

Three Meanings of Reform: Understanding Change in Constitutional Courts

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The article explores the concept of reform as applied to constitutional courts, arguing that the term is far from univocal. It systematically identifies three distinct meanings of reform: (1) reform as improvement, aimed at strengthening legitimacy, independence or institutional balance; (2) reform as elimination, aimed at a court perceived as harmful to the constitutional order (as in authoritarian regimes); and (3) reform as curtailment, intended to curb a court perceived as excessive or politically intrusive. Drawing on comparative examples (notably from the USA, Canada, Spain and Chile), I emphasize that reform efforts are always closely tied to context, and often reveal deeper political or ideological tensions over the role of constitutional justice in the functioning of institutions and democracy. Ultimately, the contribution highlights how reform can be both a constructive and strategic tool, and calls for greater methodological clarity when examining changes in constitutional courts.

The challenge is real due to the global dimension of constitutional justice¹, which no constitutional scholar today would seriously

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¹ The expansion of constitutional justice is largely linked to democratic transitions and the notion that constitutional democracy requires a judicial body to sanction violations of the "new democratic constitution." This phenomenon has been quantitatively analyzed to illustrate its progression: the proportion of constitutions explicitly providing for judicial review of legislation increased from 38% in 1951 to 83% in 2011. See T. Ginsburg, M. Versteeg, 'Why Do Countries Adopt Constitutional Review?', 30, *Journal of Law*,

question. Let it be said from the outset: offering a general perspective on this matter is no easy task, as the question of reform cannot be approached in the same way for every court. This is due to the sheer number of variables involved—too numerous, and above all, too decisive. The case of the United States Supreme Court illustrates this perfectly. In an article published in 1997, Bruce Ackerman described the U.S. Supreme Court as incomparable: although it became so only after World War II, once the rise of constitutional courts in Europe had been consolidated, it has remained, according to the author, a special case². The report of the Biden Commission, issued at the end of 2021, fully confirms this³. Beyond the fact that it avoids—or rather only marginally engages with—foreign examples, several elements stand out. First, the report presents the debate as raising serious issues because of the Supreme Court’s “unique role and structure.”⁴ The Court’s singularity gives its function unparalleled weight: “The Court’s decisions have extraordinary impact on the lives of Americans generally. The Court also exercises enormous power within the U.S. system of government, as do the individual Justices themselves, who serve for life.”⁵ Not all courts, nor all judges, wield such influence. For

Economics, and Organization, p. 587, 2014.

² B. Ackerman, ‘The Rise of World Constitutionalism’, 83, *Virginia Law Review*, p. 774-75, 1997.

³ Presidential Commission on the Supreme Court of United States, Final Report, December 2021, available at <https://www.presidency.ucsb.edu/documents/final-report-the-presidential-commission-the-supreme-court-the-united-states>.

⁴ *Ibid.*, p. 17.

⁵ *Ibid.*

instance, one cannot simply replace “Supreme Court” in the aforementioned sentence with “*Conseil constitutionnel*” as many French citizens are unaware even of its existence—despite its now well-established institution in the national legal and political landscape. One thing is certain: after ten years of application, the priority preliminary ruling on the issue of constitutionality (so called *question prioritaire de constitutionnalité* or QPC) is not a legal remedy primarily in the hands of individuals, but rather of commercial companies, and concerns primarily tax law issues. The Council still appears today as an “intermittent guardian of the Constitution,”⁶ and thus of rights. Finally, the Biden Commission report highlights that, since the Trump presidency, the political context is marked by “the sharp polarization in contemporary American politics [which] only exacerbates the conflict over the Court.”⁷

Through the American example, differences tied to political context—but also more deeply rooted distinctions linked to the history and institutional structure of courts—clearly emerge. This is why, as a preliminary step, a methodological caveat must be stated: comparative analysis is, above all, an argumentative and reasoned exercise⁸. Beyond

⁶ S. Benzina, ‘Dix ans de QPC : au-delà de la communication du Conseil constitutionnel’, JP Blog, December 17, 2020, available at https://blog.iuspoliticum.com/2020/12/17/dix-ans-de-qpc-au-dela-de-la-communication-du-conseil-constitutionnel-par-samy-benzina%E2%80%A8/#_ftnref24.

⁷ Presidential Commission on the Supreme Court of United States, Final Report, op.cit., p. 18.

⁸ M.-C. Ponthoreau, ‘Droit(s) constitutionnel(s) comparé(s)’, Paris, Economica, 2e éd., pp. 91-95, 2021.

the already mentioned global dimension of constitutional justice, the proposed attempt at systematization will need to rely on a selection of foreign examples, carefully chosen to shed light on the American case.

To this end, both contrasting cases (such as Canada, known for its consensual approach—for instance, the traditional norm of not publicly criticizing appointments to the Supreme Court, although this tradition was challenged under the Harper government between 2006 and 2015) and analogous ones (such as Chile, which shares a similar sense of disillusionment with both constitutional justice and the constitution itself) will be used. These will not be the only cases considered, but they will be the only ones examined in depth. It becomes evident that one cannot reflect on the meaning of reforms without also considering their substance.

It is then necessary to clarify both the object and the form of reform. Not all reforms carry the same weight. One might assume that reforms affecting the structure (such as the status of the court and its functions), particularly those concerning the appointment of judges, are of greater importance than those related to procedural rules. Such structural reforms are likely to have far-reaching effects on the entire constitutional system, including the relationship between the governed and the governing. The Biden Commission Report seems to suggest as much: “The stakes of the nomination process are so high precisely because they implicate matters of great public concern. Indeed, at various moments throughout history, conservatives and progressives alike have turned to the Court to protect the rights they most value

and to define the authority of the elected branches of the federal government and of the states in accord with their understandings of the Constitution.”⁹

Nevertheless, there is no strict rule. A French example shows that a reform initially seen as minor—namely the 1974 reform expanding the remedy to the *Conseil constitutionnel*—proved to be highly significant for the institution’s evolution and development. The impact of a reform is difficult to *assess*, particularly because the expected outcomes are not always the ones that materialize. Such is the case with the 2008–2009 reform introducing the priority preliminary ruling on the issue of constitutionality, a reform marked by distinctively French features¹⁰. The priority preliminary ruling has not turned out to be a major remedy for individual litigants. According to some commentators¹¹, this reform is far from being a mere “cosmetic adjustment,” even though the institution itself, which does not yet fully meet the criteria of a constitutional court¹². Reform is thus strongly advocated as a way to

⁹ Ibid.

¹⁰ One notable and significant peculiarity lies in the fact that ordinary judges cannot directly refer a constitutional question to the Constitutional Council; instead, they must transmit the question to the supreme court to which they belong. This filtering mechanism by the supreme courts—institutions that hold substantial influence within the national judicial system and perhaps viewed the potential competition from a restructured Constitutional Council under the QPC with skepticism—explains this uniqueness. Another distinctive feature concerns the subject matter of the constitutional question. As specified in Article 61-1 of the Constitution, a constitutional question can only be raised when a “legislative provision infringes upon the rights and freedoms guaranteed by the Constitution.”

¹¹ D. Rousseau, ‘La QPC, une nouvelle culture constitutionnelle, une nouvelle justice constitutionnelle’, *Jus Politicum*, n° 27, p. 333, 2022, available at <https://www.juspoliticum.com/articles/La-QPC-une-nouvelle-culture-constitutionnelle-une-nouvelle-justice-constitutionnelle>.

¹² On the contrary, “The reform was implemented in the most limited way”, see P. Wachsmann, ‘Nouvelles techniques permettant des restrictions aux libertés publiques ou

meet these standards and fully realize the Council's potential as a true constitutional court.

That said, major reforms in the field of constitutional justice remain rare. In the United States, for instance, Supreme Court reform has not featured on the political agenda since the failed presidential plan of 1937. The absence of institutional debate does not mean, however, that there is no academic controversy¹³. Reform is often a slow-moving process (though this is not always the case).

Any reform is indeed likely to disrupt existing institutional balances and is therefore always a delicate matter for those in power. More specifically, reform may undermine the link between constitutionalism and trust in institutions. The supreme or constitutional court is a cornerstone of the doctrine of constitutionalism as a technique for maintaining “effective restraints on political and governmental action,” according to Carl Friedrich’s doctrine¹⁴. As such, what is ultimately at stake is the public’s trust in this institution in particular, and in institutions more generally. Reform is carried out through established powers, even if reform does not necessarily imply constitutional amendment. Often, the status and organization of the court are

de la protection des libertés dans la société du spectacle’, *Jus Politicum*, n° 5, p. 8, 2010, available at <https://www.juspoliticum.com/articles/nouvelles-techniques-permettant-des-restrictions-aux-libertes-publiques-ou-de-la-protection-des-libertes-dans-la-societe-du-spectacle-289>.

¹³ The controversy is back. See, for example, M. Tushnet, ‘Court-Packing On the Table in the United States ?’, *Verfassungsblog*, 3 avril 2019, <https://verfassungsblog.de/court-packing-on-the-table-in-the-united-states/>.

¹⁴ C. Friedrich, ‘Constitutional Government and Democracy’, 1950.

determined by a statute with quasi-constitutional status (*loi organique*), or even by an ordinary statute. Moreover, judges themselves are rarely the actors of reform, although they may occasionally be the initiators.

Reforming a constitutional court can therefore potentially mean many things, which is why it is important to begin by asking what “to reform” actually means. Based on the different meanings identified, a systematization of the possible understandings of “reforming a constitutional court” can be proposed. These meanings are organized according to the purpose attributed to reform, rather than based on observations drawn from constitutional experience — although the latter are used to illustrate and empirically support the proposed systematization, anchoring it in constitutional reality: first, to transform a constitutional court with the aim of improving it (I); second, to abolish a constitutional court deemed harmful (II); and finally, to weaken a constitutional court considered excessive (III).

1. Transforming a Constitutional Court with a View to Improvement

The first meaning that comes to mind for a legal scholar in a liberal democracy corresponds to “transforming with a view to improvement.” Most general-use dictionaries¹⁵ note that this sense is particularly appropriate for a system or institution: to organize or

¹⁵ See Collins dictionary : <https://www.collinsdictionary.com/dictionary/english/reform>;
Cambridge dictionary : <https://dictionary.cambridge.org/dictionary/english/reform>.

modify by transforming existing rules in order to improve its structure or functioning.

If *to improve* means to make something better, it raises the idea of perfecting the institution—but in relation to what, and to what end? Several questions naturally arise: Should reform aim to strengthen the institution's legitimacy? Or perhaps its independence? Or should it reinforce institutional balance and the democratic functioning of the system? These questions echo the debates recounted in the Biden Commission report, even though the report does not endorse any particular direction for reform.

Ideally, reform is undertaken in line with the vision that governing actors have of a legitimate, independent, and transparent court—even if that vision is rarely made explicit, or only vaguely alluded to through references to the “modernization” of the institution. For while agreement may be reached on the principle of reform, the means to achieve it often remain contested. For example, the Biden Commission did not issue any recommendations in its final report, which may be seen as surprising.

The example selected here is that of a reform successfully carried out in Canada regarding the process for selecting judges to the Supreme Court. This reform can be explained in part by the strengthening of constitutional democracy following the introduction of the Canadian Charter of Rights and Freedoms into the constitutional corpus in

1982¹⁶. It also stemmed from a desire to break with the opacity of appointments that had traditionally fallen under the sole responsibility of the Canadian Prime Minister. From 1875 (the year the Supreme Court began functioning) to 2004, nothing about the judicial appointment process was ever made public: judges were appointed by the Governor in Council on the advice of the Prime Minister, following informal consultations with leading figures in the legal community—consultations that were not codified in law. One of the main architects of the reform, Irwin Cotler, former Minister of Justice (2003–2006) and professor of law at McGill University, put forward other reasons for transforming the appointment process, relying on the more “classic” arguments surrounding the supposed politicization of the judiciary and the perception of the Court as an “activist” and “counter-majoritarian” institution¹⁷. These arguments systematically emerge whenever the composition of a constitutional court is in question, making it a critical issue in the balance of powers with Parliament. They raise fundamental questions about the court’s legitimacy to strike down legislative initiatives or to impose on the legislature an alternative reading of the constitution¹⁸.

¹⁶ Until then, constitutional democracy existed but was applied solely to imperial laws, primarily concerning federalism and the division of powers.

¹⁷ I. Colter, ‘The Supreme Court Appointment Process : Chronology, Context and Reform’, 58 *University of New Brunswick Law Journal*, 58, pp. 132-133, 2008.

¹⁸ **Canada has nevertheless established a mechanism to preserve parliamentary sovereignty.** While the rights enshrined in the Canadian Charter of Rights and Freedoms prevail over legislation, their constitutional protection is limited by the override provision set out in Section 33 (commonly known as the “notwithstanding clause”). This clause allows a federal or provincial law to remain in force even if it contravenes certain rights protected by the Charter. However, the scope of this clause is restricted to the fundamental freedoms in Section 2 (freedom of conscience and religion, freedom of

This reform is undeniably a major one due to its purpose, the depth of the changes it introduced, and the way it was implemented. It can be considered a success based on three main elements. First, it was a gradual reform carried out in several stages¹⁹ and consolidated in 2016²⁰. The necessary time—over ten years—was taken to see it through. It embodies the spirit of a consensual reform tested by practice. In a democracy following the Westminster model, it thus took an informal form. This second characteristic facilitated the adjustment of the reform, which did not require a constitutional amendment or even formal legislation. In fact, the only relevant legislation in force in Canada is the Supreme Court Act²¹. The reform is also informal in that

thought and expression, freedom of the press, freedom of assembly, and freedom of association), the legal rights under Sections 7 to 14 (notably, the right to life, liberty, and security of the person, and judicial rights), and the equality rights in Section 15. This derogation is valid for a period of five years and can be renewed. In this sense, the principle of parliamentary sovereignty is theoretically safeguarded. Nevertheless, this power is seldom used in practice, as its invocation is perceived by many Canadians as an act of defiance against the Charter. See J.L. Hiebert, 'Parliamentary Bill of Rights: An Alternative Model?', 69, *Modern Law Review*, p. 20, 2006.

¹⁹ The revised appointment process stipulates that a new advisory committee is formed each time a vacancy arises on the Supreme Court. Initially, the committee comprised five members from the parliamentary majority and three representatives from the opposition. However, the latest composition in 2022, established in 2016, for the appointment of Justice Michelle O'Bonsawin, reflects a shift towards an eight-member committee that is more "professional" than "political", see <https://www.fja.gc.ca/scc-csc/2022/establishment-creation-fra.html>.

²⁰ P. H. Russell, 'Selecting Supreme Court Justices: Is Trudeau's Sunny Way a Better Way', 68, *University of New Brunswick Law Journal*, pp. 3-17, 2017; J. D. Whyte, 'Virtues and Shortcomings in Constitutional Dynamism: Commentary on Prime Minister Trudeau's 2016 Creation of an Independent Advisory Board for Supreme Court of Canada Appointments and on the Instructions for Making Recommendations for Appointment', 68, *University of New Brunswick Law Journal*, pp. 36-45, 2017.

²¹ Although lacking constitutional status, the Supreme Court entrenched its own existence and key characteristics in the Reference re Supreme Court Act, ss. 5 and 6, concerning the appointment of Justice Nadon, which was deemed void from the outset of the process (2014), available at <https://scc-csc.lexum.com/scc-csc/scc-csc/fr/item/13544/index.do?r=AAAAAQAtUmVudm9pIHJlbGF0aWYgw6AgbGEgTE9JIFNVUjBMQSBBDT1VSIFNVUFLDik1FAQ>.

it is tailored to the federal structure: there is a convention ensuring regional representation of judges²². In the case of Quebec, a protocol was signed in 2019 between the Premier of Quebec and the Prime Minister of Canada concerning the appointment of the judge from Quebec. There is no guarantee that such a protocol will be signed again, or that a similar arrangement will be made for a judge from another part of the federation. These governmental practices are flexible and suited to the territorial and political demands at the time of the reform.

Finally, it is a reform that forms part of a broader picture, as it extends constitutional reform efforts that were ultimately abandoned in the early 1990s (namely, the 1987–1992 constitutional reforms, including the Charlottetown Accord). It is not a reform directed against any institution—neither against the Supreme Court, nor even against the Prime Minister who retains the actual power of appointment. Rather, it was a reform initiated by the institutions themselves, driven by the idea of involving parliamentarians in the process of selecting a replacement for Justice Arbour, who had expressed her intention to leave the Court in 2004. A collaborative effort between branches of government lies at the heart of this successful reform²³. Legitimacy, independence, and institutional balance: everything is interconnected.

²² **According to Section 6 of the Supreme Court Act, at least three judges of the Supreme Court must be appointed from Quebec.** By established convention, the remaining six seats are typically filled by appointing three judges from Ontario, two from Western Canada, and one from Atlantic Canada.

²³ See the application of the reform in the most recent appointment, Honourable Mary

However, the reform is not without flaws. Its core feature is the establishment of an independent, non-partisan advisory committee tasked with compiling a short list of candidates (three to five), presented without any ranking. These candidates are either self-nominated or suggested by members of the public. This list is then submitted to the Prime Minister, who retains full responsibility for the appointment. The weak point of this reform lies in the parliamentary oversight, which remains largely a formality, both in form and substance. Members of Parliament do not have sufficient time to prepare for the hearing of the selected candidate and cannot block the appointment. Still, the parliamentary hearing serves a function of transparency and public visibility²⁴. This is likely the next aspect of the reform to be improved, even if the ongoing efforts to enhance the Court and its selection process are currently focused more on the criteria for appointing judges. In addition to professional qualifications, bilingualism and diversity have now become decisive factors in the final selection²⁵.

In light of the criteria previously identified (with the exception of the informal nature of the reform), a similar analysis could likely be made by some with regard to the introduction of the *question prioritaire de*

Moreau (2023) at <https://www.fja.gc.ca/scc-csc/2023/index-eng.html>.

²⁴ The transparency of the process is also ensured by the fact that the completed selection questionnaire by the candidate is made public.

²⁵ In August 2022, the appointment of a judge from the Indigenous minority for the first time responded to this demand expressed within Canadian society. See the Honourable Michelle O'Bonsawin's questionnaire at <https://www.fja.gc.ca/scc-csc/2022/nominee-candidat-eng.html>.

constitutionnalité (QPC) in France: a long-term reform process embedded within a broader constitutional revision. The extension of constitutional review to its a posteriori form had already been considered in 1990 and then in 1993, before being implemented in 2008. By contrast, the strong polarization of American political life currently leaves very little room for a reform of such magnitude. It is worth noting that, both in the media and in academic discourse, the debate has shifted from a reform targeting the Supreme Court alone to one that now questions the U.S. Constitution as a whole²⁶.

Many reforms do not have such scale or ambition. They generally aim to resolve a specific, concrete issue. For instance, the Spanish Constitutional Court was quite rapidly confronted, as early as 1985, with an excessive number of *amparo* appeals²⁷. This situation persisted for nearly twenty years, to the extent that the Court was effectively hindered from carrying out its primary mission of safeguarding the Constitution. It is noteworthy that the Constitutional Court did not merely raise the alarm—both to political authorities and the public—about this suffocating situation; it also actively participated in working with the organic legislator to devise the necessary measures. It was only in 2007 that the organic legislator finally addressed the issue by

²⁶ M. Tushnet, op.cit. See *infra*, section III.

²⁷ A *recurso de amparo* is a legal remedy available to individuals or legal entities who allege that their fundamental rights, as enshrined in Articles 14 to 29 and Article 30.2 of the Spanish Constitution, have been violated by public authorities, including legislative, executive, or judicial bodies.

introducing a new admissibility condition for *amparo* appeals, thereby limiting access to the Court.

In a liberal democracy, governments tend to favor the promise of beneficial reforms for the court and its judges. However, the previous example demonstrates that some reforms can also be deceptive²⁸: governments may not act in an overtly harmful way toward the constitutional court, yet they take their time when it comes to reforming it²⁹. In the Spanish case discussed, it took over a decade for the reform to be enacted. During that time, the Court remained preoccupied with the procedural difficulty, and the legislature operated with fewer constraints from constitutional judicial review. The end result was indeed the subordination of the Court without formal reform... though reform can also be carried out deliberately and explicitly to subordinate—or even abolish—the court.

II – Reforming to Subordinate or Even Eliminate a Constitutional Court Seen as Undesirable

Examples abound, both across space and time. The composition of a constitutional court is always vulnerable to political leaders who seek

²⁸ About the French case, see P. Wachsman, *op.cit.*, p. 6.

²⁹ See beyond French case and specially about Spanish case, R. Paour, 'Le pouvoir des cours constitutionnelles. Analyse stratégique des cas espagnol, français et italien', Paris, Société de législation comparée, pp. 249-263, 2023.

to capture the very constitutional mechanisms designed to limit their power—whether through early judicial retirements, court-packing, impeachment proceedings, or even arrests of judges. This is, if anything, further proof of the importance of reforming judicial appointments and, more broadly, court composition—extending well beyond constitutional courts alone. Over the past decade, several now well-known European cases illustrate this trend: the Hungarian Constitutional Court, the Polish Constitutional Tribunal, and the Turkish Constitutional Court, whose judges have all come under various forms of attack. One can also look to Latin America. Two examples among many: in 1990, then-President Carlos Menem asked, “Why should I be the only Argentine president not to have my own Supreme Court?”—he reportedly said, before packing the Court with a new group of justices. Since 1994, and especially since 2003, the Argentine Supreme Court appears to have stabilized and gained more autonomy from the executive. This is far from the case in Venezuela, where former President Hugo Chávez simply eliminated the Supreme Court in 1997. These two examples highlight the upheavals to which constitutional justice is exposed in contexts where political and institutional life is unstable and/or where pluralistic expression of opinion is lacking. And yet, Latin America remains the continent where constitutional courts have become embedded in the institutional landscape, following the democratic transitions that began in the late 1980s. Turning to Africa, the vulnerability of constitutional courts is even more acute, particularly when they oppose presidential attempts

to secure a third term—as in Burundi or Niger, for example³⁰. These examples, while far from exhausting the creative means found in constitutional reality³¹, serve to illustrate the wide array of measures that can be taken against judges individually, or against the institution as a whole.

In these various cases, the constitutional or supreme court—if it remains in place—serves to legitimize the political power in office rather than to hold it accountable. No theory can justify the subjugation of courts in a liberal democracy—not even political constitutionalism, which aims at balancing powers by limiting the role of constitutional adjudication. Balance can indeed be achieved through so-called “weak” forms of constitutional review³², in contrast to “strong” review, which grants judges the authority to invalidate laws that conflict with individual rights or to reinterpret their scope of

³⁰ There has undoubtedly been an overinvestment in constitutional justice in both Africa and Latin America. This is particularly true in the case of Niger. See P. MASSIMA, « Le juge constitutionnel africain francophone : entre politique et droit », R.F.D.C., 2017, n° 111, p. 656 and, more broadly, M. NDIAYE, « La stabilité constitutionnelle, nouveau défi démocratique du juge africain », A.I.J.C., vol. 33-2017, pp. 667. There is, however, a neo-constitutionalism at work through the emergence of a “constitutional consciousness.” Latin America is the epicenter of this neo-constitutionalism. It refers not only to a renewal of constitutional law through the action of constitutional courts, but also to a jurisprudence. Noteworthy in this regard are the following works: M. BARBERIS, *Stato costituzionale. Sul nuovo costituzionalismo*, Modène, Mucchi, 2012 ; M. BARBERIS, « El neoconstitucionalismo. Third Theory of Law », in S. POZZOLO (ed.), *Neoconstitucionalismo. Derecho y derechos*, Lima, Palestra, 2011, p. 250.

³¹ See G. TUSSEAU, « Le gouvernement [contraint] des juges. Les juges constitutionnels face au pouvoir de réplique des autres acteurs juridiques – ou l’art partagé de ne pas pouvoir avoir toujours raison », *Droits*, 2012/1, n° 55, pp. 51-65.

³² On the British case, see R. BELLAMY, « Political constitutionalism and the Human Rights Act », *I.CON*, 2011, pp. 86-111.

application³³. To address the longstanding tension between judicial authority and legislative supremacy, Stephen Gardbaum identified, drawing from the examples of Canada, New Zealand, and the United Kingdom, an institutional arrangement that he termed the “new Commonwealth model of constitutionalism.” This model attempts to reconcile constitutional supremacy with the principle of parliamentary sovereignty³⁴. The capture of constitutional justice in Hungary and Poland by governing authorities cannot be assimilated to such a model. As Gábor Halmai aptly puts it: “The remainders of both Hungarian and Polish constitutional review have nothing to do with any types of political constitutionalism or a weak judicial review approach, which all represent a different model of separation of powers. In the authoritarian Hungarian and in the Polish sham system of constitutionalism, there is no place for any kind of separation of powers.”³⁵

Doing without constitutional justice? The idea may seem surprising today, given how widely constitutional justice has spread around the world. If the notion is unsettling, it is also likely because constitutional scholars tend to focus on the same constitutional experiences.

³³ On the distinction between these both forms of judicial review, see M. Tushnet, ‘Weak-form Judicial Review and ‘Core’ Civil Liberties’, 41, *Harvard Civil Rights - Civil Liberties Law Review*, pp. 1-15, 2006.

³⁴ S. Gardbaum, ‘The New Commonwealth Model of Constitutionalism’, 49, *American Journal of Comparative Law*, p. 739, 2001, and his book, ‘The New Commonwealth Model of Constitutionalism : Theory and Practice’, Cambridge, Cambridge University Press, 2013.

³⁵ G. Halmai, ‘Illiberal Constitutional Theories’, *Jus Politicum*, n° 25, p. 148. 2021, available at <https://www.juspoliticum.com/articles/Illiberal-Constitutional-Theories>.

However, judicial review of legislation is not strictly necessary for limited government, as the Dutch case demonstrates³⁶. What cannot be dispensed with, on the other hand, is the distribution of power among several institutions—and especially between the executive and the parliament—in order to avoid the risk of arbitrariness.

The capture of constitutional justice by the ruling majority is never an isolated event³⁷. It is usually accompanied by the progressive dismantling of checks and balances—most notably, by undermining judicial independence, as illustrated by the creation of a “disciplinary chamber” within the Polish Supreme Court in 2018, designed to intimidate judges, especially those applying European Union law. It also goes hand in hand with the erosion of political competition, through the manipulation of electoral rules, control over the media, and restrictions on freedom of expression and academic freedom.

Constitutional justice is often the first pillar of constitutionalism to be targeted by a ruling majority intent on dismantling the foundations of pluralist democracy. In such cases, the pace of reform tends to accelerate. Take the example of Hungary: Viktor Orbán, upon coming to power in 2010, immediately launched a process that led to the

³⁶ See M. De Visser, ‘Nonjudicial Constitutional Interpretation : The Netherlands’, in D.S. Law (ed.), *Constitutionalism in Context*, Cambridge, CUP, pp. 216-236, 2022.

³⁷ D. Landau, ‘Abusive Constitutionalism’, 47, *U.C. Davis Law Review*, pp. 189-260, 2013. On the Turkish, the significance of both the context and the process of reform, see T. G. Daly, ‘“Good” Court-Packing ? The Paradoxes of Constitutional Repair in Context of Democratic Decay’, 23, *German Law Journal*, pp. 1082, 2022. See also, M.-C. Ponthoreau, *op.cit.*, pp. 363-372.

drafting of a new constitution. Under this new framework, the term of constitutional judges was extended from 9 to 12 years, and the number of judges increased from 11 to 15. Most crucially, the Fundamental Law of Hungary, which entered into force on 1 January 2012, retained only the requirement of a two-thirds majority (held by Orbán's FIDESZ party and its ally KDNP) for electing constitutional judges, abolishing the previous requirement of cross-party approval in Parliament. The combination of these three changes enabled the governing majority to take full control of the Constitutional Court by 2015. In the meantime, it had also amended the Fundamental Law to reduce the Court's powers and to prohibit it from relying on its previous liberal jurisprudence on fundamental rights adopted before 2012³⁸.

Although constitutional justice is viewed in these contexts as a harmful element, it is maintained in name only, serving the appearance of constitutional orthodoxy widely promoted by international organizations such as the Council of Europe or the World Bank. It remains only because it appears to conform to the canons of constitutionalism. Just as we speak of "sham constitution"³⁹, we are now witnessing the rise of "fake constitutionalism," in which the idea of limiting power fades in favor of its concentration in the hands of an

³⁸ M.-C. Ponthoreau, 'De la constitution invisible à la constitution évanescence. La Loi fondamentale de la Hongrie à la lumière des expériences européennes', in *Mélanges en l'honneur de Pierre Bon*, Paris, Dalloz, pp. 525-540, 2014.

³⁹ G. Sartori, 'Constitutionalism: A Preliminary Discussion', 56, *American Political Science Review*, p. 861, 1962.

elected autocrat. If a constitutional court is powerless, the fault lies not with the constitution itself—which is neither inherently democratic nor a guarantor of the rule of law.

At this point in the debate, one key question arises to help shed light on the American case: can the reform wanted by President Roosevelt in 1937 be meaningfully compared to these developments? To recall, the President's plan⁴⁰ applied to all federal courts and was justified by a practical concern—relieving the courts' workload—but it also entailed increasing the number of Supreme Court justices in order to counter opposition to New Deal policies.

Returning to the meanings assigned to “reform,” we can draw a line of demarcation: the intention was no longer to eliminate something harmful, but rather to scale back something perceived as excessive. The 1937 reform can thus be interpreted as a “threatening reform” aimed at curbing judicial activity deemed excessive. In no way, however, was this reform part of a broader anti-liberal constitutional rollback—unlike the Hungarian strategy of undermining constitutional justice, which did not only target judges as a constraint on power but formed part of a more global and structural strategy to subjugate the court and disregard the rights of the political minority.

⁴⁰ The aim of the reform so-called ‘court-packing’ is to shift the majority within the court (either by increasing the number of justices or by curbing the existing majority). In Roosevelt's plan, all federal courts were concerned by this proposal, which intended to appoint new judges (up to six) for each sitting judge who had reached the age of 70. See for example, M. Tushnet, *op. cit.*

In the same vein, observations of the U.S. debate prior to the Biden Commission report reveal the care taken to avoid using the term “court-packing,” which was replaced by alternatives such as “court expansion” or “re-balancing.”⁴¹ This lexical choice signals that the term is perceived as an indication that the democratic system itself is undergoing change—and indeed, a negative one: altering the composition of the Court in such a system inevitably raises suspicion. The confrontation of these examples once again highlights how everything is interconnected, and how constitutional justice, where it exists, is deemed essential to institutional balance. The great challenge lies in finding—and then maintaining—that balance. That is why reform can also be conceived as a way of diminishing a court deemed excessive.

III. Reforming to Limit a Constitutional Court Viewed as Overreaching

To introduce this third meaning, the statement of the Secretary of the Interior, Harold Ickes, during the New Deal era perfectly captures the dilemma a democratic and liberal system can face : *“Reform the Court or submit to judicial tyranny.”* Constitutional justice may experience a crisis of trust—namely, a structural alteration of the Court driven by the perception of political influence among the justices⁴². Such an alteration erodes trust “in the belief that the Court is guided by legal

⁴¹ A. Belkin, ‘Court Expansion and the Restoration of Democracy: The Case for Constitutional Hardball’, *Pepperdine Law Review*, p. 19, 2020.

⁴² S. Breyer, ‘The Authority of the Court and the Peril of Politics’, *Havard, HUP*, 2021.

principles rather than politics” (even though the boundary between law and politics remains one of the most contested issues). In the case of the U.S. Supreme Court, the authority of its decisions is being called into question. This situation is not new. With the *Dobbs* decision (2022), the Court is once again facing such a moment. This ruling is not the only one that has drawn criticism, but it is certainly the one that has had the greatest impact—well beyond the United States—given that the right to abortion was a hard-won victory in the 1970s. Even though the decision does not eliminate the right to abortion per se, but rather as a federally protected right, what is at stake is the entire symbolic legacy of the *Roe* decision of 1973, as well as part of the Court’s history as not only a protector, but also a creator of rights. (Indeed, other rights it has recognized could also be called into question, such as the constitutional protection of access to contraception or the right to same-sex marriage).

At this stage of the argument, a return to the meaning of “reform” as improvement is warranted, in order to assess whether the different meanings are truly distinct from one another. This reflection draws on the etymology of the verb. The Latin word *reformare* means “to rectify,” that is, to restore something to its former shape or to a better one. From this perspective, the dividing line between the first meaning and the last becomes blurred. Put differently, reducing something deemed excessive can be understood and conceived as establishing a better form.

This hypothesis deserves closer examination through a comparison of the Chilean and U.S. cases. A school of thought, *popular constitutionalism*⁴³, serves as a common thread between these two constitutional experiences, which may at first appear quite distant from one another: one stands as a constitutional model and an established democracy⁴⁴, while the other entered a democratic transition only in 1988, following the end of Pinochet's military regime.

This movement is well rooted in the United States, albeit still a minority position. Nevertheless, its influence continues to grow. For over twenty years, a segment of American constitutional scholars has criticized the Supreme Court—and some have even advocated for its abolition⁴⁵. *Popular constitutionalism* has also resonated in Chile, where the idea of abolishing the Constitutional Court was actively discussed during the drafting of a new constitution (a draft that was ultimately rejected by referendum on 4 September 2022). Although abolition was ruled out, the Court was nevertheless downgraded within the constitutional order—placed after independent administrative authorities—and its powers were curtailed (after having been significantly expanded by the 2005 reform)⁴⁶.

⁴³ L. Kramer, 'The People Themselves : Popular Constitutionalism and Judicial Review', New-York, Oxford University Press, 2004.

⁴⁴ The status of the U.S. constitutional experience as a model, once widely acknowledged, is now open to debate - especially as we gain more distance from the Trump presidency. On the notion of 'constitutional model', see M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, cit., pp. 202-208.

⁴⁵ For example, see M. Tushnet, 'Taking the Constitution away from the Courts', Princeton, Princeton University Press, pp. 154, 1999.

⁴⁶ P. Ruiz-Tagle, 'En el Tribunal Constitucional hay un exceso de atribuciones', 3 juin 2021,

This downgrading was also reflected in Article 377 of the draft Constitution, which stated:

“The Constitutional Court is an autonomous, technical, and professional body responsible for exercising constitutional justice in order to guarantee the supremacy of the Constitution, in accordance with the principles of deference to the legislative body, the presumption of constitutionality of laws, and the pursuit of interpretations in conformity with the Constitution. Its decisions are based solely on law.”

The idea of doing without constitutional justice is therefore not as far-fetched as it might initially seem. After a period of intense enthusiasm, could constitutional justice become a marginal element of constitutional design? This hypothesis, however, does not appear likely to materialize in many constitutional systems—particularly those undergoing democratic transitions. In such contexts, constitutional justice continues to be seen and conceived as the institution most capable of ensuring not only the safeguarding of the new supreme norm of the state, but also of anchoring the idea that those in power accept to be bound by the constitution⁴⁷.

available at <https://idealex.press/pablo-ruiz-tagle-en-el-tribunal-constitucional-hay-un-exceso-de-atribuciones/>.

⁴⁷ As Michael Stolleis reminds us, there existed in Germany a favorable environment: a long-standing trust in the judiciary, to which the Rechtsstaat notably contributed. Often, it is precisely this favorable context that is lacking to empower a court's institutional will to build the authority of constitutional justice. See M. Stolleis, Préface à A. Gaillet, ‘La Cour constitutionnelle fédérale allemande. Reconstruire une démocratie par le droit (1945-1961)’, Paris, La mémoire du droit, 2021.

Building on this observation, the deep connection between courts and constitutions serves as an indicator of constitutional culture. Yet, not all constitutional cultures are cultures *of* the constitution. Not all of them exhibit the same attachment to the constitution as in the American or German traditions. This explains why a form of disenchantment can be observed in certain systems where the foundations of constitutionalism remain weak—disenchantment that extends to both the constitution itself and the institution tasked with upholding it.

This was precisely reflected in Chile in the choice to initiate a constituent process. Emerging in October 2019 from a popular movement triggered by the government's decision to raise metro ticket prices, the drafting of a new constitution was presented by many commentators as a paradigm shift in the way political power has traditionally been exercised across Latin America—particularly in relation to the recurrent issue of the absence of term limits for presidents. In the specifically Chilean context, the new constitution also aimed to enshrine social rights absent from the 1980 Constitution, which had been inherited from the Pinochet era, and to break with the country's ultraliberal economic and social order. During this period, the Constitutional Court failed to build its authority in the face of political power⁴⁸.

⁴⁸ F. Atria Lemaitre, 'Sobre el nuevo Tribunal Constitucional y la Nueva constitucion', 2021, available at https://www.plataformaconstitucionalcep.cl/constituyente/site/docs/20210728/20210728171133/03a_rol_t_constitucional_franandoatrial_.pdf.

This close connection between the social question and the institutional question can also be observed in the United States, where the Supreme Court no longer recognizes rights but may instead withdraw them at the federal level. Moreover, criticism is directed at the executive's control over the Court's majority composition—something President Trump exercised during his first term by appointing three justices⁴⁹. As a result, the Constitution appears to have lost much of its meaning; it no longer represents a true constraint. One inevitably recalls the assault on the Capitol on January 6, 2021. Beyond disenchantment, it may well be that the sacrality of the 1787 Constitution has come to an end⁵⁰. It is no longer universally accepted—at least within a significant part of the legal community⁵¹—that changing the number of justices or limiting their terms constitutes an illegitimate attack on the institution's independence. This opens the door to reform as improvement, though the political conditions for such reform are not necessarily in place. The legitimacy of such a measure is by no means self-evident, given that the Supreme Court has long operated under well-established rules. Put differently, reform can worsen rather than improve the institution. The 1937 precedent highlights the risks inherent in any reform that aims to bring about structural change: it may seriously undermine public trust in the court in question and trigger retaliatory reforms. As

⁴⁹ Over the longer term, Republican presidents have appointed fourteen of the eighteen justices since 1969.

⁵⁰ The veneration of the Constitution as a source of blindness to its flaws, see J. R. Zink, Ch. T. Dawes, "The Dead Hand of the Past? Toward an Understanding of "Constitutional Veneration"", 38, *Political Behavior*, no 3, pp. 535-560, September 2016.

⁵¹ See P. G. Daly and references quoted, *op.cit.*, p. 1075.

Mark Tushnet rightly acknowledges: “Treating the Court openly as an essentially political institution undermines its legitimacy and could render it unavailable to protect democracy from future threats.”⁵² Therefore, should we not broaden our perspective in order to better understand the U.S. situation? Beyond the Court itself, questions arise about the democratic functioning of the entire institutional system, particularly the presidential election process. The starting point for reflecting on court-packing reform should thus be framed in terms of democratic restoration, rather than in the context of a democratic transition in crisis⁵³. Nonetheless, the central and recurring challenge with regard to the Court remains the same: drawing the line between reforms that seek to improve the institution and those that constitute illegitimate interference with its status and operation. While it can be asserted that judges must not be perceived as the instrument of a single political force, close case-based analysis proves essential and unavoidable⁵⁴.

To conclude, a *contrario* hypothesis may offer some valuable insight. Formulating it in direct opposition to the initial question underlying this proposed systematization could reveal something further: what does it mean *not* to reform a constitutional court? For example, what is the significance of the persistent inability to reform the procedures

⁵² M. Tushnet, ‘Court-Packing On the Table in the United States ?’, op. cit.

⁵³ P. G. Daly, op.cit., pp. 1071-1075.

⁵⁴ D. Kosar, K. Šipulova, ‘How to Fight Court-Packing’, 6, Constitutional Studies, pp. 145-157, 2020. In this article, the authors establish a taxonomy of the mechanisms employed and identify key distinctions to determine on which side court-packing reforms fall.

and criteria for the appointment of members of the French Constitutional Council? Put differently, reforming may sometimes amount to revolutionizing—or more precisely, disrupting—the conception that governing elites have of constitutional justice. Whether or not a constitutional court is reformed ultimately depends on those in power. It is therefore understandable why many courts—especially in a populist context—are increasingly aware that their very existence and function also depend on the nature of their relationship with the governed. Other lines of inquiry are emerging, particularly inspired by Latin American constitutional experiences, focusing on the popular legitimacy of supreme or constitutional courts: the election or random selection of judges, or even the popular veto of rendered decisions. Thus far, courts operating within 'North constitutionalism' have tended to favour public engagement through greater institutional transparency and enhanced representativeness of their judges, as exemplified by Canada⁵⁵.

⁵⁵ See M.-C. Ponthoreau, 'La confiance du public dans la justice constitutionnelle à l'ère du populisme', *Annuaire International de Justice Constitutionnelle*, vol. 35, pp. 15-20, 2019, available at https://www.persee.fr/doc/aijc_0995-3817_2020_num_35_2019_2747.