(edited by)
Pasquale Pasquino, Francesca Billi

THE POLITICAL ORIGINS OF CONSTITUTIONAL COURTS

Italy, Germany, France, Poland, Canada, United Kingdom

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Editor:
Francesca Limana, Press and Public Relations of the Fondazione Adriano Olivetti

Fondazione Adriano Olivetti
Rome
Via Giuseppe Zanardelli, 34 - 00186 Roma
tel. +39 06 6877054 fax +39 06 6896193
Ivrea
Strada Bidasio, 2 - 10015 Ivrea (TO)
tel./fax +39 0125 627547

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Introduction

I would like to start reminding briefly the general questions of our meeting. The increasing development of Constitutional Justice in the world has been often explained as just one aspect of the *global expansion of judicial power*; this was by the way the title of a famous book edited by Tate and Vallinder (1995).

This account that is not wrong but somehow partial is largely influenced by the American experience. *Judicial review* in the United States is not written down in the constitution, it is a constitutional *convention* that developed, by the way, mostly in the 20th century. View from Europe, Latin America and more recently from Asia, Constitutional justice seems difficult to understand, if we don't take into account the reasons that may have motivated political actors in constituent assemblies, after the Second World War, to introduce in written and rigid constitutions, judicial organs in charge of controlling what the doctrine calls the *hierarchy of norms*.

Having in mind this question, I asked friends and colleagues to discuss with us four European experiences, in chronological order Italy, Germany, France and Poland. I had moreover the chance, last fall, to co-teach with Sujit Choudhri and Cristina Rodriguez a seminar at NYU on comparative Constitutional justice and thanks to Sujit, who kindly accepted to come from Canada to be today with us, I learnt a

lot about the emergence of constitutional adjudication notably in common law countries.

Professor Torre also kindly accepted to tell us about the country that, in superficial comparative legal culture, has the strange reputation of being a sort of giacobin regime dominated by a sovereign parliament, the United Kingdom. We'll see, that it's not exactly true that Giacobins took power on the northern side of the Channel.

Moreover, as you know, an American political scientist, Tom Ginsburg, published recently an important book part of which is devoted to the same topic, the political origins of Constitutional court. Sujit Choudhry will come back to the Ginsburg book, let me just say that in my opinion his hypothesis is interesting and thought provoking but it may prove not to be true most of the time from a descriptive/historical point of view. It may be rescued, as usual in case of rationale choice interpretative models, as a normative theory, or perhaps as a prescriptive one, so as theory about constitutional engineering. But it seems to me in general an unduly and somehow misleading generalization from a specific French experience that Michel Troper will probably discuss, the French Constitutional reform of 1974. But I don't want to take more time and shall I ask Justice Garlicki to open a conversation this morning, he will speak about the interesting case of Poland, where there was a Constitutional court already before the collapse of the communist regime.

Pasquale Pasquino

Lech Garlicki

Constitutional Court of Poland: 1982-2009*

This seminar is meant to discuss how the constitutional adjudication was emerging in selected countries of Europe and, in particular, what were the reasons that prompted drafters of the respective Constitutions to accept a judicial check on parliamentary powers. We were further invited to comment on the relevancy of Tom Ginsburg's observations related to the similar processes in Western Asia.

Let me begin with a reference to the Ginsburg's *insurance model of judicial review*, i. e. to his idea that the establishment of a constitutional jurisdiction should be regarded in a perspective of an insurance that a present majority offers to itself as a future opposition. This is a very attractive approach, but - when seen upon all particularities of the Polish transformation process - it reflects only a part of the reality and, perhaps, not the most important part.

The history of the Polish Constitutional Court is now 27 years long and, even if it is not a very impressive time span, it should not be forgotten that the process of democratic transition (if calculated from the Round Table Talks in the Spring of 1989) is only 20 years old. The Constitutional Court was created when the Communist regime was still around and, at that time, it was very difficult to imagine that, within next two decades, Poland would join the Western world, the

* This paper, adjusted to the methodological approach of the Rome Seminar, is based on my previous presentations of the history of the Polish Constitutional Courts. See, in particular:
M. F. Brzezinski, L. Garlicki: *Judicial Review in Post-Communist Poland. The Emergence of a Rechtstaat, Stanford Journal of International Law*, 31 (1995), p. 13-59;
L. Garlicki: *The Experience of the Polish Constitutional Court* [in:] W. Sadurski (ed.): *Constitutional Justice - East and West, Kluwer Law International*, The Hague-London-New York 2002, p. 265-282;
L. Garlicki: *Vingt ans du Tribunal constitutionnel polonais* [in:] *Renouveau du droit constitutionnel. Melanges en l'honneur de Louis Favoreu*, Dalloz, Paris 2007, p. 191-207.

European Union and NATO included.
Thus, the evolution of constitutional adjudication in Poland developed in a very particular context and its final shape was a combination of three factors: miscalculation (or - simply - ignorance of those who allowed its creation); chance (or - simply - a particular constellation of lucky events that allowed it to survive) and persistence (or - simply - the Court's ability to preserve integrity and courage over the three decades of its operation).
Those factors were present in the entire history of the Polish Court, but their role has been changing depending on the general context. There were at least three distinct periods in the development of constitutional adjudication in Poland:

1) 1982-1989, i. e. from the enactment of the constitutional amendment that provided for the establishment of the Constitutional Court till the democratic elections of 1989 that marked the end of the Communist regime;
2) 1989-1997, i. e. from the beginning of transformation till the enactment of the new Constitution, that entered into life on October 17, 1997;
3) since 1997, when the Court is operating under the new Constitution.

The Formative Period (Spring 1982- Fall 1989)

1.

There has never been any tradition of constitutional adjudication in Poland. The 1921 Constitution was drafted under a clear influence of the institutions of the French Third Republic. Thus, the Constitution was very much parliamentary-oriented and it offered no room for judicial review of parliamentary legislation. The only judicial body that

could, indirectly, decide on constitutional questions was the Court of Impeachment, but it has never played any important role in practice.
Neither was there any room for constitutional adjudication after the WWII. As it is well known, the Communist doctrine has never taken Constitutions too seriously and, besides, was quite hostile to the existence of any independent judicial bodies. Also in the doctrine, once - after 1956 - it was permitted to propose some modifications of the existing constitutional system, constitutional adjudication was not among the favourite ideas. Most of the liberally-minded scholars focused their proposals on the reestablishment of the administrative courts and they succeeded in 1980, when the Supreme Administrative Court began to operate.
It was only in the end of 1970s, and particularly in the *First-Solidarity-Period* (Summer 1980 - Fall 1981) when more developed discussions on constitutional adjudication began. This time also politicians, on both sides, were ready to get in. However, it was the proposal of reestablishment of the Court of Impeachment that appeared as the most attractive for politicians, particularly for the reform-oriented wing of the *ancien regime*. The Court of Impeachment was perceived as an instrument to try (and, perhaps, even punish) those former leaders of the Communist Party who were made responsible for the economic crisis. Thus, it was regarded as a *legitimization-instrument* allowing the new leadership to get public confidence they desperately needed at that time. But, once an expert group was appointed to prepare necessary legislative measures, its mandate became broader and the group was also invited to propose amendments concerning the reintroduction of the office of the President of the Republic (an idea quite attractive for General Jaruzełski) and the introduction of a constitutional court. This latter proposal was of no particular interest to the political leaders and the credit for its inclusion into the mandate of the expert group should be given to some open minds still present around the political leadership of the Communist Party.
The political situation changed dramatically when, in December 1981,

martial law was imposed, Solidarity leaders were imprisoned and the military assumed control. It left no room for any genuine democratic transformation, but it did not kill the idea of a constitutional court. In March 1982, only three months after the martial law had been imposed, a constitutional amendment provided for establishment of two new judicial bodies: the Court of Impeachment (so-called Tribunal of State) and the Constitutional Court (called - the Constitutional Tribunal; it should be kept in mind that, in the Polish tradition, the name *Tribunal* has always been associated with particularly distinguished judicial bodies). It could seem wholly illogical, since the martial law - by its very nature - was incompatible with any form of judicial review. But history of institutions does not always follow all patterns of logic. As it was already mentioned, General Jaruzełski believed that the establishment of the Court of Impeachment (and, eventually, the use of that Court to deal with some former State officials) would help to legitimize the new structure of power. The proposals of the expert group were ready and - since all State institutions remained under full control of the military/communist party leadership - it could be assumed that also new Courts would remain within that control. Thus, even if the creation of the Constitutional Court seemed not to be as attractive as of the Court of Impeachment, it was assumed that it would serve as a nice decoration bringing no particular harm for the system. But, just in case of unexpected troubles, the powers of the Constitutional Court should have remained limited: its judgment on unconstitutionality of a parliamentary law was not to be final and could be rejected by a Parliamentary resolution adopted by a majority of two thirds of members. Since more than 90% members of Parliament were controlled by the Communist Party, the last word as to the effects of constitutional adjudication remained outside the competence of the Court. It did not promise too much for the future chances of constitutional adjudication, but the formal step had been taken and the Court was present in the Constitutional provisions. So, the 1982 Amendment could be regarded as a result of combination of

a lot of political calculation (or - simply - hypocrisy) and a bit of luck.

2.

The 1982 Amendment provided for a limited version of a constitutional court. However, soon after it has been adopted, some second thoughts emerged in more conservative circles of the Communist establishment. Unlike the Generals, who did not have a faintest idea what a constitutional adjudication could mean, and unlike *the systemic democrats* who believed that it may play some role when political situation would stabilize, the conservatives grasped dangers inherent in any idea of independent control of their action. It was, first of all, the legal services at the Prime Minister's Office as well as the leadership of the Supreme Court who were not ready to allow the actual creation of the Constitutional Court. In consequence, it was only the Court of Impeachment Act that was adopted already in March 1982 and only that Court was appointed few months later (it is worth to add that expectations accompanying that institution proved to be completely miscalculated: until the end of 1989, the Court has never heard any case and early attempts to indict four former State officials were abandoned already in 1984). The process of elaboration of the Constitutional Court Act dragged indefinitely due to a deadlock between the conservatists and democrats. Between 1982 and 1985 dozen versions of the Act have been submitted, none of them surviving criticism of the opponents of any form of constitutional adjudication. It should be observed that those opponents had also foreign support - in 1982 a group of East-German party members dispatched a letter to the Polish leadership expressing their concern that the establishment of a constitution court would constitute a first step on the sliding scale of destruction of the communist pattern of government. Today, we can say that they were quite right.

But, this was another piece of luck that *democrats* were still present in

the Parliament and were able to pursue their idea to squeeze constitutional adjudication into the communist system of government. At the same time the political context has changed. The military were no longer able or willing to run the State (and, particularly, to assume responsibility for the deteriorating economy) and the Communist Party was too week to regain its traditional position of leadership. The whole system was slowly disintegrating and there were more and more gaps in the once centralized system of power. It led to a certain competition between the Parliament (its commissions) and the Cabinet (the Prime Minister Office). At least some MPs believed that once the Constitutional Court is brought to life, it would promote pro-parliamentary interpretation of the 1952 Constitution.
In the beginning of 1985, the 14-th draft of the Constitutional Court Act was accepted by the Politburo of the Communist Party. Now, the elaboration of the final text was controlled by the parliamentary Committee of Legislation. The Act was adopted on April 29, 1985.

3.

The new Act had to follow the constitutional provisions: it provided that judges of the Constitutional Court are elected by the Parliament for a single eight-years term and it reserved for the Parliament final decisions as to unconstitutionality of its laws. The Act itself provided for several further limitations of the Constitutional Court:

- the right of initiative was restricted mostly to the central and locals state organs and state-controlled trade-unions and other similar organisations; the courts were allowed to request a preliminary ruling on constitutionality from the Constitutional Court, but all such requests had to be approved by the First President of the Supreme Court or the President of the Supreme Administrative Court;

- the Court's jurisdiction was limited rationae temporis (no acts adopted before 1982 could be reviewed - it immunized the 1981 martial law decrees from any challenge) and rationae materie (acts regulating matters of state security and defence were partly excluded from the review).

At the same time, however, the Court retained full competence to review all *regular* governmental regulations as to their compatibility with the Constitution as well as with the parliamentary legislation. Decisions on unconstitutionality (illegality) of such regulations were final and universally binding. In this area, the last word was reserved for the Court.

The 1985 Act was based on a compromise that situated the jurisdiction and powers of the Court on a relatively low level. But, at the same time, the Court finally obtained a *go* and the three-year delay in its creation had also advantages: had the Constitutional Court Act been adopted in 1982 instead of 1985, its powers would have been more limited and - what seems the most important factor - its personal composition would have excluded any chance of independent activity.

In November 1985 the Parliament elected all 12 judges of the Constitutional Court. In order to introduce staggering terms of judges, six of them were elected for the full eight-year term and six for only four years.

4.

The new Court encountered rather mixed reactions of the doctrine. Many scholars criticized limitations on powers and jurisdiction of the Court and predicted that - like it was the case with the Court of Impeachment - it would never be able to play any independent role.

Those predictions occurred, at the same time, right and wrong. They were right as far as the systemic independence of Court was concer-

ned - the Court was created as a part of the existing system of government and had neither intent nor capabilities to challenge that system as such. There were few cases brought before the Court, most of those cases dealt with problems of - at best - secondary importance, political opposition (organized around the Catholic Church and the - officially outlawed - Solidarity) had no access to the Court.

They were wrong because the Court managed to find its place in the complicated political reality of the end of the decade. In May 1986, the Court adopted its first judgment. While it dealt with, rather obscure, regulation of the Council of Ministers, the Court decision was of a paramount importance. The panel of three judges of the Court invalidated the regulation as contrary to both the Constitution and the ordinary legislation. The invalidation was based on a restrictive interpretation of the Cabinet's power to regulate: the Court developed the idea (well recognized in the legal doctrine, but rather ignored in the regulatory practice) that regulations concerning rights and obligations of individuals must be adopted by the parliament and not by the executive bodies. Thus, the very first decision of the Constitutional Court required that the traditional system of executive regulations be abandoned. Such approach was quite in line with the interests of parliament and received a clear support from the same *democrats* who were advocating the establishment of the Constitutional Court. The executive bureaucrats reacted immediately: a rehearing before the full Court was requested and rather strongly worded criticism of the Court was expressed on several occasions. It did not work: attacks on the Court prompted its judges to integrate and, in November 1986, the original judgment was confirmed by a 11:1 majority in an even more resolute language. The resolution in question lost its legal force and the Undersecretary of State in the Prime Minister Office lost his job.

Within next three years, the Court heard and decided about 25 cases. In almost all of them the Court was invited to review regulations issued by the Cabinet and/or ministers and in almost all of them the Court adopted decisions of unconstitutionality. While protection of

the *Gesetzesvorbehalt* clearly did not belong to the main political problems in Poland, the Court managed to maintain consistency in that area and to avoid entering into more complicated fields of political controversy. The Court had now a strong support in the parliament as well as in the High Administrative Court and in the legal doctrine. Its skill to act only where it had a chance to construct a decent case law saved the Court from entering areas where it would be easy to destroy its reputation. Using Ginsburg's terminology, the Court maintained a low equilibrium, but it allowed the Court to gain quite a lot of legitimacy - a capital necessary to survive the future process of transformation. Again, there was a combination of chance (on the one hand, the Court became an attractive ally for some orientations within the parliament; on the other hand - the political leadership was no longer able to control the situation) and persistence (it required a lot of courage to get into conflict with the governmental bureaucrats and to resist criticism and attacks). This was a time to pay for miscalculation and ignorance: the Court meant once as a lipstick for the military government began to play a role quite far from predictions of those who had allowed its creation.

The Emergence of a Real Court (Spring 1990- Spring 1997)

1.

The Summer elections of 1989 and the emergence of the first non-Communist Cabinet in August-September of 1989 marked the beginning of the transformation process in Poland. Within next twelve months, the Communist Party disappeared from the political scene, Lech Wa??sa became the President of the Republic, and far-reaching economic reform has been launched. This was a real revolution and no area of public life was exempted from profound changes.
Thus, the first challenge for the Constitutional Court was to survive in

the new political environment. Transformation meant, of course, change in organisation and composition of all constitutional organs of the State; even in the Supreme Court all judges were dismissed and only some of them were appointed again. It was only the Ombudsman and the High Administrative Court that, due to their record, could continue in the previous composition. That the Constitutional Court was not purged in a manner the Supreme Court was, resulted - again - from a lucky combination of different factors. On the one hand, no one could challenge the case-law of the Court and it was quite clear that the same constitutional interpretations should be continued in the new political situation. On the other hand, in November of 1989, the terms of six judges of the Constitutional Court elapsed and the new Parliament could use its appointment power in a regular manner. Thus, the process of personal transition went smoothly as no revolutionary moves were necessary. It seemed also clear that most of the *old* judges would have no problem to adapt to the new situation and to integrate with *new* judges. It should be emphasized that, at least some of *old* judges were recognized scholars and it had been their persistence and courage that shaped the role of Court in its formative period.

This made the Court capable to function in the new political context. At the same time, it was quite obvious that the Court, as an institution, should continue its existence. I do not think that new political elites perceive the Court as an *insurance policy*, in the Ginsburg's understanding of that term. It was too early for any predictions as to the future role of the opposition as it was still very difficult to define who was in the majority and who was in the opposition. The, more or less, unanimous acceptance for the Court's continuation should rather be explained by the Western-oriented democratic perspective of the *Solidarity* leaders. It was clear that not only the transformation of economy, but also that of the constitutional system should be oriented at solutions adopted in West-European countries. The constitutional adjudication (vested into a separate constitutional court) was regarded as one of the obvious features of the democratic constitutionalism. Two West-

European systems were, at this time, seen as the main source of inspiration: Germany, due to its geographical proximity and its traditional influence on Polish scholars, and Spain, due to its successful (and peaceful) departure from an authoritarian rule. In both countries, constitutional courts formed an important component of the constitutional landscape. Therefore, also for Poland, the existence of constitutional adjudication was regarded as a necessity and as a factor legitimizing the democratic nature of constitutional transformation.

Had no separate Constitutional Court been created in Poland in the 1980s. it could have been, perhaps, possible that constitutional adjudication would have been given to the (*new*) Supreme Court. But, as the Constitutional Court was already in place, there was no alternative for the continuation. It was like a *one-way-street* situation: the Constitutional Court had simply to move forward and its problem was whether it would be able to establish its new position and legitimacy.

2.

Another factor that confirmed the existence and the role of the Constitutional Court was the inability of Poland's political elites to agree to a new Constitution.

The constitutional situation in Poland was rather complicated. The Communist Constitution of 1952 (revised in 1976) was still in place. It was amended (by the *old* Parliament) in the Spring of 1989 to prepare democratic elections, but those amendments dealt with the structure of the State machinery and expressed the Round-Table-Compromise that lost its validity already six months later. In December 1989, the *new* Parliament adopted another constitutional amendment that reformulated general principles of the constitutional order. Provisions concerning the leading role of the Communist Party and the system of centralized economic planning were replaced by declarations of political pluralism and market economy. New Article

One of the Constitution provided that Poland is *a democratic State ruled by law* - a formula meant to invoke the traditional German concept of *Rechtstaat*. But, constitutional modifications affected only few provisions of the old Constitution and, what more important, were rather chaotic. It was assumed that a new Constitution would be adopted already in May 1991 to commemorate the 200th anniversary of the first Polish Constitution of May 3, 1791.

Political developments and, in particular, conflicts within the *Solidarity*, blocked the constitution-drafting. The new Constitution was adopted only in 1997, in a completely new political environment. In effect, the transitory period had to continue for more than eight years.

This situation offered a chance for the Constitutional Court. Poland badly needed a constitution - the process of transition had to be organized according to some legal framework. However, such framework existed only to a limited extent. The written Constitution represented a hardly coherent patchwork of provisions adopted in different historical periods and for different political aims. There was no organized body of constitutional precedents that would be able to fill the gaps of the written text: few Constitutional Court's decisions about relations between parliamentary statutes and governmental regulations were obviously not sufficient. At the same time, numerous controversies were emerging almost on a daily basis: relations between the parliament and the President of the Republic were far from peaceful, the newly-created local government strived for more power and independence, there were more and more questions related to individual rights and limits of their protection. Someone had to provide answers and to place those controversies within an organized system of constitutional norms and precedents.

The Constitutional Court appeared to be particularly qualified for this task. Already in 1990-1991, it elaborated new, quite activist, techniques of constitutional interpretation. It declared that the text of the Constitution must be read in light of the present political conditions and, therefore, its *old* provisions should be interpreted without any

regard to the *original intent* of their drafters. It further decided that, instead of trying to reinterpret the *old* provisons, constitutional interpretation should focus on *new* general clauses, in particular the *Rechtstaat-Clause*. The Court's position was that the *Rechtstaat-Clause*, contained in new Article One, should be read as an abbreviated expression of several more specific rules and principles. Those rules and principles have not been expressly registered in the written text of the Constitution, but - due to their inherent link with the idea of a state-ruled-by-law - they also enjoy constitutional rank and can be enforced by the Constitutional Court.*** The *Rechtstaat-Clause* jurisprudence developed quite rapidly and within few years principles like nonretroactivity, protection of vested rights, proportionality or legitimate expectations were recognized as components of the judge-made constitution of Poland. In later years, the Court went even further and granted constitutional rank to some substantive individual rights like right to life (in the abortion context), right to dignity and right to privacy. Generally, it can be observed that a considerable portion of the *real Constitution* was elaborated *out-of-nothing* by the Constitutional Court.

The Court's activism provoked numerous discussions and, quite often, the legitimacy of the judicial constitution-making was put in doubt by its critics. It is true that the Court went rather far in the constitutional interpretation. It seems, however, that it had but a very little choice. As long as there was no new Constitution (regarded as a binding expression of the *will of the People*), the alternative was not between judicial self-restraint (understood as adherence to the already established norms and precedents) and judicial activism (understood as revision of those norms and precedents). The realistic alternative in the beginning of the 1990s. was between constitutional nihilism (i. e. acceptation that the State must somehow survive without any coherent constitutional framework) and judicial activism (i. e. an attempt to elaborate such framework). The latter approach provided for more checks on arbitrariness of the political branches of government and, therefore, seemed to be better linked with the idea of the rule of law.

In any case, the new role of the Constitutional Court contributed to the stabilisation and reinforcement of its position. From a rather obscure body of illegitimate origin, it evolved into a commonly recognized and respected participant of the governmental process. And even those who disliked the Court had to accept its existence and importance. In other words, a particular combination of the political context and Court's own skills and persistence allowed it to establish its position.

3.

This process was not free from problems and controversies. The Court had always its enemies: parliamentary majority did not like to see its laws invalidated or deformed by the Constitutional Court, the Supreme Court did not like any interference with its control over the judicial branch. The Constitutional Court's position remained particularly vulnerable because the democratic transition has never gone far enough to abolish the original limitation on its powers. While the 1985 Constitutional Court Act was revised on several occasions, the principal - constitutional limitations remained in place: the Parliament retained its power to reject (to override), by the two thirds majority of the Sejm - any judgment on unconstitutionality of a statute. Even if this restriction seemed entirely incompatible with the new understanding of the separation of powers, its practical attractiveness outweighed doctrinal arguments and politicians were not ready to lift it too soon. The Court tried to fight and - in a landmark judgment in 1993 - it limited parliamentary overriding power, but what was left for the Parliament allowed it to reject some decisions of the Court. That the override remained relatively exceptional in practice was the result of the composition of parliament. The Constitution required a two-thirds majority for the overriding. While such majority could have been easily reached in a Communist parliament, the situation changed completely after the

1989 elections. Now the parliament was split between the majority and the opposition and, in effect, no overruling was possible unless at least some opposition groups were ready to support the majority. Nevertheless, between 1990 and 1997, eight judgments were subjected to the parliamentary override that accounted for about 10% of the total number of judgments on unconstitutionality of statutes.

Another channel of parliamentary influence was the power of judicial appointments. The Constitution provided for parliamentary appointment of all twelve judges and required an absolute majority of the present Members of the Sejm. Such system placed decisions within the exclusive province of an actual majority and could lead to a domination of the Court by appointees of one political orientation. But also in this respect, the course of events appeared quite lucky for the Court. Since 1993, when dividing lines between political parties became firmly established, each consecutive parliamentary election traded places of majority and opposition. And, due to early dissolution of the 1991 Parliament, the dates of four consecutive elections (1993, 1997, 2001 and 2005) coincided with the dates of partial renouvellemnt of the Court. In effect, each time the newly elected Sejm majority had an immediate possibility to decide on some new appointments to the Court and - as it was always a politically different majority - the Court never became packed with judges having the same political preferences. Thus, the Court was able to retain a lot of independence and to develop its own identity. Accordingly, its internal way of operation was to seek compromises and to avoid identification with any side of the political spectrum. It was facilitated by the fact that most judges came from academia and political differences between professors were always easier to overcome.

4.

The process of Constitution-writing got accelerated only in 1995-

1996. At this time, the Court's position become stabilized enough to remove any doubts that the Court would continue its existence once the new Constitution is adopted.

Thus, the problem was not whether the constitutional adjudication should exist or whether it should be vested into the, already existing, Constitutional Court. This system has been sufficiently entrenched in the political practice and was regarded as the closest one to patterns adopted in West-European countries. While, in the early years of constitutional discussions, there was also a proposal (sponsored, in particular, by the Supreme Court) that the Constitutional Court should be replaced by a Constitutional Chamber of the Supreme Court, it has never gained any real support among the politicians.

The discussion within the Constitutional Committee (a parliamentary body entrusted with preparation of the final draft of the Constitution) was focused on questions concerning jurisdiction and powers of the Court. There was a general agreement that the parliamentary system of judicial appointments (by absolute majority) should be retained. It was also agreed that the number of judges should be increased from 12 to 15 and that judges should be appointed for a single nine-year term. Thus, the system of periodic renouvellement of half of the Court's composition would be gradually replaced by individual appointments separated in time. It was finally agreed that the President and the Vice-president of the Court will be appointed by the President of the Republic from among two candidates at each submitted - for each of those positions - by the plenary Court (under the 1982 Amendment the President and the Vice-President of the Court were appointed by the Sejm on its discretion). The Constitution did not regulate their term of office - it was assumed that both presidents would hold those positions for the entire time of their judicial mandate.

As to the Court's powers, there was a general agreement that it is no longer possible to retain the parliamentary power of override. However, as a transitory regulation, it was provided that, in some situations, the override would continue for two years, i. e. until October

1999. Only then, all decisions of the Constitutional Court became fully final and universally binding.

There were also other attempts to limit the finality of the Court's decisions. In particular, there were fears that the Court may go too far in interpretation of social rights and that its interventions may ruin the State budget (a scenario not entirely improbable taking into account the experience of the Hungarian crisis in the mid-90s.). Thus, proposals that - some or all - decisions on unconstitutionality should require a qualified majority of the Court or that, in all *economic expensive* cases, the Court should request the Government's assessment of the financial effects of its decision. Only the latter one was adopted, but - in the subsequent practice - remained without any real importance.

Finally, there was a general agreement that the jurisdiction of the Court should be developed in three directions:

- the Court was given the power to review constitutionality of international treaties but, at the same time, also the power to review the conformity of statutes (and sub-statutory instruments) with international treaties. The inclusion of treaties into the system of norms of reference allowed, in particular, a direct application of the human rights instruments, first of all - the European Convention on Human Rights;

- the Court was given the power to decide on conflicts concerning competences of the constitutional organs of the State. In practice, however, this procedure remained dormant for more than 10 years and only in 2008-2009 first conflicts of competence were submitted to the Court;

- next to the already existing procedures of abstract review and preliminary questions, the new procedure of individual complaint (Verfassungsbeschwerde) was introduced. This was an idea not particularly attractive for the Supreme Court since a developed version

of constitutional complaint could subordinate the Supreme Court's interpretation of statutes to the control of the Constitutional Court. After quite vivid discussions, a compromise was set: the procedure was established but in a limited version. Under Article 79 of the Constitution, individual complaints can be lodged only against constitutionality of a statutory (or a substatutory) provision that served as a legal basis for the judgment or decision that interfered with constitutional rights of a person affected. Thus, it is not possible to challenge directly the constitutionality of statutory interpretation elaborated by the Supreme Court (or any other ordinary court). In consequence, the finding of unconstitutionality does not automatically invalidate individual judgments or decisions and affected persons have only a possibility to request the reopening the procedure before a court or an administrative agency. This was not the most optimal version of the Verfassungsbeschwerde, but the Court's primary concern was focused on the finality of its decisions and it had no alternative but to accept a limited model of the constitutional complaint.

The new Constitution strengthened the position of the Court and removed traditional limitations of its powers. The drafters appeared to be quite convinced that Poland must obtain a *normal* constitutional court, even if - after more a decade of constitutional adjudication in Poland - it was clear that a strong Court would limit the powers of the parliament and may distract plans of the parliamentary majority. The main reason for such choice resulted from the ideological affinity to the Western constitutional ideas. Poland needed an institutional and ideological integration with the West; it should not be forgotten that it aspired to the European Union at that time. So, the Constitution was written with a clear orientation towards solutions adopted in Western Europe, particularly towards the German idea of *a rationalised parliamentarism*. A separate and strong constitutional court constituted a necessary part of that model. Another important factor was the pro-

tection of individual rights. The 1997 Constitution provided for a developed list of different rights and also for a developed system of their guarantees. The Constitutional Court played, by definition, a prominent role within that system.

By 1997, the political leadership has realized that an alternance constitute a normal pattern of political developments. Thus, unlike on the earlier occasions (1982-1986 and 1989-1990), the drafters of the Constitution could now have in mind also the *insurance function* of the Constitutional Court. Since the judges' term of office was set for nine years, it was clear that new parliamentary majorities would have to live with the Court composed of judges appointed under another political constellation. This capacity of a delayed personal change should prevent an excessive centralization of power. The Court (as well as the President of the Republic and some other bodies, for example the Council of Monetary Policy and the Council of Radio and Television) could represent a mitigating factor and could assure more pluralism in the political process. This was a macro-political approach, related to the general projection of the functioning of the constitutional system. It seemed to confirm the Ginsburg's assessment that *judicial review can deepen the constitutional order and contribute to the consolidation of the democratic system*.

The "New-Old Court" (Fall 1997- Spring 2009)

1.

The Constitution entered into life on October 17, 1997, few weeks before parliamentary elections that sent the previous social-democratic majority into the opposition benches (the Presidency, however, was kept by Mr. Kwasniewski, a former leader of the Social-Democratic Party; and - in 2000 - Mr. Kwasniewski easily won the second term). The new transitory provisions confirmed the mandate of all sitting judges of the

Constitutional Court, but three of them were at the end of their term and, since the new Constitution increased the number of judges, there were three additional openings to fill. Thus, the new centre-right majority obtained an immediate possibility to appoint six new judges. Together with two judges *inherited* after the previous centre-right coalition (1991-1993), they enjoyed a narrow eight to seven majority.

However, the main problem of the new Court was not the integration of *old* and *new* judges (a facilitating factor was that 11 out of 15 judges were law professors), but to define the Court's position under the new constitutional system. Almost immediately, it became clear that the Court would put a particular emphasise upon continuation of its previous case-law. While the Court was now confronted with the new constitutional text, it was obvious that the drafters of the Constitution had never intended to revise or to reject basic interpretations of rule of law, equality, proportionality and other general concepts elaborated in the constitutional jurisprudence. It should be kept in mind that, as far as individual rights were concerned, both the Court and the Constitutional Committee relied on international human law instruments, particularly on the European Convention on Human Rights. That was why a continuation was not only possible, but also relatively easy.

Already in December 1997, the Court declared that its case-law on the interpretation of *the Rechtstaat-clause* and the equal protection clause retained its validity; in January 1998 the same approach was adopted in regard to relations between statutes and substatutory acts. New Constitution was understood as a confirmation of ideas and concepts that had been present already in the 1989 December Amendment and, later, were continuously developed in the process of constitutional adjudication. At the same time, since the new Constitution adopted more detailed regulations, several - hitherto purely jurisprudential - concepts acquired solid textual basis.

Continuation, however, applied to the substance, but not necessarily to the method of constitutional adjudication. With a new constitutional text in place, there was no longer justification for activist and indepen-

dent judicial interpretation. While, before 1997, *a real constitution* had to be constructed by the Court, now the Court had to apply the written document as well as to respect *the original intent* of its drafters. The Court had to adjust to the new situation and, not without some initial errors, managed to do it in a relatively smooth manner.

The spirit of continuation helped to integrate judges around a common approach to the constitutional interpretation and to prevent a split along political lines. Already in June 1998, the Court, by a strong majority, invalidated a statute allowing for summary dismissal of judges involved in the Communist system of justice. Later in 1998, the Court upheld, in principle, the so-called Lustration Act, but only after establishing several, quite detailed, rules of its interpretation that neutralized most obvious vices of that law. At the same time, basic reforms of local government, social insurance and health care, adopted by the new majority easily received confirmation of the Court. And, when in beginning of 1999, the centre-right parliamentary coalition began to crumble; the Court obtained more space for its own way of action. In sum, the first four years of the new Constitution allowed the Court to confirm and to strengthen its position. The Court managed to avoid *frontal collisions* with parliamentary majorities, but - at the same time - preserved integrity of its case-law and successfully began transformation of the new Constitution into a judicially-enforceable instrument.

2.

The principle of political alternance was confirmed in September 2001, when parliamentary election was won by the centre-left coalition. Only one month later, the term of four Constitutional Court judges came to the end. It was a situation almost copy-pasted from the Fall of 1997. Again, the new majority obtained a possibility to appoint some new judges (but - not to pack the Court); again, the Court beca-

me composed of judges that arrived in different political periods; again, it was clearly dominated by law professors.
All this facilitated further continuation. The judges managed to integrate in a relatively efficient manner and to confirm and develop earlier *grand-lines* of constitutional interpretation. The political branches were not always happy with the Court's decisions, but - like their predecessors in 1997-2001 - accepted that the Court's role as the guardian (and - interpreter) of the Constitution sets limits to their legislative discretion. And, also like four years before, the coalition disintegrated after only two years: in effect, there was no strong parliamentary majority during the last two years of the 4th legislature and equally weakend became the position of the Cabinet.
Those developments contributed to the further strengthening of the Court's role. While the Court did not encroach too often on the fields that did not belonged to it (particularly into the area of economy and social benefits), it continued, in a quite energetic manner, its jurisprudence on personal and political rights as well as on the separation of powers. Both, the pre-1997 and post-1997 precedents were confirmed on several occasions - it was quite clear that the Court regarded the whole of its jurisprudential ideas as valid and applicable under the new Constitution. Since most of the important decisions were adopted unanimously (or by an overwhelming majority), the differences in the *political origin* of judges were gradually loosing the original clarity. In sum, this was a relatively quiet period in which, by contrast with the disintegration of the political branches of government, the Court appeared to the public opinion not only as a symbol of stability and continuation but also as a guardian of individual right against political pressures.

3.

The situation became less comfortable after the 2005 parliamentary

election when the general dissatisfaction with the centre-left orientations brought to power the Law and Justice Party, led by Jarosław Kaczyński and representing more traditional, right-oriented approach. Two months later, Lech Kaczyński, the twin brother of Jarosław, won presidential election (in Poland, the President of the Republic is elected, for a five-tear term, by a popular vote). As usually, the expiration of the term of four judges coincided with elections, two further judges were to leave soon after.

The new government launched several projects; some of them drastically departing from the model developed in the political practice of 1989-2005 (now called as a period of *the IIIrd Republic* and contrasted with the new concept of *the IIIrd Republic*). A particular emphasis was put upon the reorientation of *the historical policy* as well as the fight against corruption and crime. It required more cooperation of the judicial branch that it was ready to offer; thus attempts to strengthen the powers of the Ministry of Justice at the expense of the judicial independence.

A conflict with traditional understanding of *the IIIrd Republic* was unavoidable and, very soon, that conflict expanded into the area of constitutional interpretation. This put the Constitutional Court (and, to some extent, also the Supreme Court) at the forefront of events. Both Courts were not ready to accept restrictions on individual rights, nor were they prepared to rewrite the understanding of the separation of powers principle at the expense of the opposition and of the judicial branch. The Constitutional Court, when invited to adjudicate on the constitutionality of new legislative measures, was consequently upholding the earlier established lines of jurisprudence. Several politically important pieces of legislation were declared contrary to both the 1997 Constitution and the European Convention on Human Rights. Those conflicts climaxed in the late Spring of 2007 when, in a rather dramatic setting, the Court invalidated most of the provisions of the new Lustration Act.

The Kaczynskis' government was not ready to yield. On the one hand,

the time worked to its advantage - two further judges were scheduled to leave in the end of 2007 and in the beginning of 2008, a development that would shift the balance of votes within the Court. In the meantime, the Court was frequently criticized as an institution assuming too much power and illegimately encroaching upon the area of political decisions. Even the leading politicians of the majority did not hesitate to attack the Court and to undermine its authority. Also, some individual judges were targets for criticism and other discredit attempts. This was something new for the Polish political culture since the last serious attack on the Court's authority had taken place in 1986. Another new element was an attempt to block Court's activities by proposing amendments to the Constitutional Court Act. A bill, proposed in July 2007 by the parliamentary group of the Law and Justice Party, provided for:

- modification of the term of the President and Vice-president of the Court: it was proposed that they would be appointed for three years (with a possibility of reappointment) and that the Court would have to present three (and not - like under the 1997 Act - two) candidates at each of those posts. Since under that system most Court Presidents would be eligible for consecutive terms, it would strengthen the role of the President of the Republic who was vested with the ultimate power of appointment;

- abolition of the traditional system that most cases are decided by panels of five or three judges and only most important cases by the plenary Court. The bill provided that almost all cases would be heard by the plenary court and that, in principle, in each case a public hearing would be held. It was argued that the system of parliamentary appointment of judges reflects an idea of *representation of many orientations within the Court*. This principle *is damaged if cases may be decided by panels of three or five judges [...] because there is no guarantee that opinions of all judges would be present in all judgments*;

- introduction of the principle that cases would be heard and decided *in the sequence of their arrival*; thus - the hitherto discretionary - power of the President of the Court to decide on the priorities would be abolished. When combined with the provision that all cases must be heard - at a public hearing - by a plenary Court, it could ultimately pack the Court with less important cases and block the way for speedy decisions on politically sensitive matters.

The confrontation with the Court constituted only a small (and - probably - not the most important) fragment of the developing crisis. Already in the late Summer of 2007, the parliamentary coalition dissolved. In consequence, the Parliament decided its self-dissolution. In the Fall of 2007, the Law and Justice Party lost parliamentary elections. A new coalition, led by the *Civic Platform Party* declared an immediate return to the values and ideas of *the III Republic*. Also relations between the Parliament and the Court returned to what was regarded as normal during the last two decades.

The Court emerged from the crises with a strengthened authority: due to its courage and persistence, the leading lines of its case-law remained intact. Other traditional factors were also present: first of all - luck (the timing of events saved the Court from being packed by one political orientation) and - to a lesser extent - miscalculation (the parliamentary majority did not realize that - should their attempts to weaken the Court appear sucesfull - they also could be affected once the balance of power would change in the future; it is worth to observe that, in the current legislature, the Law and Justice parliamentary group has, on several occasions, challenged new legislation before the Constitutional Court).

The outcome of the confrontation gave additional legitimacy to the Court (and to its consecutive Presidents), but there was also a price, namely a - rather visible - rift within the Court. For the first time in the Court's history, the process of integration of judges appointed by different political majorities seems to encounter some difficulties: most

politically important judgments are adopted by a 10:5 or 9:6 majority and the language of the dissenting opinions is sometimes quite emotional. While such entrenched and strongly emphasised division of opinions has already, on many occasions, arisen in modern democracies and by no means is incompatible with general standards of constitutional adjudication, it has never been present, at least to such extent, in the practice of the Polish Constitutional Court.

The development of the **constitutional adjudication** in Poland can be regarded as a story of success. While the circumstances of its creation did not stimulate too much optimism, its further evolution resulted in the emergence of a regular constitutional jurisdiction having an established place in the political process of government. There is not a single explanation why could it happen. In the general perspective, the success of the Constitutional Court was a part of the overall success of the political and economic transformation in Poland. That, however, the Court was able to participate in, to contribute to and to profit of that overall success, was the result of particular combination of events, in which chance, ignorance and persistence played also a visible role. The chance has been present for most of the time - without it the Court might never be created, might never be staffed with honest judges and might not survive political confrontations. The persistence was very important - the Court showed a particular ability to develop an intellectual framework of constitutional interpretation and to preserve continuation in maintaining its principal concepts and ideas. Sometimes, it required a lot of courage and integrity from the judges. The ignorance (miscalculation) seemed to be one of the main factors contributing to the creation of the Court by the Communist regime, but - at least to some extent - has also been present in the subsequent historical periods. While, already in the mid-90s., political elites realized that constitutional adjudication represented an important component of the political process, more difficult for them was to understand that this adjudication cannot be subjected to a political control.

That was why, the theory of *the insurance model of judicial review* cannot

provide a full explanation of all Polish developments. Those who allowed the creation of the Court could not think about insurance against becoming opposition after a lost election: there were no democratic elections at all, the domination of the Communist Party seemed to be permanently entrenched, and the opposition was placed in jails and not on the bench. Later, once the political transformation began, it took several years before politicians realized that - sooner or later - they all would have to experience the fate of an opposition. Only than, they learned to think prospectively and they understood that the Constitutional Court may be their last hope in confrontations with future majorities. This may have given more weight for the *insurance approach*, but - before that approach gained more recognition - the constitutional adjudication has already been well established. Thus, unlike in some other countries, in Poland the *insurance psychology* (that, by the way, seems to be a part of more general principles of pluralism and alternance) arrived relatively late and had not been relevant neither in the process of creation of the constitutional adjudication nor for the first formative years of the Constitutional Court.

Sujit Choudhry

*Not a New Constitutional Court: The Canadian Charter, the Supreme Court and Quebec Nationalism**

Introduction

Why have political actors throughout the world adopted systems of judicial review that empower courts to assess legislation enacted by democratically elected legislatures for compliance with a constitutionally entrenched bill of rights? One widely held view is that judicial review is now integral to the very idea of a liberal democratic constitutional order, and states secure their legitimacy before both domestic and international audiences by adopting it. But as Tom Ginsburg

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observes in *Judicial Review in New Democracies*, this does not explain the considerable variation in the design of judicial review[1]. His counter-thesis is that political actors have adopted systems of rights-based judicial review as a form of political insurance, to hedge against the possibility of losing political power in the future. Thus, if constitutional drafters *foresee themselves in power after the constitution is passed*, they will create weak constitutional courts *that will allow them to govern without encumbrance*[2]. By contrast, *if they foresee themselves losing in postconstitutional elections*, they will create strong courts to provide themselves with *some access to a forum in which to challenge the legislature*[3]. The former is more likely to occur when there is a single dominant political party at the moment of constitutional transition, whereas the latter is more likely when political power is fragmented. Thus, *[a]lthough judicial review is associated with the global ideal of the rule of law … the particular design of judicial review institutions reflects local political realities*[4].

Ginsburg applies his thesis to explain the design of constitutional courts in three East Asian jurisdictions: Taiwan, Mongolia, and Korea. But he claims that these cases *illustrate the universal political logic of judicial review*[5] and that his theory has explanatory power beyond them. Does the political insurance thesis fit the Canadian story? In this paper, I argue that it does not. Ginsburg's thesis has substantive and institutional limbs. The substantive limb is the adoption of a constitutionally entrenched bill of rights to enable constitutional drafters to insure against the future loss of political power through rights-based adjudication, in challenges brought either by themselves or individuals, institutions or organizations with aligned interests. The institutional limb is the creation of a new constitutional court as part of a constitutional transition to enforce this bill of rights. The power of judicial review is denied to the existing judiciary, including the Supreme Court.

Canada differs on both dimensions from Ginsburg's account. Canada adopted a constitutionally entrenched bill of rights, the *Canadian Charter of Rights and Freedoms*, in 1982[6]. But the principal political objective behind the adoption of the *Charter* was not to insure against the

[1] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003) at 35.

[2] *Ibid.* at 18

[3] *Ibid.*

[4] *Ibid.* at 33

[5] *Ibid.* at 247

[6] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 (hereinafter *Charter*).

potential loss of political power by threatened political elites, but rather, to combat sub-state nationalism in the province of Quebec. The *Charter* was meant to combat Quebec nationalism in two ways: through the imposition of rights-based limits on the ability of Quebec to engage in linguistic nation-building, and through the creation of a pan-Canadian constitutional patriotism that would compete with, and eventually overwhelm Quebec nationalism. Thus, the adoption of *Charter* was a central part of the struggle between competing nationalisms. This part of the Canadian story is well known.

But another part of the story has received less attention - that ultimate responsibility for enforcing the *Charter* was vested not in a new constitutional court specifically created for that purpose, but in the existing Supreme Court of Canada. Prior to the entrenchment of the *Charter*, the Supreme Court had ultimate responsibility for enforcing Canada's federal division of powers. It was viewed by political and legal elites in Quebec as systematically favouring federal over provincial jurisdiction, and indeed, sided with the federal government against Quebec in important cases that challenged the adoption of the *Charter* itself and turned on the location of constituent power in the Canadian constitution. The decision to empower the Supreme Court to enforce the *Charter* should therefore be viewed through the lens of this Court's pre-existing place in the constitutional politics of Canadian federalism.

The Charter and Quebec Nationalism

The link between the Charter and the rise of nationalism in Quebec was perhaps most famously made by Peter Russell[7]. Russell's question was why federal politicians, principally Pierre Trudeau, made the *Charter* their major constitutional priority over between 1968 and 1981. Until that point, the federal goal had been the *patriation* of the Constitution. Like many former British colonies, Canada's Constitution was (and remains) a statute of the Imperial Parliament,

[7] Peter H. Russell, *The Political Purposes of the Charter of Rights and Freedoms*, *Canadian Bar Review* 61 (1983): 30

but was unique in that the power of constitutional amendment rested with Westminster. This was because Canadian political actors had been unable to agree on the locus of constituent power in Canada-i.e. what combination of the federal and provincial legislatures and/or populations should possess the power of constitutional change-because answering that question required agreement on the basic character of the Canadian political community, which the amending procedure would reflect. Placing the *Charter* front and centre of the federal constitutional strategy was therefore a dramatic change. Russell's answer was the rise of Quebec nationalism, or more precisely, a significant shift in the character of Quebec's constitutional demands. Until the 1960s, Quebec constitutional claims had been defensive, aimed at safeguarding the existing areas of jurisdiction granted to Quebec under Canada's federal division of powers, established by the *British North America Act* in 1867 as part of the creation of Canada (known as Confederation)[8]. However, in the 1960s, Quebec's goals shifted to the expansion of its jurisdiction over social and economic policy, to enable the province to engage in a nation-building enterprise and construct a modern Quebec whose major institutions operated in French. Why this shift in Quebec took place is itself a complex story[9]. To a considerable extent, it was a defensive response to the dramatically increased role of the federal government in the economic and social policy arena after the Second World War. Federal policy activism meant an increase in the importance of federal institutions, especially the federal bureaucracy, which worked in English and in which francophone Quebeckers were a small minority. Another factor was the enormous social change within Quebec. After the Second World War, there was massive urbanization and industrialization, in a context where Anglophones dominated positions of economic leadership and many of the professions. These demographic and economic shifts underlined and reinforced the role of language as the basis for the unequal distribution of economic power within the province. Quebec's political elites responded by mobilizing Francophones

[8] *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3 (hereinafter *British North America Act*).

[9] See generally Kenneth McRoberts, Quebec: *Social Change and Political Crisis* (Toronto: McLelland and Stewart, 1988)

around the nationalist project of *maîtres chez nous*, which encompassed both the expansion of Quebec's jurisdiction and the use of these new tools to construct a modern set of economic and political institutions to ensure the survival of a modern, francophone society. In an important sense, then, modern Quebec nationalism was a movement led by French-speaking elites, against the English-speaking elites in Ottawa and Montreal. The dispute, as Andrée Lajoie and her colleagues put it, was *where, on the geographical and political maps, they would place the powers they wanted to give the state*[10].

As Russell persuasively argues, the *Charter* was the federal government's defensive response to these centrifugal pressures. The primary sources support Russell's analysis. The most important federal document is *Federalism for the Future*, which was released in February 1968[11]. The document acknowledged that the impetus for constitutional reform was Quebec, specifically *the dissatisfaction of the people of Canada of the French language and culture with the relative positions of the two linguistic groups within our Confederation*[12]. But the response was not to meet Quebec's demands for enhanced autonomy on the terrain of federalism. Rather, the federal government's view was that *first priority should be given to that part of the Constitution which should deal with the rights of the individual-both his rights as a citizen of a democratic federal state and his rights as a member of the linguistic community in which he has chosen to live*[13]. This choice was initially presented as a matter of logic, since *the rights of people must precede the rights of governments*[14]. Yet *Federalism for the Futur*e went on to emphasize the contribution of a constitutional bill of rights as the basis for national unity. The constitutional entrenchment of *individual human rights for all Canadians…is a fundamental condition of nationhood* and *are…fundamental to the will of the nation to survive*[15]. *[T]ake these rights away*, it continued, *and few Canadians would think their country worth preserving*[16].

How exactly was the *Charter* supposed to further national unity? We can get a handle on the nation-building function of the *Charter* and bills of rights more generally by making three sets of distinctions. The first is the distinction between two varieties of nationalism. On the

[10] Ivan Bernier and Andree Lajoie, *The Supreme Court of Canada as an Instrument of Political Change* (Toronto: University of Toronto Press, 1986) at 25

[11] Canada, *Federalism for the Future* (Ottawa: Queen's Printer, 1968)

[12] *Ibid.* at 2

[13] *Ibid.* at 8

[14] *Ibid.*

[15] *Ibid.* at 18

[16] *Ibid.*

one hand, nationalism is often paired with claims of self-determination and sovereignty. This is the nationalism of national minorities, such as the Quebecois, the Scots, and the Catalans. The political goal underlying the kinds of nationalist movements ranges from autonomy to states of their own. This is the dominant understanding of nationalism in the legal imagination. Accordingly, the regulation of nationalist politics becomes a matter for international law, with the dominant question being under what circumstances peoples' right to self-determination encompasses the right to statehood.

On the other hand, nationalism can be understood as what Rogers Brubaker has called *nationalizing nationalism*[17]. The goals of this variety of nationalism are neither internal autonomy nor statehood. Rather, the energy of nationalism is directed at an existing political community, in a process whereby states, already extent, create nations. At its core, nationalizing nationalism consists of a set of policies that are designed to homogenize the national culture and language to coincide with those of the dominant ethnolinguistic group, and to centralize political and legal power in institutions dominated by the majority group and which operate in its language. In states that contain minority nations, such as Quebec, these minorities respond to nationalizing nationalism[18] by engaging in defensive nation-building projects of their own.

Legal scholars have focussed on the first form of nationalism but not on the second. So here we get to the second distinction- between different ways in which constitutions can serve as instruments of nationalizing nationalism. Historically, the most direct way has to be to centralize legal and political power. This occurred, for example, in Spain, with the abolition of the *Generalitat* in Catalonia in 1714, and the Fueros of the Basque province and Navarre in the early 19th century. The state would possess jurisdiction over language and education, which would allow it to set the majority's language as the official language of the state and of instruction in schools. Another mechanism was the elimination of pre-existing forms of legal pluralism, to require all ethnolinguistic groups to participate in a common legal-constitu-

[17] Rogers Brubaker, *Nationalism Reframed* (New York: Cambridge University Press, 1996)

[18] Michael Hechter, *Containing Nationalism* (Oxford: Oxford University Press, 2000); Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007); and Wayne Norman, *Negotiating Nationalism: Nation-building, Federalism, and Secession in the Multinational State* (Oxford: Oxford University Press, 2006)

tional order, organized around common judicial institutions dominated by members of the majority group, applying the legal system of the dominant group (as occurred in France). In other words, one way of responding to Quebec nationalism would have been to engage in a centralizing project of this sort. As I will explain below, the use of constitutional design in the service of nationalising nationalism in fact was attempted in the colonial period in Canada between 1840 and 1867. It was a spectacular failure.

But the *Charter* project points to the use of a constitutional bill of rights to engage in a similar nationalizing project. At first blush, this seems bizarre, since the first set of nationalizing strategies involve the centralization of political and legal power, whereas a bill of rights sets limits on such policies. But a bill of rights can nonetheless serve this role, and this takes us to the final distinction. There are two ways to think about the nation-building role of a bill of rights: the *regulative* conception and the *constitutive* conception. On the regulative conception, the function of a bill of rights is to enable individuals to invoke the machinery of the courts to set binding constraints on political decision-making. Serving this function does not depend on a bill of rights having any effect on citizens' political identities. On the constitutive conception, a bill of rights constitutes the demos that it also constrains. It encodes and projects a certain vision of political community-in particular, the idea of a political community as consisting of rights-bearing citizens of equal status. To serve as an instrument of nation-building, a bill of rights must alter the very self-understanding of citizens. This is the idea of civic citizenship, most famously presented by Ernest Renan[19].

The *Charter* relies on both the regulative and constitutive conceptions of a bill of rights to serve as instrument of nation-building. In regulatory terms, the *Charter* imposes legal restraints on minority nation-building by Quebec, through the rights to inter-provincial mobility and to minority language education for their children. The centrality of the mobility and minority language education rights provisions to the

[19] Ernest Renan, *Qu'est-ce qu'une nation*, (1882), http://archives.vigile.net/04-1/renan.pdf

nation-building project of the *Charter* is underlined by their exemption from the legislative override, which enables the federal Parliament and provincial legislatures to enact laws notwithstanding that they violate the *Charter*. Both rights can be understood as a response to potential or actual policies of linguistic nation-building by Quebec, and indeed, Quebec objected to both[20].

The *Charter* prohibits the use of disincentives to inter-provincial migration, by guaranteeing the right to *move and take up residence in any province* and *to pursue the gaining of a livelihood in any province*[21]. These rights are subject to laws of general application *other than those that discriminate among persons primarily on the basis of province of present or previous residence* and *laws setting down reasonable residency requirements for the receipt of social services*[22]. These rights prohibit policies that would encourage and legitimize discrimination against inter-provincial migrants in the delivery of public services, contracting, and public employment. Quebec objected because the province *legitimately discriminates in its legislation to preserve and enhance its integrity as a culturally differend [sic] society operating within the context of the dominant Anglophone culture of the continent*[23].

Far more important as a tool of minority nation-building in Canada is the linguistic assimilation of international and inter-provincial migrants. The key tool here is education. Under the Canadian Constitution, education lies in provincial jurisdiction, and encompasses power over the language of instruction and curriculum[24]. This has been a crucial power for Quebec, because it has permitted Quebec to establish and operate a primary and secondary educational system that works in French, which is a centerpiece of linguistic nation-building. It has also enabled Quebec to create French-language universities, an indispensable support for the use of French in economic and political life that is the source of considerable controversy in other multinational states. Conversely, it has denied to the federal government the power to set a standard curriculum in a shared national language, a common instrument of nation-building in many countries.

Absent the *Charter*, Quebec could have mandated that the exclusive language of public education in Quebec-at all levels-be French. But

[20] See, for example, *Letter from Premier Rene Levesque to Prime Minister Margaret Thatcher, December 19, 1981*, reprinted in McGill Law Journal 30 (1985): 645 at 708-14

[21] *Charter, supra* note 6, s. 6(2)

[22] *Ibid.* at s. 6(3).

[23] *Letter from Premier Rene Levesque to Prime Minister Margaret Thatcher*, supra note 20, 710.

[24] *British North America Act*, *supra* note 8

the *Charter* granted the right to certain categories of citizens to receive minority language primary and secondary education for their children where numbers warrant. The federal government justified this right by reframing the problem of linguistic disadvantage. For Quebec, the problem was the diminished status of French within Quebec. The federal government responded by attempting to break the equation of French with Quebec, by making the issue the status of Francophones across Canada. As *Federalism for the Future* put it, *the people of the French language and culture do not have the same opportunities as do those of the English language to live their lives, to raise their children … in their own language in all parts of Canada*[25]. The goal was to make Canada the home for Francophones from coast to coast. The minority language education provisions were the centerpiece of this strategy. But the language rights applied symmetrically to Quebec's Anglophone minority.

The flashpoint of controversy within Quebec has been the right of Anglophones who received their primary school instruction anywhere in Canada in English to have their children educated in English in Quebec- the so-called *Canada Clause*[26]. This provision was sharply attacked by Quebec Premier René Levesque as undermining *the capacity of our National Assembly to protect French culture in Quebec*[27]. *Quebec's Charter of the French Language* attempted to limit this right to parents who had been educated in English in Quebec. The *Charter* was drafted specifically to render this policy unconstitutional, which the Supreme Court did in one of its first *Charter* judgments. Another provision of the *Charter*, which grants citizens whose children have received their schooling in English anywhere in Canada the right to English-language education for their children in Quebec, also limits Quebec's ability to linguistically integrate migrants from other provinces.

For Quebec, minority language education rights are very controversial, precisely because they limit Quebec's ability to encourage the linguistic integration of migrants to Quebec from other parts of Canada, not just immigrants to Canada. Although the minority language rights provisions apply symmetrically to Francophone minorities outside

[25] *Canada, supra* note 11, 4

[26] *Charter, supra* note 6, 4

[27] *Letter from Premier Rene Levesque to Prime Minister Margaret Thatcher*, *supra* note 20, 710

Quebec and the Anglophone minority in Quebec, they are rather unequal in their impact. The reason is the status of English as the dominant language of North America, and indeed, as the dominant language of international economic life. So the economic pressures for Francophones within Quebec to assimilate are great. What this means is that for Quebec to continue as a French speaking community in the modern world, it must adopt linguistic policies that in other provinces are unnecessary. The symmetrical character of the minority language education rights provisions conceals a lack of symmetry in fact.

However, the *Charter* was also intended to function constitutively as the germ of a pan-Canadian constitutional patriotism. In a federal state such as Canada, since citizens share these rights irrespective of language or province of residence, a bill of rights serves as a transcendent form of political identification-the spine of common citizenship that unites members of a linguistically diverse and geographically dispersed polity across the country as a whole. In this light, the minority language education rights provisions are more than regulative measures that constrained linguistic nation-building by Quebec. They communicate a conception about the place of language in Canada, with two components. First, they were designed to inculcate a self-understanding in Francophones that Canada as a whole was their home, not simply Quebec, and a corresponding set of understandings for Anglophones in Quebec. Second, by detaching linguistic identity from province of residence, by opting for personality over territoriality as the basis of language of education, and by granting a right for linguistic minorities to choose their linguistic identity, the *Charter* adopted a stance of neutrality on matters of linguistic choice. This challenged the very legitimacy of linguistic nation-building by Quebec.

Russell was sceptical of the constitutive effects of a bill of rights, stemming from an underlying skepticism regarding the efficacy of symbolic constitutionalism[28]. For Russell, a constitution can only become a source of political identification and the basis of a national identity because of its concrete effects on public policy. Subsequent expe-

[28] Russell, *supra* note 7, 36

rience proved that Russell was right and wrong. Outside of Quebec, the *Charter* has generated a new pan-Canadian patriotism, likely much more quickly than even the most optimistic predictions suggested. However, within Quebec, the *Charter* has decidedly not had this effect. The Charter has not served to bind francophone Quebeckers to the Canadian constitutional order. Indeed, the sharply differentiated effect of the *Charter* on Canadian constitutional culture suggests that it may now be harder, because of the *Charter*, to build a unifying account of the Canadian constitutional order that transcends linguistic and regional divides.

The conflicting reactions to the *Meech Lake Accord* within and outside Quebec powerfully illustrate these points. The entrenchment of the Charter was agreed to by the federal government and the nine provinces other than Quebec, which insisted unsuccessfully that there was a constitutional convention granting it a veto over constitutional change. Although Quebec's lack of consent had no impact on the legality of the *Charter*, both the failure to accept that Quebec possessed a veto and that the veto had been exercised damaged the legitimacy of the *Charter* in the eyes of many Quebecers. The *Meech Lake Accord*, signed in 1985, was a series of constitutional amendments that together were an attempt to bring Quebec into the constitutional fold. Ultimately, however, the Accord failed to attain the requisite degree of provincial consent to amend the constitution.

Outside of Quebec, the public reaction to the *Meech Lake Accord* was very hostile, as famously described by Alan Cairns[29]. There were two points of criticism. The first was the process whereby the Accord was reached. The proposed constitutional amendments were arrived at as the result of closed-door negotiations between the premiers and the Prime Minister. The complete package was then presented to the Canadian public as a *fait accompli*, a seamless whole that could not be altered for fear that the whole deal would unravel. As a legal matter, this approach grew out of the relevant procedures for constitutional amendment themselves, which require the consent of the two cham-

[29] Alan Cairns, *Citizens (Outsiders) and Governments (Insiders)* in *Constitution-Making: The Case of Meech Lake*, Canadian Public Policy 14 (1988): S121

bers of federal Parliament and the provincial legislatures[30].

Citizens outside Quebec rejected this process for constitutional change by rejecting its underlying theory. They asserted themselves, not governments, as the constituent actors in the constitutional process. The constitution did not belong to governments; it belonged to them. This was a dramatically different way in which citizens situated themselves *vis-à-vis* the constitution before the *Charter*. The *Charter* had transformed Canadians outside Quebec into constitutional actors and the basic agents of constitutional change. The view fuelled by the *Charter* that Canadian citizens irrespective of province of residence are the constituent actors in the amending process is largely irreconcilable with a veto for Quebec. To be clear, the idea of a veto for Quebec does not preclude the idea of public consultation. Rather, it suggests that rather than there being a single, national community that must be consulted, there are in fact two-i.e., the two constituent nations of Canada-whose consent must be separately given.

The transformative effect of the *Charter* on constitutional culture also explains the hostile reaction to perhaps the central provision in the *Meech Lake Accord*- the Distinct Society clause. The clause would have mandated that the Constitution be interpreted to recognize *that Quebec constitutes within Canada a distinct society* and would have affirmed *[t]he role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec*[31]. The clause did not identify in what precise respects Quebec was distinct from the rest of Canada, and indeed, the precise legal effect of the clause was the subject of widespread contestation.

Outside Quebec, the fear was that the clause would provide for the unequal application of the *Charter*, by authorizing Quebec to limit the *Charter* in a manner not open to other provincial governments. In particular, there was a concern that it would provide additional constitutional support for linguistic nation-building on the part of Quebec. Now the question is why the unequal effect of the *Charter* mattered at all. Canadian public policy has long been differentiated on a provincial or regional basis, because of vast differences in demography and the

[30] *Constitution Act*, 1982 (U.K.), 1982, c. 11, ss. 38, 41, and 43

[31] *Motion for a Resolution to Authorize an Amendment to the Constitution of Canada* (Ottawa: Queen's Printer, 1987), ss. 2(1)(b) and 2(3).

structure of the economy. The answer was that for Canadians outside Quebec, the *Charter* was what made Canada a country, and was the spine of a Canadian citizenship that was shared by all Canadians, both those within and outside Quebec. Consequently, the potential for its unequal application across Canada was an assault on a basic, non-negotiable term of the Canadian social contract and very identity of the country.

But within Quebec, the view on the Distinct Society clause was exactly the opposite, rooted in a particular account of the history and origins of Canada. For Quebec, the adoption of federalism and the creation of Quebec was a direct response to the failure of the United Province of Canada, a British colony that resulted from the merger of the previous colonies of Lower Canada (later Quebec) and Upper Canada (later Ontario), and which existed between 1840 and 1867. The history here is complex[32]. In brief, citizens of both Lower and Upper Canada elected equal numbers of representatives to a legislative assembly, although the largely francophone citizens of the former outnumbered the largely anglophone citizens of the latter[33]. The language of government was meant to be English[34]. The goal behind the merger and departure from representation by population was to facilitate the assimilation of Francophones. As time went on, Upper Canada became more populous and demanded greater representation in the joint legislature, which was resisted by Francophones who feared they would be outvoted on matters important to their identity. The result was political paralysis. Federalism was the solution- providing for representation by population at the federal level, but also creating a Quebec with jurisdiction over those matters crucial to the survival of a francophone society in that province, such as education through institutions that operated in French.

So to Quebec, Canada is unintelligible except against the backdrop of the idea that the institutions of federalism are designed to protect Quebec's linguistic distinctiveness. But the odd thing about the Canadian constitution is that it lacks express recognition of this fact,

[32] Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997).

[33] *An Act to Reunite the Provinces of Upper and Lower Canada, and for the Government of Canada*, 3 and 4 Vict., c. 35 (U.K.), s. XII

[34] *Ibid.* at XLI

and treats Quebec on a basis of juridical equality to the other provinces. The Constitution is absolutely silent on who Canadians were, or were to be[35]. When compared to other constitutions, for example that of the United States of America, the Constitution is a rather conservative, if not uninspiring, document. This silence may be nothing more than a function of the peculiar legal character and political function of the *British North America Act*, a statute of the British Parliament that granted Canada extensive powers of internal self-government but not independence. But it may also reflect a lack of agreement on such a shared account at the time Canada came into being. This silence may have shown some prescience about the possibilities, but also the limits, of a federalism designed to manage the conflict between competing nationalisms rooted in a basic disagreement on the fundamental nature of the Canadian political community.

But as Charles Taylor has perceptively argued, whatever the reasons for this silence, the lack of such a statement did not come without its costs[36]. The reason is that it was accompanied by a political culture outside of Quebec that refused to acknowledge the French-Canadian understanding of Confederation. The formal juridical equality of the provinces reinforced this refusal, setting up the dominant constitutional conversation as the contest between province-building and pan-Canadian nation-building. The Distinct Society clause therefore mattered a great deal, because it was the first time the constitution would explicitly acknowledge a view of what Canada was for. The concrete legal effect of the clause counted for a whole lot less than this simple statement. And so the repudiation of the clause on the basis of a theory of Canada that was grounded in the *Charter* set up the *Charter* as an obstacle to, rather than as a central component of, how many Quebecers understood the nature of their relationship with the rest of Canada.

[35] Sujit Choudhry, Jean-Francois Gaudreault-DesBiens, and Lorne Sossin, *Afterword: Solidarity Between Modesty and Boldness*, in Sujit Choudhry, Jean-Francois Gaudreault-DesBiens, and Lorne Sossin, eds., *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (Toronto: University of Toronto Press 2006), 206

[36] Charles Taylor, *Shared and Divergent Values*, in Charles Taylor, ed., *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal and Kingston: McGill-Queen's University Press, 1993), 155

Empowering the Supreme Court of Canada

So the story of the adoption of the *Charter* is intimately tied up with the history of Canadian federalism. In particular, the adoption of the *Charter* was an intervention in a longstanding debate over the place of Quebec within the Canadian constitutional order, and more fundamentally, the underlying conception of political community that is reflected in Canada's constitutional arrangements. But there is another connection between the adoption of the *Charter* and Canadian federalism, in which the courts and constitutional interpretation take centre stage. I now want to turn to this story, because it directs our attention to the significance of vesting the Supreme Court of Canada with responsibility for enforcing the *Charter*, as opposed to a new Constitutional Court.

The starting point is the *British North America Act*, which created Canada through the union of three pre-existing British colonies, and then proceeded to create a federal state with two levels of government, each with a legislature and executive, and to allocate jurisdiction between them. Although the framers of Canadian federation agreed on this basic, thin account of Canada's constitutional architecture, they disagreed profoundly on the substantive vision that lay behind it. I have already described the understanding of Confederation within Quebec. This manifested itself in a particular view of the powers of provincial governments, their relationship with the federal government, and the scope of provincial jurisdiction. On this view, provinces possessed a complete set of executive and legislative powers, identical to those possessed by the federal government; provinces enjoyed a coordinate relationship with the federal government, such that their legislative and executive machinery was entirely independent of federal control; and the scope of provincial jurisdiction was broad, encompassing jurisdiction over all matters central to the distinct identity of Francophones which they had lacked when coexisting in a unitary state with Anglophones, and to which the adop-

tion of federalism was a direct response. On the other hand, many Anglophones (including Canada's first Prime Minister, Sir John A. MacDonald) conceptualized Canada as a highly centralized federation. They read Canadian federalism against the backdrop of the American Civil War. For MacDonald, the American constitution had made the Civil War possible by leaving the residue of legislative power not explicitly assigned to the federal government to the states who had accordingly had quasi-sovereign status, much like a treaty. The *British North America Act*, in contrast, did precisely the opposite. On the centralist vision of Confederation, the federal government possessed the full range of executive and legislative powers, which were denied to the provinces; the provinces were subordinate to the federal government, which had the power to direct the executive and legislative machinery of the provinces; and the scope of federal jurisdiction was broad, while the scope of provincial jurisdiction was very limited.

The constitutional text did not resolve which of these competing interpretations of the *British North America Act* was correct. One reason is that the document was adopted against the backdrop of British constitutional practice, which leaves the existence, status, powers and relationship of many institutions to unwritten constitutional conventions. For example, the *British North America Act* declares that all executive power in Canada vests with the Queen[37]. There is no mention of the office of the Prime Minister, the cabinet, and the doctrine of responsible government. Moreover, many of the most important provisions conferring legislative are open-ended, and are therefore open to a multiplicity of interpretations. The *British North America Act* assigns *exclusive* legislative jurisdiction to the federal and provincial governments over a lengthy list of powers[38]. However, many of those provisions overlap. To pick but one example, the federal government is assigned jurisdiction over *Trade and Commerce*[39], whereas the provinces is granted jurisdiction over *Property and Civil Rights*[40]. Given that most trade and commerce occurs through the vehicle of contracts that create civil and proprietary rights, the overlap between federal and pro-

[37] *British North America Act*, supra note 8, s. 9

[38] *Ibid.* at ss. 91 and 2

[39] *Ibid.* at s. 91(2)

[40] *Ibid.* at s. 92(13)

vincial jurisdiction is great. Moreover, as discussed above, the document does not contain any language that sets out an overarching vision of Confederation that could guide the interpretation of the document, and resolve the conflict between these competing interpretations.

It therefore fell to the courts to resolve these basic disagreements over the very nature of Canada. The *British North America Act* did not explicitly authorize judicial review, because it was incorrectly assumed that the text was sufficiently clear to not require judicial interpretation. However, the *British North America Act* was adopted against the backdrop of a long-standing practice pre-dating Confederation whereby colonial courts reviewed local legislation for repugnance with Imperial law, which prevailed in the event of a conflict. Since the *British North America Act* is also an Imperial statute, very soon after Confederation, the lower courts began to review federal and provincial laws for compliance with its terms. As a consequence, judicial review grew out of a prior mechanism for maintaining imperial control over a far-flung empire. Moreover, because Canada remained part of the Imperial constitutional order, the court of final appeal was not the Supreme Court of Canada, but the Judicial Committee of the Privy Council (JCPC), which sat in London. The JCPC-which still exists today-is not a court in a formal sense. Rather, appeals are made from colonial courts to the British monarch, who acts on the JCPC's advice. In practice, however, the JCPC is a court that is largely staffed by members of the Judicial Committee of the House of Lords, Britain's highest appeal court. For the first eighty years of Canada's history, the JCPC was Canada's court of final appeal. It soon fell to the JCPC to settle disagreements among governments over constitutional meaning.

The JCPC quickly set out a vision of a Canada with strong provinces and a weak federal government, in which the provinces had jurisdiction over the major aspects of social and economic policy. There were two major sets of cases. One concerned the status and powers of provincial executive and legislative power. To recall, under the British North America Act, executive authority was vested in the British

monarch. However, the Governor-General exercises all of these powers in Canada on behalf of the British monarch. The Governor General in turn appoints provincial Lieutenant-Governors. The question was whether Lieutenant-Governors also possessed the full range of executive powers within provincial jurisdiction, or only those expressly conferred by the Governor-General, and therefore subject to federal control. The JCPC held that Lieutenant-Governors were representatives not of the Governor General, but of the Queen, and therefore possessed the full range of executive power with respect to matters falling within provincial jurisdiction[41]. A parallel issue was the ability of provincial legislatures to delegate law-making power to administrative agencies, ministries, etc. In the British constitutional tradition, Parliament may delegate its law-making powers, but the subordinate decision-makers who receive those powers are prohibited from delegating them away. The question was how to conceptualize provincial legislatures-as Parliaments who could delegate legislative powers, or as subordinate decision-makers like municipalities who could not delegate away powers they received. The JCPC affirmed that they were the former, not the latter[42].

Another set of cases concerned the relative scope of federal and provincial legislative jurisdiction. The *British North America Act* grants the federal Parliament jurisdiction to legislative with respect to the *Peace, Order and Good Government* (pogg) of Canada, and then enumerates a list of specific areas of federal jurisdiction. Although this language is open to the interpretation that the pogg power is a broad, general grant of federal jurisdiction, and the specific areas of jurisdiction merely illustrative, the JCPC quickly took the view that pogg was a residuary power granting the federal Parliament jurisdiction over areas not specifically assigned to either level of government. Moreover, the JCPC held that laws enacted pursuant to pogg could not incidentally affect provincial areas of jurisdiction, which limited the scope of the pogg power even further[43]. JCPC's next move was to declare that the pogg power was in fact an emergency power[44]. A similar story can be

[41] *Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437

[42] *Hodge v. The Queen*, [1883] 9 A.C. 117 (P.C.).

[43] *Ontario* (A.G.) v. *Dominion* (A.G.), [1896] A.C. 348 (P.C.) [hereinafter *Local Prohibition Reference*]

[44] *Reference Re Board of Commerce Act, 1919 (Canada)*, [1922] 1 A.C. 191, 60 D.L.R. 513 [hereinafter *Board of Commerce*]

told about the federal trade and commerce power. Although potentially broad in scope, particularly given that the Commerce Clause in the U.S. Constitution only confers on the federal government jurisdiction over interstate and international trade, the JCPC limited federal jurisdiction under the trade and commerce power to the regulation of international and inter-provincial trade, as well as the *general regulation of trade*[45]. The Supreme Court of Canada then further narrowed the power, by excluding intra-provincial transactions from the scope of federal jurisdiction, even if they had important economic effects both inter-provincially and internationally[46]. The JCPC also held that the *general regulation of trade* excluded legislation that was industry-specific[47], and later suggested that it lacked any independent content[48]. In these same cases, the JCPC read the provincial power over property and civil rights broadly, as encompassing jurisdiction over the whole law of private relations found in contract, tort and property. This was in effect a plenary jurisdiction, which was not limited by inter-provincial and international implications of provincial regulatory activity.

Why did the JCPC read the *British North America Act* in this way? Scholars have offered competing stories. James Mallory argued that the JCPC's jurisprudence reflected a commitment to the principles of laissez-faire, and hostility to the regulatory, redistributive state[49]. Since most legislation regulating market relations was enacted by the federal Parliament, this attitude manifested itself in an expansive toward to provincial power, and a narrow reading of federal power. The link between underlying ideological commitment and constitutional doctrine, however, was entirely contingent. Another view, offered by Alan Cairns, is that the provincial bias of the JCPC reflected the trajectory of Canadian constitutional development[50]. In the first decades after Confederation, the federal government had completed the tasks which the *British North America Act* contemplated it would undertake-the territorial expansion of Canada, the building of the national railway, and the creation of new provinces in Western Canada. The centre of political gravity then shifted to the provinces, which became the major

[45] *Citizens Insurance Company v. Parsons*, [1881] 7 A.C. 96 (P.C.)

[46] *King v. Eastern Terminal*, [1925] S.C.R. 434, 3 D.L.R. 1 [hereinafter *Eastern Terminal*].

[47] *Canada (A.G.) v. Alberta (A.G.) (The Insurance Reference)*, [1916] 1 A.C. 589 [hereinafter *Insurance Reference*]

[48] *Toronto Electric Commissions v. Snider*, [1925] A.C. 396, 2 D.L.R. 5 (P.C.).

[49] J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954)

[50] A. Cairns, *The Judicial Committee and Its Critics*, in *Canadian Journal of Political Science* 4 (1971): 301

locus of governmental activity. The JCPC ratified, as opposed to spurring, the rise of provincial power. A third view holds that the JCPC was guided by a desire to preserve Quebec's autonomy. Although very cases actually arose from Quebec, the JCPC did refer to Quebec's distinct constitutional status as justification for its narrow interpretation of federal power. As mentioned above, Quebec is treated on a basis of juridical equality with other provinces. One exception is a constitutional provision that authorizes the federal Parliament to harmonize areas of private law normally within provincial jurisdiction with provincial consent, but explicitly excludes Quebec from its scope. The JCPC reasoned that the exclusion of Quebec from the harmonization provisions was meant to preserve Quebec's autonomy, which would be undermined if those areas already fell within federal jurisdiction and thus did not require provincial consent for federal legislation[51]. As well, the JCPC did state on one occasion that *the preservation of the rights of minorities was a condition upon which the whole structure* of the *British North America Act* was built, and hence that *[t]he process of interpretation … ought not to be allowed to dim or whittle down the provisions of the original contract upon which the federation was founded*[52].

But regardless of its reasons, the JCPC's interpretation of the *British North America Act* eventually became a source of binational cleavage. The event that brought this to the fore was the Great Depression. The apogee of the JCPC's decentralist vision of Canada was a series of decisions handed down in the late 1930's which struck down the Canadian version of the New Deal-a federal legislative package designed to alleviate the social and economic upheaval of the Depression by regulating markets and creating the beginnings of the Canadian welfare state. In many ways, the decisions were not a surprise, because they involved the application of the JCPC's narrow interpretation of the scope of federal authority. However, it had been hoped that the exceptional economic circumstances of the Depression would lead the JCPC to decide differently. The academic reaction to these decisions in English Canada was fiercely emotional. Leading Anglophone scho-

[51] *Citizen's Insurance Company of Canada v. Parsons*, [1881] 7 App. Cas. 96

[52] *Reference Re the Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 at para. 27

lars-Frank Scott and William Kennedy-advanced two lines of attack[53]. One was originalist, i.e. that the design of the Canadian federation was centralist, and that the failing of the JCPC was its refusal to respect both the clear text and intent behind the *British North America Act*. Another was that the JCPC had erred in not adapting the *British North America Act* to enable the federal government to deal, effectively and quickly, with its pressing social and economic needs, and more fundamentally, to respond to a vastly different set of expectations regarding the responsibilities of the state than prevailed in the mid-19th century. The solutions proposed were to amend the *British North America Act* in order to augment federal authority, and to end appeals to the JCPC. Without these changes, they argued, Canada could not be a true nation, and would be incapable of controlling its destiny. But the latter were considered fundamental, because of the concern that the JCPC had misinterpreted a document that had been framed with a strong federal government, and could therefore not be entrusted to interpret a new constitutional arrangement. Of these two options, the federal government only pursued the latter-the abolition of appeals to the JCPC. In large part, this was because wholescale constitutional reform was a political non-starter[54]. The reason was national unity. At the time of the Great Depression, there was no clear Anglophone majority in favour of an expanded role for the federal government, and the government of the day, a Liberal administration, was dependent on seats from Quebec for it survival. In addition, Quebec was governed by the Union Nationale, which was a staunch defender of provincial autonomy. By comparison, the abolition of appeals to the JCPC was not transparently directed toward the same end. Indeed, the public justification offered for the abolition of JCPC appeals was not to shift the interpretation of the federal division of powers, but rather, to complete the process of Canadian independence, which occurred between 1919 and 1931[55]. The issue was external sovereignty, not the internal distribution of sovereign power. Of course, these arguments were not entirely distinct, since some critics linked the case for increased federal jurisdic-

[53] W.P.M. Kennedy, *The British North America Act: Past and Future*, in *Canadian Bar Review 15* (1937): 393 and F.R. Scott, *The Consequences of the Privy Council Decisions*, in *Canadian Bar Review 15* (1937): 485

[54] Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990) at 81-83

[55] Maurice Ollivier, *Problems of Canadian Sovereignty from The British North America Act, 1867, to The Statute of Westminster*, 1931 (Toronto: Canada Law Book Company Limited, 1945) at ch. 15

tion to the need to implement international treaty obligations.

Appeals to the JCPC were abolished in 1949[56]. The strongest, and most sustained opposition came from Quebec. Indeed, it is Quebec and particularly Francophone scholars who have been the strongest defenders of the JCPC and its legacy. Louis-Philippe Pigeon, a future justice of the Supreme Court, wrote that the *great volume of criticism … heaped upon the Privy Council … is ill-founded*[57], because its decisions *firmly uphold the principle of provincial autonomy: they staunchly refuse to let our federal constitution be changed gradually, by one device or another, to a legislative union*[58]. Another future justice of the Supreme Court, Jean Beetz, also defended the record of the JCPC, again because it protected Quebec's autonomy[59]. But since the JCPC appeals had been abolished, the question was what would replace them. By default, the Supreme Court had become the final court of appeal. There was no guarantee that the Supreme Court would interpret the *British North America Act* any differently. Indeed, after an initial period in the late 19th century when the Supreme Court had advanced a centralist interpretation of the federal division of powers, it quickly fell into line, and faithfully interpreted the JCPC's judgments. Moreover, as future Chief Justice Bora Laskin wrote, in those areas where there were no precedents and it had the legal space to strike out on its own, *[t]he Court as a whole appeared loath to strike out in new directions*[60]. What would happen in the future was unknown.

But this did not stop Quebec from launching a sustained critique of the Supreme Court and proposing alternative arrangements for constitutional adjudication. The fullest statement of Quebec's position can be found in the Report of *Royal Commission of Inquiry on Constitutional Problems (*the Tremblay Commission) in 1956[61]. The Tremblay Commission was struck by Quebec to develop its response to the growth in federal policy activism brought about by the end of the Second World War. The Commission critiqued the Court on a number of mutually reinforcing grounds that could still be made. First, the Supreme Court's existence is not constitutionally entrenched. The *British North America Act* authorizes Parliament to create the Supreme

[56] *Act to Amend the Supreme Court Act*, S.C. 1949 (2nd sess.), c. 37, s. 3

[57] *The Meaning of Provincial Autonomy*, (1951), Canadian Bar Review 29 (1951): 1126

[58] *Ibid.*

[59] J. Beetz, *Les attitudes changeantes du Quebec a l'endroit de la Constitution de 1867*, in P. Crepeau and C.B. Macpherson, eds., *The Future of Canadian Federalism (*Toronto: University of Toronto Press, 1965) at 113

[60] Bora Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians*, in *The Canadian Bar Review 1038* (1951): 1069

[61] Quebec, *Report of the Royal Commission of Inquiry on Constitutional Problems* (Royal Commission of Inquiry on Constitutional Problems Imprint (Quebec City): Province of Quebec, 1956) Volume III, Book I at 287

Court, and it is a creature of federal statute[62]. In other federal states, the existence, jurisdiction and membership of the Supreme Court is entrenched so that they are *beyond the reach of governmental whim*[63]. Second, the federal government has asserted sole authority over the scope of the Supreme Court's jurisdiction, and through legislation, has expanded it to make the Court the final court of appeal in all legal matters of law, including the Quebec *Code Civil*[64]. The Supreme Court therefore is *the greatest power for the standardization of law in Canada*[65]. In addition, it argued that an expansive approach to the Supreme Court's jurisdiction flaunted the original purpose of authorizing Parliament to create a final court of appeal for Canada, and interfered substantially in provincial jurisdiction over the areas of law within the Court' jurisdiction[66]. Finally, the power to appoint Supreme Court justices vests solely with the federal executive. As the Commission started, *[t]his might be acceptable if a mere matter of judging ordinary civil and criminal questions were involved, but in the case of constitutional disputes it is neither normal nor satisfactory that a single party should choose, name and pay all the arbiters*[67]. How did the Commission propose to respond to these critiques? The re-establishment of appeals to the JCPC was a non-option. The Commission therefore proposed a radically different alternative: the creation of a specialist Constitutional Court with jurisdiction limited to constitutional matters. Although the German Federal Constitutional Court was the inspiration for the Commission's proposal, the Constitutional Court of Canada would be quite different. First, there would be one panel of judges, not two Senates, as in the German system. This may reflect the fact that at the time, the range of constitutional issues coming before the Supreme Court was much narrower than those falling with the jurisdiction of the German Federal Constitutional Court. For Canada, the principal constitutional questions at the time concerned federalism; for Germany, they included federalism, rights, the banning of political parties, and separation of powers disputes between federal institutions. Second, the selection process would provide for protection of provincial interests *not* by

[62] *Ibid.* at 289

[63] *Ibid.* at 292

[64] *Ibid.* at 294

[65] *Ibid.* at 291

[66] *Ibid.* at 293

[67] *Ibid.* at 291

involving the upper chamber (the Canadian Senate) in the selection process, but by dividing up the power of appointment between the federal and provincial executives. The Commission proposed that the Constitutional Court consist of five federally appointed judges, and one judge appointed by each region of Canada (Quebec, Ontario, the Maritimes, and Western Canada). One reason for this difference is that the Canadian Senate is neither elected directly nor selected by provincial legislatures or executives, and therefore cannot provide a mechanism for provincial involvement over the membership of the Supreme Court like the Bundesrat does in Germany. In addition, whereas judges of the Federal Constitutional Court do not also sit as justices of the Federal Supreme Court, on the Commission's model, the five federally appointed judges on the Constitutional Court would be Supreme Court of Canada justices. Finally, the existence, jurisdiction and membership (including appointment mechanism) of the Constitutional Court would be constitutionally entrenched.

Over the course of the next several decades, the Quebec government proposed several variations on the Constitutional Court model. Indeed, it first proposed this idea in 1947, in anticipation of the abolition of Privy Council appeals. The details have varied. At different times, Quebec has proposed that provincial executives appoint a majority or two-thirds of the Constitutional Court[68]. For the latter variant, one-third of the judges would be appointed by Quebec, and another one-third appointed by the other provinces. Although many other provinces held concerns similar to those identified by the Tremblay Commission and advanced by Quebec, none supported the creation of a Constitutional Court as a solution to these problems. Moreover, the federal government consistently opposed the creation of a specialist constitutional tribunal.

The federal government offered its most extensive critique to the idea of a Constitutional Court in 1979[69]. First, there were concerns regarding the proposed appointing procedure. The federal government feared that distributing the power of appointment among several gover-

[68] *Quebec's Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001* (Québec City: Secretariat of Canadian Intergovernmental affairs, 2001) at 38, 52

[69] Otto E. Lang, *Constitutional Reform: The Supreme Court of Canada*, reprinted in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson Limited, 1989) at 476

nments would turn the Court into a representative body, which *would not likely function as a independent judicial body interpreting the Constitution but more as a body or tribunal negotiating the interests of the various governments*[70]. This critique was rooted in an understanding of adjudication and the judicial role that sharply distinguished legal and political decision-making. Second, the federal government cast doubt on the wisdom of separating constitutional from non-constitutional issues in the adjudication of particular dispute, which the creation of a Constitutional Court would necessitate. It envisioned a model of Constitutional Court jurisdiction in which there would be no direct access by litigants. Rather, ordinary courts would refer abstract constitutional questions to the Constitutional Court while retaining jurisdiction over the case. The Constitutional Court would send its answers back to the ordinary court, which would then apply it to the facts at hand. In the federal government's view, this would harm the development of the law, since *our system of law requires that decisions in a case be related to all the factors involved, including the facts and the other relevant law*[71]. In addition, it would produce delays. By contrast, a system of dispersed jurisdiction would *result in only the most contentious constitutional issues being appealed to the Supreme Court and allows them to be decided in reference to the factual situation and the case as a whole*[72]. Finally, the federal government questioned an argument sometimes offered in favour of a Constitutional Court: that constitutional issues are sufficiently different from other legal issues that they require special expertise, which is lacking on a generalist Supreme Court. Its response was that *[o]ur system is not one of specialization; we do not require that only experts in criminal law decide criminal law cases, or that only experts in commercial law decide commercial law questions*[73].

[70] *Ibid.* at 478

[71] *Ibid.* at 482

[72] *Ibid.*

[73] *Ibid.*

The opposition to the creation of a Constitutional Court did not mean that the status quo remained unchallenged. Rather, it had the effect of shifting the debate to the reform of the Supreme Court itself. Some proposals sought to constitutionally entrench the Supreme Court's existence, to guarantee Quebec's existing representation on the Court, but to modify the appointments process to provide for greater provin-

cial involvement. A representative set of proposals can be found in the *Meech Lake Accord*, discussed earlier[74]. If a vacancy occurred on the Supreme Court, each province would have been allowed to submit a list of nominees to the federal Minister of Justice. The power of appointment would have remained with the federal cabinet, but appointments would have had to be made from provincial lists. The amendment also made special provisions for Quebec. At present, the Court consists of nine members-three from each of Ontario and Quebec, one from the Maritimes (Nova Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island), one from British Columbia, and one from the Prairie provinces (Alberta, Saskatchewan, Manitoba). Only Quebec's representation on the Court is entrenched in statute, whereas the distribution of the remaining seats is a matter of political convention[75]. The proposed amendment would have entrenched Quebec's current level of representation, which is out of proportion to its share of the national population, and is predicted to decline further. This has been a common element in many otherwise disparate proposals. Moreover, the *Meech Lake Accord* would have required the appointment of judges from Quebec to be made from a list of nominees provided by that province. With respect to appointments to non-Quebec positions, the provision would have required appointments to be made from names provided by provinces other than Quebec.

This was not the only option. Other proposals provided that the appointment be agreed to by the federal and provincial executives without the requirement that the appointment be made off a provincial list (e.g. the 1971 *Victoria Charter*)[76]. In the event of disagreement, a *nominating council* would be struck consisting of a federal representative, a provincial representative, and a mutually agreeable chair, or in the absence of agreement on a chair, the Chief Justice of the province from which the appointment would be made. The federal government would send a list of at least three names to the nominating council, from which a majority of the committee would recommend one. Other variations would have replaced the appointing power of

[74] *Meech Lake Accord, Amendment to the Constitution,* 1987, c. 11, s. 5

[75] S*upreme Court Act (R.S.)*, 1985, c. S-26, s. 6

[76] *Victoria Charter*, 1971, c. 38

the federal executive with a power of nomination, and required legislative affirmation for an appointment to be made[77]. Legislative affirmation would have been linked to the reform of the second chamber of the federal Parliament, the Senate, by enabling it to serve as vehicle for the representation of provincial interests in the federal Parliament- for example, by transforming it into a House of the Federation in which half of the members would be selected by the House of Commons, and the other half by and provincial legislatures. Some proposals (e.g. the *Victoria Charter*) would have entrenched the Supreme Court's jurisdiction over all constitutional disputes, while leaving other questions of jurisdiction to federal statute.

Other proposals were more radical. Thus, the *Victoria Charter* proposed that appeals from Quebec relating to the *Code Civil* should be heard by a special panel consisting of five judges, with three from Quebec. This would have the effect of restructuring the internal workings of the Court to respond to the fact of Quebec's juridical distinctiveness. It would in effect have been a form of asymmetrical federalism, not by denying the Supreme Court jurisdiction over appeals raising the *Code Civil* from Quebec and thereby leaving those issues to be resolved by the Quebec courts, but rather by restructuring a national institution to create a unique procedure not applicable to comparable issues from the nine common law provinces. Another set of provincial proposals developed in 1980 proceeded from similar premises but led to a different conclusion[78]. These proposals would have expanded the size of the Supreme Court and increased the number of judges from Quebec- e.g. a Court of 13 or 11 judges (as opposed to the current 9) with 4 or 5 judges from Quebec. The idea here was that the disproportionate representation of Quebec reflected its unique vulnerability to constitutional interpretation of the division of powers, because it is home to Canada's Francophone minority. This increase in the size of the Supreme Court was often paired with a proposal for constitutional cases to be heard by a select panel of Supreme Court justices in which the proportion of the panel drawn from Quebec relative to the Court's

[77] *Constitutional Amendment Bill*, Bill C-60, 1978

[78] *Report on the Supreme Court, Document 830-83/010, 1980*, in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Document History* (Toronto: McGraw-Hill Ryerson Limited, 1989) at 633

configuration in non-constitutional cases would be higher-e.g. on a Court of 13 with 5 Quebec justices, there would be a constitutional panel of 11 with all 5 Quebec justices. Unlike the proposal for Quebec appeals on the Code Civil, Quebec judges would still be in a minority. But they would have disproportionate representation on all constitutional panels, not just those hearing appeals from Quebec.

In the end, the constitutional status of the Supreme Court was only modified slightly as part of the constitutional package that included the *Charter*. The most sweeping reforms were rejected. The Supreme Court remains a creature of statute, which provides that the Court has nine members, at least three of whom are from Quebec; that the Court's members are appointed by the federal executive; and that the Court's jurisdiction encompasses all legal questions. On the other hand, the rules governing constitutional amendment provide that changes to the *composition of the Supreme Court of Canada* require unanimous federal and provincial consent, and that amendments in relation to *the Supreme Court of Canada* require the consent of the federal government and two-thirds of the provinces accounting for at least 50% of the national population[79]. Although it is not clear how any changes to the Supreme Court could require constitutional amendment given that the existence of the Court and its features are set by statute, the conventional wisdom is that these provisions have the effect of entrenching the Court's existence, its size and the requirement that at least three judges come from Quebec.

The reasons why the more ambitious constitutional reforms proposed for the Supreme Court were not adopted alongside the *Charter* is a complex story, in which the Court played a central role[80]. The federal-provincial negotiations on the constitutional package including the *Charter*, the reform of the Supreme Court, and a range of other issues, including rules governing constitutional amendment that terminated the Imperial role in constitutional change, broke down in 1980. The federal government decided to proceed unilaterally, and requested the Imperial Parliament to amend the Constitution without provincial

[79] *Constitution Act*, 1982, *supra* note 30 at s. 41

[80] Sujit Choudhry and Jean-Francois Gaudreault-DesBiens, *Frank Iacobucci as Constitution Maker: From the Quebec Veto Reference to the Meech Lake Accord*, University of Toronto Law Journal 57 (2007): 165

agreement. The constitutional package sent to London was limited to the *Charter* and the rules governing constitutional amendment. The federal government's position was that once the power of constitutional amendment was transferred to Canada, a second round of constitutional negotiations could address the remaining issues, including the Supreme Court.

In response, three provinces launched a constitutional challenge to the federal government's unilateral plan, arguing both as a matter of constitutional convention and constitutional law that there was a requirement for *the consent of the provinces* flowing from constitutional convention or as a matter of constitutional law. In the *Patriation Reference*, a seven judge majority of the Supreme Court summarily dismissed the legal argument[81]. But the controversial part of the judgment was the decision of a differently constituted six judge majority that there was a constitutional convention for a *substantial degree of provincial consent*. The reference question asked whether there was a constitutional convention requiring provincial consent for amendments *affecting federal-provincial relationships or the powers, rights or privileges* of the provinces. Several constitutional amendments fell into this category and indicated the absence of a consistent practice, which should have led to the conclusion that there was no constitutional convention of any kind. But the Court evaded this conclusion, by narrowing the scope of the reference question to those which *directly affected federal-provincial relationships in the sense of changing provincial legislative powers*. This had the effect of excluding precisely those precedents where provincial consent had *not* been obtained, but created another problem. The remaining precedents indicated a practice of *unanimity*. But the Court reasoned instead that the failure of the reference questions to refer to *all* the provinces left it open to answer if the consent of some, but not all was required, and held this is what the precedents established. Finally, while the Court refused to specify the measure of provincial consent required, the consent of two provinces was deemed insufficient.

The *Patriation Reference* was likely driven by the Supreme Court's politi-

[81] *Reference re a Resolution to Amend the Constitution (Patriation Reference)*, [1981] 1 S.C.R. 752

cal agenda. The Court's judgment call was that unilateral amendment of the Constitution would severely damage the fabric of federal-provincial relations. The judgment forced the parties back to negotiations. Both sides could claim victory-the federal government on legality, the provinces on legitimacy. Both parties also had strong incentives to reach a settlement. But the *Patriation Reference* increased the risk of isolating Quebec. Prior to the judgment, the provinces assumed that unanimity was required. The shift to a convention of a substantial measure of provincial consent divided the provincial coalition, because each province no longer could claim a veto.

Yet the *Patriation Reference* also gave Quebec the ammunition to challenge the legitimacy of the constitutional package that included the *Charter*, which it did soon after the *Charter* was adopted. Quebec made two arguments. First, it argued that the requirement for a *substantial measure of provincial consent* could be interpreted not only *quantitatively*, but also *qualitatively*, requiring the consent of Quebec in recognition of the binational nature of the Canadian federation. Second, it argued that the evidence suggested the existence of a distinct constitutional convention granting a veto to Quebec. The best support for a Quebec veto arises from two negative precedents, where Quebec's opposition to two attempts to secure agreement on a domestic amending formula (in 1964 and 1971) was regarded by the other constitutional actors as sufficient to scuttle them.

In the *Veto Reference*, the Court rejected both arguments[82]. Since the Patriation Reference had held that the convention was substantial provincial consent, it had by logical implication rejected unanimity. On the Quebec veto, the Court shifted gears. The criteria for a constitutional convention is a consistent practice of political behaviour, accompanied by *acceptance or recognition by the actors in the precedents* which distinguishes behaviour motivated by constitutional obligation from conduct driven by expediency. On the facts, the evidence of such acceptance was lacking. But this is very hard to square with the *Patriation Reference*, where the Court did not point to a single statement of the

[82] *Reference re Amendment to the Canadian Constitution*, [1982] 2 S.C.R. 793

need for substantial provincial consent. The Court was willing to infer acceptance of such rule from constitutional practice. Had the Court imposed the standard applied in the *Veto Reference* in the Patriation Reference, it would have denied that claim as well. Had it done the reverse, it would have accepted Quebec's argument for the existence of a conventional veto.

Once again, a political agenda likely drove the judgment. By the time the Veto Reference was heard by the Supreme Court, the constitutional package including the *Charter* was a legal *fait accompli*. Since Quebec had only impugned the legitimacy, not the legality, of the constitutional amendments, the Court was faced with the prospect of finding that legally valid constitutional amendments were nonetheless illegitimate. A judgment to this effect would have inflicted serious damage on the constitutional order. But although the ruling may have been politically unavoidable, it was legally incoherent. Not only had the Court manipulated its analysis to achieve a result inconsistent with the evidence, but in doing so, it contradicted he *Patriation Reference*, handed down just one year earlier. The *Veto Reference* confirmed what critics had been saying all along-that although the Court claimed to have been acting impartially as a judicial tribunal, it had acted in a politically partisan way to favour the federal government. This is true no where more than in Quebec, where there was nearly universal denunciation of the Court. Quebec Premier René Lévesque used the metaphor of the *La Tour de Pise* to describe what he perceived as a partial and profoundly unjust attitude on the part of the Court. Quebec legal scholars were generally more circumspect, but no less critical. The Supreme Court's image was badly bruised in Quebec after the *Veto Reference*, and that its legitimacy was substantially weakened: the general court of appeal for Canada instantly became la *Cour des Autres*.

In contrast, the Supreme Court's actual track record in federalism cases prior to the enactment of the *Charter* was actually much more balanced. On the one hand, the Supreme Court had begun to expand federal jurisdiction to cover intraprovincial trade whose regulation was

necessarily incidental to the regulation of international and interprovincial trade[83], limited the ability of provinces to regulate the prices of products heading into export markets[84], rendered portions of the private sector subject to federal regulation (banking, telecommunications) immune from provincial labour laws[85], and held that pogg was not an emergency power[86]. But on the other hand, it affirmed exclusive provincial jurisdiction over intraprovincial trade[87] even where it affected interprovincial trade[88], and read the pogg power narrowly. For Quebec language legislation in particular, the Supreme Court's judgments were mixed. Thus, while the Court struck down attempts to withdraw official language status from English in the legislature and the courts[89], it later upheld the constitutionality of legislation regulating the language of the private sector[90]. However, whatever credit the Court had garnered in Quebec through its constitutional jurisprudence on the federal division of powers was overwhelmed by its involvement in the process surrounding the adoption of the *Charter*.

Conclusion

Ginsburg's thesis does not hold in the Canadian case. The *Charter* was not adopted as a form of insurance by political actors to hedge against the risk of future electoral uncertainty, and was not accompanied by the creation of a new Constitutional Court to enforce it. Rather, the adoption of the *Charter* was designed to combat Quebec nationalism, both by constraining Quebec's ability to engage in linguistic nation-building and to serve as the seed of a pan-Canadian constitutional patriotism. Moreover, the final court of appeal for the *Charter* is not a specialist Constitutional Court, but the Supreme Court of Canada. But the Canadian case is not important merely because it illustrates that the substantive and institutional limbs of Ginsburg's argument are not true in a prominent example. The Canadian example also offers more general lessons.

[83] Murphy v. CPR (1958), 15 D.L.R. (2d) 145

[84] *Central Canada Potash Company v. Saskatchewan (Attorney General)*, [1979] 1 S.C.R. 42, *CIGOL v. Saskatchewan*, [1978] 2 S.C.R. 545

[85] *Commission du Salaire Minimum v. Bell Telephone Company of Canada*, [1966] S.C.R. 767

[86] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373

[87] *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844, *Labatt Breweries of Canada Ltd. v. Canada (Attorney General)*, [1980] 1 S.C.R. 914

[88] *Carnation Company Limited v. Quebec Agricultural Marketing Board et al.*, [1968] S.C.R. 238

[89] *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016

[90] *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790

Canada is a linguistically divided society, in which language has served as the basis of political mobilization. The *Charter* project was an attempt to use a bill of rights as a nation-building instrument to build a shared political identity that transcends the linguistic divide. Moreover, the *Charter* was adopted a part of a process of constitutional transition, as Canada severed its final legal connections with the United Kingdom and adopted an indigenous source of title for the Canadian constitutional order. So the Canadian case is really a case about the nation-building role of a bill of rights at moments of constitutional transition in a divided society. Canada is far from alone in adopting a bill of rights in this context and for this purpose. Indeed, many of the most prominent and recent examples of constitutional engineering are in societies striving to overcome deep divisions on the basis of race, ethnicity, religion and/or language. And in these new constitutions, bills of rights are front and centre as nation-building instruments that serve both regulative and constitutive roles. In many divided societies, racial, ethnic, religious or linguistic status was the basis for the unjust distribution of primary social goods in the Rawlsian sense - liberty and opportunity, income and wealth, and the bases of self-respect. Bills of rights are meant to serve as hard checks on political power to ensure that such abuses will not occur again, and to provide groups with the political incentive to acquiesce and participate in the new constitutional-legal order. But bills of rights have been also looked to as constitutive documents to transform the political self-understanding of citizens. A bill of rights calls upon citizens to abstract away from race, religion, ethnicity and language, which have previously served as the grounds of political identity and political division, and to instead view themselves as citizens who are equal bearers of constitutional rights.

Can a bill of rights serve this constitutive purpose? To answer this question, we need to first distinguish between two kinds of divided societies in the process of constitutional transition. In the first category, there are competing nationalisms within the same political place.

These places are variously referred to as multinational polities, plurinational polities, or, plurinational places. In some cases, these places are states, such as Bosnia Herzegovina, Sudan, Sri Lanka, and Cyprus. In other cases, it falls within part of a state, as does Northern Ireland. In yet other cases, it traverses the boundaries of a state, as does Kurdistan, which straddles the borders of Turkey, Iraq and Iran. In the second category, a divided society in constitutional transition is not the site of competing nationalisms. A good example is South Africa. Save for the very margins of political discourse, the South African debate generally presupposed a shared nation, with the claims of black South Africans framed in the language of inclusion and equal citizenship.

So can a bill of rights constitute a national identity? I think the answer to this question can be found in the debates occasioned by another constitutional transition-the reunification of Germany. The question was how Germans should make sense of reunification. There were two options on the table. One was ethnic nationalism, which equates states with ethnic nations. On this account, reunification brought ethnic nation and state back into alignment, after a four decade interruption. The other was *verfassungspatriotismus* or constitutional patriotism, offered by Jurgen Habermas[91]. For Habermas, the core of the German political identity was the Basic Law, Germany's postwar constitution. Reunification was justified as the restoration of democracy and the *rechstaat* in a territory that had lacked both since the rise of Hitler.

Now the best answer to Habermas came from Bernard Yack[92]. Yack argued that a purely abstract constitutional patriotism could not explain the defence reunification over the simple restoration of liberal democracy in East Germany, or why Germany did not unify with the former communist dictatorship of Czechoslovakia, with which it shared a border. Constitutional patriotism in Germany was accordingly best understood as an appeal to a certain audience, united by a shared historical memory and common historical experiences which gave the rules and institutions of liberal democracy a particular salience. The more general point is that even in nations which claim to define citi-

[91] Jurgen Habermas, *Citizenship and National Identity*, in Jurgen Habermas, ed., *Between Facts and Norms* (Cambridge, MA: MIT Press, 1996), 491

[92] Bernard Yack, *The Myth of the Civic Nation*, Critical Review 10 (1996): 193

zenship in civic terms, those principles are nested in a contingent context-a constitutional narrative drawing on a web of political memory forged by shared experiences, challenges, failures and triumphs, which is often but not necessarily tied to a particular set of institutions.

So it is very difficult for bills of rights, on their own, to serve a constituting role in defining a new political identity. In a case like South Africa, for a bill of rights to serve as the basis of a common political identity, it must be married to a constitutional narrative particular to South Africa, about the struggle for racial equality and democracy. The Canadian experience tells us that in plurinational places there is an additional hurdle. The task is not simply to situate a bill of rights in a contingent historical and political context. The task is to do so in a context where the existence of competing nationalisms makes the dominant question of constitutional politics the conflict between competing national narratives. If the ambition of a bill of rights as a constitutive instrument of nation-building is to serve as a central element of an overarching narrative, by standing apart from and transcending these competing narratives by, a plurinational context is a particularly difficult environment in which to do so. Indeed, there is the danger that rather than transcending those national narratives, a bill of rights will be drawn back into it. This is precisely what has happened in Canada.

The second lesson from the Canadian experience is that the institutional arrangements surrounding the enforcement of a new bill of rights is an important choice as well. Indeed, failing to address this issue carefully may further undermine the relatively limited ability of a bill of rights to serve as an instrument of nation-building in a divided society. To understand why, let us begin with Ginsburg. Ginsburg accurately observes the choice of centralized judicial review through a specialist constitutional court has emerged as a dominant feature of constitutional design for jurisdictions that have recently adopted bills of rights. He explains this institutional choice by linking the adoption of a bill of rights to the process of democratic transition. A diffuse system of review through the ordinary courts is a non-option, becau-

se *the judiciary was typically trained, selected, and promoted under the previous regime*[93]. The old judiciary is tainted through its association with an undemocratic regime, and cannot be trusted to interpret and enforce a new bill of rights that fundamentally rejects the previous undemocratic constitutional order. Thus, as Ginsburg says, *[i]n many constitutional design situations, there is no real choice to be made here*[94].

Now the easy response to Ginsburg would be to say that Canada is clearly different from the cases around which he built his theory. The adoption of the *Charter* was not a component of a process of transition from authoritarian to democratic rule. There was no concern that the enforcement of the *Charter* could not be trusted to generalist courts, including the Supreme Court of Canada, that were part of the discredited, prior constitutional order. On this argument, the substantive question of the adoption of the *Charter* could be treated separately from the institutional question of which court should enforce it. A related point is Canada's common law tradition in constitutional law, in which the power of judicial review is vested with ordinary courts of general jurisdiction. This is true even in Quebec, notwithstanding its civil law tradition in the realm of private law. If pressed, I suspect most scholars of Canadian constitutional politics would offer this argument to defend the failure of the field to systematically reflect on the choice of the Supreme Court of Canada to enforce the *Charter*, and to focus exclusively on the substantive work that the *Charter* was intended to do. However, this would be an over-simplification. The Canadian story is complex, because there was not one moment of choice, but two. The first moment was the abolition of appeals to the JCPC. Although publicly defended in the name of Canadian independence, many of the most vocal proponents of this move hoped it would open the door to a radically different interpretation of the federal division of powers. The choice was between two options-the Supreme Court of Canada or a new Constitutional Court. How each would interpret the federal division of powers was unknown. But proponents of each had hopes. The Canadian nationalists who argued in favour of the Supreme Court

[93] Ginsburg, *supra* note 1 at 9

[94] *Ibid.* at 36

hoped that it would emerge from the shadow of the JCPC, depart from established precedent, strike out in a bold new direction and increase the power of the federal government. Quebec, which argued in favour of a Constitutional Court, hoped it would continue to favour provincial autonomy and adhere to the JCPC's jurisprudence.

The Canadian case turns on its head Ginsburg's account of the implications of this constitutional choice. On his account, creating a new Constitutional Court increases the likelihood of constitutional transformation, while vesting the power of judicial review in an old court diminishes that prospect. In Canada, the opposite was true. Constitutional actors who disagreed on the choice to be made nonetheless agreed that vesting ultimate authority with the existing Supreme Court was the choice for constitutional change, whereas creating a new Constitutional Court was the choice for the *status quo*. Why? What shaped constitutional actors' assessments of the impact of this constitutional choice was the mechanism of appointment. The Supreme Court was, and remains, federally appointed. Over time, it was assumed that the federal government would use its power of appointment to select justices who took an expansive view of federal legislative power. By contrast, the proposals for the Constitutional Court always assumed that provinces would have the power to appoint a significant proportion, perhaps even an outright majority, of the justices. Although Quebec's proposals to create a Constitutional Court gained little traction, they did give rise to a set of counter-proposals to reform the Supreme Court that would have institutionalized a major provincial role in appointments. Thus, the institutional limb of Ginsburg's thesis needs to be modified for federal states.

The choice of the Supreme Court as the ultimate judicial custodian of the *Charter* has to be analyzed against the backdrop of this earlier constitutional choice, and the decades of constitutional politics that it spawned. For Quebec nationalists, the Supreme Court was allied with the federal government, with the best evidence being its central role in the adoption of the *Charter* itself. Since the *Charter* was a nation-buil-

ding instrument directed at Quebec nationalism, the choice of the Supreme Court to enforce it had an added significance-and indeed, was viewed by Quebec nationalists as an added insult to Quebec.
So the value of the Ginsburg thesis is not that it explains the Canadian case. Rather, its value is that it forces us to revisit and enrich our constitutional histories of the adoption of the *Charter*. In so doing, we recover a forgotten history that the institutional question of which court was vested with ultimate responsibility for its enforcement, which also a controversial choice.

Christoph Schoenberger
The Establishment of Judicial Review in Postwar Germany

I. Introduction

According to Tom Ginsburg's thesis[95], the introduction of judicial review is due to a sober calculation by hegemonic political elites trying to protect their increasingly threatened political power. They will adopt judicial review as an *insurance* against possible electoral defeats. By providing this *insurance* to prospective electoral losers, judicial review especially facilitates the transition to democracy. This general thesis is of course fascinating. The fascination is due to two elements: it is simple and, thereby, reduces the complexity of the question. And it claims to offer a *realist* account by opposing the *idealism* of usual lawyerly justifications of judicial review that stress the rule of law. But I have to confess immediately: I'm not convinced. To be sure, there may be some situations where Ginsburg can explain the introduction of judicial review (especially transitions from certain types of authoritarian regimes to democracy). But I tend to think that those cases are rather exceptional and that Ginsburg's thesis does not provide a convincing general frame of explanation. I will try to show this in some detail for the German case after World War II. But before doing so, let me offer

[95] Tom Ginsburg, *Judicial Review in New Democracies. Constitutional Courts in Asian Cases*, 2003; for a similar argument see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 2004

some general theoretical objections to Ginsburg's view. His is a rational choice perspective. Politicians do have clear-cut interests as to the introduction of judicial review and they do have a clear-cut understanding of those interests. If they are bound to lose power, they will introduce judicial review as a political insurance mechanism. I would challenge this empirical assumption for several reasons: In many cases, there will not be a clear political majority in a constitutional assembly. Even if there is one, the outcome of future parliamentary elections will always be uncertain to a certain extent. In addition, if judicial review of legislation is introduced for the first time, there will be little experience with that institution so that politicians will have difficulties assessing the potential political impact of this change. Last not least, the general picture of the new institutional framework and of the place of the Constitutional Court within that framework will only emerge over time. At the moment when they adopt a new Constitution, politicians will usually not foresee the extent to which political power may be transferred to the Constitutional Court in the actual development under the new Constitution. And this ignorance and uncertainty probably leaves room for decisions to be determined by deeper ideological beliefs or longer cultural traditions than Ginsburg's thesis would allow for. As a general hypothesis, then, I would argue that Ginsburg's thesis is a victim of false realism. We probably do not have to choose between *realism* and *idealism*, but we definitely need a more *realist* realism than the one Ginsburg provides. I will try to illustrate this by giving an overview of the introduction of judicial review in Germany after World War II.

II. The German case after the Second World War

If we examine the debates preceding the adoption of the Basic Law (*Grundgesetz*) in 1948/49 - first in the expert convention at Herrenchiemsee and then in the Parliamentary Council which eventually drafted the Basic Law[96] - we are immediately confronted with a signi-

[96] The most comprehensive account remains: Heinz Laufer, *Verfassungsgerichtsbarkeit und politischer Prozess. Studien zum Bundesverfassungsgericht der Bundesrepublik Deutschland*, 1968, p. 35-92

ficant surprise: The establishment of judicial review of parliamentary legislation and of a new Constitutional Court was not subject to important discussions. There was a lack of passionate debate on these questions in Germany at the time and this lack is even more significant if we compare it with the heated discussion that had taken place under the Weimar constitution (or that took place in the French and Italian constituent assemblies after 1945). In the Weimar Republic, the problem of judicial review of parliamentary statutes had been intensely discussed by practicioners and law professor alike. At the highest theoretical level, Carl Schmitt and Hans Kelsen had developed the different fundamental positions, with Schmitt denouncing a constitutional court as a countermajoritarian usurpation of legislative power by an unaccountable institution and Kelsen taking its defence by claiming that only such a Court could guarantee the permanent compromise between majority and minority which, for him, was the essence of democracy[97]. If we look at the German debates after 1945, no such principled discussion took place. Only isolated communist members of the Parliamentary Council and the first *Bundestag* voiced the concern that a Constitutional Court might become a countermajoritarian institution. But apart from those voices, the fundamental arguments for establishing or rejecting judicial review were almost not discussed at all. There are several reasons which can explain this tired consensus on judicial review.

[97] See Olivier Beaud, Pasquale Pasquino (ed.), *La controverse sur "le gardien de la Constitution" et la justice constitutionnelle.* Kelsen contre Schmitt. Der Weimarer Streit um den Hüter der Verfassung und die Verfassungs-gerichtsbarkeit. Kelsen gegen Schmitt, 2007

1. The new significance of human rights after Nazism

The first and most important reason is the *new significance of human rights* in German constitutional law. The Parliamentary Council started its document with a proclamation of human dignity and a catalogue of human rights. The Herrenchiemsee Convention had even considered opening the Basic Law with the words: *The State exists for the sake of Man, not Man for the sake of the State*. Theirs was a strong reaction to the Nazi period. And they wanted not only to proclaim fundamental

rights, but to make them judicially enforceable. As the Weimar tradition was inconclusive on the matter, the Founders looked to the new Constitutional Court for the legal guarantee of the newly proclaimed rights. They cared less for the problem of the delicate balance between Parliament and the new Court than for the clean and unequivocal break with the Nazi experience.

2. The tradition of constitutional jurisdictions on institutional and federal disputes

The second important element was not the present, but the longer past. To be sure, Germany had no established tradition of judicial review before 1945. But nevertheless it had a tradition of *constitutional jurisdictions* dating back to the Holy Roman Empire[98]. There were two important experiences in this tradition. On the one hand, the old idea of the Constitution as treaty or compact, which had been used in some German territories to submit the conflicts between Princes and Estates to legal dispute resolution. And on the other hand, there was an even more important tradition of resolving *federal disputes* between the states and the federal government or among the states by judicial means. The Weimar Constitution had even established a State Court of the German Empire (*Staatsgerichtshof*) whose main task had been to adjudicate disputes between the German states and the Reich. These legal mechanisms had not implied judicial review. But at least, they had accustomed German lawyers, bureaucrats and politicians to the possibility of resolving certain political conflicts by the decision of special courts.

[98] On this tradition see Ulrich Scheuner, *Die Überlieferung der deutschen Staatsgerichtsbarkeit* im 19. und 20. Jahrhundert, in: Christian Starck (ed.), *Bundesverfassungsgericht und Grundgesetz*, 1976, p. 1-62

3. The problem of the plurality of German high courts

The third element was the peculiar problem of the plurality of *Germany's highest courts*. It is striking to see the extent to which the pro-

blems of court organization in general dominated the debates on the Constitutional Court. To be sure, the establishment of judicial review always implies the question whether this review should be vested in the ordinary courts or whether a separate constitutional court should assume this task. But in the German case, this general problem was still complexified because Germany had an important number of different unrelated high courts. Therefore, the question of the Constitutional Court was always mixed up with the reorganization of the court system as a whole and the possible establishment of a new German *Supreme Court* similar to the Swiss or American model[99]. Finally, the Parliamentary Council could not agree to establish a unified *Supreme Court* and stuck with the traditional systems of special high courts for specific areas of law like administrative, financial or labour matters. But this debate obscured and complicated the discussion on the Constitutional Court and diverted attention from the specific problems of the judicial review of parliamentary legislation.

[99] One of the significant documents of this debate is a memorandum submitted to the Parliamentary Council and published later on: Walter Strauß, *Die Oberste Bundesgerichtsbarkeit*, 1949

4. The weakness of the German parliamentary tradition

A more general reason which facilitated the almost silent introduction of judicial review was the *weakness of the German parliamentary* tradition. Due to the strong monarchical element which had persisted until 1918, this tradition had been particularly weak and Hitler had dealt it a deadly blow. After all, Hitler had been the leader of the most important party when he was appointed chancellor in 1933. As a consequence, after 1945, there was a deep mistrust towards politicians and electoral politics even among politicians themselves. Therefore, the idea of parliamentary sovereignty - which had never developed deeper roots in Germany anyway - could not be a counterweight to the adoption of judicial review as in France or Italy.

5. The provisional situation encountered by the Parliamentary Council

There was also the fact that the Parliamentary Council was confronted with a task that was at the same time huge and provisional. It drafted a fundamental statute only for the three Western occupation zones. The situation of Germany as a whole remained very much in a limbo. As all the old institutions of the German Empire had vanished in the defeat, many of the institutions considered by the Parliamentary Council were new and unprecedented. Judicial review, then, was *only one innovation among many others*. At the same time, the scope of influence of these institutions seemed fairly limited for a long time as the main political decisions were still being taken by the Allied occupation powers. Under these circumstances, the old conviction of many German lawyers and politicians that a Court could not be entrusted with the decision of questions of *high politics* could no longer be used effectively against the introduction of a Constitutional Court as there did not seem to be much *high politics* left to the Germans anyway.

6. Ignorance, uncertainty and openness

Last not least, the German founding fathers had *no clear idea of the potential political power the Constitutional Court might acquire* by the means of judicial review. How could it have been otherwise? The American experience was not yet very well known at the time and, in any event, theirs was not an experience of a separate Constitutional Court in the continental sense. The Austrian *Kelsenian* tradition of judicial review was very limited in scope and had not included the question of judicial review of parliamentary statutes with respect to human rights. The Parliamentary Council, rather, embarked on unchartered territory with no clear idea at all as to how a judicial review of parliamentary statutes with respect to fundamental rights might unfold. And it left many important questions

- among others the exact organization and composition of the Court, the qualification of the judges, the potential membership of judges from the existing high courts, the possibility of dissenting votes, the introduction of an individual constitutional complaint for human rights violations - to the future legislation. It was the first Bundestag that, after long and difficult deliberations, adopted the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz) in 1951[100], thereby paving the way for the Court to start its activity in Karlsruhe in 1952. Only in a long process throughout the 1950's, the Federal Constitutional Court gradually, and not without important political conflicts, climbed to the institutional position it still holds today. It would be anachronistic to say that the Parliamentary Council actually devised in 1948/49 the system of constitutional adjudication and judicial review as we know it in Germany at present.

[100] On the debates and compromises surrounding the adoption of the Federal Constitutional Court Act see the account by Wolfgang Kralewski, *Das Gesetz über das Bundes-verfassungsgericht*, in: id./Karlheinz Neunreither (ed.), *Oppositionelles Verhalten im ersten Deutschen Bundestag*, 1949-1953, 1963, p. 168-204; comprehensive documentation: Reinhard Schiffers, *Grundlegung der Verfassungsgerichtsbarkeit. Das Gesetz über das Bundesverfassungsgericht vom 12. März 1951*, 1984

III. Some general lessons of the German case

What does the German case teach us about Ginsburg's thesis? I think it confirms my first impression that his thesis cannot provide a general framework of explanation. The German experience after 1945 suggests at least three variables that a general explanation of the reasons for the introduction of judicial review should take into account and that Ginsburg does not address:

1. The importance of federalism

The first one is the importance of *federalism* or, in general terms, of the *territorial organization* of the political community which is supposed to have a Constitutional court. Federalism may accustom politicians to the legal resolution of political conflicts and there had been a limited tradition of this in Germany even before 1945. Federalism in general

tends to force politicians to compromise also by other means, e.g. by the existence of a second chamber representing the federated states that limits the capacity of majority government by the lower house alone. Politicians in federal systems are usually accustomed to a system of compromise and not of clear majority decisions. The compromise between different institutional actors is a built-in dimension of the constitutional design and this tends to facilitate the adoption of judicial review. If an observer like Ginsburg only takes into account the situation in national centralised systems, he misses this important part of the picture.

2. The importance of the national parliamentary tradition

The second aspect is the situation of the national parliamentary tradition before the introduction of judiciary review. The weakness of this tradition, a mistrust of politics and politicians even among politicians themselves helps to clear the way for the introduction of judicial review. In such a general context, the introduction of judicial review is not so much a measure of pure political expediency that tries to enshrine certain institutional positions of a political elite bound to lose power. It is, rather, a consequence of the perception of parliamentary government and democratic mechanisms in general. The German example is a case in point, as the German founding fathers inherited from the Weimar experience a certain mistrust of democratic politics which they tended to enshrine in the new constitutional system.

3. Ignorance and lack of experience

The third important element that Ginsburg thesis does not consider is what I would call ignorance and lack of experience. Politicians create institutions but they do not know the institutions they create. This is

especially true for the introduction of judicial review. In the German case, for example, it took many years before judicial review materialised as a regular important weapon of the parliamentary opposition. This was not clear at the beginning, it developed over time. Even today, with enhanced possibilities of obtaining the necessary information about the functioning of judicial review in other countries, the knowledge about foreign experiences in constitutional assemblies is still usually fairly limited and it may prove inconclusive anyway. If transplanted into another country, a system of judicial review may work out in a completely different manner from the country of origin. Even a deeper knowledge of the system of the country of origin may not enable politicians to know the consequences of the institutional decisions they are taking. In general terms, then, Ginsburg is right in claiming that we need realism. But his realism does not pass the test of reality.

Michel Troper

Constitutional amendments aiming at expanding the powers of the French Constitutional Council

Why do politicians accept to create mechanisms of Constitutional review, thus limiting their own power in favor of judges ?

In the French case, the question cannot be discussed exactly as in other countries, because there was never was a conscious decision to create a Constitutional court. The Constitutional council was first established in 1958 not as a Constitutional court and constitutional adjudication was developed, like in the United States, as a result of the Council's own jurisprudence when it decided in 1971, in a famous decision on freedom of association, to review the constitutionality of statutes in reference to the preamble of the constitution and all the implicit principles indirectly mentioned in that preamble, thus increasing its own powers. This decision resulted in an enormous expansion of the powers of the council, which has been correctly compared to Marbury v. Madison,

but which in some respects is even more audacious. This is first because the framers of the constitution had very explicitly refused to allow the council to review the constitutionality of statutes in reference to the preamble. The framers followed a French tradition going back to the Revolution that is suspicious of any form of government by the judiciary. The second reason is that, unlike the US constitution, the principles that the council decided to use when reviewing the constitutionality of statutes are only partially text based and the council gave itself in 1971 the power to decide what counts as a constitutional principles. The list of these principles is therefore entirely open. The third reason is that, unlike Marbury, the 1971 decision is not supported by any argument. As is well known French opinions are extremely brief. In fact they are not really opinions. Last year the archives of the Constitutional council were open to researchers and some of the deliberations have been made public. What is particularly striking is the fact that in 1971 the members mostly discussed whether the statute that had been referred to them really violated the freedom of association, but not the essential point whether freedom of association was a constitutional principle.

However this decision would have been of relatively little consequence, had access to the Constitutional council remained restricted to the four authorities to whom the constitution gave the power to refer a statute to the Council within 15 days after its adoption in Parliament. These four authorities were the President of the Republic, the Prime Minister, and the two Presidents of the two houses of Parliament. Indeed between 1971 and 1974 no statute was referred to the Constitutional council by these authorities.

Since we have been asked to test Ginsburg's hypothesis that politicians create or strengthen a mechanism of Constitutional adjudication because they have an interest in creating an insurance mechanism against the possible victory of an opposing party in parliamentary elections, the 1971 decision obviously falls outside our topic.

However two major constitutional amendments have taken place after

1971, the first in 1974, the second in 2008. Both allow broader access to the Council and both can be analyzed in order to test Ginsburg's hypothesis. We shall find that the 1974 amendment undoubtedly validates the thesis. Yet, the 2008 amendment is different, because the majority did not fear a victory of the opposition and because the substance of the amendment does not provide a clear protection in the event of such a victory.

1974 : The Counter-Majoritarian solution

It seems that the first case clearly confirms the hypothesis : in 1974, president Giscard d'Estaing, who had just been elected by a short margin against the candidate from the left, Mitterrand, realized that his majority could be defeated in the next general election and that there was a strong possibility of a cohabitation. He also realized, and said as much, that the constitution gave the president of the Republic few possibilities to resist a committed left wing majority in Parliament. He said so explicitly a few years later in 1978 before a general election when he feared that a coalition of the socialists and the communists would win: *Vous pouvez choisir l'application du Programme commun. C'est votre droit. Mais si vous le choisissez, il sera appliqué. Ne croyez pas que le Président de la République ait, dans la constitution, les moyens de s'y opposer*[101].

Giscard was right. The president was given important powers by the constitution, but he could not have resisted a left wing majority, as was demonstrated later by cohabitation.

One possibility would have been to amend the constitution and give the president a veto power as in the constitutions of the 18th and 19th century. Such a veto power was often thought to be a guarantee against possible excesses of the legislature. It was defined as an internal guarantee, similar in that respect to bicameralism, as opposed to an external guarantee given by a court[102]. Some even argued that the veto power allows the head of State to oppose a statute because he does not appro-

[101] Valéry Giscard d'Estaing, Allocution prononcée à Verdun-sur-le-Doubs, 27 janvier 1978, http://www.assemblee-nationale.fr/histoire/suffrage _ universel / giscard _d%27estaing.asp

[102] This is one of the main reasons why constitutional review of statutes was considered unnecessary in France. In 1795, when Sieyes proposed to create a "constitutional jury", an institution inspired by the councils of censors, that the constitutions of some American States had created, the proposal was rejected unanimously on the base of two main arguments : who will guard the guardians ? and moreover there is no need for an external guarantee since the balance between the two houses of the legislature already provides and internal guarantee, similar to a veto power

ve the content, but also because he views it as unconstitutional. Indeed it has sometimes been justified in that way in the United States.
However in the France of 1974 this was definitely out of the question. The experience of the King's veto in the constitution of 1791 and its consequences in 1792 had disqualified this type of institution, which was clearly viewed as anti-democratic. None of the constitutions written in Europe after the Second World War have given real veto power to the president. Only later would such a veto be found in some post communist constitutions, where it can be overridden by a two-third majority in Parliament, e.g. Russia (article 107), Poland (article 122-5) or Ukraine (article 94).
Thus, the only and obvious solution against the risk feared by Giscard, that a socialist majority could effectively implement their platform, was to create a real external guarantee, and build a power that could check the parliamentary majority by giving a minority of 60 members of either house the power to refer a statute to the Constitutional council.
It is quite possible that this was not the only motive and that Giscard was seriously committed to provide better guarantees of fundamental rights or to start building what is called in France *un statut de l'opposition*. However, one should note that a) fundamental right would have been better protected with ex post review, which Giscard did not take into consideration; b) the protection would have been better - according to the ideology of the rule of law - if members of the council were real lawyers c) the classic view of the rule of law was contradicted by the original plan by Giscard, who intended to create a system much more powerful than that of Constitutional adjudication. He intended to give the Constitutional council the power to decide on its own to examine a new statute. In the bill there was a provision to that effect, which was rejected for fear of government by the judiciary, but this shows that there was a real wish to create a counter-power.
Constitutional adjudication in this case clearly worked as an insurance mechanism, exactly as planned: the right used it after the left had won both the presidential and the general elections in 1981 and passed legi-

slation to nationalize large corporations. The left used it after the right came back to power in 1986 and passed legislation to privatize these corporations.

Years later, this was recognized by Sarkozy :

"*Votre institution a accompagné l'alternance en empêchant les majorités politiques de succomber à l'inévitable tentation des excès. De droite ou de gauche, toutes les familles politiques de notre pays, lorsqu'elles se sont retrouvées dans l'opposition, ont vu le Conseil constitutionnel conforter des valeurs qui leur étaient chères : les droits de la propriété privée au moment des nationalisations - nous fûmes bien contents alors d'avoir le Conseil constitutionnel - comme ceux de la propriété publique au moment des privatisations ; la liberté de l'enseignement comme celui de l'existence d'un enseignement public, laïc et gratuit*[103]. (Colloque du Cinquantenaire. Auditorium du Louvre, 3 Nov. 2008).

All this seems to validate perfectly Ginsburg's hypothesis both from the point of view of Giscard's intention to create an insurance mechanism and that of the efficiency of that mechanism although it can be shown that it works better in favor of the right. However constitutional adjudication continued to be *a priori*, *until the revision that took place in 2008*.

[103] Allocution de M. le Président de la République lors du colloque du cinquantenaire du Conseil constitutionnel, Paris, Auditorium du Louvre, Lundi 3 novembre 2008, http://www.elysee.fr/documents/index.php?mode=cview&cat_id=7&press_id=2000&lang=fr

2008 : The free gift ?

The second step, which has not yet been fully completed, started in the spring of 2008 when President Sarkozy initiated a complex constitutional amendment. One of the new provisions gives the power to refer to the Constitutional council a statute already in force to the parties to a case where the statute is applicable. Thus, the Constitutional council will be able exercise *a posteriori* Constitutional adjudication.

If the question of Constitutionality is raised the lower judge may not decide on the issue as in the US and she may not refer it directly to the Constitutional council as an Italian judge may do. She must refer it to the Cour de Cassation or the Conseil d'État, which will act as filters before referring cases to the Constitutional council. The new amen-

dment needs to be specified by an *organic law*. The procedure to pass such an organic law is slightly different from that of ordinary legislation: as for ordinary statutes, the bill can be submitted to the two houses of Parliament either by the cabinet or by private members, and it is adopted in the same way as ordinary statutes (by a simple majority); but unlike ordinary statutes it is automatically referred to the Constitutional council and can only be promulgated after the council has decided that it is not unconstitutional. In this case, the organic law has not yet (June 2009) been debated in Parliament, but the bill has been made public.

At first glance, it would seem that in this case Ginsburg's hypothesis does not provide a satisfying explanation and one might be tempted to argue in favor of a more classical view, namely that ideology plays the most important role and that disinterested liberal politicians create or develop constitutional adjudication because they are committed to the principles of the rule of law and want to protect fundamental rights. Indeed, Sarkozy clearly did not contemplate the possibility that he might lose the next election and probably did not think that in that case he might benefit from the new a posteriori Constitutional adjudication. Moreover, as we have seen, a posteriori adjudication is not terribly advantageous for the opposition.

However, between the cynical view that politicians creating Constitutional adjudication wish to create an insurance mechanism and the assumption that they are virtuous creatures moved by the sole desire to protect fundamental rights, there is room for a mixed theory that explains the expansion of the powers of the Constitutional council by the combined strategies of the President and that of Constitutional council. In the case of the President there are various benefits to be expected from the revision

a) He wanted to have a very general reform of the constitution to make history, inaugurate a change of regime, appear liberal, above political parties: thus, he created a committee, chaired by Balladur, a former Gaullist Prime Minister, with law professors and politicians,

mostly from the right. Sarkozy is a great admirer of the US. One of the reforms he wanted badly was the right to go to Parliament and give the equivalent of a speech on the State of the Union. He may even have contemplated a presidential system. The committee was in charge of drafting a complex proposal to give Parliament more powers and reflect upon more dramatic changes regarding the presidential or parliamentary character of the system. The result was a list of 67 propositions that were important but not spectacular and would not change the whole system. Most of them were difficult to sell to public opinion, because of their technicality. Something was needed with greater political visibility.

b) A constitutional referendum being risky, Sarkozy had to use the other amending procedure of article 89 and introduce the bill in the Congress of Parliament (the two assemblies sitting together), where he needed a 3/5 majority. He could not get it without at least some socialist votes. Moreover it had been a constant strategy to weaken the socialist party by seducing some of its important figures or at least dividing them. One way of achieving this result and trap the socialists seemed to be the introduction of Constitutional review a posteriori because it had been a socialist plan presented by Badinter in the years of Mitterand. Indeed the bill was adopted with a very small margin of two votes, one of them Jack Lang's, a socialist politician.

c) A third reason was even more important: the need to control lower judges as well as the Cour de Cassation and the Conseil d'État . Contrary to what one might think, the reform of 2008 is not meant to increase the power of judges, but on the contrary to limit that power. At the same time, it is hoped that the introduction of Constitutional adjudication a posteriori might help limit the prevalence of international law over domestic law and thus preserve national sovereignty.

This is because of an institution known as *control of conventionality*, that has greatly developed since 1975. Article 55 of the constitution of 1958 reads :

> *Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.*

Nevertheless, at first, courts were prevented from applying this provision because, since Acts of Parliament are the expression of the general will, they could not refuse to apply them even if they thought that they were unconstitutional or contrary to an international treaty. Indeed refusal to apply a statute had been considered since the time of the Revolution as an usurpation of the legislative power and therefore a crime. This is one of the reasons why judicial review of legislation was so difficult to introduce in France.

It was not until 1975 that the primacy of international law over statutes became effective after a famous decision by the constitutional Council[104]. According to that decision, the violation of a treaty was not equivalent to a violation of the constitution and was not therefore within the council's jurisdiction. In the words of the Council, *a statute that is inconsistent with a treaty is not ipso facto unconstitutional. Review of the rule stated in Article 55 cannot be effected as part of a review pursuant to Article 61 (constitutional review), because the two reviews are different in kind; It is therefore not for the constitutional Council, when a referral is made to it under Article 61 of the Constitution, to consider the consistency of a statute with the provisions of a treaty or an international agreement* .

The door was thus open for ordinary courts to use article 55 and they began to refuse the application of statutes contrary to treaties. Today, every court, while not exercising judicial review of the constitutionality of statutes, exercises another and very powerful form of control by examining the conformity of statutes to treaties. This procedure has been known as *review of the conventionality of statutes*. The prevalence of

[104] Decision 74-54 DC of 15 January 1975 Voluntary Interruption of Pregnancy Act

treaties is not limited to the European treaties related but extends to derived law produced by European authorities and also to other international conventions. For example, one treaty that is frequently invoked is the European Convention of Human Rights.

This procedure has been developed to a very great extent and is now being used extremely often. It may lead to very paradoxical situations. It may happen for instance that a statute that the Constitutional council has declared to be constitutional is nevertheless found to be contrary to a treaty and judges will refuse to apply it. Or vice versa, a statute that could be unconstitutional if there was a procedural means to review it is nevertheless applied because it is not contrary to any international convention.

On one occasion a very important statute reforming labor law was struck down by a lower court, not even composed of professional judges, the *Conseil des Prudhommes*, because it was contrary to a convention of the International Organization of labor.

This has been a source of frustration for the Constitutional council and also for all those who fear that France may lose its sovereignty because of the European Union and who also felt that sovereignty was better protected in other European countries.

Indeed Sarkozy said as much in his speech for the fiftieth anniversary of the Constitutional Council: *Dans les années récentes, le Conseil a rappelé que la supériorité du droit communautaire et international sur le droit interne français ne peut pas s'étendre à la Constitution. Et il a dégagé le principe d'identité constitutionnelle de la France afin de préserver ce qui, dans notre tradition juridique, ne saurait se dissoudre dans un droit international, aussi protecteur des libertés fondamentales soit-il. Chacun sait que cela vise notamment la laïcité, le droit de grève, les services publics, mais chacun pressent que cela pourrait viser bien davantage si telle était la volonté du Conseil constitutionnel .*

D'abord, je ne crois pas qu'il y ait une homothétie absolue entre les droits fondamentaux protégés par nos normes constitutionnelles et les droits fondamentaux protégés par les textes internationaux. Si le Conseil constitutionnel a cru pouvoir dégager le concept d'identité constitutionnelle de la France, c'est qu'il a eu conscience de

cette différence. Ensuite, il est singulier d'observer l'ardeur de nos hautes juridictions à rappeler la suprématie absolue de la Constitution dans la hiérarchie des normes, sans être pour autant réellement dotées de mécanismes permettant de la faire respecter. Très franchement, et le Constituant l'a compris, je préfère que nos lois soient censurées sur le fondement de notre Constitution plutôt que sur le fondement de conventions internationales et européennes. Permettre aux lois d'être contestées sur le terrain de notre Constitution, ce n'est pas remettre en cause la souveraineté du peuple et de la Représentation nationale, c'est au contraire la conforter, car c'est le peuple ou la Représentation nationale qui écrit la Constitution, et qui la place au sommet de ses normes, alors que ce n'est ni le peuple, ni la Représentation nationale qui écrit la norme internationale. Cet argument a été déterminant pour moi dans le choix que j'ai fait de proposer au Parlement la réforme du 23 juillet 2008.
In this respect the new *a posteriori* procedure protects national sovereignty better for two reasons: the first is a decision by the Conseil constitutionnel that although European law prevails over French law, including Constitutional law, it does not prevail over some core principles, that form the Constitutional identity of France[105]. The second reason is that when a party to a case is in a position to argue that the applicable statute is contrary both to international law and to Constitutional law, the new amendment gives priority to the question of constitutionality: the judge must refer the question of constitutionality to the Constitutional council via the Cour de Cassation or the Conseil d'État instead of deciding herself of the question of conventionality. Thus, whenever a statute violates a fundamental principle guaranteed in both international law and Constitutional law, this principle will prevail as expressed in Constitutional law. Once the Constitutional council decides the statute is unconstitutional there is no further need to check its conformity to international law.

[105] Décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d'auteur et aux droits voisins dans la société de l'information

d) The new procedure can also protect France from international law in another way. Before applying to The European court of Human rights one must have used all the remedies in the State. It is probable that the ECHR will decide that referring a question to the

Constitutional council is part of the remedies. For the court this will diminish the number of French cases. But this means also that France will be sentenced less often.
This will put some pressure on the Cour de Cassation and the Conseil d'État which having the power to filter referrals to the Constitutional council, might be tempted to use it extensively. If the statute does not get to the Constitutional council the ECHR may be decide that a citizen has been deprived of her right to a fair trial.

e) From the point of view of politicians, the current majority has little to fear from the Constitutional council because of its present composition, which is not likely to change dramatically. But if the reform is be neutral as far as the balance of powers is concerned, the majority can afford to seem liberal and benefit from a new image of militants of the rule of law.

On the other hand, while the introduction of this new procedure will not bring any benefit if the current majority loses the next general election, it does bring them some benefits while they are in power: in recent years, on several occasions, some bills were introduced by the executive in parliament and adopted too rapidly, sometimes drawing intense resistance. The executive could not have it abrogated without losing face. If the Constitutional council declared the law to be unconstitutional, the executive could always tell his majority that he did his best, pretend to be angry and blame the judges.
It is also possible that the reform reinforces the position of the majority vis-à-vis the opposition, because with a priori review the opposition is sometimes able to negotiate a compromise on a bill in exchange for a promise not to go the Constitutional council. With the new system, the incentive to compromise is not as high because, since *a posteriori* review is always possible, not going to the Constitutional council does not guarantee permanent immunity for the statute. On the other hand, if the Constitutional council reviews the statute a prio-

ri and declares that it is constitutional, the same statute cannot be referred later *a posteriori*. Thus, it is in the best interest of the majority to antagonize the opposition by refusing to compromise, thus challenging it to refer the statute to the council and achieving immunity[106].

[106] I am indebted to Raphael Paour for this idea

Finally, we should also remember that any form of Constitutional review is more favorable to those who prefer the status quo than to reformists. This is not only the consequence of the dominant ideology of the justices, although the selection process plays an important role. It is also due to the fact that the constitutional provisions that are the standards against which the review is exercised are themselves a reflection of the status quo. It is true that these provisions can be interpreted, but the argumentative constraints inside a court prevent rapid changes in the jurisprudence.

Thus, while the introduction in 2008 of *a posteriori* Constitutional review, may represent a better protection of fundamental rights, it does not limit the powers of the president or of the current majority and provides other substantial benefits. If it is a gift, the beneficiary is not only the Constitutional council or the citizen, but also the giver himself.

Conclusion

From the story of the two constitutional revisions, one might be tempted to conclude that the former validates Ginsburg's hypothesis that politicians do not abandon their power in favor of courts out of sheer commitment to the rule of law, but rather take an insurance policy to limit the consequences of losing an election, but that the latter provides a counterexample because the political majority in 2008 did not fear losing power to the left and because, in any case, the new procedure would not increase the protection already provided by the Constitutional council against radical reforms.

However, the initial hypothesis should not be viewed too narrowly. If what is to be explained is the creation or expansion of Constitutional

review, the alternative should not be limited to the creation of an insurance mechanism or the disinterested and sincere commitment to the defence of fundamental rights. The example of the French revision of 2008 shows that there may be self-interested reasons to create such an institution, other than the will to avoid the consequences of an electoral defeat and that one of those self-interested reasons is putting up the appearance of disinterested commitment to fundamental rights.

Alessandro Torre

Forms of a constitutional adjudication under a flexible, unwritten Constitution. The case of the United Kingdom

Thank you very much. It may seem somehow extravagant to speak about the United Kingdom in a context where people are talking about constitutional adjudication. So where to start? I think it might help to start from the roots of the issue. We know that in Britain we never had a formal written Constitution, so we can describe our Constitution as unwritten, flexible and evolutionary. We know that the structure of the British Constitution is partly written in ancient documents or statute laws. This is the formal part of the Constitutional system as a whole. The other part is conventional: there are understandings, usages, customs and Constitutional conventions; partly they are made through the adjudications of the courts and partly they come from the legal doctrine of the common lawyers and of the text books.

We know that the authors of this legal sources were the same persons: they were judges, common lawyers, the legal advisors of the king; so the judges had an important part in the building of the legal system.

So there is mixité of sources and the relationships between this sources aren't hierarchical but, instead, they are on the same level. So we can say that there isn't a paramount Constitution but we still have to ask ourselves whether there is ground for constitutional adjudication in this kind of system; why do we have to ask ourselves such a question?

Just to remind you one of the most recent examples, there is a big revival of enacted reforms where the parliament is very important - let's say - in relation to Constitution: the Human Rights Act of 1998, the Bank of England Act, Freedom of Information Act, all the devolution Acts like the Scotland Act, the referendum political parties Act which regulates the elections and the propaganda, the House of Lords Act and, later, the Constitutional reform Act of 2005 that is important to us to understand what might happen on the ground of constitutional adjudication. So it's a long list of formal enactments, not to mention the many British nationality Acts and the terrorism Acts.

There is an increase of value of enacted force; so can we say that the Constitution is unwritten? Just some days ago there was an article by Timothy Garton Ash on *La Repubblica* entitled *Costituzione scritta per la Gran Bretagna* and, at one point, he says "We must go towards a written Constitution". This is a neobenthamian approach as Bentham use to say how good it would be if the father of a family could have in his pocket the book of the English Constitution and read it while he goes for a walk. They said that the unwritten Constitution is going towards a different structure. It is increasingly a documentary Constitution: decentralization, self government, more powerful courts, more direct democracy by referendum and so on.

Evidently there can't be a pure evolution without enactments because they give a concrete shape to the evolution; this is the nature of this kind of Constitution and that makes it common place to say that it's not written just because there isn't a single document.

But if there isn't a single document the common argument is that there isn't constitutional adjudication and, indeed, they have never had a Constitutional Court. Let's call it multi-dimensional Constitution; so the slogan is "no written Constitution, no Constitutional Court". It's very simple and it's what we usually think about this kind of Constitution. There shouldn't be a judicial review model of constitutional adjudication like in the United States. We must remember that the term judicial review of legislation comes from the common law,

from the ordinary activity of the courts.

We can also add just to prepare what I'm going to say at the end of the presentation that the new Supreme Court of the United Kingdom, which has been formally established with the Constitutional reform Act of 2005, but isn't working now because it shall start working concretely in 2009, is not the classical Constitutional Court - that's not what it is intended to be -. In other words, the total lack of a paramount Constitution that can be considered, as in the United States, the supreme law of the land and the need to enforce the principle of the sovereignty of parliament works, today, against the establishment of constitutional adjudication.

But we must remember that if we look at the basic principles of the British Constitution - the sovereignty of parliament and the rule of law - we can say that the principal machinery of sovereignty of parliament lies in the parliament itself but that the rule of law was enforced by the judges; so we can see that there is a dual dimension that gives strong power to the judges. If the power isn't to disregard the law but to interpret it than the judges are under the law. Nevertheless, we know that historically the judges had more complex and sophisticated ways to interpret the rules.

Does United Kingdom really lack not to say a single formal Constitution but some basic paramount laws that we can consider more important on the Constitutional point of view?

Is parliament such an absolutely sovereign constitutional body that it can exclude the existence of a constitutional counterpart, be it in the courts or in a single high-level court? Aren't the judges the authors of Constitution making in the history and up to today? Is the lack of a single formal Constitution enough to assert that no form of constitutional adjudication is workable in the United Kingdom?

Which Constitutional body, if any, - and I'm trying to assert that there are or at least there were - accepts some form of Constitutional Adjudication in Britain? As far as the first question is concerned, we know that in Britain all laws are equal, they are made by the parliament.

Dicey says that there is no difference between a law made on a matter concerning dentists and a law concerning the monarchy; so we can say that there isn't difference between a reform on fishery and a reform about the House of Lords. This represents the formal approach. Nevertheless, if we look at the debate and the self-constraint that some time we have when a law on the House of Lords is on the floor, than we can see that there are some laws which are more important than others. De Tocqueville argues that in the British system, because all act of constitutional relevance are made by the parliament, the parliament is the current Constitution maker without no real restraints. But, for example, we can see that some acts of parliament, like the devolution Acts or the Acts on parliament, are something more important, on a higher level, than day to day laws.

There is, also, a big resistance to change. As a matter of fact they started to speak about the reform of the House of Lords at the end of eighteen century - the English and Irish Jacobins tried to say that the second chamber wasn't useful - in the parliament act of 1911 there was a clause saying that the House of Lords should have been changed and finally now they are talking about that but the reform isn't at its final stage. The Scottish lawyers say that the Act of Union of 1707 is a paramount law because the parliament decided about the Union and then decided that this Union was binding: they couldn't change all the Scottish institution; and so when the parliament binds itself for the future there is no sovereignty, the new parliament isn't sovereign. This argument was used by some Scottish constitutional lawyers like Mitchell who said that the European Community law was a revolutionary law because it was binding for all parliaments. The same can be said for the devolution Acts because on a formal level the parliament can repeal the law because he is sovereign but, actually, nobody thinks that this is possible without a complete disruption of all the constitutional order and international relations.

So there is a British bloc de constitutionnalité that exists, due to the recent laws, and a lot of ground for constitutional adjudication. Also

because the research for a fundamental law is very longstanding in the English legal culture.

Francis Bacon spoke about the law of the land - the lex terre - the rule of law like something that binds the sovereign that might be the king, as a law-maker, but also the parliament. So the Westminster parliament is no longer actually a sovereign - you were speaking before about the problem of the party government that is overruling the parliament traditional activity -.

Hence a confrontation on the field of constitutional reform between parliament and the courts is unlikely; nevertheless there could be a confrontation on Constitution making because if we look at the activity of the courts we can say that they were actors, together with the king and the parliament, of the Constitution making.

If we have a strict and formal idea of what constitutional adjudication is, we can say that there is no Constitution without no constitutional adjudication; but if we have a broad idea of what is constitutional adjudication, what can we say about, for example, the Petition of Right that was written by a judge and by a parliamentarian - Sir Edward Coke - or about all the activity of the judiciary that by its interpretation just work against the infamous black Act of 1723 which established the death penalty for 60/80 crimes against the property. Griffith in his essay 'The Politics of the Judiciary' spoke about the activity of the courts in order to protect some basic rights during the welfare state. What to say about the revival of the Habeas corpus in immigration cases?. What about the conflicts between kingship and the parliament when the judges decided about the boundaries of royal prerogative?. On what about the support of the courts during the glorious revolution in favour of the parliament against the king?. So the courts were important.

What about the role of the courts in the technicalities of legislation?; for example, all statutes were written by judges in ancient times and then they created the new administrative law in Britain.

What about the role of the judges under the Human Rights Act of 1998 in certification of the compatibility of Westminster legislation

according to the European Convention?.

There was someone who said that courts have been acting, from time to time, as architects of the Constitution and so on.
Which judicial bodies have a role in this kind of constitutional adjudication? The first one may be seen in the Judicial committee of the Privy Council; we use to speak about Canada as the most noble, honourable and reverend assembly of the king in the early seventeen century. The members of the Judicial committee of the Privy Council were - I say "were" because now things have changed - the Lord Chancellor, the highest judges of the country, the Lord President of the Council and other senior judges, some of which were coming from other countries of the Commonwealth because under the Judicial committee Act of 1844, the committees of the Privy Council held all appeals coming from the Supreme Courts of colonies and, later, dominions. The Council was, indeed, the supervisor of a uniform application of the Common Law throughout the empire. Later, just by analogy, when the Irish question arouse at the end of the nineteen century, the Privy Council had the power to intervene in the territorial conflicts arising from Ireland; as far as devolution is concerned it was the Judicial committee of the Privy Council that could intervene on devolution cases - problems of conflicts between laws or between levels of government -. So we can call it a broadly territorial jurisdiction cases coming from all the territorial parts first of the empire and, later, of the United Kingdom. The second body is or was, the Judicial committee of the House of Lords. It starts its activity in the Mid Victorian Age with the appellate jurisdiction Act. It is an appellate court and until the passing of the Constitutional Reform Act - but basically until today - its members were the Lords of Appeal in Ordinary, we call them the Law Lords, the Lord Chancellor and some other senior judges. It was a Supreme Appellate Court for civil and criminal cases from the whole United Kingdom - but not for Scotland in criminal cases -

and is made by professional judges and it was a parliamentary body, so there was some kind of confusion of power in this court. Anyway it was considered a very dignified and constitutional grounded court because of its connection with the second chamber of the parliament; its communications were considered parliamentary orders and were enforced by an order of the House of Lords and many obiter dicta of judges were important in the field of human rights as well as in the field of an harmonization of domestic legal system with the European Union. After this judicial committees were constitutional courts, in the formal sense of the world; but they were responsible for fragments, for sui generis constitutional adjudications and they were in continuity with the activity of the lower courts because of the Appellate power of the Judicial committee of the House of Lords or due to the Commonwealth connections of the Privy Council. We can say that the real novelty of this system is, now, the Constitutional Act of 2005. I don't think it is a real novelty because it is a new shape of an old topic is to say putting together this fragments that we can call a *constitutional adjudication*. The reform of 2005 says many things. The Lord Chancellor lost his role as an high judge: he was a member of the judicial body and could participate to the system and sometimes he, actually, did. The Lord Chancellor thus turned into a Secretary of State for justice. The Supreme Court of the United Kingdom was established and the Judicial Committee of the House of Lords was abolished and its Law Lords will move from the House to the new Supreme Courts at least for the first period because, then, the appointment of further judges will go under the responsibility of an independent committee of selection. The Supreme Court isn't that - and I quote - *great conspicuous tribunal* that Walter Bagehot pictured as a solution of the over fragmentation of the judiciary but, when he spoke those words, he wasn't thinking of a Constitutional Court, he was just thinking of a rationalization of the existing system. Its most apparent connection with the bloc de constitutionnalité is not really the written Constitution but devolution because the most important and challen-

ging responsibility of the Supreme Court will be to adjudicate devolution issues, all those conflicts that may arise between devolved governments or between this governments and the central government - between, for example, the Scottish parliament and the Westminster parliament -. So there will be conflicts between government powers or between government laws. We shall see, because now - beside debating on the origins of constitutional adjudication which belong to the past - we have the privilege of discussing the origins in fieri of something which hasn't started yet. According to the Constitutional Reform Act this new Supreme Court will get the heritage of both the Judicial Committees: in toto from the House of Lords and partly from the Privy Council because the Privy Council shall retain the power of appeal from Commonwealth countries like New Zealand and so on. It will be a third level appellate court in civil and criminal cases - but not for Scotland where there is a different legal system - and it will be the judge of the devolution cases. Will it be a sort of Constitutional Court? The question is really open, we had a meeting last year in London with Anthony Bradley about whether United Kingdom is going toward a new form of constitutional adjudication; many constitutionalists beg Italian colleagues to avoid talking about constitutional adjudication asserting that they are too optimistic and go too fast on that issue. Also the government said that it isn't intended to be a Constitutional Court - or something like that - and there won't be, arising from the devolution cases, a different form of adjudication. I don't understand that, it's a logic fiction that saves the form of the existing system. It will be, surely, a quartum genus adjudication: civil, criminal, administrative and then devolution adjudication which can mean a sort of constitutional adjudication because, clearly, the lack of a written Constitution according to constitutional lawyers in Britain is the main argument against the Supreme Court as a Constitutional Court but we must also think about the superior level of the devolution Acts of Scotland, Wales and Northern Ireland since this superior level of conflict resolution is the most important to see whether this

kind of constitutional adjudication may arise. There is also a more open minded group of public lawyers - and Bradley was one of them - who considers the possibility that this is a new stage of the development of the British Constitution. Now we have a documentary Constitution which means that there are some laws that are more important than others and if we will have - as many in Britain are convinced of - a written Constitution then constitutional adjudication will be a necessary consequence of that.
It was also emphasized that the new Supreme Court enjoys almost the same empowerment of the Supreme Court of the United States: appellate jurisdiction and arbitration of conflicts.
So the question is: did United States Supreme Court start exactly like that? Well this is the idea that let me believe that the UK Supreme Court will soon get a full citizenship of the Republic of the Constitutional Courts. Thank you.

Pasquale Pasquino
The debates of the Italian Constituent Assembly concerning the introduction of a Constitutional Court (1947-1948)

Last but not least Italy. Not least for two reasons. The first reason is that the Italian Constitution was the first one establishing an organ specialized in constitutional adjudication after the Second World War; it wasn't the first body working, because the Germans are normally quicker than Italians, but German's Constitution was enacted in 1949 while Italian Constitution was enacted in 1948. So is the first post Second World War, and still working, Constitutional Court in Europe. And second and not least because the debates relative to the establishment of the Constitutional Court are in my opinion among the most interesting in the constitutional history as they show that the political actors had a quite clear understanding of what they were doing. For sure they couldn't foresee the technicalities that the Constitutional

Court would have developed but they were aware of what they were doing: limiting the power of political majorities.

Before getting into the core of my presentation let me briefly remind you the starting point which is this thesis presented by Tom Ginsburg which develops a model able, in principle, to make predictions. It is a very specific model although not analytically perfectly clear. The model claims that *under electoral uncertainty in a non federal system when there are two group, i.e. political parties of equal weight in a constituent assembly, then this constituent assembly should establish a strong Constitutional Court as a mechanism of insurance*. That's certainly specific but I think analytically unclear because Ginsburg never says what is insured; what the court has to insure, it could insure three different things.

1. It could insure the constitutional *status quo*: so it could be an insurance for keeping the Constitution stable.
2. It could insure democracy in a strict sense: meaning alternation in power, which is, by the way, one of the pillar of this type of regime, avoiding that the winner becomes to strong and the loser too weak.
3. finally, it could insure citizens rights, which is a different point although in some way connected to the two others.

The constitutional law passed by the French parliament in 1974, we could argue, ensured that the loser of the elections didn't loose to much, concretely that, if the socialists had won, the country won't have become a socialist country because there was an insurance (the *Constitutional Council*) that something - e.g. private property - would have been protected. Let us consider that more closely. The *Constitutional Council* in his famous decision concerning the *nationalizations* did not cancelled the socialist decision, but modified its costs reducing them for the people expropriated. Is that an insurance for whom? For the owners and the political forces that lost the elections. So that seems an instantiation of a different thesis, the one presented by Jon Elster in his *Ulysses Unbound* (Cambridge, 2000), according to which the constitution ties up the hands of some one other, not those of the maker of the constitution. Now, in the case we are considering

what looks surprising is that we are speaking of a constitutional amendment passed (like in 2008) by the majority against the will of the opposition. That shows first of all that the French constitution is almost flexible since the constitution can be modified without the agreement of the opposition - which is in general the reason for having a rigid constitution! Or that in France, because of the nature of the electoral law the majority can pretty easily dispose of a constituent supermajority, like in China. Perhaps something is wrong with that. In any event the story looks like a sort of unilateral insurance for the incumbent vis-à-vis the challenger! To this reconstruction one can object though that in a regular democracy there is alternation in power? So either one party is able to control constantly the Constitutional Court (that happens perhaps in France and again something seems wrong with that), or the Court becomes an insurance for any incumbent (conservative or liberal) independently so from its *name*. Now to avoid a functionalist explanation conflating the ex ante with the ex post, i.e. the intentions and the motivations of the constitution makers with the (unforeseen) effects of an institution, we have to keep distinct the two perspectives. It is possible that what Giscard wanted to guarantee was his political part, but there is sufficient evidence now, ex post, that the insurance worked in France in the two directions. This is a well known phenomenon we call (constitution-making) myopia.

Italy is in this perspective a case in point. On the basis of Ginsburg explicative hypotesis Italy should have been a country were the two blocks present in the Constituent Assembly, the Christian-democrats and the social-communists, should have been supporting a strong Constitutional Court, at least if they would have been Ginsburgian. I believe that if it is almost impossible to predict the future in political life, we can try to use rational choice models to predict the past i.e. to explain what happened. We can try to verify if Ginsburg's thesis can explain what happened. In the past, at least in Italy, it happened something really different from what happened in Germany more or less at

the same time since there was a violent fight inside the Constituent Assembly among the supporters of the constitutional Court and its enemies. Now which are the arguments? Who are the people in favour and who are the people against?

The people in favour were, inside the committee preparing the section of the constitution concerned with the guarantees of its rigidity, two quite outstanding legal experts, Giovanni Leone for the Christian-democrats and, more outstanding, Pietro Calamandrei for the non-Marxist left - represented by a very small political party, *Partito d'Azione* that played a crucial role at the origin of the Republic. They suggested the introduction of a Constitutional Court on a clear basis which is the starting point of the entire debate, I mean the work produced by a small group of legal experts - the *Commission Forti* - that, before the convening of the Constituent Assembly, produced an important document. We have to bear in mind that before the beginning of the Constituent Assembly there were a lot of law professors who prepared the work for the assembly to the point that there was a Ministry for the Constitutional Assembly under the direction of the leader of the Socialist Party, Nenni, which produced a vast preparatory material translating and commenting all the constitutions existing in the world at the time. Some are first class work like the translation and commentary of the Weimar *Reichsverfassung* by Constantino Mortati, one of the fathers of the Republican constitution.

This *Commissione Forti* prepared the intellectual draft for the assembly and two articles of the volume it published were crucial, one written by Giannini and one written by Giordano, in which the main point was that Italy had to establish a *rigid* Constitution. The idea of constitutional rigidity is the paramount starting point of the entire work of the Italian constituent assembly of 1946-47.

Italy had for one century a Constitution, the Statuto Albertino, that survived under the fascism and which was clearly a flexible Constitution. In the country there had never been any significant debate about Constitutional Court; anything comparable to the large French acade-

mic debate about constitutional adjudication. Parenthetically, France had no form of constitutional adjudication until 1958 and de facto until the 1970ties, from the institutional point of view, but we can read hundreds of pages discussing and often supporting constitutional adjudication during the Third Republic. We have to distinguish, indeed, the French political history from the French intellectual history. We tend to speak of Lambert and of his obsession of the *government des juges* but we forget a group of prominent law professors in the Third Republic that discussed interestingly this issue.

There was nothing like that in Italy - only Calamandrei had written a technical book on the question - but the shared starting point was in any event the idea that Italy needed a rigid Constitution. Leone, whose claim was generally accepted, insisted on the point that the rigidity of the Constitution would have been a useless instrument to defend the fundamental principles of the political organization of the new Italian republic if there was no specialized organ guaranteeing the superiority of the Constitution *vis-à-vis* the ordinary (statute) laws.

So the principle of hierarchy of norms is the essential starting point of the entire debate. Now, once everybody accepted that - everybody accepted the idea that it was too dangerous to have a flexible Constitution in Italy because of the Fascist experience -, then the debate was engaged on what type of organ. There was one member of the Assembly proposing to introduce the American model, he was an economist and a future President of the Republic, Luigi Einaudi; but his proposal was immediately discarded. It may be interesting to know why Einaudi proposed that model of judicial review with a Supreme Court. The reason is that one of Einaudi's sons Mario, who made his academic career in the US, knew well the US political system and even published a book that the father read about judicial review - that was one of the few interesting book written in the thirties by an Italian professor about guaranteeing the Constitution - so the father proposed in the Assembly to accept the American model, but unsuccessfully.

The next proposal was to establish a new organ not compromised

with the fascists regime: a specialized Constitutional Court. We are approaching the core of the debate; against this proposal by the Christian-democrats and the Partito d'Azione there was a very strong opposition in the Assembly by two groups, one very small but prestigious and the other one very large; the small group which started to attack upfront the proposal made by Calamandrei and Leone was made up by Liberali (centrists) who had in mind the parliamentary sovereign, and the British constitutional sustem, people who were close to the experience of parliamentary democracy under Giolitti, for instance the philosopher Benedetto Croce.

They claimed that the Constitutional court was a bad and dangerous idea; the most articulated representative of this pro-British group was Vittorio Emanuele Orlando, perhaps most prominent constitutional lawyer, quite old at that time, he argued that such an institution would have changed the political regime ending the era of parliamentary democracy because of the subordination of the authority of the parliament to an unelected body. So the gravitational centre of the regime would have been displaced from the Parliament to the Court. Orlando was firmly against the Constitutional Court and Croce insisted that it was a strange and curious idea. They were influential intellectually but also a very small group of representatives; the strong numerical opposition came both from the socialists and the communists.

There are two aspects of this opposition worth considering more closely: one is that the socialists and the communists had the same idea of democracy of Orlando and Croce; this overlaps essentially with the superiority of the legislative power and the parliament. The social-communists were so firmly committed to this idea that they even opposed, in another crucial debate, any suggestion to introduce in the constitution popular referendum, an idea that Mortati, who wrote large part of the draft of the constitution, took from the Weimar Constitution. Mortati disliked a version of democracy identical with absolute parliamentarism; the Catholic constitutionalist was in favour of a mix system: parliamentary and popular. So he introduced in his

draft all types of popular referendum on the model of Weimar. The left opposed strongly any form of popular participation because the parliament is the sovereign, and the political elites more progressive than the people; there was no need of popular participation through the institution of referendum because the people speak through the parliament. All of them - Orlando, Croce, Togliatti and Nenni - were against any institutional setting that could modify the traditional model of representative parliamentary democracy. So this is what we may want to call, objecting to Ginsburg's apparent suppression of any ideology, the role of beliefs in political decisions. It is not clear if what Ginsburg has in mind in his book is a simplified version of the rational choice theory according to which people have just material interests; but human actors have at least three type of motivations: interests, beliefs and emotions. And beliefs matter a lot, as we know from the debates of another Constituent Assembly, the first French revolutionary assembly; there are constraints on a position depending on the necessary coherence of public rhetoric. If you say, on a debate on referendum, that you are against referendum because the parliament is the centre and the apex of the political system, in another debate you must say the same because you can't contradict yourself. We can say that you are under constraint of rhetorical coherence. So the socialists and the communists, being in favour of parliamentary supremacy, could not accept a Constitutional Court notwithstanding possible interests in that institution. Evidently, not only beliefs matter, but also short-term interests; Togliatti is very clear on this point. In his mind this strange idea of a Constitutional Court isn't just wrong because nobody can judge an elected assembly - as he strongly believed that popular sovereignty mean parliamentary sovereignty, so no one except the voters at the moment of elections can be judge of the parliament - but also since this idea of Constitutional Court is the consequence of the fear by Christian-democrats that the left may win the coming election and pass laws in favour of the working class. So to avoid that the *working class* could modify the legislation, the Christian-democrats

- so Togliatti thought - wanted to establish a Constitutional Court to put an obstacle to a progressive legislation the social-communists would have enacted, after winning the election.

This is in my opinion a *short-term interest*. It is true that if the socialists and the communists would have won - which was possible - the Constitutional Court would have act in such a way similar to the French Constitutional Council in '81. But this attitude was is myopic, things may have changed.

And, indeed, things changed in the sixties when at the end the Constitutional Court became operational under the new Constitution.

The last point I want to take into account is why in the sixties the left changed its mind. The social communists were at the outset very hostile to the idea of constitutional justice, but in the last 20 years or so, the Constitutional Court as been defended essentially by the left while the conservatives would like to abolish it or at least to put on the Court - as it happened in Argentina - all the lawyers of the Prime Minister in order to take a full control of it. What can explain this radical *revirement* ?

I guess there are two important reasons. First, because of the experience of being in the opposition: if you think that you will win than you don't want anyone checking what you do but when you see that you lose and that the winners are doing what they want you may start thinking that an *insurance* is needed against the winner. Due to their experience of being for such a long time in the opposition the leaders of the left started changing their mind concerning the Constitutional Court and even had to fight to get Crisafulli, a constitutional law professor close to the left, appointed on the bench.

Later on the Italian left realized that the Constitutional Court was protecting rights in general. Which rights? Any sort of rights. It's true that property rights are important - and I don't see why we should be against property rights - but as a matter of fact courts in the last 50 years have been able to protect a huge amount of rights which are not typically in the interest of conservative forces, we may think of the German Constitutional Court, or of the Italian Constitutional Court;

the latter has been able not only to clean up the fascists criminal code the country kept after the war but also to help weak citizens, whose rights were violated and that the political system as such couldn't help. The Italian experience is interesting since it shows that the political origins of constitutional adjudication are more complex than Ginsburg's model would predict.

The article in the Appendix is an academic version in French of the arguments presented here

Appendix

L'origine du controle de constitutionnalité en Italie

Pasquale Pasquino

*Les débats de l'Assemblée constituante (1946-47).**

SOMMAIRE: 1. *Introduction.* - 2. *La choix de l'Assemblée Constituante pour la constitution rigide.* - 3. *La Constitution italienne et la tradition française.* - 4. *Le model américain et le model autrichien.* - 5. *La naissance contrarié e d'un modèle mixte.* - 6. *Le contrôle de constitutionnalité et la souveraineté du peuple.* - 7. *De l'entrée en vigueur de la Constitution à la première sentence.*

* Ce texte n'aurait pas été écrit sans l'aide de Sabino Cassese et de Stefano Nespor, que je remercie vivement

1.

Après dix-huit mois d'intenses travaux, le 22 décembre 1947, l'Assemblée constituante italienne approuvait le texte définitif de la première constitution républicaine. En dépit des diverses tentatives de réforme, en partie avortées, en partie abouties et en attente d'un jugement populaire, ce texte, qui s'approche de son 60e anniversaire, est toujours en vigueur. Il a été l'un des premiers, dans la vague constituante qui succéda la deuxième guerre mondiale, à introduire dans la loi fondamentale (au Titre VI: Garanties constitutionnelles; art. 134-137) un organe spécialisé compétent pour contrôler la constitutionnalité des lois. Au cours de la même vague, en 1945, l'Autriche rétablissait la Court constitutionnelle introduite par la constitution de 1920 et supprimée par le régime autoritaire qui s'était imposé à Vienne entre les deux guerres. A peu après au même moment, l'Allemagne fédérale et le Japon aboutissaient à des choix semblables; il faut, d'ailleurs, tenir compte de la nature fédérale de l'État allemand, qui imposait un organe d'arbitrage des conflits législatifs entre *Bund* et *Länder*, et du fait que la constitution japonaise fait partie de la catégorie, peu nombreuse, de constitutions "imposées" (dans le cas d'espèce par les Américains). Il faut rappeler aussi que le Tribunal constitutionnel fédéral allemand (le

Bundesverfassungsgericht) commença à travailler en 1951 tandis que la Cour italienne ne siégera qu'à partir de 1956, et ceci pour des raisons que l'on évoquera à la fin de cet article. A ma connaissance, la première constitution européenne qui introduisit le contrôle de constitutionnalité des lois est la constitution portugaise du 21 août 1911, qui à l'art. 63 organisait un contrôle *diffus*, exercé par le pouvoir judiciaire (sur le modèle du *judicial review*).

L'intérêt extraordinaire du cas italien réside notamment dans la circonstance que le choix d'un organe de contrôle fut accompagné par de nombreuses discussions qui représentent l'un des rares grands débats constituants à propos d'une institution qui, si elle s'est entre temps universalisée, n'a pas fini de susciter de controverses et d'opposer les tenants de différentes idéologies démocratiques et constitutionnelles. Un précédent tout à fait remarquable de débat constituant portant sur le contrôle de constitutionnalité est celui de thermidor de l'an III à la *Convention* révolutionnaire, discutant et repoussant à l'unanimité la proposition de l'abbé Sieyes d'établir au sommet du système politique une *jurie constitutionnaire* (qui était un organe électif, mais non responsable). Il faut voir à ce propos surtout l'important discours critique de Thibaudeau[107]. Il est surprenant de faire le constat que l'introduction d'une Cour constitutionnelle dans la constitution républicaine de l'Autriche ne fit l'objet d'aucun débat important ni en assemblée ni au sein du comité de constitution[108].

2.

Avant le début même des travaux de l'Assemblée, en 1945, le *Ministère pour la constituante* avait mis sur pied une commission, connue sous le nom de son président Forti, qui devait fournir un travail important et qui représente en un sens le véritable point de départ du processus constituant de l'Italie post-fasciste. C'est dans le cadre de cette commission que le juriste Massimo Saverio Giannini avait souligné l'impor-

[107] Republié au *Moniteur*, vol. XXV, pp. 484 et 487-89; la proposition de Sieyes est réimprimée in P. Pasquino, *Sieyes*, Odile Jacob, Paris, 1998, pp. 193-96; traduction italienne in: J.-E. Sieyes, *Opere*, vol. secondo, Milano, Giuffrè, 1993, pp. 823-35

[108] Cf. F. Ermacora, *Quellen zum österreichischen Verfassungsrecht* (1920). *Die Protokolle des Unterausschusses des Verfassungsausschusses* Druck und Verlag F. Berger & Söhne Ong, Horn, Nö., Wien, 1967

tance du choix en faveur d'une constitution *rigide*. La distinction entre constitutions flexibles, ne demandant aucune majorité qualifiée ni autre procédure *aggravée* pour leur amendement, et constitutions rigides avait été présentée d'une manière systématique par James Bryce lors de deux conférences tenues pendant l'année 1884[109]. Il s'agissait par ce moyen de s'opposer au modèle du Statuto albertino, la charte octroyée aux piémontais en 1848 par le roi Carlo Alberto et devenue par la suite constitution du royaume d'Italie, qui avait pu s'adapter facilement au régime fasciste. Tout en insistant sur la nécessité de ne pas choisir un système constitutionnel trop difficile à modifier, Giannini demandait que soient prises les précautions nécessaires pour éviter que puissent être introduits *des changements constitutionnels sans une réflexion sérieuse et pondérée*[110]. Et son collègue Giordano ajoutait: *Les principes juridiques et les normes des constitutions rigides se trouvent sur un plan de super-légalité, en d'autres termes, ils sont caractérisés par une efficacité plus grande et supérieure à celle des lois ordinaires. On établit de telle sorte une hiérarchie des sources du droit où le pouvoir législatif est subordonné au pouvoir constituant et on introduit des procédures strictes et différentes de celles qui sont nécessaires pour l'édictions d'une loi ordinaire, par exemple, une majorité qualifié de voix favorables*[111]. Parmi les constituants, le principe de la constitution rigide rassembla un consensus à peu près général. C'est sur les modalités de la garantie et sur l'identité des garants de la constitution que s'engagea le débat.

3.

On n'a pas besoin de faire remarquer que cette idée de constitution rigide, que l'on qualifie aussi de *superlégalité* des normes constitutionnelles, était loin d'être une nouveauté introduite par la doctrine italienne au lendemain de la guerre. Indépendamment de Kelsen, et en tant que principe abstrait, elle était inscrite dans la doctrine constitutionnelle des deux grandes révolutions de la fin du 18e siècle. Dans une édition de l'Opinion sur la *Jurie constitutionnaire par Sieyes* publiée en 1795 et sui-

[109] Et publiées sous le titre de *Flexible and Rigid Constitutions in Studies in History and Jurisprudence*, vol. I, pp. 145-252, Clarendon Press, Oxford, 1901

[110] Cité par G. Conso, *Cosí è nata la Corte Costituzionale*, in *Dalla Costituente alla Costituzione*, Atti dei convegni Lincei, Accademia Nazionale dei Lincei, Roma, 1998, p. 273; cet article est du plus grand intérêt pour l'étude de la naissance du contrôle de constitutionnalité en Italie. Le rapport Giannini sur *Constitution rigide ou flexible* est publié dans Commissione per gli studi attinenti alla riorganizzazione dello Stato, Relazione all'Assemblea costituente, vol. I, Problemi costituzionali. Organizzazione dello Stato, Roma, Stabilimento tipografico Fausto Failli, 1946, pp. 37-50

[111] *Ivi*, dans le rapport qui aborde explicitement la question du contrôle de constitutionnalité: *Sindacato di costituzionalità della legge*, pp. 51-66 (pp. 51-52).

vie par des *Observations sur l'ouvrage de Sieyes*, on lit (p. 39): *Il est bien malheureux pour la France et peut-être pour le genre humain, que le développement des idées neuves et véritablement grandes que renferment les dernières productions de Sieyes n'ait pas été connu plutôt. Si le temps avait pu les mûrir, si elles eussent été débattues hors du cercle de l'amour propre et des passions, si on avait eu le loisir de se familiariser avec elles, la question préalable ne les aurait pas écartées d'une manière aussi tranchante et aussi générale. Elle n'anéantira cependant pas des vérités éternelles, que Sieyes a osé le premier proclamer. C'est 1° qu'il n'y a point de constitution sans garantie, et qu'il n'y a point de garantie sans juge entre des contendants établis nécessairement tels par la loi.* (il n'est pas impossible, me semble-t-il, que ces *Observations*, anonymes, soient de l'abbé lui-même. C'est moi qui souligne.). Mais si du côté ouest de l'Atlantique, la nature fédérale de l'État et la tradition anglaise du juge créateur de droit avaient permis au courant du 19e siècle le développement lent mais certain de la justice constitutionnelle, sur le continent européen la garantie de la constitution, avec l'exception autrichienne que l'on connaît, était resté, pour l'essentiel, l'objet de débats universitaires[112]; elle n'avait pas pu s'établir au sein des institutions de l'État de droit. Il se trouve qu'un autre principe, propre, lui, à la doctrine révolutionnaire française, avait fait obstacle à l'institutionnalisation du contrôle de constitutionnalité: principe énoncé par Sieyes lui-même et d'après lequel il n'y a pas de représentation politique, ni de légitimité (démocratique, comme on dit aujourd'hui) sans élections. Certes, ce principe ne se trouve pas dans la Constitution de 1791 (qui considérait le roi représentant de la Nation à même titre que la l'Assemblée élue … et qui ne resta en vigueur que quelques mois), mais il s'imposera à la fin du long processus révolutionnaire de longue durée qui aboutira à la Troisième République. On rappellera que le *jury constitutionnaire* que Sieyes proposa lors des débats pour la constitution de l'an III était un organe électif. En fait, l'idée de la supériorité de la constitution finit par se transformer en souveraineté du Parlement (enjolivée ou cachée, de ce côté-ci de la Manche, par la formule de la souveraineté de la Nation). Si on tient compte de cela, on ne sera pas étonné de lire, dans un ouvrage de

[112] Cf. J. Luther, *Idee e storie di giustizia costituzionale nell'ottocento*, Giappichelli, Torino, 1990

doctrine publié à Paris en 1966, que *la Constitution italienne s'écarte donc sur ce point [le contrôle de constitutionnalité] d'une tradition d'origine française qui avait toujours refusé de donner à un corps de magistrats le soin de contrôler les volontés du parlement*[113]. L'affirmation, d'ailleurs, n'est pas tout à fait exacte, car la Cour constitutionnelle italienne n'est pas à proprement parler un corps de magistrats (elle n'est pas partie du pouvoir judiciaire), mais on verra que sur le fond elle n'est pas fausse non plus.

La rupture de la Constituante italienne avec la tradition française, rupture qui ne se fera évidemment pas sans conflits, fut en large partie déterminée par la réflexion des pères fondateurs sur la dérive du Parlementarisme italien des années 1920 vers un système totalitaire et sur les contraintes imposées aux constituants par la nécessité de *prendre la constitution au sérieux*. Mais après avoir fait remarquer le rôle joué par le principe de rigidité de la constitution, d'où la nécessité d'une garantie de celle-ci, il faut considérer maintenant les différentes propositions avancées tout au long des débats, les oppositions à la *constitutionnalisation* d'un organe de contrôle, et finalement les résultats du travail constituant.

[113] P. Lalumière et A. Démichel, *Les régimes parlementaires européens*, p. 571

4.

Parmi les membres de l'Assemblée, on ne peut compter guère que Luigi Einaudi, l'économiste et futur président de la République, qui prit position ouvertement et sans hésitation en faveur du système de contrôle diffus de type américain. Pourtant, deux raisons s'opposaient à l'hypothèse d'attribuer aux juges ordinaires la tâche toute entière du contrôle de constitutionnalité: d'un côté, une certaine méfiance (dont on connaît l'origine, française) vis-à-vis du pouvoir judiciaire, subordonné purement et simplement au législatif dans la version continentale de la séparation des pouvoirs; de l'autre, la conscience qu'il aurait fallu attendre au moins une génération pour que la magistrature se débarrasse de sa lourde hypothèque fasciste, en l'absence de toute

mesure d'épuration. Il s'agissait donc de chercher ailleurs et déjà la Commission Forti s'orienta vers le choix de l'organe spécialisé. Même si, comme on va le voir, le résultat final peut être mieux caractérisé comme le choix d'un modèle mixte (entre la version américaine et la version autrichienne).

Le comité de la constitution, établi par la Constituante (et mieux connu sous le nom de Commission des 75), distribua le travail en sous-commissions; la deuxième avait la tâche de présenter un projet concernant le pouvoir judiciaire et la cour constitutionnelle. Un rôle de tout premier plan fut joué dans ce cadre par le juriste florentin Piero Calamandrei, élu à l'Assemblée comme représentant du Parti d'action, petite formation politique de la gauche non marxiste, qui n'aura pas d'avenir politique, mais dont les membres ont donné une contribution remarquable à la culture italienne du dernier demi siècle.

Dans son rapport présenté à la sous-commission au début de 1947, Calamandrei proposait un modèle de contrôle à mi-chemin entre le *judicial review* et l'institution d'un organe centralisé. A l'Art. 27 de son projet portant sur le *pouvoir judiciaire et la suprême cour constitutionnelle*, on pouvait lire:

> *Le contrôle concret de constitutionnalité des lois par voie incidente [ou par voie d'exception] avec effet intra partes relève de la compétence des juges ordinaires et, en dernière instance, de la première section de la Cour Suprême constitutionnelle; le contrôle abstrait avec effet erga omnes relève de la compétence exclusive de Cour Suprême constitutionnelle siégeant en sections réunies*[114].

Même dans le langage ("Cour Suprême"), le précédent américain se retrouve ici avec beaucoup plus de force que ce qu'on a tendance à dire lorsqu'on fait valoir le poids du modèle autrichien et de son auteur, Hans Kelsen; on a fait remarquer, à raison, que le nom du maître viennois n'est cité qu'une seule fois dans les discussions sur la Cour constitutionnelle et, d'ailleurs, dans un contexte où il est question des actes présidentiels[115]. En fait, le contrôle abstrait vient simplement doubler

[114] *La Corte costituzionale negli atti dell'Assemblea Costituente*, Camera dei deputati, Servizio studi, mars 1997, p. 91.

[115] G. D'Orazio, *La genesi della corte costituzionale*, Edizioni di Comunità, Milano, 1981, p. 81

le contrôle concret que Calamandrei voudrait laisser dans les mains des magistrats ordinaires. On sait que la proposition ne fut pas retenue sous cette forme et on vient juste d'évoquer quelques unes des raisons qui furent à l'origine du refus.

Si l'on se tourne vers le projet du deuxième rapporteur, le jeune avocat napolitain et futur président de la République, Giovanni Leone, on voit apparaître un modèle alternatif qui s'inspire explicitement de la Cour autrichienne de 1920. Ici disparaît toute forme de *judicial review* et apparaît, à côté de la saisine d'origine politique (comme dans la version 1958 du Conseil Constitutionnel francais), l'exception d'inconstitutionnalité qui peut être soulevée par les citoyens, sans autre intermédiaire (*ceci pour obéir à une exigence de réalisation large du principe démocratique*). En réalité, la formulation du projet Leone n'était pas parfaitement claire; mais on peut y lire que la Cour de justice constitutionnelle décide, entre autre, à la demande *d'un citoyen ou d'une association, même non reconnue, lorsqu'il s'agit d'une loi ou d'un acte du pouvoir exécutif concernant un droit, un capacité ou une faculté garantis par une norme constitutionnelle*[116]. Le projet Leone commençait par ces mots qu'il vaut la peine de citer: *Tout le monde reconnaît que la rigidité d'une constitution représente un instrument illusoire de défense des principes fondamentaux d'organisation de la vie d'un peuple si elle n'est pas accompagnée par la création d'un organe chargé du respect de celle-ci et capable de la garantir contre toute tentative de l'annuler. Le point controversé n'est donc pas la nécessité de cet organe, mais celui du choix de l'organe le plus adéquat à exercer une telle fonction*. Le rapporteur exclut d'emblée l'hypothèse que cette fonction puisse être attribuée au pouvoir législatif: *Cette hypothèse doit être écartée de toute évidence, car l'organe chargé de contrôler le respect de la limite constitutionnelle de la part des actes législatifs ou exécutifs doit être au dessus des éventuels pouvoirs concernés*[117].

[116] *Ivi,* p. 96

[117] *La Corte costituzionale*, cité, pp. 96 et 93

5.

Ce n'est pas non plus ce modèle, bien sûr, qui sera retenu. Petit à petit

un certain nombre de caractères de l'organe de contrôle vont être précisés tout au long des travaux de la sous-commission d'abord, de la Commission de la constitution ensuite et de l'Assemblée enfin, concernant ses fonctions, sa composition, sa place dans l'architecture de la séparation des pouvoirs et le mécanisme de saisine d'un organe soumis au principe de *passivité* (au sens qu'il ne peut pas se saisir motu proprio d'une affaire).

D'abord - mais dans ce résumé schématique, je ne suis pas la chronologie des travaux constituants - il est décidé de créer sous le nom de *Cour constitutionnelle* un organe indépendant des trois pouvoirs: législatif, exécutif et judiciaire. Deuxièmement, que cet organe, formé en tout cas par des spécialistes du droit, sera mixte tant dans sa composition (magistrats, avocats et professeurs de droit) qu'en ce qui concerne les ayants droit à nommer les membres de la Cour (le Parlement à majorité qualifié, le Président de la République et la haute magistrature). Troisièmement, que le président de la Cour sera élu par la Cour elle-même et non par un acteur externe, tel que le président de la République. Quant aux compétences, elles sont fixées dans les termes essentiels déjà lors de la séance de la sous-commission sur les garanties constitutionnelles du 23 janvier 1947: la Cour juge (a) de constitutionnalité des lois, (b) des conflits de compétence entre les pouvoirs de l'Etat, (c) des accusations contre le Président de la République. Cette éventualité sera, finalement, réglé par l'art. 90 de la Constitution d'après lequel le Président ne peut être mis en état d'accusation devant la Cour constitutionnelle qu'en cas de haute trahison ou d'attentat à la Constitution et exclusivement par la majorité absolue des membres des deux Chambres réunis en séance conjointe. Enfin, le texte constitutionnel établira au nombre de 15 les membres, qu'elle appelle *juges*, de la Cour.

Avant de considérer le point capital représenté par les mécanismes de saisine, il est important de considérer de plus près les objections de fond à la mise en place d'un organe de contrôle de constitutionnalité exprimées par des secteurs de l'Assemblée. On a déjà fait allusion à l'opposition de Einaudi qui défendait la position très minoritaire du

contrôle diffus exercé par les juges; il est plus intéressant de constater que l'attaque frontale à l'hypothèse d'établir dans la loi fondamentale une Cour constitutionnelle sera menée conjointement par la gauche socialo-communiste et par les libéraux de la vieille génération tels que Croce, Nitti ou Orlando, tenants du système représentatif parlementaire absolu. Francesco Saverio Nitti ne mâche pas ses mots; dans la séance plénière de l'Assemblée qui porte à l'ordre du jour la discussion du projet voté en sous-commission (28 novembre 1947), il débute en disant: *Je considère inutile et dommageable la création d'une Cour constitutionnelle*, qu'il définit tout court comme une *nouveauté absurde*. En réalité, Nitti s'inquiétait surtout de ce qu'il appelait le *caractère politique* de cet organe et demandait que la Cour de cassation fût chargé du contrôle de constitutionnalité des lois par simple voie incidente et à la demande des tribunaux ordinaires[118].

L'opposition la plus ferme vis-à-vis de la Cour viendra du doyen des publicistes italiens, Vittorio Emanuele Orlando. Dans un article de 1951[119], il résumera les raisons de son opposition à tout organisme de contrôle sur l'activité législative du Parlement élu:

> *...la création de la Cour constitutionnelle [...] comporte un doute très profond de compatibilité avec le type classique du gouvernement parlementaire; j'entends l'existence et les modalités de formation d'une autorité dont la caractéristique essentielle est d'être super-parlementaire. Le fait même que le Parlement ne serait plus l'autorité suprême de l'Etat mais serait assujetti à une sorte de subordination vis-à-vis d'une autre autorité, me semble avoir l'effet de déplacer le centre de gravité du système [les italiques sont miens]. On dira que la compétence de la Haute Cour se limitera rigidement à la solution purement objective d'un point de droit. Mais peut on croire à une séparation totale entre le droit et le fait? [...] Il est certain que le dernier mot sur des questions vitales pour l'État n'échouera plus aux Assemblées parlementaires, mais à huit personnes [la majorité des 15 membres de la Cour].*

Il ne s'agit pas de réfuter ici les arguments de Orlando, cela a été fait

[118] *La Corte costituzionale*, cité, pp. 153 et 157

[119] *Studio sulla forma di governo vigente in Italia secondo la Costituzione del 1948*, in *Rivista trimestrale di diritto pubblico*, pp. 5-45; le texte cité se trouve à la p. 43

abondamment par la majorité de la Constituante; on voudrait montrer seulement que son opposition à l'égard de la Cour constitutionnelle trouva une écho et un soutien dans les critiques venant de la gauche de l'Assemblée. Les chefs du Parti Socialiste, Pietro Nenni, et du Parti Communiste, Palmiro Togliatti avaient mené le combat de front lors du débat en Assemblée le 10 et 11 mars 1947. Venant l'un et l'autre d'une culture politique de type jacobin - proche sur ce point du parlementarisme à l'anglaise des vieux libéraux, car ils partageaient, les uns et les autres, une conception de l'État constitutionnel que l'on pourrait qualifier d'hyper-parlementariste en même temps que l'idée de la primauté de la politique sur le droit, typique d'un réalisme politique mal entendu -, on ne sera surpris, en les lisant, de retrouver les arguments de l'idéologie constitutionnelle révolutionnaire française:

> *Sur la constitutionnalité des lois - ainsi s'exprimait Nenni - ne peut délibérer que l'Assemblée nationale [que l'on se souvienne ici du "référé législatif"], le Parlement, car il n'est possible d'accepter d'autre contrôle que celui du peuple. La Cour dont il est question pourra bien être composée des hommes les plus illustres, les plus ferrés en droit constitutionnel, mais puisqu'il n'ont pas été élus par le peuple, ils n'ont pas le droit de juger les actes du Parlement.*[120]

Pas besoin de commentaires, sauf pour dire que les partis social-démocrates n'ont pas toujours partagé cette vision de l'État. Vaudra comme illustration ce texte du projet constitutionnel de la social-démocratie autrichienne de juin 1920 où à l'art. 168 (qui porte sur les garanties de la constitution) on lit:

> *Le tribunal constitutionnel n'a aucune limite dans l'examen de la constitutionnalité des lois*[121].

Palmiro Togliatti revient à la charge, le lendemain de l'intervention de son collègue socialiste:

[120] *La Costituzione della Repubblica nei lavori preparatori dell'Assemblea Costituente*, Roma, Camera dei Deputati, 1970, vol. I, p. 305; c'est moi qui souligne

[121] *Der Verfas-sungsgerichtshof ist bei der Prüfung der Verfassungsmäßigkeit von Gesetzen an keinerlei Schränken gebunden*, in *Verfassungsentwurf der sozialdemokratischen Partei*; in F. Ermacora, ouvrage cité, p. 186

Toutes ces normes sont inspirées par la peur: on craint que demain il puisse se trouver une majorité, expression libre et directe des masses laborieuses, qui désirent innover profondément la structure politique, économique et sociale du pays, et c'est pour cette éventualité que l'on veut se donner des garanties […] d'où aussi cette bizarrerie de la Cour constitutionnelle, un organe dont on ne sait ce que c'est et grâce auquel des illustres citoyens seraient placés au dessus de toutes les Assemblées et de tout le système du Parlement et de la démocratie, afin d'en être les juges. Mais qui sont ces gens? D'où dériveraient ils leur pouvoir si le peuple n'est pas appelé à les choisir?[122]

[122] *La Costituzione della Repubblica nei lavori*, cit. p. 330; c'est moi qui souligne

A côté de l'idéologie, on voit apparaître ici la préoccupation que la Cour puisse bloquer la législation édictée par une possible majorité de gauche, que Togliatti avait peut-être l'espoir de voir sortir des élections de 1948. On retrouve, ici, la même idéologie hyper-parlementariste et la même préoccupation dans la gauche italienne lors des débats sur le référendum abrogatif[123]. Cette préoccupation n'était pas, bien entendu, dépourvue de tout fondement. Mais on comprend que, de l'autre côté, la majorité des constituants ait essayé de garantir la stabilité relative du pacte constitutionnel - ce qui est une autre manière de parler de rigidité de la constitution -, sans s'empêcher pour autant de prévoir un mécanisme de révision relativement facile à activer (art. 138 Const.), mais soustrait au pouvoir de la simple majorité.

[123] Voir sur ce point: P. Pasquino, *La costituzionalizzazione del referendum a Weimar e a Roma*, Rivista Trimestrale di Diritto Pubblico, December 1998, pp. 1-18

6.

A toutes ces objections de Togliatti et Orlando, de Nitti et Nenni, répondait le chef du comité de la constitution, l'indépendant de gauche Meuccio Ruini:

Une bizarrerie dit le député Togliatti […] Le raisonnement, en tout cas, est plutôt simple. Si la Constitution est rigide, il doit exister un organe qui vérifie si les lois sont conformes ou non à la Constitution […]. Le comité a pro-

posé un organe qui représente un bon compromis, où l'on trouve à la fois des hommes compétents venants de la magistrature, du barreau et de l'Université et ceux qui sont nommés par le Parlement[124].

Ruini reviendra à la fin des travaux de l'Assemblée sur la philosophie constitutionnelle qui avait inspiré la Commission des 75, en soulignant qu'elle s'était efforcée d'éviter deux systèmes opposés, d'un côté, le système fondé sur la primauté de l'exécutif (ce dont le pays avait fait la malheureuse expérience sous le fascisme), de l'autre, celui caractérisé par le gouvernement d'assemblée qui se fonde sur un syllogisme inacceptable. Le syllogisme d'après lequel *puisque la source de la souveraineté est uniquement dans le peuple, unique doit être sa délégation; de sorte que tout pouvoir se concentre dans le Parlement" les autres organes n'étant que des pouvoirs commis. Une forme de gouvernement qui tourne le dos au constitutionnalisme fondé sur la "répartition et l'équilibre des pouvoirs*[125].

Dans le refus du modèle moniste de la souveraineté du peuple, la Constitution italienne ira loin. Ce n'est pas seulement le contrôle sur les lois du Parlement, et les actes ayant force de loi, de la part d'un organe non électif qui est établi, mais le peuple lui même devient d'organe constituant, organe constitué de l'État, s'il est vrai, comme le dit l'art. 1 à l'alinéa 2, qu'il exerce son pouvoir (sa souveraineté) *sous les formes et dans les limites fixées par la Constitution*. On peut rappeler que même les référendums abrogatifs d'initiative populaire doivent passer l'examen d'*admissibilité* de la Cour constitutionnelle.

Les conflits internes à l'Assemblée Constituante concernant l'organisme de contrôle ne permirent pas de trancher la question relative aux acteurs ayant titre à saisir la Cour constitutionnelle. Le choix décisif fut renvoyé à la loi constitutionnelle n° 1 du 9 février 1948. C'est celle-ci qui est à l'origine du *modèle mixte* auquel on a fait allusion[126]. Pour l'essentiel, la Cour est sollicitée, comme on le sait, par les juges ordinaires qui peuvent la saisir par une exception d'inconstitutionnalité vis-à-vis d'une loi qu'ils seraient amené à appliquer et dont la constitutionnalité leur paraît douteuse. La Cour constitutionnelle est de cette manière,

[124] *La Costituzione della Repubblica nei lavori* , cit. p. 355

[125] *Le discours de Ruini est cité par P. Pombeni*, La Costituente, Il Mulino, Bologna, 1995, p. 152

[126] Voir les remarques de G. Silvestri au début de son article: *La Corte costituzionale nella svolta di fine secolo, Storia d'Italia - Annali 14* (Legge Diritto Giustizia) sous la dir. de L. Violante, Einaudi, Torino, 1998, pp. 943-958

outre organe de co-législation, le véritable sommet du système judiciaire (au delà même de la Cassation et du Conseil d'État), car c'est au jugement de la Cour que les juges se rangent en cas de doute et donc à son interprétation de la Constitution, encore plus qu'à la loi. En ce sens, comme aux États-Unis, l'ensemble institutionnel constitué par le pouvoir judiciaire et la Cour représente un véritable contre-pouvoir vis-à-vis du pouvoir des majorités élues[127].

[127] Cf. P. Pasquino, *Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy*, Ratio Juris, 11, mars 1998, pp. 38-50

7.

Il a fallu attendre un certain nombre d'années depuis l'entrée en vigueur de la constitution avant que la Cour ne commence à siéger. La victoire du parti de la Démocratie Chrétienne aux élections de 1948 et l'opposition de la gauche au contrôle de constitutionnalité ne poussaient ni l'une ni l'autre moitié du Parlement à appliquer les dispositions de la Constitution concernant cette institution nouvelle. Il faudra la loi de 1953 qui définit les détails de la composition et des procédures de la Cour, le changement d'attitude des partis socialiste et communiste et de longues négociations pour que le Parlement nomme ses premiers juges et pour qu'on en arrive en 1956 - il y a cinquante ans - à la première sentence. Depuis, le travail, le pouvoir et le prestige de cette institution n'ont fait que croître en Italie[128]. Mais ceci est une autre histoire. Ici, il ne s'agissait que d'en illustrer les débuts.

[128] Les sondages, conduits par Renato Mannheimer (et publiés par *Il Corriere della sera*), font état de la confiance de la majorité des Italiens vis-à-vis d'une institution qu'ils considèrent, d'ailleurs, de nature politique.

Here we reproduce the articles of the constitutions concerning constitutional adjudication of the countries discussed in this volume, in English and in the original language

Italia

TITOLO VI
GARANZIE COSTITUZIONALI

Sezione I
La Corte costituzionale.

Art. 134.
La Corte costituzionale giudica:
sulle controversie relative alla legittimità costituzionale delle leggi e degli atti, aventi forza di legge, dello Stato e delle Regioni;
sui conflitti di attribuzione tra i poteri dello Stato e su quelli tra lo Stato e le Regioni, e tra le Regioni;
sulle accuse promosse contro il Presidente della Repubblica, a norma della Costituzione.

Art. 135.
La Corte costituzionale è composta di quindici giudici nominati per un terzo dal Presidente della Repubblica, per un terzo dal Parlamento in seduta comune e per un terzo dalle supreme magistrature ordinaria ed amministrative.
I giudici della Corte costituzionale sono scelti tra i magistrati anche a riposo delle giurisdizioni superiori ordinaria ed amministrative, i professori ordinari di università in materie giuridiche e gli avvocati dopo venti anni d'esercizio.
I giudici della Corte costituzionale sono nominati per nove anni, decorrenti per ciascuno di essi dal giorno del giuramento, e non possono essere nuovamente nominati.
Alla scadenza del termine il giudice costituzionale cessa dalla carica e dall'esercizio delle funzioni.
La Corte elegge tra i suoi componenti, secondo le norme stabilite dalla legge, il Presidente, che rimane in carica per un triennio, ed è rieleggibile, fermi in ogni caso i termini di scadenza dall'ufficio di giudice.
L'ufficio di giudice della Corte è incompatibile con quello di membro del

Parlamento, di un Consiglio regionale, con l'esercizio della professione di avvocato e con ogni carica ed ufficio indicati dalla legge.
Nei giudizi d'accusa contro il Presidente della Repubblica, intervengono, oltre i giudici ordinari della Corte, sedici membri tratti a sorte da un elenco di cittadini aventi i requisiti per l'eleggibilità a senatore, che il Parlamento compila ogni nove anni mediante elezione con le stesse modalità stabilite per la nomina dei giudici ordinari.

Art. 136.
Quando la Corte dichiara l'illegittimità costituzionale di una norma di legge o di atto avente forza di legge, la norma cessa di avere efficacia dal giorno successivo alla pubblicazione della decisione.
La decisione della Corte è pubblicata e comunicata alle Camere ed ai Consigli regionali interessati, affinché, ove lo ritengano necessario, provvedano nelle forme costituzionali.

Art. 137.
Una legge costituzionale stabilisce le condizioni, le forme, i termini di proponibilità dei giudizi di legittimità costituzionale, e le garanzie d'indipendenza dei giudici della Corte.
Con legge ordinaria sono stabilite le altre norme necessarie per la costituzione e il funzionamento della Corte.
Contro le decisioni della Corte costituzionale non è ammessa alcuna impugnazione.

Italy

TITLE VI
CONSTITUTIONAL GUARANTEES

Section I
The Constitutional Court

Art. 134
The Constitutional Court shall pass judgement on:
- controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions;
- conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions;
- charges brought against the President of the Republic and the Ministers, according to the provisions of the Constitution.

Art. 135
The Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme Courts.
The judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university professors of law and lawyers with at least twenty years practice.
Judges of the Constitutional Court shall be appointed for nine years, beginning in each case from the day of their swearing in, and they may not be re-appointed.
At the expiry of their term, the constitutional judges shall leave office and the exercise of the functions thereof.
The Court shall elect from among its members, in accordance with the rules established by law, a President, who shall remain in office for three years and may be re-elected, respecting in all cases the expiry term for constitutional judges.

The office of constitutional judge shall be incompatible with membership of Parliament, of a Regional Council, the practice of the legal profession, and with every appointment and office indicated by law.
In impeachment procedures against the President of the Republic, in addition to the ordinary judges of the Court, there shall also be sixteen members chosen by lot from among a list of citizens having the qualification necessary for election to the Senate, which the Parliament prepares every nine years through election using the same procedures as those followed in appointing ordinary judges.

Art. 136
When the Court declares the constitutional illegitimacy of a law or enactment having force of law, the law ceases to have effect the day following the publication of the decision.
The decision of the Court shall be published and communicated to Parliament and the Regional Councils concerned, so that, wherever they deem it necessary, they shall act in conformity with constitutional procedures.

Art. 137
Aconstitutional law shall establish the conditions, forms, terms for proposing judgements on constitutional legitimacy, and guarantees on the independence of constitutional judges.
Ordinary laws shall establish the other provisions necessary for the constitution and the functioning of the Court.
No appeals are allowed against the decision of the Constitutional Court.

France

Titre VII
LE CONSEIL CONSTITUTIONNEL

ARTICLE 56.
[dispositions en vigueur] Le Conseil constitutionnel comprend neuf membres, dont le mandat dure neuf ans et n'est pas renouvelable. Le Conseil constitutionnel se renouvelle par tiers tous les trois ans. Trois des membres sont nommés par le Président de la République, trois par le président de l'Assemblée nationale, trois par le président du Sénat.
En sus des neuf membres prévus ci-dessus, font de droit partie à vie du Conseil constitutionnel les anciens Présidents de la République.
Le président est nommé par le Président de la République. Il a voix prépondérante en cas de partage.

ARTICLE 56.
[Entrée en vigueur dans les conditions fixées par les lois et lois organiques nécessaires à leur application (article 46-I de la loi constitutionnelle n° 2008-724 du 23 juillet 2008)] Le Conseil constitutionnel comprend neuf membres, dont le mandat dure neuf ans et n'est pas renouvelable. Le Conseil constitutionnel se renouvelle par tiers tous les trois ans. Trois des membres sont nommés par le Président de la République, trois par le président de l'Assemblée nationale, trois par le président du Sénat. La procédure prévue au dernier alinéa de l'article 13 est applicable à ces nominations. Les nominations effectuées par le président de chaque assemblée sont soumises au seul avis de la commission permanente compétente de l'assemblée concernée.
En sus des neuf membres prévus ci-dessus, font de droit partie à vie du Conseil constitutionnel les anciens Présidents de la République.
Le président est nommé par le Président de la République. Il a voix prépondérante en cas de partage.

ARTICLE 57.
Les fonctions de membre du Conseil constitutionnel sont incompatibles avec

celles de ministre ou de membre du Parlement. Les autres incompatibilités sont fixées par une loi organique.

ARTICLE 58.
Le Conseil constitutionnel veille à la régularité de l'élection du Président de la République.
Il examine les réclamations et proclame les résultats du scrutin.

ARTICLE 59.
Le Conseil constitutionnel statue, en cas de contestation, sur la régularité de l'élection des députés et des sénateurs.

ARTICLE 60.
Le Conseil constitutionnel veille à la régularité des opérations de référendum prévues aux articles 11 et 89 et au titre XV. Il en proclame les résultats.

ARTICLE 61.
Les lois organiques, avant leur promulgation, les propositions de loi mentionnées à l'article 11 avant qu'elles ne soient soumises au référendum, et les règlements des assemblées parlementaires, avant leur mise en application, doivent être soumis au Conseil constitutionnel qui se prononce sur leur conformité à la Constitution.
Aux mêmes fins, les lois peuvent être déférées au Conseil constitutionnel, avant leur promulgation, par le Président de la République, le Premier ministre, le président de l'Assemblée nationale, le président du Sénat ou soixante députés ou soixante sénateurs.
Dans les cas prévus aux deux alinéas précédents, le Conseil constitutionnel doit statuer dans le délai d'un mois. Toutefois, à la demande du Gouvernement, s'il y a urgence, ce délai est ramené à huit jours.
Dans ces mêmes cas, la saisine du Conseil constitutionnel suspend le délai de promulgation.

ARTICLE 61-1.
[Entrée en vigueur dans les conditions fixées par les lois et lois organiques

nécessaires à leur application (article 46-I de la loi constitutionnelle n° 2008-724 du 23 juillet 2008)] Lorsque, à l'occasion d'une instance en cours devant une juridiction, il est soutenu qu'une disposition législative porte atteinte aux droits et libertés que la Constitution garantit, le Conseil constitutionnel peut être saisi de cette question sur renvoi du Conseil d'État ou de la Cour de cassation qui se prononce dans un délai déterminé.
Une loi organique détermine les conditions d'application du présent article.

ARTICLE 62.
Une disposition déclarée inconstitutionnelle sur le fondement de l'article 61 ne peut être promulguée ni mise en application.
Une disposition déclarée inconstitutionnelle sur le fondement de l'article 61-1 est abrogée à compter de la publication de la décision du Conseil constitutionnel ou d'une date ultérieure fixée par cette décision. Le Conseil constitutionnel détermine les conditions et limites dans lesquelles les effets que la disposition a produits sont susceptibles d'être remis en cause.
Les décisions du Conseil constitutionnel ne sont susceptibles d'aucun recours. Elles s'imposent aux pouvoirs publics et à toutes les autorités administratives et juridictionnelles.

ARTICLE 63.
Une loi organique détermine les règles d'organisation et de fonctionnement du Conseil constitutionnel, la procédure qui est suivie devant lui et notamment les délais ouverts pour le saisir de contestations.

France

Title VII
THE CONSTITUTIONAL COUNCIL

ARTICLE 56.
The Constitutional Council shall comprise nine members, each of whom shall hold office for a non-renewable term of nine years. One third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate.
In addition to the nine members provided for above, former Presidents of the Republic shall be ex officio life members of the Constitutional Council. The President shall be appointed by the President of the Republic. He shall have a casting vote in the event of a tie.

ARTICLE 56(1).
(1) See Warning.
The Constitutional Council shall comprise nine members, each of whom shall hold office for a non-renewable term of nine years. One third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. The procedure provided for in the last paragraph of article 13 shall apply to these appointments. The appointments made by the President of each House shall be submitted for the opinion solely of the relevant standing committee in that House.
In addition to the nine members provided for above, former Presidents of the Republic shall be ex officio life members of the Constitutional Council. The President shall be appointed by the President of the Republic. He shall have a casting vote in the event of a tie.

ARTICLE 57.

The office of member of the Constitutional Council shall be incompatible with that of Minister or Member of the Houses of Parliament. Other incompatibilities shall be determined by an Institutional Act.

ARTICLE 58.

The Constitutional Council shall ensure the proper conduct of the election of the President of the Republic.

It shall examine complaints and shall proclaim the results of the vote.

ARTICLE 59.

The Constitutional Council shall rule on the proper conduct of the election of Members of the National Assembly and Senators in disputed cases.

ARTICLE 60.

The Constitutional Council shall ensure the proper conduct of referendum proceedings as provided for in articles 11 and 89 and in Title XV and shall proclaim the results of the referendum.

ARTICLE 61.

Institutional Acts, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and the Rules of Procedure of the Houses of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution.

To the same end, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.

In the cases provided for in the two foregoing paragraphs, the Constitutional Council must deliver its ruling within one month. However, at the request of the Government, in cases of urgency, this period shall be reduced to eight days.

In these same cases, referral to the Constitutional Council shall suspend the time allotted for promulgation.

ARTICLE 61-1(1).

(1) See Warning.

If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council, within a determined period. An Institutional Act shall determine the conditions for the application of the present article.

ARTICLE 62.

A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented.

A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.

No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.

ARTICLE 63.

An Institutional Act shall determine the rules of organization and operation of the Constitutional Council, the procedure to be followed before it and, in particular, the time limits allotted for referring disputes to it.

Deutchland

IX. DIE RECHSPRECHUNG

Artikel 92

Die rechtsprechende Gewalt ist den Richtern anvertraut; sie wird durch das Bundesverfassungsgericht, durch die in diesem Grundgesetze vorgesehenen Bundesgerichte und durch die Gerichte der Länder ausgeübt.

Artikel 93

(1) Das Bundesverfassungsgericht entscheidet:

1. über die Auslegung dieses Grundgesetzes aus Anlaß von Streitigkeiten über den Umfang der Rechte und Pflichten eines obersten Bundesorgans oder anderer Beteiligter, die durch dieses Grundgesetz oder in der Geschäftsordnung eines obersten Bundesorgans mit eigenen Rechten ausgestattet sind;
2. bei Meinungsverschiedenheiten oder Zweifeln über die förmliche und sachliche Vereinbarkeit von Bundesrecht oder Landesrecht mit diesem Grundgesetze oder die Vereinbarkeit von Landesrecht mit sonstigem Bundesrechte auf Antrag der Bundesregierung, einer Landesregierung oder eines Drittels der Mitglieder des Bundestages;

2a. bei Meinungsverschiedenheiten, ob ein Gesetz den Voraussetzungen des Artikels 72 Abs. 2 entspricht, auf Antrag des Bundesrates, einer Landesregierung oder der Volksvertretung eines Landes;

3. bei Meinungsverschiedenheiten über Rechte und Pflichten des Bundes und der Länder, insbesondere bei der Ausführung von Bundesrecht durch die Länder und bei der Ausübung der Bundesaufsicht;
4. in anderen öffentlich-rechtlichen Streitigkeiten zwischen dem Bunde und den Ländern, zwischen verschiedenen Ländern oder innerhalb eines Landes, soweit nicht ein anderer Rechtsweg gegeben ist;

4a. über Verfassungsbeschwerden, die von jedermann mit der Behauptung erhoben werden können, durch die öffentliche Gewalt in einem seiner Grundrechte oder in einem seiner in Artikel 20 Abs. 4, 33, 38, 101, 103 und

104 enthaltenen Rechte verletzt zu sein;
4b. über Verfassungsbeschwerden von Gemeinden und Gemeindeverbänden wegen Verletzung des Rechts auf Selbstverwaltung nach Artikel 28 durch ein Gesetz, bei Landesgesetzen jedoch nur, soweit nicht Beschwerde beim Landesverfassungsgericht erhoben werden kann;
5. in den übrigen in diesem Grundgesetze vorgesehenen Fällen.
(2) Das Bundesverfassungsgericht entscheidet außerdem auf Antrag des Bundesrates, einer Landesregierung oder der Volksvertretung eines Landes, ob im Falle des Artikels 72 Abs. 4 die Erforderlichkeit für eine bundesgesetzliche Regelung nach Artikel 72 Abs. 2 nicht mehr besteht oder Bundesrecht in den Fällen des Artikels 125a Abs. 2 Satz 1 nicht mehr erlassen werden könnte. Die Feststellung, dass die Erforderlichkeit entfallen ist oder Bundesrecht nicht mehr erlassen werden könnte, ersetzt ein Bundesgesetz nach Artikel 72 Abs. 4 oder nach Artikel 125a Abs. 2 Satz 2. Der Antrag nach Satz 1 ist nur zulässig, wenn eine Gesetzesvorlage nach Artikel 72 Abs. 4 oder nach Artikel 125a Abs. 2 Satz 2 im Bundestag abgelehnt oder über sie nicht innerhalb eines Jahres beraten und Beschluss gefasst oder wenn eine entsprechende Gesetzesvorlage im Bundesrat abgelehnt worden ist.
(3) Das Bundesverfassungsgericht wird ferner in den ihm sonst durch Bundesgesetz zugewiesenen Fällen tätig.

Artikel 94
(1) Das Bundesverfassungsgericht besteht aus Bundesrichtern und anderen Mitgliedern. Die Mitglieder des Bundesverfassungsgerichtes werden je zur Hälfte vom Bundestage und vom Bundesrate gewählt. Sie dürfen weder dem Bundestage, dem Bundesrate, der Bundesregierung noch entsprechenden Organen eines Landes angehören.
(2) Ein Bundesgesetz regelt seine Verfassung und das Verfahren und bestimmt, in welchen Fällen seine Entscheidungen Gesetzeskraft haben. Es kann für Verfassungsbeschwerden die vorherige Erschöpfung des Rechtsweges zur Voraussetzung machen und ein besonderes Annahmeverfahren vorsehen.

Germany

IX. THE JUDICIARY

Article 92 [The courts]
The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder.

Article 93 [Federal Constitutional Court: jurisdiction]
(1) The Federal Constitutional Court shall rule:
1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body;
2. in the event of disagreements or doubts respecting the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law, on application of the Federal Government, of a Land government, or of one third of the Members of the Bundestag;
2a. in the event of disagreements whether a law meets the requirements of paragraph (2) of Article 72, on application of the Bundesrat or of the government or legislature of a Land;
3. in the event of disagreements respecting the rights and duties of the Federation and the Länder, especially in the execution of federal law by the Länder and in the exercise of federal oversight;
4. on other disputes involving public law between the Federation and the Länder, between different Länder, or within a Land, unless there is recourse to another court;
4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been infringed by public authority;

4b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a Land law, however, only if the law cannot be challenged in the constitutional court of the Land;
5. in the other instances provided for in this Basic Law.
(2) The Federal Constitutional Court shall also rule on such other matters as may be assigned to it by a federal law.

Article 94 [Federal Constitutional Court: composition]
(1) The Federal Constitutional Court shall consist of federal judges and other members. Half the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat. They may not be members of the Bundestag, of the Bundesrat, of the Federal Government, or of any of the corresponding bodies of a Land.

(2) The organization and procedure of the Federal Constitutional Court shall be regulated by a federal law, which shall specify in which instances its decisions shall have the force of law. The law may require that all other legal remedies be exhausted before a constitutional complaint may be filed, and may provide for a separate proceeding to determine whether the complaint will be accepted for decision.

POLAND

TRYBUNAŁ KONSTYTUCYJNY

Art. 188.

Trybunał Konstytucyjny orzeka w sprawach:

1) zgodności ustaw i umów międzynarodowych z Konstytucją,

2) zgodności ustaw z ratyfikowanymi umowami międzynarodowymi, których ratyfikacja wymagała uprzedniej zgody wyrażonej w ustawie,

3) zgodności przepisów prawa, wydawanych przez centralne organy państwowe, z Konstytucją, ratyfikowanymi umowami międzynarodowymi i ustawami,

4) zgodności z Konstytucją celów lub działalności partii politycznych,

5) skargi konstytucyjnej, o której mowa w art. 79 ust. 1.

Art. 189.

Trybunał Konstytucyjny rozstrzyga spory kompetencyjne pomiędzy centralnymi konstytucyjnymi organami państwa.

Art. 190.

1. Orzeczenia Trybunału Konstytucyjnego mają moc powszechnie obowiązującą i są ostateczne.

2. Orzeczenia Trybunału Konstytucyjnego w sprawach wymienionych w art. 188 podlegają niezwłocznemu ogłoszeniu w organie urzędowym, w którym akt normatywny był ogłoszony. Jeżeli akt nie był ogłoszony, orzeczenie ogłasza się w Dzienniku Urzędowym Rzeczypospolitej Polskiej "Monitor Polski".

3. Orzeczenie Trybunału Konstytucyjnego wchodzi w życie z dniem ogłoszenia, jednak Trybunał Konstytucyjny może określić inny termin utraty mocy obowiązującej aktu normatywnego. Termin ten nie może przekroczyć osiemnastu miesięcy, gdy chodzi o ustawę, a gdy chodzi o inny akt normatywny dwunastu miesięcy. W przypadku orzeczeń, które wiążą się z nakładami finansowymi nie przewidzianymi w ustawie budżetowej, Trybunał Konstytucyjny określa termin utraty mocy obowiązującej aktu normatywnego po zapoznaniu się z opinią Rady Ministrów.

4. Orzeczenie Trybunału Konstytucyjnego o niezgodności z Konstytucją, umową międzynarodową lub z ustawą aktu normatywnego, na podstawie którego zostało wydane prawomocne orzeczenie sądowe, ostateczna decyzja administracyjna lub rozstrzygnięcie w innych sprawach, stanowi podstawę do wznowienia postępowania, uchylenia decyzji lub innego rozstrzygnięcia na zasadach i w trybie określonych w przepisach właściwych dla danego postępowania.

5. Orzeczenia Trybunału Konstytucyjnego zapadają większością głosów.

Art. 191.

1. Z wnioskiem w sprawach, o których mowa w art. 188, do Trybunału Konstytucyjnego wystąpić mogą:

1) Prezydent Rzeczypospolitej, Marszałek Sejmu, Marszałek Senatu, Prezes Rady Ministrów, 50 posłów, 30 senatorów, Pierwszy Prezes Sądu Najwyższego, Prezes Naczelnego Sądu Administracyjnego, Prokurator Generalny, Prezes Najwyższej Izby Kontroli, Rzecznik Praw Obywatelskich,

2) Krajowa Rada Sądownictwa w zakresie, o którym mowa w art. 186 ust. 2,

3) organy stanowiące jednostek samorządu terytorialnego,

4) ogólnokrajowe organy związków zawodowych oraz ogólnokrajowe władze organizacji pracodawców i organizacji zawodowych,

5) kościoły i inne związki wyznaniowe,

6) podmioty określone w art. 79 w zakresie w nim wskazanym.

2. Podmioty, o których mowa w ust. 1 pkt 3–5, mogą wystąpić z takim wnioskiem, jeżeli akt normatywny dotyczy spraw objętych ich zakresem działania.

Art. 192.

Z wnioskiem w sprawach, o których mowa w art. 189, do Trybunału Konstytucyjnego wystąpić mogą: Prezydent Rzeczypospolitej, Marszałek Sejmu, Marszałek Senatu, Prezes Rady Ministrów, Pierwszy Prezes Sądu Najwyższego, Prezes Naczelnego Sądu Administracyjnego i Prezes Najwyższej Izby Kontroli.

Art. 193.

Każdy sąd może przedstawić Trybunałowi Konstytucyjnemu pytanie prawne co do zgodności aktu normatywnego z Konstytucją, ratyfikowanymi umowami międzynarodowymi lub ustawą, jeżeli od odpowiedzi na pytanie prawne zależy rozstrzygnięcie sprawy toczącej się przed sądem.

Art. 194.

1. Trybunał Konstytucyjny składa się z 15 sędziów, wybieranych indywidualnie przez Sejm na 9 lat spośród osób wyróżniających się wiedzą prawniczą. Ponowny wybór do składu Trybunału jest niedopuszczalny.

2. Prezesa i Wiceprezesa Trybunału Konstytucyjnego powołuje Prezydent Rzeczypospolitej spośród kandydatów przedstawionych przez Zgromadzenie Ogólne Sędziów Trybunału Konstytucyjnego.

Art. 195.

1. Sędziowie Trybunału Konstytucyjnego w sprawowaniu swojego urzędu są niezawiśli i podlegają tylko Konstytucji.

2. Sędziom Trybunału Konstytucyjnego zapewnia się warunki pracy i wynagrodzenie odpowiadające godności urzędu oraz zakresowi ich obowiązków.

3. Sędziowie Trybunału Konstytucyjnego w okresie zajmowania stanowiska nie mogą należeć do partii politycznej, związku zawodowego ani prowadzić działalności publicznej nie dającej się pogodzić z zasadami niezależności sądów i niezawisłości sędziów.

Art. 196.

Sędzia Trybunału Konstytucyjnego nie może być, bez uprzedniej zgody Trybunału Konstytucyjnego, pociągnięty do odpowiedzialności karnej ani pozbawiony wolności. Sędzia nie może być zatrzymany lub aresztowany, z wyjątkiem ujęcia go na gorącym uczynku przestępstwa, jeżeli jego zatrzymanie jest niezbędne do zapewnienia prawidłowego toku postępowania. O zatrzymaniu niezwłocznie powiadamia się Prezesa Trybunału Konstytucyjnego, który może nakazać natychmiastowe zwolnienie zatrzymanego.

Art. 197.

Organizację Trybunału Konstytucyjnego oraz tryb postępowania przed Trybunałem określa ustawa.

Poland

THE CONSTITUTIONAL TRIBUNAL

Article 188

The Constitutional Tribunal shall adjudicate regarding the following matters:
1. the conformity of statutes and international agreements to the Constitution;
2. the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
3. the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;
4. the conformity to the Constitution of the purposes or activities of political parties;
5. complaints concerning constitutional infringements, as specified in Article 79, para. 1.

Article 189

The Constitutional Tribunal shall settle disputes over authority between central constitutional organs of the State.

Article 190

1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final.
2. Judgments of the Constitutional Tribunal regarding matters specified in Article 188, shall be required to be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, then the judgment shall be published in the Official Gazette of the Republic of Poland, Monitor Polski.
3. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences

not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.
4. A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.
5. Judgments of the Constitutional Tribunal shall be made by a majority of votes.

Article 191

1. The following may make application to the Constitutional Tribunal regarding matters specified in Article 188:
1) the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights,
2) the National Council of the Judiciary, to the extent specified in Article 186, para. 2;
3) the constitutive organs of units of local government;
4) the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations;
5) churches and religious organizations;
6) the subjects referred to in Article 79 to the extent specified therein.
2. The subjects referred to in para. 1 subparas. 3-5, above, may make such application if the normative act relates to matters relevant to the scope of their activity.

Article 192

The following persons may make application to the Constitutional Tribunal in respect of matters specified in Article 189: the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Supreme Administrative Court and the President of the Supreme Chamber of Control.

Article 193

Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.

Article 194

1. The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.
2. The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal.

Article 195

1. Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution.
2. Judges of the Constitutional Tribunal shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of the office and the scope of their duties.
3. Judges of the Constitutional Tribunal, during their term of office, shall not belong to a political party, a trade union or perform public activities incompatible with the principles of the independence of the courts and judges.

Article 196

A judge of the Constitutional Tribunal shall not be held criminally responsible or deprived of liberty without prior consent granted by the Constitutional Tribunal. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The President of the Constitutional Tribunal shall be notified forthwith of any such detention and may order an immediate release of the person detained.

Article 197

The organization of the Constitutional Tribunal, as well as the mode of proceedings before it, shall be specified by statute.

Canada

Canadian Charter of Rights and Freedoms
PART I OF THE CONSTITUTION ACT, 1982(80)
Assented to March 29th, 1982

PART I
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:
Guarantee of Rights and Freedoms
Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
Fundamental Freedoms
Fundamental freedoms

2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.
Democratic Rights
Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.
Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.(81)

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.(82)

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.(83)

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals

in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.
Legal Rights
Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.
Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.
Arrest or detention

10. Everyone has the right on arrest or detention
(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.
Proceedings in criminal and penal matters

11. Any person charged with an offence has the right
(a) to be informed without unreasonable delay of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.
Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.
Equality Rights
Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination

and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.(84)

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.(85)

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.(86)

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.(87)

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.(88)

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.(89)

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament(90)

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.(91)

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.
Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.(92)
Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.
Minority Language Educational Rights
Language of instruction

23. (1) Citizens of Canada
(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
have the right to have their children receive primary and secondary school instruction in that language in that province.(93)
Continuity of language instruction
(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.(94)

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.(95)

Application to territories and territorial authorities

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters

within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation

34. This Part may be cited as the Canadian Charter of Rights and Freedoms.

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In its research area *Institutions and Society*, the Adriano Olivetti Foundation organizes and promotes conferences, seminars and publications which seek a comparative understanding of institutional reform and legislative processes. The seminar on *The origins of Constitutional Courts* devoted special attention at the role that political actors played in Constituent Assemblies and through constitutional reforms in order to establish and shape the organ in charge of the guardianship of rights and liberties.

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