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DISPENSA

CONSTITUTIONAL JUSTICE

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Constitutional Justice

Sommario

Introduction

In Europe, Constitutional adjudication was born in Austria in 1920. The main function of the court charged with the power of Constitutional adjudication is the **judicial review of legislation**, since it is entitled to review the legislative decisions of the parliament in order to verify the compatibility with the constitution. The judge of the legislator has the power to establish if the legislature is compatible with the constitution, which is revolutionary, since the parliament was considered the sovereign during the liberal historical period. Therefore, we have a revolution: a judge is on top of the power, because he has the power to strike down the decisions of the Parliament.

Why was it necessary to have a judge judging the legislation? In the **United States**, the idea of democracy is very different from ours, which includes the idea of the judiciary, because there it has always had a role in shaping rules regarding every aspect of society, while in Europe the judge simply said what the law provided. The historical need to have this power, borrowed from the United States and adapted to Europe, comes also from the rigidity of the constitution, but most of all from some principles and fundamental rights which needed a guardian.

The guardian of the constitution should clearly be a judicial body, which enjoys independence and impartiality, not a political one, but *why is it given the power to review legislation?* Because, by means of legislation, the **totalitarian regimes** took places, not through armies, but through a step by step legislation. That's why there was the idea of having a guardian of the higher law who has also the power to review legislation, which is not always compliant with the constitution. Even nowadays, what happened in Poland is that the new power, which didn't want to have this kind of control, demolished the constitutional court in some way.

Constitutional courts are an essential body for the functioning of a constitutional democracy. **Democracy** is not just electing the political body; it's also having a body which ensures that the fundamental principles are always respected.

Overview of the exam

4 parts:

- Self-evaluation test (multiple choices, filling the gaps) – you can choose to keep the mark (out of 30); if you refuse the mark, the oral exam will be on all the course; **15 October!!!!**
- Class presentation mandatory for attending students (mark **cannot** be refused);
- Take-home assignment (develop a paper to submit at the end of November, you can refuse the mark);
- Oral exam (the number of questions depends on the number of marks you accept/refuse – max 3); if you accept the mark of the self-evaluation test, the oral exam is only on the second part of the course. You can decide on the day of the oral exam which marks you want to keep or not.

The Historical Origins of Constitutional Justice

There's an historical background we have to consider in order to arrive to constitutional adjudication. Constitutional justice is indeed a relatively recent phenomenon and comes with the advent of the **constitutional state**, when it was clear the idea that the constitution was the supreme law. From a legal perspective, the concept behind this idea is a hierarchical order of legal sources, where constitution is at the top. Of course, with this come more logical considerations: constitution contains the most important values, and we need rigidity.

While constitutional adjudication is relatively recent, the idea that we have a supremacy of the **fundamental law**, or some laws which are more fundamental than others, is something with ancient origins, that we can trace back to **Ancient Greece**: back then there weren't constitutions as we know them today, but there was the idea that some norms were more important than others.

- **ANCIENT GREECE**
  - ***Nómoi*** (supreme rules of the society – prevailing over other rules) VS ***psefísmata*** (acts adopted by the **representative Assembly** known as ***ecclesia***) ® ***Graphé paranómon***;
    - There was the idea that some rules were basic, and you cannot but respect them, otherwise you were outside society, while others were not so important. In fact, in Ancient Greece we had *poleis*, cities organized according to legal rules, which could be distinguished in *Nómoi*, at the top of an ideal hierarchy, and other rules. *Nómoi* were agreed and fundamental rules, which could not change, while the others could.
    - In case any citizen dared to even just suggest new rules against the *Nómoi*, he could be exiled through the ***graphé paranómon***, a form of public accusation we

find in ancient Greece, particularly in Athens. Literally, it means "accusation against an illegal law" or "accusation for proposing an illegal law". What is important here is to remember the idea behind the structure, since there was not a modern system with which you could declare a norm invalid.

- Solon age in **Athens**: Council of 400 (***Boulé***; "**guardians of the law**"). The body which had the task of protecting *Nómoi* was, in Athens, the *Boulé*, composed of 400 hundred wise people, who had the role of checking whether Nómoi were respected.
- Lycurgus age in **Sparta**: ***èphoroi*** was the body which assured that all the other norms complied with the fundamental ones.

- **ANCIENT ROME**
  - Cicero: ***Lex naturalis***. Here we find the idea of natural law: **jusnaturalism** is a philosophical approach according to which we have some rights which are not attributed to us, since they are just some rights we have because we are human beings, some rules that exist just because they are embodied in the very nature of the human being and cannot be overstepped by other norms.
- **MIDDLE AGES**
  - Tommaso D'Aquino: ***Jus naturalis***. According to him, rules which violated *jus naturalis* didn't have legal force, they did not exist. The difference with Cicero is that the concept described by Tommaso D'Aquino came directly from God, since he was a Christian philosopher, so, from his point of view, natural rules come directly from God and are the most important norms, which had some repercussion on what we consider today fundamental rights (ex. human dignity). Tommaso D'Aquino wrote in the first years of Middle Ages, but later we did not have any example of constitutional justice.

  The reason why Middle Ages was a hostile environment for constitutional justice is that we didn't have any proper constitution. We refer to the Middle Ages also talking about Ancient Régime, as opposed to what came after French Revolution. Therefore, we cannot talk about constitutional adjudication yet, but these authors laid down the foundations for it.

- **ANCIEN RÉGIME**
  - We have some examples of **constitutional provisions** which result from settled relationships between institutions and their reciprocal balance; at the same time, the Constitution expresses the **political power** of the institutions themselves:
    - **permanent tension**; **lack of continuity.**
    - rules occasionally incorporated into Charters or Agreements (es. ***Magna Charta Libertatum***, King John "Lackland", 1215) which set the rules of how society should work: for example, we have *Magna Charta*, whose addressees were the king and the parliament, so it aimed at formalizing with a contract the relationship between the institutions of the time – basically the king – and the parliament, which represented a certain part of society. *Magna Charta* is very important also for the origins of parliamentarism, since it's one of the first

formalization of the parliament, but it's more like a **contract** rather than a constitution: it didn't want to regulate the future, it was more a photograph of the current situation between the parties, while a constitution must be forward looking, so we cannot consider *Magna Charta* as a constitution.

- The **"Constitution"** of the pre-revolutionary system is **unintentional**, fragmented and **backward-looking**.
- **NO mechanisms of constitutional justice**.
- We have other examples of charters: the bill of rights, the *Confirmatio Cartarum* (or *Confermatio Cartarum*), which translates as "Confirmation of the Charters." This document, issued in 1297 by King Edward I of England, reasserted the principles laid out in the Magna Carta and provided additional confirmations regarding the rights and privileges contained in it. The *Confirmatio Cartarum* reinforced the idea that the *Magna Carta* was not a constitutional document in the modern sense, but rather a contract or agreement which needed to be adjourned. In fact, it has a contractual approach and was adopted at a time when only the relationship between the king and some parts of the society needed to be regulated, not thinking about the future.

CONSTITUTIONAL JUSTICE

The late 18th century **revolutionary context** was the precondition for **review on acts of the legislative assembly**. Constitutional justice was not an issue throughout all the Middle Ages. The events which formally ended Middle Ages were indeed the French and American revolutions. With this shift we have the end of the absolute state and the beginning of the liberal age.

There was the idea that, first of all, the legislative acts could be reviewed by someone, which is one of the most important principles of the liberal revolutions: the **principle of separation of powers**, according to which even parliament could be constraint. This principle could have different interpretations, and constitutional justice had more readings according to the different interpretations of this principle. In America, for instance, constitutional justice developed more smoothly thanks to a particular interpretation.

However, it was generally clear the need of some norms which were intentionally chosen as the rules they wanted to give to society.

- **Constitution: set of rules governing** the political life of the state, intentionally placed at the **top of the hierarchy of sources of law**. It is aimed at establishing the basis of the institutional framework. It is usually codified in a **solemn written text resulting** from the **constituent power**, which was original and unlimited. We have no rigid constitutions yet, but we have the idea to have fundamental rules which regulate the society.
- **Constitutional justice:** checking the compliance of constituted powers with the constituent power.

France

Political and philosophical considerations lead to different outputs in France and in the United States: in **France**, most people making the revolution were against a judicial body performing constitutional adjudication. We had a debate among some people who wanted this body and the majority which said it was very dangerous and didn't need to be incorporated in the constitution. If we look at the debate in the constitutional convention:

- On one hand we can see the theories of **Sieyès**, a strong advocate of constitutional adjudication, who strongly supported a body with the role of constitutional adjudication. According to him, the constitution must be a set of mandatory laws; if it's not mandatory, it's nothing; if it's mandatory, we need a guardian for it.[1] In fact, if these norms were to be mandatory, they needed to be protected, but not by a common judge, because if you leave the constitution in the hands of an ordinary judge, you are downgrading the constitution. So, he said that a specific body was needed: he suggested the establishment of a ***Jury Constitutionnaire*** vested with the power of assessing the constitutionality of laws.
- Nevertheless, the project was rejected by the Convention, i.e. the assembly tasked to write the constitution, and was not incorporated into the **1795** Constitution, because according to the other members, having a specific judge in charge of reviewing whether the law complied with the constitution was dangerous and useless, as **Thibaudeau** said. It was dangerous because judges should **not** overstep the parliament.

In fact, the majority was against it because the revolution was based on the **Enlightenment**, which was based on the **principle of rationalism**, which considered very important the **principle of separation of powers**. Therefore, reviewing acts of the Representative Assembly was inconsistent with the French doctrine of the Enlightenment, since there had to be a rigid separation of powers: the **legislative** one was up to the **Representative Assembly**, which expressed **people's general will**.

Both French and American revolutions theorized the separation of powers, because there is no state without it, but with some differences: the main one is that in France there was no autonomy of judges. According to **Montesquieu**, judges were the mouth of the law (***bouche de la loi***), so they couldn't give any creative interpretation of it, because it was the expression of the sovereignty of the parliament. The judges were mere executors of the law, which should not leave room to interpretation, so it needed to be very precise, because the courts needed just to apply it without adding anything. They had such a negative idea of judges because in absolute states they were like an administrative branch, a branch of the executive, depending on the king. For this reason, they were not independent, autonomous. The king was precisely the authority they wanted to overthrow, so they didn't want to give

[1] « Une constitution est un corps de lois obligatoires, ou ce n'est rien ; si c'est un corps de lois, on se demande où sera le gardien, où sera la magistrature de ce code ? […] Un oubli de ce genre serait inconcevable autant que ridicule dans l'ordre civil ; pourquoi le souffririez-vous dans l'ordre politique ? […] Qui avez-vous nommé pour recevoir la plainte contre les infractions à la Constitution ? La magistrature civile vous paraîtrait-elle pouvoir remplir un aussi haute mission ? Non, on ne peut méconnaître assez l'importance de l'acte constitutionnel, pour le réduire à n'être qu'un titre de code civil ».

power to a non-autonomous body. If the judge is the *bouche* of the law, how could they accept that they could revise the very legislative acts to verify the compatibility with the constitution? It was not acceptable.[2]

If we didn't have constitutional justice made by judges, since we are ideologically against it, what could be an alternative? If constitutional judicial review of legislation couldn't be carried out by bodies that were not democratically elected, the alternative is that we encompass the review of the constitutionality of law into the **legislative procedure**, in order to ensure a certain degree of review while not contradicting the separation of powers, which was firmly rooted for them. We will see that in France the compatibility of the law with the constitution was indeed checked before the end of the legislative procedure, since after it became the expression of sovereignty and could **not** be changed. Revolutionary France rejected constitutional justice, which had repercussion later. They gave this role to a ***conseil***, not calling it a court.

United States

To understand the **historical, cultural and institutional** context of the **Constitution of the United States of America**, which is **consistent** with a system of **constitutional justice**, We have to look at what the founding fathers wrote:

- **Statutes** of several North American colonies;
- **Protestant** doctrines: supremacy of the **Parliament**;
- Otis (1761): **«Acts against the Constitution are void […] and courts must pass such Acts into disuse»**. They maintained that acts against the constitution were void, which is normally used to indicate invalidity, but in this context it's a synonym of not effective; the important thing is that constitution had to prevail.
- Adams: **«Acts against the Constitution shall not be applied by courts»**. Adams put it in an even clearer way: if an act does not comply with the constitution, courts have to refrain from applying it.

Keep in mind, as a general principle, that the constitution had to prevail and there was something wrong with acts which didn't comply with it.

Even before the federal constitution and the so-called Marshall doctrine, some courts of the states that later on made up the US already started declaring **unconstitutional** the norms that conflicted with their Constitutions. They were not federal courts, since the federation did not exist yet. Initially we had a **confederation**, then they went into a federation. Therefore, here we are referring to the confederated states; the difference is just historical, because nowadays we do not have confederations, just federations: the tool which regulates the relationship between federated states and the federal state is normally the federal constitution, which means that the relationships between federal power and federated states are regulated by constitutional law. When you have a confederation, the relationship between the center and the federated entities is regulated by **international law** instead. In a confederation, we have states with their own constitutions. For this reason, too, a

[2] The office of the judge was also something you could sell and buy, so there was a sort of monetarization of the role of the judge, from which comes the negative idea related to judges.

federation was considered a tighter union, a union which is nearer to a unique state, while in a confederation you just have international agreements.

However, already before the federal constitution, courts started to exercise this power of not applying norms not compatible with their constitutions.[3] The reason why is that the constitution **delegates** authority to the legislative power. If you are delegated and you do something **not** compatible with the request, there are going to be consequences. According to **Hamilton** (Nevis, 1755 – New York, 1804), it's the same when you talk about the constitution and the legislative branch: if the act is not compatible, it should be considered void:

> «*There is no position which depends on clearer principles, than that* ***every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid.*** *To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid*.»

Therefore, **courts** have to keep the representative assemblies within the **limits** of their power. If you look at this context, you see that the US were very prone to constitutional adjudication.

However, even if the historical, cultural and institutional background promoted:
- the independence of the Judiciary and
- the possibility to check the compliance of laws with the Constitution,

the federal **Constitution of the United States of America does not provide (explicitly) for any mechanism of judicial review over legislative acts** (not even **art. III**, which deals with the judiciary power, contains no reference to constitutional adjudication).

Why? Since there still was a ***rigid separation of power***, so there could be no interference between powers, they hoped that, by interpreting the constitutional text, it was possible to identify a mechanism to check the compliance of laws with the Constitution. Judicial review was therefore considered **implicit**, ideologically embedded in the constitution. Nevertheless, it happened that the Supreme Court decided that ordinary court could provide a judicial review, even if it was not specified in the federal constitution.

The **Supreme Court** is not a constitutional court, it does not only deal with the constitutionality of the law: it is a court of last instance in its everyday task, which means:
- Ultimate appellate jurisdiction over cases decided by federal judges;
- Original jurisdiction over some specific public-law related issues.

[3] ***Holmes vs Walton*** (1779-1780): SC of New Jersey; ***Trevett vs Weeden*** (1786): SC of Rhode Island; ***Bayard vs Singleton*** (1787): SC of North Carolina; ***Commonwealth vs Caton*** (1782): Appeal Court of Virginia; ***Rutgers vs Waddington*** (1784): New York Mayor's Court; ***Simsbury Case*** (1785): Litchfield County Superior Court, Connecticut.

Marbury v. Madison (1803)

Some scholars have called it the most important case in the history of the Supreme Court; what started out as a minor matter about federal jobs turned into a legal decision that resonates to this day: this is the story of Marbury vs. Madison. In 1802 Thomas Jefferson defeated John Adams in the presidential election. Just before he left office, Adams appointed a bunch of judges, who are indeed appointed by the executive power, from his Federalist Party to the District of Columbia courts; these appointments were approved by the Senate and signed by the president. However, there was a hole: the last step before these judges could take office was a **commission**, i.e. a formal piece of paper that said essentially "this is their job, and these guys are good to go". These commissions hadn't been delivered yet, which meant the judges couldn't start their jobs yet, and when President Jefferson took office in March of 1801, he had the Secretary of State James Madison keep them from being delivered. One of those prospective judges was named William Marbury, a federalist party member from Maryland. Marbury brought the case to the Supreme Court; he wanted the court to issue a *writ of mandamus* (that's legalese for "a court order"). Marbury wanted the court to order Madison to show why he couldn't get his commission. In 1803, Supreme Court Chief Justice John Marshall – himself a federalist appointed by John Adams – ruled on the case of Marbury vs. Madison: he saw this as an opportunity to establish some important legal precedents, i.e. decisions that extended way beyond whether or not Marbury got his job. First, Marshall ruled that Marbury had the right to receive his commission, and Marshall also ruled that Marbury had a right to remedy to have his wrong writing.

There was a third part to Marshall's decision, and this is what made Marbury vs. Madison so important: Marshall ruled that the Supreme Court **didn't** have the power to make Madison hand over Marbury's commission. In making his ruling justice, Marshall had the court ruled itself: Marshall brought up the **Judiciary Act of 1789**, a law that gave the Supreme Court the power to rule in cases just like this, but Marshall ruled that section 13 of this law violated the Constitution, because it gave the court powers the Constitution said it shouldn't have (it was not compliant with the separation of powers described in the constitution). Long story short, it wasn't the Supreme Court's place to rule in a decision like this, and, striking down the Judiciary Act of 1789, Marshall also struck a blow against the authority of Congress. The Constitution was the supreme law of the land, so, whenever Congress and the Constitution were in conflict, the Supreme Court would turn to the Constitution. As a court, it went much beyond the case: the act was bested by the power of the court to decide the compliance of the law with the constitution, therefore the court could decide not to apply it. This is called **judicial review** and it's been an important function of the Supreme Court ever since. In relinquishing the power it was granted in 1789, the Supreme Court defined its emerging role for the young nation: the court staked out its claim as a branch of government equal to and independent of Congress and the executive branch, all that from a case about someone's paperwork not getting delivered.

"US-style" judicial review of legislation was established (Marshall doctrine):

«[…] *The Constitution is either a superior, paramount law, unchangeable by ordinary means* (he is describing a **rigid** constitution)*, or it is on a level with ordinary legislative acts, and,*

like other acts, is alterable when the legislature shall please to alter it (**flexible** constitution, which can be changed at the will of the legislature).[4] […] *If the former part of the alternative be true then a legislative act contrary to the Constitution is not law.* […]*».*

The supreme court invested the ordinary judges with the power to review legislation. This is a **decentralized/diffused model**, in which any court can review the constitutionality of a legislative act. All the judges can decide whether an act is unconstitutional, but that have binding **precedent**, so, if the Supreme Court declares the unconstitutionality of an act, this decision cannot be challenged, and it usually has the status of a precedent.

«So, if a law be in opposition to the Constitution: […] the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply».

This means that the constitution must become the rule of the **concrete case**: you must interpret general and abstract law, making it specific by making the constitution the rule of the concrete case.

The point of this decision is that there's no need for the constitution to provide a system for constitutional adjudication, since it comes from a **syllogism** derived from the very essence of the constitution.[5] In fact, the **Constitution of the United States of America does <u>not</u> provide (explicitly) for any mechanism of judicial review over legislative acts** (art. III) **BUT <u>judicial review of legislation</u> was established by way of <u>interpretation</u>:**

- ***If the Constitution is the highest-ranked source within the hierarchy of sources of law and is a rigid legal source (cannot be amended by ordinary law), then any law that breaches the Constitution cannot be considered as law*** **(T1)**.[6]
- *If the Constitution has the same hierarchical rank as ordinary law, it can then be amended by the legislator, as all other laws* (T2).

- If T2 is true ® The Constitution is a failed attempt to limit the legislative power, which cannot be limited by its very nature.
- If T2 is false ® The Constitution is supreme, fundamental law, so any legislative act against the Constitution is invalid.
    - If we assume it is superior and cannot be changed by ordinary law, when judges are called to apply a law, but this law violates the Constitution, they must **not** apply it and apply the Constitution instead: in this way, they safeguard the Constitution.

Constitution shall not be considered an ordinary act; therefore, if an ordinary act does not respect the constitution, it should not be applied. This is the same reasoning made by **Sieyès**, who said that the constitution must be considered something higher than ordinary

[4] *Statuto Albertino* is an example of flexible constitution, which was adopted in 1848 and then extended to united Italy: it could be changed at any time, so it was no real constitution, it was more like a law which addressed institutional aspects of the state.
[5] Syllogism: structure of a reasoning with a major and minor premise followed by a conclusion. Those statements are logically related among themselves.
[6] This is the basic assumption for our reasoning, even if it's a political choice to have a constitution at the top of the hierarchy.

law, therefore needing a guardian. The difference is that Sieyès said that special judges were needed in order to protect the constitution, while Marshall said that any judge in the US can avoid applying the law not compliant with the constitution. According to Sieyès, you needed a constitutional provision framing the constitutional adjudication, but this was not realized. Differently, US constitution has no reference to constitutional adjudication, because this mechanism flows from the constitutional system, it is implicit: legislation must be interpreted according to the constitution.

Another important aspect to point out is that this decision entails that the law not compliant with the constitution is **not applied**, which is very different from saying it is invalid. The difference is that when an act is invalid, *tamquam non essent*, i.e. it ceases to be considered in the legal system, and no one can apply that law. If the act is disapplied in a concrete case, it means that it will not rule that case, but it will remain in the legal system, so it could rule other cases, if it is considered compliant with the constitution in another concrete case. The problem that might rise is related to **legal certainty**,[7] one of the principles at the basis of the rule of law. There's a way to mitigate this problem: a system where **precedents are binding**.

In our system, a decision by the court of cassation is highly considered, but there's no legal requirement to consider it binding. In **common law systems**, when a decision is taken by a higher court, it is a precedent, binding to other judges, so, in some extent, case law contributes to the system of sources of law. If you introduce judicial review in a common law system, you have to enforce it through a binding precedent, so that the decision is binding for every citizen and judge.

How to decide whether a federal or state court should decide? It applies the **principle of competence**: a clause in the constitution explains how competences are shared between the federation, in which case they are regulated by federal law, and states, in which case it is a matter of state law interpreted by state courts. Normally, in federal states you have a clause in the constitution describing federal competences, at a central level, while the others are left to the states. In terms of drafting techniques, there's a list of federal competences, while the rest is up to the state.

Constitutional Justice and the **Liberal Age** (XIX Century)

The liberal age (from the end of the XVIII century until the WWI) was **not** a flourishing time for constitutional adjudication, because:

1. Most of the constitutions of the time were **flexible charters**.
2. Moreover, the idea of the liberal age was that the state does **not** have to interfere with the life of citizens. The rights which prevailed were **first generation rights**, which do not need any action by the state (private property, personal rights such as freedom of speech, personal freedom, freedom of movement, religious freedom to some extent).
3. Other more grounded reasons why it was not possible to have an organized system of constitutional adjudication are connected to the **form of government**.

[7] We have to know what to expect, the possible consequences of our behavior, the laws applicable and not.

a. There was a dualistic form of government. **Dualism** in the form of government means that you have a power, in particular the power to govern, the executive power, which is **shared** between the head of the state – the king – and the parliament. The government had to have the confidence of **both** the parliament and the king. At the time, the main difference between king and government was that the parliament was elected and expressed an executive, which means that, based on the forces present in the parliament, the government was appointed, while the king was there for dynastical reasons. They competed for power; therefore, they had no interest in having their list of powers set by a court, they preferred to have them defined by political strength. Parliament could not be judged by the court, because that meant that the sovereignty would be judged by a court.[8]

4. Another reason why constitutional adjudication was not well-developed deals with the ground principles of the liberal state, in particular with the **principle of legality**, with how it was interpreted at the time. The law was the expression of the sovereignty of people, and it was the output of the parliament. Consequently, we couldn't have a court deciding if the law was wrong, it was not acceptable. The right of vote was restricted to the richest citizens, however it was believed that the general will was expressed by the parliament, so nothing could overstep it.[9]

Some courts could nevertheless decide on a very specific matter regarding constitutional adjudication: the respect of **competences in federal states**:

- **Austrian monarchy**: Imperial Tribunal (Reichsgericht, 1867) settles the **conflicts between the Reich and the Länder** and **between Länder themselves**. In Austria, a federal state, the court could decide whether the federal state was respecting the allocation of competences made in the constitution. If a federated state, a land, enacted a law violating the allocation of competences, the federation would raise the question before the imperial tribunal, which would declare that law unconstitutional (**arbitral role**).
- **Swiss Confederation:** Tribunal Fédéral (1874) settles the **conflicts between the Federation and federal entities**.[10]

The **arbitral competence of constitutional adjudication** is one of the first task in the history of constitutional adjudication. We still have courts performing this arbitral function. Among contemporary experiences, we can mention **Italy**, too, since our regional system is very similar to a federal one: cases dealing with competences are referred to the constitutional court.

[8] Then we shifted to **monistic** parliamentarism, where the government need approval just from the parliament, not from the king, because the head of state remains outside the dynamics of state powers. Let's think about contemporary monarchs: they're just representative figures; they may have a constitutional role, but they have no political power, which is shared between parliament and government, which just needs the confidence of the parliament.

[9] The difference between the principle of legality and of constitutional legality is that in the first case there is no difference between the law and the constitution, the important thing is that the law is decided by Parliament. The principle of constitutional legality obviously implies that the constitution is at the top of the legal sources system.

[10] In Switzerland, the Federal Tribunal still adjudicates disputes between the federal government and cantons, though the scope of its constitutional review is limited compared to other countries. It doesn't strike down federal laws but can rule on cantonal and administrative matters.

The **formal state** is the relationship which exists between the central state and the decentralized entities, which can be regions or federated states. The arbitrary competence of the constitutional adjudication body is therefore something related to the formal state, enabling that body to establish whether the allocation of competences is respected.

Constitutional Justice between the **World Wars**

The period going from 1919, the end of the WWI, and 1945, before the beginning of the second one, was characterized by a debate between Kelsen and Schmitt, who had very different ideas concerning the entity which should safeguard the constitution.

At that time, the Austro-Hungarian empire was in force, but after the WWI it was fragmented into several different states, among which we had the German republic. In **1919**, the **Weimar constitution** entered into force: it was very advanced in terms of protection of different categories of rights. Moreover, it was based on a significant compromise, since the assembly was composed from very different forces, but it didn't survive the Nazism. One of the ways through which Nazism took power consisted indeed in an emergency clause of the constitution itself (**art. 48**), which allowed the president of the republic (there was semi-presidentialism, so the president was the head of state and government) to take all the powers in case of crisis.[11]

The main works of Kelsen will be published in 1929, the ones of Schmitt in 1930, so we are in the middle of the two WWs.

Kelsen's «pure theory of law» & the Austrian Constitution of 1920

Kelsen was born in Prague at the end of the 19th century and was a scholar who founded the idea of law organized in a hierarchy. Kelsen is important precisely because he was the first to theorize the legal sources according to a precise hierarchy. According to him, the most important legal source was the ***Grundnorm***, the fundamental law, the constitution, which gives foundation to all the other norms. The constitution is the source of validity of all the other norms. This implies that the norms below the constitution cannot change it, because they have **not** enough legal force, in fact we have more procedural steps to change the constitution. In terms of validity, the source of validity of the constitution is not grounded on any higher source instead, because it is in itself the *Grundnorm*. Therefore, it originates from the so-called **constituent power**, opposite to the constituted power, which will always find a limit, while the constituent power does not, since it derives from **political** will. In other words, the constitution does not have any legal ground, but it is based on an unlimited power exercised once, when the constitution is created, while constituted powers can be exercised many times.

Kelsen's formalistic conception of the legal system consists of a **pyramid**: if a law does not respect the higher rank, it is **not** valid. In legal terms, the lack of validity means that the norm is expelled from the legal system. Invalidity is normally the result of the application of this theory of law: I cannot apply in any case (*erga omnes* effect) a law contrary to the

[11] Schmitt's thinking reflects the idea of someone who takes all the powers during an emergency.

constitution. This is called "**the pure theory of law**", which is the definition of Kelsen's approach.

A law does not respect the constitution, for instance, when there's a substantial violation, such as a law which endangers personal freedom, or which discriminates. Another example of invalidity may derive from a law adopted according to a procedure different from the one that the constitution prescribes.[12] However, Kelsen's theory, in its pure form, states that any violation of the constitution is a **formal** violation, because according to him, when a law of a lower rank does not respect the constitution, it's like if it is trying to change the constitution without following the right procedure. This is why any violation is a formal one, independently from the fact that it contradicts a substantial norm or not.

The **Austrian state**, born after the WWI (in 1919), adopted the **1920 constitution**, based on Kelsen's pure theory of law: it was rigid, the source of validity of any other legal source. It is the very first constitution which is rigid and based on this theory. In the same year, we have the Czech constitution, based on the same kelsenian model.

Judicial review based in the kelsenian model:

- **Centralized review** (*Verfassungsgerichtshof*) ® According to Kelsen, if you embrace this approach regarding the hierarchal order of legal sources, you need someone safeguarding this hierarchy, in particular a specific court, whose main task was preserving the constitution. Kelsen thought this specialized court could be the only guardian, the only actor defending the constitution, as in a centralized system. The 1920s most important constitution was the Austrian one, which provided for a special court dealing with constitutional matter (we still have the constitutional tribunal in Austria).
- **Abstract review**: the constitutionality of a law can be challenged regardless of the need to apply it to a concrete judicial proceeding (until 1929); challenged laws didn't need to be applied in any specific case: they could be directly challenged without waiting for their application.
- **Direct action**: challenging the law was something which could be done only by the entities of the state: the federal government could challenge an act of a federated state, or vice versa (in this case, Federal Government and Governments of Länder). From 1929 this will change, with the addition of the Supreme Court and the Supreme Administrative Court.
    - The central government did not need to wait that the law was applied in a specific litigation before a court. The abstract review was, according to Kelsen, the most appropriate to carry out constitutional adjudication.
- **Constitutive effects**: *erga omnes* and *ex nunc* (or ***pro futuro***). When a law was unconstitutional, the output was **invalidity**, something which applied *erga omnes*, towards anyone, which meant that nobody of the state would apply this law again. Moreover, invalidity applied only *pro futuro*.

[12] According to the Italian constitution, the exact same text of a law needs to be approved by both the houses of the parliaments, there cannot be any differences, otherwise we would have a procedural violation of the constitution.

This is the pure kelsenian model as it was described in the Austrian constitution of 1920. This model based on Kelsen's ideas was characterized by a strictly rigid legal nature of the constitution, which was considered something legal and formal, which is the main difference with Schmitt's idea.

Schmitt v. Kelsen debate - The concept of jurisdiction & Constitution

According to **Schmitt**, constitution is not a legal source, it is not the ground of validity of other legal sources: it was a political choice, a political agreement embodying the rights considered fundamental by the society at that time. If it is only a political document, a set of political values, this does not mean it is not binding; it means that it is **not** *legally* binding: as a society, we agree to respect those values, but they are not legally binding. The consequence is that no judge could enforce the constitution, while in Kelsen's view we needed a body of a judicial and technical nature to do it. According to Schmitt, if you put the constitution in the hands of a judge, you're making **politics justiciable**. It would mean politicizing the judiciary, which should remain outside politics instead. Therefore, jurisdiction on constitutional matters is not conceivable, there cannot be a court protecting the constitution, since it is not up to judges to enforce political values, otherwise this would politicize the court.

Keep in mind the political context of Weimar, a semi-presidential republic where the president had also political powers. Moreover, he had great emergency powers, since **art. 48** stated that he could take any measure during a crisis, having therefore full discretion. He was *par excellence* the decision maker and he was, according to Schmitt, the most appropriate guardian of the constitution, since he was the strongest political body: the **president of the republic**. In fact, the guardian of the constitution should be the one who exercises sovereignty, which, according to Schmitt, means deciding in times of exception, crisis, not only deciding how to act, but also when there's a crisis. This is why he was considered the most appropriate guardian for the political values embedded in the constitution.

Schmitt and Kelsen had different notions of **constitutional justice & politics**, too:

- **Protecting the state from external threats** (**emergency powers**) ® The idea of attacking the constitution, according to **Schmitt**, was something coming from the **external**, a threat which comes by someone who does not share the same political values and wants to change the system. **"*Amicus-inimicus*" logic** reflects Schmitt's reasoning: the constitution shall be protected by a political body, because political sovereign bodies, in particular the president of the republic in a semi-presidential form of government (the head of the executive), could address external crises with any means necessary and it **wasn't** even bound to restore the precedent situation.
    - If the threat is considered external, it makes sense that the best guardian is perceived in someone with discretion in times of emergency. The president could even decide **not** to restore the situation as it was before the crises (*status quo ante*), but to go beyond the legal order, which is a very wide power. Emergency, in this case, is therefore something which goes outside the legal order, while it is normally something temporary, and for this reason the body which has to deal with it tries to

restore the *status quo ante*. This is why it would be more correct to talk about a **state of exception** instead of an emergency: the president has the power to go beyond the law if he has to fight an emergency, with external legal powers.

- **Protecting the state from internal threats** (**keeping the *status quo***) ® According to **Kelsen**, the threat to the constitution is the **parliament** enacting a law violating the constitution, so something which comes from the **inside**, an internal threat, for which reason the best guardian would be a court.
  - According to **Kelsen**, **constitutional justice** may contribute to protect **minorities**, because, in terms of relationships between society and minorities, the aim was to maintain **social peace**, keeping in mind that minorities can become the majority overtime. According to him, it was normal to have different views in a society. The task of the constitution was keeping this pluralistic scenario within the state while keeping also peace. The objective was not defending the society from external, but it was social peace the very purpose of the constitution. The constitution is therefore to be considered a legal document resulting from a legal process, and which should be protected by a judicial body, i.e. a court.

Concept of the Constitution	
Hans Kelsen	**Carl Schmitt**
Hierarchical structure of the legal system: - Formal (and substantive) compliance of laws with the Constitution; - Non-compliant norms are invalid; - The most appropriate body to carry out this task is a specialized court. «*If there are no guarantees of constitutional legality […], then constitution […] lacks full legal force*». The constitution is a **legal** document, the fundamental norm, the foundation for any other legal norm's validity. Its purpose was to ensure legality but also social peace, which was possible by ensuring pluralism within the society.	The Constitution is a contract: - Constitutional disputes arise between the contracting parties; - The Reich President – the focal point of a «party-politically neutral system» – is in charge of resolving the disputes. * «*direct connection to the State as a whole*» – active defence of the Constitution The constitution is a **political** document which embodies political values rather than legal norms. It is made up of open-ended principles.[13] Constitution is a tool which contributes to defend the state from external, which divides the society between black and white, friends and enemies. Pluralism could result into dangerous threats.

These two theories have very different premises: **Schmitt's** view was based on a strong *amicus inimicus* logic, so it tended to theorize the situation according to a black and white view. Those inside the state should be as uniform as possible, otherwise they would be considered an enemy. He was not a supporter of pluralism inside the state: internal threats

[13] Open-Ended Principles: Schmitt contends that the constitution is founded on fundamental decisions about the political identity of a state. These principles, such as who the people are, the nature of sovereignty, and the distribution of power, are not merely legal norms but broad political decisions that shape the state's identity and direction.

should not exist, since the state should be very compact.[14] Differently, **Kelsen** did not adhere to this logic: the constitution was a tool to defend pluralism within society.

A direct consequence of this opposition is the different concept of protection of the constitution: for **Kelsen**, a specialized court should do this as its main task. It was a body responsible for solving all the problems concerning the constitution. For **Schmitt**, we couldn't have a judicial body defending the constitution, a political set of values. Therefore, the guardian should be a political body with the power of deciding during crisis. According to the system, the president of the *Reich* was the one vested with sovereignty in full.

Constitutional Justice after World War II

This opposition between Kelsen and Schmitt was one of the most important debates at the time, but after WWII Kelsen's view prevailed in Europe. Many constitutions are in fact based on a kelsenian approach nowadays.

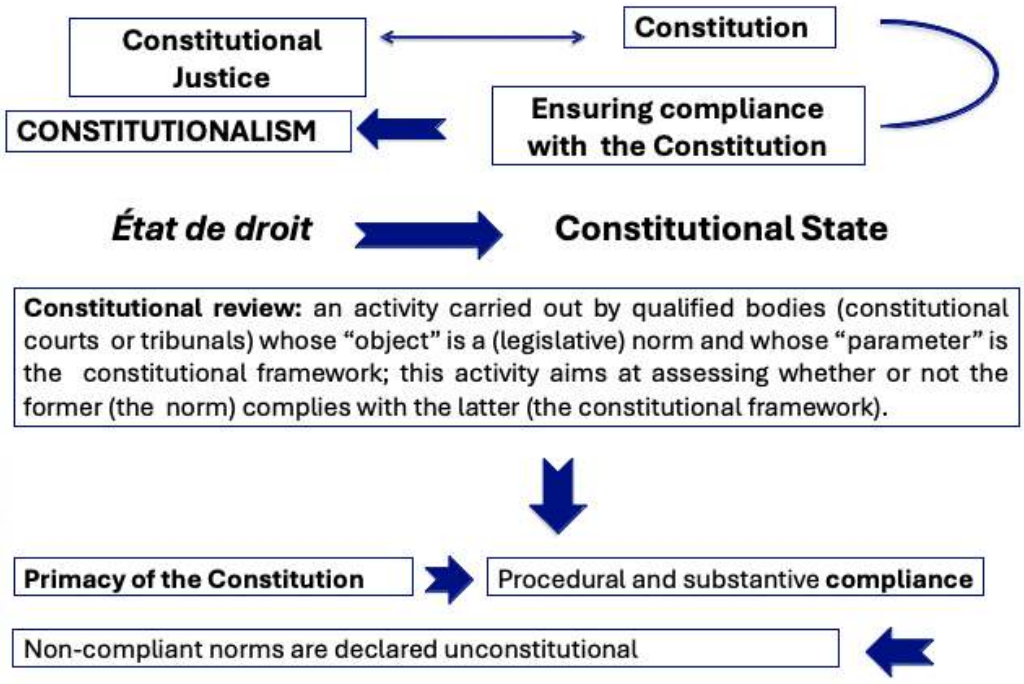
After the WWII, constitutional courts, an ***ad hoc* body** guaranteeing for **constitutional adjudication**, flourished, with the formal **precondition** to have a **rigid** constitution at the **top** of the hierarchy. Constitutions are now the **outcome of the *pactum societatis* and of the *pactum subiectionis***,[15] and constitutional justice is charged with the Protection and implementation of the Constitution.

Society is accepting to have a constitution at the top of the legal sources and a judge defending it because not only there was distrust against the political body, but also because people assisted to the horrors of the WWII, which should not be repeated: the values which were violated needed to be stated in a legal document protected by a judiciary body.

Therefore, in Europe, constitutions will be based on the kelsenian approach, with some differences and exceptions.

[14] This is not realistic, because you cannot imagine a state not fragmented with opposite views. This is a very totalitarian view of the state. This is why someone says his theory paved the way for Nazism.

[15] *Pactum Societatis*: After WWII, this concept, rooted in social contract theory, took on renewed significance. It reflects the foundational idea that constitutions are born out of a social agreement – a collective decision by the people to come together as a political community. This idea is particularly important in post-war constitutionalism, where the emphasis was placed on the re-establishment of democratic societies. The constitution symbolizes this fundamental social agreement, ensuring the rule of law, human rights, and democracy.
Pactum Subiectionis: The "pact of subjection" remained relevant but transformed considering the lessons learned from authoritarian regimes. Instead of a pure submission to sovereign authority, post-WWII constitutions sought to balance authority with the protection of individual rights. The constitution became the outcome of an agreement to submit to a legal order that was grounded in democratic legitimacy and checks on state power. It was not simply about obedience but about ensuring that the sovereign (whether an individual, parliament, or government) would be constrained by constitutional limits and human rights.



Constitutionalism now represents a foundational principle of modern democratic states, ensuring that the **constitution** – as the supreme legal document – guides and restrains all political and legal actions within a state. At its core, constitutionalism aims to safeguard the **primacy of the constitution**, ensuring that no law or government action can override the fundamental principles established by this central document.

In a **constitutional state**, which operates under the rule of law (***état de droit***), all public authorities and institutions must act in accordance with the constitution. The rule of law requires not only adherence to established legal norms but also that these norms comply with constitutional principles, both **procedurally and substantively**.

To ensure this compliance, **constitutional justice** comes into play. This refers to the system of **constitutional review**, an essential mechanism carried out by qualified bodies such as **constitutional courts**. These courts are tasked with reviewing the legality of laws, regulations, and government actions to ensure their compatibility with the constitution. Specifically, the **object** of constitutional review is a legislative or governmental norm, and the **parameter** is the constitutional framework itself.
Through constitutional review, these courts assess whether laws meet the standards of **procedural and substantive compliance**. If a law or action is found to conflict with the constitution, it is declared **unconstitutional**. This declaration renders the non-compliant law invalid, preserving the integrity of the constitutional order.
Thus, constitutional review not only protects individual rights and ensures the rule of law but also enforces the **primacy of the constitution**, maintaining a delicate balance between state authority and the protection of fundamental principles that form the core of constitutionalism.

The So-Called Waves of Constitutional Adjudication

There are three waves of constitutional adjudication:

1. **First** ® Aftermath of the WWII (**1940s**): the constitution of Austria (1945), which is a readdressing of the constitution of 1920 with some changes; the Italian constitution (1948), which embodies the kelsenian model; the west German constitution, called "the fundamental law of Germany" (1949),[16] which, after the fall of the wall, became the constitution of the whole Germany, still based on the kelsenian model. This first wave represents the introduction of constitutional adjudication models.
2. **Second** ® **1970s**: the Greek (1975) and Portugal (1976) models, which are also called fourth model of constitutional adjudication because of their specific adaptations in adjudication mechanisms, differing slightly from the Kelsenian model in terms of institutional structures and procedures for judicial review;[17] the Spanish constitution (1978), created after the Franco regime.
3. **Third** ® Centre-Eastern Europe **post-1989**: Bulgaria, 1991; Romania, 1991; Poland, 1997; Albania, 1998; Croatia,1990; Slovenia, 1991. After the fall of the Soviet Union and the collapse of communist regimes, these countries adopted new constitutions with mechanisms for constitutional review. This third wave reflects the post-communist constitutional transformation in Central and Eastern Europe, where new constitutional systems, often based on Kelsen's model, were introduced to protect democratic principles and the rule of law.

These 3 historical periods have in common the fact that they came after a totalitarianism/dictatorship. These regimes were overthrown, and democracy was reinstated.

The **constitutional courts** adopted in this period are characterized by multiple **roles**: carrying out constitutional review (i.e. controlling that the law complies with the constitution), but the majority have also arbitrary functions. Having an arbitral role means setting the conflicts which arise between the central government (federal state/executive power in a regional system) and the federated states/regions, so between state entities or powers.

[16] *Grundgesetz* ("Basic Law").

[17] This model differs from the traditional **Kelsenian model** in a few key ways:

1. **Advisory Role of Courts**: In the fourth model, constitutional courts or other judicial bodies often have a **more advisory role** in certain contexts. For example, courts may offer preventive control, reviewing legislation **before** it is enacted to ensure constitutional compliance. This is different from the Kelsenian model, which typically focuses on reviewing laws **after** they have been passed.
2. **Direct Access to Constitutional Courts**: These systems may allow **broader access** to constitutional courts by individuals, political bodies, or even civil society actors, compared to the more limited access found in traditional Kelsenian systems, where the referral might come only from certain political or judicial actors.
3. **Integration with Ordinary Judiciary**: In some cases, the **fourth model** more closely integrates constitutional adjudication with the ordinary judiciary. Rather than a strictly separate constitutional court, ordinary courts may have enhanced powers to apply constitutional principles or refer matters directly to the constitutional court.

In sum, the fourth model reflects a **hybrid approach**, incorporating elements of Kelsenian judicial review while adapting to the political and legal cultures of Greece and Portugal, emphasizing **preventive control** and broader access to constitutional justice.

The models of constitutional justice

Not all countries adopted constitutional adjudication according to the same scheme: there are countries which relied totally on the kelsenian model, while others put the protection of the constitution in the hands of a political body. However, at least in Europe, the kelsenian model prevailed, with some differences. Theorization and categorization are useful in order to study models, but general categories cannot perfectly reflect the reality.

We have **2 macro-models of constitutional adjudication**:

1. **Political review model**, according to which constitutional review is a step of a political process, particularly of the legislative process. This activity is normally carried out by bodies which cannot be considered proper courts, since they have a strong political attitude.
   a. The historical context where we saw something similar would be **France after the revolution**, so it can be considered as the paradigm of this model: there still is the *conseil constitutionnel* (not a court) made up of people who are not technical experts of law, they have different backgrounds.
   b. Moreover, the constitutional review is carried out during the legislative process, it takes place before the law enters into force, which is very coherent with Montesquieu's ideas, because once the law is put into force, it is the output of the sovereignty, i.e. the parliamentarian activity. This is an ***ante* and *in abstracto* review**, since it is impossible to apply the law to a concrete case before it is put into force.
2. **Judicial review model**, which can be further subdivided into 2 sub-models. Bodies in charge of constitutional review are independent from both the legislative and executive power. When a court carries out constitutional review, it is carried out after the law (or other acts) enters into force, which is logical, since, in terms of general principles, it cannot be a step of the legislative process, otherwise the court would intervene, and this would compromise the separation of powers, therefore the review is carried out *ex post*.
   a. **Decentralized model**: it is the US judiciary review legislation, according to which any court can decide if a law complies with the constitution, so all judges are entitled to carry out constitutional review.
   b. **Centralized model**: only a specialized body with constitutional review functions (a specialized court) decides on the matter. The paradigm is the kelsenian model, so the 1920 constitution of Austria, which is the purest centralized model.

These are the pure models of constitutional adjudication, but, in reality, they are hybridized. A general scheme is however essential in order to understand the concrete changes. Therefore, first of all, we will study the pure models.

Political review model

- It is carried out by **"political" bodies**;
- It takes place within the **legislative process**;
- The **prototype** of this model is **France**:

- The role of the judge ® it cannot be accepted that a judge establishes what is compliant or not with the constitution, which is coherent with the historical context:
  - Montesquieu doctrine: principle of separation of powers;
  - Rousseau's theories of popular sovereignty;
  - The legal-philosophical approach of the Enlightenment contributed to the non-judicial nature of constitutional review in France, emphasizing that such decisions should be made by political representatives rather than unelected judges.
- Legal–historical tradition ® these ideas are so rooted in France, that if you look at the constitutions there, none of them describes a constitutional adjudication model:
  - 1799 Constitution: Sénat Conservateur;
  - 1852 Constitution: it was the senate (*Sénat*) the body which checked if the law complied with the constitution before it came into force.
  - Constitution of the IV Republic (1946): the *Comité Constitutionnel* was introduced as a constitutional advisory body. It was still not a court, but a political organ designed to ensure that laws adhered to the constitution.

The current constitution (of the **V republic, 1958**) describes the *conseil constitutionnel* instead. The words *comité* and *conseil* remind of something which is more part of a political and legislative process, since in the parliaments you have committees; moreover, a council is more similar to a gathering of people than to a court, even though over time it has evolved to function more like a court. Initially, constitutional review in France was *ex ante*, *a priori*, meaning it occurred before a law was fully enacted by the legislature.

The French Constitution of 1958 – *Ordonnance of 7 November 1958*

Conseil Constitutionnel

The *conseil* has a political nature, which is very clear if you look at its members:

- **Former Presidents of the Republic** ® all former presidents of the republic have the right to automatically seat in the conseil as soon as they end their mandate. Of course, they can wait or renounce to the seat, but they have this right, and that's why you won't find any former president in the *conseil* right now.
- **3 members** appointed by the **President of the Republic** in charge;
- **3 members** appointed by the **President of the National Assembly**, one of the 2 Houses of Parliament, particularly the lower one;
- **3 members** appointed by the **President of the Senate**, the upper house.

All the 9 appointed members[18] are chosen by a political body, so the composition of the conseil is strictly related to politics. Moreover, not all of them are experts of the law, because there is no specific requirement stating that you have to appoint lawyers, professors, judges or experts in law in general, which is a confirmation of the fact that this body has a political approach.

How do they carry out the work? Before a piece of legislation enters into force, they assess if it complies or not with the constitution, so it's an *ex ante* review. It would be hard to assess

[18] They can be more than 9, because also the former presidents can be a part of the conseil, but new members will be appointed only at the end of a mandate. Appointed members: 9 years non-renewable terms.

the constitutionality of *any* law decided by the parliament, so it was decided that the review of certain acts is mandatory, while for some other laws they do it only if they're asked to do so (non-mandatory review).

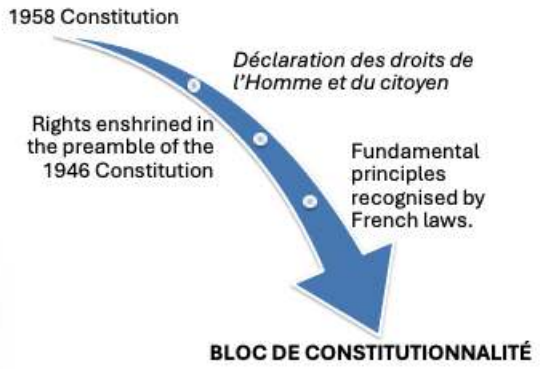
Contrôle de la constitutionnalité des lois:

- Mandatory for ***lois organiques*** (*lex organicas*), a sort of intermediate source between constitution and statutory law, and other categories of acts explicitly mentioned by the Constitution:[19]
  - ***Lois organiques*** ® from a hierarchical point of view, they are below constitution, but above statutory law. Normally, they deal with provisions concerning very important sectors, subjects very important for the organization of the state, such as: the structure and functioning of government institutions (e.g., the Parliament, the President, the judiciary), the organization and operation of territorial collectives or decentralized state structures, the establishment of specific public powers or procedures, such as electoral laws or budgetary processes. Examples include laws governing the functioning of the Constitutional Council itself or the status of members of the judiciary.
  - **Proposed referendum laws** ® Article 11 allows for the President of the Republic, on the proposal of the government or a joint motion from both houses of Parliament, to submit certain types of laws to a national referendum. These laws concern: the organization of public powers, the ratification of international treaties, reforms related to social, economic, or environmental policy. Thus, any law proposed for a referendum under Article 11 must be reviewed by the Conseil Constitutionnel before being submitted to the public. This is to ensure that the proposal complies with the constitution before moving to the referendum stage.
  - **Parliamentary regulations**, which says how the parliament should work. These so-called "*standing orders*" regulate procedures, debates, voting processes, and the functioning of parliamentary committees.
- Non-mandatory for other laws:
  - on the referral of the President of the Republic, of the Prime Minister, of the President of one or the other House of Parliament; these political bodies can ask the *conseil* to review an act not included in the above-mentioned categories, because maybe there are doubts about the compliance of that law with the constitution.
  - After the 1974 reform, also on the referral of (at least) 60 deputies **or** 60 senators (art. 61 Const.) ® ***saisine parlamentaire***: this body is the outcome of a

[19] **1958 *Constitution* – tit. VII, Art. 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.

constitutional reform; its rationale is giving power to the minorities, or at least the possibility for them to ask if a law is actually compliant with the constitution. Therefore, it is a useful tool at the disposal of the minorities, because otherwise they would not have enough strength to block the majority, but it can be abused: if you do not like a piece of legislation, you could obstruct the work of the majority. This tool is normally very used in France.

The Constitutional Parameter



The parameter that the constitutional council uses, i.e. the standard used to understand whether or not the constitution is respected, is the **constitution**. However, it is very focused on the institutional aspects of the state rather than on the protection of rights. Therefore, the constitutional council decided to include other norms in the parameter in order to carry out the review: the ***declaration or rights of man and of the citizen***, the most important document concerning rights enacted after the French Revolution. In addition, they included rights of the preamble of the constitution, such as the principle of dignity,[20] and other implicit fundamental principles, which you can derive from the attitude of a constitutional democracy such as France. All these elements can bring to a ***bloc de constitutionnalité***, which was decided in the ***grand décision* of 1971**, considered a very important step in France constitutional law, since it gave the council the power to establish constitutionality based on human rights and not only institutional aspects, widening the original constitutional parameter.

[20] Here are some of the key rights recognized in the Preamble:

1. **Principle of equality** – All citizens are equal before the law without discrimination, whether it be in civil or political matters.
2. **Individual freedom** – Fundamental personal freedoms, such as the freedom of thought, expression, and religion, are protected.
3. **Social rights** – The right to work, the right to unionize, the right to strike, and the right to social security are guaranteed.
4. **Right to education** – The Preamble emphasizes access to free, compulsory, and secular education for all citizens.
5. **Right to a healthy environment** – Although not explicitly mentioned in 1946, environmental rights are now interpreted as part of the broader principles, especially after more recent reforms in France.
6. **Human dignity** – The notion of human dignity is central, though it evolved more clearly in later judicial interpretation.
7. **Equality between men and women** – The principle of equality between men and women in both the political and social spheres is explicitly mentioned.

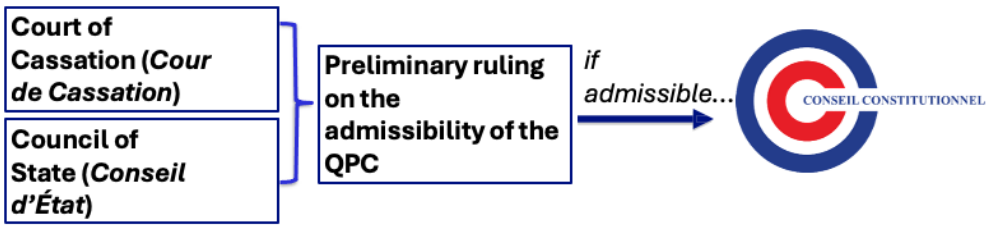
The Constitutional Reform of 1 July 2008 (nr. 2008-724) – The QPC

This model still exists in France, but in **2008** they added a further function for the council (even if the reform entered into force in 2010): in particular, it has been given a function that caused the **hybridization** of the pure *ex ante* French model. The function consists in deciding the constitutionality of a law *in concreto*, i.e. when applied to a concrete case ***ex post*** its entering into force. This function is called ***question prioritaire de constitutionnalité*** **(QPC)**.

The French model therefore got some features of **concrete** and *a posteriori* review: concrete because the decision of the *conseil* comes when there's a case pending before **any court** that has a doubt concerning the compliance of a law they're applying with the constitution and raise a qpc (indirect/**incidental** mechanism).

However, a qpc **CANNOT be raised *ex officio***, i.e. the judge cannot raise the issue of constitutionality on their own initiative. Instead, the QPC can only be raised if one of the parties involved in the case formally requests it.[21]

Moreover, the court has to refer this doubt to the supreme courts: the **court of cassation** (for civil and criminal matters) and the **council of the state** (for administrative matters). These bodies won't give an answer: they will decide whether the preliminary question is **admissible**, i.e. if it can be referred to the constitutional council, based on its relevance and constitutional foundation.[22] Only after a positive outcome of this preliminary ruling the constitutional council will decide on the merit, so it does not directly look at constitutional questions. This functions as a **filtering mechanism**, which is useful in order not to have too many requests.



From an ideological and political perspective, this is kind of a revolution, since they are accepting that a law is checked after its entry into force. If we look at the historical background, the law of the parliament-sovereign could not be adjudicated by anyone before,

[21] «*Nowadays, any citizens, during a process, can raise their hand and say: "Mr. President, you wish to apply Law…, but I allege it breaches the Constitution". Hence, a procedure is triggered (filtered by the Council of State and the Court of Cassation), called question prioritaire de constitutionnalité. We receive the application and we decide whether of not the law complies with the Constitution. And if we decide that the law breaches the Constitution, we declare that law void*». https://qpc360.conseil-constitutionnel.fr/videos/quand-citoyens-saisissent-conseil-constitutionnel-qpc

[22] Object: «***une disposition législative***» **that** «***porte atteinte aux droits et libertés garantis***».

while now a body can check the outcome of the activity of the houses of parliaments after an act is already having effect. This is why the 2008 reform is so important.

How can the QPC be consistent with traditional principles? It's true that the law expresses sovereignty, however we are now in a system where we accept that the constitution is superior to everything. Therefore, even if something expresses people's will but does not respect the constitution, we cannot consider it sovereignty. The constitution is even higher than the law, which consequently expresses sovereignty only when it complies with the constitution.[23]

Nevertheless, the judge still cannot decide on constitutional matters. Who decides about the constitutionality is still the *conseil*, which has a political nature.

Judicial Review Model

The body deciding on the constitutionality is a technical, **independent and neutral** body, not composed of political people, but of experts of law. It is characterized by independence from politically sensitive powers (legislative and executive powers).

Moreover, the review is carried out **after** the law enters into force, after the law is already within the legal system and is having effects in the legal system.

There are 2 sub-models:

- **Centralized**: centralization means we have an *ad hoc* court in charge of constitutional review. An example is the system described in the 1920 constitution of Austria, based on the kelsenian model.
- **Decentralized**: any court can decide on the constitutionality of legislation. An example is the US diffused model, which was not hybridized, i.e. it was not mixed with any other element.

The U.S. Model

- **Decentralized model** ® All courts can carry out constitutional review (see US-style judicial review of legislation). If the court has a doubt about the constitutionality of an act it should apply, the issue of constitutionality can be autonomously decided, without referring it to a higher court.
- **Concrete review** ® A question of constitutional legitimacy can be raised only while a judicial proceeding is pending before a court. Working *in concreto* means that US courts can only decide on the constitutionality of a law if it is applied in a case pending before them.
- **Incidental** ® Incidental means that the doubt has to come during a proceeding and that it has to be related to the main proceeding, depending on how the judge is applying the law.
- **Effects of the decisions**:
  - Purely declaratory effect ® the court just declares something that already exists. It acknowledges that the situation is in a certain way. Ex. If you're the owner of the

[23] ***«La loi n'exprime la volonté générale que dans le respect de la Constitution»*** (déc. 85-197 DC).

house and you're litigating about its property, the judge will research information about the property and will just declare your property, that you're actually the owner.
    - The difference with constitutive effect is that the latter changes the legal system creating a new legal situation. Ex. Someone bought something by someone who was not the real owner; the judge can constitute the property of the buyer creating a new legal situation.
  - *Ex tunc* effect ® if the norm was born as unconstitutional, the decision will be declaratory, so it will apply retroactively, because the situation was already there.
  - In theory: *inter partes* effects, i.e. it only binds the parties related to the case;
  - In practice: *erga omnes* effects, because of the binding precedence we have in the common law system, according to which a decision is binding for lower courts and for citizens. Decisions of Supreme Court therefore applies to all courts and to all citizens.

US model is the only one which was not hybridized, and which still exists in its pure form.

The Original Austrian Model (1920)

The centralized model is exemplified by the Austrian constitution as enacted in **1920** (it underwent a reform in 1929 which brought a hybridization of the pure model).

- **Centralized model** ® A single *ad hoc* body, judicial in nature and specialized in ruling on constitutional matters decides the constitutionality of law: the constitutional tribunal (*Verfassungsgerichtshof*).
- **Abstract review** ® No need for a judicial proceeding already pending before a court. The review takes place independently from a judiciary procedure pending before a national court or not, which is coherent with the actors who can bring a constitutional challenge.
- **Direct access** ® *Ad hoc* complaint (*Antrag*). In systems with direct access, certain designated bodies or individuals (e.g., government officials, legislators, or sometimes citizens) can directly submit a complaint or request to the constitutional court asking for a ruling on the constitutionality of a law or legislative act, without the need for the issue to arise through an ongoing case in the lower courts.
- **Who can challenge the constitutionality of laws** before the constitutional tribunal? Only Political bodies: Federal Government (*Bundesregierung*) and Governments of the Länder (*Landesregierungen*), but they cannot decide on the constitutionality.
  - The choice to raise a question of constitutional legitimacy is up to the discretion of political bodies, it is **never** mandatory because of their very political nature, thanks to which they can set the problem on a political level. For instance, if you're the federal government and you have a doubt about the constitutionality of the law of a certain *Land*, you can either send the issue to the constitutional tribunal or you can lead a dialogue with the representative of the *Land*.
  - This procedure mostly aims at assessing whether or not rules on the allocation of competences between the Federation and the *Länder* (*verfassungsrechtliche Kompetenzverteilung*) are respected.

The Austrian Model after the 1929 Reform

The constitutionality of laws can now be challenged also during some judiciary proceeding, in particular during those pending before an ordinary and administrative **Supreme** Court.

Therefore, the **review** might be either:

- **Direct** ® abstract;
- **Incidental** ® need for a judicial proceeding already pending before a court. This is a *in concreto* review, so the original model, which was characterized by *in abstracto* review, is hybridized.
    - Ordinary and administrative supreme courts (*Oberster Gerichtshof; Verwaltungsgerichtshof*) can challenge the constitutionality of laws. This allows the supreme courts to bring challenges based on any provision of the constitution, not just the ones related to the allocation of competences, but also the ones dealing with human rights and the organization of the state. Thus, this reform is considered in favor of citizens human rights, since it deals with the compliance with the constitution in general, not just with the allocation of competences.
    - Supreme courts have no choice but to raise a question of constitutionality (if they suspect that a norm they are applying breaches the Constitution); here the actors are no longer political bodies (government), but judicial bodies, courts. The fact that they're not politicians implies that they're obliged to raise an issue of constitutionality if they have a real doubt (not just an irrelevant doubt raised by parties in order to delay proceedings), since they have no other mean to solve the problem. They cannot settle it from a political point of view. They have to refer it to an *ad hoc* body.
    - The procedure aims at ensuring compliance with the Constitution (not limited to rules on the allocation of competences), hence acts that do not comply with it are declared null and void. Before, the government challenged a law only when it violated its competences basically, so they just relied on the principle of allocation of competences.

The constitutional amendment introduced some elements of incidental review: only administrative and ordinary supreme courts, apart from the federal state and the federated entities, can challenge constitutionality.

The Italian Model: The Essential Features

The Italian system of constitutional adjudication, which you reference as the *tertium genus*, represents a distinct model of judicial review that draws heavily from Hans Kelsen's ideas. This model is characterized by **centralization**, meaning that constitutional adjudication is concentrated in a single, specialized court: the **Italian Constitutional Court** (*Corte Costituzionale*).
Members of the court include former judges of higher courts, university professors, and lawyers with at least 20 years of experience. These experts are appointed by various branches of government: a third by the **President of the Republic**, a third by **Parliament**, and a third by the **Supreme Courts of Italy** (such as the Court of Cassation and the Council of State).

In the Italian constitutional adjudication system, there are indeed two primary ways to bring a question of constitutionality before the Constitutional Court. These methods allow for both **direct abstract review** and **incidental (concrete) review** of laws. Here's a detailed explanation of both paths:

1. Direct Method of Constitutional Adjudication (Abstract Review)

This method is closely aligned with Hans Kelsen's original concept of centralized judicial review, modeled after the Austrian system of 1920. In Italy, this process allows certain entities to challenge laws without the need for a specific legal dispute, aiming to address the law's constitutional validity in an abstract manner. This is sometimes referred to as "abstract review" because it does not require a concrete case or controversy.

- **Who Can Initiate the Review?** In Italy, this method is primarily used by:
  - The **central state/government**, which can challenge the constitutionality of regional laws.
  - **Regional executives**, which can challenge national laws or laws from other regions.

  This reciprocal capacity to challenge laws exists because Italy is a regional state, with both the national government and regional governments possessing legislative powers. Disputes often arise when a law passed by one level of government potentially infringes on the constitutional competencies of the other.

- **Nature of the Review**:
  - This method is **abstract** because the review is focused on the law's constitutionality as a legal norm, independent of its application in a specific case. It is not tied to any particular litigation.
  - It is an ***ex-post*** review, meaning it takes place **after the law has already entered into force**.
  - There are **time limits** within which the challenge can be brought. This ensures that the review is conducted soon after the law has been enacted to prevent legal uncertainty from persisting for an extended period.

2. Incidental (Concrete) Review (Incidente in Concreto)

The **incidental review** is more commonly used and allows constitutional issues to be raised within the context of an ongoing legal dispute. This method is **concrete** because it is triggered by a specific case where the application of a law raises doubts about its constitutionality.

- **Who Can Raise the Question?** Any **Italian judge**, whether presiding over a criminal, civil, or administrative case, at any level, can raise a question of constitutionality to the Constitutional Court. This can happen in one of two ways:
  a. The judge can raise the issue ***ex officio*** (on their own initiative).
  b. A **party** involved in the case may request the judge to refer the question to the Constitutional Court.

- **Requirements for Raising a Constitutional Question**: not every constitutional question can be referred to the Court. The judge must meet two key requirements before submitting the question:
  c. **Relevance** (*rilevanza*):
     - The judge must demonstrate that the constitutional issue is relevant to the case being decided. The judge must show that they **cannot resolve the case without first determining the constitutionality of the law** in question. This ensures that the constitutional issue is central to the resolution of the case at hand.
  d. **Non-Manifest Unfoundedness** (*non manifesta infondatezza*):
     - The question must not be **manifestly unfounded**. This means the judge needs to show that there is a **serious and reasonable doubt** about the constitutionality of the law. The doubt must be based on solid legal arguments, as frivolous or insubstantial claims could overload the Constitutional Court with unnecessary cases.
     - The judge must provide a well-reasoned ***ordinanza di remissione*** (referral order), which explains why the question is both relevant and supported by strong legal grounds.

- **Procedure**:
  - Once the question is raised, the ordinary proceeding is **suspended** until the Constitutional Court has ruled on the matter.
  - The Constitutional Court then determines whether the law complies with the Constitution. If it finds the law unconstitutional, the law is voided and cannot be applied, including in the case where the question arose.

In the Italian system of constitutional adjudication, the role of the ordinary judge in the **incidental (or concrete) review** process adds a unique layer to the system, leading some scholars to describe it as a **"third model"** of judicial review. This model combines elements of both **centralized** and **decentralized** judicial review, thus distinguishing it from purely

centralized systems like the Kelsenian model or purely decentralized systems like that of the United States.

Key Features of this "Third Model":

- **Preliminary Assessment by the Ordinary Judge**:
  - Although the **ordinary judge** does not have the power to declare a law unconstitutional, they play a crucial role in **filtering** constitutional questions.
- **Centralized Decision-Making by the Constitutional Court**:
  - Even though ordinary judges conduct this preliminary assessment, the **Constitutional Court** retains exclusive authority to make the final decision on the constitutionality of laws. The Court decides whether the law in question complies with the Constitution and has the power to strike down unconstitutional laws.
  - This centralized decision-making ensures uniformity in constitutional interpretation across the country.
- **Decentralized Aspect in Raising Questions**:
  - This means that constitutional scrutiny is not confined to specialized constitutional bodies but is instead integrated into the ordinary judicial process. Judges from all areas of law have the opportunity to raise constitutional concerns, though the final word remains with the Constitutional Court.

The effects of unconstitutionality:

1. **Erga Omnes effects**
2. **Retroactive Effects (*Ex Tunc*):**
   - In Italy, the declaration of unconstitutionality typically has **retroactive effects (*ex tunc*)**, meaning the law is considered unconstitutional from the moment it was enacted.
   - The ***ex tunc*** effect ensures that individuals whose cases are still open or pending benefit from the unconstitutionality ruling, which serves as an incentive for parties to raise constitutional issues. If the unconstitutionality applied only moving forward, it would not help those whose rights were infringed by the law in the past.
   - However, **closed cases** (where the decision is final) are typically not reopened due to the declaration of unconstitutionality, with one important exception.
3. **Favor Rei in Criminal Cases:**
   - In criminal cases, if a law is declared unconstitutional and that declaration would benefit someone who was convicted under that law, the effects can still apply to **closed cases**. This is known as the principle of ***favor rei***, which means the decision will apply retroactively to a person's advantage, even if their case has already been decided.
4. **Differences from the Austrian Model:**
   - One of the key differences between the Italian and Austrian systems is that in Austria, the effects of a declaration of unconstitutionality are typically **prospective (*ex nunc*).**
   - Italy's decision to opt for **retroactivity** is crucial, as it incentivizes parties to raise constitutional challenges. If the effects were purely **prospective**, litigants would

have little motivation to challenge a law, as they would not benefit from the court's decision in their own case.

The German Model: The Essential Features

1. **Historical Context of the German Constitution**:
   - The **German Constitution** was adopted in 1949, one year after the Italian Constitution, in the context of post-World War II reconstruction.
   - Like Italy, Germany's constitution was part of the **first wave of constitutional adjudication** systems established after WWII, influenced by the need to ensure democratic governance and prevent the rise of totalitarianism.
2. **Centralized Model of Constitutional Review**:
   - The **German Federal Constitutional Court (*Bundesverfassungsgericht*)**, established in 1951, was given exclusive authority to conduct **constitutional review**.
3. **The "Third Model" Features in the German System**:
   While the German system is primarily centralized, it shares features with the Italian system that position it as a "third model" of constitutional adjudication, blending both **centralized authority** and **decentralized access**.
   - **Ordinary Judges Can Refer Constitutional Questions**:
     This is known as the **concrete judicial review** (*konkrete Normenkontrolle*), where judges refer cases to the Constitutional Court when the constitutionality of a law affects the outcome of a specific case.
   - **Individual Complaints (*Verfassungsbeschwerde*)**:
     One of the most important features of the German system, which adds to its **decentralized access**, is the ability of **individuals** to file constitutional complaints (***Verfassungsbeschwerde***) directly with the Federal Constitutional Court.
     - Any citizen who believes their constitutional rights have been violated by a public authority can bring a complaint after exhausting all other legal remedies in ordinary courts.
   - **Abstract Judicial Review (*Normenkontrolle*)**:
     In this process, certain political institutions, such as the federal government, state governments, or a specific group of parliament members, can challenge the constitutionality of laws before the Federal Constitutional Court, independent of a specific case or application.

Federal Constitutional Court

- **Composition**:
  - **16 justices**: They are appointed by the two main federal legislative bodies:
    - **½ by the Bundestag** (Federal Parliament)
    - **½ by the Bundesrat** (Federal Council, representing the federal states)
- **Term**: justices serve for a **12-year term**, and this term is **non-renewable**.
- **Eligibility** → candidates must be:
  - **Over 40 years old**;
  - Hold **German citizenship** and have **political rights**;

  - They must **confirm their availability in writing** before appointment.
- **Composition**: the court includes **members of the judiciary** and **lay members**, which likely refers to those with significant legal or political experience but not necessarily active judges.

The Spanish Model: The Essential Features

Spain is another example of the ***tertium genus*** (third model) of constitutional adjudication. Its constitution is part of the **second wave** of democratic constitutions, adopted in **1978** after the end of the **Franco dictatorship**.

1. **Centralized Constitutional Court**:
   - The **centralized body** in Spain is the **Tribunal Constitucional** (Constitutional Court), which has the sole authority to decide on the constitutionality of laws, similar to the Italian and German models.
2. **Two Paths to Reach the Constitutional Court**:
   Spain, as a **regional state**, allows two main paths to bring cases before the Constitutional Court:
   - **Direct method**: similar to Italy, where the **central government** can challenge laws passed by the **Comunidades Autónomas** (Autonomous Communities, the regional governments), and vice versa. This is a form of **abstract review**, where there is a conflict between different levels of government.
   - **Incidental review**: like in Italy and Germany, ordinary judges in Spain can also raise constitutional questions if a law's constitutionality affects a specific case. The judge must demonstrate certain requirements (such as relevance and seriousness of the constitutional question) before referring the matter to the Constitutional Court.
3. **Recurso de Amparo** (Individual Complaint):
   - The **recurso de amparo** allows **any Spanish citizen** to bring a case before the Constitutional Court without relying on a judge to do it for them.
4. ***Erga Omnes* and Retroactive Effects**

Spanish Constitutional Court (Tribunal Constitucional)

- **Composition**:
  - The court consists of **12 justices**.
  - These justices are **appointed by the King** of Spain, but the King's role is **merely ceremonial**.
  - The appointments are made **on the proposal of**:
    - **4 justices** proposed by the **Congress of Deputies** (the lower house of Parliament).
    - **4 justices** proposed by the **Senate** (the upper house of Parliament).
    - **2 justices** proposed by the **Government**.
    - **2 justices** proposed by the **General Council of the Judiciary**.
- **Term**: justices serve a **9-year term**.
- **Eligibility**:

- Appointees must come from specific professional backgrounds, including:
  - **Magistrates and prosecutors**
  - **University professors**
  - **Public officials**
  - **Lawyers**
- All candidates must have at least **15 years of recognized practice** in their profession.

Quartum Genus?

We have another model which is even more blended at the decision stage: the *quantum genus*, a fourth model of constitutional adjudication.

PORTUGAL and GREECE

The constitutional systems of Portugal and Greece, as described here, represent hybrid models of judicial review, combining both decentralized and centralized elements, as well as aspects of *a priori* and *a posteriori* constitutional review.

Key Features of the Systems:

5. **Decentralized Judicial Review at First Instance**:
   - In both Portugal and Greece, the constitutionality of laws can be challenged in decentralized courts, meaning that ordinary judges at various levels have the authority to rule on constitutional matters.
   - This allows any judge, at the first instance, to determine whether a law is consistent with the constitution, creating a broad capacity for judicial oversight of laws.
6. **Centralized Review at Second Instance**:
   - If a decision regarding the constitutionality of a law is contested, it can be appealed to a centralized constitutional body.
   - In **Portugal**, this is the Constitutional Court, a specialized tribunal tasked with ruling on constitutional questions.
   - A similar system exists in **Greece**, where constitutional matters are eventually heard by a constitutional court after initial review by ordinary courts.
   - This system mixes decentralized review (in the first instance) with centralized constitutional adjudication (at the second instance).
7. ***A Priori* Review**:
   - Both countries include the possibility of ***a priori*** (or preventive) constitutional review, where laws can be reviewed for constitutionality before they are enacted. This is a feature of the **political review model**, often associated with countries like **France**.
   - The existence of this model suggests a mix of **political** and **judicial** oversight of constitutional compliance, whereby laws can be challenged even before they take effect.

A Comparative Overview of "Atypical Functions"

Constitutional courts sometimes perform other functions beside constitutional adjudication. These are atypical functions, different from ordinary judiciary review, which remains the main task, i.e. deciding on the constitutionality of legislation. However, during its evolution, in particular during the 20th century, after the 1989 events, constitutional adjudication bodies started to be given further functions.

The Evolution of Constitutional Justice after 1989

The idea of the 19th century was for the constitutional court to embody as many functions as possible, which were related to the protection of democracy. All these functions were aimed to protect somehow democracy, since constitutional courts were considered a sort of balancing element, the guardians both of constitution and democracy.

Constitutional courts started to be "containers" of useful functions to protect democratic principles. So, in addition to constitutional review and the arbitral role to safeguard of the form of state, several other functions started to be added. For example, assessing the admissibility of a referendum, deciding on the charges against the president of the republic, and other functions aimed at protecting democracy, a safeguarded interest with a constitutional relevance.

4 Categories of Atypical Functions

We can identify 4 categories of atypical functions based on their aims:

1. **Institutional pluralism and form of state:** the first one gathers functions aiming at protecting institutional pluralism within the form of state in synchronic terms, i.e. considering the relationship between government and people. Institutional pluralism means that we have several levels of governments participating to the constitutional system. Federal and regional states imply institutional pluralism, since also regions can have political autonomy. We have also lower levels of government with administrative autonomy, and which contribute to institutional pluralism. Defending institutional pluralism is a way to protect democracy, because it allows democracy to be spread in the territory.
   - Conflicts between the central state and the territorial entities ® A way to protect institutional pluralism is through the arbitral role: constitutional courts settle conflicts arising between the central state and municipalities (this is not the case in Italy, but it happens). When constitutional courts settle conflicts between different levels of government, they are protecting institutional pluralism.
   - Check of acts other than primary legislation (e.g. acts of the municipalities) ® In some African states, constitutional courts can review also acts of municipalities, with a lower rank than primary law. Normally, constitutional courts can review primary legislation only, which, in the hierarchy of sources, is exactly below constitution. However, in some contexts, constitutional courts can review also acts at a lower level, which is still a way to defend institutional pluralism.

2. **Correct functioning of constitutional bodies (form of government):** the second group of functions protects the form/system of government, which, according to constitutional law, is the relationship which exists between supreme bodies of the state and politically sensible powers (legislative and executive), so how the former can act.
   - Bridging between representative democracy and direct democracy (referendum) ® constitutional adjudication bodies can also oversee referendum, an act of direct democracy, which citizens are called to vote over certain questions with. In some cases, constitutional courts have a role in these proceedings.

   - Regularity of electoral proceedings ® constitutional courts can oversee the regularity of elections of supreme bodies of the state. When there's an election aiming at electing a president or a legislative assembly, they can oversee.

Categories of Elections	**Role of the Court/Tribunal**
Central State Bodies	**Oversight over elections**: Supervises the general conduct of elections for national or federal-level positions (such as the President, Prime Minister, or Parliament). Ensures that elections are conducted according to constitutional laws and regulations.
Regional Bodies (in regional systems) / State Bodies (in federal systems)	**Declaration of election results**: Responsible for officially validating and declaring the outcomes of elections held in regional or state jurisdictions. This includes regional parliaments or governors in federal systems.
Administrative or Other Bodies	**Jurisdiction over complaints**: Handles disputes, complaints, or appeals regarding the electoral process. This can involve administrative bodies that oversee smaller local elections or other relevant public institutions.

   The electoral jurisdiction is a competence of the constitutional justice bodies of Austria, Portugal and France.
   - In *France*, this is very broad:
     - the *Conseil constitutionnel* oversees both the lower house of the parliament (the French parliament is a bicameral body) and the presidential elections and it ensures the referendum legitimacy; this means that the council checks if everything is done according to constitutional principles and that there are no incompatibility concerning the members; [24]
     - Its oversight includes operations carried out before and during the elections;
     - it declares the final results;

[24] In France there's semi-presidentialism, which combines the double function of the President directly elected by the people and who is the head of the executive (this is taken by presidentialism), and the relationship of confidence between the executive and the parliamentary majority (taken by parliamentarism).

- jurisdiction over election complaints (parliamentary and referendum). Therefore, if there has been some cheating, it will be the one to adjudicate if the elections were carried out incorrectly.[25]

- In *Austria*:
  - Elections of federal bodies, *Länder*, municipalities, members of the European Parliament and representative bodies of statutory professional associations can be challenged before the *Verfassungsgerichtshof*;
  - Standing:[26] members of the electoral body, other candidates, representative assembly;
  - Effects: elections are (totally or partially) void of the elections and need to be held again total/partial repetition.
- In *Portugal*:
  - The *Tribunal Constitucional* has jurisdiction over national and territorial elections of political assemblies;
  - It oversees the elections of the Portuguese members the European Parliament.
- In Italy, if there's a controversy about the election of a member of parliament, the same Houses of Parliament decide about it. This choice has been made because the constituent assembly wanted to maintain the independence of the parliament. The constitutional court can only take part in the proceeding of the referendum, particularly it can decide about the asmissibility of *referendum abrogativo* ("rebuilding referendum"), aimed at rebuilding an act with the same force of law. **not** of the elections for parliament.

- Assessment over political associations ® Upon referral by the Bundestag, Bundesrat, or the federal government, the Federal Constitutional Court is responsible for deciding on the unconstitutionality of certain political parties.[27] The consequences of such a declaration might be:
  - Party dissolution: this is a standard consequence when a party is declared unconstitutional.
  - Confiscation of assets: this may happen, but it depends on the court's decision. The court can order the confiscation of the party's assets to prevent them from being used to re-establish the party or support unconstitutional activities.
  - Ban on re-establishing the same party: this is typically enforced to prevent the reformation of the same party under a different name, but it also depends on the court's ruling.

[25] The council can oversee aspects of the electoral process even **after** elections have taken place, particularly concerning the legitimacy of the electoral outcomes and any complaints that may arise related to the conduct of the elections.
[26] "Standing" refers to the legal right of individuals or entities to bring a lawsuit or challenge a legal decision in court.
[27] Art. 21 (2) Cost. – "Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of The Federal Republic of Germany shall be unconstitutional". The local government can resort to the Federal Tribunal only as regards territorial parties.
This happened in only two cases: 1952, neo-Nazi party; 1956, communist party.

- Deputies lose their seat in parliament: this can happen, but it's not automatic. The loss of parliamentary seats depends on how closely individual deputies are tied to the unconstitutional activities or aims of the party. The court may also make specific decisions regarding the individual members.

This is a very strong and historical rule aimed at preventing totalitarianism and dictatorship from happening again. German constitution was enacted immediately after Nazism, so it's understandable they feared it. This is a competence that in the Italian system does not exists, however this is possible in some other states. In fact, it was also adopted by other countries: Portugal, East Europe countries (Albania, Romania, Croatia).

- Interpretation of the constitution in a way which makes it compliant with the functioning of the form of government. This is essential in order to protect the form of government. Only by interpreting the constitution, you can make sure that the correct relationships among the supreme bodies of the state are respected. Constitutional courts have a significant role which consists in ensuring the correct functioning of the form of government.

3. **Constitutional courts sitting as criminal courts:** some constitutional courts can decide on criminal charges against the supreme bodies of the state, such as the President of the Republic or members of parliament.
   - In Italy, this power applies only to the President of the Republic, who has total immunity from prosecution within his official functions, except in cases of high treason or attack on the constitution, i.e. a serious violation of the constitution (Art. 90 of the Italian Constitution – the president will be charged by the Houses of Parliament in joint session, but it would be adjudicated by the constitutional court).[28]
   - In some Latin American countries, constitutional courts also have the power to decide on criminal charges against high-ranking state officials, but the specific mechanisms and scope vary from country to country.[29]
   - While impeachment may seem similar, the key difference lies in the nature of the decision-making body. Impeachment is handled by a political body (such as a parliament or senate), which decides whether to remove an official from office based on political accountability, not criminal liability. In contrast, when a constitutional court decides, it's a legal and judicial process, focusing on whether the law or constitution has been violated, placing it more in the realm of jurisdiction than politics.

4. **Personalistic principle:** some constitutional courts can decide over individual complaints raised by individuals, and this is related to the personalistic principle, which means protection of human rights. In fact, individual complaints raised by individuals usually concern individual rights and personal freedoms. Therefore, when constitutional courts can hear complaints coming directly from individuals, those competences aim at

[28] The constitutional court is only competent for crimes that the president commits within its office, for the others it's immune until the end of its mandate, when it will be adjudicated by the competent court.
[29] For instance, in Brazil, the Supreme Federal Court can try criminal cases against high officials like the president, but often after political procedures such as impeachment have been initiated.

protecting human rights. In Italy, you need to be into a judicial proceeding, and you need a referring judge who brings a preliminary question before the constitutional court. In Germany and Spain constitutional courts can hear individual complaints. The individual can bring complaints if he alleges to have been damaged by an act of public power.

- *Verfassungsbeschwerde*
  - Extraordinary legal remedy that can be resorted to by both individuals and legal entities, in order to safeguard their rights enshrined in the Constitution.
  - The violation of individual rights must be the consequence of the exercise of a state power (executive, legislative and judicial powers). In Germany you can use this remedy for any act of public power, so the possibilities for individual complaints are wider.
  - The contested act have directly prejudiced the applicant. You have to demonstrate that the law brings direct prejudice to yourself, that in some way this law has an incidence to your individual situation.
  - Remedy of last resort: any other possible remedy must have been already undertaken.
- *Recurso de amparo*
  - Extraordinary legal remedy that can be resorted to by both individuals and legal entities, in order to safeguard their rights enshrined in the Constitution.
  - The violation of individual rights must be the consequence of exercise of a state power, excepted for laws. In Spain you cannot use this remedy for legislation, but only for act of the executive (public administration) and the decision of a court, because for laws Spain has other procedures (incidental judicial review) and they preferred not to confuse these remedies, since it would be inefficient.
  - The issue must be one of a "particular significance". You have to demonstrate that your case has a particular significance from the constitutional perspective. In Spain there's a special section of the Tribunal that assesses the admissibility of the complaint. If the special section decides that it is not significant enough in constitutional terms, it will not be adjudicated. There's this special section in order for the court not to be overwhelmed.
  - Remedy of last resort: any other possible remedy must have been already undertaken.
- Drawbacks:
  - Overload of constitutional courts;
  - Risk of conflicting decisions ® Decisions of the constitutional courts may conflict with those of courts of cassation or other high courts, creating legal uncertainty and complicating the coherence of the legal system. The conflict may arise in the application of laws or in overlapping interpretations of legal principles, but ultimately the constitutional court's ruling would prevail on constitutional issues. This dynamic can create jurisprudential tension, especially in cases where human rights law intersects with ordinary law.
  - Longer proceedings and additional appeal stage ® While this can extend the timeline for a final resolution, it also serves as an important safeguard for human

rights, especially in cases where ordinary courts fail to address constitutional issues adequately.

- Overlap with supranational courts ® Overlap with courts like the ECtHR occurs because many constitutional complaints involve fundamental rights violations, which also fall under the jurisdiction of supranational human rights bodies. Although the ECtHR requires the exhaustion of domestic remedies before a case can be brought before it, a situation can arise where the same issues are being considered by both national and international courts, sometimes leading to inconsistent rulings or legal interpretations.[30]

[30] In some jurisdictions, constitutional courts may work to coordinate their jurisprudence with supranational courts to minimize conflicts.

The “Birth” of a System of Constitutional Adjudication: The Italian Case Study

Introduction

The topic discussed is the creation of a system of constitutional adjudication in post-WWII Italy. After World War II, Italy faced the task of drafting a new constitution through the formation of a Constituent Assembly. The process was unique, as Italy self-drafted its Constitution, unlike Germany or Japan, where external forces imposed the new legal framework.

In a 1946 referendum, the Italian people were asked to choose between a monarchy or a republic. This marked the first time that women could vote. The result led to the establishment of the Italian Republic on June 2, 1946.

The Debate on Constitutional Justice

The Constituent Assembly was comprised of representatives from various ideological backgrounds – Catholics, liberals, and leftists (some influenced by Soviet ideals). This diversity led to a need for compromise in the drafting of the Constitution. The **Forti Committee** (formed in early 1946) debated two main objectives of constitutional justice:

- The protection of rights enshrined in the Constitution.
- Preventing legislative overreach or abuse of power.

The Constitution was intentionally flexible in some areas, allowing its implementation to adapt to changing political scenarios.

The 75 Committee Debate

Within the Assembly, key figures from different political ideologies debated the structure and role of constitutional justice:

- **Liberals**: Figures like Nitti, Orlando, and Salvemini favored parliamentary supremacy and the idea that sovereignty lay with the people, as expressed through Parliament.
- **Marxists**: Led by Togliatti and Nenni, they supported parliamentary supremacy but also advocated for popular legitimacy.
- **Catholics**: Mortati, La Pira, Moro, and Dossetti argued that constitutional review was essential to safeguard the rigidity and stability of the Constitution.

The debate reached a compromise, recognizing the need for constitutional guarantees and judicial oversight.

Notable Contributions to the Debate

- **Giorgio La Pira** (November 28, 1947): Stressed the necessity of a judicial body to oversee constitutional violations by future legislators.
- **Paolo Rossi** (November 28, 1947): Warned that without strong constitutional guarantees, the Constitution would become merely a symbolic document without real enforceability.

These contributions highlighted the need for a robust system of constitutional review to ensure that the Constitution would not become a "romantic declaration" but a functional instrument of governance.

Articles 134-137 of the Constitution

These articles formally established the Constitutional Court, inspired by the Kelsenian model but with modifications. The Court's membership was to be composed of highly experienced legal professionals, drawn from three categories:

- Lawyers with at least 20 years of experience.
- University professors of law.
- Judges from other superior courts.

The Court's composition was diverse to ensure a plurality of views and maintain a balance between technical legal judgment and political considerations. Five members of the Court were appointed by the President of the Republic, who acted as a neutral figure ensuring this balance.
However, the Court doesn't say how it actually works. This is because during a discussion they decided that further details were better differed to other laws and in particular to other acts having a constitutional rank (constitutional legislation, adopted through a specific procedure) or primary rank. The result of this discussion was called ***emendamento Arata***.

Constitutional Law No. 1 of 1948

In February 1948, Constitutional Law No. 1 was passed, creating a system for centralized, incidental constitutional review. However, citizens could not file individual complaints; review was limited to conflicts between the central government and territorial entities.

The Delayed Start of the Constitutional Court (1948-1955)

Though the Constitutional Court was established in 1948, it did not begin functioning until **1956**. This delay was due to several factors:

- The organization and structure of the Court were still being finalized.
- Political factors, particularly concerns about the Court potentially invalidating Fascist-era laws, contributed to the delay. Many laws from the Fascist period were deemed important for maintaining public order and security, and political figures feared that declaring these laws unconstitutional would create a legal vacuum.

Timeline:

1. During the first years of the Republic, Italy was governed by **centrist coalitions**. These governments faced significant opposition, leading to what **Piero Calamandrei** called **"majority obstructionism"** – a situation where the dominant political forces delayed the implementation of important constitutional mechanisms, including the Constitutional Court.
2. At the end of the **first legislature (1953)**, the Parliament passed the law required by **Article 137.2 of the Constitution**, which outlined the procedures for the Court's functioning. This marked an important step toward making the Constitutional Court operational.
3. A **political agreement** was reached on November 30, 1955, regarding the election of the Constitutional Court judges by Parliament. This agreement was necessary to overcome political deadlock and ensure that the Court could be staffed with judges.
4. After years of delay, the Constitutional Court held its **first public hearing** on April 23, 1956, marking the beginning of its actual judicial functions.

The First Constitutional Court (1955-1957)

Enrico De Nicola, appointed by the President of the Republic, became the first President of the Constitutional Court. The Court's members included figures from the Cassation, the Council of State, and the Parliament, reflecting a blend of legal expertise and political considerations. The balance of appointments was crucial to maintain impartiality and ensure that no one political faction dominated the Court.

Constitutional Review Before 1956

Before the Constitutional Court became operational, constitutional review was carried out in a decentralized manner by ordinary judges. However, this system was unsatisfactory:

- Judges were unaccustomed to the process of constitutional adjudication.
- The interpretation of the Constitution was often formalistic and conservative.
- Lower courts were heavily influenced by the decisions of higher courts.

During this period, judges often applied the principle that the Constitution "**rebuilt**" pre-1948 laws rather than invalidating them outright. This approach, however, failed to recognize the superior authority of the Constitution, a principle later affirmed by the Constitutional Court in its first judgment.

Key Issue: Declaration of Invalidity vs. Rebuilding

When a law conflicted with the new Constitution, judges had to decide whether to:

- Declare the law invalid (null and void): This approach would mean the law is entirely abolished, with effects applied retroactively (*ex tunc*), as if the law had never existed.
- Rebuild the law to align with the new Constitution: This method only affects the law moving forward (*pro futuro*), meaning the law remains valid but is interpreted or adjusted according to the Constitution.

Legal and Ideological Differences

- Rebuilding the law: Implies that the Constitution is not rigid. The law is adjusted to fit within the constitutional framework without being annulled. This method suggests that both the Constitution and the conflicting law are on the same hierarchical level.
- Declaring the law invalid: Asserts that the Constitution is superior and rigid, meaning any conflicting law must be entirely annulled because it cannot coexist with constitutional principles.

1956 Constitutional Court Judgment

In **Judgment No. 1 of 1956**, the Constitutional Court addressed the constitutionality of **Article 113** of the ***Testo Unico delle Leggi di Pubblica Sicurezza*** **(TULPS)**, a law from 1931 that required government authorization for publishing printed materials. This provision conflicted with **Article 21 of the 1948 Constitution**, which guarantees freedom of the press without prior authorization or censorship.

The government's argument was that **Article 21** was a "preceptive" norm, which automatically repealed conflicting pre-1948 legislation, making a formal declaration of unconstitutionality unnecessary.

However, the Constitutional Court rejected this view. It ruled that **any conflict between pre-1948 laws and constitutional provisions, whether preceptive or programmatic, required a formal declaration of unconstitutionality**. The Court declared **Article 113 of the TULPS unconstitutional**, emphasizing the principle that constitutional provisions override prior legislation and cannot merely "rebuild" it.

This ruling clarified that **both pre- and post-1948 laws** can be declared unconstitutional and that this process applies to **all types of constitutional norms**, whether directly applicable or requiring legislative action.

Transition to Centralized Constitutional Review

The 1948 Constitution introduced a centralized system of review through the Constitutional Court. Under the Kelsenian-inspired model, any conflicts between pre-1948 laws and the new Constitution were resolved by declaring the conflicting law unconstitutional. This marked a shift from the earlier, decentralized approach.

Italian Constitutional Court: Sources and Organizational Framework

Constitutional Foundations (Articles 134-137)

The Italian Constitutional Court is a key institution established by **Part II, Title VI of the Italian Constitution**, dedicated to safeguarding constitutional guarantees. The provisions in **Articles 134-137** define the essential structure and functions of the Court:

- **Article 134** establishes the **jurisdiction** of the Constitutional Court. The Court's primary function is to exercise **judicial review**, ensuring that state and regional laws comply with the Constitution. It also serves an **arbitral function** by resolving **conflicts of jurisdiction** between state and regional authorities, as well as having a special jurisdiction in cases where the **President of the Republic** is charged with crimes.
- **Article 135** describes the **composition** of the Court and the process for selecting its judges, as well as their term of office.
- **Article 136** sets forth the **effects of a declaration of constitutional illegitimacy**, which results in the invalidation of the offending law.
- **Article 137** provides for the future enactment of specific laws that would govern the functioning of the Constitutional Court, recognizing that not all procedural details could be fully addressed within the Constitution itself.

The Italian Constituent Assembly deliberately left certain aspects of the Court's functioning for subsequent legislation (like the ***Arata Amendment***), allowing flexibility in how the institution would operate in practice.

Laws Governing the Constitutional Court

The Italian Constitutional Court operates under a detailed legal framework, which includes both **constitutional laws** and **ordinary laws** that complement and specify its powers and organization:

- **Constitutional Law No. 1 of 1948**: Adopted by the **Constituent Assembly**, this law laid the foundation for the **centralized and incidental system of judicial review** in Italy. It also confirmed that citizens cannot file direct constitutional complaints. The Court's review can only occur in cases of **conflicts between state and regional entities**, or through **incidental review**, where ordinary courts refer questions of constitutionality to the Constitutional Court.
- **Constitutional Law No. 1 of 1953**: This law further clarified the **organization and functioning** of the Court. It regulated the procedures of constitutional adjudication, defining how the Court operates and interacts with other institutions.
- **Constitutional Law No. 2 of 1967**: This law amended Article 135 of the Constitution, introducing changes to the process for electing justices.
- **Law No. 87 of 1953**: This is one of the most significant ordinary laws, providing detailed rules on the **organization and functioning** of the Constitutional Court. It outlines procedures for constitutional review and describes the Court's internal workings.
- **Law No. 352 of 1970**: Regulates **referenda**, particularly concerning the Court's role in assessing their admissibility.
- **Law No. 219 of 1989**: Governs the criminal procedures to be followed in cases involving ministers and the President of the Republic when facing charges of constitutional violations.

In addition to these formal laws, the Court also operates under **integrative norms** – special procedural rules that the Court itself can adopt and amend independently. These norms

stand outside the ordinary legal hierarchy, reflecting the Court's autonomy in procedural matters.

Composition of the Constitutional Court

According to **Article 135** of the Constitution, the Court is composed of **15 judges**, appointed through a balanced system to ensure a diversity of legal expertise and prevent political dominance:

- **5 judges are appointed by the President of the Republic**, who acts as a neutral figure ensuring political balance.
- **5 judges are elected by Parliament** in joint session, reflecting the political sensibilities of the legislative body.
- **5 judges are elected by the highest courts** of Italy:
  - 3 from the **Court of Cassation** (Italy's supreme court for civil and criminal matters);
  - 1 from the **Council of State** (Italy's highest court for administrative matters);
  - 1 from the **Court of Accounts** (which oversees public finance and accountability).

Judges serve a single, **non-renewable term of 9 years**. The staggered appointment process ensures that not all judges are replaced at the same time, maintaining institutional continuity. The prohibition against re-election is a crucial safeguard of judicial independence, preventing judges from making decisions influenced by the prospect of reappointment.

A **quorum** is required. Specifically, **at least 11 justices** must be present for a hearing to take place. Although unanimous agreement among the attending justices is not necessary for decisions to be made, this minimum number of justices must be present to ensure the validity of the proceedings. This quorum is stipulated by **Article 16.2 of Law 87/1953**.

Requirements for Appointment

Candidates for the Court must belong to one of the following categories:

- Judges from the **highest ordinary or administrative courts** (even if retired);
- **Full professors of law**, with extensive academic and professional qualifications;
- **Lawyers** with at least 20 years of experience.

The inclusion of these categories ensures that judges possess the requisite legal expertise and experience. Although the law does not require judges to elect from within their own ranks, in practice, judges typically select their peers to serve on the Court.

Incompatibilities and Immunities

Judges of the Constitutional Court must remain free from any external influence, and therefore their office is **incompatible** with certain other positions. For example, they cannot simultaneously serve as:

- **Members of Parliament** or **Regional Councils**;

- **Members of the High Council of the Judiciary** (*CSM*, a body that ensures judicial independence);
- **Attorneys** or engage in any commercial, financial, or economic activities.

These incompatibility rules are designed to protect the integrity of the Court and ensure that judges are fully independent from political and economic pressures.

Furthermore, judges cannot be held accountable for their decisions or votes expressed in the exercise of their functions. This **immunity** guarantees that they can perform their duties without fear of legal or political repercussions.

Term of Office and Grounds for Removal

The term of office for a constitutional judge is **9 years**, and it **cannot be extended or renewed**. Judges may cease their mandate early due to:

- **Resignation**, which must be approved by the President of the Court;
- **Removal or suspension**, which requires a two-thirds majority decision by the Court in cases of physical or legal incapacity, or for serious misconduct;
- **Revocation**, after a prolonged and unjustified absence from their duties (e.g., 6 months without fulfilling constitutional justice functions).

This system reinforces the Court's autonomy and insulates it from political pressures, as decisions about the removal of judges rest with the Court itself.

International Relations of the Constitutional Court

The Italian Constitutional Court maintains an active presence in international judicial cooperation. It participates in meetings and conferences with other constitutional courts, such as those of **Germany** and **Croatia**, and is involved in initiatives to foster dialogue on **constitutional justice** across Europe. These exchanges help align Italy’s constitutional standards with broader European norms and principles.

The Italian Constitutional Court and the Incidental Method of Judicial Review

Among the various functions of the Italian Constitutional Court (CC), the most typical and essential one is judicial review, which involves determining the compatibility of certain legal acts with the Constitution, as stipulated in Article 134 of the Italian Constitution. However, while Article 134 establishes the Court's power to oversee judicial review, it does not explain the specific mechanisms of this function. To understand the procedural details, we must turn to Constitutional Law 1/1948 and Law 87/1953.

The Constitutional Court conducts judicial review through two primary methods: the incidental method and the direct method. These methods, which follow a Kelsenian model, form part of what is considered the "*tertium genus*" in comparative constitutional law, distinguishing Italy's approach from other systems.

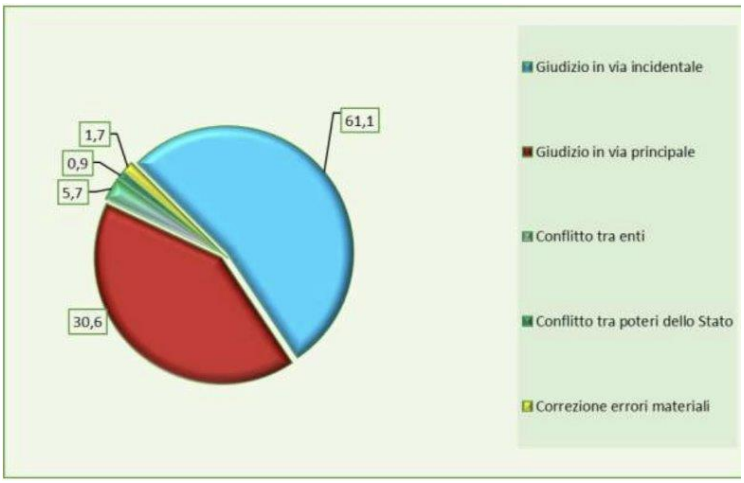
The Incidental Method of Judicial Review

The incidental method of judicial review is characterized by its concrete nature. It arises from a specific legal case in which a judge has doubts about the constitutionality of a law that must be applied to resolve the dispute. When this happens, the judge can refer the matter to the Constitutional Court for a ruling on the constitutionality of the relevant law. This process is what makes it a "concrete" review, as it is triggered by an actual case (*in concreto*).

In contrast, the direct method is an abstract review and involves cases where the central government or a region directly challenges the constitutionality of a law, typically in disputes over the allocation of powers. For instance, the President of the Council of Ministers might challenge a regional law, or a regional executive might challenge a state law.

According to a report issued by the Constitutional Court, 61% of the Court's decisions in 2023 were made through the incidental method, highlighting its importance. The direct method accounted for 31%, while a smaller portion related to the arbitral role of the Court in resolving conflicts between state powers and about allocation between entities. A very small number of decisions were dedicated to correcting material errors, such as typographical mistakes.

It depends on different years, but generally the majority of the activity concerns constitutional review, particularly the incidental one.



The Court's Jurisdiction: Constitutional Law 1/1948

Article 1 of Constitutional Law 1/1948 provides that any question concerning the constitutional legitimacy of a statute or an act with the same force, raised by a judge either *ex officio* or at the request of one of the parties during a judicial proceeding, must be referred to the Constitutional Court if the judge deems the question to be not manifestly unfounded.

- **Object**: The object of review includes parliamentary laws and regional laws, which are equal in rank, differing only in their allocation of competences. The Court also reviews acts with the same force as laws, such as law decrees and legislative decrees, governed by Articles 76 and 77 of the Constitution.
- **Subjects**: The referral can be initiated by the judge, either on their own initiative or upon the request of the parties involved. This distinguishes the Italian system from the French *Question Prioritaire de Constitutionnalité* (QPC), which only starts upon a party's request.

Who Can Raise a Constitutional Question?

The ability to raise a constitutional question has evolved over time. Initially, the Court adopted a broad interpretation, allowing bodies such as the **Disciplinary Division of the *Consiglio Superiore della Magistratura*** and the **Patent and Trademark Commission** to refer questions. However, since the mid-1970s, the Court has narrowed this interpretation, limiting the ability to raise questions to bodies performing **judicial functions** (e.g., courts and judges), not administrative bodies.

Requirements for Referring a Question

To refer a question to the Constitutional Court, the judge must meet certain criteria, including the following:

1. **Relevance**: The constitutional question must be essential to the case. The judge cannot proceed without resolving the doubt about the law's constitutionality.
2. **Non-manifest unfoundedness**: There must be **reasonable doubt** regarding the constitutionality of the law. In Italy, it is sufficient to show serious doubt, unlike in Germany, where certainty of unconstitutionality is required.

Additionally, the Italian case law has developed the ***tentativo di interpretazione conforme*** requirement, where the judge must attempt to interpret the provision in a way that complies with the Constitution before raising the question. This principle, although not codified, was established in the Court's **Judgment 356/1996**. In recent years, this requirement has

become less stringent, as the Court recognizes that some provisions may have only one dominant interpretation, which could be unconstitutional.

Referral Order (Ordinanza di Remissione)

The referral order is a crucial procedural step in the incidental review. It includes:

- **Object**: The law or provision in question;
- **Parameter**: The constitutional provision assumed to be violated;
- **Justification**: Why the constitutional question is relevant and non-manifestly unfounded.

The referral order also **suspends the ongoing proceedings** until the Constitutional Court delivers its ruling. The parties involved in the original case are not required to participate in the constitutional proceedings but may submit ***memorie*** (briefs). Moreover, since 2019, **experts and associations** may intervene as ***amicus curiae***, providing additional perspectives on the constitutional issue.

Acts Subject to Judicial Review

The Constitutional Court can review:

- **Primary legislation**: Laws passed by Parliament or regional councils;
- **Legislative Decrees**: Laws passed by the government under delegation from Parliament;
- **Decree Laws**: Emergency laws issued by the government that must be confirmed by Parliament within 60 days.

However, certain sources, such as **secondary legislation** (e.g., governmental regulations) and the **standing orders of Parliament**, cannot be directly challenged before the Constitutional Court. These matters fall within the jurisdiction of **administrative judges** or, in the case of standing orders, are protected by the principle of parliamentary autonomy.

Interaction with EU Law

The Constitutional Court does not have jurisdiction over the constitutionality of **EU law** due to the **principle of supremacy**. According to **Article 11 of the Italian Constitution**, Italy consents to the limitations of sovereignty necessary to ensure peace and justice among nations, including the primacy of EU law. In cases where a domestic law violates EU law, the constitutional challenge is framed as a violation of **Articles 11** and **117** of the Italian Constitution, making EU law a ***parametro interposto*** (interposed parameter).

The Direct Method of Constitutional Review

The **Direct Method of Constitutional Review** is the second approach used by the Italian Constitutional Court (CC) to ensure that laws comply with the Constitution. Unlike the incidental method, which arises from ongoing judicial proceedings, the direct method involves an **abstract review**, meaning that no case is pending before a judge. Instead, **political bodies** – the central government or regional governments – may challenge each other's legislation, invoking the CC's jurisdiction.

Legal Framework: Articles 127 and 117 of the Constitution

According to **Article 127 of the Italian Constitution**, the central government may challenge a regional law before the Constitutional Court within **sixty days of its publication** if it believes the law exceeds the region's competence. On the other hand, regional governments can challenge state laws or acts with the force of law if they believe these laws **infringe upon** regional competence.[31]
The allocation of competences is outlined in **Article 117 of the Constitution**, which lists matters under the exclusive competence of the state, shared competences, and residual matters left to the regions. If regions legislate beyond their scope, the central government can challenge these laws. In practice, the central government often challenges regional laws for a variety of constitutional reasons, not limited to competence issues, giving it an advantage. By contrast, regions face a **burden of proof** and must demonstrate how the state law **infringes upon** their responsibilities.
Both the central and regional governments have a **60-day window** from the publication of a law to file a challenge with the Constitutional Court.

Parties and Representation

In cases brought by the **central government**, the head of the executive, the **President of the Council of Ministers**, initiates the action. However, in practice, the ***Avvocatura Generale dello Stato*** represents the government before the Constitutional Court.
For **regions**, the head of the **Regional Executive (*Giunta Regionale*)** initiates the challenge, and they rely on ordinary lawyers.

Suspension of Laws

In certain cases, particularly when there is a risk that a law might cause significant damage, the Constitutional Court may **suspend the effects** of the law while it is deciding the case. For example, during the COVID-19 pandemic, the CC suspended a regional law from Valle d'Aosta, which allowed public spaces to reopen, considering the potential risk associated with its immediate implementation.

Special Procedure for Regional Statutes (Art. 123 of the Constitution)

Regional statutes, which outline the form of government and basic principles for regional organization, are subject to a **special procedure**. These statutes are considered primary legislation but are adopted through a more complex process. The central government may challenge a regional statute within **30 days of its publication**. While this procedure is seldom used, it exists to ensure that regional statutes comply with constitutional principles.

Incidental vs. Direct Review

In the **incidental method**, the question of constitutionality arises in the context of a specific judicial proceeding, and the judge is **obligated** to refer the question if they have serious doubts about the constitutionality of a law. The **direct method**, on the other hand, is an **abstract review** where political bodies challenge laws directly, and the action is **optional**.

[31] State vs Region: if law EXCEEDS region's competence (NO NEED FOR HARM TO HAVE HAPPENED, State has autonomous standing).
Region vs State: if law INFRINGES regional competence (NEED FOR HARM TO BE DERIVED FROM LAW, and needs proof).

These political bodies may **drop the case** at any point during the proceedings, reflecting the political nature of the direct method.

Types of Decisions by the Constitutional Court

When ruling on constitutional challenges, the Court issues several types of decisions:

1. **Judgments**: These are detailed decisions on the merits of a case. They are articulated and provide substantive reasoning.
2. **Orders**: Shorter, less detailed decisions, typically addressing procedural issues rather than the merits.
3. **Decrees**: Procedural decisions, often issued by the President of the Constitutional Court, such as assigning tasks to specific judges.

In terms of content, the Court's decisions can address **admissibility** or the **merits** of the case:

- **Admissibility**: The Court may declare a case inadmissible if procedural requirements are not met (e.g., challenges brought after the 60-day deadline, or challenges raised by bodies without the legal standing to do so).
- **Merits**: When ruling on the merits, the Court can either **accept** or **reject** the challenge:
  - **Acceptance**: If the Court finds the law unconstitutional, it declares the provision void and removes it from the legal order with ***erga omnes*** (universal) and **retroactive** effects, meaning the law is treated as if it had never existed.
  - **Rejection**: If the Court rejects the challenge, it does not mean that the law is necessarily constitutional in every sense – only that it is not unconstitutional based on the arguments presented. The same law could be challenged again on different grounds.

Manipulative and Interpretative Decisions

Over time, the Court has developed **manipulative decisions** as a tool for more nuanced rulings:

- **Additive decisions**: The Court declares a law unconstitutional because it does not provide something it should. For instance, if a law provides a benefit only to one group but should extend it to another, the Court may add that missing element.
- **Substitutive decisions**: The Court may replace an unconstitutional part of a law with a constitutionally acceptable alternative.
- **Partial acceptance (*Accoglimento parziale*)**: Only part of the provision is declared unconstitutional.
- **Interpretative decisions**: When a provision has been consistently interpreted in a way that violates the Constitution, the Court may declare only that interpretation unconstitutional, leaving other possible interpretations intact.

Timing of Decisions

Typically, the Court's decisions on unconstitutionality have **retroactive effects**, but in certain cases – such as when immediate invalidation would cause severe social or financial disruption – the Court may limit the effects to the **future** or set a specific date when the decision takes effect. This allows the political branches time to adjust the legal framework.

Dismissal and Exhortative Decisions

The Court may issue **interpretative dismissals**, where it suggests that a challenged provision has a constitutional interpretation that the judge should apply. Alternatively, it may issue **exhortative decisions** (*sentenze monito*), where the Court rejects the case but warns Parliament to intervene and amend the legislation because it is close to being unconstitutional.

Conflicts of Attribution

The Constitutional Court acts as an **arbiter** in **conflicts of attribution** between different state entities. These conflicts can occur:

- Between the **state and a region** or **two regions**;
- Between **state bodies**, such as supreme institutions.

In these cases, the Court safeguards **institutional pluralism** and the proper functioning of the **system of government**.

Key Differentiation

- A conflict of attribution does not involve **legislative acts**, which are handled through **direct constitutional review**. Instead, it addresses disputes over non-legislative acts, such as regulations or administrative behaviors (within 60 days publication/acknowledgment).
- For conflicts between state entities, the relevant standard is **Article 117 of the Constitution**, which outlines the allocation of competences between the state and regions. The parameters for deciding these conflicts may extend beyond the Constitution to include **constitutional conventions** and **practices**, making the review broader.

Differences from Administrative Court Proceedings

Conflicts of attribution differ from administrative court cases because they are focused on **constitutionally relevant issues**, not just the legality of administrative acts. Legislative acts are explicitly excluded from conflicts of attribution.

Conflicts Between State Powers

State powers are defined as those *bodies empowered by the Constitution to make final decisions within their domain*. According to **Article 37 of Law No. 87/1953**, such powers are entitled to establish the extent of their authority based on the Constitution. This definition goes beyond the traditional powers of the state (executive, legislative, and judicial), recognizing other state bodies with autonomous powers.

Expanded Definition of State Powers

For a body to qualify as a **state power** and be involved in these conflicts, it must:

- Hold a **constitutionally independent position**.

- Be vested with **autonomous powers** by the Constitution.

The Court's case law has provided clarity on which bodies qualify as **state powers** capable of initiating or being the respondent in conflicts of attribution. Below are specific examples:

A. President of the Republic (PdR)
   - **Case law reference**: **Order No. 150/1980**.
   - The **President of the Republic** (PdR) is a unique constitutional figure in the Italian system. Unlike other countries where the president might also serve as the head of the executive (as in presidential systems), Italy has a **parliamentary system**, meaning the PdR holds a **neutral position** above both the legislative and executive branches.
   - The PdR exercises specific autonomous powers granted by the Constitution, such as the ability to **appoint judges**, **promulgate laws**, and, notably, **declare state secrecy**. Due to this independent role, the PdR can be involved in conflicts of attribution. The Constitutional Court recognized this role in **Order No. 150/1980**, affirming that the PdR has standing to bring conflicts before the Court.

B. Constitutional Court
   - The Constitutional Court itself can also raise or be involved in conflicts of attribution. The Court is distinct from the **ordinary judiciary** due to its **unique functions** and **self-governing** nature.
   - The Court is not subject to the authority of the **High Council of the Judiciary** (which oversees the ordinary judiciary), and its judges are appointed through a **separate process** involving the President of the Republic, Parliament, and the judiciary. This independence allows the Constitutional Court to act autonomously in matters of constitutional review and conflicts of power.

C. High Council of the Judiciary (*Consiglio Superiore della Magistratura*)
   - **Case law reference**: **Order No. 379/1992**.
   - The **High Council of the Judiciary** (*CSM*) is another body vested with **autonomous constitutional powers**. Its role is to manage the careers of judges, including appointments, promotions, and disciplinary actions. The *CSM's* **disciplinary section** is specifically tasked with overseeing the conduct of judges and imposing sanctions for violations of professional duties.
   - The Constitutional Court recognized that the *CSM*, due to its constitutionally enshrined functions, can be involved in conflicts of attribution. This was confirmed in **Order No. 530/2000**, which addressed the role of the *CSM's* disciplinary section in particular.

D. Court of Accounts (*Corte dei Conti*)
   - **Case law references**: **Order No. 150/1980**, **Judgment No. 406/1989**, **Judgment No. 466/1993**.
   - The **Court of Accounts** plays a dual role:
     - **Judicial role**: As part of the judiciary, it reviews the legality of government actions, especially in the field of **public finance** and the **budget**.
     - **Administrative role**: It conducts **preventive reviews** of government acts and checks the **budget** of state-subsidized entities.

- Given its critical function in monitoring public resources and ensuring financial accountability, the Court of Accounts is recognized as a state power. It has the authority to raise conflicts of attribution, particularly when its role in checking public finances comes into conflict with other state bodies.

E. Central Office for Referenda
   - **Case law reference**: **Judgment No. 69/1978**.
   - The **Central Office for Referenda** is a special body housed within the **Court of Cassation**. It plays a constitutional role in overseeing the legality and organization of referenda, an important mechanism for direct democracy in Italy.
   - Because of its constitutionally mandated role, the Central Office for Referenda can raise conflicts of attribution before the Constitutional Court. This was established in **Judgment No. 69/1978**, confirming its standing as a body capable of initiating or responding to conflicts of power.

Parameters for Conflicts Between State Powers

In cases of conflict between state powers, the Constitutional Court's review extends beyond the Constitution to include:

- **Constitutional conventions** and **parliamentary standing orders**;
- Some **ordinary laws**, such as **Law No. 124/2007** concerning state secrecy.

This broader scope allows the Court to ensure that each state power is acting within its **constitutionally attributed competences**, even if those competences are clarified or specified in ordinary law.

Traditional State Powers and Their Standing in Conflicts of Attribution

- **Legislative Power**: Each House of Parliament or Parliament in joint session can raise conflicts of attribution, particularly in functions like electing members of the Constitutional Court or the High Council of the Judiciary. Parliamentary committees, such as **COPASIR** (the parliamentary oversight committee on state secrecy), may also raise conflicts.
  - **Individual members of Parliament** do not normally have standing to raise conflicts, but exceptions may arise when they exercise autonomous constitutional powers.
- **Executive Power**: The **Council of Ministers**, **single ministers**, and notably the **President of the Council of Ministers**, can raise conflicts. The President has autonomous standing, particularly in matters of state secrecy, where the President acts independently of the Council.
- **Judiciary**: Any judge or court can raise a conflict of attribution, reflecting the **independence** of the judiciary. Even within the judiciary, **public prosecutors** may raise conflicts, but only General Prosecutors have the standing to raise conflicts in certain cases, as outlined in the Court's case law.

The Role of the Constitutional Court in Referenda

Introduction to Referenda in Italy

Referenda in Italy were introduced by **Article 2 of Constitutional Law No. 1 of 1953** and are regulated by **Articles 33-34 of Law No. 352/1970**. The process involves two stages of control:

- **Legitimacy control** by the **Central Office for Referenda** (located within the Court of Cassation).
- **Admissibility control** by the **Constitutional Court**.

The Court plays a **"special function"** in ensuring that proposed referendum questions adhere to legal and constitutional standards, a role that was added after the Italian Constitution was adopted in 1948.

Historical Context

The Parliament delayed passing the implementing law for referenda for several years due to concerns about "rebuilding" (modifying) essential laws via referenda. This delay, part of a phenomenon called **"constitutional freezing"**, reflected the fragmented political power during the early years of the Republic, and fears that important legislation could be radically altered by popular vote.

Referendum Procedure

Formal Legitimacy

The formal process of proposing a referendum is governed by **Law No. 352/1970**. A referendum can be initiated through:

- The collection of **500,000 valid signatures** from eligible voters, or
- The support of **5 regional councils**.

The deadline to submit these requests to the **Central Office for Referenda** is **September 30** of each year, and the Central Office reviews the **formal legitimacy** of the proposal by October 31. This review checks:

- The **validity of signatures** (e.g., ensuring voters are of legal age and possess Italian citizenship);
- **Compliance with time limits** (e.g., ensuring the proposal is submitted before the deadline);
- **Clarity of the referendum question**, ensuring that it is free from ambiguity or errors that could change its substance.

The Central Office's role is purely formal, ensuring that the legal requirements are met without considering the merits of the request.

The office can correct material mistakes as typos, but there are some aspects which are borderline: changing a comma may change the meaning of a sentence, chancing the substance of the question.

Admissibility

Once the Central Office confirms the formal validity, the **Constitutional Court** assesses the **admissibility** of the referendum question. This involves a **substantive assessment** to ensure the referendum complies with **constitutional limitations**.

Limitations

Explicit Limitations (Article 75 of the Constitution)

The Court must verify whether the law being subjected to referendum falls under categories that cannot be modified through a popular vote. These include:

1. **Taxation and Budgetary laws**: These are excluded because allowing citizens to vote on tax laws could result in impractical outcomes, such as people voting to eliminate taxes. These laws are often complex and require specialized knowledge.
2. **Laws authorizing the ratification of international treaties**: Such laws have no substantive content themselves but are essential for enforcing international agreements in Italy. Altering them would affect **Italy's international obligations**, risking the country's reputation and subjecting it to sanctions under the principle of ***pacta sunt servanda***.
3. **Laws on amnesty and general pardon**: These laws require a **two-thirds majority** in Parliament, giving them a higher legislative authority than ordinary laws, and therefore cannot be modified through referenda.

Explicit limits must be interpreted broadly, including legislation implementing EU obligations. Directives are normally implemented through legislative decrees, so, if you rebuild them, Italy will be subject of an infringement procedure before the EU.

Implicit Limitations (Case Law)

The Court has also developed **implicit limitations** that further restrict which laws can be subjected to referendum:

- **Constitutional laws** cannot be changed via referenda.
- Laws that are essential for the **functioning of the state** (such as laws governing constitutional bodies) are protected.
- **Electoral laws**: Although electoral laws can be partially modified through referenda, the Court ensures that such referenda do not undermine the fundamental right to vote. For example, a referendum that completely dismantles the electoral system would not be admissible.
- **Manipulative Referenda**: These referenda attempt to create new legal provisions by removing specific parts of an existing law. The Court rejects questions that **rewrite** laws through elimination, as this is considered a legislative function reserved for Parliament. The referendum is a negative act, you cannot circumnavigate the provisions like this.

The **Constitutional Court's decision on admissibility** is typically made within a **month** of the Central Office's ruling.

Special Characteristics of Referendum Questions

The **Constitutional Court** ensures that referendum questions are:

- **Homogeneous**: The question must cover a single, coherent subject. If a referendum addresses multiple issues, voters may be confused about how to vote on it.
- **Clear**: The wording of the question must be straightforward, providing voters with all the necessary information to make an informed decision.
- **Complete**: Voters must be given sufficient context to understand the implications of their vote. Inadequate or ambiguous wording could infringe on the **right to vote**, as it would prevent voters from making a free and informed choice.

Constitutional Court Decisions

By **February 10th** of each year, the Constitutional Court must publish its decision regarding the admissibility of a referendum question:

- If the Court declares the referendum **admissible**, the **President of the Republic** sets a date for the vote on a Sunday between April 15 and June 15 of the year in which it is called.
- If the referendum is **inadmissible**, the same question cannot be proposed again for a period of **five years** (duration of Houses of Parliament), the same length as a Parliamentary term.

In cases of inadmissibility, the Court does not need to provide an extensive justification. Instead, it identifies the **primary ground of inadmissibility**, which is usually based on one of the explicit or implicit limitations. The Court's decision on inadmissibility cannot be challenged.

Constitutional Justice and Charges Against the President of the Republic

Overview: Impeachment vs. Constitutional Criminal Justice

The impeachment process and constitutional criminal justice differ in their nature and procedures:

- **Impeachment** is handled by a **political body** (such as a legislative assembly) and typically involves legal procedures based on charges of misconduct, without being a vote of confidence.
- **Constitutional criminal justice**, on the other hand, is overseen by a **judicial or technical body** (e.g., a constitutional court), focusing on whether the President has committed a specific crime as outlined in the Constitution.

While both procedures involve legal charges, impeachment tends to have more political undertones, whereas constitutional criminal justice is purely legal.

Comparative Perspective on Charges Against the President

In different legal systems, constitutional courts or legislative bodies play varying roles in addressing charges against heads of state:

- In **Italy**, **Germany**, and **Austria**, the **Constitutional Court** determines whether the President is guilty of the charges (e.g., high treason or violating the Constitution).
- In **Romania**, the **Constitutional Court** issues **advisory opinions** on such matters, leaving the final decision to other bodies.
- In **France**, the **Parliament** sits as a **High Court** (Article 68 of the French Constitution) to handle charges against the President.

In common law countries like the **United States** and **United Kingdom**, the legislative body often plays a key role in **impeachment**. Although these systems are politically driven, they still follow legal procedures.

Historical Comparison with Italy's Past

Under Italy's earlier **Statuto Albertino**, ministers could be impeached by a political body if they committed criminal acts during their mandate, a process similar to impeachment. Today, however, Italy only uses **constitutional criminal justice** for the President, and no Italian President has yet been tried under this procedure.

Impeachment in the United States

In the U.S., **impeachment** is a legal mechanism for removing the President or other federal officials accused of **"Treason, Bribery, or other High Crimes and Misdemeanors"** (Article II, Section IV of the U.S. Constitution). The impeachment process is distinct from a vote of no confidence seen in parliamentary systems, as it is a **legal proceeding**, not a political one.

- The process begins when a complaint is filed by citizens or members of Congress. A **Judiciary Committee** within the **House of Representatives** reviews the complaint and drafts **Articles of Impeachment** if the charges have merit.
- After the committee's review, the House of Representatives votes on the articles, requiring a **simple majority** to formally impeach the President.

The Senate's Role in U.S. Impeachment

Once the House votes to impeach, the case moves to the **Senate**, which holds a trial presided over by the **Chief Justice of the U.S. Supreme Court** (to avoid conflicts of interest). The Senate acts as a jury, and a **two-thirds majority** is required for conviction and removal from office. The trial operates like a criminal process, with both prosecution and defense teams presenting their cases.

Even if impeached by the House, the President is not immediately removed from office; the Senate's decision on guilt or innocence determines whether they are **removed** and **barred from holding public office**.

Criminal Charges Against the President of the Republic in Italy

In Italy, the procedure for addressing charges against the President is outlined in **Article 90 of the Constitution**, which allows for charges only in cases of **high treason** or **attacks on the Constitution**. Unlike the U.S., Italy's process is not referred to as "impeachment," and it is overseen by a judicial body rather than the legislature.

The Process

1. The **Parliament** in **joint session** brings the charges against the President, requiring an **absolute majority** vote.
2. The case is then tried by the **Constitutional Court**, which operates in an expanded form for this purpose. The **15 regular members** of the Court are joined by **16 "lay" members** – citizens randomly selected from a list prepared by Parliament of forty-five people over the age of forty chosen every nine years. These lay members ensure broader representation and help maintain a balance between legal and public interests.

Sanctions and Review

The **Constitutional Court** has the authority to impose any type of sanction within the Italian legal system, including administrative, civil, criminal, and constitutional penalties. One potential constitutional sanction is the **removal of the President from office**.

While most decisions of the Constitutional Court are final and cannot be appealed, in the rare case of presidential conviction, the decision can be challenged through **revision** if new evidence emerges (*Corte d'Appello* is responsible for the revision).

High Treason and Attacks on the Constitution

Charges of **high treason** and **attacks on the Constitution** are often intertwined. **High treason** typically involves actions that undermine the state's sovereignty or integrity, while **attacks on the Constitution** may involve efforts to dismantle or violate the country's constitutional order. Both crimes represent the gravest offenses a President can commit in Italy, and the Constitutional Court is responsible for determining guilt.

In the case of a conviction, the Court may remove the President from office, and the decision may include **criminal penalties** or **constitutional sanctions**, depending on the severity of the offense.

Rule of Law Crisis

The Rule of Law: Its Foundations, Core Principles, and Global Erosion

1**. Foundations of the Rule of Law**: The concept of the rule of law, a bedrock of democratic governance, was formalized by A.V. **Dicey** in Introduction to the Study of the Law of the Constitution (1885). Dicey identified three essential aspects:
   - **Supremacy of Law**: No one, including the government, is above the law.
   - **Equality Before the Law**: Laws apply equally to all individuals.
   - **Legal Precedents**: Courts and established legal principles guide decisions.

Modern understandings expand on Dicey's principles, emphasizing that governance should be based on laws rather than arbitrary power.

2. Core Principles of the Rule of Law:

1. **Legality**
   - Laws must be enacted through transparent, democratic processes and accessible to the public.
   - Example: Parliamentary procedures in constitutional democracies ensure legitimacy.

2. **Legal Certainty**
   - Legal rules must be clear, stable, and predictable, enabling citizens to plan their actions accordingly.
   - Example: Laws should not have retroactive effects unless they serve overriding public interests.

3. **Prohibition of Arbitrariness**
   - Public authorities must act within legal frameworks and cannot abuse discretion.
   - Example: Judicial review of executive actions, as seen in the U.S. Chevron Doctrine.

4. **Access to Justice and Judicial Independence**
   - Courts must remain free from external influence, providing fair and impartial judgments.
   - Example: European Court of Human Rights (ECtHR) decisions on violations of judicial independence.

5. **Respect for Fundamental Rights**
   - Laws and legal systems must safeguard human rights and freedoms.
   - Example: Protection against arbitrary detention under Article 5 of the European Convention on Human Rights (ECHR).

6. **Non-Discrimination and Equality Before the Law**
   - Legal systems must ensure equal treatment irrespective of race, gender, or political affiliation.

3. Global Erosion of the Rule of Law: The **World Justice Project Rule of Law Index** reports a continuous global decline in the rule of law, starting in 2016. Factors contributing to this erosion include:

1. **Authoritarian Shifts**
   - Political leaders undermining judicial independence.
   - Example: Turkey's judiciary reforms under Recep Erdoğan, expanding control over courts.

2. **Judicial Erosion**
   - Politicization of judicial appointments and interference with courts.
   - Example: Poland's Law and Justice Party (PiS) targeting the judiciary to consolidate power.

3. **Democratic Backsliding**
   - Weakening of constitutional safeguards in countries like Hungary, Venezuela, and Poland.

Court-Packing: Concepts, Modalities, and Techniques

1. Definition of Court-Packing

Court-packing refers to irregular, politically driven changes in the composition of courts to create a new judicial majority or weaken an existing one. These changes are intended to influence court decisions, often in favour of the ruling government.

2. Criteria for Court-Packing

A practice qualifies as court-packing if it meets the following conditions:

1. **Change in Composition**: Quantitative (adding or removing judges) or qualitative (replacing judges).
2. **Irregularity**: The change deviates from constitutional norms or conventions.
3. **Actively Driven** (**non-random**): Intentional actions by political actors to alter the court (death of justices does not count).
4. **Targeting Existing Courts**: Does not include creating entirely new courts.
5. **Creation of a New Majority or restricts the old one**: A shift in judicial power, even if subtle or localized (in other words, court-packing does not necessarily need to target the majority of the whole court, it is enough if it aims at getting a majority in a strategically important chamber).
    - What Does "Majority" Mean in This Context? The definition broadens the concept of a judicial majority beyond a strictly numerical or ideological alignment. A "majority" could mean:
        - Judges ideologically aligned with the ruling government or executive power.
        - Judges who lack ties to the previous regime (a purge of the judiciary to replace older judges with new ones loyal to the current political leadership).
        - Judges from specific social or age groups that help achieve a strategic advantage for those in power.
    - Objective Application – Not Limited to Intentional Court-Packing: The definition claims to be objective, meaning it focuses on the outcome rather than the intent of the actors involved. Even if the political actors did not explicitly aim to create a new majority, or if their primary justification was different, the outcome of shifting the judicial majority still qualifies as court-packing. Ex. Even legislation primarily (genuinely or seemingly) pursuing a different aim which creates a new majority only as a side effect therefore also falls within our definition. This approach broadens the scope to include structural changes that indirectly affect the balance of power in the judiciary.

The subsequent behavior of judges appointed via court-packing is also irrelevant. If the political leader increases the number of judges, aiming to secure a loyal majority, this step will qualify as court-packing even if judges emancipate and refuse to submit to the politician's expectation in their decision-making

Three Court-Packing Strategies

1. EXPANDING Strategy

The **expanding strategy** involves increasing the number of judges on a court, often justified by claims of judicial inefficiency or increasing caseloads, but frequently used to create a politically favourable majority.

Key Features:

- Often framed as necessary for the judiciary's functionality but undermines judicial independence by diluting the influence of sitting judges.
- Adds new judges while retaining existing ones, making it less overtly confrontational, i.e. in a way that appears less aggressive or openly antagonistic than other methods of court-packing.

Examples:

- **United States (1937)**: Franklin D. Roosevelt proposed adding one justice for each Supreme Court member over 70, citing the Court's inefficiency in blocking New Deal policies. Though unsuccessful, he later reshaped the Court through subsequent vacancies.
- **Hungary (2012)**: Viktor Orbán increased the size of the Constitutional Court from 11 to 15 members to secure a loyal majority.
- **Venezuela (2004)**: Hugo Chávez expanded the Supreme Court from 20 to 32 judges, filling the new positions with allies.

2. EMPTYING Strategy

The **emptying strategy** focuses on removing judges from the bench, either temporarily or permanently, to clear space for politically loyal replacements.

Key Techniques:

- **Downsizing**: Reducing the size of the court through legislation or constitutional amendments.
- **Obstruction of Appointments**: Blocking or delaying judicial nominations to leave seats vacant. Mitch McConnel alla fine della presidenza Obama.
- **Forced Retirements**: Imposing mandatory retirement or other conditions to remove sitting judges.

Examples:

- **Poland (2017)**: The Law and Justice Party (PiS) lowered the retirement age for Supreme Court judges, forcing several to retire early and allowing the government to appoint loyal successors.
- **Argentina (1950)**: Juan Perón reduced the size of the Supreme Court from seven to five justices to remove opposition judges.
- **Czech Republic (2003–2005)**: President Václav Klaus obstructed judicial appointments to the Constitutional Court, leaving it severely understaffed.

3. SWAPPING Strategy

The **swapping strategy** involves replacing existing judges with new appointees, often using methods like impeachment, forced resignations, or mandatory retirements.

Key Techniques:

- **Mandatory Retirement**: Lowering retirement ages to replace sitting judges, as seen in Hungary (2012) and Poland (2017).
- **Abusive Impeachment**: Removing judges through impeachment proceedings, typically reserved for serious misconduct, but used instead for political reasons.

  - Example: Philippines (2018): Chief Justice Maria Lourdes Sereno was impeached after being accused of administrative violations, but many observers saw it as retaliation for her independence from the government of then-President Rodrigo Duterte.
- **Criminal Prosecution**: Targeting judges with legal charges to force their removal or silence dissent.[32]
- **Golden parachute**: offer incentives to encourage judges to resign.
- **Vetting**: reviewing judges for past actions (conducting extensive reviews of judges' past actions, qualifications, or political ties, often under the guise of promoting accountability).
- **Violence**: While less common in democratic contexts, there have been instances in authoritarian regimes where judges faced violence or were assassinated for opposing government interests (South America).

Examples:
- **Hungary (2012)**: Orbán's government lowered the judicial retirement age, forcing the dismissal of 274 judges, a move later ruled illegal by the European Court of Justice but largely irreversible.
- **Philippines (2018)**: The impeachment of Chief Justice Sereno for her opposition to President Duterte's policies.
- **Turkey (2016)**: Following a failed coup, over 4,000 judges were dismissed, many accused of terrorism without fair trials.

WHY IS IT USEFUL?

- Turns the courts into a powerful instrument
- Has immediate results
- Is difficult to reverse, judges are protected by judicial independence
- The Low Visibility: compared to other authoritarian practices, court-packing is less obvious as many of its techniques are not easily recognizable.

How can court-packing be legitimate?

META-GOALS

The scholarship typically invokes the following meta-goals that court-packing aims to meet:

- the rule of law (including judicial independence)
- separation of powers
- democracy
- social responsiveness (a person or institution's obligation to contribute to the welfare or environment of their community or society)
- public confidence in the courts
- the well-functioning of the judiciary

[32] Difference from Impeachment: Impeachment is a political process, typically conducted by a legislative body, to remove judges for alleged misconduct or incapacity. It doesn't involve criminal penalties but focuses on removing the judge from office.
Criminal Prosecution, on the other hand, involves legal charges (e.g., corruption, fraud, or other offenses), often handled by the courts. Convictions can result in criminal penalties, such as fines or imprisonment, in addition to removing the judge from office.

However, all these meta-goals are ambiguous and often contested concepts, whose relationship to court-packing is empirically unclear and at best disputed. As a result, all of these meta-goals are typically invoked by BOTH the supporters and the critics of court-packing.

According to some scholars, the very idea of court-packing contravenes the spirit of the rule of law.

MID-LEVEL THEORY

Legitimacy of Court-Packing: Justifications and Frameworks

Kosár and Šipulová propose that court-packing's legitimacy must be evaluated through two dimensions: **ius ad bellum** (just cause) and **ius in bello** (legitimate execution).

1. Ius Ad Bellum: Justifications for Court-Packing

Legitimate justifications include:

1. **Democratic Transition**:
   - Reforming courts after authoritarian regimes to ensure independence.
   - **Examples**: Post-communist judicial purges in Central and Eastern Europe after 1989.
2. **Addressing Systemic Corruption**:
   - Removing judges involved in widespread judicial corruption.
   - **Examples**: Albania's 2016 vetting process removed corrupt and politically influenced judges.
3. **Correcting Previous Court-Packing**:
   - Reversing illegitimate court-packing measures from prior administrations.
   - **Examples**: Reforms aimed at undoing earlier partisan judicial appointments.
4. **Rebalancing Representation**:
   - Addressing demographic or ideological disparities within courts.
   - **Example**: Efforts to diversify courts in racially divided societies.
5. **Improving Efficiency**:
   - Addressing inefficiencies in court systems, provided the changes are proportional and non-partisan.

2. Ius In Bello: How to exercise court-packing legitimately

Even with a valid justification, court-packing must be executed in a manner that minimizes risks to the judiciary's independence and credibility.

Key Criteria for Legitimacy:

1. **Transparency**: The process must be open and publicly debated.
2. **Multi-Partisan Consensus**: Broad political agreement is essential to prevent perceptions of bias.
3. **Proportionality**: Changes must not exceed what is necessary to achieve their stated goals.

4. **Adherence to Constitutional Norms**: Reforms must respect existing legal frameworks.

RISKS OF COURT-PACKING

Even when justified, court-packing poses significant risks:

1. **Cyclical Court-Packing**:
   - Successive governments may engage in retaliatory reforms, perpetuating instability.
     - Cyclical court-packing is thus still court-packing, because it deviates from the existing constitutional norm and hence it is irregular.
   - **Example**: Argentina's frequent alternation between expansion and downsizing of its Supreme Court.
2. **Entrenchment[33] of Power**:
   - Courts risk becoming tools of the ruling regime, undermining their independence.
   - **Example**: Venezuela's judiciary under Chávez became a government-controlled body.
3. **Public Distrust**:
   - Politicized reforms erode public confidence in judicial impartiality.

N.B. The purpose of a constitutional court is to represent a wide spectrum of cultural and political views, ensuring that it remains non-partisan and independent.
In the United States, there is currently a problem stemming from a unique situation where the Senate, the House of Representatives, and the President are all controlled by the same party, disrupting the checks and balances meant to prevent one branch of government from exceeding its authority.
In Europe, constitutional courts were established to avoid such scenarios by creating institutions independent of government control. This is why the Italian Constitutional Court has a mixed composition and has never been dominated by a single party.

Currently, there are four judges to be elected simultaneously, and concerns have arisen that the government, led by Prime Minister Meloni, might influence all four appointments, raising fears that the parliamentary majority could dominate the selection process. To prevent this, an absolute majority threshold is required for parliamentary elections of judges, ensuring broader consensus. However, this high threshold often delays the elections, leaving cases pending. If the composition of the court changes before pending cases are resolved, the judicial process must restart, further delaying justice. This highlights the tension between ensuring a balanced court and maintaining efficiency in its functioning.
Solution: 2 justices are going to be chosen by the coalition, 1 by the opposition, 1 by both.

Israel's Constitutional Crisis

1. The Context of the Crisis

1.1 Nature of the Reforms

Prime Minister Benjamin Netanyahu's government has introduced sweeping constitutional reforms that:

[33] The process or fact of an attitude, habit, or belief becoming so firmly established that change is very difficult or unlikely.

1. Aim to concentrate power in the executive branch.
2. Target the judiciary and government legal advisers to reduce their independence.
    - Limit the judiciary's power to review and overturn laws passed by the Knesset (Israel's parliament).
    - The government proposes giving the ruling coalition greater control over the appointment of judges, including Supreme Court justices.
    - The reforms aim to remove the binding nature of legal advisers' opinions.
3. Exploit the flexibility of Israel's Basic Laws to establish executive dominance.

1.2 Key Concerns

- **Judicial Independence**: Proposals weaken the Supreme Court's authority to review legislation and government actions.
- **Populist Governance**: Populist governance is a style of rule that emphasizes the supremacy of the majority's will, often equating **majority rule** with democracy. This view downplays the importance of institutional safeguards like courts or independent legal systems, which are designed to protect minority rights and uphold the rule of law.
    - Reforms reflect a populist agenda, equating majority rule with democracy, dismissing the need for checks and balances, which are essential to restrain the power of any one branch of government and prevent authoritarianism.

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2. Israel's Constitutional Framework in Detail

2.1 Basic Laws: Dual Purpose and Vulnerabilities

- **Function**: Basic Laws act as quasi-constitutional provisions regulating governance and protecting fundamental rights.
- **Notable Basic Laws**:
    - *Basic Law: Human Dignity and Liberty* (1992) – Protects rights under strict limitations:
        1. Must align with Israel's values.
        2. Must serve a legitimate purpose.
        3. Must proportionately restrict rights.
- **Weaknesses**:
    - Basic Laws can be amended or enacted with a simple majority, lacking the procedural safeguards typical of entrenched constitutions.
    - This flexibility allows populist governments to pass laws favouring their agenda and circumvent judicial oversight.

2.2 Dual Role of the Knesset

The Knesset's combination of legislative and constituent powers creates inherent risks:

1. **Legislative Power**: Enacting ordinary laws based on majority rule.
2. **Constituent Power**: Enacting Basic Laws with constitutional status.

Key Issue: No procedural or substantive rules distinguish the exercise of constituent power, allowing temporary majorities to misuse it.

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3. The Supreme Court: Protector of Democratic Norms

3.1 Judicial Review

The Supreme Court has broad powers to:

1. Review legislation for compatibility with Basic Laws.
2. Review executive actions based on the doctrine of **reasonableness**.

3.2 Importance

1. **Absence of Alternative Checks**: Israel lacks a bicameral parliament, federal system, or external oversight mechanisms like the European Court of Human Rights.
2. **Guardian of Rights**: The judiciary is the primary institution safeguarding minority rights and preventing executive overreach.

3.3 Criticism from Right-Wing and Populist Movements

1. **Perceived Leftist Bias**: Seen as prioritizing democratic values over Israel's Jewish identity.
2. **Alleged Overreach**: Accusations of excessive intervention in military and settlement issues.
3. **Populist Framing**: Described as an unelected elite undermining the "will of the people".

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4. Proposed Reforms: A Detailed Breakdown

4.1 Judicial Selection

- **Current System**: Judges are appointed by a balanced committee comprising:
    1. Two ministers (including the Minister of Justice).
    2. Two Knesset members (one from the coalition, one from the opposition).
    3. Three sitting Supreme Court judges (members of the judiciary itself, including the President – Chief Justice – of the Supreme Court).
    4. Two representatives from the bar association.
- **Proposed Changes**:
    1. Replace bar representatives with coalition politicians, giving the government a 5/9 majority.
    2. Remove the supermajority requirement for Supreme Court appointments.

Implications:

- Allows the government to control judicial appointments.
- Promotes self-censorship among lower court judges aspiring to the Supreme Court.

4.2 Appointment of the Chief Justice

- **Current Tradition**: Based on seniority, ensuring neutrality and continuity.
- **Proposed Changes**: Allow the selection committee to appoint any candidate, including non-judges, for a seven-year term.

Implications:

- Risks politicization of the judiciary's leadership.
- Encourages judges to align with government preferences for career advancement.

4.3 Limiting Judicial Review Proposals:

1. **Supermajority Requirement**: Require 12/15 or unanimous agreement to invalidate laws.
2. **Immunity for Basic Laws**: Prevent judicial review of Basic Laws, allowing the Knesset to shield legislation by labelling it as such.
3. **Override Clause**: Allow the Knesset to re-enact invalidated laws with a simple majority.

Implications:

- Severely curtails judicial checks on legislative and executive power.
- Enables the government to bypass constitutional protections, jeopardizing minority rights.

4.4 Politicization of Legal Advisers

- **Current System**: Legal advisers are independent professionals under the Attorney General.
- **Proposed Changes**: Make legal advisers political appointees removable at will.

Implications:

- Undermines the independence of legal advice.
- Increases the risk of arbitrary and illegal government actions.

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5. Judicial Response: The 2024 Ruling on the Unreasonableness Amendment

Context:

The government sought to limit the judiciary's ability to review executive actions for "unreasonableness", a key doctrine ensuring decisions are not arbitrary.

Supreme Court Ruling:

1. **Invalidation**:
    - By an 8-7 majority, the Court declared the amendment incompatible with democratic principles, specifically the separation of powers and the rule of law.
2. **Key Findings**:
    - Basic Laws must not undermine Israel's democratic identity.
    - Judicial oversight of Basic Laws is permissible if they violate core principles.
3. **Dissenting Opinions**:
    - Two judges argued that Basic Laws are immune from judicial review, reflecting ongoing debates about the Court's role.

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6. Populism and Its Impact on Israeli Democracy

Manifestations of Populism

1. **Targeting the Judiciary**:
    - Framing the Supreme Court as elitist and obstructive to the majority's will.
2. **Exploiting Basic Laws**:
    - Enacting laws like the *Nation-State Law*, prioritizing Jewish identity over equality.
3. **Undermining Legal Norms**:

- Transforming legal advisers into political tools and weakening checks on executive power.

Consequences

- **Erosion of Democratic Norms**: Populist governments prioritize majority rule over the rule of law.
- **Risk to Minority Rights**: Weakening judicial protections disproportionately affects vulnerable groups.

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7. Conclusion: The Imperative to Safeguard Democracy

Israel's proposed reforms threaten to dismantle the delicate balance of powers that underpins its democracy. To preserve its democratic identity:

1. **Judicial Independence**: The Supreme Court must retain its authority to review legislation and executive actions.
2. **Clear Constitutional Safeguards**: Procedural rules for enacting or amending Basic Laws are urgently needed.
3. **Protection of Minority Rights**: Institutions must resist populist pressures to ensure equality and the rule of law.

Without these safeguards, Israel risks sliding into an authoritarian model, eroding the freedoms and values foundational to its democracy.

Legitimacy in Judicial Review

1. What is Legitimacy in Judicial Review?

The legitimacy of judicial review concerns its justification and acceptance within a constitutional democracy. It is often criticized as an exercise of judicial activism but involves a more nuanced analysis of the following dimensions:

- **Legal Legitimacy:** Based on adherence to legal norms, including constitutional texts and judicial precedents.
- **Sociological Legitimacy:** Refers to public acceptance of judicial authority and the implementation of judicial decisions.
- **Moral or Political Legitimacy:** Evaluates decisions in light of ethical or political values, such as democracy, equality, and dignity.

2. Legal Legitimacy: The Foundation of Authority

Legal legitimacy evaluates whether judicial decisions comply with formal legal norms. According to Richard Fallon:

- **Definition:** Legally legitimate decisions conform to existing constitutional texts, structures, and precedents.
- **Challenges:** Critics from the legal realist and critical legal studies movements argue that legal norms are inherently indeterminate.
- **Defenders:** Scholars like Karl Llewellyn suggest that professional norms and interpretive methods provide meaningful constraints, ensuring courts operate within recognized legal boundaries.

3. Sociological Legitimacy: Public Acceptance of Authority

Drawing from Max **Weber's** theories, sociological legitimacy focuses on citizens' willingness to accept judicial authority:

- **Active Belief:** This includes trust in courts as legitimate arbiters, even in controversial cases.
- **Acquiescence:** A weaker form of legitimacy, where citizens comply with judicial decisions out of habit or deference, rather than active endorsement.
- **Impact:** Courts with strong sociological legitimacy see their decisions implemented smoothly, while those with weak legitimacy risk public resistance.

4. Moral and Political Legitimacy: Justification Beyond the Law

This dimension examines whether judicial decisions align with ethical principles and democratic values:

- **Moral Justifiability:** Decisions are evaluated based on substantive principles, such as fairness or equality.
- **Political Legitimacy:** Courts are assessed on their ability to protect democratic values, such as:
  - **Democratic Minimum Core:** Protecting essential rights (e.g., free elections, freedom of expression).
  - **Legislative Failures:** Addressing legislative blind spots or inertia.[34]

Responsive judicial review emphasizes a politically liberal understanding of legitimacy, which accommodates reasonable disagreements about constitutional morality.

5. Assessing Judicial Implications: A Framework for Legitimacy

Judicial implications are interpretations or doctrines derived implicitly from constitutional texts. These implications often arise in the context of judicial review and are aimed at addressing gaps, ambiguities, or systemic issues within constitutional or legal frameworks.
Key Points from Rosalind Dixon's Work on Judicial Implications:

1. **Responsive Judicial Review**:
   a. Courts may use judicial implications to respond to "democratic dysfunctions," such as blind spots in legislation, political inertia, or risks to the democratic minimum core.
   b. This approach emphasizes calibrating judicial interventions to address urgent and systemic risks to democracy while respecting the broader legal and political context.
2. **Principles of Legitimacy** ® Judicial implications are deemed legitimate based on their:
   a. Legal Legitimacy: Conformity with the constitution's text, history, and structure.
   b. Political Legitimacy: Support for addressing urgent threats to democracy or protecting human dignity, especially when legislative action is inadequate.
3. **Conditions for Legitimacy**:

[34] **Legislative blind spots** refer to areas of law or society that legislators fail to adequately address or entirely overlook, often due to a lack of knowledge, awareness, or understanding of evolving social and technological contexts. These blind spots can also include laws that appear neutral but have disproportionate or discriminatory effects on specific groups. They may stem from cultural biases, implicit prejudices, or a failure to consider how policies will impact marginalized populations. Examples include indirect discrimination, such as zoning laws that disproportionately affect low-income communities, or workplace regulations that fail to accommodate individuals with disabilities. The result is incomplete or inadequate regulation, perpetuating inequities, uncertainty, or injustice.
Legislative inertia describes the tendency of legislative institutions to preserve the status quo, resisting updates or reforms even when societal, economic, or technological contexts evolve significantly. This phenomenon may arise from political gridlock, bureaucratic resistance, or the complexity of revising entrenched laws. Legislative inertia can also exacerbate systemic inequities when outdated laws disproportionately harm specific groups, particularly when those groups lack adequate representation in the legislative process. As a result, the failure to act leads to a growing misalignment between existing legal frameworks and the current needs of society, perpetuating injustice and stagnation.

- **Illegitimacy:** Implications lacking both legal support and political justification are presumptively illegitimate.
- **Core Democratic Protections:** Implications protecting democracy's minimum core are legitimate, even if they have weak legal grounding.
- **Conditional Legitimacy:** Implications addressing less systemic issues as legislative blind spots or burdens of inertia may be legitimate if:
  - They enjoy some legal support.
  - They counter irreversible harms, such as threats to human dignity.

By deriving judicial implications, courts often play a role in interpreting and constructing constitutional principles in ways that can adapt to changing societal needs or protect vulnerable rights against majoritarian rule.

6. Political Legitimacy and Democratic Dysfunction

Responsive judicial review adapts to democratic dysfunction, such as:

- **Electoral Monopolies:** Courts may act to prevent dominant parties from eroding democratic competition.
- **Legislative Inertia:** Courts address systemic failures when legislatures neglect urgent issues (e.g., minority rights).

7. Calibration of Judicial Review: Adjusting the Intensity

Responsive judicial review suggests calibrating judicial intensity based on:

- **Evidence:** Courts must consider factual evidence of democratic risks (e.g., systemic failures or minority oppression).
- **Contextual Factors:** The degree of deference to legislative decisions should vary:
  - **Close Scrutiny:** Applied to laws threatening democracy or dignity (e.g., voter suppression).
  - **Deference:** Reduced scrutiny for laws that follow reasoned, recent deliberation.

8. Practical Applications of Legitimacy

The concept of legitimacy has been applied in key areas of judicial review, including:

- **Abortion Rights:** Cases like *Roe v. Wade* faced critiques for lacking legal and political legitimacy, despite addressing legislative inertia.
- **Proportionality Tests:** Courts in Canada and South Africa apply proportionality analyses, balancing constitutional rights against legislative objectives.
- **Affirmative Action:** Courts evaluate whether such measures genuinely redress historical disadvantage or risk democratic backsliding.

9. Principles for Responsive Judicial Review

A responsive approach emphasizes:

- **Democratic Context:** Courts should consider democratic risks, such as blind spots or systemic failures.
- **Judicial Restraint:** Deference is appropriate where there is evidence of reasoned deliberation by the legislature.
- **Proportionality and Necessity:** Courts assess whether legislative measures are narrowly tailored to achieve legitimate goals without overreach.

Responsive judicial review

1. Introduction to Legitimacy in Judicial Review

Judicial review often faces critiques of illegitimacy, particularly accusations of "judicial activism." These critiques encompass several claims:

- **Judicial Overreach:** Courts invalidating legislation too frequently.
- **Contradicting Democratic Will:** Courts acting against majority preferences.
- **Excessive Creativity:** Courts reconstructing rather than adhering to established constitutional practices.

2. Responsive Judicial Review: Definition and Scope

Responsive judicial review offers a framework for judicial intervention, emphasizing **democratic dysfunctions** as a basis for action. It operates on two levels:

- **Scope:** Determines when courts should intervene to protect democratic values.
- **Intensity:** Adjusts the level of scrutiny based on the context and evidence of dysfunction.

Core Principles ® Responsive judicial review:

- **Addresses Democratic Dysfunctions:** Courts act to mitigate issues like legislative inertia, blind spots, or risks of political monopolies.
- **Balances Values and Contexts:** Decisions are calibrated to reflect both legal norms and political circumstances.

3. Types of Legitimacy in Responsive Judicial Review

Legal Legitimacy

Responsive judicial review aligns with **formal legal norms** but allows flexibility in addressing:

- **Gaps in the Constitution:** Courts may infer principles (implications) to safeguard democracy.
- **Judicial Precedent:** Prior rulings guide but do not strictly constrain courts.

Sociological Legitimacy

Responsive review strengthens sociological legitimacy by fostering public trust through:

- **Reasoned Decisions:** Transparent and well-justified rulings.
- **Protection of Core Rights:** Addressing systemic risks (e.g., threats to free elections or freedom of speech).

Political Legitimacy

Responsive review gains political legitimacy by responding to urgent democratic threats:

- **Electoral or Institutional Monopoly:** Intervening against actors consolidating power to erode democratic competition.
- **Legislative Blind Spots:** Acting where legislators fail to represent marginalized groups effectively.

4. Democratic Dysfunctions and Judicial Responses

Responsive judicial review is particularly concerned with **democratic blockages**, including:

- **Electoral Monopolies:** Courts act decisively to prevent dominant parties from entrenching themselves in power.
- **Legislative Blind Spots:** These arise when laws fail to address systemic inequalities or protect vulnerable groups.
- **Burdens of Inertia:** Where legislative inaction persists, courts may step in to address pressing issues (e.g., minority rights or climate policy).

5. Calibration of Judicial Review Intensity

Responsive judicial review adjusts its intensity based on evidence of democratic dysfunction:

- **Close Scrutiny:** Applied when laws directly threaten democracy (e.g., voter suppression or viewpoint discrimination).
- **Ordinary Scrutiny:** Used for less urgent issues, provided there is evidence of recent, reasoned legislative deliberation.
- **Reduced Scrutiny:** Appropriate for laws minimally affecting rights and reflecting robust democratic processes.

Factors Influencing Calibration

1. **Evidence of Democratic Risks:** Courts assess whether laws undermine constitutional norms.
2. **Legislative Deliberation:** Judicial deference increases if lawmakers engage in meaningful debate.
3. **Urgency of Harm:** Immediate and systemic risks justify more intensive review.

Aims of Responsive Review

- **Protect Democracy:** Guard against monopolies and erosion of democratic norms.
- **Promote Accountability:** Ensure legislative processes are inclusive and deliberative.
- **Safeguard Rights:** Address blind spots and inertia to protect vulnerable groups.

Approaches to judicial review

Judicial review is the process by which courts assess the legality of laws, especially laws that might restrict constitutional rights. This balancing act is at the core of judicial review. Different countries have developed unique methods to find this balance, which has shaped their judicial landscapes and approaches to democracy.

The two primary approaches are: the **US Tiered Scrutiny System** and the **Proportionality Test** used in many other democracies. Each system has unique methods for evaluating whether laws that limit rights are justified.

A newer concept consists of **Calibrated Proportionality** – a blended approach that combines elements from both systems to provide greater flexibility. This framework adapts the scrutiny level based on the specifics of each case, giving courts more tools to assess complex legal and social issues.

The **US Tiered Scrutiny System** provides a three-layered approach to reviewing laws that might infringe on individual rights:

1. **Strict Scrutiny** is the highest level. Courts use it when fundamental rights, like free speech or equal protection, are at stake. Here, the government must show a *compelling* interest, and the law must be *narrowly* tailored to that interest.
2. **Intermediate Scrutiny** applies a middle level of rigor, often used for cases like gender discrimination. This level requires the law to have an *important* government interest and be *substantially* related to that purpose.

3. **Rational Basis Review** is the most lenient standard, typically applied when no fundamental rights or protected categories are involved. The law just needs a rational connection to a legitimate government interest.

Each tier sets a different threshold for justification, which affects how the courts assess the law's impact on rights.

The **Proportionality Test** is widely used in many democratic countries. Proportionality doesn't have preset tiers; instead, it's a four-part test designed to carefully balance rights against the law's purpose.
The **Four-Part Proportionality Test** works as follows:

1. **Legitimate Purpose** – Does the law serve a *valid public* purpose?
2. **Rational Connection** – Is there a *logical link* between the law's goals and the means used?
3. **Minimal Impairment** – Does the law limit rights *as little as possible*?
4. **Proportionality in the Strict Sense** – Do the *benefits of the law justify the costs* to individual rights?

This approach offers flexibility and allows for a case-by-case assessment. It's often seen as more adaptable than the tiered scrutiny system because it allows for a nuanced examination of the specific circumstances.

Let's compare these two approaches:

- **Tiered Scrutiny** offers clear guidelines, especially for protecting fundamental rights in the US. However, its structured tiers can sometimes be rigid and might not account for all the nuances in complex cases.
- **Proportionality**, on the other hand, is much more flexible. It considers the specifics of each case, allowing courts to balance rights and government purposes more fluidly. But with flexibility comes unpredictability – it can be hard to predict exactly how a court might apply proportionality in different situations.

Ultimately, each system has advantages and limitations. Courts worldwide sometimes blend these methods to achieve a balance that can address a wide range of modern legal challenges.

Calibrated Proportionality is a hybrid approach that combines structured scrutiny with the flexibility of proportionality.
Calibrated Proportionality adjusts the level of scrutiny based on the context, the stakes, and the potential for a law to infringe on democratic values. This approach lets courts focus more closely on cases where they suspect a law may disproportionately affect certain groups or undermine democratic principles.
This method recognizes that not all cases require the same level of review, allowing courts to adapt their analysis to suit each situation's specifics.
To see these approaches in action, let's consider a *freedom of expression* case. Imagine a law banning *all* protests in a public park:

1. **Using Tiered Scrutiny**: If the law specifically targets particular speech content, the court would apply **strict scrutiny** to determine if there's a compelling government interest and if the law is narrowly tailored. If the law is content-neutral, **intermediate scrutiny** might apply, evaluating if the law is substantially related to an important government interest.
2. **Using Proportionality**: Courts would look at the law's purpose, then assess if it reasonably balances the right to free expression with other interests. They'd also check if there are less restrictive ways to achieve the same goal.
3. **Using Calibrated Proportionality**: If the law disproportionately impacts certain groups, courts might increase scrutiny, even beyond proportionality.

This example shows how different systems might reach similar results but use distinct reasoning based on each method's principles.

Laws that seem neutral can sometimes have hidden, disproportionate effects on certain groups. These are called **democratic blind spots**.
Courts using **Calibrated Proportionality** can respond to these blind spots by applying heightened scrutiny when laws may unintentionally harm democratic values or exclude certain communities. This ensures laws align with both democratic principles and equitable outcomes, helping courts maintain fair representation and prevent unintentional bias.

Let's apply these approaches to *affirmative action* – a policy aimed at improving equality but which involves differential treatment:

1. **In the US**, courts apply strict scrutiny, meaning affirmative action is allowed only when it addresses proven past discrimination.
2. **In countries like Canada or South Africa**, proportionality allows a broader use of affirmative action, based on the idea that equity sometimes requires proactive measures.
3. **Calibrated Proportionality** enables courts to support affirmative action when it's carefully designed, balancing the need for equality with limits on government power to avoid misuse.

This case shows how different approaches influence the acceptability and design of affirmative action policies.

Legislative intent is a central consideration in judicial review.

- **In Tiered Scrutiny**, intent is essential; courts examine whether a law was meant to discriminate.

In Proportionality and **Calibrated Proportionality**, the emphasis often shifts to impact, ensuring that a law's real-world effects align with democratic and equality principles. By focusing on both intent and impact, these approaches enable courts to better understand how laws affect citizens and protect democratic integrity. This focus on impact helps address cases where seemingly neutral laws disproportionately harm certain groups, protecting democratic values through more attentive judicial oversight.

This interpretative power underscores a dynamic tension, as the judiciary often corrects or reinterprets legislative actions to better fit democratic values.
The legislative and judiciary branches have an interdependent relationship where each respects the other's domain but intervenes when necessary to ensure laws align with constitutional and democratic principles.

Separate Opinions

The concept of *separate opinions* reflects the tension between collective decision-making and individual judicial reasoning in constitutional justice. A separate opinion is a public expression of disagreement, or an alternative perspective provided by one or more judges on the reasoning or outcome of a court's decision. These opinions are explicitly attributed to their authors and are officially published, ensuring transparency in judicial deliberations.

Separate opinions are categorized into **dissenting opinions** – where judges disagree entirely with the court's decision – and **concurring opinions**, in which judges agree with the final outcome but not with the majority's reasoning. This practice enriches legal discourse by offering diverse perspectives, contributing to the evolution of case law and the refinement of legal reasoning.

Concurring opinions are sometimes so different from the majority one that some could consider it dissenting as well.

Historical Origins of Separate Opinions

The practice of separate opinions has evolved through three distinct stages, deeply rooted in legal traditions:

1. **The Common Law Tradition**
   In the early common law systems, courts employed the *seriatim* practice, where each judge independently wrote and published their opinion without prior deliberation. This approach was particularly prevalent in England, emphasizing judicial independence and impartiality. It also ensured transparency and accountability, as each judge was directly responsible for their statements.
2. **Unified Court Opinions**
   During the tenure of Chief Justice **Mansfield** in England (1756–1788) and Chief Justice **Marshall** in the United States (1801–1835), courts transitioned to issuing a single, unified opinion. This shift aimed to strengthen the court's authority and prevent fragmentation, which could undermine public confidence in judicial decisions. Debate and compromise became integral to decision-making, ensuring a collective voice.
3. **The Balancing Approach**
   Modern judicial systems strive to balance the independence of judges with the court's unity. This approach seeks to combine the benefits of transparency and individual accountability with the need for authoritative, cohesive judgments.

So they started to publish both a unified opinion along with dissenting and concurring ones.

Types of Judicial Opinions and Their Characteristics

1. Seriatim Opinions

- **Definition**: Each judge writes and publishes a separate opinion, independently expressing their reasoning.
- **Key Features**:
  - No official synthesis of the court's final decision; the outcome is deduced from the aggregate of individual opinions.
  - Reflects a lack of collegiality, emphasizing the individuality of judges.
- **Historical Example**: Common in 18th-century English courts, where each judge explained their vote individually.

2. Majority Opinions

- **Definition**: A decision supported by more than half of the judges, forming the majority view.
- **Key Features**:
  - The court issues a unified majority opinion, representing the position of most judges.
  - Separate opinions (concurring or dissenting) are allowed but do not impact the clarity of the final judgment.
  - Demonstrates a higher degree of unity compared to plurality opinions.
- **Example**: In the U.S. Supreme Court, a case with five out of nine justices agreeing on both the outcome and reasoning produces a majority opinion.

3. Plurality Opinions

- **Definition**: A decision where no single opinion garners the majority of judges' support, but one opinion receives more support than any other.
- **Key Features**:
  - The plurality opinion decides the case but does not have majority backing for its reasoning.
  - Other judges may issue concurring opinions agreeing with the outcome but offering different rationales.
  - This often results in fragmented reasoning, making it harder to identify the court's clear stance.
- **Example**: In the U.S., *Rapanos v. United States* (2006) resulted in a plurality opinion, with no majority agreeing on a single rationale for the outcome.

Key Difference Between Majority and Plurality:

- **Majority Opinion**: Unified reasoning with more than half the judges agreeing.

- **Plurality Opinion**: Fragmented reasoning, where the lead opinion has less than majority support for its rationale.

4. Per Curiam

- **Definition**: "Per curiam" means "by the court" and refers to an opinion attributed collectively to the court rather than a specific judge.
- **Key Features**:
  - Anonymous and represents the unified voice of the court.
  - Common for brief, straightforward, or uncontested decisions.
  - Less frequent in divisive cases, where separate opinions are more likely.
- **Example**: *Bush v. Gore* (2000) was issued per curiam, reflecting the court's collective stance.

5. Single Majority Opinion (Italian Style)

- **Definition**: A model emphasizing collegiality, where the court's decision is unified but written by a single judge (often the reporting judge or president).
- **Key Features**:
  - The opinion reflects the majority's view but is drafted by one judge, ensuring a unified rationale.
  - Separate opinions (dissenting or concurring) are allowed but play a limited role or are not formally published.
  - Balances institutional unity with individual judicial contributions.
- **Example**: The Italian Constitutional Court follows this model, where the reporting judge drafts the court's reasoning and presents it as the majority decision.

6. Single Per Curiam (Fully Collegial)

- **Definition**: The most collegial model, where the court speaks with one voice, without separate or dissenting opinions.
- **Key Features**:
  - Reflects complete unanimity, with all judges adhering to a single, collective opinion.
  - No concurring or dissenting opinions are allowed, ensuring institutional unity.
- **Example**: Rare but found in landmark decisions of international courts or in jurisdictions prioritizing collective authority, such as some decisions of the European Court of Justice.

Comparison Table: Majority, Plurality, and Other Models

Model	Collegiality	Transparency	Flexibility
Seriatim	Lowest	High (individual reasoning visible)	High (judges act independently)

Majority	High (unified reasoning)	Medium-High (clear rationale)	Medium (allows dissent)
Plurality	Medium (outcome unified, reasoning fragmented)	Medium (rationale unclear)	Medium (allows multiple rationales)
Per Curiam	Medium-High (anonymous)	Medium (dissent allowed)	High (flexible for simple cases)
Single Majority	High (unified decision)	Medium-Low (limited dissent)	Medium (promotes unity)
Single Per Curiam	Highest	Lowest (no dissent allowed)	Low (requires full consensus)

Practical Applications

- **Majority Opinion**: Best for ensuring a clear rationale, widely used in systems like the U.S. Supreme Court.
- **Plurality Opinion**: Reflects fragmented courts, common in contentious cases with diverging rationales.
- **Per Curiam**: Ideal for simple or uncontested cases, or when anonymity is preferred.
- **Single Majority (Italian Style)**: Balances institutional unity with limited room for individual dissent, suitable for systems like Italy.
- **Single Per Curiam**: Demonstrates full unanimity, used in contexts requiring strong institutional authority.

Comparative Insights: Separate Opinions Across Jurisdictions

The adoption and regulation of separate opinions vary widely across legal systems, influenced by historical, cultural, and institutional factors:

1. **Common Law Systems**
    a. **United Kingdom**: The UK continues the *seriatim* tradition but has evolved to allow prior discussions among judges. While individual opinions are published, the majority opinion is clearly identified, preserving institutional coherence. Despite each judge having the right to express their own opinion (seriatim), in many cases, they tend to endorse the opinion of another judge with whom they agree.
    b. **United States**: Separate opinions are integral to the U.S. Supreme Court's practice, fostering robust legal debate and transparency. There is a court opinion, but judges can publish separate opinions.
        i. In the US, justices seem to participate in the public life, since their confrontation is shared, which does not happen in Italy.
2. **Civil Law Systems**

a. **Germany**: Separate opinions (*Sondervotum*) are regulated by a 1970 federal law, not the constitution, so they can be issued only by the federal constitutional court, not by ordinary courts. While they are moderately used, critics argue they risk diluting the court's unity and authority. Judges may also reference and adhere to another judge's opinion (*Anscluβvoten*), demonstrating collegiality.
    i. Main criticism: risk of fragmentation of court's authority.
b. **Spain**: The Spanish Constitution explicitly guarantees separate opinions (*voto particular*), applicable in both constitutional and ordinary courts. These opinions are particularly frequent in cases involving state-regional relations.
    i. Main criticism: risk of politicization.

3. **Other European Courts**
    a. Countries like Finland and Lithuania introduced dissent mechanisms through constitutional reforms, reflecting a desire to modernize their judicial processes without risking excessive fragmentation.
    b. Conversely, nations like Italy and Belgium prohibit separate opinions, emphasizing the collective authority of their courts.
    c. In countries like Greece, Portugal the possibility to dissent has existed since the entry in force of the Constitution (but it has never been used in a radical way like in the US).

The Italian Perspective

In Italy, the prohibition of separate opinions stems from a commitment to judicial unity and clarity. However, the topic has sparked significant debate:

- **1993**: at a study seminar organized by the Constitutional Court they discussed the pros and cons and in which form to implement them.
- **1997**: A proposed constitutional amendment by the *D'Alema Bicameral Commission* suggested allowing dissenting opinions but was ultimately rejected (amendment of art. **136 Cost**.).
- **2002**: The Italian Constitutional Court debated the inclusion of dissenting opinions in its integrative norms but decided against it.
    - Is it necessary to introduce **art.18-*bis* Integrative Norms** introducing dissenting opinions? No

A peculiar situation arises when the judge rapporteur – the one responsible for initially preparing and presenting the case – is different from the judge who ultimately writes the decision. This divergence could potentially signal internal dissent, as it might imply that the original rapporteur did not fully agree with the majority opinion, or the final reasoning adopted by the court (speculative). This point was raised in the **2003 Annual Report of the President of the Court** and discussed in the context of the **2008 amendments to the Integrative Norms.**

In case we decided to introduce separate opinions, which source of law should be used? Constitution does not prevent separate opinions, so it could also be used a regulation of the court, so that it can autonomously decide.

Pros and Cons of Separate Opinions

The use of **separate opinions** presents a nuanced set of advantages and challenges:

Advantages

1. **Enhanced Responsibility**: Judges are directly accountable for their views, fostering a sense of duty.
2. **Comprehensive Reasoning**: Divergent opinions enrich the court's reasoning, providing a more thorough legal analysis.
3. **Transparency**: The publication of separate opinions increases public trust in judicial processes.
4. **Dynamic Case Law**: Separate opinions often plant seeds for future legal developments, influencing majority positions over time.
5. **Positive systemic consequences** (lawmakers, ordinary courts, public opinion): Someone who delivers important separate opinions, especially on social matters, might be an inspiration for the legislator.

Challenges

1. **Personalization of Decisions**: i.e. focused on the identity of judges, making them less autonomous and more political. Individual opinions may lead to perceptions of bias or partisanship.
2. **Slower Processes**: Crafting multiple opinions can delay judgments.
3. **Fragmentation Risks**: Well-supported divergent views may weaken the court's authority and coherence.
4. **Litigation Increases**: Dissenting opinions might encourage further legal disputes, complicating case resolution. Lack of a final and clear decision.
5. **Negative consequences on ordinary judges and increase of litigation**, having negative systemic consequences, since a dissenting opinion may be used in a litigation.
6. **Damaging for the reputation and the political authority of the court**: if a judge publicly criticises their colleagues.
7. **There may be discretion with regards to the dialogue** and discussion among justices with opposite views, who might decide not to share their opinions.

Debate on separate opinions in the Italian Constitutional Court

Views from various legal scholars. Below is a summary of the main points:

In Favor of Separate Opinions

1. Costantino Mortati:

   a. Believed the Italian Constitutional Court had gained enough prestige to make secrecy obsolete.
   b. Argued that dissenting opinions could:
      a. Deepen case analysis and enhance reasoning.
      b. Provide clarity for future legislative action and legal evolution.
      c. Adapt constitutional principles to societal transformations.
      d. Rejected fears that separate opinions would compromise judges' independence, citing robust safeguards (e.g., nomination rules and no reappointments).
2. Giuseppe Branca:
   a. Argued that dissenting opinions were compatible with collegiality and could hold judges accountable, especially in controversial cases.
3. Francesco Paolo Casavola:
   a. Saw dissent as a "peaceful search for the right decision" that could counter public indifference toward the Court.
4. Sabino Cassese:
   a. Proposed a phased introduction of separate opinions, arguing they would enrich public debate and constitutional discourse.
5. Gaetano Silvestri:
   a. Believed dissenting opinions could refine majority reasoning and enhance transparency, suggesting their adoption through internal Court rules or legislation.

Against Separate Opinions

1. Gustavo Zagrebelsky:
   b. Initially attempted to integrate diverse views into single judgments but later opposed separate opinions.
   c. Feared they could lead to judges seeking public or political attention, undermining collegiality and the Court's pluralistic essence.
2. Granata and Modugno:
   a. Expressed concerns about undermining the principle of collegiality, which ensures collective decision-making and institutional legitimacy.
3. Sarah Harding:
   a. Highlighted the uniqueness of the Italian system, where collegiality strengthens the Court's authority and legitimacy.
   b. Argued that introducing separate opinions might not necessarily enhance internal or external dialogue.

The Practice of Using Foreign Precedents

- **Core Idea**: Constitutional judges occasionally reference foreign case law to support their decisions, but this practice remains limited and uneven across jurisdictions.
- **Key Motivations**:
  - Strengthening a legal argument or decision by showcasing international consensus (especially in human rights cases).
  - Addressing "*hard cases*," such as euthanasia, freedom of expression, or terrorism, which require balancing societal values and legal principles.
  - Learning from similar legal systems to address new challenges (e.g., Canada's reliance on U.S. First Amendment cases for free speech rulings).

Types of Foreign Precedent Citations

We might classify citations based on their purpose and the depth of engagement with the foreign precedent. Below are the key categories:

1. *Ad Adiuvandum* (To Assist or Illustrate)

- **Purpose**: Foreign precedents are used to provide a comparative framework or showcase similar rulings elsewhere. These citations serve as auxiliary references to broaden the scope of judicial reasoning.
- **Characteristics**:
  - Cited precedents are not discussed in detail.
  - They help illustrate potential solutions without direct application.
- **Example**: The South African Constitutional Court frequently uses foreign cases at the initial stage of reasoning, not to emulate them, but to recognize global practices.

2. *Ad Confirmandum* (To Confirm or Reinforce)

- **Purpose**: These citations serve to strengthen and legitimize a decision, showing alignment with established practices in other jurisdictions.
- **Characteristics**:
  - Precedents are cited briefly, often without a detailed analysis of their context.
  - Common in cases where courts wish to reinforce their interpretation with external validation.
- **Example**: German courts occasionally use foreign precedents in constitutional matters to reinforce their reasoning without engaging deeply with the foreign judgment.

3. *Ad Persuadendum* (To Persuade)

- **Purpose**: Often found in dissenting or concurring opinions, these citations aim to persuade other judges or public audiences by highlighting foreign solutions to analogous issues.
- **Characteristics**:
  - Cited precedents are carefully selected to advocate a particular viewpoint.
- **Example**: The use of European and Canadian jurisprudence to argue for expanded rights in minority opinions in South African and Irish courts.

4. *Ad Solvendum* (To Solve or Resolve)

- **Purpose**: Foreign precedents are employed directly to address a novel or complex legal issue where domestic jurisprudence offers limited guidance.
- **Characteristics**:
  - Involves a deeper analysis of the foreign precedent.
  - Typically appears in "hard cases" involving emerging rights or socio-political complexities.
- **Example**: The proportionality test, derived from German and Canadian courts, has been adopted globally to balance competing rights.

5. *Ad Opponendum* (To Challenge or Critique)

- **Purpose**: Courts use foreign precedents to critique or distinguish their domestic decisions from foreign interpretations.
- **Characteristics**:
  - Precedents are cited to highlight differences or incompatibilities with local laws.
- **Example**: The U.S. Supreme Court occasionally references foreign precedents to explain why certain international principles are unsuitable for American constitutional interpretation.

6. *Ad Dialogandum* (To Engage in Dialogue)

- **Purpose**: This form aims to foster a judicial conversation across jurisdictions, particularly on global issues like human rights or climate change.
- **Characteristics**:
  - Indicates a deliberate engagement with foreign jurisprudence as part of a "global judicial dialogue."
- **Example**: The Kenyan and South African courts' references to each other's human rights jurisprudence reflect an effort to create horizontal dialogues.

7. Cherry-Picking (Selective Citations)

- **Purpose**: Strategic, selective use of foreign precedents to support pre-determined outcomes without a comprehensive comparative analysis.
- **Characteristics**:
  - Precedents are cited out of context or in isolation.
  - Criticized as undermining the integrity of judicial reasoning.
- **Example**: Hungarian courts have selectively cited German precedents on constitutional identity to justify limitations on rights.

Observations

- **Common Trends**:
  - Many courts, especially those in civil law systems, use foreign precedents sparingly, often as ad adiuvandum or ad confirmandum.
  - Courts in common law traditions (e.g., South Africa, Canada) engage more extensively, employing foreign precedents in diverse ways.
- **Challenges**:
  - A lack of systematic methodology in selecting foreign precedents.
  - Implicit citations, where judges are influenced by foreign sources but do not explicitly acknowledge them, remain hard to detect.

Patterns in Citation Across Courts

Courts differ significantly in their openness to foreign jurisprudence:

- **Frequent Users**: Courts from common law systems like Canada, Australia, and South Africa often reference foreign precedents, especially in human rights cases.
- **Rare or Non-Users**: Civil law countries (e.g., Germany, Austria) and some major common law jurisdictions (e.g., the U.S. Supreme Court) rarely cite foreign law explicitly. In the U.S., this stems partly from judicial nationalism and fears of undermining sovereignty.
- **Emerging Trends**: Courts in Latin America and the Global South (e.g., Brazil, Colombia, India) increasingly engage in "judicial borrowing," often reflecting their focus on socio-economic rights.

The **most cited courts** in constitutional jurisprudence include:

1. **Supreme Court of Canada**
   - Frequently cited for its progressive jurisprudence on issues like proportionality, human rights, and multiculturalism.
   - Known for its influence on other common law and mixed-system jurisdictions, including South Africa and India.
2. **German Federal Constitutional Court (BVerfG)**
   - Widely referenced for its pioneering use of proportionality and robust decisions on human dignity and constitutional identity.
   - Its decisions are influential across Europe and in constitutional debates globally.
3. **U.S. Supreme Court**
   - Often cited, especially for its foundational rulings on freedom of expression, equality, and judicial review.
   - However, its influence is sometimes controversial due to differences in constitutional contexts.
4. **European Court of Human Rights (ECtHR)**
   - Frequently referenced for its jurisprudence on proportionality and human rights protections, particularly in European and global contexts.
5. **South African Constitutional Court**
   - Cited for its activist approach to socio-economic rights and post-apartheid jurisprudence, influencing courts in other Global South countries.
6. **Supreme Court of India**
   - Referenced for its innovative interpretations of constitutional rights, including privacy, environmental law, and socio-economic rights.

Empirical Research Challenges

- **Data Collection**: Identifying explicit and implicit influences is difficult. Implicit use of foreign law often goes uncited but may arise from judges' educational backgrounds or comparative legal research by their clerks.
- **Quantitative Findings**:
  - Some courts exhibit increasing citation rates (e.g., High Court of Australia saw a rise in foreign precedent use from 51% to 78% of constitutional cases in recent decades).
  - Other courts, like South Africa's Constitutional Court, show a decline, likely due to the development of robust domestic jurisprudence.

Theoretical and Methodological Debates

- **Judicial Dialogue vs. Pragmatism**: The idea of a "global judicial dialogue" is often overstated. Most courts use foreign precedents pragmatically to reinforce their reasoning rather than to engage in true inter-court conversations.
- **Criticisms**:
  - "Cherry-picking" precedents to justify pre-existing decisions undermines the integrity of the comparative method.
  - Limited resources and training in comparative law constrain many courts, particularly in civil law countries.

Historical and Contemporary Context

- **Golden Age of Comparative Law (1990s)**: The post-Cold War era saw the spread of democratic constitutionalism, with courts borrowing ideas during the drafting of new constitutions and adjudicating new rights.
- **Democratic Backsliding (21st Century)**: In some countries (e.g., Hungary, Russia), foreign precedents are misused to justify authoritarian policies under the guise of constitutional identity or sovereignty.

Regional and Global Trends

- **Global South**: Courts in regions like Latin America and Africa are fostering a constitutionalism that prioritizes socio-economic rights, engaging more with international law and precedents.
- **Europe**: Mixed trends emerge, with some courts (e.g., Germany, Slovenia) showing modest increases in citation, while others (e.g., France) avoid referencing foreign case law altogether.
- **Technological Impact**: Digital access has made comparative legal materials more accessible, though its effect on actual citations remains unclear.

Case Studies Highlighted

- **Italy (2018)**: Borrowed Canada's approach to assisted suicide, suspending a ruling to give the legislature time to act.
- **South Africa**: Cited foreign precedents in cases involving the death penalty and freedom of expression but saw declining citation rates overall.
- **India**: Frequently references foreign precedents, especially on proportionality and privacy rights, showcasing a blend of global influence and local adaptation.

Future of Comparative Constitutionalism

- **Challenges**:
  - Balancing national sovereignty with the benefits of judicial cross-fertilization.
  - Developing standardized methodologies for studying judicial borrowing.
- **Recommendations**:
  - Training judges in comparative law and creating specialized research departments to support this practice.
  - Encouraging transparent citation practices to mitigate accusations of selective use.

Methods of Constitutional Interpretation in Italy

The Italian Constitutional Court's interpretative methods represent a sophisticated, multi-layered approach that integrates textual, systematic, historical, and comparative reasoning to ensure coherence and adaptability of constitutional norms.

1. The **Syncretic Approach to Constitutional Interpretation**

The Italian Constitutional Court adopts a **syncretic approach**, integrating multiple interpretative methods to ensure the Constitution's systemic unity. This strategy avoids fragmented or isolated readings, treating constitutional norms as interdependent within the broader legal and societal context.

Key Components of Syncretic Interpretation:

1. **Textual Analysis**: Understanding the literal meaning of constitutional provisions.
2. **Historical (Originalist) Reasoning**: Analyzing the framers' intent through historical debates and prior legal frameworks.
3. **Systematic Interpretation**: Placing constitutional norms within the context of the legal order as a whole.
4. **Pragmatic Reasoning**: Adapting interpretation to contemporary societal needs and evolving practices.
5. **Comparative and Transnational Perspectives**: Drawing insights from European and international jurisprudence.
    a. Nowadays, the use of transnational law and the circulation of legal models between different constitutional systems is flourishing. The comparative method is an increasingly common tool used for interpreting domestic constitutional law.
    b. In Europe, this transjudicial constitutional dialogue often concerns methodological issues and legal reasoning more than the merits of the case. As for Italy, the Constitutional Court sometimes prepares its decisions considering foreign law. It has even organized a special unit of the Court's "study and research office" specially devoted to comparative study. However, in the texts of its judgments it typically gives only very minor importance to comparative argument among the many methods of interpretation that it uses in its syncretic approach. Moreover, the legal reasoning of the Italian Court often borrows rules and principles from European legislation and from the case law of the European Courts. In a great number of opinions, the Italian Constitutional Court offers an overview of the European principles. The Constitutional Court is wide open to the direct influence of European law, and to the indirect influence of foreign legislation. An intense circulation of legal values is active in Europe, not only through horizontal contacts among different countries but also through the mediation of supranational European institutions.

Case Study: Judgment No. 200/2006 – The **Presidential Pardon**

This judgment exemplifies the Court's integrated reasoning, addressing the President of the Republic's pardon power under **Article 87** of the Constitution.

Historical (Originalist) Interpretation:

- The Court traced the pardon's origins to the Albertine Statute (Art. 8), where it was a monarch's absolute prerogative. Under the Republic, this power was subordinated to constitutional accountability through the requirement of ministerial countersignature.
- The Constituent Assembly debates highlighted the intent to democratize this authority, aligning it with principles of ministerial responsibility and systemic coherence.

Systematic Interpretation:

- Article 87 was interpreted in conjunction with:
  - **Article 2**: The inviolability of human dignity.
  - **Article 27**: The rehabilitative role of punishment, emphasizing the pardon as a tool for exceptional humanitarian relief.

Pragmatic Adaptation:

- The Court contextualized the pardon's historical application, noting its decline in use post-1980s due to improved prison conditions, followed by a reemergence as a mechanism to address extraordinary humanitarian needs.

2. Integrated and Coherent Legal Reasoning

The Court often surpasses textualism to ensure a holistic and coherent interpretation of constitutional provisions. It examines how each norm fits into the overall constitutional system, emphasizing that individual provisions derive meaning from their interaction with the broader legal order.

Case Study: Judgment No. 1/2013 – Presidential Phone Recordings

This case revolved around phone recordings of the President of the Republic during a criminal investigation.

- **Textual Basis**: The Court began with a literal analysis of the constitutional provisions at issue.
- **Systematic and Teleological Reasoning**: It highlighted that resolving conflicts of power required a comprehensive understanding of the President's constitutional role and responsibilities. The Court applied systematic interpretation to reach its decision, linking the provisions related to the President of the Republic (particularly Article 90 of the Constitution) to the broader constitutional framework and the role of guarantee attributed to this figure.

- Article 90 of the Constitution: Establishes the President's immunity for acts carried out in the exercise of their functions, except in cases of high treason or attempts to undermine the Constitution.
- The Court connected this immunity to the need to protect the President's communications, considering them essential for the free exercise of their mandate.
- Through systematic interpretation, the Court concluded that even in the absence of a specific rule prohibiting wiretapping, the protection afforded to the President implies that such interceptions cannot be allowed.

- **Integration with International Law**: The Court referenced the ECHR to ensure conformity with international human rights principles, reinforcing the constitutional framework. The Court also referred to international principles safeguarding the independence and dignity of public officeholders. Although no explicit rule addresses this issue in international treaties, the Court cited:
  - General Principles of International Law: Recognizing the immunity of high-ranking state officials due to the nature of their functions.
  - Comparative Jurisprudence: Drawing from the practices of other constitutional democracies that grant similar protections to heads of state.

Key Principle:

- "*All provisions must be interpreted considering the Constitution*, not vice versa," reflecting the systemic and hierarchical unity of constitutional norms.

3. Proportionality and Balancing of Competing Rights

The Italian Constitutional Court employs **proportionality reasoning** as a cornerstone for resolving conflicts between fundamental rights. This involves evaluating:

1. Whether a legislative measure pursues a **legitimate aim**.
2. Whether it is **necessary** in a democratic society.
3. Whether it is **proportionate**, ensuring minimal infringement of competing rights.
4. Benefits outweighcosts.

Case Study: Judgment No. 85/2013 – Environmental Protection vs. Economic Rights

This case addressed the closure of a steel mill in Taranto, which posed severe environmental and health risks but also threatened jobs and economic activity.

1. **Conflicting Rights**:
   a. **Article 32**: Right to health and environmental safety.
   b. **Articles 4 and 41**: Right to work and economic freedom.
2. **Proportionality Analysis**:
   a. The Court assessed whether the steel mill’s operations could continue under conditions that mitigated health risks.

   b. It emphasized that no right is absolute, and that constitutional interpretation must preserve the essential core of all competing rights.
3. **Outcome**:
   The Court ordered measures to safeguard both public health and workers' rights, underscoring the necessity of balancing these principles.

N.B. Moreover, in declaring a challenged provision unconstitutional, the Court must consider the impact that such a declaration will have on other constitutional principles. The role entrusted to the Court as guardian of the Constitution in its entirety requires that it avoids situations where declaring a provision unconstitutional paradoxically results in effects that are still less compatible with the Constitution than the ones that provoked the constitutional challenge.

4. Judicial Innovation: Interpretative and Manipulative Judgments

The characteristic and distinctive forms of judicial reasoning employed in the Constitutional Court do not only result from the methods and tools of constitutional interpretation but also from the range of different kinds of decisions that it is capable of issuing. Taking into consideration this, we may understand why the Italian Constitutional Court is no longer a "negative legislator" in the Kelsenian sense but instead also exercises an explicitly positive lawmaking function.

In the incidental judicial review system, the Court has developed several types of decisions, different from the traditional categories of inadmissibility, reject or acceptance of unconstitutionality, employing interpretative and manipulative judgments to align legislation with constitutional principles without creating legal vacuums. The introduction of these new decisions was made possible by the theoretical distinction between "provision" and "norm." A provision represents a linguistic expression that mirrors the will of the body that produces a specific legal act. A "norm" is the result of a process of interpretation of the text.

Types of Judgments:

1. **Interpretative Judgments**:
   a. **Di Rigetto**: Guides the referring judge toward a constitutional interpretation, avoiding invalidation.
   b. **Di Accoglimento**: Invalidates unconstitutional interpretations, preserving legislative intent.
2. **Manipulative Judgments**:
   a. **Additive**: Declares omissions unconstitutional, requiring legislative action.
   b. **Ablative**: Removes unconstitutional provisions.
   c. **Substitutive**: Replaces invalid norms with constitutionally compliant ones.

Examples:

- **Sentenze Additive di Principio**: These judgments articulate principles for legislative reform, deferring invalidation to allow parliamentary correction.

Defensive vs. Foundational Conceptions of the Constitution

Giorgio Pino: Advocates a **foundational model**, where the constitution provides not just limits on legislation but principles and values guiding legislative and judicial actions.

Jeffrey Pojanowski: Links the **defensive model** with rule-based interpretation and formalism. While acknowledging its advantages in stability, he questions whether such an approach can adequately address the evolving nature of a **foundational constitution** like Italy's, which is inherently more dynamic and pluralistic.

1. Giorgio Pino's Perspective

Foundations of Pino's Analysis

Giorgio Pino delves into the theoretical dimensions of constitutional interpretation, focusing on how constitutional norms should be understood and applied in a pluralistic, modern legal system. He identifies a pivotal debate: whether constitutional norms should be treated as **rules**, **principles**, or **values**. This categorization profoundly influences the methods of interpretation employed by courts.

The Nature of Constitutional Norms

1. **Rules**:
    a. Defined as precise and determinate norms, rules provide clarity in their application. For example, they directly outline what is constitutionally permissible or forbidden.
    b. **Advantages**: Their determinacy limits judicial discretion, ensuring predictable outcomes.
    c. **Drawbacks**: Rules are inherently rigid and struggle to address complex or unforeseen conflicts between constitutional provisions.
    d. **Example**: A rule might explicitly forbid censorship of speech but fail to address nuanced situations involving hate speech or misinformation.
2. **Principles**:
    a. Principles are general norms expressing moral or political ideals. Unlike rules, they are flexible and adaptable, often conflicting with one another, requiring **judicial balancing** to resolve tensions.
    b. **Advantages**: Principles offer a framework for addressing the complexity of constitutional conflicts.
    c. **Drawbacks**: Their flexibility introduces judicial discretion, which may lead to variability and subjectivity.
    d. **Example**: The principle of freedom of speech (Art. 21 of the Italian Constitution) might conflict with the principle of protecting public order, necessitating a proportionality analysis.
3. **Values**:

a. Values are the most abstract category, representing ideals such as human dignity, equality, or liberty. They are often unwritten, inferred from the constitutional system or the "spirit" of the document.
b. **Advantages**: Values allow for dynamic and expansive interpretations of constitutional rights.
c. **Drawbacks**: Their abstraction risks excessive subjectivity, as they are not directly grounded in the text.
d. **Example**: Human dignity (Art. 2 of the Italian Constitution) is frequently invoked as a constitutional value that informs interpretations of other norms.

Pino's Preference for a Principle-Based Approach

Pino argues that **principles** are the most effective normative framework for constitutional interpretation in modern democracies like Italy. His reasoning includes:

1. **Flexibility and Balancing**:
   Principles provide the necessary adaptability to reconcile conflicting rights and adapt constitutional norms to evolving societal contexts. Unlike rules, they are not static, and unlike values, they remain tethered to the text and structure of the Constitution.
2. **Judicial Accountability**:
   a. Pino emphasizes the importance of **reasoned balancing**, where courts justify their decisions by explicitly weighing the principles involved.
   b. This approach ensures transparency and prevents arbitrary or unchecked judicial power.
3. **Critique of Values**:
   a. Values, while aspirational, often lead judges far from the constitutional text, risking decisions that reflect personal moral judgments rather than the collective will of society as expressed in the Constitution.

Implications for the Italian Legal System

Pino identifies the Italian Constitution as inherently favoring a principle-based approach due to its historical and structural characteristics:

1. **Embedded Pluralism**:
   a. The post-war Italian Constitution enshrines a wide range of competing rights and principles (e.g., freedom of speech, environmental protection, and economic activity).
   b. These conflicts necessitate judicial balancing rather than rigid application of rules.
2. **Dynamic Adaptation**:
   a. Italian jurisprudence often incorporates international and supranational norms, such as the ECHR, treating them as ***norma interposta*** that influence domestic interpretation.
3. **Case Example**:

a. **Judgment No. 85/2013**: The Court balanced the right to health (Art. 32) and the environment against the right to work (Art. 4) in the context of a steel mill closure. This balancing exercise exemplifies Pino's principle-based approach in action.

2. Jeffrey Pojanowski's Perspective: A Formalist and Originalist Critique

Foundations of Pojanowski's Analysis

Pojanowski critiques the principle-based approach from a formalist and originalist standpoint, arguing for stricter adherence to the constitutional text and the framers' intent. His analysis contrasts sharply with Pino's, emphasizing the risks of judicial discretion in principle-based systems.

Core Tenets of Formalism and Originalism

1. **Rule-Based Interpretation**:
   a. Pojanowski advocates for rules as the primary mechanism of constitutional interpretation, offering predictability and reducing judicial discretion.
   b. Rules are grounded in the text, providing clear boundaries for both government actions and judicial review.
2. **Originalist Fidelity**:
   a. Originalism seeks to preserve the framers' intent, ensuring that the Constitution remains a fixed guide rather than an evolving document.
   b. This approach aligns with a **defensive model** of constitutionalism, which limits government overreach without granting excessive power to unelected judges.

Critique of the Principle-Based Model

Pojanowski identifies significant issues with principle-based interpretation, particularly in systems like Italy's:

1. **Judicial Overreach**:
   a. Principles, due to their indeterminacy, allow judges to engage in extensive balancing exercises that may reflect their subjective preferences.
   b. This undermines the rule of law and risks politicizing the judiciary.
2. **Erosion of Democratic Accountability**:
   a. Pojanowski warns that shifting interpretative power from elected legislatures to unelected judges diminishes democratic legitimacy.
   b. Principle-based systems blur the line between judicial and legislative functions, particularly when courts engage in policy-making through their decisions.
3. **International Influence**:

a. The Italian system's integration of European norms, such as the ECHR, introduces external influences that may not align with domestic democratic processes.
b. Pojanowski argues that formalist methodologies better manage such tensions by adhering strictly to the constitutional text.

Comparison of Italian and American Approaches

1. **Italian Constitutionalism**:
   a. Relies heavily on principles and values, emphasizing flexibility and systemic coherence.
   b. Treats the Constitution as a **living document**, integrating international norms and adapting to societal changes.
2. **American Constitutionalism**:
   a. Prioritizes originalism and textualism, ensuring that interpretation remains anchored to the framers' intent.
   b. Resists external influences, preserving the Constitution's specificity and protecting popular sovereignty.

Pojanowski's Observations on the Italian Model

1. **Paradox of Originalism**:
   a. Originalism, though restrictive, might offer stability in a pluralistic system like Italy's.
   b. Conversely, the flexible, principle-based Italian approach could address social rights and dynamic legal challenges more effectively than the rigid American model.
2. **Practical Concerns**:
   a. Pojanowski notes that principle-based systems often rely on **proportionality reasoning**, which, while flexible, lacks the consistency and predictability of formal rule-based systems.

3. Comparing Pino and Pojanowski in Detail

Aspect	Giorgio Pino	Jeffrey Pojanowski
Interpretative Model	Principle-based, emphasizing balancing.	Rule-based, emphasizing textual fidelity.
Judicial Role	Active, resolving conflicts through reasoned balancing.	Restrained, enforcing clear constitutional rules.
Accountability	Achieved through transparent judicial reasoning.	Ensured by limiting judicial discretion.
Role of International Law	Integrated into domestic interpretation.	Viewed as potentially intrusive.

Constitutional Model	Foundational, emphasizing systemic coherence.	Defensive, emphasizing negative limits.

4. Conclusion: Bridging the Perspectives

The Italian Constitutional Court balances these tensions by employing a **dialogical approach** that integrates principles without abandoning textual anchors. By situating its jurisprudence within both domestic and international frameworks, it reflects Pino's pluralistic vision while addressing Pojanowski's concerns about judicial overreach. This dynamic interplay underscores the evolving nature of constitutional interpretation in a complex legal and societal landscape.

Case Analysis: Handyside v. United Kingdom (1976)

The European Court of Human Rights (ECtHR) judgment in **Handyside v. UK** is a landmark decision on the boundaries of **freedom of expression** under Article 10 of the ECHR. The case explores the legitimacy of restrictions imposed by national authorities to protect public morals, balancing individual rights with societal interests.

Case Background

1. **Facts of the Case**:
    a. Richard Handyside, a publisher in the UK, released *The Little Red Schoolbook*, a book aimed at young readers that discussed topics like education, sexuality, and authority in a provocative and unconventional manner.
    b. Following public complaints, British authorities deemed parts of the book obscene under the **Obscene Publications Act 1959-1964**, claiming that certain passages tended to "deprave and corrupt" its young readers.
    c. Thousands of copies were confiscated, and Handyside was convicted, fined, and ordered to destroy the seized materials.
2. **Key Legal Challenge**:
    a. Handyside argued that the confiscation of his book, the subsequent fines, and the destruction of materials violated **Article 10** of the ECHR, which guarantees the right to freedom of expression.
    b. He also invoked **Article 1 of Protocol No. 1** (protection of property), alleging that the destruction of his books unlawfully deprived him of his possessions.

Issues Before the Court

The ECtHR considered the following central questions:

1. **Legitimacy of Restricting Freedom of Expression**:

   a. Whether the UK's actions were justified under Article 10(2), which permits restrictions on freedom of expression when necessary in a democratic society for purposes such as protecting morals.
2. **Scope of the "Margin of Appreciation"**:
   a. How much discretion should member states have in determining what constitutes "*morality*" and the necessity of limiting expression.
3. **Proportionality of the Measures Taken**:
   a. Whether the measures (confiscation, fines, destruction of books) were proportionate to the legitimate aim of protecting public morals.

ECtHR's Analysis

1. Freedom of Expression (Article 10)

- **General Principles**:
  - The Court affirmed that freedom of expression is a cornerstone of democratic societies and protects not only popular or harmless ideas but also those that "offend, shock, or disturb."
  - However, Article 10(2) allows restrictions when prescribed by law and necessary to protect specific societal interests, such as public morals.
- **Application of the Margin of Appreciation**:
  - The Court recognized that concepts of morality vary significantly among member states due to cultural, historical, and societal differences.
  - National authorities are better positioned to assess what is necessary to protect morals within their societies. Therefore, the UK was granted a **wide margin of appreciation** in this case.
- **Necessity and Proportionality**:
  - The Court examined whether the measures taken by the UK were "necessary in a democratic society."
  - It acknowledged that *The Little Red Schoolbook* contained material that, while factual and informative, could be interpreted by young readers as encouraging premature sexual activity or even criminal behaviour.
  - The Court concluded that the UK's actions pursued a legitimate aim (protecting morals) and were not disproportionate given the potential harm to vulnerable groups.

2. Protection of Property (Article 1, Protocol No. 1)

- Handyside argued that the confiscation and destruction of his books violated his right to peaceful enjoyment of possessions.
- The Court held that the interference was lawful and aimed at protecting public morals, a legitimate public interest under Article 1.
- It found no violation, reasoning that states have the right to regulate property use to safeguard societal interests.

Key Findings on Proportionality

- The **proportionality test** was central to the Court's reasoning:

- **Legitimate Aim**: The protection of public morals, especially for children, was a valid objective under Article 10(2).
- **Necessity**: The confiscation and destruction of the book were deemed necessary to prevent exposure of inappropriate material to young readers.
- **Least Restrictive Means**: The Court considered alternative measures, such as limiting sales to adults, but concluded these would have been ineffective given the book's target audience (adolescents).

ECtHR's Decision

1. **Article 10**:
   a. The Court ruled that the UK's actions did not violate Handyside's freedom of expression. The measures were justified under Article 10(2) as necessary to protect public morals.
   b. It emphasized that while freedom of expression is vital, it carries "*duties and responsibilities*," especially concerning vulnerable audiences like children.
2. **Article 1, Protocol No. 1**:
   a. The Court found no violation, as the interference with Handyside's property rights was lawful, proportionate, and pursued a legitimate aim.
3. **Other Claims (Articles 14 and 18)**:
   a. Handyside alleged discrimination (Article 14) and improper motives behind the restrictions (Article 18). The Court rejected these claims, finding no evidence of bias or ulterior intent.

Significance of the Case

1. **Establishing the Margin of Appreciation Doctrine**:
   a. The judgment solidified the doctrine, granting member states discretion to interpret and enforce morality-related laws.
   b. The Court clarified that the margin of appreciation is not unlimited and must align with the proportionality principle.
2. **Balancing Freedom and Societal Interests**:
   a. Handyside v. UK demonstrated the ECtHR's commitment to balancing individual freedoms with societal protections, particularly for vulnerable groups like children.
3. **Impact on Future Jurisprudence**:
   a. This case has been cited in numerous subsequent rulings to justify national variations in restricting freedom of expression, particularly concerning morality, public order, and national security.

Critiques and Controversies

1. **Overreliance on National Discretion**:

   a. Critics argue that the wide margin of appreciation granted to the UK risks undermining the universality of human rights by deferring excessively to local standards.
2. **Chilling Effect on Expression**:
   a. The judgment has been criticized for potentially discouraging publishers and authors from tackling controversial topics, fearing similar legal repercussions.
3. **Insufficient Scrutiny of Proportionality**:
   a. Some scholars suggest that the Court did not adequately evaluate whether less restrictive measures, such as content warnings or age restrictions, could have achieved the same aims without suppressing expression.

Access to the Constitutional Court

Introduction: The Role of Constitutional Courts

Constitutional courts are the guardians of constitutional supremacy, guarantor of human rights, ensuring laws and governmental actions adhere to the principles enshrined in a nation's fundamental charter.

Access to these courts can be classified into:

1. **Direct vs. Indirect Access**:
   a. **Direct Access**: Individuals, groups, or institutions can challenge the constitutionality of a law directly before the court.
   b. **Indirect Access**: Constitutional questions arise incidentally in ongoing legal cases and are referred by judges.
2. **In Abstracto vs. In Concreto Review**:
   a. **In Abstracto**: The court reviews a law's constitutionality independently of a specific case.
   b. **In Concreto**: Triggered by actual disputes where a law's application raises constitutional concerns.

The Italian Constitutional Court exemplifies an **indirect, in concreto review system**.

Mechanisms of Access in the Italian System

The Italian Constitutional Court provides three primary avenues for review:

1. **Incidental Judicial Review**:
   a. It was decided by the constitutional law 1/1948.
   b. Arises during ongoing legal proceedings when judges identify doubts about a law's constitutionality.
   c. Judges suspend the trial and refer the constitutional question to the Court for a ruling.
2. **Direct Judicial Review**:

   a. Used by the **Government** or **Regions** to challenge actions by one another that exceed their constitutionally assigned powers (for regions there must also be damage).
   b. Ensures a balance between regional autonomy and central authority.
3. **Conflicts of Attributions**:
   a. Resolves disputes between branches or levels of government over who holds the authority to perform a specific act.

These mechanisms reflect the Court's dual mandate: protecting fundamental rights and maintaining institutional balance within the constitutional framework.

Comparative Analysis: The Spanish **System**

The Spanish Constitutional Court operates differently, allowing **direct access** and **abstract review,** which comprehends **individual complaints**:

- *Recurso de inconstitucionalidad* – This mechanism of abstract review is reserved exclusively for certain political or institutional bodies with legal standing. It enables them to challenge the constitutionality of laws or normative acts.

- *Recurso de amparo* – A more recent mechanism, *subsidiary in nature*, meaning that individuals can resort to it only as a last measure (*ultima ratio*). It focuses specifically on the protection of fundamental rights and freedoms guaranteed by the Spanish Constitution.

Direct individual access and abstract review bring both theoretical advantages and significant practical challenges:

1. **Strengths of Direct Access**:
   a. Wide access to the tribunal.
   b. Enhances individual empowerment by enabling citizens to directly challenge constitutional violations. Citizens can be directly involved and be an active subject, which can make constitutional justice more responsive.
   c. Demonstrates a commitment to protecting fundamental rights.
2. **Benefits of Abstract Challenges**:
   a. Pre-emptive Constitutional Review: Abstract challenges allow the Court to address constitutional issues in laws before they affect individuals in concrete cases, thus ensuring broader legislative compliance with the Constitution.
   b. Legal Uniformity: They also enhance legal certainty by resolving potential constitutional conflicts early, which avoids inconsistent interpretations in lower courts.
3. **Challenges in Practice**:
   a. **Overburdened Caseload**: The Spanish Court receives a vast number of individual complaints, many of which are dismissed without substantial review

due to limited judicial capacity, with the risk for the guarantee of fundamental rights of being deprived of any substance.

b. **Efficiency Issues**: The backlog of cases delays justice, diminishing the practical utility of direct access.
c. **Judicial Discretion**: The Court's selective case review process risks excessive judicial discretion and politicization, even if the tribunal deals only with legal aspects. However, decisions to dismiss cases without hearing them undermine the promise of accessible constitutional justice.
d. **Political Instrumentalization**: Abstract challenges may be used by political actors to contest legislation on strategic or partisan grounds, rather than on genuine constitutional concerns.
e. **Judicial Activism**: The ability to review abstract challenges can increase the Court's involvement in the legislative process, which some critics argue risks the Court becoming overly activist and stepping into policy areas.

The Italian system avoids these pitfalls by filtering constitutional questions through ordinary judges, ensuring that only substantial and relevant issues reach the Constitutional Court.

Strengths of the Italian Constitutional Court

The Italian model balances accessibility, efficiency, and rigorous constitutional oversight through several key features:

1. **Efficient Adjudication**:
    a. **Timely Review**: The Court maintains a manageable workload by relying on incidental review and preliminary filtering by ordinary judges.
        i. **Timing Issues**: The Italian Court has been criticized for its inability to intervene promptly in emergency situations, unlike the German system, which has mechanisms to address urgent constitutional matters in a timely fashion.
    b. **Provisional Remedies**: Ordinary judges can issue urgent measures to protect rights while awaiting the Court's decision, ensuring individuals are not left unprotected during delays.

    Case Example:

    c. **Judgment 212/1997 (Penitentiary Law)**: Prisoners lacked a formal mechanism to challenge rights violations by the prison administration. A supervisory judge referred the issue to the Court, which allowed the referral, recognizing it as the only available remedy. This case highlights the Court's flexibility in addressing gaps in constitutional protection.

2. **Collegial Decision-Making**:
    a. All 15 judges deliberate collectively, ensuring consistency and avoiding fragmentation of jurisprudence.
    b. Unlike systems in Spain or Germany, the Italian Court does not divide into panels or sections, maintaining uniformity in its rulings.

3. **Integration with the European Human Rights System**:
    a. Italian citizens can directly petition the **European Court of Human Rights (ECtHR)** under Protocol 11, which removed intermediary stages. This dual-layered protection reduces the need for direct individual access to the Constitutional Court, avoiding systemic overload.

Italy compensates for the lack of direct individual access by providing alternative protections for individual rights. Citizens can appeal to the **European Court of Human Rights (ECHR)** or the **Court of Justice of the European Union (CJEU)**. Furthermore, ordinary courts can directly disapply domestic laws that conflict with EU law.

Scholarly Perspectives: Insights on the Italian Model

1. **Mauro Cappelletti's Analysis**:
    a. Cappelletti emphasized the **completeness** of the Italian system. The incidental review mechanism prevents gaps in constitutional protection by ensuring every relevant case can reach the Court if deemed significant by the referring judge.
    b. He highlighted the growing **constitutional awareness** of ordinary judges. Over time, Italian courts have routinely interpreted laws in light of the Constitution, reducing the Constitutional Court's burden.
        i. "*All courts are to some extent constitutional courts, empowered – and obliged – to apply the Constitution when interpreting the law*."
    c. Cappelletti also stated that the understandable desire of every citizen to be able to object directly and without intermediation before the Italian Constitutional Court could be satisfied by the possibility of applying directly to the European Court of Human Rights. This second argument became even more convincing when, ten years after his comments, **Protocol 11** to the ECHR altered the system governing appeals by individuals to the ECtHR by removing the intermediary stage of the committee.

    Example:

    d. **Judgment 1/2014 (Electoral Law)**: The Court invalidated portions of Italy's electoral laws, demonstrating its capacity to address politically sensitive and systemic issues.

        Before Judgment No. 1 of 2014, there were significant doubts about the possibility of subjecting an electoral law to constitutional review, as it was considered a regulation with "direct effect." This meant that the electoral law produced immediate effects within the legal system, without the need for specific implementing acts that could form the basis for a judicial dispute. With this judgment, the Court clarified that:

        1. Electoral laws are not exempt from constitutional review, as they regulate a fundamental aspect of democratic life.

2. Access to the Court can occur through the mechanism of incidental review (Article 134 of the Constitution), initiated by a judge who deems a question of constitutionality relevant and not manifestly unfounded.

In particular, the Court of Cassation had admitted an appeal filed by a citizen contesting the violation of their electoral rights due to the application of the *Porcellum*. This appeal enabled the activation of constitutional review by the Court.

3. **Paladin's Comparative Criticism**:
   a. Paladin argued that direct access systems, like those in Spain and Germany, often result in **frivolous complaints**. These cases are summarily dismissed, leaving individuals without meaningful recourse despite theoretical access.
   b. He cautioned against introducing similar mechanisms in Italy, noting that the existing system's efficiency and effectiveness could be compromised by an influx of direct complaints.

Paladin, on the other hand, revisited his position drawing on the experiences of other European legal systems that provide for the possibility of direct complaints. According to the author, the need for caution results from the fact that in Spain and Germany the number of complaints is "innumerable, and in the vast majority of cases are not accepted". The situations in which the mechanism has proven its worth in those countries are, according to Paladin, "isolated, as against on the other hand a plethora of disputes which the court tends to dismiss in a summary manner, with the result that the guarantee of fundamental rights, which may apparently have been emphasised, in actual fact ends up being deprived of any substance".

Case Studies Illustrating the Court's Functionality

1. **Judgment 212/1997 (Prisoners' Rights)**:
   a. Penitentiary law was previously immune to challenge, since there was no court to which prisoners could apply.
      i. The reference of the "supervisory judge" was the only remedy, but before this judgement this procedure was not considered a proceeding through which it was possible to refer a question to the constitutional court.
      ii. After this judgement, also this procedure was deemed to have the status of "proceeding" necessary to go before the constitutional court.
   b. Highlighted the Court's adaptability in recognizing unconventional referrals to address systemic rights violations.
   c. Strengthened the notion that the Italian system provides comprehensive remedies even in atypical situations.
2. **Judgment 1/2014 (Electoral Law)**:
   a. Addressed the unconstitutionality of certain electoral provisions, reinforcing democratic principles.

b. Demonstrated the Court's ability to navigate complex political-legal questions with impartiality.

Potential Reforms and Risks

Introducing direct individual access to the Italian Constitutional Court, as seen in Spain or Germany, might appear democratically appealing but poses significant risks:

1. **Overloading the System**: An influx of direct complaints could create backlogs, reducing the Court's ability to deliver timely decisions.
2. **Selective Adjudication**: Forced case selection could lead to perceptions of bias and undermine trust in the Court's impartiality.
3. **Erosion of Current Strengths**: The collegial and centralized nature of the Court's work, as well as its efficiency, could be jeopardized by increased workloads.

Conclusion: Preserving a Balanced System

The Italian Constitutional Court exemplifies a well-functioning model of constitutional justice. Its strengths include:

- **Timely and Comprehensive Review**: Ensuring manageable caseloads while addressing all referred cases.
- **Decentralized Preliminary Scrutiny**: Filtering by ordinary judges prevents frivolous or unsubstantiated cases from reaching the Court.
- **Robust Integration**: Synergy with the European Court of Human Rights complements domestic protections.

Introducing direct individual access risks disrupting this balance, as seen in comparative systems. The Italian model has successfully upheld constitutional integrity for over seven decades, providing both efficient and effective protection of fundamental rights. Maintaining this structure ensures that the Court remains a cornerstone of Italy's constitutional democracy.

N.B. The current system does not allow individuals to directly challenge the constitutionality of laws, requiring the intermediation of ordinary courts. This creates significant limitations, as courts sometimes dismiss valid constitutional questions as manifestly unfounded.
This is particularly problematic when fundamental rights are at risk. For example, if a law criminalizes homosexuality, it exposes individuals to prosecution without providing a clear path to challenge its constitutionality, since it could only be done before the same criminal court prosecuting them. Similarly, in the Cappato case, the issue of assisted suicide only reached the Constitutional Court because Cappato deliberately violated the law, risking his personal freedom. Civil courts would not address the matter without a prior violation.
These examples reveal systemic shortcomings in protecting fundamental rights. While the Constitutional Court has permitted some creative avenues, such as in electoral law cases, these exceptions are insufficient.

The Courts and the Digital Environment

Introduction: The Paradigm Shift to Digital Constitutionalism

Historically rooted in protecting individual freedoms and limiting state powers, constitutionalism now faces a transformative shift as private actors – especially digital platforms – assume roles traditionally associated with public authorities. Therefore, the debate is no longer locked into the field of private or competition law but is shifting to a public law perspective, and precisely a digital constitutional angle. From a constitutional law perspective, the notion of power has traditionally been vested in public authorities; a new form of (digital) private power has now arisen due to the massive capability of organizing content and processing data. Therefore, the primary challenge involves not only the role of public actors in regulating the digital environment, but also, more importantly, the "talent of constitutional law" to react against the threats to fundamental rights and the rise of private powers, whose nature is much more global than local. This phenomenon, termed ***digital constitutionalism***, reflects the urgent need to adapt legal frameworks to address the societal impact of digital technologies.

As Giovanni De Gregorio notes, the European Union's digital policy has evolved from a *liberal economic approach*, emphasizing market freedom, to a *constitution-oriented strategy* aimed at safeguarding fundamental rights and democratic values.

Three Phases of Digital Regulation

1. ***Digital Liberalism*: The Market-Centric Approach**

   The European Economic Community (EEC) was primarily established to create a common market and harmonize economic policies among its member states. These economic foundations shaped the Union's initial approach to digital technologies. During the early stages of the digital era, the focus was on fostering innovation and commercial growth, with minimal regulatory interference. This laissez-faire attitude aligns with the broader late 20th-century debate on Internet governance, where the digital realm was viewed as beyond the reach of traditional public authority.

   In his *Declaration of Independence of Cyberspace*, John Perry **Barlow** argued that cyberspace was a distinct domain from the physical world, where conventional legal concepts like property, expression, and identity were not applicable. This vision advocated for a bottom-up regulatory approach, empowering digital communities to shape their own rules rather than relying on traditional state-driven frameworks. Self-regulation was seen as a more effective and adaptive mechanism than centralized governance.

   At the time, concerns about the potential rise of dominant private actors threatening fundamental rights were not yet prevalent. Excessive regulation of the Internet was feared to hinder the growth of the internal market, particularly as emerging technologies promised to transform society. Digital innovation was perceived as a driver of economic and social progress, rather than a potential concentration of power.

   Key features of this phase include:

   - **The E-Commerce Directive (2000):** the primary aim of the e-Commerce Directive is to provide a common framework for electronic commerce for "the proper functioning of the internal market by ensuring the free movement of information society services between the Member States."

- Established liability exemptions (*safe harbor*) for online intermediaries to foster the free movement of information services.
  - When the US Congress passed section 230 of the Communication Decency Act in 1996, the primary aim was to encourage free expression and development of the digital environment. In order to achieve this objective, the choice was to exempt computer services from liability for hosting third-party content.
  - Within this framework, the e-Commerce Directive establishes a regime of exemption of liability for Internet service providers (or "online intermediaries"). Based on the US "safe harbor" model, this regime acknowledges the passive role of online intermediaries lacking any involvement in the creation of content, and exempts them from liability for transmitting or hosting unlawful third- party content.
- Prohibited general monitoring obligations, ensuring platforms could operate without constant oversight.
  - Member states cannot oblige online intermediaries to monitor the information transmitted or stored by users within their services, and online intermediaries are not required to seek facts or circumstances that reveal illegal activities conducted by their users through the relevant service.
  - Hosting providers are not liable for the information or content stored by their users unless, upon becoming aware of the unlawful nature of the information or content stored, they do not promptly remove or disable access to the unlawful information or content.
  - By imposing upon hosting providers an obligation to remove online content based on their awareness (i.e. "*notice and takedown*"), this system of liability has entrusted online intermediaries with the power to autonomously decide whether to remove or block vast amounts of content based only on the risk of being held liable. Since online platforms are privately run, these actors would attempt to avoid the risk of being sanctioned for non-compliance with this duty by removing or blocking even that content whose illicit nature is not fully evident (i.e. collateral censorship). This liability regime incentivizes online platforms to focus on minimizing this economic risk rather than adopting a fundamental rights-based approach.
  - This incentive (or indirect delegation) to moderate content can be considered one of the primary reasons explaining how online platforms have acquired broad margins in determining the scope of protection of fundamental rights in the digital environment.
  - The turning of economic freedom into a new form of power is one of the primary challenges which led to the rise of European digital constitutionalism.
- Framed intermediary liability as an extension of freedom of expression, reflecting Article **10 ECHR**.

- **The Data Protection Directive**: in the field of data, at first glance, the EU has not followed a liberal regulatory path.
  - The EU decided to regulate the processing of personal data to face the challenges coming from the increase in data usage and processing relating to the provision of new services and the development of digital technologies.
  - In 1995, the EU policy was oriented to an economic approach toward the free movement of data. The Data Protection Directive highlights the functional nature of the protection of personal data for the consolidation and proper functioning of the internal market and, consequently, as an instrument to guarantee European fundamental freedoms.
    - Although the Data Protection Directive highlighted that the processing of personal data shall serve mankind and aim to protect the fundamental right to privacy of data subjects, the EU could not foresee how the digital environment would affect the right to privacy and data protection. At that time, the role of intermediaries was merely passive.
  - Within this framework, the fragmentation of domestic regimes and the lack of any revision have been the primary drivers encouraging the evolution of forms of freedoms into power based on the processing of vast amounts of (personal) data on a global scale.

This approach, while promoting rapid technological advancement, failed to address the societal risks posed by unregulated digital spaces, such as the monopolistic tendencies of platforms and the erosion of individual privacy.

2. *Judicial Activism*: Bridging Regulatory Gaps

The transformation of online intermediaries, such as social media platforms, stems from their data-driven business models, where targeted advertising depends on user profiling. To ensure user retention and safety, platforms employ automated content moderation, making their role more active than neutral.

Judicial intervention, particularly by the CJEU, has been crucial in addressing the inadequacies of the liberal framework and protecting fundamental rights. In *L'Oréal*, the Court recognized the non-neutral nature of certain platform activities like content promotion.

This rights-based shift continued in *Promusicae*, where the CJEU emphasized data protection as a fundamental right under the EU Charter, particularly in the context of automated data processing risks. Similarly, in ***Schrems***, the Court invalidated the Safe Harbor framework, requiring third countries to provide data protection equivalent to EU standards.

These cases highlight a move from an economic to a constitutional approach in regulating digital environments.

- **Key CJEU Cases:**
  - *Digital Rights Ireland (2014):* Invalidated the Data Retention Directive, underscoring the constitutional significance of privacy and data protection under **Articles 7 and 8 of the EU Charter of Fundamental Rights**.

- *Google Spain v. González (2014):* Introduced the *right to be forgotten*, recognizing search engines as "data controllers" and mandating a balance between privacy and freedom of information. The Google Spain case demonstrates a first judicial attempt to face the power of online platforms and address the legislative inertia of the EU, thereby laying a foundation for European digital constitutionalism.

The CJEU has entrusted search engines with delisting online content without removing information. Hence, the data subject has the right to request that the search engine obtain the erasure of a link to the information relating to him or her from a list of web results based on his or her name, "in the light of his fundamental rights under Articles 7 and 8 of the Charter." As a result, one can argue that this interpretation has unveiled a legal basis for data subjects to enforce their rights against private actors. The CJEU has recognized a right to be forgotten online through its interpretation of the Data Protection Directive or the horizontal application (de facto) of Articles 7 and 8 of the Charter. Despite this high level of protection of fundamental rights and the limitations on private actors' activities, at the same time, the CJEU has delegated to search engines the task of balancing fundamental rights when assessing users' requests for the right to be forgotten.

- **ECtHR Contributions:**
  - *Delfi v. Estonia (2015)*: Imposed liability on a news portal for user-generated defamatory comments, emphasizing a balancing test between freedom of expression (**Article 10 ECHR**) and the right to reputation (**Article 8 ECHR**).
    Key Aspects of the Case:
    - *Platform Responsibility*: Delfi, an online news portal, was held liable for defamatory comments made by its users. The ECtHR found that Delfi exercised significant control over its platform, integrating comments into its service and benefiting economically from user activity.
    - *Duty to Act*: The Court ruled that Delfi failed to effectively prevent or promptly remove unlawful comments, including hate speech, which had remained online for weeks.
    - *Balancing Rights*: The judgment acknowledged the platform's freedom of expression but prioritized the victim's right to reputation and protection from harm.
    - *Proportionality*: The Court noted that the penalty imposed (320 euros) was not excessive and aligned with the seriousness of the offense.

  Judicial activism has thus been instrumental in addressing the inertia of legislators, marking the transition toward a rights-centered approach to digital governance.

3. ***Digital Constitutionalism*: Safeguarding Rights in a Networked Society**

Algorithmic technologies have made platform decision-making increasingly opaque, raising concerns about transparency and accountability. Platforms have evolved beyond market participants, assuming quasi-governmental roles by establishing their own "law

of the platforms" through terms of service and automated systems. This private authority shapes user interactions and data processing rules unilaterally in the absence of regulation.

The influence of digital firms extends to their partnerships with public actors, where governments rely on big tech for services and innovation. This reliance grants companies access to vast public sector data and creates dependencies, allowing them to dictate terms. Such dynamics challenge transparency, fairness, and even the rule of law, as private standards replace traditional legal norms.

The concept of digital constitutionalism addresses these challenges by rethinking limits on power in the digital age. It reflects a dialectic between how digital technologies reshape constitutional principles and how constitutional law responds to the emerging power of public and private digital actors. This approach is evident in the EU's efforts, particularly the CJEU's role in protecting fundamental rights and initiatives like the DSM (digital single market) strategy, which aims to regulate online platforms, enhance accountability, and establish new user rights in content moderation and data processing. The rise of these rights stems not only from institutional measures (top-down) but also from societal demands (bottom-up), underscoring the need to clarify intermediaries' roles and responsibilities in safeguarding human rights.

Under the DSM strategy, the EU has introduced legislative measures to limit online platforms' discretion and enhance transparency and accountability in content moderation. A key example is the **Copyright Directive**, which established a licensing framework between platforms and rightsholders to address financial losses from unauthorized uploads. Article 17 classifies platforms as performing acts of public communication when hosting third-party content, with liability assessed based on factors like service size and content type.
This directive also codifies CJEU rulings on proportionality, requiring platforms to act diligently, proportionately, and non-discriminatorily while safeguarding fundamental rights, particularly freedom of expression. Additionally, platforms must adopt safeguards, including human oversight, to ensure automated moderation tools are accurate and fair. To further encourage accountability, the Commission has implemented codes of conduct and guidelines. Despite these advances, fragmented legal frameworks at domestic and supranational levels risk undermining efforts to establish a unified approach to cross-border content moderation challenges.

This phase reflects the EU's proactive efforts to embed constitutional principles into digital regulation. Central to this approach are:

- **The General Data Protection Regulation (GDPR):**
  - Enforces data protection as a fundamental right.
  - Introduces rights such as data portability and the right to be forgotten.
  - Mandates transparency in automated decision-making.

To achieve the objective of data protection without neglecting the need to protect other constitutional interests clashing with the right to privacy and data protection, the entire structure of the GDPR is based on general principles which orbit around the accountability of the data controller.

Even when the data controller is not established in the EU according to some conditions, the GDPR increases the responsibility of the data controller which, instead of focusing on merely complying with data protection law, is required to design and monitor data processing by assessing the risk for data subjects' rights and freedoms. The data controller is required to implement appropriate technical and organizational measures to guarantee, and be able to demonstrate, that the processing is conducted in accordance with the GDPR.

Put another way, the GDPR focuses on promoting a proactive, rather than reactive, approach based on the assessment of the risks and on the context of specific processing of personal data. This obligation requires that data controllers conduct risk assessment which is not only based on business interests but also on data subjects' (fundamental) rights and freedoms. The GDPR has not only increased the degree of accountability of the data controller but also empowered individuals by introducing new rights of data subjects. Among these safeguards, the GDPR establishes the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

This right of the data subject does not overcome the new challenges posed by the algorithmic society. First, it should not be neglected that enhancing due-process safeguards could affect the freedom to conduct business or the performance of a public task, due to additional human and financial resources required to adapt automated technologies to the data protection legal framework. Second, the presence of a human being does not eliminate the risks of error or discrimination. Third, the opacity of some algorithmic processes could not allow the data controller to provide the same degree of explanation in any case.

The GDPR has not provided a comprehensive answer to these challenges or, more generally, to the fallacies of European data protection law. Without being exhaustive, it is worth underlining how the potential scope of the principle of accountability leaves data controllers to enjoy margins of discretions in deciding what degree of safeguards are sufficient to protect the fundamental rights of data subjects in a specific context. In other words, the risk-based approach introduced by the GDPR appears to delegate to the data controller the power to balance conflicting interests, thus making the controller the "arbiter" of data protection.

- **The Digital Services Act (DSA):**
  - Modernizes intermediary liability, emphasizing accountability and procedural safeguards in content moderation.

- **The Ai Act:** This regulation aims to establish a clear and harmonized framework for governing artificial intelligence (AI) systems across the EU. It introduces a risk-based

approach, classifying AI applications by their level of potential harm. High-risk systems, such as those used in healthcare, transportation, or critical infrastructure, must meet strict requirements for transparency, accuracy, and oversight. The regulation also upholds a framework for liability, ensuring accountability while maintaining space for innovation.

Beyond these binding rules, the EU has developed guidelines and ethical principles to promote trust and responsibility in AI development. For example, the Ethics Guidelines for Trustworthy AI (2019) emphasize the importance of human-centric design, fairness, and non-discrimination, encouraging companies to adopt best practices voluntarily.

In addition to EU-wide measures, some member states, such as France and Finland, have launched national strategies to complement these efforts. France has heavily invested in AI research and ethical committees, while Finland focuses on public education, aiming to equip citizens with basic AI literacy.

This phase represents the EU's attempt to counterbalance the influence of platforms, fostering transparency, accountability, and alignment with fundamental rights.

Challenges in the Digital Landscape

1. **The *Opacity* of Algorithms and Accountability** ® Platforms increasingly rely on automated decision-making, raising concerns about transparency, fairness, and bias. Frank Pasquale's *The Black Box Society* highlights the risks of opaque algorithmic governance, calling for enhanced oversight mechanisms.
2. **Disinformation and Content Moderation** ® The digital environment amplifies the spread of harmful content, including deepfakes and misinformation. Courts face dilemmas in regulating *lawful but harmful* material without infringing on freedom of expression. European courts have adopted proportionality tests to navigate this tension.
3. **Fragmentation and Global Implications** ® Despite the EU's aspiration to set global standards (the *Brussels Effect*), regulatory fragmentation persists due to national implementation disparities. This inconsistency complicates cross-border digital governance and innovation.
4. **Balancing Innovation with Regulation** → Excessive regulation risks stifling technological progress, while under-regulation allows unchecked platform power. Striking this balance remains a central challenge for courts and policymakers.

The Role of Courts in Shaping Digital Constitutionalism

Courts occupy a pivotal role in mediating conflicts within the digital environment. By interpreting and adapting existing laws, they ensure that constitutional values remain resilient in the face of technological evolution. Their interventions address critical questions, such as:

- The horizontal application of fundamental rights against private actors.
- The territorial scope of rights like the right to be forgotten.
- The compatibility of algorithmic content moderation with democratic values.

However, as seen in cases like *Google Spain* and *Delfi*, judicial decisions often carry inherent limitations, highlighting the need for complementary legislative measures.

***Conclusion*: Navigating the Digital Constitutional Era**

The journey from digital liberalism to constitutionalism illustrates the dynamic interplay between innovation, regulation, and fundamental rights. As digital technologies continue to redefine societal structures, courts, legislators, and civil society must collaborate to ensure that constitutional principles adapt effectively to this new reality.

Digital constitutionalism offers a roadmap for reconciling competing interests in the digital age. Its success depends on the ability to balance innovation with accountability, private autonomy with public oversight, and economic growth with the protection of fundamental rights.

European Digital Constitutionalism

Recap

Phase 1: Liberal Market Strategy (Pre-2005)

- **Focus**: Foster innovation and competition in the internal market by liberalizing the digital economy.
- **Policy Approach**:
  - Minimal regulatory intervention to encourage growth in digital services.
  - Priority on economic integration, sidelining explicit protections for fundamental rights.
- **Consequences**:
  - Enabled major technology companies to amass unprecedented power.
  - Undermined privacy, data protection, and user autonomy as corporate interests prevailed.

Phase 2: Judicial Activism and Fundamental Rights (2005–2015)

- **Catalyst**: The failure of legislative bodies to address emerging challenges.
- **Role of the CJEU**:
  - Positioned itself as a defender of fundamental rights, bridging gaps in EU law.
  - Key Decisions:
    - **Schrems I (2015)**: Invalidated the Safe Harbor Agreement for inadequate protection of EU citizens' data in transatlantic transfers.
    - **Digital Rights Ireland (2014)**: Struck down the Data Retention Directive, reinforcing the right to privacy and data protection.
  - Emergence as a quasi-constitutional court, ensuring that EU citizens' rights were upheld against corporate overreach.

Phase 3: Codification through Legislative Frameworks (2016–2020)

- **Introduction of Comprehensive Laws**:
  - **GDPR (2018)**:
    - Harmonized data protection standards across the EU.

        - Introduced rights like access, rectification, erasure, and portability.
        - Extraterritorial scope ensured compliance by entities outside the EU targeting EU citizens.
    - **Digital Services Act (2020)**:
        - Imposed obligations on online platforms for transparency in content moderation.
        - Ensured algorithmic accountability and user safeguards in decision-making processes.
- **Policy Goals**:
    - Limit the discretionary powers of private entities (e.g., tech giants).
    - Establish legal standards for technological due process.

Phase 4: Transnational Constitutionalism (2021–Present)

- **Core Objective**: Expand EU constitutional principles globally.
- **Mechanisms**:
    - Enforcement of extraterritorial laws like GDPR to create a "global compliance effect."
    - Collaboration with international partners to promote democratic digital governance.
- **Challenges**:
    - Balancing the global reach of EU rules with respect for other nations' legal frameworks.
    - Avoiding accusations of "regulatory imperialism."

Core Elements of European Digital Constitutionalism

1. Transparency and Algorithmic Accountability

- **Transparency Obligations**:
    - Platforms must explain the rationale behind automated decisions, particularly in critical areas like employment, credit, and social services.
    - Users have a right to appeal and seek human intervention.
- **Algorithmic Impact**:
    - Algorithms determine visibility, relevance, and access to information, raising concerns about bias, discrimination, and opacity.
    - EU laws require auditing and reporting on algorithmic processes to ensure fairness.

2. Fundamental Rights Protection

- **Right to Privacy**:
    - Enshrined in the GDPR, privacy protections apply irrespective of geographical location if the data concerns EU citizens.
- **Freedom of Expression**:
    - Balances with obligations on content moderation under the DSA.
    - Ensures that platform policies do not stifle legitimate discourse or political debate.

- **Right to Human Oversight**:
  - Critical decisions affecting individuals must involve human evaluation, countering the risks of fully automated systems.

3. Extraterritorial Reach and Global Influence

- **GDPR's Global Impact**:
  - Defines conditions under which non-EU entities must comply, extending EU data protection principles worldwide.
  - Encourages international companies to adopt EU standards to simplify operations, leading to a **"Brussels Effect."**
- **Content Moderation Standards**:
  - Cases like **Glawischnig-Piesczek v. Facebook** highlight the EU's push for uniform content policies, promoting a global baseline for freedom of expression.

4. Balancing Interests in the Digital Ecosystem

- **Regulatory Tensions**:
  - Reconciling privacy rights with freedom of information and economic interests.
  - Addressing conflicts between EU and non-EU regulatory environments (e.g., U.S. tech policies and Chinese AI governance).

Legal Case Studies

Case 1: Schrems I and Schrems II

- **Context**: Legal challenges to U.S.-EU data transfer frameworks.
- **Key Findings**:
  - U.S. surveillance laws insufficiently protect EU citizens' data rights.
  - Set strict requirements for data transfer mechanisms, influencing global data practices.

Case 2: Google v. CNIL (2019) – France

- **Issue**: Scope of the "Right to Be Forgotten."
- **Ruling**:
  - Limited the application of de-referencing to EU domains, balancing privacy with global freedom of expression.
  - Acknowledged the importance of proportionality in extending EU laws.

Case 3: Glawischnig-Piesczek v. Facebook (2019)

- **Issue**: Cross-border enforcement of content removal.
- **Outcome**:
  - EU member states can mandate global content takedowns under international law.
  - Encourages platforms to adopt universal compliance measures aligned with EU norms.

Challenges and Critiques

1. Legal Uncertainty and Jurisdictional Clashes

- **Problem**: Overlapping regulations create complexity for global corporations and users.
- **Impact**: Potential conflicts with non-EU laws undermine predictability and enforcement.

2. Risk of Overregulation

- **Criticism**:
  - Excessive compliance burdens may stifle innovation and harm small businesses.
  - Could lead to unintentional censorship under stringent content moderation rules.

3. Ethical and Technological Implications

- **Challenge**:
  - Aligning rapid AI advancements with fundamental rights protections.
  - Avoiding unintended consequences of automated decision-making on marginalized communities.

Future Trajectory

1. Addressing AI and Automation

- **High-Level Expert Group Recommendations**:
  - Advocate for transparency, fairness, and ethical design in AI systems.
  - Emphasize anthropocentric AI models to maintain human oversight and accountability.

2. Digital Humanism and Dignity

- **Vision**: A constitutional framework prioritizing human dignity over techno-determinist solutions.
- **Goal**: Position the EU as a global leader in ethical AI governance.

3. Consolidating Global Influence

- **Strategy**: Expand partnerships with international stakeholders to promote unified standards.
- **Impact**: Strengthen the EU's role as a defender of digital rights and democratic values worldwide.

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