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DAVID SOBREIRA BEZERRA DE MENEZES

TAMING JUSTICE:
HOW COURTS DIE AND WHAT CAN BE DONE TO SAVE THEM

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Dissertation presented to the Academic Master's Program in Law at Christus University Center as a partial requirement for obtaining the title of Master. Concentration area: Law and Access to Justice.

Supervisor: Professor Dr. Juraci Mourão Lopes Filho

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To Sirene and Michelle, who give meaning to the achievements of my life.

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Once, while speaking to graduates of a university, Arnold Schwarzenegger remarked that he rejected the label of "self-made man." According to him, the idea is nothing but a myth that we, as human beings, can achieve greatness without the help of others. I start from the same premise when talking about this work. Even though its writing was entirely done by me, its completion would not have been possible without the help of dozens of people whose support and ideas contributed to my ability to finish this work. Therefore, I could not fail to thank each one – apologizing in advance if, by carelessness, I forget to mention someone.

First, and it could not be otherwise, I thank my mother, Michelle, and my grandmother, Sirene. You are not only my greatest gifts but also the reason I strive to achieve the highest degree of excellence possible, to be worthy of your pride. I add to these thanks a dedication to my younger sister, Ártemis. I hope that one day I can be as much a source of pride to you as you are to me.

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All mistakes are entirely my own.

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

Timothy Snyder

ABSTRACT

The new wave of global autocratization seems to be here to stay. Reports from the V-Dem Institute demonstrate that in 2023, at least 42 countries were undergoing (or continue to undergo) a process of autocratization. In this context, the present work aims to evaluate a particular strategy used by authoritarian agents seeking to entrench themselves in power permanently: court capture. The objective of this work is to assess how such acts occur and what can be done to prevent them from materializing. To this end, the work begins with the presentation of a conceptual framework (court taming) and typological proposal for evaluating measures to reform supreme courts and constitutional courts. Based on this framework, six case studies (Venezuela, Turkey, Hungary, Poland, El Salvador, and Israel) are presented, which have experienced processes or attempts to tame their courts. Subsequently, drawing on the experience of these countries, the work presents ideas on how a system can be improved to prevent its supreme court or constitutional court from being captured. Following this, a chapter is dedicated to analyzing, using the taming framework, proposals discussed and presented in the Brazilian National Congress for the reform of the Supreme Federal Court. Finally, some considerations are presented to reinforce the proposals for court protection, with an emphasis on the Brazilian reality.

Keywords: Constitutional Erosion; Abusive Constitutionalism; Judicial Independence; Court Taming.

RESUMO

A nova onda de autocratização mundial parece ter chegado para ficar. Relatórios do V-Dem Institute demonstram que em 2023 pelo menos 42 países passavam (ou continuam passando) por um processo de autocratização. Nesse contexto, o presente trabalho se propõe a avaliar uma estratégia particular utilizada por agentes autoritários que buscam se entrincheirar no poder permanentemente: a captura de cortes. O trabalho tem como objetivo avaliar como atos desse tipo acontecem e o que pode ser feito para evitar que se concretizem. Para isso, o trabalho parte da apresentação de uma proposta conceitual (domesticação de cortes) e tipológica para avaliação de medidas de reforma de supremas cortes e cortes constitucionais. Com base nesse framework, são apresentados seis estudos de caso (Venezuela, Turquia, Hungria, Polônia, El Salvador e Israel) que experimentaram processos ou tentativas de domesticação de suas cortes. Em seguida, tomando por base a experiência desses países, apresenta ideias de como um sistema pode ser melhorado para evitar que sua suprema corte ou corte constitucional seja capturada. Após isso, um capítulo é dedicado a analisar, a partir do framework da domesticação, propostas discutidas e apresentadas no Congresso Nacional brasileiro para a reforma do Supremo Tribunal Federal. Por fim, são apresentadas algumas considerações no sentido de reforçar as propostas de proteção das cortes com ênfase na realidade brasileira.

Palavras-chave: Erosão Constitucional; Constitucionalismo Abusivo; Independência Judicial; Domesticação de Cortes.

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1 INTRODUCTION

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

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

Political science has shown that a new wave of autocratization is upon us.[1] Academics have been studying this problem incessantly, especially in the last decade and a half when the phenomenon seems to have gained more traction worldwide. Despite the different research approaches, one conclusion about the autocratization process seems unanimous: the importance of Apex Courts in its realization. Often seen as obstacles by authoritarian leaders, these courts fall victim to attacks that seek to undermine their independence and turn them into tools to legitimize their agendas.

The importance of Apex Courts in protecting democratic values cannot be underestimated. It is due to the power they wield that these institutions can act as a democratic bulwark against authoritarian projects. By protecting fundamental rights and ensuring that the Legislative and Executive Powers operate within constitutional limits, they play a vital role in preserving democracy. However, this same role makes them prime targets for authoritarian agents seeking to consolidate power and eliminate mechanisms that can hinder their plans.

In recent decades, Supreme Courts and Constitutional Courts have been the targets of systematic attacks in various parts of the world. In countries like Venezuela, Turkey, Hungary, Poland, El Salvador, and Israel, political leaders and parties have implemented strategies to weaken or control these institutions. In the repertoire of these illiberal figures are measures such as judicial structure reforms, reducing the number of judges, increasing executive control over judicial appointments, and limiting the authority of the courts. Such measures not only

[1] LÜHRMANN, Anna; LINDBERG, Staffan I. A third wave of autocratization is here: what is new about it? **Democratization**, v. 26, n. 7, p. 1095-1113, 2019.

compromise judicial independence but also facilitate the implementation of policies that may be contrary to democratic principles. It is due to these issues that this work aims to analyze how political agents have subverted courts and weaponized them for their purposes.

Thus, Chapter 2 takes a historical approach, exposing the reasons that led to the concentration of powers in Supreme Courts and Constitutional Courts. From Marbury v. Madison in 1803 to the invalidation of Amendment 3 by the Israeli Supreme Court in 2024, through the creation of the basic structure doctrine in India in the 1970s, this explanation is important for understanding the authority of the courts and the interest they arouse in authoritarian agents. This chapter explores how these tribunals acquired their role as guardians of the Constitution and how this authority made them targets in times of democratic crisis.

Next, a concept for what I court taming is introduced, a term I find more appropriate than the alternatives used in the specialized literature. This concept is supplemented by a typology created from the analysis of the experience of six countries. Starting from the presented concept and using a deductive argument, brief reasons are given for why I believe that the taming of a court should be seen as unconstitutional.

Dedicated to a comparative approach, Chapter 3 begins explaining the methodology used for selecting the countries analyzed. Issues such as temporal scope and concepts of democracy and regime transition are also explained. Subsequently, the political context and erosion process of six countries (Venezuela, Turkey, Hungary, Poland, El Salvador, and Israel) are presented, with an emphasis on the attacks directed at their supreme courts and constitutional courts.

Building on the lessons learned from the study of each of these countries, Chapter 4 presents sociological and institutional proposals to address the problem of court taming. In a non-exhaustive list, ideas related to sociological legitimacy and how a court can build it, how constitutional designers can establish rules to hinder taming attempts, and ways in which the courts themselves can defend against attacks are presented.

Chapter 5 focuses on the Brazilian reality. Drawing on the lessons learned from studying other countries, proposals that have been discussed or presented in the National Congress with the aim of reforming the Supreme Federal Court are analyzed. The objective of this analysis is to verify the constitutionality of each proposal based on the framework presented in Chapter 2.

Finally, some ideas are presented as final remarks with a brief emphasis on the Brazilian reality. In addition to reinforcing the foundations and proposals of the work, this section brings specific criticisms of judges' behavior that may contribute to the weakening of the courts, opening a flank for potential attacks.

For the sake of intellectual honesty, it is necessary for the reader to know that this work was written using liberal lenses. Therefore, as taught by the first linguistic turn, it is impossible for my reading of the presented phenomena to be dissociated from how I see the world. However, I hope that the research presents objective elements sufficient to be replicated and used by others.

2 COURT TAMING

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

In the past two decades, legal academic literature has seen an increasing production of studies on the process of degradation of liberal democracy – which is facing yet another crisis in many countries around the world.[2] Quantitatively, the world is divided between 91 democracies and 88 autocracies, as pointed out in the 2024 report of the Varieties of Democracy Institute (V-Dem Institute).[3] This modest victory for democracy, however, is only apparent. A qualitative reading of the same report indicates that 71% of the world's population (5.8 billion people) live in autocracies – a 48% increase in the last decade.[4]

It is difficult to assess whether this is a trend that will persist or if, on the other hand, the phenomenon is part of a cycle of crises in democratic regimes. Whatever the answer, academics have produced warnings, analyses, and responses to try to overcome this moment. The result has been a vast collection of works that have brought relevant insights for understanding this period. Without exhausting the topic – and probably doing the injustice of failing to mention some – the works of Jack Balkin (Constitutional Rot),[5] David Landau (Abusive Constitutionalism),[6] Nancy Bermeo (Democratic Backsliding),[7] Emílio Peluso Meyer (Constitutional Erosion),[8] and Steven Levitsky and Daniel Ziblatt (How Democracies Die) [9] can be mentioned.

The authoritarian challenges launched against contemporary democracy have a common hallmark: the progressive strengthening of multiracial democracy – as pointed out by Levitsky and Ziblatt.[10] By multiracial democracy, Levitsky and Ziblatt understand the "political system

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[2] Em uma visão holística, Hanspeter Kriesi discorda da que exista uma crise democrática na Europa. Cf. KRIESI, Hanspeter. Is There a Crisis of Democracy in Europe? **Polit Vierteljahresschr**, v. 61, p. 237-260, 2020.
[3] NORD, Marina et al. **Democracy Report 2024**: Democracy Winning and Losing at the Ballot. University of Gothenburg: V-Dem Institute, 2024. p. 6.
[4] Ibid., p. 6.
[5] BALKIN, Jack M. Constitutional Rot. **Maryland Law Review**, v. 77, iss. 1, p. 147-160, 2017.
[6] LANDAU, David. Abusive Constitutionalism. **UC Davis Law Review**, v. 47, p. 189-260, 2013.
[7] BERMEO, Nancy. On Democratic Backsliding. **Journal of Democracy**, v. 27, n. 1, p. 5-19, 2016.
[8] MEYER, Emílio Peluso Neder. **Constitutional Erosion in Brazil**. New York: Hart Publishing, 2021.
[9] LEVITSKY, Steven; ZIBLATT, Daniel. **How Democracies Die**. New York: Crown, 2018.
[10] LEVITSKY, Steven; ZIBLATT, Daniel. **Tyranny of the Minority**: Why American Democracy Reached the Breaking Point. New York: Crown, 2023. p. 1-3.

with regular, free, and fair elections in which adult citizens of all ethnic groups possess the right to vote and basic civil liberties such as freedom of speech, the press, assembly, and association."[11] These guarantees cannot be empty; therefore, it is necessary that, in addition to being effective, they are available to individuals of all backgrounds.

In this context, the strengthening of an increasingly cosmopolitan and globalized world has contributed to the advancement of multiracial democracy. As a consequence, formerly dominant social groups now find themselves forced to share their positions of power with groups once marginalized. For Levitsky and Ziblatt, this loss of political space leads the old dominant groups to question the changes in the social status quo, causing them to fear for their positions in society.[12]

This fear, tempered by the resentment of losing social status, makes such groups susceptible to capture by demagogic populist discourses. Some of these populists, often charismatic, have little or no commitment to democracy and are capable of channeling the worst feelings of a people. This is because, "[i]n spite of the reliance on rhetoric and irrational appeals, populism does respond to real problems," [13] such as the democratic deficit, currently growing due to factors like:

> […] the general growth of executive power at the expense of legislatures, political corruption and the role of money in the electoral process, the weakening of political parties, the rise of 'media democracy', the instrumentalization and commercialization of the public sphere, the transformation of civil society into a network of formal organizations, the reduction of direct democratic practices into plebiscitary ones and the growth of powerful regional or international organizations less democratic in form and operation than were many nation states.[14]

Populism, however, has many definitions. According to Bojan Bugaric, populism is like a chameleon ("chameleon-like"), capable of adapting to its environment and possessing a very narrow ideology. Thus, populism can be "agrarian, socio-economic, xenophobic, reactionary, authoritarian," and even "progressive."[15] Some elements of populism, however, frequently

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[11] LEVITSKY, Steven; ZIBLATT, Daniel. **Tyranny of the Minority**: Why American Democracy Reached the Breaking Point. New York: Crown, 2023. p. 2.
[12] Ibid.
[13] ARATO, Andrew. How we got here? Transition failures, their causes and the populist interest in the constitution. **Philosophy and Social Criticism**, v. 45(9-10), p. 1106–1115, 2019. p. 1108.
[14] Ibid., p. 1108.
[15] BUGARIC, Bojan. The two faces of populism: Between authoritarian and democratic populism. **German Law Journal**, v. 20, Special Issue 3: Populist Constitutionalism: Varieties, Complexities and Contradictions, p. 390-400, April 2019. p. 392.

recur, such as the separation of society into antagonistic groups; the pretense of speaking on behalf of the people; and the prioritization of popular sovereignty and direct democracy.[16]

Similarly, but with a more systematic approach, Andrew Arato starts from the premise that "today's main challenge to democracy comes from projects (movements and regimes) that very well fit the six criteria," which are drawn from the theories of various political scientists:

> 1. Appeal to 'the people' and 'popular sovereignty' as empty signifiers, uniting in a rhetorical form heterogenous demands and grievances (=the fiction of E. Morgan; the myth of M. Canovan).
> 2. A part (of the population) standing for the whole ('the people').
> 3. The construction of frontier of antagonism (=the friend–enemy couplet of Carl Schmitt).
> 4. Unification through strong identification with a leader, or rarely unified leadership group (=embodiment model of Lefort, Habermas; the general will of C. Mudde).
> 5. Insistence on a strong notion of politics, or 'the political' and a disinterest in mere 'ordinary' politics or policy.
> 6. Nevertheless, attachment to at least partially competitive elections (until a populist regime with mere ritualized elections can be constituted).[17]

The conclusion is that the populist project, in its authoritarian form[18] [19], presents elements essentially incompatible with democracy, such as dividing society between allies and enemies – not as allies and opponents. This idea, in fact, reflects proposals such as Levitsky and Ziblatt's mutual tolerance. For them, as long as opponents play by the rules of the game, their right to exist and compete for power must be respected by those who claim to be democratic.[20]

Respect for the opponent – and their right to participate – is also defended by more radical theories, centered on the naturally conflictual character of democracy, such as Chantal Mouffe's. In her agonistic model of democracy, Mouffe uses the word enemy but in a qualified way: "[a]n adversary is an enemy. but a legitimate enemy. one with whom we have some

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[16] BUGARIC, Bojan. The two faces of populism: Between authoritarian and democratic populism. **German Law Journal**, v. 20, Special Issue 3: Populist Constitutionalism: Varieties, Complexities and Contradictions, p. 390-400, April 2019. p. 392.

[17] ARATO, Andrew. How we got here? Transition failures, their causes and the populist interest in the constitution. **Philosophy and Social Criticism**, v. 45(9-10), p. 1106–1115, 2019. p. 1107.

[18] Bojan Bugaric differentiates between two types of populism: one authoritarian in nature and, therefore, contrary to liberal values; and the other emancipatory, which can be compatible with liberal democracy. Cf. BUGARIC, op. cit.

[19] The concept of populism is essentially disputed, despite having some common characteristics. However, not all authors agree with the existence of a populism with liberal characteristics as Bugaric does. Cf. GOUVÊA, Carina Barbosa; CASTELO BRANCO, Pedro H. Villas Bôas. **Populist Governance in Brazil**: Bolsonaro in Theoretical and Comparative Perspective. Cham: Spinger, 2022. p. 43.

[20] LEVITSKY, Steven; ZIBLATT, Daniel. **How Democracies Die**. New York: Crown, 2018.

common ground because we have a shared adhesion to the ethico-political principles of liberal democracy: liberty and equality." [21]

Contrary to these proposals, the world has seen populism gaining ground. The discourses of authoritarian agents and their illiberal practices have been well received in various countries facing crises of different natures. Just as happened in the last century, when democracy was not yet a consolidated value – today, autocrats are the new sexy, at least for part of the population.

Knowing that the proper functioning of a constitutional democracy depends on a series of elements such as (i) the proper performance of institutions containing power; (ii) popular trust in popular representatives, as well as (iii) the patience and obedience of public agents to the rules of the political game,[22] authoritarian figures see no problem in sabotaging the mechanisms that maintain the integrity of these factors in the name of their political projects.

Among these ingredients necessary for good democratic performance, the proper performance of institutions containing power, more specifically the independence of the Apex Courts, is the central object of study in this work. This is because, due to the power they hold, they have become recurring targets of attacks by those who want to promote illiberal projects.

2.1 The Rise of Apex Courts

When Alexander Hamilton began circulating his essays in New York, defending the ratification of the American Constitution, he viewed the Supreme Court as the "least dangerous branch." [23] Without access to the purse (budget), which was the competence of the Legislature, or the sword (military), which was the competence of the Executive, the Judiciary represented, for the founding fathers, a reduced risk to liberty.

Just over a decade after the ratification of the Constitution, the United States Supreme Court signaled that Hamilton's prediction was far from true. In *Marbury v. Madison*,[24] the Court arrogated to itself the power to invalidate laws incompatible with the Constitution. Far from being a truly legal issue, Marbury v. Madison was the result of a dispute between the two main

[21] MOUFFE, Chantal. **The Democratic Paradox**. London; New York: Verso, 2000. p. 102.
[22] BALKIN, Jack M. Constitutional Crisis and Constitutional Rot. **Maryland Law Review**, v, 77, n. 605, p. 101-117, 2017. p. 105.
[23] HAMILTON, Alexander; MADISON, James; JAY, John. **The Federalist Papers**: a collection of essays written in favour of the new Constitution as agreed upon by the Federal Convention, September 17, 1787. Dublin: Coventry House Publishing, 2015. p. 381.
[24] **Marbury v. Madison**, 5 U.S. 137 (1803).

political groups of the time: the Democratic-Republicans, led by Thomas Jefferson, and the Federalists, led by former President John Adams.

This authority was not new. In Virginia, two decades before the Marbury ruling, the state's Court of Appeals already claimed the power to refuse to apply laws it considered unconstitutional. The same happened in Rhode Island in 1786 in *Trevett v. Weeden*.[25] Still, nothing of the sort existed at the Federal level, ensuring Marbury v. Madison a special place in constitutional history.

As time passed, the field of Law, including Constitutional Law, evolved. Consequently, Supreme Courts and Constitutional Courts have become increasingly relevant. Created by the Philadelphia Constitution of 1787, the United States Supreme Court was the first of its kind, serving as a model for several countries across the American continent during the nineteenth and twentieth centuries. Meanwhile, in 1920, Austria established the first model of a Constitutional Court. Following the so-called diffuse system, the American model, anchored by a Supreme Court, allows any court to exercise judicial review over laws in specific cases. In contrast, the concentrated system, following a tradition from continental Europe, only allows constitutional review to be exercised abstractly by a Constitutional Court.[26]

From studies involving these institutions, one of the most significant academic debates in history emerged, addressing the question: Who should guard the Constitution? Hans Kelsen and Carl Schmitt provided different answers to this question. Following a more democratic tradition, Kelsen argued that the interpretation of the constitution should be delegated to an independent body, not part of the traditional structure of Powers. For Kelsen, the existence of a constitutional court was essential to guarantee constitutional supremacy and to avoid the arbitrariness of political power, that is, a closed system where morals and politics should be impenetrable.[27]

In turn, Carl Schmitt, a critic of liberalism, also maintained that the guardian of the Constitution should be a third institution different from the constituted powers, as delegating this responsibility to them could elevate them above the others and allow them to evade control – resulting in a master of the Constitution.[28] However, departing from Kelsen, Schmitt argued

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[25] MEIGS, William. **The Relation of the Judiciary to the Constitution**. New York: Da Capo Press, 1971. p. 63 e 70.

[26] SILVA, Virgílio Afonso da. Constitutional Courts / Supreme Courts, General. In: GROTE, Rainer; LACHENMANN, Frauke; WOLFRUM, Rüdiger (ed.). **Max Planck Encyclopedia of Comparative Constitutional Law**. Available at: https://oxcon.ouplaw.com/page/595. Accessed in 24 abr. 2024.

[27] KELSEN, Hans. **Jurisdição Constitucional**. São Paulo: Martins Fontes, 2003. p. 237 e ss.

[28] OLIVEIRA, Cláudio Ladeira. Judicialização da Política, Auto-restrição judicial e a Defesa da Constituição: algumas lições de Carl Schmitt em Der Hüter der Verfassung. **doispontos:**, Curitiba, São Carlos, v. 17, n. 2, p. 63-84, dez. 2020. p. 65.

that the guardianship of the Constitution should be attributed to the President or the sovereign, due to the very nature of politics and sovereignty.[29]

A second moment of prominence for constitutional history, especially for the proliferation and consolidation of Constitutional Courts, was the post-World War II period, when the center of gravity of Constitutions shifted. Previously focused on state structuring and the establishment of competencies, Constitutions began to orbit around fundamental rights.[30]

This new framework led to the development of a unique hermeneutics, now focused on the realization of fundamental rights.[31] One hallmark of this phenomenon is the Lüth case, judged by the German Federal Constitutional Court. At that time, the notion of the objective dimension of fundamental rights was introduced into the constitutional lexicon, a sign that the constitution permeated the entire society, protecting the citizen not only in their relationship with the State but also with other citizens.[32]

As a result, Constitutional Courts have become central to the project of constitutionalism. Responsible for ensuring the effectiveness of the constitutional promises made by many states, some of them have claimed powers not expressly provided for in the constitution. As Arato recalls, before receiving these powers expressly by delegation, it was the courts that first assumed the role of differentiating constituent and constituted powers.[33]

In another example, the Supreme Court of India, in 1967 – exceeding the boldness of the American Supreme Court in Marbury v. Madison – recognized its authority to invalidate constitutional amendments that violated fundamental rights.[34] This authority was reaffirmed in 1973 in Kesavananda Bharati v. State of Kerala, when the Court outlined what would become known as the basic structure doctrine, responsible for establishing minimum parameters for exercising this power. From then on, the essential elements of the Indian Constitution, its basic structure, gained new protection. [35]

More recently, in early 2024, the Supreme Court of Israel invalidated an amendment to the Basic Law. The provision was part of a larger plan by Benjamin Netanyahu's government

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[29] VINX, Lars. **The Guardian of the Constitution**: Hans Kelsen and Carl Schmitt on the limits of Constitutional Law. Cambridge University Press, 2015. p. 180.
[30] BONAVIDES, Paulo. **Curso de Direito Constitucional**. 35. ed. Salvador; São Paulo: JusPodivm; Malheiros, 2020. p. 616-7.
[31] Ibid., p. 611.
[32] BVerfGE 7, 198 **(Lüth-Urteil)**.
[33] ARATO, Andrew. Populism, Constitutional Courts, and Civil Society. *In*: LANDFRIED, Christine (ed.). **Judicial Power**: How Constitutional Courts affect Political Transformations. Cambridge; New York: Cambridge University Press, 2019, p. 318-341. p. 331.
[34] ACKERMAN, Bruce. **Revolutionary Constitutions**: Charismatic Leadership and the Rule of Law. Cambridge: The Belknap Press of Harvard University Press, 2019. p. 67.
[35] **Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.**, 1973 SCC (4) 225.

to entrench itself in power and reduce the fundamental rights and guarantees of part of Israel's citizens. In the decision, without being able to use an express provision granting it this power, the Court demonstrated this authority by borrowing the Indian basic structure doctrine, the thesis of unconstitutional constitutional amendments from Professor Yaniv Roznai, and other elements of the literature on constitutional erosion. [36]

In this context, jurists and political scientists began to study the reasons, forms, and consequences of this process of (self) empowerment of courts. Tom Ginsburg highlights that in "recent decades, new democracies around the world have adopted constitutional courts to oversee the operation of democratic politics."[37] In a scenario of political uncertainty, states adopt judicial review as a mechanism to protect "constitutional bargains."[38]

With a different theory, Ran Hirschl suggests that the empowerment of courts is better understood as resulting from the interrelated actions of three groups: i) threatened political elites seeking to maintain their hegemony by isolating their political preferences from democratic vicissitudes; ii) economic elites using the constitutionalization of rights to advance economic agendas with protections against government action; and iii) judicial elites interested in increasing their power and international reputation.[39]

Whether by Ginsburg's thesis or Hirschl's, the result is invariably judicialization.[40] Consequently, issues of political relevance – and the power to deliberate on them – are transferred to the Judiciary, "to the detriment of traditional political bodies, which are the Legislature and the Executive."[41]

This scenario of strengthened courts stimulates political agents to seek ways to use the courts to entrench themselves in power. Not without reason, since Apex Courts offer various mechanisms – not all republican – for ambitious politicians to solidify their projects.

It so happens that, while courts can play legitimate roles in promoting democracy and the Rule of Law, as well as defending fundamental rights, they can also be weaponized to

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[36] **HCJ 5658/23 Movement for Quality Government in Israel v. Knesset**. Decidido em: 1º jan. 2024. Disponível em: https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/23/580/056/v31&fileName=23056580.V31&type=2. Accessed in Feb. 29, 2024.

[37] GINSBURG, Tom. **Judicial review in new democracies**: Constitutional courts in Asian cases. New York: Cambridge University Press, 2003. Apresentação da obra (página não numerada).

[38] Ibid., p. 25.

[39] HIRSCHL, Ran. **Towards juristocracy**: The origins and consequences of the new constitutionalism. Cambridge, MA: Harvard University Press, 2004.

[40] BARROSO, Luís Roberto. Contramajoritário, Representativo e Iluminista: Os papeis dos tribunais constitucionais nas democracias contemporâneas. **Direito & Práxis**, Rio de Janeiro, v. 9, n. 4, p. 2171-2228, 2018. p. 2178.

[41] Ibid., p. 2178.

demolish these same elements that constitute the basis of the constitutional system.[42] Successful attempts to carry out this illiberal project have been seen frequently in recent decades. Venezuela, Hungary, and Turkey are some examples of countries where constitutional courts no longer fulfill their role. However, there are examples to the contrary, countries that have resisted authoritarian attacks, such as Israel and Poland.

According to Dieter Grimm, constitutional courts, being one of the main mechanisms of checks and balances in democratic systems, are often the first victims of authoritarian attacks on the constitutionalism project.[43] In their more sophisticated forms, these attacks have become known as autocratic legalism[44] and abusive constitutionalism,[45] depending on the path the potential autocrat wishes to follow.

This phenomenon becomes even more serious due to the "demonstration effect." Coined by economist James Duesenberry[46] – and borrowed by political science – the expression translates into events and innovations that, despite occurring in one place, influence agents in other societies to try to replicate them, as explained by Jørgen Møller, Svend-Erik Skaaning, and Jakob Tolstrup.[47] Thus, "when democratic powers predominate, pro-democratic demonstration effects proliferate and democratization flourishes; when autocratic powers preponderate, anti-democratic demonstration effects abound and democratic regressions dominate."[48]

Whether through the infraconstitutional route or the constitutional route, specialized literature has shown how authoritarian agents promote changes to weaken the foundations of the democratic system, especially the courts – which do not always have effective ways to defend themselves.

Therefore, studying this process of subverting constitutional courts allows for a deeper understanding of the risks that arise from it, as well as presenting effective solutions against such procedures.

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[42] ARATO, Andrew. Populism, Constitutional Courts, and Civil Society. *In*: LANDFRIED, Christine (ed.). **Judicial Power**: How Constitutional Courts affect Political Transformations. Cambridge; New York: Cambridge University Press, 2019, p. 318-341. p. 331-3.
[43] GRIMM, Dieter. Neue Radikalkritik an der Verfassungsgerichtsbarkeit. **Der Staat**, Berlin, v. 59, iss. 3, p. 321-353, 2020, 321-353. p. 321.
[44] SCHEPPELE, Kim L. Autocratic Legalism. **University of Chicago Law Review**, v. 85, iss. 2, p. 545-583, 2018.
[45] LANDAU, David. Abusive Constitutionalism. **UC Davis Law Review**, v. 47, p. 189-260, 2013.
[46] DUESENBERRY, James Stemble. **Income, Saving, and the Theory of Consumer Behavior**. Cambridge: Harvard University Press, 1949.
[47] MØLLER, Jørgen; SKAANING, Svend-Erik; TOLSTRUP, Jakob. International Influences and Democratic Regression in Interwar Europe: Disentangling the Impact of Power Politics and Demonstration Effects. **Government and Opposition**, v. 52, n. 4, p. 559–586, 2017. p. 560.
[48] Ibid., p. 561.

2.2 Concept and Tipology

Among the meanings of "taming," according to the Cambridge Dictionary, is the act of "controlling something dangerous or powerful." Normally used to refer to animals, the verb tame was borrowed from biology here as it represents the best way to describe what happens when a court loses its autonomy in the face of illiberal attacks.[49] Furthermore, the option seems more appropriate than "capture," which is widely used in specialized literature.[50] This is because a capture does not necessarily result in the direct use of the captured object or person. In contrast, the act of taming, although equally instrumental, seeks to directly use what has been tamed, "imposing alignment between the intended conduct and the will" [51] of the taming[52] agent.

In this context, "tamed courts present a valuable asset for any government,"[53] especially considering that, until 2011, more than 80% of the world's constitutions adopted some measure of judicial review.[54] Thus, after the taming process, courts can: i) guarantee differentiated treatment to laws and amendments of dubious constitutionality; ii) promote constitutional changes unfeasible through the political path; iii) hinder the next government – if the country remains democratic – in its attempts to reverse illiberal changes; and iv) facilitate the process of entrenching the taming government in power indefinitely.[55]

The power and prestige that Apex Courts have are such that even in consolidated autocratic regimes, these institutions have their existence preserved. For Arato, this happens for

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[49] SOBREIRA, David; COUTINHO, Carlos Marden Cabral. Domesticando a Justiça. **Revista de Investigações Constitucionais**, Curitiba, vol. 10, n. 2, e242, maio/ago. 2023. p. 4.

[50] See LANDAU, David. Abusive Constitutionalism. **UC Davis Law Review**, v. 47, p. 189-260, 2013; SCHEPPELE, Kim L. Autocratic Legalism. **University of Chicago Law Review**, v. 85, iss. 2, p. 545-583, 2018; DIXON, Rosalind; LANDAU, David. **Abusive Constitutional Borrowing**: Legal Globalization and the Subversion of Liberal Democracy. New York: Oxford University Press, 2021; ROZNAI, Yaniv; COHEN, Amichai. Populist Constitutionalism and the Judicial Overhaul in Israel. **Israel Law Review**, v. 56, p. 502–520, 2023.

[51] SOBREIRA; COUTINHO, op. cit., p. 4.

[52] Andrew Arato used the expression "domestication of the apex courts" in passing. Although commonly used as synonyms, "taming" refers to the process of habituating animals to the presence—and eventually the commands—of a human; whereas "domestication" is the product obtained from the crossbreeding of species of animals or plants. Cf. ARATO, Andrew. Populism, Constitutional Courts, and Civil Society. *In*: LANDFRIED, Christine (ed.). **Judicial Power**: How Constitutional Courts affect Political Transformations. Cambridge; New York: Cambridge University Press, 2019, p. 318-341. p. 320.

[53] SOBREIRA; COUTINHO, op. cit., p. 4.

[54] GINSBURG, Tom; VERSTEEG, Mila. Why Do Countries Adopt Constitutional Review? **The Journal of Law, Economics, and Organization**, v. 30, iss. 3, p. 587-622, ago. 2014. p. 587.

[55] SWEENEY, Richard J. Constitutional conflicts in the European Union: Court packing in Poland versus the United States. **Economics and Business Review**, v. 4, n. 4, p. 3-29, 2018. p. 5.

reasons of legitimacy and political calculation. [56] Tamed courts continue to be courts. They thus carry a symbolic role both internally and internationally.[57] Moreover, the tamed court can serve the autocrat during an eventual defeat, making it difficult to restore democracy or apply transitional justice.

By court taming – a term coined in the article "Taming Justice",[58] co-written with Carlos Marden – I refer to changes made to the composition and/or capacities of a court, in order to subject it to the interests of an agent or political group. By limiting the autonomy of a court, the taming process unbalances the separation of powers and contributes to the erosion of a country's democratic indices – as can be derived from the work promoted by institutes such as V-Dem.[59] This taming process can affect both the subjective dimension of a court, expanding or reducing the number of its members, and the objective dimension, representing the institution's ability to perform its constitutional functions.

The analysis of court taming processes around the world highlights three main strategies, whether in isolation or in combination. Thus, taming can occur through: i) expansion; ii) reduction; and/or iii) transformation. The first two affect the courts in their subjective dimension (composition), while the latter affects their objective dimension (capacities).

This does not mean, however, that any change in the composition or capacities of a court represents an attempt at taming. A contextual evaluation, "transcending the formal verification of compliance with requirements,"[60] is essential to verify the constitutionality of measures aimed at modifying a court.

Besides the philosophical foundations of constitutional democracy, which are not limited to proceduralism, this examination is justified as a legal system is designed to be integrated. Modifications to courts can, therefore, represent polycentric problems – borrowing Lon Fuller's lesson. Polycentric problems are like a spider web:

> A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of

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[56] ARATO, Andrew. Populism, Constitutional Courts, and Civil Society. *In*: LANDFRIED, Christine (ed.). **Judicial Power**: How Constitutional Courts affect Political Transformations. Cambridge; New York: Cambridge University Press, 2019, p. 318-341. p. 332-3.

[57] URRIBARRI, Raul A. Sanchez. Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court. **Law & Social Inquiry**, v. 36, iss. 4, p. 854–884, 2011. p. 857.

[58] SOBREIRA, David; COUTINHO, Carlos Marden Cabral. Domesticando a Justiça. **Revista de Investigações Constitucionais**, Curitiba, vol. 10, n. 2, e242, maio/ago. 2023. p. 4.

[59] OUR WORLD IN DATA. Judicial constraints on the executive index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/grapher/judicial-constraints-on-the-executive-index?country=~VEN. Accessed in: 20 mar. 2024.

[60] SOBREIRA; COUTINHO, op. cit., p. 5.

> tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" - each crossing of strands is a distinct center for distributing tensions.[61]

Just like a spider web, interference with the structure and composition of courts can bring unforeseen results. In this context, literature warns that the evaluation of measures be done both individually and collectively, because only then is it possible to have a holistic view of the effects they can bring.[62]

This precaution, however, is not sufficient to safeguard the courts. This is because incrementalism – "a central element in the process of democratic erosion"[63] – is not always noticed and, when it is, can be difficult to counter. As Roznai, Dixon, and Landau teach, being implemented through small steps – which do not necessarily mean a slow process[64] – democratic erosion is not always seen as "a frontal assault on the basic principles of liberal democracy."[65]

Thus, "[l]ike the apocryphal frog placed in slowly boiling water, a democratic society in the midst of retrogression may not realize its predicament until matters are already beyond redress." [66] In such situations, the work of the democratic opposition can be complicated. First, because there is no event significant enough to catalyze societal efforts against the measures. Second, because warnings are seen as "hysterical" and "paranoid."[67]

Another way to identify non-republican intentions regarding the courts is to analyze what political agents seeking to modify them say. Some of these agents only make their objectives clear after being consolidated in power, as was the case with Viktor Orbán's "illiberal democracy" speech in Romania in July 2014, four years after becoming Prime Minister of Hungary for the second time.

On that occasion, Orbán celebrated his party's second consecutive victory in the elections. During his speech, he highlighted elements that recur in illiberal populist discourses,

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[61] FULLER, Lon L. The Forms and Limits of Adjudication. **Harvard Law Review**, v. 92, p. 353-409, 1978. p. 395.
[62] SADURSKI, Wojciech. **Poland's Constitutional Breakdown**. New York: Oxford University Press, 2019. p. 5-6; ROZNAI, Yaniv; DIXON, Rosalind; LANDAU, David E. Judicial Reform or Abusive Constitutionalism in Israel. **Israel Law Review**, v. 56, 292–304, 2023. p. 298-9.
[63] ROZNAI, Yaniv; COHEN, Amichai. Populist Constitutionalism and the Judicial Overhaul in Israel. **Israel Law Review**, v. 56, p. 502–520, 2023. p. 298.
[64] SADURSKI, op. cit., p. 5-6; ROZNAI; DIXON; LANDAU, op cit., p. 5-6.
[65] ROZNAI; DIXON; LANDAU, op. cit., p. 298.
[66] HUQ, Aziz; GINSBURG, Tom. How to Lose a Constitutional Democracy. **UCLA Law Review**, v. 65, p. 78-169, 2018.
[67] SADURSKI, op. cit., p. 6.

such as the emphasis on collectivity over individuals. For him, the "[h]ungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state."[68]

Curiously, other politicians are more open about their intentions, such as the leader of the Law and Justice Party (Prawo i Sprawiedliwość - PiS) of Poland, Jarosław Kaczyński, the de facto head of government in the country. As early as 2011, four years before his party came to power, Kaczyński announced that "[t]he day will come when there will be Budapest in Warsaw,"[69] referring to the illiberal project that Orbán was implementing in Hungary.

There is also a third group. In this group are politicians who try to disguise their intentions. Benjamin Netanyahu is an example of this. In announcing his project to reform Israel's Judiciary, Netanyahu tried to legitimize the measure by claiming that the constitutional revolution of 1990 represented "a crack in Israeli democracy, which must be corrected."[70]

The political context, hidden by Netanyahu but well known to Israeli society, explains the purpose of the attacks on the Judiciary: the Prime Minister is being tried in the Jerusalem District Court for corruption and fraud, and he has a coalition of religious parties seeking to implement illiberal and discriminatory changes in the country.[71]

Given this information, an analyst can verify whether the proposed – or ongoing – changes to the structure of a particular court characterize a taming process. The evaluation, however, requires appropriate methodological tools, which this work seeks to refine. Unlike the typology proposed in "Taming Justice,"[72] here, taming occurs in three ways – not four.

2.2.1 Expansion

One of the best-known ways a court can be tamed is through court-packing. Coined in the 1930s in the United States, the expression court-packing was used to refer to an attempt to expand the

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[68] TÓTH, Csaba. Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014. **The Budapest Beacon**, 29 jul. 2014. Disponível em: https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/. Accessed in: 14 mar. 2024.

[69] "PRZYJDZIE dzień, że w Warszawie będzie Budapeszt". **TNV24**, 9 out. 2011. Disponível em: https://tvn24.pl/polska/przyjdzie-dzien-ze-w-warszawie-bedzie-budapeszt-ra186922-ls3535336. Accessed in: 14 mar. 2024.

[70] ROZNAI, Yaniv. Israel: A Crisis of Liberal Democracy? *In*: GRABER, Mark A.; LEEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 355-375. p. 370.

[71] SOBREIRA, David. Como os Tribunais morrem: o caso de Israel (entrevista: Yaniv Roznai). **JOTA**, 24 mar. 2023. Disponível em: https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-de-israel-24032023. Accessed in: 14 mar. 2024.

[72] SOBREIRA, David; COUTINHO, Carlos Marden Cabral. Domesticando a Justiça. **Revista de Investigações Constitucionais**, Curitiba, vol. 10, n. 2, e242, maio/ago. 2023.

American Supreme Court by then-President Franklin Delano Roosevelt. Roosevelt attempted this when, trying to address the effects of the Great Depression of 1929, he presented the nation with the New Deal, a bold economic plan that placed the State at the center of the country's recovery process.

However, the Supreme Court's precedents at that time was guided by what Matthew L. Lindsay called laissez-faire constitutionalism, marked by decisions that imposed strict limits on the State's attempts to implement labor guarantees and rights. Known as the Lochner Era, this 40-year period began with the judgment of *Allgeyer v. Louisiana*[73] in 1897 and only ended in 1937 with the judgment of *West Coast Hotel Co. v. Parrish*.[74]

In this context, the Supreme Court developed an expansive reading of substantive due process. Thus, the due process clause of the 14th Amendment to the United States Constitution, which established that no state could deprive any person of life, liberty, or property without due process, was considered by the Court to also encompass economic liberty.

The result was the declaration of unconstitutionality of over a hundred state laws.[75] According to Mary Dudziak, the Supreme Court "had played a judicially activist but politically conservative role,"[76] preventing the Parliament from playing its natural political role.[77]

In 1937, after repeated battles with the Supreme Court, Roosevelt, who had been re-elected with an overwhelming victory the previous year, put his court-packing plan into action – something that had not even been mentioned during the election period.[78] With a solid majority in Congress, Roosevelt then announced his intention to reform the Supreme Court. The proposal would give him "the power to appoint a new justice for every justice over the age of seventy-five,"[79] which, at that time, would guarantee six new appointments, increasing the Court from 9 to 15 members.

The last change to the composition of the Supreme Court dated back to 1869, "long enough for many people to regard it as set by the Framers."[80] This, combined with the rise of

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[73] **Allgeyer v. Louisiana**, 165 U.S. 578 (1897).
[74] **West Coast Hotel Co. v. Parrish**, 300 U.S. 379 (1937).
[75] EMANUEL, Steven L. **Emanuel Law Outlines**: Constitutional Law. Boston: Aspen Publishers, 2010. p. 172.
[76] DUDZIAK, Mary L. The Politics of "The Least Dangerous Branch": The Court, the Constitution, and Constitutional Politics Since 1945. *In*: AGNEW, Jean-Christophe; ROSENZWEIG, Roy (ed.). **A Companion to Post-1945 America**. Malden: Wiley- Blackwell, 2006, p. 385-405. p. 386.
[77] SOBREIRA, David; COUTINHO, Carlos Marden Cabral. Domesticando a Justiça. **Revista de Investigações Constitucionais**, Curitiba, vol. 10, n. 2, e242, maio/ago. 2023.
[78] NELSON, Michael. The President and the Court: Reinterpreting the Court-packing Episode of 1937. **Political Science Quarterly**, v. 103, n. 2 p. 267-293, 1988. p. 277.
[79] TUSHNET, Mark (ed.). **I dissent**: Great Opposint Opinions in Landmark Supreme Court Cases. Boston: Beacon Press, 2008. p. 103.
[80] NELSON, Michael. The President and the Court: Reinterpreting the Court-packing Episode of 1937. **Political Science Quarterly**, v. 103, n. 2 p. 267-293, 1988. p. 276.

fascism in Italy and Germany, contributed to a portion of the population developing even more affection for judicial independence. [81] Consequently, Roosevelt's proposal was received with hostility, even by the Court itself.

The court-packing plan would be buried in July 1937 with the death of Senator Robinson, responsible for establishing the necessary agreements for the proposal's approval. Unable to anticipate the event, the Court made a turn in its jurisprudence a few months earlier, in March of that year. In *West Coast Hotel Co. v. Parrish*,[82] the Court held as constitutional a Washington state law establishing a minimum wage for women. This shift in the Court's position – known as the switch in time that saved nine – was due to Justice Owen Roberts. Usually a vote aligned with the conservative majority, he began to rule with the Court's liberal wing.[83]

After this event, the expression – and practice of – court-packing spread worldwide. Only in this century, the packing of Apex Courts has been seen in countries such as Venezuela,[84] Hungary,[85] and Turkey,[86] in addition to discussions about its use in the United States[87] and Brazil,[88] just to name a few.

Still, some in the literature argue that court-packing can be used for democratic purposes. Rivka Weill,[89] Thomas Keck,[90] and Tom Gerald Daly[91] are some who defend this thesis. Empirical experience, on the other hand, has shown how the expression court-packing

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[81] Ibid., p. 276.
[82] **West Coast Hotel Co. v. Parrish**, 300 U.S. 379 (1937).
[83] HO, Daniel E.; QUINN, Kevin M. Did a Switch in Time Save Nine? **Journal of Legal Analysis**, v. 2, n. 1, p. 69–113, 2010.
[84] TAYLOR, Matthew M. The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez. **Journal of Latin American Studies**, v. 46, iss. 2, p 229 – 259, maio 2014. p. 253.
[85] BUGARIC, Bojan. Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge. **LEQS**, n. 79, July 2014.
[86] DALY, Tom Gerald. 'Good' Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay. **German Law Journal**, vol. 23, n. 8, p. 1071–1103, 2022. p. 1083.
[87] WEILL, Rivka. Court packing as an antidote. **Cardozo Law Review**, v. 42, iss. 7, p. 2705-2761, 2021; KECK, Thomas M. Court-Packing and Democratic Erosion. *In*: Lieberman, Robert C.; METTLER, Suzanne; ROBERTS, Kenneth M. (ed.). **Democratic Resilience**: Can the United States Withstand Rising Polarization? New York: Cambridge University Press, 2022, 141-168.
[88] CASAGRANDE, Cássio. Bolsonaro e o 'plano de empacotamento' do STF. **JOTA**, 10 out. 2022. Disponível em: https://www.jota.info/opiniao-e-analise/colunas/o-mundo-fora-dos-autos/bolsonaro-e-o-plano-de-empacotamento-do-stf-10102022. Accessed in: 21 mar. 2024; BOLSONARO COGITA ampliar número de ministros no Supremo caso seja reeleito. **Correio Brasiliense**, 08 out. 2022. Disponível em: https://www.correiobraziliense.com.br/politica/2022/10/5042935-bolsonaro-cogita-ampliar-numero-de-ministros-no-supremo-caso-seja-reeleito.html. Accessed in 21 Mar. 2024.
[89] WEILL, Rivka. Court packing as an antidote. **Cardozo Law Review**, v. 42, iss. 7, p. 2705-2761, 2021 p. 2709.
[90] KECK, Thomas M. Court-Packing and Democratic Erosion. *In*: Lieberman, Robert C.; METTLER, Suzanne; ROBERTS, Kenneth M. (ed.). **Democratic Resilience**: Can the United States Withstand Rising Polarization? New York: Cambridge University Press, 2022, 141-168. p. 143.
[91] DALY, Tom Gerald. 'Good' Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay. **German Law Journal**, vol. 23, n. 8, p. 1071–1103, 2022. p. 1082-3.

has become almost synonymous with illegitimate maneuvers[92] taken with the aim of taming courts.

Contrary to what Weill, Keck, and Daly propose, I understand that court-packing is an unconstitutional measure, as I demonstrate in Chapter 4, where I present a framework for the appropriate use of reforms in Apex Courts, that is, a way to alter the composition or functioning of courts without resulting in taming.

2.2.2 Reduction

Contrary to the expansion intended by court-packing, the strategy of reduction seeks to remove judges from a court. The main reason for adopting this type of measure is that, sometimes, some judges represent the last trench against the implementation of illiberal projects by authoritarian rulers.

The proposal adopted here, therefore, is different from that of David Kosař and Katarína Šipulová, according to whom court-packing is not just a process of expanding a court, but "an intentional irregular change in the composition of the existing court, in quantitative as well as qualitative terms, that creates a new majority at the court or restricts the old one."[93]

Such strategies materialize in various ways. One of them is the reduction of the retirement age of public servants in general, or judges in particular. This happened in Hungary, when Prime Minister Viktor Orbán's government reduced the retirement age for judges from 70 to 62 – a measure that was eventually invalidated by the Constitutional Court.[94] Something similar was also observed in Poland[95] under the PiS and discussed in Brazil during the Bolsonaro government.[96]

A court can also have its composition reduced through political persecutions, fraudulent impeachments, or abusive removals. In Argentina, for example, the impeachment of Supreme Court judges has become an ordinary political tool since Juan Perón, in the late 1940s, until the

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[92] SIEGEL, Neil S. The Trouble with Court-Packing. **Duke Law Journal**, v. 72, p. 71-159, 2022; KOSAŘ, David; ŠIPULOVÁ, Katarína. How to Fight Court-Packing? **Constitutional Studies**, v. 6, n. 1, p. 133-163, 2020.
[93] KOSAŘ, David; ŠIPULOVÁ, Katarína. How to Fight Court-Packing? **Constitutional Studies**, v. 6, n. 1, p. 133-163, 2020. p. 135.
[94] SCHEPPELE, Kim L. Constitutional Revenge. **Verfassungsblog**, 03 mar. 2013. Disponível em: https://verfassungsblog. de/constitutional-revenge/. Accessed in: 26 out. 2022.
[95] SADURSKI, Wojciech. Constitutional Crisis in Poland. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 257-275.
[96] PIANARO, Rick Daniel. É preciso estar atento e forte: Supremo e a 'PEC do Pijama'. **JOTA**, 10 jun. 2020. Disponível em: https://www.jota.info/opiniao-e-analise/artigos/e-preciso-estar-atento-e-forte-supremo-e-a-pec-do-pijama-10062020#_ednref5. Accessed in: 20 mar. 2024.

early 21st century.[97] Impeachment, in this case, serves not only as an effective measure to remove a judge but also as a political pressure tool for court members to resign. Similar events were seen in Venezuela under Hugo Chávez[98] and in El Salvador under Nayib Bukele's government,[99] the latter case adopting a different guise.

Given the growing sophistication of autocrats and authoritarian populists in promoting their power projects, it is difficult to establish all the ways in which a court can suffer a reduction in its number of members, but the framework proposed here presents objective guidelines sufficient for analyzing each case. Whether by a permanent reduction of vacancies or by the vacancy and subsequent appointment of a new member, the shadow of taming will be present.

2.2.3 Transformation

When it affects the objective dimension of the court, transformation impacts its capacities to perform the constitutional role assigned to it. Transformations can affect the composition of the court (objective dimension), but only indirectly. This happens, for example, when the rules for appointing judges to the court are changed. Additionally, like reduction, a hallmark of transformation is the variety of ways it can be achieved.

Budget, attributions, methods of appointing judges, and even the extent of the court's authority are necessary elements for a court to adequately perform its constitutional functions. This does not mean that changes to these attributes cannot be made. A society can legitimately, for example, alter the competencies of its Constitutional Court or even restrict access to it. Such reforms, however, must not affect the court's power to act as a check on the other branches of government, part of what Rosalind Dixon and David Landau call the "democratic minimum core."[100]

Some cases illustrate how transformation is concretized. In India, for example, in 1971, four years after the Supreme Court claimed the power to invalidate constitutional amendments

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[97] HELMCKE, Gretchen. **Courts under Constraints**: Judges, Generals, and Presidents in Argentina. Cambridge: Cambridge University Press, 2012. p. 15.

[98] TAYLOR, Matthew M. The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez. **Journal of Latin American Studies**, v. 46, iss. 2, p 229 – 259, maio 2014. p. 254; URRIBARRI, Raul A. Sanchez. Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court. **Law & Social Inquiry**, v. 36, iss. 4, p. 854–884, 2011. p. 872.

[99] GRAUTE, Lukas. A Second Term for "the World's coolest Dictator"? **Verfassungsblog**, 13 nov. 2023. Disponível em: https://verfassungsblog.de/a-second-term-for-the-worlds-coolest-dictator/. Accessed in: 21 mar. 2024.

[100] DIXON, Rosalind; LANDAU, David. Competitive democracy and the constitutional minimum core. *In*: GINSBURG, Tom; HUQ, Aziz (ed.). **Assessing Constitutional Performance**. New York: Cambridge, 2016, p. 268-292. p. 277-8.

contrary to fundamental rights, Prime Minister Indira Gandhi, supported by a supermajority in Parliament (352 of 518 seats), promoted constitutional changes to prevent the Court from exercising judicial review over certain matters. The Court responded with the creation of the basic structure doctrine, reaffirming its authority and establishing a vague formula for exercising this power.[101]

In Venezuela, Chávez used a Constituent Assembly – of very questionable legitimacy – to suspend the irremovability and stability of judges. [102] Even before considering the effects of the measure, it is commonly acknowledged that such guarantees are essential to the judiciary's performance of its functions. Thus, their suspension, by itself, already represents a problem.

Likewise, in Poland, under the PiS leadership of Kaczyński, a law was passed – later invalidated by the Constitutional Court – that limited the exercise of abstract review by the Constitutional Court, increasing the minimum quorum of judges present to deliberate on the constitutionality of provisions. In practice, given the Court's deficient composition, the legislation would prevent it from acting.[103]

More recently, in Israel, Prime Minister Benjamin Netanyahu's government approved an amendment to the Basic Law that limited the authority of the country's Supreme Court. According to the new provision, the Court could not, in its deliberations, evaluate the reasonableness of acts by various political agents. This would give the government ample space to manipulate institutions and promote an illiberal agenda.[104]

The history of these countries demonstrates the risks of transformative reforms. It is therefore necessary for democratic agents to be alert to changes of this nature and to subject them to rigorous scrutiny.

★ ★ ★

As democracies spread around the world, autocracies have done the same. These cases of attacks on courts, besides demonstrating how the manual of subverting democracies works, are a warning for societies to direct efforts to preserve these institutions. After all, as Timothy Snyder pointed out, institutions need our help to perform their functions adequately. Therefore,

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[101] ACKERMAN, Bruce. **Revolutionary Constitutions**: Charismatic Leadership and the Rule of Law. Cambridge: The Belknap Press of Harvard University Press, 2019. p. 67.

[102] DIAS, Roberto; TEDESCO, Thomaz Fiterman. Erosão democrática e a corte interamericana de direitos humanos: o caso venezuelano. **Revista Brasileira de Políticas Públicas**, Brasília, v. 11, n. 2. p.195-224, 2021. p. 211.

[103] GARLICKI, Lech. Constitutional Courts and Politics: The Polish Crisis. *In*: LANDFRIED, Christine (ed.). **Judicial Power**: How Constitutional Courts affect Political Transformations. Cambridge; New York: Cambridge University Press, 2019, p. 141-162. p. 147-8.

[104] KREMNITZER, Mordechai. Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness. **Israel Law Review**, v. 56, p. 343–354, 2023. p. 344.

"[d]o not speak of 'our institutions' unless you make them yours by acting on their behalf. Institutions do not protect themselves. They fall one after the other unless each is defended from the beginning."[105]

As a consequence of this lesson, a question arises: what is the best way to safeguard a Court? Modern history presents us with various examples of how democracies succumbed, persisted, and eventually recovered after their courts were attacked. Therefore, I believe that the first step in answering this question is to evaluate how this happened and how it has been happening around the world.

[105] SNYDER, Thimothy. **On Tyranny**: Twenty Lessons from the Twentieth Century. London: The Bodley Head, 2017. p. 22.

3 HOW COURTS DIE: A COMPARATIVE ANALYSIS

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

Among the uses that can be made of comparative constitutional practice, one is to discover how different legal systems address specific problems. Currently, attacks on Apex Courts are one of those issues that can be seen in different places and take various forms. Comparing different systems, however, requires them to share common traits. This is because the compared objects need to be subjected to common parameters without the use of ad hoc rules. In this sense, besides having gone through taming processes in the 21st century, countries like Venezuela, Turkey, Hungary, Poland, El Salvador, and Israel share[106] inherent values of liberal democracy – some to a greater extent than others. This means that these systems have sought to implement ideals such as the Rule of Law, political rights, and systems of checks and balances. The process of democratic erosion, however, has caused these countries to shift from a more democratic regime to a less democratic one.

To evaluate and classify each of these countries, I shall use the typology, methodology, and indices developed by the V-Dem Institute.[107] According to their researchers, the world's regimes are currently divided into four categories: closed autocracies, electoral autocracies, electoral democracies, and liberal democracies. As Anna Lührmann, Marcus Tannenberg, and Staffan I. Lindberg explain, in closed autocracies, the executive leader does not subject themselves to elections or these do not offer real competition for adversaries; in electoral autocracies, multiparty elections continue to occur – as a way to legitimize the system – but they do not follow democratic standards, with frequent irregularities and other violations of institutional democratic requirements; in the democratic spectrum, electoral democracies can promote free and fair multiparty elections and ensure freedom of suffrage, association, and expression; finally, liberal democracies are characterized by regimes that, in addition to meeting

[106] Despite the ongoing risk of autocratization, Israel is still whitin the democratic spectrum.
[107] The V-Dem Institute is just one of the large organizations that globally evaluate the world's democracies. Along with him, Freedom House and The Economist can be mentioned. Despite the seriousness and breadth of the work carried out by these organizations, the assessment of the quality of democracies in the world faces factual and methodological issues. Therefore, despite being some of the most respected parameters in specialized literature, their data cannot be taken as an absolute reading of reality.

the requirements of an electoral democracy, demonstrate effective legislative and judicial checks on the executive and protect individual liberties and the rule of law. [108]

The Regimes of the World (RoW) project, part of the V-Dem Institute, conducted a study evaluating the world's political regimes from 1900 onwards, which can be observed dynamically using tools available at Our World in Data. [109] The V-Dem index evaluates regimes by assigning scores between 0 (closed autocracies) and 1 (liberal democracies). Until the rise of chavismo, for example, Venezuela had gone through a process of strengthening its democracy from the late 1950s to the 1990s. Characterized as an electoral democracy at least since the 1970s, Venezuela reached an index of 0.63. Similarly, in Turkey, it is possible to note a process of strengthening the democratic regime between the 1990s and the first decade of the 21st century. The country maintained the status of an electoral democracy between 1999 and 2008, when the regime began to shift to the group of electoral autocracies. Shortly thereafter, Hungary experienced a process of democratic erosion. Once a liberal democracy with an index of 0.77, the country saw its regime become an electoral autocracy. This was followed by the case of Poland, which saw its index drop from 0.82 (liberal democracy) to 0.42. El Salvador also joins the list of countries experiencing democratic recession. The country saw its modest index drop from 0.44 to 0.15. Finally, there is Israel's case. According to the 2024 V-Dem report, for the first time in 50 years, the country lost its place among liberal democracies. [110]

A common practice can be observed in the process of democratic deterioration in these countries: the taming of their courts. In at least four of these countries – Hungary, Poland, El Salvador, and Israel – the taming of Apex Courts can be seen as a tool for subverting democracy. In the other two cases – Venezuela and Turkey – taming appears to have been part of consolidating the new regime. This leads us to a conclusion: despite their essential importance to the constitutional system, Apex Courts do not always manage to curb authoritarian projects.

These inferences stem from a joint reading of two indices developed by the V-Dem Institute. The first is the Liberal Democracy Index[111] – previously used to check the quality indices of each country's democracies. The second is the Judicial Constraints on the Executive

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[108] LÜHRMANN, Anna; TANNENBERG, Marcusand; LINDBERG Staffan I. Regimes of the World (RoW): Opening New Avenues for the Comparative Study of Political Regimes. **Politics and Governance**, v. 6, iss. 1, p. 60–77, 2018. p. 61.

[109] OUR WORLD IN DATA. Liberal democracy index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/explorers/democracy?time=latest&country=~TUR&Dataset=Varieties+of+Democracy&Metric=Liberal+democracy&Sub-metric=Main+index+test. Acesso em: 20 mar. 2024.

[110] NORD, Marina et al. **Democracy Report 2024**: Democracy Winning and Losing at the Ballot. University of Gothenburg: V-Dem Institute, 2024. p. 60.

[111] OUR WORLD IN DATA. Liberal democracy index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/explorers/democracy?time=latest&country=~TUR&Dataset=Varieties+of+Democracy&Metric=Liberal+democracy&Sub-metric=Main+index+test. Acesso em: 20 mar. 2024.

Index, which assesses to what extent the Executive Branch submits to the decisions of independent courts.[112]

It is possible to observe, in the analysis of all six countries, a causal relationship between the decrease in the Judicial Constraints on the Executive Index and the consequent drop in the Liberal Democracy Index. This is no surprise since the former is contained within the latter. However, a detailed evaluation of each taming case can present relevant insights, as seen in Venezuela and Turkey. In these two countries, although it is one of the main factors of democratic erosion, court taming was not an essential element in establishing a new regime, but perhaps in consolidating one.

Therefore, the choice to address these countries is justified as they share – or shared – cosmopolitan moral values of liberal democracy; belong to the gradient of the democratic spectrum; underwent a process of constitutional erosion; and court taming, in one or more of its forms, was observed in each case.

The comparative analysis has two objectives. First, to verify the integrity of the concept and typology proposed in this work. Secondly, to expand the previous study,[113] increasing the number of cases and improving its theoretical and methodological aspects.

Finally, repeating what I did in Taming Justice,[114] I start from the hypothesis – which also seems to be Raul Urribarri's[115] – that the taming of courts becomes an option when autocrats and potential autocrats have their plans thwarted by the constitutional exercise of the checks and balances system by Apex Courts.

3.1 Supreme, *pero no mucho*: Venezuela's Highest Court under Chávez

In 1989, Carlos Andrés Pérez won the presidential election, running on an anti-neoliberal platform. However, once in office, he diverged from his promises and implemented austere and unpopular economic measures. This new and unexpected platform led to mass protests across the country, prompting Pérez to declare a state of emergency and deploy the

[112] OUR WORLD IN DATA. Judicial constraints on the executive index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/grapher/judicial-constraints-on-the-executive-index?country=~VEN. Acesso em: 20 mar. 2024.
[113] SOBREIRA, David; COUTINHO, Carlos Marden Cabral. Domesticando a Justiça. **Revista de Investigações Constitucionais**, Curitiba, vol. 10, n. 2, e242, maio/ago. 2023.
[114] Ibid., p. 3.
[115] URRIBARRI, Raul A. Sanchez. Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court. **Law & Social Inquiry**, v. 36, iss. 4, p. 854–884, 2011. p. 871-3.

military. The confrontation between civilians and the military, known as El Caracazo, resulted in the deaths of over 250 people.[116]

The event led Hugo Chávez – then a career military officer and founder of the Bolivarian Revolutionary Movement-200 – to plan a coup against the Pérez government. The plan was executed in February 1992, but without success. Chávez surrendered and, in an attempt to quell the insurgents, the Pérez government decided to put Chávez on national television to ask his comrades to cease the violence and surrender.[117] Once in front of the cameras, Chávez took full responsibility for what he called a "military movement" and demonstrated his disregard for democratic rules by stating, "unfortunately, for now, the objectives we established in the capital were not achieved."[118]

A year later, Pérez, whose government was weakened by the coup attempt and public dissatisfaction, faced an impeachment process.[119] After his removal, the presidency was held by two politicians until Rafael Caldera, who had previously served as president (1969-1974), was elected for a second term starting in 1994. Caldera had capitalized on Chávez's coup attempt to re-enter the presidential race.[120] Consequently, Chávez, then in prison, gained further legitimacy with the new president's support[121] and saw his image boosted by the TV broadcast.[122]

Rafael Caldera, one of the founders of Venezuelan democracy, embraced a man who had attempted to end Latin America's oldest democracy. This "fateful alliance"[123] crafted by Caldera was a clear demonstration of what Juan Linz calls a semi-loyal democrat. According to Linz, semi-loyal democrats are those whose commitment to democracy is eclipsed by their commitment to their power project.[124] Semi-loyal democrats tolerate authoritarian figures within their parties, cooperate or ally with them, are unwilling to condemn acts of violence committed by their allies, and show little willingness to ally with rivals to face anti-democratic

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[116] GIBBS, Terry. Business as unusual: what the Chávez era tells us about democracy under globalisation. **Third World Quarterly**, v. 27, n. 2, p. 265-279, 2006. p. 270.
[117] MARCANO, Christina; TYSZKA, Alberto Barrera. **Hugo Chávez**: The Definitive Biography of Venezuela's Controversial President. New York: Random House, 2007. p. 74.
[118] Ibid. p. 75.
[119] TARVER, H. Michael; FREDERICK, Julia C. **The History of Venezuela**. Westport, Connecticut: Greenwood Publishing Group, 2005.
[120] LEVITSKY, Steven; ZIBLATT, Daniel. **How Democracies Die**. New York: Crown, 2018; MARCANO; TYSZKA op. cit., p. 108.
[121] Ibid., 2018.
[122] MARCANO; TYSZKA, op. cit., p. 75.
[123] LEVITSKY; ZIBLATT, op. cit., p. 13.
[124] LINZ, Juan. **The Breakdown of Democratic Regimes**: Crisis, Breakdown and Reequilibration. John Hopkins University Press, 1978. p. 33.

risks[125] As Levitsky and Ziblatt remind us: "when democracies die, their [semi-loyal democrats'] fingerprints are rarely found on the murder weapon." [126]

Thus, violating a second test of his loyalty to democracy,[127] Caldera dismissed the case against Chávez, who spent only two years in prison for his coup attempt. In the president's words: "Dismissal does not imply a value judgment. When you dismiss a legal proceeding, you are not saying that the proceeding is relevant or irrelevant, nor are you pardoning anyone."[128]

Free and with his popularity soaring among the Venezuelan people, Chávez only had to wait until the next election in 1998 to run and win the country's presidential race – this time without resorting to violence, as his charisma and public support were sufficient to secure a decisive victory.

However, despite winning the presidential election, Chávez lacked a parliamentary majority, which posed an obstacle to implementing his revolutionary project. Faced with this situation, early in his term in 1999, Chávez called for a referendum to establish a Constituent Assembly, invoking the argument of constituent power. The measure lacked constitutional support, as the Venezuelan Constitution contained provisions for a "total reform" procedure – something Chávez did not want to use because it would mean negotiating with an oppositional Congress.[129]

This attempt to bypass the "total reform" rules was contested, and the Supreme Court of Justice, then the highest judicial body in Venezuela, had to resolve the issue. At that time, although not yet under Chávez's control, the Court operated under political pressure.[130] The result was an ambiguous decision with general considerations on the theory of original constituent power, recognizing that the people had a right 'prior and superior to the established legal regime.'[131]

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[125] LINZ, Juan. **The Breakdown of Democratic Regimes**: Crisis, Breakdown and Reequilibration. John Hopkins University Press, 1978. p. 32.
[126] LEVITSKY, Steven; ZIBLATT, Daniel. **Tyranny of the Minority**: Why American Democracy Reached the Breaking Point. New York: Crown, 2023. p. 32.
[127] LINZ, op. cit., p. 33.
[128] MARCANO, Christina; TYSZKA, Alberto Barrera. **Hugo Chávez**: The Definitive Biography of Venezuela's Controversial President. New York: Random House, 2007. p. 108.
[129] DIXON, Rosalind; LANDAU, David. **Abusive Constitutional Borrowing**: Legal Globalization and the Subversion of Liberal Democracy. New York: Oxford University Press, 2021. p. 123.
[130] LANDAU, David. Constitution-making and authoritarianism in Venezuela: the first time as tragedy, the second as farce. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 161-175. p. 164.
[131] BREWER-CARÍAS, Allan R. La configuración judicial del proceso constituyente o de cómo el guardián de la Constitución abrió el camino para su violación y para su propia extinción. **Revista de Derecho Publico**, n. 77-78/79-80, p. 453-514, jan./dez. 1999. p. 461 e 468; DIXON, Rosalind; LANDAU, David. **Abusive Constitutional Borrowing**: Legal Globalization and the Subversion of Liberal Democracy. New York: Oxford University Press, 2021. p. 123.

In protest against this decision – which was followed by another recognizing the Assembly's power to intervene as it saw fit in all institutions – Cecilia Sosa Gómez, then president of the *Corte Suprema de Justicia* (Supreme Court of Justice), resigned. Announcing the end of the rule of law, Gómez said the Court had committed suicide to avoid being murdered.[132]

In the decision recognizing the original constituent nature of the Assembly, the Court, while acknowledging the maneuver's validity, tried to establish some limitations on the power Chávez was about to wield. Among the requirements, Chávez needed to outline the Assembly's rules along with the referendum to avoid creating them *ex post facto*.[133] As Dixon and Landau explain, the measure had little practical effect. First, because many voters were unaware of or did not understand the rules.[134] Additionally, an opposition boycott led to a massive Chávez victory. This was because opposition parties largely refused to participate in the event.[135] The result was the chavismo controlling over 90% of the Constituent Assembly seats, winning 123 out of 131 available seats.[136]

With the new Constituent Assembly in place, Chávez took full advantage of the control he had gained to draft a constitution that would allow the implementation of his revolutionary project. He exploited almost all the measures identified by Aziz Huq and Tom Ginsburg[137] as part of the manual of democratic erosion:

i. **i. The use of constitutional amendments to modify basic governance arrangements:** in this case, Chávez went beyond the amendment process and completely redesigned the constitution;
ii. **Elimination of checks between Powers**: the new constitution transformed the old bicameral system into a unicameral one;[138]

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[132] TAYLOR, Matthew M. The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez. **Journal of Latin American Studies**, v. 46, iss. 2, p 229 – 259, maio 2014. p. 250.
[133] DIXON, Rosalind; LANDAU, David. **Abusive Constitutional Borrowing**: Legal Globalization and the Subversion of Liberal Democracy. New York: Oxford University Press, 2021. p. 123.
[134] Ibid., p. 123.
[135] LANDAU, David. Constitution-making and authoritarianism in Venezuela: the first time as tragedy, the second as farce. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 161-175. p. 164.
[136] TAYLOR, Matthew M. The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez. **Journal of Latin American Studies**, v. 46, iss. 2, p 229 – 259, maio 2014. p. 249.
[137] HUQ, Aziz Z.; GINSBURG, Tom. **How to Save a Constitutional Democracy**. Chicago: The University of Chicago Press, 2018. p. 72-3.
[138] LANDAU, op. cit., p. 164; CORRALES, Javier. Autocratic legalism in Venezuela. **Journal of Democracy**, v. 26, n. 2, abr. 2015. p. 38.

iii. **Centralization of Executive Power**: presidential terms were extended from five to six years, with the provision that a president could run for two consecutive terms. Additionally, presidential powers were strengthened.[139]

iv. **Elimination or suppression of effective political-party competition and the related prospect of rotation out of office**: early in the Assembly's deliberations, a commission was formed that "replaced many members of the judiciary and sharply limited the powers and composition of the Congress."[140]

v. **Contraction of the shared public sphere, where rights such as freedom of expression and association are exercised**: unlike the previous points, the new constitution established mechanisms for popular participation such as presidential recall and a civil society commission to participate in the selection of magistrates.[141]

Between 1998 and 2000, Venezuela saw its democracy quality index plummet from 0.59, an electoral democracy, to 0.31, an electoral autocracy.[142] During the same period, judicial independence degraded from 0.65 to 0.32, reaching 0.17 in 2004, shortly after the taming of the *Supremo Tribunal de Justicia* (Supreme Tribunal of Justice), created by the Constituent Assembly in 1999 as the successor to the Supreme Court of Justice.[143] This taming process began in the Constituent Assembly, which, in the exercise of original constituent power, refused any limitations imposed by the previous legal order. And like that, entire institutions were redesigned in both their functions and compositions.[144]

Besides redesigning the political landscape and significantly reducing the chances of his opponents returning to power, Chávez and his Constituent Assembly carried out a judicial restructuring that lasted ten years. During this period, the Constituent Assembly established that the guarantees of irremovability and stability of magistrates would have no effect, resulting in 80% of the judges in the country being "provisional" (lacking such guarantees) by 2005.[145] The

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[139] LANDAU, David. Constitution-making and authoritarianism in Venezuela: the first time as tragedy, the second as farce. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 161-175. p. 164-5.

[140] Ibid., p. 165.

[141] Ibid., p. 165.

[142] OUR WORLD IN DATA. Liberal democracy index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/explorers/democracy?time=latest&country=~TUR&Dataset=Varieties+of+Democracy&Metric=Liberal+democracy&Sub-metric=Main+index+test. Acesso em: 01 abr. 2024.

[143] OUR WORLD IN DATA. Judicial constraints on the executive index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/grapher/judicial-constraints-on-the-executive-index?country=~VEN. Acesso em: 01 abr. 2024.

[144] DIXON, Rosalind; LANDAU, David. **Abusive Constitutional Borrowing**: Legal Globalization and the Subversion of Liberal Democracy. New York: Oxford University Press, 2021. p. 124.

[145] DIAS, Roberto; TEDESCO, Thomaz Fiterman. Erosão democrática e a corte interamericana de direitos humanos: o caso venezuelano. **Revista Brasileira de Políticas Públicas**, Brasília, v. 11, n. 2. p. 195-224, 2021. p. 211.

Assembly also appointed a new Supreme Court, a new National Electoral Council, as well as a new attorney general, comptroller general, and ombudsman.[146] As a result, the Court was more concerned with establishing its authority than challenging the new government's aspirations.[147] Despite this, it continued to show – albeit timidly – its own will. Some of its decisions represented setbacks for the government's interests. This issue gained new significance with the attempted coup against Chávez in 2002.[148]

The growing political polarization, combined with the difficulty of finding ways to confront a highly popular government – which had institutionally crippled the country – led part of the opposition to embark on a coup adventure against Chávez. The coup failed, and after that, high-ranking military officers were brought before the Supreme Court for trial. However, on three occasions, the Court ruled that there was insufficient evidence to convict two generals and two admirals for the coup attempt. According to Matthew Taylor, "this adherence to jurisprudential norms above political preferences came as a shock to the government," after all, the Court's composition had been entirely selected by Chávez supporters in the Assembly.[149]

Before the final judgment, Chávez threatened the Court, stating that its judges could be replaced if they did not behave. The threat did not have the desired effect. In August 2002, while announcing the final decision, the Court's president, Iván Rincón, defended the Tribunal and its preference for a minimum of jurisprudential stability, also stating that "[t]he constitution is not only to be used when it is beneficial to me. It has to be respected all the time."[150]

Consequently, a special committee of Congress (National Assembly) recommended the removal of one Supreme Court member and the investigation of another. Franklin Arrieche, the author of the Court's decision, was accused of presenting false credentials during his confirmation process for the Court. This led to the annulment of his appointment by the National Assembly, a decision temporarily halted by an injunction.[151]

During 2002 and 2004, the Court remained deeply divided internally. This resulted in decisions that sometimes benefited the government and sometimes harmed it, as would be expected from a properly functioning institution – at least assuming the legal foundations used

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[146] TAYLOR, Matthew M. The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez. **Journal of Latin American Studies**, v. 46, iss. 2, p 229 – 259, maio 2014. p. 250.
[147] SOBREIRA, David. Como os Tribunais morrem: o caso da Venezuela (entrevista com Raul Sanchez Urribarri). **JOTA**, 04 fev. 2024. Disponível em: https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-da-venezuela-04022024.%20Acesso%20em:%2001%20abr.%202024. Acesso em: 01 abr. 2024
[148] TAYLOR, Matthew M. The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez. **Journal of Latin American Studies**, v. 46, iss. 2, p 229 – 259, maio 2014. p. 250.
[149] Ibid., p. 251.
[150] Ibid., p. 251.
[151] Ibid., p. 251-2.

were sound. One such decision was issued by the Electoral Chamber of the Supreme Court, which overturned a National Electoral Council decision that had invalidated 876,000 of the 3,000,000 signatures collected by the opposition in support of a referendum on whether Chávez should resign. In an appeal, the government took the case to the Constitutional Chamber, occupied by a Chávez-aligned majority, burying the Electoral Chamber's decision and the opposition's hopes.[152]

The Electoral Chamber's challenge wouldn't come cheap. After the matter was resolved, the government announced that the attorney general would initiate an investigation of three of the Chamber's judges for unethical behavior. The measure was a clear attempt by Chávez to alter the Court's preferences.

The taming process of the Supreme Court gained momentum from 2004, when the government decided to amend the Organic Law of the Court by an unconstitutional relative majority. The measure used noble justifications to promote changes in the Court's structure and composition. First, access to the Court was expanded, ensuring that all citizens could approach it. This was coupled with strengthening the Supreme Court's control over judicial administration and lower courts.[153]

These changes concealed the government's disguised intentions. This is because these were not the only changes. Citing congestion due to the number of cases to be judged by the Court, Chávez increased the number of judges from 20 to 32, distributed to ensure a government majority in the Electoral Chamber. The method of appointing Supreme Court judges was also altered, no longer requiring a two-thirds qualified majority but a simple majority.[154]

The removal of judges was also facilitated. As Raul Urribarri explains, seeking to make the Court more accountable to the government, an accelerated procedure was established "to circumvent the restrictions in place for dismissals of the Court's justices, allowing for a post hoc annulment of the justice's designation on the basis of several broad criteria, carried out and decided by a relative majority of the legislature."[155] With the change, the impeachment of Supreme Court judges could be initiated by a majority of the members of the Citizen Power, composed of the attorney general, comptroller general, and ombudsman. Furthermore, the mere

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[152] TAYLOR, Matthew M. The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez. **Journal of Latin American Studies**, v. 46, iss. 2, p 229 – 259, maio 2014. p. 252.
[153] URRIBARRI, Raul A. Sanchez. Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court. **Law & Social Inquiry**, v. 36, iss. 4, p. 854–884, 2011. p. 871-2.
[154] TAYLOR, Matthew M. The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez. **Journal of Latin American Studies**, v. 46, iss. 2, p 229 – 259, maio 2014. p. 253.
[155] URRIBARRI, op. cit., p. 872.

opening of the procedure already suspended the judge immediately until two-thirds of the National Assembly resolved the matter.[156]

With the changes made, it did not take long for the National Assembly to finalize the persecution that had begun. Franklin Arrieche, who had remained in office due to an injunction, was removed by a simple majority of the Assembly. In his appeal, he argued that his removal violated the Constitution, an argument rejected by the Constitutional Chamber by three votes to two.[157] Besides this case, two other judges, Alberto Martini Urdaneta and Rafael Hernández Uzcátegui, members of the Supreme Court's Electoral Chamber known for consistently deciding in favor of the opposition, were forced to retire to avoid Arrieche's fate.[158] A year later, in March 2005, with the new composition reinforced by 12 Chávez revolutionaries, the Supreme Court reversed its decisions regarding the 2002 coup attempt, allowing those allegedly involved to be retried.[159]

This was followed by the defeat of a referendum against Chávez and his victory for a third term, starting in January 2007. That month, Chávez would receive from the National Assembly the power to govern by decree for 18 months for the second time, having exercised this power in 2001. With all these tools in hand, Chávez consolidated his power by issuing decrees that expanded his authority, while the Court ensured that opposition candidates could not run.[160]

The Venezuelan case illustrates well how the process of court taming operates in all its forms – expansion, reduction, and transformation. As Javier Corrales pointed out, after 2005, the Supreme Tribunal of Justice issued more than 45,000 decisions, none against the government.[161]

3.2 Democratization Gone Wrong in Turkey

As a career politician, Erdoğan served as the mayor of Istanbul from 1994-1998 and co-founded the Justice and Development Party (Adalet ve Kalkinma Partisi - AKP) in 2001. The AKP was composed of members from the former Welfare Party (Refah Partisi) and the Virtue

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[156] URRIBARRI, Raul A. Sanchez. Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court. **Law & Social Inquiry**, v. 36, iss. 4, p. 854–884, 2011. p. 872.
[157] TAYLOR, op cit., p. 254.
[158] TAYLOR, Matthew M. The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez. **Journal of Latin American Studies**, v. 46, iss. 2, p 229 – 259, maio 2014. p. 254.
[159] Ibid., p. 254.
[160] Ibid., p. 254-5.
[161] CORRALES, Javier. Autocratic legalism in Venezuela. **Journal of Democracy**, v. 26, n. 2, abril 2015. p. 44.

Party (Fazilet Partisi), which had been dissolved by the Constitutional Court (Anayasa Mahkemesi) for advocating the end of secularism in favor of a state anchored in Islamic values.[162]

A product of the 1962 Constitution, created after a coup, the Turkish Constitutional Court was established in a period like the courts in Austria (1945), Germany (1951), and Italy (1956). However, as Daly points out, due to Turkey's historical, political, and constitutional context, the primary role of its Constitutional Court was not the defense of fundamental rights but the preservation of the Republic's values, particularly secularism.[163] This conclusion is reinforced by Bertil Emrah Oder[164] and Esin Örücü,[165] who view the Court as a mechanism for preserving secularism and the hegemony of the elites in a predominantly Muslim society.

With its rebranding, the AKP advocated liberal values such as secularism, a market economy, and Turkey's entry into the European Union. The opportunity to demonstrate these values quickly arose. The year after its establishment, the AKP won two-thirds of the seats in the parliamentary elections,[166] leading Erdoğan to assume the position of prime minister. Turkey then underwent an economic growth period that bolstered the AKP's popularity. Additionally, the party's political platform, which included expanding political participation, minority ethnic and religious rights, and restricting military powers, made the party attractive to the progressive segments of Turkish society.[167]

Historically marked by coups, Turkey's constitutional system featured substantial military involvement. However, the rise of the AKP implemented a belated transitional justice project.[168] The result was the approval of reforms that affected the military's institutional and decision-making power, reducing its influence over the country's democracy.[169] High-ranking

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[162] VAROL, Ozan O. Stealth Autoritarianism in Turkey. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 339-354. p. 342.

[163] DALY, Tom Gerald. 'Good' Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay. **German Law Journal**, vol. 23, n. 8, p. 1071–1103, 2022. p. 1082.

[164] ODER, Bertil Emrah. The Turkish Constitutional Court and Turkey's Democratic Breakdown: Judicial Politics Under Pressure. **ICL Journal**, v. 18, iss. 1, p. 127–163, 2024. p. 129.

[165] ÖRÜCÜ, Esin. The Constitutional Court of Turkey: The Anayasa Mahkemesi as the Protector of the System. **J. Comp. L.**, v. 3, p. 254-268, 2008.

[166] VAROL, Ozan O.; PELLEGRINA, Lucia Dalla; GAROUPA, Nuno. An Empirical Analysis of Judicial Transformation in Turkey. **The American Journal of Comparative Law**, v. 65, n. 1, p. 187-216, 2017. p. 195.

[167] VAROL, Ozan O. Stealth Autoritarianism in Turkey. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 339-354. p. 342.

[168] MIHR, Anja. Regime Consolidation through Transitional Justice in Europe: The Cases of Germany, Spain and Turkey. **International Journal of Transitional Justice**, v. 11, iss. 1, p. 113–131, 2017. p. 125.

[169] ESEN, Berk; GUMUSCU, Sebnem. Rising competitive authoritarianism in Turkey. **Third World Quarterly**, v. 37, iss. 9, p. 1581-1606, 2016. p. 1584.

military officials were also criminally investigated and imprisoned for allegedly conspiring to overthrow the government.[170]

According to Ozan Varol, despite this set of initiatives, it was evident that Erdoğan's real purpose was not to eliminate or reform undemocratic institutions but to bring them under his control. Under his leadership, the AKP enacted legislative and constitutional reforms that reduced the population's capacity for dissent, restricted individual rights, and hindered the opposition's institutional ability to challenge the government.[171]

Erdoğan, intolerant of negative comments against him, "lawyered up and filed hundreds of libel lawsuits against his critics."[172] The reasons for this ranged from satirical comments to montages of the prime minister's head on a dog's body. But his determination to silence critics did not stop with private citizens. Journalists and outlets were prosecuted – and sometimes fined – for insults or simply reporting facts (such as a journalist prosecuted for announcing an investigation into corruption involving senior government officials). The effect of this, of course, was a chilling effect on public debate.[173]

This was compounded by the selective prosecution of political opponents. Varol points out that many of the prosecutions had sufficient evidence. Since the cases stemmed from crimes of fraud, tax evasion, and money laundering, it was easier to maintain the appearance – both domestically and internationally – that it was not political persecution. However, the prosecutions targeted government opponents.[174]

Thus, without resorting to open violence, Erdoğan used legal and institutional mechanisms to make life difficult for his opponents and facilitate his perpetuation in power. These practices are especially pernicious to democracy because they use its mechanisms against the values that should guide it. Authors like Kim Lane Schepelle and Ozan Varol refer to these techniques as autocratic legalism[175] or stealth authoritarianism,[176] ideas that, despite nuances, describe quite similar concepts.

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[170] VAROL, Ozan O. Stealth Autoritarianism in Turkey. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 339-354. p. 347-8.
[171] Ibid., p. 342.
[172] Ibid., p. 342.
[173] Ibid., p. 343.
[174] Ibid., p. 344.
[175] SCHEPPELE, Kim L. Autocratic Legalism. **University of Chicago Law Review**, v. 85, iss. 2, p. 545-583, 2018.
[176] VAROL, Ozan O. Stealth Autoritarianism. **Iowa Law Review**, v. 100, p. 1673-1742, 2015.

Other reforms continued to be approved in the first decade of the 21st century. One occurred through a referendum[177] in 2007. The amendment expanded the president's powers and made their election subject to popular vote, which gave the officeholder greater legitimacy – and the visions they carried.[178]

During the same period, the Constitutional Court imposed two defeats on the government. The first occurred in 2007, before the reform, and hindered the AKP's presidential choice when the party held 60% of the parliamentary seats. [179] The second strongly demonstrated the Court's commitment to an illiberal notion of secularism. When deciding on the validity of a constitutional amendment allowing the use of headscarves in higher education institutions, the Court ruled the provision unconstitutional.[180]

The headscarves amendment was seen by the government as a solution to the issue since the Constitutional Court had invalidated attempts to do the same through legislative means in previous decades.[181] Despite all the requirements for approving the amendment being met, the Court invalidated it, even in the face of limits that only allowed judicial review of constitutional amendments on procedural grounds.[182] To circumvent this, the Court argued that the amendment violated secularism, a value, along with the fundamental characteristics of the Republic, constitutionally unamendable.[183]

The constitutional showdown[184] between the government and the Constitutional Court became even more serious in 2008 when the Court deliberated on dissolving the AKP for violating the state's secular principles. The decision was 6 to 4 against the AKP, falling one

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[177] In Turkey, referendums are used when proposed constitutional amendments reach three-fifths of the votes (330) in parliament. However, if the proposal achieves two-thirds (367) and the president's approval, the amendment is approved immediately. Cf. VAROL, Ozan O. Stealth Autoritarianism in Turkey. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 339-354. p. 350.

[178] Ibid., p. 348.

[179] BAKINER, Onur. How Did We Get Here? Turkey's Slow Shift to Authoritarianism? *In:* BASER, Bakar; ÖZTÜRK, Ahmet Erdi. **Authoritarian Politics in Turkey**: Elections, Resistance and the AKP. London; New York: I.B.Tauris, 2017, p. 21-46. p. 33.

[180] BÂLI, Asli. The Perils of Judicial Independence: Constitutional Transition and the Turkish Example. **Virginia Journal of International Law**, v. 52, n. 2, p. 235-320, 2012. p. 235 and 252-6.

[181] UZUN, Mehmet Cengiz. The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education. **Penn State International Law Review**, v. 28, n. 3, p. 383-426, 2010. p. 408-11

[182] BÂLI, op. cit., p. 253-4.

[183] VAROL, Ozan O.; PELLEGRINA, Lucia Dalla; GAROUPA, Nuno. An Empirical Analysis of Judicial Transformation in Turkey. **The American Journal of Comparative Law**, v. 65, n. 1, p. 187-216, 2017. p. 196.

[184] A constitutional showdown is a confrontation between and among the branches of government. For a deeper understanding of the topic, see POSNER, Eric; VERMEULE, Adrian. Constitutional Showdowns. **University of Pennsylvania Law Review**, v. 156, p. 991-1048, 2008.

vote short of the qualified majority needed to ban a party. Nevertheless, the Court issued a warning against the AKP and withdrew half of its public funds.[185]

This power to ban parties was used at least 25 times in 26 years. According to Tom Daly, this ostensive role in dissolving parties, coupled with the failure "to provide sufficient protection to individual rights" and the blocking of liberalizing reforms, was subject to strong criticism.[186]

It was in this context that, in September 2010, the AKP presented a referendum proposal with a set of reforms. According to the government, the goal was to democratize the 1982 Constitution, written after a coup. Among the proposed provisions were reforms reducing the influence of the Constitutional Court, seen as activist and committed to preserving the values of the country's old secular elites. [187]

However, the entire package comprised 26 items, and its referendum vote was not divided. Thus, when the population chose to approve the package by 58% of the vote, they accepted all its provisions. As a result, the composition of the Constitutional Court was changed from 11 permanent judges and 4 substitutes to 17 permanent ones. Additionally, the judges' terms were set at 12 years – in addition to the previous age limit of 64 years – and their appointment processes became more politically influenced by other political branches.[188] Access to the Court was also expanded, and its system for protecting rights was improved – measures taken in response to actions against Turkey in the European Court of Human Rights.[189]

As a result, studies point to an expansion of the Court's democratic role in protecting fundamental rights. Daly, for example, highlights how, in the first years after the reform, the Court appeared to act independently, judging landmark cases defending rights to freedom of expression and fair trial. In June 2014, the Court annulled the trial of 230 petitioners convicted of attempting a coup against the AKP. The decision pointed to procedural and principled violations committed during the original trial.[190]

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[185] VAROL, Ozan O. Stealth Autoritarianism in Turkey. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 339-354. p. 348-9.

[186] DALY, Tom Gerald. 'Good' Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay. **German Law Journal**, vol. 23, n. 8, p. 1071–1103, 2022. p. 1082-3.

[187] VAROL, Ozan O. Stealth Autoritarianism in Turkey. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 339-354. p. 349.

[188] VAROL, Ozan O.; PELLEGRINA, Lucia Dalla; GAROUPA, Nuno. An Empirical Analysis of Judicial Transformation in Turkey. **The American Journal of Comparative Law**, v. 65, n. 1, p. 187-216, 2017. p. 190.

[189] DALY, op. cit., p. 1083.

[190] Ibid., p. 1084-6.

For Asli Bâli, the reforms were necessary to attempt to consolidate democracy because the Court continued to act as a mechanism for preserving the establishment responsible for the undemocratic 1982 Constitution. The notion of judicial independence, according to Bâli, must be interpreted contextually considering democratic transition processes.[191]

Still, unlike what would be expected from a government with liberalizing projects, the new rules and composition shifted the Court's ideology in a conservative direction. As pointed out in an empirical and quantitative analysis of the Court's decisions, Varol, Pellegrina, and Garoupa indicate that 2010 marked a rupture in the Constitutional Court's ideological pattern, which continues to move to the right. [192] After the taming, the Court altered previously consolidated understandings, such as issues related to the expansion of executive powers. According to Oder, "[t]hese interpretative shifts of the Court are instances of an absolute deference that empower the executive in the institutional balance at the expense of the democratic oversight and rule of law guarantees." [193]

Following these reforms, Erdoğan attempted to push through a second ambitious project: transforming Turkey into a presidential system. However, the 2011 elections left the AKP four seats short of the 330 needed to submit constitutional amendments to a national referendum. Consequently, the AKP formed a coalition and proposed writing a new constitution with other parties. The proposal for an extremely strengthened presidency, however, led to a deadlock. Although Erdoğan claimed to defend a model similar to the American one, his proposal bore greater resemblance to the Russian one, allowing the president to unilaterally appoint Constitutional Court members and declare a state of emergency. The constitutional process failed, but Erdoğan continued to expand presidential powers through informal means, preparing the office for which he would be elected in 2014.[194]

In 2013, corruption allegations involving government ministers began to weaken the AKP. Added to this was the end of the ceasefire with Kurdish militants in 2015, leading to numerous lawsuits in the country's courts to address allegations related to civil rights restrictions and even killings. Demonstrating some degree of autonomy, the Constitutional

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[191] BÂLI, Asli. Courts and constitutional transition: Lessons from the Turkish case. **International Journal of Constitutional Law**, v. 11, iss. 3, p. 666–701, 2013. p. 679 and 690-7.
[192] VAROL, Ozan O.; PELLEGRINA, Lucia Dalla; GAROUPA, Nuno. An Empirical Analysis of Judicial Transformation in Turkey. **The American Journal of Comparative Law**, v. 65, n. 1, p. 187-216, 2017. p. 213.
[193] ODER, Bertil Emrah. The Turkish Constitutional Court and Turkey's Democratic Breakdown: Judicial Politics Under Pressure. **ICL Journal**, v. 18, iss. 1, p. 127–163, 2024. p. 135.
[194] VAROL, Ozan O. Stealth Autoritarianism in Turkey. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 339-354. p. 350-1.

Court issued some decisions that displeased the government, prompting the AKP, led by now-President Erdoğan, to seek to limit access to the Court.[195]

The situation reached a critical point in 2016, when lower-ranking military officers executed a poorly planned coup attempt. Erdoğan, who was on vacation, appeared on television via FaceTime, calling on his supporters to defend the regime – a call many promptly heeded. The attempt was suppressed in less than 24 hours.[196]

In the aftermath, the death toll exceeded two hundred. Following this, a significant purge was carried out: 6,823 soldiers, 2,777 judges and prosecutors (including two Constitutional Court judges), and dozens of governors were detained. These numbers are supplemented by over 49,000 civil servants removed from their positions and another 21,000 private school teachers who lost their teaching licenses. Nearly 1,600 university deans were forced to resign, and university academics were sent home and ordered not to travel abroad.[197]

In 2017, strengthened by the victory against the coup attempt, Erdoğan finally managed to pass a referendum, with 52% of the vote, transforming his *de facto* concentration of power into *de jure*.[198] From that moment on, the presidency became an office with no real checks on its authority. Among its functions are appointing judges to the judiciary and ordering disciplinary investigations against any of Turkey's 3.5 million public servants.[199]

According to V-Dem data, Turkish democracy peaked in 2003, reaching a score of 0.53, which remained relatively stable until 2007, the year the constitutional erosion process gained traction. Consequently, the country saw its democracy rating decline year after year, reaching 0.26 in 2014,[200] a number that continued to fall, removing Turkey from the group of global democracies.[201]

Judicial control over the Executive, however, lagged behind the pace of democratic degradation. Although it also declined, judicial independence maintained high levels until 2016, when it reached 0.39. The following year, the judiciary almost completely lost its autonomy,

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[195] DALY, Tom Gerald. 'Good' Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay. **German Law Journal**, vol. 23, n. 8, p. 1071–1103, 2022. p. 1086.
[196] VAROL, Ozan O. Stealth Autoritarianism in Turkey. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 339-354. p. 351-2.
[197] Ibid., p. 352.
[198] DALY, Tom Gerald. 'Good' Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay. **German Law Journal**, vol. 23, n. 8, p. 1071–1103, 2022. p. 1087.
[199] VAROL, op. cit., p. 353.
[200] OUR WORLD IN DATA. Liberal democracy index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/grapher/liberal-democracy-index?tab=chart&time=1900..latest&country=~TUR. Acesso em: 20 mar. 2024.
[201] NORD, Marina et al. **Democracy Report 2024**: Democracy Winning and Losing at the Ballot. University of Gothenburg: V-Dem Institute, 2024. p. 61.

reducing the "judicial constraints on the executive" index to 0.15. This value saw slight positive variations up to the present day.[202]

Turkey's recent history, like Venezuela's, demonstrates that court taming was not an essential element in the country's democratic erosion but part of the incumbent's power consolidation strategy. In 2024, Erdoğan completed 21 uninterrupted years in power – and there is no indication that this will change.

3.3 Hungary's Iliberal Democracy Laboratory

With the end of World War II, Hungary and other Eastern European countries found themselves behind the Iron Curtain, under Soviet influence. Despite this, Hungary maintained a certain degree of independence compared to countries like Czechoslovakia, Romania, Bulgaria, Latvia, Lithuania, and Estonia. [203] However, regardless of this relative independence, the period under Soviet rule left deep scars on the Hungarian people[204] and their constitutionalism. Previously governed by a historical (unwritten) constitution, it was during this period of Soviet tutelage that Hungary adopted its first written constitution, the Communist Constitution of 1949.[205]

With the fall of the Soviet Union, the West began implementing a democratization project for those countries that had been behind the Iron Curtain. Thus, Hungary, which had spent more than 40 years under Soviet control, now became acquainted with ideals such as the rule of law, liberal constitutionalism, and human rights.[206] The immediate result was a "peaceful and gradual"[207] transition, starting in the late 1980s, which made the country a success story[208] and a promising model for the Western project.

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[202] OUR WORLD IN DATA. Judicial constraints on the executive index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/grapher/judicial-constraints-on-the-executive-index?tab=chart&time=1900..latest&country=~TUR. Acesso em: 20 mar. 2024.

[203] SOBREIRA, David. Como os Tribunais morrem: o caso da Hungria (entrevista com Tímea Drinóczi). **JOTA**, 14 abr. 2023. Disponível em: https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-da-hungria-14042023. Acesso em: 04 abr. 2024.

[204] For a more detailed analysis of the impacts of constitutional transitions on Hungary's national identity, see DRINOCZI, Timea; BIEN-KACALA, Agnieszka. **Illiberal Constitutionalism in Poland and Hungary**: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law. New York: Routledge, 2022.

[205] Ibid., p. 51.

[206] Ibid., p. 60.

[207] LEWIS, Paul; LOMAX, Bill; WIGHTMAN, Gordon. The emergence of multi-party systems in East-Central Europe: A comparative analysis. *In*: PRIDHAM, Geoffrey; VANHANEN, Tatu (ed.). **Democratization in Eastern Europe**: Domestic and international perspectives. London; New York: Routledge, 1994, p. 151-188. p. 157-8.

[208] BUGARIC, Bojan. Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge. **LEQS**, n. 79, julho 2014. p. 6-7.

As Gábor Halmai explains, this transformation was not achieved by creating a new constitution. Hungary opted to preserve the existing Constitution, implementing a new model of liberal constitutionalism through amendments that substantially altered the document's content. [209] As part of the structural elements of a democracy, the amendment also strengthened the Constitutional Court, granting it strong judicial review powers.[210]

During this transition, a young politician named Viktor Orbán began to gain prominence. Flanked by military colleagues and the political establishment, Orbán founded the Alliance of Young Democrats (the original name of his current party, Fidesz). Initially with a liberal-nationalist ideology, Fidesz began as an opposition to the conservative government, undergoing an internal ideological transition and shifting to the right in the early 1990s. [211] In 1998, after forming a coalition with two other parties, Orbán became Hungary's prime minister for the first time at the age of 35. His government lasted until 2002, when he was defeated by the liberal-socialist coalition, which remained in power until 2010.

The transition of power between parties seemed to work well until 2010 when Fidesz achieved a landslide victory in the elections,[212] securing a parliamentary majority sufficient to amend – or even replace – the country's Constitution. Several factors contributed to this event. First, the alliance established between Fidesz and the Christian Democratic People's Party (KDNP). Second, a widespread dissatisfaction across Central and Eastern Europe with the transition process.[213] Third, the constitutional design of Hungary's electoral system, developed during the democratic transition and concerned with issues like a fragmented parliament.[214] Lastly, the leak of speeches by government leaders at a closed party meeting, admitting that they had blatantly lied to the people, a fact that almost became a political platform for Orbán.[215]

In this context, Halmai explains that this significant victory, with more than 50% of the vote, was amplified by the proportional electoral system, granting the Fidesz-KDNP coalition

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[209] BUGARIC, Bojan. Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge. **LEQS**, n. 79, julho 2014. p. 8.
[210] HALMAI, Gárbor. A Coup Against Constitutional Democracy: The Case of Hungary. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 243-256. p. 244.
[211] DJANKOV, Simeon. Hungary under Orbán: Can Central Planning Revive Its Economy? **Peterson Institute for Internal Economics: Policy Brief**, n. PB15-11, p. 1-9, Jul. 2015. p. 3.
[212] HALMAI, Gárbor. A Coup Against Constitutional Democracy: The Case of Hungary. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 243-256. p. 245.
[213] Ibid., p. 245.
[214] BÁNKUTI, Miklós; HALMAI, Gábor; SCHEPPELE, Kim Lane. Hungary's Illiberal Turn: Disabling the Constitution. **Journal of Democracy**, v. 23, n. 3, p. 138-146, July 2012. p. 138.
[215] SOBREIRA, David. Como os Tribunais morrem: o caso da Hungria (entrevista com Tímea Drinóczi). **JOTA**, 14 abr. 2023. Disponível em: https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-da-hungria-14042023. Acesso em: 04 abr. 2024.

two-thirds of the parliamentary seats (263 out of 386). This allowed the new government to promote whatever changes it wanted without negotiating with opposition members. And so it happened.[216]

Early in his new term, still in 2010, Orbán and Fidesz began their illiberal blitzkrieg by repealing Article 24 (5) of the Constitution. A product of the redemocratization process, Article 24 (5) had been inserted into the Constitution in 1995 to force consensus among different political players and protect the interests of minority parties.[217] This provision required a four-fifths quorum of parliamentary votes to determine the Constitution's concept – a vague expression that did not necessarily mean a new constitution, as Drinóczi argues.[218]

Understanding the significance of this change requires a deeper contextual analysis. According to Drinóczi, in Hungary, there is no substantive difference between original and derived constituent power. One reason justifying this is the lack of immutable elements (entrenched clauses) or mechanisms to protect the Constitution's identity. The consequence of this phenomenon is an almost unlimited power of constitutional amendment for those holding two-thirds of the votes in the Legislative Power.[219]

Thus, performing something similar to what Brazilian constitutional doctrine would consider a "double revision"[220] – first removing the limit on constitutional amendment, then altering the unprotected content – the Orbán-led government amended the Constitution to remove Article 24 (5) and, shortly thereafter, established a new Constitution.

Therefore, despite its abusive nature, the measure was taken within a constitutional design that offered few obstacles besides the qualified quorum. According to Richard Albert, for a change to be adequately understood as an amendment, it must be consistent with the

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[216] HALMAI, Gárbor. A Coup Against Constitutional Democracy: The Case of Hungary. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 243-256. p. 245.

[217] BUGARIC, Bojan. Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge. **LEQS**, n. 79, julho 2014. p. 8-9.

[218] SOBREIRA, David. Como os Tribunais morrem: o caso da Hungria (entrevista com Tímea Drinóczi). **JOTA**, 14 abr. 2023. Disponível em: https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-da-hungria-14042023. Acesso em: 04 abr. 2024.

[219] DRINÓCZI, Tímea. Constitutional Politics in Contemporary Hungary. **ICL Journal**, v. 10, p. 63-98, 1/2016. p. 66.

[220] Under the Brazilian doctrine, double revision is understood as the process of circumventing constitutional limitations on the power of amendment, specifically those established by the entrenched clauses of Article 60, § 4 of the Brazilian Constitution. Initially, the rules with limits established by the original constituent power are revoked, and then the Constitution is amended without any disrespect to the modified text. The Brazilian Supreme Federal Court has already addressed – and rejected – this thesis on different occasions. BRASIL. Supremo Tribunal Federal. **ADI 981-MC**. Plenário. Rel. Min. Néri da Silveira, j. 17/03/1993; **ADI 1.722-MC**. Plenário. Rel. Min. Marco Aurélio, j. 10/12/1997. For further reading on the topic, see SILVA, Virgílio Afonso da. Ulisses, as sereias e o poder constituinte derivado: sobre a inconstitucionalidade da dupla revisão e da alteração no quórum de 3/5 para aprovação de emendas constitucionais. **Revista de Direito Administrativo**, v. 226, p. 11-32, 2001.

existing constitution.[221] Applying this lesson to the Hungarian reality encounters two obstacles: first, by not differentiating between original and derived constituent power, the Hungarian system blurs this requirement; second, at that time, as Drinóczi points out, constitutional literature did not yet debate topics like unconstitutional constitutional amendments,[222] making attempts to analyze the facts through today's lenses susceptible to accusations of anachronism.

Still in 2010, without an opposition capable of countering its power, Fidesz continued its constitutional revolution by passing several constitutional amendments and other laws affecting various state areas. Changes were made to representative bodies, such as reducing the number of parliamentary seats from 386 to 200 and the number of local government representatives,[223] centralization measures that Orbán borrowed from Vladimir Putin.[224] Media sector changes were also approved. Constitutional guidelines against monopolies were weakened, and an authority over the sector was established.[225]

The administration of justice was not spared from Fidesz's assault. Constitutional changes altered how judges were appointed to the Constitutional Court (Alkotmánybíróság)[226]. As Kovács and Tóth explain, under the previous model, appointments to the Court went through a special committee composed of a member from each parliamentary faction. These members were elected by two-thirds of the plenary of the Legislative House. According to the new rules, however, appointments would be made by "a parliamentary committee whose members are appointed from and by the parties according to their share of seats in parliament."[227] According to Bugaric, the change ensured that Fidesz could use its two-thirds supermajority to appoint whomever it wanted.[228]

The second change occurred after the Court prevented the government from retroactively taxing up to 98% of public funds whose gains were considered contrary to "good morals." The measure targeted high-ranking public officials and was challenged before the

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[221] ALBERT, Richard. **Constitutional Amendments**: Making, Breaking, and Changing Constitutions. New York: Oxford University Press, 2019. p. 15.
[222] DRINOCZI, Timea; BIEN-KACALA, Agnieszka. **Illliberal Constitutionalism in Poland and Hungary**: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law. New York: Routledge, 2022. p. 158
[223] KOVÁCS, Kriszta, TÓTH, Gábor Attila. Hungary's Constitutional Transformation. **European Constitutional Law Review**, v. 7, iss. 02, p. 183-203, junho 2011. p. 188.
[224] SCHEPPELE, Kim L. Autocratic Legalism. **University of Chicago Law Review**, v. 85, iss. 2, p. 545- 583, 2018. p. 551.
[225] KOVÁCS; TÓTH, op. cit., p. 190.
[226] The Hungarian jurisdiction system resembles the German one, meaning that Hungary has a Constitutional Court (Alkotmánybíróság), which is not part of the Judiciary, and a Supreme Court (Curia), which occupies the top of the hierarchy of this branch of Branch. KOVÁCS; TÓTH, op. cit., p. 184-5.
[227] Ibid., p. 193.
[228] BUGARIC, Bojan. Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge. **LEQS**, n. 79, julho 2014. p. 9.

Court, which was easily accessible to everyone. In response, on the same day, the government re-enacted the law with the same content along with a constitutional amendment restricting the Court's authority to deliberate on fiscal matters.[229]

Shortly after implementing these measures, in 2011, Orbán and Fidesz gave Hungary a new Constitution, promised at the beginning of 2010. The new Fundamental Law (Alaptörvény) came into effect in 2012 and introduced "several provisions which radically undermine basic checks and balances from the old constitution."[230] Among these changes, access to the Constitutional Court, previously almost unrestricted, suffered severe limitations.

In addition, the retirement age for ordinary judges was reduced from 70 to 62, approved as a transitional measure at the end of 2011, just days before the Fundamental Law took effect. This measure forced approximately 274 judges to retire early, including "six of the twenty county-level court presidents, four of the five appeals court presidents, and twenty of the eighty Supreme Court judges."[231]

A new National Judicial Office was also created, given powers to replace the retiring judges with new ones. Unsurprisingly, as Bugaric points out, Fidesz appointed a close friend of Orbán to the position, the wife of Szájer, the main author of the new Fundamental Law. In addition to the power to appoint new judges, the president of the National Judicial Office, during their nine-year term, has the power to reassign cases between courts and even determine which judge will handle which case[232] – a power that was nullified by the Constitutional Court.[233]

Despite all the measures taken to cripple the Court in its constitutional capacities, its president, Paczolay Péter, managed to build alliances with his colleagues and imposed defeats on Orbán's illiberal project. Among the government measures overturned were: i) the reduction of the retirement age from 70 to 62; ii) a law criminalizing homelessness; iii) part of a law removing the official status of over 300 churches.[234]

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[229] KOVÁCS, Kriszta, TÓTH, Gábor Attila. Hungary's Constitutional Transformation. **European Constitutional Law Review**, v. 7, iss. 02, p. 183-203, junho 2011. p. 192-3.
[230] BUGARIC, Bojan. Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge. **LEQS**, n. 79, julho 2014. p. 10.
[231] HALMAI, Gárbor. A Coup Against Constitutional Democracy: The Case of Hungary. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 243-256. p. 246.
[232] BUGARIC, Bojan. Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge. **LEQS**, n. 79, julho 2014. p. 10.
[233] SCHEPPELE, Kim L. Constitutional Revenge. **Verfassungsblog**, 03 mar. 2013. Disponível em: https://verfassungsblog. de/constitutional-revenge/. Acesso em: 26 out. 2022.
[234] Ibid.

However, in March 2013, Fidesz passed the Fourth Amendment, containing a package of constitutional provisions adding 15 pages to the 45-page Fundamental Law. According to Gábor Halmai, several measures overturned by the Constitutional Court were reinstated. For him, however, the most sensitive of these changes was the annulment of all Court precedents established before the new Fundamental Law – "which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law."[235]

Since Fidesz's return to power in 2010, Hungary has been moving toward autocratization. The evaluation of its democracy quality fell from 0.77 (2009), an electoral democracy, to 0.32 (2023), an electoral autocracy.[236] Curiously, however, despite all Hungarian Constitutional Court judges having started their terms after Orbán came to power, the Judicial Constraints Index remains high, having migrated from 0.9 to 0.63.[237] This may indicate that the process of taming the Hungarian Constitutional Court has not yet been fully realized or that the changes made so far have been sufficient to prevent it from intervening in Orbán's plans.

Regardless of Hungary's Constitutional Court's actions, Orbán's illiberal constitutionalism[238] has proven successful. Having begun by borrowing practices from preceding autocrats, Orbán has been able to create his own illiberal democracy laboratory and export practices to those seeking to replicate the Hungarian model, as happened in Poland.[239]

3.4 Budapest in Warsaw: The Polish Blitzkrieg on Judicial Independence

Created in 1952 and personally approved by Stalin,[240] the Polish Constitution remained in force until 1992, when it was replaced by a transitional document,[241] which in turn was

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[235] HALMAI, Gárbor. A Coup Against Constitutional Democracy: The Case of Hungary. *In*: GRABER, Mark A.; LEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 243-256. p. 247.

[236] OUR WORLD IN DATA. Liberal democracy index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/explorers/democracy?time=latest&country=~TUR&Dataset=Varieties+of+Democracy&Metric=Liberal+democracy&Sub-metric=Main+index+test. Acesso em: 20 mar. 2024.

[237] OUR WORLD IN DATA. Judicial constraints on the executive index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/grapher/judicial-constraints-on-the-executive-index?country=~VEN. Acesso em: 20 mar. 2024.

[238] The term is controversial, considered coherent by some, such as Tímea Drinoczi and Agnieszka Bień-Kacała, and an oxymoron by others, such as Gábor Halmai, Kim Lane Scheppele, and Gábor Attila Tóth. See DRINOCZI, Timea; BIEN-KACALA, Agnieszka. **IIlliberal Constitutionalism in Poland and Hungary**: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law. New York: Routledge, 2022. p. 22.

[239] SCHEPPELE, Kim L. Autocratic Legalism. **University of Chicago Law Review**, v. 85, iss. 2, p. 545- 583, 2018.

[240] SADURSKI, Wojciech. **Poland's Constitutional Breakdown**. New York: Oxford University Press, 2019. p. 35.

[241] Ibid., p. 41.

replaced by the current Constitution in 1997. Previously an ideological signpost with no reflection in reality, the new Polish Constitution embraced liberal democracy and its predicates.[242]

However, even during the decline of the Soviet regime, the country underwent significant transformations in its constitutional structure. Throughout the 1980s, a Supreme Administrative Court, an official Ombudsman office, and even a Constitutional Court were created.[243]

As expected in such a situation, the Constitutional Court did not have substantive powers. Its decisions on the constitutionality of legislative provisions were subject to subsequent examination by the Parliament (Sejm), which could invalidate them by two-thirds of its chamber.[244]

Taking advantage of the weakening Soviet power, in the late 1980s, the Court continued its strategic actions, invalidating some laws and maintaining institutional balance, which earned it some degree of legitimacy – "an asset necessary to survive the future process of transformation," which began in 1989 and only ended in 1997 with the adoption of the Constitution still in force today.[245]

Following the implementation of the new Constitution, the Court strengthened its authority by ruling on cases related to fundamental rights and institutional issues of judicial independence, all without directly conflicting with the other constituted powers.[246] This background changed in 2005 when the Law and Justice Party (Prawo i Sprawiedliwość - PiS) first came to power, as Lech Garlicki explains:

> The situation became less comfortable after the 2005 parliamentary elections when the new majority of the Law and Justice Party (LaJ) launched a new project that drastically differed from the hitherto established patterns. The political conflict soon expanded into the area of constitutional interpretation and, as neither the Constitutional Courts nor other supreme courts were ready to yield, it culminated in attacks on the judicial branch.[247]

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[242] According to Sadurski: "It was less a legal document, more an ideological signpost". SADURSKI, Wojciech. **Poland's Constitutional Breakdown**. New York: Oxford University Press, 2019. p. 35.
[243] Ibid., p. 35 e 42.
[244] GARLICKI, Lech. Constitutional Courts and Politics: The Polish Crisis. *In*: LANDFRIED, Christine (ed.). **Judicial Power**: How Constitutional Courts affect Political Transformations. Cambridge; New York: Cambridge University Press, 2019, p. 141-162. p. 142.
[245] Ibid., p. 142.
[246] Ibid., p. 144.
[247] Ibid., p. 144.

The PiS government, under the leadership of Prime Minister Jarosław Kaczyński, was then defeated in 2007[248] with the election of opposition leader Donald Tusk as prime minister, restoring the status quo. Having demonstrated the ability to resist government-backed practices, the Court "emerged from the crisis with a strengthened authority."[249] This apparent victory, however, taught the inexperienced PiS some important lessons on how to implement radical changes.[250]

Several years later, during the Polish presidential election in May 2015, Jarosław Kaczyński, president of the PiS, expected an easy victory for the incumbent, Bronisław Komorowski. Not wanting to run under such conditions, Kaczyński chose to nominate a relatively unknown young politician to run for his party against Komorowski. The chosen one was Andrzej Duda, a young politician who had held some minor positions.[251] Surprisingly, however, a chaotic campaign by Komorowski saw Duda emerge victorious. This was followed by a second victory in the parliamentary elections in October of the same year. With a turnout of only 50.9%, the PiS secured an absolute majority with only 37.5% of the votes (18% of the total number of voters in the country).[252]

These consecutive defeats ended the eight-year dominance of the centrist-liberal coalition. However, unlike Hungary, where Orbán's party secured two-thirds of the Parliament, the PiS majority exceeded the opposition by only five seats.[253]

The Polish case also differs from its Hungarian neighbor in another aspect: the absence of a catalytic crisis. Since the fall of the Soviet Union, Poland saw its economy sextuple and was the only EU country that did not suffer a recession due to the 2008 crisis[254] – which calls into question the lesson that old and rich democracies do not die, as pointed out by Levitsky and Ziblatt.[255]

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[248] Lech Kaczyński, who founded the PiS with his twin brother Jarosław, was the President of Poland from 2005 until his death in 2010. During this period, the PiS had two of the three Prime Ministers: Kazimierz Marcinkiewicz (October 2005 - July 2006) and Jarosław Kaczyński (July 2006 – November 2007).

[249] GARLICKI, Lech. Constitutional Courts and Politics: The Polish Crisis. *In*: LANDFRIED, Christine (ed.). **Judicial Power**: How Constitutional Courts affect Political Transformations. Cambridge; New York: Cambridge University Press, 2019, p. 141-162. p. 144.

[250] SADURSKI, Wojciech. **Poland's Constitutional Breakdown**. New York: Oxford University Press, 2019. p. 2.

[251] Ibid., p. 1.

[252] Ibid., p. 1.

[253] O PiS conquistou 235 das 460 cadeiras da Casa Inferior (*Sejm*) e 61 das 100 da Superior (*Senat*). SWEENEY, Richard J. Constitutional conflicts in the European Union: Court packing in Poland versus the United States. **Economics and Business Review**, v. 4, n. 4, p. 3-29, 2018. p. 7.

[254] SADURSKI, op. cit., p. 2.

[255] LEVITSKY, Steven; ZIBLATT, Daniel. **Tyranny of the Minority**: Why American Democracy Reached the Breaking Point. New York: Crown, 2023.

Despite these differences, both countries underwent similar processes of democratic sabotage. Sadurski points out that the transformation experienced by Poland was an unexpected coup. Still, at the end of 2015, after the October elections, the country "witnessed the beginning of a fundamental authoritarian transformation: the abandonment of dogmas of liberal democracy, constitutionalism, and the rule of law that had been so far taken for granted."[256]

Under the command of Kaczyński, the de facto leader of the government, the PiS repeated practices taken directly from Orbán's playbook:[257] i) attacks on the media; ii) reduction of the Constitutional Court's power; iii) changes in the electoral commission's rules; iv) treating the European Union as a hostile entity.[258]

The conditions did not seem favorable for revolutionary plans. First, because despite having a majority, the party did not have enough votes to promote constitutional changes. Added to this obstacle was a constitutional design issue: it was up to the Parliament to appoint judges to the Constitutional Court. Finally, due to the nine-year term of these judges, they were expected to remain in office during the upcoming legislature[259] – now dominated by the PiS.

However, these mechanisms proved insufficient against the determination of the PiS. The Court was attacked both in its composition and its institutional capacities.[260] As Sadurski explains, the "reforms" began under the disingenuous justification of ensuring no legal obstacles to creating a fairer economy.[261]

By the beginning of the new legislature at the end of 2015, the Polish Constitutional Court had prided itself as an institution protecting the democratic process, effectively establishing checks on the powers exercised by the Executive and Legislative branches in various matters. This does not mean the Court's decisions were immune to criticism. Sadurski explains that in areas such as the separation of church and state, freedom of expression and press, and protection of linguistic minorities, the Court's decisions were sometimes weak or not committed to enforcing constitutional provisions.[262]

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[256] SADURSKI, Wojciech. **Poland's Constitutional Breakdown**. New York: Oxford University Press, 2019. p. 3.
[257] SCHEPPELE, Kim L. Autocratic Legalism. **University of Chicago Law Review**, v. 85, iss. 2, p. 545- 583, 2018. p. 552-3.
[258] SADURSKI, op. cit., p. 3-4.
[259] GARLICKI, Lech. Constitutional Courts and Politics: The Polish Crisis. *In*: LANDFRIED, Christine (ed.). **Judicial Power**: How Constitutional Courts affect Political Transformations. Cambridge; New York: Cambridge University Press, 2019, p. 141-162. p. 142.
[260] KONCEWICZ, Tomasz Tadeusz. The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux. **Review of Central and East European Law**, v. 43, n. 2, p. 116-173, 2018. p. 120-1.
[261] SADURSKI, Wojciech. **Poland's Constitutional Breakdown**. New York: Oxford University Press, 2019. p. 58.
[262] Ibid., p. 58-9.

Even so, due to its previous experience in government (2005-07), the PiS did not have good memories of the Constitutional Court, which had prevented many of its plans.[263] This led to the first crisis at the end of 2015, when five of the Court's 15 judges were to end their terms (three in November and two in December).[264]

In June 2015, before the October parliamentary election that year, the outgoing legislature – knowing the likely victory of the PiS – made a change to the governing law of the Constitutional Court. Dishonestly,[265] the centrist-liberal coalition engaged in a constitutional hardball[266] by bringing forward the appointment dates for the five judges, three of whom were leaving the Constitutional Court during the legislature still controlled by the centrist-liberal alliance.[267] The parliamentary majority then appointed five new judges (two of whom would only take office in December, during the new legislature).[268]

Since August of that year, President Andrzej Duda refused to administer the oath of office to the five new judges. The new legislature, now dominated by the PiS, in an unprecedented move, declared the appointments invalid and appointed five other judges, who were immediately sworn in by the President of the Republic.[269]

Consequently, the opposition challenged the act before the Constitutional Court, which ruled that it was the incumbent legislature's responsibility to fill the vacancy of a judge leaving the Court during its term. This meant that three of the five appointments remained valid. In another decision, however, the Court refused to assess the individual validity of the appointments, arguing that such power was beyond the scope of its jurisdiction.[270]

Duda, supported by the parliamentary majority, refused to comply with the Court's order, asserting the validity of the new appointments. Confronting Duda, the President of the Constitutional Court decided that only two of the judges appointed by the "new" Parliament – those whose appointments were invalidly made by the previous legislature – could occupy seats on the Court. Because of this, the Court faced two groups of three judges claiming the vacant

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[263] SADURSKI, Wojciech. **Poland's Constitutional Breakdown**. New York: Oxford University Press, 2019. p. 61.
[264] GARLICKI, Lech. Constitutional Courts and Politics: The Polish Crisis. *In*: LANDFRIED, Christine (ed.). **Judicial Power**: How Constitutional Courts affect Political Transformations. Cambridge; New York: Cambridge University Press, 2019, p. 141-162. p. 146.
[265] SADURSKI, op. cit., 62.
[266] TUSHNET, Mark. Constitutional Hardball. **The John Marshall Law Review**, v. 37, n. 7, p. 523-553, 2004. p. 523.
[267] SADURSKI, op. cit., p. 62.
[268] GARLICKI, op. cit., p. 146.
[269] Ibid., p. 146.
[270] Ibid., p. 147.

seats, one group appointed by the previous legislature and the other appointed by the PiS.[271] This led the government to challenge the legitimacy of the Court and its judgments.[272]

The attacks did not stop. After the failed attempt to pack the Court, the PiS made an unprecedented move in the European continent: it refused to publicize the Court's judgments. Citing procedural errors and lack of legal grounds, the government stopped observing the constitutional requirement to publish the Court's decisions.[273] When deliberating on the matter in Case K 47/15, the Venice Commission, an advisory body of the Council of Europe on constitutional matters, considered this "omission" by the Polish government contrary to the rule of law. Internally, the Constitutional Court reinforced the duty to publish its decisions, ruling out any government discretion on the matter.[274]

In its blitzkrieg against the Constitutional Court, the government passed successive laws affecting the institution's functioning, competencies, or authority. As a result, the Court spent most of its time confronting these provisions, leaving substantive issues aside to defend itself. This state persisted until the end of 2016 when the Court's composition was finally dominated by a PiS-loyal majority that began to uphold the constitutionality of laws crippling the Court.[275]

On another front, judicial independence was attacked through the taming of the National Judicial Council (Krajowa Rada Sądownictwa - KRS). Alongside the Executive, court presidents, and judicial self-governance bodies, the National Judicial Council is part of Poland's judicial governance system. Created under the communist regime but designed with independent powers during the transition, the KRS "was established as the guardian of the separation of powers and the independence of courts and judges, and indirectly for the effective realization of the right to a fair trial enshrined in Article 45 (1) of the Constitution."[276] Among its competencies are: i) selecting judges for the Supreme Court; ii) transferring judges between posts; and iii) adopting rules on judicial ethics and overseeing them.[277]

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[271] GARLICKI, Lech. Constitutional Courts and Politics: The Polish Crisis. *In*: LANDFRIED, Christine (ed.). **Judicial Power**: How Constitutional Courts affect Political Transformations. Cambridge; New York: Cambridge University Press, 2019, p. 141-162. p. 147.
[272] Ibid., p. 147.
[273] KONCEWICZ, Tomasz Tadeusz. The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux. **Review of Central and East European Law**, v. 43, n. 2, p. 116-173, 2018. p. 121.
[274] KONCEWICZ, op cit., p. 121-2.
[275] SADURSKI, Wojciech. **Poland's Constitutional Breakdown**. New York: Oxford University Press, 2019. p. 71-2.
[276] ŚLEDZIŃSKA-SIMON, Anna. The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition. **German Law Journal**, v. 19, n. 7, p. 1839-1870, dez. 2018. p. 1844 e 1847-8.
[277] Ibid., p. 1848.

With a hybrid composition, the KRS has 25[278] members whose terms last four years. As Anna Śledzińska-Simon explains, a Constitutional Court decision requiring the physical presence of KRS members to deliberate prevented other members, such as the Minister of Justice, the First President of the Supreme Court, and the President of the Supreme Administrative Court, from frequently participating in long sessions addressing judge evaluation and selection. The result was the domination of the KRS by judicial representatives.[279]

Until 2017, the Judiciary held 15 of the 25 KRS seats. However, the Polish Constitution made no stipulation about the equal voting power of judicial members in the judge selection process. Exploiting an apparent representational issue in the Judiciary's seat distribution[280], the PiS began promoting propaganda against this KRS characteristic.[281]

After popular protests against legislative initiatives to restructure the KRS, President Duda, politically wary of the situation, vetoed a PiS-drafted bill. However, it didn't take long for Duda and the PiS to strike a deal to resume the plan to subjugate the KRS.[282]

Even though there was no clear constitutional provision on how KRS judicial members should be elected, the consolidated understanding was that the Judiciary should make these appointments. Consequently, the governing law of the KRS established different election models for the various Judiciary sectors. This provision was challenged before the Constitutional Court – now with a PiS-controlled majority – which ruled it unconstitutional.[283]

The Court, however, did not dismiss the idea that judges should be elected by judges. Its decision merely prevented "different methods of inter-judiciary elections at different levels of the courts."[284] According to Śledzińska-Simon, this "gave the government a 'legitimate' reason to reform the election process and move the authority to select judicial members away

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[278] KRS' composition is as follows: "According to the Constitution, the KRS consists of fifteen judges. The remaining members are the chief justices of the SC and Supreme Administrative Court, the MJ, a representative of the president, four MPs 'elected by the Sejm', and two senators 'elected by the Senate'". Cf. SADURSKI, op. cit., p. 100.

[279] ŚLEDZIŃSKA-SIMON, Anna. The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition. **German Law Journal**, v. 19, n. 7, p. 1839-1870, dez. 2018. p. 1849-50.

[280] According to Anna Śledzińska-Simon: "[...] 2 members were judges of the Supreme Court; 2 members – the judges of administrative courts; 2 members – the judges of appellate courts; 8 members – the judges of regional and district courts; and, 1 member – a judge of a military court. 51 As a result, judges of higher courts were overrepresented, while the district court judges did not have an adequate number of representatives (for example, in the last term of the NCJ there was only one judge from the district court)". Ibid., p. 1850.

[281] SADURSKI, Wojciech. **Poland's Constitutional Breakdown**. New York: Oxford University Press, 2019. p. 99.

[282] Ibid., p. 98-99.

[283] Ibid., p. 100.

[284] Ibid., p. 100.

from the bodies representing the judiciary and into the hands of the Parliament."[285] Under the new system, judges would be heard only during the pre-selection phase.

The result of this constitutional erosion process, which besides taming the Constitutional Court also concentrated powers in other positions under PiS control[286], led to the evaluation of Polish democracy falling from 0.81 in 2014 to 0.42 in 2022.[287] Like Hungary, however, the metrics on judicial control over the Executive remain relatively high, despite a substantial drop (from 0.92 in 2014 to 0.61 in 2022).[288]

3.5 In the Shadow of El Salvador`s Millennial Autocrat

Unfamiliar with democratic governance until the 1990s, El Salvador underwent five decades of military rule and 12 years of civil war against the guerrilla movements of the Farabundo Martí National Liberation Front (Frente Farabundo Martí para la Liberación Nacional - FMLN). However, at the beginning of the 1990s, the Republican Nationalist Alliance (Alianza Republicana Nacionalista – ARENA) and the FMLN decided to end the civil war. Through the Chapultepec Peace Accords, signed in Mexico in 1992, ARENA and FMLN sought to democratize El Salvador, ensuring respect for human rights and the reunification of its society.[289]

Previously excluded from the electoral process, the FMLN was incorporated as an official party, allowing guerrillas to actively participate in the country's political life. To secure the interests of the elites involved, electoral laws were established to reconcile the interests of ARENA and the FMLN. This process created legislative barriers that hindered the rise of new parties, making El Salvador's political system bipartisan, with ARENA representing the right of the political spectrum and the FMLN the left.[290]

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[285] ŚLEDZIŃSKA-SIMON, Anna. The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition. **German Law Journal**, v. 19, n. 7, p. 1839-1870, dez. 2018. p. 1851.
[286] For example: the Ministry of Justice has incorporated the functions of the Prosecutor General.
[287] OUR WORLD IN DATA. Liberal democracy index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/explorers/democracy?time=latest&country=~TUR&Dataset=Varieties+of+Democracy&Metric=Liberal+democracy&Sub-metric=Main+index+test. Acesso em: 20 mar. 2024.
[288] OUR WORLD IN DATA. Judicial constraints on the executive index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/grapher/judicial-constraints-on-the-executive-index?country=~VEN. Acesso em: 20 mar. 2024.
[289] ARNSON, Cynthia J. (ed.). **El Salvador's Democratic Transition Ten Years After the Peace Accord**. Washington: Woodrow Wilson International Center for Scholars, 2003. p. 1.
[290] MELENDEZ-SÁNCHEZ, Manuel. Millennial Authoritarianism in El Salvador**. Journal of Democracy**, v. 32, n. 3, p. 19-32, 2021. p. 25.

The peace accords were followed by amnesty laws, which forgave war crimes from both sides of the conflict. Manuel Melendez-Sánchez points out that, despite being a setback in the application of transitional justice,[291] the measure facilitated the democratization process by allowing "wartime leaders on both sides of the conflict to participate in the new democratic regime."[292] This arrangement allowed El Salvador to follow a direction contrary to the famous lesson of Von Clausewitz – according to whom war is the continuation of policy with other means – as it paved the way for former combatants to occupy key positions in subsequent governments.[293]

The result of this transition was a steady increase in the country's democratic ratings, moving from an electoral autocracy in 1991 to an electoral democracy in 2006, according to V-Dem metrics.[294] During the same period, the Judiciary, previously submissive to the Executive,[295] also experienced a gradual and steady increase in its independence.[296]

In the decade following the peace accords, El Salvador enhanced its respect for human rights, expanded political participation, and increased social control of institutions.[297] However, as a country poor in natural resources and lacking a coast on the Caribbean Sea, El Salvador became increasingly dependent on dollar remittances sent from abroad by citizens who emigrated in search of better living conditions. Faced with these challenges, ARENA and the FMLN were unable to propose initiatives to stimulate the country's economic growth.[298]

These difficulties were compounded by rising levels of corruption and violence. Crimes of all kinds placed El Salvador among the countries with the highest crime rates in the world. As noted by Forrest Colburn and Arturo Cruz, "[e]ven everyday activities such as riding a public bus can be dangerous" in a country plagued by uncontrolled gang proliferation.[299]

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[291] What is not necessarily correct, as amnesties are included among the mechanisms of transitional justice. Cf. DANCY, Geoff et al. Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies. **International Studies Quarterly**, v. 63, iss. 1, p. 99-110, 2019.
[292] MELENDEZ-SÁNCHEZ, Manuel. Millennial Authoritarianism in El Salvador**. Journal of Democracy**, v. 32, n. 3, p. 19-32, 2021. p. 25.
[293] Ibid., p. 25.
[294] NORD, Marina et al. **Democracy Report 2024**: Democracy Winning and Losing at the Ballot. University of Gothenburg: V-Dem Institute, 2024. p. 60.
[295] O'SHAUGHNESSY, Laura Nuzzi; DODSON, Michael. Political Bargaining and Democratic Transitions: A Comparison of Nicaragua and El Salvador. **Journal of Latin American Studies**, v. 31, n. 1, p. 99-127, 1999. p. 107.
[296] OUR WORLD IN DATA. Judicial constraints on the executive index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/grapher/judicial-constraints-on-the-executive-index?tab=chart&country=~SLV. Acesso em: 20 mar. 2024.
[297] ARNSON, Cynthia J. (ed.). **El Salvador's Democratic Transition Ten Years After the Peace Accord**. Washington: Woodrow Wilson International Center for Scholars, 2003. p. 2.
[298] COLBURN, Forrest D.; CRUZ, Arturo. El Salvador's Beleauguered Democracy. **Journal of Democracy**, v. 25, n. 3, p. 149-158, 2014. p.152.
[299] Ibid., p. 155-7.

The relative institutional independence of prosecutors and courts in the young Salvadoran democracy further exposed the severity of the situation. Starting in 2014, for the first time, the country began to witness corruption investigations against high-level government officials. Former President Francisco Flores (1999-2004) and his chief of staff, both from the Arena Party, were arrested. Flores died two years later under house arrest. Meanwhile, from the FMLN's side, former president Mauricio Funes (2009-2014) sought asylum in Nicaragua to avoid arrest.[300]

In this context, confined to the same old options presented by Arena and the FMLN, and bound by the Electoral Code of 1992, which made it difficult to create new parties, the population of El Salvador became increasingly dissatisfied with the country's political and social situation. This decline in the perception of party representativeness also led to discontent with the democratic system[301] – a scenario ripe for the allure of populists.

Enter Nayib Bukele. Bukele began his political career at the age of 30 by being elected mayor of the city of Nuevo Cuscatlán for the FMLN in 2012, a position he held until 2015 when he was elected mayor of the country's capital, San Salvador. Since the start of his political life, Bukele has used social media, especially Twitter (now X), as tools to project his image, a practice that eventually earned him the nickname "millennial president."[302]

Expelled from the FMLN in 2017 due to his criticisms of the party leadership, Bukele quickly leveraged his popularity to create a new party, Nuevas Ideas. However, electoral laws prevented the party from fielding a candidate in the 2018 presidential elections, leading Bukele to run under the Grand Alliance for National Unity Party (Gran Alianza por la Unidad Nacional - GANA).[303]

According to Martin Nilsson, Bukele's campaign already exhibited traits of his populism. With an antipluralist discourse, marked by demonstrations against the elites and the political establishment, and claims of speaking on behalf of the people,[304] Bukele emerged victorious from the 2019 elections with a 21 percentage point lead over his closest rival, making

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[300] MELENDEZ-SÁNCHEZ, Manuel. Millennial Authoritarianism in El Salvador**. Journal of Democracy**, v. 32, n. 3, p. 19-32, 2021. p. 28.
[301] Ibid., p. 26.
[302] RUIZ-ALBA, Noelia. The communications strategy via Twitter of Nayib Bukele: the millennial president of El Salvador. **Communication & Society**, v. 33, p. 259-275, 2020.
[303] NILSSON, Martin. Nayib Bukele: populism and autocratization, or a very popular democratically elected president? **Journal of Geography, Politics and Society**, v. 12, n. 2, p. 16–26, 2022. p. 19.
[304] Ibid., p. 22-3; MELENDEZ-SÁNCHEZ, Manuel. Millennial Authoritarianism in El Salvador**. Journal of Democracy**, v. 32, n. 3, p. 19-32, 2021. p. 21.

him the “the only candidate not from Arena or the FMLN to win the Salvadoran presidency since 1984.”[305]

Bukele's authoritarian behavior, however, could be observed even before the 2019 election. Melendez-Sánchez notes that in 2016, Bukele gathered supporters outside the attorney general's office to threaten him with removal. In 2018, before the 2019 election, he replicated Donald Trump’s modus operandi and claimed that the elections would be rigged by electoral authorities.[306]

Besides these cases, Melendez-Sánchez mapped out a series of other behaviors by Bukele that would fit Levitsky and Ziblatt’s criteria to detect authoritarians: i) rejection of (or weak commitment to) democratic rules of the game; ii) denial of the legitimacy of political opponents; iii) toleration or encouragement of violence; iv) readiness to curtail civil liberties of opponents, including the media. [307] Among the actions are reductions of tax incentives for print newspapers; verbal attacks on media outlets; launching investigations against news websites; encouraging supporters to invade the offices of electoral authorities; rejection of the recognition of the constitutionality of court decisions related to the executive.[308]

One of the most striking displays of authoritarianism occurred in February 2020, before Bukele's victory in the 2021 election, which granted him an unprecedented supermajority. On that occasion, Bukele used the military and security forces to occupy the Legislative Assembly. Once inside, Bukele sat in the chair reserved for the president of the legislature[309] and demanded that the congressmen approve an international loan, which would be used to fund his major plan for socioeconomic reforms. Among his final statements, Bukele issued a veiled ultimatum: “[a] week, gentlemen. In a week we'll meet here.”[310]

Although the Supreme Court, which was still independent at the time, declared the president's act unconstitutional and ordered that the president refrain from using the military for political purposes,[311] Bukele continued to defy democratic norms. On another occasion, the president challenged the authority of the Supreme Court by announcing that he would not

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[305] MELENDEZ-SÁNCHEZ, Manuel. Millennial Authoritarianism in El Salvador**. Journal of Democracy**, v. 32, n. 3, p. 19-32, 2021. p. 21.
[306] Ibid., p. 22.
[307] LEVITSKY, Steven; ZIBLATT, Daniel. **How Democracies Die**. New York: Crown, 2018.
[308] MELENDEZ-SÁNCHEZ, op cit., p. 22.
[309] Ibid., p. 21.
[310] MARTÍNEZ, Carlos. “Ahora creo que está muy claro quién tiene el control de la situación”. **El Faro**, 10 fev. 2020. Disponível em: https://elfaro.net/es/202002/el_salvador/24006/”Ahora-creo-que-está-muy-claro-quién-tiene-el-control-de-la-situación”.htm. Acesso em: 24 abr. 2024.
[311] MERINO, Manuel. El Salvador. *In*: BARROSO, Luís Roberto; ALBERT, Richard (ed.). **The 2020 International Review of Constitutional Reform**. Austin: Program on Constitutional Studies at the University of Texas at Austin; International Forum on the Future of Constitutionalism, 2020, p. 105-108. p. 106.

comply with the rulings of certain judgments made by its Constitutional Chamber against measures imposed by Bukele during the pandemic.[312] Under Balkin's framework, events of this nature are distinctive markers of constitutional crises.[313]

Despite all this, Bukele's approval ratings have remained above 75% since he took office in 2019.[314] The same cannot be said for the assessment of the quality of democracy in El Salvador, which peaked in 2017 at 0.48 and then went into free fall in the following years, reaching 0.11 in 2023.[315]

Still in 2020, starting the second year of his five-year term, Bukele began planning his reelection, even though he knew that the Constitution of El Salvador contains an eternity clause[316] that prevents the President from succeeding himself. Attempting to conceal this intention, Bukele announced the creation of a commission to study, discuss, and eventually propose constitutional reforms "according to the current needs of society."[317] This maneuver met with critics both in society and academia. However, the situation would not truly change until after the February 2021 elections.

With Bukele's popularity still high, Nuevas Ideas, his new party, managed to elect 56 deputies. In a legislature with 84 seats, Nuevas Ideas' victory represented an occupation of 66% of the Assembly's seats. ARENA and the FMLN combined secured a total of 19 seats, a disastrous outcome for the parties that had governed the country for nearly three decades.[318]

Now under Bukele's control, the new legislature wasted no time. On the same day that its new members were sworn in, the Legislative Assembly invoked an alleged prerogative granted by the Constitution to deliver a major blow to El Salvador's institutional independence:

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[312] ARAUZ, Sergio. Nayib Bukele anuncia que no acatará órdenes de la Sala de lo Constitucional. **El Faro**, 15 abr. 2020. Available at: https://elfaro.net/es/202004/el_salvador/24296/Nayib-Bukele-anuncia-que-no-acatará-órdenesde-la-Sala-de-lo-Constitucional.htm. Accessed in 25 abr. 2024.

[313] BALKIN, Jack M. Constitutional Crisis and Constitutional Rot. **Maryland Law Review**, v, 77, n. 605, p. 101-117, 2017. p. 102.

[314] GALDAMEZ, Eddie. President Nayib Bukele's Approval Rating! What's Behind the President's Popularity? **El Salvador Info**, 19 abr. 2024. Disponível em: https://elsalvadorinfo.net/nayib-bukele-approval-rate/. Acesso em: 24. abr. 2024.

[315] The declines in democratic indices occurred as follows: 0.44 (2018), 0.43 (2019), 0.35 (2020), 0.19 (2021) e 0.15 (2021). Cf. NORD, Marina et al. **Democracy Report 2024**: Democracy Winning and Losing at the Ballot. University of Gothenburg: V-Dem Institute, 2024. p. 63.

[316] Article 248: Under no circumstances, may the articles of this Constitution, which refer to the form and system of government, to the territory of the Republic, and to the principle that a President cannot succeed himself (alternabilidad), be amended.

[317] MERINO, Manuel. El Salvador. *In*: BARROSO, Luís Roberto; ALBERT, Richard (ed.). **The 2020 International Review of Constitutional Reform**. Austin: Program on Constitutional Studies at the University of Texas at Austin; International Forum on the Future of Constitutionalism, 2020, p. 105-108. p. 106.

[318] MELENDEZ-SÁNCHEZ, Manuel. Millennial Authoritarianism in El Salvador**. Journal of Democracy**, v. 32, n. 3, p. 19-32, 2021. p. 19.

the removal of all the judges of the Supreme Court's Constitutional Chamber[319] as well as the attorney general. [320]

Composed of 15 judges, the Supreme Court of El Salvador includes 4 chambers: i) the Constitutional Chamber, with 5 judges; ii) the Civil Chamber, with 3 judges; iii) the Criminal Chamber, with judges; and iv) the Contentious-Administrative Chamber." Bukele and his allies in the Legislative Assembly placed 5 new judges in the Constitutional Chamber. Furthermore, in August 2021, laws were also passed to remove judges from lower courts who were over 60 years of age.[321] Together, these attacks on the judiciary contributed to the country's judicial independence index plummeting from 0.5 (2020) to 0.11 (2021). [322]

Even though these changes may seem wrong, Nilsson argues that they are within the constitutional order of El Salvador. The problem, he states, lies in the country's institutional design, which did not consider the possibility of a single party or coalition controlling both the presidency and two-thirds of the Legislature at the same time.[323]

Now tamed, the Constitutional Chamber was wielded to further entrench Bukele in the presidency. In September 2021, the Constitutional Chamber decided that Bukele could run for reelection. This is where things start to get a bit tricky. For Nilsson, although the Constitution of El Salvador was designed to promote the alternation of power, there are loopholes in its text. In this regard, Article 154, which states that: "The presidential term shall be five years, and shall begin and end on the first of June, without the person who has exercised the Presidency being able to continue in his functions one day more"; when read together with Article 152, which stipulates: "[The following] shall not be candidates for the President of the Republic: 1st. He who has held the Presidency of the Republic for more than six months, consecutive or not, during the period immediately prior to or within the last six months prior to the beginning of the presidential term [...]" allows the interpretation that the president can resign a few months before reelection and become eligible for the next election.[324]

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[319] MERINO, Manuel. El Salvador. *In*: BARROSO, Luís Roberto; ALBERT, Richard (ed.). **The 2021 International Review of Constitutional Reform**. Austin: Program on Constitutional Studies at the University of Texas at Austin; International Forum on the Future of Constitutionalism, 2020, p. 81-83. p. 81.
[320] MELENDEZ-SÁNCHEZ, Manuel. Millennial Authoritarianism in El Salvador**. Journal of Democracy**, v. 32, n. 3, p. 19-32, 2021. p. 19.
[321] GELLMAN, Mneesha. The Democracy Crisis in El Salvador: An Overview (2019-2022). **CeMeCA's Regional Expert Paper Series**, No. 4, p. 1-16, 2022. p. 8.
[322] OUR WORLD IN DATA. Judicial constraints on the executive index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/grapher/judicial-constraints-on-the-executive-index?tab=chart&country=~SLV. Acesso em: 20 mar. 2024.
[323] NILSSON, Martin. Nayib Bukele: populism and autocratization, or a very popular democratically elected president? **Journal of Geography, Politics and Society**, v. 12, n. 2, p. 16–26, 2022. p. 20.
[324] Ibid., p. 21.

Despite presenting this scenario, Nilsson argues that Bukele's intention is unacceptable because the Constitution's intent was to establish one-term presidencies. Moreover, the Supreme Court itself had a precedent establishing a 10-year period before a former president could run again.[325] Given this circumstance, a lenient interpretation of the situation would easily conclude that the Supreme Court's new decision portrays a practice of constitutional hardball.[326] However, considering the constitutional canons of the Salvadoran Constitution, it is reasonable to assert that the Supreme Court engaged in what Richard Albert would call a constitutional dismemberment.[327]

The autocratization of El Salvador continued in the following years. Popular protests against the government were suppressed, journalists were targeted by a Pegasus spyware operation,[328] and Bukele's government began a process of mass incarceration that put more than 70,000 people in jail for allegedly having connections with gang violence or having certain tattoos. In March 2022, to tackle the country's high crime rates, Bukele declared a state of emergency, an instrument whose use is questionable for the alleged purpose, according to Graute.[329]

In 2024, Justice and Security Minister Gustavo Villatoro claimed that homicides had plummeted by more than 70%, bringing the murder rate per 100,000 inhabitants down from nearly 106 (2015) to 2.4 (2023).[330] Besides being a claim of dubious veracity, given the cunning nature of autocracies, it demonstrates the essence of illiberalism, by believing that supposed security for the country can be achieved through widespread disrespect for the population's fundamental rights.

No fim de 2022, Bukele começou a defesa de duas propostas, buscando reduzir tanto o número de municípios do país quanto o número de cadeiras na Assembleia Legislativa. Depois de alguma resistência da oposição, ambas as propostas foram aprovadas em junho de 2023. Como resultado, o número de cadeiras na Assembleia Legislativa caiu de 84 para 60 e o número

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[325] NILSSON, Martin. Nayib Bukele: populism and autocratization, or a very popular democratically elected president? **Journal of Geography, Politics and Society**, v. 12, n. 2, p. 16–26, 2022. p. 21.
[326] TUSHNET, Mark. Constitutional Hardball. **The John Marshall Law Review**, v. 37, n. 7, p. 523-553, 2004.
[327] ALBERT, Richard. **Constitutional Amendments**: Making, Breaking, and Changing Constitutions. New York: Oxford University Press, 2019.
[328] GELLMAN, Mneesha. The Democracy Crisis in El Salvador: An Overview (2019-2022). **CeMeCA's Regional Expert Paper Series**, No. 4, p. 1-16, 2022. p. 8.
[329] GRAUTE, Lukas. A Second Term for "the World's coolest Dictator"? **Verfassungsblog**, 14 nov. 2023. Available at: https://verfassungsblog.de/a-second-term-for-the-worlds-coolest-dictator/. Accessed in 25 abr. 2024.
[330] EL SALVADOR SAYS murders fell 70% in 2023 as it cracked down on gangs. **Reuters**, 3 jan. 2024. Available at: https://www.reuters.com/world/americas/el-salvador-says-murders-fell-70-2023-it-cracked-down-gangs-2024-01-03/#:~:text=Americas-,El%20Salvador%20says%20murders%20fell%2070%25%20in%202023,it%20cracked%20down%20on%20gangs. Accessed in 25 abr. 2024.

de municípios foi cortado de 262 para 44.[331] A medida representa uma clara manobra de manipulação eleitoral que contribuirá para a perpetuação de Bukele no poder.

In 2024, with no obstacles to his new candidacy, Bukele was reelected with more than 80% of the country's votes[332] – if we can even call a contest under such conditions an election.

3.6 Israel's Constitutional Showdown

In March 2024, when V-Dem's annual report classified Israel as an electoral democracy for the first time in 50 years, it was already accompanied by news of a contrasting nature: the decision by Israel's Supreme Court (Beit haMishpat haElyon) on January 1st to strike down the Netanyahu government's judicial reform. Understanding this clash, however, requires a study of Israel's constitutional structure.

Established as a Jewish state, Israel was founded in 1948. Its Declaration of Independence proclaimed that the Israeli regime would be structured under a constitution. However, this document was never formally crafted. According to Hanna Lerner, political disagreements over its content, as well as over how it should be created, led to a political impasse. In this context, unable to reach a consensus on various issues—especially the polarization between its secular and religious factions—the Knesset adopted an incrementalist approach[333] and decided to implement the constitutional project gradually through Basic Laws.[334]

By the early 1990s, the Knesset had passed nine Basic Laws, mainly addressing institutional and state organization issues, topics that sparked little disagreement, according to Lerner.[335] This scenario began to change in 1992, when two Basic Laws on human rights were finally approved: the first on dignity and liberty, and the second on freedom of occupation. These provisions set limits on the powers of the Knesset and guaranteed their enforcement

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[331] FREEDOM HOUSE. **El Salvador**. Available at: https://freedomhouse.org/country/el-salvador/freedom-world/2024. Accessed in 25 abr. 2024.
[332] SHERIDAN, Mary Beth; ESCOBAR, Carmen Valeria. 'World's coolest dictator' reelected in El Salvador: What to know. **The Washington Post**, 4 fev. 2024. Available at: https://www.washingtonpost.com/world/2024/02/03/el-salvador-election-nayib-bukele/. Accessed in 25 abr. 2024.
[333] LERNER, Hanna. **Making Constitutions in Deeply Divided Societies**. New York: Cambridge University Press, 2011. p. 51-2.
[334] ROZNAI, Yaniv. Israel: A Crisis of Liberal Democracy? *In*: GRABER, Mark A.; LEEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 355-375. p. 358.
[335] LERNER, op. cit., p. 71.

through robust judicial review powers, sparking what became known as the "constitutional revolution."[336]

Three years later, the Supreme Court decided *United Mizrahi Bank v. Migdal Cooperative Village*. Under the presidency of Aharon Barak, one of the major proponents of Israel's judicial expansion, the Court deepened its constitutional revolution. According to Gideon Sapir, the Court leveraged these provisions to "create a full-fledged Bill of Rights,"[337] recognizing that (i) the Basic Laws had a normative constitutional status superior to ordinary laws and (ii) the Court had the authority to invalidate laws incompatible with them. For Roznai, this "extensive interpretation of the rights protected in the basic law together with a broad right of standing before the court and minimal justiciability restrictions" ensured that the Court was on par with the Political Powers, something previously nonexistent.[338]

With this transformation, Israel shifted from a system of legislative supremacy—where the Parliament had the final say on constitutional matters—to an era of constitutional dialogues[339], where the Supreme Court now had the authority to give the last provisional word on such matters.

In cases following United Mizrahi Bank v. Migdal Cooperative Village, the Israeli Supreme Court continued to expand its powers. In a broad interpretation, it recognized aspects of the right to equality and freedom of expression as inherent to human dignity, giving constitutional status to these rights that were intentionally excluded from the 1992 Basic Laws. Additionally, it developed the reasonableness doctrine, a standard of review allowing the Court to assess the substantive merits of government decisions.[340]

These factors led the Israeli Supreme Court to be considered one of the most activist in the world.[341] According to Roznai, these criticisms of the Court's enlightened stance—

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[336] ROZNAI, Yaniv. Israel: A Crisis of Liberal Democracy? *In*: GRABER, Mark A.; LEEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 355-375. 358.

[337] SAPIR, Gideon, Constitutional revolutions: Israel as a case-study. **International Journal of Law in Context**, v. 5, n. 4. p. 355–378, 2009. p. 355.

[338] ROZNAI, Yaniv. Israel: A Crisis of Liberal Democracy? *In*: GRABER, Mark A.; LEEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 355-375. p. 358.

[339] For further reading on the topic, see MENDES, Conrado Hübner. **Constitutional Courts and Deliberative Democracy**. New York: Oxford University Press, 2013.

[340] ROZNAI, op. cit., p. 359.

[341] Menachem Mautner inicia o prefácio de seu livro da seguinte forma: "This book tells the story of the Supreme Court widely regarded as the most activist in the world". MAUTNER, Menachem. **Law & The Culture of Israel**. New York: Oxford University Press, 2011. p. ix; Richard Posner comparou o trabalho de expansão dos poderes judiciais realizado por Aharon Barak ao de John Marshall. Barak foi presidente da Suprema Corte israelense entre 1995-2006 e responsável por grande parte da revolução constitucional, ao de John Marshall. POSNER, Richard A. Enlightened Despot. **The New Republic**, 23 abr. 2007. Disponível em: https://newrepublic.com/article/60919/enlightened-despot. Acesso em: 15 abr. 2024. Robert Bork referiu-se ao

promoting universal values over the will of the people—were intensified by complaints about the homogeneous composition of its judges.[342] Explaining this latter issue, Ran Hirschl stated that:

> […] jurists who are Opera-goers and Ha'aretz subscribers, whose mothers knew Yiddish, and who own an apartment or two in an upscale neighborhood are much more likely to get appointed to the Supreme Court than those who celebrate the Mimoona (a Northern- African Jewish feast), wear Tefillin (phylacteries) every weekday morning, speak fluent Arabic, were born in the former Soviet Union, or have a close family relative under the poverty line. As it happens, over two-thirds of the Israeli electorate falls into at least one of these categories.[343]

As a result, attempts to limit the Court's powers began to emerge. Doron Navot and Yoav Peled explain that the first such attempt was noted in 2007-2008, a few years after Barak's compulsory retirement, initiated by then-Justice Minister Daniel Friedman.[344] This began a trend that gained momentum from 2015 onwards, under the second government of Benjamin Netanyahu.[345]

Bibi, as he is known, served as Israel's prime minister for more than 15 years across three periods (1996-1999, 2009-2021, and 2022-present). However, according to Roznai, unlike his first term, by 2015 Netanyahu's coalition formed "the most right-wing government in the nation's history pushing for national, traditional, and religious values, and the territorial integrity of Israel."[346] As a result, legislative proposals to reduce the powers of gatekeepers, including the Supreme Court, began to be presented in the Knesset.

The legislative process in the Knesset has a unique feature among the world's democracies: lacking a constitution to distinguish procedures for passing ordinary laws from Basic Laws, the exercise of constituent power is conflated with that of constituted power.[347]

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trabalho de Barak da seguinte forma: "In a word, Barak's court can turn ordinary legislation into a constitution, force it on the nation, and then announce that it can prevent any democratic amendment. In this, Barak surely establishes a world record for judicial hubris". BORK, Robert H. Barak's Rule. **Azure**, n. 27, Winter 5767 / 2007. Disponível em: https://azure.org.il/include/print.php?id=34. Acesso em: 15 abr. 2024.

[342] ROZNAI, Yaniv. Israel: A Crisis of Liberal Democracy? *In*: GRABER, Mark A.; LEEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 355-375. p. 360.

[343] HIRSCHL, Ran. The Socio-Political Origins of Israel's Juristocracy. **Constellations**, v. 16, n. 3, p. 476–492, 2009. p. 487.

[344] NAVOT, Doron; PELED, Yoav. Towards a Constitutional Counter-Revolution in Israel? **Constellations**, v. 16, n. 3, p. 429-444, 2009. p. 429.

[345] SOBREIRA, David. Como os Tribunais morrem: o caso de Israel (entrevista: Yaniv Roznai). **JOTA**, 24 mar. 2023. Disponível em: https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-de-israel-24032023. Acesso em: 14 mar. 2024.

[346] ROZNAI, op cit., p. 362.

[347] LERNER, Hanna. **Making Constitutions in Deeply Divided Societies**. New York: Cambridge University Press, 2011. p. 56.

This means that a constitutional norm can be amended by an absolute majority of the Legislature—provided the material limits created by the Supreme Court are respected.

This counterrevolution, intended by Netanyahu and his coalition, has multiple fronts. While attempting to reduce the Supreme Court's authority in exercising judicial review and access to it, they also seek to change the voting method of the judicial selection committee and the seniority criterion in choosing the Court's president. One of these measures was a proposed Basic Law that, among its provisions, sought to limit judicial review power to the Supreme Court, preventing other courts from exercising this power. I agree with Roznai's conclusion that this element, by itself, is not problematic, but when combined with other provisions of the proposal, the colors of the attack become clearer. This is because the other clauses would severely restrict the institutional capabilities of the Supreme Court, such as a clause requiring a supermajority of the Court to invalidate laws and another granting the Knesset the power to override Court decisions by a simple majority. This set of proposals was presented by the Netanyahu government under the justification that the "constitutional revolution is a crack in Israeli democracy, which must be corrected."[348]

In December 2022, after having left the government for just over a year in mid-2021, Netanyahu was re-elected as Israel's prime minister. Still with a right-wing nationalist coalition (64 out of 120 Knesset members), Netanyahu now faced corruption and fraud charges that put him at risk. These factors combined to make the new government resume the project to weaken – or to tame – the Supreme Court with greater vigor.[349]

According to Roznai, Dixon, and Landau, in January 2023, Justice Minister Yariv Levin, during a special press conference, announced a set of legal reforms. The first was a package with six axes, five of which established substantive limits on the authority of the Supreme Court and other courts, in addition to altering the method by which judges are selected.[350]

The first point of the proposed reform restricted the exercise of judicial review. Given that all courts in the country could, diffusely, exercise control over acts of the Executive and Legislature, the proposal aimed to centralize judicial review power in the Supreme Court. Despite appearing reasonable, its execution was far from it. Under the changes, judicial review

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[348] ROZNAI, Yaniv. Israel: A Crisis of Liberal Democracy? *In*: GRABER, Mark A.; LEEVINSON, Sanford; TUSHNET, Mark (ed.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018, p. 355-375. p. 363-4 e 370.

[349] SOBREIRA, David. Como os Tribunais morrem: o caso de Israel (entrevista: Yaniv Roznai). **JOTA**, 24 mar. 2023. Disponível em: https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-de-israel-24032023. Acesso em: 14 mar. 2024.

[350] ROZNAI, Yaniv; DIXON, Rosalind; LANDAU, David E. Judicial Reform or Abusive Constitutionalism in Israel. **Israel Law Review**, v. 56, 292–304, 2023. p. 295.

could only be exercised by the Supreme Court's full bench (15 members), and invalidating a law would require a supermajority of 12 members.[351]

The second element removed the Judiciary's power to assess the constitutionality of Basic Laws. The Supreme Court's jurisprudence had already recognized that the Knesset's actions, even in creating Basic Laws, could not violate the "core values of the state as a Jewish and democratic state"—which represents a kind of creation of an implicit eternity clause by the Court. Therefore, removing the Court's authority to review Basic Laws, besides subjecting the population to unchecked parliamentary will, is incompatible with modern constitutionalism.[352]

The third part introduced an override clause into the legal system. If approved, the proposal would allow an absolute majority of the Knesset (61 out of 120 members) to override a Supreme Court decision of unconstitutionality, reestablishing the provision. Taken together with the supermajority requirement for invalidating laws, this measure would hollow out the Court's power, "put at risk fundamental rights and freedoms and would grant the executive absolute powers," given Israel's parliamentary system.[353]

The fourth element abolished the reasonableness standard for reviewing administrative measures. Reasonableness is a standard used by the Israeli Supreme Court to review all administrative actions. According to Roznai, Dixon, and Landau, although the Court only intervenes in extreme cases in practice, the broad scope of the standard ensures it has a wide intervention space. The problem, in the Executive's eyes, seems to be the use of reasonableness to justify the Court's intervention in the appointment process, especially for ministers.[354]

The fifth item aimed to reform the judicial selection committee. The selection of judges for the Israeli Supreme Court is done by a nine-member committee, consisting of two Knesset members, three Supreme Court judges, two ministers, and two members of the Israeli Bar Association. Selections must be made by a qualified majority of seven out of nine members, a design that gives both the Legislature and the Court veto powers, forcing a composition of wills for selection. The initial proposal would have allowed a parliamentary coalition (controlled by the government) to appoint judges to the Supreme Court. This idea underwent modifications and ended up as a provision for the unilateral appointment of two judges per term.[355]

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[351] ROZNAI, Yaniv; DIXON, Rosalind; LANDAU, David E. Judicial Reform or Abusive Constitutionalism in Israel. **Israel Law Review**, v. 56, 292–304, 2023. p. 295.
[352] Ibid., p. 295.
[353] Ibid., p. 295-6.
[354] Ibid., p. 296.
[355] Ibid., p. 296.

Finally, the sixth element of the proposal restructured the process of appointing government and ministerial legal advisors, removing the authority to conduct the process from an independent committee and turning it into a personal appointment system, while reducing these advisors' authority from binding to non-binding.[356]

The presentation of these proposals resulted in an unprecedented wave of protests. Israel's population repeatedly took to the streets against the government's new proposal to cripple the Supreme Court.[357] Thousands of people, academics, and even sectors of the country's economic elite opposed the amendment to the Basic Law.[358] In an interview, Professor Yaniv Roznai spoke about the work done by academics in defense of Israel's Supreme Court:

> I believe that part of the advantage we have seen in terms of the size and intensity of the protests is due to the lessons we have learned from what happened in Poland and Hungary. As constitutional scholars, we have seen democratic erosion occur in other countries and we have been quick to recognize the warning signs. In the past three months, we have been doing an incredible amount of work to raise awareness about the potential implications of the proposed reform. We have given pro bono lectures all around the country, in private homes, schools, and high-tech companies. We have given interviews in the media, both in Israel and abroad, and have produced short videos to share on YouTube, TikTok, and other social media platforms. All of this work has been done to educate the public about the proposed changes and their potential impact.[359] [360]

Despite all these efforts from civil society, the government proceeded with its plans and, at the end of July 2023, approved Amendment Number 3 to the Basic Law. It prevents those with judicial authority from using reasonableness to rule on cases or grant injunctions against the government, its ministers, and the prime minister. The provision extends to decisions regarding appointments to positions and the non-exercise of authority.[361]

According to Mordechai Kremnitzer, the interpretation of this amendment must be made considering the attempt to tame the Supreme Court by political power. The government's

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[356] ROZNAI, Yaniv; DIXON, Rosalind; LANDAU, David E. Judicial Reform or Abusive Constitutionalism in Israel. **Israel Law Review**, v. 56, 292–304, 2023. p. 296.
[357] AMICHAY, Rami. Israel protests flare over Netanyahu's new Supreme Court bill. **Reuters**, 11 jul. 2023. Disponível em: https://www.reuters.com/world/middle-east/protesters-block-israel-highways-over-new-supreme-court-bill-2023-07-11/. Acesso em: 16 abr. 2024.
[358] SOBREIRA, David. Como os Tribunais morrem: o caso de Israel (entrevista: Yaniv Roznai). **JOTA**, 24 mar. 2023. Disponível em: https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-de-israel-24032023. Acesso em: 14 mar. 2024.
[359] Ibid.
[360] For more information on the work developed by the academic community in Israel in defense of the Supreme Court, see BAR-SIMAN-TOV, Ittai et al. Scholactivism in the Service of Counter-populism: The Case of the Constitutional Overhaul in Israel. **International Journal of Constitutional Law** (forthcoming).
[361] KREMNITZER, Mordechai. Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness. **Israel Law Review**, v. 56, p. 343–354, 2023. p. 344.

intention is to rid itself of judicial review, granting the Executive, in practice, unlimited power, which has the potential to benefit the government in various ways: (i) benefit Netanyahu in his corruption trial; (ii) remove barriers to government corruption; (iii) allow the government coalition to achieve its goals of occupying Palestinian territories; (iv) suppress Israel's liberal foundations and establish Jewish supremacy; and (v) gain the support of the ultra-Orthodox by exempting them from mandatory military service.[362]

Kremnitzer argues that, by setting rules for the application of judicial review, the Knesset is establishing standards for its own acts—revealing an underlying conflict of interest.[363] Thus, by removing part of the Supreme Court's control, the Amendment creates a fissure in the separation of powers, "the baseline constitutional strategy for suppressing selfinterested decisionmaking." [364]

Moreover, the reasonableness doctrine plays a crucial role in Israel's constitutional system. Reasonableness means that executive acts must be authorized by law. "This authorization includes the duty of public officials to pursue the purposes that underlie the authorizing law according to the correct balance between them."[365] According to Kremnitzer, this legal authorization implies that public officials act: (i) in good faith in defense of the public interest; and (ii) with responsibility, diligence, and good judgment in their decisions. This second duty imposes that public decisions take into account "all relevant considerations (and no other considerations)."[366]

In this context, reasonableness serves two functions. The first evaluates whether the decision-making process of a government decision was appropriate, which does not necessarily mean that the decision made is correct, but whether it was within the expected field for an average public official. In its second function, connected to the requirement of good faith, reasonableness acts as a control mechanism for the outcomes of public decisions. It does not, therefore, analyze the personal reasons of decision-makers but the practical effects their acts will bring to the system.[367]

Regarding public appointments, reasonableness acts as a limit on government arbitrariness, preventing the filling of positions with technically unqualified individuals,

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[362] KREMNITZER, Mordechai. Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness. **Israel Law Review**, v. 56, p. 343–354, 2023. p. 344.
[363] Ibid., p. 345.
[364] VERMEULE, Adrian. Veil of Ignorance Rules in Constitutional Law. **The Yale Law Journal**, v. 111, n. 2., p. 399-433, nov. 2001. p. 405.
[365] KREMNITZER, op cit., p. 345.
[366] Ibid., p. 345.
[367] Ibid., p. 346.

convicted by the courts, or those "given their shady background, would never be hired for a job in the private sector or a junior post in a properly managed civil service."[368] At the same time, reasonableness ensures that candidates from marginalized groups—such as Arabs, women, LGBTQ+, and Ashkenazim—can access public positions due to the principle of equal opportunity. Therefore, preventing the Supreme Court from controlling the reasonableness of government appointments contributes to the parochialization of the state, allowing acolytes without technical capabilities to occupy important positions and facilitating the process of controlling corruption.[369]

For Aeyal Gross, this was a crucial step in the process of taming the Supreme Court because it affects both its subjective dimension (composition) and its objective dimension (capabilities). This is because, by restricting the Court's authority to exercise judicial review, the Knesset will be able to alter the Judicial Selection Committee, responsible for choosing Supreme Court judges. This way, the government will be able to pack the Court with its supporters.[370]

While the government struggles to implement this maneuver, mainly due to defeats in political conflicts with the opposition, Justice Minister Yariv Levin—engaging in what appears to be constitutional hardball—has used his powers as a member of the Committee to prevent it from meeting to deliberate on new judge appointments, including the vacancy left by Esther Hayut, former president of the Supreme Court, who was compulsorily retired in October 2023.[371]

Therefore, the amendment has enormous destructive potential, as Kremnitzer points out. Based on it, government decisions could "uproot liberal democracy" by: (i) taking over the media; (ii) subordinating social welfare to the government coalition; and (iii) violating Palestinians in occupied territories. These are just some of the potential measures that affect Israel's foundational system and can be implemented by the government with little resistance.[372]

This means that Israel's constitutional identity itself is at stake. Despite the approval of a Basic Law in 2018, declaring Israel a Jewish state, the Supreme Court continued to recognize the country's constitutional identity as both Jewish and democratic, valuing citizenship equality. As Barak Medina and Ofra Bloch pointed out, the new amendment, however, is part of an

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[368] KREMNITZER, Mordechai. Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness. **Israel Law Review**, v. 56, p. 343–354, 2023. p. 348.
[369] Ibid., p. 349.
[370] GROSS, Ayeal. An Unreasonable Amendment. **Verfassungsblog**, 24 jul. 2023. Disponível em: https://verfassungsblog.de/an-unreasonable-amendment/. Acesso em: 27 fev. 2024.
[371] Ibid.
[372] KREMNITZER, op cit., p. 347.

illegitimate attempt[373] "to transform Israel's constitutional identity from a (limited) democratic and Jewish state to a state that is first and foremost Jewish, with no promise of equal citizenship."[374]

However, in October 2023, Hamas launched the largest terrorist attack in Israel's history, causing over 1,000 deaths of Israeli citizens.[375] This led Benny Gantz and his National Unity Party to join the government to face the national emergency. As part of the agreement, no law would be passed without the approval of both Netanyahu and Gantz, which might seem to block Netanyahu's judicial reform—were it not for Amendment 3 being approved two months earlier.[376]

As a result of the attack—and the ensuing war—the continuation of Netanyahu's government post-war became uncertain. With the government focused on the war, the Supreme Court seems to have found a perfect opportunity to make its move. On the first day of 2024, the Court declared Amendment 3 to the Basic Law invalid.

The majority decision (8:7) was written by former president of the Court[377], Esther Hayut. Among the decision's important points, 12 of the 15 judges recognized the Court's power to invalidate Basic Laws that represent an excess of the Knesset's constituent power. Among the remaining three judges, one believed that only exceptional violations of fundamental rights would justify this power, while the other two refused to recognize the Court's authority to exercise judicial review over Basic Laws.[378]

The board of this constitutional showdown[379] now awaits the government's next move. Will Netanyahu have enough political strength to challenge the decision and deepen the

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[373] A abordagem de Medina e Bloch sobre a legitimidade da emenda é natureza social e representativa, procedimental e normativa. Cf. MEDINA, Barak; BLOCH, Ofra. The Two Revolutions of Israel's National Identity. **Israel Law Review**, v. 56, p. 305–319, 2023. p. 317-8.

[374] MEDINA, Barak; BLOCH, Ofra. The Two Revolutions of Israel's National Identity. **Israel Law Review**, v. 56, p. 305–319, 2023. p. 317-8.

[375] ISRAEL REVISES down toll from October 7 attack to 'around 1,200'. **Al Jazeera**, 10 nov. 2023. Disponível em: https://www.aljazeera.com/news/2023/11/10/israel-revises-death-toll-from-october-7-hamas-attack-to-1200-people. Acesso em: 16 abr. 2024.

[376] GROSS, Aeyal. Did the Israeli Supreme Court Kill the Constitutional Coup? **Verfassungsblog**, 09 jan. 2024. Disponível em: https://verfassungsblog.de/did-the-israeli-supreme-court-kill-the-constitutional-coup/#:~:text=In the Israeli case%2C the,of-law institutions without scrutiny. Acesso em: 27 fev. 2024.

[377] Despite having retired in October 2023, the Court's statute, in Article 15(a), allows its judges to sign decisions that will be issued up to three months after their retirement. ISRAEL. Supreme Court of Israel. See **Court Laws**. Disponível em: https://www.nevo.co.il/law_html/law00/74849.htm. Acesso em: 29 fev. 2024.

[378] ISRAEL. Supreme Court of Israel. HCJ 5658/23 Movement for Quality Government in Israel v. Knesset. Decided in: Jan. 1st 2024. Disponível em: https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/23/580/056/v31&fileName=23056580.V31&type=2. Acesso em: 29 fev. 2024.

[379] POSNER, Eric; VERMEULE, Adrian. Constitutional Showdowns. **University of Pennsylvania Law Review**, v. 156, p. 991-1048, 2008.

constitutional crisis? So far, the Supreme Court remains the only effective check on the Legislative power.

4 ANCHORING JUDICIAL INDEPENDECE

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

The countries studied in the previous chapter demonstrate the reasons why autocrats and authoritarian agents, in general, have a particular interest in Supreme Courts and Constitutional Courts. The path to illiberalism seems to almost invariably involve the taming of these institutions. In most of the cases analyzed, the constitutional safeguards were not sufficient to preserve judicial independence.

Based on these experiences, I propose some suggestions on how societies can develop ways to protect their courts. I divide my proposal into two dimensions: one sociological and the other institutional. In the first, I explain how the actions of a court can undermine its credibility and jeopardize its position within a constitutional system. The second dimension, in turn, is divided into two approaches: preventive and repressive. The former discusses elements of constitutional design that can contribute to the preservation of courts even in times of political stress. For this, I borrow ideas not only from constitutional law but also from political philosophy. Finally, in the repressive approach, I present arguments in defense of the courts' authority to invalidate certain changes that may lead to their taming.

4.1 Paths to build Sociological Legitimacy

The sequence of protests against judicial reform in Israel lasted for more than six months. As Roznai pointed out, the Israelis seem to have learned some lessons about implementing illiberal projects from Hungarian and Polish experiences.[380] This civil society action in Israel contributed to the strengthening of its Supreme Court, allowing the decision to invalidate Amendment 3 to be taken with social support.

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[380] SOBREIRA, David. Como os Tribunais morrem: o caso de Israel (entrevista: Yaniv Roznai). **JOTA**, 24 mar. 2023. Disponível em: https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-de-israel-24032023. Acesso em: 14 mar. 2024.

Although with less intensity, this phenomenon also occurred in Brazil under the Bolsonaro government. Pro-democracy demonstrations took place in several capitals,[381] and a letter signed by more than 900,000 people was read at the Law School of the University of São Paulo.[382] Despite the damage caused by the attack on the seats of the three branches of government on January 8, 2023, the resilience of Brazilian democracy seems to demonstrate that the country, like Israel, has also learned some lessons on how to resist authoritarian populism.

In Poland, despite extensive resort to pork barrel politics, the alteration of electoral laws, and the instrumentalization of state media by PiS,[383] the October 2023 elections secured a victory for the opposition led by Donald Tusk, who will now occupy the position of the country's prime minister. An event of this magnitude seems to indicate that, in addition to learning from their own mistakes, the Poles may be able to reverse what Sadurski called a constitutional breakdown.[384]

Other courts around the world have been under stress. In Argentina, for example, former President Alberto Fernández clashed with the country's Supreme Court after a decision on budget allocation. After saying he would reject a Supreme Court decision,[385] Fernández announced that he would initiate the impeachment process of four of its judges, including Chief Justice Horacio Rosatti.[386] In the United States, the constitutional hardball played with Merrick Garland's nomination gave the Republicans an extra seat on the Supreme Court. Now holding 6 of the 9 seats, the conservative majority has been steering the Court's decisions to the right. Consequently, scholars have discussed the possibility to pack the Court to reverse the

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[381] CAPITAIS têm atos em defesa da democracia nesta quinta-feira, 11. **G1**, 11 ago. 2022. Disponível em: https://g1.globo.com/politica/eleicoes/2022/noticia/2022/08/11/ato-em-defesa-da-democracia-e-do-sistema-eleitoral-reune-artistas-juristas-empresarios-professores-no-brasil.ghtml. Acesso em: 16 abr. 2024.

[382] CARTA PELA democracia é lida na USP, e ato tem protesto contra Bolsonaro. G1, 11 ago. 2022. Disponível em: https://www.cnnbrasil.com.br/politica/cartas-pela-democracia-sao-lidas-na-faculdade-de-direito-de-usp/. Acesso em: 16 abr. 2024.

[383] SADURSKI, Wojciech. Poland's Elections: Free, perhaps, but not Fair. Verfassungsblog, 20 set. 2023. Disponível em: https://verfassungsblog.de/polands-elections-free-perhaps-but-not-fair/. Acesso em: 23 abr. 2024.

[384] SADURSKI, Wojciech. in **Poland's Constitutional Breakdown**. New York: Oxford University Press, 2019.

[385] ARGENTINA president rejects Supreme Court ruling, sparking backlash. **Reuters**, 23 dez. 2022. Disponível em: https://www.reuters.com/world/americas/argentina-president-rejects-supreme-court-ruling-sparking-backlash-2022-12-23/. Acesso em: 20 maio 2024.

[386] ARGENTINA president seeks impeachment of Supreme Court chief. **Al Jazeera**, 03 jan. 2023. Disponível em: https://www.aljazeera.com/news/2023/1/3/argentina-president-seeks-impeachment-of-supreme-court-chief. Acesso em: 20 maio 2024.

situation[387], and politicians have introduced a legislative proposal with this aim.[388] The phenomenon also repeats with the Brazilian Supreme Court, which has been the target of various criticisms. It is true that – a large – part of these criticisms is anti-institutional, a legacy of former President Jair Bolsonaro; however, there are scholars and segments of society, committed to improving the STF, who also criticize the Court in various ways.[389]

One lesson that can be drawn from these events is sociological in nature and was well illustrated by a statement from John Roberts, Chief Justice of the United States Supreme Court, according to whom "public trust is essential, not incidental, to our function."[390] This argument – about the centrality of public trust as a guarantee of court preservation – was developed more sophisticatedly by Tomasz Tadeusz Koncewicz. For him, "[a]s important as institutions might be as focal points of the constitutional system, they have a chance of survival only when their institutional pedigree and prestige are built on the popular support of civil society."[391]

What, then, can a court do to achieve public trust? The answer to this question has two dimensions, one endogenous and the other exogenous. Under the endogenous dimension, which stems from an analysis of the functioning and actions of the courts, it is up to them to use their attributions in a way that does not jeopardize their independence. In this sense, Martin Shapiro argues that when constitutional designers assign a court the duty of resolving conflicts, they implicitly accept the positive and negative consequences that result from this choice, including the potential capacity for rule-making and institutional self-defense. Conversely, "courts that owe their existence to democratic institutional choice must act prudently, or the choice may be withdrawn."[392]

Following a different line of reasoning, Barry Friedman materializes public trust in courts using the idea of authority. For him, the authority of an Apex Court depends on its ability

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[387] In this sense, see DALY, Tom Gerald. 'Good' Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay. **German Law Journal**, vol. 23, n. 8, p. 1071–1103, 2022; WEILL, Rivka. Court packing as an antidote. **Cardozo Law Review**, v. 42, iss. 7, p. 2705-2761, 2021.

[388] KAPUR, Shail. Democrats to introduce bill to expand Supreme Court from 9 to 13 justices. NBC News, 14 abr. 2021. Disponível em: https://www.nbcnews.com/politics/supreme-court/democrats-introduce-bill-expand-supreme-court-9-13-justices-n1264132. Acesso em: 20 maio 2024.

[389] Cf. ARGUELHES, Diego Werneck; RIBEIRO, Leandro Molhano. Ministrocracia: O Supremo Tribunal individual e o processo democrático brasileiro. **Novos Estudos Cebrap**, São Paulo, v. 37, n. 01, p. 13-32, jan.-abr., 2018; GODOY, Miguel Gualano de. S**TF e processo constitucional**: Caminhos possíveis entre a ministrocracia e o plenário mudo. Belo Horizonte: Arraes Editores, 2021.

[390] ESTADOS UNIDOS DA AMÉRICA. Supreme Court of the United States. **2021 Year-End Report on the Federal Judiciary**. Disponível em: https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf. Acesso em: 20 maio 2024.

[391] KONCEWICZ, Tomasz Tadeusz. The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux. **Review of Central and East European Law**, v. 43, n. 2, p. 116-173, 2018. p. 118.

[392] SHAPIRO, Martin. The European Court of Justice: Of Institutions and Democracy. **Israel Law Review**, v. 32, n. 1, p. 3–50, 1998. p. 30.

to spend accumulated political capital with sensitive decisions. Illustrating his argument, Friedman recalls Bush v. Gore, a case that led the American Supreme Court to decide the outcome of a presidential election. Given such a close result, why, then, would the population have accepted the Court's decision? According to Friedman, it is possible that at that moment the Court had so much political capital that the decision would continue to be accepted by the population, despite the problems it carried.[393]

There are also those who view the issue of authority without resorting to the idea of political capital, such as Theunis Roux, for whom the authority of a court manifests itself in two ways: through its independence and its legal legitimacy. Independence is understood as a court's ability to demonstrate that its decisions are not influenced by external factors, such as politics. Viewed this way, independence should not be analyzed as a binary system (present or absent) but as a gradient that features its presence in varying degrees. Legal legitimacy, in turn, is a court's ability to decide within a range of tolerance, ensuring respect for its decisions and enhancing its institutional legitimacy.[394]

In this context, a court that engages in constitutional hardball, for example, undermines the trust placed in it, weakening its authority. Adapted from the concept of constitutional hardball, constitutional hardball represents a practice that, although not violating the legal order, disrespects the principles inherent to it, as explained by Rubens Glezer. Thus, when a court opportunistically alters its precedents or excessively interferes in the political sphere, its authority is eroded.[395] Likewise, when a court's actions are perceived as partisan, its authority can be questioned. Trust in the United States Supreme Court, for example, reached a historic low of 25% among Americans in 2022. [396] Such situations, especially in polarized societies, create fertile ground for increasing political influence in judge appointments.[397]

On the other hand, there is an exogenous dimension to the question of public trust in courts. From this perspective, courts are protected not because of their actions but despite them. In this scenario, courts may not have significant political capital or may even suffer a deficit of authority among a substantial part of the population, but this will not be an obstacle to

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[393] FRIEDMAN, Barry. **The will of the people**: how public opinion has influenced the Supreme Court and shaped the meaning of the Constitution. New Yourk: Farrar, Straus and Giroux, 2009. p. 358.
[394] ROUX, Theunis. **The Politics of Principle**: The first South Africa Constitutional Court, 1995-2005. Cambridge: Cambridge University Press, 2013. p. 19-20 e 24.
[395] GLEZER, Rubens. **Catimba constitucional**: O STF, do antijogo à crise constitucional. 2. ed. rev. e atual. São Paulo: JusPodivm, 2021.
[396] JONES, Jeffrey M. Confidence in U.S. Supreme Court Sinks to Historic Low. **Gallup**, 23 jun. 2022. Disponível em: https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx. Acesso em: 22 maio 2024.
[397] HASEN, Richard L. Polarization and the Judiciary. **Annual Review of Political Science**, v. 22, p. 261-276, 2019. p. 261.

democratic action in defense of the institution. The case of the Brazilian Supreme Federal Court and the Israeli Supreme Court illustrate this argument. Despite the abundant criticisms directed at both courts, this did not prevent a significant portion of both societies from mobilizing in their defense.

I believe this phenomenon is partly due to what we can call constitutional culture. Following Jason Mazzone's idea, constitutional culture can be understood as the set of invisible forces that lead citizens to respect the rules established by society in a constitution. It is because of this sociological element that people:

> […] accept that they are governed by a written document, one that creates institutions of government and sets limits on what the government may do; the accepted belief that the governing charter is created by the citizenry; the knowledge that the charter is not timeless, but rather that the citizens may change it or revoke it under certain circumstances; and the understanding that until the charter is changed we are bound by it and required to go along with its ultimate results even though we are free to disagree with them.[398]

The understanding of this concept can be improved by the work of Andrew Siegel, for whom "'constitutional culture' is the black box through which the Constitution's words are transformed into concrete consequences." Despite acknowledging the difficulty of defining the idea precisely, Siegel claims it is "an interlocking system of practices, institutional arrangements, norms, and habits of thought that determine what questions we ask, what arguments we credit, how we process disputes, and how we resolve those disputes."[399]

It was due to some degree of constitutional culture that the Israeli population repeatedly took to the streets in defense of their Supreme Court. The same can be said about Brazil and the popular support for the Supreme Federal Court. It is not about ignoring the fact that many of the demonstrators may be political hacks, but recognizing that the successful defense of an institution like an Apex Court depends on a level of support that transcends ideological barriers. For something of this magnitude to be possible, there needs to be a shared understanding that the existence of an independent court, however flawed it may be in a given system, is still a better alternative than its taming – and this is due to constitutional culture.

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[398] MAZZONE, Jason. The Creation of a Constitutional Culture. **Tulsa Law Review**, v. 40, n. 4, p. 671-698, 2005. p. 672.
[399] SIEGEL, Andrew M. Constitutional Theory, Constitutional Culture. **Journal of Constitutional Law**, v. 18, n. 4, p. 1067-1128, 2016. p. 1107.

4.2 A Few Lessons of Constitutional Design

Supreme Courts and Constitutional Courts can also be protected institutionally, which is usually the most common way to achieve this task. Ordinary and constitutional legislators can create different protection mechanisms capable of restricting attempts to tame courts. In this section, I present some of the ways in which constitutional design can be used to discourage and reduce the destructive potential of ill-intentioned agents.

4.2.1 Avoiding the Sirens

In 1791, during the French Revolution, the National Constituent Assembly, created two years earlier, concentrated original and derived constituent powers – a problematic arrangement, according to Jon Elster. Elster's conclusion stems from the conflict of interest between these functions. This dual assignment would allow the ordinary assembly to act as a judge in its own cause, as it is the task of the constituent assembly to balance the powers between the Legislative and Executive. There is, therefore, in this scenario, an incentive for this assembly to guarantee excessive powers to the Legislative.[400]

This context, however, led Robespierre to address the assembly in defense of a self-denying ordinance. The idea was embraced, resulting in the adoption by the constituents of a clause making them ineligible for the first ordinary election immediately following the drafting of the constitution.[401]

These arrangements are an example of what Elster called pre-commitment, a limitation an agent imposes on itself hoping to gain future benefits. To illustrate this phenomenon, Elster uses the passage from the Odyssey about Ulysses and the sirens. Knowing that he would cross a stretch occupied by these mythical creatures, Ulysses ensured that his sailors' ears were plugged with wax, preventing them from being led to death by the sirens' song. He himself, however, did not do the same. Eager to enjoy the experience of hearing the sirens, Ulysses ordered his sailors to tie him to the ship's mast and not to release him, even if he begged for it.[402]

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[400] ELSTER, Jon. **Ulysses Unbound**: Studies in Rationality, Precommitment, and Constraints. Cambridge: Cambridge University Press, 2005. p. 140.
[401] Ibid., p. 141.
[402] Ibid., p. 94

Pre-commitments can also take the form of eternity clauses in constitutions. Just like Ulysses' decision, made in a moment of rationality, constitutional designers use moments of sobriety to establish pre-commitments that will protect essential elements of the constitution during periods of social stress. Thus, if the siren song of an ill-intentioned agent conquers a large portion of society, the constitution will remain protected[403] – except, of course, in the case of a revolution.[404]

Thus, although they may precede constitutional design, pre-commitments have been incorporated into it. It is up to the constituents, therefore, to establish rules that increase the rationality of a system and reduce as much as possible the self-interest in the decisions of government agents. This can be done through more general responses, such as the choice between a presidential or parliamentary system, or more specific ones, such as those dealing with the structure, attributions, and appointment of members of a Constitutional Court. Let us focus on the latter set.

Observing the events that led to the fall of the Polish Constitutional Court and the degradation of popular trust in the American Supreme Court, Konrad Duden suggested changes to protect the German Federal Constitutional Court. According to him, a simple majority in the German parliament (Bundestag) could instrumentalize the Court. According to Duden, elements such as the duration of judges' terms or the number of votes required for them to be appointed to the Court are not part of Article 94 of the Basic Law, but of the Federal Constitutional Court Act.[405]

Given this situation, Duden suggests that new and more robust protections be given to the German Constitutional Court. The first would be to prevent simple majorities from altering elements inherent to the Court's independence. This could be done by entrenching the norms regarding the Court's organization in the constitution. Additionally, Duden advocates that the alteration of such provisions be subject to a special procedure, either by a qualified majority of parliament or the Court itself. [406]

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[403] STRECK, Lenio Luiz. Entre fetiches por ditadura e vivandeirismo, o que o Direito pode fazer? **Conjur**, 19 abr. 2022. Disponível em: https://www.conjur.com.br/2022-abr-18/streck-entre-fetiches-vivandeirismo-direito/. Acesso em: 27 maio 2024.

[404] ELSTER, Jon. **Ulysses Unbound**: Studies in Rationality, Precommitment, and Constraints. Cambridge: Cambridge University Press, 2005. p. 94.

[405] DUDEN, Konrad. Protect the German Federal Constitutional Court! **Verfassugsblog**, 13 fev. 2024. Disponível em: https://verfassungsblog.de/protect-the-german-federal-constitutional-court/. Acesso em: 03 jun. 2024.

[406] Ibid.

4.2.2 Courts On The Top

The use of qualified majorities in constitutional design can be done in layers, as explained by Landau and Dixon. According to the authors' proposal, the tiered constitutional design attempts to leverage the best elements of the two models known in constitutionalism: one characterized by conciseness, abstraction, and rigidity, and the other by extension, detail, and flexibility.[407]

By combining "the virtues of rigidity and flexibility," the tiered constitutional design presents a constitutional amendment model with different rules for each part of a constitution. Following this alternative, constitutional designers can avoid some of the negative points of other models. For example, despite surviving for more than 200 years due to its Article V[408], the United States Constitution presents extraordinary difficulty in being amended, preventing democratic forces from introducing modern elements into its text.[409] On the other hand, constitutions that are rigid in name only, like the Brazilian one (which has been amended more than 100 times in its 30 years), could benefit from a tiered amendment system. First, because it would allow less important issues to be changed without major difficulty; second, because it would avoid potential damage to popular trust in the document, which can be degraded due to repeated amendments.[410]

Thinking about court protection, this proposal can be used to establish stricter amendment rules for provisions concerning judicial independence. Elements such as irremovability, stability, and judges' retirement age, as well as the rules for appointing members of constitutional courts and their attributions, are provisions that, if well protected, can serve as a shield against antidemocratic attacks.

I use the word "can" for a pragmatic reason: there is no insurmountable obstacle to political power – a lesson that scholars of the state of exception have long taught us.[411] Although we can use the best legal tools available to preserve democracy, the Law can only go so far. It is up to constitutional legislators to choose the most effective means to safeguard democracy and the institutions that support it – and hope they are sufficient.

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[407] LANDAU, David; DIXON, Rosalind. Tiered Constitutional Design. **The George Washington Law Review**, v. 86, p. 438-512, 2018.
[408] Article V stipulates that, to be approved, constitutional amendments must receive two-thirds of the votes in each house of Congress and three-quarters of the votes in the State Legislatures.
[409] LANDAU; DIXON op. cit.
[410] Cf. ALBERT, Richard. **Constitutional Amendments**: Making, Breaking, and Changing Constitutions. New York: Oxford University Press, 2019. p. 43.
[411] AGAMBEN, Giorgio. **Estado de exceção**: [Homo Sacer, II, I]. Tradução de Iraci D. Poleti. 2. ed. São Paulo: Boitempo, 2004.

Despite this – and the recognition of the proposed model's imperfections – Landau and Dixon argue that it can help combat the (third) wave of illiberal projects[412] that have been unfolding around the world since the 1990s, as noted by Anna Lührmann and Staffan I. Lindberg.[413]

4.2.3 Blinding the Decisionmakers

Constitutional design can also protect courts by introducing uncertainty into the political equation, which Adrian Vermeule calls applying the veil of ignorance to constitutional law. The rules of the veil of ignorance subject decision-makers to "uncertainty about the distribution of benefits and burdens that will result from a decision,"[414] which can be done in two ways: i) ensuring that decision-makers do not know their identities and attributes; ii) preventing them from knowing whether they will benefit from their decisions.[415]

In this context, constitutional designers insert veil of ignorance rules into constitutions to limit their interests, fostering impartial decision-making. Let's take presidential succession rules as an example. Imagine a scenario in which a constitution does not establish who should succeed the president if they cannot perform their duties. Such a situation would have catastrophic potential, as different parties and political agents would possibly dispute the position, which would remain vacant until a solution was found. During this period of choice, the country would be leaderless, without someone responsible for the most important decisions. By introducing a clear constitutional clause on succession rules, constitutional designers present an acceptable solution, as its benefits will be reaped by whoever occupies the succession line.[416]

Examples of veil of ignorance rules can be found in different constitutions around the world. The Brazilian Constitution, for instance, establishes the order of presidential succession in its Article 80, assigning the President of the Chamber of Deputies, the President of the Federal Senate, and finally, the President of the Supreme Federal Court to the position in case of the President and Vice-President's impediment. Similar rules can be seen in the 1961 Venezuelan Constitution, which lasted until the Constituent Assembly convened by Chávez. Its

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[412] LANDAU, David; DIXON, Rosalind. Tiered Constitutional Design. **The George Washington Law Review**, v. 86, p. 438-512, 2018.
[413] LÜHRMANN, Anna; LINDBERG, Staffan I. A third wave of autocratization is here: what is new about it? **Democratization**, v. 26, n. 7, p. 1095-1113, 2019. p. 1102.
[414] VERMEULE, Adrian. Veil of Ignorance Rules in Constitutional Law. **The Yale Law Journal**, v. 111, n. 2., p. 399-433, nov. 2001. p. 399.
[415] Ibid., p. 399.
[416] Ibid., p. 400.

Articles 186, 187, and 188 dealt with presidential succession through veil of ignorance rules, as repeated in Article 106 of the Turkish Constitution.

Considering this new third wave of autocratization, societies[417] – especially those that are highly polarized – can use this tool to design rules that reduce the potential impact an authoritarian agent can have on constitutional courts. For instance, if a president intends, for some reason, to expand the number of seats on a constitutional court, the constitution can establish that the expansion will only be implemented in the next term. By doing this, the agent promoting the change must deal with the possibility that their act will benefit a political rival if they do not win the next election.

The veil of ignorance rules can also prevent court taming in its other forms. Provisions can stipulate, for example, that changes affecting the court's functions will take effect in the next term, which can be repeated in the case of reducing judges' retirement age. In the latter case, the constitution can delay the effectiveness of modifications that grant the Executive a majority of the court's members.

4.3 Emergency hermeneutics

So far, I have analyzed ways in which supreme courts and constitutional courts can be protected preventively to avoid the taming process. However, taming does not necessarily occur abruptly. With this in mind, a question must be answered: what to do when preventive mechanisms fail?

In this scenario, courts must use their authority to preserve themselves. The idea here is to argue that supreme courts and constitutional courts, when facing a taming process, have the power to invalidate acts, laws, and even constitutional amendments that may jeopardize their constitutionally assigned capabilities.

This proposal, however, presents a risk of expanding court authority, a problem that cannot be underestimated. For this reason, I attempt to outline interpretative parameters to be used by courts in exercising these exceptional powers. Despite being far from perfect, I hope the proposal brings some rationality to the process.

Analyzing the gradual process of democratic degradation, Suzie Navot explains that none of the laws, amendments, or other approved provisions represent, in isolation, a fatal blow. It is only when we sum up all the acts and evaluate them holistically that the damage to the

[417] LÜHRMANN, Anna; LINDBERG, Staffan I. A third wave of autocratization is here: what is new about it? **Democratization**, v. 26, n. 7, p. 1095-1113, 2019.

system can be adequately observed. “It is the big picture, the whole series of legal moves, that brings about a fundamental change in the state’s regime until it is no longer a liberal democracy.”[418]

The taming process of a court sometimes mimics the death of democracies. In the case of Hungary, for instance, Fidesz began with a significant change that altered the Constitution. This was followed by changes in the way judges were appointed, then the reduction of judges' retirement age, and finally the creation of the National Judicial Office until, piece by piece, the Constitutional Court lost its independence. The process was similarly repeated in Poland, where legislative changes gradually restricted the Constitutional Court's capabilities.

In such situations, the Israeli Supreme Court's actions illustrate the argument defended here. In a decision with hundreds of pages, the Israeli Supreme Court recognized that the amendment approved by the Netanyahu government stripped the court of its capacity to effectively perform its checks and balances role.[419]

A first step for such a measure to be taken is recognizing the court's authority to overturn legislation and constitutional amendments. The exercise of judicial review over ordinary provisions is part of the liberal constitutionalism pattern, with many countries establishing in their constitutions powers for supreme and constitutional courts to exercise this authority.

However, the same cannot be said about invalidating constitutional amendments. Rarely found in constitutions, this authority has been claimed by some courts worldwide, such as the Brazilian Supreme Federal Court and the Supreme Courts of India and Israel. In these courts' cases, the authority to exercise judicial review over constitutional amendments derives from an interpretation – by the courts themselves – recognizing the inviolability of certain constitutional provisions.

The Brazilian case differs from the others by having a special element that contributes to this understanding: eternity clauses. In its Article 60, § 4º, the Brazilian Constitution prohibits elements such as the federal form of the state, the separation of powers, the voting model, and individual rights and guarantees from being amended. This provision allowed an interpretative

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[418] NAVOT, Suzie. An Overview of Israel’s ‘Judicial Overhaul’: Small Parts of a Big Populist Picture. **Israel Law Review**, v. 56, p. 482–501, 2023. p. 482.

[419] ISRAEL. Supreme Court of Israel. HCJ 5658/23 Movement for Quality Government in Israel v. Knesset. Decided in: Jan. 1st 2024. Disponível em: https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/23/580/056/v31&fileName=23056580.V31&type=2. Acesso em: 29 fev. 2024.

opening for the Supreme Federal Court to recognize its power to invalidate constitutional amendments due to material incompatibility with eternity clauses.[420]

Systems with varied amendment rules for different elements of a constitution demonstrate, even implicitly, a hierarchy of constitutional values – which Richard Albert calls the symbolic function of amendment rules. When the Cuban Constitution, for instance, entrenches socialism as an unalterable clause, it expresses which political values are most esteemed by that society. The same can be said of the South African Constitution, which establishes three parameters, with the most rigorous intended for provisions that declare the constitution's values.[421]

On the other hand, the Indian Supreme Court's claim to the power to invalidate amendments on material grounds occurred despite the lack of unalterable clauses or tiered amendment rules in its constitution. In the Kesavananda Bharati v. State of Kerala case, the Indian Supreme Court decided that the amendment power does not reach the Constitution's identity and its basic features.[422] The doctrine of basic structure, outlined in Kesavananda, allowed the Indian Supreme Court to hear another series of cases in which it ended up claiming the role of appointing its members.[423]

The power of this hermeneutic tool is so great that even after India's autocratization under Modi's government, the Supreme Court maintained high levels of constraint over the Executive Branch[424] – making India an outlier among countries that underwent autocratization without their supreme or constitutional courts being captured.

As pointed out by Yaniv Roznai, the Kesavananda ruling did not present a clear list of intangible elements. However, this did not prevent the Supreme Court from drawing clearer lines in subsequent cases regarding the constitutional provisions protected by the basic structure doctrine, such as elements of “liberal democracy, such as the supremacy of the Constitution,

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[420] In this sense: BRASIL. Supremo Tribunal Federal. **ADI 5.105/DF**. Tribunal Pleno. Rel. Min. Luiz Fux, j. 01/10/2015.

[421] ALBERT, Richard. **Constitutional Amendments**: Making, Breaking, and Changing Constitutions. New York: Oxford University Press, 2019. p.47-8.

[422] **Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.**, 1973 SCC (4) 225.

[423] TRIPATHY, Rangin Pallav. Unveiling India's Supreme Court Collegium: Examining Diversity of Presence and Influence. **Asian Journal of Comparative Law**, v. 18, n. 2, p. 179–209, 2023.

[424] Since the 1970s, India's Judicial Constraints on the Executive Index has remained above 0.7, reaching 0.8 in the 1990s and maintaining that level until 2014, when it started to decline. In the most recent evaluation (2023), the index recorded 0.71, continuing the downward trend. See OUR WORLD IN DATA. Judicial constraints on the executive index, 2022. **V-Dem** (2023). Disponível em: https://ourworldindata.org/grapher/judicial-constraints-on-the-executive-index?country=~VEN. Acesso em: 20 mar. 2024.

the rule of law, separation of powers, judicial review, judicial independence, human dignity, national unity and integrity, free and fair elections, federalism, and secularism."[425]

Similarly, on the first day of 2024, the Israeli Supreme Court recognized its power to invalidate amendments to the country's Basic Law.[426] As in India, the Israeli Supreme Court judicially created an unalterable clause, removing the political power to violate Israel's identity as a Jewish and democratic state.

The history of these countries shares an essential element that conferred, to some extent, legitimacy for their Supreme Courts to act so boldly: the values of liberal democracy. Brazil, for instance, is a Democratic State of Law, an identity found in Article 1 of the 1988 Federal Constitution. Additionally, the eternity clauses in its Article 60, § 4º, present typical characteristics of the liberal notion of democracy, such as the separation of powers and individual rights and guarantees. Similarly, India calls itself a Democratic Republic already in its preamble, listing its duty to protect typically democratic elements such as liberty, equality, and fraternity. Another preamble that explicitly establishes a commitment to liberal democracy is the Turkish Constitution, a commitment that is repeated in various provisions of the constitutional text. Israel, in turn, recognizes the democratic character of the State in its Article 1A and Article 7A, which prohibits candidates whose actions, expressed or implied, deny the existence of Israel as a Jewish and democratic state. The Polish Constitution also recognizes the democratic nature of its state and establishes a commitment to the rule of law. In El Salvador, the Constitution recognizes that the government is republican, democratic, and representative. Even in Hungary, where a Constitution was established by Viktor Orbán's government, the commitment to democracy and the rule of law is present.[427]

Why is democracy still a present element even in constitutions created by autocrats? The answer to this question has two dimensions, one domestic and the other international, but both can be summarized in one word: legitimacy. Only the people can confer legitimacy to a regime, which is why even in autocratic regimes, leaders are still concerned with maintaining the illusion of speaking for the people.

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[425] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. New York: Oxford University Press, 2017. p. 46-7.

[426] ISRAEL. Supreme Court of Israel. HCJ 5658/23 Movement for Quality Government in Israel v. Knesset. Decided in: Jan. 1st 2024. Disponível em: https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/23/580/056/v31&fileName=23056580.V31&type=2. Acesso em: 29 fev. 2024.

[427] As provisões constitucionais de todos os países citados podem ser verificados em inglês no projeto *Constitute*. Disponível em: https://www.constituteproject.org

Therefore, there is a great inconsistency in the actions of these authoritarian agents, as a person cannot enjoy the benefits of legitimacy conferred by democracy without demonstrating a commitment to the principles that give it substance.[428] Allowing such a situation is equivalent to recognizing that constitutional promises are empty of normativity, incapable of preserving the very system that embraced them.

In this context, it is necessary to understand that the notion of liberal democracy, the rule of law, and modern constitutionalism are cooriginal[429] – in the Habermasian sense.[430] Born from liberal revolutions, these ideas take shape together and cannot be interpreted in isolation, making systems that only have some of these elements dysfunctional from a democratic point of view.

However, although it can be argued that the concept of democracy is essentially contested,[431] the notion of liberal democracy carries with it certain non-negotiable elements, something that Rosalind Dixon and David Landau called the "democratic minimum core," whose concept is extracted from an overlap of provisions found in various constitutional democracies around the world.[432] In a nutshell, the democratic minimum core consists of: i) a commitment to free, fair, and regular multiparty elections; ii) political freedoms and rights; and iii) a system of checks and balances necessary to preserve the previous items. Based on this parameter, the evaluation of a change in the structure of a constitutional court can be invalidated when it can, alone or in conjunction with others, lead to a violation of the democratic minimum core.[433]

How would the exercise of this authority materialize in practice? Imagine that the president of a given country plans to reform the Supreme Court. Among the proposed reforms are a change in the Court's authority and an expansion of its members from 9 to 15. In this scenario, if the reforms are capable of causing an imbalance in the balance of powers, subjecting the Court to the president's will or preventing it from adequately performing its functions, they could be declared unconstitutional by the Supreme Court itself.

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[428] SCHEPPELE, Kim L. Autocratic Legalism. **University of Chicago Law Review**, v. 85, iss. 2, p. 545-583, 2018.
[429] BERCOVICI, Gilberto. **Soberania e Constituição**: para uma crítica do constitucionalismo. 2. ed. São Paulo: Quarter Latin, 2013.
[430] HABERMAS, Jürgen. **Between Facts and Norms**: Contributions to a Discourse Theory of Law and Democracy. Translated by William Rehg. Polity Press, 1996.
[431] GALLIE, W. B. Essentially Contested Concepts. Meeting of the **Aristotelian Society** at 21, Bedford Square, London, W.C.1, on March 12th, 1956.
[432] DIXON, Rosalind; LANDAU, David. **Abusive Constitutional Borrowing**: Legal Globalization and the Subversion of Liberal Democracy. New York: Oxford University Press, 2021. p. 27.
[433] ROZNAI, Yaniv; DIXON, Rosalind; LANDAU, David E. Judicial Reform or Abusive Constitutionalism in Israel. **Israel Law Review**, v. 56, 292–304, 2023. p. 292.

Does this mean that increasing the composition of a Court from 9 to 15 members is unconstitutional? Not necessarily. It may be that none of the nine judges were appointed by the president who intends to reform the Court, or that the change in authority does not affect the Court's institutional capacities. Therefore, the evaluation must be contextual, considering the proposals' impact on the system as a whole and not just in isolation.[434]

Well-intentioned political agents can carry out reforms of this nature without major difficulties. One way to do this is to dilute the reform's effects on the balance of powers. For example, by adding new seats to the Supreme Court, the president can establish that the first two seats will be filled immediately, and the remaining four will be divided between the next two terms. Introducing an element of uncertainty – in this case, the possibility of the reforming president not being re-elected – removes the self-interest stain from the proposal, ensuring its legitimacy, especially by allowing opponents to benefit from the change.[435]

For these reasons, I consider court-packing proposals unconstitutional, even if their intention may be to expand democracy. This is because the packing of a court presumes the appointment of judges loyal to the intentions of those who appointed them, which can pose a much greater danger to the separation of powers compared to a court composed of judges less committed to democracy.

★★★

A first conclusion that can be drawn from the study so far is that there is no one-size-fits-all model for all countries. The rules for protecting courts – and democracy – must be tailor-made, considering the context and constitution of each society. This personalized approach, derived from the countries studied, reinforces the importance of solutions adapted to each nation's specificities.

None of the presented models is sufficient in isolation to guarantee the protection of constitutional courts. However, together, they can form a robust obstacle against authoritarian advances. Constitutional design can fail, requiring recourse to emergency hermeneutics, which, in turn, can only be sustained with strong popular support. This is because, in times of abnormality, the rule of law is useless, as “legislation of exception deals with something that,

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[434] ROZNAI, Yaniv; DIXON, Rosalind; LANDAU, David E. Judicial Reform or Abusive Constitutionalism in Israel. **Israel Law Review**, v. 56, 292–304, 2023.
[435] VERMEULE, Adrian. Veil of Ignorance Rules in Constitutional Law. **The Yale Law Journal**, v. 111, n. 2., p. 399-433, nov. 2001.

in reality, it cannot handle. The legitimacy of acts carried out during the exception depends on political and popular support, not legal."[436]

Bercovici's lesson was illustrated by the recent Brazilian scenario, especially between 2020 and 2022, when the Supreme Federal Court made a series of decisions – many of which were of dubious constitutionality – to face an authoritarian threat that culminated in an attempt to subvert the electoral result on January 8, 2023.

The conceptual and typological proposal, the countries analyzed, and the ways to defend judicial independence reinforce the need for a system with multiple layers of protection for the most important elements in a legal system, especially supreme courts and constitutional courts.

[436] BERCOVICI, Gilberto. **Soberania e Constituição**: para uma crítica do constitucionalismo. 2. ed. São Paulo: Quarter Latin, 2013. p 40.

5 A COURT TAMING IN BRAZIL: A THREAT

> "Few things matter more to democracy under the threat of an autocratic project than independent courts with a clear vision. Courts guided by a courageous supreme court that inspires through argument and leads through precedents. A court whose justices educate by example, beyond acumen and competence."
>
> Conrado Hübner Mendes

After a little more than two decades under a dictatorship, the Brazilian people have been experiencing the benefits of a young democracy that recently celebrated its 35th anniversary. However, the authoritarian tradition continues to hover over the country, always seeking ways to return to power, because, to paraphrase Bertolt Brecht: the bitch that bore authoritarianism is in heat again.

There are two emblematic cases of court taming in Brazilian history, both occurring during dictatorships, which challenge an appropriate analysis from the framework I proposed. Nonetheless, understanding the history of attacks on Brazilian judicial independence helps in a deeper reading of how court taming proposals take shape today.

In this chapter, I present the historical context of taming that occurred after the 1930 Revolution under Getúlio Vargas' government, as well as during the 1965-1985 dictatorship under military rule. Afterward, I use the concept and typology developed earlier to analyze some proposals for altering the structure of the Supreme Federal Court that have been discussed in recent years. The objective is to verify the constitutionality of each of them given the context in which they were presented.

5.1 The Death of the Judicial Branch

This scenario led the São Paulo oligarchy to break its alliance with the Minas Gerais oligarchy. By the café com leite policy (coffee and milk policy), Luís – who had been nominated by the São Paulo elites for the presidency – was supposed to nominate a candidate from Minas Gerais as his successor, but instead supported the candidacy of Júlio Prestes. In response, Antônio Carlos Ribeiro de Andrada, Luís' natural successor and representative of the Minas Gerais oligarchy, endorsed the candidacy of the oppositionist from Rio Grande do Sul, Getúlio Vargas.

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Scheduled for the first day of March 1930, the presidential election gave victory to Prestes – a position he would never hold. With Prestes' inauguration scheduled for November of that same year, Antônio Carlos began articulating Brazil's first republican coup d'état. On October 3 of that year, with the support of lieutenants from the states that backed Vargas (Rio Grande do Sul, Paraíba, and Minas Gerais), the conspirators initiated the 1930 Revolution, which led to the deposition of Washington Luís and the rise of Getúlio Vargas.

In control of the presidency, Vargas issued Decree No. 19.398, prominently stating in its first article what could be expected of the new state: "The Provisional Government shall exercise at its discretion, in all its fullness, the functions and attributions, not only of the Executive Power but also of the Legislative Power, until the Constituent Assembly is elected and establishes the constitutional reorganization of the country."[437]

One of the first victims of the new regime was the Supreme Federal Court. The Court had become a prime target of some of the revolutionary lieutenants because they had had successive habeas corpus petitions denied due to previous insurrections.[438] Thus, three months after the provisional government was established, Vargas issued Decrees No. 19.656 and 19.711. The first reduced the Court's composition from 15 to 11 judges and altered the extent of its authority; the second, in turn, compulsorily and nominally retired 6 judges from the Court.[439] This led Hermenegildo de Barros, one of the remaining judges, to declare "the death of the Judiciary in Brazil." In his speech, Barros stated that:

> No justice can consider himself guaranteed in the situation in which the Supreme Federal Court currently finds itself, which cannot have independence and will live

[437] BRASIL. Decreto nº 19.398 de 11 de novembro de 1930. **Institue o Governo Provisório da República dos Estados Unidos do Brasil, e dá outras providencias**. Presidência da República, [2022]. Disponível em: D19398 (planalto.gov.br). Acesso em: 01 dez. 2022.

[438] ROSENFIELD, Luis. **As Encruzilhadas da Justiça no Estado Novo (1937-1945)**: o Supremo Tribunal Federal e a Ideia de Oligarquia da Toga. Rev. Fac. Dir. Uberlândia, v. 48, n. 1, p. 134-155, jan./jul. 2020. p. 137.

[439] BRASIL. Decreto nº 19.656 de 3 de fevereiro de 1931. **Reorganiza provisoriamente o Supremo Tribunal Federal e estabelece regras para abreviar os seus julgamentos**. Presidência da República, [2022]. Disponível em: D19656 (planalto.gov.br). Acesso em: 01 dez. 2022; BRASIL. Decreto nº 19.711 de 18 de fevereiro de 1931. **Aposenta ministros do Supremo Tribunal Federal**. Câmara dos Deputados, [2022]. Disponível em: Portal da Câmara dos Deputados (camara.leg.br). Acesso em: 01 dez. 2022.

> exclusively on the magnanimity of the Provisional Government. As for me, [...] I have no honor in being part of this Court, so discredited, vilified, humiliated, and it is with shame and embarrassment that I occupy this thorny seat to which the eyes of the audience will be turned, doubting whether there is an independent judge here, capable of fulfilling his duty with sacrifice.[440]

Between 1931 and 1934, other judges left their positions in the Court. This allowed Vargas to fill the vacancies with a total of 7 new judges, forming a new majority. The new appointments, however, were not submitted to the Federal Senate, which had remained closed since the revolution.[441] Hermenegildo de Barros himself would be expelled from the Court in 1937, due to the enactment of a new Constitution that reduced the compulsory retirement age from 75 to 68 years.[442]

Without resistance, the Supreme Federal Court was tamed. Now occupied by judges loyal to the government, the Court abandoned its previous institutional role and became an instrument for legitimizing the government's will, especially its war policies and its confrontation with communism and other enemies of the nation.[443]

5.2 Garroting[444] the Supreme Federal Court

Set within the context of the Cold War, João Goulart assumed the presidency of Brazil in September 1961, following the resignation of Jânio Quadros. In office, Goulart signaled alignment with the communist bloc, opposing the sanctions imposed on Cuba by the United States and visiting the People's Republic of China. These political positions, coupled with fears of a supposed socialist revolution in the country, led the military to stage a coup d'état and seize

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[440] COSTA, Emília Viotti da. **O Supremo Tribunal Federal e a construção da cidadania**. São Paulo: IEJE, 2001. p. 71.

[441] DEL RIO, Andrés. La era Vargas y la trayectoria del Supremo Tribunal Federal de Brasil: un análisis histórico institucional 1930-1945. **Revista Internacional de História Política e Cultura Jurídica**, Rio de Janeiro, v. 7, n.2, p. 298-320, maio/ago., 2015. p. 305-6.

[442] ROSENFIELD, Luis. **As Encruzilhadas da Justiça no Estado Novo (1937-1945)**: o Supremo Tribunal Federal e a Ideia de Oligarquia da Toga. Rev. Fac. Dir. Uberlândia, v. 48, n. 1, p. 134-155, jan./jul. 2020. p. 137.

[443] Ibid., p. 138.

[444] An excerpt from the speech of Ulysses Guimarães, president of the National Constituent Assembly, when presenting the new Constitution to the country: "A traitor to the Constitution is a traitor to the Fatherland. We know the accursed path. Tearing up the Constitution, locking the doors of Parliament, garroting freedom, sending patriots to prison, exile, and the grave. When after so many years of struggles and sacrifices we promulgate the Statute of Man, Liberty, and Democracy, we cry out by imposition of its honor. We have hatred for dictatorship. Hatred and disgust." BRASIL. Câmara dos Deputados. Rádio Câmara. **Íntegra do discurso presidente da Assembleia Nacional Constituinte, Dr. Ulysses Guimarães (10' 23")**. 02 de fev. 1987. Disponível em: https://www.camara.leg.br/radio/programas/277285-integra-do-discurso-presidente-da-assembleia-nacional-constituinte-dr-ulysses-guimaraes-10-23/. Accessed in: 10 jun. 2024.

control of the government, promising subsequent elections – something that did not occur for the next 20 years.

Just over a week after the coup, the new government issued its first Institutional Act. Concerned with the regime's legitimacy, the military attempted to rewrite the event by referring to it as a revolution – a claim unsupported by specialized political science literature.[445] Regardless of the revisionism, the provisions of Institutional Act No. 1 (AI 1) not only promised new elections but also suspended the guarantees of tenure and stability for public servants for six months, and prevented judicial review of actions taken by the Chiefs of Staff to suspend political rights for 10 days or to revoke legislative mandates.[446]

A little over a year after introducing Institutional Act No. 1, the military presented Institutional Act No. 2. Like the previous Act, AI 2 maintained the validity of the 1946 Constitution but altered it in the interest of the new regime. Among the provisions changed, one was directly aimed at the Supreme Federal Court, which had its composition expanded from 11 to 16 members. AI 2 also reinstated the position of federal judge, abolished by the 1937 Constitution, to be appointed by the president from a list of 5 nominees by the STF.[447]

During this period, the Court did little to resist or confront the regime. Several factors contributed to this stance, such as the presence of government supporters among the Court's members, exemplified by Pedro Chaves.[448] Additionally, there was the fear that the Court's image might be damaged if any of its decisions were not enforced, a concern shared by many judges throughout history, similar to what happened with John Marshall when writing his opinion in Marbury v. Madison against then-Secretary of State James Madison.[449] The Brazilian case, in turn, is well illustrated by Felipe Recondo when narrating the behind-the-scenes of the STF's trial in October 1964. In a conversation between Justice Vilas Boas and lawyer Arnoldo

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[445] In the sense of recognizing the seizure of power in Brazil in 1964 as a coup, see PEYTON, Buddy; et al. **Cline Center Coup d'État Project Dataset** (2024). University of Illinois at Urbana-Champaign. https://doi.org/10.13012/B2IDB-9651987_V7; LEHOUCQ, Fabrice; PÉREZ-LIÑÁN, Aníbal. Breaking Out of the Coup Trap - Political Competition and Military Coups in Latin America. **Comparative Political Studies**, v. 47, n 8, p. 1105–1129, 2014.

[446] BRASIL. Ato Institucional nº 1, de 9 de abril de 1964. **Dispõe sobre a manutenção da Constituição Federal de 1946 e as Constituições Estaduais e respectivas Emendas, com as modificações introduzidas pelo Poder Constituinte originário da revolução Vitoriosa**. Presidência da República, [2022]. Disponível em: https://www.planalto.gov.br/ccivil_03/ait/ait-01-64.htm. Acesso em: 10 jun. 2024.

[447] BRASIL. Ato Institucional nº 2, de 27 de outubro de 1965. **Mantem a Constituição Federal de 1946, as Constituições Estaduais e respectivas Emendas, com as alterações introduzidas pelo Poder Constituinte originário da Revolução de 31.03.1964, e dá outras providências.**. Presidência da República, [2022]. Disponível em: https://www.planalto.gov.br/ccivil_03/ait/ait-02-65.htm. Acesso em: 10 jun. 2024.

[448] CARVALHO, Alexandre Douglas Zaidan de. Entre o dever da toga e o apoio à farda: Independência judicial e imparcialidade no STF durante o regime militar. **Revista Brasileira de Ciências Sociais**, v. 32, n. 94, jun. 2017.

[449] BECKER, Rodrigo Frantz. **Marbury v. Madison, 1803**: O estabelecimento do controle de constitucionalidade difuso. *In*: BECKER, Rodrigo Frantz (Coord.). **Suprema Corte dos Estados Unidos**: Casos Históricos. São Paulo: Almedina, 2022, p. 81-97.

Wald about a pending habeas corpus before the Court, Vilas Boas privately asked Wald: "I have information to ask you. If we grant this habeas corpus, can you guarantee that it will be enforced?" Perplexed by the question, Wald responded, and Vilas Boas explained: "If you can guarantee that the decision will be enforced, we will unanimously grant the habeas corpus. If you say it cannot be enforced, we will unanimously deny it."[450]

5.3 Court Taming Proposals Under the 1988 Constitution

It is not uncommon for constitutional amendment proposals related to the Supreme Federal Court's powers to be presented in Congress or discussed by society. It can be stated without exaggeration that the STF is currently the most powerful institution in the country, both in terms of the powers it effectively exercises and those it has the potential to exercise.

But how can a court concentrate so much power? National and foreign scholars attempt to answer this question in different ways. Some argue that the strengthening of supreme and constitutional courts results from the pressure of economic groups seeking greater legal certainty. Another hypothesis sees judicial expansion as a consequence of the representative system's retraction, unable to fulfill democracy's promises. A third perspective points to the adoption of rigid constitutions as the cause of this phenomenon.[451]

In Brazil, these factors combine with a special one: the choice of an omnipresent constitutional project made in the 1988 Constituent Assembly. This ambitious project is directly linked to the Constitution's ethos, whose distrust of the ordinary legislator led the original constituent to legislate extensively, even on topics that traditionally are not part of a Constitution's substance. This excessive constitutionalization consequently restricts the freedom of legislators and administrators, who end up seeing their actions easily tainted by some unconstitutionality that will bring the case to the STF.[452]

The second consequence of the constituent choice materializes in the Supreme Federal Court's powers. When drafting the STF's institutional design, the 1988 Constitution aimed to preserve the constituent's work against future attacks. This resulted in a Court endowed with "broad powers of constitutional guardian." In this context, the Supreme concentrated

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[450] RECONDO, Felipe. **Tanques e togas**: o STF e a Ditadura Militar. São Paulo: Companhia das Letras, 2018. p. 79.
[451] VIEIRA, Oscar Vilhena. Supremocracia. **Revista Direito GV**, São Paulo, v. 4, n. 2, p. 441-464, jul./dez. 2008. p. 443.
[452] Ibid., p. 44-7.

attributions that, in other democracies, are divided among different institutions: i) constitutional court; ii) specialized judicial forums; and iii) courts of last instance.[453]

This model of constitutional design not only made the Supreme an outstanding institution but also allowed the Court to continue concentrating increasingly ostentatious powers over the last decades, making it one of the most important players in the national political scene.

It is not surprising, therefore, that politicians, academics, and even society debate the legitimacy of the Court's extensive powers in the Brazilian institutional design. These debates have led to reform proposals that could substantially alter the STF's role, which does not necessarily mean they are unconstitutional.

A first example that can be cited is the proposal presented by Deputy Nazareno Fonteles of the Workers' Party (PT) in 2011. The Proposed Constitutional Amendment 33/2011 (PEC 33/11) aimed to limit the Supreme Federal Court's powers due to what was seen as an expansion of the Judiciary's power.

Among the proposal's provisions, two are particularly problematic. The first intended to change the quorum required for declaring a law or act unconstitutional. Previously exercised by the majority of its members (6 out of 11), the declaration of unconstitutionality would only be exercised by 9 judges (four-fifths). Additionally, Fonteles' proposal also conditioned the Court's decision's effects on unconstitutionality to a popular referendum.[454]

The Supreme Court's very power to invalidate constitutional amendments derives from a conclusion of the Court itself. Therefore, it is first necessary to recognize the legitimacy of the discussion on the subject. As pointed out by Virgílio Afonso da Silva, the issue is “more about convenience and opportunity than mere constitutional interpretation.” The decision about who has the final say on the Constitution is not contained within it, “but involves issues such as legal tradition, the expectation of rights protection, democratic stability, and the Legislature's legitimacy, among others.”[455]

However, despite the legitimacy of the judicial review models that can be adopted by a legal system, the framework proposed here requires a contextual analysis of the issue.

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[453] VIEIRA, Oscar Vilhena. Supremocracia. **Revista Direito GV**, São Paulo, v. 4, n. 2, p. 441-464, jul./dez. 2008. p. 447.

[454] BRASIL. Câmara dos Deputados. **Proposta de Emenda à Constituição 33-A, de 2011**. Disponível em: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1089319&filename=Avulso+-PEC+33/2011. Acesso em: 10 jun. 2024.

[455] PROFESSOR da USP fala sobre a PEC 33 e embate de poderes. **Conjur**, 13 jun. 2013. Disponível em: https://www.conjur.com.br/2013-jun-13/virgilio-afonso-silva-professor-usp-comenta-pec-33-embate-poderes/. Acesso em: 10 jun. 2024.

Immediately, it is possible to note that PEC 33, if approved, would give significant political and electoral advantage to the government, which at that time was led by the same party as the proposal's author, the PT. This does not mean that a proposal presented by another deputy not part of the government coalition would automatically be free of problems. The preliminary problem here is self-interest. By adopting a weak judicial review model, the proposal not only restricts the Court's institutional capacities but also opens up space for a presidential term with few effective checks – at least that was the reality of coalition presidentialism in the early last decade.[456] Following Robespierre's example in the French Constituent Assembly, a proposal with such an impact could easily reinforce its legitimacy with a provision that postponed its effectiveness to the term following its approval. Not being the case, I see in the potential for presidential aggrandizement aromas of illegitimacy, as it would suffice for the government to secure three votes to preserve the constitutionality of any legislation or amendment it approved. Submitting this situation to the "democratic minimum core" parameter, the answer would be similar, due to two factors: i) the potential harm to political freedoms and rights; and ii) the reduced capacity of the STF to act as an effective check to ensure these guarantees.[457] A form of taming by transformation, therefore.

Another idea for STF reform was discussed by Deputy Wadih Damous, also a member of the Workers' Party. In a speech that showed little care with words in times ruled by social networks, Damous spoke of "closing the STF" and transforming it into a Constitutional Court, in addition to giving fixed terms to its judges.[458]

Given the context in which it was made – criticizing decisions by Justice Luís Roberto Barroso against former President Lula – it can be argued that Damous' proposal does not carry the virtues of republicanism. Despite this, the proposal can be analyzed using the framework proposed in this work. To perform this task, a preliminary question needs to be answered: does the proposal have the potential to affect the separation of powers? I believe not. The change would certainly cut an incalculable number of cases from the STF, which today reaches five digits.

Another challenge that could be made to the proposal is how it might affect the Supreme's role in ensuring the effectiveness of the fundamental rights provided for in the 1988

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[456] ABRANCHES, Sérgio. **Presidencialismo de coalizão**: Raízes e evolução do modelo político brasileiro. São paulo: Companhia das Letras, 2018.
[457] ROZNAI, Yaniv; DIXON, Rosalind; LANDAU, David E. Judicial Reform or Abusive Constitutionalism in Israel. **Israel Law Review**, v. 56, 292–304, 2023.
[458] DEPUTADO do PT diz que 'tem que fechar STF' para criar corte exclusivamente constitucional. **O Globo**, 13 abr. 2018. Disponível em: https://oglobo.globo.com/politica/deputado-do-pt-diz-que-tem-que-fechar-stf-para-criar-corte-exclusivamente-constitucional-22588979. Acesso em: 10 jun. 2024.

Constitution. It is true that it is not uncommon for the STF to overturn lower court decisions for violating constitutional precepts. This issue could be addressed by modifying the Superior Court of Justice's (STJ) competencies, for example, or even by accepting the new system's consequences. Based on the parameters established here, however, I do not see a potential taming with the proposal, especially since the Court's composition would not be altered, only its constitutional jurisdiction model. Likewise, the Court's ability to act as a check on the Executive and Legislative would be preserved, but it would be performed only in concentrated and abstract constitutional review. Under these conditions, the proposal would be, at least in theory, constitutional.

A third proposal was discussed in 2020, the so-called PEC do Pijama (Pajama PEC). Contrary to what was done by the Bengala Amendment (Constitutional Amendment No. 88/15), which raised the retirement age of STF judges to 75 years, removing up to 5[459] new appointments from then-President Dilma Roussef, the Pajama PEC sought to reduce these judges' retirement age. The proposal, opportunistic in the most pejorative sense of the word, began to be discussed in a context of open attacks by then-President Jair Bolsonaro on the Supreme Federal Court. Some may interpret that, like the Bengala Amendment, the Pajama PEC would characterize constitutional hardball,[460] despite the risky move. The thesis has some merit, even under the scrutiny anchored in the previously presented parameters.

Proposed by Deputy Bia Kicis, a faithful supporter of Bolsonaro, the Pajama PEC aimed to repeal the Bengala Amendment, restoring the retirement age of STF judges to 70 years. If approved, the proposal would immediately open two vacancies on the Court, one for Ricardo Lewandowski and the other for Rosa Weber. Combined with the expected appointments due to the retirements of Celso de Mello (2020) and Marco Aurélio (2021), Bolsonaro would have a total of 4 appointments to a Court composed of 11 judges. As self-interested and perverse as the measure may seem, it is not tainted by unconstitutionality under the proposed framework. This is because 4 appointments would not give the president control over the Court unless he were re-elected, a scenario that would guarantee him two more appointments. Re-election, however, is an unknown, a potentiality. Even though all presidents who have run for re-election since democratization have won a second term, Bolsonaro proved to be an exception. Therefore,

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[459] In the article that served as the basis for this work, I presented counterfactuals with different scenarios in which the then-president would appoint between 1 and 5 judges. See SOBREIRA, David; COUTINHO, Carlos Marden Cabral. Domesticando a Justiça. **Revista de Investigações Constitucionais**, Curitiba, vol. 10, n. 2, e242, maio/ago. 2023.

[460] PIANARO, Rick Daniel É preciso estar atento e forte: Supremo e a 'PEC do Pijama'. **JOTA**, 10 jun. 2020. Disponível em: https://www.jota.info/opiniao-e-analise/artigos/e-preciso-estar-atento-e-forte-supremo-e-a-pec-do-pijama-10062020?non-beta=1#_ednref4. Acesso em: 10 jun. 2024.

taken in isolation and even considered in a context of repeated verbal attacks on the Court, this measure cannot, in my view, be considered a taming.

The last proposal on the list was briefly discussed during the second round of the 2022 elections, first by then-Vice President and Senator-elect Hamilton Mourão[461] and then considered by then-President Jair Bolsonaro[462] – who quickly abandoned it after the negative backlash it generated.[463] Among the ideas thrown into the public debate were the establishment of 10-12 year terms, a possible reduction of judges' retirement age, or alternatively, the expansion of the Court's number of seats, something Bolsonaro had already advocated during his 2018 presidential campaign.[464]

I will focus my analysis on the possibility of expansion and the establishment of terms, as the reduction of retirement age was addressed in the evaluation of the Pajama PEC. Like a country's judicial review model, the discussion about terms for court judges is more situated in the realm of politics than law. As Conrado Hübner Mendes demonstrates, both the lifetime term system and the temporary term system have positive and negative points. The former, combined with a rational appointment model, has the potential to address the problem of court members' partisanship. Judges with lifetime tenure have their jobs guaranteed despite the passage of time. Although this ensures independence, it affects the court's rejuvenation and can contribute to the entrenchment of intransigent positions and epistemic homogenization. On the other hand, temporary terms do not suffer from the rejuvenation problem but can reduce the court's potential to develop collegiality. Moreover, temporary terms also face another risk: post-judgeship career planning. Given that their terms will end at some point, judges may bias their decisions in hopes of opening future doors.[465]

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[461] SENADOR eleito, Mourão sinaliza plano para interferência no STF. **Uol**, 07 out. 2022. Disponível em: https://noticias.uol.com.br/eleicoes/2022/10/07/eleito-senador-mourao-sugere-mudancas-no-stf-alem-do-aumento-de-cadeiras.htm. Acesso em: 10 jun. 2024.

[462] Bolsonaro diz que pode descartar aumento de ministros do STF se corte 'baixar temperatura'. **Folha de São Paulo**, 09 out. 2022. Disponível em: https://www1.folha.uol.com.br/poder/2022/10/bolsonaro-diz-que-pode-descartar-aumento-de-ministros-do-stf-se-corte-baixar-temperatura.shtml. Acesso em: 10 jun. 2024.

[463] BOLSONARO diz que proposta de alterar número de ministros do STF é 'invenção'. **Estadão**, 11 out. 2022. Disponível em: https://noticias.uol.com.br/ultimas-noticias/agencia-estado/2022/10/11/bolsonaro-diz-que-proposta-de-alterar-numero-de-ministros-do-stf-e-invencao.htm. Acesso em: 10 jun. 2024.

[464] BOLSONARO SOBRE aumento do STF: 'Não tem uma fala minha favorável a isso'. **Estado de Minas**, 20 out. 2022. Disponível em: https://www.em.com.br/app/noticia/politica/2022/10/20/interna_politica,1410028/bolsonaro-sobre-aumento-do-stf-nao-tem-uma-fala-minha-favoravel-a-isso.shtml.

[465] MENDES, Conrado Hübner. **Constitutional Courts and Deliberative Democracy**. New York: Oxford University Press, 2013. p. 158-9.

A change in the duration of court judges' terms does not seem, *a priori*, to pose a threat under the idea of taming. If the current composition is not prematurely removed to give the altering agents control over the court, I do not see the measure as a constitutional violation.

Court expansion, on the other hand, is the most well-known form of taming. When first discussed by Bolsonaro in 2018, the proposal considered expanding the Supreme Federal Court from 11 to 21 judges, giving the president 10 new appointments – assuming all would be made immediately – in addition to the two he would be entitled to during his first term. In the second scenario, when the proposal was broached during the 2022 elections, the idea was to expand the Court by 5 seats. In this situation, besides the 2 appointments in his first term, Bolsonaro would appoint judges for the 5 new seats, plus two more due to compulsory retirements in his second term. In both cases, the characterization of taming is undeniable.

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These hypothetical scenarios demonstrate that, in addition to being cyclical, the threat of court taming in Brazil is ambidextrous. The development of a solid constitutional culture has not yet occurred, and the constitutional design can still be improved to prevent such attacks. Despite its strength, the Federal Supreme Court has seen its legitimacy increasingly questioned. To avoid resorting to emergency hermeneutics, it is crucial that society and institutions play a role in defending democracy – before the STF commits suicide in its attempt to defend itself.

FINAL REMARKS

The taming of a court, in my understanding, represents an invariable violation of the democratic minimum core because it results in a court incapable of effectively performing its role in checks and balances. This conclusion is reinforced by the experiences of the countries studied here, all of which are electoral or liberal democracies that ended up undergoing regime transitions after the process of constitutional erosion was intensified by the expansion, reduction, and/or transformation of their supreme courts or constitutional courts.

Make no mistake, court taming is not sufficient to put an end to a democracy, but it has certainly proven to be one of the favorite and most successful paths through which authoritarian agents around the world have been spreading the third wave of autocratization – an apparently cyclical problem that cannot be left unaddressed.

There is also the question of the risk that each of the domestication methods poses to democracy. Although the context has a strong influence on the damage that can result from domestication, it seems to me that the expansion and reduction of members of a court presents itself, at least prima facie, as potentially more damaging experiences to the democratic structure of a country.

Thus, based on a comparative analysis, I sought to establish a framework to verify how this taming process materializes. My intention – and I hope I have achieved it – was to present parameters that reach the highest possible level of objectivity, allowing other academics, politicians, and members of civil society to evaluate court restructuring measures with a sound tool.

Obviously, and I apologize for being repetitive, I do not fail to recognize the liberal bias of the lenses through which I view democracy and project the taming proposal. I hope, despite this, that the methodological tools I have presented will serve ambidextrously to those who, like me, continue to defend liberal democracy despite its numerous flaws and unfulfilled promises.

The most challenging – and possibly most controversial – section of this work may be the one in which I dealt with emergency hermeneutics. Defending the expansion of judicial powers, even exceptionally, is an interpretation that many will legitimately reject. After all, the debate about who has the final say on the constitution is far from reaching the end of its history.

In this sense, the Brazilian case presents some lessons that contributed to the construction of the theses in defense of judicial independence. Returning to democratic normality after a conspiracy for a coup d'état on January 8, 2023, the country continues to

observe how the Supreme Federal Court has been conducting the processes to bring to justice those responsible for the attempt to subvert the young Brazilian democracy.

However, the conduct of this process has been based on elements that challenge the pillars of the rule of law. The Court has resorted to a perpetual and almost always secret inquiry to investigate attacks committed against the institution itself, positioning it as investigator, judge, and victim in a single case. This is compounded by the fact that the inquiry was initiated ex officio by the STF itself to censor a magazine that accused one of the Court's members of corruption, claiming it was fake news.[466]

A second stain contaminating this inquiry, which remains in effect in 2024, was the lack of constitutionally required approval by the Office of the Prosecutor General of the Republic (PGR). Occupied by an appointee of Jair Bolsonaro from 2019 to 2023, the PGR remained inert in the face of dozens of attacks (verbal and physical) made or instigated by the president of the Republic and his supporters against the Supreme Federal Court. In this scenario, the Court resorted to what I see as a distortion of Loewenstein's militant democracy thesis, a topic that has been the subject of much debate among scholars in Brazil.

Another problem that questions the legitimacy of these investigations is the methods used, considered of quite dubious constitutionality and heavily criticized in the context of Operation Lava Jato. An example that can be cited is the case of Mauro Cid's plea deal, Bolsonaro's former aide-de-camp accused of being involved in the conspiracy to overthrow the elected government. After four months of pre-trial detention, Mauro Cid agreed to a plea deal that allowed his detention to be served under house arrest.[467] This practice of imprisoning to force plea deals – and then releasing the informants – was not only criticized by an STF[468] judge but also declared unconstitutional.

The Brazilian experience allows for some conclusions. The first is that many of the measures taken by the Supreme Federal Court exceed the scope of what I called emergency hermeneutics. In this sense, these examples of Court action, whether the interpreter sees them as legitimate or not, are incompatible with the proposals for defending judicial independence that I support.

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[466] BRASIL. Supremo Tribunal Federal. **INQ 4.781/DF**. Rel. Min. Alexandre de Moraes, j. 18/04/2019. Disponível em: https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/INQ478118abril.pdf. Acesso em: 11 jun. 2024.
[467] APÓS homologação de delação premiada, Mauro Cid é solto e coloca tornozeleira eletrônica. **CNN**, 09 set. 2023. Disponível em: https://www.cnnbrasil.com.br/politica/apos-homologacao-de-delacao-premiada-mauro-cid-deixa-presidio-em-brasilia-e-utilizara-tornozeleira-eletronica/. Acesso em: 11 jun. 2024.
[468] SAMPAIO, Cristiane. "Delação de presos sugere tortura", afirma Gilmar Mendes citando ministro do STJ. **Brasil de Fato**, 17 out. 2019. Disponível em: https://www.brasildefato.com.br/2019/10/17/delacao-de-presos-sugere-tortura-afirma-gilmar-mendes-citando-ministro-do-stj. Acesso em: 11 jun. 2024.

The second conclusion, drawn from reading the works of Barry Friedman and Theunis Roux, recognizes the amount of wear suffered by the Supreme Federal Court in both its political capital[469] and legal legitimacy.[470] Therefore, the Court needs to recognize the fragility of its position despite the breadth of its institutional powers.

Understanding this means knowing when the Court's powers are being exercised beyond their limits, especially in the absence of a period of abnormality. The political legitimacy that supports the exercise of emergency powers[471] does not persist in normality. Thus, the Court – and this lesson transcends Brazilian borders – must act with discernment to identify moments to accumulate political capital.

In addition to a more sober institutional performance, courts can build a more solid position through the personal actions of their members, returning to the idea of sociological legitimacy. Thus, when judges demonstrate restraint, reserve in their private lives, and distance from political and economic powers, their courts flourish. Conversely, when judges, notably those members of Apex Courts, participate in events sponsored by large companies whose cases will be judged by these courts, receive gifts from billionaires, or publicly express political opinions, the courts' legitimacy is eroded, event by event, interview by interview, gift by gift.

Defending a court is one of the ways we can help preserve democracy. This role, however, is not always exercised through praise. The defense of courts also materializes through criticism. I am not referring to anti-institutional criticism, such as those that seek to abolish their existence or question their performance of constitutional functions. The criticisms I refer to are those methodologically supported, aimed at improving the institution, not destroying it. After all, as Conrado Hübner Mendes wrote, "[s]ubjecting judicial misconduct to legal criticism is a constitutional cause."[472]

Protecting courts – and judicial independence – involves the ability of the people's representatives to anticipate problems, presenting institutional solutions that mitigate potential risks; but, above all, it depends on the commitment of society and judges to the values of liberal democracy, which may be the last line of defense against autocratization.

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[469] FRIEDMAN, Barry. **The will of the people**: how public opinion has influenced the Supreme Court and shaped the meaning of the Constitution. New Yourk: Farrar, Straus and Giroux, 2009. p. 358.

[470] ROUX, Theunis. **The Politics of Principle**: The first South Africa Constitutional Court, 1995-2005. Cambridge: Cambridge University Press, 2013. p. 19-20 e 24.

[471] BERCOVICI, Gilberto. **Soberania e Constituição**: para uma crítica do constitucionalismo. 2. ed. São Paulo: Quarter Latin, 2013. p. 39.

[472] MENDES, Conrado Hübner. Defender o STF de seus ministros. **Folha de São Paulo**, 05 jun. 2024. Disponível em: https://www1.folha.uol.com.br/colunas/conrado-hubner-mendes/2024/06/defender-o-stf-de-seus-ministros.shtml. Acesso em: 11 jun. 2024.

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APPENDIX - Minutes of the Master's Dissertation Defense Session

Unichristus
Centro Universitário Christus

MINUTES OF THE DISSERTATION DEFENSE SESSION

ACADEMIC MASTER'S IN LAW

Defense No. 100/2024

Minutes of the Master's Dissertation Defense Session presented by **DAVID SOBREIRA BEZERRA DE MENEZES,** under the title **"TAMING JUSTICE: HOW COURTS DIE AND WHAT CAN BE DONE TO SAVE THEM"**.

At 9:00 a.m., on July 17, 2024, at the Christus University Center - UNICHRISTUS, Parque Ecológico headquarters, Fortaleza - CE, **by videoconference,** the Commission appointed to judge the Dissertation presented by master's student **DAVID SOBREIRA BEZERRA DE MENEZES,** under the title **"TAMING JUSTICE: HOW COURTS DIE AND WHAT CAN BE DONE TO SAVE THEM",** met. The Examining Committee was made up of Professors **JURACI MOURÃO LOPES FILHO (UNICHRISTUS)**, as member and Chairman, **YANIV ROZNAI (REICHMAN UNIVERSITY), DAVID E. LANDAU (FLORIDA STATE UNIVERSITY) and CARLOS MARDEN CABRAL COUTINHO (UNICHRISTUS).** In a public session, after a presentation of approximately 20 (twenty) minutes, the master's student was orally questioned by the members of the Board, obtaining the following results: APPROVED, in accordance with the guidelines defined by the collegiate body of the Postgraduate and Research Program of the Academic Master's Degree in Law. After the final paper defense session, the student must, within 30 (thirty) days, submit an electronic copy of his or her final paper, approved by the advisor, with the inclusion of any changes suggested by the Examining Committee during the oral defense session, via the link https://bit.ly/entrega-dissertacao, as the final condition for issuing the diploma. In accordance with the regulations, these Minutes were drawn up and signed by the members of the Examining Board mentioned below and by the master's student.

Fortaleza July 17, 2024.

DocuSigned by:
JURACI MOURÃO LOPES FILHO
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PROF. DR. JURACI MOURÃO LOPES FILHO
Advisor/President - CPF: 624.758.863-15

Signed by:
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PROF. DR. YANIV ROZNAI
Member - Passport No. 39040581

Signed by:
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PROF. DR. DAVID E. LANDAU
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Modifications required for the Master's thesis defense of **DAVID SOBREIRA BEZERRA DE MENEZES.**

Dissertation completed on July 17, 2024.

The condition for receiving the candidate's diploma is to fulfill the following required changes:

Specific suggestions for text and content highlighted in the session.

The deadline for complying with the modification requirements is up to 30 (thirty) days, and the supervisor is responsible for checking compliance with the modification requirements.

You are hereby informed:

Chairman of the Board — DocuSigned by: JURACI MOURÃO LOPES FILHO 0DD283A7257C475...

Master's Student — Assinado por: DAVID SOBREIRA 9488ABDB59474DF...