Judicial review and institutional balance
Comments on Dimitrios Kyritsis

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Dimitrios Kyritsis has provided us with a marvelously interesting theory of the legitimacy of judicial review. In this paper, I juxtapose my own theory of judicial review against Kyritsis’ in order to develop a precise picture of where we agree and disagree, thus providing a basis for further fruitful discussion. To do so, I briefly summarize Kyritsis’ theory, limiting my summary to those parts relevant for my discussion. I then lay out my own theory of institutional practical concordance that can be applied to the problem of judicial review. The third section collects some common ground between our theories, while the fourth section briefly lists a couple of minor differences and problems. In the fifth section, I engage with what I think is the most important difference between our theories, namely the choice between a combination model or a separation model.

Keywords: judicial review, competence, balancing, formal principles, separation of powers

In a perfect world, there would be no judicial review. There would be no judicial review because it would be unnecessary. Judicial review would be unnecessary, in a perfect world, because the legislature would always ‘get it right’. Statute after statute, the legislature would simply spell out what constitutional rights require, and it goes without saying that, in a perfect world, the executive would follow suit.

Our real world, however, is not perfect for all sorts of reasons. Sometimes regimes are wicked and the legislature makes laws that foster the wealth of a limited elite, or worse, dictators suppress the rights of all those who do not happen to have the luck of being members of the leading group. Even in not-so-wicked systems, legislatures are often inclined to compromise with certain rights in favor of other interests. People then claim that the former have been violated, others deny that there was such a violation, and hence rational (or not-so-rational) disagreement frequently occurs. This is why many legal systems provide for the judicial review of legislative decisions. In consequence, our real world confronts us with the problem of the legitimacy of judicial review.

Dimitrios Kyritsis has provided us with a marvelously interesting theory of the legitimacy of judicial review. In this paper, I shall juxtapose my own theory against Kyritsis’ to develop a precise picture of where we agree and disagree, thus providing the basis for further fruitful discussion. I will briefly summarize Kyritsis’ theory, limiting my summary to those parts relevant for my discussion.

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(1). I will then lay down my own theory of institutional practical concordance that can be applied to the problem of judicial review (2). The third section collects some common ground between our theories (3), while the fourth section briefly lists a couple of rather minor differences and problems (4). In the fifth section, I turn to what I think is the most important difference between our theories, namely the choice between a combination model or a separation model (5).

1 THE LEGITIMACY OF JUDICIAL REVIEW

In his monograph Where our protection lies. Separation of powers and constitutional review, published by Oxford University Press in 2017, Dimitrios Kyritsis develops a quite rich and complex account of judicial review. It is not possible here to present a full discussion of his theory. Instead, I will collect the various instances in which Kyritsis makes the legitimacy of judicial review dependent upon the idea of a balance between institutional powers.

Kyritsis refers to a balanced account of judicial review at various points throughout his book. In fact, this issue appears in all chapters except two and four. That the relevant passages are so widespread demonstrates that it is indeed one of the main points of the book, even though Kyritsis does not assemble his various remarks on this issue into a longer sub-chapter.

Right at the beginning of his book, Kyritsis stresses that the best model of judicial review is a middle way between the two extremes of the enthusiasts and the sceptics. Instead of either unconditionally accepting or denying the legitimacy of judicial review, the vital task was to ‘weigh’ its merits and demerits in order to determine ‘under what conditions’ it was legitimate.1 Kyritsis objects to solutions presented ‘in an all or nothing fashion’ and demands that the legitimacy of judicial review be judged ‘on a case-by-case basis’.2 These considerations already suggest some sort of balancing mechanism, but Kyritsis is explicit on this from the very beginning. ‘Our concern for legitimacy’, he writes, ‘dictates’ [sic!] a ‘balancing exercise’ in which fundamental rights ‘are weighed up against considerations of institutional design’3 What ultimately determines the overall legitimacy of a political regime, according to Kyritsis, is striking the proper balance between two types of moral considerations, namely considerations regarding the content of basic rights and considerations regarding institutional design.4

Having established the necessity to consider institutional design when evaluating the legitimacy of judicial review, Kyritsis uses these institutional considerations to criticize both Dworkin and so-called ‘dialogue’ theorists. In chapter

1 Kyritsis 2017: 2.
2 Kyritsis 2017: 3.
3 Kyritsis 2017: 25.
three, he introduces a different terminology from that he used in previous chapters: Kyritsis labels considerations of content as ‘first-order considerations’ and considerations of constitutional design as ‘second-order considerations’. He then objects to Dworkin’s theory claiming that it did not properly account for the distinctness of second-order considerations. Dworkin, according to Kyritsis, projects first-order considerations on second-order considerations, making institutional design derivative from considerations of content. As a result, Kyritsis claims, the independent character of second-order considerations is lost.

At this point, I do not wish to discuss the accuracy of his objection to Dworkin. Instead, I want to record the desideratum Kyritsis derives from his analysis of Dworkin’s theory, namely that theories of judicial review must account for the distinctness of second-order concerns.

This criticism of Dworkin is followed, in chapter five, by a similar objection to so-called ‘dialogue’ theories. Dialogue theories of judicial review often maintain that only a weak review standard is appropriate, and that the legislature must have the last word. According to Kyritsis, such theories downplay second-order considerations of institutional design in two ways. First, they do not account for the authoritative impact of judicial decisions, specifically for the fact that courts officially determine the concrete content and meaning of our legal rights. Kyritsis refers to Raz and to Waldron to underline this point. Courts enjoy practical, not merely theoretical, authority in Raz’ sense. They create a coercive ‘institutional settlement’ of a legal dispute. Second, judges are not free to bring whatever moral insights they may have into the dialogue. Rather, they are bound by the limiting framework of their legal system as well as by their own institutional role in the legal enterprise. Based on the double impact of these institutional considerations, Kyritsis stresses that we must distinguish and balance the authoritative and the discursive dimensions of judicial review.

2 THE THEORY OF INSTITUTIONAL PRACTICAL CONCORDANCE

Kyritsis’ project of reconstructing the relationship between courts and legislature ‘through the lens of the idea of institutional cooperation’ closely resem-

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5 Kyritsis 2017: 78 text at fn. 49.
6 Kyritsis 2017: 79.
9 Waldron 2003: 56.
12 Kyritsis 2017: 3.
bles my own theory of institutional practical concordance. Like him, I endorse a theory that acknowledges and combines both the authoritative and the discursive dimensions of judicial review. I initially developed my theory to solve the conflicts of jurisdiction in the multilevel system of European fundamental rights protection. Subsequently, I specifically applied this theory to the judicial review of positive rights. I claim, however, that this theory has a universal character. Due to its analytic power, it can be applied to the puzzle of judicial review more generally.

The vital point here is that we can reconstruct the problem of judicial review as a conflict of competences. A competence is a legally established ability to change a normative situation by means of an institutional act. In the case of judicial review, the conflict lies between the competences of the legislature to decide upon important issues of society and the competence of the constitutional court to control these legislative decisions. As I have argued elsewhere, competences are a specific kind of legal norm. They are principles, as opposed to rules. Principles can be satisfied to varying degrees, whereas rules are norms that are always either fulfilled or not. Principles theory distinguishes between material principles and formal principles. Material principles establish substantial content. The most important examples of material principles are constitutional rights. Formal principles, in contrast, establish who has the authority to make material decisions. They depict the authoritative dimension of a legal system. I argue that competences are formal principles.

This norm-theoretic fundament is of the utmost importance for the project of developing a legitimate model of judicial review because the particular characteristics of principles can help in that regard. Principles are optimization requirements that frequently compete with each other. Principles require that something is realized to the greatest extent possible, given the factual and legal possibilities. We are most familiar with these characteristics in the case of material principles. Their object of optimization is of material character, e.g. freedom of speech, protection of honor and reputation of a person, etc. However,

13 Klatt 2015a; this paper is based on a major German monograph, my habilitation thesis, Klatt 2014b.
15 See, in particular, my concluding remark in Klatt 2015b: 382.
16 Ross 1968: 130.
17 Klatt 2015b: 363.
18 Note that the concept of principle employed here is different from Dworkin’s concept of principle.
20 Alexy 2002a: 58, 82, 192, 313, 416.
there are also principles that have a formal object of optimization, e.g. unfettered majority decisional power, control exercised by a constitutional court, etc. Here, I focus on formal principles.

In the present context, the legal possibilities for optimization matter, and these are defined by competing principles in a situation of conflict. Competing principles pull in different directions, and the correct course of action has to be determined by balancing these principles according to the specific weights each bears in a given case.²³

We can reconstruct the problem of judicial review quite well with the help of these analytical tools from principles theory.²⁴ Many constitutions not only contain several fundamental rights qua material principles that compete with each other, but they also contain several competences qua formal principles that likewise compete with each other. Many constitutions strive at protecting the competence of the democratically elected legislature. They also, however, aim at protecting fundamental rights by establishing a control-competence exercised by courts. In the exercise of judicial review, both competences compete since they cannot both be fully realized. They must, however, both be realized to the greatest extent possible, qua optimization requirements. The solution to the institutional problem of judicial review, therefore, lies in balancing the competing formal principles in order to determine which competence ought to gain preference in a given case.²⁵

The core of this solution is the idea of a practical concordance of competences. The idea of practical concordance was developed by Konrad Hesse as a means to solve conflicts between fundamental rights.²⁶ It is nowadays the prime notion in German constitutional doctrine on rights conflicts. The core of Hesse’s highly influential idea is that when fundamental rights compete as they frequently do, neither of those rights has to give way completely. Rather, they must be correlated in such a way that both gain reality. In other words, both rights need to be limited to a certain extent so that both attain optimal effectiveness as far as possible.²⁷

I have transferred Hesse’s idea from the substantial level of fundamental rights to the institutional level of legal authority and competence.²⁸ The theory of institutional practical concordance allows us to distinguish and determine different degrees of legal authority in a spectrum of institutional powers. It stands in sharp contrast to theories that acknowledge only two possible relationships between

²⁵ For details regarding this balancing operation, see Klatt 2015b: 364-376.
²⁶ Hesse 1995: § 2 para. 72.
²⁷ For a brief overview of Hesse’s idea, see Marauhn & Ruppel 2008.
different legal authorities, namely either cooperation or friction. The theory of institutional practical concordance provides a middle way between these two extreme views. Furthermore, it is dynamic in two important respects. First, it allows for a shift in the relative powers, according to the particular circumstances of the case. Second, it allows for the institutional balance between the competing competences of the legislature and the courts to change over time.

3 AGREEMENTS

Many of the aforementioned elements of my theory seem to match quite well with Kyritsis’ theory of judicial review. I concur with numerous points he makes in his book, e.g. with his critical stance towards fashionable ‘dialogue’ theories that downplay actions of institutional authority to mere ‘conversations’. I will, however, only discuss here those points of agreement that relate specifically to the idea of institutional balance in judicial review.

First, Kyritsis invokes two types of moral considerations, relating to the content of basic rights and institutional design. My theory refers to them as material and formal principles respectively. Just like Kyritsis, the theory of institutional practical concordance also insists on distinguishing a material and a formal level of constitutional theory. This closeness of our theories is confirmed by the examples Kyritsis lists as second-order considerations: the makeup of the institutions; the processes they followed to reach their decisions; the separation of powers; checks and balances among the different legal authorities. All these considerations are formal principles, or at least factors that matter when determining the concrete weight of a competence. For example, both the makeup of an institution and the processes it followed to produce its decision determine the quality of that decision. The better the quality of a primary decision, the higher the weight this primary decision has in a given case. As I have demonstrated elsewhere, when producing a statute the legislative process can display either very thorough engagement with the subject matter, bringing together abundant expertise, or a rather superficial and hurried handling. In the former case, the weight of the competence of the legislature to decide the

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29 Barber 2013: 570-577.
30 For a similar approach cf. Fritzsche 2010: 386.
32 Kyritsis 2017: 78.
33 On factors for determining the concrete weight of a competence, see Klatt 2015b: 367-373; Klatt 2014b: 222-244.
34 Klatt 2015b: 367.
35 Or, indeed, anything between those poles.
matter will be considered as high, all other factors being equal, so that judicial review may only be exercised with great restraint. In the latter case, in contrast, the importance of exercising control by judicial review increases.

These considerations lead to a second agreement between our theories. They demonstrate that judicial review under the theory of institutional practical concordance is not an ‘either-or’ matter, but a matter of degree. The problem of judicial review is not about whether the legislature should determine the scope of protection of fundamental rights, or alternatively, whether this is the task of the judiciary. The problem is about how both competences combine and interact constitutionally with each other. This closely resembles Kyritsis’ position that the legitimacy of judicial review should not be judged in an all-or-nothing fashion, but rather ‘on a case-by-case basis’. Furthermore, my theory’s approach to distinguish degrees of review and to determine the correct degree within a spectrum, resonates decidedly well with Kyritsis’ aim to justify a middle way between the two extreme positions of enthusiasts and sceptics.

The third point on which our theories coincide concerns the role of balancing when determining a legitimate model of judicial review. Kyritsis stresses that the balancing of fundamental rights and institutional design was necessary and that this balancing would allow for the determination of the legitimate conditions of judicial review. This is precisely the point that the theory of practical concordance of competences claims to enlighten by providing a detailed account of this balancing mechanism that spells out its operational details. One of the most important points of principles theory is that it is impossible to determine unconditional preference relations between competing principles that can settle the preference generally, abstractly, and finally. Rather, the outcome of a balancing of principles will always be dependent upon the legal and factual circumstances of concrete cases, and hence only conditional preference relations can be determined. Anyone who, like Kyritsis, speaks of conditional rather than unconditional preference relations between constitutional principles, has joined the camp of principles theory. So, our two theories concur since they both deny the possibility of determining unconditional preferences among the competences of legislatures and courts.

Fourth, while Kyritsis acknowledges that judges argue by reference to moral insights on the scope of rights, he also underlines the limiting framework of their institutional role. This account echoes the special case thesis that I also endorse in my theory of institutional practical concordance. The special case

37 Kyritsis 2017: 3.
thesis holds that legal argumentation is an instance of moral reasoning, but that it is bound to the context and frame of a concrete legal system.\footnote{Alexy 1989: 212-220; Alexy 1999; cf. Klatt 2012: 4-5, 14.} The latter provides limitations to moral discourse by means of statutes, precedents, legal doctrine, etc. It is this second part of the special case thesis that is relevant here. If it is true that the argumentation of constitutional courts exercising judicial review is legal argumentation, then constitutional argumentation is subject to the special case thesis. This is so, in particular, with respect to the so-called external justification of balancing constitutional principles.\footnote{Klatt & Meister 2012b: 53, 72, 158, 168; On the ‘moral infection of proportionality’; see Klatt & Meister 2012a: 692-695; I elaborated on this point in my ICon-debate with Luc Tremblay, Klatt 2014a: 897-899.}

This is my list of points of agreement between our two theories. To be sure, agreement is a bidirectional process, so I am curious to learn whether Kyritsis, from his perspective, also accepts these points in his reply.

4 DIFFERENCES AND PROBLEMS

Without intending to downplay the significant degree of our agreement, I would like to invite attention to a few problems I see in parts of Kyritsis’ account, and I thereby mean to note certain differences between our theories. I would like to mention four minor differences between our theories in this section (4.1-4.4) and one major objection I have to Kyritsis’ account of judicial review in the next section (5).

4.1 Proportionality

Kyritsis touches upon proportionality in a rather brief section of his eighth chapter. In particular, he raises ‘deeply sceptical’ concerns about the ‘consequentialist undertones’ of proportionality analysis, citing and thereby presumably following, Tsakyrakis’ criticism.\footnote{Kyritsis 2017: 187 with fn. 21 and 22; citing Tsakyrakis 2009.} As I have demonstrated elsewhere, however, proportionality analysis by no means implies a crude utilitarian and consequentialist moral theory, and I would regret if Kyritsis subscribed to this frequent misunderstanding of proportionality analysis advocated by Tsakyrakis. Proportionality analysis must be linked to and supplemented with both a theory of legal argumentation and a theory of moral values. Proportionality analysis always carries a ‘moral infection’.\footnote{Klatt & Meister 2012a: 692-695.} Proportionality cannot avoid moral reasoning altogether. Rather, moral reasoning is a necessary component of rights adjudication.\footnote{Klatt & Meister 2012a: 692.} As I have laid out elsewhere, this ‘moral infection’ follows from
two elements: the special case thesis and the distinction between internal and external justification. According to the special case thesis, legal argumentation is a special case of general practical argumentation.\textsuperscript{46} In the case of proportionality analysis, the evaluation of degrees of satisfaction and non-satisfaction of competing principles will always depend on substantial, contested, moral considerations.\textsuperscript{47} The internal formal structure of proportionality is indeed neutral towards morality. But any application of this internal structure depends on theoretically informed practical reasoning provided from outside. This is the so-called external justification that feeds into the internal structure of proportionality. Internal and external justification must always complement each other, and taken together, they demonstrate that proportionality analysis cannot offer the relief of being detached from moral discourse.\textsuperscript{48} I have characterized proportionality by a relation of inheritance between the premises and the conclusion.\textsuperscript{49} The outcome of proportionality analysis necessarily inherits all unreliabilities of those substantially, morally, politically, contestable propositions used to externally justify the premises. One of the main benefits of proportionality analysis is precisely that it brings to light the premises that are used to determine the aims and means as well as their relations of suitability, necessity, and proportionality in the narrower sense.

Despite this moral infection, and this is the point I would like to draw Kyritsis’ attention to, proportionality does not automatically come with a specific moral theory, like, for example, utilitarianism. Rather, it is open to be supplemented by all sorts of moral theories. Proportionality is ‘a formal structure that essentially depends on premises provided from outside’.\textsuperscript{50} In other words, the moral considerations used to justify the premises in proportionality analysis, most notably the assignment of abstract and concrete weights to the competing principles in the balancing stage, have to be justified by arguments that are distinct from and independent of proportionality per se.\textsuperscript{51} These arguments are fed into proportionality’s formal structure from the outside; they are not a specific part of proportionality-arguments. They are used in proportionality analysis, but they originate from elsewhere.\textsuperscript{52} External justification is not specific to proportionality analysis, but an entirely different battlefield upon which proportionality as such has no stakes. My aim here is to counter Kyritsis’ sceptical remark on consequentialism by pointing out that proportionality is not linked to consequentialist thought any more than to any other moral theory.

\textsuperscript{46} Klatt & Meister 2012a: 693.
\textsuperscript{47} Afonso da Silva 2011: 288.
\textsuperscript{48} Klatt 2014a: 899.
\textsuperscript{49} Klatt 2014a: 899.
\textsuperscript{50} Alexy 2007: 344.
\textsuperscript{52} Klatt 2014a: 899.
To be sure, proportionality analysis does not figure prominently in Kyritsis’ book. This is somewhat unfortunate since a proper understanding of proportionality analysis goes a long way to helping solve many of the problems critical voices ascribe to judicial review. Many of the issues raised by Kyritsis, e.g. the notion of deference or the different degrees of review intensity, are the bread and butter of proportionality analysis. Principles theory has developed proportionality as a form of legal argument in constitutional rights reasoning in much more elaborate complexity than parts of the critical literature acknowledge. In fact, this theory offers a detailed theory of various types of deference, and it thus supports the very point Kyritsis convincingly makes in his eighth chapter, namely that nothing in the logic of constitutional rights precludes deference – a point to which I could not concur more.

4.2 The separation of powers

A second minor difference between Kyritsis’ account and my own theory relates to the status of the separation of powers. Right at the beginning of his book, Kyritsis introduces the principle of separation of powers as the main device for solving the problem of the legitimacy of judicial review. He characterizes the separation of powers as ‘an overarching principle of political morality’, which guides the relation between courts and the legislature in their ‘joint project’ of protecting our rights. I have doubts about the term ‘overarching’. If this were so, then the balancing of the various considerations determining the legitimacy of judicial review would, so to speak, happen within the one super criterion of separation of powers. I doubt whether all factors relevant for the legitimacy of judicial review could be characterized as sub-aspects of the separation of powers. If, however, the separation of powers is only one of the competing principles, and if it is in tension with other principles, then it can hardly be assigned the status of an overarching super criterion.

It seems more plausible to argue that the balancing procedure relevant for determining the legitimacy of judicial review entails considerations of both the formal and material aspects of the rule of law. The separation of powers, however, is only related to the formal aspect of the rule of law. It follows that it is the rule of dual-natured law in its entirety, rather than the separation of powers, which invites itself as the ‘overarching’ principle Kyritsis is looking for. The separation of powers alone will not do the trick.

53 Alexy 2002a; Klatt & Meister 2012b.
56 Kyritsis 2017: 3.
4.3 Discourse and judicial review

The third minor difference between our theories lies, arguably, in the appreciation given to the discursive elements of judicial review. Kyritsis aptly describes the tension between first-order and second-order considerations as well as the challenge to embrace both types of considerations in a full-blown theory of judicial review. I concur with both of these points. I also concur with his argument that fashionable ‘dialogue’ theories underplay the authoritative, competence-related side of judicial review. Kyritsis very convincingly stresses that ‘dialogue’ theories lack the normative resources to account for the limits of judicial review.58

Two remarks are, however, necessary. First, one wonders whether Kyritsis makes the opposite mistake, by downplaying the discursive element of judicial review and placing too much weight on its institutional dimension. This worry is warranted by his remarks that the discursive potential to improve public deliberation was merely a ‘valuable side-effect’ and that constitutional review was ‘primarily ‘power-oriented’’.59 In contrast to these remarks, I would like to underline that the discursive potential to improve public deliberation is one of the main effects of constitutional review. In my view, the power-oriented and the discourse-oriented dimensions of constitutional review carry the same abstract weight. I would like to underline that it is as much a mistake to emphasize the authoritative dimension of constitutional adjudication at the expense of its discursive dimension as it is a mistake to assess the weights of these two dimensions the other way around. I only find, however, the latter mistake accounted for in Kyritsis’ book.60

Second, it cannot be stressed enough that the criticism Kyritsis rightfully raises against ‘dialogue’ theories do not affect discourse theory of the Habermas-Alexy type. The latter theory does account for the institutional dimension of constitutional review.61 I stress this point because of how Kyritsis uses the label ‘discursive’ in the course of his criticism of dialogic theories. ‘Discourse’ and ‘dialogue’ represent two entirely different schools of thought, and the former is not affected by Kyritsis’ rightful criticism of the latter.

4.4 Weak, strong, or neither?

In terms of constitutional design, a pair of normative questions arise: should a legal system provide for judicial review at all? And if this question is answered in the affirmative: should the degree of scrutiny exercised by the court be weak or strong? I do not wish to deal with these questions here. Rather, I would like to comment on the character of these questions. Political morality, according to

59 Kyritsis 2017: 116; in the second remark, Kyritsis cites Kahana affirmatively.
61 See, e.g., Klatt 2015b.
Kyritsis, decides on the question of whether to provide for judicial review at all, and if so, which degree of review is legitimate. He stresses from the outset that his theory ‘does not prescribe constitutional review as a necessary feature of legitimate political orders’ and that it ‘merely seeks to add constitutional review to the menu of options’.\(^\text{62}\) In a similar vein, he stresses that he does ‘not seek to give a normative argument’ for either weak or strong review because this is a matter of ‘institutional choice’.\(^\text{63}\) In short, according to Kyritsis, these questions are of a political, rather than legal, character.

I find this position a peculiar abdication of constitutional theory as a legal discipline, at least as far as the choice between different degrees of scrutiny is concerned.\(^\text{64}\) In contrast to Kyritsis, I would like to stress that from the perspective of the theory of practical institutional concordance, the competing formal principles as well as the relevant factors determining their concrete weight are of legal character, rather than merely being principles of political morality. After all, the whole of the bunch of aspects elaborated in Kyritsis’ book are not merely pieces of political prudence. Rather, they are binding constitutional norms: separation of powers, subsidiarity, substantive principles and fundamental rights, democracy, and so on. Handing the problem of judicial review over to political morality does not utilize well the capacities of constitutional law to provide for legal certainty and the legal constraint of power.

Another trouble I have with Kyritsis’ account of determining the correct degree of scrutiny is that it seems to be overly strict and too abstract. Once the political choice for a particular system of judicial review has been made by the constitutional designers, the degree of scrutiny is fixed once and for all within a legal system.\(^\text{65}\) In sharp contrast to such a system-wide choice, the theory of practical concordance allows for flexible degrees of scrutiny also within a particular system. The balancing of competences is sensitive to the specific circumstances of concrete cases or, at least, groups of cases. That way, once a system provides for judicial review at all, the full range of scrutiny is in principle available to the courts. Of course, the courts must justify their choice of a particular degree of control intensity in a particular case by formal balancing. Such a flexible, yet legally (rather than politically) structured account of the correct intensity of control is preferable to a system-wide settlement because it better allows for case-sensitive judgments. By stating that some choice between a range of options is required, Kyritsis is on the correct path. Nevertheless, he should additionally allow for the last step and provide for the possibility of choices being made within a system.


\(^{64}\) Cf. Klatt 2015a: 199, 204-205.

\(^{65}\) Kyritsis 2017: 122, 150-151.
5 COMBINATION MODEL VERSUS SEPARATION MODEL

The problem of adopting either a combination model or a separation model concerns, in Kyritsis’ terms, the relation between first-order and second-order considerations or, in principles theoretical terms, the relation between material and formal principles. It is to Kyritsis great credit that he is one of the very few scholars outside principles theory to have addressed this topic to more than a superficial extent. In fact, much of what he writes resembles the debates conducted among principles theory scholars, which started with the famous exchange between Trevor Allan and Robert Alexy. I will first summarize Kyritsis’ consideration of the subject. I will then recollect the Alexy-Allan-debate, and lastly engage in some further thoughts.

Kyritsis stresses at various instances throughout his book that his theory of judicial review does not only allow for the balancing of first-order and second-order considerations, but rather that his theory demands such balancing.66 He discusses the point I would like to elaborate on now mainly in his seventh and eighth chapters. It concerns the problem of whether a direct balancing of material and formal principles is possible at all.

Kyritsis appears to adopt the view that such a direct balancing is possible. Immediately after stressing that his account of legitimate judicial review combines substantial rights considerations with sensitivity to authority, Kyritsis stresses that considerations of institutional design may actually ‘relax the grip’ of deontological constraints, which stem from substantial moral rights.67 As a result, the substantive content of constitutional rights may fall short of the content of moral rights precisely for reasons of institutional design:

[I]nstitutional considerations such as the need for coordination or expertise may have a bearing on the content of constitutional rights […] the judge must assign normative weight to inputs that are morally sub-optimal.68

The main argument, however, against such direct balancing of formal and material principles is the argument of incommensurability. Waldron argued that balancing formal and material sources of legitimacy was to constitute a ‘category-mistake’69. In the same vein, Allan claimed that formal considerations of institutional design were ‘external’ to justice-related rights reasoning and that both operated ‘on different scales of assessment’.70 Kyritsis is not convinced by these

66 See above, 1.
68 Kyritsis 2017: 193; see also 189, 197.
objections, and nor am I.71 Commensurability is, generally, not a precondition for balancing, but its outcome. It is the very point of balancing to make the competing principles commensurable, even if this task – left to us by the fact that the constitution entails both material and formal principles – is a difficult one.72

There is, however, a variant of the objection from incommensurability that figured prominently in the Alexy-Allan-debate73 that is worthy of further consideration. Alexy had originally adopted a view quite similar to Kyritis’, allowing for a direct balancing of formal and material principles.74 We call this the combination model because both types of principles are combined in the same balancing exercise.75 The combination model was already present in Dworkin’s early work. Dworkin called formal principles ‘conservative principles’ and material principles ‘substantive principles’.76

A main problem of the combination model, however, is to explain from a substantive perspective why it is morally justified to deviate from the substantive requirements of rights merely for the reason that some authority thinks such deviation suitable or appropriate. Constitutional rights, after all, will lose their binding power upon exactly those authorities in that way. This problem is, presumably, the reason why Alexy later stressed that procedural principles can override substantive rights only in connection with other substantive principles.77

Allan, however, objected to this combination model on the grounds that a formal principle like, for example, the principle of democracy fostering the authority of parliament, could never justify an infringement with a substantive right which is substantively unjustified.78 In his response, Alexy conceded this point and offered a further argument against the combination model.79 He concluded that formal principles could not ‘directly’ participate in the balancing of substantive principles.80

Due to these considerations, the combination model is under attack, and it seems that Kyritis could expand his response to these challenges, given that there is an alternative to the combination model, namely the separation model. The separation model strictly distinguishes the substantive level of constitu-

74 Alexy 2002a: 82.
76 Dworkin 1977: 38.
77 Alexy 2002b: 423.
78 Allan 2012: 136; see also Allan 2006: 675; Allan 2004: 291.
tional rights from the formal level of power and authority.\textsuperscript{81} In the separation model, the balancing, which determines the legitimacy of judicial review, does not occur directly between formal and material principles, but between formal principles exclusively. The separation model, therefore, is not affected by Allan’s criticism. As far as the balancing of material principles (e.g. competing human rights) is concerned, the separation model keeps this balancing free of any considerations of competence conflict.\textsuperscript{82} This is preferable to the combination model since any state authority is bound to the substance of constitutional rights.\textsuperscript{83} This fettering would be compromised if considerations of competence were intertwined with material balancing, as the combination model claims. Rivers has rightfully stressed the ‘logical gap between what a legislature does when it seeks to set proportionate limits to rights and what a court does when it reviews that legislation’.\textsuperscript{84} Aspects of the latter are generally irrelevant for the former. In the separation model, the solution to the conflict inherent in judicial review, namely the conflict between the competences of the legislature to decide and the competence of the court to control, is settled on the formal level by balancing formal principles.\textsuperscript{85}

Both models must meet the challenge of explaining in detail how exactly the balancing operates. The separation model has already presented some of these operational details, including the law of formal balancing, the formal weight formula, and the list of factors relevant to the external justification of the concrete weights of the competing competences.\textsuperscript{86} It seems to me that, in contrast, the combination model is not yet fully developed as to the operational details regarding the alleged balancing of material and formal principles.\textsuperscript{87} I would like to submit that my own theory supplies the operational details of balancing competences in judicial review, and that it thereby provides answers to questions that Kyritsis leaves open. With an eye to the list of agreements between our theories, this invites the thesis that our theories stand in a complementary and mutually reinforcing relation.

It would be highly interesting to hear how Kyritsis evaluates the separation model. In particular, it strikes me that Kyritsis – although being a proponent of the combination model, if my interpretation is correct – seems to defend the

\textsuperscript{81} I introduced the separation model earlier as the ‘two-level model’ in Klatt & Meister 2012b: 141-146; see also Klatt 2014b: 191-203.
\textsuperscript{82} Klatt & Schmidt 2012: 583; see also Rivers 2006: 205.
\textsuperscript{83} Rivers 2006: 206.
\textsuperscript{84} Rivers 2012: 252.
\textsuperscript{87} I explored two different variants of the combination model, integrating formal principles in the internal and the external justification of the weight formula respectively, and found both variants problematic, see Klatt 2014b: 181-190.
separation model in the course of his engagement with the position Allan has taken in more recent work.88 Addressing Allan’s recent writings, Kyritsis first reports that Allan now seemed to acknowledge the ‘interplay between considerations of institutional design and content’ and an ‘internal’ stance of deference in judicial rights reasoning.89 This new position that Allan explicates, if reported correctly by Kyritsis – a question that I will not address here –, sounds very much like the old combination model, integrating first-level and second-level elements in one single act of reasoning, rather than in separate steps of deliberation. My point is that when Kyritsis, on the next page, moves on to criticize Allan’s new position, he seems to be arguing in favor of a separation model: Kyritsis demands upholding Dworkin’s distinction between background rights and institutionalized rights.90 Kyritsis’ criticism here necessary disentangles material background rights considerations from considerations of institutional design and competence. If Kyritsis were inclined to further develop this line of thought maintained in his answer to Allan, he would presumably have to give up, or at least clarify, some of his statements that point toward the combination model. He would, however, gain the possibility of being able to connect his own theory to the separation model in a beneficial way. The separation model could provide the operational details for spelling out how the main lines of Kyritsis’ theory actually determine both the fundaments and limits of judicial review as a legitimate means to protect the rights we have. I must say, however, that Kyritsis’ position slightly perplexes me in this regard since he seems to oscillate between the combination model and the separation model. At the end of his answer to Allan, he nevertheless acknowledges the difficulties of disentangling the two levels, at least in the context of particular cases.91 This is why I would appreciate hearing more from Kyritsis regarding the choice between a combination and a separation model.

6 CONCLUSION

Dimitrios Kyritsis has provided us with a marvelously interesting theory of the legitimacy of judicial review. In this paper, I have juxtaposed my own theory of institutional practical concordance against Kyritsis’ account. After briefly summarizing Kyritsis’ theory, as far as it addresses the legitimacy of judicial review specifically, summarized some basic elements of my own theory of institutional practical concordance that can be applied to the problem of judicial review. This allowed for the collection of a list of agreements between our theories.

89 Kyritsis 2017: 177.
91 Kyritsis 2017: 178, last paragraph before IV.
We both, first, distinguish between a material and a formal level of constitutional theory, between the content of basic rights and questions of institutional design. Second, we both aim at developing a middle way between the two extreme positions of judicial review enthusiasts and sceptics in that we both reconstruct judicial review as a matter of degree, rather than in an either-or-fashion. Third, our theories concur in employing some notion of balancing in order to determine the conditions under which judicial review is legitimate. Fourth, we both accept the special case thesis in that we acknowledge that rights adjudication takes reference to moral insights while still being limited by an institutional framework. I have then listed four minor differences between our approaches. They regard the relation between the proportionality test and moral argument, the status of the separation of powers as a super-criterion or as one constitutional principle among others, the role of discourse in judicial review, and the spectrum of various control intensities. The most important difference between our theories lies in our divergent answers to the question of how to reconstruct the relation between the material and formal elements of our constitutions, in other words, in the choice between a combination model or a separation model. After explaining these two models with the help of an earlier debate between Alexy and Allan, I have demonstrated why I think Kyritsis adheres to the combination model, but sometimes also flirts with the separation model. I conclude by cherishing this opportunity to develop a precise picture of where we accord and where we disagree, inviting further fruitful discussion between us. After all, it is our mutual project to spell out the details of where our protection lies.

References