, political institutions, popular opinion and Europe in combination with the presence or lack thereof of the dependent variable, the increase in unconstitutionality rulings in abstract judicial review. Area studies

lends itself especially to the *most similar systems design* (Przeworski and Teune 1970:330) as court systems in Europe allowing for abstract norm control, and especially those in this list above, are not sufficiently different for a *most different systems design* (Landmann 2003:29).

The most similar systems design applied to this study therefore requires the choice of countries which are closest in their general characteristics, but in which at least one country lacks the dependent variable (x), namely variations in abstract norm control, and the independent variables (y1, y2). Italy, Spain, Portugal and Germany all show similar variations in abstract norm control throughout the 1980s and 1990s, whilst Austria shows an increase in review in that time but a decrease of unconstitutionality rulings throughout the time period, whilst Hungary and Poland lack the development throughout the 1990s. As court statistics are not readily available for Russia or Turkey it is hard to make any decision on them. The independent variables of legal factors (y1), Europe (y2), popular opinion (y4) and political institutions (y3) exist in all countries. The influence of attitudes of judges on their decisions (y5) has been argued to be absent in Germany Austria and Italy due to the appointment procedures in all three countries (Funk 2007; Kommers 2006; Kommers 1997; Onida 2007; Volcansek 1990; Volcansek 2000). When concentrating on the period from 1980 till 2008 it then leaves us with two main groups from which to choose:

Country	Dependent variable	Legal factors (y1)	Europe (y2)	Political Institutins (y3)	Popular Opinion (y4)	Attitudes (y5)
Austria	No	Yes	In 90s onwards	Yes	Yes	No
Germany	Yes	Yes	Yes	Yes	Yes	No
Spain	Yes	Yes	Mid 80s	Yes	Yes	No
Portugal	Yes	Yes	Mid 80s	Yes	Yes	No
Poland	Yes	Yes	No	Yes	Yes	No
Hungary	No	Yes	No	Yes	Yes	No
Italy	Yes	Yes	Yes	Yes	Yes	No
Turkey	Not known	Yes	No	Yes	Yes	No

Country	Dependent variable	Legal factors (y1)	Europe (y2)	Political Institutins (y3)	Popular Opinion (y4)	Attitudes (y5)
Russia	Not known	Yes	No	Yes	Yes	Yes

Table 3 Independent and Dependent Variables present/absent. Highlighted in turquoise are those countries excluded due to time period. Orange excluded due to lack of y2.

Choosing from courts that have been in existence throughout the whole period of study, 1980 until 2008, is a necessity and therefore excludes Poland, Hungary and Russia. The lack of EU membership and therefore the formal influence of EU law excludes Turkey. Of the remaining five, Germany, Austria and Italy are closest in their history. The three courts have all been in existence since shortly after the Second World War. It has been argued that a court has to establish itself in the regard of the people before it can be truly effective. If this is the case then choosing courts with similar "life experience" seems necessary. Therefore the influence of legal factors, Europe, political institutions, popular opinion and attitudes of the judges on the decision-making patterns in abstract norm review will be studies on the example of Germany, Austria and Italy. The fact that Germany and Italy are original members of the European Union, whilst Austria only joined in 1995 adds another interesting dimension to the analysis.

2.3 Legislative process and judicial process in Germany, Italy and Austria

Germany, Italy and Austria are the logical choice of case studies when testing the hypothesis that harmonisation of national law and EU/EC law leads to the change in decision-making pattern of the courts through the affect it has on judicial and political attitudes to the legal system. Even so, are the paths a law takes on its way through the political system and the judicial system, if it is challenged under abstract judicial review, comparable? On first view, the three countries have very similar systems. All three are federal states with two chambers of government, extensive committee stage and increasingly strong executives.

2.3.1 Political Process - proposition to promulgation

In all three countries one chamber is more regionally dominated whilst the other is organised more on party lines, the German and the Austrian Bundesrat and the Italian Senate. In Austria and Italy legislative proposals can be introduced to either Chamber, whilst in Germany a

legislative proposal has to come through the Bundesrat first. Here, therefore is the first difference between the country's systems. However, in all three countries the legislative proposal has already gone through an extensive consultation process with interest groups, governmental departments, business and other interested parties. In the three countries, the legislative proposal then goes through various readings and an extended committee stage in the house in which it was proposed before that house takes a decision. In Germany, the national government can then adapt the law according to the propositions of the Bundesrat before it is given to the second house, in the other two countries it goes directly to the second house where the process is repeated. After both Houses have agreed the law is promulgated. In Austria, the Bundesrat retains a constitutional veto in cases of constitutional legislative proposals (Meny 1998:187; Hague 2001:218)

Obviously, the odd one out in the decision-making process is Germany. After the legislative proposal has passed through the Bundestag, the Bundesrat sees it for a second passage. If it votes to pass the legislative proposal it becomes law. If it does not, then the law goes into the mediation process, involving a joint committee and various further votes. The process seems a lot less confrontational than that of the other two countries (Meny 1998194) which might explain why Germany has a lower number of abstract review referrals than either. Therefore, whilst the overall structural similarities between the three countries are marked there are definite differences in the law-making process. However, this affects the number of cases reaching the court more than the process of abstract review at the court.

2.3.2 Judicial process of abstract judicial review at the court

Abstract judicial review in all three countries can be initiated by political institutions, regional and national, some judicial institutions and in Germany and Austria a percentage of parliament independently. The courts do not act under the adversarial system but rather have the right to their own fact finding (Harding 2009). To safeguard the independence of the judges, they deliberate and vote on a decision in secret but hearings in court before deliberations can be public. We do know that judges have specialities and that they are assigned responsibility over cases according to these. The appointed judges then prepares the decision text, following deliberations, and circulates it. His or her colleagues then have a possibility to comment before the decision is published. In many instances, the decision is the announced in a public hearing. This process is approximately the same in all three countries, with the only exception of

Germany allowing for dissenting comments by other judges being published in the case materials. The actual voting pattern of each judge is secret and therefore we do not know if a dissenting comment indeed is the result of a judge dissenting with the whole decision and has decided to vote against the decision or not. Aside from the above considerations, the path a law takes through the abstract review process is broadly the same in all three countries.

The literature on constitutional courts is very diverse and nationally based. For a long time it was considered that a comparison of courts is simply not possible as the national legal cultures and the legal frameworks surrounding courts are simply too diverse (Koopmans 2003::4). Nevertheless the last 20 years have seen some attempts at comparing courts - with most work being done in the comparison of court systems. Relatively little work is based on the decision making patterns of courts outside the US and even less on abstract judicial review, a form of judicial review common in Europe (Neal Tate and Vallinder 1995). To date only three scholarly articles concentrating on abstract review have been published and both concentrate on the German court alone (Manow and Burkhart 2007; Vanberg 2000; Vanberg 1998). Over 95% of all other work on courts has been based on the US Supreme Court, sometimes in comparison to the Australian, Canadian or Israeli courts (Jackson and Tate 1992::10). However, abstract judicial review has changed over the last three decades and it remains to be seen if the variables tested on the American court model can suggest an explanation for the reasons behind this change. In this chapter, I will give an overview of the current state of the literature on the influences on constitutional court judges in their decision-making before describing the methods appropriate to study the changed decision-making pattern in abstract norm review in Austria, Italy and Germany in the next Chapter.

2.4 Literature Review

What influences the judge in making a decision? In the literature, five distinct answers to this question can be identified.

1) The judge is influenced solely the legal variables - by precedent, the Black Letter of the Law and the intent of the law-maker (Dworkin 1977, 1998; Hart 1997; Posner 2003, 2008; Whittington 2000)

2) The judge is influenced solely by his or her own political or ideological conviction (Epstein et al. 1998; Epstein and Segal 2007; Howard and Segal 2004; Schubert 1965, 1970; Segal and Cover 1989; Segal et al. 1995; Segal and Spaeth 1995, 1996, 2004; Segal and Spaeth 2002; Spaeth and Segal 2001b)
3) The judge is influenced solely by the will of the other political actors (Dahl 1957; Maltzman et al. 2000; Whittington 2005)
4) The judge is influenced solely by the will of the people (Kramer 2004, 2007)

Increasingly a fifth influence is identified, but empirical evidence remains scarce.

5) The judge is influenced by European considerations (Friedman 2005)

The arguments for all the above propositions face some common problems. First, they have in their majority only been tested on the US Supreme Court. Second, they often have not considered other areas of influence apart from their own proposition systematically. Furthermore, systematic empirical evidence for the influence of either of the variables on the decision-making of judges is still rare. This chapter will outline and debate each school of thought in turn.

2.4.1 Legal model

The oldest and most prevalent school of thought argues for the judges' decision to be only influenced by legal factors. The judge therefore weighs the exact word of the law as written in a legal document, precedent and possibly the intent of the law-maker, past and present, and then draws a decision to the case from these materials. This is often called the legal model of decision-making and dominates law schools in the US and Europe. Outside legal establishments it has faced much critique as unrealistic, improbable and illogical over the years. However, it has the merit that no scholar denies the influence of the legal variables, word of the law, precedent and intent, as a whole. Scholars are merely in doubt if the legal variables are the deciding influence on the judge's decision.

The legal model's basis lies on the assumption that law is a closed system and that the only possible influences on a decision taken by a judge can therefore be found within that system. For legalism, or the legal model, the influence on the judge's decision-making are threefold, the plain text of the law, stare decisis and potentially the original intentions of the law-makers (Maltzman et.al 2000:4). Each of these terms faces its own difficulties beginning with the

problem that there is little agreement in the literature how to define each (Farber 1988:1086). Its main weakness remains that most of the writings in this school of thought are more concentrated on theoretical considerations of what the judge should do (Cross 1997::252; Graber 1993; Graber 2005a, 2005b; Keck 2004::288). The projects testing the legal model's variables empirically are rare - to date they still number below ten and are almost entirely limited to the political science literature. This is based on the difficulty how to reliably measure the adherence of judges to the plain text of the law, precedent or the intent of the law-makers.

Legalism argues that the decisions of the judge are influenced solely by the letter of the law, his or her considerations of precedent and the intentions of those having framed the law. Frank B. Cross wrote, after attempting to narrow down a definition of the legal model, that it "remains ill defined, characterised by various, often contradicting theories" (Cross, 1997:262). Whereas "what typically connects these variants together is the belief that, in one form or another, the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the constitution, the intent of the Framers and/or precedent" (Segal 2002:48). There are few writers who see the judge as a pure legalist, believing that a judge only makes use of the text of the of the law to come to a conclusion when considering a case. However, most take the position that the text of the law is the starting point and main influence on the decision taken by the judge. Richard Posner (2008:7) describes a legalist judge as deciding "cases by applying pre-existing rules or, in some versions of legalism, by employing allegedly distinctive modes of legal reasoning, such as 'legal reasoning by analogy'. They do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts - mainly statutes, constitutional provisions, and precedent (authoritative judicial decisions) - for guidance in deciding new cases. For legalists, the law is an autonomous domain of knowledge and technique. Some legalists are even suspicious of precedent as a source of law, because it is infected by judicial creativity." Legalists main assumption is that the text of the law and rational reasoning based on this text are sufficient to come to a judgement in all cases (Sherman 2004:26). Furthermore, that all judges schooled in the same forms of reasoning in law schools, using the same basis for their decisions, the text of the law, will come to the same conclusions (Dworkin 1986). When looking at the United

States Supreme Court, Justice Scalia is often identified as one of the main proponents of this understanding of how decisions are, and should be, made (Scalia 1989).

The philosophical basis legalism has rests with legal positivism or the pure theory of law as it has been developed by Jeremy Bentham, John Austin, H.L. Hart and Hans Kelsen. Their understanding of laws is that there is no necessary connection between the conditions under which laws are valid and applicable and justice but rather that laws are man made and the validity of their application depends on the legitimacy of the ones making these laws or the threats with which they can enforce them (Austin 2000; Bentham 1988; Hart 1997). With other words there is no underlying truth and good in the world to be defended by law. Laws are not based on some underlying rights and obligations conferred on us through the simple fact that we are human. Laws are simply words written with the purpose of ordering and governing a group of humans. Without rules we are unable to interact and would isolate ourselves from others out of fear. Rules give us the safety to live among others within a society. However, the decision what form this interaction will take and therefore the rules necessary to order the interaction are not based on anything but the legitimacy and the power to enforce them of those passing them. In the case of a monarchy the legitimacy lies with the monarch who claims to be given his power by God and has the state power to enforce them. In a democracy the legitimacy rests with the will of the people and their elected representatives.

At some point in the history of each nation with a constitution, representatives of the people have come together to write a document setting out the basic rights and obligations of each citizen. These representatives have written the rules to govern interaction between citizens and these rules are legitimate only because the people in some form have empowered the representatives to do so. It is the obligation of the judge to ensure that these rules are being observed and his decisions are only legitimate if he bases his decision on the laws and enforces the will of the representatives of the people. The question remains how exactly a judge enforces the law through employing the law. Cannot two judges come to contradictory decisions? Whose decision is then the legitimate one? Eminent scholars of the 18th and 19th century such as Blackthorn and Langdell argued that there is a determinacy in law which causes judges to come to the same result if they employ the right reasoning (Grey 1983, Kennedy 1983, Lyons 1980). Reasoning inherent in and taught by the legal profession through years of education. Each case can be solved by presenting it as a syllogism employing

simple logic (Bork 1990:162). Doubt was cast on this view of the law and its applicability or even relationship to reality in the beginning and middle of the 20th century.

In practice legalists describe the decision making process of the judge as follows. When a judge decides on a case he or she should look at the plain text of the law, The Black Letter meaning, as guidance. Many laws however employ vague or indeterminate language and therefore cannot be applied directly to each case without interpretation of the words. Because the judge has been trained for years in the legal reasoning any judge will be able to use legal reasoning and come to the right judgment based on these words (Dworkin 1978:110-115). If all judges would be perfect and therefore employ the perfect reasoning, having attained the skills perfectly throughout the training in law, then this would be enough to ensure that each judge comes to the same decision and is only employing the plain text of the law (Schauer 1988:509). Only, judges are human, and therefore the human judge might need some more guidance than often vague or contradictory information provided by the different codes of law at his or her disposal. As a result precedent (stare decisis which is the past decisions of other judges) can serve as guidance for the human judge. These past judges have faced the same dilemma and have employed the same reasoning skills so it is permissible to make use of their results (Whittington 1999:12). To ensure not to use guidance from a judge who has been unable to employ his reasoning skills satisfactorily it is necessary to consider established and recognised precedent as more important than decisions rendered only last week. Also precedent from a court higher than that of the judge in question has more authoritative meaning than precedent from equal level. This is based on the assumption of seniority. Judges on higher courts have accumulated more years of experience and therefore perfected their reasoning skills more effectively. By this argument therefore the Supreme Court will render the most authoritative precedent but is also free to divert from all precedents but its own (Dworkin 1986). This is a substantial problem when studying the Supreme Court, or any High Court in the world.

Stare decisis and Black Letter of the Law has been considered in combination as the cornerstone of the legal model by most. In recent years those voices who argue that there should be another consideration possible for the judge have become louder. The originalists within the legal model have argued that as Supreme Court precedent is authoritative over all others to protect the constitution the judges on the Supreme Court should consider the intent of

those who originally wrote the constitution, the framers, as a deciding factor in their reading of the law. The judges of the Supreme Court draw their legitimacy from the constitution which draws its legitimacy from democracy and the will of the majority. Therefore the judge only renders legitimate judgments if he or she preserves the intentions of those who wrote the constitution - or, to follow the argument through, the will of those passing laws today. Problematic remains the impossibility to define the actual will of the policy-maker. Typically there is a group of policy-makers and their decisions are compromises between them. The vagueness of many laws and the indeterminate nature of the words employed hide the various intents and disagreements. The argument has come full circle. Laws are written in a vague general language with not even the policy-makers agreeing on what exactly is meant in each case. How can the judge employing his or her reasoning skills therefore find the RIGHT answer? However, the theoretical principle of law as a closed system stands as: Judges applying their in education and practice acquired reasoning skills to the plain meaning of the law, the meaning of the Black Letter, and the precedent authoritative to them should therefore be able to produce the same judgements without controversy among themselves.

Clearly, much of this literature is based on the question how a judge should act to render a legitimate judgment. It has been argued for a long time that empirically testing the variables of precedent, Black Letter of the Law and original intent of the framers, is impossible and therefore that this has to remain a theoretical discussion (Segal 2008:21). Some few attempts, however, have been made to assess the influence of plain text, precedent and original intent on today's judgments empirically. Most empirical evidence brought forward here is the public interviews of judges and their endorsement of the legal model within. It is recognised that this is a problematic measure to use. In 2002 Howard and Segal tested the influence of plain text and original intent by assessing which arguments used by the parties in the case finds weight in the judgment. They find less than one third of cases including successful references to plain text or original intent (2002:127). In 1996 Segal and Spaeth had found that Supreme Court judges are not influenced by precedent (1996: 987). Their results have not gone unchallenged. Others have argued that there is at least some influence visible if legally recognisable mitigating circumstances were taken into account (Segal 1986, Johnson 1987). The legal model has therefore developed over decades from a purely prescriptive theory to an attempt to include empirical data into a descriptive account.

The legal model has been questioned not only because of its concentration on theoretical discussion rather than on empirical research but also on it empirical foundations. Law as a closed system has been drawn into doubt by scholars, mainly in political science and economics. It has been argued that outside influences such as the judges private opinions, political influences, public considerations and philosophical considerations influence the judge in his or her decision and therefore the law as a closed system is a misrepresentation of reality. On the one hand institutional reasons such as the viability of the court force it to consider outside factors and the reception of its decisions on the other hand the indeterminacy and the wide range of precedent allow the judge to be selective and choose his or her preferential decision. However, the answer of the legal model to the original question of what influences the decision-making of a judge is simple. If law is a closed system then the answer has to be found purely within the bounds law presents. The answer therefore remains: the Black Letter of the Law, Precedent and the Intent of the Law-maker. For the remainder of this chapter I will consider what other possible answers there can be to the question what influences the judge in his or her decision-making if we consider the law as an open system. I will discuss the literature on the influence of the attitudes of the judges, the power of other political institutions, public considerations for the judge and the influence of European factors.

2.4.2. Attitudes

The attitudinal model finds its beginning in the legal realist school which saw law not as an internally closed system, as the legal models purports it to be, but as a sphere open to outside influence (Hammond, 2005:1). Attitudinalists try to answer the question of how different judges can derive different rulings form the same information with the claim that it is solely the political opinions and ideology of the judges themselves which denote the strongest influence on the decision (Friedmann 2005:263).

> "Working with an identical set of facts, and with roughly comparable training in the law, they (judges) come to different conclusions. If our thesis is correct, these divisions of opinion grow out of the conscious or unconscious preferences and prejudices of the justices …" (Pritchett 1948:890).

From Pritchett onwards there have been various attempts to explain Supreme Court decision making quantitatively with the political affiliations of judges. The attitudinal model exists in two slightly distinct ways. On the one hand, judges are seen as coming to a case with preconceived political opinions measured on their party affiliation and will vote according to

party lines (Segal, 2002). On the other hand judges are seen to have a policy preference in each case independently and vote according to this policy preference (Knight, 1996). What both strands have in common is the assumption that a judge first derives the judgement and then justifies it with the legal rules at his or her disposal. Most recently this has been analysed with rational choice methods in a multistage game (Hammond, 2005).

Glendon Schubert was among the first to provide a detailed model of judicial decision making based on their preferences and attitudes (Schubert, 1962; 1963). He attempts to predict the variance in the voting behaviour of Judges by linking them to ideological opinions of different judges (Schubert, 1962:90). Segal (1984, 1997) and Segal and Spaeth (1996, 2002) show evidence for judges at the US Supreme Court deciding cases according to their personal policy preference.

> "Attitudinalists argue that because legal rules governing decision making (e.g. precedent, plain meaning) in the cases that come to the Court do not limit discretion; because the judges need not respond to public opinion, Congress or the President; and because the Supreme Court is the court of last resort, the justices, unlike their lower court colleagues, may freely implement their personal policy preferences as the attitudinal model specifies" (Segal, 2002:111).

The main assumption is here that political institutions cannot hold the courts accountable effectively and therefore a judge is free to choose his or her decision based on personal attitude rather than the necessity to bow to outside pressures. This is where the attitudinalists do not differ from the legalists. Their system of law includes the judge's private opinions and political attitudes but no influence of a non-legal entity.

Attitudinalists share more with the legalists - they also share some of the problems. The first lies in the question in how far it is possible to measure the attitudes of judges to certain issues. Segal and Spaeth answer this in relating the political party by which a judge was appointed to his or her opinions. Whereas it is nevertheless true that highly differing opinions can exist within one party or that a judge might agree to something in exchange for the agreement to a personally more salient issue by another judge. This leaves the question, however, how one makes sure that a decision was based on the attitude of the judge rather than on the precedent in case of precedent and opinion not differing. Therefore party affiliation seems difficult as a

basis for measurement, as seen on the example of the Burger court reaching liberal results (Eskridge 1991). Moreover, when granting that a court is not under the power of the political institutions because it is difficult and requires large majorities to reel the court in then it becomes difficult to argue that a judge will follow party opinions, as sanctioning of a judge is even more fraught with difficulties. Also, what happens in situations when a judge simply has no opinion.

The strongest criticism facing attitudinalists comes from outside the United States. It has been argued that those cases in which the court does not have an opinion or would be unable to agree and therefore would not come to a decision can be weeded out through docket control. Whilst most high courts around the world have got docket control over concrete review, the form of review existing in the United States, they do not have control over other forms of decision making, such as abstract review. Moreover, the appointment procedures in most European countries make it impossible for any party to dominate the high courts and therefore no judge can hope to be able to ensure an outcome. As a result, the institutional settings on European courts make it more likely that judges are engaging in trading among each other to come to a compromise and therefore a decision.

2.4.3. Political institutions

It has been argued that not only within the court does there have to be compromise but also within the wider political system. Political constitutionalists propose a view of the law as a system which is open to outside influences. Their argument is that it is unrealistic to imagine the court as an enduring and efficient institution without considering the choices it has to make strategically. The argument in its most simple form claims that a constitutional court is dependent on the goodwill of the institutions surrounding it. The political institutions surrounding the court have the power to replace their interpretation of a law through further legislative action. Furthermore they have the theoretical power to curtail the actions of the courts through the budget or changes in the constitution. As a result it is necessary for the court to compromise in its decisions to ensure the decision's viability and longevity. Clearly the criticisms the courts face in the political realm are an indication that the court is not simply the mouthpiece of the political institutions or ruling majority.

Political constitutionalists base their analysis on equilibrium analysis and rational choice. They start with the assumption that each individual wants to increase his or her utility. In the instance of judges it is the endurance of their decisions. They do not want their decisions to be overturned by the political institutions. A further assumption is that a loss will count more than a gain. In this instance a judge will perceive and overturned decision as graver than five upheld decisions. Following this argument through it also signifies that political institutions will consider an overturned law as a failure and will want to avoid this situation. Political constitutionalists argue that as the political institutions have more power over the court than vice versa, it is the court which will avoid acting against the will of the ruling majority that make up the political institutions. The court will therefore avoid ruling in a way that would constitute a loss to the political institutions. However, the legislative process is not as simple - there are more than two institutions involved. In most western democracies the legislature consists of two political bodies and an executive which has at least some influence on the outcome. Therefore the court needs to consider the utility of various bodies as well as its own in the decision of what constitutes a gain or a loss.

Equilibrium analysis suggests a solution to the question where the decision would lie when the court has to consider the desires of other political actors in the game. Figure 2 is the graphical representation of this decision. If the court would be standing against the political institutions as a united front then the court would have to concede in each decision to avoid causing the political institutions to experience a loss. However, when seeing the political institutions as separate actors with distinct and often opposing preferences the image changes to a court which can make use of the separate preferences to realise a decision closer to its own preferred decision without facing opposition. In the pool of possible decisions there will be one decision which will satisfy each legislative body simply because any other decision will constitute a loss for one of the political bodies and would therefore be opposed by that political body. This decision lies on the equilibrium point, the point which lies within the preferences of all actors leaving no one worse off than the other (at least in their own perception).

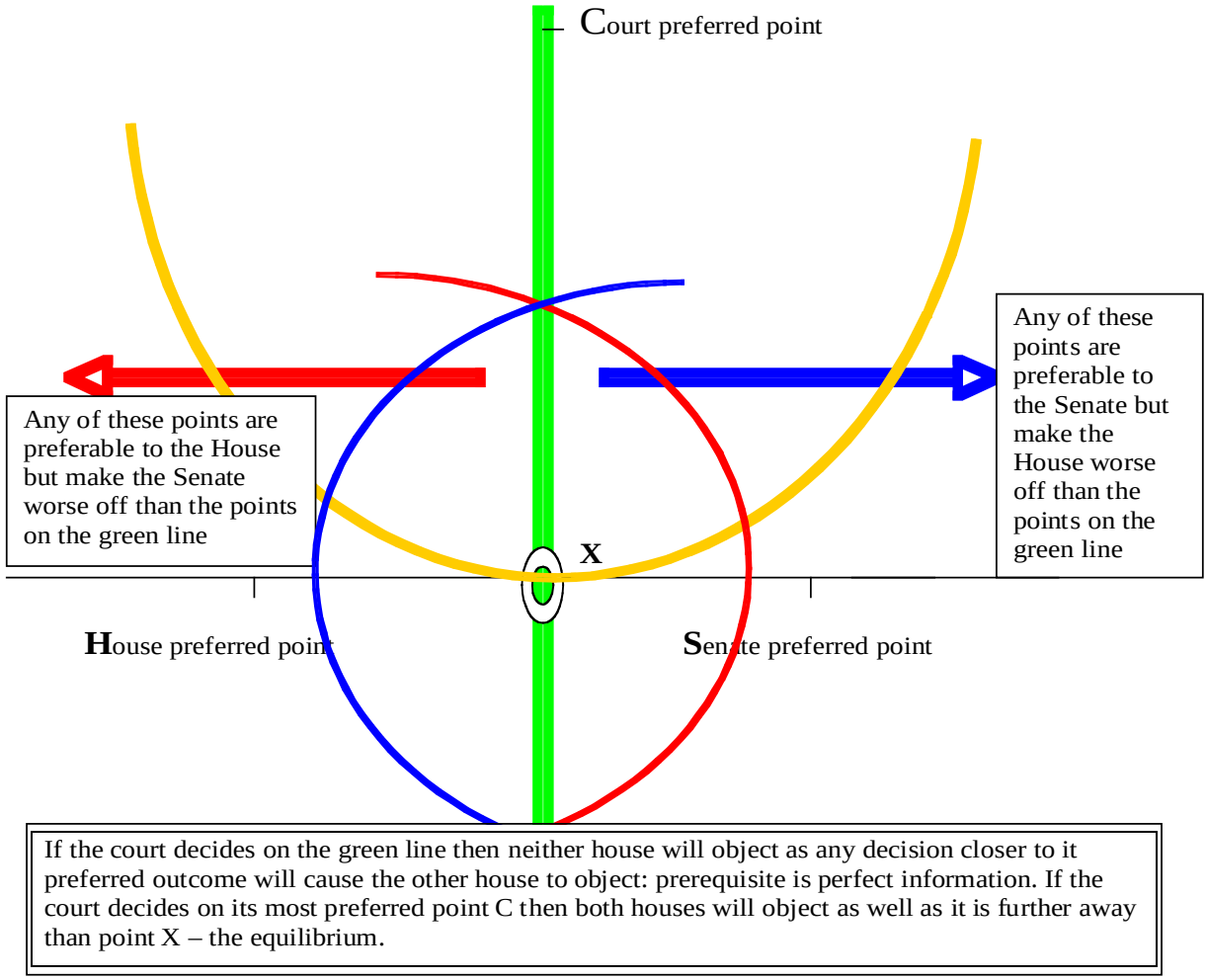


Figure 2: The equilibrium point for a court in a game with two legislative bodies

The deciding influence for the judge is therefore not the legal considerations nor his or her own political attitudes but rather the reaction he or she will provoke in the political institutions with his or her decision. The legal considerations and his or her own political preferences might inform the choice of decision the judge would prefer to realise. After having considered the most preferred decision, the considerations of the reactions of other players in the game will then lead to the decision the judge makes. One of the main pieces of evidence the political constitutionalists use against attitudinalism is that in certain cases judges vote atypically. Maltzman (2000) uses the correspondence between Justice O'Connor and Brennan in a Miranda related case in 1990 as an example for strategic considerations within the court. In all previous cases both justices had voted against limiting the protections Miranda awards to the suspect in any way. However, in this case Justice Brennan voted for a limitation, arguing that this would have allowed him to ensure that the limitation of the rights protected in Miranda will be as small as possible (Brennan 1990, O'Connor 1990). Here a judge clearly acted strategically to ensure that the outcome of the case was as close as possible to his policy goal,

the preservation of Miranda. The fact that many judges routinely switch their vote in the process of decision-making has also been shown and used as an example for strategic considerations within the court, as well as concerning the actions of other political branches.

Other political branches, for example the government through the advocate general or any part of the administration through filing an amicus brief, make it clear to the court what side of the controversy they are supporting. Therefore, when the judges make a decision they are aware of when they are opposing the ruling majority - and their votes are cast with that in mind. The correspondences and the changing votes might not be conclusive in giving evidence for the influence of political branches on the strategy pursued - it could be that the strategy is only towards other judges. Yet the unusually high percentage of success of the Advocate General in front of the court seems to be an indication for the court being willing to consider the ruling alliance in its decisions. Around two thirds of cases brought to the court by the Advocate General see review.

However, political constitutionalism falls short in explaining certain outcomes, as for example when the court is clearly ruling against the ruling majority, no matter what consequences the court faces. Another serious objection is that rational choice presupposed an almost perfect knowledge for what preferences other actors within the system have. It also still suffers from the vagueness of the early work which did not produce clear predictions but identified strategies the court might, or might not, pursue. This lack of clear predictions was a result of the small amount of data analysed and complied by the early rational choice scholars in judicial politics and therefore the limited predictive powers of the early rational choice models. The increase in systematic use of statistics as well as qualitative data and the advent of equilibrium analysis over the last decade goes far to alleviate this problem. The again, this poses another question - does equilibrium analysis become a necessity for the rational choice scholar or is it possible to argue for strategic interactions not using this sometimes-crude tool (Schwartz 1992)? Most recent analyses seem to indicate this but it can be argued that the necessity to use equilibrium points makes analysis unnecessarily rigid and is unable to account for hidden influences.

One problem remains with this argument. How does the court know what the majority of politicians want? It has been argued that ‘cheap talk’ is a problem (Epstein and O’Halloran

1995, Mashaw 1990:282). Many politicians say something simply for the purpose of strategy and secretly have other opinions. This might mean that the court might have been able to establish an equilibrium point closer to its own preferred decision. However, this does not change the viability of the equilibrium point fundamentally. It would nevertheless cost the member of the political branch if he or she would be fully in favour of one decision and then oppose that decision wholeheartedly. Again not one single actor can upset the equilibrium point. So if the majority suddenly opposes a decision they seemed to favour beforehand then that means loss of credibility in the eyes of the voters for either one party or large numbers of either party. This might very well mean that even if a party opposes the decision secretly and its support has only been cheap talk that they will continue to support it to save their credibility. It is also possible to assume here that the chance of the court being opposed is higher in highly emotional and politically salient issues and that therefore the court will be more careful in its consideration and choice of the equilibrium point.

Rational choice scholars face a problem as they often treat the court as a unified actor but attitudinalism has presented compelling evidence that it often is not (Weingast 1992:266). Moreover, for the rational choice theorists the court has to spend a large amounts of its time in considering the stances of other political branches to the case. Does the court actually have the time to do so? Most constitutional courts are desperately overworked and are barely able to fulfil the requirements of so many cases. Are they likely to spend time in finding out what reaction there will be? In abstract judicial review the plaintiff is in some form always part of the political branches and therefore it can be argued that here the court is automatically aware of the stance each member in the game has. Here however the question is if the rational choice constitutionalist is able to adjust to the court decision being seen as a sequence of games, as a sequence of decisions that have to be taken. Rational choice scholars have argued that one of its main advantages for the study of courts is that it can, in comparison to attitudinalists and the adherents of the legal model, explain all interactions of the court rather than just the vote. This might be true regarding the US - but, as yet, remains untested in Europe.

2.4.4 Popular opinion

It has also been argued in recent years that the courts will defend the opinion of the majority of the public as the approval of the general public insulates them against political repercussions. To preserve this shield their decisions are made in consideration of what the majority of the

public approves of (Caldeira, 1986:1223; Adamany, 1983). Some courts, such as the Mexican Supreme Court, even use this and promote public awareness through the media, their own websites and news bulletins (Staton, 2006).

> "According to this argument, the Court's concern for its authority makes it reluctant to depart too far or too long in its decisions from prevailing public sentiment. This is not to say that judges "play the role of Galahad". Neither is it to argue that justices consult opinion polls prior to making decisions or that they tailor their judicial philosophies to the latest fluctuations in public opinion in specific issues. It is rather to suggest both that members of the Court are political creatures, who are broadly aware of fundamental trends in ideological tenor of public opinion, and that at least some justices, consciously or not, may adjust their decisions at the margins to accommodate such fundamental trends" (Mishler, 1993:89).

This does not only mean that the Court, just as any public body, reacts to changes in society through changing make-up but that judges consciously react to public opinion shifts. The change of heart of the Supreme Court towards New Deal legislation and the support for the internment of Japanese-Americans in 1944 are often given as examples for this (Mishler, 1993:89). Mishler and Sheehan used the Supreme Court database and compared the cases within and compared the outcomes to a wide range of data from opinion polls. Their results indicate that the Court is highly responsive to majority public opinion, but they also report that this is mainly due to a reaction to the changing ideological make-up of the political branches even if they found evidence for cases where the court reacted directly to public opinion (Mishler, 1993). This has led Norpoth and Segal to argue that it is in fact the political opinions of the judges which influence their behaviour rather than their responsiveness to public opinion or the will of the political institutions. As the president appoints the judges and generally appoints justices who share his views and as the president is elected by the people it seems, they argue, logical that the responsiveness to public opinion simply proves that judges vote on cases according to their own political preferences rather than considerations of law or political institution's power over them (Norpoth, 1994). In an answer to the criticisms Mishler and Sheehan argue that due to a lack of direct evidence and data the criticism misses the mark (Mishler, 1994). When testing both models Stimson et. Al. had to agree and disagree with both

– but agreed definitely with the observation that there is lack of data for absolutely conclusive arguments (Stimson, 1995:556). This resulted in extensive research in both fields.

Problematic here is especially the difficulty of finding a reliable measurement of opinions (Mondak, 1997). It is true that whilst opinion polls generally rank courts higher in the public esteem than other political institutions (Gibson, 1991; 1998) for public support to be an influence on judges there is also the necessity that citizens must be able to monitor the court and the legislative responses to court rulings (Vanberg, 2001:347-351). If the citizens cannot monitor the responses of the political branch then, consequently, the court is also not protected against adverse reactions by the political branches through the citizen's support. 71% of all courts publish their decisions and issue press releases so that the public is aware of what is happening in the marble halls. It has been argued that this is an indication for courts using and reacting to public opinions (Staton, 2006:98) as any ruling adverse to reigning popular belief will cause a backlash on the courts and therefore their willingness to employ these means indicates that they seldom stray. However, research in confidence levels into the US Supreme Court have shown that there is a limited relationship between individual decisions and the attitude towards the institution as a whole (Gibson, 2003:364).

One way of arguing that citizens make their opinion known to court is through pressure groups. Interest groups not only turn to the court to win their cases but also to increase visibility for their interests. Also they not only turn to the court in an instance of litigation but often file amicus curiae briefs – offering the court an opinion to the implications of a case when they themselves are not involved as a party of the case (Epstein, 1991:212). Caldeira found that the involvement, in any way, of an interest group in a case increased the likelihood of this case being heard by 40-50% (Caldeira, 1988:1122). However, as almost 80% of cases were by 1993 connected to interest groups most positions seem to be able to be defended by a pressure group and a quantitative comparison using data from Supreme Court and District Court indicates that there is hardly any impact by amicus curiae (Songer, 1993:340).

2.4.5. European Influence

Recent literature has begun to consider the EU and European law and influence as another variable constraining the judges. Even the US Supreme Court has made references to other courts in Europe, International and European Norms (Friedmann 2005). Alter has described

how lower courts in Europe see the preliminary reference procedures and the European Court of Justice as a means to increase their power towards higher courts (Alter, 1998; 2000; 2001). However, she concentrates on lower courts and on court activity in general. In a conference with the title “Die Stellung der Verfassungsgerichte bei der Integration in die Europäische Union” (The position of constitutional courts following integration into the European Union) constitutional court judges and academics came together in 2004 and discussed the influence courts can have on the EU and the influence the EU can have on courts. The conference resulted in a number of papers which were published by the Zeitschrift für Őffentliches Recht in 2005.

According to various authors membership of the EU should limit the amount of judicial review the constitutional court undertakes on its own as any EU law will be superior to national law and the review of this EU law has to be undertaken on European level (Schaeffer, 2005:352; Skouris, 2005:328; Craig 2003). Furthermore, Schaeffer goes as far as to state that EU integration is not relevant for national norm control and should have no influence. He tries to say with this not only that all influence European Integration has on judicial review goes by way of preliminary rulings procedures but furthermore that the picture presented by judicial review in the past is not changed significantly by European Integration (Schaeffer, 2005:386). The Italian constitutional court is not that sanguine about the matter, arguing that the question of competence is not solved yet. In concrete judicial review the question might not arise – but it does in abstract review and has already in the case of Italy. It is true that influence is also exerted by preliminary references but only if the constitutional court decides the community law to be unclear and therefore has to refer to the ECJ. As the Italian Constitutional Court, as well as the German and Polish court, is not that sure of who has final jurisdiction on basic constitutional matters this decision might seldom be taken (Onida, 2005:394; Hassemer, 2005:406; Grzybowski, 2005:532). It is therefore not enough to measure the influence only as exerted by preliminary references but any case which involves European legal norms. Moreover in the case of many European countries it is routine to refer to cases from other countries, the ECJ or to European principles in the reasoning pertaining to judicial review cases (e.g. Hungary see Harmathy, 2005:320; Germany see Geiger, 1998; Slovenia see Ribicic, 2005:411).

In the literature there are therefore two separate issues: one, the question if there is a "European Influence" and two, what this influence consists of. The first is the question this study is attempting to consider and the second needs to be clarified before even starting. Clearly, it is not enough to see European influence as simply any case which was based on a preliminary reference but also needs to be considered as those cases which involved EU norms or referred to European norms or values somewhere within the reasoning. There is no consistent empirically researched body of literature concentrating on the influence of EU law apart from preliminary references but there are many references and footnotes observing the increase in which the actual court documents contain the word Europe in any of its permutations. However, with so little empirical data on this it is hard to evaluate the actual extent. Therefore during this study, the variable European influence will be defined as the direct reference to "Europe" within the texts of the cases encompassing both the preliminary references as well as nebulous concepts as European norms and ideals.

2.5 Judicial review in Europe

Most of this literature has been tested on the US American model and then simply applied to the European court system. However, the European court system differs extensively from the American system in the forms of judicial review it allows the Courts to undertake. Judicial review, or norm review how it is termed in legal texts, is the power of a court to decide on the legality of a rule or norm which has been referred to the court for that purpose (Stone Sweet, 2004:9). A legal norm is a rule of any kind passed and enforceable by a public body (e.g. ordinances, statutes, administrative rules, common law, precedent and international and supranational treaties) (Kalyvas, 2006:575). This meaning of the term "norm" is derived from a combination of its meaning in sociology and philosophy. For a sociologist a norm is anything which is socially enforced, which includes enforcement by courts and the police but also by social groups. Homosexuality is no longer illegal in Germany however it is still a social norm for one's sexual partner to be of the opposite sex and those deviating from this norm are often punished with social sanctions. In philosophy a norm is commonly understood as a reason to act, believe or feel - such as commands or permissions. Norms are not descriptively true or false, since they do not purport to describe anything but they prescribe, create or change (Stone Sweet, 2000:8). The term norm, as used in this study, therefore denotes a rule which commands or permits a certain action and is passed by a public body and enforced by a court. Norm review therefore signifies the power of a court to decide which of

the norms passed by a public body are in the power of that body to be passed and can therefore be enforced by courts generally.

However, norm review occurs in two different forms – concrete and abstract. Concrete judicial review is based on an actual case and therefore is a judgement on the constitutionality of the application of a particular law or norm (Currie, 1994:162). In this, the litigant has to have legal standing and the case has to take the customary route of rising through the ranks of courts by means of appeal. In other words, the litigant's rights have to have been directly infringed upon before he or she can take the injury up with the court and ask for a ruling on this application of a law to his or her circumstances. After this ruling has passed he or she can then decide to appeal to the next higher level of court till the case ends with judges of the highest court which give a final and binding decision. In the case of abstract review a court decides on the text of a law without a concrete case. Here the litigant does not have to have his or her individual rights infringed upon before he or she can ask the constitutional court to decide and, furthermore, the law does not even have to be legally binding yet. If it is an individual citizen who asks for the ruling, then the constitutional court does not have to comply but if it is an official such as the head of state or a certain number of parliamentarians who ask for the ruling the court has to consider the case. Abstract judicial review is an important power within the political system as it involves the courts closely with law-making (Shapiro, 2002:185). A body whose membership is not based on election, a court, can decide if a law passed by the elected political body can stand and be applied. The court can make this decision before the law is legally binding or even after – depending on the court model. In this function the court is part of the separation of powers ideal embedded in most codified constitutions in liberal democracies in Europe. The court ensures that the elected body adheres to the fundamental rules of the state. Strictly speaking these rules form the borders of power the public body holds and the court ensures that the public body remains within these borders – that all the norms passed by the public body are intra vires, within its power to pass (Barnett, 1999:736). The United States Court system only knows concrete judicial review whilst abstract judicial review is a common feature of European court systems.

CHAPTER III

METHODS

From the literature above five possible reasons for the increased levels of review in abstract norm control are identified:

1. Precedent, Black Letter and Intent of the law-makers
2. Political Attitudes of the Judges
3. Influence by political institutions
4. Influence of public attitudes
5. Influence of European Union membership

The wide range of theories and the comparative lack of previous analysis of abstract judicial review necessitates an equally wide range of methods. To consider the possible causes for the increased levels of review in Italy, Austria and Germany a combination of statistical analysis, interviews and content analysis are most promising. Each of these methods are most appropriate to different variables and each has advantages and disadvantages of their own. This chapter will therefore detail the reasons for the choice of methods before discussing each method separately in theory and in its application to the hypothesis of the thesis.

3.1 Choice of methods and form of analysis

Traditionally, the literature on courts has analysed the voting behaviour of judges quantitatively, but has eschewed any quantitative analysis in European court where this is not possible. The courts themselves publish limited quantitative analysis regarding their workload and the average time it takes for a case to pass through the court proceedings. Measures of Association between variables are therefore almost exclusively limited to linear regression over time. Little correlation analysis has been undertaken. However, the original text of all the cases are accessible online or through special software packages. It is therefore possible to code for a wide range of factors such as origin of law, of plaintiff, of judge, in respect to region or academic affiliation, time at the court, appointing party, party in government, coalition and so on. The wealth of systemic factors which can be identified through the case materials is also of interest: lawyer, region, institution, amicus brief, dissent. There is therefore a wealth of possible variables to test for their explanatory power regarding the decision-making pattern of the three courts.

The most usual correlation analysis performed by social scientists today is regression analysis. The usefulness of this has already been drawn into doubt by seminal works of Verba and King in 1986 and 1994 (King 1986; Verba 1994). The argument made here is that in much of the quantitative methodology employed in the social science simply mechanically follows analytical steps without real understanding or consideration of the appropriateness of the measure. This is especially the case with regression analysis (King 1986: 674).

Simple Regression analysis is an excessively useful tool when predicting future development or when extrapolating from a representative sample to the whole population (Wright 1997:90). However, simple regression is only one form of correlation analysis. There is a wide range of measures of association to choose from. The choice depends on the size and quality of the data (Salkind 2010:282). The reason why regression analysis is often held to be more reliable lies in a wide range of misperceptions. Regression analysis is not more likely to causation than other forms of correlation analysis - to be exact both forms of analysis will only prove the likelihood that two or more conditions covary, occur at the same time. Regression analysis is, however, often more accurate to extrapolate to the larger population. All the statistical analysis in this thesis are based on the entirety of cases, and most of the analysis is based on nominal data or a combination of nominal and ordinal data. The most appropriate measures of association in this instance are therefore Spearman's, Cramer's V and Phi, depending on the combination of data needed for the test.

One of the often cited disadvantages of quantitative methods remains it's potential superficiality and inflexibility of its analysis. Combining the quantitative side of the analysis with qualitative content analysis and interviews. More importantly, this also addresses two main criticisms commonly levelled against studies comparing different systems, quantitatively or qualitatively. It has been argued that a comparative analysis between the systems is difficult due to the high variance in legal systems, an accusation that has already been addressed in the last Chapter by the analysis of the systems. However, the more serious argument lies in the follow up accusation that law is too case dependent and that therefore a quantitative comparative study is unable to account for possible missing variables or system specific changes (Holland 2010:156). Therefore it is necessary to supplement the quantitative analysis with qualitative content analysis of the texts of the cases. However, this will only add a deeper understanding of the individual cases, for a more general image of the other systemic factors

surrounding the courts interviews with judges, civil servants and politicians are employed. Below an account of the detailed coding scheme of the quantitative analysis and aspects of the qualitative analysis will be detailed.

3.2. Statistical Analysis

The statistical data drawn from the case materials relating to the increase of review in Germany, Austria and Italy is extensive. The text and data relating to abstract norm review is readily available on the court websites. The collection of the abstract review case materials is purely a question of identification. The coding within the texts has to be undertaken with ultimate care to account for country specific circumstances. Most statistical analysis throughout the thesis is a correlation between the different causes identified by the literature and the outcome of the case. The decisions rendered in the cases can be coded in four possible decisions: constitutional, unconstitutional, partial unconstitutionality and stopped.

The first step in a statistical analysis of abstract review is the correct identification and codification of relevant cases. In Germany this is made easy by the fact that the court labels all cases with a BvF. Cases after 1998 are readily available online whilst those for the periods before can be purchased through a computer programme (Bundesverfassungsgericht 1952-2002). In Austria, the court denotes these cases with a G, however this also applies to direct review. As a result it is necessary to examine each of the cases for its format in detail. Fortunately, all Austrian cases, as well as the Italian cases are readily available through the court websites (http://www.cortecostituzionale.it/;http://www.vfgh.gv.at/cms/vfgh-site/index.html). Concerning the Italian cases it is also necessary to identify the abstract review cases by examining the whole jurisdiction of the constitutional court as there is no way of identifying the cases through their titles or numbers. In Italy this results in 1064 cases over the period 1980-2010, in Austria 300 and in Germany 150.

After a collection of all the cases it is then possible to code the decision texts with a wide range of variables employing qualitative content analysis. By reading each case it is possible to identify the form the decisions takes, who the plaintiff was, what kind of law was challenged and where the law originated. It is moreover possible who provided an expert opinion, which political or regional institution submitted an opinion or which precedent the

court employs. Even the style of the decision can be coded for. The courts themselves have coded for decisions and as a safeguard it is possible to compare the decision-making patterns.

To test any variables against the decision-making pattern it is necessary to first code the decisions. Table 6 presents a full coding scheme in a tabular format. For a decision to be coded as constitutional the whole norm needs to be considered as within the bounds of the constitution. No part must have been revised or considered as unconstitutional by the court. However, within this group those cases which were dismissed outright can also be found. However, those cases dismissed due to procedural grounds were coded as stopped. In this category are also those cases which were withdrawn for any reasons. Whilst interesting, the cases which were withdrawn, cannot give an insight into the question what influences the judges in their decisions causing increased levels of review. Unconstitutional is any case which has the norm annulled or declared unconstitutional in its entirety. The distinction between annulled and declared unconstitutional lies in the time period the norm remains in power. A norm being annulled, or declared void, will cease to be legal from this moment on. A decision to declare a norm unconstitutional can lead to the norm remaining in power for a prescribed period of time to allow the legislature to replace the norm with a constitutional one. A partial unconstitutionality ruling denotes the category of those cases in which a norm is only declared unconstitutional in part. Part of the norm is therefore considered as constitutional by the court whilst some part of it, a codicil, a phrase or a word, is declared unconstitutional (Table 4).

Constitutional	Unconstitutional	Partial	Stopped
No part of the norm revised	The whole norm annulled	Part of a norm revised	Withdrawn
No part of the norm annulled	The whole norm declared unconstitutional	Part of a norm annulled	Dismissed due to procedural reasons
Dismissed		Part of a norm declared unconstitutional	
The norm being declared constitutional in its entirety			

Table 4: coding scheme for "decision rendered"

Other coded variables are self-explanatory (Table 6 below and Appendices 1,2,3). The party in government, the number of precedent used in the case, the party affiliation of the plaintiff are all coded without any possible interpretation. However, the variable EU and the variable of party not in government are in need of more differentiated coding schemes. A party not in government is not only a party which at the time of decisions is not in government, but state coalitions which are made up of parties not in government, those coalitions where the parties in the absolute majority are not in government or a group of parliamentarians which is made up to at least 75% by parties not in government (Table 5). The variable EU denotes those cases which have any reference to any EU institution or contract. Moreover, it also contains those cases with a reference to European values, obligations and ideals.

Party	Coalition	Group of parliamentarians
Any party not in government	A coalition made up of parties not in government	Parliamentarians from a party not in government
	Coalitions in which the party not in the national government has a distinct majority	A group of parliamentarians at least 2/3 containing members from parties not in government

Table 5: coding scheme for "party not in government"

The analysis of the relations between the outcome of cases and the possible causes for the decision will be undertaken making use of simple and multiple regressions, cross-tabulations, correlations and significance testing. The detailed derivation and explanation of the formulae can be found in Appendix 4. Considerations of the uses, advantages and disadvantages of each of these statistical analysis are common to all the variables in the analysis and need to be considered here.

	Coding scheme per class of variables		
Class of Variable	Germany	Italy	Austria
Year	These relate to the identification numbers of the cases in the court's system. They contain the year, the number of the case and in Germany the place where it is save in the court records.		
Number			

	Coding scheme per class of variables		
Class of Variable	Germany	Italy	Austria
Number1	(G1986/345; 2BvF1/2002; 1994/234)		
Decision rendered	constitutional, unconstitutional, partial unconstitutional, stopped		
Kind	financial, environmental, social rights, political rights, education, internal security, military, international, democracy, media, infrastructure, other (combined categories: rights (social and political), Security:(military, internal security))		
Year referred	year in which the case was brought to the court		
Year decided	year in which the case was decided		
Time at court	period of time between referral and decision measured in months		
Challenged by	identity of the “plaintiff” coded for: identity, party affiliation, regional affiliation, institutional affiliation, coalition, governmental affiliation, opposition affiliation		
Origin	origin of the law coded for: party in government when law passed, party in government when law proposed, electoral promise, coalition, regional, regional government, regional party identification. regional party in government (national)		
Federal	federal law		
Regional	regional law		
Federal/regional conflict	yes/no		
Government in power at time of decision	coded for parties and coalitions		
Government in power at time of referral	coded for parties and coalitions		
Opposition at time of referral	coded for parties and coalitions		

	Coding scheme per class of variables		
Class of Variable	Germany	Italy	Austria
Opposition at time of decision	coded for parties and coalitions		
Coalition partner	yes/no		
European mention	yes/no and number thereof		
International mention	yes/no and number thereof		
Number of pages	number of pages (word document, font 12, European standard margins DIN4)		
Number of precedent	number		
Dissent	ratio of decision and identity of dissenting opinion author	not possible	not possible

Table 6: coding scheme for all variables

Regression analysis measures if there might be a causal relations between two variables through a graph. The perfect relationship between two variables would be a graph in which an increase in one variable will lead to the same increase in the other variable (Reynolds and Buttolph Johnson 2008:477). A typical example would be time and age, an increase in time of one year is related of an increase in age of one year[9]. A relationship that creates such a perfect regression line is rare and clearly none of the graphs depicting the development of abstract review in the previous chapter is such an example (McLean et al. 1993:89). A regression line can therefore be used to measure general development between two variables, how strong the relationship between the two variables is and most often to predict future development (Field 2005:103). Due to the question this thesis asks the regression analysis here is not attempting any future predictions but purely to explain or illustrate past development. This development

[9] To satisfy the theoretical physicists we are assuming the measurements are taken somewhere on earth, not traveling at light-speed or falling into a black hole.

can be best illustrated by the addition of a trend line to the graphs. The trend line is a linear regression line. Any point on this line would be the perfect relationship between the two variables. The distance between the actual observations and the trend line shows in how far the actual observations differs from the perfect relationship (Bryman 2008). The direction and gradient of the trend line shows the general development of the relationship between the two variables. An increasing trend line denotes an increasing trend in the relationship between the two variables.

Regression analysis has two major disadvantages. One outlier, an observation which is numerically distant from any of the other data points, throws the analysis and moves the regression line, and therefore trend line, considerably, if the number of observations is relatively low (Figure 1 in chapter I is a good example). This is a serious problem in social sciences as here often the observances are limited. When analysing abstract review development over time the observances are only 30, for 30 years, and therefore the measurement of strength of relationship is unreliable. Regression analysis will be used in this thesis only to establish general trends of relationship between two variables, for the most part for temporal development as in Chapter I. Moreover, it is an analysis only usable when dealing with parametric data. With other words, both variables have to be either ratio or interval data. As this is often not the case in social sciences regression is of limited use here. The dependent variable in this study, when not used numerically (e.g. 75 occurrences in 2008), is nominal or dichotomous as are many of the other variables. A nominal variable, such as the "decision rendered" coded as constitutional, unconstitutional, partial or stopped, is a variable in which the values are artificial. The values have no intrinsic numerical meaning apart from distinguishing separate categories from each other. So concerning the dependent variable "decision rendered" it means that numbers are arbitrarily assigned to distinguish the categories of:

Constitutional = 1

Unconstitutional = 2

Partial unconstitutionality = 3

Stopped = 4

Re-coding this variable into a dichotomous form puts the emphasis on one category and codes the other categories as "other", such as constitutional = 1 and other (unconstitutional, partial unconstitutionality, stopped) = 2. The format the variables in the analysis take has far reaching

influences on the statistical tests employed, such as the strength of the relationship between the variables and the significance of the relationship between the variables. Contingency tables, such as cross-tabulations, are useful and most appropriate for the analysis of nominal variables.

The strength of relationships between two variables can be mathematically calculated through various correlation coefficients. For all the analyses within this thesis it first has to be ascertained that the relationship between two variables cannot simply be due to coincidence. A statistical significance test, a CHI-Square test, measures the difference between the expected values if the relationship would be 100% and the de facto observed values. If the value of the CHI-Square test is below 0.05 then it is probable at a 95% level of certainty that the relationship between two variables is not due to coincidence. It can therefore be said that the relationship is statistically significant (Wright 1997:38). Notwithstanding, the strength of the relationship cannot be ascertained with this statistical test. An association coefficient is able to supply not only the strength of the relationship but also the direction[10]. An association coefficient of 0 denotes no correlation between the two variables. A perfect association is denoted by either a 1 or -1, which in form of a graph would show as the perfect regression line. Therefore the closer the association coefficient is to +/- 1 the stronger the relationship between the two variables. A positive relationship, so a number between 0 and 1, would mean that the increase in one variable results in an increase in the other variable. A negative association coefficient, a number between 0 and -1, denotes that the increase in one variable results in a decrease in the other variable. Cross-tabulations which measure the statistical significance and strength of the relationship between two variables are the most common forms of statistical analysis in the social sciences.

It has to be stressed here that statistical analysis can only establish relationships not causality (Reynolds and Buttolph Johnson 2008:326). A mathematical analysis of the relationship between two variables simply ascertains that an increase or decrease in one variable occurs to the same time as a decrease or increase in the other variable. It is still possible that the decrease or increase in both variables is de facto caused by a third, unobserved variable:

A affects B

[10] Depending on the nature of the variable the appropriate correlation coefficient is Phi/Cramers V (nominal variables), Gamma (ordinal or both dichotomous variables), Spearman Rho (nominal/interval),

B affects A

OR

C affects both A and B

Whilst it is possible to use statistical tests to ascertain how much of one variable can be explained by the other (an Adjusted R^2 test), these tests cannot determine which is the variable influencing all others. To make a decision what to test for, which variable to correlate with another, data from interviews, content analysis and focus groups can help.

3.3. Interviews

The advantage of the statistical analysis of abstract judicial review in Germany, Austria and Italy is that the difficulties of sampling do not apply. The relative scarcity of cases (between 160 in Germany and 1140 in Italy) allows for a statistical analysis of all cases equally without having to resort to taking a sample (Silverman 2003). The same does not apply to interviews. Not all judges on the bench between 1980 and 2009 are willing to be or can be interviewed. Forty interviews have been conducted. 25 of these interviewees were either current or former constitutional court judges. The remaining 15 were interviews with politicians, civil servants or media representatives working closely with the court. The nature of elite interviews is such that it is difficult to draw a representative sample for interviews but rather snowball sampling is necessary (Smith 1998). This means that only approximately one third of the interviews were previously arranged whilst the other interviews were arranged through recommendations from judges already interviewed. However, with approximately two thirds of the courts or senates dealing with abstract review having been interviewed and combining the interview data with statistical and content analysis the validity and representativeness of the data should be assured.

Due to the need to preserve the privacy of the interviewees and make frank statements possible the interviews were taken under the promise of confidentiality and anonymity (Mason 2002; Rubin and Rubin 1995). Therefore within this thesis the reporting of interview data will be coded as to the identity of the interviewee. Each interviewee has been assigned a letter and a number, the letter identifying the country from which he or she stems[11]. The number was assigned randomly with aid of the computer to the different interviewees. Furthermore, the very small number of women among the interviewees necessitates the reporting of interview

[11] A list of the interviews together with the coding scheme will be provided in examination

data as gender neutral. Appendix 5 contains a list of the questions prepared for the semi-structured interviews undertaken (de Vauss 2002). Therefore within this thesis interviews pertaining to the German constitutional court will be identified with the letter **G** preceding a randomly assigned number. The Italian interviewees will be identified through the letter **I** followed by a number and the Austrian interviewees are identified by an **A** throughout the study. In the interest of preserving anonymity and confidentiality the interviewees were not made aware by the researcher of the identity of any other interviewees. Whilst these measures might seem excessive the preference evidenced by the majority of interviewees for this format lends support to the research design.

3.4 Content Analysis - Qualitative and Quantitative

The analysis of the case materials on the other hand combined quantitative and qualitative aspects within the same method. This is only possible because of the relatively small number of cases under consideration. Even in Italy, which has the largest number of abstract review cases in these thirty years, it is still possible to analyse the 1140 cases qualitatively as well as quantitatively. Quantitatively it is therefore possible to code for the occurrence of certain terms, such as EU or European values in the analysis of the European connection in Chapter IX. The coding scheme in Table 6 relating to the quantitative analysis details many of the coded variables taken from the quantitative content analysis.

However, the analysis in Chapter V is clearly qualitative in nature. Here the case materials are analysed according to the style of the decisions, the symbols contained in the language and the level of interpretation. Qualitative content analysis of the written record rarely needs to be defended in the social sciences but we tend to take its advantages and disadvantages too easily as proven (Johnson 2008:290). Regarding this study the main advantage is that content analysis is the only method with which a comprehensive picture of the entirety of the cases can be drawn. Interviews with each person involved in all the cases would be cost and time prohibitive. Moreover, the rare data is nonreactive, removing the danger of intentional or unintentional bias by subjects. Content analysis of the case materials also allows for longitudinal analysis - interviews with those involved in cases 30 years ago is not always possible and due to the record keeping requirements of the courts the main disadvantage of content analysis, selective bias of accessible records, is no danger. Nether is the problem of incompleteness, present in much of content analysis studies. Therefore, content analysis as a

method has all the advantages in a study of this kind whilst avoiding the common disadvantages.

3.5. Issues with Mixed Methods

Mixed methods research has been criticised widely by both positivists and post-structuralists. It has been argued that the research paradigms underlying qualitative and quantitative methods are so different (Sale et al. 2002). Quantitative research assumes an ontology which excludes research in beliefs, values and intentions equal meaning as possible causes for actions as they are hard to quantify. Qualitative research strategies on the other hand are aimed especially at beliefs, values and intentions as the argument goes that quantification of social phenomena has no intrinsic value and are deceptive (Bryman 2008:592). Mixed methods approaches have claimed to be able to overcome the disadvantages of both sides. Qualitative methods are criticised for being too anecdotal. Interviews, focus groups and even qualitative content analysis emphasise small snippets of time, stories told, information that wants to be shared and therefore is criticised for giving these too much importance. By underlying the qualitative analysis with quantification the anecdotalist tendency of qualitative research can be kept in check. Quantitative analysis is often accused of oversimplification of social phenomena and the inability to account for human nature. Inclusion of qualitative research strategies ensures that social phenomena which are not quantifiable can be accounted for. Moreover, it allows for a certain control of missing variables. Quantitative analysis can only analyse those variables coded previously - it cannot discover new possible variables.

This point is very well illustrated by this thesis as each chapter makes use of a combination of both quantitative and qualitative methods. In chapter III the question is asked if the increase in review levels is caused by a change in how far precedent is adhered to, the levels of interpretation in the case materials or the intent of the law makers. The answer to this question is given through statistical analysis and quantitative and qualitative content analysis. Chapter IV asks if a change in the composition of the court in relation to the political attitudes of the judges on the court causes the increased levels of review in abstract norm control. Interview data combined with quantitative analysis of the composition of the court is used to illustrate this point. In Chapter V the influence of political institutions on the decision rendered is discussed through statistical considerations whilst Chapter VI considers the influence of public

opinion through content analysis. Chapter VII then uses all four methods in ascertaining the evidence for the influence Europe has on the decision.

CHAPTER IV
FIRST EXPLORATIONS OF THE DATA

This Chapter presents a first exploration of the datasets. In this it will show that neither the greater number of abstract judicial review cases, nor the higher percentage of unconstitutionality rulings can be explained with a change in the types of cases reaching the courts. With other words it is not readily visible that an increase in, for example, rights legislation accounts for the increased unconstitutionality rulings or even the increased number of abstract review cases. The only kind of cases on the increase are those concerned with the environment. However, other statistics prove very interesting. The number of academics, the style of decisions and the mention of supranational sources of law, EC law and “European” concepts is on the increase in Germany and Italy. This further suggests, following the indications drawn from the literature in the last chapter, that a possible explanation for the increased number of unconstitutionality rulings might be found in these factors rather than in a specific category of cases.

What are case categories? The formalistic separation of the cases into categories by the courts themselves has been outlined in detail in the methods section in the last chapter. However, some particular points deserve additional notice here. As we have seen the courts themselves do not attach any particular legal area to a case, save that of abstract review. As a result the separation in cases here is purely artificially based on the main legal question asked in the case. A case questioning the constitutionality of a budget provision, one of the most common form of cases, falls into the Finance category. It does not matter if this budget provision related to the funding of childcare support, which would make it a case in the Social and Political rights category. The law was questioned on its budgetary provisions and therefore is treated here as part of the Finance category. Decisions challenging provisions of election law, on the other hand, are clearly within the realm of political rights, however a case challenging the constitutionality of public finance of party again is classed among the Finance cases. Environment cases reach from the constitutionality of building a street to the constitutionality

of transport of nuclear waste over German soil. However, a case on the constitutionality of protest regarding nuclear waste would be found in the political and social rights category. A challenge to the public funding of a certain environmental project, on the other hand, is a financial case again. As a result it becomes clear why Finance and Social/Political Rights cases dominate the statistics, closely followed by environment cases (see below). The education category is a slight anomaly as it only is of real importance in Austria and Germany where the organisation of universities has been questioned often recently. However, it also contains cases relating to the mandatory teaching of religion in schools. One could have argued these to be cases under the Political/Social Rights category. The challenge in the case, however, rests on legal provision related to education and therefore was classed as an education category case.

4.1. Distribution of cases in kind 1980-2009

A first exploration of cases allows for an overview of the kind of cases reaching the constitutional courts in the three countries. The most common source of cases are those originating in the area of environment, finances and rights. In all three countries these areas account for the highest number of cases. The next largest number of cases are those concerned with issues of democracy, those cases which in some form challenge any part of democratic elections. Education, issues concerning the media and security concerns are also areas common to all three countries (Figure 1,2,3). Cases originating in concerns relating to infrastructural (traffic) concerns and administrative matters are limited to Austria and Italy but missing in Germany (Figure 1,3). Only the Italian Constitutional Court had to review cases in the area of Criminal Law over the last three decades (Figure 3).

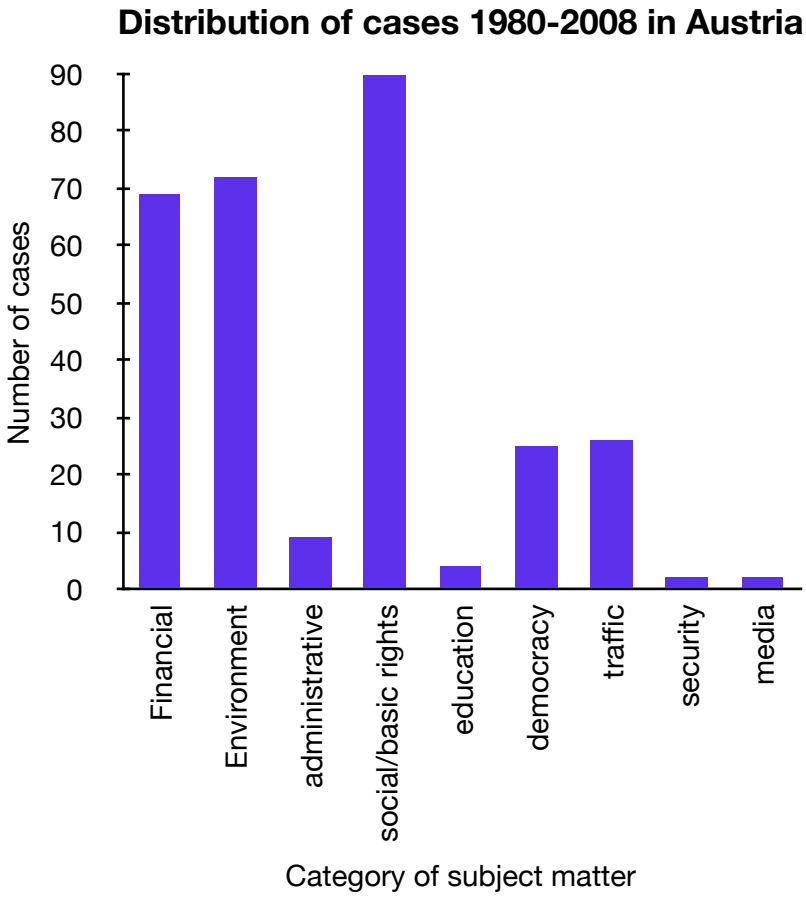


Figure 1: Distribution of cases sorted into subject matter 1980-2008 in Austria

Distribution of cases between 1.1. 1979-31.12.2009 in Germany

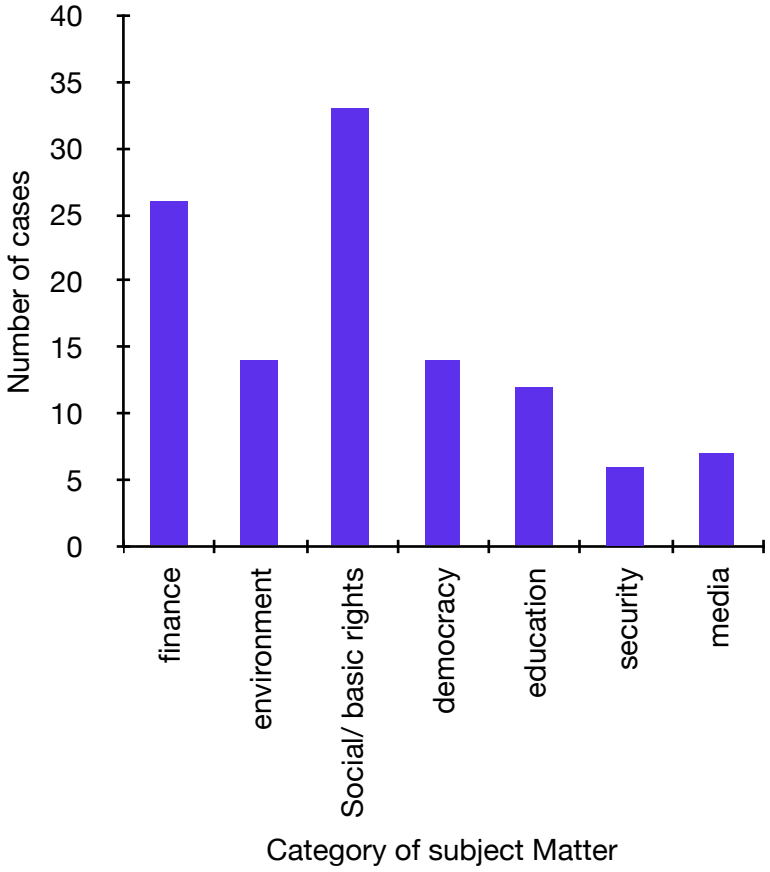


Figure 2: Distribution of cases sorted into subject matter 1980-2008 in Germany

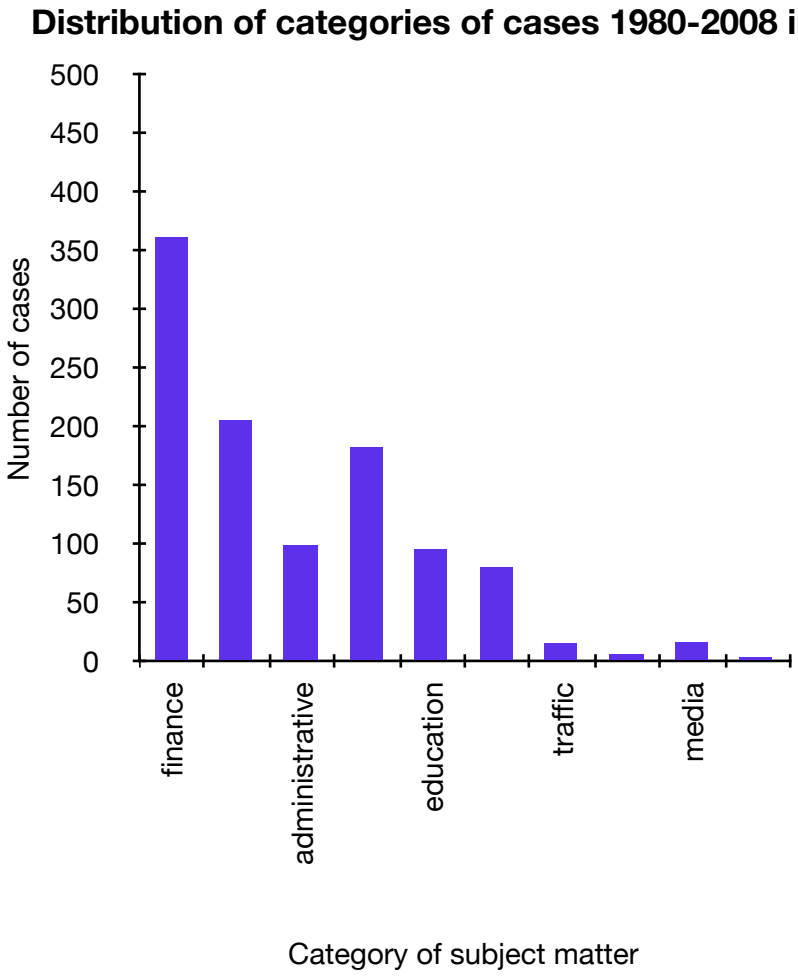


Figure 3: Distribution of cases sorted into subject matter 1980-2008 in Italy

This is not unexpected. In Interviews conducted with judges some argued that the increased levels of unconstitutionality rulings are linked to the rise in the importance of financial and environmental cases (G1; A1). The judges are especially conscious of the impact of financial cases relating to tax or budgetary concerns. When a law is passed it remains in power till the moment it is reviewed by the court. Regarding financial issues this signifies that the proceeds of the laws, the monetary gain acquired in the time period between the inception of the law and the court ruling, remains in the hands of the state (G1; A1). Both judges argue that they see an increase in instances when these kinds of cases are brought to them (G1; A1). This would present an explanation for the increase in unconstitutionality rulings. The argument has another aspect. The judges describe the circumstances of a financial law as follows: because a law remains in effect till the moment the court rules it unconstitutional, the financial proceeds of this law up to that moment, the moment of unconstitutionality, remain in the hands of the state.

Therefore a win/win situation develops for the law-maker. If the court rules the law constitutional then future financial proceeds are safe as well as those acquired since the inception of the law. Whereas if the court rules the law unconstitutional, in part or whole, then the law-maker still remains with a financial gain from the period between inception and ruling. Moreover, as most financial cases garner little public attention the law-making body does suffer a loss of perceived legitimacy by the general public. The constitutional courts, on the other hand, express concern regarding this development (G1; I3,4). In their perspective there is no legitimate reason for this development and they are loath to be used as financial law makers. Resulting from this sentiment is the reaction by judges to make clear, through an increased number of unconstitutionality rulings, that the courts will not treat these cases lenient now or in future. This could explain the increased numbers of unconstitutionality rulings in Germany and Italy, especially in consideration of the decrease of the more conciliatory form of rulings, the partial unconstitutionality.

A similar argument can be made regarding the environment. Many instances present the legislator with a further win/win situation in front of the courts. Most environmental laws also contain a financial aspect and in relation to purely monetary gain the same situation applies. Furthermore, the environment has developed over the last two decades into a topic which garners public approval (I1,3). A politician stands in good regard when he or she argues for or includes in a legislative proposal aspects of environmental protection. This has led to aspects of laws not being integrated well within the wider legislative proposal and to parts of laws which are not as well written or researched as they should be. This “shoddiness”, as one judge called it (I3), leads to courts feeling, on the one hand that there is a need to clarify laws through clear decisions but also, on the other hand, to send a further signal that more care has to be taken in the formulation of legislative proposals. This signal is the increase of clear unconstitutionality rulings. The environment and financial cases, as seen in Figure 1,2, and 3 some of the largest groups of cases reaching the court and therefore an increase in percentages of laws being ruled unconstitutional in these might explain the changed pattern of decision-making by the courts. This would mean that if the impression of the judges proves to be correct then we should see an increase of cases of both environment and finances over time therefore accounting for the increase in unconstitutionality rulings overall.

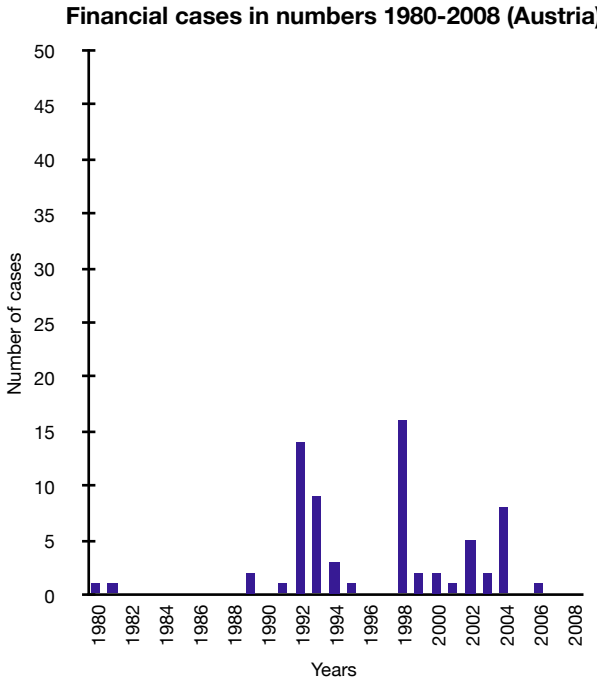
4.2. Distribution of cases across time - Has a fundamental change in any of the categories caused the overall change in the decision making pattern?

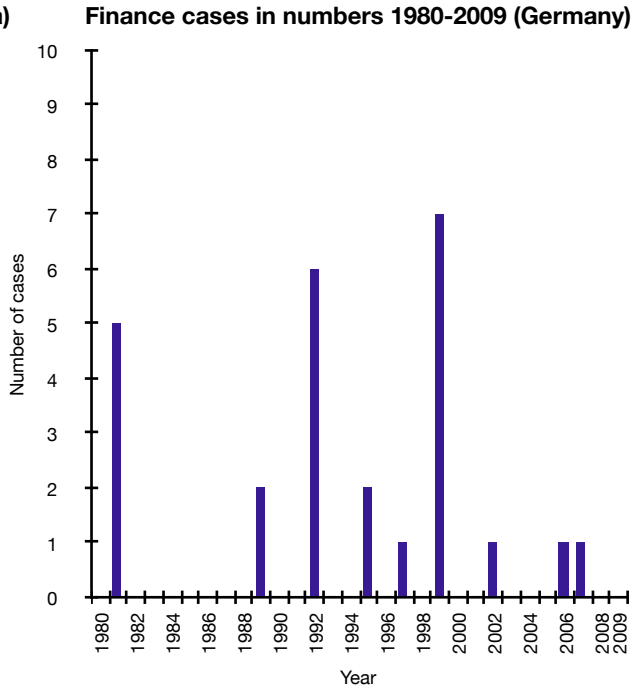
Comparing the distribution of different categories of cases over time there is an increase in absolute numbers apparent. However, when considering these cases as a percentage of the whole no clear pattern can be identified. The cases in the categories of Finance, Environment, Social Political Rights, Education and others show that only in the category of Environment there is an increase in cases and rulings. This is an expected result as cases under the Environment category are very recent occurrences. The increase in abstract review cases is evenly distributed among the different categories of cases. Moreover, the changed pattern of decision-making cannot be linked to certain categories of cases exclusively.

4.2.1 Is the change in overall pattern based on a fundamental change of the ruling pattern in the Finance category?

The Finance category is dominated by cases relating to new budgets and financing of public projects. Publicly, they generally receive little attention, apart from some exceptions such as the attempt by the city Berlin to declare the high level of its contributions to the national budget as unconstitutional. The lack of public notice taken of these cases, however, is not an indication of the importance of the cases. Challenging a statute on its financial applications or implications can be a last effort of the opposition parties to change policy (Schaal 2004: 95). An increase in finance cases therefore might indicate a more confrontational political atmosphere between the parties. This is definitely the position judges themselves express in interviews. They deplore that they are forced into choosing between alternative politically controversial views, especially in the finance category(I1,3,4; G1,5; A2,3,7). As seen above, at the same time as criticising the opposition parties for challenging laws on financial grounds as a ploy in party politics they criticise the government parties as being intentionally less painstaking in testing the constitutionality of financial laws before passing them (G1,3;A1,2,3). Figure 4 and 5 show that there are some problems with this assumption. Whilst there is an increase in total numbers of finance cases (Figure 4) the percentage these cases present of the total of cases is not on the increase (Figure 5).

Distribution of Rulings in Finance Category in Absolute Numbers





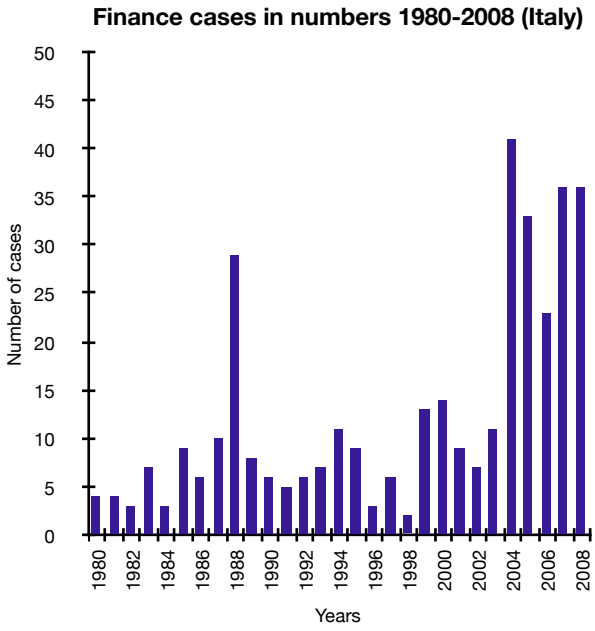
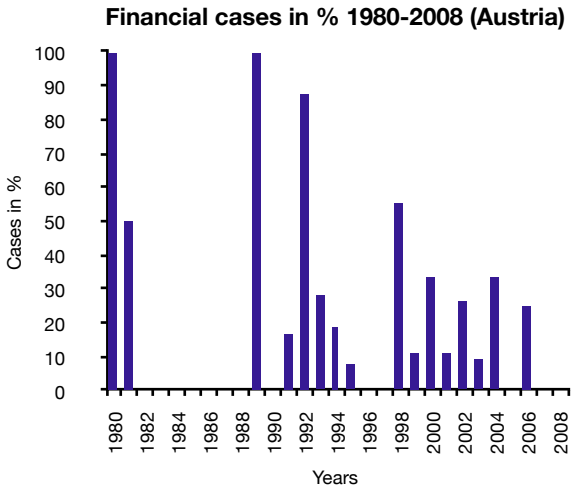
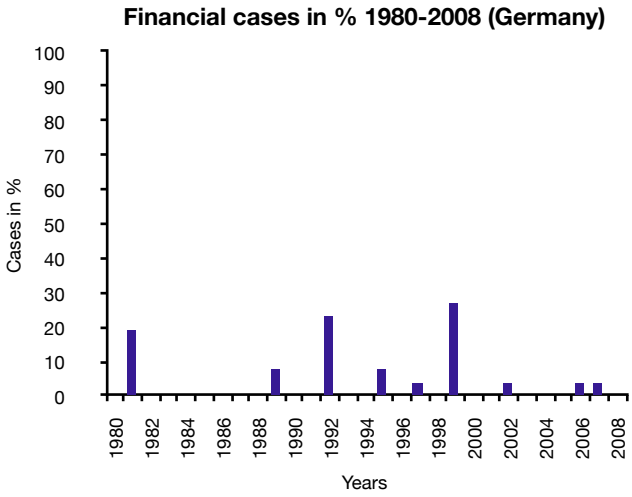


Figure 4: Development of rulings in absolute numbers in Finance category

Cases in Finance Category expressed as Percentage of Total Cases





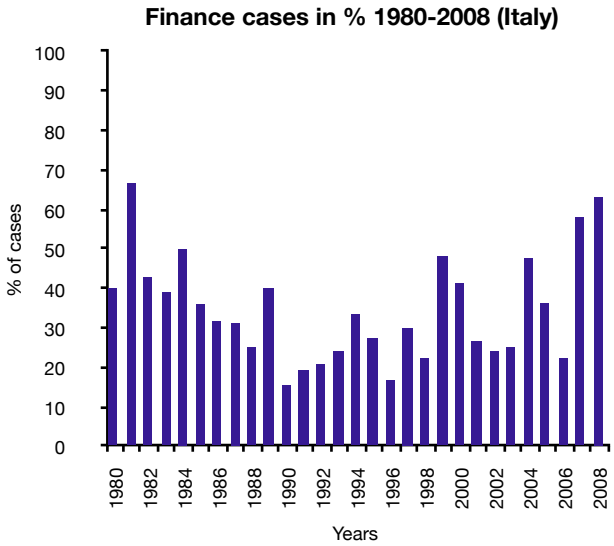


Figure 5: Development of number of cases in Financial category in Percentage of total number of cases.

It is therefore possible to conclude that there is no noticeable increase in the willingness to challenge finance laws in respect to any other category. Opposition parties are not more likely to challenge laws on their constitutionality under finance issues today than they were thirty years ago. Moreover, financial laws do not seem to lack quality any more, or less, than laws in other categories. The interesting question however is if the changed decision-making pattern can be explained with an increase in unconstitutionality rulings found in the finance category. Figures 6,7,8 and 9 display the development of kinds of decision in Italy, Germany, and Austria respectively.

Distribution of Rulings in Italy as Percentage of Cases (all categories) in Finance Category

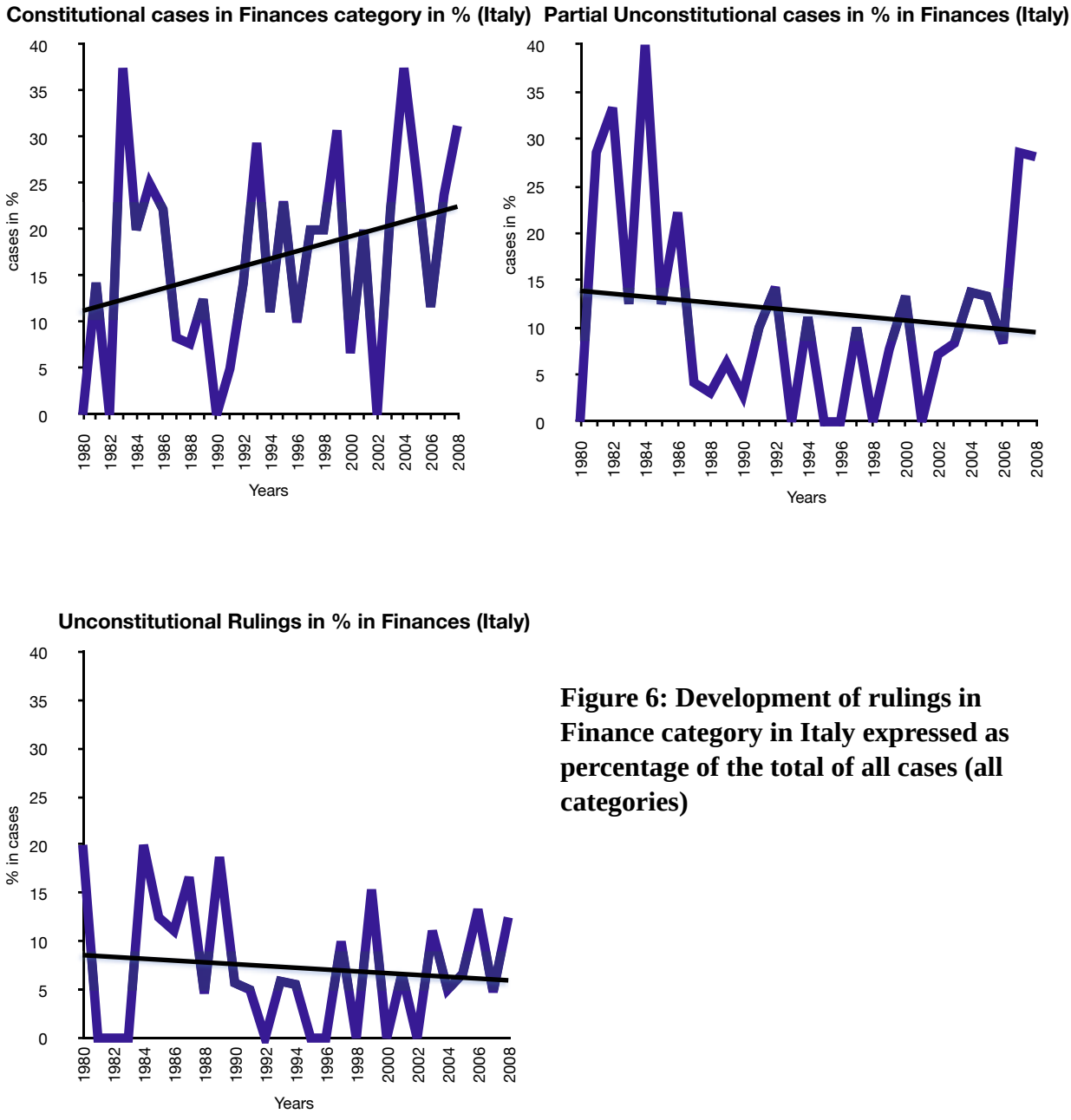


Figure 6: Development of rulings in Finance category in Italy expressed as percentage of the total of all cases (all categories)

Distribution of Rulings in Germany as Percentage of Cases (all categories) in Finance Category

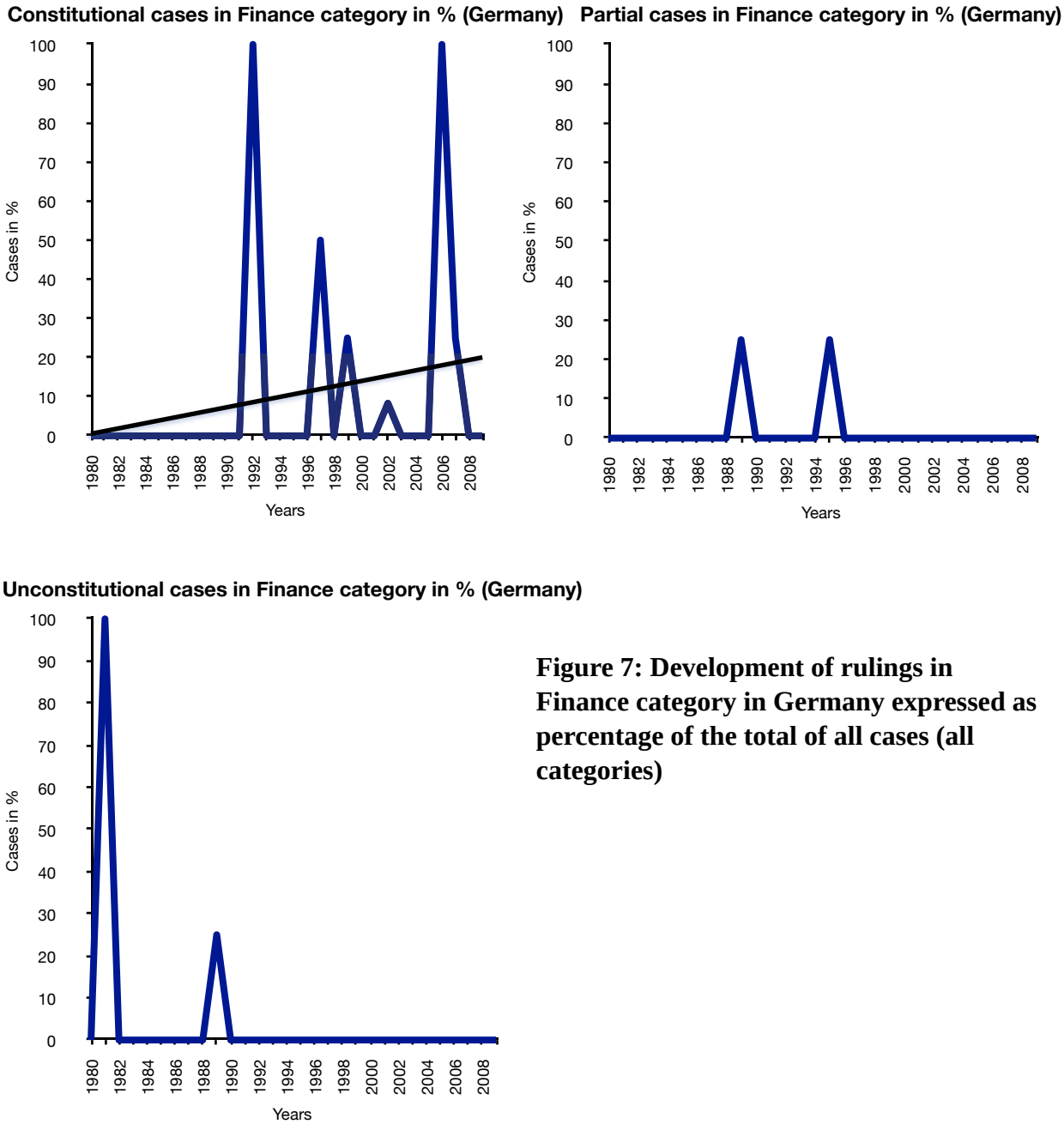


Figure 7: Development of rulings in Finance category in Germany expressed as percentage of the total of all cases (all categories)

Distribution of Rulings in Austria as Percentage of Cases (all categories) in Finance Category

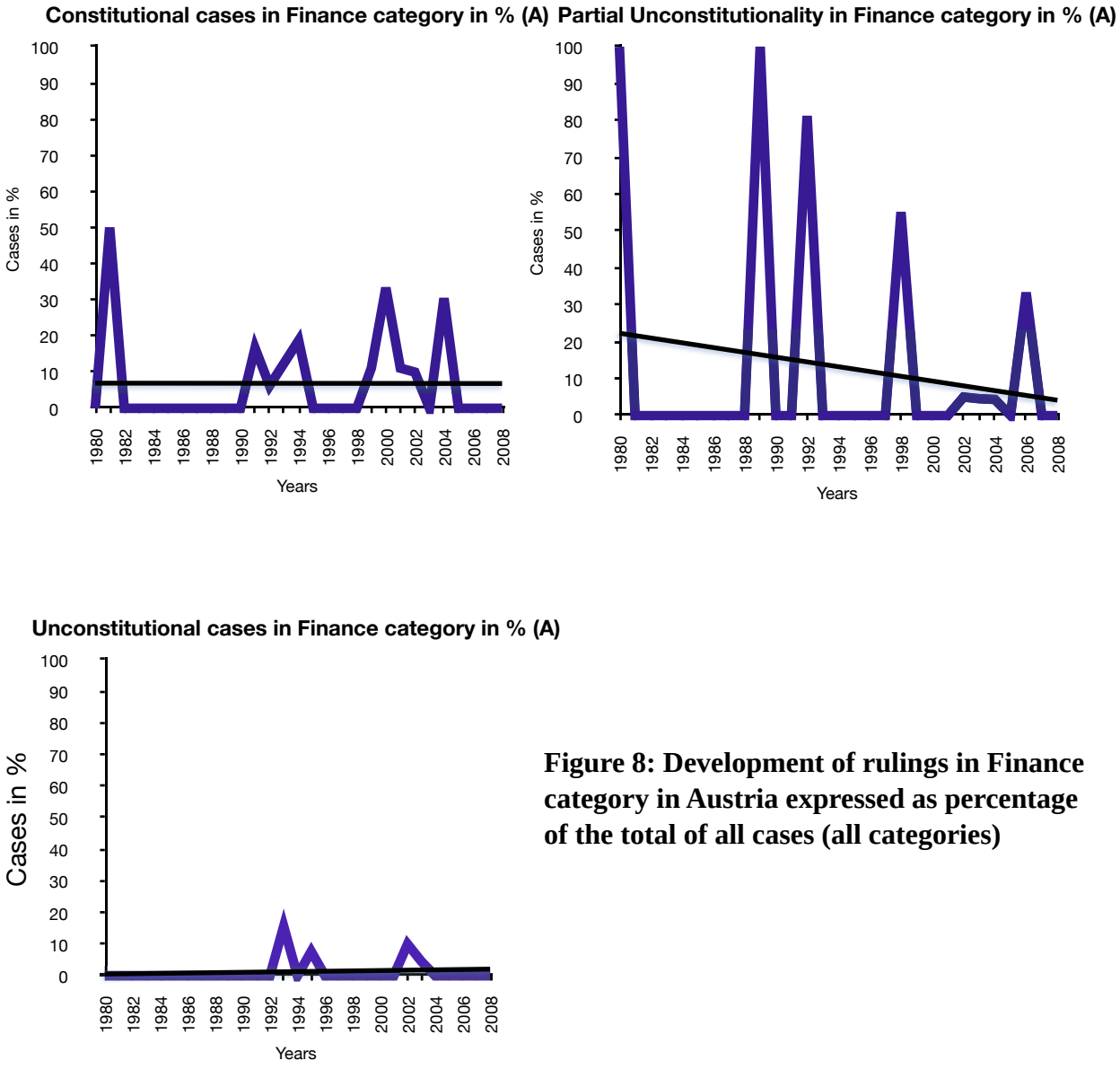


Figure 8: Development of rulings in Finance category in Austria expressed as percentage of the total of all cases (all categories)

Distribution of Review (Partial and Unconstitutional rulings) in Finance category

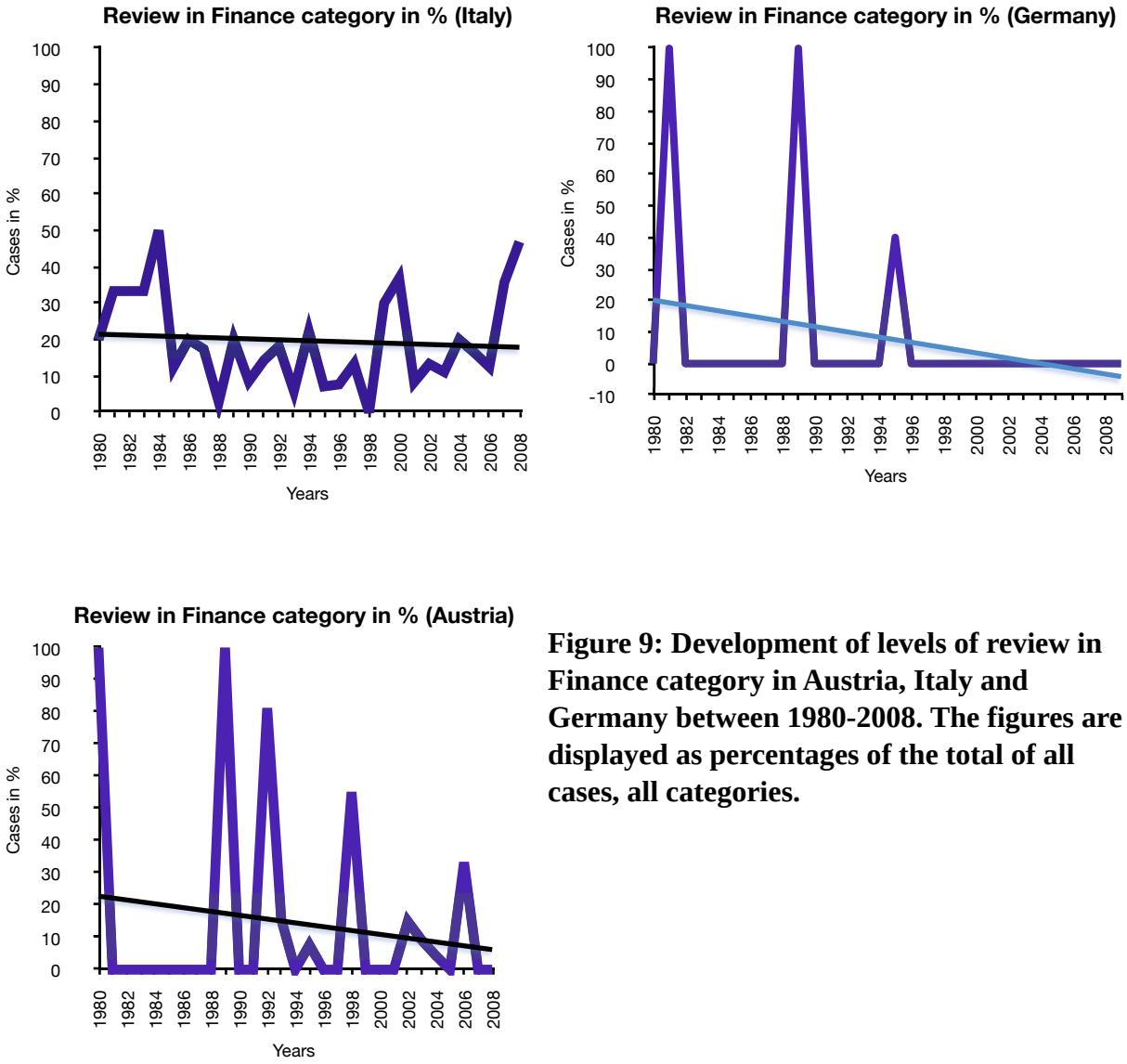


Figure 9: Development of levels of review in Finance category in Austria, Italy and Germany between 1980-2008. The figures are displayed as percentages of the total of all cases, all categories.

From this it is possible to conclude that the development of rulings is even converse to the overall development of rulings. Overall partial rulings are on the increase and unconstitutional rulings on the decrease in Austria, which leads to more laws seeing review. In the Finance category the level of unconstitutionality rulings remains the same, whilst the number of partial unconstitutionality decisions decreases. Review overall in the Finance category therefore is on the fall in Austria. In Germany and Italy the same development can be observed. We would expect in Germany the percentage of unconstitutionality rulings to increase, the percentage of partial unconstitutional rulings to decrease and the constitutional rulings to remain even or decrease as well. Figure 7 clearly displays an opposite development with an increase in

constitutionality rulings and a decrease of unconstitutionality rulings. Italy's increase in constitutionality rulings in the Finance category is also unexpected. Overall there is a decrease of constitutionality rulings, and consequently an increase in review of cases. Figure 6 show that the trend observed in the Finance category is opposite to this expected result. The conclusion therefore has to be that the development in the Finance category, one of the largest categories of cases, cannot explain the overall pattern change in abstract judicial review. Even more importantly, the observed pattern in the Finance category is converse to the overall pattern.

The above analysis is based on a distribution based on percentage of the total cases. This is in order to examine the explanatory strength of the Finance category over the overall pattern change. No higher percentage of cases reviewed find their origin in the Finance category, as had been suggested in interviews. This is the necessary analysis to explain if the change in overall pattern is due to a change in a single category, for example Finance. However, it does not present an image of the development within the Finance category, independent of other categories. This is displayed by Figure 10,11, and 12 below. We see from these figures that even when presented as percentage of the total Finance cases the overall pattern does not repeat itself in this category. The original argument that the rise in party political strife reaching the courts finds their strongest expression in the Finance category cannot be supported by the statistical data found here. Purely on the basis of the quantitative data no such development can be observed. However, certain parts of the literature argued that courts are more likely to rule in favour of the ruling elite (see section 2.3.3). An increase in constitutionality rulings in the Finance category, a clear ruling against the non-government actors challenging a governmental law might give more credence to this view. If seen from this perspective, the pattern in the Finance category does not only lack explanatory powers to illuminate the causes of the increased levels of review in Germany and Italy but furthermore undermines the second part of the hypothesis - that politicians are more likely to fight the political war in front of the courts now than they were 30 years ago. There is no evidence that their chances of success have improved in this category and therefore there is no incentive for them to involve the courts. It remains to be seen if the other large areas of cases are able to serve as an explanation for the changed decision making pattern.

Distribution of Rulings in Austria (Finance category)

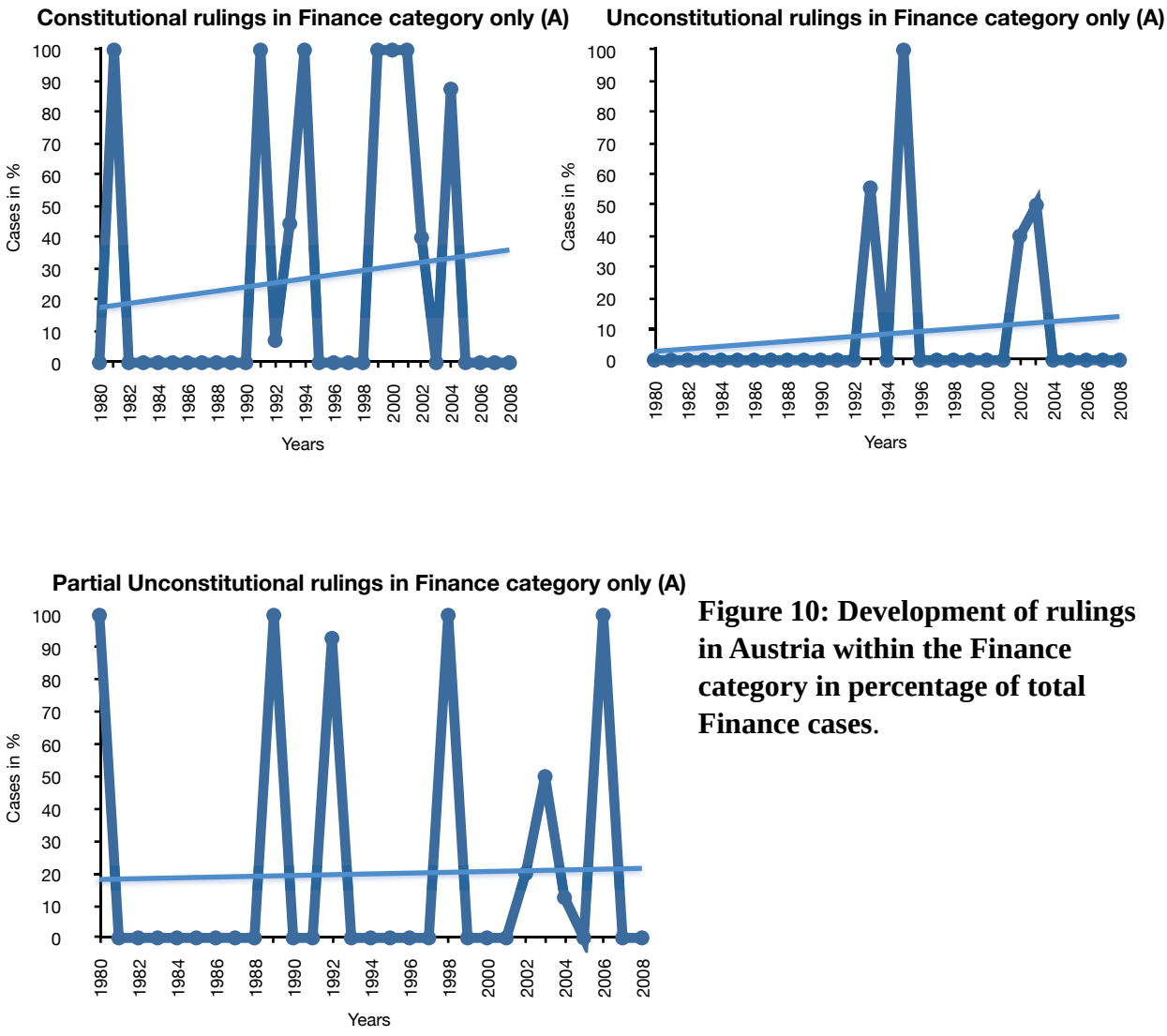


Figure 10: Development of rulings in Austria within the Finance category in percentage of total Finance cases.

Distribution of Rulings in Germany (Finance category)

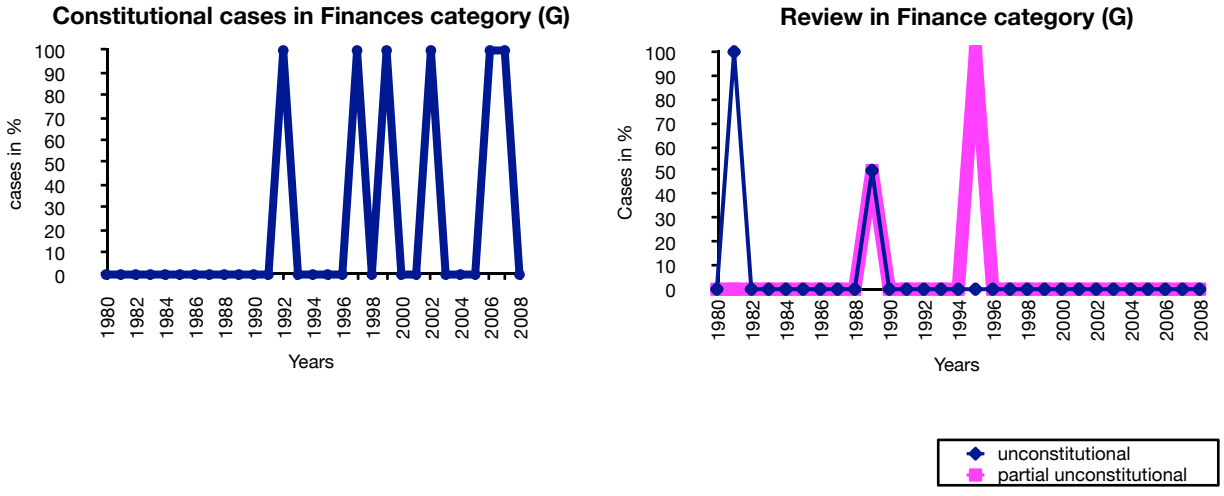


Figure 11: Development of rulings in Germany within the Finance category in percentage of total Finance cases

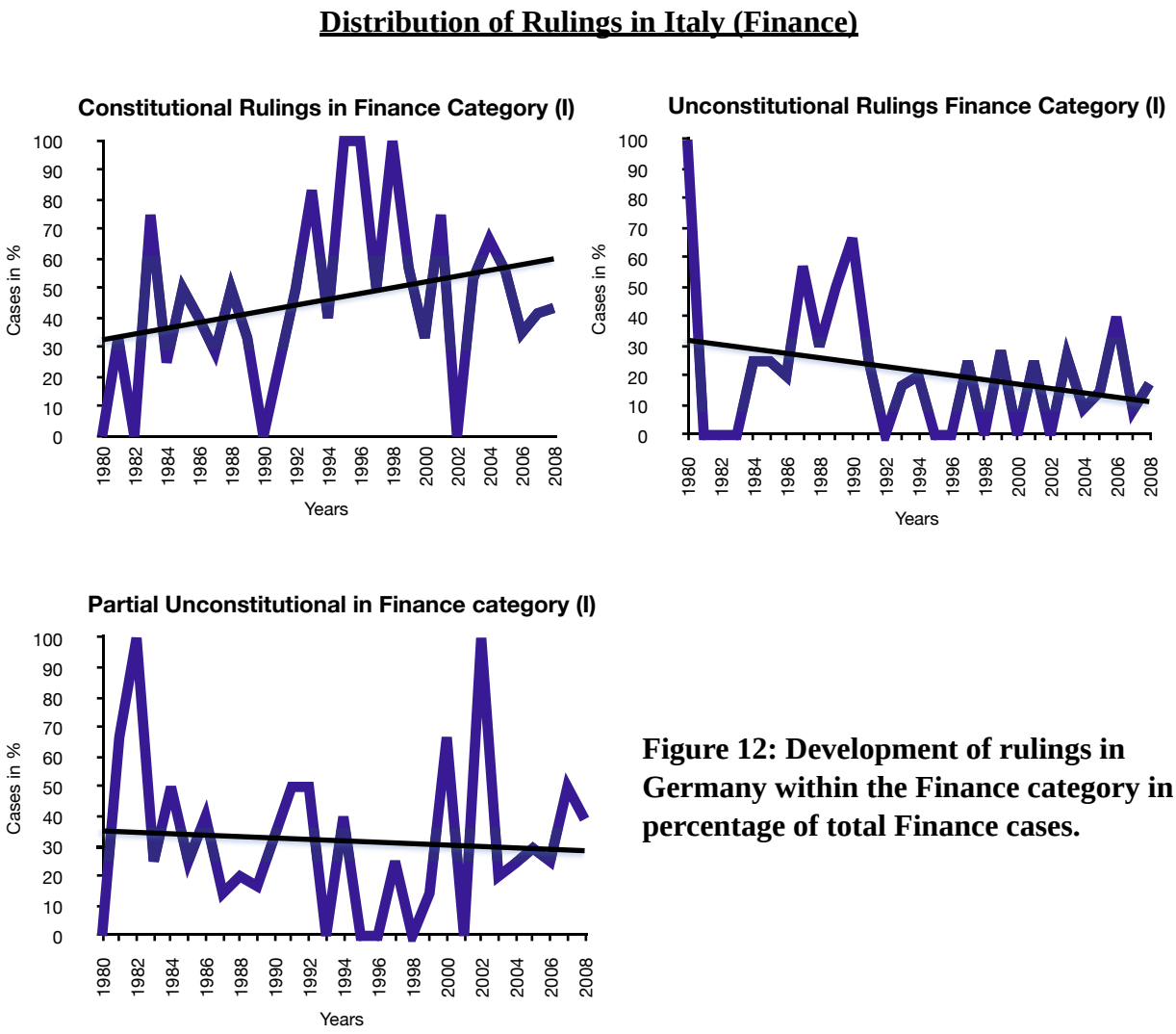


Figure 12: Development of rulings in Germany within the Finance category in percentage of total Finance cases.

4.2.2 Is the change in overall pattern based on a fundamental change of the ruling pattern in the Political and Social Rights category?

The distribution in absolute numbers in the Social and Political Rights category mirrors that of the Finance category. The absolute number of cases are on the increase (Figure 13) in all three countries but the percentage these cases from of the total number of cases is near to unchanging in Germany and Italy. Only Austria sees a perceptible increase in the percentage of cases which are classed as cases under the Social and Political Rights category (Figure 14). This might prove to be an interesting development as Austria also is the odd one out in the

overall pattern change as its increase in review is based on an increase in partial unconstitutionality, the less controversial, rulings.

Distribution of Cases in Social and Political Rights Category in Numbers

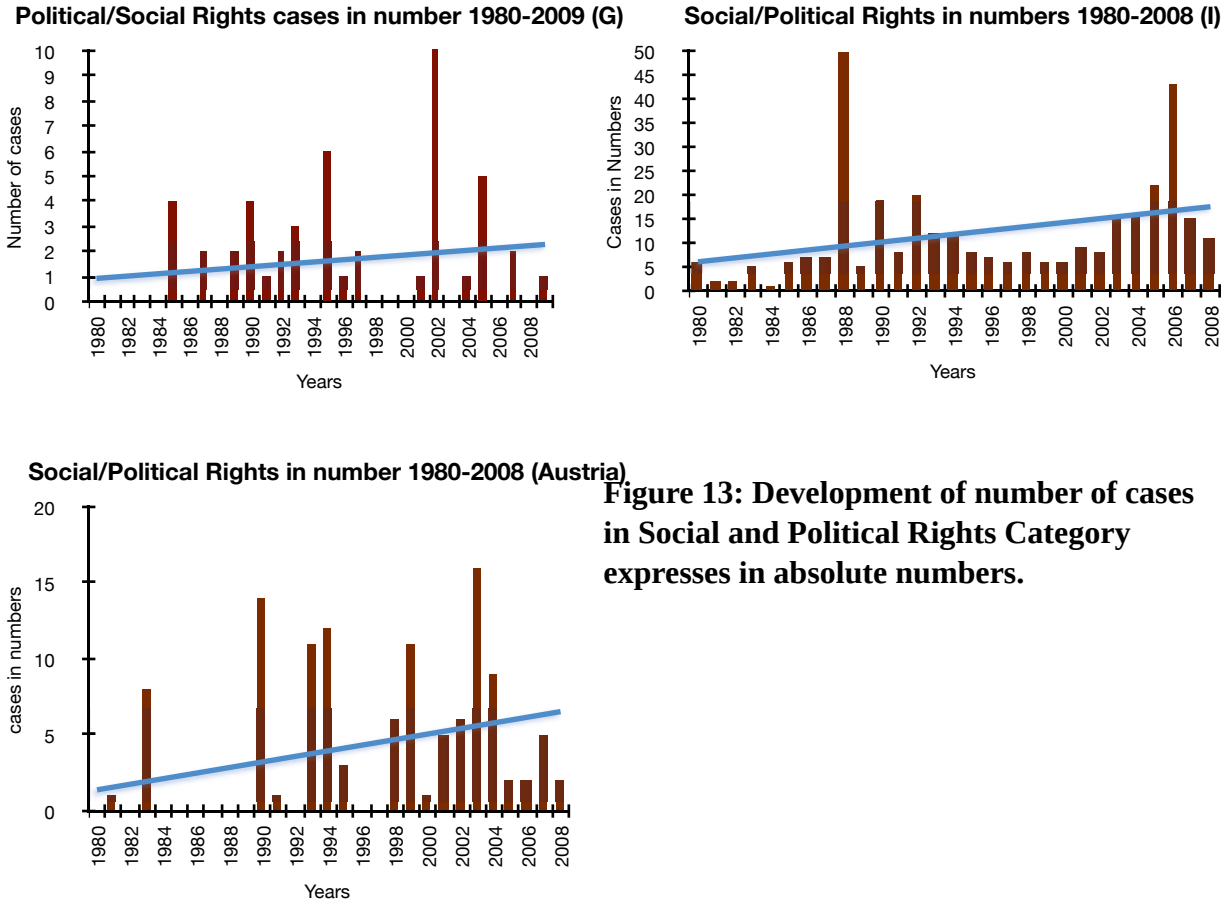


Figure 13: Development of number of cases in Social and Political Rights Category expresses in absolute numbers.

Distribution of Cases in Social and Political Rights Category (% of Total Cases)

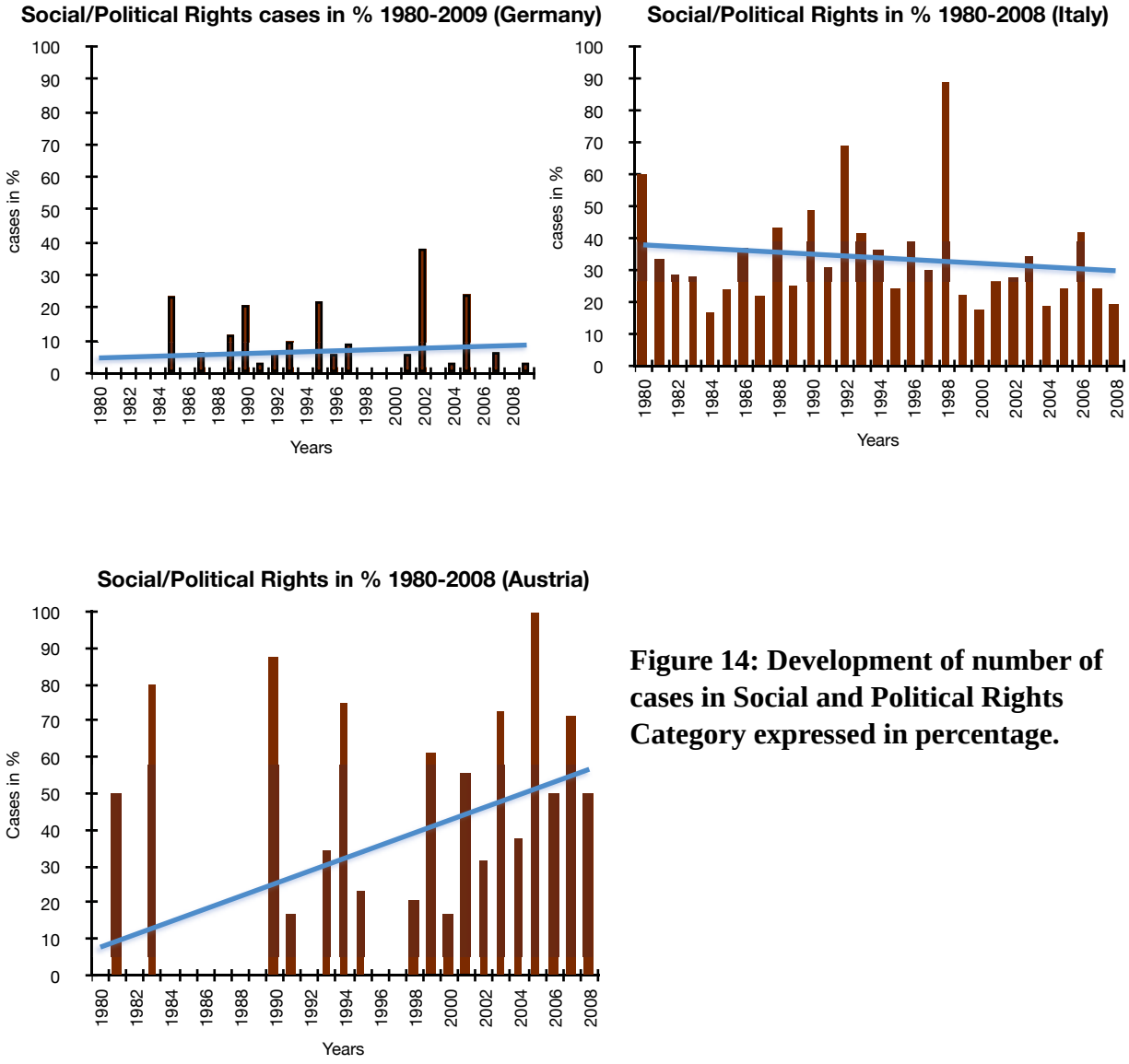
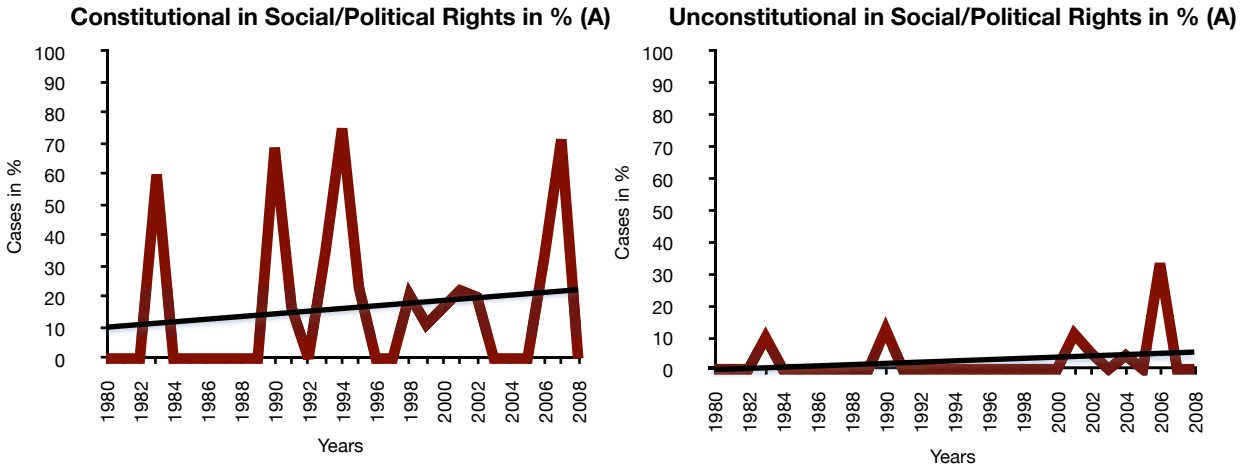


Figure 14: Development of number of cases in Social and Political Rights Category expressed in percentage.

In Austria the Social and Political Rights category displays a similar overall decision making pattern as was seen in the total of cases (Figure 15). There is a definite increase in partial unconstitutionality rulings. However, there is also an increase in constitutional rulings as well as unconstitutional rulings, even if the rise is not as strong. This is a result of the general increase of Political and Social Rights cases overall. (Figure 16) expresses the development within the Social Political Rights category itself, not the development in respect to the total of cases (Figure 15). The development within the isolated group is a mirror image in respect to partial and constitutionality rulings of the overall development observed in Chapter 1 Figure 7. However, the expected decrease in unconstitutionality rulings is missing.

Distribution of Rulings in Austria as Percentage of Cases (all categories) in Social and Political Rights Category



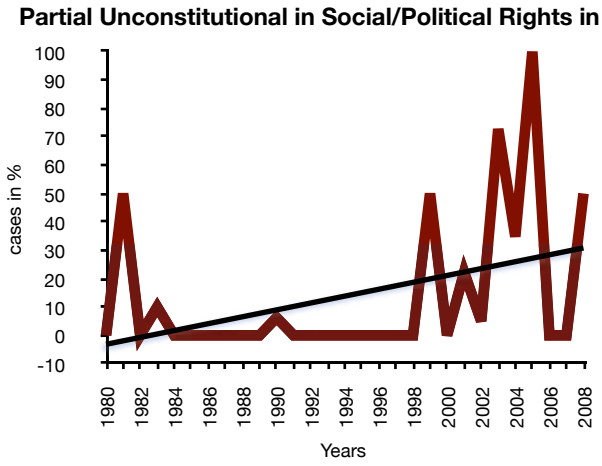
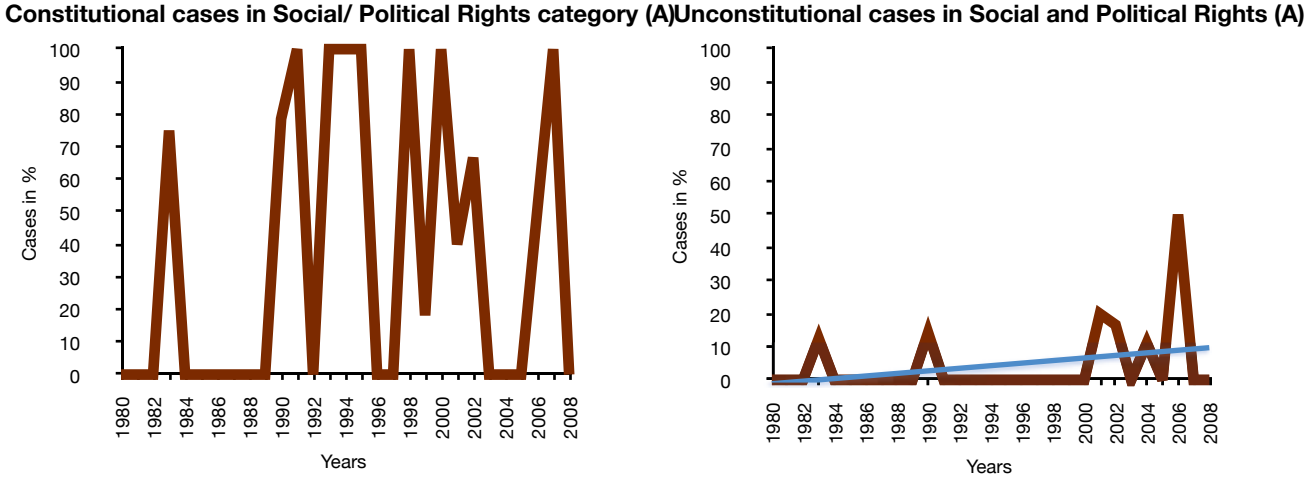


Figure 15: Development of rulings in Social and Political Rights category in Austria. They are expressed as percentage of all cases (all categories)

Distribution of rulings in the Social and Political Rights Category in Austria



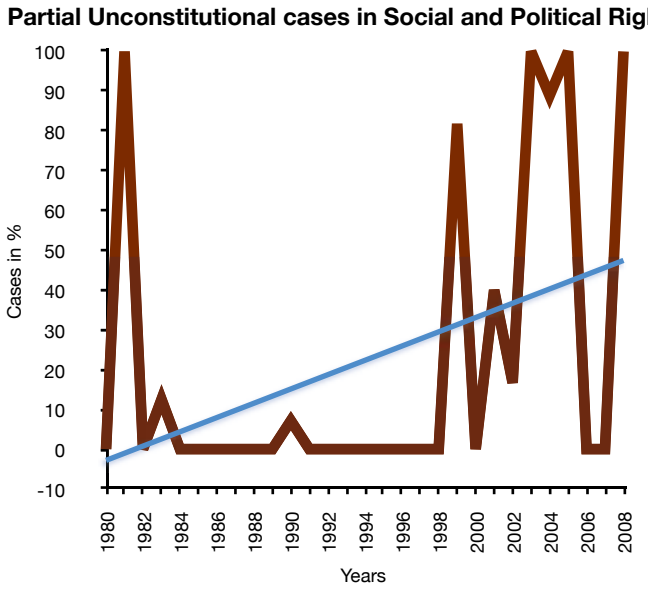


Figure 16: Development of rulings in the Social and Political Rights category in Austria in %

Two questions need to be answered: 1. Is the change in the Social and Political Rights category enough to explain the change of the overall pattern? and 2. Why does the Social and Political Rights category in Austria mirror the overall development in Austria, but not in Germany and Italy, as can be seen below. The answer to the first question is displayed in Figure 17 below. The change in review levels in Austria overall can be almost entirely with the change in levels of review in the Social and Political Rights category. The percentage of laws seeing any form of review in the Social and Political Rights category lies at 37.3% for the period 2000-2010, which is only 4.7% below the overall of 42% (Chapter 1 Table 3). For the 1990s, however, the explanatory power of this category is limited as here the review levels lies at below 10%, in comparison to the 50% in the overall distribution. Even combining it with the Finance cases, in which the 1990s see a higher level of review, the number still falls short by over 20%. In the 2000s adding the two categories together leaves us merely 2% short. So the answer to the question if the change in the Social and Political Rights category can explain the overall pattern has to be no. Adding the two major categories of cases together seems to explain partially the 1990s and almost entirely the 2000s in Austria. Nevertheless the source of the pattern change falls short in explaining the development in Germany and Italy. As the levels of review in both countries are almost unchanging in the social and political rights category over the last 30 years (Figure 17).

Comparison of levels of review expressed inPercentage of Cases (all categories) in Social and Political Rights Category

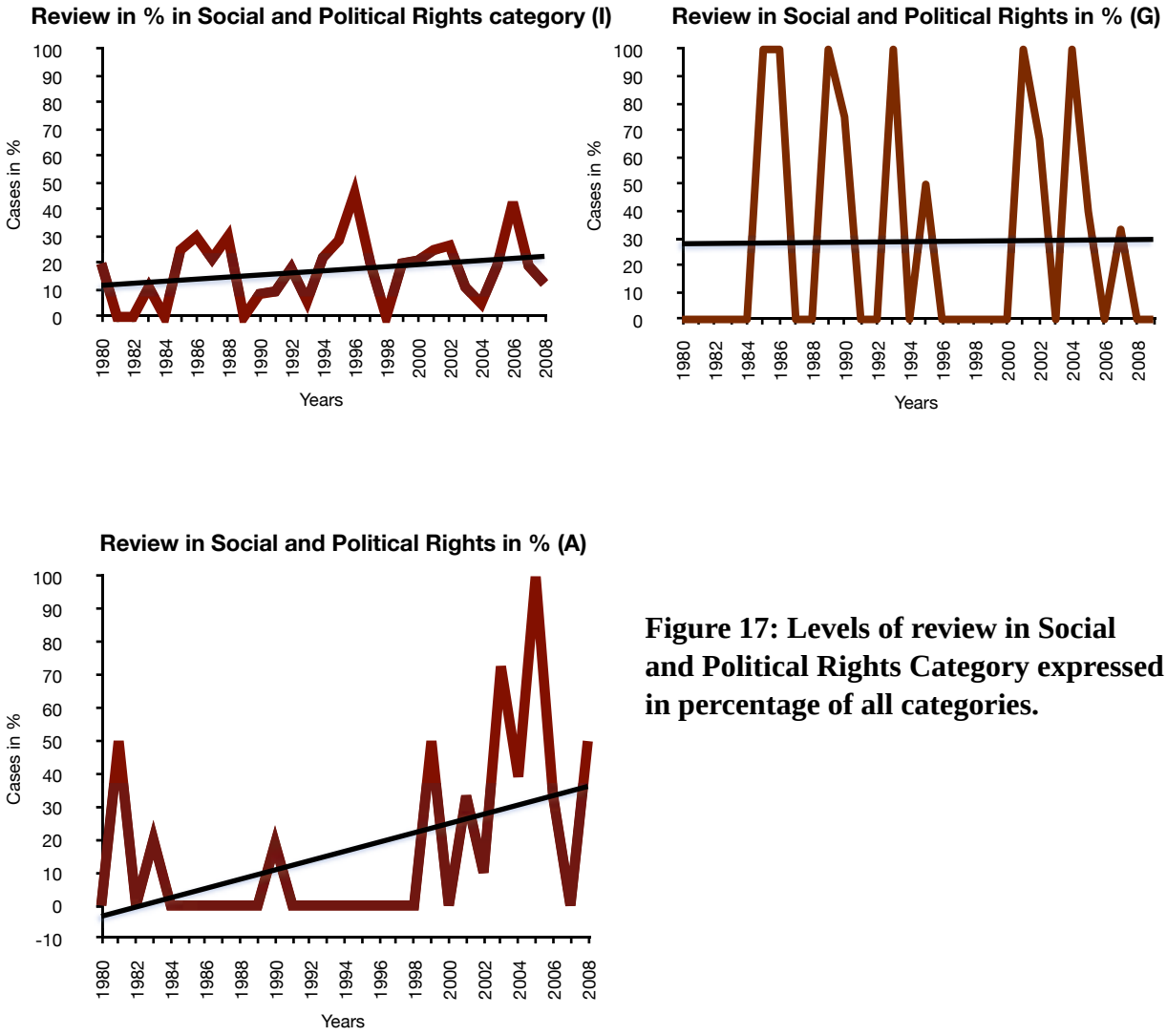


Figure 17: Levels of review in Social and Political Rights Category expressed in percentage of all categories.

The analysis of the Italian and German cases in the Social and Political Rights category the image is further refined. Figure 18 and 19 show that the development of decision-making patterns in these two countries has nothing in common with each other or with that of Austria. The only commonality observable is the fact that the decision-forms formerly considered most rare are on the increase (Kommers 1997; Modugno, Agro et al. 2008). However, the increase in unconstitutionality rulings in Germany and partial unconstitutionality rulings in Italy as percentage of the total of categories is not grave enough to result in an overall increase of cases seeing review in this category as it tends to be coupled with a decrease in the more common form of decision format resulting in review, partial and full unconstitutionality rulings in Germany and Italy respectively (Figure 17).

Distribution of Rulings in Italy as Percentage of Cases (all categories) in Social and Political Rights Category

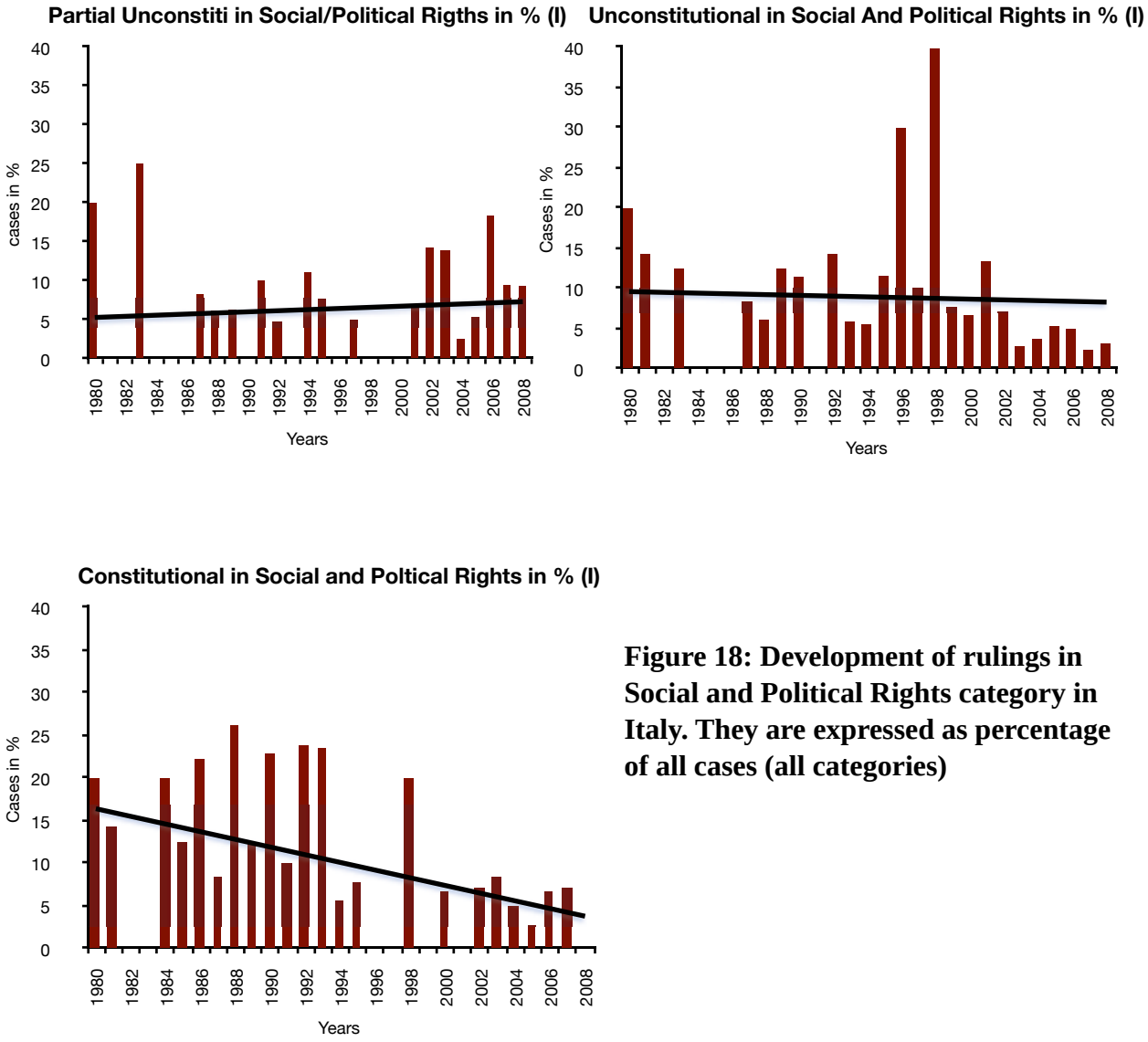


Figure 18: Development of rulings in Social and Political Rights category in Italy. They are expressed as percentage of all cases (all categories)

Distribution of Rulings in Germany as Percentage of Cases (all categories) in Social and Political Rights Category

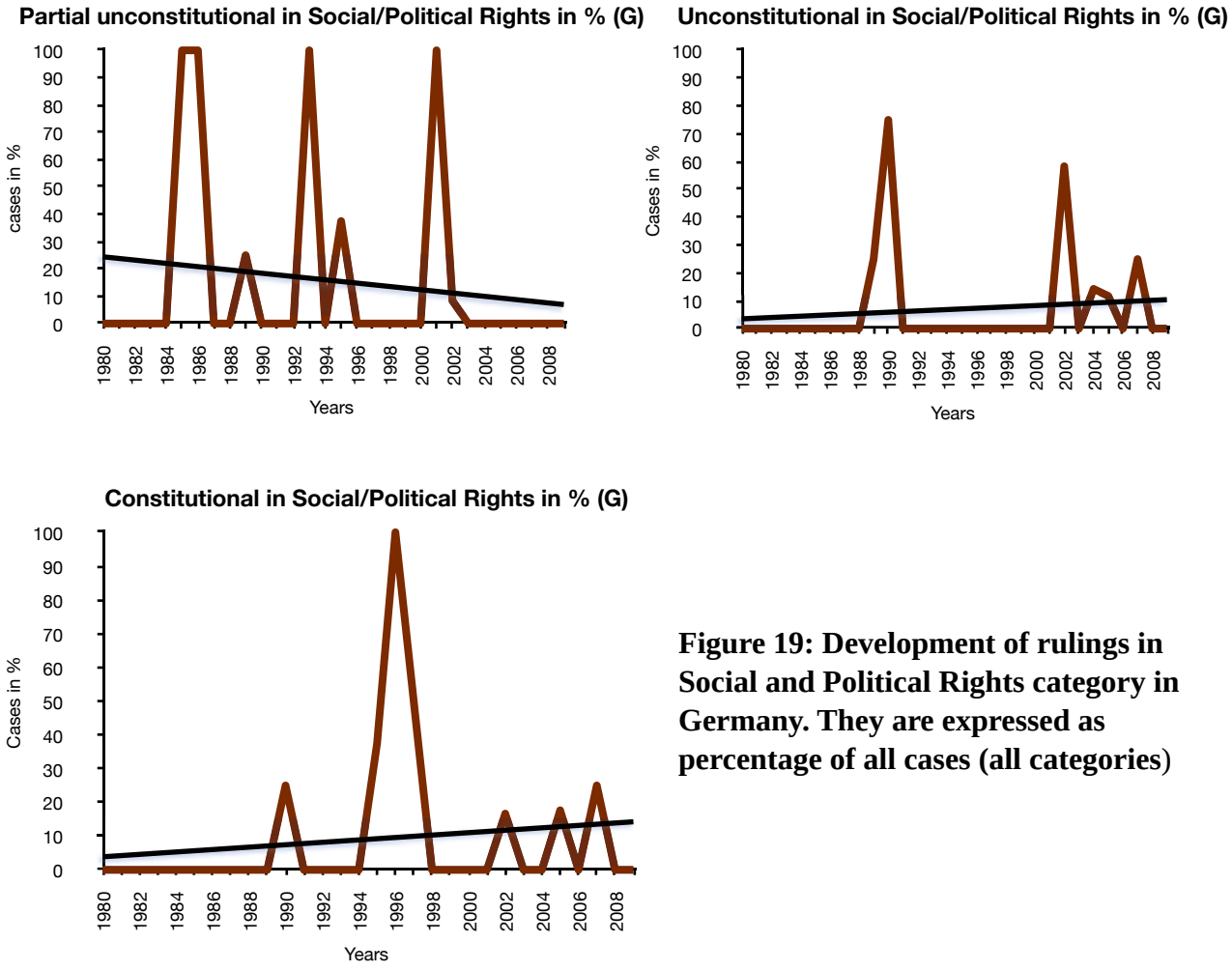


Figure 19: Development of rulings in Social and Political Rights category in Germany. They are expressed as percentage of all cases (all categories)

Within the category itself the overall pattern finds replication (Figure 20 and 21). Therefore, the overall change cannot be explained by this category either but the category in itself displays the same overall developmental markers. It therefore can be concluded that whilst social and political rights cases are not the root of the development overall their development is not entirely unlinked. Whilst it cannot be concluded without doubt that the same explanatory factors will come to weigh within the category as do for all cases combined it seems likely and probable. The fact that increases in unconstitutionality rulings and partial rulings do not account for the overall pattern change simply indicates that the category of social and political rights cannot be the sole source of change. This is further supported by data from the environmental and educational areas below.

Distribution of rulings in Social and Political Rights Category in Germany

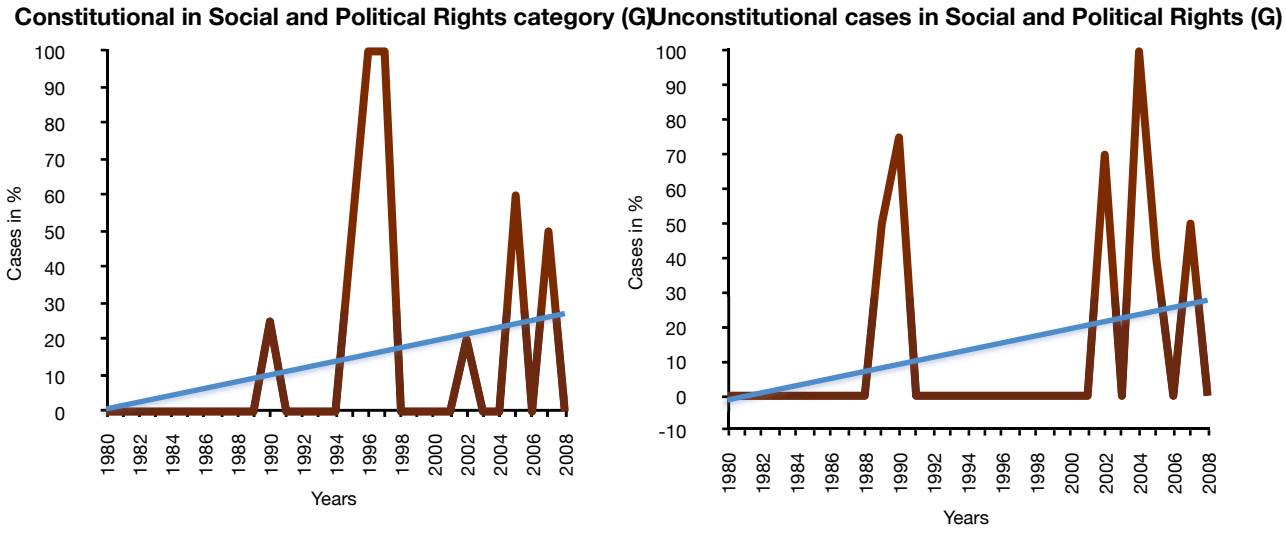
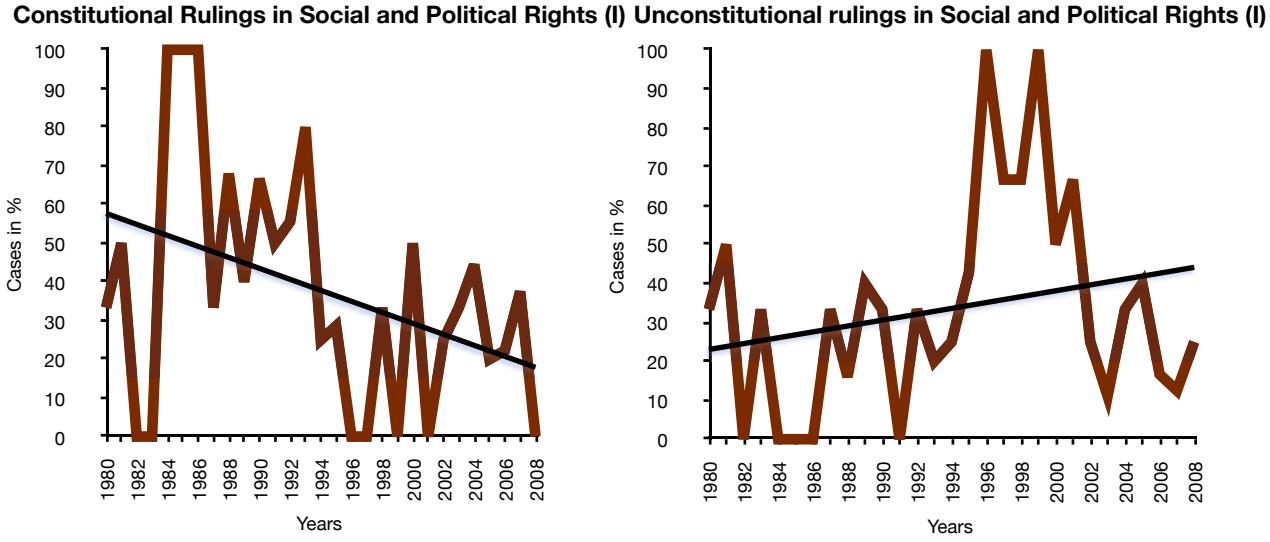


Figure 20: Development of rulings in the Social and Political Rights category

Distribution of rulings in Social and Political Rights Category in Italy



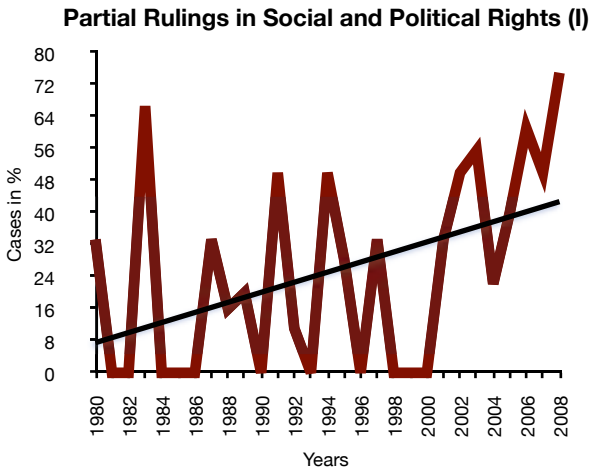


Figure 21: Development of rulings in the Social and Political Rights category

4.2.3 Environment, Education and Other cases 1980-2008

No other category of cases has the potential to explain the overall pattern in its own right. The environment might form the third largest category in the last decade but was negligible for much of the period prior to that. Figure 22-28 all show that whilst we see an increase in absolute numbers, no category is becoming more predominant in percentage of the whole. Education cases only exist in a sufficient number in Italy and Germany and even there the numbers are small (Figure 23). This sounds promising as Italy and Germany show a different pattern in which kinds of review are on the increase. In Austria partial rulings were on the increase whilst Germany and Italy see a rise in unconstitutionality rulings. However the numbers are simply not sufficient to explain the increase in rulings alone.

Distribution of Cases in Environment Category in Numbers

Environemental category in absolute numbers 1980-2008 (A)

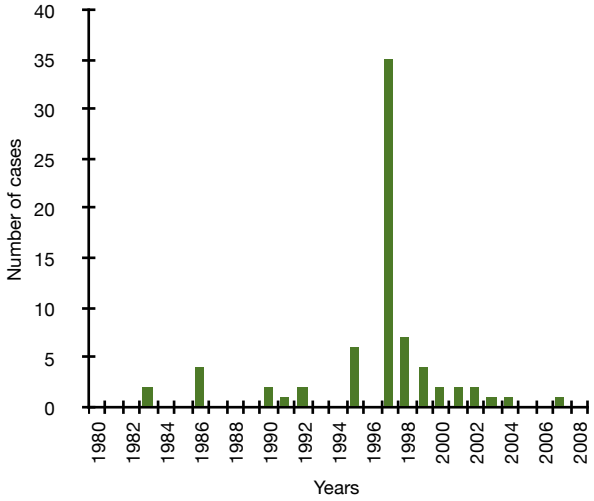
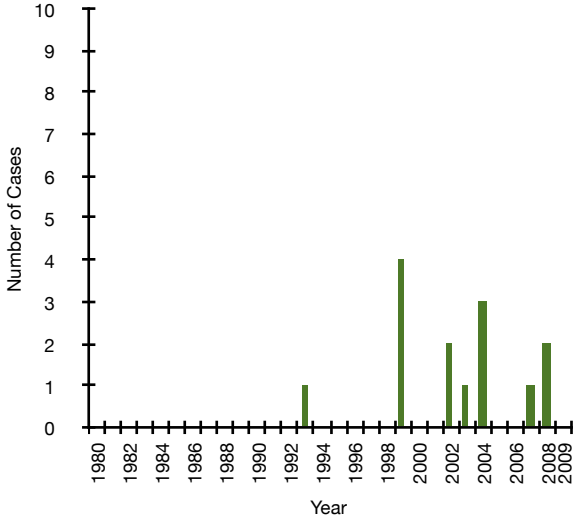
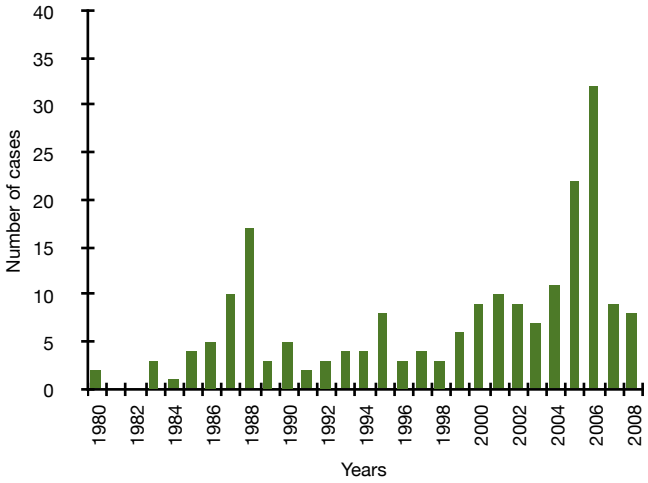


Figure 22: Development of number of cases in Social and Political Rights Category expresses in absolute numbers.

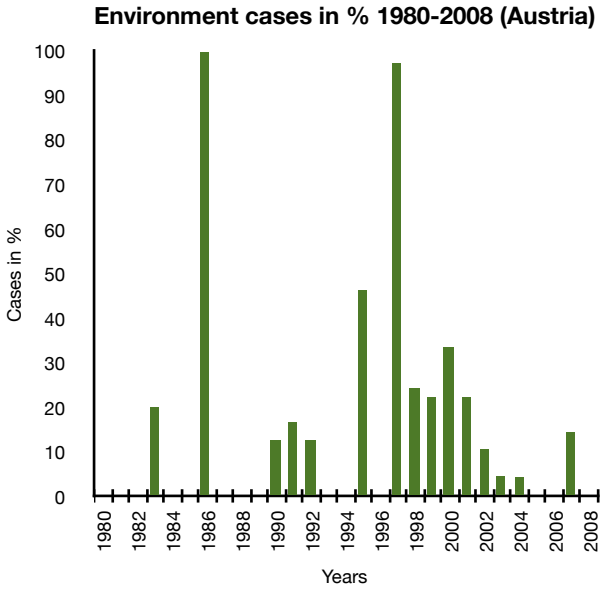
Environment category in absolute numbers 1980-2009 (G)

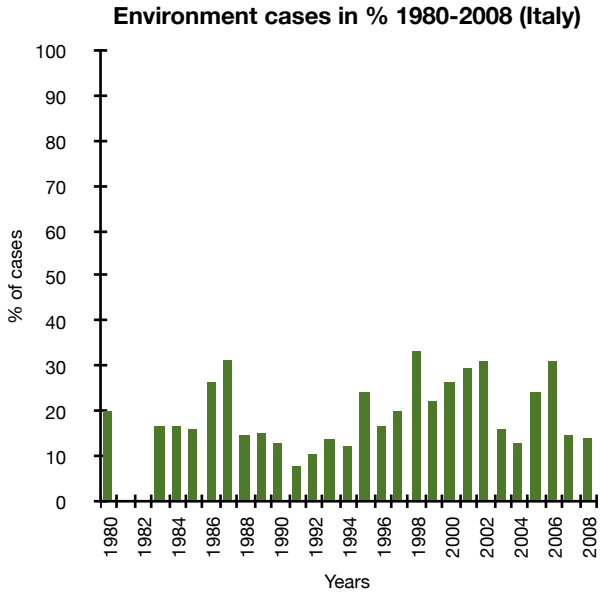


Environment category in absolute numbers 1980-2008 (I)



Distribution of Cases in Environment Category in Percentage of Total Cases





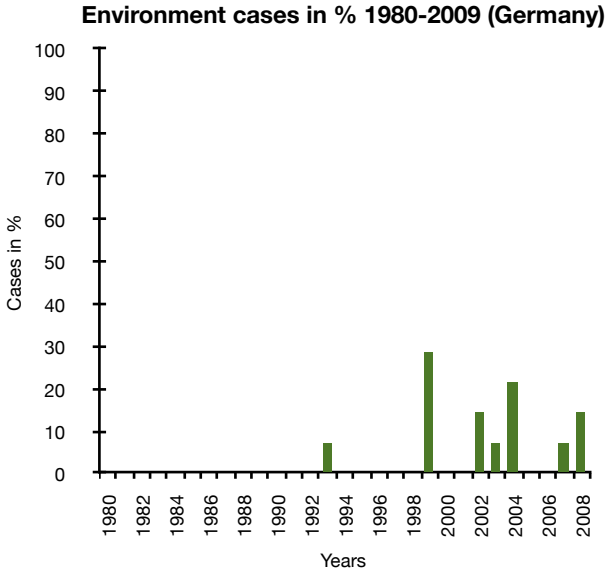


Figure 23: Development of number of cases in Social and Political Rights Category expresses in percentage.

Distribution of numbers of cases in Education category

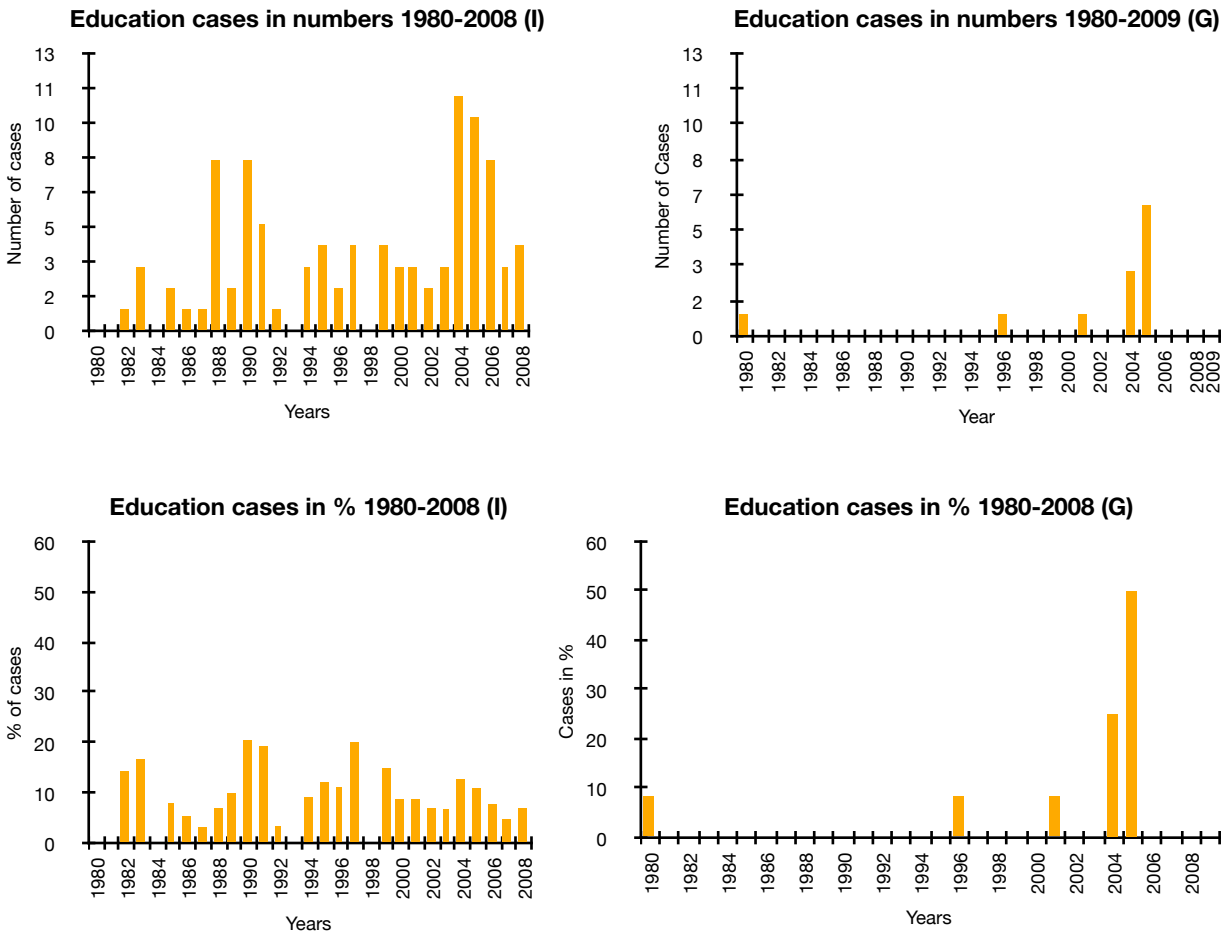


Figure 24: Distribution of cases in numbers and percentage in the Education category

This becomes even more apparent when considering the development of rulings within the totality of cases. As percentages within the increase in kinds of rulings seems to be evenly spread across the review categories and time. With other words whilst there is an increase for all kinds of rulings the increase is so evenly spread among the kinds and years that not one single kind of ruling is evenly on the rise. Concerning constitutionality rulings, they are clearly on the decrease in all three countries in the environment category (Figure 28) and education category (Figure 33). Levels of partial unconstitutionality rulings remain even over time or are on a slight decrease when concentrating on percentage of all cases. Therefore, both areas support the argument that, rather than one area being the cause for the change in levels of review, and especially unconstitutionality rulings, the cause of the change in abstract judicial review decision-making pattern is rooted in changes across the case categories.

Distribution of Rulings in Italy as Percentage of Cases (Environment)

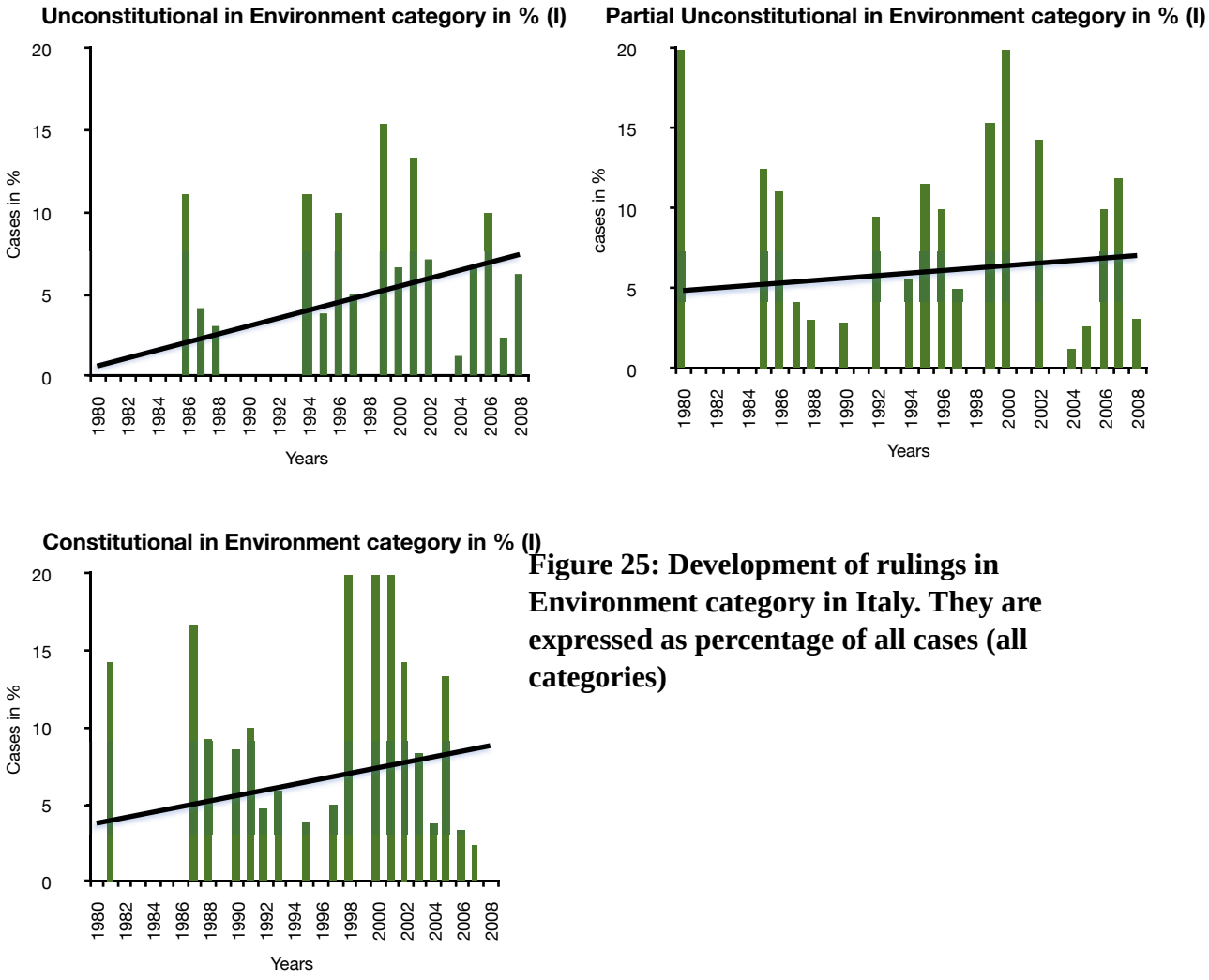
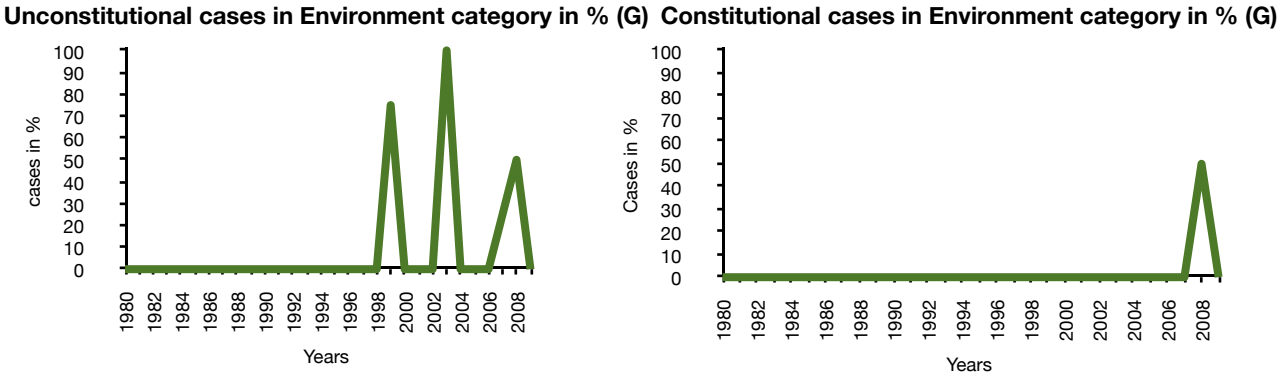


Figure 25: Development of rulings in Environment category in Italy. They are expressed as percentage of all cases (all categories)

Distribution of Rulings in Germany as Percentage (Environment)



No partial rulings in % in Germany

Figure 26: Distribution of Rulings in Environment category in Germany in %.

Distribution of Rulings in Austria as Percentage (Environment)

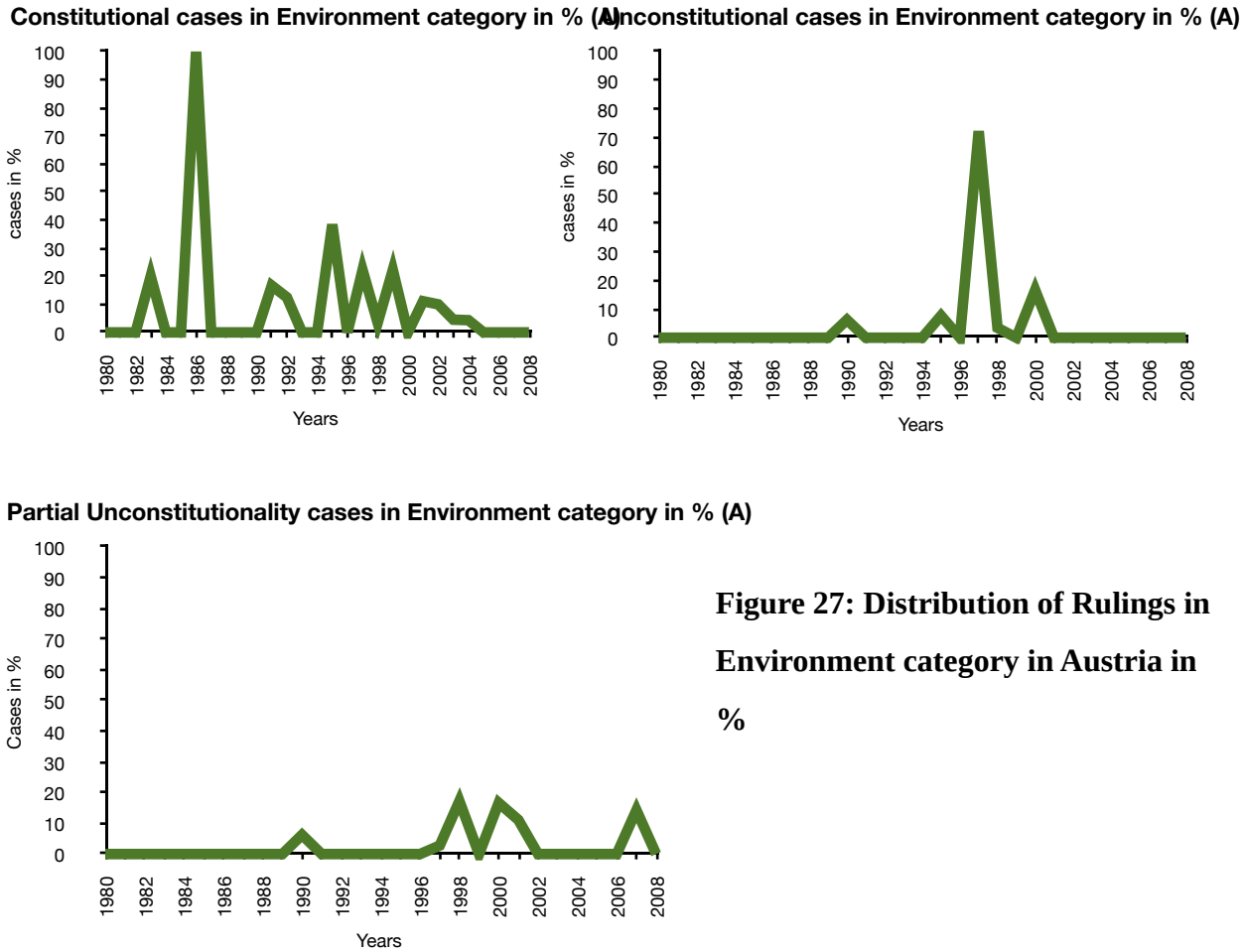
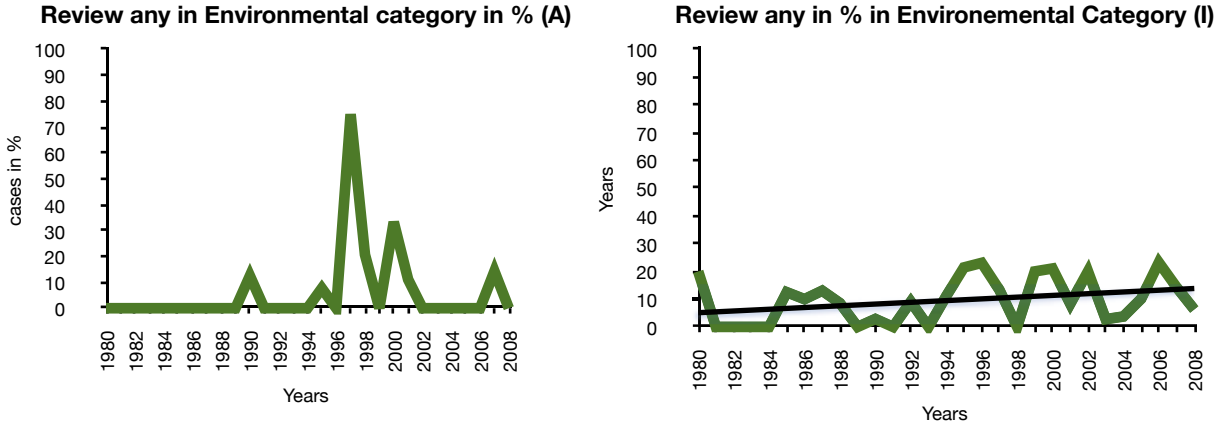


Figure 27: Distribution of Rulings in Environment category in Austria in %

Development of levels of review in the Environment category expressed in %



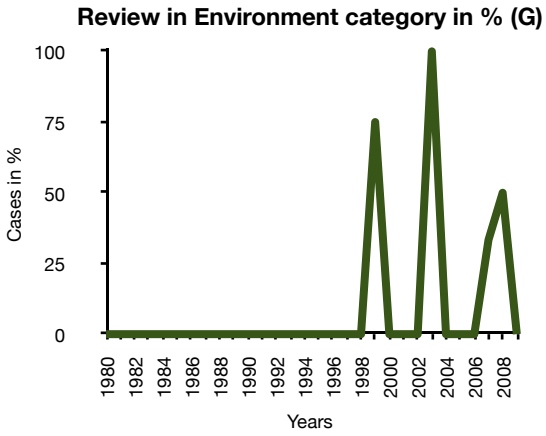


Figure 28: Levels of review in Environment category expressed in % of category

Distribution of rulings in the Environment category in Austria in percentage of category

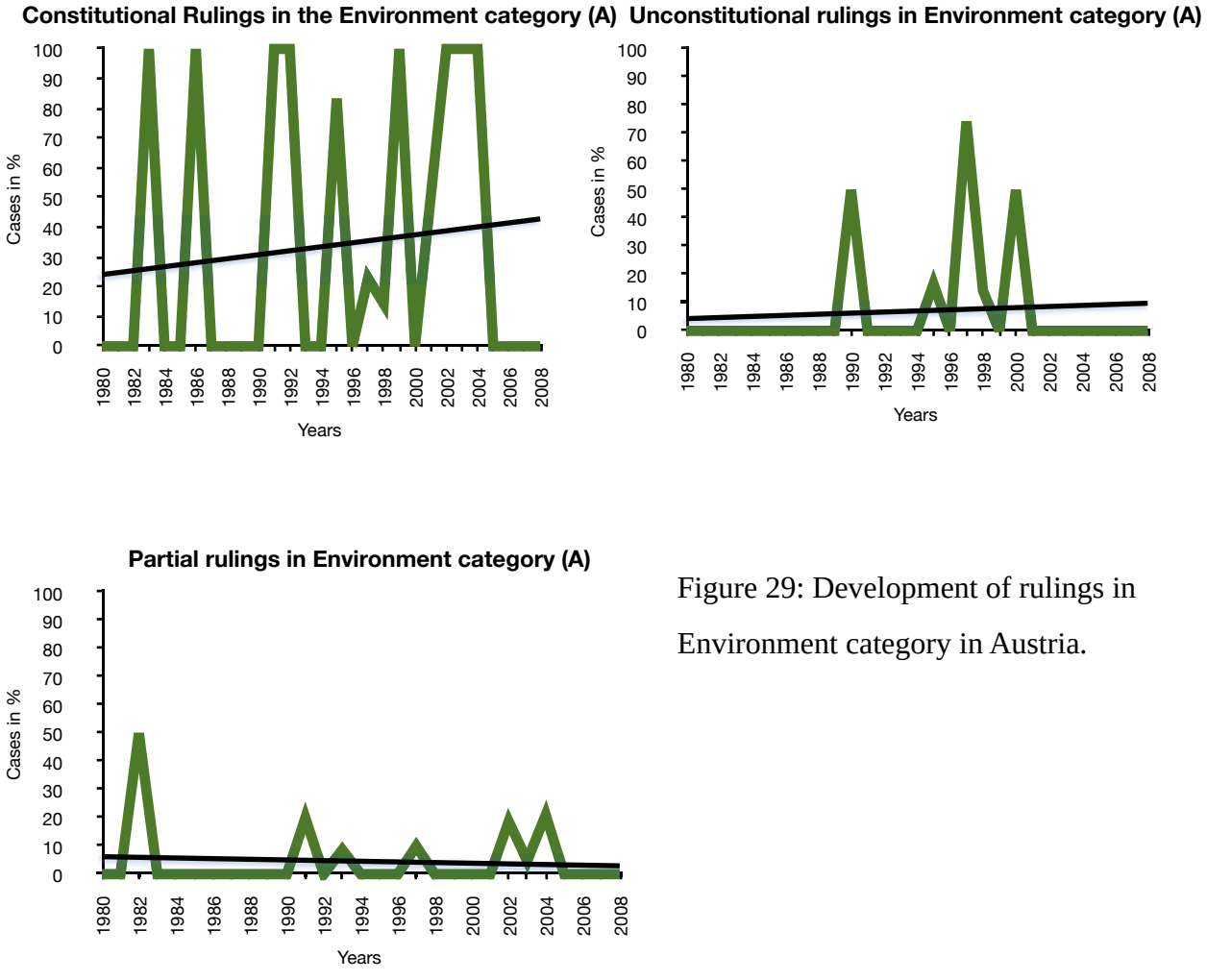
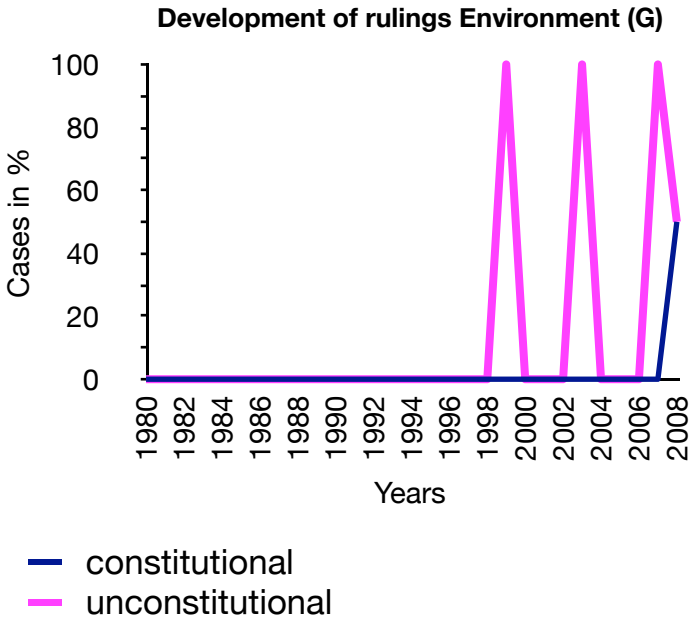


Figure 29: Development of rulings in Environment category in Austria.

Distribution of rulings in the Environment category in Germany in percentage of category



NO partial rulings in Germany

Figure 30: Development of rulings in Environment category in Austria

Distribution of rulings in the Environment category in Italy in percentage of category

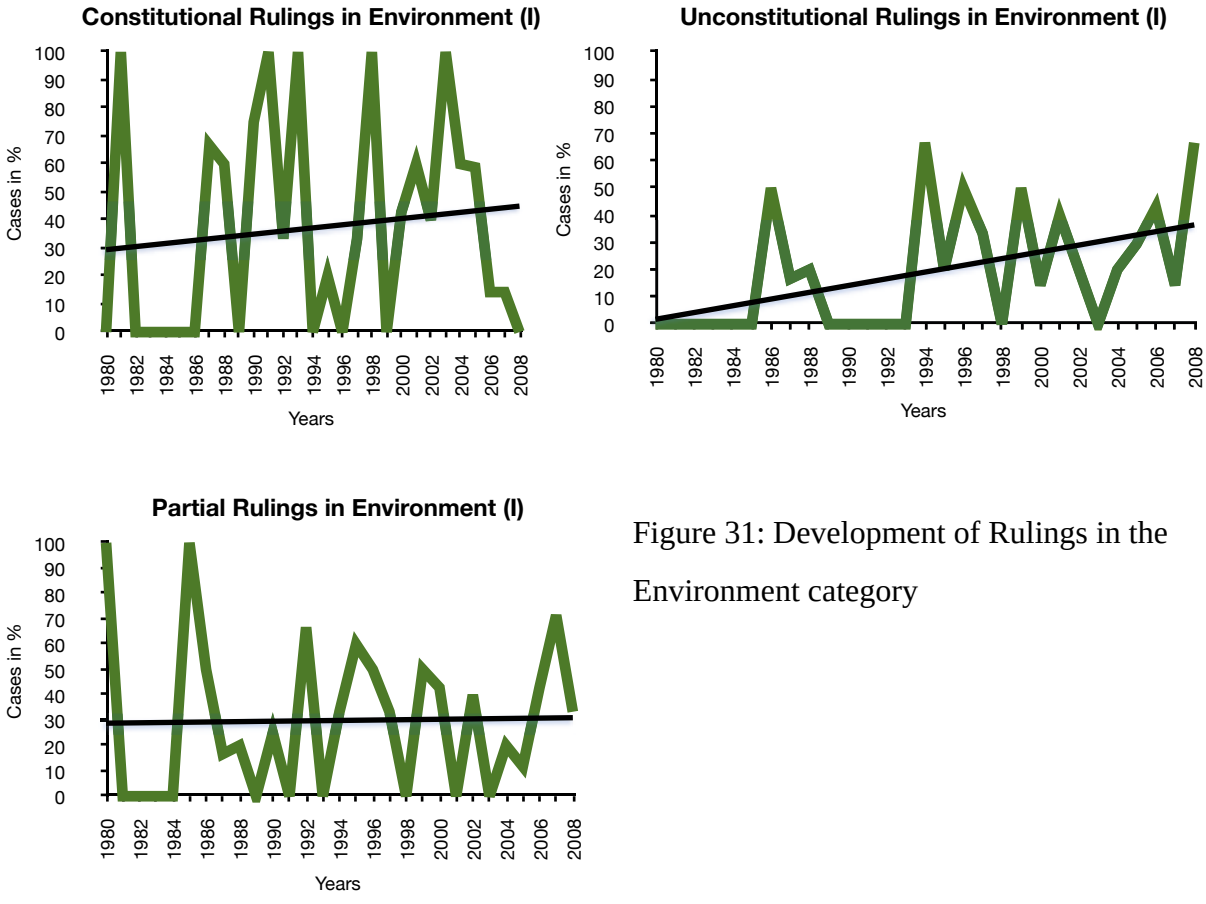


Figure 31: Development of Rulings in the Environment category

Number of rulings in total numbers and percentage in Education category in Germany and Italy

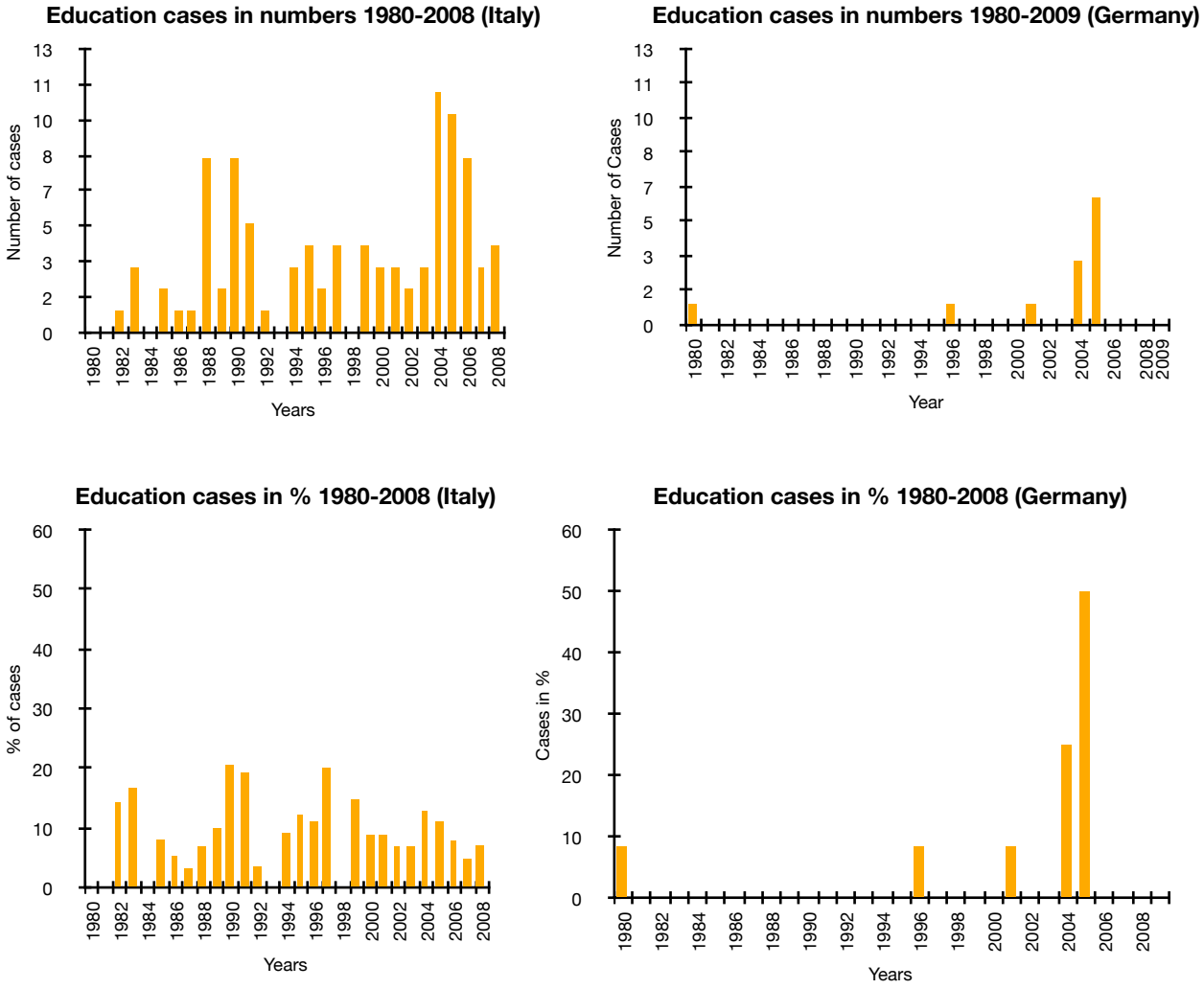


Figure 32: Development of education cases in % and number

Development of rulings in Education category in Germany

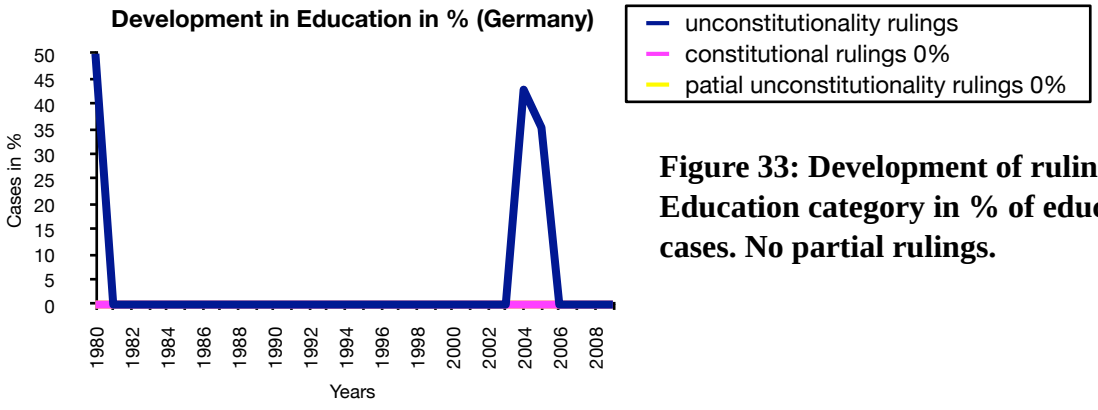
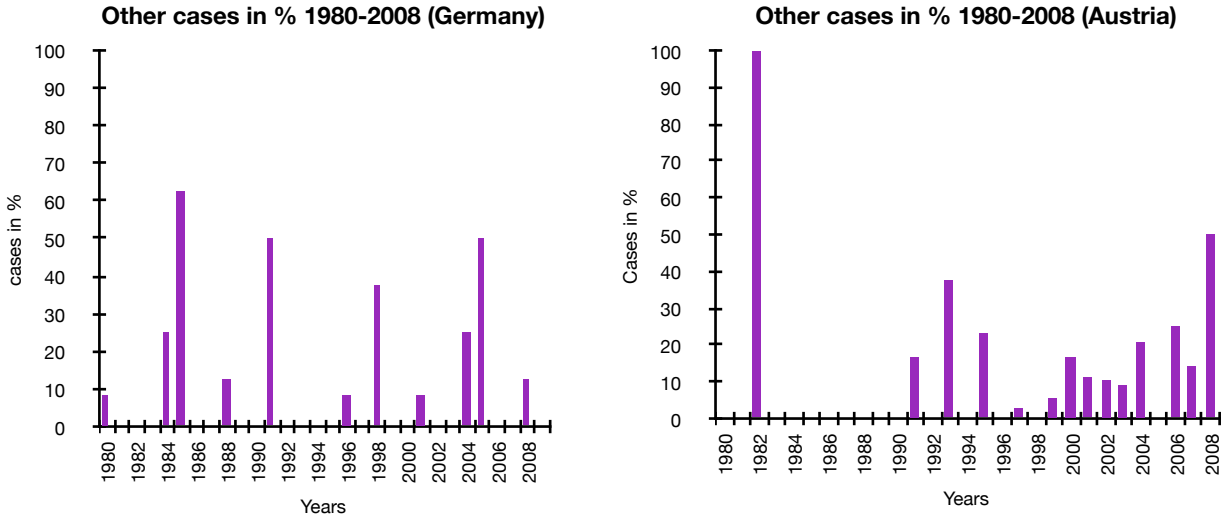


Figure 33: Development of rulings in Education category in % of education cases. No partial rulings.

4.2.5 Other



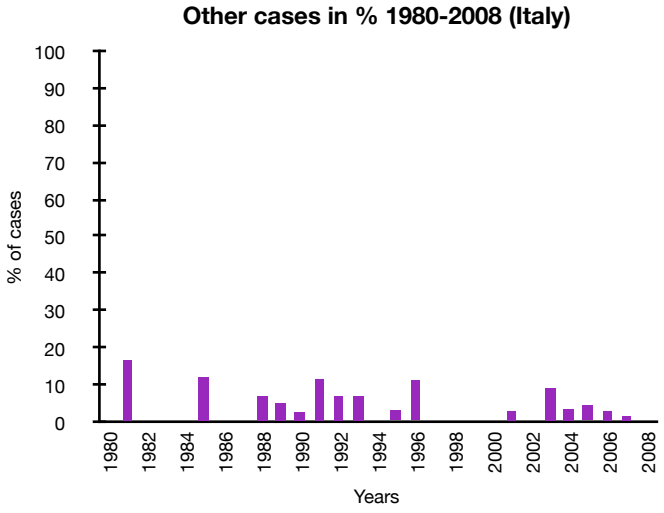
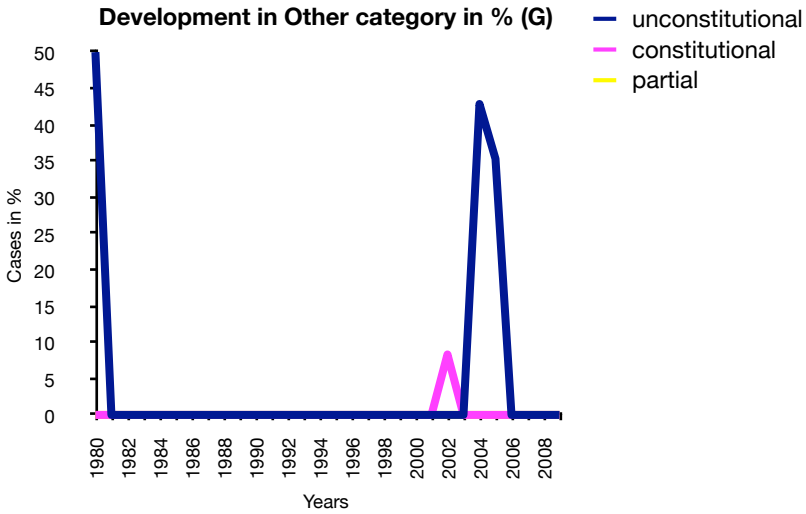


Figure 34: Development of number of "other" cases in %

Development of rulings in "other" category



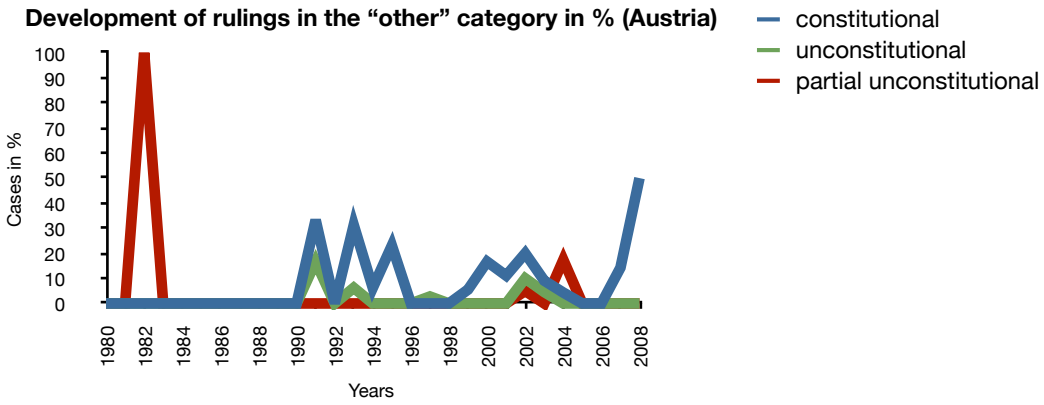


Figure 35: Development of rulings in “other” category expressed in % of total

The “other” category is in absolute numbers not important enough to influence an overall pattern-change significantly but it is interesting to see that cases in this category are not on the increase (Figure 34).

4.3. Can the change in decision-making pattern in any of the categories explain the overall change?

The short answer to this is: No. Table 1 to 4 give a summary of the above graphs and therefore illustrate the answer to the question well. There is an overall increase of abstract judicial review cases in all three countries evenly spread across categories, more so in Germany and Italy than in Austria. Only the Finance category does not contribute to the increase in review, partial and unconstitutional combined, observed in Chapter I (Table 1). It therefore can be concluded that the change in pattern has a reason which holds sway over all categories, with the possible exception of finance (Table 1-4; red highlight). This directly contradicts the predictions judges made about the source of the change in pattern. In their impression, cases involving financial matters, are the cases in which politicians are most likely to test the borders they are set by the constitution and in which the quality of legislation has decreased most.

Is there one category that can explain the increase in unconstitutionality rulings in Germany and Italy, and the decrease thereof in Austria? In the categories of Environment, Social and Political Rights and “other” all fit the change in pattern regarding the increase in unconstitutionality rulings (Table 2-4; yellow highlight). It is therefore equally the case that the

changing pattern within the cases seeing review cannot be traced back to one single category. The change is observable in all but one category, finance.

Finance	Italy			Germany			Austria		
Cases in Numbers	+			+			+		
Cases in %	=			=			=		
% of review	=			-			-		
	uc	**c**	**p**	**uc**	**c**	**p**	**uc**	**c**	**p**
% of total	=	+	-	-	+	=	=	+	-
% in category	-	+	=	-	+	-	-	+	=

Table 1: Summary table of development in Finance category

Social and Political Rights	Italy			Germany			Austria		
Cases in Numbers	+			+			+		
Cases in %	-			=			+		
% of review	+			=			+		
	uc	**c**	**p**	**uc**	**c**	**p**	**uc**	**c**	**p**
% of total	+	-	=	+	+	-	+	+	+
% in category	+	-	+	+	+	-	+	-	+

Table 2: Summary table of development in Social and Political Rights category

Environment	Italy			Germany			Austria		
Cases in Numbers	+			+			=		
Cases in %	+			+			-		
% of review	+			+			+		
	uc	c	p	uc	c	p	uc	c	p
% of total	+	+	+	+	+	0	+	-	+
% in category	=	=	=	=	=	0	=	+	-

Table 3: Summary table of development in Environment category

Other	Italy			Germany			Austria		
Cases in Numbers	+			+			=		
Cases in %	=			=			-		
% of review	+			+			+		
	uc	c	p	uc	c	p	uc	c	p
% of total	+	=	-	+	=	-	+	+	-

Table 4: Summary table of development in Other category

The only overall conclusion able to be drawn from the analysis of the cases in kind seems to be a realisation of a lack of overall pattern. Not one single category of cases can be held responsible to the change in overall pattern. Not one single category is able to explain the overall pattern but rather the explanation must lie with an external factor influencing all the categories, with the possible exception of finance, equally. The hypothesis of this thesis posits that there is a "European" influence affecting the jurisprudence of constitutional courts.

4.4. Interesting statistics - style, membership and levels of trust

The literature reviewed in Chapter II showed however that standard research in the behaviour of courts is more concentrated on other potential influences rather than subject matter of the case. A first exploration of the typical data such as composition, style and trust levels also shows interesting developments with potential explanatory power in respect to the search for reasons of the changed decision-making pattern.

4.4.1 Style expressed through length of decisions

Style of decisions has often been linked to the length of the decisions (Holland and Webb 2010: 284). Two forms of decisions are commonly identified: an interpretative style and a literal one, often also called the impure and pure style (Posner 1995). From the data relating to the length of cases in the three countries it becomes clear that they have developed very differently. Figure 36 shows that the average length of decisions has increased steadily over the last three decades in Italy. Between 1978 and 1993, the first half of these 30 years, the average length of decision is 3.5 pages whilst it is 7 pages after 1993. In Austria the development is converse. Figure 37 shows a steady decrease in the length of the text of decisions over the last three decades. In Germany, on the other hand, there seems to be no noticeable change in length of decisions (Figure 38). However, the German Constitutional Court is particular in so far that its decision texts are longer than those of the other courts. In the early 1980s Austria and Germany seem to have comparable length in texts of decisions but whilst the Austrian case length has declined since, the German court's case length remains constant.

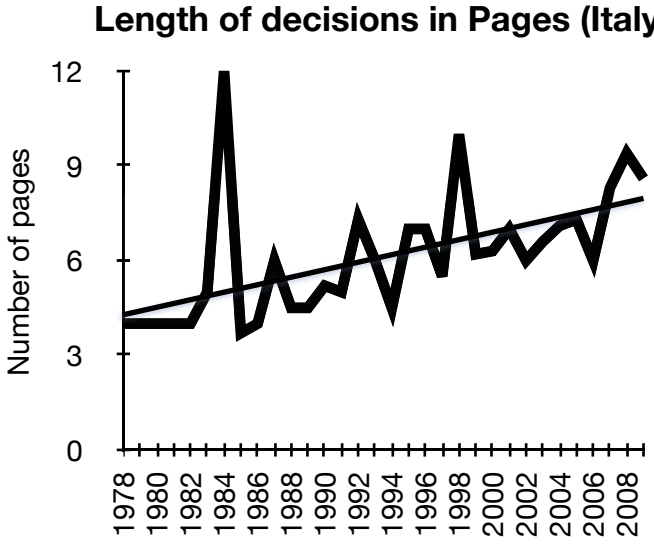


Figure 36: The development of length of decisions in Italy. Length displayed as average per year excluding outliers. An outlier in statistics is a point in a sample widely separated from the main cluster of points in the sample. In this case it means a case which is more than ten pages different from any of the other cases that year.

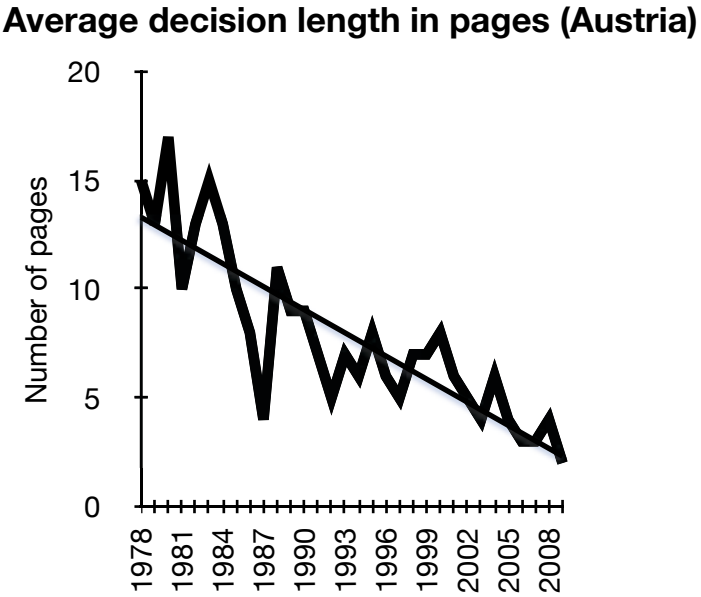


Figure 37: The development of length of decisions in Austria. Length displayed as average per year excluding outliers. An outlier in statistics is a point in a sample widely separated from the main cluster of points in the sample. In this case it means a case which is more than ten pages different from any of the other cases that year.

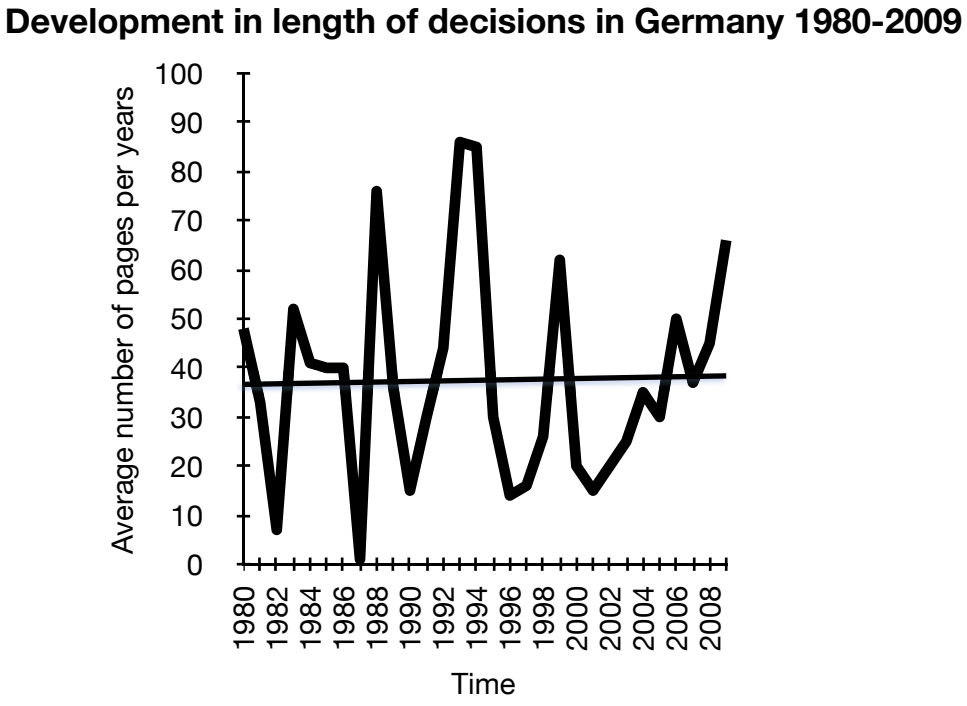


Figure 38: The development of length of decisions in Germany

The German Constitutional has been known for its interpretative and impure style since its inception. Its tendency to prefer a style which argues from first principles, uses a high level of metaphors and interpretation of traditional philosophical and legal concepts has been commented on often in comparison to the US Supreme Court (Ackerman 1997: 797). The Italian Constitutional Court's development on the other hand is less typical. The court has often been compared more with the US Supreme Court and its decisions were seen as very legalistic and "pure". In this it was perceived as a very legal positivist court (Merryman 1965: 47; Casamassima 2008: 78). Notwithstanding, that the design of the Italian system is closest to those of the Austrian and German Constitutional Court (Groppi 2009: 129). The English speaking literature often assumes the closeness between the Austrian and German constitutional court without closer examination (Lijphart 2004: 105).

For the period before 1978 both courts, the German Constitutional Court and the Austrian Constitutional Court, seem to develop similarly at least concerning length of decisions. The average length of cases is around 14 for each year in the decade before 1978, even taking into account the constitutional reform of 1975 in Austria (Gamper 2007). The Austrian Constitutional Court was known for its interpretative style and its use of philosophical and legal concepts similar to the German Constitutional Court (Oehlinger 2007). Expectation based on forecasts developed from the early years of both the German and the Austrian Constitutional Court therefore would lead to the assumption that both courts are representatives of the interpretavist, "impure" style and have, on average, longer decision texts than the Italian court. The Austrian constitutional's average length of decision is however on the decrease over the last 20 years, suggesting a change in style. In Italy the development is converse with decisions becoming longer on average, also indicating a change in style.

4.4.2 Membership of the court

Another interesting statistic lies withe the membership of the court. The increase in Academics on the bench has been noted in the literature before (Kommers 1997). The German constitutional court especially has always had the reputation of being highly influenced by the high number of academics in its membership (Landfried 1984; Kommers 1997). It has been argued that courts with higher numbers of academics use a more interpretative style in their decisions and the German court along with the European Court of Justice is generally cited as an example (Wald 1993; de Burca and Weiler 2001). The number of Academics on the bench is

often linked to the style a court exhibits in its decisions (Posner 2008). The hypothesis that higher numbers of academics in the membership of the courts leads to greater evidence of the impure style in the case materials holds when applied to the current membership of the German, Austrian and Italian courts in so far as the German and Italian courts tend to have more academics on the bench than the Austrian one. Over the last three decades the membership of the Austrian constitutional court has changed away from over 50% academics to less than a third (Figure 39). The Italian Constitutional Court on the other hand has increased its membership of academics from half to two thirds (Figure 39). A higher number of academics in the membership of the court therefore coincides with more evidence of the impure, longer style, observed above, in the texts of decisions rendered

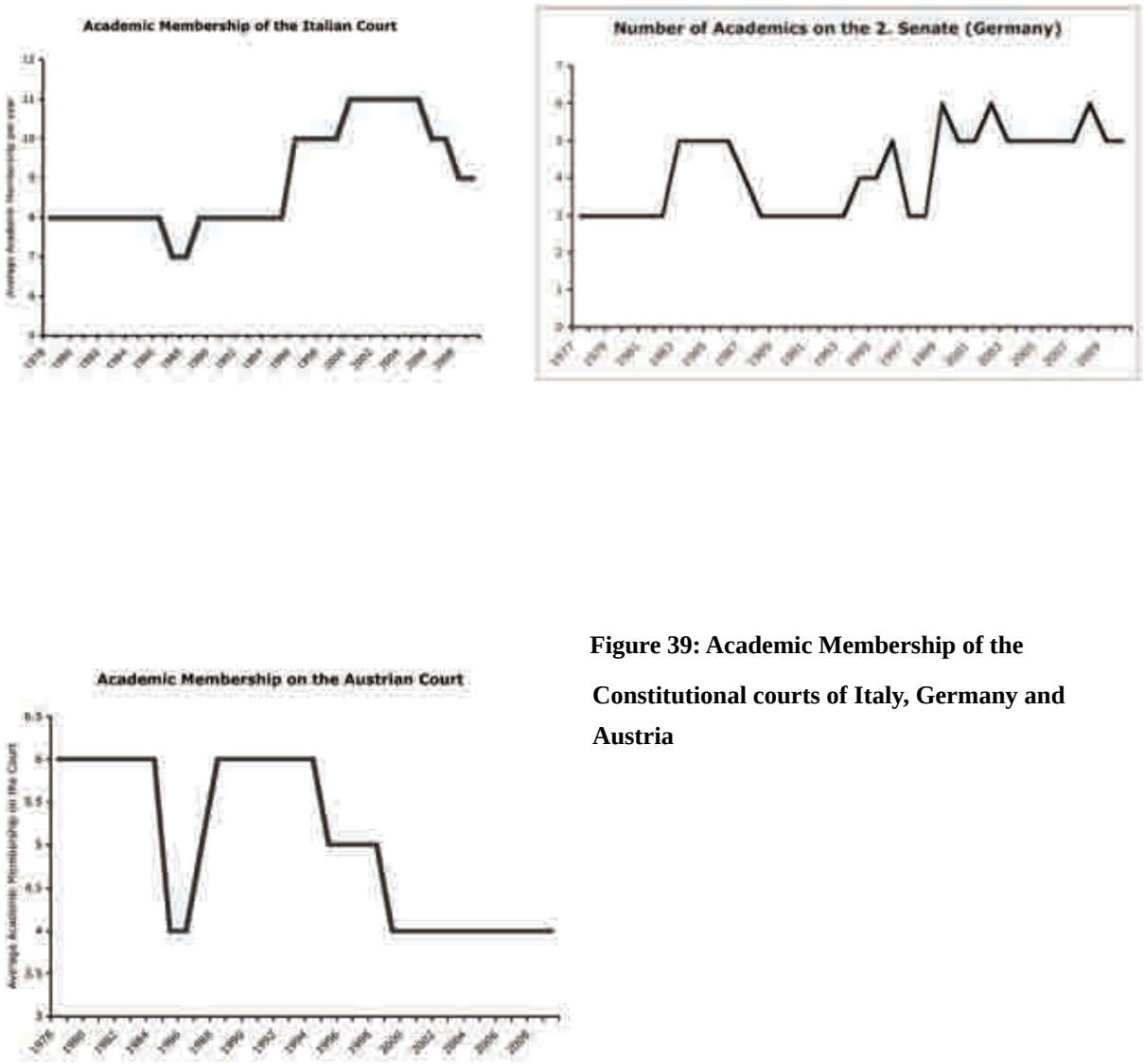


Figure 39: Academic Membership of the Constitutional courts of Italy, Germany and Austria

So whilst there seems to be no pattern at all in the categories of cases there is a clear pattern relating to style and membership. It is further suggested by some of the literature that style and membership are related. Moreover, their development seems to be parallel with the development of unconstitutionality rulings in all three countries. It might therefore be possible to explain at least some of the pattern shifts through these variables. It still falls short to explain the overall change, the overall increase of any form of review.

4.4.3. Levels of Public Trust

Both the change in style and membership therefore needs to be explained as well as the changing pattern in abstract judicial review. A possibility is the amount of public criticism (Esterling 1998: 113; Epstein, Knight et al. 2001). It has been postulated that higher levels of criticism will make a court cautious. The argument hypothesises that the court is dependent on public approval to insulate it against political reprisals (Ferejohn and Kramer 2006). A court can be more proactive if the political institutions are facing loss of public standing if they oppose the court (Kramer 2007). Therefore a court which enjoys high public standing is able to be more interpretative and active (Kramer 2004). The German Constitutional Court is often cited as a good example for this theory (Kommers 1987; Landfried 1994; Kommers 2006). The development of the decision-making pattern over the last three decades indicates a higher probability of a law seeing review in its entirety in Germany and Italy, a lower probability in Austria. Consequently, we would expect no or few instances of public criticism in Germany or Italy whilst some or many criticisms in Austria in the 1980s. Additionally, we would expect high levels of public trust in Italy and Germany and lower ones in Austria.

On first impression the last three decades seem to fit the image. The German Constitutional Court has always enjoyed high public regard and the political institutions have always displayed caution towards the court (Landfried 1984). This does not mean that there have been no criticisms, but for the most part they have been very mild. Only in the recent two years has there been increased criticisms by the political institutions starting with the protest of the minister of the interior, Wolfgang Schäuble, when the constitutional court decided that the terrorist laws he had proposed were not lawful (Jungholt and Mueller 20.1.2008). Shortly after that, the court's public standing might have been damaged by the very public and political debate about the new appointment of the president of the court (Keil, Kerscher et al. 2008).

This was the first time in the history of the court when the appointment of a judge became a political issue. We have no actual research data on the impact this had on the trust of the population in the constitutional court. The last data are from 2009 (Figure 40) in which the court consistently receives higher levels of trust and approval from the population than any of the other institutions. When looking at the same statistic over the last thirty years it becomes clear that the constitutional court consistently has the highest level of approval in the population (Vorlaender and Brodocz 2006).[12] Therefore the development in style and membership of the German Constitutional Court fits the hypothesis that both are influenced by the level of public and political approval within the system the court exists within.

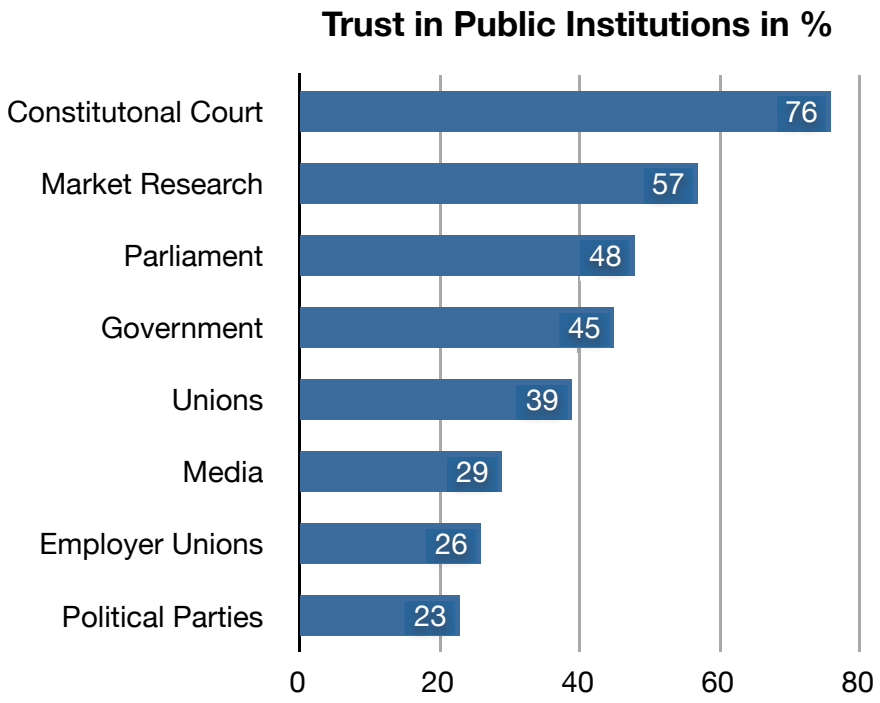


Figure 40: Trust in the German Constitutional Court (Bundesverfassungsgericht) in 2009 (Statista 2010)

The expectation is therefore met regarding the German constitutional court. Concerning the Austrian Constitutional Court, we would expect a period of criticisms in the 1980s which then leads to a change in style and membership. This holds true as well. The late 1970s and early 1980s saw a very active court locking horns with the political institutions (Oehlinger 2007). This led to wide spread criticisms and the court withdrawing to become more legalistic in its public voice (Funk 2007). The 1990s and early 2000s were relatively free of criticism for the court. The last three years see Presidents of the Constitutional Court being more vocal in their

[12] The court does loose some public approval in 1994 following the "soldiers are murderers" decision but it never falls lower than that of the other institutions.

criticisms of political institutions in respect to human rights, democracy and equality. The same time period sees the court faced with more criticisms by political institutions as well (Gamper 2007; Gamper and Palermo 2009). This is interesting considering the indications of a change from a “pure” to a more “impure” style of decision-making in the last few years. At the same time opinion polls show a decrease in the trust of the public in the courts and the constitutional court in particular (Standard 2009; Zeitung 2009). Figure 41 displays levels of trust in the Austrian level system over the last three decades. Levels of trust decrease throughout the 1980s before increasing again in the 1990s.

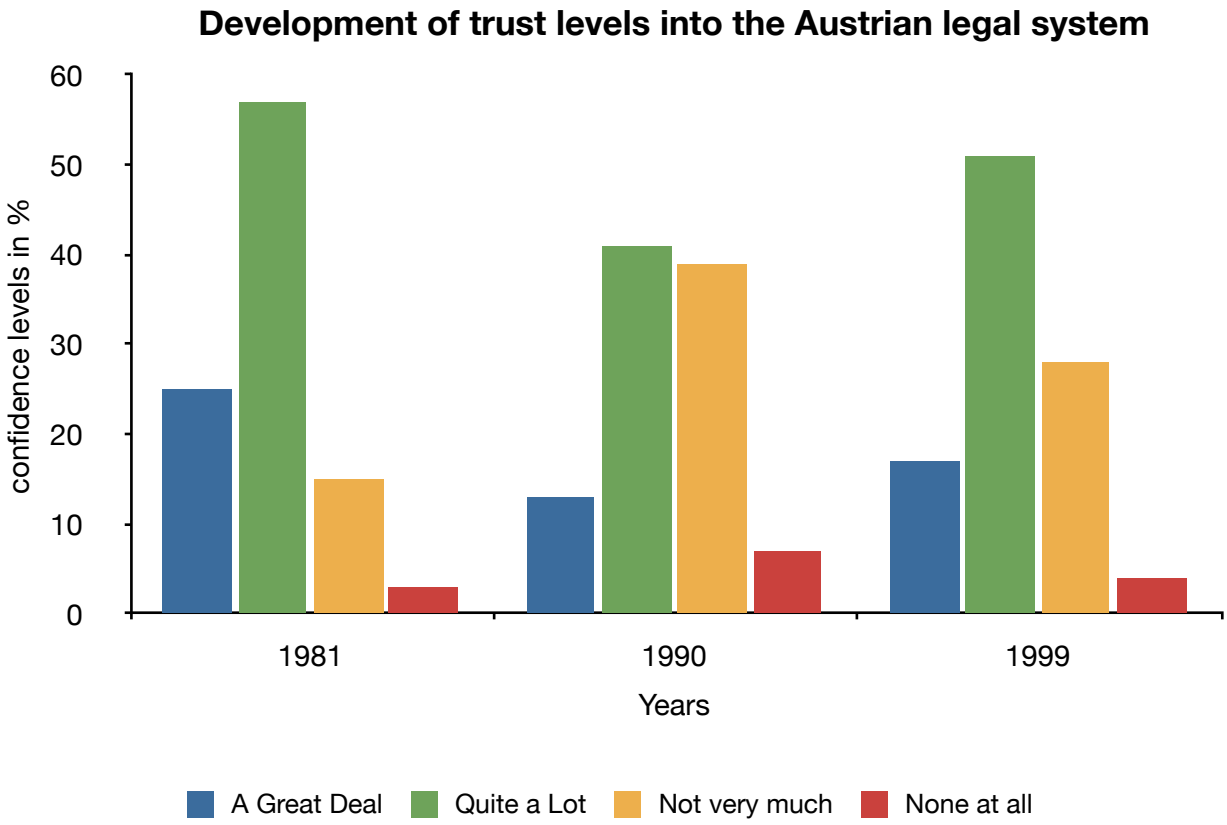


Figure 41: Trust levels into the Austrian legal system over the last three decades according to the World Values Service (Service 2009)

We should expect the Italian Constitutional Court to either have little or no criticism in its history. Again, the assumption holds true. The Italian Constitutional Court has led a fairly unremarkable existence throughout the 1980s and early 1990s. However, this routine period without any remarkable occurrences is important. There was no criticism for the court. The Italian Constitutional Court existed almost invisibly in Italian society without any instances which drew either bad or good attention. The court then profited from the general increase in trust in the judiciary in general when the courts started the war against the Mafia and

corruption in general. The constitutional reform in 2001 leading to a shake-up in the relationship between the national and regional levels of government has led to the court having a more visibly important role in policy shaping (Groppi 2009: 144). So the higher regard for the judiciary coincides here with a move from a more purist to a more impure style. Figure 42 shows the development of levels of trust in Italy over the last three decades. Trust in the Italian legal system is on the increase over the last decade.

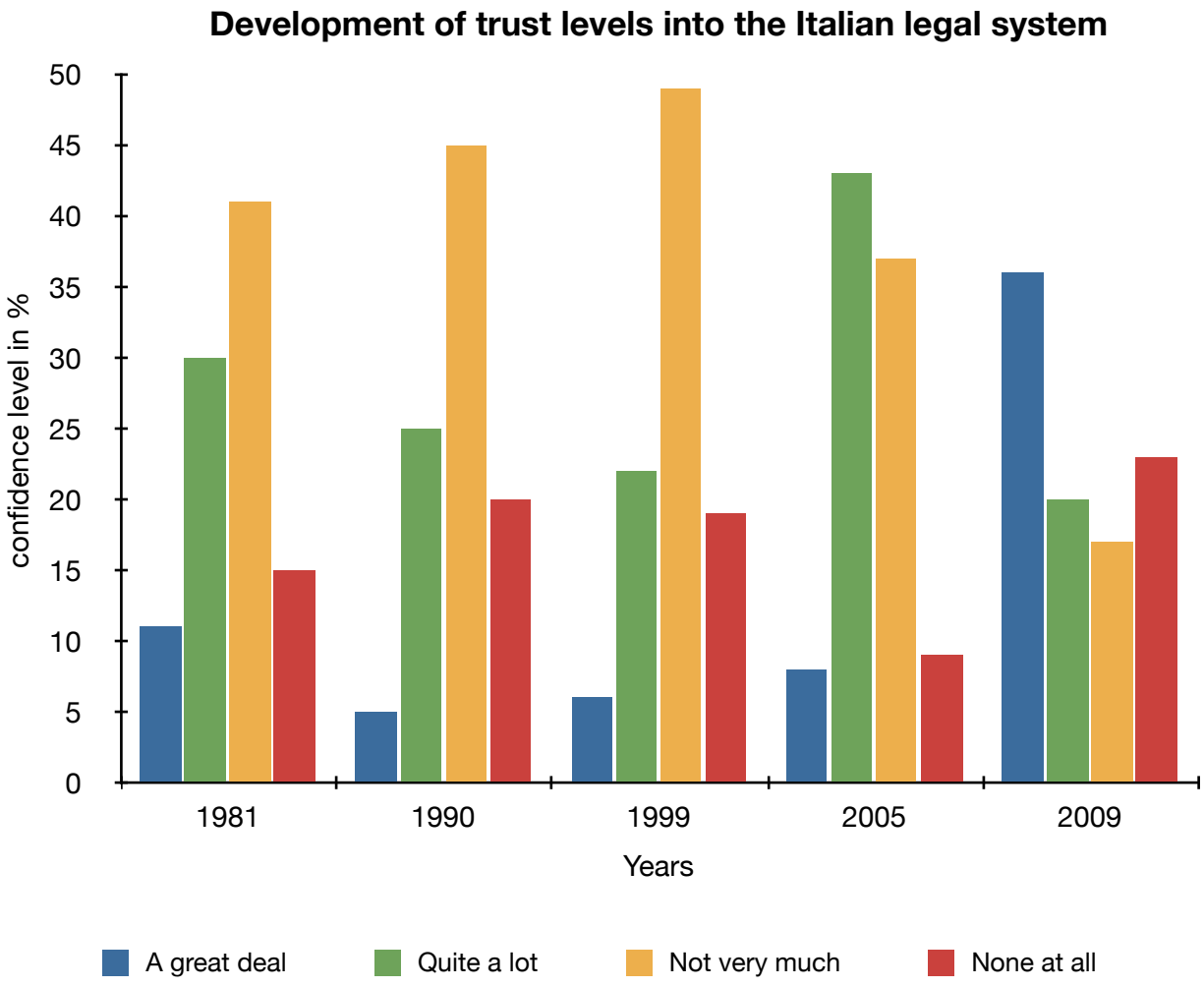


Figure 42: Trust levels into the Italian legal system over the last three decades according to the World Values Service (Service 2009)

4.4.4. Increased reference to extra-national concepts - namely “European” concepts.

The increased importance of supranational factors on courts and court decisions has been observed all over the world (Tate 1995). The statistical analysis of case materials in Germany Austria and Italy support this statement (Figure 43-45).

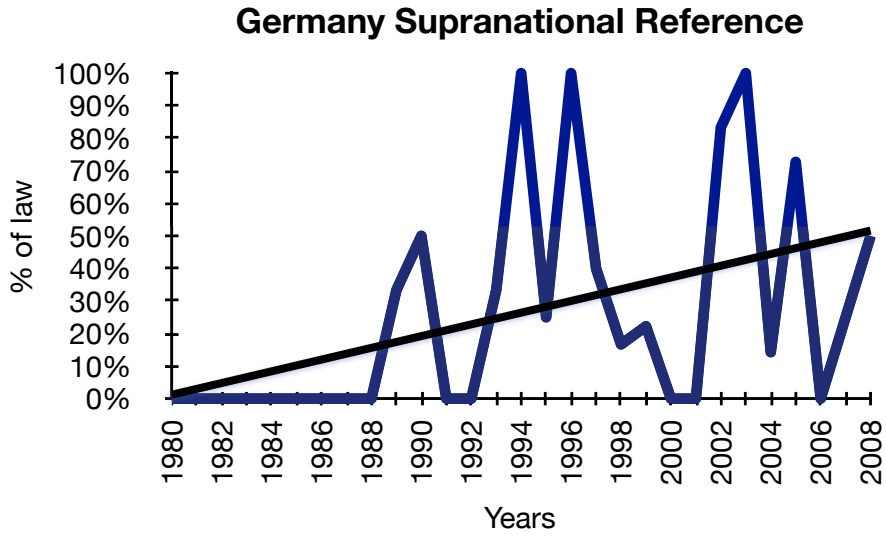


Figure 43: Percentage of laws containing a reference to a supranational source of law in Germany

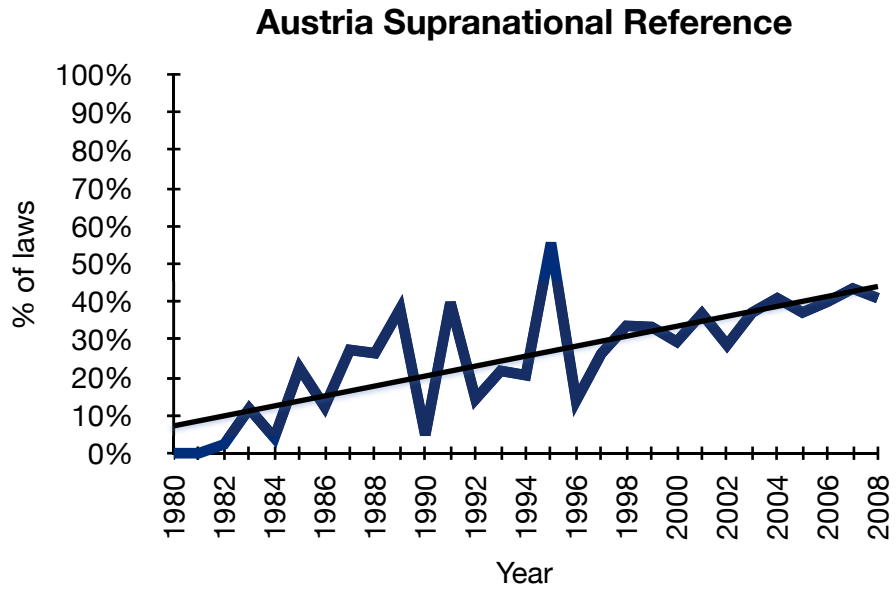


Figure 44: Percentage of laws containing a reference to a supranational source of law in Austria

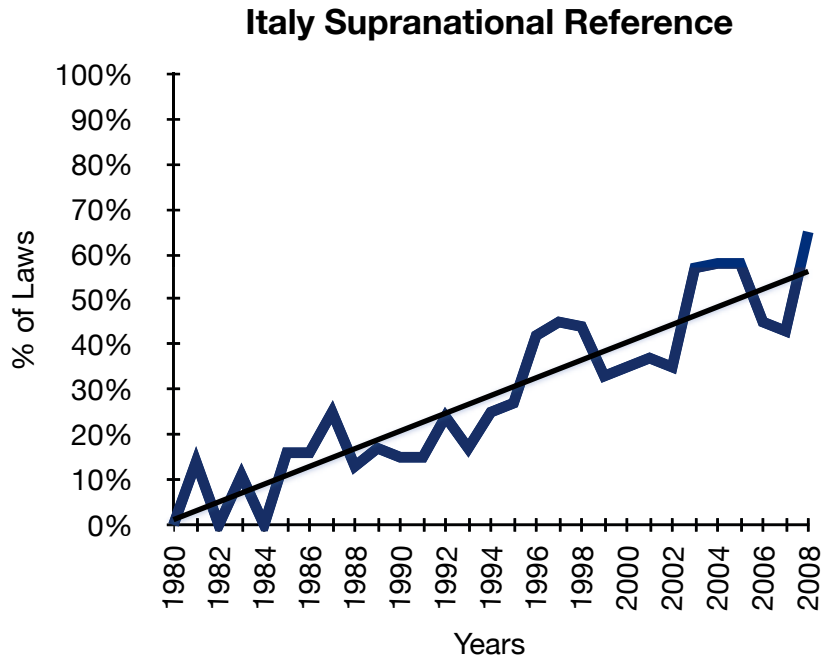


Figure 45: Percentage of laws containing a reference to a supranational source of law in Italy

In comparison to style, membership and trust, supranational reference are on the increase in all three countries. This is not entirely surprising, it has long since been argued that our world is becoming ever more aware of the international arena and courts are no exception. Even the United States Supreme Court is increasingly known to refer to supranational factors, if only in passing and in obiter dicta (Duxbury 1995). Interesting, is the form this supranational reference takes as in over 98% of these cases the reference contains the word “European”.

A first assessment can be drawn relating to application of the common factors identified as an influence on a judge’s decision in the literature on constitutional courts generally and the first explorations of the data from the German, Austrian and Italian constitutional court. The literature on the influence the ruling elite has on the constitutional courts suggests that politically difficult decisions are decided in a way that is in accordance with the ruling elite’s desires. Most of these cases will be found in the category of social and political rights and there is no indication that the courts are shying away from declaring laws unconstitutional. Far from it, in this area there is a clear increase in review over the last three decades. This might not necessarily signify that the hypothesis that courts are more likely to rule with the ruling elite in controversial cases is not applicable. Due to the way the cases are categorised it is very possible that categories such as environment and especially Finance also contain highly controversial cases and that it is therefore impossible to say if courts are more likely to rule

with the interests of the ruling elite in controversial cases. On the other hand it will have to be seen if the courts are overall more likely to consider the desires of the ruling elite. However, there clearly has been a change not only in the decision-making pattern observed on these constitutional courts, and a change that cannot be attributed to simply a change in one category of cases whilst others remain unaffected. The categories give no indication for the reasons for this change. However, the change has developed parallel with a change in the membership of courts, trust levels and a change of the overall style. Moreover, an increasing tendency to refer to the "European" in some format has been observed in the same time period.

The literature has demonstrated that the traditional approach of research into the factors which influence the judge in his or her decision-making concentrate on one variable exclusively. Little research has, as yet, been undertaken which looks at the interconnectedness of various variables to explain a particular observed outcome. From a first investigation of the data relating to the Italian, German and Austrian constitutional court it is not possible to exclude certain influences in their entirety - but it is possible to conclude that some variables seem more likely than others The hypothesis set out in the first Chapter appears a probable from the above analysis. A first look at the data shows that parallel to the increase in review a change in the membership pattern and style of these courts can be identified. At the same time there is more recognition not only of European Community laws and regulations within the texts of the decisions but also of more instances in which the courts refer to European obligations, values and ideals. This is not surprising when taking into account that a more interpretative style, the most likely reason for the longer court cases, is often the result of increased academic membership. Furthermore, more interpretative styles are often characterised through more teleological arguments and discussions of values, obligations and ideals in the abstract. That within the European Union, an area in which each country faces the challenge to include the fast and extensive growth of European legislations into its national system, these debate are often found in conjunction to the word European is hardly surprising. To close the circle it has been suggested in interviews that the increased number of academics appointed to the courts is, at least in part, based on the necessity to increase the representation of specialist knowledge relating to areas in conjunction to the European Union in Germany and Italy.

Although this argument of linking the variables of style, membership and the "European" seems promising, it also seems impetuous to discard the attitudes of judges, the influence of

the ruling elite and levels of public approval. A preference for a more teleological approach can be seen as an attitude of a judge or hide the preference of a judge for one political or moral choice over another. Also courts have been observed to be more interpretative in their style, and more likely to produce high numbers of unconstitutionality rulings, if public levels of trust are high. It therefore still is necessary to test each possible hypothesis in turn before concentrating on finding an explanation for the increased levels of review in the three countries, and the rise in unconstitutionality rulings in Italy and Germany, by creating a more holistic image of the potential influence of a combination of variables.

CHAPTER V

INTENT, PRECEDENT AND THE BLACK LETTER OF THE LAW

This chapter denotes the first of five chapters testing the influence of the previously identified variables on the decisions constitutional court judges take in abstract judicial review. Many lawyers and legal theorists over the years have argued that the only influence on a judge making a decision should be of a legal nature. With other words that only the black letter of the law, precedent of a court of higher standing or the intent of the law-maker should matter in the decision the judge takes. This perspective of the role of a judge is a very commonly held position not only by academics but by the general public. The myth of legalism, the assumption that the judge only applies the tools given to him or her through the law, precedent and law-makers, has wide-ranging consequences for the understanding of constitutional courts[13]. As such, this chapter will first detail the importance of the legal variables for our, and more importantly, the judges understanding of constitutional courts and the actions of judges. To answer the question if a change in the decision-making patterns in abstract review was caused by the factors identified by the legalist school of thought three main questions have to be considered:

1. Has a change in the importance or treatment of the Black Letter of the Law[14] caused higher levels of unconstitutionality rulings in abstract judicial review?
2. Did a change in the pattern of adherence or use of precedent cause more laws to see review under abstract judicial review in front of constitutional courts?
3. Is an increase in the importance allotted to the intent of law-makers a cause for more laws facing review in front of the courts?

Whilst the answer to all these questions will be shown to be inconclusive as to provide a reason for a change in the levels of laws seeing review, indication for a change in the legal

[13] Legalism is not only a prescriptive but also a descriptive theory. Theorists have argued that not only should the judge be only motivated by the Black Letter, Precedent and Intent of the law-maker but that many are. It has been argued that especially those judges sitting on high courts have perfected the technique. See Posner, Richard. 2008. How Judges Think. London: Harvard Univeristy Press.

[14] “Black Letter of the Law” is a term originally only applied to common law denoting legal rules and concepts which are free from doubt and dispute. They are understood as being commonly known and employed without doubt or interpretation in all courts the same way. As most literature on judicial review is based on the US Supreme Court the term is also applied to civil law countries.

culture surrounding the Italian and Austrian court become apparent. These changes indicate that a study into the philosophical attitudes of judges, the European dimension of law as well as a changed attitude towards the political branches might prove a more fruitful source in the search for the cause of the increased levels of review in abstract judicial review proceedings in these countries.

5.1 Particularities of the Research design concerning the legal variables

For the most part research on the importance of the legal factors, the black letter of the law, intent and precedent, has been prescriptive rather than descriptive. Only recently has there been an effort to engage in empirical research into the influence legal factors have on the decision-making process in courts. This is partially due to two arguments: firstly, that one cannot compare legal concepts across legal areas or national borders. Secondly, that the concept of the Black Letter of the Law is not applicable to administrative or public law. Both of these concerns have to be addressed before presenting the empirical evidence relating to Precedent, the Black Letter of the Law and Intent.

The problem of comparability in respect to courts has been encountered and addressed in the literature at various points. Throughout the whole of this thesis a combination of statistical and qualitative analysis will be employed. The textual analysis of the cases will follow the example of Spaeth and Segal's studies of the Supreme Court (1984, 1998, 2002) and concentrate on cases in the area of the environment, social and finance. These cases comprise around 70% of the cases of all three courts. This sets apart this chapter from other chapters in this thesis. Regarding all other variables a comprehensive analysis of all cases is possible but due to the intensity of textual analyses it is difficult to engage in an analysis of all cases. More importantly, following Segal and Spaeth's example, it is undesirable due to reasons of comparability. They argue that it is not possible to compare judicial cases in a textual analysis of Black Letter law across subject lines due to the large difference in nature, procedure and expertise required. They therefore engage in a comparison within certain areas of the jurisprudence of particular courts. Following a close textual analysis of area such as search and seizure, finances, environment and social law they widen their analysis by comparing these areas with each other (Epstein et al. 1998; Jacob et al. 1996; Kritzer 2005; Segal 1984, 1986; Segal and Cover 1989; Segal and Spaeth 1995, 2004). They analysed search and seizure cases by searching the text for mention of "exact word", "intent" and "precedent". In their

2002 book (Segal and Spaeth 2002) they widen the research in terms of precedent, following certain cases and their “progeny”. In both instances they had found to be the influence of the “Black Letter of the Law” not to be sufficient to change the judge's desired decision.

Their research differs from this study of European courts in two major ways: a) they concentrate on concrete review and therefore are only able to test their hypothesis on a small sample of cases. The relative scarceness of material in relation to abstract review allows a more thorough analysis of the cases in Germany Austria and Italy. Likewise, b) they concentrate for the main part on a quantitative analysis of the texts due to the vast number of cases they face in the US. Again, the advantage of the relatively limited number of cases in abstract review allows for a combination of quantitative and qualitative analysis. In general, there have been disputes of the applicability of the theory of the “Black Letter of the Law” to public or administrative law which have to be addressed before considering the empirical evidence.

Secondly, the appropriateness of the application of the concept of the Black Letter of the Law to constitutional or administrative law has been drawn into doubt. The concept of the “Black Letter of the Law” is relatively new and was originally an exclusively American term. It is based on the common practice which denoted that all codified rules and cases were referred to in texts by printing them in black-letter type. A reference to black letter law quickly signified a court referring to a concept it considered as generally known and free from doubt or dispute[15]. In recent years the term has become common in civil law countries as well, mainly through international trade law concepts (Perillo 1994-1995:282). However, the possibility of any “Black Letter Law” concepts in constitutional court jurisdiction has been doubted due to the necessity of interpretation in public law and especially administrative law (Gasaway 2005:27).

This problem is well illustrated regarding the German “dignity clause” in the constitution. Article 1 of the German constitution protects “human dignity” and was meant as a catch-all paragraph to ensure the atrocities of the Third Reich could not be repeated. Early on in court history, this Article was used to guide the decision on social security, family law, life imprisonment and later even environmental cases. In the last decade barely any case is brought

[15]Naglee v. Ingersoll, 7 Pa. 185 (1847),Jackson ex dem Bradford v. Huntington, 30 U.S. 402, 432 (1831)

to the court which does not refer to Article 1 in some form. The wide use of the term has caused the future Vice-president of the constitutional court to caution the need to use the Article less widely (Vosskuhle 2008). The problem lies defining “human dignity” closely enough. Whilst the concept of “human dignity” is considered an accepted and overriding ideal in the German courts the German constitutional court has not been able to define a usable definition that remains without dispute (Kommers 1997). This inability to define clear and indubitable borders to the concept of “dignity” contrasts widely with doctrine of trade law, the classic area of Black letter law. In trade law concepts and terms are more clearly defined simply because they are based on concrete objects rather than ideals (Bhala 1999:849). Nevertheless, the attempt has been made to see in how far it is possible to analyse public law under the same stringent guidelines(Holmes 1998:710). For a legalist all legal concepts are in some form reducible to Black Letter concepts. This means that legal concepts are clear and indubitable for the judge who applies them and can therefore be applied to law across courts within the same jurisdiction (Dworkin 1998). It has been argued that eventually this will mean that in an area of European law the same concepts would also find applicability across nations (Ward 2007). Therefore the jurisprudence of all three courts should develop similarly and use the same principles when coming to the Black Letter of the Law. The text of abstract judicial review cases in Germany, Austria and Italy show similar patterns of interpretation of legal concepts in the text of the decisions which might give credence to this claim.

Having considered both possible objections to the research design regarding comparability and applicability of Black Letter Law it is now possible to turn to the empirical evidence. Concerning comparability it is reasonable to assume that an analysis across legal areas and nations is possible as long as the comparison concentrates not on the material meaning of concepts in particular, but how concepts are employed generally. The question if Black Letter is applicable in administrative or public law is simply a theoretical corollary to the question if Black Letter Law influences the judge’s decision. Therefore, the answer depends very much on the empirical evidence discovered. This thesis can provide a step in this process by considering the empirical evidence if a change in the adherence to Black Letter Law has caused the change in the decision-making patterns in abstract judicial review jurisprudence in Austria, Italy and Germany.

5.2 Empirical Evidence: Black Letter and Precedent

Adherence to Black Letter Law is notoriously difficult to analyse and the attempt has often been considered as futile and impossible (Cross 1997; Howard and Segal 2002; Reynolds and Buttolph Johnson 2008). It is true that there is no way to prove or disprove the amount of interpretation occurring within the head of a judge - however, it is possible to analyse case materials according to the level of interpretation contained. By no means will this be a conclusive answer to the question if judges were able to adhere to the Black Letter of the Law or needed to interpret the legal terms within their judgements. It is still entirely possible that in cases where no evidence of interpretation is contained in the case materials the judges nevertheless employed interpretation in their minds. However, what the instances of interpretation in the case material is evidence for is the existence of a positive attitude towards interpretation at the court. When interpretation is used openly in case materials it shows that the judges see nothing wrong with the necessity to consider possible alternative meanings of certain legal terms. Therefore, whilst a lack of evidence of interpretation in case materials is not evidence for a court's belief in the strict adherence of Black Letter of the Law, the existence of interpretation in case materials cannot be seen as hiding a lack of interpretation.

What is evidence of interpretation in this case? There are distinct differences in the way case materials are phrased. On the one hand there are those cases which state the meaning of laws and terms without discussing possible alternate meanings.

> "**In effect** the regional law of Valle d 'Aoste (6 June 1977, n. 40, art. 4) states **textually**: " The regional laws approved of with the regional Council n. 38, in date 10 February 1976, and n. 332, in date 30 September 1976, are repealed".[16]

In this one page long decision there is no doubt about the meaning of the legislation but the assumption that in effect the textual meaning is clear. Other examples are (133/1986):

> ".... the provisions,..., are **formulated as authoritative**: they convene special authority or permission, as **defined through the textual meaning** of proper use of the words, which exclude the operation..."[17]

[16]In effetti la legge regionale della Valle d'Aosta del 6 giugno 1977, n. 40, all'art. 4 dispone testualmente: "Le leggi regionali approvate con provvedimenti del Consiglio regionale n. 38, in data 10 febbraio 1976, e n. 332, in data 30 settembre 1976, sono abrogate

[17]... che i provvedimenti, ..., sono qualificati dalla legge solo come autorizzativi: sono o "speciali autorizzazioni", o "permessi", così testualmente definiti nel senso proprio del termine, per modo che, ai fini dell'esecuzione delle opere...

And G128/00 the court states:

> "According to §12 No 3 Railway law the federal minister decides on the approval of the yearly budget and the strategic plan as well as the termination of the employment of the members of the executive body. Herein the minister has to pay particular attention to the 1992 railway act."[18]

In these cases the court states the meaning of legal principles, often simply mentioning laws by paragraph numbers.

However, in other case materials the courts engage in interpretation by discussing legal concepts and alternate possible meanings. Here not only the discussion of meaning and definition of norms and phrases is common but also reference to non-codified legal ideals and obligations inherent in the constitutional structure (V90/82 (principles of the rule of law), V35/82). The last decade has seen the Italian court move to the same style of decision with recurrent reference to "national legal ideals" (411/1993), "European/international norms" (412/1993) and "community obligations" (353/2004). This frequent mention of legal principles, which arise from the mere structure of the state or the philosophical underpinnings of democracy have always been a common feature of the German constitutional court decisions.

> "The **national legal ideal** of comparable conditions of living is only then threatened when the conditions of living are...."[19] (BvF 1/01)

There is no explicit federal "legal ideal" of comparable living standards expressly contained within the constitution. Rather it is a construct based on the jurisprudence of the constitutional court, which sees it contained within the ideal of the Federal Republic of Germany. Unsurprisingly, this different, more interpretative, style also finds expression in the length of decisions. Those decisions with little interpretation are noticeably shorter than those with interpretation. It is therefore possible to give a statistical overview of all cases concerning level of interpretation and a more detailed qualitative analysis of approximately 70% of cases by concentrating on environment, financial and social cases.

---

[18]Gemäß §12 Abs3 BundesbahnG entscheidet überdies die Bundesministerin über die Genehmigung des Jahresabschlusses und des Lageberichtes sowie über die Entlastung der Mitglieder des Vorstandes und des Aufsichtsrates, wobei insbesondere auf die Bestimmungen des BundesbahnG 1992 Bedacht zu nehmen ist

[19]Das bundesstaatliche Rechtsgut gleichwertiger Lebensverhältnisse ist vielmehr erst dann bedroht und der Bund erst dann zum Eingreifen ermächtigt, wenn sich die Lebensverhältnisse

5.2.1 The development of interpretation in case materials based on length of decisions

When looking at the three countries the development of cases seems to have little in common. The length of German cases has remained steady over time with an average of 14 pages.[20] Italian cases have increased steadily over the last 30 years whilst Austrian cases have decreased in length.

	Germany-1990	Germany 1990 -	Italy -1990	Italy 1990-	Austria -1990	Austria 1990-
Length (in average calculated per year)	14	14 (one outlier 98)	3.5	7	15	5

Table 1: Levels of interpretation measured in length of decision calculated per year and decade

When looking at the decisions in more detail this development becomes even more obvious. The shortest text of decisions in Germany is five pages whilst Austrian cases tend to be only two pages long today. The length of the Austrian texts however seems to have steadily decreased over the last two decades. Those Austrian texts pertaining to cases in the early and mid 1980s are substantially longer, on average 7 pages long. This development can be found in reverse in Italy. Here the length of texts has steadily increased over time to reach an average of 7 throughout the last five years. This is still only half the length of the average length of German cases. The German constitutional court is known for its academic style in writing decisions, which might explain the more discursive and lengthy style of German court decisions. However, the length of the decisions is based not only on the regular use of academic works and commentaries within the texts but also on the discussion relating to the legal provisions and interpretation. The length of the decision is therefore an indication for the style of the text written. It is therefore interesting to consider if this change in length in Italy and Austria indicates that the style of their decisions closer or further away from the style of German decisions.

[20] calculated per year

5.2.2 The development of interpretation on case materials based on style

The style of the German court's decisions have always been considered more interpretative and academic than other courts (Kommers 1997; Landfried 1984). Examples for this can be found spanning the last three decades. In a German case brought to the court by members of one of the Länder parliaments in 2000 the legitimacy of an environmental protection law was doubted. Here the court spends considerable time defining property (page 15 of BvK1/00). More important however is its reasoning of the necessity of applying concepts of property in the name of the rule of law. The Länder government had argued that Article 14 of the basic law, the guarantee of property, is not applicable to a Länder government as that institution only has to follow the rules within the Land constitution. That particular constitution did not contain a provision for the sanctity of property, which would allow the Land to buy a certain area for the purpose of environmental protection. The constitutional court replied:

> "Article 14 of the basic law does not apply directly to the cases in front of Land constitutional courts. The Land constitution also does not contain any provisions, which would make the basic law directly applicable as basic laws of the Land constitution. However there exists an institutional guarantee which makes property in an individual and subjective to an objective part of the whole. This institutional guarantee does also apply to the Land constitution. A Land, which as part of the federal republic has to follow the institutional guarantee in the interest of the rule of law (Rechtsstaatsprinzip)... Parts of the constitutional order within the Land are those "institutions" which are guaranteed by the basic law. In accordance with this analysis the judicature as well as literature have accepted non-codified components as part of the constitutional whole such as institutional guarantee of the existence of parties, the civil service and local self-administration."[21]

[21]Das Grundrecht des Art. 14 GG sei zwar, wie auch die anderen Grundrechte des Grundgesetzes, nicht Maßstab des Landesverfassungsrechtsstreits; auch kenne die Landesverfassung keine Transformationsnorm, die Grundrechte des Grundgesetzes zu solchen der Landesverfassung mache. Es bestehe aber eine Institutsgarantie, welche die individuell-subjektive (grundrechtliche) Eigentumsfreiheit auf objektiv-struktureller Seite zu einem Gesamtkomplex freiheitlicher Verbürgung ergänze. Diese Institutsgarantie müsse auch Element der Landesverfassung sein. Dies lasse sich schon aus der Einordnung Schleswig-Holsteins in den staatlichen "Gesamtstandard" der Bundesrepublik Deutschland gemäß Art. 1 LV herleiten... Zur verfassungsmäßigen Ordnung in den Ländern im Sinne von Art. 28 Abs. 1 Satz 1 GG zählten die vom Grundgesetz garantierten "Einrichtungen". Entsprechend hätten Judikatur und Literatur als ungeschriebene Bestandteile der Landesverfassungen etwa die institutionelle Garantie der Mitwirkung politischer Parteien, die kommunale Selbstverwaltung oder ein nach hergebrachten Grundsätzen gestaltetes Berufsbeamtentum anerkannt.

So here the German constitutional court argues for non-codified philosophical components to have constitutional value. Furthermore, certain rights are conferred on the people and governmental agencies simply because they are institutions within a state observing the rule of law, a Rechtsstaat. This is a form of interpretation of the word of the law as there is no clear and explicit definition of the term contained in any of the legal texts – even if the rule of law and its protection is contained in the German constitution.

Other cases from 1998, 1994 and 1983 also lend themselves as examples of forms of interpretation can also be seen when looking at 2BvF1/94 where the court spends four of the ten pages of the decision detailing what an administrative directive is. For this purpose it quotes material from the plenary discussions in parliament as well as academic work.

> "A failure to follow the referencing guidelines contravenes an "indispensable element of the democratic rule of law" (compare to Bartelsperger, Zur Konkretisierung verfassungsrechtlicher Strukturprinzipien, VerwArch 58 (1967), S. 249ff. (270). Such a failure would lead to the directive being declared void (compare Wilke in: v. Mangoldt/Klein, Bonner Grundgesetz, 2. Aufl. 1969, Art 80 Anm. Xl. 2 d; Nierhaus, a.a.O., Rn328 "formelle Wirksamkeitsvoraussetzung"; Bauer in: Dreier Hrsg., Grundgesetz, Kommentar, Bd. 2 1998, Art. 80 Rn. 43; Ossenbühl in: HStR III, § 64 Rn. 65)."[22] (BvF3/90)

The German court's style in its decisions is therefore very discursive and interpretative, making wide use of materials outside the law such as academic writings and plenary protocols.

The German's court use of direct quotes from laws is limited. In most instances it quotes the law being questioned in full or large parts in the beginning but thereafter only refers to the laws used by number (e.g. Paragraph 18 Abs.1 Nr.2 BVerfGG (2BvF1/98)). These numbers are often followed by quotes of terms out of the text, which then are elaborated upon, such as in case 2BvF1/98, where the court discusses the meaning of the term "in the same matter" which is contained in the article mentioned before. Therefore the style of the cases is very discursive

[22]Eine Mißachtung des Zitiergebots verletzt ein "unerläßliches Element des demokratischen Rechtsstaates" (vgl. Bartlsperger, Zur Konkretisierung verfassungsrechtlicher Strukturprinzipien, VerwArch 58 <1967>, S. 249 ff. <270>). Ein solcher Mangel führt deshalb zur Nichtigkeit der Verordnung (vgl. Wilke in: v. Mangoldt/Klein, Bonner Grundgesetz, 2. Aufl. 1969, Art. 80 Anm. XI. 2 d; Nierhaus, a.a.O., Rn. 328 <"formelle Wirksamkeitsvoraussetzung">; Bauer in: Dreier <Hrsg.>, Grundgesetz, Kommentar, Bd. 2 1998, Art. 80 Rn. 43; Ossenbühl in: HStR III, § 64 Rn. 65).

consistently over the whole thirty years. Many sources have commented that the increase in interpretation in constitutional court decisions to be a common development across the world in the 1990s (Jackson and Tate 1992; Koopmans 2003; Rogowski and Gawron 2002; Stone 1992). In case of the German court this clearly is a practice consistently applied even before the 1990s.

The Austrian and Italian courts' style is consistent over the last three decades. Similarities can however be found in both countries. Firstly, the length of decision seems to vary over time. Italian decisions have increased in length reaching an average of close to the German cases. Austrian cases on the other hand have decreased in length. The early 1980s see decisions in length similar to those of the German court. This might be due to the court regularly quoting whole Articles of law as well as debating phrases and legal concepts contained within paragraphs and codicils. In this time period there are also extensive debates on the meaning of terms. In like manner, in respect to property, the Austrian court writes in 1982 (G35/81):

> "In this case the doubts of the court relate to the possibility that an undifferentiated inclusion of public property into the agricultural order, to which the constitutional law relating to farmland applies, will cause disproportionate preferential treatment towards some members of the society which is against the principle of equality under the rule of law. If this applies in certain instance then the non-conformity of these situations with the constitutional norm of equality are mirrored back onto the whole law..."

Here the Austrian constitutional court uses the rule of law, or the Rechtsstaatsprinzip, as a reason within its decision. The style is discursive; setting out the reasons not related directly to the strict word of the law in detail and discussing them. This is very similar to the German court and further similarities can be found in the regular and extensive use of its own precedent, even more than is the case in Germany, to justify its actions.

However, the style of the Austrian constitutional court has changed over time. Cases from the 1990s and 2000s are shorter and less discursive. The number of references to past cases has decreased by half and laws are mainly quoted as numbers rather than discussing them within the text of the decision.

> "The constitutional court does not doubt that the environment is a fragile good and that its protection is a desirable concern. Its protection is contained in the duties of the state (see VfSlg 11294/1987 with reference to BGB1 491/1984)." (G312/97)

It is not discussed why environmental protection is part of the duties of the law, as seen above, but rather there is an assumption that through reference to prior cases and laws it undoubtedly is. In general, whilst there is extensive reference to the numbers denoting laws, there is little to no discussion of meaning. Thus a clear assumption underlies the application of the laws, which is that there is only one interpretation. The same can be observed in the Italian cases from the 1980s. Also little doubt of a single interpretation of the law becomes visible in the text.

> "Article 1 of law 47, opening paragraph, allows that "the regions emanate norms controlling matters of urban planning and building and decide administrative endorsements in conformity with heading 1,2 and 3 of this law"; while "it is in each case a matter of discharge" - as arranged in the third codicil - "the special competencies of the regions of special statute and the autonomous regions of Trent and Bolzano" 179/1987

A further example can be found in another case from the same period:

> "Decree Number 384 of 1987, and the connected law 470 of 1987, has its cause in the exceptional atmospheric adversities under which Northern and Central Italy came to suffer in summer 1987 for several weeks. Such events, when determined as grave emergencies, force the state institutions to compete with local powers through employment of a wide range of technical and financial resources" 966/1986

Parts of the laws are used within the text, not to have their meaning discussed but rather to state facts, which have no interpretation. Therefore the cases taken from Italy in the 1980s and Austria since the 1990s are very different stylistically from the German cases. The text shows little interpretation, little doubt on the single meaning of the word of the law and fewer precedents quoted.

That is not to say that there is no interpretation of laws in Austria and Italy at that time, simply that this interpretation is not contained clearly within the text of the decision. This is also characterised by stating the intent of the law as seen below:

> "The law under examination was not intended, in fact, in any way to determine the categories of prisoners through their work relationships, thus to affect or condition prison life and the conditions of atonement through punishment, but wanted simply to offer prison administration the possibility to engage the prisoners in socially useful employment." (2/1990)

Here there is no debate what the law could mean or why a certain interpretation has been undertaken but simply an assumption that this is the only possible way.

However, when looking at cases taken from the 1980s in Austria or late 1990s in Italy interpretation contained within the text is clearly visible. Here not only the discussion of meaning and definition of norms and phrases is common but also reference to non-codified legal ideals and obligations inherent in the constitutional structure (V90/82 (principles of the rule of law), V35/82). The last decade has seen the Italian court move to the same style of decision with recurrent reference to "national legal ideals" (411/1993), "European/ international norms" (412/1993) and "community obligations" (353/2004). These frequent mention of legal principles, which arise from the mere structure of the state or the philosophical underpinnings of democracy have always been a common feature of the German constitutional court decisions.

Stylistically a definite trend can therefore be identified. The text of decisions shows increasing empirical evidence of interpretation in Italy, decreasing in Austria and is stable across the decades in Germany. The overall development across the last three decades therefore indicates that Austria develops conversely to Italy and Germany when comparing the style. The statistical evidence concerning length of court materials supports this development.

5.3 Is there a correlation between the level of interpretation in the case materials and the increased levels of review in abstract judicial review?

On first impression the development of levels of interpretation in the case materials seems to have little in common with the increasing trend of review in all three countries. This stylistic development however is more promising as an explanation when looking at the levels unconstitutionality rulings. These, as opposed to partial unconstitutionality rulings, are increasing in Italy and Germany whilst they are on the decrease in Austria. So the stylistic

development in Austria is mirrored by the development of unconstitutionality rulings. However, just because the development displays a similar trend in the case of Italy and Austria, the same development cannot be found in Germany. And it does not explain why more interpretation, and consequently longer decision texts, would be a result of increased levels of unconstitutionality rulings in Italy whilst the reverse causes lower levels of unconstitutionality in Austria. There is no significant link between the decision rendered and the style of the judgment. When running a Spearman's Rho correlation coefficient analysis between the level of interpretation (x) and the decision rendered (y) in the case no statistical correlation is apparent (Spearman's Rho measure of association 0.01).

The Spearman Correlation Coefficient is:

$$0.01 = r_s=1- ((6(\Sigma D^2)/(N(N^2- 1))$$

Formula 1: Where 6 is a constant within the formula (it is always used in the formula), D refers to the difference between a subject's ranking of the two variables (e.g. x = level of interpretation = 5 and y = decision rendered = 2; D = 3), and N is the number of subjects. This correlation is significant at a 99% confidence level (Field 2005).

The developmental trends identified hold over the whole range of cases analysed and all the decisions rendered. They are neither stronger nor weaker in any of the legal areas or decisions rendered. It is therefore possible to conclude that there is no statistical relation between a case seeing review and a style that is more interpretative.

5.4 The development of the use of precedent

The same developmental trends hold for the number of precedents used in the decisions. Just as with the level of interpretation the average number of precedent used remains stable in Germany, increases in Italy and decreases in Austria. A steady average of 1.3 per page in Germany, increase in Italy from 0.6 to 1 and decrease from 2.3 to 1 in Austria. So here as well Austria and Italy have an opposing development trend which brings them closer to the steady levels in Germany.

	Germany - 1990	Germany 1990 -	Italy -1990s	Italy 1990s-	Austria - 1990s	Austria 1990s-
Precedent average per page	1.3	1.3	0.6	1	2.3	1

Table 2: Number of precedent on average calculated per year and per decade

It has been argued that a judge uses precedent as an aid to fill in those areas in which the black letter of the law is lacking in direction. Therefore, higher levels of interpretation, as were found to exist in Germany and Italy in the previous section, should lead to higher numbers of precedent being referred to. Statistically this proves to be true. There is a strong correlation between the levels of interpretation (x) and the number of times precedent is used (y) in the decision texts (Spearman's 0.65).

The Spearman Correlation Coefficient is:

$$0.655 = r_s = 1 - ((6(\Sigma D^2)/(N(N^2 - 1))$$

Formula 2: Where 6 is a constant within the formula (it is always used in the formula), D refers to the difference between a subject's ranking of the two variables (e.g. x = level of interpretation = 5 and y = number of precedent = 7; D = - 2), and N is the number of subjects. This correlation is significant at a 99% confidence level (Field 2005).

However, just as there is no correlation between the level of interpretation and the decision rendered, so there is no correlation between the decision rendered and the number of precedent used. So whilst the development of unconstitutionality rulings in Austria, Germany and Italy co-vary with the levels of interpretation and precedent their development measured on a case to case basis is not enough to be linked. To be exact the R^2 value (0.13) indicates that only 13% of the variation in the dependent variable (a law seeing review) is explained by the number of precedent and the level of interpretation in the decision. This indicates that there is another factor, an antecedent variable, which influences all three, the level of interpretation, precedent and the level of review.

A hint to the identity of the antecedent variable in question has to be found outside the statistics. A possible source are the differing and changing socio-political circumstances surrounding the courts, such as the image of the judge. Moreover, it has been argued that

courts are dependent on the political branches as they have no enforcement methods when it comes to abstract judicial review (Comella 2009:14). A court cannot force the political institutions to follow its judgement and consequently is dependent on external factors forcing compliance. The perceived loss of legitimacy by political institutions if they act against the court is one of these external forces (Epstein et al. 2001). Another is the educational socialisation of the judges into certain patterns of behaviour (Gibson 1983). If either of these, the public image of the judge, pressures by political institutions or philosophical attitudes of judges, is able to explain the change in style and the change in the decision-making patterns the missing link is established. It therefore needs to be considered now in what way, or if, any of the three variables are linked to either style or/and decision-making patterns. The following chapters will then consider if this link is evidence of covariance. With other words, two questions need to be ascertained:

1. Can a change in the public image of the judge, pressures by the political institutions or changes in the philosophical attitudes of judges cause a change in the decision-making patterns of the courts in abstract norm review? A question considered below
2. Does a change in the public image of the judge, pressures by the political institutions or changes in the philosophical attitudes of judges cause a change in the decision-making patterns of the courts in abstract norm review? Which will be discussed in the next three chapters.

5.5 The public image of the judge as antecedent variable

However, the public image of the judge is not only important in its consideration as an antecedent variable. To evaluate, analyse and understand not only the style in which decisions are written but also the underlying messages within interviews, the expectation the interviewee has of his role has to be understood. Moreover, an interviewee's perception of his own role is not only informed by society's perception of said role but he or she also reinforces this social perception by attempting to conform to it. "To understand what people are saying, interviewers learn to hear the taken-for-granted assumptions of the interviewees and try hard to understand the experiences that have shaped these assumptions". (Rubin and Rubin 1995:9). Knowledge of the societal image of the judge is therefore essential to understand the way

cases are presented and the way judges act when making a decision. This societal image is bound closely to the legal variables, as only they allow for the assumption of the judge as an impartial arbiter, as we have seen it to be presented in the United States. What is the situation in Europe?

Like their US colleagues the German, Austrian and Italian judges face regular accusations of taking the constitution into their own hands, but the areas in which they are accused of this differ extensively from country to country. German judges are rarely accused of ignoring the law in their decisions but rather of giving extra-judicial advice even when not asked for an it. They are criticised for having a high media presence. On the other hand, the Austrian and the Italian court rarely give interviews but regularly is accused by the political branches of "taking the law into their own hands". However there are notable differences between Europe and the United States. The perception of the judge is in Europe, as in the US, the perception of an impartial arbiter simply applying the tools (the legal variables, identified above as Black Letter Law, Precedent and Intent) given to him. However, in some of the European countries this image includes the assumption that judges through their training are allowed to apply their expertise more widely.

It has been argued that a constitutional court is only able to openly interpret law when its legitimacy is not in question (Epstein et al. 2001:119). The argument of the public image of a judge as antecedent variable goes as follows:

Premise: A court can only be chastised by political institutions

Premise: Political institutions want to preserve legitimacy in the eyes of the public

Premise: Legitimacy in the eye of the public is higher with courts than it is with political institutions

Premise: If political institutions chastise courts they loose legitimacy

Conclusion: The court cannot be chastised (as long as its perceived legitimacy is higher than that of the political institutions)

The perception of what a judge can and cannot legitimately do is therefore a framework for the answers a judge can give in media interviews, as well as for the style the decisions are written in. For the judge to preserve legitimacy and therefore the efficiency of the court he or she has to be seen as acting within the social perception of what a judge is. Within that perception he or she is safe from political criticism that will cost him or the court public legitimacy. A change in the public image of what is legitimate for the court to do or decide on can therefore create reasonable leeway for interpretation for courts.

In all three countries the perception of the judge is primarily of a legal entity. However, when considering the political identity of constitutional court judges two distinct perceptions become apparent. The German judge is seen as applying the law faithfully in his or her deliberations of cases but also as a necessary and qualified source for legal interpretation. In the German mind it is obvious that there is a certain leeway in the interpretation of laws but that the education and experience of the judge make him or her well qualified to engage in this interpretation. It is only when the judge seems to offer advice in policy areas not related to current cases that criticism is offered.

In spring 2008 this was demonstrated vividly with public discussions and accusations between the Minister for the Interior Wolfgang Schäuble and the constitutional court judges, especially Chief Justice Papier. Wolfgang Schäuble did not criticise the court for diverging from the law in the decisions it rendered but rather from giving advice and hints to politicians in interviews. He said:

> "There is a limit to all the areas which are protected by basic rights. Where these limits lie and how one separates the areas is for the legislature to decide. I understand that many constitutional court judges would love to give advice but they have no legitimisation for it."[23]

This criticism is typical for the current debate in Germany but not for the Austrian and Italian debates.

[23]Alle grundrechtlich geschützten Bereiche enden irgendwo. Wo diese Grenzen sind, wie man die gegensätzlichen Interessen abgrenzt, ist Sache
Gesetzgebers. Ich verstehe, dass manche Verfassungsrichter gern Ratschläge geben würden. Dazu sind sie aber nicht demokratisch legitimiert. Welt Online http://www.welt.de/politik/article1571640/Schaeuble_greift_Verfassungsrichter_scharf_an.html

Whilst the German judges are more likely to be criticised for their extra judicial remarks the Austrian and the Italian court are criticised for behaving like a political institution in their decision-making. Notable here are the criticisms by the Austrian politician Jörg Haider (Wolf 2006) and the Italian Prime Minister Silvio Berlusconi. Haider repeatedly accused the constitutional court of adjusting law to its political ideals when making a decision. In 2006 when debating a new law concerning linguistic standardisation Haider accused the court of being a politicised power in relation to a concrete pending case:

> "I am sure that the politicised powers in the court will find a way to turn the decision against Kärnten (standardisation) " (Wolf 2006)

Berlusconi attacked the Italian court with the same accusation, even if it was after a decision was made rather than before, when the court declared a law on criminal immunity for politicians as unconstitutional.

Therefore the perception of the judge in Germany is one of a legitimate law-maker as long as he or she is concentrated on a case in front of the court. The Anglo-American image of the judge as purely applying the tools given to him or her by the law without room for much interpretation is therefore not prevalent in Germany. In Italy and Austria the situation seems to be different. Here the image of the judge is very Anglo-American based on the assumption that in their work the Black Letter of the Law gives them clear and indubitably right instructions as to how to decide a case. The accusation of law-making is therefore of serious importance in these two countries, more so than in Germany, and all the data taken needs to be evaluated under this point of view.

Partially the difference in the perceptions of the courts can be attributed to the access the court has to the public and therefore the opportunity it has to influence the public image of the court. The German court, through its media office, has always had the opportunity to engage with the public and has always made good use of this opportunity. This is not the case in either Austria and Italy. Interviews with Austrian and Italian judges are rarer than interviews with German judges. Whilst it is possible in any year to find various interviews with German judges published in German newspapers the number of interviews from Austrian and Italian judges are less frequent. In a decade an Austrian or Italian judge might only agree once to give an

"Ich bin mir sicher, dass die politisierenden Kräfte im VfGH wieder mit irgendeinem Trick eine Entscheidung gegen Kärnten herbeiführen" (Wolff 2006)

interview to the media (or more likely be asked only once). In these few interviews the Austrian representation of their judges is more legalist than the German representation. In Italy accusations of the wrong interpretation of the law are common: judges are accused of interpreting the law to fit their political ideals or those of the government. However, there is no indication for extreme legalism such as displayed by Ronald Dworkin (Dworkin 1977, 1998; Whittington 2000) in either country, not even Austria. A certain leeway in the application of law is presupposed, just as limits to the freedom of interpretation are considered as commonly understood, and any discussion of the adherence to single possible meanings of legal concepts is absent. The Austrian court has only had a media representative since 2001 whilst the Italian court still has none. The Austrian and the Italian court are therefore regularly criticised for acting politically, i.e. interpreting the law to fit their political desires, rather than legally, without ever having the possibility to react to the accusations. They are criticised for interpreting the law to fit their political desires. This emphasises the legalist understanding of the position the court in both countries. Interestingly, these criticisms in Austria are often followed by demands that the "law should return" (Wolf 2006) to its original state. Therefore implying that the general understanding is that there is a way to apply the law without interpreting it but that the court had moved away from this position wilfully ignoring the Black Letter of the Law for their own interpretation. Clearly in the development of the Austrian court something has happened which has changed the court from applying the law to making the law in the eyes of the country. Only since the late 1980s the Austrian court appears to face accusations of judicial activism. Moreover, these accusations seem to lessen in frequency since their high point in the early 1990s (Gamper 2000). The Italian court on the other hand has only been facing accusations of judicial activism within the last few years, a circumstance virtually unknown prior to 2001. Again this hints at a change in the view of judges, or in the behaviour of judges. The question remains to be seen if this change in Austria and Italy is the cause for the increased levels of review in abstract judicial review or if another factor, as yet undiscovered, has caused the change in attitudes alongside a change in review levels.

However, if this change in attitudes towards the court is the reason for the changed unconstitutionality levels in abstract review then the unchanged attitude in Germany presents a problem. The view of the constitutional court in Germany seems to always have been less legalistic. In 1964 Georg August Zinn, then Prime Minister but before that a serving member

of the constitutional council designing the constitutional court, declared the constitutional court a success because it decides whether laws are according to the word and ***spirit*** of the constitution (Ziegler 1964). Through decisions on referenda for nuclear electricity and public television stations the court "has shown the federal and state governments and parliaments the constitutional limits of their powers and has given the numerous regulations of the basic law real substance"[24] (Ziegler 1964). So already in the 1950s, shortly after its foundation, the constitutional court was seen as adhering to the spirit of the law and giving the law substance rather than simply applying law and taking substance from it. Additionally, the court was praised for these actions. The discussion itself has therefore a different flavour. In interpretation of the constitution the judges are, in the opinion of the public and politicians, obliged to also protect the spirit of the constitution. The criticism is levelled at the extra-judicial activities. Schäuble and others suggest restraint regarding to suggestions made in the media by constitutional court judges on how politicians should and can phrase future legislation. Even among judges there seems to be division on this topic. Justice Hassemer, in an interview with the Frankfurter Allgemeine, supported the calls for restraint when giving suggestions to politicians. Legalism therefore seems to take a different form in Germany. The necessity of interpretation of the law when applying it to a case is not in doubt. What is in doubt, and always has been, is the right of a judge to be vocal about possible future topics in front of the court? Therefore, whilst the Italian and Austrian attitudes towards their judges has changed towards a clear display of legalism in the Anglo-American sense no such view can be identified in Germany either today or in the past.

There is a second component to the public image of the judges - the way they themselves present their position in the media. They regularly face questions of judicial activism and their answers in format as well as content are enlightening in the face of reconstructing the image being formed. After a controversial ruling Professor Adamovich, then president of the Austrian Constitutional Court, was asked to comment on accusations of the court putting itself "above the law". This is one of the very few interviews given by an Austrian judge and characteristically to interviews in all three countries. The answer of Professor Adamovich concentrated on specific topics, in this case the appointment procedures of judges. However, it

[24]" …den Regierungen und Parlamenten von Bund und Ländern die verfassungsrechtlichen Grenzen ihrer Befugnisse verdeutlicht und zahlreichen Bestimmungen des Grundgesetzes faßbare Konturen verliehen."

is clearly visible that he is aware of the accusations of political influence on decisions when he says:

> "Where there is a constitutional court there is also a certain political influence. This is not necessarily bad – as long as the judges are highly qualified and follow their conscience enough so that they do not decide in the interest of the political parties but rather how the law dictates and they what they see as right" [25] (Klenk 2002)

This is a typical example. The Austrian judge is emphasising the fact that even if there is the potential political influence the fact that judges are bound by their conscience to follow the law negates any outside influence. The format of interviews with constitutional court judges is very similar across all three countries. Rarely do questions relate to the overarching jurisprudence of the courts. Interviews are given related to concrete cases and specific instances of law.

From the evidence above it is possible to extrapolate three main assumptions relevant when considering the empirical data relating to the legal variables: The adherence to the Black Letter of the Law, precedent and intent of the law-maker.

1. The judges in Austria and Italy face a more "legalistic" public opinion than those in Germany. As a result their answers to interview questions but also their style in writing decisions will have to display less open interpretation than those in Germany.
2. The Austrian and Italian constitutional court seem both to only have been criticised for judicial activism recently. This leads to the conclusion that either a change in public perception or a change in the behaviour of courts has occurred.
3. The public perception of the judge and the role of the court has remained stable in Germany over time. As a result it is not possible to see the change in perception as a cause for changed review levels in abstract judicial review in itself in all three countries. Rather, the review levels and the perception of the judges have to be influenced by a third factor.

The importance for the testing of the empirical evidence relating to the legalistic variables, the Black Letter of the Law, precedent and intent of the law-maker are therefore twofold: they are predicted to be more prominent in Austria and Italy, as the image of the judge is more strongly linked to these variables and German judges are predicted to be more open when speaking

[25] Überall, wo es ein Verfassungsgericht gibt, gibt es einen gewissen politischen Einfluss. Das ist nicht weiter schlimm, wenn die Richter qualifiziert sind und genug Gewissen haben, nicht so zu entscheiden, wie es die Partei verlangt, sondern so, wie sie es für Recht und richtig halten

about interpretation of legal rules. However, the empirical evidence presented above does not fit this image wholeheartedly. A model which postulates the change of review levels to be caused by a changing image of the judge in Germany, cannot explain sufficiently the change in review levels, as there is no change corresponding change in the public image of the court over the last three decades. The Black Letter and precedent seem to be stronger in Austria than in Germany, which would fit the model, however Italy should here develop like Austria. Contrary to this expectation Italy develops converse to Austria. Therefore it can be concluded that the changing image of the judge is not sufficient to explain the increased levels of review nor the style of the decisions.

5.6 Political institutions as antecedent variable

A change in the attitudes of the political institutions towards the constitutional courts seems to be more promising as antecedent variable. The political surrounding of the court has changed extensively in Austria and to a lesser extent in Italy. The jurisprudence of the Austrian constitutional court underwent two changes in the last thirty years, one in the late 1970s and one mid 1990s (Gamper 2007; Gamper and Palermo 2009:48). Prior to the 1970s the decisions rendered by the Austrian constitutional court displayed little to no interpretation and avoided political controversy. An article was simply stated as having one meaning without explanation or recognition of a different possible meaning. Very like the Austrian constitutional court is phrasing its decisions now. A change of this attitude towards cases was notable at the Austrian constitutional court in the late 1970s and early 1980s. Austria's political system was and is based on the constitutional rule that the constitutional court can only interpret and annul laws that are not of constitutional ranking. Therefore all controversial or difficult laws, such as many tax or budgetary laws, were passed as being of constitutional rank. The prohibition to concern themselves with laws of constitutional rank was accepted by the constitutional court until the late 1970s/early 1980s when the judges began to argue for a distinction between laws simply passed as constitutional and those with truly constitutional character (Gamper 2007). The early eighties then resulted in various laws with constitutional rank being annulled by the court nonetheless. This caused the first change in attitudes towards the court. It had now moved from a very inactive and uncontroversial court to one engaged in the political process through judicial review. The court defended its right to annul even laws with constitutional rank until the mid 1990s when a case on linguistic harmonisation resulted in a public outcry and protest against the court and especially its president (Gamper and Palermo 2009:49). As a

result the more restrained elements at the court gained in influence, supported by the appointment of various advocates of restraint to the bench to replace retiring judges (A1,2,4). As a result the court has reverted to the pre 1980s style and attitude, at least in part. Its style of judgement changed back to the simple statement of the meaning of laws rather than a discussion thereof.

In the Austrian case it seems therefore to be an external factor, the insistence of the political institutions to deny the court its jurisdiction, which led to the court annulling more laws. This seems to support the assumption that no matter the importance of the legal variables of precedent, Black Letter of the Law or intent, the courts cannot act against the will of the political institutions consistently. This is supported by interview data when one of the judges tries to explain the decision making process:

> "The most important influence is precedent...Even academic writings are without importance for the decision ... but one cannot decide something that is politically and economically impracticable" (A 3)[26]
>
> "It is the fear of the constitutional court judge that he oversteps his boundaries and creates an "accident". That, with his decision, he creates with his judgment an unwanted, not practicable situation and these are the moments when considerations of practicability come to the fore. A situation in which one has to say: the constitution points in this direction, but if we rule in this way then something will break down." (G1)

According to this explanation the change in review levels would be due to the change in political attitude towards the courts and the courts reactions to these changes. However the socio-political surroundings of the courts has only changed significantly in the case of Austria. In Germany and Italy no such development can be identified clearly.

The use of political intent within the case materials however does increase in all three countries, just as the levels of review do. The German constitutional court has always referred to the intent of parliament in its case materials and made open use of evidence collected through parliamentary committees. However, especially in the last decade the court has

[26] Das wichtigste ist die vergangene Rechtssprechung... Es nimmt noch nicht einmal die Akademische Literatur einfluss...aber man kann ja nichts entscheiden das nicht politisch und wirschaftlich praktikabel ist.

become more critical in its stance towards parliament. In various instances it reminded parliament that the constitutional court was not founded to resolve parliamentary debates (Koopmans 2003). This is evidenced by the increasing numbers of cases which contain detailed analysis of the parliamentary proceedings and statements relating to a case. In Italy and Austria these debates on the intent of the law-makers were virtually unheard of in the 1980s but have since become common place. However, just as with precedent and Black Letter there seems to be no statistical evidence for a link between a case containing reference to the intent of law-makers and possibility of this case seeing review.

So, contained within the case materials the evidence of political institutions as antecedent variables is mixed. Relating a change in political circumstances, seen as the attitudes political institutions display towards the court, is not successful in explaining the change in levels of review. However, the increasing reference to intent of law-makers suggests that political institutions might be somehow linked to the change in levels of review. This is a hypothesis that will be considered in Chapter VII.

5.7 Philosophical Attitudes of Judges as antecedent variable

When assuming it is not the change in political attitudes that triggers the change in review levels another possible explanation needs to be found. This alternate explanation is that a change in attitudes of judges might be influencing the levels in interpretation in case materials, the image of judges, and the levels of review. As one of the Austrian judges mentioned:

> "There is no influence aside from the constitutional and legal foundation of the decision....but there are instances in which a law is annulled when one has to admit that whilst parliament decided differently the constitutional court judges annul it as it contravenes the philosophical foundations of the state"[27]

However, what the philosophical foundations of the state are depends very much on the personal understandings of these judges (A1)[28].

---

[27] Es gibt bei uns keinen Einfluss, eis gibt nur eine verfassungsrechtliche und rechtliche Grundlage...aber dann gibt es schon Faelle in denen was aufgehoben wird wo man schon sagen muss: das Parlament hat das Gesetz so entschieden aber da sagt der verfassungsrichter dies wiederspricht den tragenden Grundsätzen unseres Staates.

[28] Ich habe lange geglaubt es seien nur die unterschiedlichen Rechtsauffassungen der Richter die sich zentral auswirken würden.

Ulrich K. Preuss (1994) argues that due to the philosophical underpinnings of European legal thought it is the cultural background of the judges not their political beliefs which influences their decision. However, one question remains: what is the cultural background? One German judge (G4) argued that it is the influence of the "academic fathers" of individual judges, which can be clearly identified within the arguments. In his view it is therefore held that the arguments of judges are based on the philosophical underpinnings of their schools of thought. Judges from the Italian and Austrian court deny the direct influence of this. In both countries the opinion is voiced that people might come to the court with an identifiable school of thought but are socialised into the "school of the constitutional court", as an Italian judge calls it (I3) within a year. Austrian and Italian judges also have connected the initial schools of thoughts influencing judging with the professional backgrounds of the judges. As appointments are made from academia, lawyers, high court judges, magistrates and solicitors, different schools of thought can be identified depending on where the judge originated.

It has been argued that the make-up of courts influences the style a court displays in its decisions. Also a high number of academics on the court correlates with more interpretative styles in case materials (de Burca and Weiler 2001; Kommers 2006; Kommers 1997). Therefore philosophical attitudes of judges are the most promising avenue of research as antecedent variable. The influence of the philosophical attitudes on the style of decisions seems to be unchallenged, however, there is a distinct lack of empirical data relating to it possible influence on the outcome of decisions. It therefore needs to be ascertained if the increased levels of review in Austria, Italy and Germany are defacto caused by a change in judicial philosophical or political attitudes. This will be discussed in the next Chapter.

5.8 Conclusion

This chapter has considered if a change in the levels of interpretation, the style or the use of precedent has caused more laws to be reviewed under abstract review proceedings. Two distinct styles of decisions can be identified over the last three decades in Austria, Italy and Germany. Decisions in Italy are getting longer, emphasising the different meanings of concepts and provisions possible and explaining the rationale the court had to choose one interpretation over another. There are regular references to academic sources clarifying

debates and arguments. This is a style of decision the German constitutional court always has displayed in the format of its decisions. “Democratic ideals” and “international obligations” are discussed and referenced alongside paragraphs and codicils. The Austrian constitutional court followed this style of decision in the early 1980s as well but underwent a change in the 1990s towards a different style. From this time onwards the style of decision is shorter, stating the meaning of terms and concepts rather than discussing alternative interpretations. The use of academic sources decreases and references to legal concepts such as “European ideals”, “rule of law” or “democratic obligations” are virtually unknown since the early 1990s.

Clearly, there is a change in the style of the decisions. Additionally, this change seems to display covariance with the development of unconstitutionality rulings in Austria and Italy, if not in Germany. Statistical tests however suggest that there is no direct link. The change in style and the change in decision-making patterns in abstract judicial review are statistically independent. It therefore seems most likely that there is a third, as yet unidentified, factor causing the change in style of decisions and the change in decision-making patterns in all three countries. Two possibilities present themselves as to the identity of this third factor. The more interpretative and explanatory style of the European Court of Justice has been attributed to the Judges being mainly recruited from academia and bringing with them a different philosophical attitude to the bench. So a change in philosophical attitudes at the courts might one of the reason for a change in the style and decision pattern. A further cause might be found in literature on the Eastern European constitutional courts. An increase in partial unconstitutionality rulings, and a converse decrease in norms being declared unconstitutional in their entirety, has been attributed to the court reacting to criticism from the political institutions in Russia and Hungary (Epstein et al. 2001; Zagrebelsky 2005). It therefore remains to be seen if it can be ascertained that the change in decision-making patterns in abstract review can be linked to changes in philosophical attitudes at the court or the influence political considerations play in decisions.

CHAPTER VI

POLITICAL AND PHILOSOPHICAL ATTITUDES OF THE JUDGES AS CAUSES FOR THE CHANGES IN THE DECISION-MAKING PATTERN

Precedent, Intent and Black Letter of the Law, the so called legal variables, failed statistically to explain the increased levels of review in Austria, Italy or Germany. Moreover, the analyses have shown that the legal variables are also affected by change. The change in the legal variables, whilst seeming to be independent from the change in decision-making patterns in abstract norm review, might nevertheless be connected through a third variable. One possible factor which has pertinence on both the style of the decisions and the decision-making pattern in abstract review are the philosophical and political attitudes of the judges. Literature on the United States Supreme Court suggest the political attitudes of judges to be the main influence on the decision taken by courts (Epstein et al. 1998; Murphy and Pritchett 1961; Pritchett 1948; Schubert 1965, 1970; Segal and Cover 1989; Segal et al. 1995; Segal and Spaeth 1995, 2004; Segal and Spaeth 2002). This variable has often been dismissed out of hand in Europe as the appointment procedures of most European courts are seen to isolate the courts from the political allegiances of the single judge.(Kommers 2006; Kommers 1997; Volcansek 1990, 1994; Volcansek 2000). In Europe, it has been argued it is more likely to be the philosophical background of the judges which influences their decision-making rather than their political affiliation (Preuss 1991, 2003). As seen in the previous chapter, with the German Constitutional Court and the European Court of Justice, it has often been hypothesised that the high percentage of academics are the reason for the more interpretative style (Alter 2001; de Burca and Weiler 2001; Preuss 1999). The argument here is that a high number of academics at the court influences the philosophical attitudes of the court. However, neither the potential influence of political nor of philosophical attitudes on the outcomes of court cases has been tested empirically. A conclusive answer whether the political allegiances or philosophical attitudes of a judge influence the outcome of a case remains elusive. The purpose of this chapter is therefore to test if the political or philosophical allegiances of judges have changed over the last 30 years and if this change has led to the increased levels of review observed in abstract judicial review. In order to do this the make-up of the court will be discussed through

their appointment procedures before testing the influence of philosophical and political attitudes on the decision-making patterns in the three countries.

6.1 Appointment Procedures

An empirical analysis of a change in political or philosophical attitudes can only be measured through a change of court membership. This assumes that the attitudes of judges remain stable throughout their tenure. It is impossible to account for changes in philosophical attitudes within the minds of judges. It is only possible to observe a correlation between the change in membership of the court and the increased levels of review. Clearly the appointment procedures of the courts are an important consideration in this and have to be compared first.

Constitutional theory argues that in Europe the appointment procedures of judges to the different courts ensure that their personal political opinions and leanings have no influence on the outcome of the cases. This is why scholars on constitutional courts have argued that it is not necessary to worry about the influence of political opinions of judges on the outcome of cases here in Europe (Garlicki 2007; Gillman 2002). This would make this chapter superfluous and no result would be expected from the data collected. However, the historical assumption that European courts are insulated from politics through its appointment procedures is a chimera that does not even stand up to scrutiny of the appointment procedures - at least not in Austria and Germany. Consideration of the provisions of appointment highlights how many avenues are left open in which the courts can be dominated by one or the other party. The necessity to consider the physical evidence provided by the statistical data to answer the question if one or more groups of plaintiffs with the same party affiliation are preferred in the judgements the court passes therefore remains. If one party can be identified then it is possible to attempt to link this preference to the political attitudes of the judges sitting on the court at the time.

When the European courts were founded, both after 1945 and 1989, the necessity to isolate the courts from the political opinions of single judges was a concern in the design of the court systems. In Germany, Austria and Italy this was the case even more so than in many other countries. All previously licensed judges had been, per force, members of the fascist parties and it would have been impossible to remove all from office (Sachs 2004). It was therefore

decided to prosecute those against whom there was evidence of misconduct and crimes against humanity and to replace those on the highest levels, where possible, with known opponents of the previous regimes. Whereas when a decision had to be made of how to regulate appointment to the constitutional court it was desired to ensure the future neutrality of this court. The incorporation of a constitutional court into the political system was a condition the allies insisted on, and its purpose was to ensure that no single party would be able to dominate the political system and change its basic constitutional form (Haase and Keller 1989:218). The constitutional court was therefore a safeguard and as such it needed to be independent of the parties in government.

However, a constitutional court decides on the constitutionality, and therefore applicability, of democratic laws without itself being a democratically elected body. This creates a vacuum of democratic accountability (Gamper 2007:175). Two solutions can be, and were, imagined and discussed. On the one hand it would be possible to make the position of a constitutional court judge an elected one. On the other hand appointment could be given to those who were elected. The first case was dismissed out of hand. A democratic elected constitutional court would be too populist (Schaal 2004). The German and Italian people had proven that they would vote for exactly those ideas the court was supposed to ensure would never become expressed again by a political body. Giving parliament the right to appoint the members of the court on the other hand seemed counter-intuitive if the court's mandate was to protect the constitution against other political bodies, among which parliament has to be counted. The three countries chose different paths to ensure that any one party would not dominate the appointees to the constitutional court.

Austria returned to the constitutional system that was in place before it became part of the German Reich. Hans Kelsen, one of the most eminent scholars of modern day constitutional theory was one of the authors of the Austrian constitution of 1920 and a member of the first constitutional court. He had seen the dangers of political influence on the court through appointment procedures and had argued for a system of mixed appointments long before it became a recognised necessity for courts all over the world (Kelsen 1920). There are 12 regular members, along with the president and vice-president, on the Austrian constitutional court. Half of the judges are appointed by both houses of parliament to equal parts. The other half, as well as the President and Vice-president, are appointed by the national government

(Ohlinger 2007:442). In comparison to most other European states this still allows the government a comparatively large influence on the appointment procedure. However, this impression is tempered by the constitutional conditions the government has to fulfil when choosing its candidates. The government has to choose among current judges, academics employed at a university or civil servants. This was supposed to ensure that the government could not choose politicians. Nevertheless it has been argued that, in comparison to Italy and Germany, the Austrian court has an appointment procedure more open to potential political influence (Funk 2007:325).

Italy has often been considered the country with the most apolitical court appointment procedure (Funk 2007:325). Of its 15 judges one third is chosen by the High Courts unanimously. The houses of parliament choose one-third in joint session with a two-thirds majority. The President of the Republic chooses one-third. Traditionally the President of the Republic bases his choice of whom to appoint on the ideal of a balanced court (Pederzoli 2008:106). As in Austria and Germany the appointed judges have to be qualified to practice on the highest judicial level and as in Germany many are academics as well as constitutional court judges. It is clear that in Italy it is not the national government but the President of the Republic that has the most influence on the appointment procedure as a single unit. However, just like the German president the office of the Italian President is considered as ceremonial more than political. In both countries the role of the president is understood as neutral and divorced from party politics, at least after he is elected into office. Often they are not even party members. It is therefore less in their interest to give any one party more or less influence when appointing the judges in Italy.

The German court's appointment procedures are formally the least diversified. The two houses of parliament appoint all judges. The sixteen judges on the constitutional court are separated into two senates with distinct duties. Each house of parliament appoints half of each senate with a two-thirds majority. A committee consistent of representatives of all parties in parliament suggests a candidate and the Houses vote on this choice. Since the foundation of the court this process has been governed by the convention that the main parties in government, the Christian Democrats, Social Democrats, Liberals, and the Greens, take turns in appointing judges. Therefore the electoral committee would propose a choice supported by the party whose turn it was to appoint and parliament would rubber stamp this choice. In 2008

this process failed on the refusal of parliament to accept the proposed choice due to the personal opinions of the proposed judge regarding torture. So for the first time a choice of constitutional court judge in Germany has become politicised. It is notable that the agreement between the parties has not broken down as the final choice was supported by the same party proposing the rejected judge. The debate has emphasised the need to formalise the arrangement and possibly introduce safeguards to ensure that appointment does not become politicised as it has in the United States. Until then the German constitutional court represents in its appointments the main parties in parliament, those in government and in opposition.

These appointment procedures have led to many scholars claiming that in European courts, in comparison to the United States Supreme Court, the political attitudes of single judges do not influence the decision. This is due to the wide range of parties and backgrounds which are represented at the courts, leading to the influence of the single judge, and therefore the party, is diluted. However, an analysis of the appointment procedures in all three countries leave room for doubt. In Austria, the government appoints half the court, as well as the President and the Vice-president. In all but four years over the last thirty years this meant that in reality the two main parties governing in a grand coalition appointed half the court. The parties in government are the same parties, which dominate the Houses of Parliament and therefore the other half of the appointments to the constitutional court. Clearly the scope of one party or two to appoint a court that will have a majority of its choices on it is not only a danger but a given. In Germany, it is only an informal convention that ensures that all major parties are present on the court. Much of the discussion concerned with the appointment of new judges to the constitutional court occurs in committee and is therefore not transparent and open to scrutiny. The Italian court is the most diverse in its appointment procedures. Whereas theoretically the President is free to appoint in a way that will give predominance towards one group or another on the court.

It therefore is evident that constitutional courts in Europe are not above the potential political influence of political parties through the judges appointed to the court. It also is evident that this connection needs to be researched to question if the political attitudes of judges cause the increased levels of review. Very little empirical evidence exists in the literature that indicates a systematic test of data relating to the results of cases in relation to the identity of the plaintiffs or the origin of laws. This is especially pertinent concerning abstract judicial review as only

political bodies can ask the court for a ruling. Abstract review can therefore easily be used for the purpose of party politics. However, the potential gain/loss scenario for a plaintiff needs to be considered here. As the court rules on a law, a decision to declare a law unconstitutional will be a perceived “loss” for the party who passed the law. However, if a party approaches the court asking for the review of a case and is not successful it as well incurs a perceived “loss”. Turning to the court is therefore not a cost free endeavour. It needs to be ascertained if any party, group, or institution receives preferential treatment in front of the court. If one of the bodies or any of the parties involved in the selection process receive preferential treatment then it is possible to assume that the appointment process has resulted in a court which allows the political opinions of the judges to influence the end decision.

It is therefore clear that the appointment procedures in all three countries allow for drastic changes in membership of the courts in relation to profession, political attitudes and education background. The question remains however, if such a change has occurred over the last three decades and if this change has caused increased levels of review.

6.2 Philosophical Attitudes

How would philosophical attitudes find expression in a measurable way through the membership of the court. Two ways have been suggested: professional background and academic background. Ulrich K. Preuss (1994) argues that due to the philosophical underpinnings of European legal thought it is the cultural and academic background of the judges − not their political beliefs − which influences their decision. This view is also represented in the interviews with the judges. One German judge (G4) argues that it is the influence of the “academic fathers” of individual judges, which can be clearly identified within the arguments. In his view the arguments of judges are based on the philosophical underpinnings of their schools of thought. Judges from the Italian and Austrian court are more critical of this view. In both countries the opinion is voiced that judges might come to the court with an identifiable school of thought but are socialised into the “school of the constitutional court”, as an Italian judge calls it (I3) within a year. Austrian and Italian judges have connected the philosophical attitudes influencing judging with the professional backgrounds of the judges instead. As appointments are made from academia, lawyers, high court judges, magistrates and solicitors, different schools of thought can be identified depending on where

the judge came from. In Austria and Italy the high court judges dominate and their way of approaching rulings is said to predominantly influence any judge after a year (A3). In Germany, it is the academics who dominate (G2). The professional background of the judges has been linked to different styles of the way decisions are being phrased. Therefore the professional background appears most promising as a possible cause for the increased levels of review. It also has resulted in a different style of how the judgments are expressed (de Burca 2001, Hassemer 2004)

6.2.1 Professional Background

The German constitutional court especially has always had the reputation of being highly influenced by the high number of academics in its membership (Kommers 1997; Landfried 1984). It has been argued that courts with higher numbers of academics use a more interpretative style in their decisions and the German court along with the European Court of Justice is generally cited as an example. The image this presents is deceptive, the current and past membership of the German Constitutional Court has never had more than half of the membership recruited from academia (Table 1).

Judge	Background	Univeristy	International connection
Papier	Academic	Muenchen	X
Hohmann Dennhardt	Judge		
Bryde	Academic	Muenchen	X
Gaier	Judge		
Eichberger	Judge		
Schluckeberger	Judge		
Kirchhof	Academic	Tuebingen	X
Masing	Academic	Freiburg, Bielefeld, Heidelberg	X
Vosskuhle	Academic	Berlin, Freiburg	
Bross	Judge/Academic	Muenchen, Freiburg	X

Judge	Background	Univeristy	International connection
Osterloh	Academic	Frankfurt	
Fabio	Academic	Muenster, Trier, Muenchen, Bonn	
Mellinghof	Judge		
Luebbe-Wolff	Academic	Bielefeldt	X
Gerhardt	Judge		
Landau	Judge		

Table 1: Membership of the German Constitutional Court based on profession and academic links

The current Italian court has a higher number of academics within its members at just over two-thirds (Table 3). This is promising as an explanation as it might explain the increasingly interpretative style displayed by the Italian Court. The Austrian Constitutional Court, whose style is displaying the least evidence of interpretation has the smallest number of academics in its membership (Table 2).

Judge	Background	University	International connection
Holzinger	Judge	Graz	
Bierlein	Judge	Wien	
Haller	Academic	Wien	
Lass	Judge	Innsbruck	
Liehr	Judge	Wien	
Ruppe	Academic	Graz	
Oberndorfer	Academic	Linz	
Mueller	Judge	Wien	
Brechthold-Ostermann	Judge	Wien	
Kahr	Judge	Graz	X

Judge	Background	University	International connection
Schnizer	Academic	Salzburg	X
Hoertenhuber	Judge	Linz	
Gahleitner	Judge	Salzburg	X
Grabenwartner	Academic	Wien	

Table 2: Judges on the Austrian Constitutional Court based on profession and academic links

Judge	Background	University	International connection
De Siervo	Academic	Firenze	
Maddalena	Judge/Academic	Napoli,Pavia, Tuscia	X
Finocchiaro	Judge		
Quaranta	Judge		
Gallo	Academic	Rome	
Mazzella	Avvocato Generale		
Silvestri	Academic	Messina	
Cassese	Academic	Pisa, Rome, Naples	X
Saulle	Academic	Rome, Napoli	X
Tesauro	Academic	Rome, Napoli	X
Napolitano	Consiglio di Stato		
Frigo	Avocato/Academic	Brescia	
Criscuolo	Judge		
Grossi	Academic	Firenze	X
Amirante	Judge		

Table 3: Membership of the Italian Constitutional Court according to profession and academic association

The hypothesis that higher numbers of academics in the membership of the courts leads to greater evidence of interpretation in the case materials holds when applied to the current membership of the German, Austrian and Italian courts. Even when comparing the development of evidence of interpretation and development of membership of academics on the courts the hypothesis holds. Over the last three decades the membership of the Austrian constitutional court has changed away from over 50% academics to less than a third (Figure 2 and Appendix 6 for a tabular representation of membership by profession/appointment). The Italian Constitutional Court on the other hand has increased its membership of academics from half to two thirds (Figure 1).

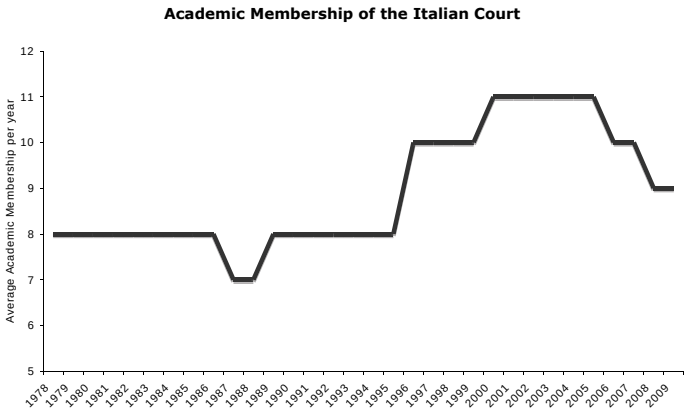


Figure 1: Membership of Academics (Italian Constitutional Court)

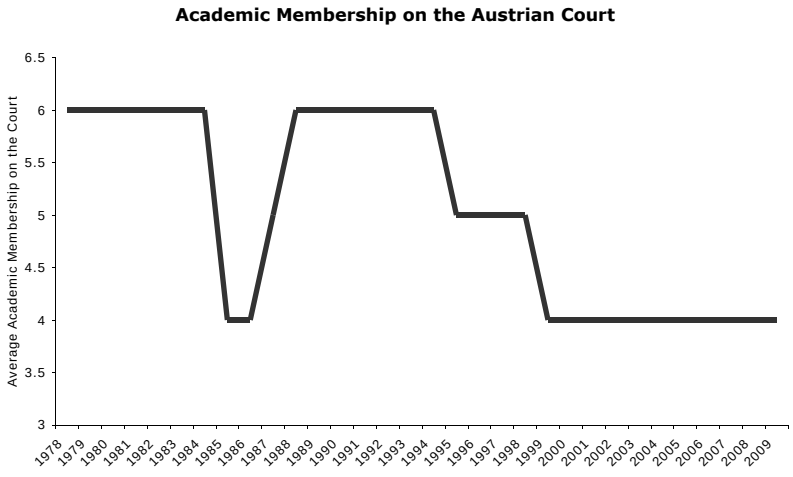


Figure 2: Membership of Academics Austrian Constitutional Court

A higher number of academics in the membership of the court therefore coincides with more evidence of interpretation in the texts of decisions rendered. However, there is no statistical correlation between the ratio of academics in the membership of the court and the decision rendered in the case (Spearman Rho = 0.023 where 0 = no correlation and 1 = perfect correlation) (McLean et al. 1993:98).

The Spearman Rho Correlation Coefficient is:

$$0.023 = r_s=1- ((6(\Sigma D^2)/(N(N^2- 1))$$

Equation 1: Where 6 is a constant within the formula (it is always used in the formula), D refers to the difference between a subject's ranking of the two variables (e.g. x = academics in the membership of the court = 5 and y = decision rendered = 2; D = 3), and N is the number of subjects. This correlation is significant at a 95% confidence level (Field 2005).

The high number of academics and the evidence of interpretation in the case materials therefore co-vary but are not related. In both the Austrian and Italian court there are some untypical years in which neither less evidence of interpretation nor lower levels of review coincides with lower levels of academics (Austria 1983-1985; Italy 1995-1997). Table 1, 2, 3, which shows the academic and professional background of judges, also shows that up to a third of the judges in the current courts have a connection to international institutions, be that a university or an international court. In the 1980s a judge with an international affiliation was rare. This might also be a factor contributing to the change in style. Chapter VII will discuss the possible influence an international connection might have on the decision-making pattern. The possible influence it has on style seems puzzling. The European Court of Justice, known as a court with a highly interpretative and lengthy style, is attributed to have developed this following the example of the German Constitutional Court (Alter 2001; Kommers 1997). Therefore it seems that the international connection comes secondary to the style.

6.2.2 Academic Background

It is harder even to empirically test the influence the "academic fathers" have on their "academic children". In interviews, it has been suggested that universities have different philosophical epistemologies which they impart on their students (G4, A5, A3, I3). As a result domination of one epistemology over others on the court would influence the view of law at

the court and therefore the style of the case materials. Table 1,2,3 all show the domination of one or two universities over others in the current membership of the court. The University of Rome and the University of Vienna in Italy and Austria and the University of Munich and the University of Freiburg in Germany are all recruiting grounds for the national constitutional courts. However, this pattern is constant over time. These universities dominate the membership of the court over the last three decades (Appendix 6). This is not surprising as all universities are among those with the highest reputation in their respective national educational system. Also statistically no correlation can be found between any of the universities and a case seeing review.

$$\text{Munich } 0.03 = \varphi = (X^2/n)^{1/2}$$

$$\text{Freiburg } 0.1 = \varphi = (X^2/n)^{1/2}$$

$$\text{Rome } 0.07 = \varphi = (X^2/n)^{1/2}$$

$$\text{Vienna } 0.12 = \varphi = (X^2/n)^{1/2}$$

Equation 2: Phi cofficient where X^2 = to Chi Square and n = population. Chi Square denotes the statistical significance of the correlation by calculating the degree in which the observations could occur at random. For the derivation of the equation see Appendix 4.

It therefore can be concluded that philosophical attitudes, either measured through professional or academic background, are not the cause, or at least the single cause for the increased levels of review.

6.3 Political Attitudes

If it is not the philosophical attitudes of judges which causes the increased levels of review it is still possible for their political attitudes to be the cause. This is a common argument in respect to the US Supreme Court but has never empirically been tested in Europe (Epstein et al. 1998; Epstein and Segal 2007; Howard and Segal 2004; Segal 1984, 1986; Segal 1997, 1998; Segal and Cover 1989; Segal et al. 1995; Segal and Spaeth 1995, 1996, 2004; Segal et al. 1996; Segal and Spaeth 2002; Spaeth and Segal 2001a; Spaeth and Segal 2001b).

The argument goes as follows:

1. Political institutions appoint the judges and will only appoint those that agree with their political stances.

2. Therefore the judge has a political and party identity and this is visible in the way he or she votes in court.
3. If it is therefore held that one party dominates appointments to the court then this party is able to have the court vote its way.

The appointment procedures in Europe have been cited as making it impossible for courts to be dominated by one political party (Koopmans 2003). However, the consideration of the appointment procedures above have shown whilst it is hard for one political party to dominate political attitudes can find their expression not only in the treatment of cases brought by a single party, but also:

1. plaintiffs dominated by a party or
2. by the treatment of regions dominated by one party,
3. the origin of a law under consideration.

6.3.1 The "origin of cases based on plaintiffs" as cause for increased "levels of review"

Different institutions and actors have different political associations. If judges are more likely to favour one party over another then this should find expression in their treatment of these institutions and actors. To answer the question if the identity of the plaintiff causes the increased levels of review, it is therefore possible to analyse if any institution or actor is more likely to be successful in front of the court. Furthermore if the plaintiff's party affiliation matters to the decision-making pattern. To this purpose, the identity of plaintiffs, political and institutional, and the frequency with which they approach the court needs to be ascertained. They are indicators for the perceived chances the actors and institutions see in winning their case. No plaintiff would approach the court and invest in considerable funds without, at least in his/her estimation, an expectation of success. If therefore one group of those approaching the court perceives their chances of success, of gain[29], to be systematically unfavourable then

[29]It has been argued that the "gain" a challenger receives from a court case might simply be the possibility to have shown the electorate that the plaintiff did take action against a certain law (Meny 1998:320). If that is the motivation for a court case, and if using the court for this form of party politics is on the rise, then the increased ratios of unconstitutionality rulings might simply be due to more plaintiffs using the court in this fashion. This will be discussed in detail in the next chapter where the question if the court favours the ruling elite in its decisions is considered. However, it has to be said here, that there is a financial loss incurred through a court case and, possibly more importantly, the loss of legitimacy if a case is decided against the plaintiff. Surveys have shown that the constitutional courts in all three countries are exceptionally high in public regard, approximately 80% of people trust the court more than any other political institution, and that loosing in front of the court results in a loss of public regard for the plaintiffs (Gibson, Caldeira 1998). It therefore seems unlikely that political institutions would regularly approach the court simply to show their protest in respect to a certain law. However, it is not unheard off. The German abortion cases are a point in case. The government of the time, Christian Democrat, proposed a very liberal abortion law to parliament, which passed the law. The Christian Democratic party led by the government ministers then approached the court under abstract review and saw the law overturned into a more restrictive one. This is an instance in which a party used the court to ensure that all its electorate, liberals and conservatives alike, are satisfied with its actions (Landfried 1994). Nevertheless this is an exception and, in general, it can be assumed that a plaintiff only approaches the court in an expectation of real gain, the review of a law.

this group will approach the court less often. This might in turn account for a change in the ratios of laws seeing review in Austria, Italy and Germany. It could be the case that an institution or actor, which has been systematically disadvantaged in front of the court, simply no longer turns to the court under abstract review.

When looking at the distribution of plaintiffs in the last thirty years (Table 4) Austria and Germany seem remarkably similar. The number of cases reaching the Italian court are far higher than those in the other two courts. This is mainly due to the high levels of cases brought through regional/national government conflict.

	Austria	Italy	Germany
Government	2	518	2
Region	38	622	76
Regional Senate	178	N/A	N/A
MPs	37	N/A	41

Table 4: Distribution of plaintiffs (numbers)

In both Germany and Austria the percentage of laws challenged by the government are negligible (2/3%) whilst there is a substantial percentage (45%) of cases originate with the government in Italy. In all three countries approximately half to two thirds of cases originate on the regional level (Figure 1).

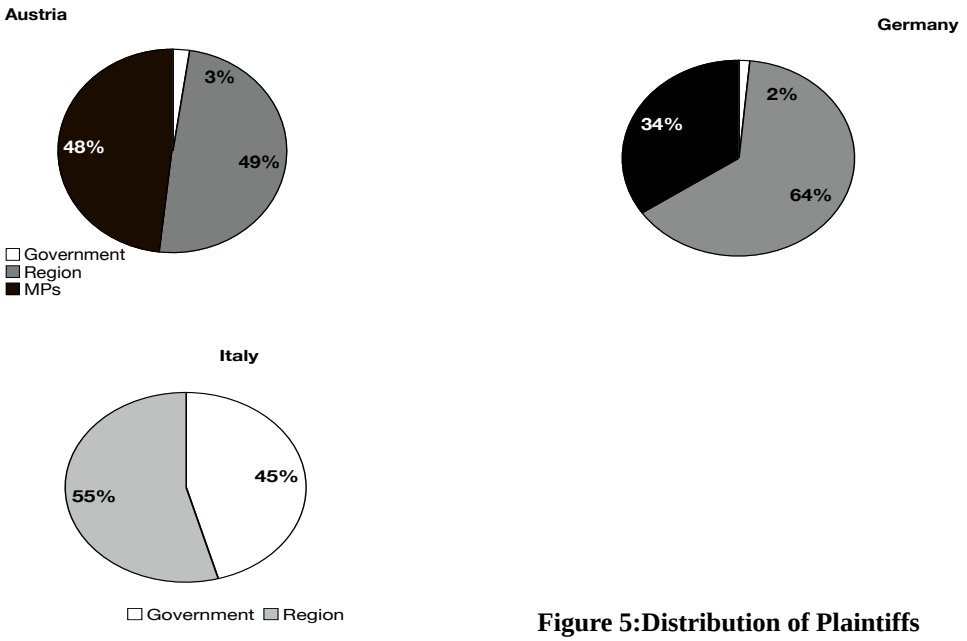


Figure 5:Distribution of Plaintiffs

Only in Italy has there been a change in the ratio of cases brought by any of the institutions or actors. In the late 1990s the number of cases brought by and against the regions has increased, most likely due to the constitutional reform. A change in the constitutional bases increases the number of cases in abstract review for a time. All actors involved in the legislative process need to reassert the status quo through litigation clearing up all grey areas in the process (I1, (Jackson and Tate 1992)). In both Germany and Austria the ratio of plaintiffs is stable over the last thirty years. It therefore appears from this data that no group of plaintiffs in Italy is more, or less, likely to approach the court. In Germany and Austria the government is least likely to approach the court. However, in both of these countries Members of Parliament compose between 34% (Germany) and 48% (Austria) of the abstract review cases. Many of these, as will be seen below, are not initiated by the opposition parties but often by the party in government. Therefore it is possible to argue that the lack of governmental plaintiffs is based on finding an alternative means of challenging laws in front of the court through members of parliament.

Tests of statistical significance between the "identity of the plaintiff" and the "likelihood of success" present a slightly different image and differ across the three countries widely (for exact formula see Appendix 7). In Austria and Italy there is a positive correlation (Table 5) between a law seeing review and the identity of the plaintiff. The Chi Square test indicates the significance of a relationship between two variables at a level below 0.05 and is an expression of certainty that the result of the data distribution could not have been achieved by chance. A Chi Square value of 0.05 or below signifies that there is a 95% or above certainty that a variation in one variable is connected, in some way, to a variation in another variable. Table 2 therefore indicates that there is an above 95% certainty that a variation in the variable "plaintiff" is related to a variation in the variable "a law seeing review" in Austria and Italy. This connection is absent in Germany.

	Austria	Italy	Germany
Chi Square	0.01/ SIGNIFICANT	0.001/ SIGNIFICANT	0.9/ NOT SIGNIFICANT
Cramers V	0.3/ MODERATE	0.5/ MODERATE	N/A

Table 5: Correlations between who challenges the law and the law seeing review

When correlating the identity of the plaintiff with the outcome of a case the numbers indicate that in Italy there is a moderately strong relationship (Cramers V value of 0.5; 0 standing for no correlation and 1 for perfect correlation) between the plaintiff and the outcome and in Austria a moderate relationship (Cramers V value of 0.3). In other words, a variation in the variable “plaintiff”, a change in the identity of the plaintiff from case to case for example, correlates with a change in the outcome of a case in Austria and Italy.This is not the case in Germany. Breaking the analysis into decades the Italian and Austrian development seem to follow the same pattern as identified in the previous chapter relating to levels of interpretation in case materials. The link between the identity of the plaintiff and the outcome of the case increases in Austria over time whilst it decreases slightly in Italy (Table 6).

	Austria	Italy
1980s	0.211	0.33
1990s	0.3	0.35
2000s	0.43	0.28

Table 6: Cramers V Correlation indication over time for Austria and Italy

	Austria	Italy	Germany
Parliamentarians	SIGNIFICANT	N/A	NOT SIGNIFICANT
Regional Governments	SIGNIFICANT	SIGNIFICANT	NOT SIGNIFICANT
National Government	SIGNIFICANT	NOT SIGNIFICANT	NOT SIGNIFICANT

Table 7: Significance between review and challenging units

The actual source of this link in both countries can be traced to two different sources of correlations (Table 7). In Austria, the relationship between parliamentarians as the source of the case and the law being upheld as constitutional holds. Furthermore, cases brought by the government are more likely to see review. In Italy the regional governments are less likely to be successful in having national laws overturned. This is not surprising, as literature on the Italian constitutional court has argued that the court is a firm defender of Italian unity (Meny and Knapp 1998; Modugno et al. 2008; Pederzoli 2008; Volcansek 1990, 1994; Volcansek 2000). As one judge tried to explain:

> "Normally the Italian court has been involved in the issue of unity. It (the court) was against the attempt of certain regions to differentiate themselves from the other parts of the country. We therefore sometimes say that the Italian court is more centralist. Inclined to rule with the centre, the national government. It is basically true." (I1)

This assumes that the reason for the increased levels of review is in some way related to conflict between the government and other actors both in Austria and Italy. Two possible reasons for this are possible

A) The political party identity of these actors is contrary to that of the judges and cause the judges to decide against them.
B) The institutional identity, the fact that the decision would be against the government, is the cause why the judges are loath to review the case.

The answer to the second possibility has to wait till the next chapter but considerations if the party identity of the plaintiff influences the decision will be discussed here.

When comparing the influence the party identity of the plaintiff has on the decision in the three countries is statistically weak (Cramers V 0.115-0.19). This supports the argument that the party affiliation of judges does not influence their decision in a case.

$$\text{Italy } 0.115 = v = (x^2/(n)(\min r\text{-}1))^{1/2}$$

$$\text{Germany } 0.185 = v = (x^2/(n)(\min r\text{-}1))^{1/2}$$

$$\text{Austria } 0.19 = v = (x^2/(n)(\min r\text{-}1))^{1/2}$$

Equation 3: x^2 denotes the significance of the relationship, n the sum of the observations and (min r) the minimum value of the number of rows = 1)

No political party is more, or less, likely to have success in front of the court. Evidence based on the voting behaviour of the judges supports this:

> "There are hardly any 4/4 decisions which follow the separation of party appointment. It is more the fundamental beliefs of the individual which influence the court" (G5)

Therefore the appointment procedures of the court in Europe really do insulate the courts from the influence of the political identities of single judges. Italian judges argue that "the membership of a political party does play a greater role on the level of high courts", possibly "due to the influence of presidential appointments which are designed to equal out the influence of a single party" (I2).

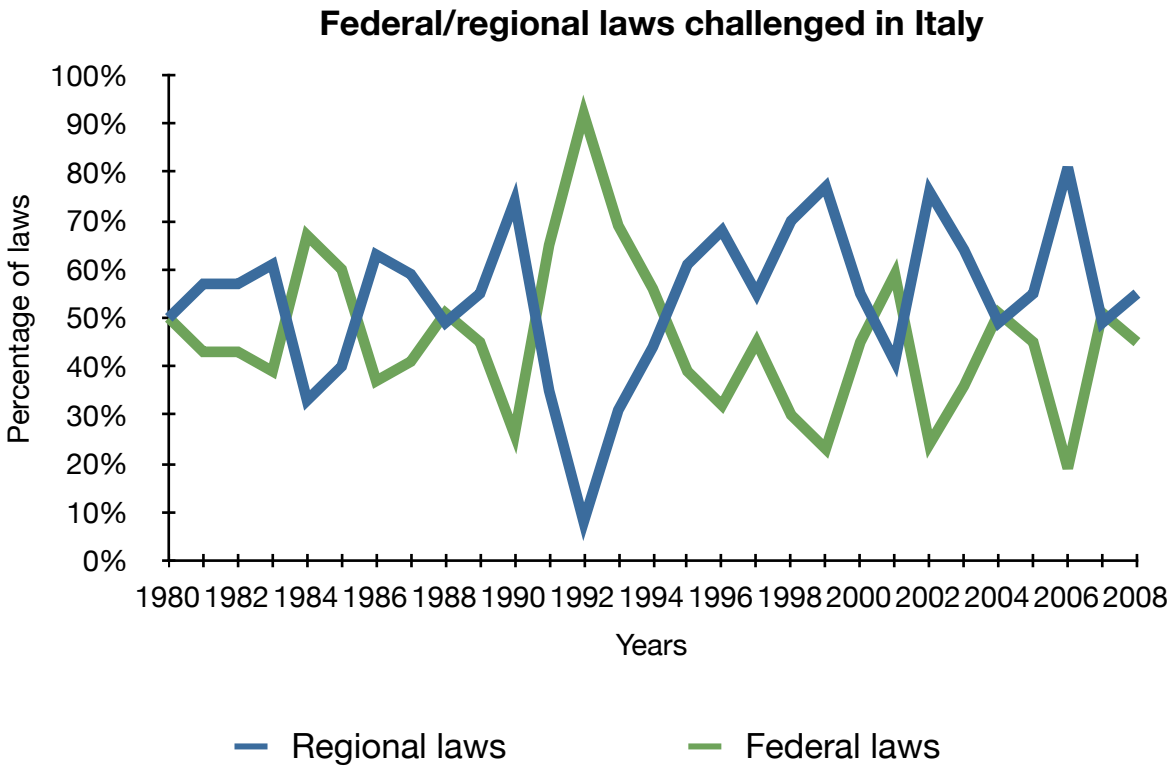
When talking with judges about appointment procedures and their influence on the decisions the conversation frequently turned to court dynamics. One Italian judge (I4) argues that concerning the judicial hierarchy within the courts it is often the presidential appointments that feel slightly superior to start with but then outgrow it within the year. In the interviews, and watching the interactions between judges at the Italian court in a focus group, the source of appointment was used as a form of teasing among the judges. It did not seem to define the judicial groupings − but each judge was aware of who appointed the other judges as were they aware of their respective seniority at the court. It is not the source of appointment which seems to regulate hierarchy in Austria − it is seniority. The Austrian constitutional court judge remains in office until they have reached their 70th year − which leads to very long and consistent terms of office (A6). The longest standing member at the court has been there for 32 years now and has named seniority as a defining factor in court hierarchy (A3). Both seniority and source of appointment was tentatively linked to philosophical attitudes. The judges argued that in discussions the political identity of the judge is not apparent whilst his or her philosophical attitude was. This philosophical attitude was often based on profession. However, it has already been shown above that philosophical attitudes based on profession or academic background cannot be linked with the increased levels if review. It can therefore now be concluded that political attitudes of judges also have no bearing on the decision of the case if these attitudes are measured through political party identity of the plaintiff.

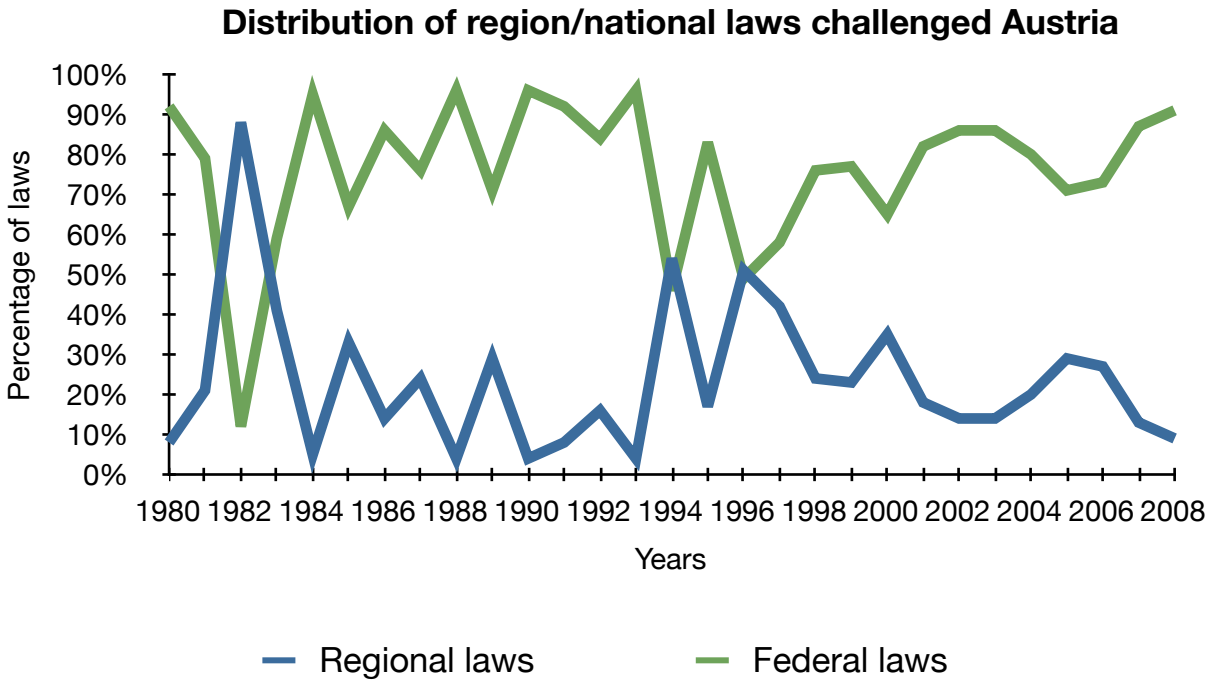
6.3.2 The political identity of the region where the law under review originated and its influence on the levels of review

However, political allegiance can also find its expression in regional identity. It therefore needs to be considered if there is a correlation between the regional identities of the judges and the higher level of review. If some regional laws are more likely to see review then an increase in laws challenged from this region would increased the levels of review overall. More general if regional laws are more likely to see review than national laws then an increase in the number of regional laws being challenged will lead to higher ratios of review in abstract judicial review overall.

The distribution of national and regional laws challenged is fairly stable over time as seen below on the example of Italy, Germany and Austria (Figure 3). What is clear from the graphs

below is that there is no significant change in the ratio of national or regional laws being challenged from decade to decade. There has not been a surge of regional or national laws being reviewed and therefore they cannot account for an increase in review.





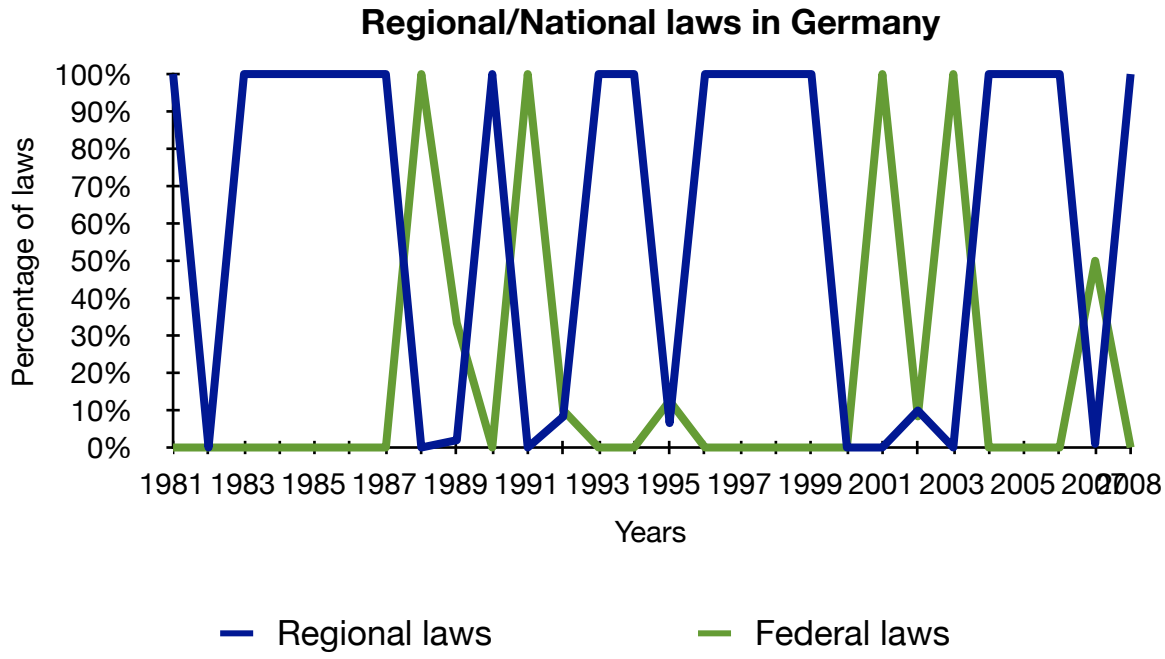


Figure 3: Development of national and regional laws Italy, Austria and Germany

Moreover, it has not empirically been proven that regional laws de facto saw more review than national laws in the last decade. In both Austria and Italy, regional laws are more likely to see review than national laws over the last three decades (Table 4). As noted above, this is not unexpected as constitutional courts have the reputation of considering giving preference to the unity of the national legal system (Currie 1994; Kempton 1996; Kommers 1997; Koopmans 2003; Merryman 1965; Modugno et al. 2008; Moreno 1995; Stone Sweet 2000; Volcansek 1994). This is evidenced in case materials such as in 963/1988:

> "Those interests, relating to the entire national community, appear therefore, to form a normative basis on which to supply a unitary solution…."[30]

Similar utterances can be found in many other cases such as 412/1993, 472/1995,118/1981,3/1981, 70/1981, 482/1991 and 484/1991. Notable is that these references occur more frequently in the 1980s and early 1990s whilst in the late 1990s and 2000 there is an emphasis on international and European obligations. This supports the surprising result from the statistical analysis which fails to find empirical evidence for the preferential treatment of national laws in Germany and in Italy when separating data into decades (Table 8). The statistical evidence suggests that there is an increasing likelihood that regional laws see review in Austria and a decreasing one in Italy. So, only in the Austrian case would there be a possibility that an increase in regional laws causes higher levels of review. However, as

[30]Tale interesse, attinente all'intera comunità nazionale, appare, pertanto, idoneo a fondare una normativa intesa a fornire un indirizzo unitario

seen in Figure 3 no increase in regional laws reaching the courts can be noted in the last decade.

Country	Austria		Italy	Germany
Correlation coefficient	Chi Square	Phi	Chi Square	Chi square
National	0.002	-0.5	0.6	0.1
Regional	0.002	0.5	0.7	0.2

Table 8: Chi Square and Phi/Cramers V values for the cross-tabulation of regional/ national law and review of a law 1990-.

If it is not an increase in regional laws being challenged which causes the increased levels of review it is possibly a change in regional identity on the court. Political attitudes cannot only find their expression in party affiliation, considerations of national unity but also in regional affiliation.

6.4 Political Attitude as Regional Affiliation and its influence on the outcome of a case

Regional identity has never been considered as a possible influence on the decision-making process in constitutional courts. When considering current membership of the courts apparently certain regions and cities dominate (Table 9). Looking further back this image is common. For the last three decades the same regions and cities have dominated the membership of the court (Appendix 6). This is not entirely unusual as they are either the seats of other high courts, the highest rated universities or the seat of the constitutional court.

Italy	Germany	Austria
Savona/Rome	Munich	Graz
Napoli/Rome	Frankfurt	Wien
Caserta/Rome	Munich	Wien/Munich
Napoli/Rome	Frankfurt	Innsbruck
Rome	Tuebingen	Wien
Naples/Rome	Frankfurt	Graz
Patti/Rome	Tuebingen	Linz

Italy	Germany	Austria
Altriparda/Rome	Freiburg	Wien
Caserta/Rome	Freiburg	Wien
Napoli/Rome	Munich	Graz
Rome	Frankfurt	Salzburg
Brescia	Munich	Linz
Napoli/Rome	Greifswald	Salzburg
Firenze	Bielfeld	Wien
Napoli/Rome	Freising	
	Hessen	

Table 9: Distribution of Judges according to regional affiliation

In Germany this does not seem to relate to any preferential treatment of any laws. No region is more, or less, likely to see its laws revised. The same cannot be said for Austria or Italy. There is a strong correlation between a law having originated in Tyrol and it being declared unconstitutional as a whole (Cramers V 0.6), and a moderately strong relationship between a laws origin in Tyrol and it seeing review in any form (Cramers V 0.4). This connection has become stronger over the last three decades. In Italy no such connection between any region exists in the 1980s. In the 1990s, however a low connection between a law being declared constitutional when challenged and its origin in the Trentino Alto Adidge can be observed (Cramers V 0.2). This connection disappears in the 2000s again. Tyrol and Trentino Alto Adidge are only separated as regions since the treaty of St Germain after the First World War and both have substantial Italian or German minorities among its population. As such both regions present some administrative difficulties to the national governments relating to linguistic identity, cultural makeup and nationalistic tendencies. No other region is disadvantaged or advantaged regarding having its laws overturned or upheld in Italy and none at all in Germany. Neither Tyrol and Trentino Alto Adidge are recruitment centres for constitutional court judges. Therefore it can be concluded that a change in the regional affiliation of judges did not cause an increase in the ratio of review in either Austria, Italy or Germany.

6.5 Conclusion

The political and philosophical background of judges appeared initially promising as an explanation for the change in decision-making patterns in abstract review. The membership of the German, Austrian and Italian court over the last decades shows that higher levels of academics correlates with longer more discursive styles of decisions. However, there is no statistically significant link between the number of academics in the membership of the courts and the decision-making patterns. The decision-making patterns also do not correlate with members of the court originating from different academic institutions. As a result it can be concluded that the philosophical attitudes of judges can be linked to the style of decisions but not the outcome. Political attitudes of judges measured by party affiliation also fall short in explaining the change in decision-making patterns. The only correlation between a law being reviewed and the identity of the plaintiff is a regional one. Certain regions, to be exact the minority regions of Austria and Italy, are more likely to have their laws reviewed by the court. The number of cases originating with these regions however is too low to account for the overall change in decisions-making pattern. Therefore the political attitudes of judges also fall short as a possible answer for the question. Nevertheless, the analysis above shows that there might be an answer in the influence political institutions have on the decision making patterns. There seems to be a relationship between the plaintiff being the government and the decision rendered in a case. This relationship will be discussed in the next Chapter.

CHAPTER VII

DEFERENCE TO POLITICAL INSTITUTIONS AS CAUSE FOR THE CHANGE IN DECISION-MAKING PATTERNS?

Neither political nor philosophical attitudes can therefore explain the increase in laws seeing review under abstract norm control. Neither are they able to explain the change in style of decisions identified in Chapter V. Both in the analysis of the change in levels of interpretation in case materials and in the analysis of the influence of political attitudes suggestions can be found to the importance of political institutions as a possible antecedent variable. Especially in Austria the evidence of preferential treatment of national laws over regional laws and the link judges make between the development of the Austrian constitutional court and the reactions of the political institutions supports political institutions as the antecedent variable. The theoretical basis to this argument can be presented as follows:

A) Judges are policy oriented
B) Judges further their goals through strategically motivated actions
C) These actions are determined by the institutional rules surrounding the court
D) The current ruling elite is able to “chastise” the court
Therefore, the court is more likely to rule with the ideals of the ruling alliance than against it.

In this argument, the increased levels of review are caused by a change in the stance the court holds against the political institutions with power over the court, namely the government (Dahl 1957). To test for a change in the attitude of the court to the government it is necessary to consider four questions:

1. Are courts more likely to review laws from past administrations?
2. Are courts more likely to review regional laws by parties not in government?

3. Are courts more likely to review laws challenged by parties not in government?
4. Has an increased level of judges seeking further political office led to a more government friendly court?

The combination of the answers to these questions should create an image of the courts stance towards the current administration and ruling elite.

7.1 Is the increase in review due to the court's increasing their review of laws of past administrations?

An increase in laws seeing review is often used as a measure of endurance of laws of the current administration. This is seen as a measure of success of a government. It is therefore also used as a measure of the willingness of the court to oppose the ruling majority and the court's independence from the political elite (Howard and Segal 2004). This would mean that a large number of unconstitutionality rulings can be used to argue that the court is immune to strategic considerations. In all three countries there has been a constant rise in the number of decisions resulting in unconstitutional rulings between 1980 and 2000. In Germany and Italy this increase has carried over to this millennium. Austria however has seen a decrease over the last 5 years (See Chapter I). However, it is very possible that this increased willingness to review laws is based on the courts annulling laws from previous administrations. This would mean that the court not only avoids counteracting the decisions of the current ruling elite but furthermore aids it by reviewing laws passed under previous governments (de Franciscis and Zannini 1992; Furlong 1988:9; Vanberg 2000).

An unconstitutionality ruling by a constitutional court against a law the current administration has passed is always an "embarrassment" − even in relatively inconsequential cases especially in countries in which approval for the court is high among the general public (Eskridge 1991). In all three countries, the public regard for constitutional courts is highest amongst all the political institutions (Epstein, Knight and Shvetsova 2001). This might very much be because people know generally very little about the courts. The result is an almost mythical regard for their position in government. Therefore an unconstitutionality ruling should be avoided, so as not to open the administration to criticism. However, in reality, loss of public approval is all that can happen to the ruling administration. The court on the other hand is more vulnerable to the possible repercussions of the political institutions. Theoretically, the government has

various means to “discipline” the court. It has power over appointment, being able to appoint members which are less open to interpretation (Koopmans 2003). The government can rewrite the law and therefore make the decision the court produced mute (Meny and Knapp 1998). Most importantly, the government can simply refuse to take full account of the decision. A constitutional court has no enforcement ability; it is dependent on the government to take heed of the decision. Only the loss of legitimacy incurred by the political institutions when they publicly counteract a decision by the highly regarded constitutional courts protects the court. Therefore, the constitutional court has to preserve the high regard in which it is held and public criticism by the political branches will undermine this. So there are many reasons why the court would be unwilling to anger the current administration. Has the court’s behaviour changed regarding the current administration’s laws causing higher levels of review?

In the past it has been argued that the time a case needs to travel through the court results in a decision being taken at a time when a new administration has taken office (de Franciscis 1992). Historically, all three courts’ original duty was to test laws passed by the fascist administrations in the time prior to the courts’ birth. They therefore spent much of their time in the first decades of their existence on testing old laws for their constitutionality (Furlong 1988:9, Vanberg 2005). This resulted in courts that were heavily backlogged for years (and the incredible amount of cases reaching the courts in Germany and Austria is another factor here) but it also defined the way the judges saw themselves as protectors of the new constitution − especially In Italy (Silvestri 2006:586). This concentration on decisions of past administrations has changed dramatically. The average time for a case to reach conclusion was eight months in Austria and six months or less in Italy in 2007. The German court managed to catch up with its workload in the mid 1990s and has since then completed more cases a year than it receives (Santoni 2004:16). The Austrian and Italian constitutional court caught up with their caseload in the early 1990s. Therefore all three courts are now deciding recent laws − and for the largest part they make decisions on the laws passed by those who dominate the political branches and have the theoretical power to curtail their actions[31]. What does all this lead to? The Italian, Austrian and German constitutional court are increasingly ruling at least parts of laws unconstitutional and are therefore increasingly invalidating laws decided upon by those who appointed them. This test of endurance of a law as a test of independence has been used

[31] Not necessarily those who appointed them as the term of office of a judge is generally longer than that of a politician

routinely as an argument for the insensitivity of the court towards the preferences of the ruling elite (Santoni 2004/2006; Spiller and Gely 1990). Therefore it seems to be the case here that all three courts display signs of acting in ignorance of the preferences of the political branches. Moreover, it appears from this that the change in the attitude to laws by the current administration could be the reason for the increased levels of review. Clearly, all three courts have changed their attitudes towards current legislation at approximately the same time as the increase in review in abstract norm control. Though, is this change de facto the cause for the increase in review or simply a procedural coincidence? To answer this question it is necessary to look for actual empirical links between the government and the increase in review.

7.2 Does a change in the treatment of laws by a party not part of the current administration cause the increased level of review?

This is supported when correlating the "origin of the law" concerning the party origin with the current "party in power" and the "decision rendered". With other words this analysis tests if the court is more likely to review a law which was passed by one of the parties not part of the CURRENT administration, non regarding which legislative period this law was passed in. The results suggest that there is no statistical link between the origin of the law and the decision rendered. The court does not seem to be more, or less, likely to review a law passed by the current administration.

Italy: 0.3 = Chi Square (Chi Square significant a a level <0.05)
Austria: 0.7 = Chi Square (Chi Square significant a a level <0.05)
Germany: 0.6 = Chi Square (Chi Square significant a a level <0.05)

Equation 1: Chi Square denotes a measure of deviance - the higher it is the less well the model (the relationship between the origin of the plaintiff and the outcome of the case, for example) fits the data. See Appendix 7 for the derivation of the formula.

From this it seems to be that political considerations based on party origin of the law do not cause the increased levels of review. Accounting for the year in which the law was passed, the party in power at that time and the party in power at the time of decision no pattern emerges which suggests that considerations of party politics find their way into the case. The lack of pattern is constant over the three decades.

It could nevertheless be held that the analysis is skewed by differences between regional and national laws, coalition governments on regional levels or the use of the court by the opposition through parliamentary groupings. A change in any of these circumstances which leads to higher levels of review could be seen as a change in the importance of political affiliations for the court.

7.3 Does an increase of regional laws originating with one of the regions not governed by the party in government cause the increased levels of review?

As seen in Chapter VI the origin of a law regarding either region or party does not influence the outcome. Germany, Italy and Austria all have electoral systems based on proportional representation. This tends to lead to coalition governments (Lijphart 1991) which explains why none of the governments in any country has been formed by one single party in the last three decades. Both Germany and Austria have had various grand coalitions in that time (Germany: 2005-2009; Austria: 1986-2000, 2006-). It has been argued that in these time periods the number of cases which reach the court from parties not in government has to be limited (Gamper 2007). Therefore, in these times it should not even be possible for the court to be in a position in which it would have to decide to confront the government or not. When both major parties are involved in government the chance of one third (in Germany one fourth since December 2009) of parliamentarians to challenge a law is limited. Whilst most of the regional units are also governed by the largest parties, there are regional units which are not. For most of the period 1980-2010 the regions of Vienna (Austria), Bavaria (Germany), Trentino and the Aosta Valley (Italy) are cases in point. Each of these regions is traditionally governed by one of the smaller parties. Furthermore, even if the regions are governed by one of the parties in government when they challenge a law it does not mean that the court might not be tempted to rule for the governmental party. Coalitions are not necessarily composed out of parties with equal weighting. Therefore, a weaker party has to pick its fights on the national level. To analyse in how far the constitutional court tries to avoid confrontation and if a change in this attitude affects the levels of review an analysis of the origins of laws needs to be adjusted based on the strength of parties within coalition governments (Table 1,2,3).

Time	Government	Parties
December 2008	Fayman	SPO-**OVP**
Jan 2007	Gusenbauer	SPO-OVP
Feb 2003	Schuessel	**OVP**-FPO/BZO
Feb 2000	Schuessel	OVP-FPO
Jan 1997	Klima	SPO-OVP
March 1996	Vranitzky	SPO-OVP
Nov 1994	Vranitzky	SPO-OVP
Dec 1990	Vranitzky	SPO-OVP
Jan 87	Vranitzky	SPO-OVP
Jun 86	Vranitzky	**SPO**-FPO
May 83	Sinowatz	**SPO**-FPO
Jun 79	Kreisky	**SPO**

Table 1: Austria governments, coalitions dominated by one party in bold

Time	Government	Dominating Party
2008	Berlusconi	PdL-FI
2006	Prodi	PD
2005	Berlusconi	FI
2001	Berlusconi	FI
2000	Amato	PSI
1999	D'Alema	DS
1998	D'Alema	DS
1996	Prodi	PDS
1995	Dini	N/A
1994	Berlusconi	FI
1993	Ciampi	N/A
1992	Amato	PSI
1991	Andreotti	DC
1989	Andreotti	DC

Time	Government	Dominating Party
1988	De Mita	DC
1987	Goria	DC
1987	Fanfani	DC
1987	Craxi	PSI
1983	Craxi	PSI
1982	Fanfani	DC
1982	Spadolini	PRI
1981	Spadolini	PRI
1980	Forlani	DC
1980	Cossiga	DC
1979	Cossiga	DC

Table 2: Italy Governments and dominating parties

Time	Government	Dominating Party
2009	Merkel	CDU
2005	Merkel	
2002	Schroeder	SPD
1998	Schroeder	SPD
1994	Kohl	CDU
1991	Kohl	CDU
1987	Kohl	CDU
1983	Kohl	CDU
1982	Kohl	CDU
1980	Schmitt	SPD

Table 3: German governments and dominating party

It is then possible to analyse if the cases brought to the court according to the party challenging the law being in the majority in the government is correlated to the outcome of the case. There still is no pattern between the law seeing review and the challenger not being

affiliated to the party in government. From this perspective it therefore also appears that change in the court's adherence to the will of the government is therefore not the cause for more laws seeing review. What of the success of groupings of parliamentarians?

7.4 Does a change in the treatment of groups of parliamentarians with a party affiliation of a party not in government cause the increased levels of review?

In Austria and Germany groups of parliamentarians have the right to approach the court with questions of legitimacy, which they often do when they have been defeated in parliament. The Italian founding fathers decided against including this power into their constitution. If the increased number of review cases in Austria and Germany are related to an increased use of parliamentarians of the court then this is interesting in comparison to Italy which does not have the same mechanism but shows the same increase of cases seeing review. However, if the increased number of unconstitutionality rulings in Austria and Germany are based on parliamentarian review then this allows for conclusions to be drawn about the court's adherence to the will of the governing majority. It also might show a major difference to the Italian court.

The question therefore is: What are the success chances of those who are in the minority in parliament at the moment? In both countries the appointment rules of judges try to ensure that opposition and majority parties both make some appointments. Each political branch has the right to appoint a certain number of judges and within these rules there exists the convention that the main parties within the political system take turns in appointing judges (Kommers 1997:17). Access rules to abstract judicial review in both countries are also stringent. Only a group of parliamentarians which make up one third of parliament's members is able to ask the court for a ruling under abstract judicial review. It is therefore almost necessary in all cases that the major opposition party is involved and abstract review is very difficult if the government has a greater than two thirds majority (such as is the case in a grand coalition). The development of parliamentary minority induced abstract judicial review is as follows in Austria:

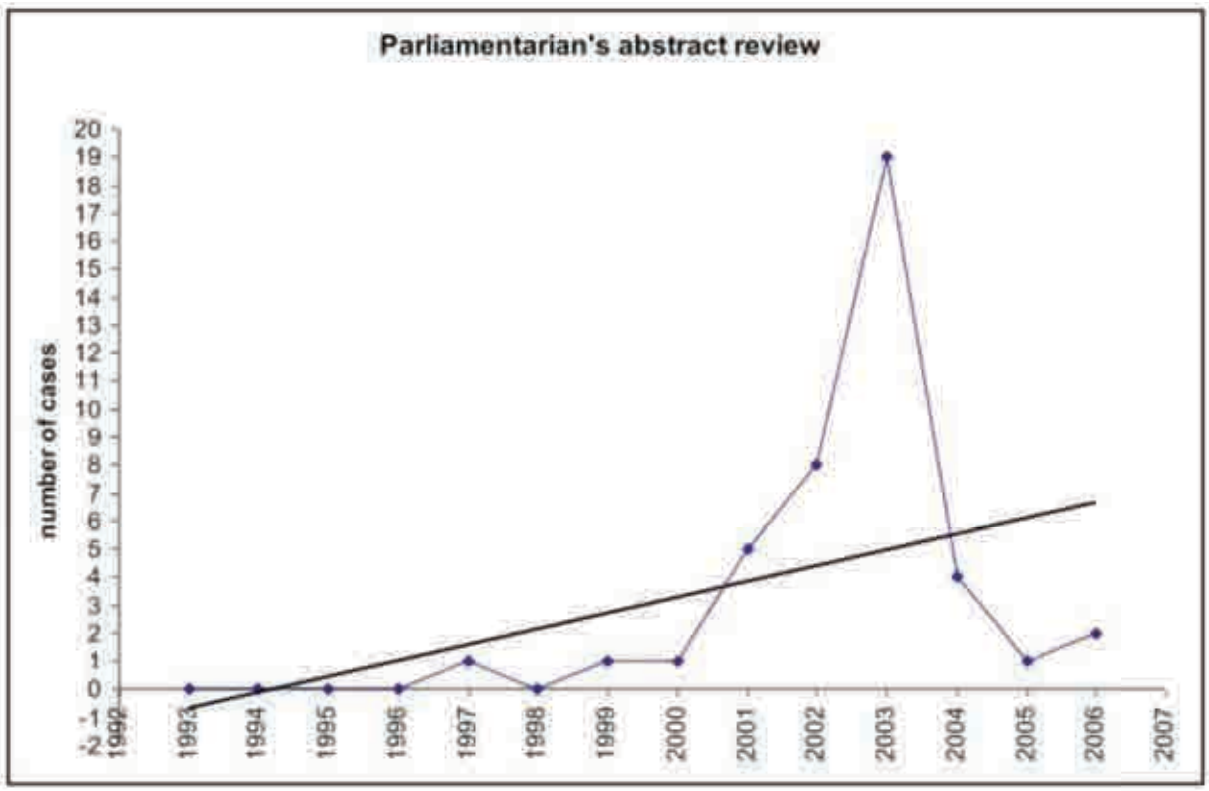


Figure 1: Austrian parliamentarian review

It is clearly visible that the use of the court by parliamentarian groups is on the increase in Austria - even if it is a very slow increase. Also, in the case of Austria it needs to be taken into account that the period between 2000-2007 was one of the few times in the history of Austria in which there has not been a grand coalition. This therefore might explain the spike in that period. Most intriguingly, the group of parliamentarians has a one in three chance to see some success in its case in front of the court. This means that it has a one in three chance to see at least part of the law in question being ruled unconstitutional. In the period before 1990 the chance of success for a group of parliamentarians under abstract judicial review was around one case in five (Stone Sweet 1992). Moreover, almost all cases in which the court decides in favour of the group of parliamentarians it renders a partial ruling. This still means that the majority of cases brought to the court by parliamentarians not in power is low, although on the increase, and that their chance of success lies below that of other plaintiffs in abstract judicial review. The Austrian court is therefore more likely to vote with the government than against it. When running a simple test of correlation it becomes clear that there is a statistical significance between who approaches the court and what kind of ruling is rendered.

In Germany, on the other hand, the use of the court by minority groups of parliamentarians has become a normal phenomenon with between one and five cases a year (Figure 2). There is no

spike in the development of abstract judicial review induced by groups of parliamentarians in the last twenty years, possibly because there have been very few grand coalitions, but rather a steady increase of cases. However, there has been a marked decrease in the last years, since Germany has been governed by a grand coalition, however not a decrease to the previous levels. Whilst prior to 1980 there five cases a decade were unusual, even in the time of the grand coalition, one or two cases a year have become the norm (Figure 2). The last twenty years have seen more cases of parliamentarian judicial review then the forty years following the formation of the court. In a simple test of correlation between the variable of "minority group parliamentarians" and "review of norm, partial or complete" there seems to be no statistical significance. However, when asking if there is a correlation between parliamentary minority use of the court and partial ruling, it appears that there is a strong positive relationship (Chi Square 0.039 and Cramers V at 0.25). In other words, and without statistical terms, it is more likely that the court renders a partial ruling if the case is brought to the court by the opposition. Therefore, it seems to be arguable that the court is more willing to appease the political majority if it is their political adversary who brings the case to the court. In these instances the German court rules more appeasingly by giving both sides a partial success. So this would rather lead to the conclusion that the court does feel a certain dislike towards ruling against the poitical elite at the time.

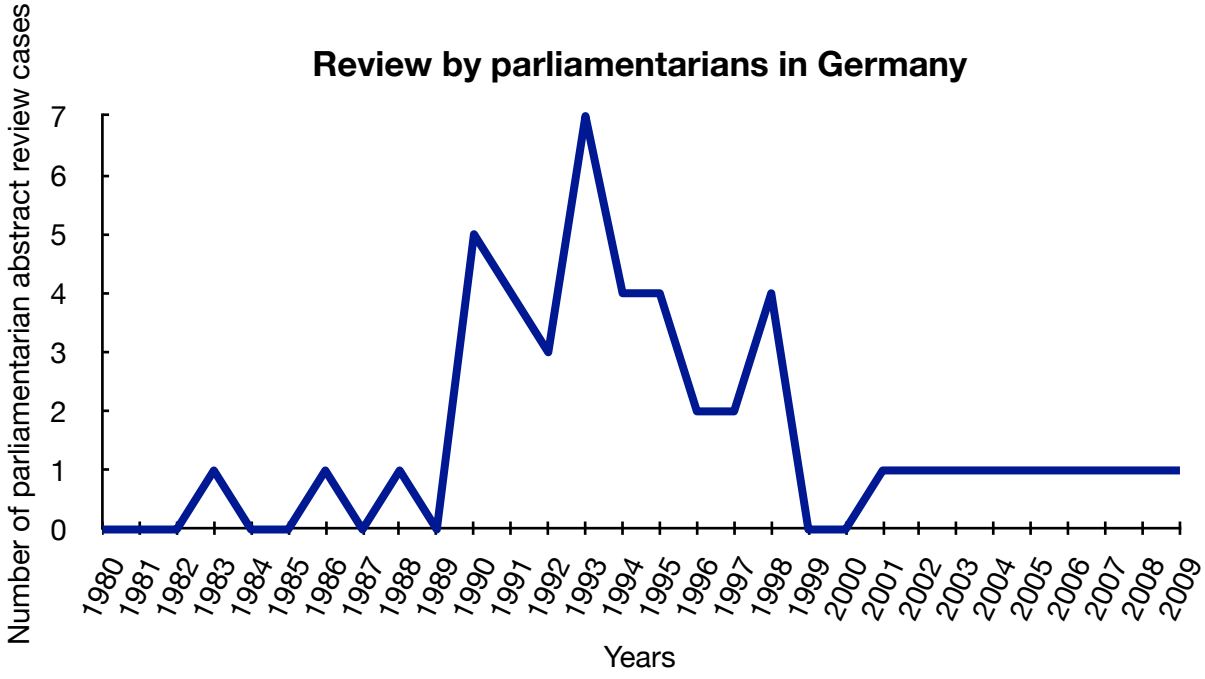


Figure 2: Germany parliamentarian review

To summarise: The increasing amount of unconstitutionality rulings, not only partial but also complete, indicates an increased independence of the courts from the political branches. Even

when splitting this into regional and national laws the trend towards higher unconstitutionaltiy rulings stands. However, when looking at national laws challenged by minority groups in parliament, it becomes clear that in these cases there are more concilitory rulings. Not only are there more constitutionality rulings but also the cases which see review are more likely to be only partially annulled rather than struck down completely. This on the other hand indicates a lesser independence from the political branches at least in the two countries in which parliamentarian review is possible, namely Austria and Germany. The preferences of the political branches therefore seem to matter in respect to cases which are brought to the court by minority groups in parliament but not in other cases.

7.5 Does a lower percentage of judges seeking further political office cause higher levels of review?

It has been argued that the future career decisions judges make might also be an indicator. The thought behind this is that they are planning on future career moves and therefore act strategically in order not to destroy that possibility by acting against the will of the ruling elite, those who will be in control of future political appointments. As political appointment I have considered here for example being appointed to be elected President, as in the case of Roman Herzog in Germany but also becoming the advisor to the President such as Ludwig Adamovich in Austria. I do not count professorial appointments to universities, national or international. More than 85% of all the judges in the three countries lecture at a university after their tenure at the constitutional court is over. Also I am considering professorial appointments as not being under the control of the ruling elite.

Fiorino, Padovano and Sgarra (2004) have considered the political appointment potential in Italy and have shown that the low number of judges seeking further appointment, below 5%, indicates that the argument fails. As seen in Table 4 the numbers are slightly higher for Germany and Austria, potentially due to the lower number of judges[32] appointed to the court during the same time, the period 1980 to today (Table 5).

[32] It is seldom the case in Italy that a judges fulfills his or her 9 year term - many withdraw or die in office. In Austria there is an age limit of 70 but no time limit on the period of office of judges and that explains the very low number of judges.

Country	No of judges seeking further political app.	No of judges seeking no further political app.	Percentage of judges seeking political app.
Austria	6	12	33.33%
Italy	2	46	4.2%
Germany	4	28	14%

Table 4: political appointments

When comparing the three countries Austria seems exceptional regarding the high number of judges seeking further political appointment (Table 4). A consideration in this however has to be age as well. When looking at the current court composition in Austria it is apparent that the age range of judges is very high. The youngest judge, Professor Dr Grabenwarter was only 38 years of age when he was appointed to the court. The oldest judges on the court, Professor Spielbuechler and Professor Heller are close to the obligatory retirement age of 70 but the age of the others ranges between those two extremes. In Italy, the country with the lowest number of judges seeking further appointment there is no obligatory retirement age. Judges serve a fixed nine year term but must have risen through the ranks of the judiciary before being eligible for election. This takes more time than in any other country and as a result the judges are on average much older, with the youngest judges in the current college of judges, Professor Cassese and Judge Napolitano only 64 years of age. The oldest judge in Italy is Chief Justice Bile, with 79 years of age. All other judges ages range between these three. The German constitutional court lies between the other two concerning age. The age range here varies between 45 and 65.

Time period	Austria	Italy	Germany
1980-1993	1	1	1
1993-2008	5	1	3

Table 5: political appointments over time

It is rational to assume that younger judges appointed to the court are more likely to seek further appointment rather than an older judge. Austria tried to counteract this by not limiting the tenure of its judges in any other way but age. However, it might still be of interest to judges to consider a change in scenery after a certain time and seek further fields of personal development. If one considers the possibility of future appointments as a possible driving

force in the decisions a constitutional court judges makes then the Austrian court seems most likely to be influenced by this and the Italian one least.

Non regarding all the above, interview data throws doubt on the statistical evidence. Whilst the judges deny direct party political influence on decisions the majority admits that political considerations matter. It is claimed that “the membership of a political party does play a greater role on the level of high courts”, possibly “due to the influence of presidential appointments which are designed to equal out the influence of a single party” (I2).

> “There are hardly any 4/4 decisions which follow the separation of party appointment. It is more the fundamental beliefs of the individual which influence the court” (G5)

Nevertheless some voices, especially in Austria, warn:

> “There are hidden streams of influence between individual judges, they do exist... but only very seldom. It is definitely overestimated. It is not the case that the Head of the OEVP or the SPOE (the main parties in Austria) calls and tells the court how they want the case to go − no judge would stand for that.” (A5)

In Austria, the court, at least in the past, has been dominated by one party (Funk 2007:325; A5/6). In Italy each of the magistrates, the president and parliament appoint five judges − with the presidential appointments traditionally chosen to ensure an equal party distribution among the judges (I3). When talking to constitutional court judges from Germany and Austria they referred to the past courts as politically dominated by one party (A5/6, G1) but emphasised that the current courts do not suffer from this.

> “You know that our constitutional court is appointed politically. In the past this has created a politically motivated court - today that is not anymore the case”[33] A1

All the judges of the German court, judges in Austria prior to 1997 and the majority of the Italian court (I1,3,4,5,6,7,8,9) named the political and economic implications of a decision as a major influence to be considered when deciding a case.

[33] Sie wissen ja das bei uns der cc ja politisch besetzt wurde. Frueher war es ein politische gerichtshof - heute aber nicht mehr

> "What plays a role are the implications of a decision ...[34]The court is very aware of the political implications of a decision. It is never only a decision on a single case. In Germany the text of the decisions are read as closely as the Bible and interpreted accordingly. Every word is taken that seriously that it often is astonishing. A side clause is taken out ten years later and everyone will say "look the constitutional court has said this already then." And that is why we very carefully consider the long term implications" G1

However, none of the current Austrians mentioned political considerations on their own accord. When directly asked about it, two of the Austrian judges (A1,A3) deny explicitly that the political and economic implications are of any significance. The other Austrian judges name the economic implications as a potential influence but argue that it is very seldomly the case that it actually carries any weight. The term "political" seems to be understood differently across nations. In conversation the German judges seemed to set economic implications equal to political implications. The German case of reparations payments to the dispossed after World War II is a case in point. The decision was based on the consideration that the German state will not be able to pay reparations to all the dispossed and therefore would break under the economic strain. A solution had to be found that was in line with the consitution without bankrupting the state. In inteviews it was clear that these considerations were considered political in Germany, whilst Austrian judges called them economic.

From interviews it is clear that the influence of the government is considered low in the current courts but the influence of political considerations is not. However, these political considerations, when questioned further, often appear results of practicability or philosophy. The necessity to defend national unity, economic workability and democratic ideals such as the rule of law are the basis for these "political considerations" not an increased or decreased willingness to oppose the current government. Therefore whilst there is no empirical evidence

[34]Was natürlich sicher eine Rolle spielt, die Wirkung einer Entscheidung... Das Gericht guckt sehr darauf welche Wirkung das haben wird. Und zwar, es ist ja nie, also es ist zwar ein Urteil über einen Einzelfall aber das ist ein bisschen schwierig, in Deutschland werden die Entscheidungen des Bundesverfassungsgerichts wie die Bibel gelesen und ausgelegt. Die werden so wörtlich genommen, dass man sich manchmal wundert, da wird ein Nebensatz reingeschrieben den holt einer nachher mit spitzen Fingern einer raus 10 Jahre später und sagt die haben es ja schon gesagt. Und so ist das. Und deshalb achtet man da seht drauf was das für eine Dauerwirkung haben wird.

for the court to avoid confronting the government there is empirical evidence for the influence of political considerations.

It would nevertheless be wrong to say that the court is completly free from a desire to avoid confrontation with the ruling government. There is a weak correlation, around 57%, between the review of a law resulting in a conflict with the government and the law only seeing partial review rather than being declared void in Germany and Italy, In Austria this correlation has increased over the last three decades with over 70% of cases avoiding the outright conflict of a complete unconstitutionality ruling of a norm. It has often been argued that the distinction between partial and complete unconstitutionality rulings is used as a tool by the constitutional courts to preserve the goodwill of the ruling elites (Koopmans 2003). An uncosntitutionalty ruling is a major embarassment for the governement whose law is being declared void. Especially if the court in question enjoys high levels of approval in the eyes of the public and is seen as the defender of the minorities (Comella 2009:96). Therefore courts only rule part of the norm unconstitutional, thus sparing the government complete loss of face. The more established and highly regarded the constitutional court, the more insulated is it from the possible repercussions by the ruling elite. This leads to higher regarded consitutional courts making fewer partial and more unconstitutionality rulings than less well established courts (Epstein et al. 2001). This theory fits the above pattern of both Italy and Germany, courts which face very little public criticism, showing increased levels of unconstitutionality ruling and decreased partial unconstitutionality rulings. The Austrian court also saw increased levels of unconstitutionality rulings in the 1980s. However throughout the late 1990s until today the level of unconstitutionality rulings has been falling and the level of partial unonstitutionaliity rulings is on the increase. This change in behaviour followed wide spread public criticisms of the court as activist and undemocratic (Gamper 2007).

7.6 Conclusion

The answer to the question if a change in the deferrence to political institutions caused the changed pattern in abstract review is mixed. The court does not seem to give preferential treatment due to party identity of either plaintiff or origin of the law. However, when the plaintiff is a group of parliamentarians the court tends to partial rulings rather than unconstitutionality rulings. In all cases, the court is marginally less likely to enter in conflict

with the ruling government in Italy and Germany whilst there is a fairly strong lilkelihood for this in Austria. Moreover, the trend is increasing in Austria whilst it is decreasing in Italy and Germany. Judges admit that political and economical considerations do matter in their considerations. Therefore, the influence political instituions, or at least political considerations, have on the decision-making patterns seem to present possible explanations for the change in the decision-making pattern. However, it needs to be ascertained in what way political considerations influence the decision-making pattern. The argument for the power of the court is very dependent on the court preserving the high regard the public has for it. Only if the court is in high regard with the public does it matter to the government that the court rules against it. However, the assumption that the public image matters to the court and that the court is aware of this is a purely theoretical assumption. No empirical research in this has been undertaken in Europe. The next chapter will try to ascertain the influence the public image has on the decisions. One further interesting, and recurring, aspect in the last three chapters is the ocurence of “European” influences. In the style of decisions there is an increasing mention of European ideals, obligations and values. The membership of the courts increasingly contain members who have served at an international court or have been affiliated to an international academic institution. The next two chapters will try to explain how political considerations have contributed to the change in decision-making patterns by looking at the court’s public image and the recurrence of references to the “European”.

CHAPTER VIII
THE INFLUENCE ON IMPORTANCE OF THE PUBLIC IMAGE OF THE COURT

It has been argued that constitutional courts are aware of public opinion and mirror their decisions on this. The arguments for this connection are both normative and positive. On the normative side it can be argued that because judges represent people they should also represent the opinions of the people in their decisions. However, this argument only answers the question why judges **should** follow public opinion in their decisions not if they de facto do. The positive argument is based on the rational choice assumptions relating to decision-making processes in courts. The argument has been discussed in detail in the last chapter but can be summarised as follows: political institutions are less likely to curtail the court's power if it has the public's approval, therefore judges try to preserve the public's high opinion through their decisions. Whilst this argument makes intuitive sense to many without the addition of empirical data it remains an answer to the question why constitutional courts **should** follow public opinion in their decisions not why they **do**. Or more importantly, if they do. Empirical data to answer this question is still limited.

In order to answer whether the question if the changed decision-making pattern in abstract norm control are caused by a change in the influence of public opinion on the decision, it is first necessary to establish if public opinion influences judicial decisions. To do so requires a test which in the case of this chapter is the comparison of survey data with the outcome of decisions. Per force these are decisions that attract public attention and can be found in all three countries. Examples for such cases can be found in the areas pertaining to abortion, church/state relations and minority rights. In all of these controversial social areas the reliability of survey data is often bias. It is therefore difficult to establish with absolute certainty what exactly the public opinion to each of these topics is. Using polls and data from the main daily newspapers it is still possible to at least ascertain what the approximate public stance to these controversial topic is. In none of these cases did the constitutional court decide according to public opinion. However, the court's awareness of public opinion becomes

apparent in the interviews. Past incidents in which the German and the Austrian court ran foul of public opinion have caused the courts to introduce measures that allow them to make use of public opinion rather than being used by it. It is therefore clear that whilst there is the possibility that public opinion influences decision making the courts have ensured that this is not the case. The increased levels of review in abstract judicial review can therefore not be explained with the court increased adherence to public opinion - but possibly to the courts increased use of public opinion for their own means.

8.1 Problems with the research design

There has never been an attempt to empirically test the question if judges react to public opinion. Moreover, the possibility that the court would react to the vagaries of public opinion has always been denied vehemently by scholars and judges alike. The argument reaching back to the foundation of the court which sees itself as the protector of minorities. Historically, the foundation of all three courts was in part based on the reasoning that there needs to be a judicial body able to protect minorities from misuse of power. Three possible ways how to test for the influence of popular opinion on decision-making patterns in abstract review can be envisaged. Not all three are practicable when taking into account the political and social realities in Germany. Austria and Italy.

The most obvious methods would be the comparison of the decisions taken and the media reports and survey data in each case. Both are not practical possibilities as most cases will not be reported in the media or be connected to any pre-established surveys. To undertake the surveys retrospectively is impossible as few people will remember the cases well enough. This is based on a fundamental problem with many abstract review cases. Whilst important, they often also are considered boring. Issues like abortion, church/state relations, euthanasia and the death penalty all are challenged under abstract review - but more frequently so are tax laws, the budget and administrative provisions. Many of these topics are too obscure for the general populace to form an opinion about. Therefore a retrospective or current survey does not promise to be fruitful. However, there are cases about which everyone has an opinion. Abortion, church/state relations and minority rights are all cases discussed under abstract review and, most importantly, by all three courts. The purpose of this section is therefore to compare the decisions of these cases with public opinion as expressed through media reports and surveys. It then is possible to conclude if the court’s decision was in line with public

opinion. This will not allow for an answer to the question if the increased levels of review in abstract norm control are de facto caused by a change in the adherence of the court to popular opinion. Whereas it will allow for an answer if the decisions of the courts are related to public opinion. It therefore will answer the question if it is possible that the increased levels of review are based on a shifts in public opinion not if they are necessarily causing the shift in decision-making patterns.

It needs to be noted here that not all cases below are abstract review cases. Many of these topics have been developed through abstract and direct review and it would be negligent to omit the developments through direct review. However, all areas are based on initial and seminal decisions in abstract review cases and all the cases analysed are abstract review cases. Often there are connected cases in direct review which are referred to. The development of the legal principles involved is often based on a mixture of abstract and direct review. In the following section I will honour this by noting the cases of direct review, but analysing the abstract review cases at the bases of this.

8.2 Abortion, Church State Relations and Minority Rights

The three areas which allow for the clearest picture of public opinion are abortion, church/ state relations and minority. In all three areas, the courts seems to decide in ignorance to current public sentiment. However, these areas are only a small, very select cross section of the court's work and therefore not necessarily representative. These areas are not without importance. These areas create high public emotions. An unpopular court decision has far reaching influence on the court's public image if the public notices the decision. In areas of high public emotion the public will notice and therefore are more likely to be influenced by considerations of the public image. The court's stance in these areas might therefore not be representative of all cases but it is a clear indication that the court can and does, if it so wishes, act against public opinion.

8.2.1 Abortion

Abortion legislation has been challenged in front of the court numerous times in all three countries. Until the 1970s, abortion was illegal and punishable under the law of Italy, Austria and Germany. This changed in 1975 when a trimester solution was introduced in Austria and

Italy making it possible to terminate a pregnancy within the first trimester. These laws were the direct result of cases and constitutional court instigated referenda which showed up to 74% (Italy) of the population to be in favour of legalised abortion. In these cases the constitutional courts indicated to the government that abortion should be revisited as it violates the rights of woman. Here it seems that the Austrian and Italian court seem to have been in line with public opinion. Not so in Germany. The German constitutional court struck down an abortion law allowing for termination in the first trimester in 1975 (Bundesverfassungsgericht 1975). The law itself had been lobbied for by increasingly important liberal women's interest groups and was passed under a Christian Democratic government. It was then taken to the court by the Christian Democratic Faction. The court ruled that the right to life of the baby supersedes the right of the woman to self-determination. It would take until 1992 and reunification to introduce a trimester solution into abortion laws in Germany (Bundesverfassungsgericht 1992).

The German court therefore was clearly voting against public opinion, as perceived at the time, evidenced by the number of interest groups that had lobbied for the law in the first place. The development since then is just as interesting. In all three countries abortion provisions have been challenged repeatedly under abstract as well as direct review. Surveys in 1996, 1998 and 2006 show decreasing approval for legalised abortion. In the German case surveys in 1996 after reunification show divide between East and West concerning public opinion (Banaszak 1998). In West Germany public opinion is in favour (80%) of possible termination if the mothers health is at risk or the pregnancy is a result of a rape. Whereas only 40% are in favour of the right to termination without regard to any reasons the woman might have. Most judges were and still are recruited from West Germany. In East Germany 60% were in favour of the woman having the right to choose abortion within the first three months non-regarding the reasons for this decision. A second study in 2006 showed that the gap has virtually disappeared with 60% of the population now opposing the right of the woman to choose if she wants to carry a child (Buder 2008). In Germany therefore, there seems to have been a shift in opinion since 1975 with the majority of the population now opposing the right to termination of a pregnancy. However, the German constitutional court since then decided on the right of states to prohibit abortion, on the rights of doctors to be protected from anti-abortion demonstrators, on the right of women to claim social support for abortion and on the right of doctors to be paid for abortions. In all these cases the constitutional court has decided in favour of the right

of the woman to have the abortion paid for by insurance, doctors rights to be protected from abuse and rules against the state trying to prohibit abortion. So whilst the popular opinion has swung against the right of a woman to terminate her pregnancy the court has enshrined the right in many areas of law. In the case of abortion the German court decisions therefore have developed counter to public opinion.

Similar developments have occurred in the Italian and the Austrian courts. When challenged they declared that the right of life established through the European Court of Human Rights is not applicable to a foetus. Their decisions have not varied from this precept since then, even if public opinion has also shifted. In both Austria and Italy recent surveys show that only 40% of the population are in favour of the right of the woman to terminate her pregnancy. Whilst there is no constitutional court decision in Austria which establishes the right of a woman to receive a termination under health insurance no attempt to change the status quo has been successful and abortion remains legal in the first three months. There have been many tries to instigate court cases that would change abortion law in Austria. In Italy through court cases not only the right to terminate a pregnancy has been established and protected but women can turn to their health insurance for the procedure. Therefore, in the case of abortion it can be concluded that whilst public opinion has developed away from liberal abortion laws the courts' decisions have further entrenched them. The constitutional courts in all three countries seem to have been unaffected by public opinion.

8.2.2. Relations between Church and State

Church and state relations are also common themes in all three courts. In Italy the right to divorce, in Germany the sign of the cross in the schoolroom, and in Austria non-religious weddings and religious freedom have all occupied the constitutional courts.

In Italy the constitutional court was often seen as the main force pushing for a legally secular state (de Franciscis and Zannini 1992). In 1989 the court gave the principle of secularism "super-constitutional" meaning and therefore declared it unchangeable even by future administrations (203/1989). An article of the criminal code (No 724) was revised because it referred to a "state religion" and 1996 and 1997 atheists were declared to be equal to religious citizens in their rights of expression and consideration (117/1997, 334/1996). Long before that the Italian court had established the right to divorce, abortion and to abstain form religious

education. This gives an image of a court ready to defend the separation of church and state. However, recent developments are not as clear. In 1996 the court also declared that ”non-confessionality is not possible” (334/1996). It goes on to argue that religion is the basis of many of our human moral values and if all things connected to religion were removed humanity would lose their moral footing. Most telling however are two cases in 2004 and 2006. In these the question of Christian symbols (crucifix) in public places such as schools, assembly halls and court rooms was addressed. The constitutional court ruled that the plaintiffs had no right to initiate a case. It therefore refused to make a decision on a secular question. For a court that has staunchly defended secularism for the last thirty years this is a landmark decision and indicates that the courts stance on secularism might be changing.

The stance of Italy’s public regarding secularism is also changing. The number of practising Christians has decreased from 38% to barely 20% in the last twenty years according to surveys by the national newspapers. There are no official statistics on the matter as there are no taxes or benefits that are only accessible or payable by church members. This is very different in Germany and Austria. Here a member of the church has to pay church tax so statistics are readily available. According to the German and Austrian statistical office membership of the church has been steadily declining over the last two decades in both Germany and Austria. However, so have the birth rates in both countries. Possibly more telling is that the numbers of people actively leaving the church each year have started to decline over the last decade and an increasing number of re-entries are reported in Austria. Nevertheless, around 70% of the population are members of the church today. However the numbers of those indicating that they are active believers is far below that. In 1990s it lay with 22% and was declining to under 20% by the end of that decade. Although the numbers have increased slightly over the last two years again. This seems to indicate that the importance of religious belief is increasing again in both countries relative to the two decades before.

The Austrian constitutional court has had comparatively little involvement with the area of church/state relations. Nevertheless, when faced with a question of religion it has favoured the religious side more often than not. In 1998 it decided against religious slaughter of animals, in 1991 for disproportionate funding of religious schools (1275/1991). The court therefore seems to be deciding for religion, just as public opinion is turning more religious again as well. However, the turn in public opinion is as recent as 2000 with the numbers of church leavers

steadily increasing before that. Therefore in the times in which the court decided to favour religion, and often Christian, practices, the number of people believing in religion was on the decrease. The court therefore did not follow public opinion in its decisions.

The German constitutional court has had a long and complicated relationship with cases in the area of church and state. Prayers in school, religious education, church tax, religious symbols in public spaces and especially in Bavaria have occupied the court. For the most part the court has been pro secularism. Religious practices outside religious education are banned, religious education cannot be obligatory, and crucifixes may not be displayed in schoolrooms (1436/02, 1087,92, 67/01, 647/70, 7/74). This is remarkable as the court itself has been regularly dominated by openly Christian judges as is the current court. This might be the reason for the refusal of the court to engage in a clear decision relating the obligation of a child to attend religious education at the moment. One cannot argue that the court is pro-religion in schools in its hesitant stance, it is simply not deciding. Therefore the court seems to display a stance supporting and protecting secularism, even if it is not as clear in its decisions as the Italian court has been. The seeming increase of religious feeling in Germany and the stance of the court therefore are not developing in the same direction.

8.2.3. Minority Rights

Minority rights are regularly challenged in front of the constitutional courts. The Italian Constitutional Court has decided on linguistic rights of minorities, as has the Austrian court. The German Constitutional Court is more reticent in the matter as it deals with the question of dual nationalities regularly. Both the German and the Austrian court have made abundantly clear that dual nationality is not desirable in either country. In 1974 the German constitutional court has called it an “evil” and has since then produced numerous rulings that make clear that it considers dual nationality an unconstitutional concept (1339/06). However the court has also in these cases made clear that receiving the German nationality at birth in Germany allows for a dual nationality till the age of 21 when a decision has to be made. So the court was staunchly against dual nationalities in 1974 but has relented in a small way since then. In surveys the general public opposes dual nationalities in all forms. In 1996, 53% of the population were against dual nationality, in 1999 52%. For the most part the court’s decision is in line with public opinion - but not as strict. The Austrian court on the other hand has shown that whilst it opposed dual nationality, an opinion in line with public opinion, it supports the rights of

linguistic minorities within its borders. The court decided that the signs in an area dominated by a linguistic minority have to be bilingual. The public outcry following this decision was great but not unexpected as surveys before had shown that the decision would be more than unpopular. Here clearly the Austrian court disregarded public opinion as evidenced through the editorial and interview data in the Austrian newspapers (ORF 2005; Zeitung 2009).

The Italian court faced similar issues relating to linguistic minorities (28/1982, 62/1992, 15/1996, 312/1983, 213/1998). In these the court has upheld the rights of the linguistic minorities especially regarding South Tyrol. Over the last decade there has been an increasing public approval for these measures so in this instance the Italian constitutional court is ruling with public opinion. This was not always the case as the 1980s presented the court with a populace unsympathetic to the rights of linguistic minorities. It has been argued that public opinion has furthermore shifted again recently due to the connection with Roma and Sinti rights. However, there are no official statistics other than documented increased aversion to these peoples. Therefore not even in this can the Italian court be identified as being in line with public opinion.

All three areas have shown courts that seem to be in disregard or ignorance of public opinion in their decisions. However, per force these are areas of high conflict and high media coverage. Moreover, the court is more likely to receive coverage on issues where it voted controversially, against public opinion. The fact that the courts in all three countries enjoy high public approval rates indicate that possibly the above are more exceptions than the rule. The interviews suggest an alternative explanation for the high levels of approval of courts in the face of decisions made counter to public opinion.

8.3 Interviews

According to the data drawn from the comparison of court decisions with the available public opinion data there seems to be little room to claim that there is a possibility of the courts being influenced by public opinion in their decision. The data pertaining to interviews conducted support this conclusion in the broadest sense. No judge from either country considered public opinion as a legitimate or even probable influence on the decisions of courts. Rather the adverse, as they tend to see themselves as protectors of the minorities.

> "Public opinion has no influence on the single case. And that is good as the constitutional court is the last resort for minorities" (G2)

The judges are aware of the power public opinion could have and historically has had. As a result the German and Austrian court have taken steps to ensure that they are not influenced by public opinion but that the courts influence public opinion instead.

For all judges the mere possibility of having their decisions influenced by public opinion was abhorrent. However voices from both the German and Austrian constitutional court are careful to point out that public opinion is important for the court in general if not for the single decision.

> "We do not pander to public opinion. But if a court constantly is in confrontation with public opinion the court will eventually have problems to have its rulings accepted[35]" (G1)

The Austrian court learnt that lesson the hard way in the previously mentioned case on multi-lingual signs. It was perceived by members of the court that the political forces motivated and "used the media to swing public opinion against the court" (A2). As a result the Austrian constitutional court decided to employ a media representative who not only deals with the media but who actively tries to shape the public image of the court. The German court has had a media representative for decades and has made increasingly use of the position following an experience where the court faced widespread public disapproval following an unpopular ruling. In interviews it is said that the media representative's duty is to "avoid misrepresentation of facts pertaining to cases" (G5, G6, I3, I8,A7,A8). Additionally, to ensure that the public receives "balanced and well-informed information about the works of the constitutional court". The importance of the media representative is possibly also underlined by the fact that each of my Italian interviewees argued that the Italian constitutional court would be more effective if it would have a media representative. The Italian judges argued that the public is not aware of its actions and therefore the political forces have more opportunity to circumvent or try to ignore rulings.

> "We would like to use the media as it is often used against the court...To transfer information from the court to outside - we have no means. But would

[35]Also wir buhlen da jetzt nicht um die Gunst der öffentlichen Meinung. Aber ein Gericht das sich immer in Konfrontation mit der öffentlichen Meinung setzt wird irgendwann ein Problem bekommen mit der Akzeptanz.

like to have one... We are not good at using the press. It is the administrative function - everyday work is reported in an internal newspaper" (I3)

In all courts there were voices that admitted that there are areas of law where the court knows that public opinion is on its side (G1, I2, A3). In Germany and Austria environmental cases, in Italy in the 1980s and 1990s the European Union are examples of this. In these areas a decision that will be unpopular with the ruling elite is less likely to meet with opposition and the courts are aware of this. However, the interviewees in Germany and Italy strongly stress that their duty towards minority protection supersedes all. The situation is possibly best explained with a quote from one of the Italian constitutional court judges:

" We do not follow public opinion. But our debating chamber has got windows - and sometimes we even open them" (I3)

In other words, the courts are aware of public opinion and the importance public opinion can have for the court generally. They know when their decision is counter to what public opinion expects and are aware of the power the media can play in swaying public opinion their way. They use public opinion but are not used by it. Both Germany and Austria have made experiences with public opinion swinging against the court and since then make increasing use of their media representative to ensure that the data reaching the public is presented in a way the courts approve of. The interviews therefore show that public opinion has the definite possibility of influencing the courts - but that the courts have made use of that circumstance to their own end and are now influencing public opinion. In other words, the courts are now accomplished users of propaganda.

8.4 Conclusions

The above has shown that constitutional courts in Italy, Austria and Germany are aware of public opinion and therefore that there is the potential that the increased levels of review in abstract review are based on a shift in public opinion. However, the direction of the shift is unexpected. It seems to be the case that the constitutional courts have become more skilled in manipulating and guiding public opinion and have therefore increased their autonomy. The courts have learnt that there are areas in which the public supports it and is more insulated from political pressures in these areas through this knowledge. This is supported by the fact

that in these areas of high public support the Italian and the German constitutional courts are more likely to pass historically unusual decisions. For the wider picture of this thesis the clear awareness of courts of the public opinion has one main consequences: it is possible that the decision-making pattern of the court are influenced by considerations of political consequences. This is independent of the analysis that a change in public opinion has not occurred to cause a change in the decision-making pattern in the court. The court can act more freely in those decisions which follow the public opinion. However, the number of cases which fall into these areas are limited. Moreover, in most cases public opinion is not that clearly dominated by one side of the argument.

CHAPTER IX
A CHANGE IN THE NUMBER OF "EUROPEAN CONNECTIONS" AS REASONS FOR THE CHANGE IN THE DECISION-MAKING PATTERN

The previous chapters have tried to find an answer to the question what causes the change in decision-making patterns in abstract review in Austria, Italy and Germany. It was observed that not only the decision-making pattern has changed in the three countries but also the style the decisions were written in. Therefore it was concluded that the style as well as the decision in the case must be affected by a third variable. The political opinions and the pressures from political institutions are found to be possible variables with the power to influence style and decision. There is no change in political attitudes or the philosophical background of the judges which influences the decision-making pattern. However, political considerations have proven to be of some importance in the decision making process. How exactly political considerations affected the decision-making pattern is still unclear. However, in consideration of both the political attitudes of judges and the change in style of decisions, there is a regular recurrence of concepts, institutions or ideals connected with Europe. This is in line with the evidence in the literature. In the last decade the literature has noted that there is an increased tendency of courts to refer to legal sources outside their strict jurisdiction. The US Supreme Court has begun to refer to other courts' jurisdictions, the European national courts are forced to refer to European Union law and legal principles and all courts are observed to be making use of such extralegal concepts as the "rule of law", "civil rights in Europe" and "European values". It remains to see if this increased use of the term "European" is in any way related to the increased levels of review in the three countries.

The statistical analysis indicates that the increased use of the "European" in the arguments is linked to the form the decision in a case takes in Germany and Italy. After asserting this through statistical analysis this chapter attempts to explain this connection. Firstly, it is necessary to ascertain that the increased use reference to the "European" is de facto evidence for the cause of the changed decision-making pattern and not a result of it. It therefore needs to

be ascertained that the variable “Europe” is the independent variable, not an intervening variable, such as the style of decisions has proven to be. Various possible explanations for this link of “Europe” as the independent variable affecting both style and decision-making pattern can be found in the data. The analysis suggests that the inclusion of EU law has made it harder for policy-makers to ensure that the laws they are proposing are not contravening national or European legal provisions. Therefore, the likelihood of a law being unconstitutional is increased today because passing laws which are constitutional is more difficult. With EU law and national law to consider, the formulation of legislation has become more complex. The courts attempt through their decisions to clarify terms and legal boundaries, which leads to higher levels of review but also to a more interpretative style. The courts also voice a worry that the policies passed sometimes intentionally contravene the legal boundaries leaving it to the courts to clean up the legal mess created.

9.1 Increasing reference to “European” in case materials

In the three courts there is an increasing trend to refer to the “European”, in some form, in either the arguments of the plaintiffs or of the court, as noted by many authors (Friedman 2005; Newell 2005). Relevant empirical data are rare and incomplete. However, the analysis below indicates that the argument is not without merit. Furthermore, the way the word “European” is used within case materials has changed over time. Originally it was based on direct reference to formalised sources such as the European Treaties, the jurisprudence of the European Court of Justice and the European Commission. In Italy and Germany these phrasings have changed to more informal aspects such as “European values” and “obligation to other European states”. In Austria this development appears to be different becoming rather more formal, by concentrating on treaty provisions.

In Germany there was no mention of Europe in connection to either formal or informal sources of law before 1988, but since then most years have contained a substantial percentage of cases (Figure 1). In Austria and Italy this development is even more explicit (Figure 2 and 3). In the case of the Italian court the number of cases with reference to Europe outweigh those without in the last decade. This development in abstract review is counter to the general development observed. Lucio Pegoraro argues that the Italian constitutional court, contrary to other European courts, is less likely to refer to any sources outside its national borders

(Pegoraro 2006:3). The same sentiment can be found in German and Austrian literature. The results of the analysis of abstract review cases clearly contradict these findings. This discrepancy can be explained with the form the references take over time. In Italy and Germany the references have changed from articles of law, directives or European and international organisations to more informal forms such as “European values and obligations”.

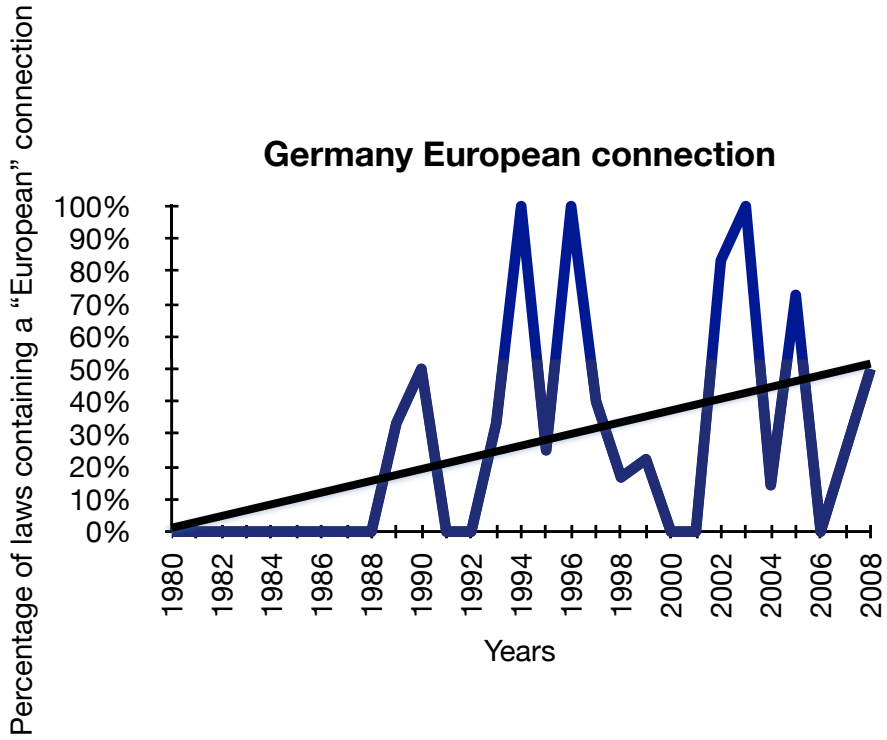


Figure 1: Increased percentage of laws seeing a mention of the “European”

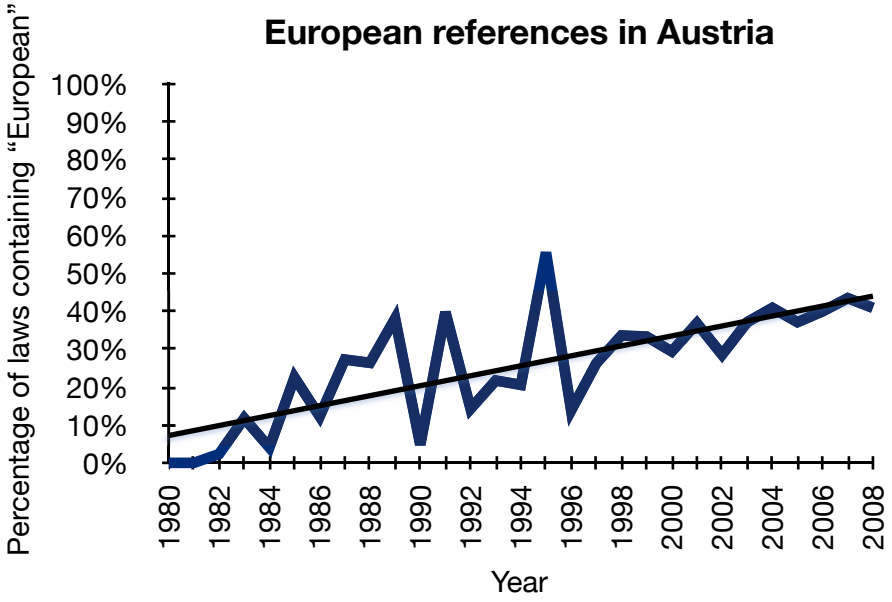


Figure 2: Percentage of cases containing a reference of “European”

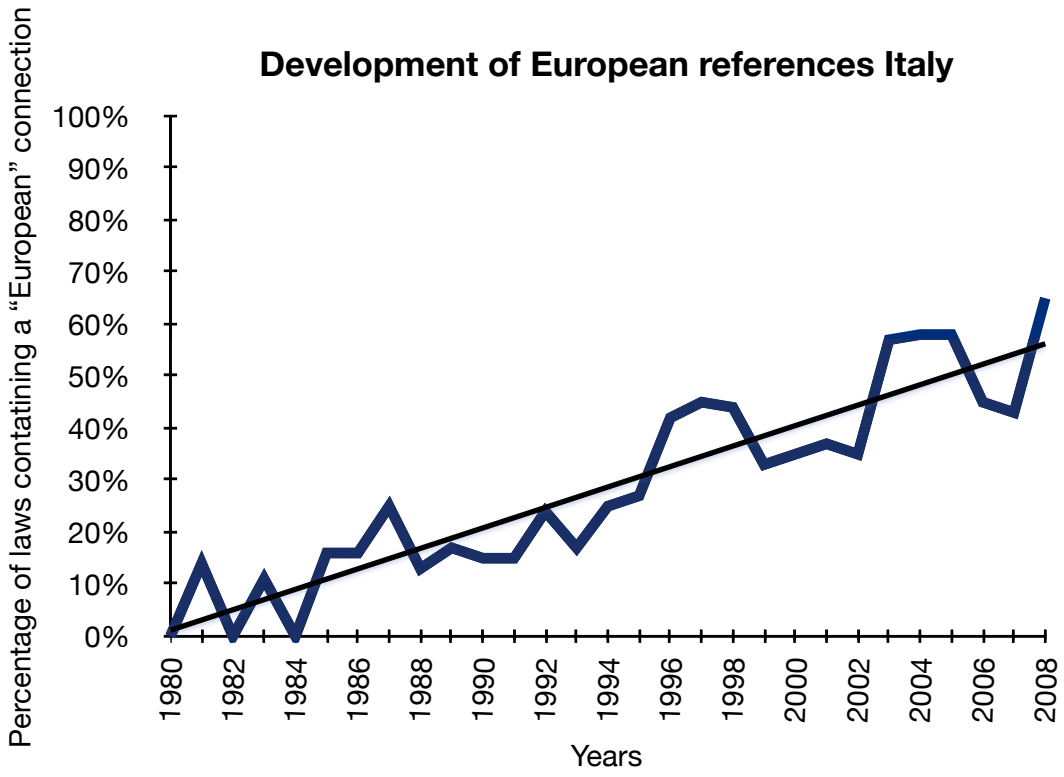


Figure 3: Development of cases containing a reference to EU in Italy

Throughout the 1980s the Italian court cases contain the use of formal sources of European law and references to the European Institutions. Over 90% of the case materials containing any reference to an extra-national source of legislation or legitimising argument is based on articles of law or European institutions. The remaining cases utilise informal concepts such as "international and European obligations". This balance shifts in favour of the informal concepts throughout the 1990s. Of the cases containing a reference to extra national concepts over 60% now utilise "European values and norms", "community obligations" and "European legal unity" ((103/2008), (134/2006), (206/2001), (356/1998), (94/1995)).

> "… in relation to the period of completion of the process of liberalisation and European integration …" (1/2008)

Informal concepts such as European values and obligations have become legitimate arguments in front of the courts.

In Austria, on the other hand, the usage of "Europe" is increasingly formalised and has changed over time. In the 1980s and 1990s, this reference to "Europe" is being cited as reason for action. This is contrary to the current decision style which uses the "European" as

supporting evidence for a point. The court argues that its decision is the only possible and practicable decision in the face of the political situation Austria finds itself in at the time.

> "These arguments as a whole become overwhelmingly convincing in connection with the treaty negotiations with the European Communities" (G245/89)

In other instances, the plaintiffs have begun to argue that a decision is "an euro-political necessity" (388/1996) and in "accordance with the intentions of the European Institutions" (189/1990). In these cases the reason given for a decision is connected to the "European" in some way. Over the last decade these references have almost entirely disappeared and have been replaced with formal references to the jurisprudence of the European Court of Justice and the European Human Rights Court[36]. Therefore, according to the empirical data, there is an increased use of the word "European" in the case materials of all three countries. Furthermore, the use of the word "European" changes from "formal" to "informal" in Italy and from "informal" to "formal" in Austria whilst it remains on an "informal" level in Germany.

9.2 Does the increase in the occurrence of "Europe" cause the change in decision-making pattern?

As yet it still needs to be ascertained if the increased levels of laws seeing review is connected to this increased use of "European". A statistical analysis correlating the cases in which a law is reviewed and the usage of the word "European" indicate that there is a link in Germany (Cramers V = 0.2) and Italy (Cramers V = 0.2). No such link can be found in Austria. This contravenes common assumptions regarding the Austrian court's supposed closeness to the European level. The Austrian court is proud of being the only well established constitutional court which regularly refers cases to the European Court of Justice. The court prizes its ability and willingness to employ, defend and support European law (Ohlinger 2007). So the fact that there seems to be no link in Austria, in comparison to Italy and Germany, seems counter intuitive. The change in the way the court refers to the "Europe" in Austria, in comparison to Germany/Italy, can provide an explanation. The explanatory strength of the model correlating the increased use of the "European" argument with the increased levels of review in abstract

[36] The dominance of the European Human Rights Court can be explained with the Austrian constitutional provision which makes the jurisprudence of the Human rights court part of national law.

norm control lies at 20% in Austria (RSQ= 0.25). In other words, the use of the "European" argument in its more formal expression in Austria is able to explain around 25% of the change in the review in abstract norm control. 25% variation in the independent variable is approximately the difference between the partial and unconstitutionality rulings. It seems that in Austria, if the word "Europe" occurs in the text of the decision, the case is more likely to be ruled partially unconstitutional. If taking the position that partial unconstitutionality rulings are less confrontational then it can be concluded that the word "Europe" in decision texts causes the court to pass less confrontational rulings. It also means that the variation in the decision-making pattern in Austria in comparison to Germany and Italy is explained. It does however not explain the higher levels of review in Germany and Italy. Another explanation has be found.

In Germany and Italy a law containing a reference to the "European" leads to a law seeing review by the constitutional court in 83% of times. This might be easily explained with the position the constitutional courts hold in the European constitutional construct. Their duty lies in ensuring the coherency of law. They have to ensure that national laws are coherent and harmonised with European law due to the concept of the supremacy of EU law. An increase in the quantity of European laws signifies that more national laws have to be reviewed to fit into the overall construct of European laws. The Austrian exception is harder to explain under this theory. The Austrian court does not observe the same increase in review nor does it see a link between a law containing the word "European" and it being reviewed. Within the group of cases which see review there is a link between the case containing the word "Europe" and the decision being a partial unconstitutionality ruling. Just as many laws containing a reference to "Europe" are declared constitutional as are unconstitutional.

A possible explanation for the Austrian exception might be found in its comparative youth as a member-state of the EU. Austria is the most recent member state among the three countries and it might be argued that the court has to accustom itself to the European sphere before making decisions which align the court. However, the Austrian court has been seen as the court with the strongest desire of a relationship with the European level by commentators (Hoennige 2007; Kotschy 2006; Ohlinger 2007). Its record of referrals to the European Court of Justice is impressive and far outweighs that of the other two courts (Sachs 2004), leading to the assumption that the Austrian court is most skilled and able to give European principles of

law national expression. In fact, the statistical analysis above suggests the reverse. The conclusion drawn from this is that whilst the Austrian court is more likely to refer cases to the European courts, the decisions the Austrian constitutional court makes on the national level are less influenced by the European dimension then those in Germany and Italy.

When comparing the form the review takes in all three countries a further pattern becomes apparent. In Germany a reference to the “European” correlates to this law being declared unconstitutional in its entirety. In Italy the reference will lead with higher probability to a partial ruling. In both countries therefore a reference to the “European” will result in a form of ruling traditionally considered “rare” in these courts. Historically the German court has ruled the majority of cases partially unconstitutional, trying to please both the plaintiff and the originator of laws (Currie 1994; Dunlop 1963; Kommers 1997; Landfried 1984, 1988, 1992; Sachs 2004). As seen in Chapter 1 the increase in cases seeing review in Germany is based, for the most part, on increased levels of unconstitutionality rulings. In Italy the increase in review is based on increased levels of partial rulings. This is remarkable as the Italian constitutional court was historically forbidden to declare partially unconstitutional. The court was designed originally with the powers to declare a law either constitutional or unconstitutional. This was to ensure that the court cannot insert any interpretation of its own into laws (Breton and Fraschini 2003; Furlong 2001; Furlong 1988, 1990; Giuffre and Nicotra 2008; Guarnieri 2007; Volcansek 1990, 1994; Volcansek 2000). In both countries there is a link between the increase in cases seeing review as observed in abstract review and the occurrence of the “European” in the argument. So whilst in Austria the reference to the word “European” leads to the court making less confrontational rulings, in Germany and Italy the court will make more confrontational rulings. Also whilst the Austrian court does not see an increase of review correlated to an increase in the mention of the word “Europe”, there is a correlation in Italy and Germany. Possibly the reasons for these correlations can be found in the form the references to “Europe” take in all three countries. This might give an indication why there is such a difference between the three courts. Potential explanations can be found in the identity of the challenger of the law, the origin of the law and the regional identity of those involved. In the end neither can sufficiently explain the importance of the mention of the “European” for the outcome of the decision.

9.3 Regional identity of a law

If the regional origin of the law, a mention to the “European” and the outcome of the case are related, then one can conclude that some regional units are better at using the “European” argument than others and therefore have more success in front of the court. It would therefore be the identity of the regional unit that is the deciding factor on the outcome of the decision. The use of the “European” is simply an intervening variable in that case. Considering the results of Chapter VI and VII it is already apparent that there is no relationship between the challengers regional identity and the outcome of a law. Nevertheless there is a link between the use of the “European” and certain regions.

Laws originating from certain regional units which result in an abstract judicial review case are more likely to contain references to the “European” in Austria and Italy. In Austria cases challenging laws originating in the regions of Tirol, Burgenland and Lower Austria are most likely to contain a reference to the “European”. Whereas there is no pattern to the decisions rendered in these cases. The only remarkable pattern is that these three regions also are the origin of the majority of the judges. It could therefore be argued that these judiciaries are more versed in the format of arguments that will gain them success in front of the constitutional court. Two circumstances speak against this theory. On the one hand there is no significant relationship between cases in Austria containing a reference to the European and the laws undergoing no review. Moreover, there is no pattern to the identity of who used the European argument in these cases, if plaintiff, court, or originator of law. It therefore cannot be argued that through their connection to the court they are more skilled in employing extra-national arguments.

This differs from both Germany and Italy. Sicily is the region most likely to have the argument of Europe used against it by either plaintiff or court. In Germany the low number of cases does not allow for a conclusive answer. However, clearly on both instances it is the court using “European” in its reasons for decision. Of the cases in question, 70% in Germany and 77% in Italy contain a reference to the “European” in their reasoning. The explanation for a correlation between a referral to the “European” and the increased levels of review in Germany and Italy can therefore not be found in the assumption that some regional units employ the argument of “European” more than others. This also applies to the regional units

challenging national laws. This is a surprising result as interviews with non-judges indicated an increase of national funding for the areas of civil service employed in preparing cases with a European connection on a regional level. Other departments have not seen the same increase of funding.

To summarise it is therefore possible to say that whilst it is not possible to identify the "European" argument as simply an intervening variable in relation to regional units it is possible to draw conclusions on who is using the argument in the cases. In both Italy and Germany the constitutional court is more likely to use the "European" argument to support its arguments. Austria does not display the same pattern.

9.4 Parliamentarians and the "European"

However, in Austria there is a definite link between groups of parliamentarians and a case containing a reference to the European (Austria: Cramers V = 0.4). This would indicate that the party identity of the challenger or the originator of the law might be the deciding factor regarding the outcome of the case. Chapter VII has already indicated that party identity matters in Austria but not in Germany and Italy. This would then make the "European" argument an "intervening" variable concerning the outcome of the case. In Austria groups of parliamentarians use the "Europe" in their argument frequently and increasingly. As Austria is the only country in which there is no link between the use of "European" in the argument and the outcome of the case this cannot explain the increased levels of review. It therefore is not possible to assume the "European" argument to be an intervening variable in Austria. In both Germany and Italy it is the central government which sees the "European" used by the court against its arguments. However, the law having been challenged by one of the opposition parties does not have any statistical influence on the outcome of the decision. The explanation that the opposition is able to use the "European" against the government therefore does not hold.

9.5 Europe as an intervening variable?

The argument of the "European" is therefore not an intervening variable in respect to either the identity of the plaintiff or the originator of the law. There is no relation between plaintiff or

origin of the law, a reference of “Europe” in the case and the law seeing review. However, there is a relation between a case seeing review and the reference to “Europe” in Italy and Germany (Figure 4,5,6). There is also a correlation between partial rulings and the word “Europe”, in any of its variations, within the text of the decision. It is therefore an independent variable in its own right. The simple fact that there is a correlation does not explain, as yet, why the word “Europe” in the case materials should lead to a change in the decision-making pattern. Moreover, it is unclear how the recurrence of the word “Europe” in the case materials and the admission that “political considerations” matter in the judges’ decisions. The only possible explanation drawn from the statistical data for the connection between the outcome of the case and the use of “European” in the argument is that the courts themselves employ the argument when they make historically unusual decisions, such as partial rulings in Italy and unconstitutionality rulings in Germany.

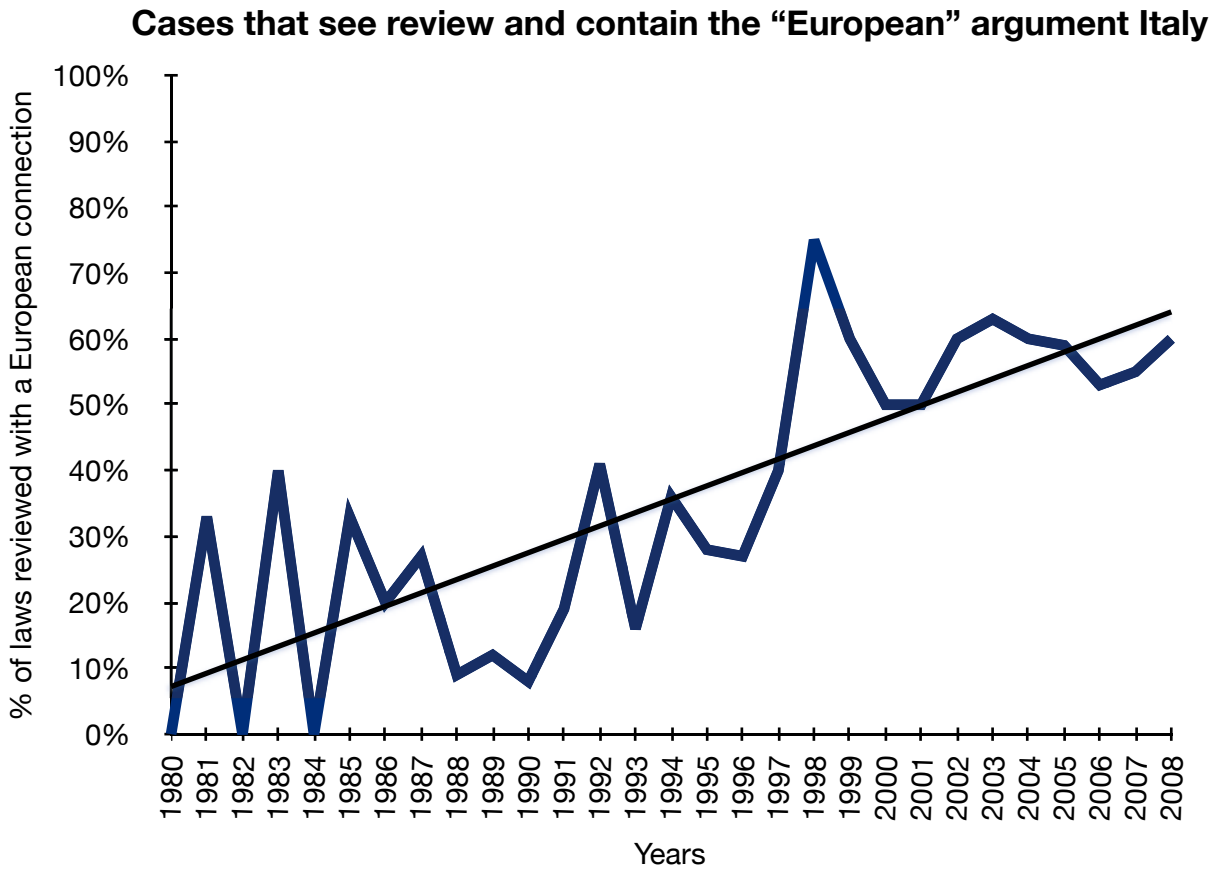


Figure 4: The percentage of cases which see review and in which the “European” argument is used by any of the involved parties.

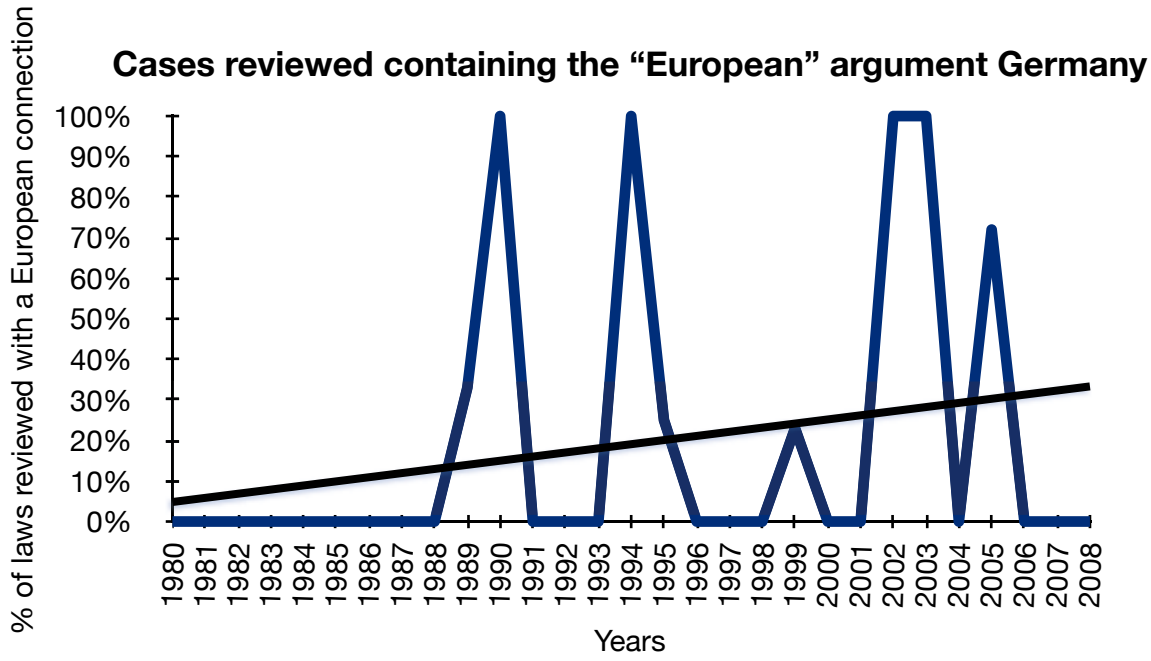


Figure 5: Percentage of laws seeing review containing the “European” argument in Germany

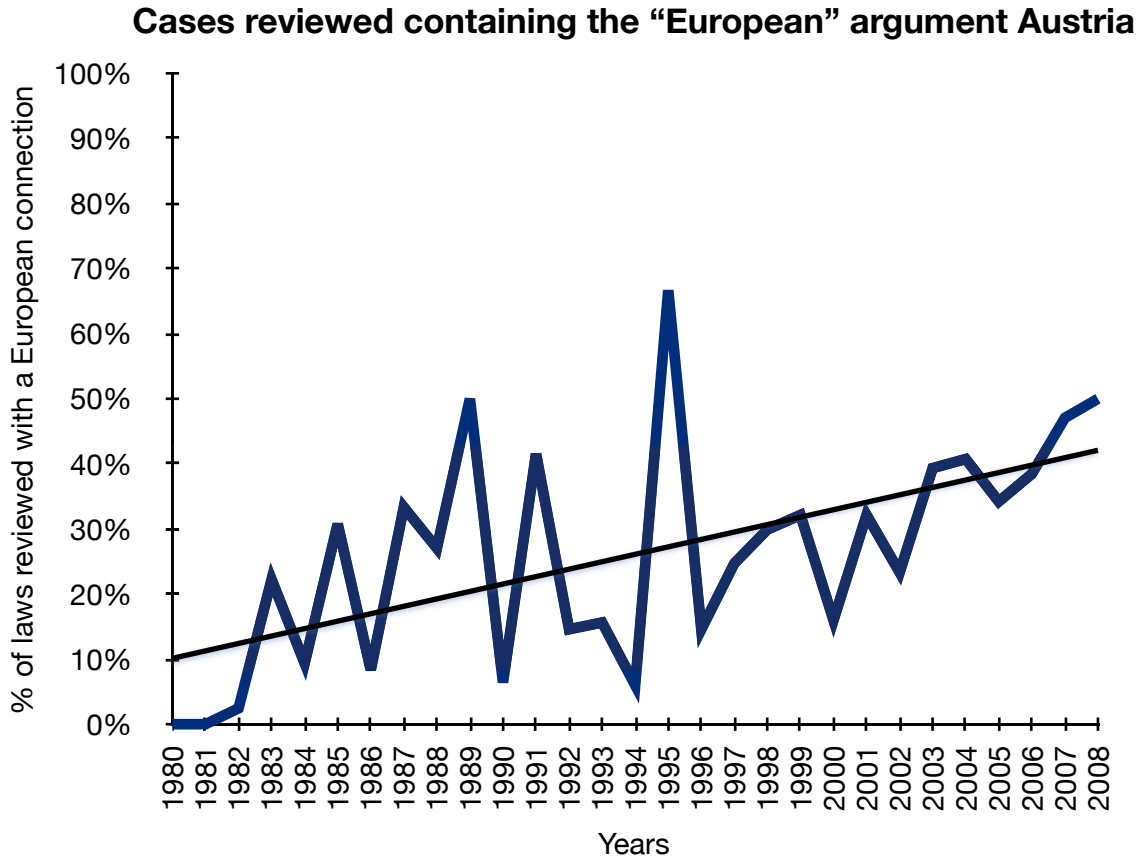


Figure 6: Number of cases seeing review in which the “European” argument is employed

9.6 Interviews

It may be that interviews with judges involved in abstract judicial review can explain why a reference to the European often leads to review in a case. Inititally, I asked if membership in the European Union influences abstract judicial review. As a whole the answer to this question was negative in all three countries. As G1 said:

> "In the case of abstract judicial review which is initiated by a constitutional organ, German constitutional organs, they will never engage in conflict with the European Union. If there it is a European Union involvement then they will not even start it. That is the reason why it does not matter in abstract review. In concrete review a lot, however[37]."

Another judge explains (I1):

> "Questions of conflict of EU law and national law are not a question for the constitutional court – any ordinary judge can and has the duty to rule on that. The constitutional court remains out of those questions. So I would not say that in Italy there are an increasing numbers declared unconstitutional relating to European law."

These opinions are representative of the opinions expressed by the majority of the interviewees. None answered the question if European Union membership has any influence on the outcome of an abstract judicial review case in the positive. When confronted with the statistical evidence they appeared surprised by the extent of the use of the European and for the most part based it on coincidence. However, they did not deny that there is a "Europeanisation" occurring. "Europeanisation" seemed to mean for them the adjustment of national laws and national legal ideals to the wider European provisions and legislation (A1, G1, G3, I1).

The interviews allowed a closer look into the areas of potential influence of the European. The origin of the cases and the area of law might be reasons for the correlation. Most judges argued that they were not even aware of the origin of a law and therefore would not be able to take this into consideration. However, according to approximately 2/3 of the interviews

[37] Und zwar die abstrakte Normenkontrolle, weil die von Verfassungsorgane, deutschen Verfassungsorganen, eingegeben wird, die werden sich nie mit der EG im Konflikt setzen. Wenn das ein EG Fall ist dann leiern die das gar nicht an. Deshalb spielt das bei der abstrakten Normenkontrolle keine Rolle. Bei der konkreten erheblich.

(A1,A2,I1..), there is a visible Europeanisation in the debate of cases. G2 explains it as follows:

> " ...the constitutional court still has difficulty to accept the supremacy of EU law. But on the other hand it sees the necessity thereof. So it will not accept the doctrine in its theory understanding but the necessity in practice is clear. There is no alternative."

So whilst it is impossible for judges to consider the influence European Union membership might have on abstract review in theory when thinking about cases in particular and real life situations they identify an EU origin as an influence on the decision they make.

It is possible that certain areas of law are more likely to result in review of a law and therefore must contain, for the correlation to be significant, higher references to Europe. In the areas of environment, financial and social law the tests of the decisions contain more references to Europe than other areas. Also these areas of law see the highest level of review. The judges seemed to be unaware of this overall development. They argued that no area of law is more, or less, likely to see review. In relation to special concepts of law, which occur within these areas, the answers diverged according to nationality, however.

The rights of European Union citizens is one such area. In all three countries the consideration of rights of European Union citizens in comparison to third country citizens are debated and considered. Over half of the Austrian judges seemed to feel that they are being forced into this by the legal surroundings. They feel that the European Treaties force them to act as they do but also felt it as an uncomfortable fit with their understanding of law. German and Italian judges on the other hand seemed to feel that the protection of the rights of European citizens is a positive duty. One judge noting that when he was appointed he inquired into the reasons for the appointment and the answer he received was:

> " ... (there was a feeling) that the European Union needs to be protected through the constitutional court"

This illustrates that there is a difference in the motives and reasons differ in the three countries for the use of "Europe" in the cases. Germany and Italy see the construction of European law containing national law. They therefore decide to increase its coherency in letter and spirit through their decisions. In Austria the acceptance of Austrian law as part

of European law is just as high but the perception of what this leads to is different. Judges make use of the direct letter of the law but do not see it in their remit of power to stand for the spirit of that law.

In all three courts the direct connections between the European Court of Justice and the national constitutional courts are manifold. Former members of the Italian, Austrian and German constitutional court have been appointed to the European Court of Justice and are serving there at the moment. When asking the question if there is a direct influence or connection between the European Court of Justice and the constitutional courts, then at least two judges from each country referred to recent meetings with these former members. All judges argued that there is no instance in which the ECJ attempts to exert direct influence on a particular case - however, there are informal avenues of connections. When enquiring if there are direct questions being asked between the levels in an informal way one judge said:

> "I believe you are aware of the co-operation problems between the German constitutional court and the ECJ. Co-operation is a declaration of intent and works internally very well. The phone was invented a few years back"[38]

Not only do the national judges in all three countries regularly meet with judges of the European level and exchange personnel with European courts but they also visit judges in other countries. Last year the Austrian court was invited to visit the United States Supreme Court. In May 2009 the German constitutional court visited the Austrian court. It is therefore not the case that some courts have a closer relationship to the European level and therefore are more likely to use the "European" as an argument. However, in conversation with various Austrian judges an increasing dislike for these meetings was made apparent. One argued that he regularly attended until approximately a decade ago but since then has become "fed up" with these meetings (A3). He clearly felt that the "national law is separate from the European level" and these meetings only confuse (A3). The sentiments expressed by the German and the Italian court were widely different in that respect. Here these meetings were not only praised but considered a useful and necessary institution.

[38] Also ich meine Sie kennen ja die Probleme zwischen EuGH und Verfassungsgericht mit diesen Kooperationsverhältnissen. Kooperation ist so die Absichtserklärung, diese Kooperation klappt intern hervorragend. Also es gibt ja die Erfindung des Telefons ja schon länger.

So, what is the reason for the increase in unconstitutionality rulings in abstract judicial review in Germany, Austria and Italy? All interviewees had argued originally that European Union membership does not influence abstract judicial review - even that according to theory it cannot. However, in the interviews they identified the origin of the case as EU related, the rights of EU citizens as considerations and admitted to an informal connection with the ECJ on a conversational level. Of the twenty judges I talked to 18 argued that the reasons for the increased levels of unconstitutionality rulings can be found in the decreasing clarity and quality of laws being passed. Eleven judges further argued that this decreasing clarity and quality is due to the increasing complexity of the political framework surroundings the courts is caused by European Union membership, or in the words of one judge (A5):

> "The playing field has become bigger and more obstacles have been added into it. It is not always clear how the obstacles can be climbed and that causes confusion."

Eight of these eleven judges continued to argue that in some cases the confusion is intentional and that politicians are not only more willing to push controversial cases to the constitutional courts but that they use this confusion, this bigger playing field, as a smokescreen for their action.

9.7 Conclusion

Three conclusions can be drawn from this chapter:

A) The use of the "European" argument is correlated to the increased levels of review
B) The use of the "European" argument is correlated to the change in style. The court have increased the membership of academics to inrease expertise of European law on the bench . Also the increased need to explain and clarify terms has caused the German and the Italian courts to break with historical precedent, partial rulings in Italy and unconstitutional in Germany, in respect to the form their decisions take
C) The use of the "European" argument is an indication of a changed legal landscape and an attitudinal change in both judges and plaintiffs

The statistical data drawn from the cases decided in all three countries over the last three decades indicates that there is a link between a case seeing review and the use of the

“European” argument. In Italy and Germany the connection is strong with over 70% of cases in the last decade seeing review also containing the “European” argument (Figure 4,5). In Austria the statistical analysis indicated that there is no link between the increased level of review and the use of the “European” argument. Figure 6 shows that for the most part less than 30% of cases that see review also contain the “European” argument. However, the trend is on the increase and it is therefore questionable if Austria will not also display this link in the future.

Moreover the use of the European argument can be linked to the increase of unconstitutionaltiy rulings in Germany. The German court has always been known for declaring most cases partially unconstitutional if review of a law was undertaken at all. Unconstitutionality rulings were considered rare and too confrontational. This seems to have changed in respect to abstract judicial review. According to the interview data judges relate this change to an increased awareness of the uncertaintiesin the legal landscape presented to the law maker through the inclusion of EU law. However, some also admit that politicians make use of this circumstance for their own means. In order to ensure that not more confusion reigns, and to discourage the use of the court for political means, the judges are more likely to declare a case clearly unconstitutional or constitutional.

In Italy the situation is comparable. Historically the court was not allowed to declare cases partially unconstitutional so as to avoid “rule-making” by judges. There is a strong link between a law being declared partially unconstitutional and the use of the “European argument” in abstract review today. Interview data suggested that the court is aware of the difficulty relating to the inclusion of EU law and the confusion it creates. Through their partial rulings they attempt to clarify and simplify the legal landscape and deter politicians from taking advantage of the court. Therefore both the German and the Italian court reacted to the same circumstance by using a constroversial method.

The increased levels of review in Italy and Germany are linked to the increased use of the “European” argument. However, the connection does not lie in the courts being more or less European friendly in their judgments. The connection is due to a changed legal landscape in which judges and plaintiffs react to an attitudinal change towards the constitutional courts. The inclusion of EU law and its increasing predominance has increased the obstacles the law-

makers face when designing a law. It is harder to be sure that the proposal does not contravene any of the existing laws, nationally or on the European level. The courts react in their own means to clarify the terms involved by either declaring each case definitely without leaving room for debate (in the German case) or by defining and debating the terms involved in detail (in the Italian case). In both countries however there is a worry that especially in financial cases politicians are aware of the confused landscape and make use of it to pass laws that clearly contravene the constitution. For the politician it is a win/win situation as the law will remain in power until it is struck down by the constitutional court and the tax proceeds from the law remain in the hands of the state thereafter. Chapter VII has corroborated these findings. However, what does this actually mean for the whole argument of this thesis?

CHAPTER X
CONCLUSIONS

This thesis has analysed the connection between the commonly known variables influencing abstract judicial review and the increasing number of laws being declared unconstitutional in any form by the constitutional courts. The different theories on constitutional court decision making suggest the Black Letter of the Law, the attitudes of judges, the influence of political institutions, changes in public attitudes and the increased importance of European influences as possible explanations for the changed review patterns in abstract judicial review. The analysis suggests that the increasingly common use of the word “European” as well as the quality of laws and the position of the court within the wider political system have been identified as the most likely explanations for the increased levels of review in Austria, German and Italy throughout the last thirty years. The argument that presents an answer to the question of what causes the increase of review in abstract norm control takes two forms and supports the hypothesis posited in the beginning:

A) Harmonisation of national law with European law
B) As a result, law-making is more complex. Law-making, within the borders of national AND European law, is more complicated than law-making only within the borders of national law.

AND/OR

C) This complication in combining national and European law allows politicians to force courts to make decisions on topics the political institution would prefer not to decide upon
D) The courts try to clarify the combined rules of national and European law by making clearer and more definite laws

THEREFORE: More laws are reviewed and more laws are reviewed in a definite way, meaning more unconstitutionality rulings are passed.

As such this study opens further avenues of questioning concerning its importance to the overall European constitutional culture, the court seen from the political perspective and the internal workings of the court. This study also adds to the state of knowledge regarding

abstract judicial review in Europe and especially in Austria, Italy and Germany. However, it only scratches the surface of what we do not know in respect to abstract judicial review and the empirical workings of constitutional courts in this area but it clarifies through its inquiry the areas in need of further research.

10.1 Harmonisation of national and European law

Throughout the same time period in which there is an increase in laws seeing review in Germany, Italy and Austria there is also an increase of decisions which make reference to the "European". Whilst in 1980 there was virtually no case using the word "European" in the arguments underpinning the decisions today that number has risen to over 50% in all three countries. Statistical analysis reveals a link between the increased levels of review in abstract review and the increased use of the word "European" in the arguments in Germany and Italy but not in Austria. The correlation is medium strong and will only account for less than 20% of the variation in the dependent variable, the increase of review. However, this would be enough to explain the 20-30% increase in laws seeing review.

Moreover, there is a statistically significant connection between a case in Germany being ruled unconstitutional and this case containing a reference to the "European". This is remarkable as unconstitutionality rulings are historically the most uncommon forms of decision. The same is true for the Italian case where there is a statistically significant correlation between partial rulings and the use of the word "European" in the argument. Therefore, the correlation between the argument containing a reference to Europe and the law seeing review is able to account for the increased levels of unconstitutional and partial unconstitutionality rulings in Germany and Italy. The Austrian increase in levels of review however remains unexplained by this theory. Also the reasons for the correlation between the increased levels of review in abstract norm control remain illusive.

The research into the various potential influences identified by the literature as having an impact on the judges' decisions has suggested three possible explanations for the link between the increased mention of the word "European" in the arguments and the increased levels of laws seeing review in Germany and Italy. A longstanding complaint of judges is the observation that laws are being passed without sufficient checks and are therefore of worse

quality. Also courts point out that in certain areas of law, namely tax law, politicians leave the politically difficult questions to the courts. When looking at changes at the courts themselves an additional reason suggests itself in the increased use of the media to influence public opinion in the courts' favour. All three possible explanations suggest themselves regarding the link between higher levels of review in abstract norm control and the increased mention of the word "European" in the arguments. A combination of the three possible explanation promises to be most useful in the explanation of the behaviour of the three courts.

10.2 Law-making, within the borders of national AND European law, is more complicated than law-making only within the borders of national law.

The first explanation that was suggested in interviews was that due to the decreasing quality of the laws there is more need and possibility for review. All but one interviewee suggested this as a reason for the increased levels of review in abstract judicial review. This argument was supported through data pertaining to the funding of those civil service departments in charge of checking new laws for their constitutionality. In all three countries these departments have not increased their funding whilst the volume of the laws passed per year has almost doubled. Therefore it seems to be a reasonable argument to assume that the laws passed today are not checked on their constitutionality as thoroughly as thirty years ago.

In many of the interviews with civil servants they argued that the increase in a connection with the word "European" is based on the discrepancy of funding. Whilst those departments which consider the constitutionality of national laws have not seen an increase in funding, laws with a connection to the "European" are considered by relatively new departments which have enjoyed a steady increase of funding. Whilst this explains an increase in referral to the "European" in the arguments of the government when they defend the law's constitutionality it argues against the decrease in quality of laws. If many if the recent laws considered for their constitutionality by well funded, separate departments then there is no reason to assume that their quality has decreased.

However, it can be argued that through the different specialities of the separate departments and the lack of interaction among them more laws with unconstitutional aspects slip through the net. Those with the speciality on the national level might miss connections to the European

and those with their speciality on the European might miss national implications. This would explain why more laws with a mention to the “European” in either the argument of the judges or the government see review. It does not explain the divergent development in Austria or the increase in historically unusual decisions in Germany and Italy.

10.3 This complexity of making legislation in the framework of national and European law allows politicians to force courts to make decisions on topics the political institution would prefer not to decide upon

A further explanation for the increased level of review, and especially the historically uncommon decisions in Germany and Italy, was suggested by approximately two thirds of the interviewees as a result of politicians intentionally using the court to avoid political backlash.

There is a decreasingly important link between a law being declared partially unconstitutional and the law being passed by the current government, or ruling elite in Italy and Germany. With other words in the 1980s it was most likely that the court would try to appease the government of the time and the potential future government by ruling only partially against it. This picture has undergone a substantial change with the identity of the challenger and the identity of the originator of the law losing importance. Today, both in Italy and Germany, there is an increasing trend to rule unconstitutional also in the face of the government. Interviews indicated the reasons for this development to lie in the stance the governments take towards the constitutional courts.

Judges complain about the lack of respect of the constitution and an intentional use of the court. Especially concerning tax law they observe that governments intentionally pass laws that contravene the constitutional boundaries. In these cases the politician faces a win/win scenario, as if the court overrules the law then the proceeds of the law until that moment remain in the hands of the state whilst if the law is not challenged or reviewed then the proceeds are available indefinitely. Because of the highly technical nature of tax law there is no public outcry or even public awareness which would lead to political backlash for the government if one of these laws is overturned by the court. The courts themselves however are aware of this development and set clear signs through stringent interpretations and unconstitutionality rulings. The courts therefore use their divergence from their policy of

“appeasement” to the government as a signal that they are aware of what is happening and are not in favour of the development.

Whilst the development is most strongly linked to tax law in the eyes of the judges it is not solely limited to that area of law. Many interviewees continued to explain that this development of the court being used is on the increase especially in those areas which are heavily affected by EU law. These areas are developing highly specified and technical characteristics such as tax law has done over the last fifty years. This high level of technicality makes it tempting to governments to apply the same mechanics to these areas of law as they have to tax law and therefore avoid many political controversies by pushing the cases to the courts in Italy and Germany.

Again there is a divergent development in Austria. Here the correlation between partial rulings and the law originating with the current ruling elite is on the increase. With other words it is more likely now than it was in the 1980s that the court is appeasing the ruling elite. The explanation to this development presented through interviews is almost the opposite image than in Germany and Italy. Here the court also sees the same development regarding tax law but sees its own powers and duties as different from the courts in the other two countries. The majority of interviewees saw their position as guardians of the law, ensuring that there is clarity and coherence. In their eyes whilst they disagreed with the development of using courts they saw no way out of it. Their position was to ensure that the laws passed are coherent, not to be concerned with the substance of it. It is the politicians’ power and duty to give the direction through the laws he or she passes and the courts’ position to ensure that the whole works together. Interviews with Austrian judges, past and present, showed that this very mechanical stance was not as prevalent in the 1980s as it is today and therefore the increasingly “appeasing” stance of the court can be explained.

It is therefore the case that the Italian and German judges have increased their levels of review as a reaction to politicians taking advantage of the increasingly technical nature of law. The Austrian judges see the same development and deplore it but do not see it in their power to react the same way. They see themselves more like the government’s mechanics and try to fix the machine they are given as best as they can. The Italian and German courts are more like mechanics that are given a machine without all the parts. They turn around and tell the client

that he or she better get back and bring all the necessary bits before they ask them to fix the motor.

The courts are clearly aware of the importance of public opinion on their existence and their position vis-a-vis the other political powers. In areas where they are aware of public opinion being on their side their rulings can be less “appeasing”, which would explain the increasing use of historically unwanted forms of decision in Germany and Italy. Also the areas in which the courts are aware of public approval are the environment and the European Union and therefore the increased levels of review, especially unconstitutional in Germany and partial in Italy, in connection with these can be explained. Also interviews and court behaviour indicate that the courts have become adept over the last three decades to make use of public opinion. As a result it can be concluded that public opinion is not of importance to every decision and therefore does not influence the single case but is important for the overall success of the court. Whereas, as courts influence public opinion it is more correct to say that they use it to bolster their position than are used by it.

10.4 The courts try to clarify the combined rules of national and European law by making clearer and more definite laws

This inquiry started with the observation that the number of laws seeing review has increased all over Europe in the last three decades. Good examples of this phenomenon can be found in Austria, Germany and Italy where this number has increased by 20 to 30%.

	Review (r = p+uc)	Unconstitutional (uc)	Partial (p)
Austria	+	-	+
Italy	+	+	+
Germany	+	+	-

Table 1: increase and decrease of review of laws

This increase in itself is worth an investigation but the form the decisions take has added a further dimension to the study. It has been argued in the past that constitutional courts are more likely to rule a law partially unconstitutional in order to mediate between the two

opposing parties involved. The development of rulings in Italy and Germany does not follow this pattern whilst those in Austrian court do.

In the German case the number of unconstitutionality rulings has doubled in the period 1980 to 2008. Additionally, whilst partial rulings increased slightly throughout the 1990s they have decreased steadily since. In abstract review the German court is more likely to rule a norm either constitutional or unconstitutional, rather than the mediatory partial ruling. The Italian court on the other hand was never intended to pass partial rulings as its founders wanted to avoid a court that can substitute its interpretation of a law for that of the law-maker. Therefore the fact that partial rulings now outstrip unconstitutional rulings is remarkable. Austria shares the increase in partial rulings but it is paired with the decrease in unconstitutionality rulings. Figure 1 below illustrates the development of unconstitutionality rulings. Italy's (blue) and Germany's (red) unconstitutionality rulings show increasing trends, whereas Austria (black) shows a decreasing trend.

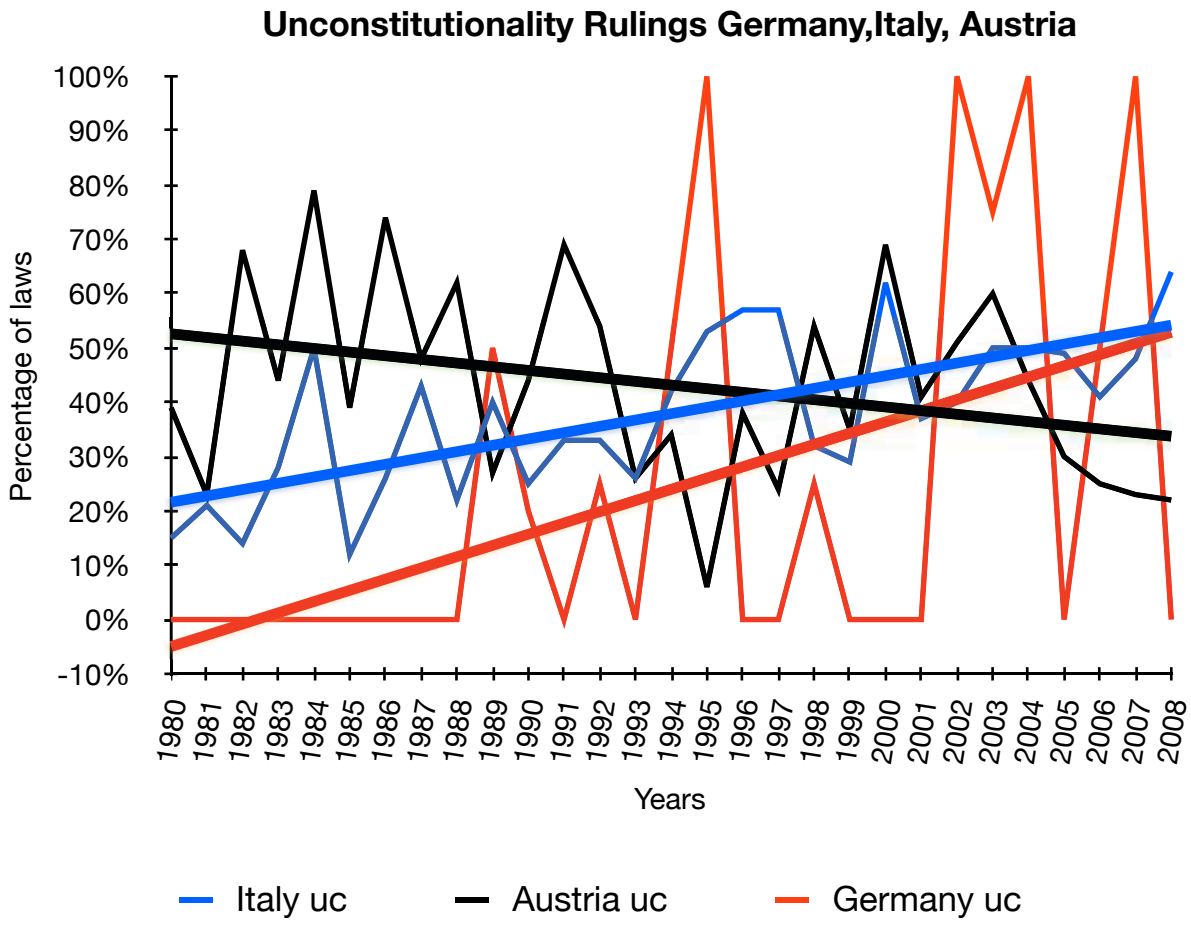


Figure 1: Development of unconstitutionality rulings Austria, Germany and Italy

Therefore not only is there a need to explain the increasing amount of laws seeing review in all three countries but furthermore the converse development in the kinds of rulings passed in Germany, Italy and Austria.

10.5 The argument summarised

The increased levels of review in abstract judicial review in Austria, Germany and Italy throughout the period 1980-2009 are connected to the increased use of the word “European” in the case materials. This is partially due to the increased difficulty to pass laws which are within the limits set by both national and European law. National law-makers are often not as well versed in the borders and framework EU law presents them with and what these mean for national laws. They therefore ignore their implications when passing national laws. However, there is also an increasing tendency to make use of the increased technical nature of law to pass laws which are known to be potentially unconstitutional. The law-makers make use of the confusion surrounding the technical details of EU and national law for their own ends. Therefore the courts are presented with either qualitatively worse laws or intentionally worse laws which they have to review. Furthermore, because of the highly technical nature of much of the legal areas there is little chance that the public will understand enough, or be willing to find out enough, to present the law-maker with any consequences. However, the courts have learnt to use public opinion as well and are therefore able to present the law-maker with clear legal consequences in certain areas. These consequences take the form of unconstitutionality rulings or unfavourable interpretations of the details of the cases in Italy and Germany. In Austria the situation has led to a court that is withdrawing further and further from the political sphere avoiding any confrontation with the political branches. Here the court makes no use of its possibility to present the political branches with legal consequences. It tries to remove itself from the game through “appeasing” positions to both sides, through more partial unconstitutionality rulings and a withdrawal from interpretation.

10.6 Austrian exceptionalism, theory and further avenues of enquiry

Whilst the above presents an explanation for the changed pattern of review across the three countries certain aspects still remain to be explained. For once the Austrian exception in the review patterns needs to be explained. Why are there more partial rulings in Austria than there

are unconstitutionality rulings. Which of the theories identified in Chapter II explains any of the development in the three countries? And what does this development mean for the study of constitutional courts?

10.6.1 Austrian Exceptionalism

The late 1970s and early 1980s saw a very active Austrian court. It was a court that argued that it has to defend the spirit of the constitution against a political elite who tries to infringe on it. Landmark decisions established the right and duty of the court to rule on the constitutionality of all laws, contrary to before when it was limited to those laws without constitutional rank. It was a reaction to a political elite that increasingly removed laws from the influence of the constitutional court through technicalities. The court has then influenced the political landscape through its interpretations of minority rights, centre-periphery decisions, abortion decisions throughout the 1980s. However, it then withdrew further and further and in interviews the current judges seem to feel that the court had gone too far in its power struggle and needed to retrench. Media reports in the mid 1990s detailed the number of laws the court ruled unconstitutional and enforced the need to withdraw politically. This would explain why the Austrian court reacts differently to the current situation than the Italian and German court.

The German court has always enjoyed high public approval and its powers are well entrenched. There is an almost religious deference to the court in Germany and therefore it has rarely faced criticism. It has also always avoided to be seen as standing in opposition to the ruling elite. The increasingly strong tendency to rule unconstitutional has gone unnoticed in the public even if the criticism the court faces from the government is becoming stronger. However, as yet the outcries against the court are more likely to harm the political branches. The court therefore feels in a position of strength and is able to give clear indications to the political branches. The Italian court is a fairly unknown entity in the public. However the constitutional reform and the increasing complexity of law through the addition of EU law has changed its position in the political make-up of the state. Whilst before it was an intermediary between the political branches and the judiciary in questions of corruption it now is an intermediary between opposing political branches. It is needed to clarify judicial questions and this increase in its position gives it the power to react more decisively. It can use the political confusion and discord in respect to the meaning of provisions for its own means and develop its powers vis-a-vis the other political branches.

Therefore whilst the Austrian court is in a position of weakness and withdrawal the German and Italian courts are in positions of strength. As a result they react differently to the challenges they are facing from the political branches through qualitatively bad laws, intentionally misleading laws and disregard.

The change in style of decisions had been puzzling when uncovered through the analysis in Chapter III. Considering the above theory however the change can be seen as supporting evidence. The Austrian cases have become less interpretavist, shorter and their use of EU references are more formal. The German and Italian court on the other hand write decisions which are very long, explanatory and full of interpretations of terms and meanings. The use of the "European" has changed away from quoting EU legal provisions, cases or guidelines towards a discussion of European obligations, values and commonalities. The Italian and German court are therefore freer in setting clear legal boundaries and clarifying political interpretations contained in laws. The Austrian court withdraws towards political formalities allowing the political branches to widely interpret the meaning of guidelines and laws.

10.6.3 Wider implications

It therefore has been possible to find an explanation for the increased levels of review in Austria, Italy and Germany within an adapted rational choice framework. But there are further implications for the European constitutional culture and avenues of further study that are still to be considered.

What does it mean for the European constitutional culture?

Wider consequences of the changed behaviour of courts are apparent. European constitutional culture has always been seen as based on courts that hold a mediatory and appeasing position. It has been argued that this is why European constitutional courts are so successful and the results of the Austrian court and its need to retrench after a period of extensive activity in the early 1980s seems to support these findings. However, aspects of the findings pertaining especially to Germany and Italy seem to indicate that the inclusion of EU law into national law changes aspects of European constitutional culture fundamentally. Courts are more adept at using the media, develop higher confidence as their position in the political framework

changes and develop extralegal concepts such as European values which they apply to cases across borders.

The use of the media to influence public opinion

It seems that the increased awareness of the possible influence of public opinion on political branches, as well as the court, has led to a realisation of public opinion as a tool. The Austrian and the German constitutional court both have media representatives since running afoul of public opinion at some instances in the past. The Italian court has a desire to have a media representative of its own. Constitutional courts developing a media personality such as the one portrayed by political branches might have far reaching influences on the way courts behave.

The increased confidence of courts

An increased confidence of courts might lead to more confrontation with the political branches and if conventional theory applies this will lead to political branches constraining courts in the future. Alternatively, if the courts can cement their more independent position in the political framework the implications for the democratic system are grave. The court nevertheless remains an unelected body and therefore if the court grows in confidence enough to substitute its own interpretation for that of the elected institutions a gap of democratic accountability opens. However, if the increased confidence is based on the confusion and uncertainty created through the inclusion of EU law into national law then there is a natural end to the development. Over time the law-makers will be more adept at the still relatively new processes of EU law and the increase of laws passed.

Development of "European" values

Possibly the most prevalent impact observed is the increase of the utilisation of informal concepts, such as European values and obligations, by the courts. The "rule of law" is a legal concept known and defended across national borders in Europe. It is therefore not an unknown development for concepts such as the "rule of law" to be used independently and these concepts finding their expression in written form across nations. A development of "European" values is potentially a huge and far reaching step in European integration. Without actual legal rules which force the Europeanisation of certain areas of law the assumption that there are such concepts as European values will lead to a convergence to legal rules across nations.

10.7 Possible further avenues of study

Much of the above is pure speculation in its potential relation to other European countries as well as Italy, Germany and Austria. Only a study of a broader application of the variable to other countries, those with the same constitutional system such as Spain, Portugal or Hungary or different systems such as France and the Netherlands can answer the question if there is a change in the European constitutional system rather than simply a change in Germany, Austria and Italy.

Certain aspects of the study also invite further and more thorough study. The use of the media by constitutional courts warrants further study. An analysis of the day to day interactions between the media representative, the media and the court promised to be most conclusive in examining the relation between court and the public

Furthermore, a study of the court from the perspective of the political branches is clearly necessary considering the changed position of courts. How do parliamentarians see the court over time? Is the way the court and laws are treated changing in the constitutional committee in parliament? Interviews as well as analysis of parliamentary transcripts would be able to allow for an answer of these questions.

The make-up of courts in respect to the identity of judges has changed and diversified over time. A study of the interactions of judges and the dynamics at the court is a desirable, if possibly unrealisable, study. Participant observation coupled with interviews would be a desirable combination of methods to undertake the study. The confidential nature of the work undertaken at the court might make such a study impossible. Also this nature might make the constraints on the way in which results can be reported so stringent that the study would be of little use.

10.8 Contributions to the field

This thesis has for the first time analysed abstract judicial review in Europe empirically by using a mixture of methods. Yet there has been little consideration of abstract norm control in the literature. Moreover, typically only one variable is tested against the workings of one

court. The relative scarcity of abstract judicial review allows for a comprehensive analysis of all variables identified as influencing decision-making at the court against all cases under the remit of abstract review. As such an insight over the relationship between the court and the political branches could be analysed and added to the literature to supplement the existing state of knowledge. There is still much that can and should be studied and as such the answers provided by this thesis are only scratches on the surface.

APPENDIX 1

Italy cases

1980,13;1980,101;1980,126;1980,154;1980,179;1980,180;1980,187;1980,191;1980,196;1980,197;1981,3;1981,70;1981,72;1981,94;1981,95;1981,97;1981,118;1982,36;1982,59;1982,65;1982,71;1982,144;1982,162;1982,177;1983,13;1983,14;1983,31;1983,37;1983,47;1983,54;1983,56;1983,107;1983,111;1983,161;1983,227;1983,228;1983,237;1983,242;1983,243;1983,253;1983,307;1983,309;1984,81;1984,118;1984,169;1984,188;1984,219;1984,245;1985,43;1985,72;1985,84;1985,100;1985,101;1985,106;1985,114;1985,115;1985,119;1985,148;1985,149;1985,150;1985,155;1985,182;1985,183;1985,184;1985,195;1985,205;1985,207;1985,214;1985,215;1985,216;1985,241;1985,242;1985,243;1986,10;1986,70;1986,71;1986,95;1986,101;1986,119;1986,127;1986,139;1986,140;1986,151;1986,165;1986,166;1986,174;1986,177;1986,179;1986,181;1986,191;1986,239;1986,258;1987,13;1987,36;1987,37;1987,38;1987,39;1987,44;1987,45;1987,46;1987,49;1987,61;1987,62;1987,64;1987,70;1987,87;1987,107;1987,121;1987,127;1987,130;1987,131;1987,139;1987,167;1987,182;1987,183;1987,188;1987,190;1987,192;1987,201;1987,210;1987,217;1987,289;1987,293;1987,433;1988,1;1988,4;1988,5;1988,10;1988,11;1988,12;1988,13;1988,14;1988,15;1988,16;1988,17;1988,79;1988,84;1988,85;1988,86;1988,87;1988,124;1988,158;1988,162;1988,163;1988,164;1988,165;1988,177;1988,191;1988,211;1988,212;1988,213;1988,214;1988,217;1988,224;1988,233;1988,234;1988,236;1988,238;1988,267;1988,271;1988,272;1988,273;1988,274;1988,302;1988,305;1988,306;1988,329;1988,400;1988,441;1988,447;1988,451;1988,472;1988,476;1988,477;1988,478;1988,480;1988,495;1988,510;1988,523;1988,524;1988,528;1988,532;1988,533;1988,555;1988,561;1988,562;1988,563;1988,570;1988,610;1988,611;1988,612;1988,617;1988,628;1988,632;1988,633;1988,642;1988,643;1988,663;1988,664;1988,665;1988,691;1988,695;1988,726;1988,728;1988,729;1988,734;1988,735;1988,736;1988,741;1988,742;1988,745;1988,746;1988,768;1988,774;1988,796;1988,799;1988,829;1988,832;1988,883;1988,921;1988,924;1988,959;1988,961;1988,962;1988,963;1988,965;1988,966;1988,967;1988,973;1988,976;1988,991;1988,997;1988,998;1988,1011;1988,1029;1988,1031;1988,1033;1988,1035;1988,1042;1988,1044;1989,1;1989,19;1989,20;1989,21;1989,37;1989,38;1989,56;1989,80;1989,85;1989,101;1989,102;1989,229;1989,253;1989,321;1989,324;1989,341;1989,342;1989,343;1989,344;1989,460;1990,2;1990,9;1990,10;1990,24;1990,51;1990,54;1990,68;1990,84;1990,85;1990,87;1990,100;1990,122;1990,125;1990,139;1990,154;1990,156;1990,157;1990,159;1990,161;1990,164;1990,181;1990,186;1990,187;1990,224;1990,227;1990,239;1990,240;1990,245;1990,260;1990,261;1990,294;1990,295;1990,308;1990,310;1990,311;1990,437;1990,493;1990,539;1990,545;1991,3;1991,4;1991,21;1991,26;1991,32;1991,37;1991,49;1991,94;1991,105;1991,116;1991,164;1991,165;1991,191;1991,255;1991,264;1991,276;1991,283;1991,284;1991,385;1991,386;1991,387;1991,476;1991,482;1991,484;1991,487;1991,493;1992,16;1992,28;1992,35;1992,36;1992,38;1992,40;1992,54;1992,75;1992,78;1992,123
1992,137;1992,145;1992,188;1992,202;1992,281;1992,392;1992,393;1992,401;1992,406;1992,407;1992,418;1992,427;1992,461;1992,462;1992,470;1992,488;1992,494;1992,495;1992,497;1993,1;1993,2;1993,80;1993,109;1993,115;1993,128;1993,150;1993,173;1993,174;1993,206;1993,232;1993,250;1993,251;1993,260;1993,266;1993,370;1993,382;1993,438;1993,449;1993,470;1993,496;1993,499;1993,501;1993,503;1993,505;1993,506;1993,507;1993,508;1993,509;1994,32;1994,52;1994,61;1994,84;1994,95;1994,124;1994,128;1994,133;1994,167;199

4,169;1994,172;1994,186;1994,192;1994,222;1994,224;1994,233;1994,235;1994,256;1994,3
83;1994,384;1994,412;1994,415;1994,421;1994,435;1994,437
1994,441;1994,446;1994,452;1994,464;1994,466;1994,469;1994,470;1994,491;1995,29;1995
,35;1995,63;1995,64;1995,94;1995,115;1995,134;1995,141;1995,146;1995,156;1995,157;199
5,174;1995,175;1995,180;1995,202;1995,217;1995,248;1995,260;1995,261;1995,458;1995,4
62;1995,476;1995,477;1995,478;1995,479;1995,482;1995,486;1995,487;1995,493;1995,517;
1995,520;1995,527;1995,528;1996,25;1996,26;1996,29;1996,53;1996,59;1996,87;1996,93;19
96,126;1996,127;1996,132;1996,134;1996,195;1996,205;1996,342;1996,352;1996,372;1996,
380;1996,381;1996,430;1997,2;1997,50;1997,59;1997,60;1997,82;1997,126;1997,153;1997,1
62;1997,191;1997,194;1997,195;1997,202;1997,320;1997,348;1997,365;1997,373;1997,380;
1997,429;1997,430;1997,444;1998,84;1998,87;1998,201;1998,216;1998,355;1998,356;1998,
398;1998,408;1998,421;1999,85;1999,88;1999,111;1999,138;1999,139;1999,141;1999,168;19
99,171;1999,185;1999,186;1999,198;1999,234;1999,235;1999,240;1999,348;1999,349;1999,
350;1999,352;1999,364;1999,382;1999,384;1999,424;1999,456;1999,465;1999,466;1999,467
;1999,468;2000,6;2000,20;2000,53;2000,63;2000,71;2000,98;2000,99;2000,100;2000,130;20
00,138;2000,162;2000,225;2000,273;2000,284;2000,303;2000,322;2000,333;2000,347;2000,
348;2000,350;2000,377;2000,381;2000,382;2000,405;2000,411;2000,417;2000,422;2000,477;
2000,496;2000,503;2000,507;2000,520;2000,527;2000,569;2001,31;2001,55;2001,66;2001,7
4;2001,84;2001,103;2001,106;2001,110;2001,111;2001,135;2001,159;2001,170;2001,195;200
1,206;2001,208;2001,212;2001,229;2001,230;2001,314;2001,317;2001,325;2001,337;2001,3
40;2001,344;2001,347;2001,353;2001,3732001,389;2001,406;2001,411;2001,412;2001,437;2
001,547;2001,553;2002,17;2002,55;2002,65;2002,141;2002,142;2002,182;2002,189;2002,19
2;2002,228;2002,246;2002,247;2002,248;2002,282;2002,304;2002,341;2002,358;2002,376;2
002,377;2002,382;2002,407;2002,422;2002,438;2002,443;2002,503;2002,510;2002,524;2002
,530;2002,533;2002,536;2003,15;2003,28;2003,37;2003,48;2003,49;2003,67;2003,91;2003,9
2;2003,93;2003,94;2003,96;2003,03;2003,186;2003,196;2003,197;2003,201;2003,213;2003,2
21;2003,222;2003,226;2003,228;2003,230;2003,242;2003,274;2003,281;2003,292;2003,296;
2003,297;2003,300;2003,303;2003,307;2003,308;2003,311;2003,312;2003,313;2003,314;200
3,315;2003,324;2003,327;2003,331;2003,334;2003,338;2003,339;2003,342;2004,1;2004,2;20
04,3;2004,4;2004,6;2004,7;2004,8;2004,12;2004,13;2004,14;2004,15;2004,16;2004,17;2004,
18;2004,26;2004,29;2004,31;2004,32;2004,34;2004,36;2004,37;2004,42;2004,43;2004,48;20
04,49;2004,69;2004,70;2004,71;2004,72;2004,73;2004,74;2004,75;2004,112;2004,116;2004,1
17;2004,118;2004,119;2004,131;2004,134;2004,137;2004,140;2004,162;2004,166;2004,167;2
004,172;2004,173;2004,176;2004,185;2004,196;2004,198;2004,203;2004,205;2004,227;2004
,228;2004,229;2004,236;2004,237;2004,238;2004,239;2004,240;2004,241;2004,243;2004,25
5;2004,259;2004,260;2004,261;2004,272;2004,274;2004,280;2004,286;2004,287;2004,307;2
004,308;2004,320;2004,345;2004,353;2004,354;2004,372;2004,378;2004,379;2004,380;2004
,381;2004,388;2004,390;2004,412;2004,414;2005,6;2005,20;2005,26;2005,30;2005,31;2005,
33;2005,34;2005,35;2005,36;2005,37;2005,40;2005,50;2005,51;2005,62;2005,64;2005,65;20
05,70;2005,71;2005,77;2005,95;2005,103;2005,106;2005,107;2005,108;2005,120;2005,122;2
005,134;2005,145;2005,150;2005,151;2005,159;2005,162;2005,167;2005,168;2005,172;2005
,173;2005,175;2005,190;2005,201;2005,202;2005,203;2005,205;2005,214;2005,219;2005,22
2;2005,231;2005,232;2005,234;2005,242;2005,249;2005,270;2005,271;2005,272;2005,272;2
005,277;2005,279;2005,285;2005,286;2005,286;2005,293;2005,300;2005,304;2005,319;2005
,321;2005,323;2005,329;2005,335;2005,336;2005,344;2005,349;2005,353;2005,355;2005,36
5;2005,378;2005,383;2005,384;2005,387;2005,388;2005,391;2005,393;2005,397;2005,403;2
005,405;2005,406;2005,407;2005,412;2005,417;2005,424;2005,426;2005,428;2006,3;2006,5;
2006,12;2006,20;2006,22;2006,29;2006,30;2006,32;2006,40;2006,42;2006,49;2006,51;2006,

59;2006,62;2006,63;2006,80;2006,81;2006,82;2006,85;2006,87;2006,88;2006,99;2006,102;2006,103;2006,105;2006,106;2006,111;2006,116;2006,118;2006,129;2006,132;2006,133;2006,134;2006,136;2006,139;2006,147;2006,153;2006,155;2006,156;2006,163;2006,171;2006,173;2006,175;2006,181;2006,182;2006,183;2006,204;2006,205;2006,207;2006,211;2006,212;2006,213;2006,214;2006,215;2006,216;2006,218;2006,230;2006,231;2006,233;2006,237;2006,238;2006,239;2006,245;2006,246;2006,247;2006,248;2006,253;2006,265;2006,267;2006,284;2006,309;2006,322;2006,323;2006,330;2006,340;2006,344;2006,345;2006,347;2006,348;2006,349;2006,356;2006,358;2006,363;2006,364;2006,365;2006,365;2006,370;2006,379;2006,385;2006,389;2006,391;2006,396;2006,397;2006,398;2006,399;2006,404;2006,405;2006,406;2006,410;2006,412;2006,413;2006,417;2006,418;2007,21;2007,24;2007,38;2007,40;02007,57;2007,64;2007,69;2007,81;2007,82;2007,89;2007,90;2007,94;2007,95;2007,98;2007,105;2007,110;2007,121;2007,137;2007,141;2007,154;2007,157;2007,159;2007,162;2007,165;2007,169;2007,175;2007,178;2007,179;2007,184;2007,188;2007,193;2007,194;2007,201;2007,202;2007,221;2007,229;2007,238;2007,239;2007,240;2007,256;2007,268;2007,269;2007,275;2007,286;2007,289;2007,299;2007,300;2007,313;2007,339;2007,346;2007,358;2007,365;2007,367;2007,373;2007,375;2007,378;2007,387;2007,398;2007,401;2007,402;2007,430;2008,1;2008,9;2008,10;2008,24;2008,25;2008,27;2008,42;2008,45;2008,50;2008,51;2008,62;2008,63;2008,73;2008,75;2008,93;2008,94;2008,95;2008,102;2008,103;2008,104;2008,105;2008,120;2008,131;2008,133;2008,142;2008,145;2008,159;2008,166;2008,168;2008,180;2008,190;2008,198;2008,200;2008,201;2008,203;2008,216;2008,220;2008,222;2008,232;2008,250;2008,253;2008,255;2008,289;2008,290;2008,304;2008,320;2008,322;2008,326;2008,342;2008,353;2008,368;2008,371;2008,371;2008,372;2008,386;2008,387;2008,388

List of variables

C - constitutional
Uc - unconstitutional
review - unconstitutional and partial
P - partial
stopped
Inad - inadmissable
withdrawn
Regional law
National law
What regional law
What region party
DC
What region (partykind)
What region (opposition)
OPPOSITION REGion CHALLENGEd
What nationaI
Year court
topic
kind
months
Tuscany challenges
Puglia challenges
Umbria Challenges
Trentino challenges
Piemonte challenges
Molise challenges
Campania challenges
Calabria challenges
Basilicata challenges
Abruzzo challenges
Liguria challenges
Marche challenges
Emiglia Romana challenges
Friuli-Venezia challenges
Valle d'Aoste challenges
Veneto challenges
Sardegna challenges
Lascio challenges
Lombardia challenges
Sicilia challenges
Council of Ministers challenges
Challenged by coded
challenged by
Party
Party1 (opposition)
Party in Government
regwihthvolun
EU
EU/other
no precedence
ordinanza
sentenza
pages

APPENDIX 2

Germany cases

2BvF1/81
2BvF1/81
2BvF1/81
2BvF1/81
2BvF1/81
2BvE14/83
2BvF2/84
2BvF2/83
2BvF3/83
2BvF1/84
2BvF4/83
2BvF2/84
2BvF1/83
2BvF5/83
2BvF6/83
2BvF1/85
2BvF1/84
1BvF1/84
2BvF1/85
2BvF2/85
2BvF1/82
2BvF2/89
2BvF3/88
2BvE3/89
2BvE2/90
2BvR3/88
2BvF2/89
2BvF3/89
2BvF3/85
1BvF1/86
1BvF1/85
1BvF1/88
2BvF1/88
2BvF4/89
2BvF5/89
2BvQ16/92
2BvF5/92
2BvF4/92
2BvQ17/92
2BvF1/88
2BvF2/88
2BvF1/89
2BvF1/90
2BvR3/88
2BvE5/93
2BvQ11/93
2BvQ17/93
2BvF2/90
2BvF4/92
2BvF5/92
2BvQ17/92
2BvQ16/92
2BvE3/92
2BvE5/93
2BvE7/93
2BvE8/93
1BvF2/86
1BvF2/87
1BvF3/87
1BvF4/87
1BvF1/90
1BvF1/90
1BvF1/87
2BvF1/92
2BvF2/93
2BvF2/93
2BvF2/95
2BvF1/95
2BvE1/97
2BvE4/95
2BvF3/92
2BvE2/93
2BvF5/95
2BvE1/96
2BvE3/97
1BvF1/91
1BvF1/94
2BvF2/98
2BvF3/98
2BvF1/99
2BvF2/99
2BvF2/99
2BvF2/99
2BvF1/90
1BvF1/94
2BvF1/96
2BvF1/00
2BvF4/98
2BvF3/99
1BvF1/01
1BvF1/01
1BvF2/01
2BvF1/01
2BvF1/02
2BvF1/02
2BvF1/02
2BvF1/02
2BvF1/02
2BvF1/02
2BvF6/98
1BvF1/98
1BvF1/98
1BvF1/98
2BvF2/02
2BvF2/02
2BvF2/02
2BvF3/92
2BvF2/01
2BvF2/01
2BvF2/01
2BvF1/03
2BvF1/03
2BvF1/03
2BvF1/03
2BvF1/03
2BvF1/03
2BvF2/03
2BvF2/03
2BvF3/03
1BvF1/05
2BvF1/04
2BvF3/02
2BvF3/02
1BvF4/05
2BvF4/03
2BvF1/04
1BvF1/05
1BvF3/05
1BvF4/05
2BvF4/05
2BvF2/05
1BvF1/07

APPENDIX 3

Austria cases

1978
117
34

1979
1
5
11
25
35
41
54
55
56
57
58
59
107
27
48

1980
10
57
109
9
26
28
30
37
2
5
6
11
17
18
49
1
6
7
96
61

1981
2
4
26
15
16
17
18
19
20
21
28
29
30
32
33
34
39
51
64
86
91
92
93
94
95
97
44
98
99

100
121
128
101
102
103
105
106
107
108
110
111
112
114
115
118
119
125
27
104
113
117
60
81
103

1982
8
45
47
54
81
79
67
44
79
2
94
101
151

1983
66

11
25
28
33
53
90
93
30
7
71
31
40
35
1
34
83

1984
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

26
27
155
28
29
30
31
32
33
34
35
59
68
82
85
102
103
104
105
106
111
112
120
130
131
132
70
78
85
138
147
222

1985
41
68
71
73
86
101
103
108
114

119
151
152
153
157
166
196
202
2
15
18
20
21
30
3
36
44
45
65
128
129
130
131
132
133
134
135
136
137
138
145
146
147
148
149
150
158
159
161
162
165
229
174

225
232
226
227
228
245
246
248
249
250
251
252
253
254
255
256
257
2
233
234
235
236
237
244
259
260
261
5

1986
16
17
90
128
224
4
114
8
9
10
11
18
80

84
89
91
111
117
119
121
122
123
124
129
140
167
173
178
179
186
229
230
231
232
233
234
235
236
237
243
13
35
36
37
71
6
13
112
47
143
147
149
150
151
152
153

154
155
156
157
158
159
160
170
171
178
183
253
255
256
257
258
259
260
269
68
44
45
46
201

1987
101
102
102
103
104
105
106
110
111
112
113
123
124
125
126
142
207
216
217
218
219
220
268
1
3
4
5
6
7
8
9
12
14
15
16
17
18
19
20
31
34
38
69
72
73
74
75
78
5
90
91
93
94
95
11
96
109
134
137
146
147
148
62
172
182
2
43
55
56
57
58
114
121
122
138
139
140
141
161
162
165
166
167
168
169
170
172
173
174
175
176
177
179
180
181
213
227
94

1988
95
144
87
7
8
9
10
10
12
13
14
15
16
18
51
63
66
67
72
82
83
84
85
86
87
89
97
98
99
100
102
103
104
107
108
109
12
123
124
125
126
133
134
136
143
151
152
153
154
155
156
157
158

1987
158

1988
159
160
164
165
166
173
175
184

1987
185
186
187
188
189
190
191
192
193
194
198
200
224
225
226
228
229
235
238

1988
248

1987
249
253
254
256
1

1988
2
37
38
39
40
41
42
43
44
45
46
47
48

1987
65

1988
69
70
71
74
75
76
77
78
79

1987
79

1988
80
81
91
117
118
119
206
251
15

1989
89
90
91
92
93
94
95
96
97
98
99
138
1988
145
213
6

1989
7
21
22
23
30
32
52
53
54
55
67
80
88
176

1988
226

1989
227
232

1988
233
236
238
239
240
241
3

1989
4
186

1988
218
228
229

1989
233
234
245
246
249
250
261
263
268
269
270
271
272
273
274
275
164

1990
165
13
14
15
71
83
84
85
86
87

1989
87

1990
88
89
90
91
92
93
94
95
96
97
117
118
119
120
121
122
123
124
127
142
172
173
280
1989
283
284
285
286
287
288
289
290
291
292
293
66

1990
2
3
4
5
6
7
10
11
24

1989
25
26
27
31
31

1990
33
35
36
38
40
41

1989
34
35
37
37

1990
38
89
42
43
44
45
46

1989
47
48
49
57
58
59
60
61
62
63
64
65
68
72
81

1990
48
49
89
50
72
78
89
79
82
85

1989
86
106

1990
115
125
126
160
161
162
170
171
230
235
262
276

1989
277
278
310
316
317
318
326
1

1990
70
170

1988
315

1989
85

1991
86
137
157

1990
176
187

1991
269
277
289

1990
319
39

1991
1
3
41
42
76

1990
82

1991
91
92
93
94
95
96
97
98
99
100
112

1990
113
116

1991
117
118
119
120
121
122
123
125
127
128

1990
129
130
132
133
134

1991
135

1990
136
137
138
139
140
141

1991
141
142
143

1990
143

1991
144
145
1990
147
155

1990
167
168
169
1991
168

1991
163
164
165
166
167
169
170
173
185

1990
186
187
188

1991
189
190
192

1990
195
207
208
213
225
226
240

1991
241
249
250
251
252

1989
253
256
256

1991
257
260
261
262
263
264
267
266
267
290

1990
290

1991
291

1990
292
323
324
325
326
327

1991
328
329
330

331
332
333
337
338
339
340
341
345

1990
37

1991
38
39
40
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
103
104
105
106
107
108
109
110
111
112
113
148

1990
149
150
151
152

153
154
155
227
228
229
230
231
232
234
235
236
237
253
254
255
256
257
263
264
265
266
267
268
269
270
271
272

1991
274
275
276
277
278
279
280
281
282
283
294

1991
322

1990
323

1991
324

343
1

1992
70
107

1990
255

1991
300
301
302
303
304
305
306
307
326
327
115

1992
231

1991
2

1992
3
10
16
22
23
24
25
26
27
28
29
30
31
32
33
42
43
44
45
46
49
50

APPENDIX 4

Statistical Formula

1. CHI SQUARE

Chi Square is employed to test the difference between an actual sample and another hypothetical or previously established distribution such as that which may be expected due to chance or probability. Chi Square can also be used to test differences between two or more actual samples.

$$X^2 = \Sigma \frac{(\text{Observed frequencies} - \text{Expected frequencies})^2}{\text{Expected frequencies}}$$
$$= \Sigma \frac{(Fo - Fe)^2}{Fe}$$

2. Cramers V

$$V = \sqrt{\frac{\chi^2}{(N)(\min r - 1, c - 1)}}$$

3. Phi

$$\phi = \sqrt{\frac{\chi^2}{N}}$$

Value	Strength
0 > 0.1	Weak
0.1 > 0.3	Moderate
> 0.3	strong

4. Spearmans Rho

$$\rho = \frac{\sum_i (x_i - \bar{x})(y_i - \bar{y})}{\sqrt{\sum_i (x_i - \bar{x})^2 \sum_i (y_i - \bar{y})^2}}.$$

5. Regression

Given a data set $\{y_i,\ x_{i1}, \ldots, x_{ip}\}_{i=1}^{n}$ of *n* statistical units a linear regression model assumes that the relationship between the dependent variable *yi* and the *p*-vector of regressors *xi* is approximately linear. This approximate relationship is modeled through a so-called “disturbance term” ε_i — an unobserved random variable that adds noise to the linear relationship between the dependent variable and regressors. Thus the model takes the form

$$y_i = \beta_1 x_{i1} + \cdots + \beta_p x_{ip} + \varepsilon_i = x_i'\beta + \varepsilon_i, \qquad i = 1, \ldots, n,$$

where $x'_i\beta$ is the inner product between vectors x_i and β.

Often these n equations are stacked together and written in vector form as

$$y = X\beta + \varepsilon,$$

where

$$y = \begin{pmatrix} y_1 \\ y_2 \\ \vdots \\ y_n \end{pmatrix}, \quad X = \begin{pmatrix} x_1' \\ x_2' \\ \vdots \\ x_n' \end{pmatrix} = \begin{pmatrix} x_{11} & \cdots & x_{1p} \\ x_{21} & \cdots & x_{2p} \\ \vdots & \ddots & \vdots \\ x_{n1} & \cdots & x_{np} \end{pmatrix}, \quad \beta = \begin{pmatrix} \beta_1 \\ \vdots \\ \beta_p \end{pmatrix}, \quad \varepsilon = \begin{pmatrix} \varepsilon_1 \\ \varepsilon_2 \\ \vdots \\ \varepsilon_n \end{pmatrix}$$

6. T-test

Suppose one is fitting the model

$$Y_i = \alpha + \beta x_i + \varepsilon_i,$$

where x_i, $i = 1, ..., n$ are known, α and β are unknown, and ε_i are independent normally distributed random errors with expected value 0 and unknown variance σ^2, and Y_i, $i = 1, ..., n$ are observed. It is desired to test the null hypothesis that the slope β is equal to some specified value β_0 (often taken to be 0, in which case the hypothesis is that x and y are unrelated).

Let

$$\hat{\alpha}, \hat{\beta} = \text{least-squares estimates},$$
$$SE_{\hat{\alpha}}, SE_{\hat{\beta}} = \text{the standard errors of least-squares estimates}$$

Then

$$t_{\mathrm{score}} = \frac{\widehat{\beta} - \beta_0}{SE_{\widehat{\beta}}}$$

has a t-distribution with $n - 2$ degrees of freedom if the null hypothesis is true.

$$SE_{\widehat{\beta}} = \frac{\sqrt{\frac{\sum_{i=1}^{n}(Y_i - \widehat{y}_i)^2}{n-2}}}{\sqrt{\sum_{i=1}^{n}(x_i - \overline{x})^2}}$$

can be written in terms of the residuals. Let

$$\widehat{\varepsilon}_i = Y_i - \widehat{y}_i = Y_i - (\widehat{\alpha} + \widehat{\beta} x_i) = \text{residuals} = \text{estimated errors},$$

$$\mathrm{SSE} = \sum_{i=1}^{n} \widehat{\varepsilon}_i^{\,2} = \text{sum of squares of residuals.}$$

Then t_{score} is given by:

$$t_{score} = \frac{(\hat{\beta} - \beta_0)\sqrt{n-2}}{\sqrt{\mathrm{SSE} / \sum_{i=1}^{n}(x_i - \overline{x})^2}}$$

The *t* statistic to test whether the means are different can be calculated as follows:

$$t = \frac{\bar{X}_1 - \bar{X}_2}{S_{X_1X_2} \cdot \sqrt{\frac{2}{n}}}$$

7. Pearsons

$$\rho_{X,Y} = \frac{\operatorname{cov}(X,Y)}{\sigma_X \sigma_Y} = \frac{E[(X - \mu_X)(Y - \mu_Y)]}{\sigma_X \sigma_Y},$$

APPENDIX 5

Interview Questions

Questions

I. General

a. Welchen Weg geht ein abstraktes Normenkontrollverfahren bis es zur Entscheidung kommt?

b. Welche Einflüsse wirken sich auf den Ablauf und die Entscheidung dieses Normenkontrollverfahrens aus?

c. In wieweit beeinflusst die Mitgliedschaft der EU und die Erweiterung von EC Gesetzen, die konkrete und abstrakte Normenkontrolle?

d. Statistiken veranschaulichen/machen deutlich, dass Gruppierungen von Parlamentariern, vor allem Oppositions- Parlamentariern, sich immer öfter an das Gericht wenden um eine Norm unter abstrakter Normenkontrolle prüfen zu lassen. Was ist ihrer Meinung nach der Grund hierfür?

e. In den wissenschaftlichen Veröffentlichungen zum Thema Normenkontrolle wird die EU immer öfter erwähnt. Was ist Ihr Eindruckt zu diesem Thema?

f. Als ich die Urteile der letzten 20 Jahre analysiert habe, erschien es mir als wäre der Anteil an Urteilen, die wenigstens Teile des Gesetzes as verfassungswidrige erklärt haben, in die Höhe gestiegen. Welche Faktoren könnten diese Entwicklung in Ihrer Meinung erklären

II. Germany

a. Verglichen mit dem österreichischen Gericht, erscheint das Deutsche viel seltener bereit, Gruppen von Parlamentariern recht zu geben wenn es um eine Gesetzesprüfung unter abstrakter Normenkontrolle angerufen gebeten wird. Was ist Ihr Eindruck zu diesem Thema?

b. Im Falle des deutschen Gerichtes ist es schwer eine Erwähnung von EU/ EC Recht zu finden – es ist allerdings der Fall, dass die meisten der Fälle in denen das Gericht Normen als verfassungswidrig/ unkonform erklärt in die gleichen Kategorien (Umwelt/...) fallen und sich auf EU Regulationen zurückführen lassen. Warum ist dies der Fall?

c. Welches sind die Motivationen (Absichten) derjenigen, die das Gericht um eine Gesetzesprüfung unter abstrakter Normenkontrolle bitten?

III. Austria

a. Die Statistiken für das Jahr 1995 zeigen eine extrem hohe Zahl an abstrakten Normenkontrollverfahren in Österreich. Was wäre Ihre Erklärung für diese Zahl?

b. Im Falle des österreichischen Gerichts erscheint es auffällig, dass Gruppierungen von Parlamentariern mehr Erfolg vor dem Gericht haben als in den anderen Ländern. Dies scheint vor allem in den letzten 8 Jahren der Fall gewesen zu sein – während die Literatur für die Zeit vor 1995 noch sagt, dass die Möglichkeit das Gericht um eine Prüfung zu bitten völlig unbedeutend ist. Was hat sich aus Ihrer Sicht verändert?

c. In vielen der Fälle in denen das Gericht eine Norm als verfassungswidrig erklärt bezieht es sich im Text des Urteils oder im Hintergrund der Diskussion auf die EU. Jedoch nicht notwendigerweise als seine Begründung des Urteils. Wie erklären sie diesen Umstand?

IV. Italy

1. Do you think membership of the EU has had an influence on abstract judicial review in Italy?
2. The Italian court does not allow groups of parliamentarians to ask for rulings under abstract judicial review. What do you think would change if this would be the case?

V. Hungary

1. The Hungarian state abolished the power of parliamentarian groups to ask for rulings under abstract review. Why was this the case and what has changed through this in the character of abstract review?
2. The Hungarian court has made open and frequent references to EU/EC law and values. It differs from other courts, such as the German and Austrian one, in this respect. What do you feel is the reason for this frequent mention of the EU in rulings and arguments and what make the Hungarian court different from the other courts in this

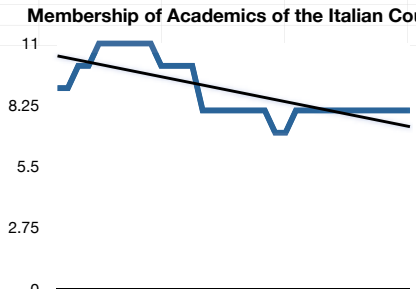
APPENDIX 6

Governments, party affiliation

	de Siervo	Maddalena	Finocchiaro	Quaranta	Gallo	Mazella	Silvestri
2009	de Siervo	Maddalena	Finocchiaro	Quaranta	Gallo	Mazella	Silvestri
2008	de Siervo	Maddalena	Finocchiaro	Quaranta	Gallo	Mazella	Silvestri
2007	de Siervo	Maddalena	Finocchiaro	Quaranta	Gallo	Mazella	Silvestri
2006	de Siervo	Maddalena	Finocchiaro	Quaranta	Gallo	Mazella	Silvestri
2005	de Siervo	Maddalena	Finocchiaro	Quaranta	Gallo	Mazella	Silvestri
2004	de Siervo	Maddalena	Finocchiaro	Quaranta	Gallo	Mezzanotte	Onida
2003	de Siervo	Maddalena	Finocchiaro	Quaranta	Zagrebelsky	Mezzanotte	Onida
2002	de Siervo	Maddalena	Finocchiaro		Zagrebelsky	Mezzanotte	Onida
2001	Chieppa	Ruperto			Zagrebelsky	Mezzanotte	Onida
2000	Chieppa	Ruperto		Mirabelli	Zagrebelsky	Mezzanotte	Onida
1999	Chieppa	Ruperto	Granata	Mirabelli	Zagrebelsky	Mezzanotte	Onida
1998	Chieppa	Ruperto	Granata	Mirabelli	Zagrebelsky	Mezzanotte	Onida
1997	Chieppa	Ruperto	Granata	Mirabelli	Zagrebelsky	Mezzanotte	Onida
1996	Chieppa	Ruperto	Granata	Mirabelli	Zagrebelsky	Mezzanotte	Onida
1995	Chieppa	Ruperto	Granata	Mirabelli	Zagrebelsky	Spagnoli	Caianiello
1994	Chieppa	Ruperto	Granata	Mirabelli		Spagnoli	Caianiello
1993	Chieppa	Ruperto	Granata	Mirabelli		Spagnoli	Caianiello
1992		Corasanti	Granata	Mirabelli		Spagnoli	Caianiello
1991		Corasanti	Granata	Mirabelli		Spagnoli	Caianiello
1990		Corasanti	Granata	Gallo	Saja	Spagnoli	Caianiello
1989		Corasanti		Gallo	Saja	Spagnoli	Caianiello
1988		Corasanti		Gallo	Saja	Spagnoli	Caianiello
1987		Corasanti		Gallo	Saja	Spagnoli	Caianiello
1986		Corasanti		Gallo	Saja	Malagugini	Caianiello
1985		Corasanti		Gallo	Saja	Malagugini	Elia
1984		Corasanti		Gallo	Saja	Malagugini	Elia
1983		Maccarone		Gallo	Saja	Malagugini	Elia
1982		Maccarone		Gallo	Saja	Malagugini	Elia
1981	Amadei	Maccarone			Saja	Malagugini	Elia
1980	Amadei	Maccarone				Malagugini	Elia
1979	Amadei	Maccarone				Malagugini	Elia
1978	Amadei	Maccarone				Malagugini	Elia

	de Siervo	Maddalena	Finocchiaro	Quaranta	Gallo	Mazella	Silvestri
1977	Amadei	Maccarone				Malagugini	Elia
1976	Amadei						Elia

	de Siervo	Maddalena	Finocchiaro	Quaranta	Gallo	Mazella	Silvestri



	Cassesse	Saulle	Tesauro	Napolitano	Frigo	Criscuolo	Grossi
2009	Cassesse	Saulle	Tesauro	Napolitano	Frigo	Criscuolo	Grossi
2008	Cassesse	Saulle	Tesauro	Napolitano	Frigo	Criscuolo	Flick
2007	Cassesse	Saulle	Tesauro	Napolitano	Vaccarella	Bile	Flick
2006	Cassesse	Saulle	Tesauro	Napolitano	Vaccarella	Bile	Flick
2005	Cassesse	Saulle	Tesauro	Marini	Vaccarella	Bile	Flick
2004		Neppi Modona	Capotosti	Marini	Vaccarella	Bile	Flick
2003		Neppi Modona	Capotosti	Marini	Vaccarella	Bile	Flick
2002		Neppi Modona	Capotosti	Marini	Vaccarella	Bile	Flick
2001		Neppi Modona	Capotosti	Marini		Bile	Flick
2000	Vassalli	Neppi Modona	Capotosti	Marini	Guizzi	Bile	Flick
1999	Vassalli	Neppi Modona	Capotosti	Marini	Guizzi	Bile	
1998	Vassalli	Neppi Modona	Capotosti	Marini	Guizzi		
1997	Vassalli	Neppi Modona	Capotosti	Marini	Guizzi		
1996	Vassalli	Neppi Modona	Capotosti		Guizzi		Cheli
1995	Vassalli	Baldassare	Ferri	Casavola	Guizzi		Cheli
1994	Vassalli	Mengoni	Ferri	Casavola	Guizzi		Cheli
1993	Vassalli	Mengoni	Ferri	Casavola	Guizzi	Greco	Cheli
1992	Vassalli	Mengoni	Ferri	Casavola	Guizzi	Greco	Cheli
1991	Vassalli	Mengoni	Ferri	Casavola	Guizzi	Greco	Cheli
1990	Conso	Mengoni	Ferri	Casavola	Dell'Andro	Greco	Cheli
1989	Conso	Mengoni	Ferri	Casavola	Dell'Andro	Greco	Cheli
1988	Conso	Mengoni	Ferri	Casavola	Dell'Andro	Greco	Cheli
1987	Conso	Mengoni	Ferri	Casavola	Dell'Andro	Greco	Ferrari
1986	Conso	Paladin	La Pergola	Casavola	Dell'Andro	Greco	Ferrari
1985	Conso	Paladin	La Pergola	Reale	Bucciarelli Ducci	Greco	Ferrari
1984	Conso	Paladin	La Pergola	Reale	Bucciarelli Ducci	Greco	Ferrari
1983	Conso	Paladin	La Pergola	Reale	Bucciarelli Ducci		Ferrari
1982	Conso	Paladin	La Pergola	Reale	Bucciarelli Ducci		Ferrari
1981	Volterra	Paladin	La Pergola	Reale	Bucciarelli Ducci	Giorfrida	Ferrari
1980	Volterra	Paladin	La Pergola	Reale	Bucciarelli Ducci	Giorfrida	Ferrari
1979	Volterra	Paladin	La Pergola	Reale	Bucciarelli Ducci	Giorfrida	
1978	Volterra	Paladin	La Pergola	Reale	Bucciarelli Ducci	Giorfrida	

	Cassesse	Saulle	Tesauro	Napolitano	Frigo	Criscuolo	Grossi
1977	Volterra	Paladin		Reale	Bucciarelli Ducci	Giorfrida	
1976	Volterra					Giorfrida	
	Volterra					Giorfrida	
	Volterra					Giorfrida	
	Volterra					Giorfrida	
	Volterra					Giorfrida	
	Volterra					Giorfrida	

	Cassesse	Saulle	Tesauro	Napolitano	Frigo	Criscuolo	Grossi

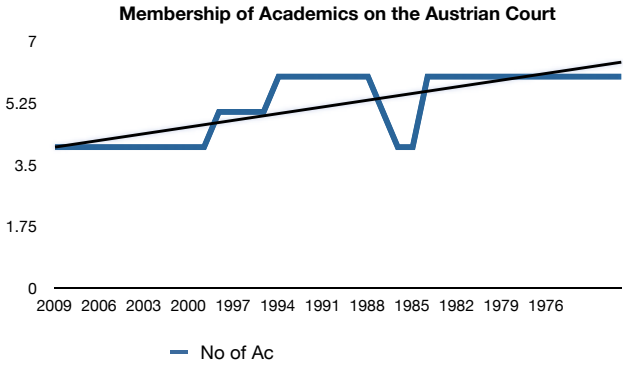
	Amirante					No of Ac	
2009	Amirante					9	
2008	Amirante					9	
2007	Amirante					10	
2006	Amirante					10	
2005	Amirante					11	
2004	Amirante					11	
2003	Amirante					11	
2002	Amirante					11	
2001	Amirante					11	
2000						11	
1999						10	
1998						10	
1997						10	
1996						10	
1995		Pescatore				8	
1994		Pescatore				8	
1993	Borzellino	Pescatore				8	
1992	Borzellino	Pescatore				8	
1991	Borzellino	Pescatore				8	
1990	Borzellino	Pescatore				8	
1989	Borzellino	Pescatore				8	
1988	Borzellino	Pescatore				7	
1987	Borzellino	Pescatore	Andrioli			7	
1986	Borzellino	Pescatore	Andrioli	Roehrssen		8	
1985	Borzellino	Pescatore	Andrioli	Roehrssen		8	
1984	Borzellino		Andrioli	Roehrssen	de Stefano	8	
1983			Andrioli	Roehrssen	de Stefano	8	
1982			Andrioli	Roehrssen	de Stefano	8	
1981			Andrioli	Roehrssen	de Stefano	8	
1980			Andrioli	Roehrssen	de Stefano	8	
1979			Andrioli	Roehrssen	de Stefano	8	
1978			Andrioli	Roehrssen	de Stefano	8	

	Amirante					No of Ac	
1977				Roehrssen	de Stefano	8	
1976					de Stefano	8	
					de Stefano	8	

	Amirante					No of Ac	

			BR	NR	BR		
2009	Holzinger	Bierlein	Haller	Lass	Liehr	Ruppe	Oberndorfer
2008	Holzinger	Bierlein	Haller	Lass	Liehr	Ruppe	Oberndorfer
2007	Holzinger	Bierlein	Haller	Lass	Liehr	Ruppe	Oberndorfer
2006	Holzinger	Bierlein	Haller	Lass	Liehr	Ruppe	Oberndorfer
2005	Holzinger	Bierlein	Haller	Lass	Liehr	Ruppe	Oberndorfer
2004	Holzinger	Bierlein	Haller	Lass	Liehr	Ruppe	Oberndorfer
2003	Holzinger	Bierlein	Haller	Lass	Liehr	Ruppe	Oberndorfer
2002	Holzinger		Gottlich	Lass	Liehr	Ruppe	Oberndorfer
2001	Holzinger		Gottlich	Lass	Liehr	Ruppe	Oberndorfer
2000	Holzinger		Gottlich	Lass	Liehr	Ruppe	Oberndorfer
1999	Holzinger		Gottlich	Lass	Liehr	Ruppe	Oberndorfer
1998	Holzinger		Gottlich	Lass	Liehr		Oberndorfer
1997	Holzinger		Gottlich	Lass	Liehr		Oberndorfer
1996	Holzinger		Gottlich	Lass	Liehr	Roessler	Oberndorfer
1995	Holzinger		Gottlich	Lass	kienberger	Roessler	Oberndorfer
1994	Jann		Gottlich	Lass	kienberger	Roessler	Oberndorfer
1993	Jann		Gottlich		kienberger	Roessler	Oberndorfer
1992	Jann		Gottlich		kienberger	Roessler	Oberndorfer
1991	Jann		Gottlich		kienberger	Roessler	Oberndorfer
1990	Jann		Gottlich		kienberger	Roessler	Oberndorfer
1989	Jann		Gottlich		kienberger	Roessler	Oberndorfer
1988	Jann		Gottlich		kienberger	Roessler	Oberndorfer
1987	Jann		Gottlich		kienberger	Roessler	Oberndorfer
1986	Jann		Gottlich		Saxer	Roessler	hinterauer
1985	Jann		Gottlich		Saxer	Roessler	hinterauer
1984	Jann		Gottlich		Saxer	Roessler	hinterauer
1983	Jann		Gottlich		Saxer	Roessler	hinterauer
1982	Jann		Gottlich		Saxer	Roessler	hinterauer
1981	Jann		Gottlich		Saxer	Roessler	hinterauer
1980	Jann		Gottlich		Saxer	Roessler	hinterauer
1979	Jann		Gottlich		Saxer	Roessler	hinterauer

			BR	NR	BR		
1978	Jann		Gottlich		Saxer	Roessler	
1977			Gottlich		Saxer	Roessler	
1976			Gottlich		Saxer	Roessler	
1975			Gottlich		Saxer	Roessler	
1974			Gottlich		Saxer	Roessler	
			Gottlich			Roessler	
			Gottlich			Roessler	
			Gottlich			Roessler	
						Roessler	
						Roessler	
						Roessler	
						Roessler	
						Roessler	



				Schnizer		Gahleitner
2009	Mueller	Brechthold-Ostermann	Kahr	heller	Hoertenhuber	
2008	Mueller	Brechthold-Ostermann	Kahr	heller	Hoertenhuber	
2007	Mueller	Brechthold-Ostermann	Kahr	heller	Korinek	
2006	Mueller	Brechthold-Ostermann	Kahr	heller	Korinek	
2005	Mueller	Brechthold-Ostermann	Kahr	heller	Korinek	
2004	Mueller	Brechthold-Ostermann	Kahr	heller	Korinek	
2003	Mueller	Brechthold-Ostermann	Kahr	heller	Korinek	
2002	Mueller	Brechthold-Ostermann	Kahr	heller	Korinek	
2001	Mueller	Brechthold-Ostermann	Kahr	heller	Korinek	
2000	Mueller	Brechthold-Ostermann	Kahr	heller	Korinek	
1999	Mueller	Brechthold-Ostermann	Kahr	heller	Korinek	
1998	Mueller	Brechthold-Ostermann	Fessler	heller		
1997	Piska	Brechthold-Ostermann	Fessler	heller		
1996	Piska	Machacek	Fessler	heller		
1995	Piska	Machacek	Fessler	heller		
1994	Piska	Machacek	Fessler	heller		
1993	Piska	Machacek	Fessler	heller		
1992	Ringhofer	Machacek	Fessler	heller		
1991	Ringhofer	Machacek	Fessler	heller		
1990	Ringhofer	Machacek	Fessler	heller		
1989	Ringhofer	Machacek	Fessler	heller		
1988	Ringhofer	Machacek	Fessler	heller		
1987	Ringhofer	Machacek	Fessler	heller		
1986	Ringhofer	Machacek	Fessler	heller		
1985	Ringhofer	Machacek	Fessler	heller		
1984	Ringhofer	Machacek	Fessler	heller		
1983	Ringhofer	Machacek	Fessler	heller		melichar
1982	Ringhofer	Machacek	Fessler	heller		melichar
1981	Ringhofer	Machacek	Fessler	heller		melichar
1980	Ringhofer	Machacek	Fessler	heller		melichar
1979	Ringhofer	Machacek	Fessler	heller		melichar

1978	Ringhofer	Machacek	Fessler	heller		melichar
1977	Ringhofer	Machacek	Fessler	heller		melichar
1976	Ringhofer	Machacek	Fessler	heller		melichar
1975		Machacek	Fessler	heller		melichar
1974		Machacek	Fessler	heller		melichar
		Machacek				melichar
		Machacek				melichar
						melichar
						melichar
						melichar
						melichar

			No of Ac	
	Grabenwarter		6	
2009	Grabenwarter		4	
2008	Grabenwarter		4	
2007	Grabenwarter		4	
2006	Grabenwarter		4	
2005	Grabenwarter		4	
2004	Morsscher		4	
2003	Morsscher		4	
2002	Morsscher		4	
2001	Morsscher		4	
2000	Morsscher		4	
1999	Morsscher		4	
1998	Morsscher		5	
1997	Morsscher		5	
1996	Morsscher		5	
1995	Morsscher		5	
1994	Morsscher		6	
1993	Morsscher		6	
1992	Morsscher		6	
1991	Morsscher		6	
1990	Morsscher		6	
1989	Morsscher		6	
1988	Morsscher		6	
1987	Quell		5	
1986	Quell		4	
1985	Quell		4	
1984	Quell		6	
1983	Quell		6	
1982	Quell		6	
1981	Quell		6	
1980	Quell		6	
1979	Quell		6	

			No of Ac	
1978	Quell		6	
1977	Quell		6	
1976	Quell		6	
1975	Quell		6	
1974	Quell		6	
	Quell		6	
	Quell		6	
	Quell		6	
	Quell			
	Quell			
	Quell			
	Quell			
	Quell			

APPENDIX 7

Legal Provisions

Appendix 7

National Definitions of abstract norm control

In Germany abstract review is defined in Article 93 of the basic law:

"(1) The Federal Constitutional Court shall rule:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body;

2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law, on application of the Federal Government, of a Land government, or of one third of the Members of the Bundestag;

2 a. in the event of disagreements whether a law meets the requirements of paragraph (2) of Article 72, on application of the Bundesrat or of the government or legislature of a Land;

3. in the event of disagreements concerning the rights and duties of the Federation and the Länder, especially in the execution of federal law by the Länder and in the exercise of federal oversight;

4. on other disputes involving public law between the Federation and the Länder, between different Länder, or within a Land, unless there is recourse to another court;

4 a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority;

4 b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a Land law, however, only if the law cannot be challenged in the constitutional court of the Land;

5. in the other instances provided for in this Basic Law."

Only Paragraph 2 is seen as abstract review, in the strictest sense, in Germany. Austria's definition of what constitutes abstract review is less well defined. In Article 140 of the constitution it reads:

"Article 140

(1) The Constitutional Court pronounces on application by the Administrative Court, the Supreme Court, or a competent appellate court whether a Federal or State law is unconstitutional, but ex officio in so far as the Court would have to apply such a law in a pending suit. *It pronounces also on application by the Federal Government whether State laws are unconstitutional and likewise on application by a State Government or by one third of the House of Representatives' members whether Federal laws are unconstitutional. A State constitutional law can provide that such a right of application as regards the unconstitutionality of State laws lies with one third of the State Parliament's members.* The Court also pronounces whether laws are unconstitutional when an application alleges direct infringement of personal rights through such unconstitutionality in so far as the law has become operative for the applicant without

the delivery of a judicial decision or the issue of a ruling. Article 89 (3) applies analogously to such applications."

The Italian constitutions is even broader in its definition. It defines the powers of the court in Article 127:

1. Whenever the government regards a regional law as exceeding the powers of the region, it may raise the question of its constitutionality before the constitutional court within sixty days of the publication of the law.
2. Whenever a region regards a state law, another act of the state having the force of law, or a law of another region as infringing on its own sphere of powers, it may raise the question of its constitutionality before the constitutional court within sixty days of the publication of said law or act."

And in Article 134 it defines the power of the constitutional court as:

"The constitutional court decides:

- disputes concerning the constitutionality of laws and acts with the force of law adopted by state or regions;
- conflicts arising over the allocation of powers between branches of government within the state, between the state and the regions, and between regions;
- on accusations raised against the president in accordance with the constitution."

BIBLIOGRAPHY

(1992). BVerfG 88,203 Schwangerschaftsabbruch II, Bundesverfassungsgericht.

(2009). 1 BvF 3/05 "Lebenspartnerschaftsrecht", Bundesverfassungsgericht.

(2009). 2 BvE 4/08 Bundeswehreinsatz im Kosovo, Bundesverfassungsgericht.

[Anon] (1997). "Laws concerning judicial review in the Netherlands, Indonesia, China and Germany." *Comparative Studies on the Judicial Review System in East and Southeast Asia* **1**: 263-307
321.

Aberbach, J. D. and B. A. Rockman (2002). "Conducting and Coding Elite Interviews " *Political Science and Politics* **35**(4).

Ackerman, B. (1997). "The Rise of World Constitutionalism." *Virginia Law Review* **83**(4): 771-797.

Ackerman, B. (2000). "The new separation of powers." *Harvard Law Review* **113**(3): 633-729.

Alter, K. J. (2001). *Establishing the Supremacy of European Law*. Oxford, Oxford University Press.

Alter, K. (1996) 'The European Court's Political Power', *West European Politics*, Vol.19, pp. 458-87

Alter, K. and Meunier-Aitsahalia, S. (1994) 'Judicial Politics in the European Union: European Integration and the Pathbreaking Cassis de Dijon Decision', *Comparative Political Studies*, Vol.26, No.4, pp.536-61

Armstrong, K. and Shaw, J. (eds) (1998*) Integrating Law, Special Edition, Journal of Common Market*

Ashfelter, O., T. Eisenberg, et al. (1995). "Politics and the Judiciary." *Journal of Legal Studies* **24**(2): 257-281.

Austin, J. (2000). *The Province of Jurisprudence determined*. London, Prometheur Books.

Baade, H. W. (1961). "Social-Science Evidence and the Federal Constitutional Court of West-Germany." *Journal of politics* **23**(3): 421-459.

Banaszak, L. A. (1998). "East-West Differences in German Abortion Opinion." *Public Opinion Quarterly* **62**(4): 545-582.

Barak , A. (2006). *The Judge in a Democracy*. Princeton, Princeton University Press.

Barnett, H. (2004). *Constitutional and Administrative Law*. London, Cavendish Publishing.

Baum, L. (1994). "What Judges Want." *Political Research Quarterly* **47**(3): 749-768.

Beatty, D. M. (2004). *The Ultimate Rule of Law*. Oxford, Oxford Univeristy Press.

Becker, J.-J. (2000). *Histoire Politique de la France depuis 1945*. Paris, Armand Colin.

Becker, M. (1992). "Family Policy in the Federal-Republic-of-Germany - between Desire and Reality - Decisions of the Federal Constitutional Court of 25 May 1990 and 12 June 1990 on Financial Compensation for Families." *Gegenwartskunde Gesellschaft Staat Erziehung* **41**(2): 191-201.

Bekkering, G. E. and J. Kleijnen (2008). "Procedures and methods of benefit assessments for medicines in Germany." *European Journal of Health Economics* **9**: S5-S29.

Bentham, J. (1988). *A Fragment on Government*. Cambridge, Cambridge University Press.

Bernhard, P. (2005). "Conscientious objection by postcard. A failed reform project of the socialist-liberal coalition." *Vierteljahrshefte Fur Zeitgeschichte* **53**(1): 109-+.

Berry, J. (2002). "Validity and Reliability Issues in Elite Interviews." *Political Science and Politics* **35**(4): 679-682.

Beyme, K. v. (2003). Constitutional Engineering. *Developments in Central and East European Politics*. S. White, J. Batt and P. G. Lewis. Basingstoke, Palgrave.

Turillazzi, E. and V. Fineschi (2008). "Preimplantation genetic diagnosis: a step by step guide to recent Italian ethical and legislative troubles." *Journal of Medical Ethics* **34**(10): -.

Bhala, R. (1999). "The Myth about Stare Decisis and International Trade Law." *American University of International Law Review* **14**: 845-956.

Bickel, A. M. (1962). *The Least Dangerous Branch*. Indianapolis, Bobbs-Merrill.

Blair, P. (1977). "Judicial Politics in West-Germany - Study of Federal Constitutional Court - Kommers,Dp." *International Affairs* **53**(1): 122-123.

Boessen, S. and H. Maarse (2008). "The impact of the treaty basis on health policy legislation in the European Union: A case study on the tobacco advertising directive." *Bmc Health Services Research* **8**: -.

Brenner, S. and H. J. Spaeth (1996). "Stare indecisis: the alteration of precedent on the Supreme Court, 1946-1992." *American Political Science Review* **90**(2): 418-419.

Breton, A. and A. Fraschini (2003). "The Independence of the Italian Constitutional Court." *Constitutional Political Economy* **14**: 319-333.

Brinkmann, G. (1982). "Federalism and Judicial-Review in West-Germany - Blair,Pm." *Journal of Common Market Studies* **20**(4): 397-398.

Bruns, M. (2007). "Consequences of high court decisions on the reform of the law on transsexuality in Germany." *Zeitschrift Fur Sexualforschung* **20**(1): 42-+.

Bryman, A. (2006). "Integrating quantitative and qualitative research: how is it done?" *Qualitative Research* **6**(1): 97-113.

Bryman, A. (2006). "Paradigm Peace and the Implications for Quality." *International Journal of Social Research Methodology* **9**: 111-126.

Bryman, A. (2008). *Social Research Methods*. Oxford, Oxford University Press.

Buder, E. (2008). Analyse der Einstellungen zum Schwangerschaftsabbruch in Deutschland. Philosophische Fakultaet. Dresden, Technische Universitaet Dresden.

Bumin, K. (2007). Intitutional Development and Public Trust. Annual Meeting of the Southern Political Science Association. Hotel InterContinental, New Orleans, LA.

Bundesverfassungsgericht (1952-2002). Entschiedungen des Bundesverfassungsgericht. Bundesverfassungsgericht. Tuebingen, Mohr Siebeck.

Bundesverfassungsgericht (1975). BVerfG 39,1 (1 BvF 1/74) Schwangerschaftsabbruch I, German constitutional court.

Bundesverfassungsgericht (1992). BVerfG 88,203, German Constitutional Court.

Burca, G. de (1998) 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor',*Journal of Common Market Studies*, Vol. 36, No.2, pp.217-235

Burley, A. and Mattli, W. (1993) ‘Europe before the Court: A Political Theory of Legal Integration’, *International Organization,* Vol. 47, No.1, pp.41-75

Butzke, K. and S. Storr (2000). "Legal issues associated with opting out of the use of nuclear power." *Atw-Internationale Zeitschrift Fur Kernenergie* **45**(4): 221-+.

Caldeira, G. (1986). "Neither the Purse nor the Sword " *American Political Science Review* **80**(December): 1209-1226.

Calvert, R., M. McCubbins, et al. (1989). "A Theory of Political Control and Agency Discretion." *American Journal of Political Science* **33**(3): 588-611.

Caporale, T. and H. Winter (2002). "A Positive Political Model of Supreme Court Economic Decisions." *Southern Economic Journal* **68**(3): 693-702.

Casamassima, V. (2008). Le "Regole" sull' interpretazione tra guidice e legislatore. . *Lavori preparatori ed original intent nella guirispruednza della corte costituzionale*. F. Giuffre and I. Nicotra. Torino, G. Giappichelli editore**:** 78-130.

Chapman, B. (1998). "More easily done than said: Rules, Reasons and Rational Social Choice." *Oxford Journal of Legal Studies* **18**(2): 293-329.

Childs, D. (1983). "Federalism and Judicial-Review in West-Germany - Blair,Pm." *International Affairs* **59**(3): 524-525.

Clinton, R. L. (1994). "Game Theory, Legal History and the Origin of Judicial Review." *American Hournal of Political Science* **38**(2): 285-302.

Cole, R. T. (1977). "Judicial Politics in West-Germany - Study of Federal Constitutional Court - Kommers,Dp." *American Journal of Comparative Law* **25**(2): 427-429.

Comella, V. F. (2009). *Constitutional Courts and Democratic Values*. New Haven, Yale University Press.

Costituzionale, C. (2002). *Corte Costiuzionale*. Roma, Libreria dello Stato.

Cownie, F., A. Bradney, et al. (2007). *English Legal System in Context*. Oxford, Oxford University Press.

Craig, P. and G. d. Burca (2003). *EU Law*. Oxford, Oxford University Press.

Creifelds, C. and L. Meyer-Grossner (1990). *Rechtswoerterbuch*. Muenchen, C. H. Beck.

Cross, F. (1997). "Political Science and the new legal realism." *Northwestern University Law Review* **92**: 251-326.

Cruz, J. B. (2008). "The legacy of the Maastricht-Urteil and the pluralist movement." *European Law Journal* **14**(4): 389-422.

Currie, D. P. (1994). *The Constitution of the Federal Republic of Germany*. Chicago, Chicago University Press.

Dahl, R. (1957). "Decision making in a democracy." *Journal of Public Law* **6**: 279-295.

Danelski, D. J. (1965). "Values as Variables in Judicial Decision-Making." *Vanderbilt Law Review* **19**: 721-741.

Danelski, D. J. (1978). "Judicial Politics in West-Germany - Study of Federal Constitutional Court - Kommers,Dp." *Review of Politics* **40**(1): 157-159.

Danilenko, G. 1999. The implementation of International Law in CIS States. *European Journal of International Law* 10:51-69.

de Burca, G. and J. Weiler (2001). *The European Court of Justice*. Oxford, Oxford University Press.

de Franciscis, M. E. and R. Zannini (1992). "Judicial policy-making in Italy: the constitutional court." *West European Poltics* **15**(3): 68-79.

de Vauss, D. (2002). *Surveys in Social Science*. London, Routledge.

Disputados, C. d. l. (2003, 2003). "Constitucion espanola." Retrieved 13.3.2010, 2010, from http://narros.congreso.es/constitucion/constitucion/indice/index.htm.

Domingo, P. (2000). "Judicial Independence: The Politics of the Supreme Court in Mexico." *Journal of Latin American Studies* **32**: 705-735.

Dunkel, F. and D. Van Zyl Smit (2007). "The implementation of youth imprisonment and constitutional law in Germany." *Punishment & Society-International Journal of Penology* **9** (4): 347-369.

Dunlop, J. (1963). "Constitutionalism in Germany and the Federal Constitutional Court - Mcwhinney,E." *International Affairs* **39**(1): 103-104.

Duxbury, N. (1995). *Patterns of American Jurisprudence*. Oxford, Oxford University Press.

Dworkin, R. (1977). *Taking Rights Seriously*. Bristol, Duckworth.

Dworkin, R. (1998). *Law's Empire*. Oxford, Hart Publishing.

Easterbrook (1983). "Statutes' Domains." *University of Chicago Law Review* **50**: 547.

Edelman, P., D. Klein, et al. (2008). "Consensus, Disorder, And The Supreme Court: A Challenge To Attitudinalism." *Public Law and Legal Theory Research Paper Series* **167**.

Ehrenforth, W. (1991). "Land-Reform and Compensation for Dispossession - Ruling of the Federal Constitutional Court, April 23, 1991." *Berichte Uber Landwirtschaft* **69**(4): 489-516.

Ely, J. H. (1980). *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA, Harvard University Press.

Epstein, L., V. Hoekstra, et al. (1998). "Do political preferences change? A longitudinal study of U.S. Supreme Court justices." *Journal of politics* **60**(3): 801-818.

Epstein, L. and J. Knight (1998). *The Choices Justices Make*. Washington DC, CQ Press.

Epstein, L., J. Knight, et al. (2003). "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the US Supreme Court." *California Law Review* **91** (4): 906-963.

Epstein, L., J. Knight, et al. (2001). "The role of constitutional courts in the maintenance of democratic systems of government." *Law and Society Review* **35**(1): 117-164.

Epstein, L. and S. O'Halloran (1995). "A Theory of Strategic Oversight." *Journal of Law, Economics, and Organization* **11**(2): 227ff.

Epstein, L. and J. A. Segal (2007). "Advice and consent: the politics of judicial appointments." *Journal of politics* **69**(4): 1217-1219.

Eskridge, W. N. (1991). "Overriding Supreme Court statutory interpretation." *Yale Law Journal* **101**: 331-455.

Eskridge, W. N. and J. Ferejohn (1992). "Making the deal stick." *Journal of Law, Economics, and Organization* **35**(1): 117-164.

Esposito, A. M. (1995). *Langenscheidts Standardgrammatik Italienisch* Berlin, Langenscheidt.

Esterling, K. M. (1998). "The cornerstone of judicial independence." *Judicature* **82**(3): 112-118.

Eusepi, G. (1995). "Broadcasting System in Italy - Evolution and Perspectives." *Public Choice* **82**(3-4): 307-324.

Ewing, K. P. (2000). "Legislating Religious Freedom." *Daedalus* **129**(4): 31-54.

Farber, D. A. and P. P. Frickey (1988). "Legislative Intent and Public Choice." *Virginia Law Review* **74**(2): 423-469.

Feld, L. P. and S. Voigt (2003). "Economic growth and judicial independence." *European Journal of Political Economy* **19**: 497-527.

Ferejohn, J. (1999). "Independent Judiciary, Dependent Judges." *South California Law Review* **72**: 353-384.

Ferejohn, J. and L. D. Kramer (2006). Judicial independence in a democracy: institutionalizing judicial restraint. Cambridge
New York, Cambridge University Press.

Fichera, M. (2009). "The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?" *European Law Journal* **15**(1): 70-97.

Field, A. (2005). *SPSS for Windows*. London, Sage.

Fineschi, V., M. G. Albano, et al. (2001). "The Jehovah's witnesses' refusal for blood transfusions: The jurisprudence and the medico-legal debate in Italy." *Medicine Science and the Law* **41**(2): 141-146.

Finn, J. E., A. Hamlin, et al. (1999). "Bruce Ackerman: we the people: transformations." *Constitutional Political Economy* **10**(4): 355-424.

Fiorino, N., F. Padovano, et al. (2003). **The determinants of judicial Independence:Evidence from the Italian Constitutional Court (1956-2002)**. Seminar of the Centre for Economics of Institutions. Universita Roma.

Fischer, B. (1995). "Drugs, communities, and "harm reduction" in Germany: The new relevance of "public health" principles in local responses." *Journal of Public Health Policy* **16**(4): 389-411.

Flick, U. (2002). *An Introduction to Qualitative Research*. London, Sage.

Frank, R. (1993). "Germany - Revolution from the Federal Constitutional Court." *University of Louisville Journal of Family Law* **31**(2): 347-354.

Frank, R. (1995). "Federal-Republic-of-Germany - 3 Decisions of the Federal Constitutional Court." *University of Louisville Journal of Family Law* **33**(2): 353-360.

Friedman, B. (1995). "The Counter-Majoritarian Problem." *University of Chicago Law Review* **95**(3): 933-956.

Friedman, B. (2005). "The Politics of Judicial Review." *Texas Law Review* **84**(2): 257-338.

Friedman, B. and A. Harvey (2006). "The Limits of Judicial Independence." *Legislative Studies Quarterly*.

Friedman, B. (2000). "the History of the Countermajoritarian Difficulty, Part Four: Law's Politics." *University of Pennsylvania Law Review* **148**(4): 971-1046.

Friedman, B. (2002). "The Birth of an Academic Obsession." *The Yale Law Journal* **112**(2): 153-259.

Frymer, P. (2007). *Black and Blue*. Princeton, Princeton University Press.

Funk, B.-C. (2007). *Einfuehrung in das oesterreichische Verfassungsgericht*. Graz, Leykam.

Furlong, P. (1988). "The constitutional court in Italian Politics." *West European Poltics* **11** (3).

Furlong, P. (1990). "Parliament in Italian Politics." *West European Politics* **13**(3): 52-67.

Furlong, P. (2001). "Constitutional politics in Italy: The Constitutional Court." *West European Politics* **24**(2): 252-253.

Gamper, A. (2007). *Staat und Verfassung*. Wien, Facultas.

Gamper, A. and F. Palermo (2009). The constitutional court of Austria. *Constitutional Courts - a comparative Study*. A. Harding and P. Leyland. London, Wildy, Simmons and Hill**:** 31-51.

Garlicki, L. (2007). "Constitutional courts versus supreme courts." *Icon-International Journal of Constitutional Law* **5**(1): 44-68.

Garrett (1992). "The European Court of Justice." *West European Politics*.

Gasaway, R. R. (2005). "Problem of Federal Preemption: Reformulating the Black Letter Rules." *Pepperdine Law Review* **33**: 25.

Geiger, R. 1998. The German Border Guard Cases and the International Human Rights. *European Journal of International Law* 9:540-549.

Gely, R. and P. T. Spiller (1990). "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases." *Journal of Law Economics and Politics* **6**(2): 263.

Germany, C. C. (2009, 2009). "http://www.bundesverfassungsgericht.de/." Retrieved 1.1.2009, 2009.

Gerstein, H. and D. Lowry (1976). "Abortion, Abstract Norms, and Social Control." *Emory Law Journal* **25**: 849-878.

Geyh, C. (2003). "Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts." *Indiana Law Journal* **78**.

Gibson, J. L. (1983). "From Simplicity to Complexity." *Political Behaviour* **5**(1): 7-49.

GIBSON, J. L. and G. A. CALDEIRA (1998). "Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis." *British Journal of Political Science* **28**(01): 63-91.

Gibson, W. (1961). "Literary Minds and Judicial Style." *New York University Law Review* **36**: 915-930.

Gillman, H. (2002). "How Parties can use the Courts to Advance their Agendas." *American Political Science Review* **96**(September): 511-524.

Ginsburg, T. (2002). "Confucian constitutionalism? The emergence of constitutional review in Korea and Taiwan." *Law and Social Inquiry-Journal of the American Bar Foundation* **27** (4): 763-799.

Giuffre, F. and I. Nicotra (2008). *Lavori Preparatori ed original intent nella giurisprudenza della corte costituzionale*. Torino, G Giappichelli Editore.

Goldstein, K. (2002). "Getting in the Door." *Political Science and Politics* **35**(4): 669-672.

Goring, A. (2002). "The portrayal of the human being and the group dynamics of the German Basic Law." *Dynamische Psychiatrie* **35**(1-2): 468-485.

Goutal, J.-L. (1976). "Characteristics of Judicial Style in France, Britain and the USA." *The American Jouranl of Comparative Law* **24**(1): 43-72.

Graber, M. (1993). "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary." *Studies in American Development* **7**(Spring): 35-73.

Graber, M. (2008). "The Countermajoritarian Difficulty." *Annual Review of Law and Social Science* **4**: 361-384.

Graber, M. A. (2005a). "Constructing Judicial Review." *Annual Review of Political Science* **8**: 425-451.

Graber, M. A. (2005b). "Constitutionalism and Political Science." *Perspectives on Politics* **3** (1): 135-148.

Greene, J. C., V. J. Caracelli, et al. (1989). "Toward a conceptual framework for mixed-method evaluation designs." *Educationanl Evaluation and Policy Analysis* **11**: 255-276.

Groppi, T. (8/9. December 2008). The Principle of Secularism as Product of the Constitutional Interpretation in Italy. **"The Constitutional Framework Governing the Relationship between State and Religion in the Italian and Israeli Constitutional Systems"**

. Jerusalem.

Groppi, T. (2009). The Italian Constitutional Court. *Constitutional Courts*. A. Harding and P. Leyland. London, Wildy, Simmonds and Hill.

Guarnieri, C. (2007). "Courts and marginalized groups: Perspectives from Continental Europe." *Icon-International Journal of Constitutional Law* **5**(2): 187-210.

Guarnini, C. (1997). "The judiciary in the Italian Political Crisis." *West European Politics* **20** (1): 157-175.

Guba, E. and Y. Lincoln (1985). London, Sage.

Haase, R. and R. Keller (1989). *Grundlagen und Grundformen des Rechts*. Koeln, Kohlhammer.

Hagle, T. M. and H. J. Spaeth (1991). "Voting fluidity and the attitudinal model of Supreme Court decision making." *Western political quarterly* **44**(1): 119-128.

Hamilton, M. A. (1994). "Discussion and Decisions - a Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation." *New York University Law Review* **69**(3): 477-562.

Hammond, T., C. Bonneau, et al. (2005). *Strategic Behaviour and Policy Choice on the US Supreme Court*. Stanford, Stanford University Press.

Hanssen, A. (2004). "Is there an Optimal Level of Judicial Independence?" *American Economic Review* **94**(3).

Harding, A. and P. Leyland, Eds. (2009). *Constitutional Courts - A comparative Study*. JCL Studies in Comparative Law. London, Wildy, Simmons and Hill.

Hart, C. (1998). *Doing a literature review*. London, Sage.

Hart, C. (2000). *Doing a literature search*. London, Sage.

Hart, H. L. A. (1961). *The Concept of Law*. Oxford, Oxford University Press.

Hartmann, J. (2008). "The Federal Eagle." *Vierteljahrshefte Fur Zeitgeschichte* **56**(3): 495-+.

Hase, F. and M. Ruete (1982). "Constitutional Court and Constitutional Ideology in West-Germany." *International Journal of the Sociology of Law* **10**(3): 267-276.

Hazareesingh, S. (1994). *Political Traditions in Modern France*. Oxford, Oxford University Press.

Helbig, G. and J. Buscha (2001). *Deutsche Grammatik*. Berlin, Langenscheidt.

Heller, W. (2006). "Air Traffic Security Act unconstitutional." *Atw-International Journal for Nuclear Power* **51**(5): 343-+.

Herron, D. R. (1983). "Federalism and Judicial-Review in West-Germany - Blair,Pm." *American Political Science Review* **77**(4): 1068-1068.

Herz, D. (1995). "Reactionary Ideas - Criticism of the Federal Constitutional Court of Germany." *Merkur-Deutsche Zeitschrift Fur Europaisches Denken* **49**(12): 1141-&.

Hingorani, S. (1997). "Territorial justice in unified Germany - Financial equalization, the Lander and the Federal Constitutional Court." *Applied Geography* **17**(4): 335-343.

Hirschl, R. (2008). The Judicialization of Politics. *The Oxford Handbook of Law and Politics*. K. Whittington, D. Kelemmen and G. Caldeira. Oxford, Oxford University Press.

Hix, S. (1999), *The Political System of the European Union,* Basingstoke: Macmillan*,* Ch.4

Hoennige, C. (2007). *Verfassungsgericht, Regierung und Opposition*. Wiesbaden, VS Verlag fuer Sozialwissenschaften.

Hoffmann, D. (2000). "The Federal Constitutional Court in the field of political power play during the early years of the Federal Republic of Germany - The conflict regarding western treaties 1952-1954." *Historisches Jahrbuch* **120**: 227-273.

Hoffmeister, F. (2006). "Germany: Status of European Convention on Human Rights in domestic law." *Icon-International Journal of Constitutional Law* **4**(4): 722-731.

Holland, J. and J. Webb (2010). *Learning Legal Rules*. Oxford, Oxford University Press.

Holmes, L. M., L. B. Tiede, et al. (2007). "Courts and the judicial process." *American politics research* **35**(5): 567-768.

Holmes, O. W. (1998). "The Path of the Law." *Boston University Law Review* **78**: 699-718.

Howard, R. M. and J. A. Segal (2002). "An original look at originalism." *Law and Society Review* **36**(1): 113-137.

Howard, R. M. and J. A. Segal (2004). "A preference for deference? The Supreme Court and judicial review." *Political Research Quarterly* **57**(1): 131-144.

Hoyer, J. (2003). "A nondirected kidney donation and its consequences: Personal experience of a transplant surgeon." *Transplantation* **76**(8): 1264-1265.

Jacqué, J J. 2000. *Droit constitutionnel*. Paris: Dalloz.

James, Simon. 1996. The political administrative consequences of Judicial Review. *Public Administration* 74:614-637.

Jackson, D. W. and C. N. Tate (1992). *Comparative Judicial Review and Public Policy*. Westport, Greenwood Press.

Jacob, H., E. Blankenburg, et al. (1996). *Courts, Law and Politics in Comparative Perspective*. New Haven, Yale University Press.

Jesus, M. C. H. (2008). "Demarcate or restrict? The debate on the scope of fundamental law protection in Germany." *Revista Espanola De Derecho Constitucional* **28**(82): 83-117.

Jochemsen, H. (1997). "Dutch Court Decisions on Nonvoluntary Euthanasia." *Issues in Law and Medicine* **13**: 447-460.

Johnson, N. (1977). "Judicial Politics in West-Germany - Study of Federal Constitutional Court - Kommers,Dp." *Political Studies* **25**(2): 300-301.

Johnson, R. B. and A. J. Onwuegbuzie (2004). "Mixed Methods Research: A Research Paradigm Whose Time Has Come." *Educational Researcher* **33**(7): 14-26.

Jungholt, T. and P. Mueller *Schauble greift Verfassungsrichter an*. Welt am Sonntag

Keck, T. M. (2004). *The Most Activist Supreme Court in History*. Chicago, University of Chicago Press.

Keil, C., H. Kerscher, et al. *Bundesverfassungsrichter hoffmann-Riem im SZ-Interview*. Sueddeutsche Zeitung

Kelsen, H. (1920). *Vom Wesen und Wert der Demokratie*. Tuebingen, Paul Siebeck.

Kempton, D. R. (1996). "The Evolution of Centre-Periphery Relations in the Russian Federation." *Europe-Asia Studies* **48**(4): 587-613.

King, G. (1986). "How Not to Lie with Statitics." *American Journal of Political Science* **30**(3): 666-687.

King, G. (1986). "How not to lie with Statistics." *American Journal of Political Science* **30**(3): 666-687.

Kirsten, G. (1996). *Grammatica italiana per tutti*. Stuttgart, Klett.

Kitzinger, J. (1994). "The methodology of Focus Groups." *Sociology of Health and Illness* **16**(1): 107-127.

Klenk, F. and A. Thurnher (16.1.2002) *Hoellische Geschichte*. Falter

Kneip, S. (2008). *Verfassungsgerichtsbarkeit im Vergleich*. Wiesbaden, Verlag fuer Sozialwissenschaften.

Knight, J. and L. Epstein (2000). "Toward a Strategic Revolution in Judicial Politics: A look back, A look Ahead." *Political Research Quarterly* **53**: 625-661.

Kommers, D. P. (1987). "The Federal Constitutional Court of the Federal-Republic-of-Germany - Decisions on the Constitutionality of Legal Norms - Foreword." *Notre Dame Law Review* **62**(4): 501-503.

Kommers, D. P. (1997). *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham, Duke.

Kommers, D. P. (2006). "The federal constitutional court: Guardian of German democracy." *Annals of the American Academy of Political and Social Science* **603**: 111-128.

Kommers. 1994. The Federal Constitutional Court in the German Political System. *Comparative Political Studies* 26 (4):470-491.

Koopmans, T. (2003). *Courts and Political Institutions*. Cambridge, Cambridge University Press.

Kotschy, B. (2006). "Austria: Asylum law in conflict with the Constitution." *Icon-International Journal of Constitutional Law* **4**(4): 689-701.

Kramer, L. D. (2004). *The People Themselves*. Oxford Oxford Univeristy Press.

Kramer, L. D. (2007). "The people themselves: popular constitutionalism and judicial review." *Journal of interdisciplinary history* **XXXVII**(3): 462-463.

Kritzer, H. (2005). "The influence of Law in the Supreme Court's Search and Seizure Jurisprudence." *American Politics Research* **33**(1): 33-55.

Kurland, P. B. (1970). *Politics, the Constitution and the Warren Court*. Chicago, University of Chicago Press.

Kvale, S. (1994). "Ten standard objections to Qualitative Interviews." *Journal of Phenomenological Psychology* **25**(2): 147-173.

Labanca, N. (2004). "Colonial rule, colonial repression and war crimes in the Italian colonies." *Journal of Modern Italian Studies* **9**(3): 300-313.

Ladeur, K. H. and R. Prelle (2001). "Environmental assessment and judicial approaches to procedural errors - A European and comparative law analysis." *Journal of Environmental Law* **13**(2): 185-+.

Ladstaetter, M. (2003). "70 Prozent der Gesetze waren verfassungswidrig." Retrieved 20.3.2010, 2010, from http://www.bizeps.or.at/news.php?nr=4617.

Landes, W. M. and R. Posner (1975). "The Independent Judiciary in an Interest-Group Perspective." *The Journal of Law and Economics* **18**(3): 875-901.

Landes, W. M. and R. A. Posner (1980). "Legal Change, Judicial Behaviour, and the Diversity of Jurisdiction." *Journal of Legal Studies* **9**: 367-397.

Landfried, C. (1984). *Bundesverfassungsgericht und Gesetzgeber*. Baden-Baden, Nomos.

Landfried, C. (1988). Constitutional Review and Legislation in the Federal Republic of Germany. *Constitutional Review and Legislation*. C. Landfried. Baden-Baden, Nomos.

Landfried, C. (1988). "The Federal-Constitutional-Court Judgment of October 29, 1987 on the Storage of Chemical Weapons in the Federal-Republic-of-Germany." *Gegenwartskunde Gesellschaft Staat Erziehung* **37**(2): 193-204.

Landfried, C. (1989). "The 1967 and 1987 Opinions of the Federal-Constitutional-Court of West-Germany on Employment Policies." *Gegenwartskunde Gesellschaft Staat Erziehung* **38**(1): 57-65.

Landfried, C. (1992). "Judicial Policy-making in Germany: The Federal Constitutional Court." *West European Politics* **15**: 50-67.

Landfried, C. (1994). "The Judicialization of Politics in Germany." *International Political Science Review* **15**(2): 113-124.

Landfried, C. 1992. Judicial Policy-making in Germany. *West European Politics* 15:50-67.

Lecourt, R. (1976). L'Europe des Juges. Brussels, E. Bruylant.

Lenaerts, K. (1992). "The Role of the Court of Justice in the European Community: Some Thoughts about the Interaction between Judges and Politicians." University of Chicago Legal Forum.

Landman, T. (2006). *Issues and Methods in Comparative Politics*. London, Routledge.

Lane, J. C. (1978). "Judicial Politics in West-Germany - Study of the Federal-Constitutional-Court - Kommers,Dp." *American Political Science Review* **72**(4): 1471-1472.

Lawson, F. H. (1977). "Comparative Judicial Style." *American Journal of Comaprative Law* **25**: 364.

Lee, D. (2008). "The Legacy of Medieval Constitutionalism in the Philosophy of Right: Hegel and the Prussian Reform Movement." *History of Political Thought* **29**(4): 601-634.

Lee, F. and B. Oppenheimer (1999). *Sizing up the Senate*. Chicago, Chicago University Press.

Lee, S. K. (2008). "A Comparative Analysis of a Pregnant Woman's Rights to Abortion: Notes on Constitutional Courts' Decisions of Abortion Laws in Germany and the United States, and their Implications for Korean Abortion Laws." *Asian Women* **24**(2): 75-101.

Leech, B. L. (2002). "Interview Methods in Political Science." *Political Science and Politics* **35**.

Leech, B. L. (2002). "Asking Question." *Political Science and Politics* **35**(4): 665-668.

Lichbach, M. I. (1999). *Comparative Politics*. Cambridge, Cambridge University Press.

Liebetrau, A. M. (1983). *Measure of Association*. London, Sage University Papers.

Lijphart, A. (1991). "Constitutional Choices for New Democracies." *Journal of Democracy* **2** (1): 72-86.

Lijphart, A. (2004). "Constitutional Design for Divided Societies." *Journal of Democracy* **15** (2): 96-109.

Limbach, J. (2000). *Das Bundesverfassungsgericht*. Heidelberg, C.F.Mueller.

Lyon, P. V. (1963). "Constitutionalism in Germany and the Federal Constitutional Court - Mcwhinney,E." *Canadian Journal of Economics & Political Science* **29**(4): 591-592.

Magalhaes, P. C. (1999). "The Politics of Judicial Reform in Eastern Europe." *Comparative Politics* **32**(1): 43-62.

Magalhaes, P. C. (2003). The Limits of Judicialisation. Political Science, Ohio State University. **PhD**.

Maltzman, F., J. F. Spriggs II, et al. (2000). *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge, Cambridge Univeristy Press.

Manow, P. and S. Burkhart (2007). "Legislative self-restraint under divided government in Germany, 1976-2002." *Legislative Studies Quarterly* **32**(2): 167-191.

March, J. G. and J. P. Olsen (1984). "The New Institutionalism: Organizational Fctors in Political Life." *American Political Science Review* **78**(3): 734-749.

Markesinis, B. (2000). "Judicial Style and Judicial Reasoning." *Cambridge Law Journal* **59** (2): 294-309.

Mackensie, S. (1977). The European Communities and the Rule of Law. London, Stevens.

McCubbins, M. N., R; Weingast,B (1992). "Positive Cannons: The Role of legislature bargains in Statutory Interpretation." Georgetown Law Review **80**: 705.

Mancini, F. (1991), 'The Making of a Constitution for Europe' in Keohane, R. O and Hoffmann, S (ed), *The New European Community – Decision-making and Institutional Change,* Boulder: Co.: Westview,pp.177-194.

Mény, I. 1993. *Government and Politics in Western Europe*. Oxford: Oxford University Press

Marks, B. (1988). A model of judicial influence on congressional policy-making. Working papers in political science, Stanford University.

Marongiu, G. (1983). "Payment of Taxes and the Ability to Pay in Italy - Article-53 of the Constitution in the Case Law of the Constitutional Court." *Bulletin for International Fiscal Documentation* **37**(9-10): 426-435.

Marschner, R. (2007). "Enforced treatment as an exception?" *Recht & Psychiatrie* **25**(4): 180-183.

Martin, P. (2003). ""The Right Result": Attitudes, Strategy and Law in the Narrative of Supreme Court Decisions." *Studies in American Political Development* **17**: 168-184.

Mashaw, J. (1990). "Explaining Administrative Process:Normative, Positive, and Critical Stories of Legal Development." *Journal of Law, Economics, and Organization* **6**: 267-299.

Mason, J. (2002). *Qualitative Researching*. London, Sage.

Maxwell, J. A. (2004). "Causal Explanation, Qualitative Research, and Scientific Inquiry in Education." *Educational Researcher* **33**(2): 3-11.

May, T. (2001). *Social Research*. Buckingham, Open University Press.

McAdams, J. (2001). *Judging the Past in Unified Germany*. Cambridge, Cambridge University Press.

McLaughlin, A. C. (1928). "Marbury vs Madison Again." *ABA Journal* **14**.

McLean, M., J. Walker, et al. (1993). *Statistics*. Essex, Hodder and Stoughton.

McNollgast (1990). "Postiive and Normative Models of Procedural Rights: An Integrative Approch to Administrative Procedures." *Journal of Law, Economics, and Organization* **6** (307-333).

Mcwhinney, E. (1982). "Federalism and Judicial-Review in West-Germany - Blair,Pm." *American Bar Foundation Research Journal*(1): 283-286.

Mendelson, W. (1962). "Constitutionalism in Germany and the Federal Constitutional Court - Mcwhinney,E." *Texas Law Review* **41**(1): 161-161.

Meny, Y. and A. Knapp (1998). Oxford, Oxford University Press.

Merkel, R. (2007). "The legal status of the human embryo." *Reproductive Biomedicine Online* **14**: 54-60.

Merryman, J. H. (1965). "The Italian Style." *Stanford Law Review* **18**(2): 39-65.

Mezey, S. G. (1983). "Civil-Law and Common-Law Traditions - Judicial-Review and Legislative Supremacy in West-Germany and Canada." *International and comparative law quarterly* **32**(Jul): 689-707.

Modugno, F., A. S. Agro, et al. (2008). *Il Principio di unita del controllo sulle leggi nella giurisprudenza della corte costitutzionale*. Torino, G Giappichelli Editore.

Moller, T., B. Grabensee, et al. (2008). "Passive euthanasia in clinical practice - doctors' decision and the legal position." *Deutsche Medizinische Wochenschrift* **133**(20): 1059-1063.

Moreno, L. (1995). "Multiple Ethnoterritorial concurrence in Spain." *Nationalism and Ethnic Politics* **1**(1): 11-32.

Morgan, A. L. (2005). "US officials' vulnerability to "global justice": Will universal jurisdiction over war crimes make traveling for pleasure less pleasurable?" *Hastings Law Journal* **57** (2): 423-+.

Morgan, D. L. (1998). "Practical Strategies for Combining Qualitative and Quantitative Methods: Applications to Health Research." *Qual Health Res* **8**(3): 362-376.

Mueller, R. (2004). "Interview with FCC Vice President." *German Law Journal* **5**(5): 603-607.

Murphy, W. F. (1964). *Elements of Judicial Strategy*. Chicago, University of Chicago Press.

Murphy, W. F. and C. H. Pritchett (1961). *Courts, Judges and Politics*. New York, Random House.

Nagel, S. (1965). "Court-Curbing Periods in American History." *Vanderbilt Law Review* **18**: 925-944.

Nakajima, K., C. Keyes, et al. (2001). "Medical malpractice and legal resolution systems in Japan." *Jama-Journal of the American Medical Association* **285**(12): 1632-1640.

Nardini, W. (2000). "Passive Activism and the Limits of Judicial Self-Restraint." *Seton Hall Law Review*(30): 1-58.

Neal Tate, C. and T. Vallinder (1995). *The Global Expansion of Judicial Power*. New York, New York University Press.

Network, E. C. L. (2009). "Constitutions of EU Member States." Retrieved 10.3.2010, 2010, from http://www.ecln.net/index.php?option=com_content&task=view&id=29&Itemid=52.

Neuman, L. (2003). *Social Research Methods*. Boston, Allyn and Bacon.

Newell, J. L. (2005). "Americanisation and the judicalization of Italian politics." *Journal of Modern Italian Studies* **10**(1): 27-42.

Nohlen, N. (2008). "Germany: The European Arrest Warrant Case." *Icon-International Journal of Constitutional Law* **6**(1): 153-161.

Nussbaum, M. C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination." *University of Chicago Law Review* **62**: 1411-1519.

Oehlinger, T. (2007). *Verfassungsrecht*. Wien, facultas.

Ohlinger, T. (2007). *Verfassungsrecht*. Wien, Facultas.

Onida, V. (2007). *La Costituzione*. Bologna, Farsi un idea.

Ooyen, R. and M. Moellers, Eds. (2006). *Das Bundesverfassungsgericht im Politischen System*. Wiesbaden, Verlag fuer Sozialwissenschaften.

ORF (2005). "Verfassungsgericht prueft wieder Ortstafeln." Retrieved 22.3.2010, 2010, from http://oesterreich.orf.at/kaernten/stories/44263/.

Ott, W. (2002). "Did East German border guards along the Berlin Wall act illegally? Comments on the decision of the German Federal Constitutional Court." *Legal Philosophy: General Aspects*(82): 143-154
208.

Pakusche.Ek (1971). "Judicial Review of Executive Acts in Economic Affairs in Germany." *Journal of Public Law* **20**(1): 273-298.

Pederzoli, P. (2008). *La Corte Costituzionale*. Bologna, Il Mulino.

Pegoraro, L. (2006). *La Corte Costituzionale italiana e il diritto comparato*. Bologna, Universita di Bologna.

Perillo, J. M. (1994-1995). "Undroit Principles of International Commercial Contracts: The Black Letter Text and a Review." *Fordham Law Review* **63**: 281.

Perretti, T. J. (1999). *In Defense of a Political Court*. Princeton, Princeton University Press.

Peters, G. B. (2005). Institutional Theory in Political Science: The New Institutionalism, Continuum International Publishing Group.

Pickerill, J. M. and C. W. Clayton (2004). "The Rehquist Court and the Political Dynamics of Federalism." *Perspectives on Politics* **2**(June): 233-248.

Poland, C. C. (2008, 2.1.2009). "Publications (http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm)." 22.12.2008. Retrieved 2.1.2009, 2009.

Posner, R. (1995). "Judges' Writing Styles (And Do They Matter?)." *The UNiversity of Chicago Law Review* **62**(4): 1421-1449.

Posner, R. (Febuary 24) *The Anti-Hero*. The New Republic

Posner, R. (2008). *How Judges Think*. London, Harvard Univeristy Press.

Preuss, A. (1995). "Role of the Public Laboratories in Food Law Inforcement." *Deutsche Lebensmittel-Rundschau* **91**(10): 317-319.

Preuss, U. K. (1991). "Politics of Constitution Making." *Law and Policy* **13**(107): 107-125.

Preuss, U. K. (1994). *Revolution, Fortschritt und Verfassung. Zu einem neuen Verfassungsverständnis*. Frankfurt, Fischer Wissenschaft.

Preuss, U. K. (1999). "The Constitution of a European Democracy." *Ratio Juris* **12**(4): 417-428.

Preuss, U. K. (2003). "Citizenship and the German Nation." *Citizenship Studies* **7**(1): 37-56.

Pritchett, C. (1948). *The Roosevelt Court*. New York, Macmillan.

Quaritsch, H. (1979). "25 Years of the Federal Constitutional Court of West-Germany 1951-1976 - Commemorative Lecture - from Imperial Supreme-Court to Federal Constitutional Court - Legal Control of Political-Power in German History - German - Scheider,." *Historische Zeitschrift* **229**(3): 751-754.

Quassoli, F. (1999). "Migrants in the Italian underground economy." *International Journal of Urban and Regional Research* **23**(2): 212-+.

Quint, P. E. (2006). "Leading a constitutional court: Perspectives from the Federal Republic of Germany." *University of Pennsylvania Law Review* **154**(6): 1853-1878.

Ramos, F. (2002). "Judicial Cooperation in the European Courts: Testing Three Models of Judicial Behaviour." *Global Jurist Frontiers* **2**(1).

Rasmussen, H. (1986). On Law and Policy in the European Court of Justice: A comparative study in Judicial policy making. Dortrecht, M. Nijhoff.

Republica, A. d. (2008). "Assembleia da republica.pt." Retrieved 3.3.2010, 2010, from http://www.parlamento.pt/Paginas/UKFR.aspx.

Reynolds, H. T. and J. Buttolph Johnson (2008). *Political Science Research Methods*. Washington, CQ Press.

Rieger, H. J. (1975). "Ruling of Federal Constitutional Court of Germany on Designation of Fixed Periods for Legal Abortions." *Deutsche Medizinische Wochenschrift* **100**(12): 637-639.

Riggin, J. C. (1997). Advances in Mixed Methods Evaluation. *Advances in Mixed Methods Evaluation*. J. C. Greene. San Francisco, Jossey-Bass.

Riker, W. H. (1990). Political Science and Rational Choice. *Perspectives on Positive Political Economy*. J. E. Alt and K. A. Shepsle. New York, Cambridge University Press.

Rodino, W. (1992). "The Constitutional Court of Italy." *Supranational and Constitutional Courts in Europe : Functions and Sources*: 281-& 404.

Rogowski, R. and T. Gawron (2002). *Constitutional Courts in Comparison*. New York, Berghahn.

Romania, C. C. (2009). "Statistics http://www.ccr.ro/default.aspx?page=statistics/periodic." Retrieved 1.2.2009, 2009.

Rosenberg, G. N. (1992). "Judicial Independence and the Reality of Political Power." *Review of Politics* **54**(Summer): 369-398.

Rotax, H. H. (2007). "Regarding the child's right to information about his/her natural parents and regarding the parents' right to information about the actual maternity or paternity." *Praxis Der Kinderpsychologie Und Kinderpsychiatrie* **56**(2): 148-171.

Rubin, H. and I. Rubin (1995). *Qualitative Interviewing*. London, Sage.

Rumpler, H. (1999). "The Council of the Austrian Empire and Austria's transition to constitutionalism 1859-1867." *Historicky Casopis* **47**(2): 202-210.

Rundschau, F. (4.1.2003) *Bundesverfassungsgericht geniesst hohes Vertrauen der Buerger*. Frankfurter Rundschau

Rupp, H. G. (1969). "Federal Constitutional Court in Germany - Scope of Its Jurisdiction and Procedure." *Notre Dame Lawyer* **44**(4): 548-559.

Rupp, H. G. (1977). "Judicial Review of International Agreements - Federal-Republic-of-Germany." *American Journal of Comparative Law* **25**(2): 286-302.

Ruppvbru.W (1972). "Admonitory Functions of Constitutional Courts - Germany - Federal Constitutional Court." *American Journal of Comparative Law* **20**(3): 387-403.

Sachs, M. (2004). *Verfassungsprozessrecht*. Heidelberg, Recht und Wirtschaft.

Sala, B. and J. Spriggs (2004). "Designing Tests of the Supreme Court and the Separation of Powers." *Political Research Quarterly* **57**: 197-208.

Sale, J., L. Lohfeld, et al. (2002). "Revising the Quantitative and Qualitative Debate." *Quality and Quantity* **36**: 43-53.

Salkind, N. (2010). *Statistics*. Los Angeles, Sage.

Santoni, M. and F. Zucchini (2004). "Does policy stability increase the Constitutional Court's independence? The case of Italy during the First Republic (1956-1992)." *Public Choice* **120**(3-4): 439-461.

Santonini, M. and F. Zucchini (2004). "Does policy stability increase the Constitutional Court's independence?" *Public Choice* **120**(439-461).

Santonini, M. and F. Zucchini (2006). "Legislative output and the constitutional court in Italy." *Constitutional Political Economy* **17**: 165-187.

Scalia, A. (1989). "The rule of law as a law of rules." *University of Chicago Law Review* **56**.

Schaal, G. (2004). *Vertrauen, Verfassung und Demokratie*. Wiesbaden, VS.

Schauer, F. (1995). "Opinion as Rules." *University of Chicago Law Review* **95**(3): 1455-1475.

Schauer, F. (2000). "Incentive, Reputation and Inglorious Determinants of Behaviour." *University of Cinncinaty Law Review* **68**: 615-638.

Schmidhauser, J. (1962). "Stare Decisis, Dissent, and the background of the justices of the supreme court of the US." *Toronto Law Journal* **14**(2): 194-212.

Schmitt, C. (1996). *Der Hueter der Verfassung*. Berlin, Dunker and Humblot.

Schubert, G. (1965). *Judicial Policy Making*. Glenview, Scott,Foresman.

Schubert, G. (1970). *The Constitutional Polity*. Boston, Boston University Press.

Schubert, G. (1974). *The Judicial Mind Revisited*. Oxford, Oxford University Press.

Schurmann, H. J. (1996). "Getting rid of special burdens in energy policy." *Atw-Internationale Zeitschrift Fur Kernenergie* **41**(5): 347-347.

Schwartz, E. P. (1991). "Policy, Precedent and Power: A Positive Theory of Supreme Court decision making." *Journal of Law, Economics, and Organization* **8**(2): 219-252.

Schwartz, H. 2000. *The struggle for Constitutional Justice in Post-Communist Europe*. Chicago: University of Chicago Press.

Shapiro, Martin. 1988. *Who guards the guardians: Judicial Control of Administration*. Chicago: University of Chicago Press.

Shapiro, Martin and Stone Sweet, Alec. 2002. *On Law, Politics and Judicialisation*. Oxford: Oxford University Press.

Slaughter, A. 1998. *The European Court and National Courts*. Oxford: Hart Press.

Solyom. 2000. *Constitutional Judiciary in a new Democracy*. Ann Arbor: University of Michigan Press.

Stein, E. (1981) “Lawyers, Judges and the makers of transnational constitutions”, American Journal of International Law 75:1-27

Stone, Alec. 1995. Governing with Judges. In *Governing the New Europe*, edited by J. a. P. Hayward, Edward. Oxford: Oxford Unversity Press.

Stone Sweet, Alec. 2000. *Governing with Judges*. Oxford: Oxford University Press.

Sweet, Alec Stone. 1999. Judicialisation and the construction of governance. *Comparative Political Studies* 32 (2):147-184.

Sweet, Alec Stone and Brunell. 1998. The European Court and the national courts. Journal of European Public Policy 5:1

Sweet, Alec and Capraso 2000 “From Free trade to supranational polity”, Revue francaise de science politique.

Seely, J. (2004). *Grammar and Punctuation*. Oxford, Oxford University Press.

Segal, J. (1984). "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases." *The American Political Science Review* **78**(4): 891-900.

Segal, J. (1986). "Supreme Court Justices as Human Decision Makers." *Journal of Politics* **48**(4): 938-955.

Segal, J. and H. Spaeth (2002). *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, Cambridge University Press.

Segal, J. A. (1997). "Separation-of-powers games in the positive theory of congress and courts." *American Political Science Review* **91**(1): 28-44.

Segal, J. A. (1998). "Correction to 'Separation-of-Powers Games in the Positive Theory of Congress and Courts'." *American Political Science Review* **92**(4): 923-926.

Segal, J. A. and A. D. Cover (1989). "Ideological values and the votes of U.S. Supreme Court justices." *American Political Science Review* **83**(2): 557-565.

Segal, J. A., L. Epstein, et al. (1995). "Ideological values and the votes of U.S. Supreme Court justices revisited." *Journal of politics* **57**(3): 812-823.

Segal, J. A. and H. J. Spaeth (1995). "The Supreme Court and the attitudinal model." *Journal of politics* **57**(1): 254-255.

Segal, J. A. and H. J. Spaeth (1996). "Norms, dragons, and stare decisis: a response." *American Journal of Political Science* **40**(4): 1064-1082.

Segal, J. A. and H. J. Spaeth (2004). "The Supreme Court and the attitudinal model revisited." *Journal of politics* **66**(4): 1304-1306.

Segal, J. A., H. J. Spaeth, et al. (1996). "The principle of stare decis." *American Journal of Political Science* **40**(4): 971-1082.

Seiwert, H. (2003). "Freedom and control in the unified Germany: Governmental approaches to alternative religions since 1989." *Sociology of Religion* **64**(3): 367-375.

Service, W. V. (2009). "World Values Service." Retrieved 3.3.2010, 2010, from http://www.worldvaluessurvey.org/.

Shapiro, M. and A. Stone Sweet (2003). "On law, politics and judicialization." *International and comparative law quarterly* **52**(4): 1071-1073.

Sherry, S. (2004). "What's Law got to do with it?" *Perspectives on Politics* **2**(4): 769-776.

Silverman, D. (2003). *Interpreting Qualitative Data*. London, Sage.

Silverstein, G. (2009). *Law's Allure*. Cambridge, Cambridge University Press.

Simon, H. (1955). "A Behavioural Model of Rational Choice." *The quarterly Journal of Economics* **69**(Febuary): 99-118.

Slaughter, A.-M., A. Stone Sweet, et al. (1998). *The European Courts and National Courts*. Oxford, Hart publishing.

Smith, J. K. (1983). "Quantitative Versus Qualitative Research: An Attempt to Clarify the Issue." *Educational Researcher* **12**(3): 6-13.

Smith, J. K. and L. Heshusius (1986). "Closing Down the Conversation: The End of the Quantitative-Qualitative Debate Among Educational Inquirers." *Educational Researcher* **15** (1): 4-12.

Smith, M. J. (1998). *Social Science in Question*. London, Sage.

Sofair, A. N. and L. C. Kaldjian (2000). "Eugenic sterilization and a qualified Nazi analogy: The United States and Germany, 1930-1945." *Annals of Internal Medicine* **132**(4): 312-319.

Solyom, L. (2003). "The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary." *International Sociology* **18**(1): 133-161.

Sommer, B. (1997). "Concerning the cannabis-decision of the Federal Constitutional Court of Germany." *Cannabis Science*: 257-262
335.

Spaeth, H. and J. Segal (2001). *Majority Rule or Minority Will*. Cambridge, Cambridge University Press.

Spaeth, H. J. (1979). *Supreme Court policy making: explanation and prediction*, San Francisco.

Spaeth, H. J. and M. F. Altfeld (1985). "Influence relationships within the Supreme Court: a comparison of the Warren and Burger courts." *Western political quarterly* **38**(1): 70-83.

Spaeth, H. J. and J. A. Segal (2001). *Majority rule, or minority will: adherence to precedent on the U.S. Supreme Court*. Cambridge
New York, Cambridge University Press.

Spiller, P. T. and R. Gely (1990). "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to teh State Farm and Grove City Cases." *Journal of Law, Economics, and Organization* **6**(2): 263-300.

Standard, D. (11.10.2003) *VfGH kippt Hauptverbands - Reform*. Der Standard

Standard, D. (2005) Verfassungsrichter Kippen im Vorjahr 49 Gesetze. Der Standard

Standard, D. (15. 11. 2009) *Misstrauen gegen die Justitz ist alarmierend*. Der Standard

Statista (2010). "Vertrauen in das Bundesverfassungsgricht." Retrieved 29.7.2010, 2010, from http://de.statista.com/statistik/studien/q/bundesverfassungsgericht/.

Staton, J. K. (2006). "Constitutional Review and the Selective Promotion of Case Results." *American Journal of Political Science* **50**(1): 98-112.

Stepan, J. (1985). "How Europe changed the rules: abortion." *People* **12**(2): 28-29.

Stevens, R. B. (1985). *Law School*. Chapel Hill, The University of North Carolina Press.

Stimson, J. A., M. B. Mackuen, et al. (1995). "Dynamic Representation." *American Political Science Review* **89**(September): 543-565.

Stone, A. (1992). *The Birth of Judicial Politics in France*. Oxford, Oxford University Press.

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

Tallberg, J. (2000) 'Supranational Influence in EU Enforcement: the ECJ and the Principle of State Liability', *Journal of European Public Policy*, Vol.7, No.1, pp.104-121

Taylor, Paul. 1983. *The Limits of European Integration*. New York: Columbia University Press.

Tarrow, S. (1995). "Bridging the Quantitative-Qualitative Divide in Political Science." *The American Political Science Review* **89**(2): 471-474.

Tashakkori, A. and C. Teddlie (2003). *Handbook of Mixed Methods*. London, Sage.

Tate, C. N. and T. Vallinder (1995). *The Global Expansion of Judicial Power*. New York, New York University Press.

Taylor, T. (1981). "The unconstiutionality of current legislative proposals." *Judicature* **65**: 199ff.

Teutsch, G. M. (1999). "Man and his fellow-creatures under ethical aspects." *Altex-Alternativen Zu Tierexperimenten* **16**(4): 211-254.

Thompson, J. (2001). "Odin's legion on the march." *World Today* **57**(2): 25-27.

Tomuschat, C. (2006). "Inconsistencies - The German Federal Constitutional Court on the European Arrest Warrant." *European Constitutional Law Review* **2**(2): 209-226.

Toobin, J. *Swing Shift*. The New Yorker

Treves, G. (1958). "Judicial-Review of Legislation in Italy." *Journal of Public Law* **7**(2): 345-361.

Turillazzi, E. and V. Fineschi (2008). "Preimplantation genetic diagnosis: a step by step guide to recent Italian ethical and legislative troubles." *Journal of Medical Ethics* **34**(10): -.

Turner, J. I. (2006). "Judicial participation in plea negotiations: A comparative view." *American Journal of Comparative Law* **54**(1): 199-267.

Tushnet, M. (2006). The Supreme Court and the National Political Order: Collaboration and Confrontation. *The Supreme Court and American Political Development*. R. Kahn and K. Kersch. Lawrence, Univeristy of Kansas Press.

Vanberg, G. (1998). "Abstract Judicial Review, Legislative Bargaining, and Policy Compromise." *Journal of Theoretical Politics* **10**: 299-328.

Vanberg, G. (2000). "Establishing judicial independence in West Germany - The impact of opinion leadership and the separation of powers." *Comparative Politics* **32**(3): 333-+.

Vanberg, G. (2005). *The Politics of Constitutional Review in Germany*. Cambridge, Cambridge University Press.

Varian, H. (1999). *Intermediate Microeconomics: A Moden Approach*. New York, WW Norton and Company.

Vigoriti, V. (1972). "Admonitory Functions of Constitutional Courts - Italy - Constitutional Court." *American Journal of Comparative Law* **20**(3): 404-414.

Voigt, S. (2001). "Explaining constitutional change: a positive economics approach." *Constitutional Political Economy* **12**(3): 277-279.

Volcansek, M. (2000). *Constitutional Politics in Italy*. London, Macmillan Press.

Volcansek, M. L. (1990). "Judicial-Review in Italy - a Reflection of the United-States." *Policy Studies Journal* **19**(1): 127-139.

Volcansek, M. L. (1994). "Political-Power and Judicial-Review in Italy." *Comparative Political Studies* **26**(4): 492-509.

Volcansek, M. 1992. Judges,Courts and Policy-making in Western Europe. *West European Politics* 15 (3).

Vonwinterfeld, A. (1956). "The Potsdam Agreement, the Basic-Law, and the Reunification of Germany in the Light of the Judgment of the Federal-Constitutional-Court in the Kpd Court-Case of August 17, 1956 and the Memoradnum of the Federal-Republic Government on September 2, 1956." *Europa Archiv* **11**(19): 9203-9212.

Vorlaender, H. and A. Brodocz (2006). Das Vertrauen in das Bundesverfassungsgericht. *Die Deutungsmacht der Verfassungsgerichtsbarkeit*. H. Vorlaender. Wiesbaden, Verlag der Sozialwissenschaften.

Wachendorfer-Schmidt, U. (1999). "The price of federalism in Germany." *Politische Vierteljahresschrift* **40**(1): 3-+.

Wald, P. (1993). "How I write." *Scribes Journal of Legal Writing* **55**(4).

Wald, P. (1995). "A Reply To Judge Posner." *The University of Chicago Law Review* **62**(4): 1451-1455.

Walter, J. (2008). "Notes from the country-side. A first stock-taking of the German legislation on youth prisons." *Kriminologisches Journal* **40**(1): 21-31.

Ward, A. (2007). *Judicial Review and the Rights of Private Parties in EU Law*. Oxford, Oxford University Press.

Weber, L. A. (1997). "Judicial review in the Federal Republic of Germany." *Comparative Studies on the Judicial Review System in East and Southeast Asia* **1**: 237-251
321.

Weiler, H. N. (1985). "Equal-Protection, Legitimacy, and the Legalization of Education - the Role of the Federal Constitutional Court in West-Germany." *Review of Politics* **47**(1): 66-91.

Weiler, J. (1981). "The Community System: The Dual Character of Supranationalism." Yearbook of European Law **1**: 268-306.

Weiler, J. (1991). "The Transformation of Europe." Yale Law Journal **100**: 2409.

Weiler, J. H. H. (1994). “A quite revolution: The ECJ and its Interlocutors” Comparative politicla studies. **26**(4): 510-534

Weinberg, L. (2003). "Our Marbury." *Virginia Law Review* **89**.

Weingast, B. (1997). "The political Foundations of Democracy and the Rule of Law." *American Political Science Review* **91**(2): 245-263.

Weingast, B. and J. Ferejohn (1992). "A Positive Theory of Statutory Interpretation." *International Review of Law and Economics* **12**: 263-279.

Weitze, C. and S. Osburg (1996). "Transsexualism in Germany: Empirical data on epidemiology and application of the German transsexuals' act during its first ten years." *Archives of Sexual Behavior* **25**(4): 409-425.

White, J. B. (1995). "What is an Opinion For?" *University of Chicago Law Review* **62**: 1363-1371.

Whittington, K. (2003). "Legislative Sancrion and the Strategic Environment of Judicial Review." *Internationa Journal of Constitutional Law* **1**: 446-474.

Whittington, K. (2008). "Political foundations of judicial supremacy." *Yale Law Journal* **117** (5): 886-919.

Whittington, K. E. (1999). "From democratic dualism to political realism: transforming the constitution." *Constitutional Political Economy* **10**(4): 405-414.

Whittington, K. E. (2000). "Dworkin's 'originalism': the role of intentions in constitutional interpretation." *Review of Politics* **62**(2): 197-229.

Whittington, K. E. (2005). "Interpose your friendly hand." *American Political Science Review* **99**(4): 583-596.

Whittington, K. E. (2005). "'Interpose your friendly hand': political supports for the exercise of judicial review by the United States Supreme Court." *American Political Science Review* **99**(4): 583-596.

Whittington, K. E. (2008). "Political foundations of judicial supremacy: the presidency, the Supreme Court, and constitutional leadership in US history." *Political science quarterly* **123** (1): 172-173.

Wincott, D. (2000). "A Community of Law? "European" Law and Judicial Politics: The Court of Justice and Beyond." *Government and Opposition* **35**(1): 3-26.

Wincott, D. (1995) ‘The Role of Law or the Rule of the Court of Justice? An Institutional Account of the Judicial Politics in the European Community', *Journal of European Public Policy,* Vol.2, No. 4, pp.583-602

Wincott, D. (1999) ‘The European Court of Justice and the Legal System’, Ch. 5 in Cram *et al.Developments in the European Union,* Basingstoke: Macmillan

Wolf, A. (27.6.2006, 22.00). Ortstafelstreit: Interview mit Haider und Van der Bellen. Zeit im Bild 2. Austria, ORF Zeit im Bild 2.

Woliver, L. (2002). "Ethical Dilemmas in Personal Interviewing." *Political Sciecne and Politics* **35**(4): 677-678.

Wright, D. B. (1997). *Understanding Statistics*. London, Sage.

Zagrebelsky, G. (2005). *Principi e voti - La Corte costituzionale e la politica*. Torino, Giulio Einaudi editore.

Zeidler, W. (1987). "The Federal Constitutional Court of the Federal-Republic-of-Germany - Decisions on the Constitutionality of Legal Norms." *Notre Dame Law Review* **62**(4): 504-525.

Zeitung, K. (2009). "Ortstafelstreit unendlich." Retrieved 22.3.2010, 2010, from http://www.kleinezeitung.at/kaernten/2218736/ortstafeln-volksanwaltschaft-wendet-sich-wieder-den-vfgh.story#forummain.

Zeitung, K. (15.11.2009) *VfGH - Praesident beklagt Misstrauen in Justiz*. Kleine Zeitung

Zoller, E. (1977). *Droit Constitutionnel*. Paris, Press Universitaire