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A Comparative-Analytical Approach to Political and Judicial Review of the Constitution in France and the United States: From the Constitutional Council to the Supreme Court

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Abstract

This article aims to provide a comparative examination of two prominent models of constitutional review—political review in France and judicial review in the United States—by analyzing the structures, theoretical foundations, and social implications of these two systems. The research methodology employed is a comparative, descriptive-critical analysis that, drawing on primary sources and contemporary legal developments, clarifies the differences and commonalities between the two models. The findings reveal that political review in France stems from the tradition of parliamentary supremacy and a concern over "judicial government," whereas in the United States, ex post judicial review is considered a tool for controlling majority power and protecting fundamental rights. The article also demonstrates that France has moved toward greater flexibility by combining both ex ante and ex post review (since 2010), while the U.S. emphasizes judicial interpretation within the context of concrete cases. Finally, through a functional comparison of institutional status, voting procedures, and social impact of rulings, the article analyzes the strengths and limitations of each system and offers recommendations for designing effective constitutional review mechanisms.

Keywords: *United States Supreme Court; French Constitutional Council; Constitution; Political Review; Judicial Review*

Introduction

The Logic of Controlling Laws through the Constitution

Sieyès, one of the architects of the French Revolution and a staunch advocate of the theory of popular sovereignty, asserted in 1792 that the constitution is either mandatory or it is nothing. (Dalloz, 2003: 911-935) John Marshall, Chief Justice of the United States Supreme Court, emphasized the same principle in his landmark 1803 ruling in *Marbury v. Madison*: "Either the Constitution is supreme and cannot be altered by ordinary laws, or it is on par with ordinary legislation and thus can be amended according to the will of the legislature. If the former proposition is true, then any law contrary to the Constitution is not law. If the latter is true, then written constitutions—created by the people to limit

unlimited power—are meaningless and void." From Marshall's perspective, "It is evident that the framers of the written Constitution intended to establish fundamental and supreme rights for the nation. Consequently, the principle is that any legislation inconsistent with the Constitution is invalid." (Burnham, 2011: 326)

Thus, the fundamental premise is that all laws enacted in a country must conform to the Constitution and should not contain provisions contrary to its principles. In other words, laws must remain within the framework established by the Constitution, and their scope must not conflict with constitutional rules. This conclusion logically follows from the principle of constitutional supremacy because if ordinary laws could violate the Constitution, firstly, the hierarchy of laws and constitutional supremacy would collapse; secondly, these two types of laws—which differ fundamentally in origin—would be placed on the same level, and any ordinary law contradicting the Constitution would expose it to change and undermine the fundamental rights of individuals by subjecting them to harmful fluctuations. Moreover, the principle of stability and continuity of the country's political structure—which is the product of the general will and has emerged through special procedures—would be destroyed. (Shari'atpanahi, 2004: 115)

To prevent this, the issue of law review (control) naturally arises. In other words, a competent authority must be established that can examine ordinary laws and determine their conformity with the Constitution, either by declaring them unconstitutional or preventing their enactment. (Shari'atpanahi, 2004: 115) Therefore, to preserve the sanctity and sovereignty of this fundamental law, an appropriate and effective enforcement mechanism is required, through the establishment of procedures and a system that monitors proper implementation of the Constitution, ensuring that laws, regulations, and administrative or political acts contrary to the Constitution are annulled and invalidated.

Regarding constitutional review, three points are especially important:

1. If the Constitution is regarded as a fundamental law, its supremacy must be guaranteed. In this regard, there must be a mechanism to supervise and review all acts, institutions, and authorities deriving from the Constitution. Such supervision requires establishing a supreme body, superior to the three branches of government, to enable effective oversight.

2. Supervision of constitutional compliance by the executive branch (both political and administrative acts) is relatively straightforward. These acts, whether political decisions, administrative acts, or regulations, can usually be reviewed by courts that may annul executive actions if unconstitutional. However, justifying constitutional review of ordinary laws is more complex. Since laws represent the general will of the sovereign people, and the Constitution also expresses this will, can the general will be subject to review? On the other hand, the necessity of constitutional supremacy makes failure to enforce this fundamental law illogical. The justification of constitutional supremacy is based on the premise that a society, while retaining its sovereign will, must establish stable foundations that secure its security and freedom. Hence, it is not appropriate for even the sovereign and founding society to undermine these basic pillars ensuring the stability and durability of social order. Clearly, all acts of society, including legislation, must respect this supremacy; thus, the necessity of constitutional review becomes evident. Otherwise, if the Constitution is violated by ruling authorities, its supremacy would be meaningless.

3. Constitutional review has significant political consequences. Granting an authority or institution the power to definitively accept or reject laws based on constitutional conformity effectively places that body above governing institutions. Undoubtedly, such decisive review raises particular political sensitivities and may provoke strong reactions, including deliberate weakening or violation of the Constitution itself. (Hashemi, 2011: 65-66)

In light of the foregoing discussion, the concept of reviewing ordinary laws and ensuring their conformity with the constitution can be summarized as follows:

> "The control and examination of the actions of a governmental authority by another authority, with the aim of ensuring that such actions remain within the limits prescribed by law. In other words, constitutional review essentially means power controlling power." (Rasekh, 2009: 5) In one interpretation, constitutional review is viewed as a power entrusted to a specific state institution (or institutions) to assess the constitutionality of actions undertaken by other branches or agencies of government. (Ginsburg, 2008: 1)

An important issue that arises in the context of controlling ordinary laws through a constitutional review body is that the establishment of such an institution, endowed with far-reaching and decisive authority, has never been free from doubt or controversy**.** The main criticism directed at such supervisory institutions concerns their democratic legitimacy**.** Based on this concern, the following question has been raised:

How can a constitutional review body—whose members are not directly elected by the people—legitimately oversee the laws passed by a parliament that represents the will of the people, or at least their elected representatives? (Jalali & Sadaqat, 2016: 123-124)

In response to this question, numerous theories and justifications have been proposed. However, exploring these theories and the broader debate around democratic legitimacy falls outside the scope of this article. While academic integrity requires that the reader be made aware of this issue, this study proceeds on the assumption that the democratic legitimacy and legal validity of constitutional review bodies are established and accepted—a topic that has been thoroughly discussed by legal scholars in other specialized works.

Forms of Constitutional Review

1. Review through Public Opinion

From an idealistic perspective, one might imagine that full trust in the people and the governed allows for oversight of the rulers and officials. In other words, public awareness and vigilance can, to a large extent, prevent governmental deviation and even violations of the constitution. (Hashemi, 2011: 69) The primary and most essential guardian of the constitution is public opinion and the general will. Popular support for the principles of the constitution serves as a potent means of oversight, acting as a deterrent against any infringement upon the rights enshrined in the constitution. The more deeply public opinion is attached to the constitution, the more effectively its stability and continuity are ensured.

Indeed, some constitutions have granted the people the right to resist, revolt, and defend their rights through force to protect their constitutional rights. For example, Article 35 of the French Constitution dated 24 June 1793 declares:

> *"When the government violates the rights of the people, insurrection is the most sacred of rights and the most indispensable of duties for the people or any part thereof."* Similarly, the Maryland Declaration of Rights (5 October 1757) states: *"The doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the happiness of mankind."* (Shari'atpanahi, 2004: 116)

There is no doubt that public opinion plays a valuable role in oversight within democratic countries. This oversight may take the form of petitions, demonstrations, protests, and public criticism directed at governmental authorities, whether legislative or executive. While this public right to supervise constitutional enforcement is undeniable, it must be noted that a constitution, as a fundamental law, requires a **profound and informed understanding**. This raises the question: To what extent are the people, in a given society, equipped with the knowledge and discernment to accurately detect violations of the constitution and initiate revolt or revolution accordingly? (Hashemi, 2011: 69)

Public oversight of laws is undoubtedly significant and appealing; however, determining whether ordinary laws conform to the constitution is a technical and complex task. It demands the existence of an institution or authority capable of navigating the intricacies of such assessments and making informed legal determinations. (Shari'atpanahi, 2004: 116)

2. Political Review: The French Model of Constitutional Protection

This approach aligns with French legal doctrine. Most French jurists, emphasizing the equality of the three branches—legislative, executive, and judicial—argue that the authority responsible for reviewing the conformity of ordinary laws with the constitution must be positioned above the legislature. Since judges are tasked with implementing and adhering to the law, it is logically inconsistent, they argue, to grant the judiciary the power to review the substance of the law itself. Judicial intervention in this area would elevate the judiciary above the legislature and violate the sovereign will of the people as expressed through their elected representatives. (Shari'atpanahi, 2004: 119) Therefore, delegating constitutional oversight to an independent institution appears reasonable because oversight by co-equal branches (such as the three traditional powers) does not sufficiently guarantee constitutional supremacy. (Bourdeau, 1977: 102)

This rejection of judicial review by French legal doctrine laid the groundwork for Sieyès, a prominent French political figure, to propose during the drafting of the Constitution of 22 August 1795 the creation of a political body called the "Constitutional Jury"[1] to review the constitutionality of ordinary laws. However, this proposal was blocked by another political figure, Thibaudeau[2], who objected on the grounds that creating such an institution would produce a monolithic organ dominating the public powers, restricting their autonomy and impeding their ability to function freely. (Shari'atpanahi, 2004: 119)

This viewpoint reveals an internal contradiction within French constitutional thought. The liberal tradition born out of the French Revolution led French jurists to define constitutional rights narrowly, essentially equating them with "freedoms." Anything perceived as contrary to French notions of liberty fell outside the realm of constitutional law. (Shari'atpanahi, 2004: 50)
This conception led scholars to reduce constitutional law to the study of the constitution itself, equating constitutional rights with freedoms, and viewing the French Constitution as the embodiment of those freedoms. Ironically, this elevated the constitution's status, yet it lacked any effective mechanism of review or enforcement.

French constitutional scholars have since questioned this paradox:
How could a constitution regarded as so authoritative, and whose study was seen as equivalent to the entire field of constitutional law, lack a mechanism for oversight and enforcement?
Some scholars have explained this contradiction as follows:

> *"Constitutional law was defined narrowly and was limited to interpreting the text of the constitution and analyzing the functioning of its institutions. The constitution was viewed as the rational and modernized product of the 1789 Revolution and as the sole source of legal order. As a result, any practice or conduct—even if it conflicted with the constitution's text—was not subject to legal analysis or critique. Paradoxically, constitutional scholars could not imagine judicial oversight of legislative acts, which were regarded as the will of the people. Hence, constitutional norms lacked effective enforcement and were neither consistently observed nor protected. The constitution was seen not as a tool of legal rationality, but as an idealized, almost utopian document whose realization in practice was rare and exceptional."* (Bell, Boyron, and Whittaker, 2009: 144)

[1] - Le Juris Constitutionnaire
[2] - A French statesman and one of the drafters of the French Civil Code.

It appears that the French eventually recognized this contradiction. During the adoption of the Constitution of 13 December 1799, Sieyès proposed again a new model, entrusting the Senate with the power to assess the constitutionality of ordinary laws. During the First Empire, this Senate, known as the "Conservatory Senate,"[3] assumed that role. (Shari'atpanahi, 2004: 119; Hashemi, 2011: 67)

This political oversight approach persisted during the Fourth Republic (1946), which established the Constitutional Committee[4], inspired by Sieyès' ideas. This body had a wholly political composition, and its members were not judges. However, French constitutional history demonstrates that neither the Senate nor the Constitutional Committee fulfilled their oversight roles satisfactorily. As a result, the Constitution of the Fifth Republic (1958) created the Constitutional Council[5], tasked with reviewing the conformity of laws with the constitution. (Shari'atpanahi, 2004: 119)

By then, constitutional law was studied more broadly, and purely textual interpretation of constitutional provisions[6] no longer sufficed. (Bell, Boyron, and Whittaker, 2009: 144) Ultimately, a significant responsibility was placed upon the French Constitutional Council.

The French Constitutional Council

A. Internal Structure and Composition

The Constitutional Council of France was established under the Constitution of the Fifth Republic, dated 4 October 1958. As a supervisory body overseeing the proper functioning of public authorities and endowed with various competencies, it is primarily tasked with reviewing the conformity of laws with the Constitution. The Council consists of nine members, appointed for a non-renewable term of nine years. Members are appointed by the President of the Republic, the President of the National Assembly, and the President of the Senate. (Conseil constitutionnel, n.d)

Since the constitutional amendment of 23 July 2008, the appointment process requires consultation with the constitutional law committees of both legislative chambers. Depending on the appointing authority, the relevant committee may veto the nomination by a three-fifths majority of votes cast.

The Council's composition is renewed by one-third every three years. Every three years, each of the three appointing authorities designates one new member. Although the term of office is non-renewable, if a member is appointed to replace someone who resigned or is otherwise unable to serve, and if the remainder of the term is less than three years, the appointee may subsequently be appointed for a full nine-year term. (Conseil constitutionnel, n.d)

All appointed members take an oath before the President of the Republic. Additionally, former Presidents of the Republic are ex officio members of the Council. The President of the Constitutional Council is appointed by the President of the Republic from among the Council's members. (Conseil constitutionnel, n.d)

There are no formal age or professional qualifications required for appointment to the Council. However, membership is incompatible with holding positions in government, the Economic, Social, and Environmental Council, or serving as the Defender of Rights[7]. Membership is also incompatible with any elected office. Furthermore, members are subject to the same rules on professional incompatibility that apply to members of Parliament. A former President of the Republic who is an ex officio member may

[3] - Le Sénat Conservateur
[4]- Le Comité Constitutionnel
[5]- Le Conseil Constitutionnel
[6] - The black letter analysis of the constitution
[7] - Le défenseur des droits

not participate in Council sessions if holding any office incompatible with Council membership. (Conseil constitutionnel, n.d)

Additionally, during their term of office, members cannot be appointed to governmental positions and, if they are civil servants, they are not eligible for promotion based on selection. Appointed members may voluntarily resign. Moreover, in cases of legal incompatibility or permanent physical incapacity, as certified by the Council itself, members may be officially declared as having resigned. (Conseil constitutionnel, n.d)

The French Constitutional Council relies on a small and limited administrative staff. The President of the Council appoints a Secretary-General[8], typically chosen from among members of the *Conseil d'État* (Council of State). The Secretary-General is responsible not only for the administrative management of the Council's services but also for organizing its legal work. They provide the necessary documentation to the *rapporteur* (reporting member), enabling them to conduct the legal review. The Secretary-General also coordinates meetings and communications with relevant ministries and government agencies. (Bell, Boyron, and Whittaker, 2009: 159)

B. Procedures for Reviewing Petitions

The Constitutional Council functions as a judicial institution, whose sessions and deliberations are based on cases referred to it. When the Council is seized prior to the promulgation of a law, it must deliver its decision within one month, or within eight days in urgent cases. In cases where the Council is seized through a Priority Preliminary Ruling on Constitutionality[9], the decision must be issued within three months. During this period, the parties involved may submit written arguments through an adversarial process, and are also invited to attend public hearings. (Conseil constitutionnel, n.d)

Upon receipt of a petition, the President of the Council assigns a *rapporteur*, selected based on their expertise in the relevant legal matter. The *rapporteur* is responsible for analyzing the case and proposing a legal solution. They are supported by the Secretary-General and provided with a case file containing: the legislative text, the initial petition, parliamentary debates, the government's response, relevant case law from the Council (and other courts, if necessary), comparative legal analysis from foreign constitutional courts, and academic commentary. (Bell, Boyron, and Whittaker, 2009: 160)

In many cases, an informal meeting is held with representatives from the relevant government department, a government legal advisor, a member of the Council's legal staff, and the *rapporteur*, in order to discuss the arguments presented in the petition. Additionally, in 2004, a parliamentary delegation was granted an oral hearing to present its arguments directly to the *rapporteur*—a rare occurrence, but one that strengthened the adversarial nature of the proceedings. To further enhance transparency, it was decided that both the initial petition and the government's response would be published alongside the Council's final decision. The *rapporteur* also leads the Secretary-General in drafting a reasoned opinion and a draft ruling, which are discussed in closed deliberations among Council members. The final decision is adopted by a simple majority vote. Notably, dissenting opinions are neither published nor allowed to be expressed, and the voting record remains strictly confidential. (Bell, Boyron, and Whittaker, 2009: 160)

3. Judicial Review: The American Model of Constitutional Safeguard

The term "judicial review" refers to the authority of a judge to evaluate an ordinary law and assess its conformity with a higher norm (such as the Constitution or general principles of law). This act is considered constitutional review of the law. Accordingly, depending on the legal system, a judge may determine whether a regional law conforms to or conflicts with a higher national law. If a subordinate law

[8] - Un secrétaire générale
[9] - Question prioritaire de constitutionalité (QPC)

introduces provisions that are inconsistent with superior norms, and if the judge is empowered with review authority, they may identify such a conflict. In some legal systems, judges may also assess whether the activities of political parties comply with constitutional principles. Furthermore, a judge may evaluate the conformity of national laws with general principles of law, such as proportionality, or with international treaties, such as the European Convention on Human Rights. Conversely, when necessary, a judge may review the compatibility of treaties or acts of international organizations with the national Constitution. Judicial review, therefore, entails the power of the judiciary to identify legal conflicts, and it may lead to consequences for resolving such conflicts. (Kelsen, 1967: 160–162)

While the authority of judges to declare laws unconstitutional is accepted, natural, and even routine in some systems, it remains highly contested in others. Typically, two fundamental arguments are advanced to justify judicial authority to determine the constitutionality of legislation. First, judicial review ensures the supremacy of the Constitution; second, it serves as a mechanism to check the legislature and protect minority rights.

The first argument emphasizes that the Constitution is the highest norm within a legal system, and all other laws derive their validity from it. Therefore, inferior laws must not be allowed to conflict with the Constitution. Proponents of judicial review argue that based on this logic, judges must refrain from enforcing ordinary laws that are inconsistent with the Constitution. In this view, having a constitution without granting courts the authority to review laws is meaningless; otherwise, the legislature could violate the Constitution with impunity. Hans Kelsen, the Austrian jurist known for designing the initial model of constitutional courts in Europe in 1920, argues that laws derive their validity from conformity with a higher norm; incompatible laws lack normative status, and the Constitution cannot be superior unless it is enforced through judicial review. Chief Justice John Marshall of the U.S. Supreme Court had articulated this position earlier in 1803, asserting that judicial review necessarily flows from constitutional supremacy. (Marbury v. Madison, 5 U.S. 137: 177–179)

The second argument posits that "checks and balances" are essential to limit the ruling majority of the time. Democracy is not equivalent to majority tyranny; rather, it also involves the protection of minority rights. In the rule of law, minorities can find such protection, since even the majority is subject to the law. (Marbury v. Madison, 5 U.S. 137: 180–182; Kelsen, 1967: 170–172)

It should also be noted that in some countries, the system for reviewing the conformity of ordinary laws with the Constitution combines both political and judicial oversight. Consequently, alongside political and judicial review systems, a hybrid system of constitutional review may also be identified. Switzerland, for instance, employs such a hybrid system, where the type of oversight depends on the category of the law in question. Federal legislation[10] is monitored for constitutional conformity by a political body, while the competence to review the constitutionality of cantonal laws lies with the Federal Supreme Court. (Fernandes de Andrade, 1999: 978)

The United States Supreme Court

A. The Position of the Supreme Court within the U.S. Judicial System

The judiciary of the United States lacks uniformity; in fact, it comprises fifty-one distinct judicial systems. Each of the fifty states has its own structure and hierarchy of state courts, while parallel to these, there exists a federal judiciary with its own hierarchical structure. The highest court in the federal system is the Supreme Court of the United States, established by the U.S. Constitution, whereas other federal courts—including district courts, courts of appeals, and specialized federal courts—are created by federal legislation. (Art. III (1), U.S. Constitution) Federal judges, including Supreme Court justices, are nominated by the President and confirmed by the U.S. Senate. (Art. II (2), U.S. Constitution) These judges are appointed for life tenure (Art. III (1), U.S. Constitution) and can only be removed through

[10] - Federal statutes

impeachment by Congress. As for state courts, each state independently determines the establishment, function, term of office, and method of appointment or election of its judges. (Heringa and Kiiver, 2009: 153)

B. The Process of Judicial Review by the Supreme Court

As the foundational provisions of the 1789 Constitution show, the system of "checks and balances" provides mechanisms for the executive and legislative branches to limit the power of the judiciary through the appointment process and jurisdictional oversight of federal courts. However, the Constitution does not explicitly specify the judiciary's tools for controlling the power of the legislative and executive branches. Today, we know that this tool is judicial review—the authority of the Supreme Court to examine the constitutionality of the acts of the other two branches—but such authority is not expressly stated in the Constitution. Instead, in 1803, the Supreme Court ruled that judicial review is implicitly embedded in the Constitution. In *Marbury v. Madison*, the Court located the source of judicial review in the very nature of a written constitution, in the Supremacy Clause (Article VI), and in the judicial power granted by Article III. Chief Justice John Marshall reasoned as follows: First, the Constitution is a law and must be observed; the Supremacy Clause identifies it as the supreme law of the land. Second, judges, appointed under Article III with "the judicial power of the United States," are authorized to determine what the law is in the cases before them. Therefore, when both an ordinary law and the Constitution are applicable, judges must follow the hierarchy of norms and set aside the inferior law. In *Marbury*, the Court invalidated a federal statute, and seven years later, in *Fletcher v. Peck*, it extended this reasoning to state laws.

All federal judges in the United States have the authority to review the constitutionality of both state and federal laws. When a dispute raises a question concerning the constitutionality of a federal or state law, it becomes a "federal question" and may be referred to federal court. The U.S. Constitution does not explicitly grant courts the power of judicial review, and the historical records of the constitutional convention provide ambiguous evidence of the framers' intent. Nevertheless, the Supreme Court in *Marbury v. Madison* (1803) held that judicial review logically derives from the Constitution. As the supreme law of the land, the Constitution must be obeyed by all officials, including judges. (Art. VI, U.S. Constitution) It is a direct expression of the will of the people. (Preamble, U.S. Constitution) The Constitution would be rendered practically meaningless if Congress could override it through ordinary legislation; similarly, the complex amendment process (Art. V, U.S. Constitution) and even the drafting of the Constitution itself would be futile if ordinary laws held equal weight. (Heringa and Kiiver, 2009: 154)

Moreover, legislation is only possible through the Constitution and the powers it confers on Congress. Laws are valid only if enacted in conformity with the Constitution (Art. VI, U.S. Constitution); a law contrary to the Constitution cannot have been validly enacted. Regarding whether judges, rather than Congress or state legislatures, should assess such conformity, the Supreme Court stated:

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. (…) Thus, if courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which both apply." (Heringa and Kiiver, 2009: 154)

Accordingly, the judiciary's duty is to resolve disputes by applying the law. If two applicable legal sources conflict, the judge must first resolve the conflict of laws to adjudicate the case. When a conflict arises between the Constitution and an ordinary law, the Constitution prevails, and the ordinary law must be disregarded. Laws contrary to the Constitution are not to be applied. Since all judges engage in this same activity—applying the law to resolve disputes—and since any judge may face the same problem—a conflict between a lower and a higher rule—all judges must adopt the same solution: to set

aside unconstitutional laws. (Heringa and Kiiver, 2009: 154–155) Thus, as all courts—from the lowest municipal court to the Supreme Court—possess this review power, the U.S. system of judicial review is considered **decentralized**. (Burnham, 2011: 325)

Given that judicial review in the United States is decentralized and available to all courts, the Supreme Court is structurally just another "ordinary" court.

Nevertheless, in practice, lawyers and lower court judges accord even the **obiter dictum** of the Supreme Court's constitutional rulings exceptional respect and authority, to the extent that such statements attain a degree of finality and binding force. Consequently, there is a prevailing perception that constitutional issues are not truly or definitively settled until the Supreme Court has spoken. As a result, decisions by lower federal and state courts—let alone statements by legislators or executive officials—are seen merely as "tentative interpretations" or "near-accurate guesses" of constitutional meaning, not as definitive or binding expositions. (Burnham, 2011: 325) Under the **common law doctrine of stare decisis**, lower and later courts must follow the precedents of higher and earlier courts. This means that once the U.S. Supreme Court invalidates a law, all other courts, both federal and state, are bound to follow that ruling. Thus, in practice, the Supreme Court has the final word on the constitutionality of laws. (Heringa and Kiiver, 2009: 154–155)

From Rule of Law to Rule of Judges: A Comparative Reappraisal of Constitutional Safeguard in France and the United States

A. Comparing Philosophical and Theoretical Foundations of the Two Models

The review of the conformity of ordinary laws with the Constitution constitutes an extraordinary tool for safeguarding constitutional supremacy, for only power can restrain power. Accordingly, the decision as to whether the authority to review laws should be entrusted to the judiciary or to other branches of government depends on the legal tradition of each legal system. (Fernandes de Andrade, 1999: 988)

The system of constitutional review in France reflects the foundational philosophy of **legislative supremacy**—a philosophy that has been a hallmark of the French legal system since the Revolution. This approach is common among countries belonging to the Romano-Germanic legal tradition. In fact, prior to the enactment of the 1958 Constitution of the Fifth Republic, no judicial review of parliamentary acts existed. Judges were required to apply codified laws without regard to their conformity with the Constitution. According to the doctrine of legislative supremacy, only Parliament held the competence to enact laws and assess their constitutionality. (David, 1972: 29)

The opposition to judicial review in France is a legacy of the excesses of the *Ancien Régime*[11], in which the local enforcement of laws was often carried out by institutions known as **Parlements,** which functioned as the King's executive arm in the provinces. (Aucoin, 1992: 446) As René David, the French comparative jurist, explains in his treatise on French law:

> "The high courts of pre-revolutionary France, known as *Parlements*, became intensely unpopular due to their opposition to any reform of the traditional legal system. By zealously defending an outdated system based on class inequality and corporate privilege, they failed in their aspiration to represent the nation. Moreover, they were unsuccessful in restraining governmental action or imposing procedural rules upon it. Their politically improper interventions, especially their resistance to structural reforms occasionally proposed by the monarchy, are vividly remembered. The abolition of the *Parlements* was among the first acts of the French Revolution, carried out on November 3, 1789." (David, 1972: 29)

[11] - Ancient Regime

It is important to note that before the 1789 Revolution, the term *Parlement* referred to **regional high courts**, not to the legislative institution as understood today. The most prominent and influential among these was the *Parlement of Paris*, whose judicial authority extended over a large part of France. (Bell, 2001: 19) Besides their judicial powers, the *Parlements* held a distinctive political role, especially through their **right of registration** of royal edicts. Under the legal structure of the *Ancien Régime*, no royal edict could take effect unless it was registered by the relevant *Parlement*. Although this process was ostensibly ceremonial, the *Parlements* used it as a formal avenue to protest royal edicts, thereby exercising a quasi-review function in the legislative process of the monarchy. (Shennan, 1969: 67)

Over time, the *Parlements* became defenders of aristocratic privileges and the traditional class order, resisting any fiscal or administrative reforms that threatened the interests of privileged classes. Consequently, they came to be seen as protectors of the old order and obstacles to the modernization of royal government. (Doyle, 2001: 4) As a result, since the French Revolution, French authorities have consistently associated a powerful judiciary with the notion of a **"government of judges.[12]"** The perceived judicial and executive excesses of pre-revolutionary France led to the creation of a new system grounded in **legislative supremacy**, which became the dominant model of public law in France following the collapse of the *Ancien Régime*. (Aucoin, 1992: 447)

This traditional philosophy of legislative supremacy continued to influence French legal thought into the twentieth century. For example, **Édouard Lambert** in 1921 criticized the American system of judicial review, describing it as a form of **government by judges**, thus reflecting this enduring view. Similarly, **Professor Pierre-Henri Teitgen**, before the establishment of the Constitutional Council, expressed comparable distrust toward a powerful judiciary. In a critical analysis, he stated:

> *"If the Constitutional Council is empowered to examine whether a law passed by Parliament conforms to the Constitution, we fall into the trap of government by judges—where every judge interprets the text, explicit or implicit, through their subjective lens. You are uprooting your entire (legal/political/institutional) system."* (Luchaire, 1987: 15)

François Luchaire, former member of the Constitutional Council and one of France's most prominent constitutional jurists, poses a thought-provoking question in his recent work on the protection of rights and freedoms in the French legal system. Despite recognizing the Council's authority and analyzing its decisions, he asks:

> *"Given his powers, does the constitutional judge not run the risk of overstepping and positioning himself against the general will, which, according to Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen, is expressed by the representatives of the people?"* (Luchaire, 1987: 20)

For many French jurists, entrusting judges with the competence to assess the conformity of ordinary laws with the Constitution constitutes a potential threat to **democracy**. (Aucoin, 1992: 448)

In contrast**, judicial review in the United States** is rooted in Montesquieu's doctrine of **separation of powers** and the principle of **checks and balances,** a framework which empowers the judiciary to act as a restraint on the decisions of other branches. (Montesquieu, 1748: 198) This philosophy, particularly as interpreted by the **Federalists**, emphasizes the role of the Supreme Court in ensuring that all powers adhere to the Constitution. Doctrines such as **originalism** and **judicial minimalism** reflect efforts to preserve judicial impartiality through restrained and historically grounded interpretations of legal texts. (Nolan, 2014: 312; Cohen, 2022: 14) These approaches view the judge's role not as that of a legislator, but as a delineator of constitutional boundaries with minimal interference in democratic processes.

[12] - Le gouvernement des juges

One of the most serious challenges to judicial review in the U.S. is the **counter-majoritarian difficulty**—the concern that an unelected body can invalidate laws passed by majority-elected representatives. (Bickel, 1962: 16–17) In response, **Alexander Bickel** proposed the theory of **judicial self-restraint,** urging courts to intervene gradually and judiciously, fostering dialogue with elected institutions rather than engaging in political activism. (Bickel, 1962: 24–26) Based on this, American judicial philosophy is built on a **gradual, cautious, and precedent-based** process, which, according to theorists such as **Cass Sunstein**, serves as a mechanism to legitimate the judiciary. (Sunstein, 2006: 768)

Recent scholarship also emphasizes that the primary function of judicial review is not to achieve **absolute justice,** but to ensure the **long-term legitimacy** of the constitutional order. (Hickey, 2022: 493) From this perspective, the Supreme Court functions not as a political body but as the **guardian of the nation's legal memory and constitutional constraints**. Thus, while the Court may sometimes appear to oppose the majority's will, its duty is to uphold standards to which even the majority must adhere. (Whittington, 2020: 1-13)

In sum, the **French model,** rooted in legislative supremacy and a historical distrust of the judiciary, excludes judges from legislative processes. This mistrust originates from the negative role of judicial *Parlements* under the *Ancien Régime* and has since become entrenched in the philosophy of French public law. In contrast, the **American system** views the judiciary as the **guardian and overseer** of constitutional order. Despite challenges such as the counter-majoritarian difficulty, theories of **judicial restraint** and **textual fidelity** aim to maintain a **balance between democratic legitimacy and constitutional guardianship.** In brief, **France fears judicial interference in the general will**, whereas **the U.S. fears majority tyranny unchecked by constitutional limits.**

B. Functional Analysis and Comparison of the Two Models

In the United States, Supreme Court rulings have had profound structural and cultural impacts that go beyond merely annulling or affirming laws. The landmark decision in *Brown v. Board of Education* (1954), which overturned the doctrine of "separate but equal," not only eliminated legally sanctioned segregation but also established a national cultural paradigm for educational equality and civil rights. (Brown v. Board of Education, 347 U.S. 483, 1954) Academic studies emphasize that this verdict triggered a "social awakening and attitude shift toward discrimination," paving the way for the civil rights movement. (Hill, 2021: 45–46)

By contrast, Constitutional Council decisions in France have had significantly less transformative effect on cultural or social movements. While the Council functions as a legal safeguard, it lacks substantial role in shaping societal cultural change or driving civic movements. Unlike its American counterpart, the French Council has generally avoided precedent-setting and played a predominantly passive role in public policy and civil activism. (Rivero & Carbasse, 2020: 112)

Despite considerable structural differences, both the U.S. Supreme Court and the French Constitutional Council share a commitment to **broad and rights-centered interpretation** of the Constitution aimed at maximizing public liberties. In the U.S., progressive jurists like Stephen Breyer advocate for **"active judicial philosophy,"** arguing that courts should not only uphold constitutional principles but also empower citizen participation and ensure access to fundamental rights. (Breyer, 2006: 246–247) Thus, constitutional interpretation is guided by democratic and participatory values as much as by textual exegesis.

Early precedent also reflects this commitment: in *McCulloch v. Maryland* (1819), Chief Justice Marshall defended the constitutionality of a federal law by invoking **"implied powers"** inherent in the Constitution. He famously stated: *"We must never forget that what we are interpreting is a Constitution."* The Constitution, unlike ordinary laws, is deliberately broad and general so that it may endure over time. (Burnham, 2011: 327)

This means that much constitutional law cannot be traced to the text of the Constitution by traditional means used to interpret other forms of enacted law[13]. In many cases, it is more accurate to say, not that a particular statute violates the Constitution, but that it violates a principle that courts say the constitution represents. In the process of ascertaining what principles underlie the Constitution, there is ample room for judges – consciously or unconsciously- to inject all manner of political, economic or social theory into their constitutional decision-making. This often leads commentators to criticize courts in general, and the Supreme Court in particular, for engaging in *"political activism"* rather than applying the law. (Burnham, 2011: 327) Some have even argued that constitutional review in the United States is not "judicial" at all; instead it is a political function that has been "carefully disguised" behind the "fiction" of courts determining the law. We have already seen how "judicial philosophy" is perceived to play an important role in judicial decision-making. It is clear that many of the elements of "judicial philosophy" touch on basic political values. For evidence, one need look no further than judicial selection process, particularly for the Supreme Court, which is almost as politicized and rancorous as any partisan election campaign. (Burnham, 2011: 326)

The French Constitutional Council has undergone similar evolution. Indeed, *the Conseil Constitutionnel* has traveled a long way since its creation in 1959. Moreover, commentators agree that its present role had not been at all foreseen by the authors of the 1958 Constitution; in fact, the drafters had arguably tied to avoid an evolution. Originally, the *Conseil* was meant to protect the Executive against encroachment from the Parliament and more generally, to regulate the working of the political system. It was not meant to put in place a control of constitutionality which would identify and protect constitutional rights and freedoms. The revolution which took place with the decision of 1971 was central to the redefinition by the *Conseil Constitutionnel* of its role. The *Conseil* was announcing loudly and clearly that it would not content itself with a sterile role of institutional watchdog, but that it would create a control of constitutionality of the same type which is assumed by other constitutional courts. (Bell, Boyron & Whittaker, 2009: 156)

In 1971, Parliament tried to change the legislation regulating associations in France. Freedom of association has been recognized in France ever since the Third Republic. A loi of the 1901 provides that the only formality resides in an official notification of the new association at the Mairie: the official systematically hands over a receipt in acknowledgment. The state then may control the aims and objectives of any association and if illegal, bans it. (Bell, Boyron & Whittaker, 2009: 157)

In 1969, the *Préfet de paris*, acting on an order from the Interior Minister, refused to hand over the receipt when the founding member of the association *"les amis de la cause du peuple"* came to the *Mairie de Paris* to notify it. Unfortunately for the Government of the time, the failure to act was refused to the administrative courts. The Government lost its case at first instance and decided not appeal. Instead, it sought to amend the 1901 legislation to give a power to the administration to control a priori the aims and objectives of any association. The *Assemblé nationale* had adopted the legislation in a final reading, as the Sénat had opposed it three times. The president of the Sénat forwarded the bill to the Conseil constitutionnel for control. (Bell, Boyron & Whittaker, 2009: 157)

In the 1946 Preamble, the *principes fondamentaux reconnus par les lois de la Républiques* are reasserted along with the rights and freedoms contained in the 1789 Declaration. This category can be explained by the drafters' wish to insert a reference to the rights and freedoms recognized during the Third Republic, as this period witnessed a great deal of progress in relation to collective and social rights, but never had a single constitutional text. The *Conseil constitutionnel* therefore counted freedom of association as one of these fundamental principles and struck down the new reform: by instituting prior security of the legality of any association before any legal personality be granted, the new legislation threatened the very existence of that freedom. (Bell, Boyron & Whittaker, 2009: 157-158)

[13] - The lack of close connection to text is evident in the typical law school constitutional law course which requires students to digest hundreds of pages of caselaw, but not to read the Constitution itself. (Burnham, 2011: 327)

The category of the PFRLR allows the Conseil to determine more freely the principles which come within the block of constitutional norms. In addition, the Conseil resorts to so-called 'rules of constitutional value', 'objectives of constitutional standards' or 'objectives of constitutional necessity'. These are not mentioned in any texts but are deduced from the spirit of the Constitution. The block of constitutional norms is a remarkable and imaginative creation of the Conseil constitutionnel, but arguably does not help with its search for more legitimacy. In one single stroke, not only did the Conseil redesign its constitutional function but it also redefined the content of the 1958 Constitution. Consequently, the Conseil constitutionnel has come as close as possible to a constitutional court and the Constitution has expanded dramatically under its stewardship: it contains the 1958 Constitution, the Preamble of the 1946 Constitution, the Declaration of the rights of man of 1789, and those fundamental principles that the Conseil recognizes. For a principle to be granted this constitutional status, a statute must be adopted during a republican regime and declare a principle of constitutional importance. (Bell, Boyron & Whittaker, 2009: 158)

The decision of 16 July 1971 performed a momentous and double constitutional revolution. Still, the decision of 1971 has been endorsed by all political actors as it was clearly underwritten by the constitutional amendment of 1974. In 1974, Valéry Giscard d'Estaing, the President of the Republic, sponsored an amendment of the Constitution which gave the right to 60 *députés* or 60 *sénateurs* to refer a bill to the Conseil constitutionnel. Thus, the nature of the constitutional control was drastically altered, for since, the opposition has had the possibility to refer any new bill to the Conseil. The number of decisions has consequently increased steadily and with it, the Conseil constitutionnel has refined its methods of review and drawn up more precisely its 'charter' of rights and freedoms. (Bell, Boyron & Whittaker, 2009: 158-159)

C. Ex Ante and Ex Post Review

Under the French model, constitutional review is primarily **ex ante**, meaning laws may be reviewed and invalidated by the Council *before* promulgation. Initially an instrument to restrain Parliament, this mechanism now underpins checks and balances across French public institutions. (Bell, 2022: 185) Operating under a precautionary rationale, ex ante review prevents unconstitutional laws from entering into force, supporting policy stability and legal certainty. This form of review, with its emphasis on **institutional stability** and **legal certainty**, is inspired by the **republican and normative model** of the **Fifth Republic**. (Stone Sweet, 2008: 47)

By contrast, the U.S. model is **ex post**, whereby only laws already enacted or applied in a specific case may be reviewed—often through litigation brought to the courts. This reactive model allows courts to interpret the Constitution dynamically within real-world disputes. In fact, **a posteriori review** is grounded in an **empirical and reactive logic**, stemming from the **pragmatist tradition** and the **Anglo-American common law system.** (Chemerinsky, 2019: 42; Tushnet, 2003: 279) Thus, there is no abstract review; courts cannot rule on a law unless a case arises. Moreover, federal and most state courts in the U.S. *cannot issue advisory opinions*. (Burnham, 2011: 325)

A major critique of the U.S. model is that **constitutional review is limited to concrete cases**, creating a significant gap in preventive oversight. Congress might pass a constitutionally suspect law, which remains effective until harm occurs—and no court may act until someone sues. Alexander Bickel warned that this structural limitation undercuts the judiciary's legitimacy and its ability to prevent injustice proactively. (Chemerinsky, 2019: 45; Bickel, 1986: 111) Thus, although the **American model** appears to safeguard the **Constitution** in principle, it is in practice characterized by a **reactive and delayed approach** in addressing the potential threats posed by **unconstitutional legislation.**

However, the French model has evolved toward a hybrid system. As a result of constitutional reform passed in the Summer of 2008, effective March 1, 2010, the argument that a law is unconstitutional may now be raised in the course of litigation and the legislation set aside by the French judge. In what has been characterized as a "jurisdictional big bang" by law professor Dominique

Rousseau, since March 1, 2010, a constitutional challenge may now be brought directly before the Constitutional Council by any citizen. The former head of the Paris Bar, Yves Repiquet, has termed this a "revolution" and a major step forward for democracy. (Creelman, 2010: 1-2)

It can be stated that the role of the *Conseil Constitutionnel* has now significantly changed to include review of any law, even ones that have been in effect for years. The right is open to all parties to a lawsuit, at any time in the proceeding, provided only that petition be made in writing – even before jurisdictions where proceedings are oral – and separate from pleadings as to jurisdiction or merits. (Creelman, 2010: 2)

The petition (called a "question prioritaire constitutionnelle" or QPC) is heard as a matter of priority before dealing with other arguments in the case. If the judge feels that the QPC meets the relevant criteria, the QPC is sent for review to the relevant Supreme Court (*Cour de cassation* in civil and criminal matters, *Conseil d'Etat* in administrative and public law matters) which again reviews before submitting the question to the Constitutional Council. The Constitutional Council must then render its decision within 3 months. An organic law 2009-1523 of December 10, 2009 and implementing decrees dated February 10, 2010, No. 2010-148 and No. 2010-149 provide details of how this new right of review is implemented. (Creelman, 2010: 2)

The QPC criteria are cumulative:

1. The Contested Provision of Law Must:

- Be relevant to the case or be the basis for the claim;
- Not have been already reviewed by the Constitutional Council (unless there has been a change in circumstances or law).

2. The QPC must be frivolous

Once the QPC has been submitted to the relevant Supreme Court, the lower court suspends the case (except where personal liberty is at stake or in the case of criminal investigations by a *juge d'instruction*. (Creelman, 2010: 2)

The Supreme Court may refer the matter to the Constitutional Council, or reject the QPC if it considers the criteria are not met. If the QPC is not sent to the Constitutional Council by the Cour de cassation or the Conseil d'Etat, as the case may be, then the lower court is required to apply the contested rule, unless it is argued that the legislation contrary to a treaty, a matter generally within the purview of the lower court. However, if the argument is that the French law is deemed contrary to European law the matter may be submitted to the European Court for interpretation of European Law. In a commentary published in Le Monde on August 1, 2010, Cécile Prieur stated that the Constitutional Council has been *"transformed into a Supreme Court".* (Creelman, 2010: 2–3)

By comparing the **Ex Ant** and **Ex Post** models of constitutional review in **France** and the **United States,** it can be argued that, in terms of the **scope and flexibility of supervisory mechanisms,** the **French model**—particularly following the **2008 constitutional reforms** and the implementation of the **Question Prioritaire de Constitutionnalité (QPC)** procedure in **2010**—exhibits greater adaptability than the American one. This is because the **French Constitutional Council** now possesses, in addition to ***à priori* review** (examining legislation prior to its promulgation), a **limited and indirect *à posteriori* jurisdiction** as well. As **Bell** aptly describes, this represents a ***"smart synthesis of prevention and reaction."* (Bell, 2022: 192)**

Therefore, in terms of speed and preventive capacity, France has an edge. Yet in terms of judicial reach, grassroots legal enforcement, and cultural impact, the U.S. system stands stronger through real litigation and decentralized legal action. (Stone Sweet, 2008: 51) The U.S. model, because every court

may nullify unconstitutional law, provides broader judicial independence and legal dynamism. (Baranger, 2011: 89)

D. The Institutional Position of the Oversight Body within the Power Structure

In the French legal system, the Constitutional Council is an independent, supra-institutional body that neither belongs to the judiciary nor forms part of the legislative or executive branches. This position "outside the classical tripartite division of power" enables the Council to oversee legislative acts and elections without intervening in ordinary lawsuits. Its special status is designed, on the one hand, to prevent it from becoming a tool of judges and the formation of a "rule of judges," and on the other hand, to grant it a semi-political legitimacy—especially since some of its members are directly appointed by the President and the heads of the parliaments. Within this framework, the Constitutional Council acts more as the institutional and formal guardian of constitutional supremacy rather than a substantive arbitrator in legal disputes. (Baranger, 2011: 93) This unique institutional position has made the Council cautious in intervening in sensitive social matters and strongly avoid precedent-setting and broad interpretations. (Bell, 2022: 187)

In contrast, the Supreme Court of the United States sits at the apex of the federal judiciary and constitutes a fundamental part of the tripartite power structure. Its justices enjoy full independence, lifetime appointments, and broad authority to interpret the Constitution within the context of actual cases. This position has led the Supreme Court to act not only as a judicial body but also as an influential actor in public policy and a shaper of American legal and social culture. Unlike the French Constitutional Council—which lacks a judicial role within the ordinary legal system—the U.S. Supreme Court, through its appellate jurisdiction over lower courts, directly impacts all levels of the legal system. As Daniel Farber puts it, *"the U.S. Supreme Court is part of political power, not just a guardian of the law."* (Farber, 2006: 33)

This institutional position has caused some scholars, like Bickel, to call it a prominent example of "judicial governance" within the power structure, while in France, the institutional design of the Council was explicitly intended to prevent such a situation. (Bickel, 1986: 70)

E. Political Unity or Judicial Transparency?

A distinctive difference between the French Constitutional Council and the U.S. Supreme Court lies in the manner of issuing and announcing decisions. In the French system, the Constitutional Council announces only its final, unanimous decision; it does not disclose the number of votes for or against nor does it publicize dissenting opinions. This approach is based on the principle of confidentiality in judicial deliberation and the necessity of institutional unity in confronting other branches of power. (Bell, 2022: 177)

The purpose of this method is to preserve the institutional cohesion of the Council, prevent public disputes among members, and reinforce its authority within the French public law system. Many French legal scholars, such as Dominique Rousseau, consider this unity of vote essential to maintaining the dignity of the oversight institution in the French political environment, where traditionally the judiciary must avoid public political involvement. (Rousseau, 2013: 201)

By contrast, in the U.S. judiciary, Supreme Court justices' opinions are fully published, with votes for and against clearly recorded and dissenting opinions publicly explained. This practice stems from the principle of judicial transparency and the philosophy that legal richness arises from judicial dialogue. American theorists such as Cass Sunstein and Alexander Bickel argue that publishing dissenting opinions not only fosters judicial accountability but also strengthens critical legal thinking and contributes to the development of constitutional doctrines and alternative interpretations. (Sunstein, 2005: 89; Bickel, 1986: 74)

Historical examples such as Justice Harlan's dissent in *Plessy v. Ferguson* demonstrate that minority opinions can later become the foundation for legal transformation. Therefore, dissenting opinions are not regarded as legal failures but rather as intellectual capital of the American legal system.

Conclusion

A comparative study of the two models of constitutional review in France and the United States shows that neither system is absolutely superior to the other. Rather, these systems are based on two distinct philosophical approaches to political power and constitutionalism. The French model, influenced by the tradition of legislative supremacy and historical mistrust of independent judiciary, provides a primarily preventive review accompanied by limited and indirect ex post review. It offers a constrained and institutional supervisory model aiming to guarantee legal stability and uniformity in the legislative process. Conversely, the American model, relying exclusively on ex post review, transparency in judicial opinions, and judicial supremacy in constitutional interpretation, adopts a dynamic approach with significant influence on social and cultural structures.

Research findings indicate that each model excels in specific domains: France in preventing unconstitutional laws from being enacted at the outset, and the United States in judicial innovation and safeguarding fundamental rights through Supreme Court precedent.

In light of this analysis, it is recommended that developing legal systems, rather than merely imitating one model, design hybrid frameworks that provide both preventive oversight mechanisms to block conflicting legislation and ex post judicial review to enable gradual legal reform and institutional accountability. Moreover, attention to principles of transparency in voting, citizen participation in oversight, and institutional independence of supervisory bodies are key prerequisites to ensure the effectiveness of constitutional review in modern governance contexts.

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