LEGISLATORS OR CONSTITUTIONAL JUDGES?
LAW AND POLICY-MAKING PRIMACY IN ABORTION JURISPRUDENCE IN THE USA AND GERMANY

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ABSTRACT

This paper examines the growth of law and policy-making powers of constitutional judges as an aspect of current profound changes within the legal and political environment sometimes also described as "judicialization of politics."[1] It argues that separation of powers between legislators and constitutional judges is not a matter of description, but has its normative significance.

This paper therefore claims that legislature should be primarily responsible for addressing broader issues of law and public policy and that such is only enabled if law and policy-making of legislature is not replaced or substantially supplemented by that of constitutional judges. In order to establish the validity of this claim, this paper examines the growth of constitutional law and policy-making and its subsequent impact on the position of legislature as well as its ramifications in policy-making area. Comparative analysis of 'judicialization' of abortion policy in USA and in Germany serves as an analytical evidence of the various arguments underlying this claim.

In order to reconcile law and policy-making powers possessed and exercised by both legislature as well as constitutional judiciary, normative arguments inherent to the institutional and functional limits of both of these governmental bodies are presented. In conclusion, this paper responses to the challenges brought about by 'judicialization' of law and policy-making by claiming a need for restoration of law and policy-making primacy of legislature.

[1] T. Vallinder, "When the Courts Go Marching In" in C.N. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995), 13 cited in Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 1.

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INTRODUCTION

Today, in the modern societies we live in, often also described as those committed to the constitutionalism understood as a governance by the supreme law of the state to which all subject of the polity, including all branches of the government have to exercise subservience,[2] it is almost impossible to think about constitutionalism without thinking about constitutional review of legislation at the same time. No matter how much we got used to see constitutionalism and constitutional review of legislation in such an inseparable fashion, it ought not to be forgotten that such understanding of constitutionalism is both in common law and civil law legal systems matter of a rather recent history.[3]

Sweet Stone defines constitutional review as an:

> authority of an institution to invalidate the acts of government – such as legislation, administrative decisions, and judicial rulings – on the grounds that these acts have violated constitutional rules, including rights.[4]

Constitutional review of legislation thus places the exercise of legislative power under the scrutiny of its compliance with the constitutional instrument. In polities where such

[2] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 20.

[3] On evolution of what Alec Stone Sweet calls 'new constitutionalism' in Europe see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 31, 37 – 40 or Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 79-82. For rise of constitutional review in the USA see Geoffrey Stone and others, eds. *Constitutional law*: *5th ed.*, (Boston: Aspen Publishers, 5th ed., 2005), 29-51. See also Thomas J. Higgins. *Judicial Review Unmasked* (West Hanover, Mass: Christopher Publishing House, 1981), 30-42 and also Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-made Law* (Lanham, Md.: Rowman & Littlefield, 7 Rev. ed., 1994).

[4] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 21.

understanding of constitutionalism is applied,[5] constitutional review is not only an expression of supremacy of the authority exercising constitutional review,[6] but has much broader implications.

Supremacy[7] and primacy[8] of legislature in law and also in policy-making "has lost its vitality."[9] Due to the very nature of the judicial office, constitutional judges in both USA, where American model, but also in Germany, where European model of constitutional review is present,[10] inevitably engage in law-making.[11] These sweeping law and therefore also policy-making powers have profound impact on legislative processes and outcomes, in both qualitative[12] as well as quantitative[13] terms. Expansion of the province of the constitutional judges both in content and also in scope[14] has incurred a profound change to the law and policy-making

[5] Stone Sweet distinguishes between two types of understanding of constitutionalism in modern democracies, i.e., either (i) "the legislative supremacy model;" or (ii) "higher law constitutionalism model." Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 20-21.
[6] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 88-90.
[7] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 1. See also Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 1-13.
[8] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 4-9. See also Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 1-13.
[9] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 1.
[10] Alec Stone Sweet, "Constitutionalism, Rights, and Judicial Power," *Comparative Politics*. Ed. D. Caramani. Oxford: Oxford University Press (2008): 217-239, 222-225. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 32-37 and also Alec Stone Sweet. *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 225-231.
[11] Alec Stone Sweet, "Judicialization and the Construction of Governance," *Comparative Political Studies* 31 (1999): 147-184, 156 – 157. See also Aharon Barak. *Judicial Discretion* (New Haven: Yale University Press, 1989), 90 – 91 and also Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 5 and also Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 29, 126-127.
[12] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 61-90.
[13] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 182. See also Alec Stone Sweet. *"Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)"* West European Politics *25* (2002): 77-100, p. 90.
[14] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 1.

processes and outcomes.[15] As a result, today, many areas of social life are governed not only by the rules produced by the legislators, but also by the constitutional judges.[16]

This profound change in legal and political environment is sometimes also described as "judicialization of politics."[17] 'Judicialization' of law and policy-making does not only refer to a quantitative expansion of judicial law and policy-making, but also refers to a change better described in categories different from those of scope or amount.[18] 'Judicialization' of law and policy-making bears special ramifications in the area of constitutional law, where "continuous dominance"[19] has been gained and subsequently secured by the constitutional judiciary.[20] It therefore also entails qualitative characteristics of the growth of the power of the constitutional judges.[21] As a result, many law and policy areas "have been gradually but meaningfully placed under the tutelage and supervision of constitutional judges."[22] Constitutional courts[23] are

[15] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 1-21.
[16] Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 74-76.
[17] Literature provides various notions of this term. Vallinder, for example, understands 'judicialization of politics' as "the expansion of the province of courts or the judges at the expense of the politicians and or the administrators" as well as "the spread of judicial decision-making methods outside the judicial province proper." T. Vallinder, "When the Courts Go Marching In" in C.N. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995), 13 cited in Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 1. Sweet Stone, on the other hand, understands 'judicialization of politics' in light of his understanding of the constitutional politics, which he sees as "lawmaking processes-legislative, administrative, judicial- that are mediated by constitutional norms and jurisprudence." Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 72. Thus, for Sweet Stone, 'judicialization of politics' does not only refer to judicial intervention into areas originally not accessible to the courts, but it also refers to the mutual influence of involved governmental players.
[18] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 7.
[19] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 89.
[20] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 89.
[21] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 7.
[22] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 1.
[23] For the purposes of this paper term 'constitutional court' or 'constitutional courts' is used also to refer to legal environment of the USA, where strictly speaking usage of such term is not possible. Although author of this paper

nowadays principal law and policy-making sites.[24] It is therefore very relevant to ask whether such a change "can … take place without altering the equilibrium of the political system."[25]

Scope of this paper is an analysis of the causes and consequences of 'judicialization' of law and policy-making caused by the qualitative and quantitative growth of the constitutional jurisprudence. This paper therefore primarily focuses on the relation between legislature and constitutional courts. It provides a close analysis of the separation of powers between these institutions; and consequences of its erosion. This analytical discussion is concluded by proposing a theoretically sound and practically feasible solution to the challenges brought about by 'judicialization' of law and policy-making.

This paper is not intended to proclaim delineation of province between constitutional courts and legislators obsolete[26] and on that basis to "deny the utility of traditional separation of powers schemes."[27] To the contrary, it analyses outlined issues by revisiting "purposive"[28] understanding of the separation of powers doctrine.[29] Contribution of this work therefore lies in applying, for some outmoded,[30] but long-established doctrine of the separation of powers to the contemporary challenges caused by 'judicialization' of law and policy-making. Instead of

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tried to avoid usage of this term with respect to the legal environment of the USA as much as possible, it is used in some instances to enable an undisturbed flow of the text.

[24] Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92.

[25] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 13.

[26] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 129-133.

[27] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 150.

[28] Peter A. Gerangelos. *Separation of Powers and Legislative Interference In Judicial Process: Constitutional Principles and Limitations* (Oxford: Hart, 2009), 29. See also M. J. C. Vile. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1969), 316.

[29] Peter A. Gerangelos. *Separation of Powers and Legislative Interference In Judicial Process: Constitutional Principles and Limitations* (Oxford: Hart, 2009), 29. See also M. J. C. Vile. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1969), 316.

[30] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 129-133.

observing rapid fusion of the two separate provinces,[31] i.e., that of law and policy-making and that of constitutional review of legislation, this paper proposes to maintain their distinctness. Conclusions of this paper can easily serve as guidance to those countries, like my own,[32] which aim to follow the legacy of such constitutional democracies like the USA and Germany.

This paper claims that separation of powers in areas of policy-making is not a mere obsolete description, but has a normative content too.[33] Legislature should be given primacy in law and policy-making, not only because it is better off to perform this tasks properly;[34] but also because it maintains other important functions embodied in the doctrine of the separation of powers such as (i) exercise of mutual control;[35] (ii) preservation of the structural balance within the government;[36] and (ii) promotion of certain societal values embodied in the law and policy-making processes.[37] This paper therefore aims to reconcile law-making and policy-making powers of legislature and constitutional courts by finding a rationale behind their institutional and functional limits. It then concludes that restoration of law and policy-making primacy of legislature is only possible if exercise of these powers is not frustrated by law and policy-making activity of the constitutional courts.

Validity of the above-mentioned claims is portrayed on the backdrop of abortion jurisprudence in the USA and in Germany. Comparative analysis of both jurisdictions is enabled by their similarities: both of these countries belong to what Stone Sweet calls "higher law

[31] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000).
[32] I.e. Slovakia.
[33] M. J. C. Vile. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1969), 316-317.
[34] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 33-56. See also Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 35-40.
[35] M. J. C. Vile. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1969), 316-350.
[36] M. J. C. Vile. *Constitutionalism and the separation of powers*. (Oxford: Clarendon Press, 1969), 329.
[37] M. J. C. Vile. *Constitutionalism and the separation of powers*. (Oxford: Clarendon Press, 1969), 317-318.

constitutional model,"[38] where individual rights as "enforceable claims against the state."[39] Also, discussion on various distinctions such as that (i) USA belong to common-law and Germany to civil-law legal system;[40] (i) in the USA American model and in Germany European model of constitutional review is applied,[41] presented throughout the paper, challenges established notions of insuperable gaps between them.[42] Selection of these jurisdictions was also due to the reputation that both United States Supreme Court ("USSC") and German Federal Constitutional Court ("GFCC") enjoy.[43]

This paper is divided into three separate chapters. First chapter analyses constitutional law-making and by its division into two consecutive sub-chapters provides, on the one hand, general discussion on constitutional law-making and also focuses on differences between American and European model of constitutional review as they pertain to constitutional law-making. Second chapter takes this discussion further by elaborating upon the impact of constitutional law-making on the legislative processes and outcomes, both in qualitative as well quantitative terms. Former is discussed in the sub-chapter focusing on direct as well as indirect impact of constitutional jurisprudence on legislative processes and outcomes, latter is discussed in the sub-chapter on ambit of constitutional law-making. Last chapter elaborates upon the

[38] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 21. See also Alec Stone Sweet, "Constitutionalism, Rights, and Judicial Power," *Comparative Politics*. Ed. D. Caramani. Oxford: Oxford University Press (2008): 217-239, 221-222.
[39] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 21.
[40] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 28-29.
[41] Alec Stone Sweet, "Constitutionalism, Rights, and Judicial Power," *Comparative Politics*. Ed. D. Caramani. Oxford: Oxford University Press (2008): 217-239, 222-225. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 32-37 and also Alec Stone Sweet. *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 225-231.
[42] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 135. See also Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 346.
[43] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 136. Donald P. Kommers, "The Federal Constitutional Court: Guardian of German Democracy," *The ANNALS of the American Academy of Political and Social Science* 603 (2006): 111-128.

implications of modern constitutional jurisprudence to politics by discussing, in separate sub-chapters, impact of constitutional law-making on politics, policy-making capacity of constitutional judiciary and finally by reconciling policy-making powers of constitutional judges and legislators by the claiming primacy of the legislature. Each sub-chapter is followed by an analysis of the abortion jurisprudence in the USA and Germany in light of the preceding theoretical debate.

Basic introduction into abortion jurisprudence of both USA and Germany is therefore also necessary at this point. Due to the gravity and breadth of this topic, on this place and also throughout the paper only respetive relevant features of American and German abortion jurisprudence will be discussed. This paper therefore does not serve as an in-depth analysis of the selected abortion jurisprudence, rather discusses it from a perspective of 'judicialization' of law and policy-making.

Abortion policy in the USA is not a result of "give-and-take of the legislative process,"[44] but was established in a series of cases that declared the abortion legislation on national or federal level "wholly or partly unconstitutional"[45] or constitutional.[46] "The first and most radical step of abortion liberalization was made by the U.S. Supreme Court"[47] ("USSC") in 1973, when *Roe v. Wade*[48] ("*Roe*") was decided.

In *Roe*, USSC found that "concept of personal liberty … is broad enough to encompass woman's decision whether or not to terminate her pregnancy."[49] In spite of the fact that "the

[44] Marry Ann Glendon. *Abortion and Divorce in Western Law* (Cambridge, Mass.: Harvard University Press, 1987), 25.
[45] Marry Ann Glendon. *Abortion and Divorce in Western Law* (Cambridge, Mass.: Harvard University Press, 1987), 25.
[46] Like in *Gonzales*. 550 U.S. 124, 127 S.Ct. 1610.
[47] Machteld Nijsten. *Abortion and Constitutional Law*: *A Comparative European-American Study* (Florence: European University Institute, 1990), 91.
[48] 410 U.S. 113, 93 S.Ct. 705.
[49] 410 U.S. 113, 93 S.Ct. 705, majority opinion.

constitution does not explicitly mention any right to privacy,"[50] USSC reaffirmed constitutional recognition of "a right of personal privacy, or a guarantee of certain areas or zones of privacy"[51] and placed woman's liberty to terminate her pregnancy within that area.[52] In *Roe*, two important regulatory concepts, on the basis of which mother's and State's[53] interests with respect to the unborn could be reconciled, were introduced: (i) the so-called "trimester framework;"[54] and (ii) "viability"[55] defined by USSC as an ability of the fetus "to live outside the mother's womb, albeit with artificial aid."[56]

Planned Parenthood of Southeastern Pennsylvania v. Casey[57] ("*Casey*") reaffirmed "essential holding of Roe v. Wade,"[58] but also "the State's interest in potential life"[59] when it declared that it has been previously "undervalue[d]."[60] 'Trimester framework' established in *Roe* has been abandoned,[61] but viability has been kept as a decisive "point at which the State's interest in fetal life is constitutionally adequate"[62] to justify restrictions to woman's right to seek and

[50] 410 U.S. 113, 93 S.Ct. 705, majority opinion.
[51] 410 U.S. 113, 93 S.Ct. 705, majority opinion.
[52] 410 U.S. 113, 93 S.Ct. 705, majority opinion.
[53] American abortion jurisprudence, unlike German, does not talk about the interests of the uborn, but rather of State's interest in protection of "potentaility of human life." (410 U.S. 113, 93 S.Ct. 705, majority opinion) American jurisprudence award the unborn a constitutional protection on the basis that "fetus is [not] a 'person' within the language and meaning of the Fourteenth Amendment," (410 U.S. 113, 93 S.Ct. 705, majority opinion), German abortion jurisprudence, on the other hand, "[includes] … the unborn life in the protection granted by Art. 2(2)(1) BL." Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 137.
[54] 'Trimester framework' specifically provides that: "(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. 113, 93 S.Ct. 705, majority opinion.
[55] 410 U.S. 113, 93 S.Ct. 705, majority opinion.
[56] 410 U.S. 113, 93 S.Ct. 705, majority opinion.
[57] 505 U.S. 833, 112 S.Ct. 2791.
[58] 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.
[59] 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.
[60] 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.
[61] 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.
[62] 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.

obtain an abortion.[63] Reconciliation of conflicting interests of the mother with regard to the termination of her pregnancy and of the State with respect to the protection of the potential human life was achieved by (i) specification of an "undue burden standard,"[64] which was not to be placed on the woman if she chooses to terminate her pregnancy before fetus attains viability;[65] and (ii) by reaffirmation of a constitutional guarantee of protection of her health and life after fetus attains viability.[66]

In *Stenberg v. Carhart*[67] ("*Stenberg*"), USSC applied *Casey*'s undue burden test and reiterated *Casey*'s constitutional principle "that a woman's health is the determinative factor in whether a statute restricting abortion is legal."[68] However, in *Gonzales v. Carhart*[69] ("*Gonzales*") USSC departed from previously established abortion case-law in number of ways: (i) USSC upheld a federal ban on partial-birth abortion lacking "requisite protection for the preservation of a woman's health;"[70] (ii) application of 'undue burden' test has been relaxed;[71] and most seriously (iii) 'viability' as a crucial concept in justifying State's intervention in abortion regulation established in the pre-existing abortion jurisprudence has been seriously obscured.[72] *Gonzales* thus placed previously established principles and concepts in American abortion jurisprudence on a rather shaky footing. *Gonzales* does not put the very existence of "women's

[63] This means that before viability (i) State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy," but also that (ii) 'undue burden' can not be imposed upon woman's right to terminate her pregnancy. 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.
[64] "An undue burden exists […] if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.
[65] 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.
[66] 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.
[67] 530 U.S. 914, 120 S.Ct. 2597.
[68] 530 U.S. 914, 120 S.Ct. 2597, majority opinion.
[69] 550 U.S. 124, 127 S.Ct. 1610.
[70] 550 U.S. 124, 127 S.Ct. 1610, dissenting opinion of Justice Ginsburg, Justice Stevens, and Justice Breyer.
[71] Whereas in *Stenberg* existence of an alternative abortion procedures as argued by Nebraska itself did not suffice to demonstrate the non-imposition of undue burden,[71] in *Gonzales* it surprisingly does. 530 U.S. 914, 120 S.Ct. 2597, majority opinion and 550 U.S. 124, 127 S.Ct. 1610, majority opinion.
[72] 550 U.S. 124, 127 S.Ct. 1610, dissenting opinion of Justice Ginsburg, Justice Stevens, and Justice Breyer.

decision to terminate her pregnancy"[73] guaranteed by the Constitution as the central holding of *Roe*[74] to question, but still seriously confuses its underpinnings.[75]

Liberalization of abortion in Germany was also subject to substantial intervention of GFCC.[76] Hence, "German abortion policy is now, as in the United States[77] fully judicialized."[78] Dating back to 1871, even a century later abortion was criminalized and exempted from criminal punishment only in case of preservation of the health of the mother.[79] It was not before late 60's that liberalization of abortion was politically possible.[80] Subsequent to lengthy negotiations and intense political battle in the Parliament, in early 70's abortion was finally liberalized pursuant to a 'stage of pregnancy' formula.[81]

GFCC received the petition as an abstract judicial review.[82] In this *Abortion I Case*,[83] GFCC annulled the challenged law on 'right to life' and human dignity basis.[84] After acknowledging personhood of the unborn independent from that of the mother, GFCC inevitably

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[73] 410 U.S. 113, 93 S.Ct. 705, majority opinion.
[74] 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.
[75] 550 U.S. 124, 127 S.Ct. 1610, dissenting opinion of Justice Ginsburg, Justice Stevens, Justice Souter and Justice Breyer.
[76] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336-356.
[77] Barbara Hinkson Craig and David O'Brien. *Abortion and American Politics.* (Chatham, NJ: Chatham House, 1993) cited in Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 109.
[78] Gerald L. Neuman, "*Casey* in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany," *American Journal of Comparative Law* 43 (1995): 273-314 and Monika Prützel Thomas, "The Abortion Issue and the Federal Constitutional Court," *German Politics* 2 (1993): 467-84 cited in Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 109.
[79] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 109.
[80] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 109.
[81] Pursuant to 'stage of pregnancy' formula, abortion was legalized within first twelve weeks of pregnancy provided that the pregnant woman underwent mandatory counseling. In the later stages of pregnancy, abortion was only justified on health or eugenic grounds and later than that only if the mother's life was in danger. Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 110.
[82] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336.
[83] 39 BverfGE I.
[84] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336-342. See also Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 135-138.

arrived to balancing possible competing interests of the fetus and of the mother.[85] After GFCC's conclusion that "the protection of the foetus' life must be given priority,"[86] and it's recommendation that criminal law can be used to that end,[87] GFCC paradoxically acknowledged various grounds[88] when abortion was justified.[89] GFCC then went on and proposed its own legislative solution[90] insisting that legalization of abortion was in principle impossible.[91]

In spite of some political opposition, government accepted GFCC's legislative solution and amended the bill accordingly.[92] New regulation, however, did not put an end to the existing controversy discontentment.[93] Reunification of Germany made the issue even more relevant and in 1992, after delicate parliamentary bargaining, new regulation was adopted.[94] New bill made abortion in the early stages of pregnancy legal, later provided for strict grounds for its

[85] Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 139.
[86] Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 140.
[87] Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 140.
[88] Such as preservation of woman's life and health, but also "eugenic, ethical (criminological), and social [considerations]" and also "[reasons] based on urgent necessity." Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 341.
[89] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 341.
[90] Abortion in principle was not to be legalized, but could remain unpunished (i) in the early stage of pregnancy after mandatory counseling; and (ii) later due strictly specified grounds such as eugenic, medical, criminal or social reasons. Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 138-144.
[91] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336-337.
[92] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 110.
[93] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 110-111.
[94] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 347-348.

procurement, and introduced comprehensive social help as a means to avoid abortions.[95] Bill was referred to GFCC for abstract review again.[96]

In *Abortion II Case*,[97] GFCC affirmed central ruling in *Abortion I Case* and thus annulled the reformed law.[98] GFCC rejected liberalization of abortion,[99] but allowed its non-punishment if the obligatory counseling condition was fulfilled.[100] GFCC provided again for detailed policy instructions mainly with regard to counseling.[101] It took another lengthy political bargaining until "compromise bill"[102] which only partially followed GFCC's directives.[103] In spite of these shortages, there was no political will to initiate another constitutional review.[104]

[95] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 111-112.
[96] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 112.
[97] 88 BverfGE 203.
[98] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 349-355.
[99] 88 BverfGE 203, at 213.
[100] 88 BverfGE 203, at 184 and following.
[101] 88 BverfGE 203, at 215 and following.
[102] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 355.
[103] Parliament for example relaxed Court's recommendation with respect to counseling or protection of woman against possible dangers in her social environment. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 355-356.
[104] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 356.

CHAPTER 1

CONSTITUTIONAL LAW-MAKING

1.1 Constitutional law-making as an inescapable phenomenon

For lawyers coming from civil-law countries in Europe the idea of judicial law-making is, to say the least, somewhat peculiar.[105] No matter how unusual judicial law-making looks at first glance, this sub-chapter will demonstrate that judicial law-making takes place not only in the common law,[106] but also in the civil law countries.[107] Judicial law-making is so embodied in the very nature of the judicial office[108] that it can not be avoided even in those legal systems that seek to establish a very strict division of the legislative, executive and judicial office.[109] Short discussion on American and German abortion jurisprudence will demonstrate presence of the law-making in both jurisdictions.

Judicial law-making is inherent to judicial office for a number or reasons. First of all, judicial law-making occurs because law-making is inseparable from dispute resolution.[110] Since dispute resolution necessitates interpretation of the law, it is unavoidably legislatively creative.[111] Secondly, judicial law-making is a simple necessity because of the imperfections of the legal

[105] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 28.
[106] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981) 28.
[107] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 28-29.
[108] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 10. See also Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 4-9.
[109] Martin Shapiro. *Courts: a Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 29.
[110] Alec Stone Sweet, "Judicialization and the Construction of Governance," *Comparative Political Studies* 31 (1999): 147-184, 156-157. See also Aharon Barak. *Judicial Discretion* (New Haven: Yale University Press, 1989), 90-91.
[111] Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 5.

norms judges are to apply in resolving legal conflicts.[112] Moreover, judicial law-making is the very result of the exercise of the discretionary powers judges enjoy.[113]

Shapiro questions the myth of non-existence of judicial law-making in Europe by pointing out multiple similarities between common and civil law systems in exercising judicial powers.[114] All of these similarities such as (i) the necessity to find and construct the law;[115] (ii) the presentation and articulation of the judicial decisions;[116] (iii) the authoritative power of the previous judicial decisions; [117] and, in addition to it, the role of the legal scholars in civil law countries[118]

> [undercut] the clear and simple picture of civil law judges deciding their cases according to a set of preexisting legal rules neatly and unambiguously set forth in the national codes.[119]

The above-mentioned discussion on the similarities between the common and civil law systems underscores the notion that judicial law-making is of a universal nature since it is an inescapable

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[112] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 29, 126-127.

[113] Aharon Barak. *Judicial Discretion* (New Haven: Yale University Press, 1989), 91. Sweet Stone quantifies 'zone of discretion' enjoyed by judges by suggesting the following formula: "(a) the sum of powers delegated to the court and possessed by the court as a result of its own accreted rulemaking minus (b) the sum of control instruments available for use by nonjudicial authority to shape (constrain) or annul (reverse) outcomes that emerge as the result of the court's performance of its delegated tasks." Sweet Stone thus makes clear that the extent of discretionary powers courts enjoy in a given polity depends on two inter-related variables: (i) how much space courts carved out for itself by its previous jurisprudence; and (ii) how easily can be such dominated space reconquered by other political players in the subsequent interactions. In modern constitutional polities is the 'zone of discretion' enjoyed by the courts remarkably large, in some areas and domains are discretionary powers of court even close to unrestricted. Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 79.

[114] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 28, 29, 127, 135, 136.

[115] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 28, 29, 135.

[116] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 135, 136.

[117] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 135-136. Sweet Stone notes with respect to constitutional law-making that it is treated as "possessing precedential authority." Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 72.

[118] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 147.

[119] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 147.

and unavoidable phenomenon. If judges are to continue interpreting and applying the law when resolving the disputes, they will inevitably engage in law-making too.[120]

Of course, courts exercising constitutional review of legislation are by no means an exception and legislate too.[121] As a consequence, a substantial bulk of constitutional law in both common and civil law countries is a result of judicial law-making creativity.[122] Moreover, precedential meaning of this judge-made constitutional law found its footing also in Europe,[123] where the binding authority of the constitutional case-law was legitimized not only by the judiciary,[124] but also by legal scholars.[125] As a result, *stare decesis*, at least in a very informal meaning of the word, ceased to be a common law exception.[126]

Seeing constitutional law-making as an inescapable phenomenon has, however, also broader implications with respect to the validity of the separation of powers[127] between legislators and constitutional judges; and consequently sometimes alleged usurpation of powers belonging to legislators by the constitutional judges.[128] If constitutional law-making comes hand

[120] Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, p. 74-76. For more theoretical discourse see Alec Stone Sweet, "Rules, Dispute Resolution, and Judicial Behavior," *Journal of Theoretical Politics* 10 (1998): 327-338.
[121] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 3, 61-125.
[122] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 29.
[123] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), p. 146.
[124] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 146. See also Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 136.
[125] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 146-147. See also Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 147.
[126] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 136. See also Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 75.
[127] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 125-133.
[128] Thomas J. Higgins. *Judicial Review Unmasked* (West Hanover, Mass: Christopher Publishing House, 1981), 43-51.

in hand with resolving constitutional disputes,[129] including constitutional review of legislation, then not only is the strict separation of powers between legislators and constitutional judges clearly impossible,[130] but also the principled contention that constitutional judges ought not to transgress into law-making sphere,[131] untenable. Therefore, "the real question is, as always, not 'yes' or 'no' but 'how much?'."[132]

As already mentioned abortion policy both in the USA as well as in Germany is a result of law-making not only of the legislators, either on state[133] or federal[134] level, but to a large extent of the constitutional judges.[135] Both USSC as well as GFCC had a significant say in shaping abortion policy in their jurisdictions. [136] Law-making creativity of both judicial institutions was set in motion by mere necessity to provide for an interpretation of the relevant constitutional provisions[137] in the pending litigations. In these litigations, it was not only USSC, which heavily

[129] Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 74-76. See also Alec Stone Sweet, "Judicialization and the Construction of Governance," *Comparative Political Studies* 31 (1999): 147-184, 156-157.
[130] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 127-152.
[131] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 345.
[132] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 182.
[133] As in *Roe*, *Casey* or *Stenberg* in the USA.
[134] As in *Gonzales* in the USA and in *Abortion I Case* and *Abortion II Case* in Germany.
[135] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 109.
[136] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 109. See also Marry Ann Glendon. *Abortion and Divorce in Western Law* (Cambridge, Mass.: Harvard University Press, 1987), 25.
[137] In the USA, it was the 14th or the 9th Amendment of the U.S. Constitution, whereas American case is somewhat peculiar because as USSC said in *Roe* 'right to privacy,' where "woman's decision whether or not to terminate her pregnancy" was located by the Court is not explicitly mentioned in the Constitution. 410 U.S. 113, 93 S.Ct. 705, majority opinion. In the subsequent cases, women's right to seek and obtain abortion was located in the 'substantive' Due Process Clause of the 14th Amendment of the U.S. Constitution. 505 U.S. 833, 112 S.Ct. 2791, plurality opinion. In *Stenberg* and *Gonzales* Court applied the constitutional principles derived from the above-mentioned constitutional provisions as acknowledged in *Roe* and subsequently reshaped in *Casey*. 530 U.S. 914, 120 S.Ct. 2597, majority opinion and 550 U.S. 124, 127 S.Ct. 1610, majority opinion. In Germany, it was mainly the Article 2(2)(1) in conjunction with Article 1(1) of the German Basic Law. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336, 350 – 351. See also 88 BverfGE 203, at I. 1-7.

relied on its preexisting relevant jurisprudence.[138] GFCC also did not hesitate to invoke the authority of its previously established case-law.[139]

Nonetheless, question of 'how much' constitutional law-making is really unavoidable bears its relevance especially when the extent of law-making creativity of USSC and GFCC in abortion jurisprudence is assessed. Since this question will be discussed in more detail in the following sub-chapters, suffice is to say now that within both jurisdictions, both judicial institutions moved substantially beyond providing an interpretation of what constitutional instruments had to say on the given matter.[140] Both courts engage in delicate formulation and elaboration of the relevant constitutional principles,[141] whereas it appears to be a rule that where

[138] In *Roe* USSC relied *inter alia* on *Griswold v. Connecticut*, 381 U.S. 479 (1965), but also on *Stanley v. Georgia*, 394 U.S. 557 (1969); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); and other decisions. In *Casey* USSC relied mainly on *Roe*, but also on *inter alia Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) and other decisions. In *Stenberg* USSC relied mainly on *Roe* and *Casey*, but also on *inter alia Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Doe v. Bolton*, 410 U.S. 179 (1973) and other decisions. In *Gonzeles* USSC mainly relied on *Roe*, *Casey*, *Stenberg*, but also on *inter alia Colautti v. Franklin*, 439 U.S. 379 (1979); *Grayned v. City of Rockford*, 408 US 104 (1972); *Hoffman Estates v. The Flipside, Hoffman Estates*, 455 US 489 (1982) and other decisions.

[139] In *Abortion I Case* GFCC relied on "established precedent" according to which "constitutional norms contain not only an individual's subjective defensive rights against the state, they also represent an objective order of values." Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 338. See also Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 137 - 138. In *Abortion II Case* GFCC relied on "essential core" of its decision in *Abortion I Case*. See Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 349. See also Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 144.

[140] Please refer especially to sub-chapter 2.2 of this paper.

[141] In the USA, in *Roe*, so-called 'trimester framework' is established, which underlying rationale is that as the human embryo and later on fetus grows in woman's womb, so does State's interest in protecting the prenatal life. Also 'viability' as a decisive point with respect to State's interference in abortion regulation, is introduced. 410 U.S. 113, 93 S.Ct. 705, majority opinion. In *Casey* USSC role resembles that of a legislator revisiting and amending its previously drafted law after "time has overtaken some of [its] factual assumptions." 505 U.S. 833, 112 S.Ct. 2791, plurality opinion. In *Stenberg* constitutional principles established in the previous case-law, especially 'undue burden' and 'health exception' are refined. 530 U.S. 914, 120 S.Ct. 2597, majority opinion. In *Gonzales*, USSC revisited the content of its established constitutional principles. 550 U.S. 124, 127 S.Ct. 1610, majority opinion. Thus, in all of these instances, USSC provides for such a detailed and delicate description of newly invented or reshaped constitutional principles that it unambiguously employs a position of a legislator cautiously shaping policy rules. In Germany, GFCC's legislative position was very obvious in its deliberation on what measures ought to be

the less is being said on the issue in the relevant constitutional instrument, there the further constitutional court moves in its legislative creativity.[142]

Undisputable law-making creativity of constitutional judges in USA and in Germany in this field is in my opinion best explained not by mere necessity to provide for an interpretation of relevant constitutional provision in order to resolve a dispute or to tackle with the imperfections of the law produced by the legislators, but rather with the inability of the constitutional judges to resist a temptation to have an influential say in shaping abortion policies in their jurisdictions.[143]

This sub-chapter has demonstrated that constitutional judges, if they are to resolve the disputes under their jurisdiction, will unavoidably engage in legislating too. Question of separation and convergence of powers between legislators and constitutional judges will be addressed throughout the paper. American and German abortion jurisprudence confirms that constitutional law-making is unavoidable, but also poses a highly relevant question of its

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used for effective protection of the 'unborn life' in *Abortion I Case*. This was subsequently subject to criticism, also by Justices Rupp-von Brünneck and Simon who raised their objections in their dissenting opinion. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 340, 343. In *Abortion I Case* GFCC also introduced 'unreasonable burden' standard as to ascertain what can be expected from a woman having a duty to carry a child to term. This position is unambiguously legislative too because it requires GFCC to engage in a delicate ascertainment and consideration of relevant factors. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 340. GFCC employed very deliberative position closely resembling a position of a legislator in *Abortion II Case* with regard to balancing of 'the right to life' of the 'unborn'and woman's constitutional right to self-determination, and also with respect to the proper measures of State's protection of the 'unborn life,' or 'unreasonable burden' standard. This judicial deliberations subsequently resulted into law-making and in determination and formulation of policy standards. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 339, 353; 88 BverfGE 203, at 147, 157, 184, 156–161, and 159–161.

[142] Compare wording of the US Constitution, i.e., word 'liberty' in the Fourteenth Amendment (US Const., amend. XIV, 505 U.S. 833, 112 S.Ct. 2791, plurality opinion) and German Basic Law on the matter, i.e., Article 2(2)(1) in conjunction with Article 1(1), but also Article 2(1), Article 6(1) and 6(4) of the German Basic Law and the bulk of constitutional principles produced by respective courts. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 338, 346).

[143] For USA see for example in *Casey*, where USSC's plurality aspires to put an end to the abortion controversy by calling people to "[accept] a common mandate rooted in the Constitution" and Justice Scalia's comment on it. This clearly shows that USSC's perceives itself not only as a participant in the debate, but indeed a very influential one, who aspires to reconcile the opponents. 505 U.S. 833, 112 S.Ct. 2791, plurality opinion and 505 U.S. 833, 112 S.Ct. 2791, Justice Scalia, the Chief Justice, Justice White, and Justice Thomas concurring and dissenting in part. For Germany see for example Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 343.

quantity. It is, however, important to keep in mind that constitutional law-making proceeds differently in the US and in Germany due to a different model of constitutional review applicable in both jurisdictions. This will be discussed in detail in the next sub-chapter.

1.2 Constitutional law-making under the American and European model of constitutional review

It has been demonstrated that constitutional judges in both common and civil law countries engage in law-making. Although in both legal environments constitutional judges create laws, the circumstances of the constitutional law-making are different due to the different models of constitutional review under which constitutional judges in common and civil law countries operate. This sub-chapter will demonstrate that in spite of such differences, constitutional judges in both USA and Germany can easily engage in law-making materially extending boundaries of a specific controversy. Differences in impact of discussed models of constitutional review on legislative politics will be also noted. At the end of the sub-chapter abortion jurisprudence in both U.S. and Germany in light of the preceding theoretical discussion will be analyzed.

There exist two models of constititonal review in the Western legal systems: (i) the American; and (ii) the European.[144] Therefore, constitutional review conducted in USA, where first model applies, proceeds differently than in Germany, where the latter model is present. Various differences both in institutional as well as in procedural terms such as the (i) "decentralized"[145] character of the American model; and (ii) its limitation to a concrete

[144] Alec Stone Sweet, "Why Europe Rejected American Judicial Review and Why it May Not Matter," *Michigan Law Review* 101 (2003): 2744-2780, 2769.
[145] Norman Dorsen and others, eds. *Comparative Constitutionalism: Cases and Materials* (St. Paul, Minn.: West Group, 2003), 113-114. See also Alec Stone Sweet, "Constitutionalism, Rights, and Judicial Power," *Comparative Politics*. Ed. D. Caramani. Oxford: Oxford University Press (2008): 217-239, 222-223.

constitutional review;[146] as opposed to (i) the "centralized" character of the European model of the constitutional review[147] and (ii) a presence of abstract constitutional review in the European model[148] ought not to be underestimated.[149] However, the evolution of both models has reduced these differences so substantially[150] that it is indeed more accurate to talk about both systems as being fundamentally similar.[151]

In the USA, where the American model of constitutional review applies, one might expect constitutional judiciary to engage only in concrete constitutional review, which is "dependent on,

[146] Alec Stone Sweet, "Constitutionalism, Rights, and Judicial Power," *Comparative Politics.* Ed. D. Caramani. Oxford: Oxford University Press (2008): 217-239, 222-223.
[147] Norman Dorsen and others, eds. *Comparative Constitutionalism: Cases and Materials* (St. Paul, Minn.: West Group, 2003), 114.
[148] Alec Stone Sweet, "Why Europe Rejected American Judicial Review and Why it May Not Matter," *Michigan Law Review* 101 (2003): 2744-2780, 2770. See also Alec Stone Sweet, "Constitutionalism, Rights, and Judicial Power," *Comparative Politics*. Ed. D. Caramani. Oxford: Oxford University Press (2008): 217-239, 225.
[149] American and European model of the constitutional review differ substantially. A definition provided by Shapiro and Stone Sweet, which defines American model of the constitutional review as follows : "any judge of any court, in any case, at any time, at the behest of any litigant party, has the power to declare a law unconstitutional" underscores its two main characteristics: (i) its 'decentralized' character; and (ii) its limitation to a *concrete* constitutional review. Martin Shapiro and Alec Stone Sweet, "The New Constitutional Politics of Europe," *Comparative Political Studies* 26 (1994): 390-420, 400 Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 32. See also Norman Dorsen and others, eds. *Comparative Constitutionalism: Cases and Materials* (St. Paul, Minn.: West Group, 2003), 113-114 and also Alec Stone Sweet, "Constitutionalism, Rights, and Judicial Power," *Comparative Politics*. Ed. D. Caramani. Oxford: Oxford University Press (2008): 217-239, 222-223. European model of constitutional review on the other hand can be defined by four "constituent components," which are the following: (i) "constitutional courts enjoy exclusive and final jurisdiction;" and "constitutional judges possess a monopoly on the exercise of constitutional review;" (ii) "terms of jurisdiction restrict constitutional courts to the settling of constitutional disputes;" and "constitutional courts do not preside over judicial dispute or litigation," which remains in province of the other courts; (iii) "constitutional courts … are formally detached from the judiciary and legislature" and have their own specific province, which is neither 'judicial', nor 'political;' and lastly (iv) European constitutional courts can usually review legislature in the absence of an underlying litigation, i.e., conduct *abstract* review. Thus, in contrast to the American model, constitutional review in Europe is conducted by centralized and specialized judicial organs, which are called constitutional courts and furthermore enables *abstract* review of legislation under which is the constitutionality of a normative act assessed in the absence of a concrete litigation before it could have had any negative effect on anyone. Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 32-34. See also Alec Stone Sweet, "Why Europe Rejected American Judicial Review and Why it May Not Matter," *Michigan Law Review* 101 (2003): 2744 -2780, 2769 – 2770 and also Alec Stone Sweet, "Constitutionalism, Rights, and Judicial Power," *Comparative Politics*. Ed. D. Caramani. Oxford: Oxford University Press (2008): 217-239, 223-224 and also Norman Dorsen and others, eds. *Comparative Constitutionalism: Cases and Materials* (St. Paul, Minn.: West Group, 2003), 114-115.
[150] Alec Stone Sweet, "Why Europe Rejected American Judicial Review and Why it May Not Matter," *Michigan Law Review* 101 (2003): 2744-2780.
[151] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 366.

or incidental to, concrete litigation or controversy involving a statute"[152] pursuant to the very wording of the U.S. Constitution that courts resolve only "cases"[153] and "controversies."[154] However, American judges are indeed far from being unfamiliar with the abstract review of legislation conducted under the European model of the constitutional review[155] when the constitutionality of a normative act is assessed in abstract - meaning the absence of a concrete dispute.[156] American jurisprudence overtly allows for abstract review of legislation in the event of (i) a preliminary injunction and declaratory judgment;[157] and (ii) facial challenge with regard to overbreadth and vagueness of a statute.[158] Especially in these instances American judges scrutinize normative acts in strikingly similar abstract fashion as their European colleagues,[159] i.e., making what Sweet Stone calls "authoritative guesses about the future."[160] Furthermore, in general, constitutional review conducted in the U.S. "has become increasingly abstract."[161]

[152] Alec Stone Sweet. *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 226.
[153] US. Const., Art. III. sec. (2).
[154] US. Const., Art. III. sec. (2)..
[155] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 363-366.
[156] Alec Stone Sweet. *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 226.
[157] Stone Sweet clarifies: "Preliminary injunctions are court orders taken to preserve the *status quo ante litem* pending a judicial resolution of the dispute on the merits. Declaratory judgments are used by judges to clarify the rights of one of the parties to a dispute, prior to that dispute's resolution." Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 348.
[158] Facial challenge refers to situations such as that a statute is "overbroad, and therefore unconstitutional on its face, regardless of whether, or how, the statute has been applied in concrete situations" or that a statute is vague, which can mean "a high risk of discriminatory enforcement," which itself "substantially [deters] or '[chills]' the exercise of rights." Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 349, 351.
[159] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 364.
[160] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 364.
[161] Alec Stone Sweet, "Why Europe Rejected American Judicial Review and Why it May Not Matter," *Michigan Law Review* 101 (2003): 2744-2780, 2772.

The European model, which enables abstract review of legislation pursuant to which constitutionality of a normative act is assessed "prior to its application or enforcement"[162] has, on the other hand, evolved into a more concrete form[163] when decision-making of the public authorities is reviewed "in light of fact contexts and general policy considerations."[164] Differences between the American and European model of the constitutional review are therefore minimized by the fact that constitutional review in the USA is not too concrete and constitutional review in Europe is not too abstract.

Thus, since concrete review in the USA as well as in Europe "remains meaningfully abstract in an overt and formal way"[165] and abstract review in Europe becomes more concerned with specific policy deliberations,[166] constitutional judges in both models of the constitutional review can easily move beyond the boundaries delineated by the litigation at hand[167] and address "broad issues of public policy and public interest far removed from the immediate circumstances of the constitutional [dispute]."[168] Furthermore, the real effect of deciding a particular case does not rest solely in its immediate result, but rather in its potential precedential meaning in the future.[169] Thus, concrete constitutional reviews conducted in the U.S. and also in Europe produce abstract standards of constitutionality, which serve as a reference point in the subsequent

[162] Alec Stone Sweet, "Why Europe Rejected American Judicial Review and Why it May Not Matter," *Michigan Law Review* 101 (2003): 2744-2780, 2772. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 34.
[163] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 92-150.
[164] Alec Stone Sweet, "Why Europe Rejected American Judicial Review and Why it May Not Matter," *Michigan Law Review* 101 (2003): 2744-2780, 2772.
[165] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 365.
[166] Alec Stone Sweet, "Why Europe Rejected American Judicial Review and Why it May Not Matter," *Michigan Law Review* 101 (2003): 2744-2780, 2772.
[167] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 371.
[168] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 371.
[169] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 169.

litigations.[170] As a consequence, both models of constitutional review by maintaining their level of abstractness and specificity with regard to particularities of a given policy area can easily serve as a means of introducing rather rapid or a radical change in the legal landscape.[171] All in all, both abstract and concrete review place constitutional judges in both models of constitutional review in functions unambiguously legislative in their nature, i.e., functions where policy considerations are addressed and rules of conduct for the future are subsequently created.[172]

Institutional and procedural differences in the American and European model of constitutional review have, however, different implications for legislative politics. Abstract constitutional review in Europe might easily trigger high 'politization' of the matter since it extends the political battle once lost in the parliament[173] by adding an additional, "constitutional reading"[174] of the challenged legislation.[175] Concrete constitutional review available in both USA and Germany, on the other hand, is usually "less politically provocative"[176] since in this kind of constitutional review legislators and constitutional judges meet only indirectly, and especially in Europe it simply takes longer until the case reaches the constitutional court.[177] However, both

[170] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 168-170.
[171] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 90-112, 369.
[172] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 91. Sweet Stone notes that especially in abstarct review processes courts "employ techniques that are inherently prospective, not retrospective." However, he also admits that other modes of constitutional review do not differ in being "less legislative or prospective."
[173] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 55. See also Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 95.
[174] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 50.
[175] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 50.
[176] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 51.
[177] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 51.

American and European system is prone to 'politization' differing in who can initiate it.[178] And both abstract and concrete constitutional review in the USA and in Europe enable 'judicialization of politics' because what was once a legislative matter becomes judicial.

In the USA, "abstract review of statutes … has become a 'normal' technique of [constitutional] law-making in the [area] … of abortion rights."[179] It is so not only because the landmark abortion jurisprudence in the US arose on the basis of petitions for preliminary injunctions and declaratory judgments or facial challenges with regard to overbreadth and vagueness of the challenged statutes,[180] but mostly because of the nature of scrutiny USSC employed in these cases. On the basis of underlying controversies, USSC resolved issues of law and policy far beyond the boundaries of respective litigation such as *inter alia* (i) whether US Constitution protects woman's decision to end her pregnancy and how far-reaching are State interests in regulating it;[181] (ii) whether and what of previously established constitutional framework should be kept;[182] how woman's liberty to terminate her pregnancy and State's "important and legitimate interest in potential life"[183] ought to be reconciled;[184] or what

[178] German experience with regard to shaping abortion policy shows that abstract constitutional review can be easily used as a means of a political battle. It, however, also shows that if GFCC requires from the legislature too much, not only with respect to constitutionality of the legislative acts, but also to their reasonableness and effectiveness, it might in the future be easily excluded from the debate all together. Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 109-112. See Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336, 346-349, 355- 356. American system, on the one hand, to some extent eliminates 'political provocativeness' of the constitutional review with respect to bigger political players, but introduces it, on the other hand, with respect to 'ordinary' subjects of the polity by means of a strategic litigation. With regard to shaping abortion policy in the USA this can be easily seen in *Roe*, *Casey*, *Stenberg* and also *Gonzales*. It can be therefore indeed said that both systems are prone to being easily politicized, differing only in who can initiate it.

[179] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 352.

[180] *Roe*, *Casey* and *Stenberg* arose on the basis of a petition for preliminary injunction and declaratory judgment *Gonzales* arose on the basis of facial challenge with regard to vagueness and overbreadth of a statute. 410 U.S. 113, 93 S.Ct. 705; 505 U.S. 833, 112 S.Ct. 2791; 530 U.S. 914, 120 S.Ct. 2597 and 550 U.S. 124, 127 S.Ct. 1610.

[181] 410 U.S. 113, 93 S.Ct. 705.

[182] 505 U.S. 833, 112 S.Ct. 2791.

[183] 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.

[184] 505 U.S. 833, 112 S.Ct. 2791.

constitutes 'undue burden'[185] when woman seeks abortion of a "nonviable fetus;"[186] and how should woman's health be preserved in regulating abortion,[187] or when promoting "respect for the dignity of human life"[188] or "integrity and ethics of the medical profession."[189] In all of these cases, USSC by addressing broader questions of law and policy inevitably moved beyond the questions raised by the litigation at hand.

In Germany, on the other hand, GFCC reviewed challenged legislation liberalizing abortion in abstract review so closely that underlying specific policy concerns such as (i) how should state provide for protection of "unborn life"[190] in an effective way;[191] (ii) when is it prudent to expect a woman to carry fetus to term;[192] (iii) how should the counseling for pregnant women be better attuned in order to achieve its purpose, i.e., to restore respect towards 'unborn'[193] and encourage woman to carry the "unborn" to term;[194] or (iv) what is the role of social assistance and health insurance in avoiding abortion[195] did not escape its attention.

Nonetheless, under both jurisdictions, judicial review of legislation turned constitutional judiciary into an institution closely resembling a "separate, but specialized, legislative

[185] 505 U.S. 833, 112 S.Ct. 2791.
[186] 505 U.S. 833, 112 S.Ct. 279, plurality opinion.
[187] 530 U.S. 914, 120 S.Ct. 2597.
[188] 550 U.S. 124, 127 S.Ct. 1610, majority opinion.
[189] 550 U.S. 124, 127 S.Ct. 1610, majority opinion.
[190] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 338.
[191] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 339-340 and *Abortion II Case* in 88 BverfGE 203, at 184 and following.
[192] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 340-341.
[193] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 342.
[194] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 341-342 and *Abortion II Case* in 88 BverfGE 203, at 215 and following.
[195] *Abortion II Case* in 88 BverfGE 203, at 167 – 168, 303 and following.

chamber"[196] scrutinizing respective legislative act with material power to change its content according to the "dictates of constitutional 'jurisprudence.'"[197] In both systems, constitutional judiciary found a way how to overcome limits of its position and get involved in detailed formulation of abortion policy. As demonstrated, USSC was far from being focused solely on the particularities of the underlying litigation; and GFCC, on the other hand, did not remain too abstract as not to determine detailed policy standards in abortion regulation.

Work of such a 'specialized legislative chamber' can, no doubt, produce various results. It can, for example, introduce legal and political change of its own making,[198] accelerate legislative change produced by the legislature by its authoritative approval,[199] but also significantly hamper it.[200] As seen, abortion policy in the USA and also in Germany was not let intact by constitutional jurisprudence in spite of the fact that USSC and GFCC operate under different models of constitutional review.

This sub-chapter has shown that constitutional judges when deciding constitutional disputes, especially those involving constitutional rights, put themselves into a position strikingly similar to those of legislators.[201]. Both abstract and concrete review can easily be a means of introducing the same rapid or radical change in the legal landscape.[202] Abortion jurisprudence of USSC and GFCC confirm this conclusion.

[196] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 61-62.
[197] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 1.
[198] For example in the USA especially by *Roe*.
[199] For example in the USA especially by *Gonzales*.
[200] In the Germany especially in *Abortion I Case*.
[201] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 97-99.
[202] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 90-112, 369.

CHAPTER 2

CONSTITUTIONAL JUDGES AND LEGISLATORS

2.1 Impact of the constitutional law-making on the legislature

As clarified in the previous sub-chapters, both USSC under American model of constitutional review as well as GFCC under European model of constitutional review by making concrete review meaningfuly abstract and abstract review meaningfuly concrete further fabricate constitutional law, expand their supervisory powers over legislative processes, and get involved in law and thus also policy-making.[203] Under both of these types of constitutional review judiciary can easily employ functions unambiguously legislative in their nature.[204]

However, the relationship between constitutional courts and legislature is not limited to the legislative-like behaviour employed by the constitutional judges. Relationship between constitutional judges and legislature can be more accurately described as inter-dependent. It is so because 'judicialization of politics' not only places constitutional judge into the position of legislator[205] as shown in the previous sub-chapters, but also *vice versa*, i.e., invites legislator to adopt constitutional judge-like mode of reasoning and behavior.[206] Sweet Stone suggests the same when he notes that "'judicialization [of politics]' engenders new modes of legislative

[203] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 95.
[204] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 91. Stone notes that especially in abstract review processes courts "employ techniques that are inherently prospective, not retrospective." However, he also admits that other modes of constitutional review do not differ in being "less legislative or prospective." See also Alec Stone Sweet, "Judicialization and the Construction of Governance," *Comparative Political Studies* 31 (1999): 147-184, 156 - 157.
[205] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 184.
[206] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 184.

discourse and practice."[207] The phenomenon of mutual borrowing of methods of reasoning and action between constitutional judiciary and legislature can be also called "coordinate construction"[208] described as "a condition in which both public policy and constitutional law are the products of sustained and intimate judicial-political interaction."[209]

Presence of the 'coordinate construction' is obvious in the effects of constitutional jurisprudence on legislative procedures and results and can be classified as follows: (i) the "immediate, direct, or formal effects;"[210] or (ii) the "pedagogical, indirect, or feedback effects."[211] Direct impact of constitutional jurisprudence on legislation ranges from the most radical measures when legislation is proclaimed unconstitutional and subsequently annulled,[212] through partial annulments when challenged law is relieved of what is considered unconstitutional,[213] to much softer measures when the constitutional judiciary rewrites unconstitutional provisions of the challenged law in such a manner as to save them from being otherwise contrary to the constitution.[214] Supervisory and controlling position of the constitutional courts *vis-à-vis* legislature is further fostered by a wide range of indirect means of influence[215] ranging from "autolimitation"[216] when legislature adjusts itself to the constitutional

[207] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 62.
[208] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 184.
[209] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 184.
[210] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 63.
[211] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 63.
[212] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 66-70.
[213] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 71.
[214] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 71-73. Stone Sweet calls these interpretations 'binding interpretations.'
[215] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 73-91.

constraints more or less anticipated,[217] to "corrective revision,"[218] when the legislature is given a constitutionally correct blueprint of how to legislate in a specific policy-area by the constitutional judges after the bill has been annulled.[219]

Multiple forms of direct effect of constitutional jurisprudence on legislative processes and outcomes enable constitutional judges to behave as either negative[220] or indeed very positive and thus active legislators.[221] Here constitutional judiciary disposes of such direct supervisory and controlling powers over the legislature as to describe this constitutional judiciary - legislature relationship a "tutelage."[222] The underlying assumption, which serves as a justification of such a 'tutelage' can be formulated as follows: "not only do [constitutional judges] make law, but … [they] make better law than do legislatures."[223] By indirect forms of the effect of constitutional jurisprudence on legislative processes and outcomes, law-makers deliberately adopt methods of reasoning and action similar to those of constitutional judges.[224] As a result, legislators move

[216] Alec Stone Sweet, "Rules, Dispute Resolution, and Judicial Behavior: Reply to Vanberg," *Journal of Theoretical Politics* 10 (1998): 327-338, 329. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 75-79.
[217] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 75-79.
[218] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 83.
[219] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 94-95.
[220] In case of entire annulments. Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 93.
[221] In case of 'binding interpretations.' Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 71-73.
[222] Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 75.
[223] Alec Stone Sweet. *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective*. (New York: Oxford University Press, 1992), 253.
[224] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 73.

within the boundaries set up by constitutional litigation[225] or projected according to the already existing constitutional constraints.[226]

Taking into account all that has been said about the relationship between constitutional courts and legislature, and keeping in mind that judicial power is a delegated power,[227] relationship between constitutional judges and legislature explained in terms of a principal and an agent, becomes so problematic[228] as to be completely reversed. According to the original principal-agent scheme, principal, i.e., the legislature, controls the normative instruments, which are supreme, and agents, i.e., judges are delegated a power to enforce them.[229] Judiciary is under the spell of the legislature because the conditions of performance of the judicial office are dictated by normative instruments and these can be changed anytime principal pleases.[230] In the constitutional review of legislation, however, constitutional judges are in charge of controlling the normative instrument and their position is strengthened by the fact that this instrument is of a supreme nature.[231] Hence, the legislature finds itself under the authority of the constitutional judges.[232] Moreover, since rules regulating constitutional revision or amendment processes are

[225] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 62. See also Alec Stone Sweet, "Constitutionalism, Legal Pluralism, and International Regimes," *Indiana Journal of Global Legal Studies* 16.2 (2009): 621-645, 642.
[226] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 75-79.
[227] Alec Stone Sweet and Mark Thatcher, "Theory and Practice of Delegation to Non-Majoritarian Institutions," *West European Politics* 25 (2002): 1-22.
[228] Alec Stone Sweet, "Constitutionalism, Rights, and Judicial Power," *Comparative Politics*. Ed. D. Caramani. Oxford: Oxford University Press (2008): 217-239, 227.
[229] Alec Stone Sweet, "Constitutionalism, Rights, and Judicial Power," *Comparative Politics*. Ed. D. Caramani. Oxford: Oxford University Press (2008): 217-239, 227.
[230] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 24.
[231] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 89.
[232] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 24.

usually rather restrictive,[233] "continuous dominance of constitutional judges over the interpretation of the constitutional law"[234] is thus secured.

In the USA, effect of USSC's constitutional jurisprudence on abortion regulation policy is visible both in direct and indirect way. In *Roe*, USSC not only attached to "woman's decisions whether or not to terminate her pregnancy"[235] constitutional protection, but proclaimed its own abortion policy constitutional law.[236] Subsequent abortion jurisprudence, in spite of amending constitutional framework established in *Roe*,[237] was still very much preempted by it. Of course, state and federal legislation was directly influenced by being placed under the 'dictate' of USSC's jurisprudence in which USSC not only annulled challenged laws[238] or parts thereof,[239] but actively replaced them by its own legislation.[240]

Effect of USSC's abortion case-law on legislature is not limited to direct only. In *Casey*, USSC overtly admits that its jurisprudence has profound impact on legislative processes and its results when it acknowledges that "legislatures throughout the Union must have guidance as they seek to address [abortion regulation] in conformance with the Constitution."[241] Needless to say, it is USSC who provides for such guidance. Indirect effect of USSC's constitutional jurisprudence on legislative processes and outcomes was also vividly demonstrated after *Stenberg*. Congress

[233] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 24-25.
[234] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 89.
[235] 410 U.S. 113, 93 S.Ct. 705, majority opinion.
[236] By establishing the so-called 'trimester framework' and determining 'viability' a decisive factor in State's intervention into abortion regulation. 410 U.S. 113, 93 S.Ct. 705.
[237] Especially *Casey* where 'trimester framework' was abandoned. Court also renounced State's interest in regulating abortion and protecting prenatal life. 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.
[238] Like in *Roe* and *Stenberg.*
[239] Like in *Casey*.
[240] Especially in *Roe* where 'trimester framework' was established (410 U.S. 113, 93 S.Ct. 705, majority opinion) and in *Casey* where 'trimester framework' was proclaimed "overtaken" and replaced by new framework based on 'viability.' (505 U.S. 833, 112 S.Ct. 2791, plurality opinion) In contrast to Germany, USSC's policy directives were proclaimed constitutional law right away. in Germany, Parliament had an option to decide whether it will 'ratify' GFCC's policy standards or not.
[241] 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.

"responded"[242] to this USSC's ruling when preparing its new 'partial-birth abortion' ban policy.[243] Congress thus "autolimited"[244] itself according to existing judge-made constitutional law.

In Germany, both direct and indirect effect of constitutional jurisprudence on shaping abortion policy is visible. In *Abortion I Case*, GFCC not only annulled law liberalizing abortion,[245] but induced direct impact on legislative outcomes by formulating its own policy solutions[246] and recommendations.[247] As a consequence, in spite of some opposition, government prepared new law by adding the most important parts of the Court's decision to the remains of the annulled law.[248] German Parliament thus only "ratified"[249] constitutionally safe solution proposed by GFCC.

GFCC's impact on legislative politics was also very visible during the lengthy and uneasy negations of the abortion regulation subsequent to re-unification of Germany.[250] Court's

[242] 550 U.S. 124, 127 S.Ct. 1610, majority opinion.
[243] USSC notes in this respect that Congress responded in its legislation to *Stenberg* in two ways: (i) "Congress made factual findings," and (ii) "Act's language" was selected cautiously as to avoid its potential 'overbreadth' or 'vagueness' and thus unconstitutionality. 550 U.S. 124, 127 S.Ct. 1610.
[244] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 94.
[245] GFCC claimed that German post-Nazi experience makes formal decriminalization of abortion impossible. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 337. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 110.
[246] Although legalization of abortion was in principle impossible, GFCC proposed that it could still go unpunished under following conditions: (i) mandatory counseling; and (ii) presence of ground (i.e., indication) such as eugenic, medical, criminal or social hardship reasons. GFCC thus rejected legislative proposal and actively proposed its own solution. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 341. See also Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 140-142.
[247] Such GFCC's proposal that criminal law is a means of effective protection of 'unborn life.' Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 339-340.
[248] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 110.
[249] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 84, 113.
[250] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 78, 111.

jurisprudence thus shaped the form of a newly drafted bill even before it decided on this matter again.[251] Although, not all of GFCC's previous policy directives were incorporated into the new bill,[252] its impact in shaping new policy was obvious.[253]

In spite of this, GFCC in its *Abortion II Case* ruling annulled legalization of abortion again.[254] Besides this negative legislating, GFCC acted as a positive legislator again when it reshaped[255] and also introduced[256] its own policy standards. Even though, legislature was praised for improving its policy, not all of it was accepted by GFCC.[257] As a result, German Parliament reshaped the bill again, but omitted some of GFCC's directives.[258] In spite of that, probably due

[251] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 78, 111. In *Abortion II Case* litigation State of Baden-Württemberg even contested that various aspect of newly drafted bill "do not satisfy the requirements of the Federal Constitutional Court's Judgment of February 25, 1975." (i.e., *Abortion I Case* decision) 88 BverfGE 203, at 111.

[252] Such as GFFC's insistence on criminalization of abortion at every stage of pregnancy in *Abortion I Case*. New bill incorporated 'stage of pregnancy' formula again and legalized abortion within first twelve weeks of pregnancy. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 348. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 111.

[253] German Parliament for example in line with GFCC's ruling in *Abortion I Case* focused in the new bill on counseling and improvement of woman's and broader social environment as a means of avoiding abortions. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 348. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 111.

[254] 88 BverfGE 203, at I., 1. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 112 and also Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 349-356.

[255] 'Social hardship' indication was narrowed and reshaped into 'unreasonable burden' or 'expectability' meaning that abortion will go unpunished if carrying fetus to term would 'force the woman to sacrifice her own existential values to a degree beyond that which can be expected of her." 88 BverfGE 203, at 160. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 112. Court also abandoned its insistence on criminal law as a proper means of protecting 'unborn.' 88 BverfGE 203, at 184 and following.

[256] GFCC set down detailed blueprint of how obligatory counseling requirement should be redrafted. 88 BverfGE 20, at 225–238, 231–238, 239–256 and other. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 112.

[257] GFCC did not approve of using public or private health insurance to cover abortions. 88 BverfGE 203, at 303 and following. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 112.

[258] First of all, the bill provided for 'less vigorous pro-life counseling as [GFCC] had urged" and also narrowed [GFCC] holding that the state would be obligated to protect the pregnant woman against danger emanating from her friends and neighbors." Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 355-356.

to rather exhaustive history of shaping abortion policy in Germany, there was no political will to initiate another "constitutional reading"[259] of it again.[260]

As seen, German history of enacting abortion policy shows GFCC's involvement in its shaping both in very direct and indirect terms. However, German history also suggests that if GFCC requires from the legislature too much, not only with respect to the constitutionality of the legislative acts, but also with respect to their reasonableness and effectiveness, it can in the future be easily excluded from the debate all together.[261]

In this sub-chapter we have identified forms in which "coordinate construction"[262] takes place in legislating and policy-making processes. We have seen that legislators and constitutional judges interact in either direct and formal or in rather indirect and informal ways. Briefly discussing these modes of interaction and subsequently applying them to the relation of principal and agent, how the relationship between legislative and judicial branch of government is often described, we can conclude that the relationship between legislators and constitutional judges can be better described in terms of control and dominance of constitutional judiciary over legislature than in terms of mutual influence and interaction. Demonstrated USSC's as well GFCC's direct and indirect effect on legislative processes and results confirm this dominant position of constitutional courts.

[259] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 50.
[260] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 356.
[261] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 109-112. See also Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336, 346-349, 355-356.
[262] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 184.

2.2 Ambit of the constitutional law-making

The previous sub-chapters have demonstrated that law-making is inherent to constitutional review[263] and thus can not be avoided.[264] It has been also shown that both abstract and concrete reviews invite constitutional judges to positions unambigiously legislative in their nature.[265] In this sub-chapter ambit of constitutional law-making will be discussed in more detail. It will be claimed that although procedural constraints pose some limit to the constitutional law-making, substantial constraints are indeed missing.

Question of the limitation of the scope of constitutional law-making bears its relevance with respect to other political players, in particular *vis-á-vis* the legislature.[266] Stone and Shapiro underscore its relevance as well as its pressing nature by noting the following:

> If the [parliament] has chosen judicially enforceable rights as a device for curing [exercise of power] problem, there is no reason that [constitutional] judges should feel guilty about what courts institutionally do and must do to make such a device work: create a good deal of constitutional law of their own in the course of litigation. The real question is, as always, not 'yes' or 'no' but 'how much'?[267]

Question of the scope of the constitutional law-making thus attains its relevance precisely because constitutional law-making as such is not a question of possibility, but of necessity.

One of the first substantial limitations of the judiciary, which have implications for its law-making powers, are, first of all, the procedural constraints under which judiciary operates.[268]

[263] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 31-90.
[264] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 162-165.
[265] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 184.
[266] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 127, 130-133.
[267] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 182.
[268] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 10.

Constitutional judiciary is, first of all, procedurally passive[269] meaning that unlike legislators who can make law anytime they please, constitutional judiciary needs to be activated by litigants first.[270] There are also other procedural rules such as the adversary principle,[271] which place some limits to what constitutional courts can do in legislative terms once being 'activated.'

Although the significance of these procedural constraints as to limit the law-making powers of constitutional judges ought not to be underestimated,[272] these can not address the problem of the scope of constitutional law-making at its core. Discussion therefore turns to existence of substantial constraints. Hans Kelsen believed that there is indeed a substantial constraint to the legislative powers of the constitutional judges. He understood judicial law-making as "constrained power"[273] precisely because judicial decision-making is and ought to be "absolutely determined by the constitution."[274] Such understanding of legislative limits on judicial decision-making, including constitutional law-making, can be found in the principle of legality.[275]

Hans Kelsen, however, was very well aware of the fact that once constitutional judiciary is given a power to protect human rights[276] as enshrined in the constitutions, his famous

[269] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 11.
[270] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 10-11.
[271] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 11.
[272] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 10.
[273] Alec Stone Sweet. *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 229.
[274] Kelsen, H. 1928. *Revue du droit public* 44: 197 cited in Alec Stone Sweet. *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 229.
[275] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 11.
[276] Hans Kelsen called constitutional bill of rights "norms of natural law." Kelsen, H. 1928. *Revue du droit public* 44: 197 cited in Alec Stone Sweet. *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 229.

distinction between "positive"[277] and "negative"[278] legislator will be gone.[279] However, inclusion of human rights protection into constitutional agenda has broader implications than a mere fusion of 'positive' and 'negative' legislator. Stone rightly notes the following:

> If in exercising review authority, the judges simply controlled the integrity of parliamentary procedures, and not the substance of legislation, the judges would be relatively minor policy makers, akin to Kelsen's 'negative legislator'. But the judges possess jurisdiction over rights that are, by definition, substantive constraints on law-making powers. The political parties thus transferred their own entirely unresolved problem – what is the nature and purpose of any given rights provision? and what is the normative relationship of that provision to the rest of the constitutional text? – to judges. This transfer constitutes a massive, virtually open-ended delegation of policy-making authority.[280]

In this regard unlimited policy-making powers enjoyed by constitutional judges equate their unlimited law-making powers. In light of the above-mentioned, it is far from surprising that constitutional judiciary nowadays finds and declares human rights not even expressly mentioned in the constitutional instruments.[281]

Abortion jurisprudence of both USSC and GFFC is an evidence of missing substantial constraints to law-making and thus also policy-making powers of constitutional judiciary. USSC's law-making powers are even more 'unconstrained' than those of GFCC since its very basis is a right that is not "explicitly mentioned"[282] in the Constitution. Nonetheless, thorough elaborations of rules that are to govern regulation of termination of pregnancy are easily found in both jurisdictions.

[277] Kelsen, H. 1928. *Revue du droit public* 44: 197 cited in Alec Stone Sweet. *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 229.
[278] Kelsen, H. 1928. *Revue du droit public* 44: 197 cited in Alec Stone Sweet. *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 229.
[279] Alec Stone Sweet. *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 229. See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 34-37 and also Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 147.
[280] Alec Stone Sweet. *"Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)"* West European Politics *25* (2002): 77-100, p. 90.
[281] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 99-100.
[282] 410 U.S. 113, 93 S.Ct. 705, majority opinion.

Legislative activity of USSC is probably most visible in *Roe*, USSC on the basis of its finding that "the right of personal privacy"[283] protected by the Constitution covers also "abortion decision"[284] and that the unborn does not enjoy the protection of the Forteenth Amendment,[285] provides for a detailed 'trimester framework' how woman's and State's interest with regard to "the potentiality of human life"[286] should be reconciled.[287] In *Casey*, USSC again engaged in detailed law and policy-making when it after abandoning 'trimester framework' filled in the concept of the 'undue burden.'[288] In *Stenberg* and *Gonzales*, USSC by applying its self-declared policy standards[289] engages in unlimited deliberation closely resembling deliberations conducted by legislative bodies. However, USSC's deliberations in its abortion jurisprudence lack substantial constraints due to the very fact that it is USSC who sets its own legislative limits.[290]

[283] 410 U.S. 113, 93 S.Ct. 705, majority opinion.
[284] 410 U.S. 113, 93 S.Ct. 705, majority opinion.
[285] This also presents an interesting contrast to German abortion jurisprudence. While American jurisprudence deprives unborn of a constitutional protection on the basis that "fetus is [not] a 'person' within the language and meaning of the Fourteenth Amendment," (410 U.S. 113, 93 S.Ct. 705), German abortion jurisprudence "[includes] … the unborn life in the protection granted by Art. 2(2)(1) BL." Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 137.
[286] 410 U.S. 113, 93 S.Ct. 705, majority opinion.
[287] This so-called trimester framework provides that: "(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." John Rehnquist in his dissenting opinion critizes legislative nature of this part of majority ruling: "The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." 410 U.S. 113, 93 S.Ct. 705 and 410 U.S. 113, 93 S.Ct. 705. dissenting opinion of Justice Rehnquist.
[288] 505 U.S. 833, 112 S.Ct. 2791.
[289] Especially with regard to 'undue burden,' but also to 'health exception.' 530 U.S. 914, 120 S.Ct. 2597 and 550 U.S. 124, 127 S.Ct.
[290] In this regard is the deliberation conducted by USSC broader than that one of Congress or respective State legislatures since they have to defer to the "dictates of constitutional 'jurisprudence.'" Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 1.

Although GFCC, contrary to USSC, bases its law-making on a specified constitutional grounds,[291] its deliberative position so overtly present in balancing the 'right to life' of the unborn and woman's constitutional rights in both *Abortion I* and *II Case* invites it to rather unlimited constitutional rule-making. This is clear from the results of this balancing. In *Abortion I Case*, GFCC rejects original legislative solution based on 'stage of pregnancy' formula, but proposes its own based on 'reasons.'[292] These reasons are partially inspired by the original law[293] and partially invented by the GFCC itself such as the "social reasons."[294] GFCC's insistence on use of criminal law in order to protect the 'unborn' also clearly "interferes with the legislator's task, thus making the FCC a quasi-legislator."[295] In *Abortion II Case*, GFCC marginally departed from its conclusions,[296] but not from its clear deliberative method of decision-making.

As theoretically discussed and demonstrated on the American and German abortion jurisprudence, non-existence of substantial constraints to constitutional law-making might easily turn this power into a non-restricted one. This conclusion taken together with the conclusion of a

[291] Mainly the Article 2(2)(1) in conjunction with Article 1(1) of the German Basic Law. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336, 350 – 351. See also 88 BverfGE 203, at I. 1-7.
[292] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 341. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 110.
[293] Such as the "eugenic, ethical (criminological), and social [considerations]" and also reasons "based on urgent necessity." Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 341.
[294] GFCC invents this "social hardship" reason by stating the following: "The legislature may also add [termination of pregnancy] for reasons of general necessity (social reasons) to this [list of reasons]. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 341. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 110.
[295] Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 141.
[296] GFCC retained core of its *Abortion I Case* ruling, but no longer insisted on the use of criminal law to provide for an effective protection of the fetus's right to life. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 349. See also Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 145. See also 88 BverfGE 203, at 184 and following.

secured "continuous dominance"[297] of the constitutional judiciary *vis-á-vis* legislature has broad implications with respect to execution of political power and policy-making in modern democracies. These issues will be subject of a further discussion in the following sub-chapters.

[297] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 89.

CHAPTER 3

CONSTITUTIONAL POLICY-MAKING

3.1 Impact of the constitutional law-making on politics

As we have seen in the preceding sub-chapters, constitutional review has turned courts deciding constitutional disputes into important and influential policy-makers. By means of constitutional review, which profoundly influences legislature and legislative processes,[298] constitutional judges exercise a political function too.[299] If legislative politics is to be understood as "the process through which competing choices over public policy are made,"[300] then, constitutional law is, no doubt, also "constitutional politics."[301] The influence of constitutional jurisprudence on legislative politics does not limit itself to the mere existence of constitutional law-making and its impact on legislature or legislative processes. As will be demonstrated in this sub-chapter, constitutional law-making has induced profound changes to broader realm of politics.

It has become a commonplace to acknowledge that the province of judicial activity, including activity of the constitutional judges has profoundly expanded in Western democracies,[302] however, it would be mistaken to see this expansion as a mere quantitative

[298] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 89.
[299] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 21-22.
[300] R. Hodder-Williams. *Six notions of 'Political' and the United States Supreme Court*, 22 BRIT. J. POL. SCI. 1 (1992), 3 cited in Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 72.
[301] Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 72.
[302] Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 1-13. However, it is important to keep in mind that this expansion of judicial activity, including constitutional judicial activity, did not occur by itself as an independent phenomenon, but rather as a consequence of expansion of governmental activity. Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 4-9.

phenomenon.[303] The expansion of constitutional adjudication to new legal and political domains[304] brings about deep changes including *inter alia* (i) shift of the political responsibility[305] and accountability[306] from the legislature; (ii) change of understanding of the function of the law and constitutional litigation as well as transformation of processes of pursuining legislative changes.[307] All of these changes are nonetheless an open list of the consequences of the 'judicialization of politics' and as the consequences of the same phenomenon are closely inter-related.

As solving specific constitutional disputes has become subordinated to broader judicial policy-making in order to administer justice in general without its limitation to a specific case,[308] so did judicial responsibility grow as as to "overlap the responsibilities of other governmental institutions."[309] Constitutional courts do not only produce political solutions when they legislate, but sometimes do so also in order to tackle unsatisfactory solutions produced by other governmental players, including the legislature.[310] Thus, "primary responsibility for adressing

[303] Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 7.
[304] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 1.
[305] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 6. See also Alexander M. Bickel. *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1978), 114-116, 134. Some justify 'judicial activism' on the following grounds: "the myth that legislature act effectively to the furtherance of the body politic's both general and individual interests' has proven unreal, because the reality is frequently characterised by *inertia* of the political branches." H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking.* (1986), 62-64 cited in Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 385.
[306] John Hart Ely. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 134.
[307] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 3-5, 25. See also Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 12.
[308] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 8-9. See also Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 1-13.
[309] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 9.
[310] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 6. See also Alexander M. Bickel. *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1978), 114-116, 134. Some justify 'judicial activism' on the following grounds: "the myth that legislature act effectively to the furtherance of the body politic's both general and individual interests' has proven unreal, because the reality is

societal change"[311] of legislature is eroded; and if not properly exercised, subsequently reshaped and supplemented by the constitutional judiciary.[312] Of course, such loss of political responsibility has implications also for political accountability.[313] 'Tutelage'[314] by constitutional courts therefore goes hand in hand with

> propensity [of legislature] not to make politically controversial decisions – to leave them instead on others, most often others who are not elected or effectively controlled by those who are.[315]

Moreover, since constitutional judges acquired public and self-reception of "problem solvers … charged with a duty to act when majoritarian institutions do not,"[316] understanding of the law and constitutional litigation has not been left intact. Law is seen as a promotional device in pursuing societal and political change.[317] Constitutional litigation then has become a channel of policy change,[318] even more so when pursuing political change by means of constitutional litigation has its practical, as well strategic advantages.[319] No wonder then that Sweet Stone goes even as far as to call constitutional courts "privileged strategic sites for lawmaking."[320] In another place Sweet Stone explains:

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frequently characterised by *inertia* of the political branches." H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking.* (1986), 62-64 cited in Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 385.

[311] William Gangi. *Saving the Constitution from the Courts* (Norman: University of Oklahoma Press, 1995), 265. Gangi refers to W. Hurst in this regard. W. Hurst. 1982. *Dealing with Statutes.*

[312] Alexander M. Bickel. *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1978),114-116.

[313] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 186-187.

[314] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 1.

[315] John Hart Ely. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 134.

[316] Alexander M. Bickel. *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1978), 134.

[317] Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 7.

[318] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 25.

[319] Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 12.

[320] Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 75.

> … in any polity, [where] rules of jurisdiction are relatively extensive, rules of standing are relatively permissive, and rights provisions are relatively comprehensive, there is no a priori reason to think that constitutional adjudication will not incrementally extend its influence to all important arenas of policy-making.[321]

All in all, one of the very reasons why constitutional review was assigned to the courts so as to prevent certain fundamental values of the society and fundamental rights of the individuals not to be compromised by the politics[322] appears unfulfilled. Fundamental societal values and fundamental individual rights remained subject to the political battle, only the arena for the political battle has changed.[323] The by-product of this change of the battle field for legislative change is substantial limitation of those who can have a say in the policy-making process of the constitutional judges.[324] In political fights fought in front of the constitutional judges, only some are recognized

> as autonomous reasoners who are entitled to an equal status as potential sources of argument and reasonable information.[325]

Thus, it is not only that one of the promises of "[placing] rights beyond politics"[326] in modern constitutional polities remains unfulfilled, but also that the processes where legislative and thus also political changes could be addressed in a much more transparent, potentially equal and accountable way are frustrated.

However, the above-mentioned discussion on the profound change constitutional courts introduced in the politics ought to be understood in the broader perspective. It would be incorrect

[321] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 144.
[322] Ronald Dworkin, "Constitutionalism and Democracy," *European Journal of Philosophy* 3 (1995): 1-11, 2.
[323] Similar argument with respect to EU's Independent Agencies is made by Matthew Flinders. Matthew Flinders, "Distributed public governance in the European Union," *Journal of European Public Policy* 11:3, (2004): 520-544, 537-539.
[324] Richard Bellamy. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), 218-221.
[325] Richard Bellamy. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), 146.
[326] Richard Bellamy. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), 146.

to think that convergence in the business of constitutional judges and legislators[327] and the effect this convergence had in turn on politics is due to complete arbitrary usurpation of policy-making powers by constitutional judiciary. Legislative institutions have also often failed to properly fulfill their law and policy-making competencies.[328] Also, constitutional jurisprudence might serve as a comfortable refuge from political accountability,[329] especially for those political decisions which are politically sensitive and socially controversial.

In light of the American history of abortion regulation bears the question of loss of political accountability of legislature special relevance. USSC's activist legislative approach in abortion policy, most vividly seen in *Roe* completely frustrated legislative processes, on State and also federal level, and as a consequence moved political accountability for policy-making in this area almost entirely from the legislature to the courts. Although in *Casey*, USSC affirmed that

> Roe v. Wade speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life [and] that portion of the decision in Roe was given too little acknowledgment and implementation by the Court in its subsequent cases,[330]

legislature is still only allowed to move within the area crafted out by USSC in its abortion policy. As much the legislature has to conform to USSC's abortion policy-making, that much political responsibility and accountability of legislature is removed from it.

Concrete constitutional review in the USA goes hand in hand with the ability of ordinary members of the polity to have profound impact on politics.[331] Although it lies within

[327] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 20.
[328] Stephen P. Powers and Stanley Rothman. *The Least Dangerous Branch?: Consequences of Judicial Activism* (Westport, Conn.: Praeger, 2002), 9.
[329] John Hart Ely. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 134.
[330] 505 U.S. 833, 112 S.Ct. 2791, plurality opinion.
[331] Such is very obvious in *Roe* where a class action brought by "a pregnant single woman" with pseudonym Roe induced such a material change to abortion regulation not on State, but directly on federal level. 410 U.S. 113, 93 S.Ct. 705, majority opinion.

the very province of US judiciary[332] to decide how far-reaching such efforts can be, their impact ought not to be underestimated.[333]

Various forms of impact of constitutional jurisprudence on abortion policy are also not absent in Germany. First of all, GFCC's detailed corrective revisions[334] in both *Abortion I* and *II Case* not only "enshrined [GFCC's] preffered policy,"[335] but more importantly underscore GFCC's skepticism towards the ability of the legislature to determine proper policy standards with respect to abortion. No doubt, such can be also said with respect to policy standards introduced by USSC in American abortion jurisprudence.

Another result of German give-and-take politics in abortion regulation between GFCC and legislature is a rather blurred accountability. GFCC's moderation of abortion liberalization in Germany[336] together with a lengthy political battle preceding and following both *Abortion I* and *II Case*,[337] but mostly the mixture of accepted and omitted GFCC's policy recommendations in

[332] American model of constitutional review is decentralized, constitutional litigation and possible policy change can be therefore obtained at any US court.
[333] As Justice Kenedy and Chief Justice in *Stenberg* say: "Requiring Nebraska to defer to Dr. Carhart's judgment is no different from forbidding Nebraska from enacting a ban at all; for it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people." 530 U.S. 914, 120 S.Ct. 2597, dissenting opinion of Justice Kennedy and the Chief Justice.
[334] Including its various policy recommendations such as GFCC's insistence on use of criminal law for effective protection of 'unborn life' in *Abortion I Case* P. Donald Kommers. 1997. *The constitutional jurisprudence of the Federal Republic of Germany.* Durham, N.C. : Duke University Press, 2nd ed., rev. and expanded, p. 340, 343. Or also GFCC's specification of grounds (i.e., indications) for legal abortion or provision of counseling in *Abortion I Case*. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336-342. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 110. GFCC formulated also very specific policy recommendations in *Abortion II Case.* See 88 BverfGE 20, at 225 – 238, 231 – 238, 239 – 256 and other. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 112.
[335] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 112.
[336] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336-356.
[337] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 109-112. See also Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336-356.

the subsequent legislative outcomes,[338] make assignment of political responsibility for abortion regulation in general as well as in specific aspects almost impossible.

Probably due to the very polarizing nature of the issue of abortion, both proponents as well opponents of abortion in Germany used litigation, including constitutional litigation, as a means of obtaining policy change.[339] Situation culminated after GFCC's ruling in *Abortion I Case* was ratified by the Parliament.[340] By 1990, GFCC got number of cases challenging regulation of abortion.[341] This fact together with the fact that both abstract reviews of amended abortion regulation in Germany were to a large extent used in order to extend political battle,[342] but also taking into account political arguments GFCC employed in both *Abortion I* and *II Case*[343] rulings point to the very fact that constitutional litigation in Germany can be indeed very political.

This sub-chapter has shown that constitutional review has profoundly altered the dynamics of the politics in a number of ways. The primacy of legislatures to introduce political

[338] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 109-112. See also Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336–356 and also Sabine Michalowski and Lorna Woods. 1999. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 135-148.

[339] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 111.

[340] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 111.

[341] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 111.

[342] Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336, 356.

[343] Including its various policy recommendations such as GFCC's insistence on use of criminal law for effective protection of 'unborn life' in *Abortion I Case* P. Donald Kommers. 1997. *The constitutional jurisprudence of the Federal Republic of Germany.* Durham, N.C. : Duke University Press, 2nd ed., rev. and expanded, p. 340, 343. Or also GFCC's specification of grounds (i.e., indications) for legal abortion or provision of counseling in *Abortion I Case*. Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 336-342. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 110. GFCC formulated also very specific policy recommendations in *Abortion II Case.* See 88 BverfGE 20, at 225 – 238, 231 – 238, 239 – 256 and other. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 112.

changes, hold responsibility for political decision as well as take political accountability for them has been eroded by quantitative and qualitative growth of judicial powers of the constitutional judiciary in the area of politics. However, the recentness of these developments,[344] the incremental nature of the constitutional policy-making,[345] and various political reasons lying behind the impact of constitutional jurisprudence on politics, shall not diminish its meaning and potential for triggering substantial structural changes in division of political power.[346] It is precisely at this point when discussion on the capacity of constitutional judiciary to adopt policy decisions bears most relevance. It is also for these reasons that these issues are addressed in more detail in the following sub-chapter.

3.2 Policy-making capacity of the constitutional judges

The previous sub-chapters have demonstrated that there is a substantial convergence between constitutional courts and legislature in exercising their law-making and thus also policy-making powers.[347] Sovereignty[348] and primacy[349] of the legislature to respond to the various needs of the people by introducing policy solutions has been eroded by direct and indirect impact of constitutional jurisprudence on legislative politics.[350] As a consequence, it is no longer fully up to the legislature to decide how, when and whether at all respective issue will be given legislative solution.[351] Constitutional judges due to their obligation not to deny justice[352] might easily find

[344] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 20.
[345] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 170.
[346] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 20.
[347] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 20.
[348] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 1.
[349] William Gangi. *Saving the Constitution from the Courts* (Norman: University of Oklahoma Press, 1995), 265.
[350] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 93-95.
[351] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 129.

themselves formulating specific policies as first[353] or if already being formulated by the legislature, reshaping it according to the dictates of the constitutional law.[354]

However, to say that there is indeed an overlap between the business of the constitutional judges and legislators is not to say that it does not matter who decides the issue.[355] Just the opposite, it matters a lot, because different branches of government "are differently composed and organized."[356] Moreover,

> if the separation of powers reflects a division of labor according to expertise, then relative institutional capacity becomes relevant to defining spheres of power and particular exercises of power.[357]

Horowitz suggests not only that delineation of competencies matters because various branches of government are differently equipped to perform tasks inherent to their area of specialization, but also that borrowing and adopting functions or methods of decision-making from other branches of the government may simply not prove very functional.[358]

Constitutional decision-making bears some specific institutional qualities, which have implications for policy-making capacity of constitutional judiciary. These institutional features such as (i) narrow focus of the adjudication;[359] (ii) limited range of the applicable remedies;[360] (iii) incremental nature of the decision-making;[361] (iv) limited potential for reversibility of

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[352] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 12. See also Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 22.
[353] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 24.
[354] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 93-95.
[355] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 20.
[356] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 20.
[357] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 19.
[358] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 21.
[359] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 34-35. See also Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 7-8.
[360] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 34-35. See also Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 37-38.
[361] Martin Shapiro and Alec Stone Sweet. *On Law, Politics, and Judicialization* (Oxford : Oxford University Press, 2002), 170. See also Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 35-39. See also Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 7-8.

previous decisions[362] due to the existence of formally acknowledged[363] or informally present[364] *stare decisis*; (v) non-representative nature of the litigants and the disputes;[365] (vi) non-suitability of judicial fact-finding for ascertainment of facts and information upon which policy-decisions should be based;[366] or (vii) disconnection of judiciary from social and political environment frustrating possible assessment of the consequences of respective decisions on social life;[367] make constitutional adjudication, including constitutional review of legislation, very well suited for resolving specific controversies, but prove not only inappropriate or insufficient for addressing broader questions of public policy, but, more importantly are indeed very likely to lead to incorrect public policy decisions.[368]

Non-suitability of the constitutional adjudication, including constitutional review of legislation, to address broader issues of social life can be to some degree mitigated by means of involvement of experts or third parties through *amicus briefs* in the proceedings.[369] However, its main disadvantage in terms of its suitability for formulating broader public policy decisions,

[362] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 36.
[363] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 135-136. Sweet Stone notes with respect to constitutional law-making that it is treated as "possessing precedential authority." Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 72.
[364] Martin Shapiro. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 135-136. Sweet Stone notes with respect to constitutional law-making that it is treated as "possessing precedential authority." Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007): 69-92, 72.
[365] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 12. See also Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 38-45.
[366] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 45-51. See also Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 37-38.
[367] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 51-56.
[368] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 33-56. See also Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 35-40.
[369] Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 38.

which is the exclusion of the issue from a broader public debate where all concerned can have a meaningful say and can be heard,[370] remains.

It is beyond doubt that both constitutional judges in the USA as well as in Germany were subject to same limitations with respect to their capacity to address broader policy concerns in abortion regulation. Both of these institutions tackle these limits by: (i) relying on vast bulk of medical[371] or social[372] evidence; (ii) substantial involvement of experts and third parties through *amicus briefs* in the litigations;[373] and also (iii) by taking into account underlying moral considerations.[374] Nonetheless, both USSC and GFCC admit that legislatures are better off to find

[370] Richard Bellamy. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. (Cambridge: Cambridge University Press, 2007), 212-214.

[371] Due to the nature of the issue of abortion, it is not surprising that medical evidence plays an important role in the litigation. In the USA, in *Roe* USSC says that it "have inquired into … medical and medical-legal history " in order to resolve how people thought about abortion and thus to build its conclusions on the basis of authoritative evidence. 410 U.S. 113, 93 S.Ct. 705. In *Stenberg* USSC relied on medical evidence obtained from medical "expert witnesses" or even medical literature. 530 U.S. 914, 120 S.Ct. 2597. Medical evidence plays also very special role in *Gonzeales* where its reliability of the medical evidence upon which Congressional legislation is based is seriously questionned especially by dissenters – Justice Ginsburg, Justice Stevens, Justice Souter and Justice Breyer. 550 U.S. 124, 127 S.Ct. 1610. In majority of these decisions, especially in *Roe*, *Stenberg* and *Gonzales* forms the medical evidence the very basis of USSC rulings. In Germany, in *Abortion I Case* GFCC bases its conclusion that even "yet unborn human being" possesses 'right to life' on "established biological-physiological findings." Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 337-338. In *Abortion II Case*

[372] In USA, in *Casey* USSC's reliance on social evidence forms the basis why woman's statutory obligation to "[notify her] husband about an abortion" was declared unconstitutional. 505 U.S. 833, 112 S.Ct. 2791. In Germany, in *Abortion II Case,* GFCC heard "evidence on issues of counseling and social assistance practice" and subsequently based its conclusions upon it. 88 BverfGE 203, at V. and also at 141-144.

[373] In the USA very much present in all discussed cases. In Germany, very much present in *Abortion II Case*.

[374] In the USA, USSC repeatedly acknowledges the moral, emotional and even religious aspect of the abortion controversy. Moral considerations play important role also in USSC's reasoning, very vividly seen in all discussed cases. Mandating and imposing own moral code on the people is a repeated theme in dissenting opinions – for example concurring and dissenting in part opinion of Justice Scalia, Chief Justice, Justice White and Justice Thomas in *Casey* and dissenting opinion of Justice Ginsburg, Justice Stevens, Justice Souter and Justice Breyer in *Gonzales.* In Germany, GFCC's moral considerations form the very basis of balancing right to life of the unborn and woman's constitutional rights. Sabine Michalowski and Lorna Woods. *German Constitutional Law: The Protection of Civil Liberties* (Aldershot, Hants, England: Ashgate, 1999), 143.

and ascertain relevant facts and related policy considerations.[375] It is therefore surprising that USSC as well as GFCC still don't hesitate to engage in formulating detailed policy standards.[376]

German experience also points to the limited scope of arguments and participants involved in constitutional policy-making. Lengthy and uneasy negotiations in the German Parliament[377] underscore how complex and broad the issue of abortion is. GFCC's ability to tackle the issue in a more timely manner in both *Abortion I* and *II Case*[378] than the German Parliament supports the conclusion that there is indeed a limited scope of arguments and participants involved in constitutional policy-making.

This sub-chapter has shown in the words of James Q. Wilson that "there are certain things courts are good at and some things they are not so good at."[379] Policy-making of constitutional judiciary does not work well because of its institutional limits. Both USSC and GFCC verbally declare their limits to find and assess relevant facts and policy considerations, however, both still formulate detailed policy standards in abortion regulation. Next sub-chapter will show that this

[375] In the USA, in *Stenberg* for example, USSC overtly admits that "Courts are ill-equipped to evaluate the relative worth of particular surgical procedures. The legislatures of the several States have superior factfinding capabilities in this regard." 530 U.S. 914, 120 S.Ct. 2597. In Germany, GFCC implies such in *Abortion II Case*. 88 BverfGE 203, at 154, 181 and following.

[376] Please refer to sub-chapter 1.2 and 2.2.

[377] It took two intense years of negotiations until first legislative solution liberalizing abortion in Germany was reached. After GFCC's ruling in *Abortion I Case*, bill was amended rather fast compared to the length of other negotiations in the abortion regulation. In 1992, it took again almost two years of debate until new wording of abortion regulation was negotiated in the German Parliament. After GFCC's ruling in *Abortion II Case*, "it would take parliament almost two years to agree on amendments to the 1992 [abortion] statute." Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 110, 111. See also Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 355.

[378] *Abortion I Case* was presumably initiated in 1973 and decided in 1975. *Abortion II Case* was initiated in July 1992 and decided in May 1993. Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 110. See also Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2nd ed., rev. and expanded, 1997), 349 and 88 BverfGE 203.

[379] J. Q. Wilson. *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1989), 290.

"purposive"[380] separation of powers pursuant to institutional capacity and competence of various branches of the government is not a mere description, but also has "normative connotation."[381] On that basis, reasons for placing the centre of law and policy-making within legislature will be provided.

3.3 Restoring law and policy-making primacy of legislature

Previous sub-chapter has shown that constitutional adjudication is not only inappropriate or insufficient for addressing broader questions of law and public policy, but more importantly is indeed very likely to prove malfunctioning.[382] This sub-chapter will shift the discussion of the capacity and competence of the branches of the government into normative context and will subsequently give reasons for placing the centre of law and policy-making within the legislature.

Separation of powers according to the capacity and competences of various branches of the government in law and policy-making points to its 'purposive'[383] nature. So understood, separation of powers ceases to be a mere description and gains normative content.[384] M.J.C. Vile argues that the 'purposive' understanding of separation of powers within the government is crucial because:

> … it [is] concerned more with the desire, by delimiting certain functional areas, to be able to restrict the ruler to a particular aspect of government and so to exercise limits on power.[385]

He then continues:

[380] Peter A. Gerangelos. *Separation of Powers and Legislative Interference In Judicial Process: Constitutional Principles and Limitations* (Oxford: Hart, 2009), 29. See also M. J. C. Vile. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1969), 316.
[381] M. J. C. Vile. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1969), 316-317.
[382] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 33-56. See also Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 35-40.
[383] Peter A. Gerangelos. *Separation of Powers and Legislative Interference In Judicial Process: Constitutional Principles and Limitations* (Oxford: Hart, 2009), 29. See also M. J. C. Vile. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1969), 316.
[384] M. J. C. Vile. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1969), 317.
[385] M. J. C. Vile. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1969), 316-317.

> This 'purposive' quality of the traditional classification of government is important, for it makes the discussion of functional analysis much more than simply an attempt at description; it inevitably carries a normative connotation as well.[386]

This 'purposive' or functional separation of powers bears normative connotation precisely because it enables control of the exercise of law and policy-making power.[387] In general, if one branch of the government is to exercise effective control over the other, it does it best by maintaining their functional differences, not by obscuring them. Control of law and policy-making power of legislature is disabled when the other branch of the government adopts its functions or frustrates their exercise by its own activity.

Policy-making capacity of constitutional judges is therefore problematic not only because constitutional judiciary is not well equipped to perform it properly as demonstrated in the previous sub-chapter, but more importantly because law and policy-making of constitutional judiciary might easily frustrate control of constitutionality of the legislative processes and outcomes. If constitutional courts control policy solutions of legislature by replacing them by their own, not controlling, but rather substitutive or supplementary powers are exercised. Control over legislative processes and outcomes should be maintained especially when a lack of competence in law and policy-making is far from being solely a judicial prerogative.[388] Malfunctioning of legislative law and policy-making and incompetence of the legislature should be addressed not by replacing it with another, possibly malfunctioning, law and policy-making process or possible incompetence, but precisely by calling it into question and putting a stop to it when necessary.

[386] M. J. C. Vile. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1969), 316-317.
[387] M. J. C. Vile. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1969), 316-350.
[388] Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1991), 38.

Another strong reason to maintain functional differences in policy-making between constitutional judiciary and legislature is the integrity of exercise of law and policy-making power with political responsibility[389] and accountability.[390] If exercise of law and policy-making power is not to be completely divorced from political accountability and transparency of law and policy-making processes, its centre of gravity should be shifted there, where it can possibly maintain such characteristics, i.e., to the legislature.[391] By doing so, constitutional judiciary becomes also more "[responsive] to the wider community."[392] Political 'responsiveness' of judiciary therefore lies in placing the centre of the political power to those, who are not detached from their political and social environment,[393] and who can be held accountable for their political decisions.[394]

Moreover, placing the centre of the law and policy-making power within the legislature solves the problem of convergence in the business of constitutional judiciary and legislature by maintaining the delicate structure of the government.[395] As M. J. C. Vile suggests:

> Although it is impossible to develop a thoroughgoing separation of functions of the kind that the pure doctrine of the separation of powers demanded (and if it were possible it would be undesirable), this does not mean that there is no importance in the attempt to assign the primary or dominant concern with the performance of a particular function to one agency of government rather than another. The whole history of the doctrine of separation of powers and its related constitutional theories is indicative of the fact that neither a complete separation nor a complete fusion of the functions of the government, nor of

[389] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 186-187.
[390] John Hart Ely. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 131-134.
[391] Although some might contend that once judiciary exercises political powers, it should be transformed "into a representative body accountable to public," I do agree with Aharon Barak that "such a pure "political" model of adjudication leads to its destruction, for it eliminates the independence, neutrality, and impartiality of adjudication." Thus, once the underlying proposition is that judiciary ought not to be made politically responsible and accountable, policy-making power shall be exercised there, where it can be held accountable. Aharon Barak. *Judicial Discretion* (New Haven: Yale University Press, 1989), 194-195. See also Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 186-187.
[392] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 187.
[393] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 45.
[394] John Hart Ely. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 131-134.
[395] M. J. C. Vile. *Constitutionalism and the separation of powers*. (Oxford: Clarendon Press, 1969), 316-318.

> the procedures which are used to implement these functions, is acceptable to men who wish to see an effective yet controlled use of the power of governments.[396]

Assigning primacy of law and policy-making to legislature is therefore not only a matter of governmental structure, but appears to be inherent to the very idea of avoiding unlimited outbreak of law and policy-making power. If law and policy-making power is to be subjected to reasonable limits, structural boundaries placed upon legislature as well constitutional judiciary must be respected.[397]

Maintaining primacy of legislature in the area of law and policy-making furthermore helps to preserve the values embodied in the legislative processes. As M. J. C. Vile notes:

> The fact that a particular task of government is regulated by 'legislation' rather than by some other procedure reflects the determination that certain values shall predominate in the ordering of society rather than others.[398]

Richard Bellamy talks about the absence of arbitrary rule and non-domination,[399] and "equality of concern"[400] towards various members of the polity in this regard. As Richard Bellamy rightly explains: there is

> … the need to adopt a procedural, or input, rather than a substantive, or output, approach to equality of concern and respect to meet the challenge of the 'circumstances of politics' – the condition of having to make necessary collective decisions where there is disagreement about their scope and content. … Having experts decide such matters might still raise the worry of enlightened despotism, where the potential for domination exists and citizens lose self-respect through their views counting for less than others. There is also the prudential fear that once appointed these guardians might abuse their position. Yet, these worries might be met by creating fair and open contestatory or consultative mechanisms rather than through giving all an equal share in the authoring decisions.[401]

Thus, issues of law and public policy, especially those, which are subject to principled disagreement, ought to be rather resolved in legislative processes than in constitutional

[396] M. J. C. Vile. *Constitutionalism and the separation of powers*. (Oxford: Clarendon Press, 1969), 329.
[397] M. J. C. Vile. *Constitutionalism and the separation of powers*. (Oxford: Clarendon Press, 1969), 315-350.
[398] M. J. C. Vile. *Constitutionalism and the separation of powers*. (Oxford: Clarendon Press, 1969), 317-318.
[399] Richard Bellamy. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. (Cambridge: Cambridge University Press, 2007), 147-154.
[400] Richard Bellamy. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. (Cambridge: Cambridge University Press, 2007), 212.
[401] Richard Bellamy. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. (Cambridge: Cambridge University Press, 2007), 212.

adjudication for the very reasons Richard Bellamy pointed out. Abortion, no doubt, belongs to such issues.

This sub-chapter has demonstrated that besides the non-capacity of constitutional judiciary to address broader issues of law and public policy, there are indeed strong reasons to place the primacy for law and policy-making within legislature. As discussed, primacy of legislature in the law and policy-making area (i) enables its effective control; (ii) integrates law and policy-making with political accountability; (iii) maintains delicate structure of the government; (iv) prevents unlimited outbreak of law and policy-making power; and also (iv) preserves values embodied in the legislative processes. Nonetheless, restoration of law and policy-making primacy of legislature is only possible if these processes are not frustrated by law and policy-making of constitutional courts. Previous discussion on abortion jurisprudence both in the USA as well as in Germany shows, however, that law and policy-making of legislature is easily supplemented or replaced by that of constitutional judges.[402] This in turn frustrates all of the advantages of 'purposive' delineation of powers between legislators and constitutional judges discussed in detail above. It is precisely in this context that the "passive devices"[403] constitutional courts dispose of should be employed.

Taking into account sensitive and divisive nature of abortion, all of the outlined reasons bear even more relevance. Very presence of the controversy over abortion till today underscores the need to subject it to more transparent, potentially equal and open debate, which is enabled in legislative processes. Nonetheless, subjection of issue of abortion to legislative processes can not and will not eradicate its divisive and sensitive nature. To the contrary, once the floor will be opened for more participants and more arguments, it is quite likely that divisive and sensitive

[402] Please refer to sub-chapters 1.2, 2.2 and 3.1.
[403] Alexander M. Bickel. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986). See especially 205-207.

nature of the abortion controversy will grow. However, uneasy circumstances of legislative policy-making ought not to obscure its normative meaning.

CONCLUSION

Constitutional review of legislation has set in motion a quantitative, but also a qualitative growth of constitutional law and policy-making.[404] This in turn, has of course, induced profound change in the relation between legislators and constitutional judges.[405] In qualitative terms, this change can be easily described as 'continuous dominance' of constitutional judges over legislators.[406] Quantitative aspect of this change demonstrates itself in a convergence of the province of legislators and constitutional judges.[407] Hence, law and policy-making processes and outcomes have been gradually 'judicialized.' However, such profound changes in legal and political landscape can not happen without altering the equilibrium between governmental institutions.[408] As a result, some declare traditional doctrine of separation of powers obsolete.[409]

'Judicialization' of law and policy-making has substantially altered the process and outcome of shaping abortion policy in the USA and Germany. Preceding discussion on the role of USSC and GFCC in shaping abortion policy in their jurisdictions demonstrates that 'judicialization' of law and politics, in spite of various differences between these jurisdictions, cuts across the borders. Abortion policy done by legislators in both of these countries has been not only materially altered, but sometimes even replaced by law and policy-making of USSC and GFCC.

[404] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000). See also Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 1-21 and also Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 7.
[405] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 61-90. See also Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100.
[406] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)," *West European Politics* 25 (2002): 77-100, 89.
[407] Donald L.Horowitz. *The Courts and Social Policy* (Washington: Brookings Institution, 1977), 20.
[408] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 1-13.
[409] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 127-150.

Nonetheless, 'purposive' understanding of separation of powers between legislators and constitutional judges provides a sound response to challenges brought about by 'judicialization' of law and policy-making. The response lies in the restoration of law and policy-making primacy of legislature. Such will in turn promote competent governing,[410] enable effective control and political accountability for law and policy-making of legislature,[411] preserve delicate governmental structure,[412] prevent unlimited growth of policy-making power of legislature,[413] and also sustain values pertaining to the legislative processes,[414] where legal and political decisions are made. Restoration of law and policy-making primacy of legislature is, however, only enabled if it is not to be substantially supplemented or replaced by law and policy-making of constitutional judges.

This paper, however, challenged 'judicialization' of law and policy-making by discussing, in particular, its consequences. Relevance of the statement that law and policy-making primacy should be maintained within the legislature and should not be substantially supplemented or replaced by law and policy-making of constitutional judges was demonstrated by analysis of the effects and results of such a development. Nonetheless, relevant and pressing nature of this claim points to the need of a further in-depth research of not only the consequences of 'judicialization' of law and policy-making, but especially of its causes. It is precisely the ignorance of the causes of these developments that enables further advancement of 'judicialization' of law and policy-making.

[410] As discussed in sub-chapter 3.1.
[411] Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), 186-187. See also John Hart Ely. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 131-134 and also M. J. C. Vile. *Constitutionalism and the separation of powers*. (Oxford: Clarendon Press, 1969), 315-351.
[412] M. J. C. Vile. *Constitutionalism and the separation of powers*. (Oxford: Clarendon Press, 1969), 316-318.
[413] M. J. C. Vile. *Constitutionalism and the separation of powers*. (Oxford: Clarendon Press, 1969), 329.
[414] M. J. C. Vile. *Constitutionalism and the separation of powers*. (Oxford: Clarendon Press, 1969), 317-318. See also Richard Bellamy. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. (Cambridge: Cambridge University Press, 2007), 209-214. For further discussion see 143-260.

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