Politicising Constitutional Court Appointments in Europe

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The growing trend of depoliticisation of constitutional court appointments across Europe – Shortcomings of depoliticised appointment models in constituting an optimal constitutional court – Strategic politicisation of appointment procedures as a solution for a more optimal constitutional court – Proposal of a baseline template drawing from different European practices – Implications for constitutional court reform in Europe

INTRODUCTION

As of May 2024, in 31[1] out of 46 Council of Europe member states, specialised constitutional courts help enforce the constitution against the elected branches.[2] This enforcement role frequently involves policing boundaries between governmental branches, protecting the electoral system's integrity, and

[1]For a complete list of these 31 jurisdictions, based on the appointment models they follow, *see* nn. 34 and 39 and the text accompanying nn. 56-57. The 15 jurisdictions that do not have constitutional courts (and which follow the decentralised models described in n. 2) are Cyprus, Denmark, Estonia, Finland, Greece, Iceland, Ireland, Liechtenstein, Monaco, Netherlands, Norway, San Marino, Sweden, Switzerland, and the United Kingdom.

[2]In centralised systems, constitutional adjudication is carried out by specialised constitutional courts, whereas in decentralised systems, such duties fall to ordinary courts, including Supreme Courts. There are significant differences between the two systems, which has ramifications for constitutional adjudication in a polity. *See* L. Garlicki, 'Constitutional Courts Versus Supreme Courts', 5(1) *International Journal of Constitutional Law* (2007) p. 44 at p. 44. However, for analytical clarity, this analysis deliberately omits the 15 decentralised systems within Europe.

European Constitutional Law Review, page 1 of 37, 2025
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safeguarding rights. Moreover, today, many powerful constitutional courts in 'Europe'[3] intervene in legislative processes, establish limits on law-making, and reconfigure policy-making environments.[4] They are also considered a vital component of the 'democracy and rule of the law' toolkit promoted by the Council of Europe and the EU in new European democracies.[5]

A constitutional court's behaviour is influenced by both institutional design and socio-political-cultural factors.[6] While multiple design elements affect constitutional court behaviour – including bench size, term limits, tenure, jurisdictional scope, etc[7] – the judicial appointment mechanism remains the most significant.[8]

Regarding judicial appointments, in the earlier years of constitutional courts' evolution, elected branches were solely responsible for appointing constitutional court judges. However, as constitutional courts' role expanded, constitutional courts whose judges were entirely appointed by the elected branches (hereafter: politically constituted constitutional courts) were frequently seen as incapable of effective constitutional decision-making. This is due to three core reasons.

First, politically constituted constitutional courts are generally perceived as lacking independence due to their inability to maintain 'neutrality'.[9] Today, neutrality[10] – defined as not giving unfair preference to particular ideologies, viewpoints or parties appearing before the court – is an integral element of judicial

[3]In this article, the term 'Europe' (and similar terminologies) encompasses the 46 member states of the Council of Europe, 27 of which are also members of the EU, and 11 non-EU states are vying for EU membership. Although Europe geographically includes a broader list of countries, the focus here is on these Council of Europe members because the analysis is confined to constitutional courts within these jurisdictions. The rationale behind this selective approach is elaborated upon in the clarification/caveat provided later in the introduction.

[4]A. Stone-Sweet, *Governing With Judges* (Oxford University Press 2000) p. 1.

[5]W. Sadurski, *Rights before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe* (Springer 2014) p. 64-65.

[6]S. Choudhary and K. Blass, *Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence* (International IDEA 2014) p. 10.

[7]*See generally* Venice Commission, Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice, CDL-PI(2022)050, 7 December 2022.

[8]*See* Venice Commission, Opinion on the Final Draft Constitution of the Republic of Tunisia, CDL-AD(2013)032, 17 October 2013, para. 126.

[9]*See generally* P. Castillo-Ortiz, 'The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions', 39 *Law and Philosophy* (2020) p. 617.

[10]Neutrality, as used in this article, can be employed synonymously with comparable terms in the literature, such as impartiality and non-biased. While neutrality and similar terms are arguably under-theorised in the literature and not necessarily terms of art, they are by and large regarded as a vital component of judicial independence. *See* text accompanying nn. 11 and 12.

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independence.[11] Even if the elected branches do not interfere in a constitutional court's operations, a constitutional court that is not neutral is not considered sufficiently independent.[12] This holds regardless of whether the constitutional court is free from external pressures or incentives. Politically constituted constitutional courts tend to favour the viewpoints of political actors who have had a chance to appoint a plurality of its judges.[13] This bias stems from the elected branches' preference to select judges whose judicial philosophies align with their values, even if they are not explicitly loyal to them.[14] Moreover, politically constituted constitutional courts typically skew towards the interests of ruling coalitions and/or big political parties and groups, given their oversized role in the appointment process.[15] Thus, rather than maintaining neutrality, politically constituted constitutional courts are prone to demonstrating a bias towards political actors – often ruling coalitions and/or big political parties and groups.[16]

Second, politically constituted constitutional courts frequently lack broad political and social legitimacy. Legitimacy is the acceptance by particular social and political actors that the constitutional court has the right or authority to make decisions and that its decisions are worthy of respect and obedience.[17] In turn, political legitimacy is the legitimacy from political actors. In contrast, social legitimacy is the legitimacy from the general populace of a polity and non-political groups. As actors 'without the power of the purse or sword', legitimacy is vital for

[11]*See* e.g. R. La Porta et al., 'Judicial Checks and Balances', 112 *Journal of Political Economy* (2004) p. 445.

[12]G. Tridimas, 'Constitutional Review and Political Insurance', 29(1) *European Journal of Law and Economics* (2010) p. 81 at p. 85.

[13]*See* N. Garoupa, 'Empirical Legal Studies and Constitutional Courts', 5(1) *Indian Journal of Constitutional Law* (2011) p. 26 at p. 30.

[14]Ibid.

[15]Sadurski, *supra* n. 5, at p. 29-31.

[16]For evidence of this trend in jurisdictions where only the legislature appoints judges, *see* J. Kantorowicz and N. Garoupa, 'An Empirical Analysis of Constitutional Review Voting in the Polish Constitutional Tribunal, 2003-2014', 27(1) *Constitutional Political Economy* (2016) p. 71; L.D. Pellegrina et al., 'Litigating Federalism: an Empirical Analysis of Decisions of the Belgian Constitutional Court', 13(2) *EuConst* (2017) p. 305. For evidence of this trend in jurisdictions where both the legislature and the executive appoint judges *see* R. Franck, 'Judicial Independence under a Divided Polity: a Study of the Rulings of the French Constitutional Court, 1959-2006', 25(1) *Journal of Law, Economics, and Organization* (2009) p. 262; R. Espinosa, 'The Independence of the French Constitutional Council in Question', 4 *The Notebooks of Justice* (2015) p. 547.

[17]M. De Visser, 'Constitutional Courts Securing Their Legitimacy: An Institutional-Procedural Analysis', in AV Bogdandy et al. (eds), *The Max Planck Handbooks in European Public Law: Volume IV: Constitutional Adjudication: Common Themes and Challenges* (Oxford University Press 2023) p. 223.

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constitutional courts to operate.[18] Only in an environment where a constitutional court is considered socially and politically legitimate does it possess the authority to issue judgments against the elected branches and secure compliance with its decisions.[19]

Politically constituted constitutional courts face legitimacy defects, even when outright loyalists are not appointed.[20] As noted above, the political constitution of constitutional courts tends to favour ruling coalitions and/or big political parties and groups. Politically constituted constitutional courts are seen with suspicion and routinely criticised by political parties and/or groups not involved in the appointment process or in appointing a plurality of constitutional court judges.[21] This may also lead the sections of the electorate that these parties and groups represent to develop doubts about the constitutional court. These factors undermine the constitutional court's overall legitimacy.

Moreover, given that ideologically friendly judges on powerful constitutional courts bring obvious political advantages, in jurisdictions with politically constituted constitutional courts, there are frequent conflicts over control of the constitutional court. Political disputes over appointments can lead people to see constitutional courts more as sites for partisan contestation than as venues for constitutional justice. This can negatively impact a constitutional court's social legitimacy.[22] Beyond social legitimacy, these conflicts routinely lead to deadlocks, resulting in the constitutional court working without a full complement of judges or, in extreme cases, below the minimum quorum.[23]

Third and last, while it can be hoped that elected officials do not appoint outright loyalists to constitutional courts – as opposed to judges who are merely

[18] *See generally* G. Vanberg, 'Constitutional Courts in Comparative Perspective: a Theoretical Assessment', 18(1) *Annual Review of Political Science* (2015) p. 167.

[19] S. Sternberg et al., 'The Legitimacy-Conferring Capacity of Constitutional Courts: Evidence from a Comparative Survey Experiment', 61 *European Journal of Political Research* (2022) p. 973 at p. 974.

[20] *See* R.M. Navarrete and P. Castillo-Ortiz, 'Constitutional Courts and Citizens' Perceptions of Judicial Systems in Europe', 18 *Comparative European Politics* (2020) p. 128.

[21] *See* P. Castillo Ortiz, 'Framing the Court: Political Reactions to the Ruling on the Declaration of Sovereignty of the Catalan Parliament', 7 *Hague Journal on the Rule Law* (2015) p. 27.

[22] *See* e.g. M. Ovádek, 'Drama or Serenity? Upcoming Judicial Appointments at the Slovak Constitutional Court', *Verfassungsblog*, 29 January 2018, https://verfassungsblog.de/drama-or-serenity-upcoming-judicial-appointments-at-the-slovak-constitutional-court/, visited 26 February 2025. For empirical work on this point in the non-European context *see* J.C. Rogowski and A.R. Stone, 'How Political Contestation over Judicial Nominations Polarizes Americans' Attitudes toward the Supreme Court', 51 *British Journal of Political Science* (2021) p. 1251.

[23] E.g. for explanations of the same in Croatia and Slovakia, respectively, *see* S. Barić, 'The Transformative Role of the Constitutional Court of the Republic of Croatia', Working Paper 6/2016, Analitika Center for Social Research (2016) p. 8; Ovádek, *supra* n. 22, at p. 21.

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ideologically sympathetic – that is frequently not the case, particularly in the current global climate where constitutional democracy and its associated norms are experiencing a decline. Politically constituted constitutional courts can be 'captured' or 'packed' and wielded for purposes that run counter to their intended function of limiting the elected branches.[24] Instead of checking the elected branches, captured or packed constitutional courts can engage in 'abusive judicial review' and provide legal validity by rubber-stamping incumbent governments' illegitimate or controversial actions.[25]

These concerns have prompted a 'European' trend[26] toward constitutional court depoliticisation, endorsed by scholars and supranational institutions like the Venice Commission.[27] Depoliticising constitutional courts has even been stipulated as a prerequisite for EU membership.[28] Initially, depoliticisation was achieved by allocating the appointment of a specific number of judges to the judiciary or non-political institutions predominantly composed of judges, like judicial councils or lower courts. In recent years, the depoliticisation process has been extended to involve non-political institutions nominating or recommending all judges sitting on a constitutional court. Currently, over half of European jurisdictions with constitutional courts have adopted depoliticisation measures.

Academic discourse has questioned the broader turn towards depoliticisation in Europe – a phenomenon observed in domains beyond constitutional courts for myriad reasons.[29] There have also been debates regarding the depoliticisation of the lower judiciary.[30] However, the depoliticisation of constitutional courts has largely been overlooked. Nevertheless, today, we have a plethora of empirical,

[24] *See* P. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe', 15 *EuConst* (2019) p. 48.

[25] D. Landau and R. Dixon, 'Abusive Judicial Review: Courts against Democracy', 53 *University of California Davis Law Review* (2020) p. 1318.

[26] This does not suggest a lack of depoliticisation trends in constitutional courts globally. There is certainly a call, both in theory and practice, for the depoliticisation of constitutional courts in the broader comparative context. However, outside Europe, this shift is arguably less pronounced, possibly due to the absence of supranational influences, both direct and indirect. Moreover, in many countries outside Europe, the move towards depoliticisation frequently stems from adopting/transplanting practices observed in European jurisdictions or following the guidelines of entities like the Venice Commission. Regardless of the global depoliticisation extent, this article focuses on Europe, explained later in the introduction.

[27] *See* text accompanying nn. 37-39 and 55-59.

[28] *See* text accompanying nn. 55-59.

[29] *See* D. Kosař et al., 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism', 15 *EuConst* (2019) p. 427.

[30] For a literature review on this point, *see* D. Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe', 19 *German Law Journal* (2018) p. 1567 at p. 1573-1584.

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comparative, and theoretical literature on constitutional courts' behaviour to question the broader trend of constitutional courts' depoliticisation. Accordingly, using such insights, this article challenges the growing tendency to depoliticise constitutional court appointments in Europe. It posits that constitutional court depoliticisation in Europe has not met expectations, despite scholarly and institutional support. Additionally, reforming models that depoliticise the appointment process might still be unable to overcome their shortcomings. In response, the article argues in favour of strategically politicising constitutional court appointments (or retaining the role of the elected branches in constitutional court appointments) – albeit with some nuanced exceptions.[31]

Consequently, this article proposes a baseline template to guide the construction of relatively optimal constitutional courts without reducing or removing the elected branches' roles. For this article, an optimal constitutional court is assumed to be relatively neutral, has sufficient levels of social and political legitimacy, and is fairly resistant to being captured or packed. As discussed above, all these elements are vital in enabling a constitutional court to carry out constitutional decision-making. Although it can be argued that an optimal constitutional court requires far more than these characteristics, such as restraint, appropriate jurisdictional powers, broad remedial authority, transparency, etc,[32] this article adopts a rather minimalist definition. This is because any other characteristics that might be argued to be necessary would be rendered either redundant or impossible to achieve in a constitutional court, lacking the three characteristics above.

It is worth noting that no constitutional court could ever be entirely optimal. This is precisely why the term 'relatively' optimal is deliberately used here. Arguably, no appointment mechanism alone can perfectly maximise all three characteristics. Therefore, when this article refers to an 'optimal' constitutional court, it means one that achieves acceptable levels of neutrality, legitimacy, and resistance from being captured or packed – not a theoretically perfect institution.

As outlined by the baseline template introduced in this article, judges to constitutional court are nominated directly by political parties and/or groups in the legislature, and the number of nominations is proportionate to their respective vote share at the time a particular vacancy arises. However, there is a limitation on the maximum number of nominations that political parties and/or groups within the governing coalition can put forward at any given moment, which is set at half

[31] *See* the final substantive section for instances where some degree of depoliticisation could be justified.

[32] *See* e.g. D.M. Brinks and A. Blass, 'Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice', 15(2) *International Journal of Constitutional Law* (2017) p. 296 at p. 304-312; Castillo-Ortiz, *supra* n. 9, p. 620-630; Institute for Integrated Transitions, *Constitution Hill Global Guidelines on Apex Court Appointments* (Institute for Integrated Transitions 2024).

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the total number of judges on the constitutional court. Additionally, nominations by political parties and/or groups require closed-door confirmations. These confirmations are conducted through consensus-based voting procedures, such as requiring supermajorities, and are carried out via secret ballots. In addition to these broader guidelines, this article provides some additional suggestions to show how its template can be tailored to accommodate a wide range of systems, scenarios, and conditions. The article shows that this baseline template, although not without its imperfections, can more often than now facilitate constituting a relatively optimal constitutional court – at least to the extent that appointment processes can 'facilitate' optimality.[33]

Accordingly, this article hopes to furnish insights for the future of constitutional court reform in Europe, a recurring discourse across nearly all jurisdictions. These insights also hold relevance for jurisdictions that currently rely on political appointments to appoint their judges.[34]

A clarification is necessary before proceeding. Baseline templates can serve essential purposes as a starting point to guide the design of constitutional courts. This is precisely why European supranational bodies endorse them. However, by proposing a baseline template, this article does not make the ambitious assertion that its proposed template can or should be adopted across every European jurisdiction. Caution must be exercised before transplanting any template. The unique political and legal realities of certain jurisdictions will undoubtedly affect the costs and benefits of implementing the proposed template and might necessitate deviations from or complete abandonment of the baseline rules suggested here. Possible situations could include cases where the legislature is significantly unrepresentative and/or dysfunctional or contexts in which the existing constitutional court is functioning relatively effectively, and any redesign would incur unwarranted social and political costs. Even otherwise, when adapting this template to different European jurisdictions, several of the

[33]Judicial appointments can facilitate constituting an optimal constitutional court but cannot guarantee it. Many other design and socio-political-cultural factors must fall in place for a constitutional court to be optimal. *See* e.g. L.B Tiede, 'Selecting Judges', in L. Epstein et al. (eds.), *The Oxford Handbook of Comparative Judicial Behaviour* (Oxford University Press 2024) p. 347. Moreover, the institutional design of constitutional courts, including appointment processes, has inherent limitations. For example, in situations where one party, as currently in Hungary, dominates the government and expects continued dominance, a constitutional court's effectiveness is significantly constrained, regardless of its design. In such cases, the constitutional court may resort to passive tactics or deferral for self-preservation against potential attacks or dismantlement. *See* e.g. S. Issacharoff and R. Dixon, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy', *Wisconsin Law Review* (2016) p. 683 at p. 700.

[34]These jurisdictions include Andorra, Austria, Azerbaijan, Belgium, Czech Republic, Germany, Hungary, Montenegro, North Macedonia, Poland, Romania, Slovakia, and Slovenia. In fact, proposals to reform Poland's constitutional court are currently being tabled.

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considerations discussed in the final substantive section of this article – and many not discussed – would need to be kept at the forefront of any proposals.

Likewise, it is crucial to tread carefully before using this template in regions beyond Europe. This template has been proposed in the context of 'Europe', where pressures from supranationalism, including the desire of many Council of Europe member states to become permanent EU members, are a significant driver of the trend toward depoliticising constitutional courts. Even when supranational bodies do not directly urge jurisdictions to enact reforms, many European jurisdictions voluntarily undertake reforms to align with 'Euro-centric' standards. Despite varying levels of democracy across these countries – from stable democracies to hybrid regimes – most European jurisdictions have comparatively stronger, more stable, and more representative legislatures.[35] Additionally, supranational bodies and courts provide oversight, particularly on human rights issues. This differs from other regions, where supranational controls might be absent, parliamentary democracy might not be the norm, or legislatures might suffer from representativeness defects uncommon in present-day Europe. In such societies, discussions might need different focal points, which are beyond the scope of this article.[36]

Nonetheless, the article does contend that its proposals are applicable irrespective of the type of role a constitutional court plays in a given society. Constitutional courts, in carrying out constitutional decision-making, serve varying roles across different constitutional systems. Some primarily focus on the abstract review of legislation, others on concrete review through individual complaints. There is also significant diversity in the jurisdictional scope of constitutional courts within Europe. Such variation might suggest that different degrees of politicisation would be required for different constitutional courts, depending on their precise role within a constitutional system. However, all constitutional courts could benefit from the manner of politicisation proposed in this article. This is because the three characteristics identified above – neutrality, legitimacy, and resistance to capture or packing – are fundamental prerequisites for any constitutional court. Without these characteristics, a constitutional court will struggle to undertake constitutional decision-making properly.

The remainder of this article is divided into four substantive sections. The first of these delves into how the first phase of depoliticisation, involving the inclusion of the judiciary as an additional actor in the appointment process, has fallen short of achieving optimality. The second highlights the challenges associated with appointment procedures featuring even higher levels of depoliticisation. The third

[35]For why this is relevant, *see* text accompanying nn. 100-102.

[36]E.g. for a work on the topic with a Latin American focal point, *see* Brinks and Blass, *supra* n. 32, p. 296-311.

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sets out the proposed baseline template for appointing judges. Lastly, the fourth section discusses some supplementary suggestions aimed at accommodating this article's baseline template to various systems, scenarios, and societal conditions.

Mixed appointments: the first phase of depoliticised constitutional courts

The adoption of the mixed appointment model marked the early stages of depoliticising constitutional court appointments in Europe. This model introduced a significant shift in constitutional court appointments by incorporating the ordinary judiciary or non-political appointing institutions alongside the elected branches into the appointment process. Italy, in 1955, pioneered this approach. Its post-World War II constitution established a system where five judges are appointed each by the indirectly elected President, the legislature (subject to a super-majority approval), and the country's highest courts.

The mixed appointment model has since been adapted in various forms across Europe. In Spain, for example, eight judges are nominated by the legislature, requiring a three-fifths majority for approval, with an equal number of nominees from the lower and upper houses. Additionally, two judges are nominated by the executive and two by the judicial council. The hereditary monarch formalises these nominations. Though the Venice Commission has since adjusted its stance,[37] it strongly advocated for this model's 'pure form' during the post-Cold War democratic wave in central and eastern Europe.[38] Today, the 'pure form' of the mixed appointment model is Europe's most widely used mechanism, adopted by 11 of the 31 Council of Europe member states with constitutional courts.[39]

This model's precise efficacy depends on each branch's specific appointment procedures. Typically, the more controls imposed on each appointing branch, the more optimal the constitutional courts are considered to be.[40] Critiques of this

[37]As discussed in the text accompanying n. 56, the Venice Commission still *de facto* advocates mixed appointment models but supplements this model with preliminary screening by a non-political body.

[38]Venice Commission, Vademecum on Constitutional Justice, CDL-JU(2007)012, 11 May 2007, p. 8.

[39]These jurisdictions are Armenia, Bosnia and Herzegovina, Bulgaria, Georgia, Italy, Latvia, Lithuania, Moldova, Portugal, Serbia, and Spain. It should be noted (and as discussed in the the final substantive section) that Portugal's mixed-model system possesses unique characteristics that set it apart. In the case of Bosnia and Herzegovina, the appointment process diverges from the typical involvement of the ordinary judiciary or judicial councils. Instead, the President of the European Court of Human Rights plays a pivotal role in this process. This system was established to aid the country's transition following its post-war period.

[40]*See* e.g. Brinks and Blass, *supra* n. 32, p. 310.

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model often cite the creation of internally fragmented constitutional courts, which struggle to produce decisive outcomes.[41] Nevertheless, scholars and supranational bodies have generally preferred this model over purely political appointments for two key reasons: first, it prevents the monopolisation of the constitutional court by a single governmental branch or political faction; and second, it supposedly fosters a diversity of perspectives within the constitutional court, thereby bolstering its legitimacy and neutrality.[42]

However, this model is not impervious to capture or packing.[43] This is mainly because political actors still appoint a plurality of judges to the constitutional court in all European countries, utilising the mixed appointment model. Furthermore, in most of these systems, judges for ordinary courts are selected through judicial councils. As discussed later, these councils are also highly susceptible to capture or packing.

The case of Georgia over the past couple of years illustrates the vulnerability of constitutional courts to capture and packing under the mixed appointment system. In Georgia, the nine-member constitutional court comprises three judges appointed by the President, three by the legislature through a simple majority, and three by the Supreme Court, which is filled through nominations by a judicial council. While a detailed exploration is beyond this article's scope, the ruling Georgian Dream party (GDP), under billionaire Bidzina Ivanishvili's leadership, executed a strategic takeover of the judicial council through a series of open and covert tactics.[44] These manoeuvres effectively placed the Supreme Court under the GDP's control, allowing it, in conjunction with a cooperative President, to pack the entire constitutional court.[45] The Georgian constitutional court's rulings have shown a discernible tilt in favour of the GDP, supporting its questionable actions.[46]

[41]T. Ginsburg, 'Economic Analysis and the Design of Constitutional Courts', 3(1) *Theoretical Inquiries in Law* (2002) p. 49 at p. 67-68.

[42]*See* Venice Commission, Opinion on the Draft Constitutional Amendments with Regard to the Constitutional Court of Turkey, CDL-AD(2004)024, 29 June 2024, p. 4-5; *see also* L.B. Tiede, 'Mixed Judicial Selection and Constitutional Review', 53(7) *Comparative Political Studies* (2020) p. 1092 at p. 1093-1095, and L.B. Tiede, *Judicial Vetoes* (Cambridge University Press 2022).

[43]Ginsburg, *supra* n. 41, at p. 67-68.

[44]*See* Z. Davit, 'The Rule of Law in Georgia: What Can the European Union Leverage?' *Verfassungsblog*, 5 March 2021, https://verfassungsblog.de/rule-of-law-georgia/, visited 26 February 2025. For a more detailed study of Georgia and judicial capture, *see* N. Tsereteli, 'Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia's Failed Judicial Reforms, Informal Judicial Networks and Limited Access to Leadership Position', 47 *Review of Central and Eastern European Law* (2022) p. 167.

[45]Ibid.

[46]*See* T. Morrison, 'Georgia's Constitutional Court Judges Elect New Chair', *Georgia Today,* 21 October 2016, http://gtarchive.georgiatoday.ge/news/4969/Georgia%E2%80%99s-Constitutional-Court-Judges-Elect-New-Chair, visited 26 February 2025.

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Proponents of this model might point out that requiring the legislature to appoint judges through supermajorities could have averted this situation. However, even with such a measure, the GDP would likely still have influenced *at least* six out of the nine constitutional court judges through appointments made by the President and the Supreme Court. Alternatively, proponents of this model might want to shift the focus to reforming the judicial council (or similar appointing institution) as a more effective solution than abandoning the mixed appointment system. However, while such reforms are beneficial, they may not sufficiently ensure neutrality and legitimacy in the constitutional court constituted via the mixed appointment model, even in relatively stable European democracies.

Concerning neutrality, consider the case of Italy. Italy typically ranks in the top quartile of democracy rankings among European nations. At the same time, it has a highly fragmented political landscape – providing conditions conducive to exercising judicial power – which renders its constitutional court rather powerful.[47] As mentioned above, in Italy, the indirectly elected President, the legislature, and the highest courts appoint an equal share of judges to the constitutional court. The fragmented political landscape has barred any single political party or group from capturing the constitutional court or other institutions involved in appointing constitutional court judges. Nevertheless, the political orientation of these appointing bodies has often led to the association of the constitutional court with certain political parties and groups. While reducing voting patterns on constitutional courts to only political leanings is overly simplistic,[48] empirical research by scholars like Pellegrina, Garoupa, and Grembi suggests a degree of correlation. Their analysis reveals a connection between the political leanings of the constitutional court's majority and its decisions in controversial cases,[49] particularly when these leanings align with the political complexion of the legislature's ruling coalition.[50] Similar empirical results have been documented in Spain,[51] which ranks

[47]For why this is the case, *see* e.g. V.F. Comella, 'The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism', 82 *Texas Law Review* (2003-2004) p. 1705 at p. 1733.

[48]*See generally* N. Garoupa et al., 'Mixed Judicial Selection and Constitutional Review: Evidence from Spain', 17 *EuConst* (2021) p. 287.

[49]L.D. Pellegrina and N. Garoupa, 'Choosing between the Government and the Regions: An Empirical Analysis of the Italian Constitutional Court Decisions', 52 *European Journal of Political Research* (2013) p. 558; N. Garoupa and V. Grembi, 'Judicial Review and Political Partisanship: Moving from Consensual to Majority Democracy', 43 *International Review of Law and Economics* (2015) p. 32.

[50]*See* Pellegrina and Garoupa, *supra* n. 49.

[51]N. Garoupa et al., 'Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court', 29(3) *Journal of Law, Economics, and Organization* (2013) p. 513.

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marginally higher than Italy in democracy rankings and where the mixed appointment model works slightly differently.

The Spanish case also illustrates this model's proneness to legitimacy defects. Spain's model for appointing constitutional court judges, distinct from Italy's, is divided between elected officials and the judiciary. As stated before, in Spain, the executive nominates two judges, each house of the legislature appoints four judges, and the judicial council nominates two. Given that elected branches are responsible for nominating the majority of constitutional court judges, there is always a possibility that the constitutional court can ideologically align with the ruling political party or group. This has sparked an intense political contestation over judicial appointments.[52] The most recent contestation led to an impasse in appointments that lasted over four years – and is arguably far from over.[53] This protracted deadlock has negatively impacted the social legitimacy of the constitutional court.[54] Furthermore, in Spain, it is feasible for a single political party or group to appoint a substantial number of the constitutional court's judges. Additionally, nominees from the judicial council may also have affiliations with specific political parties or groups. As was stated in the introduction, this mere potential for the constitutional court to align with certain factions has negative implications for its political legitimacy. When political parties and/or groups, whether justifiably or not, perceive that they have been unfairly disadvantaged in the appointment process, they often accuse the constitutional court of being controlled by rival factions. This situation even adversely affects the constitutional court's social legitimacy, particularly among the populace affiliated with the political parties and/or groups that consider themselves marginalised in the appointment process.

While the mixed appointment model might represent a significant advance over current political appointment models, it is not perfect. Susceptibility to capture or packing and challenges in ensuring neutrality and legitimacy are persistent issues. Moreover, with the mixed appointment model, these issues become harder to detect due to the multiplicity of appointing institutions. The model's successful working often hinges on the fortuitous alignment of appointments, leaving its optimality partly to chance.

[52] S. Jones, 'Spanish PM Vows to End "Unjustifiable" Block on Court Changes', *The Guardian,* 20 December 2022, https://www.theguardian.com/world/2022/dec/20/spanish-judges-block-draft-legislation-that-would-affect-their-own-court, visited 26 February 2025.

[53] Ibid.

[54] 'Spanish Politicians are Arguing over Judges', *The Economist*, 15 September 2022, https://www.economist.com/europe/2022/09/15/spanish-politicians-are-arguing-over-judges, visited 26 February 2025.

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Non-political appointments: the next phase of depoliticised constitutional courts

Stakeholders involved in constitutional court creation and reform are aware of some of the aforementioned issues with mixed appointment models.[55] This recognition has spurred a movement towards enhanced depoliticisation in recent times. This article uses the umbrella term 'non-political appointment models' to describe the various models favoured in this next phase of depoliticisation. These models typically involve judges recommended, nominated, or appointed by a committee or body predominantly composed of non-political members, usually judges –though they can include members from other groups such as civil society, the bar, universities, etc. In this model, the elected branches may only have a limited role, such as having representatives on nominating committees or approving or choosing from a shortlist provided by these non-political entities. Consequently, this approach further diminishes – and occasionally eradicates – the involvement of the elected branches in the appointment process. As was the case with the mixed-appointment model, the primary objective of this model is to reduce the possibility of capture or packing and produce more neutral and legitimate constitutional courts.

For example, among jurisdictions with constitutional courts, in Luxembourg, the appointment process involves the Grand Duke appointing nine judges based on recommendations from the Superior Court of Justice and the Administrative Court of Appeals. Meanwhile, in Malta, the indirectly elected President appoints judges, acting upon advice from the Judicial Appointments Committee, which is composed of non-political members. The appointment mechanisms in Albania and Ukraine feature an appointment committee of non-political members. This committee presents a shortlist of three candidates for each vacancy to the relevant appointing authorities, which include the legislature, the president, and the constitutional court itself. These authorities are restricted to selecting appointees exclusively from this list. In Turkey, the president and the legislature appoint an unequal number of judges based on recommendations from various courts and non-political bodies. Additionally, decentralised systems present other variants of this model. For example, in Estonia, the legislature confirms nominees proposed by the Supreme Court. In Cyprus, the President performs a similar role in confirming nominees. In the UK, the Monarch confirms nominations of the Prime Minister, who receives binding recommendations from the Lord Chancellor (equivalent of the Minister of Justice), who in turn can only suggest

[55]*See* Venice Commission, Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges, CDL-PI(2019)008, 11 December 2019, p. 15-16.

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judges to the Prime Minister recommended by an independent selection commission.

The Venice Commission has now expressed a preference for non-political models for constitutional courts.[56] This stance has even influenced EU policy, leading it to require prospective members, such as Ukraine, to implement this model as a precondition for membership.[57] Although only the five jurisdictions discussed above – Luxembourg, Malta, Albania, Ukraine and Turkey – employ the non-political appointment model for constitutional court appointments, except for the microstates of Andorra and San Marino, all European jurisdictions with decentralised courts have already shifted to this model. These five jurisdictions also represent a large share of European constitutional courts that have recently undergone reform in their appointment process. Furthermore, for lower court judges, European supranational bodies and courts have even strongly advocated relying entirely on judicial appointment committees without any further political approval process.[58] Based on these recommendations, several new European democracies were forced to utilise such appointment models for lower courts.[59] Similarly, many established democracies have voluntarily embraced these models.[60] There has even been a scholarly push for constitutional courts in centralised systems to adopt the non-political model.[61] Consequently, it is highly likely that future reforms in constitutional court appointment procedures across Europe will increasingly utilise this model.

The principal challenge associated with non-political models centres on legitimacy issues.[62] Such models markedly disempower (albeit to different degrees depending on the precise role and composition of the appointing bodies) the elected branches' voice in constitutional court appointments.[63] In turn, this reduces constitutional courts' political legitimacy. Diminished political legitimacy may make the elected branches less inclined to respect and adhere to the constitutional court's rulings. Although an increase in societal legitimacy could

[56]Venice Commission, Ukraine Urgent Opinion on the Reform of the Constitutional Court, CDL-AD(2020)039, 11 December 2020, p. 15.

[57]European Commission, Opinion on Ukraine's Application for Membership of the European Union, COM(2022) 407, 16 June 2022, p. 5.

[58]K. Šipulová et al., 'Judicial Self-Governance Index: Towards a Better Understanding of the Role of Judges in Governing the Judiciary', 17 *Regulation & Governance* (2023) p. 22 at p. 23.

[59]Kosař, *supra* n. 30, p. 1572-1573.

[60]Ibid.

[61]Castillo-Ortiz, *supra* n. 9, p. 643-645.

[62]*See* e.g. M. Bobek and D. Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', 15(7) *German Law Journal* (2014) p. 1257 at p. 1269.

[63]*See* E.W. Böckenförde, 'Democracy as a Constitutional Principle', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrechts des Bundes* [*Handbook of Federal Constitutional Law*], 3rd edn. (CF Müller 2005) § 24.

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counterbalance a lack of political legitimacy, anecdotal evidence indicates that non-political models do not necessarily enhance the societal legitimacy of constitutional courts. Urbániková and Šipulová's cross-country analysis of countries utilising this model for ordinary judicial appointments reveals that contrary to expectations, such models or the decision-making of constitutional courts constituted through them have not led to improved public confidence in the judiciary.[64] In fact, they find that in more consolidated European democracies, these models correlate with a decline in public confidence in the judiciary.[65] A key factor for this is the lack of transparency of the appointment bodies.[66] Moreover, appointment bodies and their internal workings are frequently associated with nepotism, corruption, and clientelism.[67] Further, as discussed later, this model can potentially strengthen the influence of various elite actors. The appointments made or recommended by such elite actors may not adequately reflect a breadth of societal interests. Thus, there is uncertainty about whether non-political appointment mechanisms improve the legitimacy of constitutional courts.

Unless a polity is highly fragmented, the lack of legitimacy can negatively impact a constitutional court's operation. This is because, to the extent that their design is not conducive to heightened levels of political and social legitimacy, non-politically constituted constitutional courts operate within smaller 'tolerance intervals'. This concept denotes the zone of decision-making within which elected branches will tolerate an independent constitutional court – or, at a bare minimum, enforce its decisions, even if begrudgingly.[68] The extent of this interval varies based on factors such as public support for the constitutional court and the elected branches' interest in preserving an independent constitutional court, possibly as a form of future political insurance.[69] The minimal involvement of elected branches in non-political appointment models results in their reduced investment in the constitutional court.[70] Additionally, there is a broader separation between the constitutional court and the public. As a result, these constitutional courts tend to have narrower tolerance intervals. Under

[64]M. Urbániková and K. Šipulová, 'Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?', 19 *German Law Journal* (2018) p. 2105.

[65]Ibid.

[66]Ibid. *See also* P.H. Solomon, 'Transparency in the Work of Judicial Councils: The Experience of (East) European Countries', 43(1) *Review of Central and East European Law* (2018) p. 43.

[67]S. Spáč et al., 'Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia', 19(7) *German Law Journal* (2018) p. 1741.

[68]L Epstein et al., 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government', 35 *Law and Society Review* (2001) p. 117 at p. 127-131.

[69]Ibid.

[70]*See* Choudhary and Blass, *supra* n. 6, at p. 10.

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unfavourable socio-political conditions, they may struggle to assert their authority over elected branches.

Despite these criticisms against non-political appointment models, their proponents might suggest that the diminished risk of capture or packing and the neutrality of the constitutional court can compensate for any legitimacy defects. However, it is questionable whether these purported advantages actually materialise. Non-political appointment models are susceptible to capture and packing for several reasons.

First, their legitimacy defects can serve as convenient pretexts for the elected branches, particularly in Europe's newer democracies lacking strong constitutional traditions, to reform the constitutional courts or their appointment bodies.[71] This creates a paradoxical situation where efforts to ensure the political independence of the constitutional court inadvertently render it more susceptible to political interference, often with successful outcomes.[72] Second, in many instances, the elected branches appoint half or more members to the bodies responsible for nominating constitutional court judges.[73] This involvement allows the elected branches to capture or pack these bodies, paralleling the direct capture or packing observed in political appointment models. Third, it can be argued that this latter possibility can easily be addressed by having appointment bodies wholly or predominantly made up of judges and other non-political appointees.[74] Though this may seem an improvement, it overlooks the reality that such actors frequently maintain ties with certain political factions.[75] Political factions can rely on these ties to capture or pack appointment bodies with minimal fanfare.[76] Political incumbents can even capture or pack these appointment bodies from the inside through *quid pro quo* relationships.[77] Such captures and packing are more problematic as they are less visible to the public. It is far easier to detect and mobilise against the outright capture and packing of constitutional courts than against the more subtle forms.[78]

Non-political appointment models also raise questions regarding neutrality, even in the most ideal situations. Isolation from direct political influence does not

[71]For a general account of this trend, *see* Kosař et al., *supra* n. 29, at p. 430.

[72]For an example of a successful capture, *see* the text accompanying nn. 86-89.

[73]Šipulová et al., *supra* n. 58, p. 23.

[74]For proponents of such viewpoints, *see* e.g. Castillo-Ortiz, *supra* n. 9, p. 643-645.

[75]Spáč et al., *supra* n. 67.

[76]*See* M. Avbelj, 'Contextual Analysis of Judicial Governance in Slovenia', 19 *German Law Journal* (2018) p. 1901.

[77]*See* Spáč et al., *supra* n. 67, p. 1764. *See also* A. Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition', 19 *German Law Journal* (2018) p. 1839.

[78]Kosař, *supra* n. 30, p. 1594.

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guarantee judges' impartiality from specific ideologies or viewpoints.[79] Studies by Garoupa and Ginsburg find no evidence that the formal political insulation purported by non-political appointments translates into greater judicial independence.[80] Kischel rightly points out that depoliticisation 'makes a promise it cannot keep: no neutral justices will be free from value judgments or a personal outlook on the world; but those will be more difficult to determine'.[81] Even in ideal situations, appointees may reflect biases towards the viewpoints of dominant actors in the appointment process.[82] This could be judges, the bar, or other interest groups involved.[83] These actors may have specific social and political orientations and may favour certain ideological or professional backgrounds over others.[84] Moreover, members of non-political appointing bodies are typically part of the societal elite, leading to constitutional courts that are potentially elite-driven and excessively counter-majoritarian.[85]

The example of Turkey's constitutional court during the pre-Erdoğan era illustrates the complexities inherent in non-politicised appointment models. Prior to Erdoğan's ascendancy, the indirectly elected president was responsible for appointing constitutional court judges based on recommendations from higher courts.[86] As Bali notes, the military, with its affinity for the Western-leaning ideals of Turkey's founder, General Atatürk, exerted considerable influence over these appointments.[87] When political conditions in Turkey were conducive to the constitutional court asserting judicial power, this arrangement substantially impacted its decisions. In high-profile cases, such as those concerning banning political parties and the prohibition of headscarves in public buildings, the constitutional court's rulings often mirrored the military's stance, sometimes

[79] *See* Urbániková and Šipulová, *supra* n. 64, p. 2105.

[80] *See generally* N. Garoupa and T. Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence', 57(1) *The American Journal of Comparative Law* (2009) p. 103.

[81] U. Kischel, 'Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective', 11(4) *International Journal of Constitutional Law* (2013) p. 962 at p. 972.

[82] Kosař, *supra* n. 30, p. 1591-1592.

[83] *See* N. Garoupa and T. Ginsburg, 'The Comparative Law and Economics of Judicial Councils', 27 *Berkeley Journal International Law* (2008) p. 53. *See also* M. Popova, 'Can A Leopard Change Its Spots? Strategic Behavior Versus Professional Role Conception during Ukraine's 2014 Court Chair Elections', 42 *Law & Policy* (2020) p. 365.

[84] C. Parau, 'The Drive for Judicial Supremacy', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) p. 619.

[85] *See* e.g. C. Parau, *Transnational Networks and Elite Self-Empowerment* (Oxford University Press 2018).

[86] A. Bali, 'Courts and Constitutional Transition: Lessons from the Turkish Case', 11 *International Journal of Constitutional Law* (2013) p. 666 at p. 672.

[87] Ibid, p. 671-672.

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contradicting both the constitutional text and prevailing public opinion.[88] Such decisions paved the way for Erdoğan to push back against the constitutional court during his first term as Prime Minister. He capitalised on the constitutional court's controversial decisions to introduce a new appointment procedure, which gained endorsement through a public referendum.[89] This new appointment procedure aided Erdoğan in packing the constitutional court with his loyalists.

A proposed template for constitutional court appointments

The preceding sections indicate that depoliticisation does not always yield optimal constitutional courts. Efforts to enhance non-political appointment models by increasing transparency and improving internal operations may not be the answer. The inherent flaws of this model are too profound to address through minor adjustments. Legitimacy concerns will persistently plague non-political appointment models. Alternatively, a return to the 'pure form' mixed-appointment model as the standard baseline template, even with heightened controls on each appointing institution, is a risk-averse option that cannot reliably guarantee a relatively optimal constitutional court. The model's success ultimately hinges on the fortuitous alignment of appointments. Meanwhile, as implemented in most jurisdictions, political appointment models also have significant problems.

As a solution to this conundrum, the remainder of this article will argue that the path forward lies in strategically politicising constitutional court appointments. This is demonstrated by introducing a baseline template that draws from various European practices. Given the turn towards depoliticisation, this has been a largely unexplored endeavour. At the outset, it is important to note that, ideally, at least the essential principles of this baseline template should be incorporated into national systems through constitutional entrenchment.[90] Such an approach would mitigate the potential for manipulation by transient majorities.

[88] A. Sethi, 'When Should Courts Invalidate Constitutional Amendments', 18(1) *ICL Journal* (2024) p. 25 at p. 33-34.

[89] *See* e.g. A. Bali, 'Unpacking Turkey's "Court-Packing" Referendum', *Middle East Research and Information Project*, 5 November 2005, http://www.merip.org/mero/mero110510, visited 26 February 2025.

[90] While the underlying principles of the baseline template should be embedded in the jurisdiction's constitution, it is both feasible and beneficial to detail some of the more precise aspects in ordinary legislation. Nevertheless, it would be advantageous if such legislation were designated as a special law requiring higher legislative thresholds for modification.

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Specifically, according to this proposed template, the nomination and confirmation of constitutional court judges should proceed as follows:

I. Nomination of judges
- (a) Constitutional court judges shall be nominated by political parties and/or groups[91] represented in the legislature, with nomination rights distributed proportionally based on electoral results at the time a vacancy arises.
- (b) The nomination formula shall ensure meaningful participation of smaller political parties and/or groups through an appropriate threshold mechanism.
- (c) Political parties and/or groups that form part of the governing coalition[92] shall collectively be limited to nominating no more than half the total number of constitutional court judges, regardless of their combined parliamentary strength.[93]

II. Sequence of nominations
- (a) When multiple political parties and/or groups qualify for nomination rights, priority shall be given to the political parties and/or groups with the highest unrepresented vote share relative to their current judicial nominations.
- (b) In case of equal claims between political parties and/or groups, preference shall go to the political parties and/or groups with fewer overall nominations to the constitutional court.

III. Confirmation process
- (a) All nominations require confirmation through consensus voting rules, such as a supermajority vote in the legislature.
- (b) Before the confirmation vote, nominees must demonstrate their qualifications through a process established by law.[94]
- (c) Confirmation votes shall be conducted through secret ballots in closed sessions.
- (d) Confirmed nominees may assume office directly or undergo formal appointment by the head of state.

[91]For purposes of this template, the term political parties and/or groups refers to structured political parties and/or groups with formal representation within the legislature, whether or not they are constitutionally recognised. For the successful operation of this template, rules governing constitutional courts would thus need to clarify what constitutes a party and/or group for nominating purposes. This clarification must be tailored to the jurisdiction's legal framework and political realities, including how political parties contest elections (whether at a party level, group level, or hybrid).

[92]To prevent political parties and/or groups from manipulating the system by strategically placing allies within the opposition ranks, precisely defining the 'governing coalition' is essential. Beyond the traditional inclusion of coalition partners, a potential approach could be to consider any party with members serving in the cabinet as part of the ruling coalition.

[93]In cases of super-grand coalitions, modified rules for maintaining opposition representation could apply as detailed in the final substantive section.

[94]While specific qualification requirements may vary by jurisdiction, they must include minimum standards for legal expertise, professional experience, and ethical conduct.

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The baseline template begins with proportionally dividing nominations among political parties and/or groups, as outlined in paragraphs I and II. This method of proportionally allocating 'all'[95] nominations between political parties and/or groups is already practised in jurisdictions like Germany and Belgium. Nevertheless, the appointment systems in these jurisdictions depend on informal arrangements to distribute seats among political parties and/or groups.

Informal practices have benefits such as flexibility and adaptability. However, the effectiveness of these informal practices largely depends on the political culture and inter-party trust within each jurisdiction. Further, a significant drawback of informal appointment systems is their tendency to exclude smaller, independent, or newly-established political parties and/or groups from the appointment process – including in countries with strong political cultures and inter-party trust. These arrangements are also not sensitive to changes in the political composition of the legislature. Additionally, these arrangements often lack transparency and consistency in the allocation of nominations, negatively impacting the broader optimality of the constitutional court. At a more general level, a baseline template cannot 'completely' rely on informal systems due to the risk of non-compliance in jurisdictions with unstable party systems and/or a lack of mutual trust between political parties and/or groups. Hence paragraphs I and II help overcome such issues by suggesting a degree of formalisation (at least regarding the core elements of the baseline template) while leaving room to draw on the advantages of informal arrangements in societies that may benefit from the same.[96]

Regarding this baseline template's model of dividing nominations between governing and opposition coalitions, recent constitutional scholarship has begun challenging traditional assumptions about majoritarian democracy. For example, Khaitan's theory of weighted majoritarianism,[97] and similar concepts, such as Abebe's inclusive majoritarianism,[98] argue that certain domains of constitutional governance might benefit from limiting governing coalition influence and giving the opposition coalition a voice. A constitutional court appointment process is an apt place to implement such concepts as balanced nomination rights in appointments,

[95]Other jurisdictions utilise similar informal political party quotas for the division of judges nominated/appointed solely by the legislature (with the remaining judges appointed by the executive or judiciary). These include France, Italy, Portugal, Spain, and Austria.

[96]Among other things, this could include allowing informal political bargaining regarding the type of nominations that non-nominating political parties and/or groups might be ready to accept, or allowing a larger party to informally give one of their nominations to a smaller coalition or group members in return for other political benefits (or even vice versa).

[97]T. Khaitan, 'Balancing Accountability and Effectiveness: A Case for Moderated Parliamentarism', 7(1) *Canadian Journal of Comparative and Contemporary Law* (2021) p 81.

[98]A. Abebe, 'The (Il)legitimacy of Constitutional Amendments in Africa and Democratic Backsliding', *Asian Journal of Comparative Law* (2024).

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even if technically 'overrepresenting' opposition political parties and/or groups, enhances the constitutional court's optimality. It does so in several ways.

First, it can bolster the overall neutrality of a constitutional court. Unless a polity has a minority government significantly short of a legislative majority,[99] such proportional allocation would lead to an equal division of constitutional court seats between governing and opposition coalitions. This balance can promote neutrality across the bench. It also does so in a manner conducive to constitutional decision-making. Constitutional decision-making inherently involves judges making value judgements with political implications.[100] Sometimes, answers are neither provided in the constitution nor fit a yes or no binary. In such scenarios, it is beneficial for constitutional courts, considered as a whole, to avoid favouring any specific political side and to consider society's varied interests.[101] These diverse interests are best – albeit imperfectly[102] – represented in the legislature. As previously mentioned, no judge is entirely devoid of personal value judgements or worldviews. Depoliticising appointments might protect the constitutional court from direct political influence without necessarily resulting in a neutral constitutional court. It might, at times, even result in a highly counter-majoritarian constitutional court. A system where various political parties and/or groups in the legislature nominate judges, as per paragraphs I and II, can help promote partisan balance in the constitutional court and prevent it from favouring any specific viewpoint, particularly a highly countermajoritarian one.

Second, the proposal to proportionally divide nominations can enhance the societal and political legitimacy of a constitutional court. Political legitimacy is best achieved with a broad spectrum of political contributions to appointments.[103] Appointment models involving the elected branches (both through political and mixed-appointment models) often marginalise opposition political parties and/or groups, reducing overall legitimacy. The baseline template presented here aims to rectify this by ensuring broad political participation, by

[99]In scenarios where the non-governing coalition could potentially appoint a majority of the constitutional court's judges, this would still reflect the political composition of the legislature. However, according to the rule outlined in paragraph III, non-governing coalitions would still be required to negotiate with governing political parties and/or groups and would be unable to appoint judges who are unacceptable to them.

[100]*See also* A. Dyevre, 'Technocracy and Distrust: Revisiting the Rationale for Constitutional Review', 13(1) *International Journal of Constitutional Law* (2015) p. 30 at p. 40.

[101]*See* e.g. Brinks and Blass, *supra* n. 32, p. 307-308.

[102]However, these defects might not be as pronounced in Europe, which makes this template more suitable for implementation here. *See* text accompanying nn. 106-107. In cases where they are pronounced, perhaps adding other actors to the appointment process might be an acceptable option. E.g. *see* arguments made by Brinks and Blass, *supra* n. 32, p. 307-308, in the context of Latin America for involving multiple actors in the appointment process.

[103]Choudhary and Blass, *supra* n. 6, p. 10.

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allowing opposition political parties and/or groups to nominate at least half of the constitutional court judges. This approach yields two key benefits for legitimacy: (1) it increases the likelihood of opposition political parties and/or groups respecting unfavourable constitutional court decisions (even if begrudgingly) and refraining from accusations of illegitimacy or capture and packing. The latter often happens when certain political parties and/or groups have not had a chance to nominate judges or nominate only a fraction of the judges compared to political parties and/or groups in power; (2) should opposition political parties and/or groups gain power in the future, they are more likely to maintain and enforce constitutional court decisions and less inclined to attempt to curtail its independence. Likewise, paragraphs I and II's stipulations mandate that small and underrepresented political parties and/or groups are included in the appointment process, hence ensuring their investment in supporting the constitutional court. This addresses a significant issue encountered in jurisdictions where informal arrangements for dividing nominations among political parties and/or groups have led to the exclusion of such political parties and/or groups in the appointment process.[104]

Besides political legitimacy, social legitimacy is vital for constitutional court effectiveness. Public support makes it harder for politicians to ignore or interfere with constitutional court decisions.[105] Social legitimacy can be cultivated through various means, including most notably through the constitutional court's decision-making processes. Overtly partisan or counter-majoritarian tendencies in constitutional courts can undermine their social legitimacy. However, there remains ambiguity regarding the extent to which the constitutional court's institutional design can contribute to ensuring this legitimacy.

The preceding sections illustrated that neither the standard model of political appointments nor the depoliticised frameworks have proven effective in fostering social legitimacy. The baseline template proposed in this article – 'as a matter of design' – is likely to help a constitutional court possess a degree of social legitimacy for two reasons: (1) the nomination of judges by political parties and/or groups

[104]A pertinent issue that remains concerns the representation and consideration of non-political parties and/or group-affiliated independent members within the legislature. One potential approach is to consider independent members as part of the coalition they typically caucus/align with for the purposes of constitutional court appointments. Alternative solutions might involve treating independents as a distinct group for nomination purposes. The most appropriate solution would likely vary depending on the specific jurisdiction and factors such as the usual presence of independents in the legislature and their general alignment tendencies. Regardless of the chosen approach, this baseline template does not place independent legislators at a greater disadvantage than any other political or non-political appointment model.

[105]G. Vanberg, 'Constitutional Courts in Comparative Perspective: A Theoretical Assessment', 18 *Annual Review of Political Science* (2015) p. 167 at p. 177.

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representing a broad political spectrum ensures that a larger segment of the population feels represented by the constitutional court. This aspect is particularly salient in Europe, where strong parliamentary systems are prevalent. Moreover, due to various factors, including Council of Europe and EU membership requirements and policies,[106] despite their imperfections, the electoral systems in European jurisdictions are generally more functional and representative than those in parts of the world that are frequently criticised for unfair election practices;[107] and (2) the partisan balance within the constitutional court diminishes the likelihood of the court unduly favouring specific political factions or engaging in excessive counter-majoritarian actions.

Third, as detailed in paragraphs I and II, this proportional nomination model prevents any single political party and/or group from appointing a majority of constitutional court judges, as was the case with PiS in Poland, GDP in Georgia, and Fidesz in Hungary. Those in power are limited to nominating half of the constitutional court judges at most. This holds even in cases where political parties and/or groups muster legislative supermajorities, such as Orbán's Fidesz party in Hungary. Paragraph II even counters large political parties' dominance – an issue in jurisdictions with informal quota systems like Germany – by prioritising political parties and/or groups with higher unaccounted vote shares.

Although the nomination rules in paragraphs I and II can contribute to the optimal functioning of a constitutional court, they have their limitations. There is a risk of political parties and/or groups nominating partisan or underqualified judges. Such judges directly assuming office could face opposition from non-nominating political parties and/or groups and their electorates.[108] Moreover, the partisan balance may not always be reflected in scenarios where the constitutional court convenes in smaller odd-numbered panels.[109] Hence, paragraphs I and II alone cannot guarantee neutrality if nominees directly assume office.

To mitigate some of these issues, it is certainly advisable for constitutions or laws governing constitutional courts to specify minimum qualifications/criteria for judges as is required by paragraph III(b). Concurrently, the appointment model should also incorporate a process for confirming nominations that facilitates optimality. Thus, paragraph III(a)'s requirement for nominees to be

[106] *See* e.g. Council of the Europen Union, 'Electoral Rights and Democratic Participation' (2023) https://www.consilium.europa.eu/en/policies/electoral-rights-and-democratic-participation/, visited 26 February 2025.

[107] *See* e.g. Our World in Data, *Free and Fair Elections Index 2023*, https://ourworldindata.org/grapher/free-and-fair-elections-index, visited 26 February 2025.

[108] *See* e.g. K. Bybee, *All Judges Are Political – Except When They Are Not* (Stanford University Press 2020) p. 16.

[109] For additional suggestions to ensure the optimal working of constitutional courts that sit in smaller panels, *see* the final substantive section.

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confirmed through consensus voting rules, such as supermajorities, acts as a crucial check on party nominations and ensures moderation. This is particularly so as it is rare for ruling coalitions in European jurisdictions to consistently secure supermajority vote shares (with a few recent exceptions like present-day Hungary and Armenia).[110] This pattern holds true even in jurisdictions with lower democracy rankings, such as Georgia, Turkey, North Macedonia, and Bosnia and Herzegovina. There is admittedly a risk under this template that the most qualified jurists may not be appointed to the constitutional court, particularly in some of Europe's newer democracies. However, other appointment models in such jurisdictions have often led to greater challenges, as outlined earlier. The mechanism proposed here seeks to strike an adequate balance between ensuring qualified appointees and achieving an optimal constitutional court.

Consequently, in most cases, paragraph III(a) would necessitate some level of support for nominations from non-nominating political parties and/or groups, helping to ensure that no candidates with extreme views or inadequate qualifications are appointed to the constitutional court. Beyond simply ensuring that non-qualified or hyper-partisan judges are not appointed, requiring the appointment of candidates acceptable to at least some elected officials from non-nominating political parties and/or groups, paragraph III could also enhance broader political and social support for the constitutional court.

Closed confirmation procedures and the utilisation of secret ballots for confirmation of nominees, as paragraph III(c) requires, are additional methods that can potentially improve optimality. It is crucial to recognise that advocating for secrecy in politics is not invariably advantageous, as it may detract from transparency, accountability, and the citizens' capacity to hold politicians accountable for their actions. Nevertheless, in the context of confirming nominations (and certainly not in the constitutional court's own decision-making), the benefits of secrecy might outweigh its disadvantages by ensuring the appointment system operates as intended. This is because, first, open confirmation processes and public voting can create pressure on politicians to adhere to party lines, potentially suppressing their genuine preferences.[111] Second, secret ballots in confirming constitutional court nominations might encourage political parties and/or groups to nominate candidates who are likely to gain acceptance from a critical mass of legislators, both within and beyond their

[110]In such dominant party scenarios, if the governing political parties and/or groups are not ready to play by the rules or ethos of constitutionalism, any appointment model is unlikely to be effective. As was discussed in the previous section, even non-political appointment models give way in such setups. At least with this article's baseline template, the constitutional court is shielded from covert captures, which are harder to mobilise against.

[111]Occasionally, this situation may result from formal or informal rules that enforce party discipline. In other instances, it could stem from political expectations to adhere to party stances.

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own political parties and/or groups. Third, incorporating secret ballots and closed confirmation processes can act as a moderating force in an otherwise politicised appointment process.[112] Comparative experiences from jurisdictions like the United States illustrate that highly politicised and publicised appointments can diminish public trust and adversely impact the court's legitimacy.[113] Echoing this sentiment, Kühn and Kysela have observed similar challenges in the Czech Republic, where an American-style open confirmation system is employed.[114]

Considering that one of the critical goals of any appointment process is to bolster legitimacy, a certain level of secrecy can play an instrumental role. Therefore, while secrecy in the appointment process has its costs, these are arguably balanced by the benefits outlined above. Additionally, the electorate remains informed about which party or group is nominating a judge and whether the nomination achieves the necessary consensus voting thresholds. Hence, despite the element of secrecy in the proposed baseline template, it maintains a higher level of transparency than non-political appointment models, where the public, and sometimes even the elected branches, are oblivious to how appointments are made.

The consensus-based confirmation system proposed by paragraph III(a) could be criticised to favour the appointment of judges who are legally and politically moderate (whoever those might be in a given context). Though this might be true, whether this is a net positive or negative depends on how one views the role of a constitutional court.[115] If the purpose of the constitutional court is perceived as preserving specific values or protecting them from future majorities, this moderation might be seen as a negative aspect. Conversely, if the constitutional court's role is viewed as being a neutral arbiter in constitutional disputes, having moderate judges becomes a positive attribute.

Importantly, moderation in judges does not imply they will always align with or defer to the elected branches. As mentioned earlier, judicial decision-making cannot simply be reduced to party affiliations.[116] Generally, wherever necessary, judges seek to assert their authority against the elected branches to uphold the

[112]Scholars have argued that the perception of judges being political agents can adversely impact the constitutional courts' social legitimacy (*see* Navarrete and Castillo-Ortiz, *supra* n. 20). This can be ameliorated to some extent by a degree of secrecy. For why this is the case, *see* C.N. Krewson and J.R. Schroedel, 'Modern Judicial Confirmation Hearings and Institutional Support for the Supreme Court', 104 *Social Science Quarterly* (2023) p. 364.

[113]Ibid.

[114]Z. Kühn and J. Kysela, 'Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic'. 2 *EuConst* (2006) p. 183 at p. 201.

[115]A. Sethi, 'Sub-Constitutionally Repairing the United States Supreme Court', 52(4) *Common Law World Review* (2023) p. 128 at p. 147.

[116]*See* Garoupa et al., *supra* n. 48.

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constitutional court's prestige and public image.[117] Compared to depoliticised models, constitutional courts constituted under this template are likely to enjoy greater social and political legitimacy. Hence, they have a wider 'tolerance interval' to assert power against elected branches when the majority of a constitutional court believes that constitutional transgressions have taken place. This is evidenced by constitutional courts' decision-making in cases affecting core constitutional democracy elements (such as human rights, electoral laws, and separation of powers) in European jurisdictions like Germany, Belgium, and Portugal, where political appointment rules encourage the selection of moderate, consensus-supported judges.[118]

It might also be contended that moderate judges could be more cautious on contentious social issues like abortion, LGBTQI rights, or refugee matters. This also might indeed be true. However, the European human rights framework plays a crucial role in these instances. Decisions by European supranational courts on such issues have generally not been illiberal. Member states are bound to comply with these decisions and do so more frequently than is commonly believed.[119] While there are instances of non-compliance, it is not evident that elected branches in jurisdictions known for non-compliance would be more inclined to adhere to similar decisions made by their domestic constitutional courts. Furthermore, even if elected branches do not enforce them, these supranational rulings still offer benefits akin to those provided by domestic constitutional courts, such as guaranteeing a right to a public hearing and serving as focal points for civil society activism and mobilisation.[120]

Adapting the baseline template

The diversity of systems across Europe and the specific considerations and scenarios that arise during appointments might necessitate additional rules or context-specific adaptations of the baseline template. While this challenge is not unique to the template and applies to other appointment mechanisms, it requires careful attention. This section identifies key instances where adaptations or additional rules may be needed and suggests potential solutions. Although a

[117] Garoupa, *supra* n. 13, p. 29.

[118] *See generally* chapters on Germany, Belgium, and Portugal in A. Jakab et al. (eds.), *Comparative Constitutional Reasoning* (Cambridge University Press 2017).

[119] *See generally* C. Hillebrecht, 'The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change', 20(4) *European Journal of International Relations* (2014) p. 1100 at 1123.

[120] *See* D. Kosař and J. Petrov, 'Determinants of Compliance Difficulties among "Good Compliers": Implementation of International Human Rights Rulings in the Czech Republic', 29(2) *European Journal of International Law* (2018) p. 397 at p. 402.

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comprehensive discussion of all possibilities lies beyond the scope of this article, this section focuses on common situations to demonstrate the template's adaptability and address concerns regarding its practical implementation.

Bicameral systems

Ten European jurisdictions[121] with constitutional courts have bicameral parliaments – though for different reasons.[122] The baseline template can be adapted to different bicameral contexts through three potential approaches:

(i) limiting nomination and confirmation rights to political parties and/or groups in one chamber, typically the more democratically representative house; or
(ii) allowing political parties and/or groups in one chamber to nominate judges, while requiring confirmation from the other chamber following this article's template confirmation rules; or
(iii) dividing nomination rights between political parties and/or groups in both houses, with each house independently nominating a set number of judges.

Option (i) is particularly relevant in jurisdictions where one house plays a more symbolic or less influential role than the other. Conversely, in countries where bicameralism is a consequence of federalism, such as Belgium, Bosnia and Herzegovina, and Germany, granting the house representing states a say in the constitutional court appointment process may be necessary.[123] In these cases, careful consideration is needed to design appointment processes that maintain the overall equilibrium of the constitutional court. Option (ii) offers a straightforward solution, but if deemed essential for state interests to have a more pronounced representation, option (iii) might be preferred. Germany, Bosnia and Herzegovina and Belgium all incorporate this option as part of their constitutional court appointments. Should option (iii) be selected, and if similar political parties and/or groups dominate both houses (which is the case with most European bicameral jurisdictions with constitutional courts), calculating the political parties and/or groups's combined vote share across both chambers for constitutional court nominations could be an effective way to ensure a partisan balance on the constitutional court.

[121]These are Austria, Belgium, Bosnia and Herzegovina, Czech Republic, France, Germany, Italy, Romania, Slovenia, and Spain.

[122]Common reasons include: (1) accommodating federalism; (2) balancing regional diversity; (3) improving the legislative process; (4) providing additional checks and balances; and (5) historical legacy. *See* E. Bulmer, *Bicameralism* (International IDEA 2017) p. 5-6.

[123]For how federalism has generally been incorporated into judicial appointments *see* C. Saunders, *Courts in Federal Countries* (International IDEA 2019).

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Presidential and semi-presidential systems

As a matter of default, the baseline template allows nominees, once confirmed by the legislature, to be directly approved as constitutional court judges or after receiving formal confirmation by the head of state. However, this method may not be universally desirable. In Europe, for instance, there are three jurisdictions (France, Ukraine, and Portugal) with constitutional courts operating under semi-presidential systems and one that uses a presidential system (Turkey). In these contexts, particularly where the president has a significant political role, it might be considered important for them to have some level of involvement in constitutional court appointments. Furthermore, a case could be made that parliamentary systems with directly elected presidents[124] could allow for some presidential influence in the appointment of constitutional court judges.

Allowing the president to appoint a specific number of judges to the constitutional court would not be a prudent option. Even in cases where presidents are not overtly partisan, their involvement in appointing judges could potentially disturb the partisan balance of the constitutional court. This issue is highlighted by the previously discussed case of Italy, where the president's role in appointments has influenced the constitutional court's balance.[125] Similarly, in France, which operates as a semi-presidential republic with a political appointment model, the constitutional court's equilibrium and impartiality have been affected due to the president having the authority to appoint a number of judges independently.[126]

To address these challenges, this article's template can be potentially adapted to require nominating political parties and/or groups to present multiple candidates for each vacancy (which still need to be approved via a consensus approval process), with the president selecting from among these nominees. This approach draws from Slovakia's system, where, despite recent implementation challenges,[127] the basic framework of legislative nomination and presidential approval provides a promising potential solution to ensure presidential involvement in the appointment process – at least as compared to other options.

[124]Examples of these in jurisdictions with constitutional courts include Austria, Bulgaria, Croatia, Czech Republic, Lithuania, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, and Slovenia.

[125]*See* text accompanying nn. 47-50.

[126]*See* e.g. Espinosa, *supra* n. 16; Franck, *supra* n. 16.

[127]Though the implementation challenges and deadlocks in Slovakia have less to do with the model of appointment, and more to do with the Parliament deadlocking over appointments. For a detailed explanation of the causes of deadlocks in Slovakia *see* P. Csanyi, *Why is Slovakia not Capable of Electing all Constitutional Court Judges?* (China-CEE Institute 2019). However, as discussed below in this section, this is not an insurmountable problem and can be overcome to a degree with careful design of anti-deadlock provisions.

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Notably, it must also be stated that not all systems with presidential elements require such adaptation. For example, in Portugal, a semi-presidential system, presidents are intentionally excluded from constitutional court appointments to avoid undue influence by a single individual.[128]

Constitutional courts with odd compositions or where the constitutional court sits in smaller odd-mumbered panels

Despite the nomination and confirmation rules, a challenge in implementing this template arises with constitutional courts that have an odd number of judges or operate through smaller panels. Such arrangements can raise concerns about maintaining balance on the constitutional court, as evenly dividing seats between the ruling coalition and the opposition is impossible.

The baseline template can be adapted to these scenarios in several ways. One approach draws from Portugal's unique system of political appointments. In Portugal's informal system, each political side appoints an equal number of judges to the constitutional court. These constitutional court judges jointly select one judge for each political aisle and one 'neutral' judge.[129] A similar but formalised approach could be adopted in jurisdictions with an odd number of constitutional court judges or where the constitutional court sits in smaller odd-numbered panels.

Thus, in some ways, this article's baseline template can be used to construct a specific type of mixed-appointment model. However, the goal in doing so is not depoliticising appointments but rather ensuring a relatively optimal constitutional court. This particular variant of the mixed appointment model should only be used to balance a constitutional court and not depoliticise it. Judges not appointed through political channels have the potential to cause the constitutional court to suffer from some degree of legitimacy and neutrality defects.

Moreover, in theory, lower courts or a judicial council could also undertake the odd judge(s) appointment. Likewise, directly appointing senior-most judges of the lower courts or random selection from a pool of judges could also be used to fill the extra judges. Nevertheless, caution is advised when considering bodies or options other than the already balanced constitutional court for appointing additional judges.

As described above, experiences in Italy and Spain demonstrate that unless nominating bodies are politically balanced, their nominations can unbalance the

[128]S. Amaral-Garcia et al., 'Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal', 6 *Journal of Empirical Legal Studies* (2009) p. 381 at p. 385.

[129]Ibid., p. 388.

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constitutional court.[130] Alternate nominating bodies or other appointing mechanisms should only be used if they can provide judges that would not drastically upset the long-term balance of the constitutional court. Where such options are unavailable, following the process where the judges appointed using this article's baseline template appoint the odd judge(s) may be more prudent, to ensure the constitutional court's relative optimality.

Additionally, for constitutional courts that sit in smaller panels, this article's baseline template might need to be supplemented with additional procedures to ensure partisan balance in panel composition.[131] This could include requirements for balanced representation in panel assignments or rotating panel membership systems.[132]

Preventing deadlocks and appointment delays

Knowing with whom nomination rights lie can reduce the chances of deadlocks, but the added consensus requirements in this template introduce potential risks of appointment deadlocks. However, this is not a reason to abandon the template. The template can adapt to reduce deadlocks through mechanisms such as:

(i) allowing retiring judges to continue until successors are appointed; or
(ii) appointing interim judges using the same options discussed for constitutional courts with odd-numbered judges or those sitting in panels; or
(iii) selecting an interim judge randomly from a pool of judges to temporarily fill the role until a successor is appointed.

The choice among the various mechanisms should reflect each jurisdiction's specific challenges and political realities. Jurisdictions with strong democratic traditions and high levels of inter-party trust might favour holdover provisions (option (i)), as the continuation of retiring judges would maintain the partisan balance. This option is currently used as an anti-dedlock mechanism in Germany. However, this solution could be misused to create *de facto* renewable terms in highly polarised societies and/or ones with deep-seated mistrust between political parties and/or groups. This is precisely why options such as lowering the voting threshold to a simple majority – as is used in Italy – should be avoided. With an option like this, political parties and/or groups could simply wait for the approval threshold to be lowered instead of compromising.

[130] *See* text accompanying nn. 47-54.

[131] For a discussion of how this has been managed in Belgium, where the constitutional court sits in smaller panels (including ways beyond simply ensuring bench balance), *see* Pellegrina et al., *supra* n. 16, p. 308-310.

[132] Ibid.

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Thus, societies with a lack of inter-party trust or strong democratic traditions might benefit from option (ii) or (iii), even if it diminishes the constitutional court's balance a little. While option (iii) is arguably not suited for appointing the odd judge, the case for adopting it as an anti-deadlock provision is certainly stronger – especially if the judges are appointed for interim periods until a successor is appointed.[133] This is because it makes the outcome unforeseeable for political parties and/or groups.[134] As a result, political parties and/or groups might be forced to compromise and appoint a permanent judge rather than taking the risk of playing obstructionist politics.[135]

It must be acknowledged that the mechanisms discussed here are not infallible against deadlocks. Political deadlocks are inherent, even in contexts with high levels of inter-party trust.[136] Even in bodies like judicial councils, deadlocks are likely unless there is a unanimous agreement or political homogeneity, which would raise more serious concerns about neutrality and capture or packing. Falling back on deadlock mechanisms might not be ideal, and it can sometimes be misused. Nevertheless, it is still better than operating at less than full capacity or failing to meet the minimum quorum.

Timing-related considerations

The timing of constitutional court appointments significantly influences the court's composition, impacting its neutrality, legitimacy, and overall functionality. Poorly-defined timing rules can also create opportunities for capture or packing.[137]

The baseline template accounts for certain timing-related factors by ensuring nomination rights are determined at the time a vacancy arises. This approach accommodates both staggered appointments, where terms expire at intervals, and batch appointments, where multiple vacancies arise simultaneously. By reflecting the parliamentary composition at the moment of each vacancy, the template ensures the constitutional court composition remains aligned with the evolving political landscape. Beyond these features, additional rules may be required for specific scenarios. For example,

[133] *See* G. Lübbe-Wolff, 'How to Prevent Blockage of Judicial Appointments', *Verfassungsblog*, 7 October 2022, https://verfassungsblog.de/how-to-prevent-blockage-of-judicial-appointments/, visited 26 February 2025.

[134] Ibid.

[135] Ibid.

[136] Ibid.

[137] *See* D. Kosař and K. Šipulová, 'Comparative Court-packing', 21(1) *International Journal of Constitutional Law* (2023) p. 80 at p. 80-82, 84-85, 87-89, 91-93.

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(i) Transitional appointments: vacancies arising during legislative transitions, lame-duck sessions, or parliamentary dissolution can create ambiguity over nomination rights. To avoid political disputes, laws must clearly define whether the outgoing or incoming legislature holds the authority to make appointments during such periods. While either approach can be justified,[138] clarity and consistency are essential to preserving a constitutional court's optimality and functionality in such instances.

(ii) Mid-term appointments: unexpected vacancies due to resignation, death, or removal can disrupt the constitutional court's carefully calibrated partisan balance. To address such situations, replacements for the remainder of the term could ideally be nominated by the same political parties and/or groups responsible for the departing judge's appointment, thereby preserving political equilibrium. If the original political parties and/or groups no longer exist or have undergone significant change, nomination rights could be recalculated based on the current parliamentary composition. Alternatively, jurisdictions may also appoint interim judges for the remainder of the term in accordance with its anti-deadlock provisions.

In all cases of temporal considerations (including potential ones not discussed in this article), it is crucial to establish clear and explicit timing-related provisions in the laws governing constitutional court appointments. Well-defined rules mitigate the risks posed by temporal disruptions and ensure that the constitutional court's optimality and functionality are preserved.

Grand coalitions

The baseline template's cap on governing coalition nominations poses unique challenges in the context of super-grand coalitions – defined here as alliances between at least some traditionally opposed major political forces that collectively hold a sizable majority. Although grand coalitions that significantly exceed the threshold of simple majority are relatively rare in European jurisdictions with

[138]For a detailed discussion of the arguments (albeit in the American context), *see* R.B. Kar and J. Mazzone, 'The Garland Affair: What History and the Constitution Really Say about President Obama's Powers to Appoint a Replacement for Justice Scalia', 91 *NYU Law Review Online* (2016) p. 53.

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constitutional courts,[139] the occasional occurrence of such coalitions[140] requires rules in place to ensure the baseline template core remains intact.

In situations where super-grand coalitions with a significant vote share might arise, using the baseline template as it is could give the opposition a far greater voice in appointments than prudent or justified by theories such as weighted or inclusive majoritarianism. It might also result in the governing coalition not needing to achieve consensus approval for their nominations. To address this, the template could, if deemed prudent for a particular jurisdiction's context, be temporarily modified to suspend the cap on governing coalition nominations and adopt a proportional allocation of nomination rights among all political parties and/or groups in the legislature.[141] However, to avoid domination by the governing coalition and ensure moderation, these nominations should still require confirmation votes meeting a minimum threshold of support from non-coalition political parties and/or groups.[142] This can help retain some of the core elements of the baseline template, albeit in a very different manner.[143]

Further, to prevent potential manipulation of constitutional court appointment rules in the context of grand coalitions, it is crucial for laws governing constitutional court appointments to define and regulate such arrangements clearly. These rules could include stipulations such as:

(i) Definitional clarity: coalition members must have been political opponents in prior legislative sessions.
(ii) Size thresholds: a specified threshold (whatever this might be in a specific jurisdiction) could be met to qualify as a grand coalition for the purposes of triggering the exception.[144]

[139]Many recent examples of coalitions between historically opposed political parties and/or groups have not significantly exceeded the simple majority threshold. These include the current Italian coalition (Brothers of Italy, Lega, Forza Italia, Us Moderates) with approximately 58% of seats since October 2022, Germany's coalition between SPD, Greens, and FDP which held 52% of seats from December 2021 to December 2024, and Belgium's Vivaldi coalition, which held about 56.7% of seats (85 out of 150) in the Chamber of Representatives from October 2020 to October 2024.

[140]Recent examples include the German CDU/CSU-SPD coalition (2013-2017) with 71% of seats and the Austrian ÖVP-SPÖ coalition (2013-2017) with 60.7% of seats.

[141]This was precisely how nominations were divided informally when the super-grand coalition in Germany referenced in the above footnote was formed between 2013-2017.

[142]An example of this in a different context is seen in the 2017 Thai Constitution, where per Art. 256, 20% of the opposition votes are required for any amendment.

[143]In a jurisdiction, that sees too many super-grand coalitions, perhaps, instead of the baseline template of this article, the adaption described in this section could be used permanently.

[144]In cases of coalitions between traditionally opposing forces who do not command a sizable parliamentary majority (which is a more common occurrence in European politics), the standard template provisions could continue to govern constitutional court appointments, as the arrangement would not significantly overrepresent the opposition.

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(iii) Temporal limitations: modified procedures apply only for the duration of the legislative term or until the coalition dissolves.
(iv) Dispute resolution: the constitutional court itself could be empowered to adjudicate disputes concerning the application of these rules.

While these modifications may seem to deviate from the standard baseline template, they reflect the extraordinary nature of super-grand coalitions and the need for flexibility in such circumstances.

Pluralism and societal diversity

A purely political appointment model, like any other, including depoliticised ones,[145] has the potential to favour certain types of candidates over others. This could lead to the exclusion of crucial linguistic, ethnic, racial, gender, or regional interests in judicial representation. Including diverse voices is desirable for legitimacy and has been empirically shown to enhance the quality of decision-making.[146]

While a mixed appointment model or other mechanisms involving various nominating bodies could be argued to be better suited for promoting pluralism and diversity, simply having separate appointing entities has not always been effective in achieving these goals. For instance, France's political appointment model, where both the executive and legislature independently appoint judges, has historically shown a tendency to select white, centre-right men predominantly from certain universities despite the diversity in French society.[147] Furthermore, judges appointed by different institutions do not necessarily vary in their decision-making approach, as factors like judicial training, social background, political values, and regional affiliations can influence judicial behaviour.[148]

[145]There is some empirical evidence suggesting that appointing bodies being 'sheltered from electoral accountability' results in diminished diversity on a constitutional court. *See* e.g. N. Arrington et al., 'Constitutional Reform and the Gender Diversification of Peak Courts', 115 *American Political Science Review* (2021) p. 851.

[146]*See* e.g. L. Epstein and J. Knight, 'How Social Identity and Social Diversity Affect Judging', 35 *Leiden Journal of International Law* (2022) p. 897; R. Hunter, 'More Than Just a Different Face? Judicial Diversity and Decision-Making', 68(1) *Current Legal Problems* (2015) p. 119. J. Milligan, 'Pluralism in America: Why Judicial Diversity Improves Legal Decisions about Political Morality', 81 *NYU Law Review* (2006) p. 1206.

[147]*See* T. Perroud, 'A Male, White and Conservative Constitutional Judge: The Composition of the French Constitutional Council After the New Appointments', *Verfassungsblog*, 3 May 2022, https://verfassungsblog.de/a-male-white-and-conservative-constitutional-judge/, visited 26 February 2025.

[148]Garoupa et al., *supra* n. 48.

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Therefore, to better accommodate pluralism and social diversity, implementing quotas within this template could be an effective method to ensure diverse representation on the constitutional court. Several European jurisdictions already use quotas in constitutional court appointments for various purposes. For example, in Bosnia and Herzegovina, the legislature appoints six judges, including two Bosniaks, two Serbs, and two Croats. Belgium maintains equal representation for French and Dutch speakers and also has gender quotas. A recurring requirement in many European jurisdictions, a quota requiring a certain number of judges to be sourced from the lower judiciary has been known to diversify opinions on the constitutional court. Garoupa, Gili, and Gomez-Pomar's research indicates that judges from the judiciary tend to make noticeably different decisions compared to those from the bar, academia, or politics.[149]

Such quotas could be easily implemented without compromising the template's core. In cases of implementing quotas, political parties and/or groups' nomination rights would remain proportional to their vote share, but their nominations would need to satisfy relevant diversity requirements, depending on the vacancy that arises.

Conclusion

European constitutional practices increasingly favour depoliticising constitutional court judge appointments. However, this article argues that depoliticisation seldom lives up to its promises. Instead, this article proposes a baseline template that strategically politicises constitutional court appointments while incorporating carefully designed safeguards. This template hopes to demonstrate how a relatively optimal constitutional court can be constituted without completely removing or reducing the elected branches' roles.

Although this article attempts to minimise its template's negatives through various design solutions, it is not without criticisms and trade-offs.[150] Political involvement in appointments may concern those seeking a fully insulated constitutional court.[151] Even those who do not think a completely insulated constitutional court is needed might hope for the involvement of some non-political actors in the appointment process.[152] Despite offsets by the template's other features, a direct political-constitutional court link could negatively impact

[149]Ibid.

[150]Discussions in this article have tried to address many of the criticisms and tradeoffs. *See supra* nn. 151-159.

[151]*See* text accompanying nn. 62-89 for why this might not be an optimal option in the European context.

[152]*See* nn. 40-54 and 62-89 for why this might not be an optimal option in the European context. Also *see* n. 102, for why this argument might still make sense for jurisdictions outside Europe.

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public trust to a certain degree.[153] Moreover, the model's effectiveness hinges in some ways on electoral system representativeness[154] and the political culture of a polity.[155] The template's preference for moderate judges may clash with desires for a more proactive constitutional court.[156] Politicised appointment proponents might question the template's government-opposition nomination balance.[157] Critics could doubt the fairness of giving the opposition more appointment influence than their vote share warrants.[158] Some might even find the template overly complicated.[159]

Nevertheless, this article aims to persuade readers that, despite not being perfect, its baseline template is a more viable alternative to models minimising political involvement in constitutional court appointments (or even existing political appointment models).[160] However, it is crucial to emphasise that this template is not intended as a universal solution for every European jurisdiction. The diversity of constitutional systems and socio-political contexts across Europe necessitates careful, context-specific adaptations[161] or even complete abandonment.

[153]*See* text accompanying nn. 111-114 on how this risk is mitigated.

[154]For why this might not be damaging in the present-day European context, *see* the text accompanying nn. 106-107.

[155]Although it must be stated that in some of Europe's less consolidated democracies, where this baseline template could be considered less effective (and this might well be true), other appointment models have also proved problematic. *See* e.g. text accompanying nn. 40-54, 62-89, 107-108. Whilst this template might not function as smoothly in such societies as it would in more consolidated democracies, this article's argument is that it would nonetheless represent an improvement over existing options.

[156]For why this might not be damaging in the present-day European context, *see* the text accompanying nn. 107-112.

[157]For why a lack of the same is untenable as a practical matter, *see* text accompanying nn. 9-25.

[158]*See* text accompanying nn. 9-25 and 95-107 for why such a regime is necessitated and the alternative not desirable.

[159]Though the proposed baseline template may appear complex, this is a necessary response to the challenges with most constitutional courts today. Simplistic models (be they political or non-political) often fail to address the nuances that this template is designed to accommodate. Further, in the modern era of governance, we already have extremely complicated systems in other areas of governance such as elections and law-making among others, so this template would not be a significant outlier. Even as it pertains to constitutional courts, laws governing constitutional courts in Europe today are highly complex and detailed and already cover many arrangements discussed in this article.

[160]*See supra* n. 155.

[161]While it might be tempting to demonstrate this template's operation through brief examples of its potential application in various European jurisdictions (including using current legislative compositions to illustrate the nomination and appointment process in a said jurisdiction), examples that would fit within a journal-length article risk oversimplifying: (i) the numerous context-specific considerations and adaptations that would be necessary before transplanting this template to a

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If this article's baseline template is deemed valuable, several areas might benefit from future research. As this article introduces only the broad framework of a baseline template, further refinement and adaptation to specific contexts will be required. Investigating the conditions under which this template succeeds or fails will be particularly important, especially in relation to varying levels of political polarisation and democratic consolidation. Such research could identify jurisdictions where the template is likely to work effectively, as well as those where its implementation should be avoided. Given that most European systems have experienced multiple electoral cycles and there is considerable knowledge of their distinct socio-political contexts, such research is likely to be less challenging than in regions with limited or nascent democratic traditions. It is also important to recognise that judicial appointments are just one component of constitutional court functionality. Other institutional factors, such as tenure arrangements, chief justice appointments, bench composition, appointment conditions, and removal procedures, significantly influence constitutional court dynamics. Comprehensive research and thoughtful design in these areas are critical to ensuring optimally functioning constitutional courts.

In conclusion, this article encourages European scholars, constitutional engineers, and supranational bodies to recognise politics as an integral part of constitutional court appointments. Reducing the amount of politics in a system is seldom the solution to improving politics. Instead, embracing and strategically channelling political realities may hold the key to constituting constitutional courts that are relatively optimal and effective in fulfilling their constitutional mandates.

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specific jurisdiction; and (ii) the interplay between the nomination and confirmation process in any given time and space (particularly in jurisdictions with batch and staggered appointments). The lack of examples of this baseline template's real-world applicability is certainly a shortcoming of this article, which might warrant attention on another occasion.

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