Bypassing the Judge: A Manifestation of the Legitimacy Crisis of Judicial Review

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Abstract

Judicial review is undergoing an unprecedented crisis in several regions of the world. It is criticized for its politicization related to its purpose, effects, and how judges are appointed, as well as the power of obstruction it holds over the law. Questions about the compatibility of judicial review with democracy are not new, but they have rarely been as sensitive. The problem lies not in these legitimate questions, but from their political instrumentalization and their transformation into an electoral promise: that of restoring sovereignty to the people and protecting its identity by removing any obstacles that could hinder the adoption of measures to which citizens consented at the time of the election or that enjoy strong support among the population. It is in this type of discourse, which plays on the opposition between the people and the elites, that the justifications for bypassing the constitutional judge are found, as the judge is the one who blocks public decision-making and thus hinders the exercise of sovereignty. The purpose of this Article is to analyze, through concrete examples (Canada, the United States, Hungary, Israel, Poland), how this distrust towards the judiciary oper-ates in both illiberal and liberal democracies and to construct a critical discourse to identify possible solutions.

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Table of Contents

"Literature, like democracy, breathes only through non-unanimity in suffrage."

—Julien Gracq[1]

Introduction

The rule of law has been undergoing a profound crisis in Western democracies and beyond for the past two decades, with a noticeable acceleration since the "cultural counter-revolution" in Hungary and Poland.[2] This crisis is compounded by another, older crisis, closely related but only partially overlapping—that of democracy and representation. Citizen participation in elections is declining, as is their confidence in institutions and the political class, perceived as an increasingly distant group defending its own interests. This has led to new forms of protest, action, and participation, simultaneously keeping the idea of democracy alive.[3] This crisis has multiple causes, extensively studied in political science and sociology over the past forty years. It intersects two movements or processes: the "decline of politics" and the advent of a "society of distrust," both stemming from a series of closely related events and phenomena.[4]

Distrust is even more pronounced towards the judiciary due to the pervasive sense of doubt and suspicion that surrounds it. The notion that justice acts opaquely, is politically instrumentalized, and even manipulated by the current government resurfaces whenever judicial proceedings are initiated and convictions are handed down against political leaders. Leaders, commentators, and intellectuals rush to denounce a "justice at the service of power," accusing magistrates of politically instrumentalizing the rule of law.[5] Criticisms also come from a portion of the academic world, attributing to them a "moralizing will" and

1. Julien Gracq, En lisant en écrivant 46 (Paris: José Corti, 1982) (Fr.).

2. *See e.g.* Jacques Rupnik, *La crise du libéralisme en Europe centrale*, 160 Commentaire, 797, 800 (2017) (Fr.) [hereinafter *La crise du libéralisme*]; Jacques Rupnik, *Démocrature en Europe du Centre-Est : trente ans après 1989*, 169 Pouvoirs 73, 74 (2019) (Fr.); Nicolas Baverez, *Les démocratures contre la démocratie,* 169 Pouvoirs 5, 10 (2019) (Fr.).

3. Pierre Rosanvallon, La contre-démocratie, La politique à l'âge de la défiance 20–28 (Paris: Le Seuil) [hereinafter La contre-democratie]. *See generally* Oxford Handbook of Deliberative Democracy (André Bächtiger, Jane Mansbridge, John Dyzek & Mark Warren eds., 2018); Jane J. Mansbridge: Participation, Deliberation, Legitimate Coercion (Melissa Williams ed., 2019).

4. La contre-démocratie, *supra* note 3, at 10–19.

5. Solenn de Royer, *Juges et politiques, la guerre des nerfs*, Le Monde, Sept. 21, 2019, https://www.lemonde.fr/societe/article/2019/09/21/juges-et-politiques-la-guerre-des-nerfs_6012502_3224.html.

expressing concern about the "notorious collusion between justice and the press."[6]

However, the judicialization of political life is not solely the work of magistrates; citizens themselves increasingly turn to the judiciary to intervene and prosecute elected officials for acts or omissions committed in the exercise of their duties. This blurs the line between political and criminal responsibility, creating a "people-judge," as Pierre Rosanvallon puts it. This phenomenon became evident during the Covid-19 crisis in France, with a series of complaints targeting government officials.[7] The political power's inability to self-regulate and respond effectively to citizens' demands and the inefficiency of existing mechanisms for holding political responsibility explain the "people-judge" phenomenon.[8] The fact that these mechanisms have been emptied of their substance shifts political problems to the criminal sphere.

Distrust towards the judiciary is not exclusive to Western democracies. For example, the Argentine justice system faced similar attacks in late 2022 following the conviction of former Vice President Cristina Kirchner for fraudulent allocation of public contracts in Patagonia[9]. This led the president of the Supreme Court to publicly react.[10] The conviction occurred amid heightened tension between the Peronists and the Supreme Court, which they accused of several recent controversial decisions.[11] The perception of collusion is such that the Court was also suspected of conspiring with members of the administration of former President Mauricio Macri to grant a more lenient sentence

6. Pierre Avril, *L'État de droit contre l'État républicain*, 196 Le Débat 95, 97 (2017) (Fr.). *See also* Denys de Béchillon, *Torquemada aux manettes*, 196 Le Débat 103 (2017) (Fr.); Francis Hamon, *L'État de droit et le principe d'opportunité des poursuites*, 196 Le Débat 107 (2017) (Fr.); Olivier Jouanjan, *Un "coup d'État de droit"?*, 196 Le Débat 114 (2017) (Fr.).

7. *See e.g.* Olivier Beaud, *Si les gouvernants ont failli pendant la crise du Covid-19, la solution de la plainte pénale n'est pas la bonne*, Le Monde, Apr. 20, 2020, https://www.lemonde.fr/idees/article/2020/04/20/olivier-beaud-si-les-gouvernants-ont-failli-face-a-la-crise-sanitaire-la-solution-de-la-plainte-penale-n-est-pas-la-bonne_6037132_3232.html.

8. La contre-démocratie, *supra* note 3, at 231–250.

9. Mar Centenera, *El Gobierno de Argentina ataca el poder judicial*, El País, Dec. 9, 2022, https://elpais.com/argentina/2022–12–08/el-gobierno-argentino-arremete-contra-el-poder-judicial-tras-la-condena-por-corrupcion-a-kirchner.html; Claudio Jacquelin, *Certezas y dudas de la contraofensiva cristinista*, La Nación, Dec. 10, 2022, https://www.lanacion.com.ar/politica/certezas-y-dudas-de-la-contraofensiva-cristinista-nid10122022/; Julieta Waisglod, *Por un Poder Judicial más fuerte*, Pagina 12, Dec. 17, 2022 (Arg.); Melissa Molina, "Democracia o mafia judicial": Una multitud pidió que se levante la proscripción a CFK, La Nación, Apr. 14, 2023, https://www.pagina12.com.ar/540407-democracia-o-mafia-judicial-una-multitud-pidio-que-se-levant

10. *Ibid.*

11. *Ibid.*

to a military officer convicted of torture during the dictatorship.[12] In response to Kirchner's conviction, seen to sideline her from politics, former President Alberto Fernández initiated a judicial authority reform project and triggered the *juicio político*, the procedure for impeaching members of the Supreme Court. Although its chances of success were almost nil due to a lack of majority, this procedure was not insignificant for several reasons. Firstly, the procedure had not been used for about twenty years, standing out as an exception in Argentina's recent political history (since the end of the dictatorship and the democratic transition), suggesting a period of improved relations between elected officials and magistrates. Secondly, it enjoyed significant support in public opinion, even if strongly divided, highlighting the controversy surrounding the Supreme Court.

The constitutional judge, or the one who acts in that capacity, is under even closer scrutiny due to the obstructive, repeal, or sidelining power they hold over the law despite not being elected or politically responsible. The distrust toward constitutional judges required a "doctrinal reevaluation of the concept of democracy [. . .] resulting in establishing the constitutional judge as the defender of citizens."[13] The judge is now seen "not as a deviation but as an instrument for realizing democratic requirements."[14]

This recentering of the concept of democracy around the judge has had several effects. It has contributed to the emergence of legitimacy forms other than those based on elections, such as competence and expertise, respect for the law, values identified as universal, protection of the general interest, independence, and impartiality. It has profoundly changed the perception of the law. The judge's control over the law to verify its conformity with the constitution and the catalog of fundamental rights is now a condition of its legitimacy. The moderation and rationality of the law come from how it is elaborated. A bill is adopted after preparatory discussions, legislative debates, a compromise between the majority and the opposition, and possibly

12. Laura Serra, *El Oficialismo Pedirá Kirchnersancione a un senador macrista si se niega a comparecer ante la Comisión de Juicio Político,* La Nación, Mar. 21, 2023, https://es-us.noticias.yahoo.com/oficialismo-pedir%C3%A1-suspendan-fueros-senador-180955037.html; Miguela Jorquera, El Macrismo Juega a Vaciar La Comisión de Juicio Político a la Corte, Pagina 12, Mar. 21, 2023, https://www.pagina12.com.ar/533447-el-macrismo-juega-a-vaciar-la-comision-de-juicio-politico-a-.

13. Jacques Chevallier, *État de droit et démocratie*, *in* Cahiers français, Les régimes européens en perspective 7 (1994) [excerpt chosen by the editors of the *Cahiers français*, in Jacques Chevallier, L'État de droit (Paris: Montchrestien, 2d ed., 1994)] (Fr.).

14. *Ibid.*

subjected to control by various authorities, including judicial review, achieving a form of balance. A law is balanced and therefore legitimate because it manages to consider opposing interests and reconcile them, as does the judgment of proportionality, aiming to weigh things in a balanced manner.[15]

But as interesting and convincing as these ideas may be, they are not self-evident, and more importantly, they stem from a certain conception of judicial review that is open to debate. This conception is currently challenged in academic work, political discourse, and public opinion. While the question of the democratic legitimacy of judicial review is certainly not new, it has rarely been as debated. There is a regression, and the notion that judicial review and democracy go hand in hand no longer holds authoritative status. Even more concerning is the public's growing distrust of the judiciary, reaching record levels in very different contexts, indicating a global trend. The purpose of this Article is therefore to describe, through concrete examples, how this distrust towards the judiciary operates in both illiberal and liberal democracies and to construct a critical discourse to identify possible solutions.

This requires first delving into the political, legal, and social drivers of this distrust. Some date back quite far, as they relate to the questions that have always surrounded judicial review and its compatibility with democracy (2.). The issue does not stem from legitimate questions about constitutional review and the problems it poses—it is perfectly normal to question what Nikolas Bowie refers to as "judicial supremacy" in the American context[16]—but from the political instrumentalization these questions have undergone. They have been transformed into an electoral promise: that of restoring sovereignty to the people and protecting their identity by removing any obstacle that could block measures to which citizens consented at the time of the election or that enjoy strong support among the population. It is in this type of discourse, which plays on the opposition between the people and the elites, that the justifications for bypassing the constitutional judge are found.

These justifications take two main forms. Firstly, elected officials can codify the use of legislative force, i.e., the ability to bypass a

15. *See e.g.* Aharon Barak, *Proportionality*, *in* The Oxford Handbook of Comparative Constitutional Law 739–752 (Michel Rosenfeld & András Sajó eds, 2012).

16. Nikolas Bowie, *Comments Antidemocracy*, 135 Harv. L. Rev. 160, 174 (2021); *see also* Nikolas Bowie, *How the Supreme Court Dominates Our Democracy*, Wash. Post, July 16, 2021, https://www.washingtonpost.com/outlook/2021/07/16/supreme-court-anti-democracy/.

decision of non-conformity by simply voting on a law. The bypass is blatant, but it is justified by the asymmetry between the electoral legitimacy of elected officials and the electoral illegitimacy of judges (3.). Secondly, it is possible to modify the composition and the method of appointment of the constitutional court or the jurisdiction acting in its place to make it an ally. Now composed of allies of the ruling power, it becomes a valuable tool for legitimizing public decisions since its support is guaranteed (4.). In both cases, there is indeed a bypass, but the method employed is not the same.

I. The Origin of the Phenomenon: The Real or Supposed Democratic Illegitimacy of Judicial Review

Judicial review has been contested since its inception, that is, from the introduction of judicial review in Western states. Doubts about its democratic legitimacy arose immediately because it involved entrusting non-elected, politically unaccountable judges with potentially long-term powers to obstruct, repeal, or set aside laws. This fundamental issue required the development of a discourse legitimizing judicial review (1.1.). However, even with such discourse, based on entirely defensible arguments, it does not completely dispel doubts. Judicial review, by virtue of its purpose, power, and the mode of appointment of its members, is inherently political, leading to evident challenges regarding democratic legitimacy (1.2.).

A. The Legitimization of Judicial Review

Judicial review may be considered the "bedrock of modern constitutionalism" or "a *de facto* global norm," but the question of its democratic legitimacy remains unresolved.[17] Numerous studies have been dedicated to this issue, primarily in law, political science, and philosophy, with some aiming to justify constitutional review and establish it as an essential component of the liberal democratic model. Firstly, the concept of democracy was redefined to center around the judiciary, even though the two were not originally aligned. Secondly, the presence of the judiciary was justified by the constitutionalization of the

17. *See generally* Kazuo Fukuda, *Towards an Institution-Independent Concept of Constitutional Review*, 61 Colum. J. Transnat'l L. 387 (2023). The 20th century is also commonly referred to as "the century of judicial review." *See* HCJ 6821/93 *United Mizrahi Bank v. Migdal Coop. Vill.*, 49(4) PD 221 (1995) (Isr.). *See also* Omi Morgenstern Leissner, *Leading Decisions of the Supreme Court of Israel and Extracts of the Judgment*, 31 Isr. L. Rev. 754 (1997); *see generally* Tom Ginsburg, *The Global Spread of Constitutional Review*, in The Oxford Handbook of Law and Politics 81 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds, 2008).

protection of fundamental rights after the Second World War. Thirdly, judicial review of legislation is presented to bridge the gap between representatives and represented, as their wills do not always coincide and can therefore come into conflict.

1. Reframing the Concept of Democracy Around the Judge

To legitimize judicial review and demonstrate not only its compatibility with democracy but also its necessity for democracy, it was necessary to redefine the terms. The original idea of democracy is based on two intertwined elements: the pursuit of "*political equality*"[18] and the notion of collective action, collective self-determination,[19] or in other words the "implementation of popular sovereignty."[20] A people is sovereign because it is autonomous, exercises power directly or indirectly, and sets its own rules. This conception thus excludes any intervention by a judge, especially if the judge can disrupt or prevent the exercise of sovereignty. Therefore, a new conception was substituted, one that would synthesize political liberalism and democracy, or freedom-participation and freedom-autonomy,[21] with the rule of law as its physical manifestation. This new conception is "constitutional democracy" or "democracy through law", i.e., the legal oversight of normative production by confronting it with the quintessential sovereign act (the constitution). Modern liberal democratic models, therefore, arise from the overlap of "electoral democracy" and "democracy through law" or "constitutional democracy."

This new conception of democracy would create a "competitive enunciation regime of the general will,"[22] where deliberation is the

18. Bowie, *supra* note 16, at 167. *See also* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 39–162 (1996) [hereinafter Freedom's Law]; Robert A. Dahl, On Democracy 10–11 (1998); Richard Bellamy, Political Constitutionalism, A Republican Defense of the Constitutionality of Democracy 93–94 (2007) [hereinafter Political Constitutionalism].

19. Ronald Dworkin, *Constitutionalism and Democracy*, 3 Eur. J. Phil. 2 (1995); Jürgen Habermas, *On the Internal Relation between the Rule of Law and Democracy*, 3 Eur. J. Phil. 12 (1995); Ronald Dworkin, *Equality*, *Democracy, and Constitution: We the People in Court*, 26 Alberta L. Rev. 324, 329 (1990) [reproduced in Constitutionalism and Democracy 3–35 (Richard Bellamy ed., Routledge, 1st ed. 2006)] [hereinafter Constitutionalism and Democracy].

20. Pierre Rosanvallon, La démocratie inachevée, histoire de la souveraineté du peuple en France 9 (2000) (Fr.).

21. Philippe Braud, La notion de liberté publique en droit français 11 (1968) (Fr.). *See also* Benjamin Constant, De la liberté des anciens comparée à celle des modernes [speech delivered at the Paris Royal Athénée in 1819] 10–13 (Mille et une nuit, 2010) (Fr.); *see generally* Isaiah Berlin, Four Essays on Liberty 166–217 (Henry Hardy ed., Oxford University Press 2d ed. 2002).

22. Dominique Rousseau, *Constitutionnalisme et démocratie*, La vie des idées, Sept. 19, 2008 (Fr.); *see also* Dominique Rousseau, *Juger n'est pas gouverner*, 180 Commentaire 812, 813

active principle and involves various actors, including the constitutional judge. This stands in contrast to the "monopolistic regime of the general will," which relies on a single actor (parliament) and results in the "identity of will between the body of the people and the body of representatives."[23] In this perspective, the constitutional judge becomes a "link in an argumentative chain," participating alongside others in a space of dialogue, including jurisdictions, advisory bodies, intermediary bodies, associations, political parties, media, etc.[24] Similar ideas can be found in Victor Ferreres Comella's work, where the presence of a constitutional judge is justified by the "contribution they can make to maintaining a culture of public deliberation."[25] The judge poses a threat of sanction to the legislator, compelling them to anticipate potential constitutional issues and discuss them, thereby reinforcing the deliberative dimension of democracy. In other words, judicial review is necessary because it enriches democratic debate.

Secondly, and as an argument often raised by those defending its legitimacy, judicial review is not the "end" of the argumentative chain; it does not exhaust the space of discussion. Instead, judicial review is a mere point of passage since the people retain oversight and can bypass a decision of non-conformity by revising the constitution. The people have the final say. This line of thought is closely linked to French theories known as the "*lit de justice constitutionnel*" or the "*aiguilleur*," proposing a procedural conception of judicial review.[26] This perspective is politically neutral as it merely indicates to the legislator the path to follow, whether legislative or constitutional. The 1993 "right of asylum" case in France is a good illustration, where a law related to

(2022) (Fr.). *See generally* Ronald Dworkin, Law's Empire 355–399 (1987); *What is Equality? Part 4: Political Equality*, 22 USF L. Rev. 1 (1987); Constitutionalism and Democracy, *supra* note 19, at 324–329; Freedom's Law, *supra* note 18, 39–162; Ronald Dworkin, Justice for Hedgehogs 379–399 (2011); Christopher F. Zurn, Deliberative Democracy and the Institutions of Judicial Review (2007).

23. *Ibid.*

24. Dominique Rousseau, *Constitutionnalisme et démocratie*, La vie des idées, Sept. 19, 2008 (Fr.).

25. Víctor Ferreres Comella, Justicia constitucional y democracia 139, 180 (2007) (Spa.). Quoted by Pierre Brunet, *Le juge constitutionnel est-il un juge comme les autres ? Réflexions méthodologiques sur la justice constitutionnelle*, in La notion de « justice constitutionnelle » 127 (Olivier Jouanjan, Constance Grewe, Eric Maulin & Patrick Wachsmann eds., 2005) (Fr.).

26. Charles Eisenmann, La justice constitutionnelle et la Haute Cour constitutionnelle d'Autriche 17 (Economica ed. 1999); Georges Vedel, *Schengen et Maastricht (À propos de la décision n°91–294 DC du Conseil constitutionnel du 25 juillet 1991)*, 3 Revue française de droit administratif [Rev. fra. dr. admin.] 173, 180 (1992) (Fr.); Louis Favoreu, *Le droit constitutionnel, droit de la Constitution et constitution du droit*, 1 Revue française de droit constitutionnel [Rev. fra. dr. const.] (1990) (Fr.) [reproduced in Louis Favoreu, La Constitution et son juge 13–27 (Paris: Economica, 2014].

immigration control required a constitutional revision to take effect, having initially been censored by the Constitutional Council.[27]

Similar ideas can be found in John Hart Ely's work, which also proposes a procedural approach to judicial review. However, these ideas overlap only to a certain extent. While the conclusion is the same—judicial review is politically neutral—the reasoning Ely follows to arrive at this conclusion is different. For him, the neutrality of judicial review stems from its purpose: addressing the distrust of part of the population towards the ruling majority by ensuring the proper functioning of political life and equal participation of all citizens regardless of their social or racial origin (through voting, debate of ideas, and access to representative functions). While some judicial decisions may be interventionist, especially when dealing with purely political issues (such as voting conditions or electoral district delineation), this interventionism does not reflect a desire to defend values that the Supreme Court would identify as fundamental.[28] Some emblematic decisions of the "Warren Court" (1953–1969) seem to fall into this category.[29]

2. Constitutionalizing the Protection of Fundamental Rights

In addition to these relatively recent arguments, there are traditional arguments related to the *raison d'être* of judicial review. Its development after the Second World War is rooted both in the decline of citizens' trust in the parliamentary majority—a decline clearly attributable to the German and Italian totalitarian regimes—and in the movement to constitutionalize the protection of fundamental rights.[30] From this dual perspective, judicial review is legitimate and necessary. The constitutionalization of fundamental rights requires the presence of a judge to ensure their respect by public authorities, a judge that any citizen should be able to approach to challenge a text whose constitutionality they doubt and, in doing so, interpret the constitution. Otherwise, without a control mechanism, the constitutional text remains

27. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 93–325 DC, Aug. 13 1993, J.O. 11722.

28. John H. Ely, Democracy and Distrust, A Theory of Judicial Review 73 ff (Harvard University Press 1980). This is also what Idris Fassassi asserts in his analysis of Ely's text. It is a "processualist approach (to judicial review), according to which the judge intervenes solely to address the shortcomings of the political arena, specifically when it is no longer deemed trustworthy and thus engenders mistrust." *See* Idris Fassassi, *Justice constitutionnelle et contre-démocratie*, Annuaire international de justice constitutionnelle [Ann. int'l just. constit.] 583, 593 (2018).

29. *Ibid.*

30. Dieter Grimm, *Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics*, 4 NUJS L. Rev. 15, 15–29 (2011).

a dead letter.[31] From this perspective, judicial review safeguards the limit that a society sets for itself to preserve its democratic form.

It is also essential to mention that a certain type of fundamental rights (freedom of thought, religion, and expression, freedom of association, freedom of demonstration, right to vote and run for public office, etc.) is indispensable to democracy because it is a condition for its realization, particularly those rights protecting what the French Constitutional Council refers to as the "pluralistic nature of socio-cultural expressions"[32] or the "pluralism of currents of thought and opinions."[33] These rights ensure a certain form of pluralism, genuine political competition, the regular summoning of citizens to elections, and their equal participation in public life (principle of equal political participation).[34] Everyone seems to agree on this point, including authors who do not perceive judicial review in the same way.[35] However, this does not resolve the question of other fundamental rights (those not directly linked to political life), as they are not all considered intrinsic to democracy, nor does it address the issue of the democratic legitimacy of judicial review.

This historical moment has also seen the emergence of new rights (economic and social rights) added to the preceding civil and political rights. However, these rights—no longer those of the universal human, criticized for their lack of consistency but rather those of the person

31. *See generally* Hans Kelsen, *La garantie juridictionnelle de la Constitution (La justice constitutionnelle),* Revue du droit public [Rev. dr. pub.] 197–257 (1928) (Fr.); Hans Kelsen, Heinrich Triepel, Max Layer and Ernst von Hippel, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, 5 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 30 (1929); Hans Kelsen, Wer Soll der Hüter der Verfassung Sein? 24 (2d ed. 2019) (Ger.).

32. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 82–141 DC, Jul. 27, 1982, J.O. 2422; Conseil Constitutionnel [CC] [Constitutional Court]decision No. 86–217 DC, Sept. 18, 1986, J.O. 11294.

33. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2009–577 DC, Mar. 3, 2000, J.O. 4336; Conseil Constitutionnel [CC] [Constitutional Court], decision No. 2017–651 QPC, May 31, 2017, J.O. 0128.

34. John Rawls, A Theory of Justice 221–228 (1971).

35. Michel Troper, *Justice constitutionnelle et démocratie,* 1 Revue française de droit constitutionnel [Rev. fra. dr. const.] 31, 33 (1990) (Fr.) [reproduced in Michel Troper, Pour une théorie générale de l'État 329–346 (Paris : Presses universitaires de France, 2d ed., 1994 [2015])] ; Michel Troper, *La logique de la justification du contrôle de la constitutionnalité des lois*, *in* L'esprit des institutions, l'équilibre des pouvoirs, Mélanges Pierre Pactet 911 ff. (2003) (Fr.); Thomas Hochmann, *Cinquante nuances de démocratures*, 169 Pouvoirs 19, 25 (2019) (Fr.); Anne-Marie Le Pourhiet, *Définir la démocratie*, 87 Revue française de droit constitutionnel [Rev. fra. dr. const.] 453, 464 (2011) (Fr.); Anne-Marie Le Pourhiet, *Démocratie et État de droit : quelle articulation ?*, in Constitutions, peuples et territoires, Mélanges André Roux *287,* 287–296 (2022) (Fr.).

situated economically and socially—impose an obligation on states to act, which requires "a fairly high degree of creative power."[36]

Finally, the way certain constitutional provisions are drafted implies significant interpretative work, which, incidentally, is one of the main criticisms leveled at constitutional judges: the availability of raw material that is vague, ambiguous, and therefore malleable enough for them to interpret it as they wish.[37] Constitutions sometimes consist of provisions that are not always very clear, and catalogs of fundamental rights focus on broad principles that certainly garner social approval (equality, dignity, pluralism, tolerance, open-mindedness, etc.) but are not self-operative, especially given the considerable time that often elapses between the adoption of the text and the judge's interpretation. These ambiguities necessitate the existence of an interpretation mechanism entrusted to a body independent of political power.[38]

3. The Gap Between Representatives and Represented

There is another set of reasons related to the fiction of identity or fusion between rulers and the ruled, a fiction that has long been highlighted in various political contexts. In France, Raymond Carré de Malberg, in *La loi expression de la volonté générale*, initially equated the Parliament's monopoly on law with usurpation, a deception that he proposed to address by introducing popular legislative initiatives, referendums (abrogative and confirmatory), and constitutional review.[39] Similar ideas can be found in the United States, for example, in the work of Bruce Ackerman, who describes "dualist democracy" as a situation, common to all representative systems, where the people's will does not necessarily align with that of the elected representatives and can, therefore, compete with it.[40] The essence of this idea can be summarized as follows: "Parliament is not, in the Rousseauian philosophy, an unaltered reflection of the population but rather a place where

36. Mauro Cappelletti, *Nécessité et légitimité de la justice constitutionnelle*, 33 Revue internationale de droit comparé [Rev. int'l dr. comp.] 625, 636–637 (1981) (Fr.).

37. Danièle Lochak, *Le Conseil constitutionnel, protecteur des libertés?*, 13 Pouvoirs 41, 41–53 (1980) (Fr.).

38. Cappelletti, *supra* note 36, at 638.

39. Raymond Carré de Malberg, La loi expression de la volonté générale 16 ff. (1931). *See also* Didier Mineur, *De la souveraineté nationale à la volonté générale*, 8 Jus Politicum: Revue international de droit politique [Rev. Int'l dr. pol.] (2012) (Fr.); Pierre Brunet, *Raymond Carré de Malberg*, *in* A Treatise of Legal Philosophy and General Jurisprudence, Legal Philosophy in the Twentieth Century: The Civil Law World, Vol.1: Language Areas 428–436 (Enrico Pattaro & Corrado Roversi eds. 2007).

40. Bruce Ackerman, We the People, Vol. 1 Foundations 3–33 (1993).

organized groups struggle for power and influence."[41] This implies that the law is always the result of power dynamics at a given moment and does not always express the general will.

This gap, this distancing between rulers and the ruled[42] justifies practices that are counter-majoritarian or counter-democratic, meaning those exercised "not in behalf of the prevailing majority but against it."[43] Similar ideas are found under the term "counter-democracy," which also arises from an "organized distrust" towards elected officials, proposing to go beyond electoral-representative democracy, limited to the moment of election and the appointment of rulers. However, counter-democracy encompasses various control, sanction, and prevention instruments, some initiated by citizens, whereas the "counter-majoritarian" logic is limited to the judicial constitutional review of the law. Counter-democracy is essentially a surveillance democracy.

The concept of counter-majoritarian practices can be debated, especially in the American context, as explained by Idris Fassassi. The U.S. Supreme Court ultimately defended minority rights little, especially when it was politically aligned with the majority in power, eliminating any real conflict risk between judges and elected officials.[44] Robert A. Dahl had already refused to reason in terms of majority and minority in the mid-1950s, both because quantifying the degree of approval or disapproval of a judicial decision seemed challenging and because the risk of opposition between a president and his parliamentary majority, and the Supreme Court, was limited in the American context. He provided statistical evidence that the period during which the executive-legislative couple must deal with a Court from another political family is often very short: at most one year, according to his estimates.[45]

This can be explained by the regular turnover of seats within the Supreme Court (a new judge is appointed on average every twenty-two months by a president) and by the often significant gap (more than four years on average) between the time a text is adopted by a majority and the time it is declared unconstitutional, in whole or in

41. Louis Favoreu, *La légitimité du juge constitutionnel*, 46 Revue internationale de droit comparé [Rev. int'l dr. Comp.] 557, 560 (1994) (Fr.).

42. Pierre Rosanvallon refers to it as "structural asymmetry" linked to the irreparable gap between the "social people and the civic body people," the fact that "the individual is never immediately a citizen". *See* Pierre Rosanvallon, Le bon gouvernement 197–200 (2015) (Fr.).

43. Alexander M. Bickel, The Least Dangerous Branch, The Supreme Court at the Bar of Politics, 16–17 (New Haven, Yale University Press, 2d ed., 1986 [1962]).

44. Fassassi, *supra* note 28, at 595.

45. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. of Pub. L. 279, 283–284 (1957) [reproduced in Constitutionalism and Democracy, *supra* note 19, at 141–142].

part, by the Supreme Court. This gap corresponds to the duration of a parliamentary and presidential mandate, after which new elections have taken place, allowing for the possibility of political alternation, making the censorship more acceptable when the text declared unconstitutional comes from a different majority. There is, therefore, no real difficulty.

The idea that the Supreme Court defends the interests of a minority or minorities against the "tyranny of the majority" appears even more questionable to him, especially since in 1957, the Supreme Court never truly played the role of guardian of fundamental rights and liberties, or at least it never gave the impression of wanting to play that role. It would indeed do so under the direction of Chief Justice Earl Warren, but at a time when, as explained by Idris Fassassi, it was politically aligned with the ruling power. Robert A. Dahl engages in a very precise analysis of the decisions to show that even when the Court declared certain laws or provisions unconstitutional, its interpretation was ultimately not very far from that of the legislator so that the latter only had to make minor modifications. In addition to this, it should be noted that until the direction of Justice Warren, the Supreme Court often defended the interests of the dominant class (whites) against those of racial, ethnic, or social minorities (submerged groups). However, the concept of counter-majoritarian or counter-democratic practices has the merit of showing how central the idea of dissociation between rulers and the ruled, between the people and their representatives, is in the discourse legitimizing judicial review in Western democracies.

B. The Delegitimization of Judicial Review

However, these discourses do not completely dispel the doubt that looms over judicial review. Firstly, judicial review is challenged due to the considerable power it grants to non-elected judges, who are not subject to the risk of political censorship and whose decisions can impact broad sectors of political, economic, social, and societal life. The democratic legitimacy of judicial review is then contested based on its purpose and effects, as they have an evident political dimension. The issue, therefore, does not stem from legitimate questions, which are indeed at the heart of contemporary constitutional law, but rather from their political instrumentalization. Many elected officials use them to justify certain practices or promote reform projects.

1. The Asymmetry between Powers and Responsibility

Judicial review is criticized both for its power (being able to contravene the will of the majority) and for the conditions of designation and exercise of those in charge (it is entrusted to judges who are not elected but appointed and do not run the risk of political censorship). In other words, judicial review contradicts two fundamentals of democracy and the representation link: the majority rule and the principle of political accountability.[46]

Elevating the constitutional judge to the same level as elected officials, making them a representative of the people, poses several problems. Firstly, it may fuel skepticism about the legitimacy of judicial review and, more broadly, unelected bodies participating in public decision-making. There is a highly critical discourse about the overall impression it gives—that of a model favoring experts protected by their political irresponsibility)—[47]and discourse about separation, isolation, and self-justification of law compared to other political and social phenomena.[48] Alternatively, judicial review might prompt those who, without questioning its importance and necessity, simply believe that it has transformed democracy into something else, something deviating from its original meaning: collective self-determination.[49]

Stating that the constitutional judge participates in the production of sovereignty, that the "people speak through the constitutional judge"[50] amounts to making them a co-legislator or a negative legislator without being elected themselves and, especially, without facing the risk of political sanction. This poses an obvious problem of electoral legitimacy. We know the importance of accountability, meaning the submission of rulers to the judgment of the governed, allowing them to assess the effectiveness of public action and measure the gap between what was announced and what was done, between political promise and

46. Bickel, *supra* note 43, at 17 ff..; Ely, *supra* note 28, at 4–5; Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 L. & Phil. 333 (1990–1991).

47. Bastien François, *Justice constitutionnelle et "démocratie constitutionnelle". Critique du discours constitutionnaliste européen*, in Droit et politique 53–64 (Paris: Presses universitaires de France, 1993) (Fr.); Anne-Marie Le Pourhiet, *Définir la démocratie*, 87 Revue française de droit constitutionnel. [Rev. fra. dr. const.] 453–464 (2011) (Fr.).

48. Jean-Marie Denquin, *Que veut-on dire par démocratie ? L'essence, la démocratie et la justice constitutionnelle*, 2 Rev. Int'l dr. pol. (2009) (Fr.); Olivier Jouanjan, *L'État de droit démocratique*, 2 Rev. Int'l dr. pol. (2019) (Fr.).

49. Pierre Brunet, *La démocratie entre essence et expérience. Réponse à Dominique Rousseau*, La vie des idées (Oct. 23, 2008), https://laviedesidees.fr/La-democratie-entre-essence-et.

50. *Ibid.*

its execution.[51] It is the condition for the representation link, the relationship of trust between representatives and the represented.

A second difficulty is that constitutional democracy or democracy by law creates a "hierarchy of legitimacies" between the "constituent will of the people" and the "legislative will of representatives."[52] However, constitutions change and evolve over time—they often have little resemblance to their original version—and most amendments go through the parliamentary route rather than a referendum. Consequently, constitutional courts most often control the conformity of a law voted on by representatives to a text voted on by the same representatives. This leads Jean-Marie Denquin to argue that "the will of the people has disappeared in the operation, and with it, the supposed democratic legitimization of constitutional control."[53]

Thirdly, the argument that the constitutional judge does not have the final say is itself debatable. It can be observed first that there are many ways to revise a constitution, ways that may not always involve a referendum and whose initiation is not solely left to popular initiative. Moreover, representatives are not the sole masters of the revision procedure. While they are formally in charge of initiation and voting, the success or failure of the procedure depends on factors beyond their control: the assembly of a sufficient majority of parliamentarians, the ability to convince, etc.[54] Even assuming the procedure goes through to completion, the constitutional judge often retains a right of intervention. They have the option to control the constitutionality of the revision procedure and thus invalidate it, raising the perennial issue of *supra*-constitutionality and undermining the idea of derived constituent power. This safety net can be beneficial in certain cases, for example, to contain the reform desires of a majority that has just won the elections and is eager to undo what was done by previous majorities, but the question of its legitimacy is not thereby resolved. The constitutional judge remains the ultimate interpreter, the true sovereign in many cases, hence the notions of "judicial republic" or "judicial imperialism."[55]

51. Bernard Manin, Principes du gouvernement représentatif 301 (Pari1995).

52. Denquin, *supra* note 48, at 19.

53. *Ibid.*

54. *Id.* at 23.

55. *See e.g.* Robert Badinter *et al.*, *Introductory Remarks* and Dieter Grimm *et al.*, *Judicial Activism*, *in* Judges in Contemporary Democracy: An International Conversation 9–15, 17–65 (Robert Badinter & Stephen Breyer eds., 2004).

2. The Political Dimension of Judicial Review

Finally, the issue of the political dimension of judicial review remains unresolved. It seems hardly contestable that within constitutions, "terms that are both ambiguous and value-laden"[56] prevail over behavioral norms, thereby reinforcing the power of subjective interpretation. Political problems often lurk behind legal issues—such as procedural problems—so pronouncing on one inevitably involves pronouncing on the other. Political and social events provide us with numerous examples, each as convincing as the next. The scope of intervention of the constitutional judge is considerable. Through the control it exercises over laws, administrative acts, and electoral operations, the constitutional judge's intervention is omnipresent and has oversight over entire sectors of political, economic, social, and societal life. One may always suspect the constitutional judge of using a legal difficulty as a pretext to impose its political, philosophical, and moral opinions, playing on textual ambiguities, or seeking to justify legally a solution it had initially chosen.[57]

One may respond, and rightly so, that the work of interpretation is not unique to the constitutional judge but common to all legal enforcement bodies. It does not depend on the precision of the text. Every norm must be interpreted before being applied, even if it later turns out to be clear and unambiguous.[58] However, this does not address the issue of legitimacy, as in determining the meaning of a statement, the judge "becomes the true creator of the premise, the true legislator,"[59] nor does it limit the risk of arbitrariness since the judge chooses between various possible interpretations. The judgment of proportionality itself entails an incompressible margin of arbitrariness, as reconciling principles or rights inevitably involves prioritizing one over the other.

Louis Favoreu argues that the constitutional judge settles legal disputes between the majority and the opposition in legal terms, which would not only "calm the debate" and make it "more serene" but also give the measure an "additional authority."[60] The judicial decision would thus be an instrument legitimizing public decision and extinguishing controversy. However, this seems true only to a certain extent.

56. Cappelletti, *supra* note 36, at 38.

57. Jean Waline, *Existe-t-il un gouvernement du juge constitutionnel en France?,* in Renouveau du droit constitutionnel. Mélanges en l'honneur de Louis Favoreu 490–91 (2007) (Fr.) [hereinafter Renouveau du droit constitutionnel].

58. Troper, *supra* note 35, at 31.

59. *Ibid.*

60. Favoreu, *supra* note 41, at 557.

Those satisfied by the judicial decision, as it granted their claims or gave them a favorable outcome, will indeed praise its merits. For others, it is less certain. They might instead believe—whether justified or not—that the judicial decision formalizes inequality or injustice, depriving them of a measure they approved during the election, thereby accentuating the sense of disconnection from the population, and reinforcing distrust.

This does not mean that judicial review lacks pacifying or "legitimizing" virtues, and it can contribute to citizen acceptance of a decision. However, these virtues seem questionable in certain contexts, especially when the measures contained in the text divide public opinion. The risk for the constitutional judge is, as Alexander M. Bickel puts it, to "freeze" a political dispute, "alienate" it, and even "radicalize those who would lose in court," hence the author's call to Supreme Court judges to exercise restraint and not judicially settle sensitive political disputes by invoking their non-justiciability—what he called "passive virtues."[61]

This system would find its limit in the self-limitation of constitutional judges, and their tendency toward prudence and restraint because they are concerned about their social legitimacy and avoid making decisions contrary to public opinion. I leave aside the issue of quantifying public opinion, the means of establishing with certainty whether a decision is or is not supported by a majority, which is a problem in itself, as rightly pointed out by Robert A. Dahl.[62] They set their own limits. However, the argument encounters a significant obstacle: self-regulation depends on the goodwill of the judges, does not correspond to a binding rule, and is therefore not a sufficient guarantee.[63] Moreover, one could also reproach the judge for favoring their social legitimacy at the expense of another form of legitimacy that is equally important: respect for the rules of law. Thus, the contradictions persist, and the problem remains unresolved. The exercise of distinguishing between "good activism" and "bad activism" is perilous, even if one can legitimately regret when courts backtrack and overturn rights they had established several years or decades earlier.

3. The Political Instrumentalization of Legitimate Concerns

For all these reasons, the problem of the legitimacy of judicial review appears to be unsolvable, and perhaps we must consider abandoning attempts to resolve it. However, it is possible to adopt an intermediate, more cautious position that, without denying the

61. Bickel, *supra* note 43, at 111–198.
62. Dahl, *supra* note 45, pp. 283–284.
63. Denquin, *supra* note 48, p. 22.

importance and necessity of judicial review, acknowledges that it is not compatible with the original idea of democracy. Judicial review has evolved into something else, and numerous factors (legal, political, historical, social) can explain this transformation, but it is difficult to assert that the people are still sovereign. Michel Troper perfectly summarizes the difficulty:

> Either one considers that the people are sovereign, which means they have limitless power that can be exercised in any form, and this obviously excludes any judicial review; or, on the contrary, one believes that the power of the people should not be exercised without limits, that it must respect at least constitutional forms, human rights, and fundamental freedoms, and that judicial review is the means to ensure this respect, but one cannot then claim at the same time that this people are sovereign.[64]

These legitimate criticisms or concerns have been taken up and politically instrumentalized. First, illiberal governments in Latin America and Eastern Europe have turned them into an electoral promise: to restore the people's sovereignty and preserve their identity.[65] However, this alleged return to sovereignty does not involve rebalancing the power relationship between elected officials and citizens, introducing tools for direct democracy, or improving existing tools. Illiberal governments propose to remedy "legal impossibilism," to use Jaroslaw Kaczynski's expression,[66] by removing all institutional obstacles that could prevent the adoption of measures to which voters consented at the time of the election. Among their privileged targets is the constitutional judge, as they are the ones delaying or blocking decision-making and thus impeding the efficiency of public action.

This strategy of avoidance or circumvention of institutional checks contributes to the forced erosion of the separation of powers, the rule of law, and the liberal democratic model. However, this type of discourse finds success even within liberal democracies, where it is no longer exclusive to extreme parties. It is now echoed by jurists, political leaders, and intellectuals who belong to or are close to governing parties, indicating the increasingly blurred boundary between liberalism and illiberalism. A significant part of the Western political class is embracing this rhetoric, raising questions about the relevance of the concept of

64. Troper, *supra* note 35, at 31. *See also* Michel Troper, *Quelques remarques à propos de l'analyse de Dominique Rousseau*, *in* La légitimité de la jurisprudence du Conseil constitutionnel 377–380 (Nicolas Molfessis et al. eds., 1999).

65. *See e.g.* Roïla Mavrouli, *Le "comme si" du peuple à l'aube des démocraties illibérales*, 131 Revue française de droit constitutionnel [Rev. fra. dr. const.] 593–615 (2022) (Fr.).

66. *La crise du libéralisme*, *supra* note 2, at 798.

illiberal democracy. There are no longer watertight borders or isolated systems, but a circulation of the same discourses with varying degrees of intensity, which may or may not translate into electoral success for reasons sometimes entirely unrelated to the voters' will (such as the electoral system). It is within these discourses that the justifications for bypassing the constitutional judge are found.

II. Blatant Bypass: Legislative Forceful Passage

The first type of mechanism relies on a clearly identifiable circumvention strategy. It involves giving elected officials the option not to apply a decision of non-conformity simply by voting for a law. This is known as the override clause. The ruling coalition in Israel planned to amend the Israeli Constitution to introduce such a clause until an unprecedented political and social crisis, followed by the attacks of October 7 and the ensuing war, forced them to back down (2.1). This type of mechanism exists in some states, but either it is accompanied by rules preventing abuse by the executive and legislative branches, or it exists as such but in contexts very different from Israel's, where there is a culture of institutional dialogue, reducing the risk of conflict between judges and elected officials (2.2).

A. The "Override Clause": The Israeli Example

The override clause is part of a broad project to bring the judiciary under control, a goal that the right and the far-right have been contemplating for a long time but have been unable to implement due to a lack of sufficient majority.[67] The ruling coalition has temporarily halted it, but it could very well attempt it again later by proposing, for example, a softened or mitigated version. This kind of project is made possible by the unprecedented crisis of confidence that the Israeli Supreme Court has been experiencing for several years, accused by a segment of the public of advocating secular and liberal values.

1. The Content of the Israeli Supreme Court Reform Project

In Israel, the coalition formed after the last legislative elections, comprising parties ranging from the government's right to ultra-religious parties, had long planned to amend the Basic Law, the set of texts serving as a constitution, to thoroughly reform the judicial authority. The details of the measure were outlined in January 2023 by Justice

67. Shira Rubin, *The Secretive Israel Think Tank Behind Netanyahu's Judicial Overhaul*, Wash. Post, Mar. 25, 2023; Nettanel Slyomovics, *Appointing "Our Kind" of Judges*, Ha'aretz, Apr. 7, 2023.

Minister Yariv Levin, triggering unprecedented protests and a strong reaction from the entire judiciary, academia, and part of the military, all vehemently opposing the reform.[68] Even the President of the Supreme Court broke her customary reserve—a first—to denounce a "mortal wound to democracy."[69] Prime Minister Benjamin Netanyahu initiated negotiations with the opposition and publicly announced abandoning the most controversial elements of the reform. However, it reappeared in a different form, stripped of its most contentious elements, reigniting the protest movement. This softened version of the reform project was struck down by the Israeli Supreme Court in January 2024,[70] but the mere fact that it was under discussion and enjoyed strong support among the population—at a time when judicial review is being challenged in various regions of the world—prompts reflection on the problems it poses and the historical, political, and social dynamics underlying these discussions.

The initial project included several measures, one of which was the introduction of a derogation or bypass clause. This would have allowed an absolute majority of parliamentarians (sixty-one out of one hundred and twenty) to bypass a decision of the Supreme Court by voting for an ordinary law. This was by far the most contested measure of the reform. The bypass would have taken the form of a legislative force, with parliamentarians having the option, through the derogation or bypass clause, to undo a declaration of unconstitutionality and thus maintain a text despite its non-compliance with the "Constitution." The text also proposed replacing the rule of a simple majority for decision-making—practiced by most constitutional courts, as far as we know—with a qualified or reinforced majority. Decisions of non-compliance would have required twelve out of fifteen votes, compared to the current eight out of fifteen, significantly narrowing the Supreme Court's maneuvering space.[71]

68. *See e.g.* Alan M. Dershowitz, *I Will Always Support Israel, but "Overriding" Its Supreme Court Is a Terrible Idea*, Ha'aretz, Dec. 5, 2022; Allison Kaplan Sommer, *Explained: What Is Israel's Proposed Override Clause, and Why Is It a "Terrible Mistake"?*, Ha'aretz, Dec. 14, 2022; James Shotter, *Netanyahu Defends Plan to Rein Judiciary*, Financial Times, Jan. 9, 2023.

69. Chen Maanit, *"A Mortal Wound to Democracy:" Israel's Chief Justice Slams Netanyahu's Legal Overhaul,* Ha'aretz, Jan. 12, 2023.

70. HCJ 5658/23, *Movement for Quality Government v. Knesset* (2024) (Isr.). *See also* Isabel Keshner, Aaron Boxerman & Thomas Fuller, *Israel's Supreme Court Strikes Down Judiciary Law*, N. Y. Times, Jan. 1, 2024; Aeyal Gross, *Did the Israeli Supreme Court Kill the Constitutional Coup?*, Verfassungsblog, Jan. 9, 2024.

71. Chen Maanit & Michael Hauser Tov, *In First Judicial Reforms Draft, Knesset Given Free Rein Over Constitutional Amendments*, Ha'aretz, Jan. 12, 2023.

The second measure aimed to exclude amendments to the Basic Law, i.e., constitutional revision laws, from the jurisdiction of the Supreme Court.[72] The Supreme Court would no longer have had the authority to pronounce on them or, *a fortiori*, to repeal them, even if they were manifestly incompatible with a constitutional rule or a fundamental right.[73] The issue is not so much that constitutional revision laws escape its control, which is a relatively common situation in Western democracies. Some judges have chosen not to control them in the name of protecting the sovereignty of the constituent power, as is the case with the Constitutional Council in France.[74]

However, the situation is entirely different. France has two chambers, whose agreement is necessary for a text to be adopted, and a rigid constitution subject to special revision rules designed to protect it from political alternation. It is not sufficient to vote for an ordinary law to modify it. In Israel, a Common Law country with only one chamber—even though the legislative procedure involves several readings, as in most unicameral states—and no formal constitution but a set of texts serving as a constitution, most basic laws can be amended by an ordinary law, highlighting the importance of an independent control instance from political power. Only a few provisions within the basic laws are subject to special revision rules ("entrenchment provisions"), such as the assembly of an absolute majority of members of the Knesset.[75]

We have known since the *Mizrahi Bank* decision[76] that all basic laws have constitutional value regardless of how they may be amended. To modify them, the Knesset must act as a constituent power, exercising its constituent authority since it is now accepted that it has the power to adopt norms that are both legislative and constitutional.[77] However, this constituent authority has no concrete legal form other than the intention of parliamentarians, their awareness of themselves, and the fact that they are acting at a given moment not as an ordinary legislative power but as a constituent power. When a basic law includes no special

72. *Ibid.*

73. *See e.g.* HCJ 4908/10, *MK Ronnie Ronnie Bar-On v. Israel Knesset*, 64(3) PD 275 (2011) (Isr.).

74. *See e.g.* Conseil Constitutionnel [CC] [Constitutional Court], decision No. 62–20 DC, Nov. 6, 1962, J.O. 10778; Conseil Constitutionnel [CC] [Constitutional Court], decision No. 92–312 DC, Sept. 2, 1992, J.O. 12095; Conseil Constitutionnel [CC] [Constitutional Court], decision No. 2003–469 DC, Mar. 26, 2023, J.O. 5570.

75. Suzie Navot, Constitutional Law in Israel 38–39 (2d ed., 2016) [hereinafter Constitutional Law in Israel].

76. *See* HCJ 6821/93, *United Mizrahi Bank v. Migdal Coop. Vill.,* 49(4) PD 221 (1995) (Isr.).

77. Constitutional Law in Israel, *supra* note 75, at 51–52.

revision rules, it is made and undone by a simple majority, i.e., under the same conditions as an ordinary law. This means that all basic laws are not sanctified, hence the need to adopt a formal constitution to perfect the process initiated by the Supreme Court in 1995.[78]

The adoption of a formal constitution becomes even more urgent given the phenomenon of political radicalization observed over the past decade, linked to full proportional voting. This type of electoral system is rightly considered more democratic, as it is a more faithful reflection or consideration of the election results and ensures the representation of all political formations regardless of their size and means of action, which is not the case with the majoritarian system. However, everything depends on the political, social, and religious context, especially in Israel. Applied to a "deeply divided" society where the political class is "already deeply fragmented,"[79] it contributes to both an accentuation of divisions and institutional blockages—for example, the recent failure of pluralistic coalitions with *Yesh Atid* of Yair Lapid, whose center of gravity was in the center—leading government parties to turn to the extremes, often to the far right. The current coalition has followed this pattern, even if other reasons explain Benjamin Netanyahu's choice, including ensuring that he remains in office in case of conviction. However, the political project proposed by this type of coalition raises obvious constitutional problems, prompting the coalition to reform the Supreme Court to avert any eventuality and ensure the ability to bypass future declarations of unconstitutionality.

These measures are part of a more comprehensive project to rein in the judicial authority, which the far right and some conservative right-wing factions have been considering for a long time, and whose foundations were laid by the *Kohelet Policy Forum*, a think tank largely inspired by the *Federalist Society* and close to American conservative circles.[80] It is part of a network of other think tanks with ties to the United States that defend libertarian values and the limitation of the powers of the Supreme Court, considered too activist and liberal: the *Tikvah Fund* and the *Law and Liberty Forum*. But the project has never been able to materialize for lack of a majority. Indeed, coalitions have always included political parties that set the red line of safeguarding

78. *Ibid.*

79. Marie Gren, *La Cour suprême israélienne : un adversaire institutionnel et idéologique au populisme*, XXV-2019 Annuaire international de justice constitutionnelle [Ann. int'l just. constit.] *54,* 54–55, 63 (2020) (Fr.).

80. Rubin, *supra* note 67; *see also* Slyomovics, *supra* note 67.

the Supreme Court. However, the last legislative elections removed this political barrier.

2. A Project Linked to the Crisis of Confidence in the Israeli Supreme Court

The Supreme Court has been subject to recurrent criticism since the 1990s for its alleged judicial activism and the expansion of its powers, despite exercising careful and moderate use of its prerogatives, especially in constitutional review. Critics accuse it of politicization and departing from its original role as a court of cassation. In the absence of a formal constitution and provisions specifying its areas of competence, the Court constitutionalized itself outside any textual authorization by progressively broadening the scope of its control: first administrative acts with the introduction of an interpretation tool imported from Britain (the reasonableness test), which the ruling coalition unsuccessfully sought to eliminate, then the internal regulations of the Knesset, and finally laws from 1995 onwards.[81] The Court, through a diffuse and concrete constitutional review largely inspired by the American model, has the ultimate authority to verify the conformity of enacted laws with the Basic Law.

The constitutionalization of the Basic Law followed the adoption of two basic laws in 1992, outlining a draft catalog of rights (the Professional Freedom Law and the Freedom and Dignity Law). The adoption process faced significant criticism as it occurred with a slim majority on a day when fewer than half of the parliamentarians were present, leading some to question any genuine constituent intent.[82] These laws resulted from a political compromise. Given uncertainties regarding the secular or Jewish nature of the state and the legal challenges it posed, a step-by-step approach was chosen, addressing text by text, right by right, rather than attempting to adopt a comprehensive catalog of fundamental rights. The process was expected to fail due to the absence of a clear boundary between state and religion and the issues raised by rights such as religious freedom or freedom of conscience in such a context.[83]

81. Gren, *supra* note 79, at 56 ff.

82. *Id.* at 59–60.

83. Constitutional Law in Israel, *supra* note 75, at 41; *see generally* Suzie Navot, The Constitution of Israel: A Contextual Analysis 1–46 (2014). For information on Israel's inability to establish a political and constitutional identity, and the "procrastination" it has caused, *see* Danny Trom, L'État de l'exil, Israël, les juifs et l'Europe 45–78 (2023) (Fr.). *See generally* Ran Hirschl, Constitutional theocracy (2010).

Before this date, there was indeed a catalog of fundamental rights, but its origin was primarily jurisprudential.[84] These two laws had the particularity of incorporating a so-called limitation clause inspired by the Canadian Charter. It allowed the legislature to derogate under certain conditions and for a limited time: if the law "befits the values of the State, is enacted for a proper purpose, and to an extent no greater than is required."[85] These conditions are quite like those found in several provisions of the European Convention on Human Rights, articles 8 to 11, which follow the same structure.[86] The first paragraph establishes the principle, and the following paragraph sets out the conditions under which public authorities can derogate.

The Supreme Court saw in these clauses evidence of the substantive superiority of all laws, justifying the existence of judicial constitutional review despite the absence of explicit textual foundation. Until then, only certain basic laws enjoyed formal superiority due to the special revision rules they included. The other basic laws retained the status of ordinary laws.[87] With the *Mizrahi Bank* decision, it became apparent that all basic laws, not just those adopted in 1992, gained constitutional status and could justify the annulment of a contrary text.[88]

There seems to be a shared sentiment among part of the public that judges embody a form of social aristocracy defending secular and progressive values.[89] These values are believed to belong to the Ashkenazi, those from the establishment of the State of Israel who fled pogroms in Eastern Europe and persecution by Nazi Germany, in contrast to the Mizrahim, who arrived later from the Middle East and North Africa and are known for their greater religiosity. The Ashkenazi, mostly secular due to being born into assimilated families with a primarily cultural connection to Judaism (think of authors like Walter Benjamin, Franz Kafka, Joseph Roth, Arthur Schnitzler, or Stefan Zweig) also come

84. Aharon Barak, *La révolution constitutionnelle : la protection des droits fondamentaux*, 72 Pouvoirs 17 (1995).

85. Basic Law: Freedom of Occupation, 5754–1994, March 3, 1992, Art. 4 (Isr.) [reproduced in 26 Isr. L. Rev. 247 (1992)]; Basic Law: Human Dignity and Liberty, 5752–1992, March 17, 1992, Art. 8 (Isr.) [reproduced in 26 Isr. L. Rev. 248–249 (1992)].

86. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8–11, *opened for signature* Nov. 11, 1950, 213 U.N.T.S. 211 (entered into force Sept. 3, 1953)

87. HCJ 142/89, *La'Or Movement–One Heart and One Spirit v. Central Elections Committee for the Sixteenth Knesset,* 44(3), (1990) (Isr.).

88. HCJ 6821/93, *United Mizrahi Bank v. Migdal*, 49(4) PD 221 (1995) (Isr.).

89. Mark Tushnet, *The Rise of the Weak-Form Judicial Review*, *in* Comparative Constitutional Law, Research Handbooks in Comparative Law Series 325 (Tom Ginsburg & Rosalind Dixon eds., 2011). *See generally* Ran Hirschl, Towards Juristocracy, The Origins and Consequences of the New Constitutionalism 50–99 (2007) [hereinafter Towards Juristocracy].

from Eastern Europe, where many states, while not all democracies in the conventional sense, had a close relationship with political liberalism. The establishment of legality and constitutionality checks in Prussia and the former Austro-Hungarian Empire is a good example.[90] Therefore, the Ashkenazi, except for the Russians, have some experience with democracy, whereas the Mizrahim come from states with a different political and constitutional culture, reflected in their discourse and the ideas they promote.

Distrust towards the judicial authority also has economic and social dimensions. It is fueled by the impression that the Ashkenazi belong to a privileged class that benefited from the country's economic growth. In contrast, the Mizrahim, often living in rural areas, feel neglected and hold the Labor Party and the Supreme Court responsible. In addition to refusing to align with their strict interpretation of Judaism, the Supreme Court opposes the preferential treatment the Mizrahim seek: exemption from conscription for yeshiva students (schools where Torah is studied to become a rabbi), free use of social benefits they receive, posing various legal issues related to equality and parity. Understanding the doubts and questions that accompanied the rise of the Supreme Court is crucial. These developments may have been perceived to prevent future conservative reforms, either by creating new legal tools when the Constitution did not formally authorize them or by distorting existing tools from their original function. This was a major argument against the 1995 revolution. From this perspective, the institutional reforms led by illiberal governments (or those leaning toward illiberalism, using its rhetoric) appear as legitimate tools for rebalancing power dynamics, ensuring a more faithful representation of society. However, they propose to remedy the real or perceived imbalance of powers with an even greater imbalance.

B. A Mechanism Inspired Political Systems Far Removed from Israel

Mechanisms for bypassing the constitutional judge are not unique to Israel; they exist in other regions of the world and states with entirely different histories and traditions, whether they follow Common Law or Roman-Germanic traditions. However, these mechanisms either come with safeguards to prevent the executive and its majority from having unchecked powers to systematically bypass declarations of unconstitutionality, or they arise from specific political and social contexts where

90. *See. e.g.* Michael Holoubek & Ulrich Wagrandl, *A Model for the World: The Austrian Constitutional Court Turns 100*, 17 Vienna J. on Int'l Const. L. 251–276 (2023).

there is a culture of institutional dialogue, thereby reducing the risk of direct opposition between judges and elected officials. Unlike Israel, there is no general distrust of the judiciary.

1. The Example of the Polish Constitutional Tribunal

One example is Poland, where the 1952 Polish Constitution was amended in 1982 and supplemented three years later by an ordinary law that created the Constitutional Tribunal. Its function was to review the constitutionality of administrative acts and laws, either on its own initiative or at the request of the President of the Republic.[91] However, until 1997 and the adoption of the current Constitution, its decisions did not have binding force and had to be examined by the lower house of the Congress (the Diet), which could reject them. The official rationale was to find a balance between judicial review and "socialist constitutionalism."[92] This amounted to granting the Communist Party a veto over judicial review decisions, but this compromise allowed the Tribunal to be established.[93]

The significant difference with the proposed project by the ruling coalition in Israel lies, beyond the political context, in the very rigorous procedural framework of the mechanism. An unconstitutional decision could only be set aside by the adoption of a resolution with a two-thirds qualified majority, with at least half of the total number of deputies present.[94] Additionally, the Diet was obliged to review the unconstitutional decision within six months. If not, the Tribunal's decision would definitively take effect, and the law declared unconstitutional would lose its binding force.[95] These conditions were particularly restrictive and largely limited the risk of abuse since they compelled both the majority and the opposition to reach an agreement. This is reflected in the numbers provided by Lech Garlicki: out of the eighty decisions rendered during the Tribunal's first fifteen years of activity—from its establishment to the constitutional revision—only eight were circumvented by the Diet. Although this mechanism was formally abolished in 1997 with the adoption of the new Constitution and the introduction of Article 190, Paragraph 1, stating that "decisions of

91. Lech Garlicki, *Vingt ans du Tribunal constitutionnel polonais*, *in* Renouveau du droit constitutionnel. Mélanges en l'honneur de Louis Favoreu 191, 193 (Dalloz, 2007) (Fr.) (hereinafter *Vingt ans du Tribunal)*.

92. Lech Garlicki, *La réforme de la juridiction constitutionnelle en Pologne*, XXIII-1997 Annuaire international de justice constitutionnelle [Ann. int'l just. constit.] 11, 12 (1998).

93. *Ibid.*

94. *Vingt ans du Tribunal*, *supra* note 91, at 195.

95. *Id.* at 197–198.

the Constitutional Tribunal have universal binding force and are final," it continued to have effects for two years through a transitional mechanism that allowed lawmakers to use it for certain types of decisions.[96]

It is also noteworthy that the abolition of the mechanism did not lead to any open conflict between the judiciary and elected officials. Lech Garlicki explains that the Tribunal gradually built its legitimacy, establishing itself among other supreme courts (the Supreme Court and the High Administrative Court), which was not obvious given the significant differences they had regarding the interpretation monopoly of the law and the distribution of powers.[97] The Tribunal managed to advance the idea that it was an indispensable actor in the institutional balance of the state, allowing it to develop a particularly rich and interesting jurisprudence.[98] This success is partly explained by the restraint it demonstrated during its early years of activity. It initially chose to only review regulations, even though the Constitution gave it the power to review laws, emphasizing that it was "committed to the supreme position of the Diet in the system of state organs."[99] Moreover, it opted for a "tactic of selective action, carefully avoiding involvement in cases of substantial political importance where it might struggle to maintain constitutional honesty."[100]

However, its success is also tied to the prestige and trust it gained during the initial phase of democratic transition. Unlike ordinary courts that existed and operated under communism, constitutional courts were created during the democratic transition. They were not "compromised" and enjoyed moral authority, enabling them to "directly enter the democratic transformation process."[101] Their prestige was even greater as they were composed of law professors whose independence from political power was beyond doubt. Other reasons were related to the mistrust citizens had toward parliaments transformed into rubber-stamp chambers during the communist era.[102]

96. *Ibid.*

97. *Ibid.*

98. Mark F. Brzezinski & Lech Garlicki, *Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?,* 31 Stan. J. Int'l J. 13, 13 ff. (1995).

99. *Vingt ans du Tribuna, supra* note 91, at 194.

100. *Ibid.*

101. Lech Garlicki, *La légitimité du contrôle de constitutionnalité : problèmes anciens c/ développements récents*, 78 Revue française de droit constitutionnel 227, 231 [Rev. fra. dr. constit.] (2009) (Fr.) (hereinafter *La légitimité du contrôle*).

102. *Ibid.*

2. The Example of the Canadian Supreme Court

Mechanisms for bypassing the constitutional judge also exist in several Commonwealth states, where attempts have been made to strike a balance between, on the one hand, the principle of parliamentary sovereignty, which enjoys a form of jurisdictional immunity, and, on the other hand, the protection of fundamental rights, which became constitutionalized after World War II, leading to the introduction of judicial review of the constitutionality of laws. The idea is to promote dialogue between judges and elected officials, marking the emergence of a new form of constitutionalism: "dialogical" or "cooperative constitutionalism."[103] Unlike Israel, the aim here is not to limit a constitutional judge deemed too powerful and distrusted by a portion of the population and elected officials but to carve out a new role for them by reflecting on their relationships with political bodies within the scope of their duties.

One of the most well-known examples is the Canadian Charter of Rights and Freedoms adopted in 1982 amid the constitutionalization and definitive autonomy of Canada from the United Kingdom. Like most catalogs of fundamental rights, the Charter is protected by judicial review exercised by the Supreme Court. Before this date, there was constitutional review, but it was limited to issues of the distribution of powers between the federal and federated states. The uniqueness and interest of the Charter stem from the so-called override clause provided in Article 33, which, on the surface, appears comparable to what the ruling coalition in Israel wished to introduce.[104] This argument is often heard from reform proponents, asserting that Israel would merely be importing existing constitutional mechanisms and would not distinguish itself from Western democracies.[105] However, this clause is linked both to the federal structure of the Canadian state and to a cultural and linguistic context that has nothing to do with that of Israel. Matthieu Febvre-Issaly explains that it is "the result of a compromise aimed at

103. *See e.g.* Manon Altwegg-Boussac, *Le concours des organes politique et juridictionnel à la garantie des droits. Regards sur une modélisation alternative de justice constitutionnelle*, 13 Rev. Int'l dr. pol. (2014) (Fr.); Matthieu Febvre-Issaly, *Un dialogue constitutionnel ? La circulation d'une métaphore et quelques réalités juridiques contemporaines*, 27 Rev. Int'l dr. pol. (2022) (Fr.).

104. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.), Art. 33.

105. On the Canadian override clause and its importation into Israel, *see e.g.* Lorraine E. Weinrib, *The Canadian Charter's Override Clause: Lessons for Israel*, 49 Isr. L. Rev. 67 (2016); Adam Dodek, *The Canadian Override Clause: Constitutional Model or Bête Noire of Constitutional Politics*, 49 Isr. L. Rev. 45 (2016): Rivka Weill, *Juxtaposing Constitutional-Making And Constitutional-Infringement Mechanisms in Israel and Canada: On the Interplay Between Common Law Override and Sunset Override*, 49 Isr. L. Rev. 103 (2016).

making the provinces most reluctant to accept the normative superiority of the 1982 text (some of which were keen to retain linguistic particularism) while maintaining an area of freedom for their legislatures."[106]

Concretely, the override clause provided in Article 33 allows the national and local legislator to intervene at two stages: (a-) *a priori* by voting a text in which it announces a temporary derogation from certain fundamental rights, allowing it to anticipate a future declaration of unconstitutionality; or (b-) *a posteriori* by voting a text that reproduces the content of the law struck down as unconstitutional but protected this time by the derogation clause—corresponding to the project desired by the ruling coalition in Israel. The Canadian Supreme Court has interpreted the derogation clause very broadly, allowing the national parliament and provincial parliaments to largely use it. In the *Ford* decision related to the linguistic particularism of Quebec, it held that Article 33 posed only formal conditions and that there was no need for a substantive review of the provisions declaring a derogation from specific rights protected by the Charter.[107] The national or local parliament does not have to justify itself; it just needs to specify in the text the right(s) to which it intends to derogate.

However, the mechanism is accompanied by several safeguards. Firstly, the derogation is temporary (five years), even though the derogation period can be extended several times. Secondly, the derogation can only concern certain fundamental rights, as there is a hard core of non-derogable rights excluded from the scope of the text. Above all, this mechanism arises from a specific political and social context. The *Ford* decision did not lead to an increase in the preventive use of Article 33; on the contrary, there seems to have been a tacit agreement between the national parliament and local parliaments, a kind of "constitutional convention," whereby they would refrain from using it preventively. Even when the Constitutional Court declared local or national laws unconstitutional, its decisions were circumvented only in rare cases.[108] In other words, parliaments respected the Court's decision, either by repealing the law or by adopting a new law with better guarantees or without the provisions declared unconstitutional.

The deliberative or dialogical dimension is reinforced using "suspensive declarations of nullity," allowing the law struck down as unconstitutional to remain in force until Parliament adopts a new text.[109]

106. Febvre-Issaly, *supra* note 103, at 232–233.
107. *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R.. 712.
108. *La légitimité du contrôle*, *supra* note 101, at 236.
109. *Ibid.*

Thus, there seems to be a certain deference toward the Supreme Court and a political and constitutional culture that allows for a form of balance, even if the mechanism seems to have fallen into disuse. There is no opposition between parliaments and the Supreme Court. The example of Canada is particularly interesting because there is proper judicial review, which is explained by its intermediate position between American-style federalism, which requires an organ for the distribution of powers and thus a supreme court, and the principle of parliamentary sovereignty that excludes it.

This is not the case for all Commonwealth states, which operate differently but offer interesting examples of dialogue between judges and elected officials. In the United Kingdom and New Zealand, for example, catalogs of fundamental rights do not always have constitutional status—it depends on the text, which may only have equal value to the law—and especially judges do not have the power to invalidate a law due to its incompatibility. They use fundamental rights protection texts as interpretative tools, ensuring that legislation is interpreted to align with constitutional or conventional standards.[110] Both systems introduce additional mechanisms to address issues of compatibility: in New Zealand, the Attorney-General highlights potential conflicts to the legislature and encourages resolution, without directly intervening; in the United Kingdom, higher courts can declare a law incompatible, though such declarations do not affect its validity.[111] The distinction lies less in the effects of these mechanisms and more in who is responsible for implementing them. In that model, judges retain their power to evaluate and interpret the law, as they assess its compliance with a constitutional or conventional standard, but they do not determine its fate—what Stephen Gardbaum referred to as the "new Commonwealth model" of judicial review in 2001.[112] However, in practice, the results produced are quite like those found in Roman-Germanic tradition states. While the courts do not have the power to invalidate a text, their conforming interpretation binds public authorities, so they themselves resolve the problems of incompatibility.

The notion of "dialogue" is certainly contested due to both the final word that judges retain in certain cases and the political purposes

110. New Zealand Human Rights Act, Pub. Act. 1990 No 109, 1990, Sect. 6–7 (NZ); Human Rights Act, 1998, Sect. 3(1), 4(1)-(6) (UK).

111. *Ibid.*

112. Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism", 49 Am. J. Comp. L. 707 (2001); Stephen Gardbaum, The New Commonwealth Model of Constitutionalism, Theory and Practice (Cambridge, New York: Cambridge University Press, 2013).

attributed to the establishment of judicial review. According to Ran Hirschl, judicial review would aim to preserve the threatened hegemony of a sociological group with legislative majority power, constituting, in a parliamentary sovereignty context, by preserving its rights and participation in the political system in case it loses such power, all under the impartial guarantee of a supreme judge.[113] However, these examples show that if mechanisms for bypassing exist, they respond to local specificities and are embedded in a context of exchange and dialogue between judges and elected officials.

III. Specious Bypass: Institutional Capture of Constitutional Courts

The second type of bypass is less blatant because it does not involve undoing a declaration of unconstitutionality by voting on a law. Instead, it involves a takeover of the constitutional court, with its members being removed and replaced by judges favorable to the executive and its majority. It is an institutional capture of the court, the stated ambition of which is to protect the sovereignty of the people and the outcome of elections. This type of mechanism is not new but has experienced a renewed surge in Hungary and Poland (4.1.). It has since spread to other democracies, which, while not strictly illiberal in the conventional sense, lean toward illiberalism both in political discourse and its implementation (4.2.).

A. Taking Control of the Constitutional Court by Elected Officials

Taking control of constitutional courts is not a new phenomenon. It has existed for a long time and in diverse contexts, often arising from political disagreements between governments and their majorities on one side and the supreme courts on the other. However, it has never been employed to the extent we see today. In countries like Hungary and Poland—and similarly in parts of Latin America—constitutional courts have been radically restructured, with their members replaced by individuals aligned with the executive. This shift has led to a significant change in their role. Rather than serving as independent checks on power, constitutional and supreme courts are transformed into tools for legitimizing public decisions after being reformed and stripped of their original substance.

113. *See generally* Towards Juristocracy, *supra* note 89.

1. An Ancient Practice but Never Used to Such Extent

Unlike the override clause, the circumvention through the takeover of the constitutional court does not rely on a logic of opposition between judges and elected officials. It involves turning the court into an ally of the incumbent power by purging members who might block measures desired by the executive and its majority, and to which citizens consented during the election. This mechanism thus carries the appearance of democratic legitimacy, hence the notion of speciousness. It claims not to target the institution *per se* but the institution when it is "politicized," composed of heterogeneous personalities not all favorable to the ruling power—essentially when the court is able to fulfill its role. There is circumvention in the sense that the authentic constitutional court is replaced by a puppet court acquiescent to the executive and its majority.[114] This illustrates the paradox of political parties or leaders who, after maintaining a discourse of mistrust and sometimes outright hostility toward the judicial authority, praise its merits once it has been reformed. The history of constitutional review in the United States and its opponents (alternately Democrats and Republicans), from the *Lochner* era to the present, including the New Deal and the Warren Court, is a perfect illustration of these ambiguities.[115]

The practice of court-packing has existed for a long time and in quite different contexts. It involves flooding a conservative or liberal majority within a supreme court or constitutional court—depending on the political configuration—by increasing the number of judges, often following an election and therefore a change or dispute between judges and elected officials to rebalance the power dynamic. The most well-known example is the Judicial Procedures Reform Act, a Supreme Court reform initiative launched by President Roosevelt in 1937 after the Court struck down much of the New Deal legislation.[116]

However, this practice is now being used on an unprecedented scale, jeopardizing the very idea of judicial review. The European and Inter-American courts have encountered this type of practice, which, often accompanied by constitutional reforms, contributes to the erosion

114. *See generally* Kim Lane Scheppele, *The Rule of Law and the* Frankenstate*: Why Governance Checklists Do Not Work,* 26 Governance 559 (2013).

115. *Lochner v. New York*, 198 U.S. 45 (1905). This "era" is considered to have ended in 1937, when the Court ruled that Congress could regulate labor relations. *See National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301 U.S. 1 (1937); *West Coast Hostel v. Parrish*, 300 U.S. 379 (1937). *See also* Jeff Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court (New York: W. W. Norton, 2010).

116. Stephen Breyer, The Authority of the Court and the Peril of Politics 16–22 (Cambridge: Harvard University Press, 2021).

of the liberal democratic model. They have responded with considerable firmness, even in more ordinary contexts where they were confronted with isolated measures (specific dysfunctions)[117] rather than an attempt by the executive to bring the judiciary to heel through the institutional capture of the courts (structural dysfunctions).[118]

The two most well-known examples are Hungary and Poland, where significant legislative and constitutional reforms have taken place in the last decade. In Hungary, these reforms emerged with the early electoral successes of *Fidesz*, involving an increase in the number of judges and taking control of the nomination procedure.[119] The President of the Supreme Court and former judge at the European Court of Human Rights, András Baka, was even removed from office for publicly criticizing the judicial reforms carried out by the Orbán government, resulting in Hungary's condemnation for violating Articles 6 (right to a fair trial) and 10 (freedom of expression) of the European Convention on Human Rights.[120]

Poland has undergone similar reforms in recent years. Among the most controversial measures are the early retirement of judges on the Polish Supreme Court at the age of sixty-five, limiting the term of its president, creating a disciplinary regime, and establishing two special chambers exclusively composed of new judges—the extraordinary chamber for public affairs and the disciplinary chamber. This system was supplemented by additional measures in December 2019 (the law came into force the following year), such as strengthening the powers

117. *Guðmundur Andri Ástráðsson v. Iceland*, App. No. 26374/1, Eur. Ct. H. R. (Dec. 1, 2020).

118. For the European case law, *see e.g., Dolińska-Ficek and Ozimek v. Poland*, App. Nos. 49868/19 and 57511/9, Eur. Ct. H. R. (Nov. 8, 2020); Error! Hyperlink reference not valid. *v. Poland*, App. No. 50849/21, Eur. Ct. H. R. (Nov. 23, 2023). For the Inter-American case law, *see e.g. Constitutional Tribunal v. Peru*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 71 (Jan. 31, 2001); *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 266 (Aug. 23, 2013); *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 268 (Aug. 28, 2013); *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Interpretation of the Judgment of Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 280 (Aug. 21, 2014).

119. *See generally* Tímea Drinóczi, *The Unfolding Illiberalism in Hungary*, 47 Rev. of Cent. & East Eur. L. 352 (2022); Matthijs Bogaards, *De-democratization in Hungary: Diffusely Defective Democracy*, 25 Democratization 1481 (2018); Kriszta Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union*, 51 Communist and Post-Communist Studies 189 (2018); Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. of Democracy 138 (2012).

120. *Baka v. Hungary*, App. No. 20261/12, Eur. Ct. H.R. (June 23, 2016) https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001–163113%22%5D%7D.

of the disciplinary chamber, which can lift judicial immunity, requiring judges to declare their political and associational affiliations, and allowing disciplinary action against judges who apply EU law or refer preliminary questions to the Court of Justice.[121]

The European Court of Human Rights and the Court of Justice have responded to these measures on multiple occasions. The former found a violation of Article 6 of the European Convention (right to a fair trial), stating that the new disciplinary chamber was not a "court established by law" and lacked sufficient guarantees of independence and impartiality.[122] The Court of Justice followed the same reasoning, "condemning" Poland several times over the past two years and ordering, under penalty, the suspension of the disciplinary chamber—a demand the authorities consistently refused, exposing themselves to record fines.[123] The latest condemnation dates to early June 2023, accompanied by strong reactions from the Polish executive.[124]

These judicial decisions add to a longer and more politically charged procedure: the triggering of Article 7 of the Treaty on European Union initiated by the European Parliament, which had asked the Council whether the judicial reforms in Poland (and in Hungary) constituted a "clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU." However, the procedure could not proceed due to the unanimity rule that still prevails in many areas of the European Union's competencies. Hungary and Poland can generally rely on strong support from other members of the Visegrád Group (an intergovernmental organization comprising the Czech Republic, Hungary, Poland, and Slovakia). However, the political shift in Poland, marked by Donald Tusk's return as Prime Minister, offers a glimpse of improved relations with the European Union.

121. *See generally* Éric Maurel, Émilie Malivert & Ana Pasturel, Fondation Robert Schuman, *L'État de droit en Pologne ou la fausse querelle de la primauté du droit européen,* 615 Question d'Europe (Fr.).

122. *Reczkowicz v. Poland*, App. No. 43447/19 Eur. Ct. H.R. (July 22, 2021) https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001–211127%22%5D%7D . *See also Xero Flor w Polsce sp. Z o.o. v. Poland*, App. No. 4907/18 Eur. Ct. H.R. (May 7, 2021) https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001–210065%22%5D%7D.

123. Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2020:277, (Apr. 8, 2020) and Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, (July 15, 2021); Case C-204/21, *Commission v. Poland*, ECLI:EU:C:2023:442 (June 5, 2023).

124. Andrew Higgins, *Flare-Up Over Judicial Overhaul in Poland Reignites Feud with European Union*, N.Y. Times, June 6, 2023.

2. The Misuse of Constitutional Courts

What is very interesting is how the Polish government subsequently used the Constitutional Tribunal to discredit the Court of Justice and the European Union, and thus legitimize its own reform of the judicial authority. The composition of the Tribunal had been altered in 2017 in violation of the Polish Constitution and the Tribunal's own jurisprudence, with the "controversial" decisions not being published in the Official Journal. In response to decisions from the Court of Justice and the European Court, the government referred the matter to the Tribunal. The Tribunal issued three decisions in 2021, noting, on the one hand, the incompetence of the Court of Justice, which would have acted *ultra vires* in ordering the suspension of the disciplinary chamber, and, on the other hand, the incompatibility of several provisions of EU law and the European Convention on Human Rights with the Polish Constitution.[125] This led to a change in perspective. Constitutional and supreme courts are no longer adversaries or competitors. They become valuable tools for legitimizing public decisions after they have been reformed and thus emptied of their substance.

The takeover of constitutional courts is crucial for the Hungarian and Polish governments to successfully combat the European Union and values identified as Western, revealing much about the ambiguous relationship these societies have with the West. Hungary and Poland ontologically and spiritually belong to the West, both because they are rooted in Roman Christianity, unlike Ukraine and Bulgaria, for example, and because they feel part of Western culture. At the same time, they seek to preserve their identity, like all these "small nations" of Central Europe, to use Milan Kundera's expression, whose existence was not self-evident and who have always felt they could disappear at any moment.[126]

125. Wojciech Zagorski, *Quand la Cour constitutionnelle polonaise réfute la jurisprudence de la CJUE, observations sous l'arrêt du 7 octobre 2021*, Jus Politicum Blog (Oct. 21, 2021) https://blog.juspoliticum.com/2021/10/21/quand-la-cour-constitutionnelle-polonaise-refute-la-jurisprudence-de-la-cjue-observations-sous-larret-du-7-octobre-2021-par-wojciech-zagorski/.

126. *See* "La littérature et les petites Nations" and "Un Occident kidnappé", in Milan Kundera, Un Occident kidnappé ou la tragédie de l'Europe centrale 15–31, 39–73 (trans. by Martin Daneš) (Paris: Gallimard, 1983 [2021]) (Fr.). On the issue of language and literature in "small nations", *see* Gilles Deleuze & Félix Guattari, Kafka, Pour une littérature mineure (1975) (Fr.).

B. Extension of this Type of Practice to Democracies Identified as Liberal

One would be mistaken to think that these types of practices and discourses are unique to states identified as illiberal or leaning towards illiberalism, such as Hungary, Poland, Jair Bolsonaro's Brazil, and Israel since the recent elections, even though the shift goes back further in time. They extend to other regions of the world and to states that were thought—perhaps naively—to be immune because their institutions are stronger, more legitimate in the eyes of the population, and enjoy a strong international reputation. A dangerous shift is observed both in political discourse and in its concrete implementation.[127]

1. An Increasingly Questionable Impartiality

In the United States and Israel, for example, public trust in the Supreme Court is collapsing. It is discredited both by political leaders who accuse it of preventing them from implementing the programs for which they were elected and by citizens who disapprove of decisions contrary to public opinion and sometimes made in questionable circumstances. While the criticisms are not based on the same reasons and do not come from the same political spectrum—more from the right in Israel and more from the left in the United States—it is still the politicization of the institution that is denounced, the fact that, in the eyes of some, it defends its own value system or pursues its own political agenda.

In the United States, Donald J. Trump significantly upset the political balance within the U.S. Supreme Court by appointing three conservative judges, but he did so using the powers conferred upon him by the U.S. Constitution—in other words, by playing the game. Democratic representatives did the same last year, taking advantage of their majority in the Senate to appoint a maximum number of progressive judges and pushing for a Supreme Court reform.[128] Even the obstructionist strategy of Republican representatives at the end of Barack Obama's term, who did everything to delay the appointment of a new judge pending the outcome of the 2016 presidential elections, is part of a set of tools that Democratic representatives do not hesitate

127. *See e.g.* Marc-Olivier Behrer, *Une droite intellectuelle américaine en pleine mue illibérale*, Le Monde, Nov. 4, 2022 (Fr.).

128. Carl Hulse, *Milestone Reached with New Judges, Democrats Push to Reshape Courts*, Boston Globe, June 29, 2023; Tyler Pager, *Ahead of 2024, Biden Balks at Modifying Supreme Court*, Wash. Post, July 5, 2023.

to use when opportune and in their favor. Therefore, there is no real circumvention.

However, from a European jurist's perspective, it is surprising that a president or a governor (for example, Ron DeSantis) would ask the Federalist Society to provide a list of candidates whose political and ideological homogeneity poses obvious problems of independence, impartiality, and effectiveness and then choose from only these candidates.[129] What is at stake here is not the legal competence of the selected candidates—they are almost always accomplished and recognized jurists—but the lack of diversity. The political and ideological orientations of the Federalist Society are well known, and it is known that it only proposes candidates committed to originalism, to a highly conservative ideology, and whose studies it has sometimes even funded.

In addition, some associate justices of the Supreme Court have close ties to pro-life groups. The U.S. press revealed in the fall of 2022 that they were informed of the content of certain decisions several weeks or months before they were rendered, including in the case of *Dobbs v. Jackson Women's Health Organization*.[130] The internal investigation conducted by Chief Justice John G. Roberts over several months resulted in a public report but did not identify the source of the leak.[131] However, it is the method used that raises questions and the blatant difference in treatment between the judges and other employees of the Court, such as clerks and administrative staff. While the former were subjected to informal interviews, the latter were forced to testify under oath and provide access to their personal phones and computers. The review of the investigation report was also entrusted to a close associate of Justice Samuel A. Alito Jr., one of the judges suspected due to his proximity to the pro-life movement.

129. Beth Reinhard & Josh Dawey, *DeSantis Panel Was Led by Key Federalist Society Figure*, Wash. Post, June 27, 2023.

130. Jodi Kantor & Jo Becker, *Minister Says Top Court Was Also Breached in 2014*, N.Y. Times, Nov. 19, 2019; Kimberly Atkins Stohr, *Supreme Court Wining, Dining, and Leaking No Light Matter*, Boston Globe, Nov. 25, 2022; Ann E. Marimow & Emma Brown, *Minister Detail 'Stealth' Efforts to Sway Supreme Court in House Testimony*, Wash. Post, Dec. 9, 2022.

131. Charlie Savage & Adam Liptak, *Supreme Court Says It Hasn't Identified Person Who Leaked Draft Abortion Opinion*, N.Y. Times, Jan. 20, 2023; Jodi Kantor, *Inside the Supreme Court Inquiry: Seized Phones, Affidavits and Distrust*, N.Y. Times, Jan. 22, 2023; Robert Barnes & Ann E. Marimow, *Supreme Court Unable to Determine Leak's Source*, Wash. Post, Jan. 20, 2023; Robert Barnes, *Supreme Court Justice Involved in Probe But Not Implicated, Marshal Says*, Wash. Post, Jan. 21, 2023; Editorial, *The Supreme Court Failed to Find the Leaker, But It Must Find Trust*, Wash. Post, Jan. 21, 2023; Jess Bravin, *Supreme Court Hasn't Identified Who Leaked Draft of Opinion Overruling Roe v. Wade*, Wall Street Journal, Jan. 20, 2023.

The sense of collusion is even stronger because some judges have personal relationships with individuals or groups that regularly intervene before the Supreme Court, and it is difficult not to think that they seek to influence its jurisprudence. It was recently learned that Justice Clarence Thomas and his wife "Ginni"—known for her activism and efforts in 2020 to overturn the result of the presidential election, while the Supreme Court was simultaneously hearing appeals on which her husband was sitting—received numerous perks over the past twenty years from Harlan Crow, a wealthy businessman who made a fortune in real estate. He is best known for being a generous donor to the Republican Party and serving on the boards of various think tanks involved in cases before the Supreme Court.[132]

These revelations have revived debates on the adoption of an ethics code, as the Supreme Court is the only federal jurisdiction not bound by binding rules.[133] The solution could have come from Congress—the Senate Judiciary Committee had indeed drafted a bill to this effect in the summer of 2023—but it is uncertain whether it is competent for obvious reasons of separation of powers. Even if it were, the bill would have little chance of being voted on by a Republican-majority House of Representatives. The Supreme Court has partially solved the problem by adopting its own code of conduct. However, it does not entirely convince experts: it is drafted in general terms and continues to leave a significant margin of discretion to judges who decide when to recuse themselves and are free to participate in events of their choice, even if these involve groups or associations involved in cases before the Supreme Court. Most importantly, it is not accompanied by any mechanism of sanction, so compliance with the rules entirely depends on the goodwill of the judges.[134]

132. David Smith, *Supreme Court Judge Thomas "Failed to Report Gifts" from US Billionaire*, Guardian, Apr. 7, 2023; John Wagner & Robert Barnes, *Report: Thomas Accepted Trips from GOP Donor*, Wash. Post, Apr. 7, 2023; Editorial, *Supreme Recklessness*, Wash. Post, Apr. 7, 2023, Travis Andersen, *Thomas Has Taken Luxury Trips Funded by GOP Donor for Decades*, Boston Globe, Apr., 7, 2023; Zach Montague, *Revelations About Justice Thomas Prompt Calls for Tighter Ethics Rules*, N.Y. Times, Apr. 7, 2023.

133. Editorial, *Confidence in the Supreme Court is Cratering. It Needs to Adopt a Code of Ethics*, Boston Globe, Nov. 29, 2022; Pat Yingling, *Supreme Court Needs a Code of Ethics*, Boston Globe, Dec. 5, 2022; Adam Liptak, *Supreme Court Weighs Ethics Code for Justices as Critics Push a Need for Change*, N.Y. Times, Feb. 10, 2023; Abbie VanSickle, *Justices Thomas and Alito Delay Releasing Financial Disclosure Forms*, N.Y. Times, June 8, 2023.

134. Robert Barnes & Ann E. Marimow, *Justices Give Themselves a Broadly Worded Ethics Code*, Wash. Post, Nov. 14, 2023; Abbie VanSickle & Adam Liptak, *Scrutiny of Potential Conflicts of Interest Prompt Justices to Adopt Ethics Code*, N.Y. Times, Nov. 14, 2023; Jess Bravin, *Justices Get Code of Conduct*, Wall Street Journal, Nov. 14, 2023.

Until now, judges were bound by a single law that obliges them to regularly declare their sources of income and the origin of the donations they receive.[135] But there is doubt about whether this obligation extends to "personal hospitality" or benefits from a close relative, hence the need to adopt a clear and binding text to better regulate such practices and thus restore legitimacy to the Court. It seems evident that, as members of the highest judicial body in the country, Supreme Court judges are obligated, if not to reject such benefits, at the very least to publicly declare them, and especially to recuse themselves when they are involved in cases that directly or indirectly concern their close relatives. At present, the general impression is distressing: legal actions funded by groups, institutes, or associations whose political objectives are known to all, and a Court that not only decides whether or not to hear a case based on its own jurisdiction and admissibility rules but is also composed of a conservative majority whose ideological radicalism excludes any occasional alliance with Democratic minorities, which seemed possible not long ago.

This gives the impression that everything is predetermined, and there are no effective avenues of recourse or independent and impartial procedures—two fundamental criteria of the rule of law and at the heart of the legitimization discourse of judicial review. The social legitimacy of the Supreme Court of the United States is eroding to an unprecedented degree, casting doubt on significant portions of its jurisprudence. This doubt is particularly acute in certain categories of cases: those that, while legally defensible on a strictly technical basis, either arise in specific contexts where there is a risk of interfering with an ongoing political process[136] or address highly divisive societal issues.[137]

To eliminate any doubt about the exercise of justice, the European Court of Human Rights has developed jurisprudence on the so-called "appearance theory", encapsulated by the adage: "Justice must not only be done; it must also be seen to be done."[138] Justice must demonstrate

135. Ethics in Government Act of 1978, Pub. L. 95–521, 5 U.S.C., §§ 101–111.

136. *Trump v. United States*, 603 U.S. ___ (2024).

137. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022)

138. *See e.g. Delcourt v. Belgium*, 11 Eur. Ct. H. R. (ser. A) (1970); *Piersack v. Belgium*, 53 Eur. Ct. H. R. (ser. A) (1982); *De Cubber v. Belgium*, 86 Eur. Ct. H. R. (ser. A) (1994); *Borgers v. Belgium*, 214-B Eur. Ct. H. R. (ser. A) (1991); *Guja v. Moldova*, App. No. 14277/04, (Feb. 12, 2008) https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001–85016%22%5D%7D. *See also* Alastair Mowbray, European Convention on Human Rights, Cases, Materials, and Commentary 435–446 (Oxford, New York: Oxford University Press, 3d ed., 2012 [2001]); William A. Schabas, The European Convention on Human Rights: A Commentary 294–296 (2015); Christoph Grabenwarter, European Convention on Human Rights Commentary 127–133 (2014).

its independence and impartiality, and it cannot create or fuel doubts in the minds of litigants, for example, regarding its composition or the proximity of certain members to one of the parties in the case.

Similar discussions are currently taking place in Israel as the majority and opposition have been trying since late March to reach a compromise on the judicial authority reform project.[139] Benjamin Netanyahu announced in late May to the *Wall Street Journal* that he would abandon the most controversial elements of the reform, including the derogation clause, but it could still be implemented in another form, without this other form changing much in the end.[140] A bill is currently under consideration in the Knesset. The majority of representatives have expressed their willingness to make concessions in exchange for a reform of the Judicial Appointments Committee, the body responsible for appointing magistrates. They would like to become the majority on the committee to have control over appointments, as two seats on the Israeli Supreme Court will be vacant from September, and dozens of positions will need to be filled in other jurisdictions.

The current composition rules of the Committee seek to ensure a balanced reconciliation between political leaders and legal professionals and especially require members to agree on a candidate by forming a kind of coalition (seven members out of eleven, including at least one Supreme Court judge, are required). The ruling coalition intends to increase the number of members, exclude representatives of the Bar Association, modify the seniority rule that traditionally gives the presidency to the oldest member of the Supreme Court, and ensure a majority by appointing parliamentarians from its ranks and members of the government. Therefore, the coalition is not directly attacking the Supreme Court like in the United States, but the approach is the same since it seeks to have control over the body responsible for the nomination of its members. One could even say that the situation is more worrying because, while U.S. presidents appoint judges to the Supreme Court according to sometimes debatable modalities but respecting the framework set by the Constitution, Benjamin Netanyahu and members of his coalition seek to modify existing constitutional rules in the name of protecting sovereignty and respecting the result of elections.

139. Michael Hauser Tov, *Talks on Judicial Overhaul Begin, Protests Orgs: First Axe Coup Bills*, Ha'aretz, Mar. 29, 2023.

140. Dov Lieber & Michael Amon, *Netanyahu Dials Back Overhaul*, Wall Street Journal, June 29, 2023; Eliav Breuer, *"Dropping Override Clause is Surrender to Violence", PM Tells "WSJ" Provision No Longer Part of Reform*, Jerusalem Post, June 30, 2023.

2. A Globally Challenged Trend

Crisis of the rule of law and crisis of democracy do not entirely overlap, but they feed into each other. There is a regression, and the idea that the judge "is the keystone and the condition for the realization of the rule of law"[141] is no longer self-evident. This regression explains why, in some places, there is a return to a unitary conception of legitimacy based solely on direct universal suffrage. Other actors, those who play a central role in the organization and institutional functioning of the state but are not elected, are sidelined in the name of protecting this legitimacy. The constitutional judge is obviously not the sole target. In illiberal democracies or democracies undergoing "illiberalization," all layers of civil society where politically defeated opposition may have sought refuge are targeted: administration, media, associations, education, research, etc.[142]

The difficulty arises from both the political discourse and the method on which it is based. Firstly, the declared ambition of these governments is to give a voice back to the population and restore its sovereignty. It is a well-crafted political discourse that plays on the opposition between the people, whose needs only they can identify and politically embody, and illegitimate elites against whom they propose to fight on their behalf. The ambiguity also comes from the fact that these governments advance stealthily. "The establishment of an illiberal regime is done gradually so that, taken separately, normative interventions do not even seem dangerous."[143] Moreover, illiberal governments do not claim their circumvention strategy; on the contrary, they claim to reform the country to improve its "democraticity" while respecting the rules provided by the Constitution, making the discourse even more difficult to counter.[144]

All of this is also made possible by a form of habituation to the majority's will. There is indeed a widely accepted idea: that a government can proceed with legislative, organic, and constitutional changes it deems necessary because it won the elections, and that this sole condition is sufficient. It is easy to discredit dissenting voices, often coming from the judiciary, university, and research—well-off socio-professional

141. Chevallier, *supra* note 13, at 7.

142. *La crise du libéralisme*, *supra* note 2, at 797–798.

143. Marie-Claire Ponthoreau, *La confiance du public dans la justice constitutionnelle à l'ère du populisme. Pistes de réflexion,* XXXV-2019 Annuaire international de justice constitutionnelle [Ann. int'l just. const.] 15, 15 (2020) (Fr.).

144. *See generally* Xavier Philippe, *La légitimation constitutionnelle des démocratures*, 169 Pouvoirs 33 (2019) (Fr.).

categories—by attributing them to an illegitimate elite fearing the preservation of its privileges. The crisis of representation is also linked to the impression that actors are incapable of meeting the needs of the population and that this incapacity or paralysis is partly attributable to the institutional functioning of the state, procedural burdens, and the array of controls to which a measure is subjected from the moment it transitions from the idea stage to a formalized norm in writing. Never have attacks on the rule of law been so blatant and numerous, perhaps because the political context has never been so favorable to them, and not only in the countries that come to mind spontaneously. They seem to be supported, even desired, by a portion of the electorate that sees the normal process of lawmaking and the controls it undergoes as obstacles to the expression of its sovereignty.

Conclusion

These practices of bypassing the constitutional judge pose a problem due to their nature, the diversity of regimes in which they occur—no longer confined to regimes distant from our own—and the political origin of the dissent emanating from citizens who do not share the same ideas. This highlights the significant crisis of trust and legitimacy and the urgency to act where it is still possible. The question of the compatibility of judicial review with the liberal democratic model is not new and dates back far in time. However, it becomes even more pressing today as distrust in institutions intensifies, as justice appears as an elite detached from political and social realities, and as citizens constantly feel decisions are imposed "from above."

In conclusion, some proposals can be formulated based on recommendations made by researchers from different regions of the world, leaving the question of their transferability to other political and social contexts entirely open.

The minimal solution would be not to alter the relationships that constitutional courts have with other powers but simply to modify their working methods. For instance, strengthening quorum rules could be imagined as preventing a measure from being disapproved by a small number of constitutional judges. Decision adoption rules could also be modified (shifting from a simple majority to a qualified majority, for example), allowing coalitions to form in favor or against a text, like what happens within assemblies. It would no longer be sufficient for a simple majority—which can be even more reduced on days when only certain judges sit—for a decision to be adopted, thus enhancing its

deliberative strength and legitimacy. Citizens would be less inclined to reproach four or five unelected judges for undoing a measure adopted by several dozen or hundred representatives and desired by several million citizens. In the past, we have seen U.S. Supreme Court justices vote in favor of decisions supported by judges of opposing political ideologies, which now seems entirely illusory given the ideological radicality of some of its members. One can argue that the risk of gridlock is significant in such polarized contexts, and especially that these measures are obviously insufficient to restore a trusting relationship with the population.

Another solution would be to draw inspiration from Latin American "popular constitutionalism," which seeks to reconnect with the population, better consider public opinion, make the work of constitutional courts more transparent and accessible, and thereby strengthen their legitimacy. This includes the use of *amici curiae*, which, by helping judges to better understand the political, social, economic, and cultural stakes of a decision, legitimize both the court's activity and the court itself.[145] Given the significant risk of political instrumentalization, limiting the use of *amici curiae* to cases whose implications go beyond the parties involved, with the choice left to the judges' discretion, could be considered. *Amici curiae* should be considered within a broader context of opening the work of constitutional courts to the public and enhancing communication. In Argentina, some sessions are made public, and in Chile, press conferences are held by the Court President who chose to break the rule of silence.[146] This type of discourse is not so far removed from us; Democratic senators proposed a bipartisan bill in March 2023 to televise the oral phase of cases before the U.S. Supreme Court to make its work more accessible to the public.[147]

Other solutions exist—such as introducing derogation clauses or the possibility of overturning a judicial decision through a referendum supported by a significant part of the electorate and a reinforced majority of lawmakers—but they significantly alter the relationships between political bodies and constitutional courts. They are often the result of specific contexts and require a certain political and constitutional culture. Transposed to other contexts, they might give the impression of a

145. Carolina Cerda-Guzman, *La confiance dans la justice constitutionnelle face aux pratiques populistes en Amérique latine*, XXXV-2019 Annuaire international de justice constitutionnelle [Ann. int'l just. const.], 21, 31 ff. (2020).

146. *Ibid.*

147. Ryan J. Owens & Ryan Black, *The Dangers of Camera to the Supreme Court*, Wall Street Journal, Mar. 21, 2023.

backward step and a weakening of constitutional control. Nevertheless, the idea of deliberative or dialogical constitutionalism seems particularly interesting as it removes the "last word" from the constitutional judge, a frequent point of criticism.

Many Anglo-Saxon authors have reflected on these issues and attempted to find solutions that go beyond the binary opposition between judicial and political constitutionalism. For example, Mark Tushnet and Rosalind Dixon propose developing a constitutional interpretation very protective of rights while affording the legislature a margin of maneuver rather than imposing definitive decisions on it.[148] This is what they call "weak-form judicial review," which has the advantage of protecting rights and thus providing safeguards while reducing the risk of democratic incompatibility. This seems particularly interesting concerning economic and social rights, which often lack justiciability due to their financial implications. Such ideas are not so distant from us and resemble the approach of the European Court of Human Rights when "condemning" a state. It allows the state to choose the means to comply with its decision, and the control of the decision's execution is entrusted to a separate intergovernmental body: the Council of Ministers. The Colombian Constitutional Court has used this method in specific contexts.

Ultimately, possible solutions greatly depend on the representation one has of legitimacy because there are probably as many definitions of legitimacy as there are interlocutors.

If legitimacy is synonymous with the majority—meaning a measure supported by most citizens is legitimate—then the solution involves a form of prudence or restraint, prohibiting the constitutional judge from deciding contrary to public opinion. This poses obvious problems in quantifying public opinion. We know that the constitutional judge is concerned about his "social legitimacy," and this concern

148. Mark Tushnet, *Alternative Forms of Judicial Review*, 101 Mich. L. Rev. 2781 (2003); *see generally* Mark Tushnet, *Weak-Form Judicial Review: Its Implications for Legislatures*, 2 NZJPIL 7 (2004); Mark Tushnet, Weak-Form Judicial Review "Core" Civil Liberties, 41 Harv. C.R.-C.L. L. Rev. 1 (2006); Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (2008); Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism* (Chicago Public Law and Legal Theory Working Paper No. 348, 2011); Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism*, 32 Oxford J. Legal Stud. 487 (2012); Mark Tushnet, *The Relation Between Political Constitutionalism and Weak-Form Judicial Review*, 14 German L. J. 2249 (2013); Tushnet, *supra* note 89, 322–333; Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, 38 Cardozo L. Rev. 2193 (2017); Mark Tushnet, *Weak-Form Review: An Introduction*, 17 Int'l J. of Const. L. 807–810 (2019); Rosalind Dixon, *The Forms, Function, and Varieties of Weak(ened) Judicial Review*, 17 Int'l J. of Const. L. 904, 911–14 (2019).

is perfectly understandable. However, the risk is then to contravene another form of legitimacy: one based on respect for the law because "we expect the judge to apply the law and not to align with the majority, whatever the reasons may be."[149] But regardless of what one thinks and the problems it poses, perhaps this is one of the conditions for the re-legitimization of judicial review both in political discourse and in the population's representation.

If legitimacy is synonymous with deliberation—meaning a measure that has been discussed and has undergone dialogue is legitimate—then dialogic constitutionalism offers avenues for thought. It gives a voice back to elected representatives after a measure has been declared unconstitutional.

In essence, the difficulty lies in finding a balance between the legitimate expectations of citizens who demand a redefinition of decision-making rules (whether political or judicial) and therefore perhaps a rethinking of the relationships between elected officials and judges and the inherent requirements of the legal guarantee of the constitution that require protecting the judge from the vagaries of public opinion and political alternation. But regardless of the solution chosen, it must imperatively involve a compromise and thus a bipartisan agreement. Any measure taken by a government against a court that is politically and ideologically hostile would be perceived as retaliatory and would further fuel the sense of distrust.

149. Fassassi, *supra* note 28, at 600.