HOW COURTS DIE

David Sobreira *

* Harvard Law School, L.L.M. '25; Christus University (Brazil), LL.M. '24, L.L.B. '16. I am grateful to Carlos Marden Coutinho for the conversations that inspired the writing of this article. I also thank Yaniv Roznai, Tímea Drinóczi, Agnieszka Bień-Kacała, and Raul Urribarri for their insights into the contexts of their respective countries; Adeildo Oliveira and Carina Gouvêa for their comments and suggestions; Patrick Leisure for the conversation that led me to refine some core ideas in this paper; and Professor Vicki Jackson, whose encouragement motivated me to publish this work. Finally, I would like to show my deepest appreciation to the *Vermont Law Review* Editorial Team for the astonishing reviewing process. All mistakes are my own.

INTRODUCTION

"[A] death by a thousand cuts" is how some scholars who study democratic backsliding describe the process that leads to the end of a democracy.[1] Academic literature has repeatedly shown that democratic regimes no longer end abruptly, but rather gradually, although the speed of transition may vary.[2] This phenomenon manifests itself through a series of small attacks (cuts) on democratic institutions that, individually, may seem insignificant but collectively erode the fundamental structure of the rule of law.

However, not all cuts are equal. Some are deeper and cause more serious damage than others, especially when the integrity of apex courts is violated. These institutions play a crucial role in maintaining constitutional order, acting as guardians of the constitution and protectors of fundamental rights. When attacked, the capacity of a democratic system to self-correct is severely compromised.

Political science has shown that a new wave of autocratization is upon us.[3] Academics have been studying this problem incessantly, especially in the last decade and a half when the phenomenon seems to have gained more traction worldwide. Despite the different research approaches, one conclusion about the autocratization process seems unanimous: the importance of apex courts in its fulfillment. Often seen as obstacles by authoritarian leaders, these courts fall victim to attacks that seek to undermine their independence and turn them into tools to legitimize their agendas.

The importance of apex courts in protecting democratic values cannot be underestimated. It is due to the power they wield that these institutions can act as a bulwark against authoritarian projects. By protecting fundamental rights and ensuring that the legislative and executive branches operate within constitutional limits, they play a vital role in preserving democracy. However, this same role makes them prime targets for

---

1. *See generally* Luca Cianetti & Seán Hanley, *The End of the Backsliding Paradigm*, 32 J. DEMOCRACY 66 (2021); R. H. Rohlfing & Marlene Wind, *Death by a Thousand Cuts: Measuring Autocratic Legalism in the European Union's Rule of Law Conundrum*, 30 DEMOCRATIZATION 1 (2023); Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 L. & ETHICS HUM. RTS. 49 (2020).

2. *See generally* sources cited *supra* note 1; STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) [hereinafter HOW DEMOCRACIES DIE]; Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018) [hereinafter *How to Lose a Constitutional Democracy*].

3. Anna Lührmann & Staffan I. Lindberg, *A Third Wave of Autocratization Is Here: What Is New About It?*, 26 DEMOCRATIZATION 1095, 1095–96 (2019).

authoritarian agents who seek to consolidate power and eliminate mechanisms that can hinder their illiberal plans.

In recent decades, supreme and constitutional courts have been the targets of systematic attacks in different parts of the world. In countries like Venezuela, Turkey, Hungary, Poland, El Salvador, and Israel, political leaders and parties have employed strategies to weaken or control these institutions.[4] In the repertoire of these illiberal figures are maneuvers such as judicial structure reforms, reducing the number of judges, increasing executive control over judicial appointments, and limiting the authority of the courts. Such schemes compromise judicial independence but also ease the implementation of policies that may be contrary to democratic principles. It is due to these issues that this work aims to analyze how political agents have subverted courts and weaponized them for their purposes.

Thus, Part I takes a historical approach by exposing the reasons that led to the concentration of powers in supreme and constitutional courts. From *Marbury v. Madison* in 1803, through the creation of the basic structure doctrine in India in the 1970s, to the invalidation of Amendment No. 3 by the Israeli Supreme Court in 2024, this explanation helps to understand the authority of the courts and the interest they arouse in authoritarian agents. This art explores how these courts acquired their role as guardians of the constitution and how this authority made them targets in times of democratic crisis.

Next, I present the concept of what I call "court taming," a term I find more appropriate than the alternatives used in the specialized literature, because it more accurately captures the dynamic between judiciary and legislative processes. This concept is complemented by a typology created from the analysis of the experiences of six countries. Starting from the presented concept and using a deductive argument, I provide arguments for why taming of a court should be seen as illegitimate.

In Part II, I employ a comparative approach to explain the methodology used for selecting the countries analyzed. I also explain issues such as temporal scope, concepts of democracy, and regime transition. Subsequently, I present the political context and erosion process of six countries (Venezuela, Turkey, Hungary, Poland, El Salvador, and Israel), with an emphasis on the attacks directed at their supreme and constitutional courts.

The case studies in this Part follow a uniform structure to facilitate the analysis. Initially, I delineate the situation prior to the attacks on the judiciary. Then, I present the different strategies employed to tame the courts. Finally,

4. *See infra* Part II.

I attempt to evaluate the consequences of the taming process, assessing—when possible—the implications of judicial independence.

Building on the lessons learned from the study of each of these countries, Part III presents sociological and institutional proposals to address the problem of court taming. In a non-exhaustive list, I present ideas related to sociological legitimacy and how a court can build it, how constitutional designers can establish rules to hinder taming attempts, and ways in which the courts can defend themselves against attacks.

I. COURT TAMING

> Rather than rejecting the language of constitutionalism and democracy in the name of a grand ideology as their authoritarian forebears did, the new legalistic autocrats embrace constitutional and democratic language while skipping any commitment to the liberal values that gave meaning to those words.[5]

In the past two decades, legal academic literature has seen an increasing production of studies on the process of democratic decay—a regime that seems to be facing yet another crisis in many countries around the world.[6] Quantitatively, the world is divided between 88 democracies and 91 autocracies—as pointed out in the 2025 report of the Varieties of Democracy Institute (V-Dem).[7] For the first time in the past 20 years, there are more autocracies than democracies in the world. This means that today, 71% of the world's population (approximately six billion people) live in autocracies—nearly a 50% increase in the last decade.[8]

It is difficult to assess whether this is a trend that will persist or if this is part of a cycle of crises in democratic regimes. Whatever the answer, academics have produced warnings, analyses, and responses in attempts to overcome this moment. The result has been a vast collection of works that have brought relevant insights for understanding this period. Without exhausting the topic—and probably doing the injustice of failing to mention

---

5. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 562 (2018) [hereinafter *Autocratic Legalism*].

6. *See* Hanspeter Kriesi, *Is There a Crisis of Democracy in Europe?*, 61 POLITISCHE VIERTELJAHRESSCHRIFT [GERMAN POL. SCI. Q.] 237, 239 (2020) (disagreeing that there is a democratic crisis in Europe).

7. MARINA NORD ET AL., V-DEM INSTITUTE, DEMOCRACY REPORT 2025: 25 YEARS OF AUTOCRATIZATION – DEMOCRACY TRUMPED? 6 (2025) [hereinafter DEMOCRACY REPORT 2025].

8. *Id.* at 6.

some—the works of Jack Balkin (Constitutional Rot),[9] David Landau (Abusive Constitutionalism),[10] Nancy Bermeo (Democratic Backsliding),[11] as well as Steven Levitsky and Daniel Ziblatt (How Democracies Die)[12] can be mentioned.

As Levitsky and Ziblatt point out, the authoritarian challenges launched against contemporary democracy have a common hallmark: they are a reaction to the progressive strengthening of multiracial democracy.[13] Levitsky and Ziblatt define multiracial democracy as "a political system with regular, free, and fair elections in which adult citizens of all ethnic groups possess the right to vote and basic civil liberties such as freedom of speech, the press, assembly, and association."[14]

In this context, the strengthening of an increasingly cosmopolitan and globalized world has contributed to the advancement of multiracial democracy. As a consequence, formerly dominant social groups now find themselves forced to share their positions of power with groups once marginalized. For Levitsky and Ziblatt, this loss of political space leads old dominant groups to question the changes in the social status quo, causing them to fear for their positions in society.[15]

This fear, compounded by resentment over losing social status, makes such groups susceptible to being captivated by demagogic populist discourses. Some of these populists, often charismatic, have little or no commitment to democracy and are capable of channeling people's worst feelings. This is because, "[i]n spite of the reliance on rhetoric and irrational appeals, populism does respond to real problems,"[16] such as the democratic deficit currently growing due to factors like:

> [T]he general growth of executive power at the expense of legislatures, political corruption and the role of money in the electoral process, the weakening of political parties, the rise

9. *See* Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147 (2017) (explaining how states become less democratic and less republican).

10. *See* David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013) [hereinafter *Abusive Constitutionalism*] (addressing the weaponization of constitutionalism against itself).

11. *See* Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5 (2016) (exploring the transformation of the strategies to end the democratic rule).

12. *See* HOW DEMOCRACIES DIE, *supra* note 2 (analyzing how autocrats rise to power).

13. STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY 5 (2023). [hereinafter TYRANNY OF THE MINORITY].

14. *Id.* at 4.

15. *Id.* at 10.

16. Andrew Arato, *How We Got Here? Transition Failures, Their Causes, and the Populist Interest in the Constitution*, 45 PHIL. & SOC. CRITICISM 1106, 1108 (2019) [hereinafter *How We Got Here?*].

> of 'media democracy', the instrumentalization and commercialization of the public sphere, the transformation of civil society into a network of formal organizations, the reduction of direct democratic practices into plebiscitary ones and the growth of powerful regional or international organizations less democratic in form and operation than were many nation states.[17]

Populism, however, has many definitions. According to Bojan Bugaric, populism is "chameleon-like," capable of adapting to its environment while maintaining a narrowly defined ideology.[18] As a result, populism can take various forms, including "agrarian, socio-economic, xenophobic, reactionary, authoritarian," and even "progressive."[19] Nevertheless, certain elements frequently recur in populist movements, such as the division of society into antagonistic groups, the claim to speak on behalf of "the people," and an emphasis on popular sovereignty and direct democracy.[20]

Similarly, though with a more systematic approach, Andrew Arato argues that "today's main challenge to democracy comes from projects (movements and regimes) that very well fit the six criteria" derived from the theories of various political scientists.[21]

> (1) Appeal to 'the people' and 'popular sovereignty' as empty signifiers, uniting in a rhetorical form heterogenous demands and grievances (=the fiction of E. Morgan; the myth of M. Canovan).
>
> (2) A part (of the population) standing for the whole ('the people').
>
> (3) The construction of frontier of antagonism (=the friend–enemy couplet of Carl Schmitt).
>
> (4) Unification through strong identification with a leader, or rarely unified leadership group (=embodiment model of Lefort, Habermas; the general will of C. Mudde).

---

17. *Id.*
18. Bojan Bugaric, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 GERMAN L.J. 390, 392 (2019).
19. *Id.*
20. *Id.*
21. *How We Got Here?*, *supra* note 16, at 1106.

> (5) Insistence on a strong notion of politics, or 'the political' and a disinterest in mere 'ordinary' politics or policy.
>
> (6) Nevertheless, attachment to at least partially competitive elections (until a populist regime with mere ritualized elections can be constituted).[22]

The conclusion is that the populist project, in its authoritarian form,[23] contains elements fundamentally incompatible with democracy, such as dividing society into allies and enemies—rather than allies and opponents. This notion aligns with ideas such as Levitsky and Ziblatt's principle of mutual tolerance. According to them, as long as opponents abide by the rules of the democratic process, those who claim to uphold democracy must respect their opponents' right to exist and compete for power.[24]

Respect for political opponents—and their right to participate—is also defended by more radical theories that emphasize the inherently conflictual nature of democracy, such as Chantal Mouffe's. In her agonistic model of democracy, Mouffe uses the term "enemy" in a qualified sense: "[a]n adversary is an enemy, but a legitimate enemy—one with whom we have some common ground because we share an adherence to the ethico-political principles of liberal democracy: liberty and equality."[25]

Despite such democratic ideals, authoritarianism has been gaining ground worldwide.[26] The rhetoric of authoritarian actors and their illiberal practices have found receptive audiences in various countries facing crises of different kinds. Much like in the last century, when democracy was not yet a consolidated value, today's autocrats have become the new "sexy"—at least for a segment of the population.

A well-functioning constitutional democracy relies on several key factors, including (1) the effective operation of institutions that serve as

---

22. *Id.* at 1107 (formatting altered).

23. Bojan Bugaric differentiates between two types of populism: one authoritarian in nature and, therefore, contrary to liberal values; and the other emancipatory, which can be compatible with liberal democracy. Bugaric, *supra* note 18, at 393. The concept of populism is essentially disputed, despite having some common characteristics. However, not all authors agree with the existence of a populism with liberal characteristics as Bugaric does. CARINA BARBOSA GOUVEA & PEDRO H. VILLAS BÔAS CASTELO BRANCO, POPULIST GOVERNANCE IN BRAZIL: BOLSONARO IN THEORETICAL AND COMPARATIVE PERSPECTIVE 43 (2022).

24. HOW DEMOCRACIES DIE, *supra* note 2, at 8–9.

25. CHANTEL MOUFEE, THE DEMOCRATIC PARADOX 120 (2000).

26. ECONOMIST INTEL. UNIT, DEMOCRACY INDEX 2024, at 29 (2025); *see generally* DEMOCRACY REPORT 2025, *supra* note 7; FREEDOM HOUSE, FREEDOM IN THE WORLD 2025: THE UPHILL BATTLE TO SAFEGUARD RIGHTS (2025).

checks on power, (2) public trust in elected representatives, and (3) the patience and adherence of public officials to the rules of the political system.[27] However, authoritarian figures have no qualms about undermining the mechanisms that uphold these democratic safeguards in pursuit of their political objectives.

Among the essential components of a strong democracy, the proper functioning of institutions that limit power—particularly the independence of apex courts—is the central focus of this Article. Given the significant authority these courts wield, they have become frequent targets of attack by those seeking to advance illiberal agendas.[28]

A. The Rise of Apex Courts

When Alexander Hamilton began publishing his essays in New York to advocate for the ratification of the U.S. Constitution, he described the U.S. Supreme Court as the "least dangerous" branch.[29] Without access to the purse (budget), which was the competence of the Legislature, or the sword (military), which was the competence of the Executive, the Judiciary represented, for the founding fathers, a reduced risk to liberty.

However, just over a decade after the Constitution's ratification, the U.S. Supreme Court demonstrated that Hamilton's prediction was far from accurate. In *Marbury v. Madison*,[30] the Court asserted its authority to invalidate laws that conflicted with the Constitution. Far from being a purely legal matter, *Marbury* was the product of a political struggle between the two dominant factions of the time: the Democratic-Republicans, led by then-President Thomas Jefferson, and the Federalists, led by former President John Adams.

The concept of judicial review was not entirely new. In Virginia, two decades before *Marbury*, the state's Court of Appeals had already claimed the power to refuse enforcement of laws it deemed unconstitutional.[31] A similar precedent occurred in Rhode Island in 1786 with *Trevett v. Weeden*.[32] Still, no such mechanism had yet been established at the federal level, making *Marbury* a landmark case in constitutional history.

---

27. Balkin, *supra* note 9, at 151.

28. *See* ANDRÁS SAJÓ, RULING BY CHEATING: GOVERNANCE IN ILLIBERAL DEMOCRACY 66, 74 (2021); Von Dieter Grimm, *Neue Radikalkritik an der Verfassungsgerichtsbarkeit* [*New Radical Critique of Constitutional Adjudication*], 59 DER STAAT 321, 321–22, 334 (2020).

29. THE FEDERALIST NO. 78 (Alexander Hamilton).

30. Marbury v. Madison, 5 U.S. (1 CRANCH) 137 (1803).

31. WILLIAM MEIGS, THE RELATION OF THE JUDICIARY TO THE CONSTITUTION 63 (1971).

32. *Id.* at 70.

Over time, the field of law—particularly constitutional law—has evolved, and supreme and constitutional courts have become increasingly influential. Established by the Philadelphia Constitution of 1787, the U.S. Supreme Court was the first institution of its kind—later serving as a model for numerous countries across the Americas in the 19th and 20th centuries.[33] Meanwhile, in 1920, Austria introduced the first formal Constitutional Court.[34] The American model follows a diffuse system, in which judicial review can be exercised by any court in specific cases, with the U.S. Supreme Court serving as the ultimate authority.[35] In contrast, the concentrated system, rooted in continental European legal traditions, restricts constitutional review to a specialized constitutional court, which assesses laws in the abstract.[36]

From studies on these institutions, one of the most significant academic debates in history emerged, centered on a fundamental question: Who should guard the Constitution? Hans Kelsen and Carl Schmitt offered contrasting answers. Forged in the Weimar-era crises, this clash prefigured today's divide between court-centered constitutionalism and plebiscitary- or executive-centered claims to constitutional guardianship.

Following a more democratic tradition, Kelsen argued that an independent body, outside the traditional structure of government powers, should be entrusted with constitutional interpretation.[37] In his view, the existence of a constitutional court was essential to ensuring constitutional supremacy and preventing the arbitrariness of political power—creating a closed system in which morality and politics remained impenetrable.[38]

Carl Schmitt, a critic of liberalism, also maintained that the Constitution's guardian should be a separate institution rather than one of the established powers. Entrusting this responsibility to them could elevate them above the others and allow them to evade oversight—resulting in a master of the Constitution.[39] However, unlike Kelsen, Schmitt argued that constitutional guardianship should rest with the President of the Reich, an

33. Virgílio Alfonso da Silva, *Constitutional Courts / Supreme Courts, General*, MAX PLANCK ENCYC. COMPAR. CONST. L., https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e518# (last updated Sept. 2018).

34. *Id.*

35. *Id.*

36. *Id.*

37. HANS KELSEN, JURISDIÇÃO CONSTITUTIONAL 239–40 (2003).

38. *Id.*

39. Cláudio L. Oliveira, *Judicialização da Política, Auto-restrição judicial e a Defesa da Constituição: algumas lições de Carl Schmitt em Der Hüter der Verfassung* [*Judicialization of Politics, Judicial Self-Restraint, and the Defense of the Constitution: Some Lessons from Carl Schmitt in the Guardian of the Constitution*], 17 DOISPONTOS: 63, 65 (2020) (Braz.).

agent sufficiently neutral to handle inherently political and sovereign conflicts.[40]

A second defining moment in constitutional history—particularly for the proliferation and consolidation of constitutional courts—occurred in the aftermath of World War II, when the focus of constitutions shifted. Whereas constitutions had previously been concerned primarily with state structure and the distribution of powers, they now centered on fundamental rights.[41] This transformation led to the emergence of a distinct form of constitutional interpretation, aimed at realizing and enforcing fundamental rights.[42] A landmark example of this shift was the *Lüth* case, decided by the German Federal Constitutional Court.[43] This ruling introduced the notion of the objective dimension of fundamental rights into constitutional discourse, signifying that the constitution permeates all aspects of society—protecting citizens not only in their relationship with the state but also in their interactions with one another.[44]

As a result, constitutional courts have become central to the project of constitutionalism. Tasked with ensuring the fulfillment of constitutional promises made by many states, some courts have asserted powers not explicitly granted by their constitutions.[45] As Andrew Arato observes, before these powers were formally delegated, it was the courts themselves that first assumed the role of distinguishing between constituent and constituted powers.[46]

A notable example of this judicial expansion occurred in India.[47] In 1967, the Supreme Court of India—going beyond even the boldness of the U.S. Supreme Court in *Marbury*—recognized its authority to invalidate constitutional amendments that violated fundamental rights.[48] This principle was reaffirmed in 1973 in *Kesavananda Bharati v. State of Kerala*, when the Court articulated what became known as the *basic structure doctrine*, establishing minimum parameters for constitutional amendments.[49] From

---

40. LARS VINX, THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW 150–51, 158 (Lars Vinx trans., 2015).

41. PAULO BONAVIDES, CURSO DE DIREITO CONSTITUCIONAL 616–17 (35th ed. 2020).

42. *Id.* at 611.

43. BVERFG, 1 BVR 400/51, Jan. 15, 1958 (Ger.).

44. *Id.*

45. ANDREW ARATO, *Populism, Constitutional Courts, and Civil Society*, *in* JUDICIAL POWER: HOW COURTS AFFECT POLITICAL TRANSFORMATIONS 318, 331 (Christine Landfried ed., 2019) [hereinafter *Populism, Constitutional Courts, and Civil Society*].

46. *Id.*

47. BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS 67 (2019).

48. *Id.*

49. Kesavananda Bharati Sripadagalvaru v. State of Kerala, (1973) 4 SCC 225 (India).

that point forward, the essential elements of the Indian Constitution—its basic structure—received an added layer of protection.[50]

More recently, in early 2024, the Supreme Court of Israel invalidated an amendment to the Basic Law.[51] This provision was part of a broader initiative by Benjamin Netanyahu's government to consolidate power and curtail the fundamental rights and protections of certain Israeli citizens.[52] Lacking an explicit constitutional provision granting it the authority, the Court nonetheless asserted its power by drawing upon the Indian basic structure doctrine, the theory of unconstitutional constitutional amendments—further developed by Professor Yaniv Roznai—and other insights from the broader literature on constitutional erosion.[53]

Against this backdrop, legal scholars and political scientists have increasingly studied the causes, mechanisms, and consequences of courts' (self) empowerment. Tom Ginsburg notes that in "recent decades, new democracies around the world have adopted constitutional courts to oversee the operation of democratic politics."[54] In politically uncertain environments, states turn to judicial review as a mechanism to safeguard "constitutional bargains."[55]

Offering a different perspective, Ran Hirschl argues that judicial empowerment is best understood as the result of interrelated actions by three groups. First, threatened political elites seeking to insulate their political preferences from democratic shifts. Second, economic elites leveraging the constitutionalization of rights to secure protections for their financial interests against government intervention. Third, judicial elites aiming to expand their power and enhance their international standing.[56]

Whether through Ginsburg's or Hirschl's framework, the outcome is invariably the same: judicialization.[57] As a result, issues of significant political relevance—and the authority to rule on them—are increasingly

---

50. *Id.*

51. HCJ 5658/23 Movement for Quality Government v. Knesset (2024) (Isr.) [English Translation].

52. *Id.*

53. *Id.* at 48, 53, 65.

54. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES, at i (2003).

55. *Id.* at 25.

56. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 12 (2004).

57. Luís Roberto Barroso, *Contramajoritário, Representativo e Iluminista: Os papéis dos tribunais constitucionais nas democracias contemporâneas* [Counter-majoritarian, Representative, and Enlightenment: The Roles of Constitutional Courts in Contemporary Democracies], 9 REVISTA DIREITO & PRÁXIS [REV. DIREITO PRÁX] 2171, 2178 (2018) (Braz.).

transferred to the judiciary "to the detriment of traditional political bodies, namely the Legislature and the Executive."[58]

This judicial strengthening, in turn, incentivizes political actors to exploit courts as a means of entrenching their power. Not without reason—apex courts offer various mechanisms, not all of them republican, for ambitious politicians to solidify their authority.[59]

While courts can serve legitimate functions in promoting democracy, upholding the rule of law, and safeguarding fundamental rights, they can also be weaponized to dismantle these very principles.[60] In recent decades, successful attempts to pursue this illiberal agenda have become increasingly common.[61] Venezuela, Hungary, and Turkey provide striking examples of constitutional courts that no longer fulfill their intended role.[62] However, resistance to authoritarian encroachments have also been observed, as in the cases of Israel and Poland.[63]

As András Sajó and Dieter Grimm note, apex courts are often the first to go: they are among the first victims of authoritarian attacks on constitutionalism.[64] This happens not only because they are central to the system of checks and balances in democratic regimes, but also because they are institutionally bound to apply the constitution—even when that constitution has already been rendered illiberal.[65] In their more sophisticated forms, these attacks have become known as autocratic legalism[66] and abusive constitutionalism,[67] depending on the path the potential autocrat wishes to follow.

This phenomenon is further exacerbated by the so-called *demonstration effect*. Originally coined by economist James Duesenberry[68] and later adopted by political scientists, this concept describes how events and innovations in one context influence actors in other societies to attempt to replicate them. As explained by Jørgen Møller, Svend-Erik Skaaning, and

58. *Id.*

59. HIRSCHL, *supra* note 56, at 50; *see Abusive Constitutionalism*, *supra* note 10, at 191; Grimm, *supra* note 28, at 321; *cf.* SAJÓ, *supra* note 28, at 66–74.

60. *Populism, Constitutional Courts, and Civil Society*, *supra* note 45, at 333.

61. *Id.* at 333–34.

62. *Id.* at 334.

63. *Id.* at 324–25.

64. *See* SAJÓ, *supra* note 28, at 66, 74; Grimm, *supra* note 28, at 321–22, 334.

65. SAJÓ, *supra* note 28, at 66.

66. *Autocratic Legalism*, *supra* note 5, at 548.

67. *Abusive Constitutionalism*, *supra* note 10, at 191.

68. JAMES STEMBLE DUESENBERRY, INCOME, SAVING AND THE THEORY OF CONSUMER BEHAVIOR 27 (1949).

Jakob Tolstrup,[69] "when democratic powers predominate, pro-democratic demonstration effects proliferate and democratization flourishes; when autocratic powers preponderate, anti-democratic demonstration effects abound and democratic regressions dominate."[70]

Whether through ordinary legislation or constitutional means, scholars have documented how authoritarian actors orchestrate changes that weaken the foundations of democratic systems—particularly by targeting the judiciary, which often lacks effective means to defend itself.[71]

Thus, studying the process by which constitutional courts are subverted provides a deeper understanding of the risks associated with such strategies and offers insight into effective countermeasures.

B. Concept and Typology

One of the definitions of *taming*, according to the Cambridge Dictionary, is "to control something dangerous or powerful."[72] While the term is typically used in reference to animals, it has been borrowed from biology in this context because it aptly describes what occurs when a court loses its autonomy under illiberal attacks.[73]

Furthermore, the option seems more appropriate than *capture*, which is widely used in specialized literature.[74] This is because a capture does not necessarily result in the direct use of the captured object or person. In contrast, the act of taming—although equally instrumental—seeks to directly use what has been tamed, "imposing alignment between the intended conduct and the will"[75] of the taming agent.[76]

---

69. Jørgen Møller et al., *International Influences and Democratic Regression in Interwar Europe: Disentangling the Impact of Power Politics and Demonstration Effects*, 52 GOV'T & OPPOSITION 559, 561 (2017).

70. *Id.*

71. *See generally Autocratic Legalism*, *supra* note 5; *Abusive Constitutionalism*, *supra* note 10.

72. *Taming*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/taming (last visited Dec. 14, 2025).

73. David Sobreira & Carlos Marden Cabral Coutinho, *Domesticando a Justiçia* [*Domesticating Justice*], REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS [REV. INVESTIG. CONST.], May/Aug. 2023, at 1, 4 [hereinafter *Domesticando a Justiça*].

74. *See Abusive Constitutionalism*, *supra* note 10, at 202, 216; *Autocratic Legalism*, *supra* note 5, at 570; ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY 114 (2021) [hereinafter ABUSIVE CONSTITUTIONAL BORROWING]; Yaniv Roznai & Amichai Cohen, *Populist Constitutionalism and the Judicial Overhaul in Israel*, 56 ISR. L. REV. 502, 519 (2023).

75. *Domesticando a Justiça*, *supra* note 73, at 4.

76. Andrew Arato uses the expression "domestication of the apex courts" in passing. Although commonly used as synonyms, "taming" refers to the process of habituating animals to the presence—and eventually the commands—of a human; whereas "domestication" is the product obtained from the crossbreeding of species of animals or plants. *See Populism, Constitutional Courts, and Civil Society*,

In this context, "tamed courts present a valuable asset for any government,"[77] particularly given that, as of 2011, more than 80% of the world's constitutions included some form of judicial review.[78] Once a court has been tamed, it can: (1) provide preferential treatment to laws and amendments of questionable constitutionality; (2) facilitate constitutional changes that would be unfeasible through the political process; (3) obstruct future governments—if democracy persists—in their attempts to reverse illiberal reforms; and (4) assist in entrenching the taming government in power indefinitely.[79]

The power and prestige of apex courts are such that even in consolidated autocratic regimes, these institutions are often preserved. According to Andrew Arato, this occurs for reasons of legitimacy and political strategy.[80] Tamed courts retain symbolic significance both domestically and internationally.[81] Furthermore, a tamed court can serve an autocrat even in the event of electoral defeat, complicating efforts to restore democracy or implement transitional justice.

By court taming—a term I adopted in *Domesticando a Justiça*,[82] co-authored with Carlos Marden—I refer to modifications in a court's composition or powers, or both, aimed at subordinating it to the interests of a political actor or group.[83] By restricting a court's autonomy, the taming process disrupts the balance of powers and contributes to the erosion of a country's democratic standing—an effect documented by institutions such as V-Dem.[84]

The taming process can affect the court in two dimensions, one subjective and the other objective. When it comes to the subjective dimension, taming seeks to interfere with a court's composition.[85] When

---

supra note 45 at 320. András Sajó uses both "domesticate" and "tame" as synonyms. *See* SAJÓ, *supra* note 28, at 70, 75.

77. *Domesticando a Justiça*, *supra* note 73, at 4.

78. Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J. L. ECON. & ORG. 587, 587 (2014).

79. Richard J. Sweeney, *Constitutional Conflicts in the European Union: Court Packing in Poland Versus the United States*, 4 ECON. & BUS. REV. 3, 5 (2018).

80. *Populism, Constitutional Courts, and Civil Society*, *supra* note 45, at 332–33.

81. Raul A. Sanchez Urribarri, *Courts Between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court*, 36 L. & SOC. INQUIRY 854, 857 (2011) [hereinafter *Courts Between Democracy and Hybrid Authoritarianism*].

82. *Domesticando a Justiça*, *supra* note 73, at 4.

83. *Id.*

84. *Judicial Constraints on the Executive Index*, OUR WORLD IN DATA [hereinafter *Judicial Constraints on the Executive Index*], https://ourworldindata.org/grapher/judicial-constraints-on-the-executive-index?country=~VEN (last updated Mar. 17, 2025).

85. *See infra* Part I.B.1.

directed at the objective dimension, taming aims to cripple the court in its institutional capacities.[86]

An analysis of court taming worldwide reveals a few primary (though not exclusive) strategies, which may be employed individually or in combination. Taming can occur through: (1) expansion of seats, (2) removal of judges, (3) jurisdiction stripping, or (4) defunding.[87]

However, not every change to a court's composition or powers constitutes an act of taming. A contextual evaluation, one that "transcends a purely formal assessment of compliance with legal requirements,"[88] is essential to determine whether such modifications are legitimate.

Beyond the philosophical foundations of constitutional democracy—which extend beyond mere proceduralism—this scrutiny is necessary because legal systems are designed to function as integrated structures. As Lon Fuller's concept of *polycentric problems* suggests, changes to courts can have far-reaching, interconnected effects, much like a spider web:

> A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered"—each crossing of strands is a distinct center for distributing tensions.[89]

Thus, interference with the structure and composition of courts can produce unforeseen consequences. In this context, the literature cautions that judicial reforms should be assessed both individually and collectively. Only a holistic approach can reveal their full impact.[90]

However, such precautions alone are insufficient to safeguard judicial independence. This is because incrementalism—"a central element in the process of democratic erosion"[91]—is not always immediately noticeable, and

---

86. *See infra* Part I.B.2.

87. Stephan Haggard & Lydia Tiede, *Judicial Backsliding: A Guide to Collapsing the Separation of Powers*, 32 DEMOCRATIZATION 513, 515 (2025).

88. *Domesticando a Justiça*, *supra* note 73, at 5.

89. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978).

90. WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 5–6 (2019) [hereinafter POLAND'S CONSTITUTIONAL BREAKDOWN]; Yaniv Roznai et al., *Judicial Reform or Abusive Constitutionalism in Israel*, 56 ISR. L. REV. 292, 294 (2023) [hereinafter *Judicial Reform or Abusive Constitutionalism*].

91. *Judicial Reform or Abusive Constitutionalism*, *supra* note 90, at 298.

even when it is, it can be difficult to counter. As Roznai, Dixon, and Landau explain, democratic erosion often unfolds through a series of small steps that, despite their incremental nature, do not necessarily amount to a slow process.[92] As a result, incrementalism is not always perceived as "a frontal assault on the basic principles of liberal democracy."[93]

In this context, "[l]ike the apocryphal frog placed in slowly boiling water, a democratic society in the midst of retrogression may not realize its predicament until matters are already beyond redress."[94] In such situations, the efforts of the democratic opposition become particularly challenging. First, no single event is significant enough to mobilize widespread societal resistance. Second, early warnings are often dismissed as "hysterical or paranoiac."[95]

Another way to identify non-republican intentions regarding the judiciary is to analyze the rhetoric of political actors seeking to modify the courts. Some leaders reveal their objectives only after consolidating power—such as Viktor Orbán. In July 2014, four years after returning as Hungary's Prime Minister, Orbán delivered his infamous "illiberal democracy" speech in Romania.[96] On that occasion, Orbán celebrated his party's second consecutive electoral victory.[97] During his speech, he emphasized themes common in illiberal populist discourse, such as prioritizing the collective over the individual.[98] In his words, "[the] Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state . . . ."[99]

Curiously, some politicians are more explicit about their intentions from the outset. One example is Jarosław Kaczyński, the leader of Poland's Law and Justice Party (*Prawo i Sprawiedliwość*, PiS) and the country's de facto ruler. As early as 2011—four years before PiS came to power—Kaczyński

92. *Id.* at 298–99; POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 5–6.

93. *Judicial Reform or Abusive Constitutionalism*, *supra* note 90, at 298.

94. *How to Lose a Constitutional Democracy*, *supra* note 2, at 119 (2018).

95. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 6.

96. Csaba Tóth, *Full Text of Viktor Orbán's Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014*, BUDAPEST BEACON (July 29, 2014), https://web.archive.org/web/20240428021934/https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/.

97. *Id.*

98. *Id.*

99. *Id.*

openly referenced Orbán's illiberal project in Hungary by declaring: "the day will come when there will be Budapest in Warsaw." [100]

A third category consists of politicians who attempt to disguise their intentions. Benjamin Netanyahu exemplifies this approach. When announcing his proposed judicial reforms in Israel, he framed them as necessary corrections to the constitutional revolution of the 1990s. He claimed it had created "a crack in Israeli democracy, which must be corrected."[101]

However, the political context—omitted by Netanyahu but well understood by Israeli society—clarifies the true motives behind his attacks on the judiciary.[102] The Prime Minister is currently facing corruption and fraud charges in the Jerusalem District Court. His governing coalition includes religious parties intent on implementing illiberal and discriminatory policies.[103]

Given these considerations, analysts can assess whether proposed—or ongoing—changes to a court's structure constitute a taming process. However, such an evaluation requires proper methodological tools, which this Article seeks to refine. Unlike the typology proposed in *Domesticando a Justiça*,[104] this Article proposes two broader models of taming, as opposed to the original four narrower ones.

Following this approach, my model differs from the one proposed by Stephan Haggard and Lydia Tiede,[105] who argue that the process of taming—a phenomenon they call *judicial backsliding*—occurs in three ways: (1) attacks on the court's powers; (2) attacks on its members; and (3) defunding.[106] By structuring my typology around the court's subjective and objective dimensions, my framework covers the same situations identified by Haggard and Tiede. This Article avoids conceptual duplication by grouping both defunding and competence (jurisdictional) restrictions under the objective dimension. Moreover, it expressly accommodates judicial overstay (a phenomenon that does not fit neatly within "attacks on

---

100. *"Przyjdzie dzień, że w Warszawie będzie Budapeszt"* [*"The Day Will Come When Warsaw Will Be Budapest"*], TVN24 (Oct. 9, 2011), https://tvn24.pl/polska/przyjdzie-dzien-ze-w-warszawie-bedzie-budapeszt-ra186922-ls3535336.

101. Yaniv Roznai, *Israel – A Crisis of Liberal Democracy?*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 355, 370 (Mark A. Graber et al. eds., 2018) [hereinafter *A Crisis of Liberal Democracy?*].

102. *Id.* at 373.

103. David Sobreira, *Como os Tribunais morrem: o caso de Israel* [*How Courts Die: The Case of Israel*], JOTA (Nov. 21, 2023) (Braz.) [hereinafter *o caso de Israel*], https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-de-israel-24032023 (interview with Professor Yaniv Roznai).

104. *Domesticando a Justiça*, *supra* note 73, at 4–5.

105. Haggard & Tiede, *supra* note 87, at 515.

106. *Id.*

members") since it preserves—or even prolongs—judicial tenures rather than removing them.

1. The Subjective Dimension

Taming processes targeting the subjective dimension can take a variety of forms, from the most well-known, such as court-packing, to more discreet ones, like reducing the retirement age.[107] In addition to these, however, there are other less well-known strategies, such as court-hoarding.[108] Below, I attempt to list some of the strategies used to undermine the courts' subjective dimension.

a. Packing Courts

One of the best-known ways a court can be tamed is through court-packing. Coined in the 1930s in the United States, the expression court-packing was used to refer to an attempt to expand the American Supreme Court by then-President Franklin Delano Roosevelt.[109] Roosevelt attempted this when trying to address the effects of the Great Depression of 1929. He presented the nation with the New Deal, a bold economic plan that placed the government at the center of the country's recovery process.[110]

However, the U.S. Supreme Court's precedents at that time were guided by what can be called *laissez-faire constitutionalism*, marked by decisions that imposed strict limits on the States' attempts to implement labor guarantees and rights.[111] Known as the Lochner Era, this 40-year period began with the judgment of *Allgeyer v. Louisiana*[112] in 1897 and ended in 1937 with the judgment of *West Coast Hotel Co. v. Parrish*.[113]

In this context, the Court adopted a broad interpretation of due process. Consequently, the Due Process Clause of the 14th Amendment to the U.S. Constitution, which states that no state shall deprive any person of life,

---

107. *Id.*

108. Patrick Leisure & David Kosař, *Court-Hoarding: Another Method of Gaming Judicial Turnover*, 46 L. & POL'Y 328, 329 (2024).

109. KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN 61–75 (2004).

110. *Id.*

111. Matthew J. Lindsay, *In Search of "Laissez-Faire Constitutionalism"*, 123 HARV. L. REV. F. 55, 55 (2010).

112. *See* 165 U.S. 578, 593 (1897).

113. *See* 300 U.S. 379, 408 (1937).

liberty, or property without due process of law,[114] was interpreted by the Court to also encompass economic freedom.[115]

As a result, the Court struck down more than 100 state laws.[116] As Mary Dudziak notes, the Court "had played a judicially activist but politically conservative role," preventing Congress from exercising its legislative function.[117]

Frustrated by repeated clashes with the Court, Roosevelt—who had been re-elected by a landslide in 1936—introduced his court-packing plan in 1937, despite never mentioning it during the campaign.[118] With a strong congressional majority, he proposed a judicial reform that would allow him "to appoint a new justice for every justice over the age of seventy-five."[119] At the time, this would have resulted in six new appointments, expanding the Court from nine to fifteen members.

The last modification to the Supreme Court's composition occurred in 1869—"long enough for many people to regard it as set by the Framers."[120] Combined with rising concerns over fascism in Italy and Germany, this reinforced public support for judicial independence.[121] As a result, Roosevelt's proposal was met with widespread hostility, including from the Court itself.[122]

The court-packing plan was effectively derailed in July 1937 following the unexpected death of Senator Joseph Robinson, who had been orchestrating the political negotiations necessary for its passage.[123] However, months earlier, in March of that year, the Court had already shifted its stance. In *West Coast Hotel*, the Court upheld a Washington state law establishing a minimum wage for women.[124] This abrupt reversal—popularly known as the

---

114. U.S. CONST. amend. XIV, § 1, cl. 2.

115. *See* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1502–03 (1999).

116. *See generally* Barry Cushman, *Teaching the Lochner Era*, 62 ST. LOUIS U. L.J. 537, 568 (2018).

117. Mary L. Dudziak, *The Politics of "The Least Dangerous Branch": The Court, the Constitution, and Constitutional Politics Since 1945*, *in* A COMPANION TO POST-1945 AMERICA 385, 386 (Jean-Christophe Agnew & Roy Rosenzweig eds., 2006).

118. Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 276–77 (1988).

119. MARK TUSHNET, I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES 103 (2008) [hereinafter I DISSENT].

120. Nelson, *supra* note 118, at 276.

121. *Id.*

122. *Id.* at 276, 282.

123. I DISSENT, *supra* note 119, at 103.

124. Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J.L. ANALYSIS 69, 70 (2010).

"switch in time that saved nine"[125]—was attributed to Justice Owen Roberts, who had typically aligned with the Court's conservative majority but unexpectedly began siding with its liberal wing.[126]

Following this episode, both the term and the practice of court-packing spread worldwide. In the 21st century alone, court-packing has been implemented in countries such as Venezuela,[127] Hungary,[128] and Turkey.[129] Additionally, debates over its potential use have emerged in the United States[130] and Brazil,[131] among others.

Despite its historical association with democratic erosion, some scholars argue that court-packing can serve democratic purposes. Rivka Weill,[132] Thomas Keck,[133] and Tom Gerald Daly[134] have defended this perspective. However, contemporary practice suggests that court-packing has become nearly synonymous with illegitimate maneuvers aimed at taming courts.[135]

Contrary to the arguments put forth by Weill, Keck, and Daly, I contend that court-packing is an illegitimate measure. In Part III, I propose a framework for legitimate judicial reforms—one that allows for modifications to the composition or functioning of apex courts without leading to their taming.

---

125. *Id.*

126. *Id.*

127. Matthew M. Taylor, *The Limits of Judicial Independence: A Model with Illustration from Venezuela Under Chávez*, 46 J. LATIN AM. STUD. 229, 253 (2014) [hereinafter *The Limits of Judicial Independence*].

128. BOJAN BUGARIČ, PROTECTING DEMOCRACY AND THE RULE OF LAW IN THE EUROPEAN UNION: THE HUNGARIAN CHALLENGE 9 (Europe in Question, LEQS Paper No. 79, 2014) [hereinafter PROTECTING DEMOCRACY AND THE RULE OF LAW].

129. Tom Gerald Daly, *"Good" Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay,* 23 GER. L.J. 1071, 1083 (2022).

130. Rivka Weill, *Court Packing as an Antidote*, 42 CARDOZO L. REV. 2705, 2709 (2021); Thomas M. Keck, *Court-Packing and Democratic Erosion*, *in* DEMOCRATIC RESILIENCE: CAN THE UNITED STATES WITHSTAND RISING POLARIZATION? 143 (Robert C. Lieberman et al. eds., 2022).

131. Cássio Casagrande, *Bolsonaro e o 'plano de empacotamento' do STF* [*Bolsonaro and the Supreme Court's 'Packing Plan'*], JOTA (Oct. 10, 2022), https://www.jota.info/opiniao-e-analise/colunas/o-mundo-fora-dos-autos/bolsonaro-e-o-plano-de-empacotamento-do-stf; *Bolsonaro cogita ampliar número de ministros no Supremo caso seja reeleito* [*Bolsonaro Is Considering Expanding the Number of Justices on the Supreme Court if He Is Re-Elected*], CORREIO BRAZILIENSE (Oct. 8, 2022), https://www.correiobraziliense.com.br/politica/2022/10/5042935-bolsonaro-cogita-ampliar-numero-de-ministros-no-supremo-caso-seja-reeleito.html.

132. Weill, *supra* note 130, at 2709.

133. Keck, *supra* note 130, at 143.

134. Daly, *supra* note 129.

135. *See generally* David Kosař & Katarína Šipulová, *Comparative Court-Packing*, 21 INT'L J. CONST. L. 80 (2023); *Autocratic Legalism*, *supra* note 5, at 547; Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, 26 J. DEMOCRACY 38, 38 (2015); POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 26; *How to Lose a Constitutional Democracy*, *supra* note 2, at 126.

b. Removing Judges

In contrast to the strategy employed in court-packing, which involves expanding the court, another court-taming method is to remove judges from a court.[136] The primary motivation for such measures is that certain judges may represent the last line of defense against the implementation of illiberal projects by authoritarian rulers.

These removal strategies manifest in various ways. One common method is the reduction of the retirement age for public servants in general or judges in particular. This tactic was employed in Hungary when Viktor Orbán's government lowered the retirement age for judges from 70 to 62—a measure later invalidated by the Constitutional Court.[137] A similar strategy was observed in Poland[138] under the PiS government and was debated in Brazil during the Bolsonaro administration.[139]

Another means of reducing a court's composition is through political persecution, fraudulent impeachments, or abusive removals. In Argentina, for instance, the impeachment of Supreme Court justices has been a recurring political tool since Juan Perón's era in the late 1940s and into the early 21st century.[140] In such cases, impeachment serves not only as an effective mechanism for removing judges but also as a tool of political pressure, coercing court members into resignation. Similar instances occurred in Venezuela under Hugo Chávez[141] and in El Salvador under Nayib Bukele's government,[142] though the latter employed a different approach.

Given the increasing sophistication of autocrats and authoritarian populists in advancing their political agendas, it is difficult to identify all the

---

136. My understanding of the situation involving the removal of judges differs from that of David Kosař and Katarína Šipulová, who advocate for a broader definition of court-packing—one that encompasses not merely the expansion of a court, but any intentional and irregular change, whether quantitative or qualitative, that adds, substitutes, or removes members of the court. *See* Kosař & Šipulová, *supra* note 135, at 84–85.

137. Kim Lane Scheppele, *Constitutional Revenge*, VERFASSUNGSBLOG (Mar. 4, 2013), [hereinafter *Constitutional Revenge*], https://verfassungsblog.de/constitutional-revenge/.

138. Wojciech Sadurski, *Constitutional Crisis in Poland*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 157–58 (Mark A. Graber et al. eds., 2018).

139. Rick Daniel Pianaro, *É preciso estar atento e forte: Supremo e a 'PEC do Pijama'* [*We Need to Be Vigilant and Strong: The Supreme Court and the 'Pajama Amendment'*], JOTA (June 10, 2020), https://www.jota.info/opiniao-e-analise/artigos/e-preciso-estar-atento-e-forte-supremo-e-a-pec-do-pijama-10062020#_ednref5.

140. GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERAL, AND PRESIDENTS IN ARGENTINA 15 (Margaret Levi et al. eds., 2005).

141. *The Limits of Judicial Independence*, *supra* note 127, at 254; *Courts Between Democracy and Hybrid Authoritarianism*, *supra* note 81, at 872.

142. Lukas Graute, *A Second Term for "the World's Coolest Dictator"?*, VERFASSUNGSBLOG (Nov. 13, 2023), https://verfassungsblog.de/a-second-term-for-the-worlds-coolest-dictator/.

possible methods by which a court's membership can be reduced. However, the framework proposed here provides objective criteria for assessing each case. Whether through a permanent reduction in the number of seats or through strategic vacancies followed by politically motivated appointments, the shadow of taming remains ever-present.

c. Hoarding Courts

Patrick Leisure and David Kosař identified "[a]nother method of gaming judicial turnover".[143] They called it *court-hoarding*, a strategy that involves illegitimately extending the time in office of loyal judges.[144] As the authors further explain, for court-hoarding to take place, four criteria must be met: (1) an extension of the time in office, (2) this extension must be abusive, (3) it must affect judges who are loyal to a court-hoarder, and (4) it must be done by political branches.[145] By setting these standards, Leisure and Kosař avoid a framework that would hinder legitimate changes related to a court's terms, but also leave out potential disputes between political branches that project themselves onto the courts.

Take the Hungarian case, for example. After implementing ostensive changes that brought the Hungarian Constitutional Court to its knees,[146] Viktor Orbán sought to ensure that the new composition—now mostly loyal to him—would remain in office longer than initially planned.[147] To achieve this, he had Parliament amend the Act on the Constitutional Court to remove the mandatory retirement age for constitutional justices.[148] In this case, it is possible to see that all of Leisure and Kosař's criteria were met.

In contrast, the Brazilian case illustrates how potentially abusive term extensions do not necessarily constitute court-hoarding. In 2015, shortly after a narrow victory that secured Dilma Rousseff a second term, the National Congress moved to approve Constitutional Amendment 88, which would extend the mandatory retirement age of Supreme Federal Tribunal justices from 70 to 75 years.[149]

Unlike the Hungarian case, the Brazilian case fails to meet one of the criteria—the loyalty to the court-hoarder. The National Congress in Brazil did not intend to control the Supreme Federal Court, but rather to curb the

---

143. Leisure & Kosař, *supra* note 108, at 328.

144. *Id.* at 330.

145. *Id.*

146. *See infra* Part II.C.

147. Renáta Uitz, *Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 INT'L J. CONST. L. 279, 292–93 (2015).

148. *Id.*

149. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 40 (Braz.).

president's power since she had already made three appointments to the Court. When added to the appointments previously made by Lula da Silva—both from the Workers' Party—this would have resulted in their party being responsible for 10 out of the 11 seats on the Court.[150]

This distinction is important because, although the public and scholars may debate the potential abusiveness of the measure taken by Congress at that time—which could easily be classified as a case of constitutional hardball[151]—it did not subject the court to the will of another political branch.[152]

2. The Objective Dimension

When the changes affect the objective dimension of a court, they impact the court's ability to fulfill its constitutional role. Although these changes may indirectly influence the subjective dimension—such as by altering judicial appointment rules—its primary effect is on the court's powers and functions. A defining characteristic of the attacks on the objective dimension is the wide range of methods through which they can be implemented.

A court's budget, judicial appointment process, and even the scope of its authority are all fundamental to its ability to perform its constitutional duties. This does not mean that these elements cannot be adjusted. Societies may legitimately reform their constitutional courts, including modifying their jurisdiction or limiting access to them. However, such reforms must not undermine the court's role as a check on the other branches of government—what Rosalind Dixon and David Landau call the democratic *minimum core*.[153]

Several historical cases illustrate how transformation has been carried out. In India in 1971—four years after the Supreme Court asserted its authority to invalidate constitutional amendments that violated fundamental rights—Prime Minister Indira Gandhi, backed by a parliamentary supermajority (352 of 518 seats), introduced constitutional changes to curtail the Court's ability to exercise judicial review in certain matters.[154] The Court

150. *Domesticando a Justiça*, *supra* note 73, at 17–18.

151. Constitutional hardball refers to political maneuvers—usually legislative or executive—that clearly fall within the formal bounds of existing constitutional doctrine and practice, yet nonetheless strain the unwritten norms that have traditionally guided political actors. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) [hereinafter *Constitutional Hardball*].

152. *Id.*

153. Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional Minimum Core*, *in* ASSESSING CONSTITUTIONAL PERFORMANCE 268, 277–78 (Tom Ginsburg & Aziz Huq eds., 2016).

154. ACKERMAN, *supra* note 47.

responded by developing the basic structure doctrine, reaffirming its authority and establishing a broad framework for applying judicial review.[155]

In Venezuela, Hugo Chávez employed a highly questionable constituent assembly to revoke judicial tenure and stability protections.[156] Even before assessing the effects of this measure, it is widely recognized that such guarantees are essential to ensuring judicial independence.[157] The guarantees' suspension alone constituted a serious threat to the judiciary's ability to function.

Similarly, in Poland, under Jarosław Kaczyński's PiS government, legislation was passed—later invalidated by the Constitutional Court—that restricted the Court's ability to exercise abstract review.[158] The law increased the minimum quorum of judges required to deliberate on the constitutionality of provisions.[159] In practice, given the Court's already diminished composition, this measure would have effectively rendered it inoperative.[160]

More recently, in Israel, Prime Minister Benjamin Netanyahu's government approved an amendment to the Basic Law—which functions as the country's constitution—that curtailed the Supreme Court's authority.[161] However, in early 2024, the Supreme Court struck down the amendment because its provisions would bar the Court from assessing the reasonableness of government actions. This granted the administration significant leeway to manipulate institutions and pursue an illiberal agenda.[162]

The experiences of these countries highlight the dangers posed by transformative reforms. Democratic actors must therefore remain vigilant against such changes and subject them to rigorous scrutiny.

---

155. *Id.*

156. ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 123.

157. *See generally* Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, annex, at 59, U.N. Doc. A/CONF.121/22/Rev.1 (Aug. 26–Sept. 6, 1985); ELLIOT BULMER, JUDICIAL TENURE, REMOVAL, IMMUNITY AND ACCOUNTABILITY (2d ed. 2017).

158. Lech Garlicki, *Constitutional Courts and Politics: The Polish Crisis*, *in* JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS 141, 147–48 (Christine Landfried ed., 2019).

159. *Id.*

160. *Id.*

161. Mordechai Kremnitzer, *Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness*, 56 ISR. L. REV. 343, 344 (2023).

162. *Id.*; HCJ 5658/23 Movement for Quality Government v. Knesset (2024) (Isr.) 52 [English Translation].

C. What Lies Ahead

As democracies have expanded globally, so too have autocracies. These cases of judicial attacks not only reveal the blueprint for subverting democracies but also serve as a warning for societies to mobilize in defense of their institutions. As Timothy Snyder notes, institutions require active support to function effectively, so "[d]o not speak of 'our institutions' unless you make them yours by acting on their behalf. Institutions do not protect themselves. They fall one after the other unless each is defended from the beginning."[163]

This insight raises a crucial question: What is the most effective way to safeguard a court? Modern history offers numerous examples of democracies that have collapsed, endured, or ultimately recovered after their courts came under attack. Therefore, the first step in addressing this question is to examine how these events have unfolded—and continue to unfold—around the world.

II. HOW COURTS DIE: A COMPARATIVE ANALYSIS

> Today the constitutional world looks different. The constitutionalism project is under populist pressure in many countries that only recently aspired to achieve it. The Constitutional Courts are among the first victims of this turnaround.[164]

One of the key uses of comparative constitutional analysis is to examine how different legal systems address specific challenges. Today, attacks on apex courts represent a phenomenon that occurs across various countries in different forms. However, for a meaningful comparison, the analyzed systems must share common characteristics. Comparative analysis requires the application of uniform parameters rather than ad hoc criteria. In this regard, despite undergoing processes of judicial taming in the 21st century, countries such as Venezuela, Turkey, Hungary, Poland, El Salvador, and Israel[165] share fundamental liberal democratic values—albeit to varying degrees. These systems have sought to uphold ideals such as the rule of law,

---

163. TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 22 (2017).

164. Grimm, *supra* note 28, at 321.

165. Despite the ongoing risk of autocratization, Israel is still within the democratic spectrum. *See* discussion *infra* Part II.F.

political rights, and checks and balances.[166] However, democratic erosion has led them to shift from more democratic to less democratic regimes.

To assess and classify these countries, I will rely on the typology, methodology, and indices developed by the Varieties of Democracy Institute (V-Dem).[167] According to its researchers, the world's regimes currently fall into four categories: closed autocracies, electoral autocracies, electoral democracies, and liberal democracies.[168] As Anna Lührmann, Marcus Tannenberg, and Staffan I. Lindberg explain, in closed autocracies the executive leader is not subject to elections. If elections do occur, they lack real competition.[169] In electoral autocracies, multiparty elections persist as a means of legitimizing the system, but they fail to meet democratic standards due to frequent irregularities and institutional violations.[170] On the democratic spectrum, electoral democracies hold free and fair multiparty elections and safeguard fundamental rights such as suffrage, association, and expression.[171] Finally, liberal democracies go further, ensuring not only electoral democracy but also effective legislative and judicial constraints on the executive, along with the protection of individual liberties and the rule of law.[172]

The Regimes of the World (RoW) project, part of V-Dem, has conducted a study evaluating global political regimes from 1900 onward, with dynamic data visualization tools available on *Our World in Data*.[173] The V-Dem index assigns regimes a score between zero (closed autocracies) and one (liberal democracies).[174] For instance, prior to the rise of the Chavismo movement, Venezuela had experienced democratic strengthening from the late 1950s to the 1990s, reaching an index of 0.62 as an electoral democracy since the 1970s.[175] Similarly, Turkey saw democratic progress between the 1990s and the early 2000s, maintaining the status of an electoral democracy from 1999

166. *See infra* Parts II.A, II.B, II.C, II.D, II.E, II.F.

167. The V-Dem Institute is just one of the large organizations that globally evaluate the world's democracies, along with Freedom House and The Economist, among others. Despite the seriousness and breadth of the work carried out by these organizations, the assessment of the quality of democracies in the world faces factual and methodological issues. Therefore, despite being some of the most respected parameters in specialized literature, their data cannot be taken as an absolute reading of reality.

168. Anna Lührmann et al., *Regimes of the World (RoW): Opening New Avenues for the Comparative Study of Political Regimes*, 6 POL. & GOVERNANCE 60, 62 (2018).

169. *Id.* at 63.

170. *Id.*

171. *Id.* at 62.

172. *Id.* at 63.

173. V-Dem, *Liberal Democracy Index, 2024*, OUR WORLD IN DATA (Sept. 22, 2024) [hereinafter *Liberal Democracy Index, 2024*], https://ourworldindata.org/grapher/liberal-democracy-index.

174. DEMOCRACY REPORT 2025, *supra* note 7, at 9 n.2.

175. *Liberal Democracy Index, 2024*, *supra* note 173.

to 2008 before transitioning into an electoral autocracy.[176] Shortly after, Hungary underwent democratic backsliding: once a liberal democracy with an index of 0.77, it later became an electoral autocracy.[177] Poland followed a similar trajectory, with its index dropping from 0.82 (liberal democracy) to 0.42, followed by a recovery to 0.62.[178] El Salvador also experienced democratic regression with its modest index falling from 0.44 to 0.09.[179] Lastly, the 2024 V-Dem report noted a significant shift in Israel, which lost its status as a liberal democracy for the first time in 50 years.[180]

A common trend among these cases of democratic decline is the taming of apex courts. In at least four of these countries—Hungary, Poland, El Salvador, and Israel—court taming served as a mechanism for undermining democracy.[181] In the remaining two—Venezuela and Turkey—it appears to have been instrumental in consolidating a new regime.[182] This leads to a crucial observation: despite their fundamental role in constitutional systems, apex courts do not always succeed in preventing authoritarian projects.

These conclusions emerge from an analysis of two indices developed by the V-Dem Institute. The first, the *Liberal Democracy Index*, assesses the overall quality of democratic governance in each country.[183] The second, the *Judicial Constraints on the Executive Index*, measures the extent to which the executive is subject to independent judicial decisions.[184] Across all six countries, a clear causal relationship can be observed: a decline in judicial constraints on the executive correlates with a subsequent drop in liberal democracy scores. While this is unsurprising—since judicial constraints are a component of the broader liberal democracy index—a closer examination of each case reveals important nuances. In Venezuela and Turkey, for example, while court taming played a major role in democratic erosion, it was not necessarily the decisive factor in establishing a new regime; rather, it may have been more crucial in consolidating one.

The selection of these countries for analysis is justified by their shared—though varying—commitment to cosmopolitan liberal democratic values, positioning within the democratic spectrum, experience of constitutional erosion, and the presence of court taming in one or more forms.

---

176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Judicial Constraints on the Executive Index*, *supra* note 84.

This comparative analysis has two objectives. First, to assess the coherence and applicability of the conceptual framework and typology developed in this Article. Second, to build on prior research by expanding the number of cases examined and refining theoretical and methodological approaches.

Finally, following the line of reasoning I established in *Domesticando a Justiça*,[185] I begin with the hypothesis—one that also aligns with Raul Urribarri's perspective[186]—that court taming emerges as a strategy when autocrats or would-be autocrats find their ambitions obstructed by the constitutional exercise of checks and balances by apex courts.

A. Supreme, pero no mucho: Venezuela's Highest Court under Chávez

In 1988, Carlos Andrés Pérez won the presidential election on an anti-neoliberal platform.[187] However, once in office, he deviated from his campaign promises and implemented austere and unpopular economic measures.[188] This unexpected shift sparked mass protests across the country, leading Pérez to declare a state of emergency and deploy the military.[189] The ensuing confrontation between civilians and the armed forces, known as El Caracazo, resulted in the deaths of over 250 people.[190]

The crackdown on protesters profoundly influenced Hugo Chávez, then a career military officer and founder of the Bolivarian Revolutionary Movement 200.[191] In response, he began planning a coup against Pérez's government.[192] The coup launched in February 1992 but failed.[193] Chávez surrendered,[194] and in an effort to contain the insurgents, the Pérez administration placed him on national television to call on his comrades to lay down their arms.[195] Once in front of the cameras, Chávez took full responsibility for what he called a "military movement," and signaled his

185. *Domesticando a Justiça*, *supra* note 73, at 3.

186. *Courts Between Democracy and Hybrid Authoritarianism*, *supra* note 81, at 871–73.

187. Terry Gibbs, *Business as Unusual: What the Chávez Era Tells Us About Democracy Under Globalisation*, 27 THIRD WORLD Q. 265, 270 (2006).

188. *Id.*

189. *Id.*

190. *Id.*

191. CHRISTINA MARCANO & ALBERTO BARRERA TYSZKA, HUGO CHÁVEZ: THE DEFINITIVE BIOGRAPHY OF VENEZUELA'S CONTROVERSIAL PRESIDENT 48–49, 55–56 (Kristina Cordero trans., 2007).

192. *Id.* at 55–56.

193. *Id.* at 62–63, 73.

194. *Id.* at 72–73.

195. *Id.*

disregard for democratic norms by declaring: "[U]nfortunately, for now, the objectives we established in the capital were not achieved."[196]

A year later, Pérez—his government weakened by the coup attempt and widespread public discontent—faced impeachment.[197] Following Pérez's removal, two interim politicians briefly held the presidency.[198] Rafael Caldera, who previously served as President (1969–1974), was then elected for a second term in 1993.[199] Caldera capitalized on Chávez's failed coup to re-enter the presidential race.[200] As a result, Chávez, then in prison, gained further legitimacy—not only from Caldera's implicit endorsement[201] but also from the national exposure he had received during the TV broadcast.[202]

Rafael Caldera, one of the architects of Venezuelan democracy, ultimately embraced a figure who had sought to dismantle Latin America's oldest democratic system.[203] This "fateful alliance"[204] forged by Caldera exemplifies what Juan Linz describes as a semi-loyal democrat.[205] According to Linz, semi-loyal democrats are those whose commitment to democracy is secondary to their pursuit of power.[206] They tolerate authoritarian figures within their parties, collaborate or form alliances with them, refrain from condemning acts of political violence committed by their allies, and show little willingness to cooperate with rivals in the face of anti-democratic threats.[207] As Levitsky and Ziblatt remind us, "when democracies die, their [semi-loyal democrats'] fingerprints are rarely found on the murder weapon."[208]

Caldera's decision to dismiss the legal case against Chávez further confirmed his lack of democratic commitment.[209] As a result, Chávez spent only two years in prison for his coup attempt.[210] Justifying his decision, Caldera stated: "Dismissal does not imply a value judgment. When you

196. *Id.* at 74–75.
197. H. MICHEAL TARVER & JULIA C. FREDERICK, THE HISTORY OF VENEZUELA 144 (2005).
198. *Id.* at xxii, 146, 163.
199. *Id.*
200. HOW DEMOCRACIES DIE, *supra* note 2, at 16–17.
201. *Id.*
202. MARCANO & TYSZKA, *supra* note 191, at 75.
203. HOW DEMOCRACIES DIE, *supra* note 2, at 17.
204. *Id.* at 15.
205. *See* JUAN J. LINZ, THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN, AND REEQUILIBRATION 33 (1978).
206. *See id.* at 32.
207. *See id.* at 32–33.
208. TYRANNY OF THE MINORITY, *supra* note 13, at 41.
209. LINZ, *supra* note 205, at 33.
210. TARVER & FREDERICK, *supra* note 197, at xxii.

dismiss a legal proceeding, you are not saying that the proceeding is relevant or irrelevant, nor are you pardoning anyone."[211]

Now free and with his popularity surging among the Venezuelan people, Chávez needed only to wait for the 1998 presidential election to formally enter the race. This time, he did not resort to violence; his charisma and widespread public support were enough to secure a decisive victory.[212]

However, despite winning the presidency, Chávez lacked a parliamentary majority, which posed a significant obstacle to advancing his revolutionary project.[213] Confronted with this challenge, he moved quickly. Early in his term in 1999, he called for a referendum to establish a constituent assembly.[214] Chávez justified the move by invoking the doctrine of constituent power.[215] The proposal, however, had no clear constitutional basis. The Venezuelan Constitution provided a mechanism for total reform, but Chávez deliberately avoided this route, as it would have required negotiations with an opposition-controlled Congress.[216]

His attempt to circumvent the constitutional reform process faced legal challenges, requiring intervention from the Supreme Court of Justice (*Supremo Tribunal de Justicia*), then Venezuela's highest judicial authority.[217] At the time, the Court was not yet under Chávez's control but was already operating under significant political pressure.[218] The ruling that followed was ambiguous: the Court offered general reflections on the theory of original constituent power, recognizing that the people possessed a right prior and superior to the established legal regime.[219]

In response to this decision—soon followed by another ruling affirming the 1999 Constituent Assembly's authority to intervene in all state institutions—Cecilia Sosa Gómez, then president of the Supreme Court,

---

211. MARCANO & TYSZKA, *supra* note 191, at 108.

212. ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 123.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. David Landau, *Constitution-Making and Authoritarianism in Venezuela*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 161, 163–64 (Mark A. Graber et al. eds., 2018) [hereinafter *Constitution-Making and Authoritarianism in Venezuela*].

218. *Id.* at 164.

219. Allan R. Brewer-Carias, *La Configuración Judicial del Proceso Constituyente en Venezuela de 1999 o de Cómo el Guárdian de la Constitución Abrió el Camino para su Violación y para su Propia Extinción* [*The Judicial Configuration of the Constituent Process in Venezuela in 1999 or How the Guardian of the Constitution Opened the Way for Its violation and for Its Own Extinction*], REVISTA DE DERECHO PUBLICO [REV. DERECHO PÚBLICO] 453, 453, 461, 468 (1999) (Venez.); ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 123.

resigned in protest.[220] Declaring the demise of the rule of law, she remarked that the Court had committed suicide to avoid being murdered.[221]

Although the Court had validated the Assembly's original constituent power, it attempted to impose some limitations on Chávez's authority. One such condition required that the rules governing the Assembly be established alongside the referendum itself, preventing ex post facto modifications.[222] However, as Dixon and Landau observe, these constraints had little practical effect.[223] Many voters were either unaware of or did not fully understand the procedural rules,[224] and an opposition boycott further tilted the process in Chávez's favor. With opposition parties largely refusing to participate,[225] Chavismo secured an overwhelming victory, winning 123 of the 131 available seats—over 90% of the Assembly.[226]

With the Constituent Assembly firmly under his control, Chávez seized the opportunity to draft a new constitution that would pave the way for his revolutionary project. In doing so, he systematically employed nearly all the tactics outlined by Aziz Huq and Tom Ginsburg as part of the manual of democratic erosion:

> i. *The use of constitutional amendments to modify basic governance arrangements:* in this case, Chávez went beyond the amendment process and completely redesigned the Constitution;[227]
>
> ii. *Elimination of checks between powers:* the new Constitution transformed the old bicameral system into a unicameral one;[228]
>
> iii. *Centralization of Executive Power:* presidential terms were extended from five to six years, with the provision that a president could run for two consecutive terms. Additionally, presidential powers were strengthened;[229]

---

220. *The Limits of Judicial Independence*, *supra* note 127, at 250.
221. *Id.*
222. ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 123.
223. *Id.*
224. *Id.*
225. *Constitution-Making and Authoritarianism in Venezuela*, *supra* note 217, at 164.
226. *The Limits of Judicial Independence*, *supra* note 127, at 249.
227. *How to Lose a Constitutional Democracy*, *supra* note 2, at 124.
228. *Constitution-Making and Authoritarianism in Venezuela*, *supra* note 217, at 164; *see* Corrales, *supra* note 135, at 38.
229. *Constitution-Making and Authoritarianism in Venezuela*, *supra* note 217, at 164–65.

> iv. *Elimination or suppression of effective political-party competition and the related prospect of rotation out of office:* early in the Assembly's deliberations, a commission was formed that "replaced many members of the judiciary and sharply limited the powers and composition of the Congress";[230]
>
> v. *Contraction of the shared public sphere, where rights such as freedom of expression and association are exercised:* unlike the previous points, the new constitution established mechanisms for popular participation such as presidential recall and a civil society commission to participate in the selection of magistrates.[231]

Between 1998 and 2000, Venezuela's democracy index plummeted from 0.59—qualifying as an electoral democracy—to 0.31, marking its transition into an electoral autocracy.[232] Judicial independence deteriorated significantly during the same period, dropping from 0.64 to 0.32 and reaching a low of 0.16 by 2004, shortly after the taming of the Supreme Court of Justice.[233] This institution, created by the Constituent Assembly as the successor to the Supreme Court of Justice,[234] became a key target of institutional restructuring under Chávez.

The taming process began within the Constituent Assembly itself, which, under the pretext of exercising original constituent power, rejected any limitations imposed by the existing legal order. In doing so, it fundamentally reshaped institutions, altering both their functions and compositions.[235] Beyond redesigning the political landscape to minimize the chances of opposition forces reclaiming power, Chávez and his Constituent Assembly launched a decade-long judicial restructuring effort. A key component of this strategy was the elimination of judicial guarantees of irremovability and stability, leaving 80% of the country's judges classified as "provisional" by 2005.[236] This effectively made them dependent on the government for their continued tenure. The Assembly also appointed a new

230. *Id.* at 165.

231. *Id.*

232. *Liberal Democracy Index, 2024*, *supra* note 175.

233. *Judicial Constraints on the Executive Index*, *supra* note 84.

234. *Courts Between Democracy and Hybrid Authoritarianism*, *supra* note 81, at 866.

235. ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 124.

236. Roberto Dias & Thomaz Fiterman Tedesco, *Erosão Democrática e a Corte Interamericana de Direitos Humanos: O Caso Venezuelano* [*Democratic Erosion and the Inter-American Court of Human Rights: The Venezuelan Case*], 11 REVISTA BRASILEIRA DE POLÍTICAS PÚBLICAS [REV. BRAS. POLÍTICAS PÚBLICAS] 195, 211 (2021).

Supreme Court, a new National Electoral Council, and new heads for the offices of the Attorney General, Comptroller General, and Ombudsman.[237] As a result, rather than challenging the government's ambitions, the Court was primarily concerned with consolidating its own authority.[238]

Despite this, the Court occasionally demonstrated a degree of independence. Some of its rulings ran counter to the government's interests, a situation that took on new significance following the attempted coup against Chávez in 2002.[239]

Amid rising political polarization and the opposition's inability to counter a highly popular government that had systematically undermined institutional checks, some factions turned to extralegal means. The coup ultimately failed, and high-ranking military officers involved in the attempt were brought before the Supreme Court.[240] However, in three separate rulings, the Court found insufficient evidence to convict two generals and two admirals.[241] As Matthew Taylor notes, "this adherence to jurisprudential norms above political preferences came as a shock to the government"—particularly given that the Court had been entirely appointed by Chávez's allies in the Assembly.[242]

Before the final ruling, Chávez issued a public threat, warning that justices could be replaced if they failed to "behave."[243] The threat, however, did not achieve its intended effect. In August 2002, while announcing the final decision, Supreme Court President Iván Rincón defended the Tribunal's commitment to jurisprudential stability, declaring: "The constitution is not only to be used when it is beneficial to me. It has to be respected all the time."[244]

The ruling triggered immediate retaliation. A special committee of the National Assembly recommended removing one Supreme Court justice and the investigation of another.[245] Franklin Arrieche, the author of the Court's decision, was accused of falsifying credentials during his confirmation process—an allegation that led to the annulment of his appointment.[246] A

237. *The Limits of Judicial Independence*, *supra* note 127, at 250.

238. David Sobreira, *Como os Tribunais morrem: o caso da Venezuela* [*How Courts Die: The Case of Venezuela*], JOTA (Feb. 4, 2024) (Braz.), https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-da-venezuela (interview with Raul Sanchez Urribarri).

239. *The Limits of Judicial Independence*, *supra* note 127, at 251.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 251–52.

246. *Id.* at 252.

temporary injunction delayed the enforcement of this decision, but the political pressure remained.[247]

Between 2002 and 2004, the Court remained internally divided, issuing rulings that at times favored the government and at other times did not—reflecting, at least to some extent, the functioning of an independent institution.[248] One such decision came from the Electoral Chamber of the Supreme Court; it overturned a National Electoral Council ruling, invalidating 876,000 of the 3,000,000 signatures collected by the opposition in support of a recall referendum against Chávez.[249] The government promptly appealed the decision to the Constitutional Chamber, where a Chávez-aligned majority overruled the Electoral Chamber's judgment, effectively crushing the opposition's hopes.[250]

The Electoral Chamber's defiance came at a cost. Once the matter was settled in Chávez's favor, the government announced that the Attorney General would investigate three of the Chamber's judges for unethical behavior—a clear attempt to further entrench government control over the judiciary.[251]

The Supreme Court's subjugation gained momentum in 2004 when the government amended the Court's statute through an unconstitutional relative majority.[252] The government aimed to restructure the Court and expand its composition, thus the measure was justified with ostensibly noble intentions. The amendment expanded standing, allowing all citizens to petition to the Supreme Court, and strengthened the Court's oversight of judicial administration and lower courts.[253]

However, these changes concealed the government's true intentions: they were not limited to mere structural reforms. Citing excessive caseloads, Chávez increased the number of judges from 20 to 32, strategically allocating seats to secure a government majority in the Electoral Chamber.[254] The government also altered the process for appointing Supreme Court justices, reducing the required two-thirds qualified majority to a simple majority.[255]

Judicial removals were similarly made easier. As Raúl Urribarri explains, in an effort to make the Court more "accountable" to the government, the government introduced an expedited procedure "to

247. *Id.*
248. *Id.* at 251–52.
249. *Id.*at 252.
250. *Id.* at 253.
251. *Id.* at 252.
252. *Courts Between Democracy and Hybrid Authoritarianism*, *supra* note 81, at 871–72.
253. *Id.* at 872.
254. *The Limits of Judicial Independence*, *supra* note 127, at 253.
255. *Id.* at 253–54.

circumvent the restrictions in place for dismissals of the Court's justices, allowing for a post hoc annulment of the justice's designation on the basis of several broad criteria, carried out and decided by a relative majority of the legislature."[256] Under this new framework, the impeachment process for Supreme Court justices could be initiated by a majority of the Citizen Power, which included the Attorney General, Comptroller General, and Ombudsman.[257] Furthermore, the mere initiation of proceedings led to the immediate suspension of the justice until the National Assembly reached a final decision by a two-thirds vote.[258]

With these mechanisms in place, the National Assembly quickly concluded its political purge. Franklin Arrieche, who had remained in office due to an injunction, was removed by a simple majority vote.[259] In his appeal, he argued that his removal violated the Constitution, but the Constitutional Chamber dismissed his claim by a three-to-two vote.[260] Additionally, two other judges, Alberto Martini Urdaneta and Rafael Hernández Uzcátegui—members of the Supreme Court's Electoral Chamber known for consistently ruling in favor of the opposition—were pressured into early retirement to avoid Arrieche's fate.[261]

A year later, in March 2005, with the Court now stacked with twelve Chávez loyalists, it reversed its prior rulings on the 2002 coup attempt, allowing the retrial of those allegedly involved.[262] This was followed by Chávez's victory in a referendum and his re-election for a third term, beginning in January 2007.[263] That same month, the National Assembly granted Chávez the power to rule by decree for eighteen months—his second time wielding such authority, having done so previously in 2001.[264] With these tools at his disposal, Chávez consolidated power, issuing decrees that expanded his control while the Court ensured opposition candidates were barred from running.[265]

The Venezuelan case exemplifies the full spectrum of court taming—both in its objective and subjective dimensions. As Javier Corrales observed,

256. *Courts Between Democracy and Hybrid Authoritarianism*, *supra* note 81, at 872.
257. *Id.*
258. *Id.*
259. *The Limits of Judicial Independence*, *supra* note 127, at 254.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 254–55.
264. *Id.*
265. *Id.*

after 2005, the Supreme Tribunal of Justice issued more than 45,000 rulings, not a single one against the government.[266]

B. Democratization Gone Wrong in Turkey

As a career politician, Recep Tayyip Erdoğan served as mayor of Istanbul from 1994 to 1998 and co-founded the Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP) in 2001.[267] The AKP was formed by members of the dissolved Welfare Party (*Refah Partisi*) and Virtue Party (*Fazilet Partisi*), both of which had been banned by the Constitutional Court (*Anayasa Mahkemesi*) for advocating the replacement of secularism with a state rooted in Islamic values.[268]

Established under the 1961 Constitution, which was drafted following a military coup, the Turkish Constitutional Court emerged during the same period as its counterparts in Austria (1945), Germany (1951), and Italy (1956).[269] However, as Daly points out, Turkey's historical, political, and constitutional context shaped the Court's primary role not as a defender of fundamental rights, but as a guardian of the Republic's core values—most notably, secularism.[270] This view is reinforced by Bertil Emrah Oder[271] and Esin Örücü,[272] who argue that the Court functioned as a mechanism for preserving both secularism and elite hegemony in a predominantly Muslim society.

With its rebranding, the AKP championed liberal values such as secularism, a market economy, and Turkey's accession to the European Union (EU).[273] The party soon had an opportunity to demonstrate its commitment to these principles. Just one year after its founding, the AKP secured a two-thirds majority in the parliamentary elections,[274] paving the way for Erdoğan to assume the role of prime minister. This period coincided with significant economic growth, further boosting the AKP's popularity.[275]

---

266. Corrales, *supra* note 135, at 44.

267. Ozan O. Varol, *Stealth Authoritarianism in Turkey*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 339, 342 (Mark A. Graber et al. eds., 2018) [hereinafter *Stealth Authoritarianism in Turkey*].

268. *Id.*

269. Daly, *supra* note 129, at 1082.

270. *Id.*

271. Bertil Emrah Oder, *The Turkish Constitutional Court and Turkey's Democratic Breakdown: Judicial Politics Under Pressure*, 18 ICL J. 127, 129 (2024).

272. Esin Örücü, *The Constitutional Court of Turkey: The Anayasa Mahkemesi as the Protector of the System*, 3 J. COMP. L. 254, 257 (2008).

273. Ozan O. Varol et al., *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMP. L. 187, 195 (2017) [hereinafter *Empirical Analysis*].

274. *Id.* at 195.

275. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 342.

Additionally, the party's political agenda—which emphasized expanded political participation, enhanced ethnic and religious minority rights, and restrictions on military influence—resonated with Turkey's progressive segments.[276]

Turkey's constitutional system, historically shaped by military coups, had long been characterized by substantial military involvement in governance. However, the AKP's rise to power marked the implementation of a belated transitional justice initiative.[277] The party enacted reforms that curtailed the military's institutional and decision-making authority, reducing its influence over the country's democracy.[278] Moreover, high-ranking military officials were criminally investigated and imprisoned for allegedly conspiring to overthrow the government.[279]

According to Ozan Varol, despite these various initiatives, it became evident that then-Prime Minister Recep Tayyip Erdoğan's true objective was not to dismantle or reform undemocratic institutions, but rather to bring them under his control.[280] Under his leadership, the AKP enacted legislative and constitutional reforms that curtailed dissent, restricted individual rights, and weakened the opposition's institutional capacity to challenge the government.[281]

Intolerant of criticism, Erdoğan filed hundreds of libel lawsuits against his critics.[282] These lawsuits targeted a wide range of individuals, from those making satirical remarks to others who created images depicting Erdoğan's head on a dog's body.[283] However, his efforts to silence dissent extended beyond private citizens. Journalists and media outlets faced legal action—and in some cases, financial penalties—for alleged insults or simply for reporting facts.[284] For instance, Erdoğan prosecuted one journalist merely for announcing an investigation into corruption involving senior government officials.[285] The cumulative effect of these legal actions had a chilling impact on public debate.[286]

---

276. *Id*. at 342.

277. Anja Mihr, *Regime Consolidation Through Transitional Justice: The Cases of Germany, Spain, and Turkey*, 11 INT'L J. TRANSITIONAL JUST. 113, 125 (2017).

278. Berk Esen & Sebnem Gumuscu, *Rising Competitive Authoritarianism in Turkey*, 37 THIRD WORLD Q. 1581, 1584 (2016).

279. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 347–48.

280. *Id.* at 342.

281. *Id.*

282. *Id.*

283. *Id.* at 343.

284. *Id.*

285. *Id.*

286. *Id.*

This suppression of opposition was further reinforced by the selective prosecution of political adversaries. As Varol notes, many of these cases were backed by evidence, as the charges involved fraud, tax evasion, and money laundering.[287] This gave the government plausible deniability, allowing it to present the prosecutions as legitimate law enforcement rather than political persecution. However, the legal actions were systematically directed at government critics.[288]

Thus, without resorting to overt violence, Erdoğan employed legal and institutional mechanisms to obstruct his opponents and solidify his grip on power. These tactics are particularly insidious because they exploit democratic institutions to undermine the very values they are meant to uphold. Scholars such as Kim Lane Scheppele and Ozan Varol describe these strategies as "autocratic legalism"[289] or "stealth authoritarianism"[290]—terms that, despite some nuances, refer to closely related concepts.

Throughout the first decade of the 21st century, further reforms continued to consolidate Erdoğan's authority. One key development was a 2007 referendum that expanded presidential powers and introduced direct presidential elections.[291] This change conferred greater legitimacy on the officeholder and the political vision they embodied.[292]

During this period, the Constitutional Court twice ruled against the AKP.[293] The first instance, in 2007, occurred before the referendum and effectively blocked the AKP's preferred presidential candidate, despite the party holding 60% of parliamentary seats.[294] The second ruling reflected the Court's staunch commitment to a rigid interpretation of secularism.[295] In reviewing a constitutional amendment that permitted the use of headscarves

287. *Id.* at 344.

288. *Id.*

289. *Autocratic Legalism*, *supra* note 5, at 547.

290. Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1678 (2015).

291. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 339, 348. In Turkey, referendums are used when proposed constitutional amendments reach three-fifths of the votes (330) in parliament. However, if the proposal achieves two-thirds (367) and the president's approval, the amendment can be approved immediately. *See Empirical Analysis*, *supra* note 274, at 197.

292. *See* Aslı Bâli, *Turkey's Constitutional Coup*, MIDDLE E. RSCH. & INFO. PROJECT (Dec. 15, 2018), https://merip.org/2018/12/turkeys-constitutional-coup/; *Stealth Authoritarianism in Turkey*, *supra* note 267, at 348.

293. Onur Bakiner, *How Did We Get Here? Turkey's Slow Shift to Authoritarianism*, *in* AUTHORITARIAN POLITICS IN TURKEY: ELECTIONS, RESISTANCE AND THE AKP 21, 33 (Bakar Baser & Ahmet Erdi Öztürk eds., 2017).

294. *Id.*

295. *Id.*

in higher education institutions, the Court declared the provision unconstitutional.[296]

The headscarf amendment was intended to resolve an issue that had persisted for decades, as previous legislative attempts to lift the ban had been struck down by the Court.[297] Despite meeting all formal requirements for a constitutional amendment, the Court invalidated it, even though judicial review of constitutional amendments was only permissible on procedural grounds.[298] To justify its ruling, the Court argued that the amendment violated secularism—one of the Republic's fundamental, and constitutionally unamendable, principles.[299]

The constitutional showdown[300] between the government and the Constitutional Court escalated in 2008 when the Court considered dissolving the AKP for allegedly violating the state's secular foundations. The case was narrowly decided—six justices voted in favor of the party's dissolution, falling one vote short of the qualified majority required to ban a political party.[301] Nevertheless, the Court issued a formal warning to the AKP and withdrew half of its public funding.[302]

The power to ban political parties was exercised at least 25 times over 26 years.[303] According to Tom Daly, the Constitutional Court's active role in dissolving parties, coupled with its failure "to provide sufficient protection to individual rights" and its obstruction of liberalizing reforms, drew significant criticism.[304]

It was within this context that, in September 2010, the AKP proposed a referendum introducing a series of constitutional reforms.[305] The government framed the initiative as an effort to democratize the 1982 Constitution, which had been drafted following a military coup.[306] Among the proposed changes were measures to reduce the influence of the Constitutional Court, which was

---

296. Aslı Bâli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT'L L. 235, 252–56 (2012) [hereinafter *The Perils of Judicial Independence*].

297. Mehmet Cengiz Uzun, *The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education*, 28 PA. ST. INT'L L. REV. 383, 408–11 (2010).

298. *The Perils of Judicial Independence*, *supra* note 296, at 253–54.

299. *Empirical Analysis*, *supra* note 273, at 196.

300. *See* Eric Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 992 (2008) [hereinafter *Constitutional Showdowns*].

301. *The Perils of Judicial Independence*, *supra* note 296, at 252 n.54.

302. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 348–49.

303. Daly, *supra* note 129, at 1082.

304. *Id.*

305. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 349.

306. *Id.*

widely viewed as an activist institution committed to upholding the values of Turkey's old secular elite.[307]

However, the referendum package consisted of 26 provisions that were voted on collectively rather than individually.[308] Consequently, when 58% of voters approved the package, all its provisions were enacted.[309] As a result, the composition of the Constitutional Court changed from 11 permanent judges and 4 substitutes to 17 permanent members.[310] Additionally, judicial terms were limited to 12 years—complementing the existing age cap of 65—and the appointment process became more politically influenced by other branches of government.[311] Standing was also expanded, and its rights-protection framework was strengthened in response to cases brought against Turkey at the European Court of Human Rights.[312]

Following these changes, studies indicate an initial expansion of the Court's role in protecting fundamental rights.[313] For example, Daly highlights how, in the years immediately after the reform, the Court appeared to exercise independence by issuing landmark rulings in defense of freedom of expression and the right to a fair trial.[314] In June 2014, the Court overturned the convictions of 230 defendants accused of plotting a coup against the AKP, citing procedural and substantive violations during their trials.[315]

For Aslı Bâli, these reforms were necessary for consolidating democracy, as the Constitutional Court had long functioned as a mechanism for preserving the establishment responsible for the undemocratic 1982 Constitution.[316] She argues that judicial independence must be assessed in the broader context of democratic transition.[317]

Yet, contrary to expectations for a government promoting liberalizing reforms, the new judicial framework shifted the Court's ideological orientation in a conservative direction. An empirical analysis by Varol, Pellegrina, and Garoupa found that 2010 marked a turning point, after which

307. *Id.*

308. *The Perils of Judicial Independence*, *supra* note 296, at 297.

309. Karabekir Akkoyunlu, *Electoral Integrity in Turkey: From Tutelary Democracy to Competitive Authoritarianism*, *in* AUTHORITARIAN POLITICS IN TURKEY: ELECTIONS, RESISTANCE AND THE AKP 47, 53 (Bakar Başer & Ahmet Erdi Öztürk eds., 2017).

310. *The Perils of Judicial Independence*, *supra* note 296, at 300.

311. *Empirical Analysis*, *supra* note 273, at 198.

312. Daly, *supra* note 129, at 1083.

313. *Id.*

314. *Id.* at 1085.

315. *Id.* at 1085–86.

316. *The Perils of Judicial Independence*, *supra* note 296, at 291.

317. *Id.* at 239–40.

the Court consistently moved rightward.[318] Following this shift, the Court revised its established positions, particularly on issues related to executive power expansion.[319] As Bertil Emrah Oder observes, "[t]hese interpretative shifts of the Court are instances of an absolute deference that empower the executive in the institutional balance at the expense of democratic oversight and rule of law guarantees."[320]

With these reforms in place, Erdoğan pursued an even more ambitious goal: transforming Turkey into a presidential system.[321] However, the 2011 elections left the AKP four seats short of the 330 needed to submit constitutional amendments to a national referendum.[322] As a result, the AKP sought a coalition with other parties to draft a new constitution.[323] The proposal, which envisioned a strengthened presidency, led to a political deadlock.[324] The initiative ultimately failed, but Erdoğan continued expanding presidential powers through informal means, effectively preparing the office he would assume in 2014.[325]

By 2013, corruption allegations involving government ministers began eroding the AKP's popularity.[326] Compounding this was the collapse of the ceasefire with Kurdish militants in 2015, which triggered a wave of lawsuits related to civil rights violations and extrajudicial killings.[327] Demonstrating some degree of autonomy, the Constitutional Court issued several rulings that displeased the government, prompting Erdoğan—now president—to push for further restrictions on the Court's jurisdiction.[328]

The situation reached a critical turning point in 2016, when lower-ranking military officers attempted a coup.[329] While on vacation, Erdoğan appeared on television via FaceTime, urging his supporters to take to the

318. *Empirical Analysis*, *supra* note 273, at 213.

319. Oder, *supra* note 271, at 135.

320. *Id.*

321. *The Perils of Judicial Independence*, *supra* note 296, at 309.

322. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 350.

323. *Id.*

324. *See* Felix Petersen & Zeynep Yanaşmayan, *Explaining the Failure of Popular Constitution Making in Turkey (2011–2013)*, *in* THE FAILURE OF POPULAR CONSTITUTION MAKING IN TURKEY: REGRESSING TOWARDS CONSTITUTIONAL AUTOCRACY 21, 44, 52–53 (Felix Petersen & Zeynep Yanaşmayan eds., 2020).

325. Oder, *supra* note 271, at 131–32. After the 2010 constitutional amendments, the AK Party became the dominant force in judicial appointments, and by 2017 the shift toward presidentialism and autocratization was fully institutionalized. *See id.*

326. Daly, *supra* note 129, at 1086.

327. *Id.*

328. *Id.*

329. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 352.

streets in defense of the regime—a call that many heeded.[330] The coup was crushed in less than 24 hours.[331]

The aftermath was marked by severe repression. The death toll surpassed 200, and a massive purge followed: 6,823 soldiers, 2,777 judges and prosecutors (including two Constitutional Court judges), and dozens of governors were detained.[332] Additionally, over 49,000 civil servants were dismissed, and 21,000 private school teachers had their licenses revoked.[333] Nearly 1,600 university deans were forced to resign, while academics were placed on leave and barred from traveling abroad.[334]

In 2017, strengthened by the victory over the coup attempt, Erdoğan finally succeeded in pushing through a constitutional referendum—approved by 52% of voters—that formally replaced Turkey's parliamentary system with a presidential one, thereby transforming his *de facto* concentration of power into *de jure* authority.[335] Under the new system, the President was now empowered to appoint judges, initiate disciplinary investigations against any of Turkey's 3.5 million public servants, and govern with broad executive discretion.[336]

According to V-Dem data, Turkish democracy reached its peak in 2003 with a score of 0.53, maintaining relative stability until 2007, when the process of constitutional erosion accelerated.[337] From that point, Turkey's democracy rating steadily declined, reaching 0.30 in 2013.[338] It continued to drop, eventually placing the country outside the ranks of global democracies.[339]

Judicial oversight of the executive, however, deteriorated at a slower pace than democracy itself. While judicial independence also declined, it remained relatively high until 2016, when it fell to 0.39.[340] By the following year, the judiciary had nearly lost all autonomy, with the "judicial constraints on the executive" index dropping to 0.14 in 2017—and showing only slight improvement to 0.22 in 2024.[341]

Turkey's recent history, much like Venezuela's, illustrates that court taming was not the primary driver of democratic erosion but rather a crucial

330. *Id.*
331. *Id.*
332. *Id.* at 351–52.
333. *Id.* at 352.
334. *Id.* at 352.
335. Daly, *supra* note 129, at 1087.
336. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 353.
337. *Liberal Democracy Index, 2024*, *supra* note 173.
338. *Id.*
339. DEMOCRACY REPORT 2025, *supra* note 7, at 19 n.3, 53.
340. *Judicial Constraints on the Executive Index*, *supra* note 84.
341. *Id.*

component of a broader strategy for consolidating power. In 2024, Erdoğan completed 21 uninterrupted years in office—with no clear indication that this would change.

C. Hungary's Illiberal Democracy Laboratory

With the end of World War II, Hungary, along with other Eastern European countries, found itself behind the Iron Curtain under Soviet influence.[342] Despite this, Hungary retained a certain degree of independence compared to countries such as Czechoslovakia, Romania, Bulgaria, Latvia, Lithuania, and Estonia.[343] However, despite this relative autonomy, the period of Soviet rule left deep scars on both the Hungarian people[344] and their constitutional framework. Previously governed by a historical, unwritten constitution, Hungary adopted its first written constitution during this period of Soviet tutelage: the Communist Constitution of 1949.[345]

After the fall of the Soviet Union, the West initiated a democratization project for the countries that had been behind the Iron Curtain.[346] This initiative introduced Hungary to ideals such as the rule of law, liberal constitutionalism, and human rights after more than 40 years under Soviet control.[347] This led to a "peaceful and gradual"[348] transition beginning in the late 1980s, making Hungary a success story[349] and a promising model for the western-led democratization process.

---

342. *See* Norman Naimark, *The Sovietization of Eastern Europe, 1944–1953*, *in* THE CAMBRIDGE HISTORY OF THE COLD WAR 175, 180–81 (Melvyn P. Leffler & Odd Arne Westad eds., 2010).

343. David Sobreira, *Como os Tribunais morrem: o caso da Hungria* [*How Courts Die: The Case of Hungary*], JOTA (Apr. 14, 2023) (Braz.) [hereinafter *o caso da Hungria*], https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-da-hungria-14042023 (interview with Tímea Drinóczi).

344. *See generally* TIMEA DRINÓCZI & AGNIESZKA BIEN-KAÇALA, ILLIBERAL CONSTITUTIONALISM IN POLAND AND HUNGARY: THE DETERIORATION OF DEMOCRACY, MISUSE OF HUMAN RIGHTS AND ABUSE OF THE RULE OF LAW (2022) (providing a more detailed analysis of the impacts of constitutional transitions on Hungary's national identity).

345. *Id.* at 51.

346. MILADA ANNA VACHUDOVA, EUROPE UNDIVIDED: DEMOCRACY, LEVERAGE, AND INTEGRATION AFTER COMMUNISM 3 (2005); STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR 17–18 (2010); *see generally* THE EUROPEANIZATION OF CENTRAL AND EASTERN EUROPE (Frank Schimmelfennig & Ulrich Sedelmeier eds., 2005).

347. DRINÓCZI & BIEN-KAÇALA, *supra* note 344, at 60.

348. Paul Lewis et al., *The Emergence of Multi-Party Systems in East-Central Europe: A Comparative Analysis*, *in* DEMOCRATIZATION IN EASTERN EUROPE: DOMESTIC AND INTERNATIONAL PERSPECTIVES 151, 157–58 (Geoffrey Pridham & Tatu Vanhanen eds., 1994).

349. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 6–7.

As Gábor Halmai explains, this transformation was not achieved through the creation of a new constitution.[350] Instead, Hungary chose to retain its existing Constitution while implementing a model of liberal constitutionalism through a series of amendments that significantly altered its content.[351] One key reform during this period was the strengthening of the Constitutional Court, which was granted broad judicial review powers as part of the structural framework of the new democracy.[352]

During this transition, a young politician named Viktor Orbán began to gain prominence.[353] Supported by military colleagues and members of the political establishment, Orbán founded the Alliance of Young Democrats—the original name of what is now known as Fidesz.[354] Initially adopting a liberal-nationalist ideology, Fidesz positioned itself as an opposition party to the conservative government.[355] However, in the early 1990s, the party underwent an internal ideological shift, moving further to the right.[356] In 1998, after forming a coalition with two other parties, Orbán became Hungary's Prime Minister for the first time at the age of 35.[357] His government lasted until 2002, when he was defeated by a liberal-socialist coalition that remained in power until 2010.[358]

For a time, the transfer of power between parties appeared to function smoothly. However, in 2010, Fidesz secured a landslide victory,[359] gaining a parliamentary majority large enough to amend—or even replace—the country's Constitution. Several factors contributed to this outcome. First, the alliance between Fidesz and the Christian Democratic People's Party (KDNP). Second, widespread dissatisfaction across Central and Eastern Europe with the transition process.[360] Third, Hungary's electoral system, designed during the democratic transition to address concerns such as parliamentary fragmentation.[361] Lastly, the leak of confidential speeches in

350. Gábor Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 243, 244 (Mark A. Graber et al. eds., 2018) [hereinafter *A Coup Against Constitutional Democracy*].

351. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 8–9.

352. *A Coup Against Constitutional Democracy*, *supra* note 350, at 243–44.

353. SIMEON DJANKOV, HUNGARY UNDER ORBÁN: CAN CENTRAL PLANNING REVIVE ITS ECONOMY? 3 (Peterson Inst. for Int'l Econ., Policy Brief No. PB15-11, 2015).

354. *Id.*

355. *Id.* at 4.

356. *Id.* at 3.

357. *Id.*

358. *Id.*

359. *A Coup Against Constitutional Democracy*, *supra* note 350, at 245.

360. *Id.* at 245.

361. Miklós Bánkuti et al., *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 139 (2012).

which government leaders admitted to having blatantly lied to the public—an event that nearly became a political rallying point for Orbán.[362]

Halmai explains that Fidesz's decisive victory—winning more than 50% of the vote—was amplified by Hungary's proportional electoral system, granting the Fidesz-KDNP coalition two-thirds of the parliamentary seats (263 out of 386).[363] This supermajority allowed the new government to implement sweeping changes without having to negotiate with the opposition—and that is precisely what it did.[364]

Early in his new term, in 2010, Orbán and Fidesz launched their illiberal offensive by repealing Article 24(5) of the Constitution.[365] A product of the redemocratization process, Article 24(5) had been introduced in 1995 to foster consensus among political actors and safeguard the interests of minority parties.[366] This provision required a four-fifths parliamentary majority to determine the "concept" of the Constitution—a vague term that, as Drinóczi argues, did not necessarily imply the drafting of a new constitution.[367]

Understanding the significance of this repeal requires deeper contextual analysis. According to Drinóczi, Hungary does not distinguish between original and derived constituent power in substantive terms.[368] One key reason for this is the absence of entrenched clauses or mechanisms to safeguard the Constitution's identity.[369] As a result, those holding a two-thirds legislative majority effectively wield an almost unlimited power to amend the Constitution.[370]

Thus, in a process comparable to what Brazilian constitutional doctrine would call a "double revision"[371]—first removing constraints on

362. *o caso da Hungria*, *supra* note 343.

363. *A Coup Against Constitutional Democracy*, *supra* note 350, at 245.

364. *Id.*

365. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 8.

366. *Id.* at 9.

367. *o caso da Hungria*, *supra* note 343.

368. Tímea Drinóczi, *Constitutional Politics in Contemporary Hungary*, 10 INT'L J. CONST. L. 63, 66 (2016).

369. *Id.*

370. *Id.* at 66.

371. In Brazilian academic literature, double revision is understood as the process of circumventing constitutional limitations on the power of amendment, specifically those established by the entrenched clauses of Article 60, Section 4, of the Brazilian Constitution. Initially, the rules with limits established by the original constituent power are revoked, and then the Constitution is amended without any disrespect to the modified text. The Brazilian Supreme Federal Court has already addressed—and rejected—this thesis on different occasions. S.T.F., Ação Direta de Inconstitucionalidade No. 981 MC/PR, Relator: Min. Néri da Silveira, 17.12.1993, Diário da Justiça [D.J.], 05.08.1994, 30, 54–55 (Braz.); S.T.F, Ação Direta de Inconstitucionalidade No. ADI 1722 MC/TO, Relator: Min. Marco Aurélio, 10.12.1997, 2124-2, Diário da Justiça [D.J.], 19.09.2003, 401, 417 (Braz.). For further reading on the topic, *see*

constitutional amendments, then altering previously protected content—Orbán's government amended the Constitution to eliminate Article 24(5).[372] Shortly thereafter, it introduced an entirely new constitutional framework.[373]

Despite its abusive nature, Orbán's government executed this maneuver within a constitutional design that posed few obstacles beyond the requirement of a qualified quorum. Richard Albert argues that for a constitutional change to be properly understood as an amendment it must remain consistent with the existing constitution.[374] However, applying this principle to Hungary at the time presents two challenges. First, the Hungarian system inherently blurred this requirement by failing to differentiate between original and derived constituent power. Second, as Drinóczi notes, by that time constitutional scholarship had not yet extensively debated concepts such as unconstitutional constitutional amendments,[375] making retrospective analyses susceptible to accusations of anachronism.

Later in 2010, Fidesz continued its constitutional transformation with no viable opposition to counter its dominance, passing a series of amendments and legislative changes that reshaped multiple areas of the state.[376] Among these was a restructuring of representative bodies: the number of parliamentary seats was reduced from 386 to 200, and the number of local government representatives also decreased[377]—centralization measures reminiscent of Vladimir Putin's governance style.[378]

Significant reforms also targeted the media sector. Constitutional provisions against monopolies were weakened, and a new regulatory authority was established, consolidating control over the press.[379]

The judiciary was not spared from Fidesz's assault. Constitutional amendments reshaped the appointment process for judges to the Constitutional Court (*Alkotmánybíróság*).[380] Kriszta Kovács and

---

Virgílio Afonso da Silva, *ULISSES, AS SEREIAS E O PODER CONSTITUINTE DERIVADO: sobre a Inconstitucionalidade da dupla revisão e da alteração no* quorum *de 3/5 para aprovação de emendas constitucionais* [*Ulysses, the Sirens, and the Derived Constituent Power: Regarding the Unconstitutionality of Double Revision and the Change in the 3/5* Quorum *for Approval of Constitutional Amendments*], 226 REVISTA DE DIREITO ADMINISTRATIVO [R. DIR. ADM.] 11 (2001).

372. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 8–9.

373. *Id.*

374. RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 15 (2019).

375. DRINÓCZI & BIEN-KAÇALA, *supra* note 344, at 158.

376. Kriszta Kovács & Gábor A. Tóth, *Hungary's Constitutional Transformation*, 7 EUR. CONST. L. REV. 183, 187–88 (2011) [hereinafter *Hungary's Constitutional Transformation*].

377. *Id.* at 188.

378. *Autocratic Legalism*, *supra* note 5, at 551.

379. *Hungary's Constitutional Transformation*, *supra* note 376, at 189–90.

380. The Hungarian jurisdiction system resembles the German one, meaning that Hungary has a Constitutional Court (*Alkotmánybíróság*), which is not part of the Judiciary, and a Supreme Court (*Curia*),

Gábor A. Tóth explain that under the previous system, a special committee with representatives from each parliamentary faction decided appointments. Candidates then required approval by a two-thirds majority in the legislature.[381] Under the new rules, however, a parliamentary committee would make appointments, whose composition directly reflected the distribution of seats in parliament.[382] As Bugaric argues, this change ensured that Fidesz, with its two-thirds supermajority, could appoint justices without opposition.[383]

A second major shift occurred after the Court struck down a government attempt to impose a retroactive tax of up to 98% on public funds deemed contrary to "good morals."[384] High-ranking public officials—the primary targets of the measure—successfully challenged the tax before the Court, which was widely accessible at the time.[385] In response, that same day the government reintroduced the law with identical content—this time accompanied by a constitutional amendment restricting the Court's jurisdiction over fiscal matters.[386]

Shortly after implementing these changes, in 2011, Orbán and Fidesz delivered on their earlier promise by introducing a new constitution.[387] The new Fundamental Law (*Alaptörvény*) came into effect in 2012, incorporating "several provisions which radically undermine basic checks and balances from the old constitution."[388] Among the most consequential changes, access to the Constitutional Court—previously almost unrestricted—was now severely curtailed.

Additionally, the retirement age for ordinary judges was lowered from 70 to 62, a transitional measure approved by Parliament in late 2011, just days before the Fundamental Law took effect.[389] This change forced approximately 274 judges into early retirement, including "six of the twenty county-level court presidents, four of the five appeals court presidents, and twenty of the eighty Supreme Court judges."[390]

To consolidate control over judicial appointments, the government established a new National Judicial Office and granted it sweeping powers to

---

which occupies the top of the hierarchy of this branch. *Hungary's Constitutional Transformation*, *supra* note 376, at 184–85.

381. *Id.* at 193.

382. *Id.*

383. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 9.

384. *Hungary's Constitutional Transformation*, *supra* note 376, at 192.

385. *Id.*

386. *Id.* at 192–93.

387. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 1.

388. *Id.* at 10.

389. *A Coup Against Constitutional Democracy*, *supra* note 350, at 246.

390. *Id.*

replace the retiring judges with new appointees.[391] Unsurprisingly, as Bugaric notes, Fidesz appointed a close ally of Orbán to head the institution—namely, the wife of József Szájer, the principal architect of the new Fundamental Law.[392] The president of the National Judicial Office, serving a nine-year term, was also granted the authority to reassign cases between courts and even determine which judge would preside over specific cases[393]—a power that was later invalidated by the Constitutional Court.[394]

Despite the numerous measures taken to undermine the Constitutional Court's authority, its president, Paczolay Péter, managed to build alliances with his colleagues and deliver setbacks to Orbán's illiberal project. Among the government measures overturned were (1) the reduction of the judicial retirement age from 70 to 62; (2) a law criminalizing homelessness; and (3) a provision revoking the official status of more than 300 churches.[395]

However, in March 2013, Fidesz passed the Fourth Amendment, introducing a package of constitutional provisions that added 15 pages to the 45-page Fundamental Law.[396] According to Gábor Halmai, it reinstated several measures previously struck down by the Constitutional Court.[397] Yet, in his view, the most significant of these changes was the annulment of all Constitutional Court precedents established before the adoption of the Fundamental Law.[398] As Halmai explains, "practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law."[399]

Since Fidesz's return to power in 2010, Hungary has steadily moved toward autocratization. The country's democracy rating declined from 0.77 in 2009 (which classified Hungary as an electoral democracy) to 0.32 in 2024, designating Hungary as an electoral autocracy.[400] Interestingly, even though Orbán appointed all current Constitutional Court judges, the Judicial Constraints Index remains relatively high, having declined from 0.9 to 0.62.[401] This suggests that the process of fully subjugating the Hungarian Constitutional Court has not yet been completed or that the institutional

391. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 10.
392. *Id.*
393. *Id.*
394. *Constitutional Revenge*, *supra* note 137.
395. *Id.*
396. *A Coup Against Constitutional Democracy*, *supra* note 350, at 247.
397. *Id.*
398. *Id.*
399. *Id.*
400. *Liberal Democracy Index, 2024*, *supra* note 173.
401. *Judicial Constraints on the Executive Index*, *supra* note 84.

changes enacted so far have been sufficient to prevent the Court from significantly interfering with Orbán's agenda.

Regardless of the Court's role, Orbán's *illiberal constitutionalism*[402] has proven remarkably effective. Initially borrowing tactics from previous autocrats, he has since transformed Hungary into a laboratory for illiberal democracy, exporting his model to others seeking to replicate his approach—as seen in Poland.[403]

D. Budapest in Warsaw: The Polish Blitzkrieg on Judicial Independence

The Polish Constitution, which was established in 1952 and personally approved by Stalin,[404] remained in force until 1992 when it was replaced by a transitional document.[405] In turn, this document was superseded by the current Constitution of the Republic of Poland in 1997.[406] While the previous constitution functioned primarily as an ideological symbol with little real-world application, the new Polish Constitution embraced liberal democracy and its core principles.[407]

However, even before the collapse of the Soviet regime, Poland experienced significant constitutional transformations. Throughout the 1980s, the country established a supreme administrative court, an official ombudsman's office, and even a constitutional tribunal (the Constitutional Court).[408]

As expected under such circumstances, the Constitutional Court initially wielded limited powers.[409] Its rulings on the constitutionality of legislative provisions were subject to parliamentary review, with the Parliament (*Sejm*) holding the authority to overturn them by a two-thirds majority vote.[410]

Amid the waning influence of Soviet power, the Constitutional Court strategically expanded its role in the late 1980s, striking down certain laws while maintaining institutional balance.[411] This approach earned it a degree of legitimacy, "an asset necessary to survive the future process of

---

402. The term illiberal constitutionalism is controversial, considered coherent by some, such as Tímea Drinoczi and Agnieszka Bień-Kacała, and an oxymoron by others, such as Gábor Halmai, Kim Lane Scheppele, and Gábor Attila Tóth. *See* DRINÓCZI & BIEN-KAÇALA, *supra* note 344, at 22.

403. *Autocratic Legalism*, *supra* note 5, at 552–53.

404. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 35.

405. *Id.* at 41.

406. *Id.*

407. *Id.* at 35 ("It was less a legal document, more an ideological signpost.").

408. *Id.* at 35, 42.

409. Garlicki, *supra* note 158, at 142.

410. *Id.*

411. *Id.*

transformation," a process that began in 1989 and culminated in 1997 with the adoption of the current Constitution.[412]

Following the implementation of the new Constitution, the Court gradually strengthened its authority, adjudicating cases concerning fundamental rights and judicial independence while avoiding direct confrontation with other branches of government.[413] However, this institutional dynamic shifted in 2005, when the Law and Justice Party (Prawo i Sprawiedliwość, PiS) first came to power. As Lech Garlicki explains:

> The situation became less comfortable after the 2005 parliamentary elections when the new majority of the Law and Justice Party (LaJ) launched a new project that drastically differed from the hitherto established patterns. The political conflict soon expanded into the area of constitutional interpretation and, as neither the Constitutional Courts nor other supreme courts were ready to yield, it culminated in attacks on the judicial branch.[414]

The PiS government, led by Prime Minister Jarosław Kaczyński, was defeated in the 2007 elections, with opposition leader Donald Tusk assuming the role of prime minister and restoring the status quo.[415] Having demonstrated its ability to resist government-backed pressures, the Constitutional Court "emerged from the crisis with a strengthened authority."[416] However, this apparent victory also served as a learning experience for the politically inexperienced PiS, teaching the party important lessons on how to implement radical changes more effectively in the future.[417]

Several years later, during the Polish presidential election in May 2015, Kaczyński, as PiS president, expected an easy victory for the incumbent, Bronisław Komorowski.[418] Unwilling to risk personal defeat, Kaczyński chose to nominate a relatively unknown candidate to run against Komorowski. That candidate was Andrzej Duda, a young politician with limited political experience.[419] Surprisingly though, Komorowski's chaotic campaign led to an unexpected victory for Duda.[420] This was followed by a

412. *Id.*
413. *Id.* at 144.
414. *Id.*
415. *Id.*
416. *Id.*
417. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 2.
418. *Id.* at 3.
419. *Id.* at 1.
420. *Id.*

second triumph for PiS in the parliamentary elections in October of the same year.[421] With voter turnout at just 50.9%, PiS secured an absolute majority in Parliament with just 37.5% of the vote—equivalent to just 18% of the total electorate.[422]

These back-to-back electoral victories ended the centrist-liberal coalition's eight years of dominance. However, unlike Hungary, where Orbán's party secured a two-thirds parliamentary majority, PiS held only a slim five-seat advantage over the opposition.[423]

The Polish case also differs from its Hungarian counterpart in another key aspect: the absence of a catalytic crisis. Since the fall of the Soviet Union, Poland's economy had expanded sixfold and was the only EU country to avoid a recession during the 2008 financial crisis.[424] This challenged the notion, as suggested by Levitsky and Ziblatt, that old and wealthy democracies are inherently resilient to democratic erosion.[425]

Despite these differences, both Hungary and Poland experienced similar processes of democratic backsliding. Sadurski describes Poland's transformation as an "constitutional coup."[426] By late 2015, following the October elections, the country "witnessed the beginning of a fundamental authoritarian transformation: the abandonment of the dogmas of liberal democracy, constitutionalism, and the rule of law that had previously been taken for granted."[427] Under Kaczyński's leadership as the government's de facto ruler, PiS adopted a playbook directly inspired by Orbán's playbook.[428] This included (1) attacks on the media; (2) the weakening of the Constitutional Court; (3) changes to electoral commission rules; and (4) portraying the European Union as a hostile entity.[429]

At first glance, the political conditions in Poland seemed unfavorable for revolutionary institutional changes. PiS lacked the supermajority required for constitutional amendments. Additionally, the existing constitutional framework granted Parliament the authority to appoint judges to the Constitutional Court. Finally, given that Constitutional Court judges serve nine-year terms, the existing bench was expected to remain in office

421. *Id.*

422. *Id.*

423. PiS secured 235 of 460 seats in the lower house (*Sejm*) and 61 of 100 in the upper house (*Senat*). Sweeney, *supra* note 79, at 7.

424. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 2.

425. TYRANNY OF THE MINORITY, *supra* note 13, at 197, 215.

426. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 14.

427. *Id.* at 3.

428. *Autocratic Legalism*, *supra* note 5, at 562.

429. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 3–4.

throughout the new legislative period despite PiS's parliamentary dominance.[430]

However, these institutional safeguards proved insufficient against PiS's determination. PiS attacked the Constitutional Court in both its composition and functional authority.[431] As Sadurski explains, PiS's so-called "reforms" were introduced under the disingenuous justification of eliminating legal obstacles to create a fairer economic system.[432]

By the beginning of the new legislative term in late 2015, the Polish Constitutional Court had established itself as a key institution in protecting the democratic process, effectively checking the powers of the executive and legislative branches in various matters.[433] This does not mean, however, that the Constitutional Court's decisions were beyond criticism. As Sadurski explains, in areas such as the separation of church and state, freedom of expression and the press, and the protection of linguistic minorities, the Court's rulings were sometimes weak or lacked a firm commitment to enforcing constitutional provisions.[434]

Nevertheless, PiS had unfavorable memories of the Constitutional Court from its previous time in government (2005–2007), when the Court had blocked many of its initiatives.[435] This led to the first major crisis at the end of 2015, when the terms of five of the Court's fifteen judges were set to expire—three in November and two in December.[436]

Anticipating a likely PiS victory, the outgoing legislature amended the law governing the Constitutional Court in June 2015, just months before the October parliamentary elections.[437] In an act of constitutional hardball,[438] the centrist-liberal coalition manipulated the judicial appointment process, bringing forward the selection dates for five judges.[439] Three judges were set to leave the Court before the legislative term ended, but the remaining two would have vacated their seats in December after the new PiS-controlled

430. Garlicki, *supra* note 158, at 146.

431. Tomasz Tadeusz Koncewicz, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, 43 REV. CENT. & E. EUR. L. 116, 120–21 (2018).

432. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 58.

433 *Id.* at 58–59.

434. *Id.* at 59.

435. *Id.* at 61.

436. Garlicki, *supra* note 158, at 146.

437. *Id.*

438. *Constitutional Hardball*, *supra* note 151, at 523.

439. Garlicki, *supra* note 158, at 146.

legislature had taken office.[440] Despite this, the parliamentary majority proceeded with appointing all five judges.[441]

Starting in August 2015, President Andrzej Duda refused to administer the oath of office to the centrist-liberal coalition's appointed judges.[442] After PiS gained control of Parliament, the new legislature took an unprecedented step: it declared the previous appointments invalid and instead appointed five new judges. The President immediately swore in these judges.[443]

In response, the opposition challenged these actions before the Constitutional Court. The Constitutional Court ruled that the incumbent legislature had the authority to fill vacancies only when the outgoing judge's term ended during that same legislative session.[444] As a result, three of the five original appointments remained valid. However, in a separate decision, the Court declined to rule on these individual appointments, concluding that such matters fell outside its jurisdiction.[445]

Despite the ruling, Duda—backed by the PiS-dominated Parliament—refused to comply, insisting on the validity of the new appointments.[446] In defiance, the President of the Constitutional Court declared that only two of the judges appointed by the new Parliament—those whose positions had been improperly filled by the previous legislature—could rightfully take their seats.[447] This resulted in a standoff, with two rival groups of three judges each claiming the same vacancies—one appointed by the previous legislature and the other by PiS.[448] The government used this dispute to undermine the legitimacy of the Court and its rulings.[449]

The attacks did not stop there. After failing to pack the Constitutional Court, PiS took an unprecedented step in European legal history: it refused to publish the Constitutional Court's judgments.[450] Citing procedural errors and a lack of legal justification, the government simply ignored its constitutional duty to publish and enforce the Constitutional Court's decisions.[451] In *Case K 47/15*, the Venice Commission—an advisory body of the Council of Europe on constitutional matters—ruled that this omission

440. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 62.
441. Garlicki, *supra* note 158, at 146.
442. *Id.*
443. *Id.*
444. *Id.* at 147.
445. *Id.*
446. *Id.*
447. *Id.*
448. *Id.*
449. *Id.*
450. Koncewicz, *supra* note 431, at 121–22.
451. *Id.* at 121.

violated the rule of law.[452] Domestically, the Constitutional Court reaffirmed the government's obligation to publish its rulings, explicitly rejecting any claim of executive discretion in the matter.[453]

On another front, judicial independence came under attack through the government's efforts to subjugate the National Judicial Council (*Krajowa Rada Sądownictwa*, KRS). Alongside the executive, court presidents, and judicial self-governance bodies, the KRS plays a central role in Poland's judicial governance system. Originally established under the communist regime but restructured during the democratic transition to ensure independence, the KRS was "designed as a guardian of the separation of powers and judicial independence, and indirectly as a safeguard for the effective realization of the right to a fair trial enshrined in Article 45(1) of the Constitution."[454] Its key responsibilities include (1) selecting judges for the Supreme Court; (2) overseeing judicial transfers and appointments; and (3) establishing and enforcing judicial ethics rules.[455]

With a hybrid composition, the KRS consists of 25 members serving four-year terms.[456] As Anna Śledzińska-Simon explains, a Constitutional Court ruling requiring the physical presence of KRS members for deliberations made it difficult for certain key officials to participate regularly.[457] These officials—including the Minister of Justice, First President of the Supreme Court, and President of the Supreme Administrative Court—often could not attend lengthy sessions on judicial evaluation and selection.[458] As a result, judicial representatives came to dominate the KRS.[459]

Until 2017, judges held 15 of the 25 seats on the KRS.[460] However, the Polish Constitution did not explicitly stipulate that judicial members should have equal voting power in the judge selection process. Exploiting what appeared to be a representational imbalance in the judiciary's seat

452. *Id.* at 121–22.

453. *Id.*

454. Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, 19 GER. L.J. 1839, 1843, 1847–48 (2018).

455. *Id.* at 1848.

456. KRS's composition is as follows: "According to the Constitution, the KRS consists of fifteen judges. The remaining members are the chief justices of the SC and Supreme Administrative Court, the MJ, a representative of the president, four MPs 'elected by the Sejm,' and two senators 'elected by the Senate.'" *See* POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 100 (discussing KRS's composition under the Polish Constitution).

457. Śledzińska-Simon, *supra* note 454, at 1849–50.

458. *Id.* at 1850.

459. *Id.* at 1849.

460. *Id.*

distribution,[461] PiS launched a propaganda campaign against this aspect of the KRS.[462]

Following widespread protests against legislative initiatives aimed at restructuring the KRS, President Duda—politically cautious of the growing unrest—vetoed a PiS-drafted bill.[463] However, it was not long before Duda and PiS reached an agreement to revive efforts to bring the KRS under government control.[464]

Although the Polish Constitution did not explicitly define the process for electing judicial members to the KRS, the widely accepted practice had been that judges themselves were responsible for making these appointments.[465] Accordingly, the governing law of the KRS established different election models for various sectors of the judiciary.[466] This provision was subsequently challenged before the Constitutional Court—then dominated by a PiS-aligned majority—which ruled it unconstitutional.[467]

Notably, the Constitutional Court did not reject the principle that judges should be elected by their peers. Instead, the Constitutional Court ruled only that "different methods of inter-judiciary elections at different levels of the courts" were impermissible.[468] According to Śledzińska-Simon, this "gave the government a 'legitimate' reason to reform the election process and move the authority to select judicial members away from the bodies representing the judiciary and into the hands of the Parliament."[469] Under the new system, judges would be consulted only during the pre-selection phase.

The outcome of this broader process of constitutional erosion—encompassing not only the subjugation of the Constitutional Court but also the centralization of power in positions controlled by PiS[470]—was a dramatic decline in Poland's democracy rating, which fell from 0.81 in 2014 to 0.42

---

461. According to Anna Śledzińska-Simon:

2 members were judges of the Supreme Court; 2 members – the judges of administrative courts; 2 members – the judges of appellate courts; 8 members – the judges of regional and district courts; and, 1 member – a judge of a military court. As a result, judges of higher courts were overrepresented, while the district court judges did not have an adequate number of representatives (for example, in the last term of the NCJ there was only one judge from the district court).

Id. at 1850.

462. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 98.

463. *Id.* at 101.

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.* at 100.

468. *Id.*

469. Śledzińska-Simon, *supra* note 454, at 1851.

470. For example: the Ministry of Justice has incorporated the functions of the Prosecutor General. *See* Śledzińska-Simon, *supra* note 454, at 1840, 1857–51, 1857.

in 2022.[471] These numbers have improved after the victory of the opposition coalition in 2023. The democracy index reached 0.62[472] and the judicial constraints index reached 0.77.[473]

Yet the political environment became more volatile after the 2025 presidential election delivered a PiS-backed president, creating new veto points that have the potential to stall restoration of the rule-of-law.[474] Scholars and watchdogs therefore have reason to monitor the aftermath closely, as institutional gridlock could facilitate a PiS comeback.[475]

E. In the Shadow of El Salvador's Millennial Autocrat

Unfamiliar with democratic governance until the 1990s, El Salvador endured 50 years of military rule and 12 years of civil war against the guerrilla forces of the Farabundo Martí National Liberation Front (*Frente Farabundo Martí para la Liberación Nacional*, FMLN).[476] This changed in the early 1990s when the Republican Nationalist Alliance (*Alianza Republicana Nacionalista*, ARENA) and the FMLN agreed to end the conflict.[477] Through the Chapultepec Peace Accords, signed in Mexico in 1992, both parties sought to democratize El Salvador, ensure respect for human rights, and reunify Salvadoran society.[478]

Previously excluded from the electoral process, the FMLN was incorporated as an official political party, allowing former guerrilla members to actively participate in the country's political system.[479] To safeguard the interests of the elites involved, electoral laws were designed to accommodate both ARENA and the FMLN, creating legislative barriers that hindered the

---

471. *Liberal Democracy Index, 2024*, *supra* note 173.

472. *Liberal Democracy Index, 2024*, *supra* note 173.

473. *Judicial Constraints on the Executive Index*, *supra* note 84.

474. Donatienne Ruy, *The Implications of Poland's Presidential Election*, CTR. FOR STRATEGIC & INT'L STUD. (June 3, 2025), https://www.csis.org/analysis/implications-polands-presidential-election.

475. *See* Stanley Bill & Ben Stanley, *Democracy After Illiberalism: A Warning from Poland*, 36 J. DEMOCRACY 16, 29–30 (2025).

476. Cynthia J. Arnson, *Introduction* to RICARDO GUILLERMO CASTANEDA ET AL., EL SALVADOR'S DEMOCRATIC TRANSITION TEN YEARS AFTER THE PEACE ACCORD vii, vii (Cynthia J. Arnson ed., 2003).

477. Rubén Zamora, *The Nature of the Political Transition: Advances and Setbacks in Democratic Consolidation*, *in* EL SALVADOR'S DEMOCRATIC TRANSITION TEN YEARS AFTER THE PEACE ACCORD 6, 6 (Cynthia J. Arnson ed., 2003).

478. José Miguel Cruz, *The Nature of the Political Transition: Advances and Setbacks in Democratic Consolidation*, *in* EL SALVADOR'S DEMOCRATIC TRANSITION TEN YEARS AFTER THE PEACE ACCORD 13, 13 (Cynthia J. Arnson ed., 2003).

479. Manuel Meléndez-Sánchez, *Latin America Erupts: Millennial Authoritarianism in El Salvador*, 32 J. DEMOCRACY 19, 24–25 (2021).

emergence of new parties.[480] This institutional framework resulted in a bipartisan political system with ARENA representing the right and the FMLN the left.[481]

Amnesty laws, absolving war crimes committed by both sides, followed the peace accords.[482] While Manuel Meléndez-Sánchez acknowledges that this measure constituted a setback in the application of transitional justice,[483] he also notes that it facilitated the democratization process by allowing "wartime leaders on both sides of the conflict to participate in the new democratic regime."[484] As a result, El Salvador defied the well-known lesson of Von Clausewitz—who argued that war is merely the continuation of politics by other means—by enabling former combatants to assume key positions in subsequent governments.[485]

This transition led to a steady improvement in El Salvador's democratic rankings. According to V-Dem metrics, El Salvador progressed from an electoral autocracy in 1993 to an electoral democracy by 2007.[486] The judiciary, previously subordinate to the executive,[487] experienced a gradual and sustained increase in its independence during this period.[488]

In the decade following the peace accords, El Salvador made notable advances in human rights protections, political participation, and institutional accountability.[489] However, as a resource-poor country without access to the Caribbean coast, El Salvador became increasingly reliant on remittances sent by emigrants seeking better economic opportunities abroad.[490] In the face of these structural challenges, neither ARENA nor the FMLN was able to propose effective policies to stimulate economic growth.[491] Rising corruption and violent crime further exacerbated these difficulties. A surge in criminal activity placed El Salvador among the most dangerous countries in the

480. *Id.* at 25.

481. *Id.*

482. *Id.*

483. Which is not necessarily correct, as amnesties are included among the mechanisms of transitional justice. *Cf.* Geoff Dancy et al., *Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies*, 63 INT'L STUD. Q. 1, 7–8 (2019).

484. Meléndez-Sánchez, *supra* note 479, at 25.

485. *Id.*

486. DEMOCRACY REPORT 2025, *supra* note 7, at 52.

487. Laura Nuzzi O'Shaughnessy & Michael Dodson, *Political Bargaining and Democratic Transitions: A Comparison of Nicaragua and El Salvador*, 31 J. LAT. AM. STUD. 99, 107 (1999).

488. *Judicial Constraints on the Executive Index*, *supra* note 84.

489. Ricardo Guillermo Castaneda, *The Nature of the Political Transition: Advances and Setbacks in Democratic Consolidation*, *in* EL SALVADOR'S DEMOCRATIC TRANSITION TEN YEARS AFTER THE PEACE ACCORD 1, 1 (Cynthia J. Arnson ed., 2003).

490. Forrest D. Colburn & Arturo Cruz, *El Salvador's Beleaguered Democracy*, 25 J. DEMOCRACY 149, 152 (2014).

491. *Id.* at 156.

world.[492] As Forrest Colburn and Arturo Cruz observe, "[e]ven everyday activities such as riding a public bus can be dangerous" in a nation plagued by unchecked gang violence.[493]

The growing institutional independence of prosecutors and courts in El Salvador's young democracy further exposed the severity of the situation. Beginning in 2014, high-ranking government officials faced corruption investigations for the first time. Former President Francisco Flores (1999–2004) and his chief of staff, both from the ARENA party, were arrested. Flores died two years later while under house arrest.[494] On the FMLN's side, former President Mauricio Funes (2009–2014) sought asylum in Nicaragua to evade prosecution.[495]

Amid this context, trapped between the same old choices of ARENA and the FMLN—and constrained by the 1992 Electoral Code, which made the formation of new parties difficult—the Salvadoran population grew increasingly frustrated with the country's political and social stagnation. This decline in party representativeness fueled broader dissatisfaction with the democratic system itself,[496] creating a political environment ripe for populist appeal.

Enter Nayib Bukele. Bukele launched his political career at the age of 30 when he was elected mayor of Nuevo Cuscatlán under the FMLN banner in 2012.[497] He held the position until 2015, when he was elected mayor of the capital, San Salvador.[498] From the outset of his political career, Bukele leveraged social media—especially Twitter (now X)—to cultivate his public image; a strategy that eventually earned him the nickname "millennial president."[499]

Expelled from the FMLN in 2017 for his criticisms of the party leadership, Nayib Bukele quickly leveraged his popularity to form a new political party, New Ideas (*Nuevas Ideas*).[500] However, electoral laws prevented the party from fielding a candidate in the 2018 presidential election, prompting Bukele to run under the banner of the Grand Alliance for National Unity (*Gran Alianza por la Unidad Nacional*, GANA).[501]

---

492. *Id.* at 154–55.

493. *Id.*

494. Meléndez-Sánchez, *supra* note 479, at 28.

495. *Id.*

496. *Id.* at 26–27.

497. Noelia Ruiz-Alba & Rosalba Mancinas-Chávez, *The Communications Strategy via Twitter of Nayib Bukele: The Millennial President of El Salvador*, 33 COMMC'N & SOC'Y 259, 261 (2020).

498. *Id.*

499. *Id.* at 260.

500. Martin Nilsson, *Nayib Bukele: Populism and Autocratization, or a Very Popular Democratically Elected President?*, 12 J. GEOGRAPHY, POL. & SOC'Y 19, 19 (2022).

501. *Id.*

According to Martin Nilsson, Bukele's campaign already exhibited clear signs of his populist tendencies.[502] His rhetoric was characterized by an anti-pluralist discourse, frequent denunciations of the political establishment, and claims to represent the true will of the people.[503] Bukele's victory in the 2019 election, with a 21-percentage-point lead over his closest rival, made him "the only candidate not from ARENA or the FMLN to win the Salvadoran presidency since 1984."[504]

However, signs of Bukele's authoritarian tendencies were evident even before his 2019 election. As Meléndez-Sánchez notes, in 2016, Bukele mobilized supporters outside the Attorney General's Office to pressure him into stepping down.[505] In 2018, ahead of the presidential election, Bukele emulated Donald Trump's rhetoric by alleging—without evidence—that electoral authorities were planning to rig the vote against him.[506]

Beyond these incidents, Meléndez-Sánchez identified several other behaviors that align with Levitsky and Ziblatt's criteria for detecting authoritarianism, including: (1) rejection of or weak commitment to democratic norms; (2) delegitimization of political opponents; (3) tolerance or encouragement of violence; and (4) willingness to curtail civil liberties, including freedom of the press.[507] Among Bukele's actions curtailing freedom of the press were reductions in tax incentives for print media, verbal attacks on news outlets, and investigations into critical news websites. More generally, he also encouraged supporters to storm electoral authorities' offices and refused to recognize court rulings that limited executive power.[508]

One of the most striking demonstrations of Bukele's authoritarianism occurred in February 2020, ahead of the 2021 election that would later grant him an unprecedented supermajority in the Legislative Assembly. On that occasion, Bukele deployed military and security forces to occupy the Assembly.[509] Once inside, he sat in the chair reserved for the president of the legislature and demanded that lawmakers approve an international loan to fund his proposed socioeconomic reforms.[510] Before leaving, he issued a veiled ultimatum: "A week, gentlemen. In a week, we'll meet here."[511]

---

502. *Id.*
503. *Id.* at 23; Meléndez-Sánchez, *supra* note 479, at 21.
504. Meléndez-Sánchez, *supra* note 479, at 20–21.
505. *Id.* at 22.
506. *Id.*
507. HOW DEMOCRACIES DIE, *supra* note 2, at 65–67.
508. Meléndez-Sánchez, *supra* note 479, at 22.
509. *Id.*
510. *Id.* at 21.
511. Carlos Martínez, *Ahora creo que está muy claro quién tiene el control de la situación* [*Now I Think It's Very Clear Who Has Control of the Situation*], ELFARO (Feb. 10, 2020),

At the time, the Supreme Court—still independent—declared Bukele's actions unconstitutional and ordered him to refrain from using the military for political purposes.[512] However, Bukele continued to defy democratic norms. On another occasion, he openly challenged the authority of the Supreme Court, declaring that he would not comply with rulings from its Constitutional Chamber that opposed his pandemic-related policies.[513] Under Jack Balkin's framework, such actions are hallmarks of constitutional crises.[514]

Despite these authoritarian moves, Bukele has maintained an approval rating above 75% since taking office in 2019.[515] The same, however, cannot be said for El Salvador's democratic standing. The country's democracy index, which peaked at 0.47 in 2017, has since plunged, reaching just 0.11 in 2023.[516]

By 2020, as he entered the second year of his five-year term, Bukele had already begun laying the groundwork for his reelection bid, despite the fact that El Salvador's Constitution contains an eternity clause explicitly preventing the president from succeeding himself.[517] Seeking to obscure his true intentions, Bukele announced the creation of a commission tasked with studying, discussing, and potentially proposing constitutional reforms "according to the current needs of the society."[518] This maneuver was met with criticism from both civil society and academia.[519]

The political landscape shifted dramatically after the February 2021 elections. With Bukele's popularity still soaring, his party, New Ideas,

---

https://elfaro.net/es/202002/el_salvador/24006/"Ahora-creo-que-está-muy-claro-quién-tiene-el-control-de-la-situación".htm.

512. David Agren, *Nayib Bukele's Military Stunt Raises Alarming Memories in El Salvador*, GUARDIAN (Feb. 16, 2020), https://www.theguardian.com/world/2020/feb/16/el-salvador-nayib-bukele-military-alarming-memories.

513. Sergio Arauz, *Nayib Bukele anuncia que no acatará órdenes de la Sala de lo Constitucional* [*Nayib Bukele Announces That He Will Not Comply With Orders From the Constitutional Chamber*], ELFARO (Apr. 16, 2020), https://elfaro.net/es/202004/el_salvador/24296/Nayib-Bukele-anuncia-que-no-acatará-órdenesde-la-Sala-de-lo-Constitucional.htm.

514. Balkin, *supra* note 9, at 148.

515. Eddie Galdamez, *Nayib Bukele's Approval Rating: The President Achieves an 87% Approval in the Latest Survey*, EL SAL. INFO, https://elsalvadorinfo.net/nayib-bukele-approval-rate/ (last updated Oct. 9, 2025).

516. *Liberal Democracy Index, 2024*, *supra* note 173. El Salvador's scores during the interim were as follows: 0.43 (2018), 0.39 (2019), 0.31 (2020), 0.16 (2021), 0.12 (2022). *Id.*

517. Article 248 states: "Under no circumstances, may the articles of this Constitution, which refer to the form and system of government, to the territory of the Republic, and to the principle that a President cannot succeed himself (*alternabilidad*), be amended." CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR June 28, 2014, art. 248 (El Sal.).

518. Manuel Merino, *El Salvador*, *in* THE 2020 INTERNATIONAL REVIEW OF CONSTITUTIONAL REFORM 105, 106 (Luís Roberto Barroso & Richard Albert eds., 2021).

519. Meléndez-Sánchez, *supra* note 479, at 19.

secured 56 of the 84 legislative seats, giving it a 66% majority.[520] In contrast, ARENA and the FMLN—parties that had governed El Salvador for nearly three decades—won only 19 seats combined, marking a disastrous defeat.[521]

Now fully in control of the legislature, Bukele's allies wasted no time. On the very day the newly elected Assembly was sworn in, lawmakers invoked a dubious constitutional prerogative to deliver a major blow to El Salvador's institutional independence; the removal of all five judges from the Supreme Court's Constitutional Chamber,[522] along with the Attorney General.[523]

The Supreme Court of El Salvador is composed of 15 judges divided into four chambers: (1) the Constitutional Chamber (five judges); (2) the Civil Chamber (three judges); (3) the Criminal Chamber (three judges); and (4) the Contentious-Administrative Chamber (four judges).[524] Bukele and his allies quickly appointed five new judges to the Constitutional Chamber.[525] Furthermore, in August 2021, the legislature passed laws mandating the removal of lower court judges over the age of 60.[526] These actions severely undermined judicial independence, causing El Salvador's judicial independence index to plummet from 0.5 in 2020 to 0.11 in 2021 and to 0.02 in 2024.[527]

Although these sweeping changes may appear unlawful, Nilsson argues that they were technically carried out within El Salvador's constitutional framework.[528] The real problem, he suggests, lies in the country's institutional design, which failed to anticipate the possibility of a single party or coalition simultaneously controlling the presidency and a two-thirds legislative majority.[529]

Now firmly under Bukele's control, the Constitutional Chamber became a tool for consolidating his hold on power. In September 2021, the Chamber ruled that Bukele could run for reelection.[530] This is where the legal interpretation becomes contentious. According to Nilsson, while El

520. *Id.*
521. *Id.*
522. Merino, *supra* note 518, at 106.
523. Meléndez-Sánchez, *supra* note 479, at 19.
524. MNEESHA GELLMAN, THE DEMOCRACY CRISIS IN EL SALVADOR: AN OVERVIEW (2019–2022) 9 (Ctr. For Mex. & Cent. America, Reg'l Expert Paper Series No. 4, 2022).
525. *Id.*
526. *Id.*
527. *Judicial Constraints on the Executive Index*, *supra* note 84.
528. Nilsson, *supra* note 500, at 20.
529. *Id.* at 20–21.
530. *Id.* at 19.

Salvador's Constitution was designed to ensure the alternation of power, certain loopholes exist in its text.[531]

Specifically, Article 154 states: "The presidential period shall be five years, and shall begin and end on the first of June, without the person who has exercised the Presidency being able to continue in his functions one day more."[532] When Article 154 is read in conjunction with Article 152, it becomes possible to interpret that a president could resign a few months before an election and thus become eligible to run again. Article 152 stipulates:

> [The following] shall not be candidates for the President of the Republic: 1st. He who has held the Presidency of the Republic for more than six months, consecutive or not, during the period immediately prior to or within the last six months prior to the beginning of the presidential term 533

Despite acknowledging this loophole, Nilsson argues that Bukele's maneuver remains unacceptable because the Constitution's original intent was to establish single-term presidencies.[534] Moreover, the Supreme Court previously upheld a precedent requiring a ten-year interval before a former president could seek reelection.[535] In light of this, a lenient interpretation of the Court's ruling might classify it as an instance of constitutional hardball.[536] However, considering the fundamental principles of the Salvadoran Constitution, it is more accurately described as what Richard Albert terms a "constitutional dismemberment."[537]

El Salvador's autocratization deepened in the following years. Popular protests against Bukele's government were suppressed, journalists were targeted through Pegasus spyware surveillance,[538] and a mass incarceration campaign led to the imprisonment of more than 70,000 people, allegedly for gang affiliations or even for having certain tattoos.[539] In March 2022, Bukele declared a state of emergency to address the country's high crime rates—an

531. *Id.* at 21.
532. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR June 28, 2014, art. 154 (El Sal.).
533. Nilsson, *supra* note 500, at 21.
534. *Id.*
535. *Id.*
536. *Constitutional Hardball*, *supra* note 151, at 523.
537. ALBERT, *supra* note 374, at 31.
538. GELLMAN, *supra* note 524, at 8.
539. Graute, *supra* note 142.

action that, according to Graute, is highly questionable given its stated purpose.[540]

In 2024, Justice and Security Minister Gustavo Villatoro claimed that homicides had dropped by more than 70% in 2023, bringing the murder rate down from 8 per 100,000 inhabitants in 2022 to just 2.4 in 2023.[541] However, such claims, especially in an autocratic regime, should be approached with skepticism. More importantly, this assertion encapsulates the essence of illiberalism: the belief that national security can be achieved through the widespread erosion of fundamental rights.

At the end of 2022, Bukele began advocating for two structural reforms aimed at reducing both the number of municipalities in the country and the number of seats in the Legislative Assembly.[542] After some resistance from the opposition, both proposals were approved in June 2023.[543] As a result, the number of legislative seats was reduced from 84 to 60, while the number of municipalities was slashed from 262 to 44.[544] This measure represents a clear case of electoral manipulation, designed to further entrench Bukele's dominance.

By 2024, with no remaining institutional barriers to his candidacy, Bukele was reelected with more than 70% of the country's votes[545]—though under such conditions, one might question whether this can even be considered a real election.

F. Israel's Constitutional Showdown

In March 2024, when V-Dem's annual report classified Israel as an electoral democracy for the first time in 50 years,[546] the announcement was accompanied by contrasting news: the Israeli Supreme Court's (*Beit*

---

540. *Id.*

541. *See El Salvador Says Murders Fell 70% in 2023 as It Cracked Down on Gangs*, REUTERS (Jan. 3, 2024), https://www.reuters.com/world/americas/el-salvador-says-murders-fell-70-2023-it-cracked-down-gangs-2024-01-03/.

542. *El Salvador President Wants to Cut the Number of Municipalities from 262 to 44*, AP (June 2, 2023), https://apnews.com/article/el-salvador-nayib-bukele-municipalities-fcae596ca92455394df3decd0a8a0597.

543. Nelson Renteria, *El Salvador Slashes Size of Congress Ahead of Elections*, REUTERS (June 7, 2023), https://www.reuters.com/world/americas/el-salvador-slashes-size-congress-ahead-elections-2023-06-07/.

544. *Freedom in the World 2024*: *El Salvador*, FREEDOM HOUSE, https://freedomhouse.org/country/el-salvador/freedom-world/2024/ (last visited Dec. 14, 2025).

545. Mary Beth Sheridan & Carmen Valeria Escobar, *'World's Coolest Dictator' Reelected in El Salvador: What to Know*, WASH. POST, https://www.washingtonpost.com/world/2024/02/03/el-salvador-election-nayib-bukele/ (last updated Feb. 5, 2024).

546. MARINA NORD ET AL., DEMOCRACY REPORT 2024: DEMOCRACY WINNING AND LOSING AT THE BALLOT 6 (2024); *see* DEMOCRACY REPORT 2025, *supra* note 7, at 16.

haMishpat haElyon) decision on January 1 to strike down Benjamin Netanyahu's government's judicial reform.[547] Understanding this clash, however, requires an examination of Israel's constitutional structure.

Established as a Jewish state, Israel was founded in 1948.[548] Its Declaration of Independence proclaimed that the country would be governed under a constitution. However, such a document was never formally drafted. According to Hanna Lerner, political disagreements over both its content and the process of its creation led to a deadlock.[549] The secular and religious factions were divided, unable to reach a consensus on various issues, so the Knesset (Parliament) adopted an incrementalist approach.[550] It opted to develop the constitutional framework gradually through Basic Laws.[551]

By the early 1990s, the Knesset had enacted nine Basic Laws, primarily addressing institutional and state organization matters; topics that, according to Lerner, provoked little controversy.[552] This dynamic shifted in 1992 when two Basic Laws on human rights were finally passed: one concerning dignity and liberty, and the other addressing freedom of occupation.[553] These provisions imposed limits on the Knesset's authority and guaranteed their enforcement through strong judicial review powers, marking the beginning of what became known as Israel's "constitutional revolution."[554]

Three years later, in *United Mizrahi Bank v. Migdal Cooperative Village*, the Supreme Court—under the presidency of Aharon Barak, a key architect of Israel's judicial expansion—further deepened this constitutional transformation.[555] According to Gideon Sapir, the Court leveraged these provisions to "create a full-fledged Bill of Rights,"[556] asserting that (1) the Basic Laws held a constitutional status superior to ordinary legislation and (2) the Court had the authority to strike down laws that conflicted with them.[557] As Roznai explains, this "extensive interpretation of the rights protected in the basic law together with a broad right of standing before the court and minimal justiciability restrictions," placed the Court on elevated footing compared to the political branches—an unprecedented

547. HCJ 5658/23 Movement for Quality Government v. Knesset (2024) (Isr.) [English Translation].

548. HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 51 (2011).

549. *Id.* at 51–52.

550. *Id.*

551. *A Crisis of Liberal Democracy?*, *supra* note 101, at 358.

552. LERNER, *supra* note 548, at 71.

553. *A Crisis of Liberal Democracy?*, *supra* note 101, at 358.

554. *Id.*

555. *Id.*

556. Gideon Sapir, *Constitutional Revolutions: Israel as a Case-Study*, 5 INT'L J.L. CONTEXT 355, 355 (2009).

557. *Id.*

development.[558] This shift marked Israel's transition from a system of legislative supremacy—where Parliament had the final say on constitutional matters—to an era of constitutional dialogue, in which the Supreme Court now held the power to issue the final provisional ruling on such issues.

Following *United Mizrahi Bank*, the Israeli Supreme Court continued expanding its powers.[559] Through broad interpretation, it recognized aspects of equality and freedom of expression as inherent to human dignity, thereby granting constitutional status to rights that had been deliberately excluded from the 1992 Basic Laws.[560] Additionally, the Court developed the *reasonableness doctrine*, a standard of review enabling it to assess the substantive merits of government decisions.[561]

As a result, the Israeli Supreme Court came to be regarded as one of the most activist courts in the world.[562] According to Roznai, criticism of the Court's enlightened approach—prioritizing universal values over the will of the electorate—was further fueled by concerns over the homogeneity of its judicial composition.[563] Explaining this issue, Ran Hirschl stated:

> [J]urists who are Opera-goers and Ha'aretz subscribers, whose mothers knew Yiddish, and who own an apartment or two in an upscale neighborhood are much more likely to get appointed to the Supreme Court than those who celebrate the Mimoona (a Northern-African Jewish feast), wear Tefillin (phylacteries) every weekday morning, speak fluent Arabic, were born in the former Soviet Union, or have a close family relative under the poverty line. As it happens, over two-thirds of the Israeli electorate falls into at least one of these categories.[564]

---

558. *A Crisis of Liberal Democracy?*, *supra* note 101, at 358.

559. *Id.*

560. *Id.*

561. *Id.* at 4.

562. *See* MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL, at ix (2011) (beginning the foreword as follows: "This book tells the story of the Supreme Court widely regarded as the most activist in the world"). Richard Posner compared the expansions of judicial powers done by Aharon Barak to that of John Marshall. *See generally* Richard A. Posner, *Enlightened Despot*, THE NEW REPUBLIC (Apr. 23, 2007), https://newrepublic.com/article/60919/enlightened-despot. Barak was the president of the Israeli Supreme Court from 1995 to 2006 and was responsible for much of the constitutional revolution, similar to John Marshall. *Id.* Robert Bork referred to Barak's work in the following way: "In a word, Barak's court can turn ordinary legislation into a constitution, force it on the nation, and then announce that it can prevent any democratic amendment. In this, Barak surely establishes a world record for judicial hubris." Robert H. Bork, *Barak's Rule*, 27 AZURE 125, 131 (2007).

563. *A Crisis of Liberal Democracy?*, *supra* note 101, at 359–60.

564. Ran Hirschl, *The Socio-Political Origins of Israel's Juristocracy*, 16 CONSTELLATIONS 476, 487 (2009).

As a result, efforts to curb the Supreme Court's powers began to emerge. Doron Navot and Yoav Peled note that the first significant attempt occurred in 2007–2008, a few years after Aharon Barak's mandatory retirement. At the time, then-Justice Minister Daniel Friedman initiated reforms aimed at limiting judicial authority.[565] This marked the beginning of a broader trend that gained momentum from 2015 onward, during Netanyahu's second government.[566]

Netanyahu has served as Israel's prime minister for more than 15 years across three separate periods (1996–1999, 2009–2021, and 2022–present).[567] According to Roznai, unlike his first term, by 2015 Netanyahu was leading "the most right-wing government in the nation's history, pushing for national, traditional, and religious values, as well as the territorial integrity of Israel."[568] Consequently, legislative proposals aimed at curtailing the authority of oversight institutions, including the Supreme Court, began to surface in the Knesset.[569]

A distinctive feature of Israel's legislative process, uncommon among the world's democracies, is the absence of a formal constitution to delineate the procedures for passing ordinary laws versus Basic Laws.[570] As a result, the exercise of constituent power is conflated with that of constituted power.[571] This means that constitutional norms can be amended by an absolute majority of the Legislature—provided they do not violate the material limits established by the Supreme Court.

The counterrevolution pursued by Netanyahu and his coalition operates on multiple fronts. While seeking to curtail the Supreme Court's authority over judicial review and access to the judiciary, they have also pushed for reforms to the judicial selection committee and the seniority-based process for appointing the Court's president. One such initiative involved a proposed Basic Law that, among other provisions, sought to concentrate judicial review authority exclusively in the Supreme Court, preventing lower courts from exercising this power.[572] While Roznai argues that this measure is not inherently problematic in isolation, he notes that when combined with other

---

565. Doron Navot & Yoav Peled, *Towards a Constitutional Counter-Revolution in Israel?*, 16 CONSTELLATIONS 429, 429 (2009).

566. *o caso de Israel*, *supra* note 103.

567. *A Crisis of Liberal Democracy?*, *supra* note 101, at 362; *Benjamin Netanyahu*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Benjamin-Netanyahu (Dec. 14, 2025).

568. *Id.* at 8.

569. *Id.* at 9.

570. LERNER, *supra* note 548, at 56.

571. *Id.*

572. *A Crisis of Liberal Democracy?*, *supra* note 101, at 363–64.

elements of the proposal, the broader intent becomes evident.[573] Other provisions included severe restrictions on the Court's institutional capacity, such as requiring a supermajority of justices to invalidate legislation and granting the Knesset the power to override Supreme Court rulings by a simple majority.[574] The Netanyahu government justified these proposals by arguing that the "constitutional revolution created a flaw in Israeli democracy that must be corrected."[575]

In December 2022, after being out of office for just over a year following his departure in mid-2021, Netanyahu was re-elected as Israel's prime minister.[576] Leading a right-wing nationalist coalition with 64 of the 120 Knesset seats, he now faced corruption and fraud charges that posed a direct threat to his political survival.[577] These factors contributed to the renewed push to weaken or, as some argue, to bring the Supreme Court under control with greater urgency.[578]

According to Roznai, Dixon, and Landau, in January 2023, Justice Minister Yariv Levin announced a sweeping set of legal reforms during a special press conference.[579] The first phase consisted of a package with six key elements, five of which imposed substantive restrictions on the Supreme Court's authority and that of other courts, while also altering the judicial selection process.[580]

The first element sought to limit judicial review.[581] Historically, all Israeli courts had the ability to review acts of the executive and legislature, albeit in a diffuse manner.[582] The reform aimed to centralize this power in the Supreme Court.[583] While this might seem reasonable in principle, its implementation was far from it: under the new framework, judicial review could only be exercised by the full 15-member bench, and striking down a law would require a supermajority of 12 justices.[584]

The second element stripped the Judiciary of its authority to review the constitutionality of Basic Laws.[585] The Supreme Court had previously established that even when enacting Basic Laws, the Knesset could not

573. *Id.*
574. *Id.* at 9.
575. *Id.* at 15.
576. *o caso de Israel*, *supra* note 103.
577. *Id.*
578. *Id.*
579. *Judicial Reform or Abusive Constitutionalism*, *supra* note 90, at 295.
580. *Id.*
581. *Id.*
582. *Id.*
583. *Id.*
584. *Id.*
585. *Id.*

violate "the core values of the state as both Jewish and democratic"—effectively creating an implicit eternity clause.[586] Eliminating the Court's ability to review Basic Laws would not only subject the population to unchecked parliamentary power, but would also be fundamentally at odds with modern constitutionalism.[587]

The third element introduced an override clause into Israeli law.[588] If passed, it would allow an absolute majority of the Knesset (61 out of 120 members) to override a Supreme Court ruling of unconstitutionality and reinstate the invalidated provision.[589] Combined with the supermajority requirement for judicial review, this reform would significantly undermine the Court's authority, jeopardizing fundamental rights and freedoms while granting the executive near-unlimited power, particularly in Israel's parliamentary system.[590]

The fourth element of the proposal abolished the reasonableness doctrine for reviewing administrative actions.[591] This standard, used by the Israeli Supreme Court, allows for judicial review of all administrative measures.[592] According to Roznai, Dixon, and Landau, while the Court intervenes only in extreme cases in practice, the broad scope of the standard grants it significant leeway for intervention.[593] From the executive's perspective, the main concern appears to be the Court's use of reasonableness to justify interventions in the appointment process, particularly regarding ministers.[594]

The fifth element aimed to reform the judicial selection committee.[595] Currently, Supreme Court justices in Israel are appointed by a nine-member committee comprising two Knesset members, three Supreme Court justices, two government ministers, and two representatives of the Israeli Bar Association.[596] Selections require a qualified majority of seven out of nine members, a structure that grants both the Legislature and the Court veto power, ensuring a balance of influence in the selection process.[597] The initial proposal sought to allow the ruling parliamentary coalition (which is

586. *Id.*
587. *Id.*
588. *Id.*
589. *Id.*
590. *Id.* at 296.
591. *Id.*
592. *Id.*
593. *Id.*
594. *Id.*
595. *Id.*
596. *Id.*
597. *Id.*

controlled by the government) to appoint Supreme Court justices directly.[598] While this plan was later modified, the final provision still allowed for the unilateral appointment of two justices per government term.[599]

Finally, the sixth element restructured the process of appointing government and ministerial legal advisors.[600] Under the reform, the authority to oversee these appointments was transferred from an independent committee to a system of direct political appointments.[601] Additionally, the role of these advisors was downgraded from binding to non-binding, significantly reducing their ability to constrain government actions.[602]

The introduction of these proposals triggered an unprecedented wave of protests. Israelis repeatedly took to the streets in mass demonstrations against the government's efforts to weaken the Supreme Court.[603] Thousands of citizens—including academics and key figures from the country's economic elite—vocally opposed the proposed amendment to the Basic Law. [604] In an interview, Professor Yaniv Roznai discussed the role of academics in defending Israel's Supreme Court:

> I believe that part of the advantage we have seen in terms of the size and intensity of the protests is due to the lessons we have learned from what happened in Poland and Hungary. As constitutional scholars, we have seen democratic erosion occur in other countries and we have been quick to recognize the warning signs. In the past three months, we have been doing an incredible amount of work to raise awareness about the potential implications of the proposed reform. We have given pro bono lectures all around the country, in private homes, schools, and high-tech companies. We have given interviews in the media, both in Israel and abroad, and have produced short videos to share on YouTube, TikTok, and other social media platforms. All of this work has been done to educate the public about the proposed changes and their potential impact.[605]

598. *Id.*
599. *Id.*
600. *Id.*
601. *Id.*
602. *Id.*
603. *o caso de Israel*, *supra* note 103.
604. *Id.*
605. *Id.* For more information on the work developed by the academic community in Israel in defense of the Supreme Court, *see* Ittai Bar-Siman-Tov et al., *Scholactivism in the Service of Counter-Populism: The Case of Constitutional Overhaul in Israel,* 23 INT'L J. CONST. L. 1059, 1059–60 (2025).

Despite widespread resistance from civil society, the government pressed forward with its plans, and at the end of July 2023, it passed Amendment No. 3 to the Basic Law.[606] Amendment No. 3 prohibits those with judicial authority from invoking reasonableness as a basis for ruling on cases or issuing injunctions against the government, its ministers, or the prime minister.[607] The restriction also applies to decisions regarding appointments to official positions and the non-exercise of authority.[608]

According to Mordechai Kremnitzer, Amendment No. 3 must be understood in the context of the broader attempt to subjugate the Supreme Court to political power.[609] The government's objective is to free itself from judicial oversight, effectively granting the executive unchecked authority.[610] This, in turn, serves multiple strategic interests: (1) shielding Netanyahu in his corruption trial; (2) removing barriers to government corruption; (3) facilitating the coalition's territorial expansion into Palestinian areas; (4) eroding Israel's liberal foundations in favor of Jewish supremacy; and (5) securing ultra-Orthodox support by exempting them from mandatory military service.[611]

Kremnitzer argues that by legislating rules for judicial review, the Knesset is effectively setting standards for the scrutiny of its own actions—an inherent conflict of interest.[612] By stripping away part of the Supreme Court's oversight powers, Amendment No. 3 weakens the separation of powers, affecting what Adrian Vermeule would describe as "the baseline constitutional strategy for suppressing self-interested decision-making."[613]

The reasonableness doctrine plays a crucial role in Israel's constitutional framework. At its core, reasonableness ensures that executive actions are legally authorized. "This authorization includes the duty of public officials to pursue the purposes underlying the authorizing law, striking the correct balance among them."[614] According to Kremnitzer, this legal framework requires public officials to: (1) act in good faith in defense of the public interest; and (2) exercise responsibility, diligence, and sound judgment in

606. Kremnitzer, *supra* note 161, at 344; Basic Law: The Judiciary (Amendment No. 3), 5783–2023, SH 3066 548 (Isr.), https://fs.knesset.gov.il/25/law/25_lsr_2997865.pdf [English version unavailable].

607. *Id.* at 351.

608. *Id.* at 344.

609. *Id.* at 346.

610. *Id.* at 344.

611. *Id.*

612. *Id.* at 345.

613. Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 405 (2001) [hereinafter *Veil of Ignorance Rules*].

614. Kremnitzer, *supra* note 161, at 345.

their decisions.[615] The second duty specifically mandates that public decisions consider all relevant factors—while disregarding extraneous or improper considerations.[616]

In this context, reasonableness serves two key functions. First, it evaluates whether the decision-making process itself was appropriate. This does not mean assessing whether the decision was correct, but rather whether it falls within the range of what would be expected from a reasonable public official. Second, reasonableness—closely tied to the principle of good faith—acts as a safeguard against harmful or arbitrary government decisions by focusing not on the personal motivations of decision-makers, but on the broader impact of their actions.[617]

When it comes to public appointments, the reasonableness doctrine helps prevent arbitrary or corrupt practices by ensuring that key positions are not filled with individuals who lack the necessary qualifications, have criminal convictions, or—due to their past conduct—would be unlikely to secure employment in either the private sector or a well-managed civil service.[618] At the same time, it upholds the principle of equal opportunity by enabling marginalized groups—such as Arabs, women, LGBTQ+ individuals, and Ashkenazim—to access public positions. By eliminating the Supreme Court's ability to review the reasonableness of government appointments, Amendment No. 3 facilitates political favoritism, allowing unqualified loyalists to assume critical roles while making corruption easier to entrench.[619]

Aeyal Gross views this as a pivotal step in the government's effort to tame the Supreme Court, affecting both its composition (subjective dimension) and its authority (objective dimension).[620] By restricting judicial review, the Knesset paves the way for altering the Judicial Selection Committee—the body responsible for appointing Supreme Court justices—allowing the government to reshape the Court in its favor.[621]

As the government struggles to implement this maneuver, largely due to political setbacks against the opposition, Justice Minister Yariv Levin has resorted to what appears to be constitutional hardball. Using his position on the Judicial Selection Committee, he has deliberately blocked the panel from convening to appoint new judges—including a replacement for former

615. *Id.*
616. *Id.*
617. *Id.* at 346.
618. *Id.* at 348.
619. *Id.* at 349.
620. Aeyal Gross, *An Unreasonable Amendment*, VERFASSUNGBLOG (July 24, 2023), https://verfassungsblog.de/an-unreasonable-amendment/.
621. *Id.*

Supreme Court President Esther Hayut, who was mandatorily retired in October 2023.[622]

According to Kremnitzer, Amendment No. 3 carries enormous destructive potential.[623] It could enable the government to "dismantle liberal democracy" by: (1) exerting control over the media; (2) subordinating social welfare policies to the ruling coalition's agenda; and (3) escalating violations of Palestinian rights in the occupied territories.[624] These measures, among others, threaten the foundational principles of Israel's legal and political system, enabling the government to implement them with little resistance.[625]

Ultimately, Israel's constitutional identity itself is at stake. Despite the 2018 Basic Law declaring Israel a Jewish state, the Supreme Court has continued to affirm Israel's dual identity as both Jewish and democratic, emphasizing the principle of equal citizenship.[626] However, as Barak Medina and Ofra Bloch argue, Amendment No. 3 is part of an illegitimate attempt[627] "to transform Israel's constitutional identity from a (limited) democratic and Jewish state into a state that is first and foremost Jewish, with no promise of equal citizenship."[628]

However, in October 2023, Hamas launched the largest terrorist attack in Israel's history, killing over 1,000 Israeli citizens.[629] In response, Benny Gantz and his National Unity Party joined the government to address the national emergency.[630] As part of their agreement, no law could be passed without the approval of both Netanyahu and Gantz.[631] While this arrangement might appear to have halted Netanyahu's judicial reform, Amendment No. 3 had already been enacted two months earlier.[632]

As a result of the attack—and the subsequent war—the future of Netanyahu's government beyond the conflict became uncertain. With the administration fully focused on the war effort, the Supreme Court appeared

---

622. *Id.*

623. Kremnitzer, *supra* note 161, at 353.

624. *Id.* at 347.

625. *Id.*

626. *Id.* at 317.

627. Medina and Bloch's approach to the legitimacy of the Amendment is social and representative in nature, and procedural and normative. *Cf.* Barak Medina & Ofra Bloch, *The Two Revolutions of Israel's National Identity*, 56 ISR. L. REV. 305, 317–18 (2023).

628. *Id.*

629. *Israel Revises Down Toll from October 7 Attack to 'Around 1,200'*, ALJAZEERA: NEWS (Nov. 10, 2023), https://www.aljazeera.com/news/2023/11/10/israel-revises-death-toll-from-october-7-hamas-attack-to-1200-people.

630. Aeyal Gross, *Did the Israeli Supreme Court Kill the Constitutional Coup?*, VERRFASSUNGBLOG (Jan. 9, 2024), https://verfassungsblog.de/did-the-israeli-supreme-court-kill-the-constitutional-coup/.

631. *Id.*

632. *Id.*

to seize the moment to assert its authority. On the first day of 2024, the Court struck down Amendment No. 3 to the Basic Law.[633]

The ruling, decided by a narrow 8–7 majority, was authored by former Supreme Court President Esther Hayut.[634] Among the key takeaways, 12 of the 15 justices affirmed the Court's power to invalidate Basic Laws that constitute an overreach of the Knesset's constituent authority.[635] Of the remaining three justices, one argued that only extreme violations of fundamental rights could justify such intervention, while the other two rejected the notion that the Court had the authority to review Basic Laws at all.[636]

Now, the stage is set for the next move in this constitutional showdown.[637] Will Netanyahu muster the political strength to challenge the ruling and escalate the constitutional crisis? For now, the Supreme Court remains the only effective check on the power of the legislature.

III. ANCHORING JUDICIAL INDEPENDENCE

> It is the institutions that help us preserve decency. They need our help as well. Do not speak of "our institutions" unless you make them yours by acting on their behalf. Institutions do not protect themselves. They fall one after the other unless each is defended from the beginning. So, choose an institution you care about—a court, a newspaper, a law, a labor union—and take its side.[638]

The countries examined in the previous Part illustrate why autocrats and authoritarian actors, in general, have a particular interest in supreme and constitutional courts. The path to illiberalism almost invariably involves the subjugation of these institutions. In most of the cases analyzed, constitutional safeguards proved insufficient to preserve judicial independence.

Drawing from these experiences, I propose several strategies for protecting judicial institutions. My approach is divided into two dimensions: sociological and institutional. The sociological dimension examines how a

---

633. *Id.*

634. Despite having retired in October 2023, the Court's statute, in Article D § 15(a), allows its judges to sign decisions that will be issued up to three months after their retirement. Section 15(a), The Courts Law (Consolidated Version), 1984, LSI 38 271 (1983–1984), https://www.nevo.co.il/law_html/law00/74849.htm.

635. *See* HCJ 5658/23 Movement for Quality Government v. Knesset (2024) (Isr.) 36–37, 65–66, 131–33 [English Translation].

636. *Id.*

637. *Constitutional Showdowns*, *supra* note 300, at 991–92.

638. SNYDER, *supra* note 163, at 22.

court's own actions can undermine its credibility and weaken its role within a constitutional system.

The institutional dimension, in turn, consists of two approaches: preventive and repressive. The preventive approach explores aspects of constitutional design that can help safeguard courts, even in times of political turmoil. To develop this framework, I draw from both constitutional law and political philosophy. The repressive approach, on the other hand, presents arguments in defense of the judiciary's authority to strike down legal changes that could facilitate its subjugation.

A. Paths to Build Sociological Legitimacy

The wave of protests against judicial reform in Israel lasted over six months.[639] As Roznai observed, Israelis appear to have drawn lessons from Hungary and Poland regarding the implementation of illiberal projects.[640] This mobilization of civil society contributed to strengthening the Supreme Court, enabling it to invalidate Amendment No. 3 with significant public support.

A similar, albeit less intense, phenomenon occurred in Brazil under the Bolsonaro government. Pro-democracy demonstrations took place across multiple state capitals,[641]and a letter signed by more than 900,000 individuals was read at the Law School of the University of São Paulo.[642] Despite the damage caused by the January 8, 2023 attack on the headquarters of all three branches of government, the resilience of Brazilian democracy suggests that, like Israel, Brazil has learned valuable lessons in resisting authoritarian populism.

---

639. *See generally* Bethan McKernan, *What Is Israel's Judicial Overhaul About and What Happens Next?*, GUARDIAN (Sept. 12, 2023), https://www.theguardian.com/world/2023/jul/24/what-is-israel-judicial-overhaul-vote-about-what-happens-next; Yasmeen Serhan, *After 29 Weeks of Protest, Israel Passes Landmark Legislation That Will Test Its Democracy*, TIME (July 24, 2023), https://time.com/6297024/israel-judicial-reform-protest/; Dan Williams, *Demographics and Grievances Jaundice Israel's Judicial Divide*, REUTERS (July 24, 2023), https://www.reuters.com/world/middle-east/demographics-grievances-widen-israeli-judicial-divide-2023-07-24/.

640. *o caso de Israel*, *supra* note 103.

641. *Capitais têm atos em defesa da democracia nuestra quinta-feira* [*Capital Cities Are Holding Events in Defense of Democracy This Thursday, the 11th*], G1 (Aug. 11, 2022), https://g1.globo.com/politica/eleicoes/2022/noticia/2022/08/11/ato-em-defesa-da-democracia-e-do-sistema-eleitoral-reune-artistas-juristas-empresarios-professores-no-brasil.ghtml.

642. *Carta pela democracia é lida na USP, e ato tem protesto contra Bolsonaro* [*Letter in Favor of Democracy Is Read at USP, and the Event Includes a Protest Against Bolsonaro*], CNN BRAZ. (Aug. 11, 2022), https://www.cnnbrasil.com.br/politica/cartas-pela-democracia-sao-lidas-na-faculdade-de-direito-de-usp/.

In Poland, despite PiS's extensive use of patronage politics, electoral law manipulation, and state media control,[643] the opposition led by Donald Tusk secured victory in the October 2023 elections.[644] Tusk's return to the prime ministership signals that, beyond learning from past mistakes, Poland may now be in a position to reverse what Sadurski termed a constitutional breakdown.[645]

Other courts worldwide have faced similar pressures. In Argentina, former President Alberto Fernández clashed with the Supreme Court over a budget allocation ruling.[646] After initially refusing to comply with the Court's decision,[647] Fernández announced impeachment proceedings against four justices, including Chief Justice Horacio Rosatti.[648] In the United States, the constitutional hardball tactics surrounding Merrick Garland's nomination resulted in an additional conservative seat on the Supreme Court. With a 6–3 conservative majority, the Court has increasingly shifted to the right, prompting discussions among scholars[649] and politicians[650] about court-packing as a potential countermeasure.

One key lesson from these events is sociological in nature, encapsulated by U.S. Supreme Court Chief Justice John Roberts's assertion that "public trust is essential, not incidental, to our function."[651] Tomasz Tadeusz Koncewicz further elaborates on this argument, emphasizing that "[a]s important as institutions might be as focal points of the constitutional system, they have a chance of survival only when their institutional pedigree and prestige are built on the popular support of civil society."[652]

What, then, can a court do to achieve public trust? The answer to this question has two dimensions: one endogenous and the other exogenous. The endogenous dimension concerns the court's own conduct and decision-

643. Wojciech Sadurski, *Poland's Elections: Free, Perhaps, but Not Fair*, VERFASSUNGSBLOG (Sept. 20, 2023), https://verfassungsblog.de/polands-elections-free-perhaps-but-not-fair/.

644. *Id.*

645. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 29.

646. *Argentina President Rejects Supreme Court Ruling, Sparking Backlash*, REUTERS (Dec. 23, 2022), https://www.reuters.com/world/americas/argentina-president-rejects-supreme-court-ruling-sparking-backlash-2022-12-23/.

647. *Id.*

648. *Argentina President Seeks Impeachment of Supreme Court Chief*, ALJAZEERA (Jan. 3, 2023), https://www.aljazeera.com/news/2023/1/3/argentina-president-seeks-impeachment-of-supreme-court-chief.

649. Daly, *supra* note 129, at 1071–72; Weill, *supra* note 130, at 2710 & n.12.

650. Shail Kapur, *Democrats to Introduce Bill to Expand Supreme Court from 9 to 13 Justices*, NBC NEWS (Apr. 14, 2021), https://www.nbcnews.com/politics/supreme-court/democrats-introduce-bill-expand-supreme-court-9-13-justices-n1264132.

651. JOHN G. ROBERTS, 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2021).

652. Koncewicz, *supra* note 431, at 118.

making. Courts must exercise their powers in a way that preserves their independence. Martin Shapiro argues that when constitutional designers entrust courts with conflict resolution, they inherently accept the institutional consequences of that choice—both positive and negative.[653] This includes the judiciary's potential role in rulemaking and self-preservation. However, he cautions that "courts that owe their existence to democratic institutional choice must act prudently, or the choice may be withdrawn."[654]

Taking a different approach, Barry Friedman links judicial authority to the concept of political capital.[655] He argues that a supreme court's legitimacy depends on its ability to strategically allocate its accumulated political capital when making controversial rulings.[656] He illustrates this with *Bush v. Gore*, a case in which the U.S. Supreme Court effectively decided a presidential election.[657] Despite the case's deep political implications, Friedman suggests that the Court's political capital at the time was sufficient to ensure public acceptance of its decision.[658]

Other scholars, such as Theunis Roux, conceptualize judicial authority without relying on the notion of political capital.[659] Roux identifies two key components of judicial authority: independence and legal legitimacy. Independence refers to a court's ability to demonstrate that its decisions are free from external pressures, particularly political interference.[660] Rather than being a binary trait (present or absent), independence exists on a spectrum, manifesting in varying degrees. Legal legitimacy, on the other hand, reflects a court's ability to rule within a range of societal tolerance, thereby ensuring institutional respect and reinforcing its authority.[661]

In this context, a court that engages in constitutional hardball risks eroding public trust and weakening its authority. *Catimba Constitucional*, adapted from the broader concept of constitutional hardball, refers to actions that, while technically legal, violate the fundamental principles underlying a

---

653. Martin Shapiro, *The European Court of Justice: Of Institutions and Democracy*, 32 ISR. L. REV. 3, 30 (1998).

654. *Id.* at 30.

655. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 358 (2009).

656. *Id.*

657. *Id.*

658. *Id.*

659. *See generally* THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005 (2013) (attributing the notion of conceptualizing judicial authority without relying on the notion of political capital to scholar Theunis Roux).

660. *Id.* at 87.

661. *Id.* at 24, 85.

legal system.[662] As Rubens Glezer explains, when a court opportunistically alters its precedents or excessively intervenes in political affairs, its legitimacy suffers.[663] Likewise, perceptions of partisanship can further undermine judicial authority. For instance, public trust in the U.S. Supreme Court reached a historic low of 25% in 2022.[664] In polarized societies, such crises of confidence create fertile ground for increasing political influence over judicial appointments.[665]

Beyond the judiciary's own conduct, public trust in courts contains an exogenous dimension. From this perspective, courts may retain institutional protection not because of their actions, but despite them. In this scenario, courts may lack substantial political capital or even suffer a legitimacy deficit among segments of the population. Yet, this does not necessarily preclude democratic mobilization in their defense. The case of the Israeli Supreme Court exemplifies this dynamic. Despite facing widespread criticism, both the American and Israeli courts have benefited from significant public mobilization aimed at preserving their institutional integrity.

I believe this phenomenon is partly attributable to what can be termed *constitutional culture*. Following Jason Mazzone's framework, constitutional culture refers to the set of invisible forces that lead citizens to respect and uphold the constitutional order.[666] It is this sociological element that compels individuals to:

> [A]ccept that they are governed by a written document, one that creates institutions of government and sets limits on what the government may do; the accepted belief that the governing charter is created by the citizenry; the knowledge that the charter is not timeless, but rather that the citizens may change it or revoke it under certain circumstances; and the understanding that until the charter is changed we are bound by it and required to go along with its ultimate results even though we are free to disagree with them.[667]

---

662. RUBENS GLEZER, CATIMBA CONSTITUCIONAL: O STF DO ANTIJOGO À CRISE CONSTITUCIONAL [CONSTITUTIONAL GAMESMANSHIP: THE SUPREME COURT, FROM ANTI-GAMES TO CONSTITUTIONAL CRISIS] 33 (2021).

663. *Id.*

664. Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.

665. Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 262 (2019).

666. Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671, 672 (2005).

667. *Id.*

Andrew Siegel's work provides a valuable framework for understanding this concept. He describes constitutional culture as "the black box through which the Constitution's words are transformed into concrete consequences."[668] While acknowledging the difficulty of defining the term precisely, Siegel characterizes constitutional culture as "an interlocking system of practices, institutional arrangements, norms, and habits of thought that determine what questions we ask, what arguments we credit, how we process disputes, and how we resolve those disputes."[669]

This constitutional culture played a key role in motivating the Israeli population to take to the streets in defense of their Supreme Court. A similar phenomenon occurred in Brazil, where popular support played a crucial role in shielding the Supreme Federal Court from political attacks. This is not to deny that many demonstrators may have had partisan motivations, but rather to recognize that the successful defense of an institution, like an apex court, requires a level of support that transcends ideological divides.

For such a mobilization to be possible, there must be a shared understanding that, despite any flaws a given court may have, an independent judiciary remains a better alternative than one that has been politically subdued. This fundamental belief in the necessity of judicial independence—despite imperfections—is a direct product of constitutional culture.

B. A Few Lessons of Constitutional Design

Supreme and constitutional courts can also be safeguarded institutionally—often the most common approach to ensuring their independence. Both ordinary and constitutional legislators can establish protective mechanisms to limit efforts aimed at subjugating the judiciary. In this Part, I explore how constitutional design can be leveraged to deter and mitigate the destructive potential of ill-intentioned actors.

1. Avoiding the Sirens

In 1791, during the French Revolution, the National Constituent Assembly concentrated both original and derived constituent powers. According to Jon Elster, this arrangement created an inherent conflict of interest between these powers.[670] By holding both responsibilities, the

668. Andrew M. Siegel, *Constitutional Theory, Constitutional Culture*, 18 J. CONST. L. 1067, 1107 (2016).

669. *Id.*

670. JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 140 (2000).

Assembly effectively acted as a judge in its own cause because it was tasked with balancing power between the Legislative and Executive Branches while simultaneously possessing the authority to determine its own future powers. This dynamic created an incentive for the Assembly to grant excessive authority to the Legislature.[671]

In response to this concern, Maximilien Robespierre addressed the Assembly advocating for a "self-denying ordinance."[672] His argument prevailed, leading the constituents to adopt a clause rendering them ineligible for the first ordinary election immediately following the drafting of the constitution.[673]

This type of safeguard exemplifies what Elster refers to as *pre-commitment*—a constraint that an agent imposes on itself in the present to secure long-term benefits.[674] To illustrate this concept, Elster invokes the Odyssey and the episode of Ulysses and the Sirens.[675] Aware that he would soon pass through waters inhabited by these mythical creatures, whose song lured sailors to their deaths, Ulysses took precautionary measures: he ordered his crew to plug their ears with wax, ensuring they would not succumb to temptation.[676] However, desiring to hear the Sirens' song himself, he instructed his sailors to bind him to the mast and ignore his pleas to be released.[677]

Similarly, pre-commitments can take the form of eternity clauses in constitutions. Just as Ulysses made his decision while in a rational state of mind, constitutional designers establish pre-commitments during moments of stability to protect foundational elements of the constitution during times of social or political upheaval. Thus, even if an ill-intentioned actor manages to rally widespread public support—akin to the Sirens' song—the constitution remains safeguarded,[678] barring a full-scale revolution.[679]

While pre-commitments can exist independently of constitutional design, they have increasingly been integrated into it. Constitutional framers must therefore establish rules that enhance the rationality of the system and minimize self-interest in governmental decision-making. This can be

---

671. *Id.*
672. *Id.* at 141.
673. *Id.*
674. *Id.* at 142.
675. *Id.* at 94.
676. *Id.*
677. *Id.*
678. Lenio Luiz Streck, *Entre fetiches por ditadura e vivandeirismo, o que o Direito pode fazer?* [*Between Fetishes for Dictatorship and Camp Worship, What Can the Law Do?*], CONSULTOR JURÍDICO (Apr. 18, 2022), https://www.conjur.com.br/2022-abr-18/streck-entre-fetiches-vivandeirismo-direito/.
679. ELSTER, *supra* note 670, at 94.

achieved through broad structural choices—such as opting for a presidential or parliamentary system—or through more specific measures concerning the composition, powers, and appointment procedures of a constitutional court. The latter set of protections warrants particular attention.

Observing the factors that contributed to the erosion of Poland's Constitutional Court and the decline in public trust in the U.S. Supreme Court, Konrad Duden proposed reforms to strengthen the German Federal Constitutional Court.[680] He warned that a simple majority in the Bundestag could be used to manipulate the Court's composition and authority.[681] According to Duden, key elements such as the duration of judicial terms and the voting threshold required for judicial appointments are not enshrined in Article 94 of Germany's Basic Law; instead, they are regulated by the Federal Constitutional Court Act—making them more vulnerable to political interference.[682]

To address this vulnerability, Duden recommended that Germany introduce stronger protections for its Constitutional Court.[683] First, he argued that changes affecting the Court's independence should not be left to simple parliamentary majorities.[684] Instead, the provisions governing the Court's structure and operation should be entrenched in the Constitution itself.[685] Additionally, he suggested that any modifications to these provisions should require either a qualified parliamentary majority or approval from the Court itself.[686]

In December 2024, taking into account both external threats and internal developments—particularly the rise of the far-right Alternative for Germany (*Alternative für Deutschland*), widely regarded as an extremist party—German lawmakers adopted part of these recommendations.[687] By an overwhelming majority of 600 to 69, they amended the Constitution to entrench the rules governing the Constitutional Court.[688] As a result, any future changes to these provisions now require a two-thirds parliamentary majority, significantly raising the threshold for potential manipulation.[689]

---

680. Konrad Duden, *Protect the German Federal Constitutional Court!*, VERFASSUNGSBLOG (Feb. 13, 2024), https://verfassungsblog.de/protect-the-german-federal-constitutional-court/.

681. *Id.*

682. *Id.*

683. *Id.*

684. *Id.*

685. *Id.*

686. *Id.*

687. *German Lawmakers Back Plan to Protect Supreme Court Against Meddling by Authoritarians, Extremists*, AP (Dec. 19, 2024), https://apnews.com/article/germany-constitutional-court-protection-vote-parliament-3b9a3c3966f6ac5e52d87f57c4f2b05f.

688. *Id.*

689. *Id.*

2. Courts on the Top

The use of qualified majorities in constitutional design can be structured in layers, as Landau and Dixon explain. Their tiered constitutional design approach seeks to integrate the strengths of two predominant constitutional models: one characterized by conciseness, abstraction, and rigidity, and the other by extensive detail and flexibility.[690]

By combining "the virtues of rigidity and flexibility," tiered constitutional design establishes a constitutional amendment framework with varying rules depending on the significance of each constitutional provision.[691] This model helps mitigate some of the weaknesses of more traditional approaches. For instance, the U.S. Constitution has endured for over 200 years in part due to the strict amendment procedures outlined in Article V.[692] However, this rigidity has also made it extraordinarily difficult to modernize, preventing democratic forces from incorporating contemporary principles into its text.[693] Conversely, constitutions that are rigid in theory but highly amendable in practice—such as Brazil's, which has been amended more than 140 times in just 37 years—could benefit from a tiered amendment system.[694] Such a system would serve two key purposes: first, it would allow less fundamental issues to be modified with relative ease, and second, it would prevent excessive amendments from eroding public trust in the constitutional framework.[695]

When applied to judicial protection, this approach could be used to impose stricter amendment procedures on provisions related to judicial independence. Safeguards such as judicial irremovability, tenure security, retirement age, appointment procedures, and the scope of constitutional courts' authority, if adequately protected, can serve as a shield against antidemocratic encroachments.

I use the word *can* here for a pragmatic reason: no legal safeguard is entirely insurmountable to political power—a reality well understood by

690. Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 440 (2018) [hereinafter *Tiered Constitutional Design*].

691. *Id.* at 438.

692. Article V stipulates that, to be approved, constitutional amendments must receive two-thirds of the votes in each house of Congress and three-quarters of the votes in the State Legislatures. U.S. CONST. art. V.

693. *Tiered Constitutional Design*, *supra* note 690, at 440.

694. *Id.*; *Parlamentares aprovaram 14 emendas à Constituição em 2022* [*Lawmakers Approved 14 Amendments to the Constitution in 2022*], CÂMARA DOS DEPUTADOS (Dec. 27, 2022), https://www.camara.leg.br/noticias/931900-parlamentares-aprovaram-14-emendas-a-constituicao-em-2022/.

695. *See* ALBERT, *supra* note 374, at 43.

scholars of the *state of exception*.[696] While we can design the most effective legal mechanisms available to preserve democracy, the law itself has limits. Ultimately, it is up to constitutional legislators to adopt the most robust protections possible for democratic institutions—and hope they prove sufficient.

Despite these limitations—and an acknowledgment of the model's imperfections—Landau and Dixon argue that tiered constitutional design can serve as a useful tool in resisting the global third wave of illiberalism.[697] This trend, identified by Anna Lührmann and Staffan I. Lindberg, has been unfolding since the 1990s.[698]

3. Blinding the Decisionmakers

Constitutional design can also safeguard courts by introducing uncertainty into the political equation—what Adrian Vermeule refers to as applying the *veil of ignorance* to constitutional law.[699] Rules based on the veil of ignorance subject decision-makers to "uncertainty about the distribution of benefits and burdens that will result from a decision."[700] The benefits of the veil of ignorance can be achieved in two ways: (1) ensuring that decision-makers do not know their future identities and attributes, and (2) preventing them from knowing whether they will ultimately benefit from the rules they establish.[701]

By incorporating veil of ignorance rules into constitutions, constitutional designers can curb self-interest and promote impartial decision-making. Consider the example of presidential succession rules. Imagine a constitution that fails to specify a clear line of succession in the event that a sitting president becomes unable to perform their duties. Such an omission could lead to a constitutional crisis, with competing political factions vying for control of the presidency. Until a resolution is reached, the country would be left leaderless, creating instability and governance paralysis. By introducing explicit succession rules,[702] constitutional designers provide a universally acceptable solution, as the predetermined order of succession applies regardless of who holds the office.

Examples of veil of ignorance rules can be found in several constitutions worldwide. The Brazilian Constitution, for instance, establishes the

696. GIORGIO AGAMBEN, ESTADO DE EXCEÇÃO 20 (Iraci D. Poleti trans., 2d ed. 2004).
697. *Tiered Constitutional Design*, *supra* note 690, at 503.
698. Lührmann & Lindberg, *supra* note 3, at 1102.
699. *Veil of Ignorance Rules*, *supra* note 613, at 399.
700. *Id.* at 399.
701. *Id.*
702. *Id.* at 400–01.

presidential line of succession in Article 80 for cases where both the President and Vice President are unable to serve. It designates the following order: the President of the Chamber of Deputies, followed by the President of the Federal Senate, and then the President of the Supreme Federal Court.[703] A similar approach was used in Venezuela's 1961 Constitution, which remained in effect until it was replaced following the Constituent Assembly convened by Hugo Chávez.[704] Articles 186, 187, and 188 of that Constitution regulated presidential succession using veil of ignorance rules, as does Article 106 of the Turkish Constitution.[705]

In the context of the third wave of autocratization, societies[706]—especially those experiencing high levels of political polarization—can leverage the veil of ignorance to craft rules that limit the ability of authoritarian actors to manipulate constitutional courts. For example, if a president seeks to expand the number of seats on a constitutional court, the constitution could stipulate that any such expansion will only take effect in the next presidential term. This provision forces the incumbent to confront the possibility that their political rival, rather than themselves, may ultimately benefit from the change.

The veil of ignorance can also serve as a safeguard against court taming in other forms. Constitutional provisions can mandate that any changes affecting a court's jurisdiction or authority take effect only in the subsequent legislative or judicial term. Similarly, in cases where a government attempts to lower the mandatory retirement age for judges—effectively enabling the appointment of new justices aligned with the ruling party—the constitution can impose a delay on such changes, ensuring they do not immediately grant the executive branch a majority on the court.

C. Emergency Hermeneutics

Thus far, I have examined preventive measures aimed at shielding supreme and constitutional courts from political subjugation. However, the process of judicial taming does not always occur abruptly. This raises a crucial question: What should be done when preventive mechanisms fail?

In such situations, courts must assert their authority to preserve their independence. The argument here is that supreme and constitutional courts, when facing an active taming process, possess the power to invalidate acts,

703. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 40 (Braz.).

704. CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA Jan. 23, 1961, art. 187 (Ven.).

705. Türkiye Cumhuriyeti Anayasası [Constitution of the Republic of Türkiye], Nov. 9, 1982, art. 106 (as amended by Act No. 6771, April 16, 2017) (Turk.).

706. Lührmann & Lindberg, *supra* note 3, at 1095.

laws, and even constitutional amendments that threaten their constitutionally assigned functions.

This proposal, however, carries the inherent risk of expanding judicial authority—an issue that cannot be overlooked. For this reason, I seek to establish interpretative parameters that courts can follow when exercising these exceptional powers. While no framework is perfect, I hope this approach introduces a degree of rationality into the process.

Suzie Navot highlights a key characteristic of democratic backsliding: no single law, amendment, or provision typically delivers a fatal blow to democracy.[707] Rather, the cumulative effect of multiple legal maneuvers leads to systemic decay.[708] "It is the big picture, the whole series of legal moves, that brings about a fundamental change in the state's regime until it is no longer a liberal democracy."[709]

The process of court taming often mirrors the gradual demise of democratic institutions. In Hungary, for example, Fidesz initiated its power grab with a constitutional overhaul. This was followed by changes in judicial appointment procedures, a reduction in judges' retirement age, and the establishment of the National Judicial Office—incrementally stripping the Constitutional Court of its independence.[710] A similar pattern unfolded in Poland, where successive legislative changes gradually eroded the Constitutional Court's authority.[711]

Against this backdrop, the actions of the Israeli Supreme Court illustrate the argument advanced here. In an extensive ruling spanning hundreds of pages, the Court concluded that the amendment approved by the Netanyahu government fundamentally undermined its ability to fulfill its constitutional role as a check on government power.[712]

For courts to act in self-defense, the first step is recognizing their authority to strike down not only ordinary legislation but also constitutional amendments that threaten judicial independence. While judicial review of ordinary laws is a cornerstone of liberal constitutionalism—a power explicitly granted in many legal systems—the power to invalidate constitutional amendments is far less common.

Nevertheless, some courts have asserted this authority through interpretative reasoning. The Brazilian Supreme Federal Court, the Supreme

---

707. Suzie Navot, *An Overview of Israel's 'Judicial Overhaul': Small Parts of a Big Populist Picture*, 56 ISR. L. REV. 482, 483 (2023).

708. *Id.*

709. *Id.* at 482.

710. *See supra* Part II.C.

711. *See supra* Part II.D.

712. *See* HCJ 5658/23 Movement for Quality Government v. Knesset (2024) (Isr.) [English Translation].

Court of India, and the Israeli Supreme Court have each claimed the power to review and invalidate constitutional amendments that violate fundamental constitutional principles.[713]

The Brazilian case stands out due to its incorporation of eternity clauses. Article 60, Section 4 of the 1988 Constitution explicitly prohibits amendments that tend to abolish core democratic principles: federalism, the separation of powers, and individual rights.[714] This provision has enabled the Supreme Federal Court to assert its authority to strike down constitutional amendments deemed materially incompatible with these fundamental principles.[715]

In constitutional systems with tiered amendment procedures, there is an implicit recognition of a hierarchy of constitutional values—a concept Richard Albert refers to as the *symbolic function of amendment rules*.[716] For example, Cuba's Constitution enshrines socialism as an immutable principle, signaling the regime's core ideological commitment.[717] Similarly, South Africa's Constitution establishes three levels of amendment procedures, with the most stringent requirements reserved for provisions defining the country's fundamental values.[718]

India's Supreme Court, however, claimed the power to invalidate constitutional amendments despite the absence of explicit eternity clauses or tiered amendment rules.[719] In *Kesavananda Bharati v. State of Kerala*, the Court ruled that the power to amend the Constitution does not extend to altering its basic structure.[720] This doctrine has since enabled the Indian Supreme Court to hear cases involving judicial independence, including decisions on the process of judicial appointments.[721]

Remarkably, even after India's democratic decline under Narendra Modi, the Supreme Court has continued to exert significant constraints on the executive[722]—making India an outlier among countries that experienced autocratization without their courts being fully captured.

---

713. S.T.F, Ação Direta De Inconstitucionalidade No. 5. 105/DF, Relator: Min. Luiz Fux, 1.10.2015, Diario da Justiça [D.J.], 1.10.2015, 1, 37 (Braz.).

714. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60 (Braz.).

715. S.T.F, Ação Direta De Inconstitucionalidade No. 5. 105/DF, Relator: Min. Luiz Fux, 1.10.2015, Diario da Justiça [D.J.], 1.10.2015, 1, 37 (Braz.).

716. ALBERT, *supra* note 374, at 47.

717. *Id.* at 47–48.

718. *Id.* at 48–49.

719. Kesavananda Bharati Sripadagalvaru v. State of Kerala, (1973) 4 SCC 225 (India).

720. *Id.*

721. Rangin Pallav Tripathy, *Unveiling India's Supreme Court Collegium: Examining Diversity of Presence and Influence*, 18 ASIAN J. COMP. L. 179, 179 (2023).

722. Since the 1970s, India's score on the Judicial Constraints on the Executive Index has remained above 0.7, reaching 0.8 in the 1990s and maintaining that level until 2014, when it started to

As Yaniv Roznai notes, *Kesavananda Bharati* did not specify a definitive list of untouchable constitutional principles.[723] However, subsequent jurisprudence has clarified that the basic structure doctrine protects elements such as constitutional supremacy, the rule of law, separation of powers, judicial review, judicial independence, human dignity, national unity, free and fair elections, federalism, and secularism.[724]

Similarly, on January 1, 2024, the Israeli Supreme Court recognized its authority to invalidate amendments to Israel's Basic Law.[725] Like India, the Israeli Supreme Court effectively judicially created an unalterable constitutional principle, asserting that the country's identity as a Jewish and democratic state cannot be legislatively undermined.[726]

The histories of these countries share a crucial element that, to some extent, legitimized their Supreme Courts' bold actions: a foundational commitment to liberal democracy. In Brazil, for instance, Article 1 of the 1988 Federal Constitution explicitly defines the country as a Democratic State of Law.[727] Additionally, its eternity clauses in Article 60, Section 4 enshrine core principles of liberal democracy, such as the separation of powers and the protection of individual rights and guarantees.[728] Similarly, India declares itself a Democratic Republic in its preamble, affirming its duty to uphold fundamental democratic principles such as liberty, equality, and fraternity.[729] Turkey's Constitution also makes an explicit commitment to liberal democracy, a theme reiterated throughout its text.[730]

Israel, in turn, affirms its democratic character in Articles 1A of the Basic Law: Human Dignity and Liberty and 7A of the Basic Law: The Knesset.[731] The latter provision goes even further by barring candidates whose actions—express or implied—deny Israel's status as a Jewish and

---

decline. In the most recent evaluation (2023), the index recorded 0.71, continuing the downward trend. *See Judicial Constraints on the Executive Index*, *supra* note 84.

723. YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 46 (2017).

724. *Id.* at 46–47.

725. HCJ 5658/23 Movement for Quality Government v. Knesset (2024) (Isr.) [English Translation].

726. *See supra* Part II.F.

727. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 1 (Braz.).

728. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60 (Braz.).

729. India Const. pmbl.

730. Türkiye Cumhuriyeti Anayasası [Constitution of the Republic of Türkiye], Nov. 9, 1982, art. 2 (Turk.).

731. Basic Law: Human Dignity and Liberty art. 1A, 5752–1992, LSI 45 150 (1991–1992) (Isr.) [English Translation]. Article 1A states: "The purpose of this Basic Law is to protect human dignity and liberty, in order to embed the values of the State of Israel as a Jewish and democratic state, in a basic law." *Id.* § 1A.

democratic state.[732] The Polish Constitution similarly recognizes the democratic nature of its government and explicitly commits to the rule of law.[733] In El Salvador, the Constitution defines the government as republican, democratic, and representative.[734] Even Hungary's Constitution—drafted under Viktor Orbán's government—retains formal commitments to democracy and the rule of law.[735]

Why do autocratic regimes continue to include democratic commitments in their constitutions? The answer has both domestic and international dimensions, but in both cases, it can be summarized in a single word: legitimacy. Only the people can confer legitimacy on a regime, which is why even authoritarian leaders feel compelled to maintain the illusion that they govern in the people's name.

This creates an inherent contradiction. A leader cannot claim the legitimacy of democracy while simultaneously dismantling the principles that sustain it. Allowing such a scenario effectively renders constitutional commitments meaningless, stripping them of any normative force and undermining the very system they were designed to uphold.

In this context, it is essential to understand that liberal democracy, the rule of law, and modern constitutionalism are co-original—in the Habermasian sense.[736] Emerging from liberal revolutions, these concepts developed together and cannot be meaningfully separated. Systems that incorporate some of these elements while rejecting others inevitably become dysfunctional from a democratic perspective.

While democracy itself may be an essentially contested concept,[737] the notion of liberal democracy carries certain non-negotiable elements. Rosalind Dixon and David Landau refer to this as the democratic *minimum core*, a concept derived from the overlapping provisions found in constitutional democracies worldwide.[738] In essence, the democratic minimum core consists of: (1) a commitment to free, fair, and regular multiparty elections; (2) political freedoms and rights; and (3) a system of

---

732. Basic Law: The Knesset art. 7A, 5746–1985, LSI 39 216 (1984–1985) (Isr.) [English Translation].

733. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] art. 2 (Pol.).

734. CONSTITUTION OF THE REPUBLIC OF EL SALVADOR [CONSTITUTION] 1983, art. 85 (El Sal.).

735. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. B(1).

736. Habermas uses co-originality to explain that popular sovereignty and fundamental rights—public and private autonomy—are mutually presupposing and equally basic, so that neither can be derived from or subordinated to the other. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 104 (William Rehg trans., 1996) (1992).

737. W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 168 (1956).

738. ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 27.

checks and balances necessary to preserve the previous items.[739] Under this framework, a constitutional court may invalidate changes to its structure if the changes, either individually or cumulatively, result in a violation of the democratic minimum core.[740]

How would this principle function in practice? Consider a scenario in which a president proposes reforms to the U.S. Supreme Court, including changes to its authority and an expansion of its membership from 9 to 15 justices. If these reforms are likely to disrupt the separation of powers—subjecting the Court to presidential influence or impairing its ability to function independently—the Court could justifiably declare them unconstitutional.

However, does this mean that expanding the Supreme Court from 9 to 15 members is inherently unconstitutional? Not necessarily. If none of the existing justices were appointed by the president proposing the reform, or if the proposed changes did not undermine the Court's institutional capacities, the reform might be acceptable. The evaluation must be contextual, considering not just the reform in isolation but its systemic impact on the constitutional order.[741]

Well-intentioned political actors can implement similar reforms while preserving democratic integrity. One way to achieve this is by distributing the reform's effects over time to prevent an immediate imbalance of power. For example, if a president wishes to expand the Court, they could stipulate that the first two new seats be filled immediately, while the remaining four are allocated across subsequent presidential terms. Introducing uncertainty—in this case, the possibility that the president will not be re-elected—removes the taint of self-interest from the proposal, thereby strengthening its legitimacy. By ensuring that political opponents might also benefit from the reform, the proposal becomes more difficult to interpret as an attempt to undermine judicial independence.[742]

For these reasons, I consider court-packing inherently illegitimate, even when justified as an effort to enhance democracy. Court-packing inherently assumes that newly appointed judges will be politically aligned with those who appointed them—creating a far greater threat to the separation of powers than a court composed of judges who may, to some degree, be resistant to democratic ideals.

---

739. *Judicial Reform or Abusive Constitutionalism*, *supra* note 90, at 294.
740. *Id.*
741. *Id.*
742. *Veil of Ignorance Rules*, *supra* note 613, at 399–400.

D. Key Takeaways

A key conclusion from this Article is that there is no universal model for safeguarding constitutional courts and democracy. The rules designed to protect judicial independence must be tailored to the specific legal and political contexts of each country. This personalized approach, informed by the case studies examined, underscores the importance of solutions adapted to the unique constitutional frameworks and societal dynamics of each nation.

No single model, on its own, is sufficient to guarantee the protection of constitutional courts. However, when combined, these mechanisms can create a robust defense against authoritarian encroachments. Even so, constitutional design is not infallible; in moments of crisis, it may fail, necessitating recourse to emergency hermeneutics. Yet such measures can only be sustained with strong public support. This is because, in times of constitutional abnormality, the rule of law alone may prove inadequate. As Gilberto Bercovici aptly observes, "legislation of exception deals with something that, in reality, it cannot handle. The legitimacy of acts carried out during the exception depends on political and popular support, not legal provisions."[743]

This lesson was illustrated in Brazil between 2020 and 2022, when the Supreme Federal Court issued a series of rulings—many of questionable constitutionality—to counter an authoritarian threat that ultimately culminated in an attempt to overturn the electoral results on January 8, 2023.[744]

The conceptual and typological framework presented, alongside the case studies analyzed, reinforces the necessity of a multi-layered system for protecting the most vital elements of a constitutional order—particularly supreme and constitutional courts. Only through such a comprehensive approach can judicial independence be effectively preserved against illiberal threats.

---

743. GILBERTO BERCOVICI, SOBERANIA E CONSTITUIÇÃO: PARA UMA CRÍTICA DO CONSTITUCIONALISMO 40 (2d ed., 2013) (author's translation).

744. Théo G. de Sá-Kaye, *Examining the Brazilian Supreme Federal Court's Expanded Powers in the Bolsonaro Era: A Win for Democracy or a Turn Toward Autocracy?*, 56 U. MIAMI INTER-AM. L. REV. 320, 352–53 (2025); Thomas Bustamante & Emilio Peluso Neder Meyer, *The Brazilian Federal Supreme Court's Reaction to Bolsonaro: Mixed Responses and the Need to Preserve the Court*, VERFASSUNGSBLOG (Sept. 26, 2022), https://verfassungsblog.de/the-brazilian-federal-supreme-courts-reaction-to-bolsonaro/.

FINAL REMARKS

The taming of a court constitutes an unequivocal violation of the democratic minimum core, as it renders the judiciary incapable of effectively fulfilling its role in the system of checks and balances. This conclusion is reinforced by the experiences of the countries analyzed in this Article—all of which were electoral or liberal democracies that underwent regime transitions following intensified constitutional erosion, often driven by changes in the objective or subjective dimensions of their supreme or constitutional court.

Make no mistake: court taming alone is not enough to dismantle a democracy, but it has proven to be one of the most favored and effective strategies through which authoritarian actors have advanced the third wave of autocratization. This cyclical phenomenon cannot be ignored.

There is also the question of the varying degrees of risk posed by different methods of court taming. While context plays a crucial role in determining the extent of the damage, it seems evident—at least prima facie—that court expansion and reduction present particularly significant threats to a country's democratic structure.

Thus, through comparative analysis, I have sought to establish a framework for identifying how the court taming process unfolds. My goal—and I hope I have achieved it—was to present parameters that maximize objectivity, allowing academics, policymakers, and civil society members to assess court restructuring measures with a rigorous analytical tool.

The most challenging—and likely most controversial—aspect of this Article is my discussion of emergency hermeneutics. Advocating for the expansion of judicial powers, even under exceptional circumstances, is an interpretation that many will understandably reject. After all, the debate over who has the final say on constitutional matters remains far from settled.

In this context, Barry Friedman's insights on political capital and Theunis Roux's analysis of legal legitimacy help illuminate the judiciary's precarious position—despite its broad institutional powers. Recognizing this fragility is essential for understanding when a court is exceeding its legitimate authority, particularly in the absence of an extraordinary crisis.

Beyond exercising institutional restraint, courts can solidify their legitimacy through the personal conduct of their members—returning to the idea of sociological legitimacy. When judges exercise discretion, maintain personal reserve, and remain distanced from political and economic interests, their courts gain credibility. Conversely, when judges—especially those on apex courts—attend events sponsored by corporations whose cases they may later adjudicate, accept lavish gifts from billionaires, or publicly express

political opinions, they gradually erode the legitimacy of their courts. This erosion occurs incrementally: event by event, interview by interview, gift by gift.

Defending a court is an essential act in safeguarding democracy. However, this role is not always fulfilled through praise alone. Courts are also protected through criticism—provided that such criticism is constructive rather than anti-institutional. By criticism, I refer not to attacks that seek to abolish courts or undermine their constitutional role, but rather to critiques that are methodologically rigorous and aimed at institutional improvement rather than destruction. As Conrado Hübner Mendes aptly puts it, "[s]ubjecting judicial misconduct to legal criticism is a constitutional matter."[745]

Protecting courts—and, by extension, judicial independence—requires foresight on the part of legislators, who must anticipate potential risks and implement institutional safeguards to mitigate them. However, above all, it depends on the unwavering commitment of both society and the judiciary to the values of liberal democracy. These values may very well constitute the last line of defense against autocratization.

745. Conrado Hübner Mendes, *Defender o STF de seus ministros* [*Defending the Supreme Federal Court and Its Ministers*], FOLHA DE S.PAULO (June 5, 2024), https://www1.folha.uol.com.br/colunas/conrado-hubner-mendes/2024/06/defender-o-stf-de-seus-ministros.shtml.