The Ethical and Democratic Issues at Stake Concerning the Appointment of the Guardians of the Constitution

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The procedure followed for the appointment of constitutional judges is an essential element of a constitutional justice model and affects significantly the court's self-perception.[2]

In itself, the idea of "guardianship" of a constitution is likely to cover a very broad field of skills and vigilance. Any authority or individual may be charged, often by the constitution itself, with ensuring its proper observance. Thus, the French Constitution of 1791 is famous for its provision that "entrusts the safekeeping thereof to the fidelity of the legislative body, of the King, and of the judges, to the vigilance of fathers of families, to wives and to mothers, to the affection of young citizens, to the courage of all Frenchmen", thus making any person a guardian of the constitution.[3] For the European Commission for Democracy through Law, otherwise known as the Venice Commission, "[o]f course, Parliament is the primary safeguarder of the Constitution".[4] At present, several constitutional texts in force explicitly entrust this guardianship to a particular constituted political authority, most often by a general clause evoking the people,[5] the armed forces,[6] the head of state,[7] or the Assembly.[8] Very often, this mission of guardianship of the constitution is also included in the oath of constituted authorities, as is almost always the case with the head of state.[9] However, since the advent of

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[2] Katalin Kelemen, "Appointment of Constitutional Judges in a Comparative Perspective – with a Proposal for a New Model for Hungary," *Acta Juridica Hungarica*, 2013, vol. 54, no 1, p. 5.
[3] Article 8, section VII of the French Constitution of 1791.
[4] Opinion on the Constitution of Finland, No 420/2007, CDL-AD (2008)10.
[5] See, for example, Article 120 § 4 of the Greek Constitution of 1974: "Observance of the constitution is entrusted to the patriotism of the Greeks who shall have the right and the duty to resist by all possible means against anyone who attempts the violent abolition of the Constitution."
[6] See, for example, Article 8 of the Spanish Constitution of 1978: "1. The mission of the Armed Forces, comprising the Army, the Navy and the Air Force, is to guarantee the sovereignty and independence of Spain and to defend its territorial integrity and the constitutional order."
[7] See, for example, Article 5 of the French Constitution of 1958: "The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State."
[8] Article 119 of the Vietnamese Constitution: "2. The National Assembly, its organs, the State President, the Government, the People's Courts, the People's Procuracies, other state organs, and the entire people are responsible to protect the Constitution."
[9] See, for example, Article 127. 3 of the 1976 Portuguese Constitution, which states that "Upon taking office the President of the Republic elect shall take the following oath: I swear by my honor to faithfully perform the functions in which I am invested and to defend and observe the Constitution of the Portuguese Republic and cause it to be observed"; see also Article II of the Constitution of the United States of 1787 (section 1): "Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States'." See also Article 139 of the Cape Verde's Constitution of 1980. On taking office, the President of the Republic shall take the following oath: 'I swear on my honor to

"constitutional engineering" (i.e., the establishment of a set of constitutional rules and techniques viewed as suitable for achieving liberal and democratic goals), the doctrine as well as the international and regional institutions promoting the rule of law and democracy generally consider that it is mainly for a body of a jurisdictional nature to carry out this safeguarding mission. Constitutional reviewing, after having been developed and practiced throughout the 20th century (especially in its second half), has become a geostrategic concern. When the Council of Europe created the Venice Commission in 1990, it was to provide "assistance" to the countries of Eastern Europe in their transition to democracy, through the adoption of amended constitutions. In particular, the aim was to establish and organize constitutional review as a key element of the future rule of law,[10] thus participating in the constitutional standardization of Europe, but in some respects of the world: a new regime that ignores constitutional review is almost by definition suspected of not wanting to ensure the supremacy of the constitution, i.e., the limitation of power and respect for rights and freedoms.[11]

Most of the constitutions in force in the world today therefore establish constitutional or supreme courts and entrust them with the task of reviewing the constitutionality of the laws passed and the actions of the political authorities, while often also attributing to other authorities, usually political, the title of "guardians" of the constitution. This observation shows the unspoken topicality of a famous controversy about the "guardianship" of the constitution: the idea of "guardianship" (of the law or the constitution) is old, but it was popularized in the 1930s by the opposing views of the German Carl Schmitt, who praised the quality of the head of state as the "guardian of the constitution", and the Austrian Hans Kelsen, who preferred to attribute this quality to a jurisdictional body.[12] While Schmitt was linked to the Nazi regime and Kelsen had to seek asylum in the United States, it was Kelsen's doctrine that profoundly influenced the construction of international and European standards concerning the rule of law. One of the pillars of this is that the constitution must be protected by a body of a jurisdictional nature. The actual work of guarding the constitution is therefore now entrusted to a jurisdictional body, although the term "guardian" (with some exceptions)[13] is still symbolically and explicitly linked to political authorities. The terms "judges" or "justices", responsible for constitutional reviewing, are generally preferred to the term "guardians of the constitution". Nevertheless, I have chosen to retain the term "guardian" of the constitution to refer to a constitutional or supreme court and its members, for two main reasons. First, I aim to address the controversy and hence not leave the title "guardian" to purely political authorities. Second,

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faithfully fulfill the office of President of the Republic of Cape Verde in which I am installed, to defend, fulfill, and enforce the Constitution, to observe the laws, and to guarantee territorial integrity and national independence'."

[10] The Venice Commission has produced several general documents on constitutional justice (Vademecum *on constitutional justice*, 2007, CDL-JU(2007)012) and on the composition of constitutional courts (*The Composition of Constitutional Courts* - Science and Technique of Democracy, No. 20 (*1997*)), and constantly produces opinions on reforms or revisions of the constitutional justice system in the various member countries of the Council of Europe.

[11] See Bruce Ackerman, "The Rise of World Constitutionalism," *Virginia Law Review*, Vol. 83, No. 4 (May, 1997), pp. 771-797. The absence of a constitutional review system is not, however, a barrier for the Venice Commission: it is sufficient that the system is organized in such a way that rights and freedoms can be considered to be guaranteed, as stated in its opinion on Finland, CDL-AD(2008)010, *Opinion on the Constitution of Finland*, § 115.

[12] On the elements of the controversy, see Olivier Beaud, Pasquale Pasquino, eds., *La controverse sur "le gardien de la constitution" et la justice constitutionnelle: Kelsen contre Schmitt* [The "Guardian of the Constitution" Controversy and Constitutional Justice: Kelsen versus Schmitt], Panthéon-Assas edition, 2007. See also Arkadiusz Gornisiewicz, "Dispute Over the Guardian of the Constitution: Hans Kelsen, Carl Schmitt and the Weimar Case," *Politeja*, No. 72, Between the Wars: Philosophical-Political Debates (2021), pp. 193-214.

[13] Article 247 of the Paraguayan Constitution of 1992 states that "The Judicial Power is the guardian of the Constitution. It interprets it, it complies with it and it has it complied with;" and the Brazilian Constitution states that "The Supreme Federal Tribunal has primary responsibility for safeguarding the Constitution" (Art. 102).

when speaking of constitutional "judges" and "justices" rather than "guardians" and "safeguarding", one tends to forget that certain supervisory bodies do not really have the necessary qualities to carry out a mission of a "judicial" nature, whether in terms of their independence, the status of their decisions or even the drafting of the decisions. Without excluding the term "judges" or "justices", I therefore prefer the expression "guardians of the constitution" to designate control bodies that are theoretically distinct from the executive and legislative powers, and which are charged with the mission of controlling the constitutionality of their acts and/or their relations. By contrast, I most often retain the idea of "constitutional review" to support the (political) idea that such reviewing only has a chance of taking root in our democratic culture if it develops separately outside the realm of politics per se.[14]

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There are many ways of thinking and organizing the judicial safeguarding of a constitution, and, strictly speaking, there are no international rules that favor one form or another. Constitutional review is one of the fields of a constitution itself, laying down the fundamental principles about who is the guardian, how and with what sort of powers. But, in this sense, constitutional review covers a fairly wide spectrum of configurations. The guardianship of a constitution can be entrusted to a body specially set up for this job, usually referred to as a "constitutional court." Where all courts are involved, we speak of a diffuse system of constitutional review, ultimately regulated by a supreme court.[15] Custodians may have exclusive safeguarding rights (usually a constitutional court), or they may share the job with others (for example, lawyers and defenders of rights may have this function too). Where a diffuse system of constitutional review is exercised by ordinary courts, a supreme court ultimately determines the rules of constitutional interpretation.[16] The control may concern only parliamentary bills, or a plurality of actions (all legal acts and actions adopted by public authorities or similar actions).[17] The guardian may be limited to one type of constitutional review (usually of norms) or may exercise other competences (judging the division of powers between different bodies,[18] ruling on elections,[19] judging the constitutionality of political

[14] On the character of constitutional review, which is very often asserted to be "political", which would place it outside the usual criteria of judicial bodies, see Alec Stone Sweet, "The Politics of Constitutional Review in France," *I•CON*, January 2007 Vol. 5, p. 69.

[15] It is very present in Europe, but most of the northern European countries – Denmark, Ireland, Sweden, Iceland, Norway, the Netherlands, Finland, the United Kingdom – as well as Switzerland have a supreme court, which does not always exercise a constitutional review, as in Finland. It is very present in Africa (but Rwanda, Angola, Ethiopia and Libya have a supreme court). The situation is more mixed in Asia (South Korea, Cambodia, Indonesia, Thailand and Mongolia have a constitutional court) and in South America (the supreme court model is still very present, as in Argentina, Paraguay, Costa Rica, Venezuela and Brazil).

[16] This is almost always the case in federal countries, such as the United States, Canada, Brazil or India.

[17] For example, the Serbian Constitution states that the Constitutional Court shall decide on compliance with laws "and other general acts with the Constitution;" the Constitution of Lithuania indicates that this also includes acts of the President of the Republic and of the Government of the Republic (Article 105); and the Constitution of Bolivia lists "laws, Autonomous Statutes, Constitutional charters, decrees and every type of ordinance and of non-judicial resolutions" (Article 202 of the Constitution).

[18] As in federal or regional states, but also in France with respect to the distribution between legislative and regulatory powers (Article 37 al. 2 of the Constitution); in Italy, where the Constitutional Court rules on "conflicts arising over the allocation of powers of the State and between the State and the Regions, and between Regions" (Article 134 of the Constitution); or again in Cameroon, where we find exactly the same type of formulation ("The Constitutional Council shall give a final ruling on: 'conflict of powers between State institutions; between the State and the Regions, and between the Regions'," Article 47 of the Constitution).

[19] In Gabon, for example, the Constitutional Court rules over "The legality of presidential, parliamentary, and local collectivity elections, as well as the operations of referendum, whose results the Court proclaims" (Article 84 of

parties,[20] or corruption among elected officials).[21] The prerogatives of the guardian most often include the power to render unconstitutional acts as inapplicable, and sometimes the guardian(s) exercise powers of investigation,[22] repeal,[23] or even dismissal and removal.[24] And whoever the guardians are, their designation, status and the terms and conditions of the exercise of their missions differ according to the country considered. In short, there is no real model that can be reproduced or duplicated ad infinitum: there is always something different, a procedure, a competence or a mode of appointment. No organizational configuration is identical to another, no court has exactly the same composition, the same procedures, the same competences and prerogatives.

But the fact that there is no court in Europe or in the world which is composed and functions identically to any other is not incompatible with the fact that these issues are crucial for democracies. Regional and international institutions for the promotion of constitutional justice have not developed an "ideal" system for the appointment of guardians of the constitution, but they are often led to point out the shortcomings of the systems they examine. In a given system and at a given time, the slightest difference may be questioned from the point of view of the real value and scope of constitutional justice. The conditions for ensuring the effective respect, definition and ownership of fundamental rights and freedoms are first and foremost at stake. The "democratic" quality of the regime is also at stake, since constitutional justice is supposed to ensure the protection of the constitution "against" the action of the constitutional bodies. To understand constitutional justice is therefore to understand who exercises it, under what conditions and why. Answers given to these questions must be systematically examined in the light of theories and conceptions of the constitution, of rights and liberties, and of the kind of democracy a society wishes to build.[25] It is therefore necessary always to be clear about these issues if one wants to observe and analyze usefully the practices and principles of constitutional justice that have been established in different countries. This is necessary to truly understand

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the Constitution). In France, the Constitutional Council "shall ensure the proper conduct of the election of the President of the Republic" (Article 58 of the constitution) and, when disputes arise, the Council rules "on the proper conduct of the election of Members of the National Assembly and Senators" (Article 58 of the constitution). In Portugal, the constitutional court, "as the court of final instance," has the competences "to judge the proper observance and validity of electoral procedural acts, as laid down by law" (Article 223, 2° of the Constitution).

[20] This competence is found, for example, in the German Constitutional Court (Article 21 of the Basic Law), the Serbian Constitutional Court (Article 167 of the Constitution) or the Chilean Constitutional Court (Article 82-7 of the Constitution).

[21] See Eugénie Mérieau, "Le juge constitutionnel face à l'exigence de moralisation de la vie politique: le pouvoir de destitution des élus pour corruption dans les démocraties émergentes" [The constitutional judge faced with the demands to moralize political life: the power to impeach elected officials for corruption in emerging democracies], *Annuaire International de Justice Constitutionnelle*, 2018, vol. 33, p. 653 and s.

[22] This is the case with the enigmatic Council of Constitutional Inquiry chaired by the President of the Federal Supreme Court of Ethiopia (Article 84 of the constitution).

[23] For example, the French Constitutional Council has the power to repeal legislation already in force (Article 62 of the Constitution), as does the Constitutional Council of the Ivory Coast (Article 137 of the Constitution).

[24] For example, in Portugal (the Constitutional Court may rule that the head of state shall be removed from office as a result of a conviction by the Assembly of the Republic: Articles 130 and 223 combined of the Constitution), in Albania (Article 131 of the Constitution states that the Court decides on "dismissal from duty of the President of the Republic and verification of his inability to exercise his functions"), while in Bulgaria (the Constitutional Court shall rule "on impeachments by the National Assembly against the President or the Vice President", according to Article 149 of the Constitution). Eugénie Mérieau lists several cases of impeachment by constitutional courts in what she calls "emerging democracies:" South Africa, South Korea, Thailand or Pakistan, for example ("Le juge constitutionnel face à l'exigence de moralisation de la vie politique: le pouvoir de destitution des élus pour corruption dans les démocraties émergentes", *op. cit.*).

[25] For such an analysis of the French Constitutional Council, see Lauréline Fontaine, *La Constitution maltraitée. Anatomie du Conseil constitutionnel* [The Mistreated Constitution. Anatomy of the Constitutional Council], Amsterdam, 2023.

how different political societies understand rights, freedoms, democracy and, more broadly, the very idea of the constitution.

The conditions for the appointment of the constitutional court judges are almost all emblematic of a way of looking at constitutional justice in a given political regime, concerning who appoints judges, and according to what procedures. Who can be appointed and who is actually appointed to deliver constitutional justice? The answers to these questions are set in a specific historical, political and institutional context, and they give the appropriate dimension to the constitutional justice that is delivered. It is not possible to focus seriously on the work done by constitutional or supreme courts if it is not asked who the guardians are and how they become guardians: this is a kind of "*d'où parles-tu camarade ?*" [where are you coming from, comrade?], an epistemological credo that emerged from the French events of May 1968. There is always the question of what are the aims – or not – of organizing constitutional justice in this or that way. And above all, what consequences might there be in not organizing guardianship in a particular way?[26]

This questioning is all the more acute since, in recent years, examples of political crises due to the appointment of guardians of the constitution appear to have been particularly numerous in Europe, leading to "a disorderly functioning of the court(s) and threatening the constitutional order."[27] In 2016, the Venice Commission issued a Declaration *on undue interference in the work of Constitutional Courts in its member states*.[28] In its opinion on the amendments to the law on the Constitutional Court in Poland,[29] the Commission expressed concerns about "the delays in appointing judges to the Constitutional Court in Slovakia and Croatia" and expressed concerns about "the public calls by the executive to terminate the mandate of the President of the Constitutional Court" in Georgia. The current polarization of debates on the changes of constitutional courts in Eastern European countries, whose leaders claim to be "illiberal", should not, however, be taken as a compass for the examination of constitutional justice and its organization. For example, it would be unwise to accept without discussion the argument of the current president of the French Constitutional Council that the method of appointing its members is not in itself open to criticism, on the grounds that there is no perfect system.[30] The new appointments to the French Constitutional Council in February 2022 have also been the

[26] For this see Lauréline Fontaine, "Choix des juges constitutionnels: la mauvaise exception française" [Choosing constitutional judges: the poor French exception], *Libération*, 25 February 2022.
[27] "a un funcionamiento desordenado del tribunal y amenaza el orden constitucional,"Anna Chmielarz-Grochal, Marzena Laskowska, Jarostaw Sutrowsk, "Selección de magistrados constitucionales. Aspectos legales y políticos de la crisis de nombramiento en algunos países europeos" [The selection of constitutional judges. Legal and political aspects of the appointment crisis in some European countries], *Estudios constitucionales*, 2018, vol.16, no 2, p. 485.
[28] Website of the Venice Commission, published on March 16, 2016.
[29] CDL-AD(2016)026, October 14, 2016.
[30] "Laurent Fabius vante l'indépendance du conseil constitutionnel devant des étudiants" [Laurent Fabius praises the independence of the Constitutional Council to students], *Ouest France*, September 22, 2019.

subject of an unprecedented number of critical op-eds in the written press.[31] There, part of an emerging doctrine among scholars is still discreet, but actually constitutes a small critical revolution.[32] In addition to the statutory presence of former Presidents of the Republic, the French Council is in fact composed of former Prime Ministers, former ministers and former parliamentarians. This raises questions about the independence of constitutional justice with respect to the executive and legislative powers that are subject to review. It would be intellectually lazy to be satisfied with what appears to be "worse" elsewhere.

On every continent, questions about the appointment of constitutional or supreme justices arise periodically, and in some places are a recurring topic in the political news that is not restricted to scholars. The appointment of a guardian of the constitution thus occupied a significant amount of media space in the United States between February and April 2022, following the announcement by a sitting member of the Supreme Court of his retirement in the summer of 2022.[33] Several visions have competed against each other, both in the political arena and in the media, in a context in which scholars have already said a great deal about the conditions for appointing judges to the Supreme Court of the United States.[34] In fact, according to two American legal scholars, David A. Strauss and Cass Sunstein, it is difficult to find a single person satisfied with the Supreme Court appointment system,[35] and there is no shortage of studies highlighting the shortcomings of the Supreme Court appointment process.[36] In the summer of 2020, the Economic Community of West African States (ECOWAS) promptly invited the Malian government to appoint new judges to the Constitutional Court, after the latter had been "de facto dissolved" a few weeks earlier by the President of Mali, who did not seem

[31] See, for example, Julien Jeanneney, "Les parlementaires tiennent leur rôle dans la nomination des candidats au Conseil constitutionnel de façon superficielle" [Parliamentarians play a superficial role in the nomination of candidates to the Constitutional Council], *Le Monde*, February 18, 2022; Elina Lemaire, "Pour un contrôle véritable des candidatures au Conseil constitutionnel" [For a real control of the candidacies to the Constitutional Council], *Le Monde*, February 18, 2022; Lauréline Fontaine, "Choix des juges constitutionnels: la mauvaise exception française" [Choice of constitutional judges: the bad French exception], *op. cit.*; Patrick Wachsmann, "Le cru 2022 des nominations au Conseil constitutionnel: en dessous du mediocre" [The 2022 vintage of appointments to the Constitutional Council: less than mediocre], *Jus Politicum*, February 23, 2022; Jean-Philippe Derosier, "Vers une mise au pas du Conseil constitutionnel?" [Is the Constitutional Council being brought to heal?], *Libération*, February 17, 2022; An interview with Guillaume Drago, "Les 'politiques' majoritaires au Conseil constitutionnel: est-ce souhaitable?" [Is it desirable for politicians to make up a majority in the Constitutional Council?], *Figarovox*, February 16, 2022; Jean Quatremer, "Nominations au Conseil constitutionnel: une république d'obligés" [Appointments to the Constitutional Council: a republic of the obliged], *Libération*, February 15, 2022.

[32] See for example the conference organized by Elina Lemaire and Thomas Perroud, *Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence* [The testing of the Constitutional Council's ethics and transparency], June 2021, Paris (published by the *Institut Francophone pour la Justice et la Démocratie*, 2022). See also, for example Lauréline Fontaine and Alain Supiot, "Pour une vraie réforme du Conseil constitutionnel" [For a real reform of the Constitutional Council], *Le monde*, June 17, 2017, and "Le Conseil constitutionnel est-il une juridiction sociale?" [Is the Constitutional Council a social court?], *Droit social*, September 2017, p. 754.

[33] See SCOTUS blog, *Retirement of Stephen Breyer*, January 2022 (www.scotusblog.com).

[34] Cf. infra: the present study refers to several of the studies about this question.

[35] David A. Strauss & Cass R. Sunstein, "The Senate, the Constitution, and the Confirmation Process," *The Yale Law Journal*, 1992, vol. 101, p. 1491: "[i]t is difficult to find anyone who is satisfied with the way Supreme Court Justices are appointed today."

[36] For example this one: Bruce Ledewitz, "Has Nihilism Politicized the Supreme Court Nomination Process?", *Brigham Young University Journal of Public Law*, 2017, vol. 32, pp. 1 sq.

to be willing to act on the Court's decisions.[37] ECOWAS even proposed an informal plan to change the appointment process of judges, which was eventually followed by the main actors.[38]

The occasional intervention of international or regional organizations as well as the opinions or judgments made by one country about another do not always lead to a frank willingness to resolve the difficulties wherever they arise, the case of Poland since the end of 2015 being emblematic.[39] Regardless of the rules that have been or are to be put in place, the ethics of appointing constitutional guardians is a constant source of political concern and/or crisis that challenges the political legitimacy of constitutional justice (Part 1). These concerns and crises are often the occasion for politicians or constitutional justice experts to reflect on reforms of the appointment procedure of the constitutional guardians. Two aspects of the appointment process are of particular interest: basing constitutional justice on the criteria of political democracy (Part 2), and/or on the criteria of the rule of law and the independence of the judiciary (Part 3).

1. The Ethics of Appointment: A Challenge to the Political Legitimacy of Constitutional Justice

The Venice Commission considers that "there is no requirement as such that the procedure for appointments to the judiciary be described in detail in the constitution itself."[40] However, "[s]ince the appointment of judges is of vital importance for guaranteeing their independence and impartiality, it is recommended to regulate the procedure of appointment in more detail in the Constitution."[41] Based on the law or the constitution, it is the material act of appointment – or sometimes precisely the absence of such an act – that reveals the opportunism and ethics of the authorities responsible for appointing guardians. Their actual appointment may be carried out under irregular conditions, or may simply be delayed, compromising the exercise and independence of constitutional justice (Section 1.1 below). From this point of view, the various experiences observed sometimes suggest the adoption of specific mechanisms, but often reveal the limits of the legalization of the procedure. In this respect, the choice of appointees can be revealing of how appointing authorities view constitutional justice, in a cultural environment in which the publicity of the appointment and public interest in constitutional justice vary (Section 1.2).

1. 1 Irregular practices in the appointment of guardians of the constitution

[37] "Crise politique au Mali: la Cédéao se mobilise sur le terrain" [Political crisis in Mali: ECOWAS mobilizes on the ground], RFI website, June 19, 2020 (www.rfi.fr).

[38] The President appointed the three judges nominated by the Superior Council of the Judiciary, which also used its own prerogative to appoint three members of the constitutional court, and the President of the National Assembly (whose election had been challenged by the court itself) appointed the three members unusually nominated by the bureau of the Assembly from six names proposed by civil society. Nevertheless, "the composition of the constitutional court would still violate Article 91 of the constitution", according to some legal scholars, in that it does not meet the requirement that "as a main rule, […t]he Councilors shall be chosen principally from among professors of law, advocates and Magistrates having at least fifteen years of experience, as well as qualified personalities distinguished for service to the State," this formula thus specifying the requirement formulated in the previous paragraph that of the three personalities they appoint, the President of the Republic and the President of the National Assembly must include at least "two lawyers."

[39] See below, after the first part of this paper.

[40] CDL-AD (2013)010, *Opinion on the Draft New Constitution of Iceland*, § 135.

[41] CDL-AD (2008)010, *Opinion on the Constitution of Finland*, § 112.

The primary purpose of a constitution is to establish bodies and regulate the conditions for how they exercise their powers. While few political regimes are free from misappropriation, distortion or ignorance of constitutional prescriptions, it is generally the task of established constitutional democracies to keep up a minimum of appearances: only those bodies established by the constitution actually exercise political powers, according to the procedures laid down, although this does not prevent certain deviations here and there. It could be said that well-maintained appearances are, *at the very least,* a prerequisite for a contemporary democracy to qualify as being built on the notion of the *rule of law*: i.e., compliance with procedures by constitutionally empowered bodies. When guardians of the constitution are appointed, they are in principle appointed following the rules laid down in the constitution, and, logically, without delay. At first glance, therefore, the most recent or fragile democracies are the most concerned by the problem of irregular or late use of procedures for appointing guardians of the constitution, this being symptomatic of a lack of democracy and the weakness of the rule of law which is supposed to support the constitution (sub-Section 1.1.1). However, while older democracies readily point the finger of blame, they are not spared by such phenomenon either (sub-Section 1.1.2), so introducing mechanisms designed to prevent such blockages is particularly illusory (sub-Section 1.1.3). To be sure, a crisis in the appointment of constitutional judges does not have the same significance when democracy is just being built, or is struggling to build itself, as when it occurs in a regime whose democratic habits appear to be more firmly rooted. However, to appreciate this difference, we must also bear in mind that it is the older democracies that have pushed the younger ones to implement constitutional justice and that, as such, they are more inclined to criticism of others than to self-criticism.

1.1.1 The difficult practice of appointing guardians in democracies in the making

The instrumentalization of the procedure for appointing guardians of the constitution to block institutions and political opposition is a classic feature of countries where the balance of power has not yet been established. As Katalin Kelemen notes, it is no coincidence that problems of paralysis in the appointment procedure have occurred more frequently in the former socialist countries,[42] at least as far as Europe is concerned. For example, as early as 1993, and despite the declared good will of the constituent members, "the failure of the first attempt by the Ukrainian authorities to set up a constitutional court due to the impossibility for parliamentarians to agree on the choice of judges is an eloquent example of the instrumentalization of the procedure for appointing constitutional judges and the repercussions this can have on the future functioning of the institution."[43] The first constitutional judges were finally appointed in 1996, but another crisis arose when the Court was renewed in 2005, resulting in it not functioning for a year and a half, due to the lack of the necessary quorum. On November 3, 2005, the Congress of Judges of Ukraine appointed six judges to the Constitutional Court, and the President of the Republic appointed three on November 14, 2005. However, the Parliament did not appoint its quota of four judges. Nor did it initiate the swearing-in procedure for the other judges, even though this fell within its remit. This new

[42] Katalin Kelemen, "Appointment of Constitutional Judges in a Comparative Perspective – with a Proposal for a New Model for Hungary," *op. cit*. p. 21.

[43] Natasa Danelciuc-Colodorovischi, "Enjeux politiques et composition des juridictions constitutionnelles en période de transition démocratique" [Political issues and composition of constitutional courts in a period of democratic transition], *in* Olivier Lecucq, *La composition des juridictions: perspectives de droit comparé* [The Composition of Courts: Comparative Law Perspectives], Bruylant, 2014, pp. 141-142.

crisis was particularly closely followed by the Council of Europe.[44] As of 2015, Ukraine changed its way of appointing judges to the Constitutional Court by organizing a system of competitive exams before each appointing authority.[45]

In another example, in the Czech Republic in 2003, the start of President Václav Klaus's first term (succeeding Václav Havel) gave rise to a dispute with the Senate over the appointment of judges to the Constitutional Court, because the Senate rejected four of the five candidates put forward to fill the vacant seats. The deadlock ended after the 2004 elections, which gave the President a majority in the Senate. But the Court remained understaffed for some time to come.

In 2019, the attention of European institutions was focused on Slovakia. This was not Slovakia's first political crisis.[46] In February 2019, the term of office of nine judges (out of thirteen) having expired, the members of parliament were unable to agree on the list of candidates to be put forward, once again leaving the Court to operate with just four judges until October 2019. In July, the Council of the European Union stated in its annual recommendation on Slovakia's national reform program that "[d]espite some improvements in terms of efficiency and quality, concerns about the independence of the judiciary persist and the delay in the process for appointing judges to the constitutional court could affect the functioning of the justice system."

But it is the very recent history of Polish constitutional justice that is currently feeding most of the literature on the retreat of the rule of law in Europe, and in Poland in particular: discussion in European institutions on this subject has in fact taken up a great deal of time, with dozens of decisions (mainly emanating from the European Parliament, the European Commission and the Parliamentary Assembly of the Council of Europe) having been adopted on this subject over the last few years. For some time now, the Polish "Constitutional Court" has been nothing more than the antechamber of the ruling party, while the rule of law that Poland has been building since it emerged from the Soviet era at the end of the 1980s has been stripped of its key mechanism. The beginning of this tragic story came in 2015, when the then parliamentary majority, after debates lasting two years, passed a law on June 25 on constitutional jurisdiction, one article of which modified the procedure for appointing judges. In fact, within thirty days of the law coming into force, its Article 137 allowed for candidates to be proposed for all the seats vacant between then and the end of the year. Five seats were due to be filled before the end of 2015, but three seats fell vacant before the end of the legislature on November 5, and two after the start of the new term.[47] On October 8, one month before the start of the new legislature on November 11, the Parliament elected five new judges. According to the principles underpinning

[44] See first Resolution 1466(2005), adopted on October 5, 2005 by the Parliamentary Assembly of the Council of Europe, then the common Declaration *on the appointment of Judges to the Constitutional Court of Ukraine*, Venice Commission and the Constitutional Court of Lithuania, holding the Presidency of the Conference of European Constitutional Courts, December 16, 2005, and then the opinion drawn up by the Venice Commission in the wake of this crisis, CDL-AD (2006)016, *Opinion on possible Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine* (June 9-10, 2006).

[45] This interesting and seemingly depoliticized system of appointment has not, however, prevented the Ukrainian Constitutional Court (at the request of its current president) from receiving a new and highly critical opinion from the Venice Commission on one of its rulings invalidating anti-corruption legislation, and which the Commission considers does not meet the criteria of good constitutional justice. CDL-AD (2020)039, December 11, 2020, *Urgent opinion on the Reform of the Constitutional Court* illustrates that "good" procedures are not enough to render "good" constitutional justice.

[46] See in particular CDL-AD (2017)001-f, *Slovak* Republic – Opinion on questions relating to the appointment of Judges of the Constitutional Court (10-11 March 2017) and also the Communication of the European Commission (30 September 2020) on *the rule of law situation in the European Union (Chapter on Slovakia).*

[47] See Maria Kruk, "Poland: the Constitution, the Constitutional Court and the concerns of international opinion," *Krytyka Prawa*, 2017, vol. 9, No1, p. 43.

the workings of the Venice Commission, such a political transition would have required "loyal cooperation" between the elected officials at the end of their term of office and those at the beginning, to ensure the continuity of the country's institutions.[48] However, in this case, the Polish President played a relatively unexpected role, since he does not in principle exercise any real political power (the Polish regime is truly "parliamentary"). But he nevertheless refused to swear in the five new judges, without distinguishing between the three who had been appointed "regularly" and the two for whom the new law constituted a dubious basis due to its possible unconstitutionality. Members of the Law and Justice party, while still in opposition, had referred the constitutionality of the June 25 Law to the Constitutional Court, but the latter had not yet given a ruling. At the time, the President's refusal to swear in the appointed judges was clearly contrary to the constitution.[49] But the arrival of a new majority in the Parliament reshuffled the cards of legality and the conception of legality. Just before the start of the new legislature, the new majority party withdrew its petition to the Constitutional Court against the June 25 Law and decided to amend this Law to give the new majority the right to appoint the famous five judges, as those appointed by the old majority had not been sworn in. The amendment was quickly adopted (on November 19), and immediately promulgated by the Head of State. On November 25, the Parliament considered the appointment of the five judges by the former majority as having ceased to have effect, and made new appointments on December 2. The former majority in turn brought the June 25 Law before the Constitutional Court, with a petition almost identical to that of the Law and Justice Party. The Constitutional Court announced its ruling for December 3. However, the Polish President swore in four of the five new judges elected by the new majority on December 3 at 1.30 a.m., just before the Court was due to hand down its ruling. Delivered later that day (judgment K 34/15), the judgment reviews the procedure that led to the appointment of the five judges by the old majority, separating the three that the Court deemed constitutional from the two that were not, because they had been appointed under a provision of the law that was incompatible with Article 194(1) of the Constitution. In this decision, the Court also ruled that the President of the Republic of Poland was obliged to swear in the three constitutionally appointed judges immediately. However, by swearing in the judges appointed by the new majority so quickly, the President had created a lasting political and legal conflict between the majority and the opposition, and between the executive and legislative powers and the Constitutional Tribunal. From then on, Polish political life came under constant scrutiny from other countries, and above all from the Council of Europe and the European Union. The new majority in power subsequently refused on several occasions to consider the decisions of the Constitutional Court as binding, and successive reforms brought the Court into allegiance with this majority.[50] Moreover, this majority was renewed following the elections in October 2019, which recorded the highest turnout since the fall of communism (over 60% of registered voters participated). As Maria Kruk has pointed out, "The 'early' election of judges to the [Constitutional Tribunal] would not have been

[48] CDL-AD (2012)026, *Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organization and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organization of a referendum of Romania* (December 14-15, 2012).

[49] See for example the Angelika Nussberger lecture on February 10, 2022 at the Collège de France in which she considers that the President's refusal did not conform with the spirit of the rule of law (*Les divergences et controverses concernant le rôle d'un État européen au XXIe siècle* [Divergences and controversies regarding the role of a European state in the 21st century], online (in French), www.college-de-france.fr).

[50] The "resistance" that the Court was able to offer, for example by refusing in December 2015 to admit three selected judges to the posts already occupied, was unable to stand up to the successive acts and revisions of the parliamentary majority.

problematic if the parliamentary elections had been won by the same majority?"[51] Assuming that the Law and Justice party had maintained its application before the Tribunal and that the majority had remained in power following the October 2015 elections, the Tribunal would no doubt still have invalidated the two contested appointments. The procedure would have resumed its course, unless the Polish president at the time were to have played a different role, which, had he been in the minority, was unlikely.

These events show that, in a regime which has suddenly embraced the values and mechanisms of Western political theory, irregularities in the appointment of the guardians of the constitution have rapidly led to chaos in the constitutional justice system, questioning the very place of the rule of law. Aside the failure to respect procedures, it is the very principle on which the rule of law is based that is being debated, even though it has been held up as a model of "good government." This is a situation that can be found in many parts of the world. Violations of the law – even of the constitution – by a given power do not often give rise to popular protests. They may even lead to greater support of the persons in power. This questions much more the value accorded to the law in our contemporary societies, and of the role of elites, notably administrative and judicial, who are supposed to embody it. In such a context, constitutional justice would seem almost incongruous. The argument that "too many powers" are given to the jurisdictional guardian of the constitution has been a recurrent argument in political discourse everywhere in democratic regimes, ever since the denunciation of judicial activism by the US Supreme Court as early as the 19th century. Today, this rhetoric is frequently present in the speeches of so-called "populist" leaders in Europe, but also in the theories of so-called "popular" constitutionalism in North and Latin America, returning to a conception of democracy in which the people must play a central and unquestionable power.[52]

On other continents, cases of malfunctioning constitutional courts are also frequent, betraying the non-existence of the balance of power or its great fragility. Outside Europe and North America, few constitutional courts are seen to be independent of the powers they are supposed to control, even though supreme courts more often appear to meet this requirement, as in the case of the Indian Supreme Court or the Japanese Supreme Court.[53] Moreover, malfunctions are not always easy to identify – and so document – if the news in countries is not followed closely, since, more often than not, there are no supra-national or intergovernmental institutions to point out and comment on these situations, and sometimes the latter too are plagued by malfunctions.[54] While the Venice Commission's activities may address countries outside the European zone,[55] it must nevertheless be called upon by these countries' institutions to issue an opinion. Thus, while the Commission has issued several opinions on constitutional matters concerning Tunisia, it has never issued an opinion devoted to the question of the failure to set up the Constitutional Court between the time when the Constitution came into force in 2014

[51] Maria Kruk, "La Pologne: la Constitution, la cour constitutionnelle et les inquiétudes de l'opinion international," *op. cit.* p. 44.

[52] See, for example, Richard D. Parker, "'Here, the People Rule': A Constitutionalist Populist Manifesto," *Valparaiso University Law Review*, 1993, No3, vol. 27, pp. 531 sq.

[53] But the absence of apparent malfunctions can also cover a situation in which the Constitutional Court has in reality been dismembered by the powers that be.

[54] The Economic Community of West African States (ECOWAS) is playing an increasingly important role in the management of political crises, including the appointment of constitutional judges. Created in 1977 for economic purposes, the Community has gradually turned its attention to conflict prevention in West Africa, focusing as much on relations between individual countries as on domestic institutional issues.

[55] In addition to the 46 members of the Council of Europe (Russia was excluded in 2022), the members of the Venice Commission include: Algeria, Brazil, Canada, Chile, the Republic of Korea, Costa Rica, the United States, Israel, Kazakhstan, Kyrgyzstan, Kosovo, Morocco, Mexico, Peru and Tunisia. Argentina, Japan, the Holy See and Uruguay are observers. South Africa and the Palestinian National Authority have special cooperation status.

and when the existing constitution was replaced by a new one in September 2022.[56] In a recent opinion, the Commission only highlighted this absence and that of any authority exercising constitutionality control, without however appearing to pass direct judgment on the matter.[57]

In South Korea, it took ten months to replace the president of the Constitutional Court in 2017,[58] while in the Democratic Republic of Congo, the members of the Constitutional Court set up by the Constitution of 2006 were not sworn in until 2015.[59] In Comoros, the Court was definitively paralyzed in 2017, initially due to a lack of quorum: three judges out of eight were sitting, and it seems that this situation had been carefully orchestrated by President Assoumani, elected in 2016, who also immediately dissolved the commission to fight against corruption. On April 12, 2018, arguing that the Constitutional Court could not function, he transferred its powers to the Supreme Court, which validated the result of the early presidential election a year later, and reappointed President Assoumani thanks to a revision of the Constitution obtained by referendum.[60]

Concerning Latin America, Arnaud Martin has pointed out that "constitutional justice is disarmed in the face of authoritarian power, incapable of protecting itself, and that the law cannot be a good antidote to the authoritarian drift of political systems dominated by the presidential model."[61] While this is often the case in countries such as Peru, Guatemala and Chile, Argentina experienced further upheavals between autumn 2005 and the end of 2006. At the time, two seats on the Supreme Court remained unoccupied, making it difficult for a majority of five of the Court's nine judges to reach a decision. On the initiative of Senator Cristina Fernández de Kirchner, wife of the President at the time, the 1989 Law increasing the number of judges to nine was repealed, reducing the Supreme Court to five judges and allowing it to function again.

In many countries, therefore, the appointment of guardians of the constitution is used as a lever by the powers that be, reflecting a desire not to make constitutional justice a counterweight to the exercise of executive and/or legislative power.

1.1.2. Non-standard practices for appointing guardians of the constitution in "confirmed" democracies

[56] Despite several voting sessions in the Assembly of People's Representatives, only one member out of the four expected had managed to obtain the majority of votes, namely Raoudha Ouersighni elected on March 14, 2018.
[57] CDL-PI (2022)026, *Urgent Opinion on the constitutional and legislative framework on the referendum and elections announcements by the President of the Republic* (May 27, 2022).
[58] "La Cour constitutionnelle de nouveau au complet avec la nomination d'un nouveau juge" [Constitutional Court returns to full strength with the appointment of a new judge], *KBS World* website, November 10, 2017 (http://world.kbs.co.kr).
[59] "RDC: les 9 membres de la Cour constitutionnelle ont prêté serment" [DRC: The nine members of the Constitutional Court were sworn in], RFI website, April 5, 2015 (www.rfi.fr).
[60] "Suspension de la Cour constitutionnelle aux Comores" [Suspension of the Constitutional Court in Comoros], *Voice of America Afrique* website, April 19, 2018 (www.voaafrique.com).
[61] Arnaud Martin, "L'indépendance de la justice constitutionnelle en Amérique latine" [The independence of constitutional justice in Latin America], *in* Arnaud Martin (ed.), *Le glaive et la balance. Droits de l'homme, justice constitutionnelle et démocratie en Amérique latine*, [The sword and the scales. Human rights, constitutional justice and democracy in Latin America], l'Harmattan, 2012, p. 177; referring to Edmondo Orellana, "La jurisdicción constitucional en Honduras" [Constitutional jurisdiction in Honduras], *in* Ruben Hernandez Valle and Pablo Pérez Tremps, *La justicia constitucional como elemento de consolidación de la democracia en Centroamérica* [Constitutional justice as an element for the consolidation of democracy in Central America], Valencia, Tirant lo blanch, 2000, p. 192.

The political tensions that can arise, either because a majority cannot be found, or because it is very weak, or because we find ourselves in a period of political transition between two very opposed camps, reveal the issues at stake concerning constitutional justice, whose remit is to validate or invalidate the legislative acts of a given political majority. If constitutional justice is a matter of law, this is because the law is a major political and economic issue. It is the site of the greatest battle of ideas, while often being reduced to banal political calculations. In established democracies, delays and blockages in the appointment of guardians of the constitution are more common than is often believed.

One of the most emblematic cases in recent years was that of the US Supreme Court, where the death of one of its members, Antonin Scalia, in February 2016, led to a vacancy of more than a year and, above all, to the questionable use of the Senate's appointment prerogatives. The Senate must confirm, by a majority of its members (there are one hundred of them), the nominees put foward by the President. However, if we compare the votes obtained by the members appointed over the last twenty years with their predecessors,[62] we can conclude that the replacement of judges on the US Supreme Court is, in fact, an increasingly divisive issue in the United States. For a long time, the necessary collaboration between the two branches of government meant that there was generally little conflict in the nomination procedure, as both sides took account of imperatives on which they had, in the long run, implicitly agreed, even if the candidates were rushed through their Senate hearings. Until the mid-1980s, therefore, agreement on highly qualified individuals, regardless of their political views, seemed to be fairly easy to achieve, whereas today, the outcome of the vote shows a very clear polarization, with the Senate sharply divided between Republicans and Democrats. The succession of Justice Antonin Scalia further deepened the divide: although the US Constitution does not expressly provide for a "time limit" for filling a vacancy, the constitutional composition of the Supreme Court, set at nine members, makes it necessary to fill the vacancy for the Court to exercise its powers under the Constitution. The death of sitting US Supreme Court Justice Antonin Scalia thus constitutionally triggered the procedure for appointing a new member to fill the vacancy. The President at the time, Barak Obama, even had a certain amount of time – the procedure usually takes a few weeks – since he was still in office for almost a year. However, the highly divisive political climate of recent years, and Justice Scalia's very conservative personality, have clearly changed the situation and overturned the practice: the sitting President was effectively deprived of his power to appoint to the Supreme Court, and some Republicans even considered that Barak Obama's appointment of Antonin Scalia's replacement would have constituted a "coup."[63] Their attitude, on the other hand, was an example of what is known as "constitutional hardball", a kind of showdown in which the limits of legality are pushed.[64] Antonin Scalia, appointed in 1986 by President Ronald Reagan, was a major figure of the Supreme Court, a staunch conservative and an "originalist" reader of the Constitution, which he argued should be interpreted according to the original understanding of its drafters. At the time of Scalia's death, the President of the United States, Barak Obama, was a Democrat, and himself an emblematic figure of an unprecedented evolution in the United States, as the first black president. The Republican-majority Senate refused in principle to allow Barak Obama to nominate Scalia's successor. Obama's nominee, Merrick Garland, was never appointed, as the Senate did not agree to hold confirmation hearings. The election victory of Republican nominee

[62] This is particularly true when the judges appointed are not "white men". See section 2.2.1 later in this paper. The political and cultural framework of diversity criteria for constitutional guardians.
[63] See the article from *AA*, "Republican Candidates Unite Against Obama on Replacing Scalia," by Jonathan Martin, February 13, 2016.
[64] Mark Tushnet, "Constitutional Harball," *John Marshall Law Review*, 2004, vol. 37, pp. 523 sq.

Donald Trump in November 2016 reinforced the Senate's attitude of waiting for the winner's inauguration, thus giving Trump the right to nominate Scalia's replacement: in April 2017, with the Senate's endorsement, Donald Trump's nominee Neil Gorsuch was appointed to the Supreme Court. The blocking of the nomination had little impact on the Court's operation at the time, but it did have an impact on its future direction, since circumstances meant that the new President of the United States was also able to nominate two other members to the Supreme Court.[65] This included the railroading of the nomination by Trump and confirmation by the Republican-held Senate of the highly conservative Justice Amy Coney Barret just weeks before the 2020 elections, following the death of the moderate Ruth Bader Ginsburg in mid-September 2020. The three Trump appointees have thus given the Court a six-to-three conservative super-majority, which was certainly decisive in overturning *Roe vs. Wade* on June 24, 2022, thus stripping women of their constitutional right to abortion.[66]

In Europe, among the Western democracies with a constitutional court, Italy is characterized by recurrent blockages in the appointment of judges, especially in recent years. Even when the Constitution came into force in 1948, it took Italy's Parliament five years to determine the rules governing its operation, and a further two years to appoint the judges corresponding to its quota (five out of fifteen). In recent years, the Constitutional Court has regularly been incomplete, due to the Parliament's procrastination. Given that parliamentary appointments are made by a two-thirds majority of the members of both chambers combined (and then, from the fourth ballot onwards, by a three-fifths majority), it is often necessary to reach a "multi-party" agreement, due to the political diversity of the chambers. In general, the difficulties are linked to the Court's work. For example, in the appointment crisis that took place from June 2014 to December 2015, the tension concerned a reform of the electoral system on which the Constitutional Court would then have to rule. In this case, thirty-two rounds of voting were required. The opposition either did not take part in the vote, or presented candidates who had no chance of being nominated. The then President of the Republic, Sergio Mattarella, himself a former judge on the Constitutional Court (whose seat was precisely one of the three vacant), threatened to dissolve the Parliament if the deadlock persisted for too long. Finally, a vote on December 17, 2015, ended the crisis, with an agreement between Partito Democratico and Movimento 5 Stelle on three candidates.[67]

Yet another crisis arose in Italy between 2016 and 2018, when the announced end of the legislature reinforced the blocking of an appointment, and parliamentarians seemed to lose interest in the matter.[68] The seat vacated by Giuseppe Frigo on November 7, 2016, had not been filled by lawmakers before the renewal of Parliament (following a dissolution), despite exhortations from the President of the Republic and the President of the Constitutional Court. Following the March 2018 elections, an alliance between the Movimento 5 Stelle and Lega Nord finally, but belatedly, enabled agreement on a candidate who was elected after four rounds of voting.[69]

The image of the Italian Constitutional Court among politicians has deteriorated in recent years, perhaps foreshadowing a shift in its future role in the balance of power. In fact, successive crises

[65] Following the resignation of Anthony Kennedy, Brett Kavanaugh was appointed to the Supreme Court in 2018.
[66] *Dobbs v. Jackson Women's Health Organization*, 24 June 2022.
[67] Augusto Barbera, Franco Modugno and Giulio Prosperetti.
[68] For details, *ibid.* p. 11.
[69] Céline Maillafet, "L'alliance gouvernementale fait élire le nouveau juge constitutionnel Luca Antonini" [The government alliance elects the new constitutional judge Luca Antonini], *La lettre d'Italie, Revue Droit et Vie politique italienne*, Centre de droit et de politique comparés Jean-Claude Escarras, Université de Toulon, 2019, No 13-14, pp. 18-19.

have led to a change in the role of the President of the Republic in the appointment process: previously, he would wait for Parliament to nominate candidates to create a "balance" within the Court, whereas now the President immediately appoints replacements for vacant seats for which he is responsible as the appointing authority, so as not to leave the Court chronically understaffed.[70] In this way, change has resulted from crises.

Surprisingly, this change has not been referred to the Venice Commission, just as the Commission has not been asked to address the crises that have shaken Spain in recent years, the latest of which being reported in the French press in 2021.[71] The appointments of four out of twelve judges to the Constitutional Court were blocked for four years, as were appointments to four other fundamental institutions: the Court of Audit, the Ombudsman, the Data Protection Agency and the General Council of the Judiciary. In the case of the latter, which determines the general functioning of the judicial system, the blockage has nonetheless been drawn to the attention of the European Commission by a collective of 2,400 magistrates citing infringements of the rule of law. The need for three-fifths of Parliament to appoint the members of these various institutions required the Partido Popular to reach an agreement with the Partido Socialista Obrero Español, which it refused to do. In October 2021, an agreement was reached, except for the General Council of the Judiciary. But the agreement was reached with much difficulty as regards the Constitutional Tribunal due to the appointment of a highly controversial judge, Enrique Arnaldo: "the Socialists would have accepted the choice of this magistrate with a troubled past in order to unblock an inextricable situation and allow the Constitutional Tribunal to function normally. Indeed, for three years, the Partido Popular had been demanding that the choice of magistrates should be theirs. For most commentators, this is nothing less than a scandal, revealing the increasing politicization of the judiciary."[72] However, until now, the majority system had worked, though it has been hijacked, and even perverted according to some: "In practice," Jorge Fernandez Vaquero, spokesman for the Francisco de Vitoria judicial association, has lamented that, "the right and left have traditionally shared out the number of posts to be appointed, according to their parliamentary representation, and then based their choice on questions of political affinity rather than professional trajectories."[73] But this practice, whether appropriate or not, presupposes the reciprocal acceptance of a balance between the majority and the opposition, within a political context that is not excessively divided. This, however, was no longer the case in Spanish politics in 2016, just as it was no longer the case in the United States since the 1990, with the judiciary clearly being a locus of political conflict.

1.1.3. Some technical and legal solutions to appointment bottlenecks

It is difficult to imagine an effective sanction that would force a parliament or other bodies to appoint a new judge. In any case, the implementation of such a sanction depends on the will of the players at the time and on the balance between the various forces involved. It also seems

[70] See Céline Maillafet, "La Consulta, entre évolutions et recherche de quietude" [La Consulta, between evolutions and search for quietness], *La lettre d'Italie, Revue Droit et Vie politique italienne*, Centre de droit et de politique comparés Jean-Claude Escarras, Université de Toulon, 2018, no. 12, p. 12.

[71] Several French dailies reported on it, notably on September 14, 2021, with an article in *Le Monde* (Sandrine Morel, "En Espagne, la nomination des juges bloquée pour des raisons politiques" [In Spain, the nomination of judges is being blocked for political reasons]) and an article in the newspaper *Libération* ("La droite refuse de nommer des juges qui enquêtent sur sa propre corruption" [The Right refuses to nominate judges who are examining its corruption]).

[72] François Musseau, "En Espagne, un nouveau juge constitutionnel très polémique" [In Spain, a new, highly controversial constitutional judge], published on November 11, 2021 on the RFI website (www.rfi.fr).

[73] Reported by Sandrine Morel for the newspaper *Le Monde*, *op. cit.*

difficult to imagine such a sanction being imposed by an external, international or supranational authority, in a context in which national political sovereignties appear to many as safe havens.[74] The ambiguity of the European Union's relations with Poland and Hungary over the last decade is clear to see, with the former continually "denouncing" the latter, without managing to make lasting and effective decisions in their regard that would symbolize the EU's attachment to the rule of law and the mechanisms supposed to support it.

The solutions available are therefore more mechanical by nature. In the absence of sanctions, a solution commonly put forward to the inertia of appointing authorities is the automatic extension of the terms of office of the sitting judge(s) for whom replacement(s) have not yet been appointed, due to a delay or blockage in the process of designating their successors. This solution has the advantage of obliging the appointing authorities to respect "appearances," since they cannot deliberately terminate a judge's functions. In its document on the composition of constitutional courts in 1997, the Venice Commission states that "in Portugal, Germany, Spain and Bulgaria, for example, judges continue to exercise their functions in the court after the end of their term of office until their successor is appointed. This effectively avoids that the blocking of the appointment process destabilizes the composition of the Court." This solution has also been adopted in Slovenia, Peru, Ecuador, Albania, Hungary, Latvia and Lithuania. While intuitively attractive, it can however benefit former majorities who delay the appointment of replacements to maintain their ascendancy over the supreme or constitutional court. Another rule may therefore be added to that of extending the term of office of judges who have not been replaced, namely shortening the term of office of the replaced judge by the same amount, as is the case in Spain.[75] This transfers the consequences of political delays to those who cause them, by shortening the term of office of judges presumed to be more sympathetic to their cause. Obviously, these systems fail in the event of a judge's resignation or death, as illustrated by the replacement of US Supreme Court Justice Antonin Scalia in 2015, since there is no term of office to extend.

Another mechanism consists of limiting the effects of a vacancy by anticipating it, when the term of office is of limited duration or an age has been set for compulsory retirement. In this case, the procedure for appointing the replacement(s) is started before the end of the term of office or the birthday of the judge who has reached retirement age, to give the appointing authorities time, as is the case in Spain, Bulgaria, Romania or Peru.[76] But this mechanism also presupposes fluid relations between the powers and/or a time when a divisive political transition is not underway, which would ruin the effects of the anticipation mechanism, as we have seen in the cases of the United States or Poland mentioned above. In 2022, however, Stephen Breyer's announced resignation in February for July, in a context of coinciding majorities between the Senate and the President of the United States, but also of a clear split between the Democratic and Republican camps, enabled his replacement to be appointed as early as April, despite difficult hearings and a vote that was inevitably polarized.[77]

When several authorities must jointly or successively decide on candidates, it is also possible to ensure that the inertia of one authority can be resolved by the presumption of a decision at the end of a certain period. For example, the Act on the Czech Constitutional Court provides

[74] See Katalin Kelemen, *op. cit.* p. 19.
[75] Article 16.5 of the organic law on the Constitutional Tribunal.
[76] For example, the Article 68 of the law on Romanian Constitutional Court provides that the appointment of a new judge must take place at least one month before the expiry of the term of the judge being replaced.
[77] See sub-Section 2.2.1 later in this study *The political and cultural framework of the diversity criteria for constitutional guardians.*

that if the Senate does not decide on the presidential proposals within 60 days, then they are deemed to have been accepted (Article §6 (2)). The advantage of this solution, however, has a drawback. While it forces the actors out of inertia, if political conflict is significant, it does not necessarily lead to an appointment, as the Senate may reject the President's proposals. Alternatively, in the event of paralysis in the Senate, the arrangement confers excessive power on the President of the Republic. While the provision has been in force, it has never been implemented, and seems to exceed the Czech Constitution, which states that judges are appointed by the President of the Republic *with the consent of* the Senate.

This difficulty has led some countries to transfer the power of appointment from the executive and legislative authorities to the judiciary, in the event of inertia on the part of the former. The Uruguayan constitution provides for the possibility of substitution by the judiciary (Article 236 of the Constitution), while Germany's Constitutional Court has the power to propose appointments if the Bundestag or Bundesrat have difficulty agreeing on candidates (Article 7 §a of the Constitutional Court Act). In case of disagreement, the chambers can then refer the matter to the Court, which will propose twice as many candidates as there are seats to be filled. Although this may be easy, it is not certain that the system will be sufficient to overcome a deadlock in a particularly polarized political situation.

Finally, the swearing-in of judges by political authorities is also a possible source of problems for the continuity of constitutional jurisdiction, as was the case in Poland at the end of 2015. In its aforementioned opinion on Ukraine in 2005, the Venice Commission recommended "the establishment of a default mechanism for receiving the oath" and thus welcomed "the fact that this problem has now been solved by the introduction of the system of taking the oath before the Court itself."

The result of all this is that the rules put in place, and the mechanisms designed to avoid or limit the effects of their violation or misuse, still depend most often on the will and ethics of those involved. Difficulties linked to ethics can hardly be solved by mandatory standards: in themselves, standards are only valid as long as they are considered mandatory and/or the system of sanctions that is organized is effective. The "right" rules – those that will be easily internalized by members of a group and that will help maintain or achieve a "good" state for the group – are considered to be those that are adapted to the given situation. But what works well in one configuration will not work in another. In finely balanced democracies, however, the political configuration can change rapidly depending on the outcome of elections, making it difficult to find the right rules. When it comes to rules designed to avoid, compensate for or circumvent blockages in the appointment of guardians of the Constitution, it is hard to imagine in advance what will and won't work. What prevents a blockage in one situation leads to one elsewhere.

In any case, the introduction of mechanisms designed to avoid or dissolve a deadlock can only be the consequence of an agreement on their necessity, and on the fact that they do not undermine the appointment power of the political authorities who intend to keep this power, and retain control over appointments, and therefore over constitutional justice.

1. 2 The ethics of appointment through the prism of freedom of choice for appointing authorities

As the authors of a comparative analysis of the appointment of constitutional judges in Europe have pointed out, most political forces appear not to regard the constitutional "status quo" as intangible.[78] This implies that they make the appointment of guardians a lever for their present or future action, always trying to get the guardians "on their side," so much so, in fact, that the term "personalization of judicial review" has been coined.[79] Personalities who are openly independent of "power," whether in the majority or in opposition, therefore have little chance of being appointed, as they are unreliable, both in terms of their lack of allegiance and their conception of constitutional justice, which is often more demanding. Today, constitutional and supreme court appointments are almost always made to individuals whose conception of constitutional justice work is relatively assured, and whom the appointing authorities expect to act accordingly. Appointing authorities therefore rarely question a process which, all in all, suits them.[80] But their ethics are sometimes dubious (sub-Section 1.2.1), and not always the subject of sufficient public interest (sub-Section 1.2.2).

1.2.1. The sometimes dubious ethics of appointing authorities

It is true that a judge in whom the appointing authority has "confidence" may fail to vote as expected. But although this can be identified and is theoretically always possible due to the statutory independence enjoyed by the guardians of the constitution with regard to the authorities who have appointed them, it is actually quite rare.[81] From this it follows that appointing authorities may have several reasons for designating a particular personality: i) to ensure that future guardians understand constitutional justice as not standing in the way of the policies pursued by the majorities in power; ii) to promote certain societal ideas within the constitutional jurisdiction; or iii) sometimes, simply to wish that constitutional justice be assured by personalities of recognized competence.

Changes of government in countries with a liberal tradition, for example, encourage appointing authorities to put "their eggs" in the right "basket" at the right time. It has been argued that the less cohesive a court's composition, the less likely it is to be seen as an actor in its own right,

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[78] Anna Chmielarz, Marzena Laskowska, Jarosław Sutrowsk, "Selección de magistrados constitucionales. Aspectos legales y políticos de la crisis de nombramiento en algunos países europeos" [The selection of constitutional judges. Legal and political aspects of the appointment crisis in some European countries], *Estudios constitucionales*, 2018, vol.16, No2, p. 482.

[79] See the study on the appointment and selection of judges in Israel from 1995 to 2016, Gad Barzilai, Maoz Rosenthal, Assaf Meydani, "The Personalization of Judicial Review: The Cohesiveness of Judicial Nominations and Constitutional Courts," *Address at the Comparative High Court Decision Making Workshop*, Jerusalem, https://icore.huji.ac.il/sites/default/files/icore/files/gadi_barzilai_et_al_the_personalization_of_judicial_review.pdf

[80] In recent years, some countries have shown an interest in the procedure for appointing guardians of the constitution, including: Canada which regularly modifies and adjusts the process and "reports" publicly on it (https://www.fja-cmf.gc.ca/scc-csc/2017-SheilahMartin/smartin-report-rapport-fra.html#bm08); Australia that has produced several reference reports on the issue (see the Australian Parliament website, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2021/November/Judicial_Appointments); and finally, the United Kingdom, whose House of Lords has set up a think tank on judicial appointments as part of its constitutional reform committee (House of Lords, Select Committee on the Constitution, Judicial Appointment Process: Oral and Written Evidence, Mar. 28, 2012, http://www.parliament.uk/ documents/lords-committees/constitution/JAP/JAPCompiledevidence28032012.pdf).

[81] See the examples cited by Guillaume Tusseau in his study of the US Supreme Court, "Façonner le 'gardien de la conscience'. Les présidents des Etats-Unis et les juges de la Cour suprême" [Designing the 'guardians of conscience'. US Presidents and Supreme Court Justices], *Pouvoirs*, 2014, vol. 150, no. 3, pp. 53ff. He notes on page 60 that "statistically, of one hundred and fifty Supreme Court nominees, one hundred and thirty-three have been members of the party of the president who nominates them" and that there is a strong alignment of Senate confirmation votes along party lines.

and that "an increase in the non-cohesiveness of a court undermines its ability to be seen as a unitary institutional actor."[82] By contrast, cohesion can serve the interests of the powers under review. If the political power may want to limit the cohesion of the judges, thus intensifying its control over them, it may also seek to strengthen cohesion among judges around the notion of very limited control. For example, in countries with a liberal tradition, the choice of the personalities who make up the guardian body of the constitution can be analyzed as highly "political," in the sense that they must not interfere too much with the exercise of political power, even after constitutional justice has been established as a pillar of the construction and maintenance of a constitutional state. In most countries, this system is supported by a political class intent on "keeping control" of the guardians. Many analyses tend to show that "political elites overwhelmingly control the selection of judges."[83] There is even a form of implicit consensus, even if it is not identified, on the need to maintain control over constitutional justice, sometimes leading to the assumption that little can be expected from the process of appointing guardians of the constitution, even in so-called advanced democracies.[84]

In liberal democracies, the appointment of judges is often discreet, but this is not always the case. Nor does it always escape public controversy, especially when the appointing authorities are less concerned with the qualities of future judges than with how they think they will perform their duties, even if this means putting ethics to one side. This is the case when the persons chosen are or have been criminally implicated, appear to have behaved in a questionable manner in political and/or judicial cases, or simply carry with them political and societal orientations that raise strong questions about the meaning of constitutional justice. Faced with such situations, the involvement of various authorities in the appointment process does not always succeed in "blocking" a questionable appointment. In the USA, for example, several candidates have been appointed to the Supreme Court despite being accused of sexual harassment[85] or sexual assault.[86] In France, a public figure was appointed to the Constitutional Council despite having been convicted of acting illegally in connection with the exercise of political functions, and his sentence was accompanied by a one-year period of electoral ineligibility.[87] In Spain, a four-year stalemate led to a compromise reached through a bitter struggle over the appointment of Enrique Arnaldo, a magistrate implicated in a phone-tapping scandal and for tax offences.[88] But none of these appointments was the discretionary act of a single individual: the US Senate confirmed the candidates proposed by the President, the parliamentarians making up the commission to hear the candidate proposed by the President of the French National Assembly also did so. Finally, the political coalition in Spain was admittedly makeshift, but ultimately responsible for an unethical appointment.

Circumstances can therefore make appointing authorities limit each other's actions, or not. For example, Richard Nixon, who despised the work of the Supreme Court, nominated Justice

[82] Gad Barzilai, Maoz Rosenthal, Assaf Meydani, "The Personalization of Judicial Review...," *op. cit.* pp. 3 and 6.
[83] Benjamin G. Engst, Thomas Gschwend and Sebastian Sternberg, *Who reaches the Bench? Evaluation of Judicial Nominees for Constitutional Courts*, working paper, 2018, on line https://www.sowi.uni-mannheim.de/media/Lehrstuehle/sowi/Gschwend/Articel/DCEJudgesNov18.pdf, p. 1 (referring to Venice Commission, 1997, CDL-STD(1997)020, *The Composition of Constitutional Courts*).
[84] This is the case for example in France: see Julien Icard, "Il n'y a plus rien à attendre du Conseil constitutionnel" [Nothing more is to be expected from the Constitutional Council], *Libération*, April 3, 2018, and for example the video posted about the French Constitutional Council in 2017 by the Youtube channel *Osons causer*: https://youtu.be/SD0oNXnXwbU.
[85] Clarence Thomas in 1991, confirmed by the Senate by 52 to 48.
[86] Brett Kavanaugh in 2018, confirmed by the Senate by 50 to 48.
[87] Alain Juppé nominated in 2019 by the president of the National Assembly with the approval of the parliamentary committee by 21 votes to 4 and 2 blank votes.
[88] See François Musseau, "En Espagne, un nouveau juge constitutionnel très polémique," *op.cit.*

George H. Carswell, who opposed the rights of women and blacks, to sit on the Court. However, the Senate rejected this nomination, considering him to be a "bad" judge as the reversal rate of his decisions on appeal was very high.[89] The same was true for Judge Robert Bork, who was nominated by President Ronald Reagan in 1987, giving Democratic Senator Ted Kennedy the opportunity to make a particularly alarmist speech about what constitutional justice would become if Robert Bork were appointed: "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens or whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.[…] The damage that President Reagan will do through this nomination, if it is not rejected by the Senate, could live on far beyond the end of his presidential term."[90] Robert Bork's nomination was ultimately rejected by the Senate by 58 votes to 42, with six Republican senators voting against him and two Democratic senators in his favor. Conversely, US Justice Amy Coney Barrett was finally nominated to the Supreme Court despite her extremely conservative positions (confirmed by the Senate by 52 votes to 48). In December 2021, President Bolsonaro's appointment of an openly evangelical judge to Brazil's Supreme Federal Court, André Mendonça, his former justice minister, caused great concern beyond national borders. The decision drew comparisons with Donald Trump's appointment strategy, although in the case of Brazil, the question of evangelical representation on the Supreme Court could be asked legitimately, since evangelical Christians make up around 30% of the population.[91]

Many countries, most of which have undergone democratic transitions over the past few decades, have set conditions regarding the "good" qualities of constitutional guardians: to be appointed to a constitutional or supreme court, sometimes you have to be a citizen "beyond reproach" (the Czech Republic) or have an "unblemished reputation" (Brazil, Lituania and Latvia), a "good reputation" (Afghanistan), demonstrate "good morals and great honesty" (Benin, Ivory Coast, Bosnia and Estonia); or judges must be "recognized for their impartiality and their probity" (Morocco), or demonstrate a "moral integrity" (Burundi), to be of "high moral integrity" (Cameroon) or "of high professional and moral integrity" (Bulgaria); "enjoy noted honorability" (Paraguay) or to "be recognized as an honorable citizen" (Venezuela); have "integrity and a personality that is not dishonourable", and "shall be fair" (Indonesia). These qualities are hard to evaluate "objectively," and are therefore at the discretion of the appointing authorities. They depend on the cultural and political conditions of a given country. Sometimes, entry to the Court is conditioned by a clause that is both specific and anecdotal: in Germany, for example, it is required that personalities explicitly declare their consent to be candidates for the Court;[92] in Iceland, candidates must have the "necessary mental and physical capacities;"[93] in Ukraine, it is necessary to have resided there for at least twenty years and to master the

[89] On this point see Guillaume Tusseau, "Façonner le 'gardien de la conscience'...," *op. cit.* p. 58.
[90] Senate floor speech made in response to the announcement of Bork's nomination; July 1, 1987. Senator Edward M. Kennedy. *Congressional Record*. United States Senate. pages 18518-18519. 100th Cong. 1st Sess. 133 Cong Rec S 9188. Vol. 133 No. 110.
[91] See, for example, Samuel Ravier-Regnat, "Brésil: un pasteur 'terriblement évangélique' et proche de Bolsonaro à la Cour suprême," *Libération*, December 16, 2021.
[92] §3 (1) of the Federal Constitutional Court Act.
[93] 1998 Act on the Organization of the Judiciary in Iceland.

official language.[94] The absence of prior convictions is also often a condition laid down by the laws organizing these courts.[95]

Whatever the reasons behind the choice of constitutional judges, it is not always completely free. Beyond the variability of interpretations of the conditions laid down for the recruitment of judges, it is difficult to assess the true extent of constraints and the real reasons behind the choice of constitutional judges. But the fact is that appointing authorities are often caught up in a web of diverse constraints: there may be real countervailing powers in the appointment process, the political configuration may be polarized or highly pluralist, and a situation of political clientelism may have developed. In some countries, the appointment procedure may be a matter of public knowledge and interest, with the media and public opinion acting as an additional constraint.

1.2.2. The appointment of guardians of the constitution: a matter of variable public interest

Although international institutions have made constitutional justice a key element of the rule of law, it is not often the subject of public debate. In many countries with a liberal tradition and built on the philosophy of constitutionalism, constitutions are basically viewed as liberators of the people. Yet the issues at stake in constitutional justice may, with a few exceptions, be largely ignored, downplayed or fantasized about. There may be a public and historical interest in the constitution, reflected, for example, by the fact that in almost every city there are "Constitution" streets or squares. But this does not necessarily mean the institutional conditions to allow for the scrutiny of constitutional justice actually exist, either because the control of constitutionality is not diffuse and is exercised exclusively by a special body,[96] and/or because constitutional judges are not allowed to express individual opinions, as is the case in Belgium, France, Austria, Italy or Luxembourg.

In any case, it is hard to get an accurate idea of how the "general public" perceives the work of the constitutional courts, especially when it is not obvious that citizens have a genuine interest in it. Beyond the symbolism, do we really know what people think of constitutional review and the guardians of the constitution? For example, when judges publish opinions, as is the case in almost all European countries, this certainly enables everyone to follow the evolution of their legal philosophy and check for any changes or inconsistencies. But it does not mean that their appointment attracts "the attention of the public," as Katalin Kelemen has noted.[97] And when the political opposition has a specific power to bring cases before the constitutional court, as in France for example, or when the latter is specifically charged with settling conflicts between constituted bodies, as in Italy for example, this "judiciarization" of political life represents a potential additional interest in constitutional justice for citizens.[98] Yet, it does nothing to prevent

[94] And, in Slovakia, one must be domiciled in the territory. Most of the time, nationality is required, whether this is explicitly specified for access to the constitutional or supreme court or in more general texts concerning the exercise of public, political or elective functions.

[95] As no conditions are set for members of the French Constitutional Council, the conviction of Alain Juppé in 2004 by the Court of Appeal of Versailles to 14 months of suspended imprisonment and one year of electoral ineligibility did not prevent him from being appointed in 2019 by the then President of the National Assembly.

[96] See Albrecht Weber for a history and overview of diffuse constitutional review around the world: "Notes on Comparative Constitutional Justice: Convergences and Divergences," *International Yearbook of Constitutional Justice*, 2003, p. 29.

[97] Katalin Kelemen, *op. cit.* p. 21.

[98] Yoav Dotan, Menachem Hofnung, "Legal Defeats - Political Wins. Why Do Elected Representatives Go to Court?," *Comparative Political Studies*, vol. 38, 2005, p.75.

a "divisive," ideologized or even fantasized appreciation of the latter, or an overall lack of knowledge of the activity of constitutional justice. According to a *Statista* survey conducted in 2017 on the level of public knowledge of the Constitutional Council among the French, "almost half of those questioned knew the Constitutional Council by name, but were not informed about its functions,"[99] with the persons surveyed even struggling to identify its members. In many countries, the issues at stake in appointing the guardians of the constitution appear to be little discussed, or are not an essential or priority subject: they attract little attention from politicians, and only moderate media coverage, while they are not always analyzed by academia either.

National situations vary considerably, and the same conditions do not always have the same effects. However, it is reasonable to assume that a number of historical, societal and institutional conditions must be met for constitutional justice to be of concern to the public at large, although these conditions do not automatically lead to public involvement. The American example is undoubtedly the most complete illustration of this. In the United States, the Constitution has enjoyed an almost uninterrupted reputation in public and cultural spaces. It is presented as the symbol of the success of American independence and of the historic compromise achieved in 1786-1787; the Founding Fathers who drafted the Constituion are an obligatory reference in any valid American discourse, whether by politicians, businesspersons, academics, rights activists or in cultural circles. Institutional conditions also contribute to the maintenance of constitutional symbolism: firstly, the Constitution is one of the norms that can be invoked in any trial or legal dispute, and any judge or arbitrator will interpret the Constitution, whatever the case. Secondly, individual judges, especially those of the Supreme Court, express opinions on the Constitution and the way it is interpreted and applied in the trials in which they participate. This has the effect of placing the debate on the Constitution in the shared public arena, even if in reality few people read the famous "opinions." For Americans, the Supreme Court is one of the country's most important political institutions, and one to which they pay particular attention. In June 2022, Brett Kavanaugh was the target of an assassination attempt by a man who claimed he wanted to kill a member of the Supreme Court because it was about to overturn *Roe v. Wade* which established the constitutional right to abortion (which the Court did on June 24, 2022). For weeks too, Ginni Thomas, wife of Justice Clarence Thomas, was the focus of media attention for her involvement in the events of January 6, 2021 (when the Capitol was stormed), some aspects of which are being judged by the Supreme Court, thus calling into question the real impartiality of the judiciary. Attention is therefore paid to the members of the Supreme Court, in connection with the decisions handed down by the Court, in a country where many conditions are in place for individuals to take an interest.

But this attention is not so old. Although hearings before the US Senate have been broadcast live on television since 1981, it is generally agreed that it was with President Ronald Reagan's attempt to appoint Robert Bork in 1987 that nominations to the US Supreme Court became a highly "newsworthy" subject, bringing new, so-called "outside" players into the nomination process. And, since the early 2000s, the Gallup polling company has conducted several surveys a year on the popularity of the Supreme Court, which was not the case before: the Court's current president, John Roberts, appears to be the most popular political figure in the USA, having a positive opinion rating of over 60%. Today, however, the Court appears too "politicized," and in September 2022 received only 40% of favorable opinions, the lowest percentage since the Gallup survey's inception.[100]

[99] https://fr.statista.com/statistiques/661605/connaissance-conseil-constitutionnel-france/.
[100] https://news.gallup.com/poll/4732/supreme-court.aspx.

Several factors also contribute to a form of public appropriation of constitutional justice in Germany, making German jurisdiction a special case in Europe. These include: the historical and symbolic importance of the Basic Law of 1949, drafted in the memory of both the Nazi regime and the despised Weimar Republic; the creation by the Basic Law of a Constitutional Court to which citizens can turn for respect of their rights through public actions; the highly symbolic existence of the so-called "Federal Office for the Protection of the Constitution", charged with monitoring activities that are contrary to the Constitution (even if it is above all Germany's domestic intelligence agency); and the possibility for constitutional judges, since 1970, to express individual opinions on cases submitted to the Court.[101] In a working paper, German academics Benjamin G. Engst, Thomas Gschwend and Sebastian Sternberg argue that Germany's "elites have a vital interest in selecting candidates for the judiciary whose decisions are widely accepted by the public, especially when the Court makes a decision in the political interest of the political elites rather than the public."[102] And a member of the Bundestag has declared that "there is not a single member here who thinks it would be desirable to go against the court. A serious confrontation would only create a public discussion in which one could easily get a bloody nose."[103] Yet, this "German approach" to the constitution and its guardians cannot be generalized, especially at the European level.

The American and German cases do not prejudge the nature of the gaze that is cast on the system of justice, but show that it is only possible under certain conditions. It is of course debatable whether the public gaze in question is more or less thorough or more or less relevant, and what effect this has on the content of constitutional justice.

Georg Vanberg points out, "the ability of the court to maintain its position as a focal point institution in constitutional interpretation depends – at least in the long run – on the ability of judges to convince citizens that they are, after all, serving the interests of citizens."[104] Yet this reality is difficult to establish. Certain practices can even interfere with the understanding of what the guardians of the constitution actually do. For example, it has been noted that the rhetoric used by the French Constitutional Council (Conseil Constitutionnel) to present its work, which consists of insisting on its role as guardian of rights and freedoms, has long been to some extent copied by doctrine and the media. This contrasts with the reality of the Court's debates during the drafting of constitutionality decisions.[105] In this way, the image of the Conseil constitutionnel as the guardian of rights and freedoms is conveyed without its decisions being known or understood by the public at large. This image of the Constitutional Council is relayed by the media and academic writers, acting as a kind of screen.[106] While it is not

[101] Even if the use of these opinions remains moderate and concerns mainly the so-called "societal choices:" see on this subject Christian Walter, "La pratique des opinions dissidentes en Allemagne" [The practice of dissenting opinions in Germany], *Les cahiers du Conseil constitutionnel*, No 8, July 2000.
[102] Benjamin G. Engst, Thomas Gschwend and Sebastian Sternberg, *Who reaches the Bench?...*, *op. cit.*
[103] Quoted in Georg Vanberg, *The Politics of Constitutional Review in Germany*, Cambridge University Press, 2005, p. 121.
[104] Georg Vanberg, "Constitutional Courts in Comparative Perspective: A Theoretical Assessment," *Annual Review of Political Science*, vol. 18, 2015, p. 179.
[105] See Elina Lemaire, "Dans les coulisses du Conseil constitutionnel. Comment le rôle de gardien des droits et libertés constitutionnellement garantis est-il conçu par les membres de l'institution ?" [Behind the Scenes of the Constitutional Council. How is the role of guardian of constitutionally guaranteed rights and freedoms conceived by the members of the institution?]," *Jus Politicum*, 2012, no. 7.
[106] See my developments in "Bilan et réflexions sur une éthique de la justice constitutionnelle à la lumière de ce qu'en font et de ce qu'en disent ses acteurs. Que doit-on attendre d'une réforme – nécessaire - du conseil constitutionnel ?" [Assessment and reflections on the ethics of constitutional justice in the light of what its players do and say about it. What should we expect from a – necessary – reform of the constitutional council?], *in* Elina

uncommon for particular appointments to be discussed, contested or, on the contrary, praised in the public arena, such news, both occasional and recurrent, remains a matter of fact. It is not based on, nor does it lead to, any in-depth reflection on the issues at stake in constitutional justice. In the case of France, the series of three appointments to the Constitutional Council in February 2019 gave rise to more critical comment than before, being denounced as appointments of collusion or because the appointees' skills and personalities were deemed unsuitable. Commentaries in the form of op-eds in the written press were aired, but were not picked up in the audiovisual media. Nor did they lead to any real interest from the political class. A few papers have also been published on the oddity of making the Constitutional Council a place where real constitutional justice cannot take place, both because of the collusion of its members with the political and administrative personnel who make the laws,[107] because of collusion with lobbies,[108] but also because of the illegality of the remuneration of the Conseil's members.[109]

However, this has not led to the question of the appointment of Council members being considered a major issue in French politics. What is commonly referred to as the "train" of appointments, in February 2022, to replace three members of the institution, further revealed the total lack of concern the appointing authorities had paid to the criticisms voiced previously, since the three personalities proposed all had prior working links with the authorities who appointed them.[110] Even if the criticisms were much more numerous and even almost unanimous among observers, it is hard to say whether they will have any real effect in the long term, given the different vision that seems to prevail among the appointing authorities. Publicity (the parliamentary hearings of candidates are broadcast on the websites of the parliamentary assemblies) and media coverage of the nomination process (there is now coverage of the nomination process) do not therefore appear to be a guarantee of better candidacies.

The effects of publicity and transparency in the process of appointing guardians of the constitution are not clearly and uniformly assessed by observers. It is even argued that publicity "exposes candidates to the danger of becoming the subject of political campaigning, but it also exposes them to the public and civil society gaze."[111] Extreme media coverage of judicial appointments can lead to the greater politicization of judges. Since 2003, the publication of the résumés of candidates for the Argentine Supreme Court three months before their possible appointment has not prevented the strong politicization of judges and the appointment process

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Lemaire and Thomas Perroud (eds.), *Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence*, *op. cit.* spec. pp. 173 and 175.

[107] Les amis de la terre and Observatoire des multinationales, *Les sages sous influence ? Le lobbying auprès du Conseil constitutionnel et du Conseil d'Etat* [Wise men under influence? Lobbying the Conseil constitutionnel and the Conseil d'Etat], 2017 (online: https://www.amisdelaterre.org/wp-content/uploads/2018/06/les-sages-sous-influence---rapport-amis-de-la-terre---odm.pdf)

[108] Mathide Mathieu, "Dans les coulisses du Conseil constitutionnel, cible des lobbies" [Behind the scenes at the Constitutional Council, a target for lobbies], *Mediapart*, October 12, 2015.

[109] See Elina Lemaire. Elina Lemaire, *A l'occasion des nominations de 2022, repenser les conditions de la désignation et le statut des membres du Conseil constitutionnel* [For the 2022 appointments, rethinking the conditions of appointment and the status of members of the Constitutional Council], Position paper, January 19, 2022, Observatoire de l'éthique de la vie publique, https://www.observatoireethiquepublique.com/wp-content/uploads/2022-OEP-Nominations-CC-mis-en-forme-MA.pdf.

[110] The member nominated by the President of the Republic was a current government minister, the member nominated by the President of the Senate was his chief of staff, and the member nominated by the President of the National Assembly had been the superior of the public prosecutor who had dismissed a case in which he had been implicated five years earlier.

[111] Katalin Kelemen, *op. cit.*

– even leading to a dubious control of the Court taken by its president in April 2022.[112] To cite the exemplary case of the United States, President Reagan's nomination of Robert Bork in 1987 and President Bush's nomination of Clarence Thomas in 1991 were both accompanied by extensive media coverage and lobbying.[113] The non-confirmation of the former led to the creation of a verb from his name, prompting a feminist to say later that she was going to "Bork" the nomination of Clarence Thomas,[114] who was nonetheless subsequently confirmed by the Senate. Robert Bork's "frankness" in front of the Senate in 1987 is sometimes considered to have cost him his position on the US Supreme Court,[115] with the result that nominees have been much more reserved about their statements ever since. The hearings are therefore the scene of strategic speeches by the candidates. Strictly speaking, none of the three nominees appointed during Donald Trump's term in office, between 2017 and 2021, explicitly told senators that they wished to challenge the unconstitutionality of the abortion ban, contenting themselves, for example, with saying that they knew that the 1974 *Roe V. Wade* decision was a precedent. This was a "neutral" and factual minimum, veiling their true and subsequently revealed intentions. As Benjamin G. Engst, Thomas Gschwend and Sebastian Sternberg have argued, the public assess the competence of judges according to their own ideology, thus relativizing the effects of greater transparency in the procedure for appointing constitutional guardians. [116]

2. Variations in the Democratic Nature of Appointing Constitutional Guardians

If we look at the diversity of procedures, the debates that have underpinned them, those that have arisen in practice and the academic analyses on this subject, we can see that there is a tension between the need to give the appointment of guardians of the constitution, and therefore constitutional justice, a democratic, even political, foundation on the one hand, and evidence of the jurisdictional and judicial nature of the activity on the other hand. The "standard" status acquired by constitutional justice, and promoted by regional and international institutions on the grounds that it is a key element of the rule of law, has made it necessary for constitutional justice to conform to the common principles of the administration of justice, failing which it would misrepresent itself. The resulting tension is particularly marked in constitutional courts, and sometimes in supreme courts. The ambivalence in which constitutional jurisdiction is held, and the opposition to which it can give rise, place a permanent burden on constitutional jurisdiction that makes it fragile and does not give it a free hand.

This tension was very much in evidence in the debate that took place in the United Kingdom in the early 2010s on possible constitutional reform. One of the axes of reform was the independence of the judiciary and appointment procedures, as both academics and politicians decried the "excessive judicial influence over judicial appointments" and argued for a change

[112] Hernán Cappiello, "Horacio Rosatti ya se instaló al Consejo de la Magistratura y tuvo sus primeras reunions," *La Nacion*, April 26, 2022.
[113] See Richard Davis, *Justice: Fixing the Supreme Court Nomination Process*, Oxford University Press, 2005, p.76.
[114] "We're going to *Bork* him. We're going to kill him politically ... This little creep, where did he come from?," remarks by Florynce Kennedy at the National Organization for Women convention in New York in July 1991, reported by the Wall Street Journal, which also reported the action of 'Borking,' "The Borking Begins", *The Wall Street Journal*, August 17, 2007.
[115] See for example Guillaume Tusseau, "Façonner le 'gardien de la conscience...," *op. cit,* pp. 59-60.
[116] Benjamin G. Engst, Thomas Gschwend and Sebastian Sternberg, *Who reaches the bench?...*, *op. cit*.

in the appointment system.[117] But they were divided on how to reform the system, giving primacy to Parliament, the executive or a mixed system that would not completely sideline the judiciary. The truth is, almost all systems think of constitutional justice as having a political character, which makes a country's supreme court or constitutional court a body whose competencies and composition are fixed by the constitution, unlike most other jurisdictions. In this sense, the political characterization of the courts and the political system for appointing their members would be a guarantee of the democratic character of constitutional jurisdiction, whereas simply embedding a supreme court in the day-to-day functioning of the judicial system would not provide this. But the inclusion of constitutional justice in the system of powers owes this more to its consequences than to its nature. This is less a question of making constitutional justice "democratic" than of ensuring that it does not (over)interfere with the exercise of democratic power, of which it must be an objective ally. The comparative jurist Pierre Bon believes that, because constitutional jurisdiction has a function or role in the political system, it "cannot be composed like any other jurisdiction, i.e., by magistrates who would automatically accede to it according to the laws governing judicial careers. Since the constitutional court calls into question the will of the legislator (i.e., the sovereign), it must benefit from the enhanced democratic legitimacy conferred by the appointment of all or most of its members by political bodies that are often diverse."[118] On this basis, the judicial conception of constitutional justice would be insufficient to confer on it the legitimacy necessary for its proper exercise: "Owing to the political impact of their decisions, it is widely accepted that political actors from other branches of government should be involved in the selection process, since those involved might be more inclined to accept judgments."[119] Moreover, the lack of involvement of other entities would encourage the politicization of selection.[120]

There is no solution that can be said to be perfectly democratic or liberal, just as there is no standard for the appointment of guardians of the constitution that doctrine or international institutions would wish to impose. But trends are emerging, all of which could be contained in the term "pluralism": pluralism of appointing authorities versus unilateralism on the one hand (sub-Section 2.1), and pluralism of guardians versus homogeneity on the other hand (sub-Section 2.2), according to arguments that are, however, still undeveloped or in their infancy.

2.1 Pluralism of appointing authorities versus unilateralism

For many years, pluralism has been presented by the European Court of Human Rights as the hallmark of a democratic society.[121] It is almost logically reflected in the requirements of the procedure for appointing the guardians of the constitution: several authorities or groups thus have the capacity to appoint members of the constitutional or supreme court, separately or jointly. Mechanically, the constitutional or supreme court is supposed to be composed in such

[117] Graham Gee, Robert Hazell, Kate Malleson, & Patrick O'Brien, Ministry of Justice Judicial Appointments Commission: *Triennial Review* 2014 (Apr. 2014), at 3, quoted by Erin Delaney, "Searching for Constitutional Meaning in Institutional Design: The Debate over Judicial Appointments in the United Kingdom," *International Journal of Constitutional Law*, 2016, vol. 14, No3, p. 760.

[118] Pierre Bon, "La désignation des juges constitutionnels en droit comparé. Quels enseignements en tirer pour le Conseil Constitutionnel?" [The appointment of constitutional judges in comparative law. What lessons can be drawn for the Conseil Constitutionnel?],*in* Olivier Lecucq (ed.), *La composition des juridictions. Perspectives comparées*, Bruylant, 2014, p. 211.

[119] Democracy Reporting International, *Handbook on democratic constitutions*, p. 57.

[120] See Anna Chmielarz-Grochal, Marzena Laskowska, Jarostaw Sutrowsk, "Selección de magistrados constitucionales. Aspectos legales y políticos...," *op. cit.* p. 517.

[121] *Handyside* vs. United Kingdom, December 7, 1976, Case No 5493/72.

a way that different points of view will produce an exercise that does not favor any particular power.

In democracies recognized as established or under construction, unilateralism is clearly marginalized. A situation in which a single, non-collegial body holds the entire power of appointment is not to be found, even if certain arrangements may appear similar. In Iceland, it is the President who appoints the nine members of the Supreme Court, on the proposal of the Prime Minister, but after a committee has formulated proposals for each of the seats to be filled; the committee's five members having been designated by the Supreme Court, the Judicial Council, the Bar Association and the Parliament. As for Slovakia's Constitutional Court, its 13 judges are appointed by the President, but from a list of 26 candidates proposed by the Parliament, thus limiting, at least theoretically, its full discretionary power.

The French Constitutional Council, too, is sometimes considered as standing apart from the other old democracies, because the appointment of its members has long not involved collegiality, and not necessarily pluralism, under the Fifth Republic. Its three appointing authorities (the President of the Republic, the President of the Senate and the President of the National Assembly) have long represented a similar political power. Little wonder then that the author of a comparative study of systems for appointing constitutional judges (intended to propose a new model for Hungary) notes that the French case is excluded from his study: "The French *Conseil constitutionnel* is not included in the analysis," Katalin Kelemen says, "as it did not grow out of the idea of constitutional justice of Hans Kelsen. It constitutes a *sui generis* body which was for a long considered to be a political one."[122] However, the procedure for appointing members of the Conseil constitutionnel was revised in 2008, with the introduction of a system of hearings for appointees by a commission made up of members of parliament: those appointed by the President of the Senate must answer questions from members of the Senate commission; persons appointed by the President of the National Assembly must answer questions from members of the National Assembly commission, and those appointed by the President of the Republic must undergo hearings before both commissions. In the opinion of most observers, these hearings, instituted in 2010, still constitute only a weak counterweight to the discretionary nature of the appointment of the three highest authorities of the State. In contrast to the United States, where candidates nominated by the President must answer questions from all Senators over several days, and where the President regularly has to backtrack (indeed, there have been several cases in the last 40 years),[123] hearings in France take place in little more than an hour, and are based on questions that are most often indulgent towards candidates. At this point, it is therefore still not possible to speak of appointments involving different political forces and different powers.[124] The French particularity is reinforced by the *de jure* presence of former Presidents of the Republic on the Constitutional Council, as stipulated in Article 56 of the Constitution. While other countries (Kazakhstan, Côte d'Ivoire, Djibouti and Gabon) have followed France's example in this respect, they have not followed it in the organization of the appointment of the guardians of the Constitution, seeking more readily of mechanisms involving collegiality and, in any case, a certain pluralism.

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[122] Katalin Kelemen, "Appointment of Constitutional Judges...," *op. cit.* p. 8.

[123] This is what happened with John Marshall Harlan in 1954, proposed by Dwight Eisenhower (and again in 1955, and finally confirmed by the Senate), with Harriet Miers put foward by George W. Bush in 2005, and with Merrick Garland proposed by Barak Obama in 2016.

[124] Even if, in February 2022, Jacqueline Gourault, who was proposed by the President of the Republic, did not obtain a majority of votes from the senate members of the commission that auditioned her: 16 votes against, 12 votes for and 3 blank votes (session of February 21, 2022). These votes were combined with those of the National Assembly committee. Yet Jacqueline Gourault was finally appointed, in the absence of a three-fifths majority *against* her candidacy in the Assembly.

Finally, there are the rare cases where the constitutional or supreme jurisdiction is attached to the people's body itself, which would give it an indisputably democratic basis. Bolivia's Constitutional Court, like those of the country's three other highest judicial bodies, are all elected by direct universal suffrage on the basis of a list drawn up by the National Assembly from nominations received.[125] In Japan, the members of the Supreme Court, with the exception of its President, who is formally appointed by the Emperor upon presentation by the Government, are appointed by the government in power, but upon presentation of *one* (a practice pre-Shinzo Abe) or two names by the General Secretariat of the Supreme Court. They are then confirmed by the electorate at the following general election for the Assembly of Representatives, and then again every ten years, unless the electorate demands a confirmation referendum beforehand. The declared desire to give constitutional justice unquestionable democratic legitimacy by backing it up with popular choice is nevertheless part of the history of a political regime and its culture, like indeed any other rule. It depends on the political and social circumstances in which such democratic legitimacy is deployed, so that it can be said that a constitutional court elected or confirmed by the people guarantees, *in itself,* neither a policy nor a way of exercising specific powers.

For its part, Bolivian democracy is still described as vacillating, as a regime in which the constitution is "denormatized", in the sense that the constituted bodies have developed the habit of not giving full effect to constitutional norms.[126] A specific term has been coined to describe this state of affairs: "deconstitutionalization."[127] Bolivia's Constitutional Court does not seem to be playing its role, having, for example, accepted the prospect of a fourth presidential term for Evo Morales, even though the Constitution explicitly excluded this.[128] And even after the fall of Morales, the Constitutional Court is seen as an objective ally of the President, who holds most of the country's power. As for Japan's Supreme Court, a different tradition dominates, but one that also renders the role of the electorate almost irrelevant, unless we consider voters' genuine agreement with the practices of the executive and the Supreme Court. Japanese society is known for being less divided than most Western societies, and has a particular view of its justice system: on the one hand, it is not considered the beginning and end of a society historically hostile to the law; on the other hand, there is a respectful distance towards the institution and the *men* who render it. The Japanese, for example, are said not to know their judges.[129] It is true, moreover, that the Supreme Court has not shown itself to be as offensive and decisive in the institutional game as an analysis – particularly a Western one – might have suggested at the time the Constitution was written in 1946.[130] Following this line, none of the members of the Supreme Court has ever been rejected in a confirmation referendum, and, in fact, very few referendums are held, as the practice is to appoint only judges over the age of sixty, who must retire at the age of seventy. No referendum has ever been triggered by a popular

[125] But the election system is complex, and judges are each elected in different constituencies.
[126] See Victor Audubert, "L'interprétation présidentialiste de la Constitution bolivienne au cœur de la crise post-électorale de 2019" [The presidentialist interpretation of the Bolivian Constitution at the heart of the 2019 post-election crisis,], *Cahiers des Amériques latines*, 2021, No96, pp. 67-84.
[127] See Néstor Pedro Sagüés, "El concepto de desconstitucionalización" [The concept of deconstitutionalization], *Revista de Derecho: Publicación de la Facultad de Derecho de la Universidad Católica de Uruguay*, 2007, No2, pp. 181-195.
[128] See, for example, David Biroste, "A la veille d'un scrutin historique, retour sur l'organisation constitutionnelle et électorale de la Bolivie," *Revue politique et parlementaire* website, October 9, 2020 (www.revuepolitique.fr).
[129] See Nathan Béridot. Nathan Béridot, *L'exercice du pouvoir judiciaire par la Cour suprême du Japon: Contribution à la réflexion sur l'État de droit au Japon*, thesis, 2020, Inalco, p. 222.
[130] *Ibid.*

initiative to remove a judge from office. The originality of the procedure therefore remains dormant, perhaps waiting to be reawakened by changes that are more cultural than political.

Compared to these two examples, the democratic and plural aspect of the appointment of guardians of the constitution is, in other countries, more indirect than direct: the procedure involves one or more political bodies insofar as they are – alone or together – the expression of the democratic character of the system. The system of exclusive appointment by the executive tends to be rejected. The Venice Commission considers that "[t]he shift from the system of exclusive direct appointment by the President to the mixed system providing elective or appointment powers to the three main branches of power has more democratic legitimacy while it is based on the successful experiences of the previous system."[131] And, in view of the political nature of constitutional justice, it is, for some authors, "impossible to imagine that Parliament's involvement could be eliminated," which would require the search for another source of legitimacy.[132] In the systems observed, parliaments almost always intervene. Several types of procedure can be observed: those based on separate or "parallel" appointments of the different branches of power (which do not necessarily exclude deliberation when one of these branches is the Parliament): for example, in Spain,[133] in Italy,[134] in Austria,[135] in Georgia,[136] in Romania,[137] in the Democratic Republic of Congo[138] or in Chile;[139] and those based on a

[131] CDL-AD (2004)024, *Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey,* §19.

[132] "imposible imaginar que la participación del Parlamento pueda eliminarse." Anna Chmielarz-Grochal, Marzena Laskowska, Jarostaw Sutrowsk, "Selección de magistrados constitucionales...," *op. cit.* p. 519.

[133] The Constitutional Court shall consist of twelve members appointed by the King. Of these, four shall be nominated by the Congress by a majority of three-fifths of its members, four shall be nominated by the Senate with the same majority, two shall be nominated by the Government, and two by the General Council of the Judicial Power (Article 159 of the Constitution).

[134] The Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme Courts (Article 135 of the Constitution).

[135] The President, Vice-President, six other full members and three alternate members of the Constitutional Court are appointed by the Federal President on the proposal of the Federal Government. The other six members and three deputy members are appointed by the Federal President, on the proposal of the National Council, which will submit the names of candidates for the positions of three full members and two deputy members, and of the Federal Council, which will submit the names of candidates for the positions of three full members and one deputy member (Article 147 of the Constitution).

[136] Three members of the Constitutional Court are appointed by the President of the Republic, three are elected by Parliament, and three are appointed by the Supreme Court (Article 88 of the Constitution).

[137] Three judges are appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania (Article 144 of the Constitution).

[138] The Constitutional Court comprises nine members appointed by the President of the Republic, including three on his own initiative, three appointed by Parliament in Congress and three appointed by the Superior Council of the Magistrature (Article 158 of the Constitution).

[139] Article 92 of the 1980 Constitution provides that three members of the Constitutional Court are elected by the President of the Republic, four are elected by Congress (each of the two assemblies electing two members) and three are elected by the Supreme Court. Article 378 of the draft Constitution submitted to the President on July 4, 2022, rejected by the referendum of September 4, 2022, stipulated that four members of the Constitutional Court were to be appointed by the two houses of Parliament combined, three by the President of the Republic and four by the Council of Justice.

necessary collaboration between the different powers: for example in Slovakia,[140] Slovenia,[141] the United States,[142] Lithuania,[143] Croatia,[144] the Czech Republic,[145] Argentina,[146] Mongolia,[147] Luxembourg[148] or Estonia.[149]

It is therefore quite rare for parliaments not to intervene at all: in this case, the appointment is based on a duality between the executive and the judiciary, as in Algeria,[150] Australia,[151] and mainly in northern European countries. These countries have not set up a judicial body for

[140] In Slovakia, for example, parliament submits a list of names to the President of the Republic (double the number of judges to be appointed). This list is itself based on proposals made (according to the Constitutional Court Act of October 24, 2018 (Article 15)), by the various bodies of power (members of parliament, the government, the president of the supreme court, the first attorney general, professional associations of lawyers, academic institutions, and the president of the Constitutional Court.

[141] Members of the Constitutional Court are appointed by an absolute majority of the members of the lower house, on the proposal of the President (Article 163 of the Constitution).

[142] The nine judges are appointed by the President with the advice and consent of the Senate (Article II, Section 2 of the Constitution).

[143] The Seimas (unicameral parliament) selects three candidates for the post of Constitutional Court judge from among those proposed by the President of the Republic, three others from among those proposed by the President of the Seimas and three others from among those proposed by the President of the Supreme Court; and they are appointed judges by the Seimas (Article 103 of the Constitution).

[144] The thirteen judges making up the Constitutional Court are elected by a two-thirds majority of the members of the Croatian Parliament (Article 126 of the Constitution).

[145] The fifteen judges of the Constitutional Court are appointed by the President of the Republic with the consent of the Senate (Article 84 of the Constitution).

[146] Members of the Supreme Court are appointed by the President with the consent of 2/3 of the members of the Senate (Article 99.4 of the Constitution).

[147] The members of the Constitutional Court are appointed by the State Great Hural (the Parliament), three on the proposal of the President, three on the proposal of the Supreme Court, and three on its proposal (Article 65 of the Constitution).

[148] Some members of the Constitutional Court are appointed by statute (such as the President of the Superior Court of Justice and the President of the Administrative Court, as well as two members of the Court of Cassation: see below the question of the design of a judiciary-compatible appointment procedure). But five magistrates are also appointed by the Grand Duke on the assent of the Superior Court of Justice and the Administrative Court (Article 112 of the Constitution).

[149] The Riigikogu (unicameral parliament) appoints the members of the State Court, which is Estonia's supreme court, on the proposal of the President of the State Court (Article 65 of the Constitution).

[150] Article 186 of the Constitution: The President of the Republic appoints four members to the Constitutional Court, the Supreme Court elects one member, the Council of State elects one member and law professors elect six members from among themselves.

[151] Members of the Supreme Court are appointed by the Queen's representative on the proposal of the Prime Minister, after consultation with the government and at the suggestion of the Attorney General, who has consulted the Attorneys General of the various federated states (Article 72 of the Constitution and Section 6 of the *High Court Act* 1979).

constitutional review, but in which constitutional review is diffuse and more or less open. Examples include Denmark,[152] Ireland,[153] Sweden,[154] Norway[155] and Greece.[156]

Conversely, the Venice Commission considers a system in which parliament alone have jurisdiction to be "satisfactory",[157] as in Germany, where the two chambers of the Parliament (the Bundestag and the Bundesrat), each have equal powers of appointment to the Federal Constitutional Court, insofar as the two assemblies each elect eight judges.[158] This is not a rare occurrence, not only in Germany but also in Belgium,[159] Hungary,[160] Poland,[161] Latvia,[162] Switzerland,[163] Portugal in some respects,[164] and Peru.[165] This is undoubtedly because, unlike the case where the executive is in control of the procedure, exclusive appointment by parliament implies an obligation for several people selected by direct or indirect popular suffrage, and possibly from different party backgrounds, to get together to discuss the matter. Moreover, when parliaments are bicameral, and the two assemblies are the product of distinct institutional processes (as in federal Germany where the Bundesrat is drawn from the *Länder* and the Bundestag from the direct suffrage of German voters). Parliament's power of appointment appears therefore to be the fruit of a necessary deliberation between distinct interests. The idea is that several interests, which represent the core of the democratic political system, work

[152] Constitutional review is diffuse, and the Supreme Court is made up of career magistrates appointed by the executive, assisted by the judiciary.
[153] The President formally appoints Supreme Court judges on the recommendation of the Government, which in turn relies on the recommendations of the Advisory Council on Judicial Appointments, chaired by the President of the Supreme Court (Court website, www.supremecourt.ie).
[154] Supreme Court judges are appointed by the government after a public consultation process (Court website, www.domstol.se).
[155] The King in his council – the government – appoints Supreme Court judges following the "public" opinion of the Judicial Appointments Committee after hearing the selected candidates: see Iris Nguyên-Duy and Jean-Baptiste Pointel, "La Cour suprême et le contrôle de constitutionnalité des lois en Norvège" [The Supreme Court and the review of the constitutionality of laws in Norway], *Les nouveaux Cahiers du Conseil*, 2016, No53.
[156] Disseminated control is exercised by the various high courts (the Cour de Cassation, the Conseil d'Etat and the Cour des Comptes), and by the Special Superior Court since 2001, made up of members of the former, whose most senior magistrates are appointed by the executive, and all others are appointed by decision of the Conseil Supérieur de la Magistrature.
[157] Vademecum *on constitutional justice*, *op. cit.* p. 9.
[158] The Head of State's formal power to appoint members does not make him or her a political force capable of influencing Parliament's choice. Nevertheless, in countries where the Head of State is moving towards becoming a political authority, with varying degrees of success depending on the personality of the Head of State, the latter may wish to use his (her) formal power of appointment as a power of prevention, as, for example, the President of Poland did from the end of 2015.
[159] Twelve judges formally appointed by the King from a twofold list presented alternately by the House of Representatives and the Senate. This list is adopted by a majority of at least two-thirds of the votes cast by the members present.
[160] The National Assembly (unicameral parliament) appoints the members of the Constitutional Court (Article 1 of the Fundamental Law).
[161] The fifteen judges are nominated by the Sejm and appointed by the President, who in principle has only formal powers (Article 194 of the Constitution).
[162] The Saeima (unicameral parliament) appoints the members of the Constitutional Court by an absolute majority of its members (Article 85 of the Constitution).
[163] The members of the Federal Supreme Court are appointed by the Federal Assembly: i.e., by the two chambers of Parliament combined, the National Council as lower house and the Council of States as upper house (Articles 168 and 157 of the Constitution).
[164] Ten judges of the Constitutional Tribunal are appointed by the Assembly of the Republic (single chamber of Parliament) and three others are co-opted by the former (Article 222 of the Constitution).
[165] Members of the Constitutional Court are elected by the Congress of the Republic (single chamber of Parliament, Article 201 of the Constitution).

together to appoint the guardians of the constitution. Pluralism is thus at the origin of constitutional jurisdiction.

This question of deliberation and collaboration has also been the subject of controversy in Germany, a controversy in which the Court itself has been involved.[166] Until 2019, the election of constitutional judges by the Bundestag was indirect, in the sense that it was an electoral commission made up of 12 members that elected the judges, without going through a vote in a plenary session. The matter was referred to the Constitutional Court, which handed down a decision on June 19, 2012, in which it ruled that the Constitution leaves the choice of how judges are elected to the legislature, and that, despite recurrent criticism, the latter has so far not taken the opportunity to reform this system.[167] While it considers that the indirect election of judges to the Federal Constitutional Court limits the participation rights of all deputies who are not members of the electoral commission (§C/ aa/ of the decision), "entrusting the election of federal constitutional judges to an electoral commission whose members are subject to the obligation of confidentiality (Article 6, paragraph 4 BVerfGG) is justified by the legislative objective of consolidating the Court's reputation, confidence in its independence and the need to ensure its ability to function" (§C/ cc/ of the decision). At the time, the President of the Bundestag, Norbert Lammer, openly regretted the Court's decision and its double standards, since a few weeks earlier it had stressed the importance of the legislature's deliberations in plenary session.[168] Finally, § 6 of the Federal Constitutional Court Act of March 12, 1951, was amended by Article 4 of the Act of November 20, 2019, providing that "(1) The judges appointed by the Bundestag shall be elected *on the proposal of* the committee referred to in paragraph 2 without debate and by means of a secret ballot" (emphasis added), and that "(2) (…) Each parliamentary group may propose a list of candidates for this committee. The number of members elected from each list is determined according to the highest average rule'(d'Hondt meth"d)".

In any case, the participation of different political forces is as satisfactory in principle as it gives rise to distinct and often problematic practices. In Italy, for example, it has become customary for the five seats on the Constitutional Court filled by the Parliament to be shared between the most powerful political parties, according to their representation in Parliament. Negotiations are not public and, as we saw in the first part of this study, regularly lead to vacancies on the Constitutional Court.[169]

The involvement of different branches and the requirement of a qualified majority in parliament do not, in any case, necessarily imply real pluralism, insofar as the partisan forces involved appear to be much more confrontational than collaborative. This trend towards the polarization of the political arena seems to have become more pronounced in Western democracies in recent years. In January 2020 in Belgium, a candidate proposed by a party was rejected for the first

[166] See, for example, Stefan Ulrich Pieper, *Verfassungsrichterwahlen* [The election of constitutional judges], Duncker & Humblot Gmbh, 1998.
[167] BVerfGE 131, 230 "Bundesverfassungsrichterwahl" [The election of federal constitutional judges], June 19, 2012.
[168] In an op-ed published on October 17, 2012 in the *Staat und Recht* section of the electronic version of the *Frankfurter Allgemeine Zeitung* (wwx.faz.net*),* referred to by Maria Kordeva, "Section 2: La justice constitutionnelle ou la garantie juridictionnelle du principe de séparation des pouvoirs" [Section 2: Constitutional justice or the jurisdictional guarantee of the principle of separation of powers], *Revue générale du droit*, website of the Chair of French Public Law at Saarland University, 2020, number 53192 (www.revuegeneraledudroit.eu/?p=53192).
[169] Anna Chmielarz-Grochal, Marzena Laskowska, Jarostaw Sutrowsk, "Selección de magistrados constitucionales. Aspectos legales y políticos...," *op. cit.* p. 500.

time, namely Zakia Khattabi of the "Eco" party, and was rejected a second time in May 2020, following an aggressive campaign against her on social networks. A professor of constitutional law, who openly states that he does not share Ms. Zakia Khattabi's convictions, and is even "bristling" at some of her positions, nevertheless considers this rejection to be a "wound to Belgian federalism" and that the Constitutional Court "would have been honored to count her among its members".[170] In the USA, the first woman appointed to the Supreme Court, Sandra Day O'Connor, in 1981, was confirmed by the Senate with 99 votes out of 100; the first black judge, Thurgood Marshall, was confirmed by the Senate in 1967 by 69 votes to 11, while Justice Kentanji Brown Jackson, the first black woman, was confirmed by the Senate in 2022 only after bitter, even violent hearings, and with only 53 votes.

For the time being, this multi-party cooperation still seems to be working well in Germany. The two-thirds majority requirement means that Germany's two major parties, the Christian Democrats (CDU/CSU) and the Social Democrats (SPD) have to work together. They alternately nominate judges for the two senates. The "smaller" coalition parties (the Greens and the FDP) are allowed to nominate their own candidates from time to time, in agreement with the major parties.[171] In practice, the election of judges to the Federal Constitutional Court is based on a compromise between the major parties, within selection committees internal to the parliamentary groups, so as to achieve the two-thirds majority required for each election.[172] In a study devoted to the judges of the constitutional courts of the German *Länders*, Werner Reutter considers that, while democracy and the separation of powers govern the appointment of constitutional judges, "there is no evidence of a one-sided party politicization of state constitutional courts".[173] Yet the situation of the Federal Constitutional Court is less clear.

While the polarization of the political field is not something that can be controlled legally, the effects induced by the majority requirements are nevertheless important to the research here.[174] Such requirements can work "well" or "badly." The most frequent effect of the qualified majority requirement is blockage and delays in appointing judges, leading to vacancies which often force the court to operate with a reduced, or even a very much reduced number of members. This is why the Venice Commission, while advocating a system of qualified majority nomination for the election of candidates to a constitutional court, recommends the introduction of "appropriate anti-deadlock mechanisms."[175] It is also argued that to avoid blockages, and despite the theoretical democratic advantages of appointment through the collaboration between several bodies and/or a decision by a qualified majority of the deliberative body, "parallel" appointment systems would be better, following the example, say, of the French system. For Guillaume Tusseau, one of the effects of qualified majorities is that this requirement excludes any candidate with more radical views, and politicizes appointments even more strongly.[176] But the "French-style" parallel appointment system produces no other result,

[170] Marc Uyttendaele in an opinion published on May 18, 2020 on the *Le Vif* website (www.levif.be).
[171] See Benjamin G. Engst, Thomas Gschwend and Sebastian Sternberg, "Who reaches the Bench?", in Benjamin G. Engst, Thomas Gschwend and Sebastian Sternberg, *Who reaches the Bench?.., op. cit.*
[172] See Bettina Schöndorf-Haubold, *Study by the European Parliament Research Service*, - PE 593.504, Comparative Law Library, November 2016, p. 6.
[173] Werner Reutter, "German State Constitutional Courts: The Justices," *German Politics & Society*, 2021, vol. 39, Issue 2, p. 122.
[174] See, for example, Jose Julio Fernandez Rodriguez, *La justicia constitucional european ante el siglo XXI* [European constitutional justice in the 21st century], Madrid, Tecnos, 2002, p. 42.
[175] Venice Commission, CDL-AD (2017) 001, *Slovak Republic - Opinion on questions relating to the appointment of Judges of the Constitutional Court,* 10-11 March 2017, §58. For an overview of these mechanisms, see Part I of this study, "*Some technical and legal solutions to appointment bottlenecks,"* above.
[176] See Guillaume Tusseau, *Contentieux constitutionnel comparé*, *op. cit.* n°509, p. 487.

namely a body whose members have no clear-cut differences of opinion, and which produces no real substantive discussion of constitutional norms and their scope.[177]

If, therefore, political pluralism in the composition of the constitutional court is a good thing, it seems impossible to ensure it through the inclusion or exclusion of this or that political body, or through the rules for deciding on appointments. Otherwise, these rules would be counter-productive: culture, political configuration and practice always seem to be able to thwart the ambitions nurtured by a thought-out and controlled organization. Perhaps this is part of the reason why much attention has been paid in recent years to the specific question of the diversity of judges' profiles, and how to achieve this. Rather than relying on the effects of a procedure based on pluralism, it is the pluralism of guardians that could be imposed.

2.2. Guardian pluralism versus homogeneity

In the early 2010s, the debate on constitutional reform and the independence of judges within British institutions was certainly divisive on the question of how they should be appointed, but also brought out a consensus on the issue of their necessary diversity: "there is not really much dispute," said former Secretary of State for Constitutional Affairs Lord Falconer, for example, "that the judiciary is insufficiently diverse, and that that has an impact, to some extent, on people's perception of the judiciary."[178] In 2015, Lady Hale, Deputy President of the Supreme Court and future President of the Court, also pleaded for this diversity and considered that the English should be ashamed of the sociological state of the judiciary. Since her appointment in 2004, she states that "[o]ne might have hoped that the opportunity would have been taken to achieve a more diverse collegium. It has not happened. All of those 13 appointments were men. All were white. All but two went to independent fee-paying schools. All but three went to boys' boarding schools. All but two went to Oxford or Cambridge. All were successful QCs in private practice."[179] The constitutional basis for the need for judicial diversity is nevertheless a matter of debate. Two possible bases have been proposed: the principle of the rule of law, and the democratic accountability of the courts.[180] For the Venice Commission, "Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism,"[181] insofar as "[s]ociety is necessarily pluralist – a field for the expression of various trends, be they philosophical, ethical, social, political, religious or legal." The Commission goes on to say that "the legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions."

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[177] See *La Constitution maltraitée. Anatomie du Conseil constitutionnel*, [The mistreated Constitution. An Anatomy of the Constitutional Council], *op. cit*. See also the interesting study on Israel's High Court of Justice and the question of the relationship between the homogeneity of the appointing authorities, of judges and the ensuing jurisprudence, Gad Barzilai, Maoz Rosenthal, Assaf Meydani, "The Personalization of Judicial Review...," *op. cit.*

[178] House of Lords, Select Committee on the Constitution, *Judicial Appointment Process...*, *op. cit,* p. 237.

[179] Remarks reported in Owen Bowcott, "Lady Hale: supreme court should be ashamed if diversity does not improve," *The Guardian*, November 6, 2015.

[180] Erin Delaney, "Searching for Constitutional Meaning in Institutional Design...," *op. cit.* p.763.

[181] Venice Commission, 1997, CDL-STD(1997)020, *The Composition of Constitutional Courts*, p. 21.

Determining criteria to promote diversity is a delicate exercise and one that remains largely unfinished to this day. Diverse "sensibilities" and "opinions" can only be assessed on the basis of objective criteria relating to a person's "external" qualities: skin color, gender, language, religious or community affiliation. The criteria sometimes used generally depend on a country's history and political structure (sub-Section 2.2.1). But there is one criterion for recruiting judges that is shared by most countries in the world, and whose consequences is to stifle the effects of sought-after diversity (sub-Section 2.2.2), even though these consequences are not well established and their very principle may raise problems, particularly with regard to the judicial notion of impartiality (sub-Section 2.2.3).

2.2.1. The political and cultural framework of the diversity criteria for guardians of the constitution

Debates about the ethnic, community or linguistic origins of the guardians of the constitution take place above all in federal, multi-ethnic or multi-linguistic states, whereas other countries tend for the time being to limit the question of judicial diversity to that of women's representation. And while the former tend to lay down mandatory rules for the appointment of guardians of the constitution linked to the ethnic, linguistic, community or religious origin of candidates, the latter, with a few exceptions, do not pursue diversity through the law. Sex and gender diversity is still very much a matter of practice: with few exceptions, constitutions or laws do not impose it. However, the fact is that in many countries, parity in the courts of justice is part of a system in which the legal obligation or objective of parity is developing, whether in electoral or administrative matters. This is creating a particularly favourable and no doubt morally binding climate for the appointing authorities.[182]

* *Appointment of guardians based on gender.* Europe is characterized by the relatively high number of courts chaired by a woman (eight, including Norway, Switzerland, Poland, Serbia, Moldava, Macedonia, Lithuania and Albania). But their composition rarely achieves parity. Four courts have reached or even surpassed parity in favor of women (Germany, Serbia, Lithuania and Albania, three of which are also chaired by a woman), while eight are close to parity without having reached it (Macedonia, Switzerland, Norway, Ireland, Finland, Romania, Luxembourg and Latvia since September 1, 2022, with three women out of seven judges on the Constitutional Court). In four courts, one third of the judges are women (Belgium, France, Georgia and Portugal), while all the others are below these figures, though only one court has no women at all (the Constitutional Court of Turkey). The first group is made up of courts where at least one third of the members are women, and the second group is made up of courts where fewer than one third of the members are women (mainly Central and Eastern European countries, but also Italy, Spain, Sweden, Austria and Denmark). However, none of these countries (except for Belgium),[183] has specific provisions concerning the representation of women in constitutional or supreme courts. As a result, despite this somewhat mixed picture, the figures appear very high compared to those reported by the Venice Commission in 1997 for various European countries, which is surprising given how low these figures were at the time: "Although women do not form a minority group, several contributors mention women in this context. Although no female quota was observed as a legal requirement, a de facto representation of women on the court was observed in the case of Italy (one woman out of

[182] With a few exceptions, all the following information on the actual presence of women in the world's constitutional and supreme courts is up to date, as of August 24, 2022.

[183] The Court is to be made up of judges of different genders, with at least one-third of the smaller group represented in each of the two aforementioned professional categories.

fifteen judges), Belgium (one woman out of twelve judges), Austria (two women out of fourteen judges, and one woman out of six substitute members), France, Armenia, Lithuania (each having one woman out of nine judges)."[184]

The recent increase in the proportion of women in constitutional courts can be seen in a country like Germany, where nine of the sixteen judges on the Federal Court (four in the first Senate, five in the second) are women, even though 91 of the eleven judges sitting on the court at any one time since 1951 have been men, while only 20 have been women. However, the first female judge in the first Senate, Erna Scheffler, was appointed as early as 1951, while the second Senate did not have its first female judge until 1986, Karin Grasshof. A "milestone" was reached in both Senates in the mid-1990s, when women accounted for a quarter of the judges, rising to 50% or 60% today. Indeed, the failure to replace Evelyn Haas with a woman in 2006 (she was replaced by Wilhelm Schluckebier) prompted a small debate on the question of women's representation on the Constitutional Court.[185] As for the French Constitutional Council, its first woman member was Noëlle Lenoir in 1992, and there are currently three women out of nine members (not counting the two potential former Presidents of the Republic who are men).

However, women's representation in Europe is still relatively undiscussed in academic circles, in contrast, for example, to North America, where there are substantial studies and analyses on the subject.[186] Although it is hard to say what kind of representation is emerging – parity or otherwise – practice is also evolving in Europe. Recently, in April 2022, US President Joe Biden appointed a woman to the US Supreme Court, Ketanji Brown Jackson. The "lifetime" appointment of Supreme Court justices inevitably slows down the effects of a change in practice, but makes it even more notable, if not more lasting, since today the US Supreme Court has four women among its nine members.[187] Ketanji Brown Jackson is only the sixth woman to sit on the Court since its creation at the end of the 18th century, but since Sandra Day O'Connor's appointment in 1981, the trend has been continuous. In Canada, Bertha Wilson was the first woman to be appointed, in 1982, and by the end of 2022, with the confirmation of Michelle O'Bonsawin to replace Justice Michael Moldaver, the Court will include four women on its nine-member bench. Unlike the US Supreme Court, Canada's Court has already been chaired by a woman, for almost eighteen years.[188]

The Asian continent can perhaps be characterized by the fact that no court is chaired by a woman and, in addition to having one court on which no woman sits (Thailand's Constitutional Court), none achieves parity, even by a small margin: South Korea's Constitutional Court leads the way with three women out of its nine members. The first woman to sit on India's Supreme

[184] Venice Commission, 1997, CDL-STD(1997)020, *The Composition of Constitutional Courts*, p. 9.

[185] The debate was discussed on the *Süddeutsche Zeintung* website on the occasion of the presentation of the various judges making up the Constitutional Court, "Die Richter im Porträt," April 19, 2008 (www.sueddeutsche.de).

[186] See, for example, Sally J. Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter*, Routledge 2012; Ulrike Schultz and Gisela Shaw, *Gender and Judging*, Hart Publishing, 2013; Rosemary Hunter, "More than Just a Different Face? Judicial Diversity and Decision-making," *Current Legal Problems*, 2015, p. 1.

[187] Amy Coney Barrett was born in 1972, Ketanji Brown Jackson in 1970, Elena Kagan in 1960 and Sonia Sotomayor in 1954. Barring an accident, the US Supreme Court is therefore guaranteed female representation for some time to come.

[188] Beverley McLachlin from 2000 to 2017.

Court, Fatima Beevi, was appointed in 1986, and seven others have been appointed since. There are now only four women out of a total 31 members.[189]

The diversity inherent in the African continent is also reflected on this issue: there are three courts presided over by a woman (the Constitutional Court of Gabon since 1991, as well as the Supreme Courts of Ethiopia since 2018 and Kenya since 2021). There is one court with no women members (the Constitutional Court of Togo), one court that has surpassed parity (the Supreme Court of Angola), two courts that have almost reached it (the Constitutional Courts of Gabon and Côte d'Ivoire), and the others have low levels of women's representation. Two countries have specifically enshrined the gender issue in the composition of their courts: Guinea Conakry in an organic law of 2020,[190] before, however, the Constitutional Court was dissolved in September 2021; and South Africa, where Article 174 of the Constitution states that "The need for the judiciary[191] to broadly reflect the racial and gender composition of South Africa must be considered when judicial officers are appointed." Of the ten judges currently sitting on the Constitutional Court, three are women, illustrating the difficulty of taking this obligation into account in practice.

Finally, South America is the only part of the world where there is no constitutional or supreme court that does not include a woman. Two courts are currently chaired by a woman (the Constitutional Court of Colombia and the Constitutional Court of Suriname), and one court has surpassed parity in favor of women, that of Ecuador, whose constitution states that "in the composition of the Court, parity between men and women shall be sought" (the Constitutional Court currently includes five women out of nine members). Two courts are close to parity (the Constitutional Court of Colombia, which has four women judges out of nine members, and the Constitutional Court of Chile, which has four women judges out of ten members). The other courts, mostly supreme, generally have less than a quarter of their members in favor of women.

While parity is rare in constitutional and supreme courts, and made impossible de facto when there is an odd number of judges, some courts have moved in this direction, notably in Western countries where appointing authorities now seem to make gender diversity within the courts a criterion of their choice; but, as we have just seen, there are still major disparities, between and within continents.

* *The designation of guardians based on language, province of origin, ethnicity or religion*. In federal, multicultural or plurinational countries, this criterion may be legal or a moral obligation. In 1997, the Venice Commission observed that "[t]he representation of minority groups on the bench seems not to be a common goal,"[192] and noted that "[l]inguistic differences form the principal exception to this trend," pointing to Switzerland, Canada and Belgium. Today, the reality is more diverse.

In the case of Switzerland, Article 70 of the Constitution states that "[t]he Confederation and the Cantons shall encourage understanding and exchange between the linguistic communities." At present, the Federal Supreme Court is made up of three Italian-speaking judges, twelve

[189] According to Capucine Cannone, in 2018, only 73 of the 670 judges sitting in the country's various High Courts were women, a mere 11% ("Les femmes juges encore trop peu nombreux en Inde" [Still too few women judges in India], *Lepetitjournal.com*, July 30, 2021 (lepetitjournal.com).
[190] Article 4 al. 4 of organic law no. L/2020/0011/AN on the powers, organization and operation of the Constitutional Court of the Republic of Guinea: "The composition of the Court must take gender into account".
[191] Including the Constitutional Court.
[192] Venice Commission, 1997, CDL-STD(1997)020, *The Composition of Constitutional Courts*, p. 9.

French-speaking judges and twenty-three German-speaking judges, while Romansh is no longer represented.[193] Furthermore, the court's website states that the election of judges "takes place on the basis of linguistic, regional and specialization criteria, and takes into account the proportion of representation of the major political parties," and that, at present, the judges are "16 women and 22 men," clearly including the criterion of gender in the selection of judges.[194] A comparable case is that of Belgium, where Article 31 of the organic law on the Constitutional Court stipulates that of the twelve judges on the Court, six are French-speaking and "form the French linguistic group of the Court," and six are Dutch-speaking and "form the Dutch linguistic group of the Court."[195] It is also specified that "the Court shall be composed of judges of different sexes" and that "it shall include at least one third of judges of each sex."

The question of language may therefore come into play in countries with several official administrative languages, such as Canada (English and French) and Finland (Finnish and Swedish). In the former, Supreme Court judges must be bilingual, while in Finland there is no obligation, only that Swedish be minimally represented on the Supreme Court.

While Austria has a rather original arrangement, which might even seem anecdotal, in that of the fourteen members and six deputies of the Constitutional Court, "three of the full members and two of the deputies must have their permanent residence outside the federal capital, Vienna," "provincial" diversity can come into play in federal countries whose fragmentation is not very high. While it is impossible to ensure that all 50 American states are represented on the US Supreme Court, which has only nine judges,[196] this is more likely in a country like Canada, which has ten unevenly populated provinces for nine Supreme Court justices. Thus, by convention, six positions are distributed as follows: three for Ontario, two for the western provinces (Manitoba, Saskatchewan, Alberta and British Columbia) and one for the Atlantic provinces (New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland & Labrador). Although no provision has been made for the representation of India's 28 states in the composition of the Supreme Court, it nevertheless seems to count informally: for example, when a judge from one state retires, he or she is often replaced by a judge from the same state. Finally, the recent case of Bolivia may be mentioned, where the composition of the so-called "plurinational" Constitutional Court is intended to reflect the plurinational nature of Bolivian society, as enshrined in the Constitution, which recognizes the existence of different indigenous populations with their own identities. The result is that the appointment of judges by voters is divided between different territorial districts.

There are also a few special cases of "foreign" judges, due to the specificity of the country or its history, such as Monaco, Andorra or Liechtenstein, whose constitutional courts include members from neighboring countries. In Bosnia-Herzegovina, three judges are appointed by the President of the European Court of Human Rights and must not be citizens of Bosnia-Herzegovina or a neighbouring country, while the appointment of the six other judges is based on respect of the ethno-territorial particularities of Bosnia-Herzegovina.[197]

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[193] Figures as of August 24, 2022.
[194] https://www.bger.ch/fr/index/federal/federal-inherit-template/federal-richter.htm.
[195] Special law of January 6, 1989 on the Constitutional Court.
[196] On this point, however, Guillaume Tusseau reports that two customs have been identified throughout history: that of a seat reserved for the State of New York between 1806 and 1894, and for New England between 1789 and 1932, which have not endured, "Façonner le 'gardien de la conscience...," *op. cit.*, p. 64.
[197] Four judges are appointed by the Federation parliament (two by Bosnian representatives and two by Croatian representatives), and two judges are appointed by the Parliament of the Republic Srpska (the Bosnian Serb Republic).

Another issue that has generated a great deal of comment and controversy in recent years is that of constitutional judges belonging to so-called "visible" or indigenous and aboriginal minorities. This has been a major issue in Canada for example.[198] In 2021, it led to the appointment to the Supreme Court of a "non-white" judge who is moreover of the Muslim faith (Mahmud Jamal), and, in 2022, to the appointment of an aboriginal woman (Michelle O'Bonsawin).[199] The issue is also present in South America, where the multicultural and multi-ethnic character of the state is enshrined in most countries' constitutions, a structure that is sometimes reflected in the very composition of the state's main political bodies.[200] In the USA, the need for diversity is still highly controversial: the first black judge was appointed in 1967 and confirmed by the Senate by 60 votes to 11 (Thurgood Marshall), and he was replaced in 1991 by another African-American (Clarence Thomas), indicating that it might now be a "black" seat. But, the appointment of Ketanji Brown Jackson in April 2022 – a black woman – to replace Justice Stephen Breyer in July, gave rise to strong questioning of the need to conceive of the diversity of Supreme Court justices along racial and gendered lines. After a lengthy debate, she was confirmed by 53 votes, which constitutes fairly low support.[201] From this perspective, it should be noted that of the six women appointed to the US Supreme Court to date, two have also represented an ethnic minority: Latina in the case of Sonia Sotomayor in 2009, who is of Puerto Rican origin (this minority was then represented for the first time on the US Supreme Court); and black, in the case of Ketanji Brown Jackson in 2022.

This leaves the question of religious diversity, for which there seem to be no real rules anywhere. Practices are very diverse and do not lead to any kind of general conclusion. The issue is virtually non-existent in states that are culturally built around a single religion, such as those found mainly in Middle Eastern, where there has been no process of inclusion of minorities in the institutional system. As a result, judges tend to belong to the official religion. In a secular state like Israel, on the other hand, the issue is more sensitive, and the appointment of a Muslim judge to the Supreme Court in 2021 (Khaled Kabub) was a small political event,[202] just as President Abdel Fattah Al Sisi's first appointment of a Christian judge to Egypt's High Constitutional Court in February 2022 (Boulos Fahmy) was another.[203] In Europe, the criterion of religion, no more than that of belonging to a visible minority, is not currently one of the criteria to be taken into account when appointing guardians of the Constitution. It has never been raised in France, for example, where the possibility of allocating seats on the basis of religion would seem to run completely counter to the principle of *laïcité* (secularism) asserted by the French state, as is also the case in Italy. In the United States, it has been possible to identify practices concerning seats reserved for the Jewish and Catholic communities at one time, but it seems that this is now a thing of the past.[204] Recently, in December 2021, the difficult appointment of a Presbyterian pastor, André Mendonça, to the Brazilian Supreme

[198] See in particular. Eugénie Brouillet and Yves Tanguay, "The Legitimacy of the Constitutional Arbitration Process in a Multinational Federative Regime: The Case of the Supreme Court of Canada," *UBC Law Review*, vol. 45, 2012, p. 47-101.
[199] This latest appointment is for a seat to be filled by a candidate from Ontario: see the website of the Office of the Commissioner for Federal Judicial Affairs, www.fja.gc.ca.
[200] See the case of Bolivia described above, and Chile's draft constitution in July 2022, which was nevertheless rejected by referendum on September 4, 2022.
[201] Justice Clarence Thomas himself was only confirmed by 52 votes, but this figure was essentially due to the accusations of sexual harassment against him.
[202] *AFP*, "Première nomination d'un juge musulman à la Cour suprême," [First appointment of a Muslim judge to the Supreme Court], February 21, 2002, L'Orient-Le Jour website (www.lorientlejour.com). Arab Christian judges had also previously served on the Supreme Court.
[203] "Egypt: a Coptic Christian becomes president of the High Constitutional Court for the first time," *I24 news* website, February 9, 2022 (www.i24news.tv).
[204] See Guillaume Tusseau. Guillaume Tusseau, "Façonner le 'gardien de la conscience...," *op.cit.,* p. 64.

Court, highlighted the influence of religious communities in politics, from which the Court no longer appears to be exempt.[205] But in this case, the appointment reflected less a desire to diversify the composition of the Court than a clear ambition to influence decisions in a very specific direction, exactly as with Donald Trump's appointment of several very conservative justices to the US Supreme Court.

The question of the religion of judges is both an important issue and an unspoken one in the Supreme Court of India, a large federal, multilingual and multidenominational country. Surprisingly, there is no rule of law concerning diversity in the appointment of judges to the Supreme Court and the high courts of India's various states. In this respect, "there is a complete lack of authoritative literature or even statistical information on the religion and caste of all judges appointed to the higher judiciary. No official record is maintained on any grounds, other than the list of names of the judges appointed."[206] There are, however, a few doctrinal studies on the subject that show variations in religion over time:[207] while in 1980, 4.3% of the 351 judges making up the high courts and the Supreme Court were Muslims, this percentage rose to 6.8% in 1988, before falling back to 4.5% in 2021.[208] The Supreme Court has only one Muslim judge out of a total of thirty-three, which is "an alarmingly low percentage of three per cent," given that Muslims account for 14-15% of India's total population, as Varalika Dev points out. On the other hand, even though caste was officially abolished by the 1947 Constitution, it seems to have played a major role in judicial appointments, as a former judge of the Supreme Court and Bombay High Court confessed in a book he published in 2005,[209] and which has been confirmed by several other testimonies. For example, a significant number of Supreme Court judges were Brahmins or members of the upper castes,[210] while only one seat had been reserved for a lower caste.[211]

In another multi-faith country like Lebanon, on the other hand, appointments to the Constitutional Council are very explicitly linked to community and religious issues, as is the case for almost all the country's other political institutions. There is thus a confessional distribution of judges such that the body includes five Christians (two Maronites, two Greek Orthodox and one Greek Catholic) and five Muslims (two Shiites, two Sunnis and one Druze).[212]

Listing the particularities to be taken into account or not in the different countries, according to their history, structure and/or evolution of social mentality, can highlight the difficulty of constituting a court whose diversity seems societally "just" at a given moment, and cause a kind

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[205] The Senate confirmed the nomination by 47 votes to 32, the lowest score ever obtained for this type of appointment.
[206] Varalika Dev, "Judicial diversity in India...," *op. cit*.
[207] George H. Gadbois Jr, *Judges of the Supreme Court of India. 1950-1989*, Oxford University Press, 2011 and Abhinav Chandrachud, *The Informal Constitution. Unwritten Criteria in Selecting Judges for the Supreme Court of India*, Oxford University Press, 2020. These two studies are cited by Varalika Dev, "Judicial diversity in India...," *op. cit*.
[208] *Ibid*.
[209] Parshuram Babaram Sawant, *Judicial Independence: Myth and Reality*, Mulnivasi Publications, 2005.
[210] Varalika Dev notes that "to date, at least fourteen of the forty-eight judges of the Supreme Court have been Brahmins, and in total almost 30% of the judges have been members of the upper castes, a figure far higher than their representation in the population."
[211] Like the "SC" seat for *Scheduled Caste*: two judges currently come from this group: i.e., 6% of the Court's composition, even though it represents over 16% of the population, *ibid.*
[212] See Alexis Blouet. Alexis Blouet, "Le Conseil constitutionnel dans le système politique libanais: éclairage sur une institution 'discrète'" [The Constitutional Council in the Lebanese political system: shedding light on a 'discreet' institution], *Revue Française de Droit Constitutionnel*, 2021, vol. 127, no. 3, p. e9.

of "quota competition" (i.e., a competition between different types of minorities about who should be given priority).[213] This issue has arisen in Canada, for example, where it has been argued that the bilingualism requirement hindered the appointment of an Aboriginal or racial minority judge, an argument that would no longer be relevant today insofar as "there is no longer a shortage of qualified bilingual jurists in Canada," according to professors Stéphanie Chouinard and François Larocque.[214] Guillaume Tusseau, for his part, considers the effects of a form of obligation to diversity to be problematic, citing the example of South Africa, where the first vacancy on the Constitutional Court in 1999 required a "choice" between a white, homosexual and HIV-positive judge and a black judge (the latter was chosen), and where later, in 2001, the debate concerned the advisability of appointing a lesbian or a blind person.[215]

To the general question of *whether or not constitutional or supreme jurisdictions should be organized according to criteria of sexual, gender, religious, ethnic or linguistic diversity*, a positive or intuitive response in principle might seem to be the obvious answer. But it is not at all consensual: depending on the country, all these criteria are discussed, or, on the contrary, are not mentioned at all.

2.2.2 Permanent appointment criteria limiting the desired diversity

Choosing the "right" criterion depends on how a society understands the idea of diversity at a given moment.[216] Such a criterion is all the more difficult to determine if the pool of nominable persons is highly homogeneous, thus reducing differences between judges, and between judges in different countries and continents. However, most countries impose conditions in their constitutions (or in their laws that implement them) that may actually hinder the desired diversity of judges and courts.

This is perhaps not the case for age, which is frequently referred to in the constitution or the law organizing constitutional justice. It is very delicate to draw general conclusions as to the homogeneity of judges implied by their belonging, or rather not belonging, to the youngest age groups. The idea behind setting a minimum age that would distinguish them from younger (and less experienced) personalities is far from having been established by the facts, but, for constituents or legislators, a minimum age is undoubtedly seen as synonymous with prior experience and a mind that is both wiser and sharper. Considering a Turkish reform, the Venice Commission noted the frequency of this rule, but also that the age set at fifty, the highest in Europe, nevertheless seemed "excessive."[217] The minimum age is now set at forty-five in Turkey. The minimum age most often prescribed is forty (e.g., in Ukraine, the Czech Republic, Slovakia, Serbia, Mongolia, Afghanistan, Belgium, Latvia and Germany). It can be lower, set

[213] This expression is found in Guillaume Tusseau, "Façonner le 'gardien de la conscience'...," *op.cit.,* p. 66.
[214] Stéphanie Chouinard and François Larocque, "Bilinguisme et diversité à la Cour suprême, pour en finir avec un faux débat" [Bilingualism and diversity at the Supreme Court: putting an end to a false debate.], *La Presse* website, June 6, 2021 (www.lapresse.ca).
[215] Guillaume Tusseau, "Façonner le 'gardien de la conscience...," *op.cit.,* p. 66.
[216] On the occasion of the 100th anniversary of the Supreme Court of Iceland in 2022, a document was published in which an article sought to answer the question: "How would the Supreme Court be composed if it reflected Icelandic society 100 years after its creation?," applying the constitution's non-discrimination clause with regard to sex, religion, opinion, national origin, race, color, economics or ancestry. The study concludes there should be one immigrant among the seven justices making up the Supreme Court, since one in seven citizens now belongs to this group, the male-female ratio of justices would be equal or nearly so, and one of the justices would have a disability. See "Hæstiréttur 100 ára: Jafnrétti og fjölbreytni við skipun dómara" [100 years of the Supreme Court: Equality and diversity in the appointment of judges], *Réttur Cabinet* website (www.rettur.is).
[217] Venice Commission, CDL-AD (2004)024, *Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey.*

at thirty years (e.g., Argentina) or thirty-five years (e.g., Paraguay, Georgia, Iceland or Brazil). It may be higher, set at forty-five years (e.g., in Turkey, Peru, Côte d'Ivoire or Guinea) or fifty years (e.g., Algeria). Most often, the age requirement is explicit, either in the text of the constitution or in the law governing the organization of the courts. But sometimes it derives from the fact that the condition for appointment to a constitutional or supreme court is eligibility for a political body, often the second chamber (e.g., in Argentina[218] or in the Czech Republic). While the age requirement is often lacking, it is obviously found in the citizenship requirement (e.g., in Ukraine, the Czech Republic, Sweden, Slovakia, Georgia, Brazil, South Africa and Latvia)[219] and in the right to vote (e.g., in Switzerland, Afghanistan, Bosnia, Slovakia, the Czech Republic and Germany), but above all, as we shall see later, in the fact that guardians are required to have a minimum level of higher education, or to work in a profession that can only be entered after several years of higher education. This places the pool of nominees beyond the simple voting age in most cases (set at between sixteen and twenty-five, depending on the country). Not all countries set age requirements, or experience requirements, which also imply a minimum age. However, practice shows that under the age of forty, there is little chance of being appointed as a guardian of the constitution in a constitutional or supreme court. Some countries have also "retroceded" by tightening up the requirements laid down in the Constitution: Georgia, for example, had written into its Constitution of 1995 the need for a member of the Constitutional Court to be thirty years old and have a higher education in law, and eventually raised the age to thirty-five, requiring a minimum of ten years' professional experience and a "distinguished professional qualification."[220]

While the effects of age have not been proven, it is possible that comparable training and membership in the same profession may foster a common way of thinking. A look around the world shows that the world's constitutional and supreme courts are made up of lawyers, most of them experienced. And very often, members of constitutional and supreme courts have been trained in the same universities and/or *grandes écoles*, and have pursued activities or professions that bring them into contact with people with comparable profiles. Depending on the country, lawyers are more or less accessible, and belong more or less openly to a country's political and economic elite, so that their "separation" from other professions and professional circles, particularly from the point of view of reasoning and argumentation, appears quite clear-cut everywhere. Indeed, for many observers, they constitute a "world apart," likely to thwart the objective of diversity sought in the composition of constitutional or supreme courts.[221] In particular, the homogeneity of their method and reasoning are targeted, and lawyers learn about the world and its needs through the same intellectual channels.[222] This may reduce the decision-making group's ability to assume its responsibilities.[223] The Venice Commission thus considers that "an excessive legal specialisation could undermine the diversity of the composition of some constitutional jurisdictions."[224] The phenomenon of aligned thinking and solutions is also

[218] In Argentina, Article 55 of the Constitution stipulates that to be eligible for election to the Senate one must "enjoy an annual income of two thousand pesos or its equivalent."
[219] Some countries, such as Paraguay, Peru and Venezuela, specify that you must be a citizen "by birth."
[220] Article 60 of the Constitution.
[221] See, for example, Lee Epstein, Jacques Knight and Andrew D. Martin, "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the US Supreme Court," *California Law Review*, July 2003, vol. 91, no. 4, p. 903. See also Daicoff, *Lawyer, Know Thyself. A psychological Analysis of Personnality Strengths and Weakeness*, Americain Psychological Association, APA PsycBooks, 2004.
[222] For an analysis of this effect, see Adrian Vermeule, *Law and the Limits of Reason*, Oxford University Press, 2009 and the aforementioned article, Lee Epstein, Jacques Knight and Andrew D. Martin, "The Norm of Prior Judicial Experience...," *op. cit*.
[223] *Ibid*. p. 908.
[224] Venice Commission, 1997, CDL-STD(1997)020, *The Composition of Constitutional Courts*, p. 10.

accentuated by exchanges and the sharing of judicial practices worldwide, with the result that solutions are exchanged, as are methods of reasoning. However, these observations are not shared by all observers and appointing authorities. In almost every country, the constitution or a law stipulates that members of constitutional or supreme courts must be qualified in law, either and/or through their training, profession and experience. Yet these requirements vary from country to country. While Denmark requires candidates to pass a test consisting of delivering a judgment in a number of cases submitted to the Court, one group of countries only sets requirements for training in law (or "in law and politics" as in Mongolia), without requiring them to be members of a specific legal profession. In Ukraine, judges must have a "higher legal education and professional experience in the sphere of law." In Poland, they are chosen among persons distinguished by their knowledge of the law, and in Georgia judges must have received a "higher legal education." In Morocco, the requirement includes a "high attainment of knowledge [training] in the juridical domain and of a judicial competence, doctrinal or administrative", and in Côte d'Ivoire judges are to be chosen "among persons recognized for their proven competence and expertise in legal or administrative affairs." In Belarus, they must be "among highly qualified specialists in the field of law, who as a rule have a scientific degree", or in Brazil they must have "notable legal knowledge." Germany is a little more precise, specifying that a candidate for the Constitutional Court, who is not a judge in a federal supreme court, must meet the conditions for admission to the judiciary or the public prosecutor's office, or be a qualified jurist and entitled to exercise a legal profession.

Another group of countries consider that constitutional or supreme court judges must specifically belong to professions in the legal field, and more often than not have experience in these professions, without mentioning the training received, which nevertheless seems necessary for access to these professions. Here again, this condition is laid down with varying degrees of precision: judges are chosen from among "legal experts" in Slovenia, "distinguished jurists" in Bosnia and Macedonia, or with "fifteen years of professional experience" in Bulgaria. Croatia specifies possible professions without closing the door to others, since Constitutional Court judges are chosen "among notable jurists, especially judges, public prosecutors, attorneys and university law professors." The three professions of judge, lawyer and university law professor are indeed covered in many other countries, either only one of them (lawyer in Argentina and judge in Luxembourg, or in Germany for three seats out of eight in each senate), or two of the professions (judge and lawyer in Malta and Chile), or all of them (in Italy, Turkey, Venezuela, Peru, Denmark, Spain, Senegal and Ireland, with the latter two countries still opening the door to other professions). Lastly, some countries stipulate that some members of the constitutional or supreme court must belong to a specific profession: Burundi specifies that at least four of the "jurists distinguished by their moral integrity, impartiality, and independence" must be career magistrates; Portugal stipulates that six judges appointed by the Assembly of the Republic or co-opted must be chosen from among court judges, while the others must be chosen "among jurists."

What is considered sufficient experience also varies from country to country: from three years for Iceland or Germany, to twenty years for Italy, Senegal, Algeria or Turkey (with the exception of law professors, for whom no age requirement is set) and Guinea (for those jurists who will make up the Court), via five years for Belgium or India (for those chosen from among the judges). The range is therefore wide, and a number of countries set this experience at ten years (e.g., the Czech Republic, Ukraine, Lithuania, Georgia, Austria, Paraguay, Latvia and Peru for magistrates), twelve years (e.g., Malta or Ireland)[225] or fifteen years (e.g., Morocco,

[225] This experience must not have been interrupted for more than two years.

Slovakia, Serbia, Moldova, Spain, Bulgaria, Albania, Venezuela, Chile, Benin, Mali for lawyers only, and Peru for lawyers and university professors), with Argentina, Bolivia and Rwanda preferring eight years[226] and Romania eighteen years.

Finally, another group of countries requires a combination of training in law and practice and experience in a particular legal profession. In Lithuania, the Czech Republic, Slovakia, Serbia, Moldova, Albania and Romania, for example, a "higher education in law" and a certain period of practice in a legal profession are required, with similar wording in a group of Eastern European countries. Other countries are a little more specific about the training or professions concerned, such as Rwanda, which requires at least a bachelor's degree in law and at least eight years' professional experience in a legal profession (but five years for doctors of law). Afghanistan specifies that applicants must have "higher education in legal studies or Islamic jurisprudence as well as expertise and adequate experience in the judicial system of Afghanistan." Paraguay requires guardians to have a doctorate in law and "to have effectively exercised during the term of ten years, at least, the profession, the judicial magistrature or the university chair in juridical matter jointly, separately, or successively," while Austria requires completion of studies in law and political science, and some guardians are appointed "among judges, administrative officials, and professors holding a chair in law." Latvia, on the other hand, defines a minimum level, excluding the first degree of higher education as insufficient.

Finally, two countries specify the qualifications or skills required of persons appointed to the constitutional or supreme courts: Bolivia's constitution requires them to have a specialization "in the disciplines of constitutional law, administrative law or human rights law." Algeria does not envisage any specific profession or level of training, but a minimum of twenty years' experience in law, and above all "training in constitutional law", without specifying at what level or for how long. These two cases illustrate that, while constitutional justice is conceived throughout the world as involving dealing with law, envisaged overall as a discipline imbued with unity and coherence, more specific or in-depth knowledge of the constitution or fundamental rights is not considered indispensable.

Such unanimity on the necessary qualifications and experience of guardians of the constitution raises the question of how to think about exceptions to the qualification requirements for constitutional judges. Indeed, France, Switzerland and the United States do not set any conditions as to the qualities that constitutional guardians must possess, making their profile dependent on the practice of the appointing authorities. This could be an opportunity to consider diversity within constitutional or supreme courts based on professional and/or educational criteria. The Swiss Federal Court, for example, is made up exclusively of jurists, and while in the past purely political figures with no specific legal skills could be appointed to the American Supreme Court,[227] this has long ceased to be the case. Since President Dwight Eisenhower, only judges have been appointed to the Supreme Court (the *judges-only approach*).[228] In France, the situation is almost exactly the opposite: members of the Constitutional Council with advanced legal qualifications are rare, and all the Council's present members had political experience before their appointment. This means that there is no more diversity than would be the case if the Council were made up of experienced jurists. Moreover, this composition has the great disadvantage of tying the supervisory body to the very powers (executive and legislative) it is intended to control.

[226] Experience reduced to five years in Rwanda for doctors of law.
[227] See Guillaume Tusseau, "Façonner le 'gardien de la conscience...," *op. cit.*
[228] See sub-Section 3.2.2 below. *The impossible choice between the prevalence of opinions and legal qualifications.*

By contrast, it is worth looking at the few countries that have a certain degree of diversity in the backgrounds of their constitutional or supreme court members. Some countries, such as Belgium,[229] and several African countries such as Benin,[230] Guinea[231] and Mali only require legal training, competence or experience for some of their members. Mali provides an interesting configuration: of the three members appointed by the President of the Republic and the President of the National Assembly, "at least two" must be jurists, leaving the authorities free to appoint one, two or three jurists each. Togo, for its part, determines an inverse relationship between jurists and non-lawyers, since among the three personalities appointed to the Constitutional Court by the President of the Republic, the three appointed by the National Assembly and the three appointed by the Senate, at least one must be appointed "on the basis of their juridical competence." One country, Cambodia, does not limit the required competencies to the law, opening them up to administration, diplomacy and economics.

There are few advocates of methodological, professional and intellectual diversity among the guardians of the Constitution. In France, this rhetoric is mainly used to justify the fact that highly qualified and confirmed jurists are not appointed to the Constitutional Council, which is dominated instead by personalities with an essentially political profile. In France, there has been no serious reflection on the diversity of the profiles of the guardians of the constitution and how this should be viewed in terms of constitutional justice. On the other hand, the above-mentioned American authors consider that diversity in the backgrounds of judges will improve gender, racial and ethnic diversity, since these criteria alone would not suffice. For them, to have a positive impact on constitutional justice, they would have to be combined with professional diversity criteria.[232] In their view, attention should be paid to the professional background of nominees, "because increasing diversity on this dimension may lead to increases in diversity on other critical dimensions, but particularly gender and race/ethnicity."[233] It would therefore not be enough to create mechanisms to encourage groups under-represented in the justice system to take up legal careers, as intuitive reasoning would suggest.[234] On the contrary, there should be incentives to recruit guardians of the constitution from outside the legal profession. Rosemary Hunter, in her study of the effects of diversity on judging, points out that most quantitative studies carried out in the USA show no significant difference in judging based on gender, except when another criterion has been taken into account, such as political affinity.[235] Difference based on gender is supplanted "by a deeply acculturated set of norms and traditions of judicial decision-making to which all judges tend to adhere. These norms include deference to the separation of powers and a limited judicial role, adherence to precedent, incrementalism, and the upholding of 'fundamental principles' of the common law."[236]

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[229] Half of the members of the Constitutional Court must be chosen from among parliamentarians, while the other half are appointed from among jurists, the list of whom is set out in the special law on the Constitutional Court.
[230] Article 155 of the Constitution states that of the seven members, three are magistrates, two are "high-level jurists, professors or legal practitioners" and two are "personalities of high professional reputation."
[231] Two of the nine seats are allocated to "personalities recognized for their probity and wisdom," while the other members are magistrates, lawyers and academics.
[232] Lee Epstein, Jacques Knight and Andrew D. Martin, "The Norm of Prior Judicial Experience...," *op. cit.* p. 960.
[233] *Ibid*. p. 957.
[234] For example, David Neuberger, Chief Justice of the UK Supreme Court, believes that "*the biggest diversity deficit and inclusion problem for the legal profession is for those from less privileged educational, social and economic backgrounds,"* quoted by Tristan de Bourbon, *op. cit*.
[235] Rosemary Hunter*, "*More than Just a Different Face?...," *op. cit.* p. 126.
[236] *Ibid*.

2.2.3 The ambiguities of the desired diversity

Considered one by one, none of the possible recruitment criteria alone is likely to guarantee better constitutional justice and more diverse justice: they must be considered both in relation to each other and in relation to other factors influencing the administration of constitutional justice. The real impact of a particular appointment cannot be assessed on a case-by-case basis, and must always be considered in relation to the collective entity of the constitutional or supreme court as a whole. The real, desired or desirable effects of the conditions under which judges are recruited, taking into account who they are, must therefore still be examined. For the Venice Commission, "the composition of a constitutional court may and should reflect inter alia ethnic, geographic or linguistic aspects of the composition of society."[237] The debates, or lack of them, about who can and/or should be appointed as guardian of the constitution, nevertheless demonstrate that political theory, the political world and civil society involved in social organization, are still both groping and disunited. Joining forces with the Puerto Rican community, Sonia Sotomayor, while still a judge on the US Court of Appeals for the Second Circuit and not yet a member of the Supreme Court, declared that "our gender and national origins may and will make a difference in our judging."[238] But this reality remains difficult to establish. Several studies show – and intend to show – that diversity criteria do not influence the making of legal decisions,[239] even if we must also consider that many personal factors are likely to influence the way we make judgements.[240] When research is carried out, it is usually based on national specificities. Jorge Bercholc, confronted with the question of the distribution of powers between the various Spanish communities and the competence of the Constitutional Court to settle them (particularly in the case of Catalonia), has examined the effect of the representation of Spanish communities within the Constitutional Court and the process of appointing its members, based on the experiences of Canada and Argentina.[241] Generally speaking, however, reflection on the possible or desired effects of diversity within constitutional or supreme courts does not seem to constitute a subject of public interest that engages large numbers of voters. Beyond occasional research, it is above all the question of gender representation that stands out. This is the subject of the greatest number of studies, and the conclusions to be drawn from them are not self-evident.

For example, "[f]or virtually every study that has found that female judges behave differently than their male counterparts, there is one study that has found no differences between the two."[242] Moreover, Mary Jane Mossman has argued that the legal method is a method of reasoning that tends to privilege the *status quo* by being closed to the possibility of introducing

[237] Venice Commission, CDL-AD (2005) 039, *Opinion on proposed voting rules for the Constitutional Court of Bosnia and Herzegovina* §13.
[238] Fernando Muñoz León, "Not Only 'Who Decides': The Rhetoric of Conflicts over Judicial Appointments," *German Law Journal*, vol. 14, 2013, p. 1198.
[239] See, for example, Allison P. Harris and Maya Sen, "Bias and judging," *Annual Review of Political Science*, 2019, vol. 19, p. 241.
[240] See, for example, Jacques Faget, "L'art de juger et ses biais" [The art of judging and its biases] *Délibérée*, 2018, vol. 5, p. 27.
[241] Jorge Bercholc, "La designación de los magistrados de Tribunales y Cortes Constitucionales por su procedencia regional. Los casos de España, Canadá y Argentina" [Appointment of judges in Constitutional Courts by regional origin. The cases of Spain, Canada and Argentina], *Revista Argumentos*, 2015, n° 1 p.71.
[242] Lee Epstein, Jacques Knight and Andrew D. Martin, "The Norm of Prior Judicial Experience...," *op. cit.* pp. 956-957. The authors also refer to Lee Epstein and Lynn Mather, "Bervely Blair Cook: The Value of Eclecticism," *in* Nancy Maveety ed., *The Pioneers of judicial behavior*, 2002 and Michael E. Solimine and Susan E. Wheatley, "Rethinking Feminist judging," *Indiana Law journal*, vol. 70, 1995; p 891.

feminist theory into the administration of justice.[243] In other words, women were "admitted" to the judiciary only on condition that they conform to the dominant (male) ethic. Several studies and testimonials support this.[244] At the same time, Rosemary Hunter raises the question of why we want to introduce diversity into the judicial system.[245] There are six arguments in favor of feminizing the judiciary, three of which are symbolic: increasing the democratic legitimacy of the judiciary, emphasizing equal opportunities between men and women in accessing judicial office, and creating "a virtuous circle enabling the gender balance in the judiciary to be improved."[246] The other three arguments relate to how justice is dispensed: firstly, women judges are likely to have "more empathy with women litigants and witnesses, including victims of crime" and would "promote the fact that women lawyers are not subjected to sexist comments or other forms of gender bias from the bench." Secondly, they would accompany this attitude with a form of education and civilization of their male colleagues "by not allowing sexist comments, stereotyping, and gender bias to go unquestioned." Finally, the sixth argument is that "women judges will bring a gendered sensitivity to the process of decision-making, and thus (at least sometimes) alter the outcomes of cases."[247] But Rosemary Hunter believes that there is not always a link between greater diversity (gender, race, ethnicity) and decisions.[248] Rulings depend on a number of conditions and opportunities. In particular, a more diverse judiciary "will require the appointment of judges who have the commitment and courage to make a difference,"[249] which brings the issue down to the very personality of a judge, irrespective of the objective or subjective criteria he or she is supposed to meet. The idea put forward by Rosemary Hunter is that there is a difference between appointing a woman who is not a feminist and appointing a woman who is a feminist, and "the opportunity for judging in a substantively different way is likely to arise in only a minority of cases."[250] "Neuberger's experiment" shows the difficulty of identifying cases in which gender influences the meaning of the judgment. This experiment, named after the Chief Justice of the UK Supreme Court, was carried out for a BBC 4 radio program, *Law in Action*. Using a sample of decisions from the UK Court of Appeal, half of which were handed down by men and half by women, but anonymized for the purpose, the experiment determined whether it was possible to identify the gender of the author by reading the decision. Students from Durham University assessed the Court's rulings, under the guidance of Professor Erika Rackley.[251] They found that it is "impossible to 'read off' judicial gender from simple heuristics based on either female life experience or the ethic of care."[252] However, Erika Rackley believes that "[t]he fact that we have no reliable method for identifying where and how women judge differently does not mean that such differences do not exist. One might go so far as to say that the burden of proof is on those who would deny that gender has any impact on judging."[253] For David Neuberger, it

[243] Mary Jane Mossman, "Feminism and Legal Method: The Difference it Makes," *Wisconsin Women's Law Journal*, 1987, vol. 3, p. 147.
[244] See, for example, all the contributions to the book edited by Ulrike Schultz and Gisela Shaw in 2003, *Women in the World's Legal Professions*, Hart Publishing.
[245] Rosemary Hunter, "More than Just a Different Face?...," *op. cit*. p. 122.
[246] *Ibid*. p. 123.
[247] *Ibid*. p. 124.
[248] *Ibid.* p. 140.
[249] *Ibid*. p. 141.
[250] *Ibid*. p. 136.
[251] For the precise results of this experiment see the program on BBC radio ("Do male and female judges judge differently?," *BBC 4*, June 8, 2015, and Erika Rakley, "Judgment day for gender: is diversity crucial in court?," *The Conversation*, June 18, 2013 (theconversation.com).
[252] Rosemary Hunter, *op. cit.* p. 125.
[253] Erika Rakley, "Judgment day for gender: is diversity crucial in court?," *op. cit*.

seems that the fact that we cannot quite identify the cases in which a woman is the author of a judgment is a good sign for their inclusion in the judiciary.[254]

In this spirit, the recruitment of judges based on gender, ethnic, linguistic, community or religious criteria is not supposed to have any influence on the judgments handed down. Moreover, for the Venice Commission, it should not: "once appointed, each judge is a member of the court as a collegiate body with an equal vote, acting independently in a personal capacity and not as a representative of a particular group." The Commission therefore considers that "the introduction of ethnic, linguistic or other criteria for the composition of constitutional courts is fundamentally different from the inclusion of such elements in the process of decision making."[255] Indeed, it is true that all these questions about the status and personality of judges appear to run counter to the principle of impartiality of judges and panels, which the European Court of Human Rights has made a central element of its case law. If a judge is to be "biased" on the basis of gender, community or ethnic origin, this will upset the minimal concept of impartiality.[256] As Erin Delaney points out, we need to reassure people that diversity and impartiality can be reconciled,[257] so that the criterion of belonging to the legal community remains very much a part of the reasoning.

3. Variations on the Judicial Nature of the Appointment of Guardians of the Constitution

From the moment when constitutional "justice" consists primarily of "judging" the conformity with the law of actions by the legislative and executive powers, the need for guardians to have the attributes of "judges" cannot be ignored. Constitutional justice certainly has political implications – as, indeed, does almost all justice. However, it is supposed to be exercised based on the implementation of legal norms, whose interpretation and application must serve as the sole compass for any action that is distinctly different from political action. In the words of Maurice Hauriou, "the power of jurisdiction," while being "a power of sovereignty," "is not a political power."[258] The contemporary conception of justice promoted by international and European institutions includes, *at a minimum,* the independence and impartiality of its actors, and, in some respects, their ability to understand and implement legal norms.[259] The guardians of the constitution, as judges, must therefore be independent of the powers they control and, in implementing the rule of law, impartial towards them.[260] In the specific case of constitutional

[254] Quoted by Tristant de Bourbon, *op. cit.*

[255] Venice Commission, CDL-AD (2005) 039, *Opinion on proposed voting rules for the Constitutional Court of Bosnia and Herzegovina,* § 13 and 3.

[256] It should be pointed out, however, that the measure of impartiality is particularly delicate to determine: it is in fact impossible for a judge to disregard the totality of his or her subjectivity, unless the judge is turned into a robot (through the use of algorithms, for example). Why, for example, in a case of sexual assault, is the bias necessarily greater when one has been assaulted than when one has not? People can have very fixed ideas on this issue that "bias" their judgment, as much or even more than when they have been sexually assaulted. See Rebecca Solnit's interesting analysis on *The Guardian* website, "Does experiencing harm make you biased and untrustworthy? Some think so," November 22, 2021 (www.theguardian.com).

[257] Erin Delaney, "Searching for constitutional meaning in institutional design...," *op. cit*, p. 761. See also Varalika Dev, *op. cit. "*Instead of formulating the discourse on diversity and merit as conflicting and mutually exclusive, there is an overwhelming possibility for it to be harmoniously construed."

[258] Maurice Hauriou, *Principes de droit public*, 2nd edition, Sirey, 1916, p.38 and 36.

[259] See, for example, the annual report published by the Consultative Council of European Judges for the Council of Europe, *Report on the Independence and Impartiality of the Judiciary in the Member States of the Council of Europe.*

[260] See, in particular, Anna Chmielarz-Grochal, Marzena Laskowska, Jarostaw Sutrowsk, "Selección de magistrados constitucionales...," [Selection of constitutional judges…], *op. cit.* p. 482.

review bodies, the means of ensuring their independence and impartiality are not always sufficiently or appropriately considered, particularly in terms of the procedure for appointing their members. The question of the independence of constitutional and supreme courts and their members is often reduced to the status conferred on them in and for the exercise of their mission.

As Nuno Garupo and Tom Ginsburg point out, "the selection of judges is a central factor in most theories of judicial independence,"[261] making the examination of procedure a tool for understanding the role of judges. At the appointment stage, several factors can contribute to the independence of judges: not having guardians appointed by the authorities or components of the authorities they will subsequently review; not appointing personalities from these same authorities; and requiring prior knowledge of the function of judging, which will make their mission less dependent on the conditions in which it is carried out. Constitutional review is a recent practice in political history and has not yet had time to consolidate its position in the face of the executive and legislative powers.[262] If, therefore, the aim is to prevent the appointment of guardians from being dependent on the supervised authorities, instituting an independent and impartial constitutional justice system may require a clearer separation between the latter and the appointees. In this spirit, involving the judiciary in the appointment of those who exercise justice at the highest level of the State is a solution envisaged by some countries (Section 3.1). But it may also mean separating the "pool" of appointees from that of authorities to be controlled: the guardian must not be someone who is guarded (Section 3.2).

3.1 Giving the judiciary a role in appointing guardians of the Constitution

The Venice Commission considers that "no single non-political 'model' of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary,"[263] concerning both the highest courts of the judiciary and the constitutional courts. The independence of the judiciary, a crucial issue for countries in democratic transition, is still under construction in the older, established democracies.[264] There is always a situation where "political" authorities intervene in the functioning of the judiciary: the executive, for the appointment of the highest magistrates, and the legislature, for the determination of the conditions of appointment and status of judges. But even under these conditions, the fact that the judiciary can be the source of the appointment of judges to constitutional and supreme courts may be a stronger guarantee of their independence from the authorities they control.

A look around the world reveals that giving the judiciary a role in the process of appointing guardians of the constitution is not yet a widely shared vision of constitutional justice. If there is to be a future model, it is still very much in its infancy. First, it is extremely rare for all the members of a court exercising the specific functions of constitutional judges to be drawn exclusively from the judiciary. This is the case only with Greece's Special Supreme Court, which is itself a Greek peculiarity. The Special Supreme Court is made up of the presidents of

[261] Nuno Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence," *The American Journal of Comparative Law*, 2009, Vol. 57, n°1 p. 103.
[262] See Maria Dicosola, Cristina Fasone and Irene Spigno, "Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis," *German Law Journal,* Vol. 16, No. 06, p. 1319.
[263] Venice Commission, CDL-AD(2007)0282, *Judicial appointments*, 2007, §3.
[264] Even if the Venice Commission seems to somewhat underestimate practices, stating that "[i]n some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time," *Ibid*.§5.

the three supreme courts, four members of the Court of Cassation and four members of the Council of State, all chosen by lot to serve a two-year term. Although it is sometimes referred to as the Constitutional and Electoral Court, it only sits on an ad hoc basis, and intervenes only to arbitrate conflicts revealed by contradictory decisions on the constitutionality or meaning of a law.[265]

Apart from the case of Greece, the role given to the judiciary in the procedure for appointing guardians of the constitution can take several forms: either the judiciary is given a decisive role in the entire appointment procedure, or a judicial body is made one of the appointing authorities. The first configuration can be found in around ten countries. This is the case in Luxembourg, where the Constitution not only reserves four seats on the Constitutional Court for the President of the Superior Court of Justice, the President of the Administrative Court and two members of the Court of Cassation, but also stipulates that the other five members appointed by the Grand Duke must receive the assent of the Superior Court of Justice and the Administrative Court. The Law of July 27, 1997 on the organization of the Constitutional Court stipulates that for each vacant seat on the Court, the joint general assembly (composed of both the Superior Court of Justice and the Administrative Court) must present three candidates, which illustrates the importance of the Court's role.

The ascendancy of the judiciary over the appointment process can also be the result of practice, whereby the text appears to entrust the appointment of the guardians of the constitution to a single political authority, but through a consultative process involving the judiciary. In India, for example, the consultative power has been transformed into a genuine power of appointment, with the Supreme Court in a sense granting itself the power to appoint its members. The Constitution of 1946 stipulates that the President appoints judges to the Supreme Court, after consultation with the latter and any other courts the President deems appropriate to consult. Consultation with the President of the Supreme Court is still mandatory for the appointment of his successor. According to Articles 124 and 217 of the Constitution, this is merely a consultation which is not binding on the President of India. However, the Supreme Court has interpreted this text in such a way that the Chief Justice and the four most senior judges deliberate on appointments, giving the executive a peripheral role.[266] This assumption of power over the appointment of supreme judges nevertheless has the drawback of leading to a lack of transparency in the selection process since, unlike with the political power, the activity of judges is not the subject of permanent public and media interest.[267]

The situation is different in South Africa, where the appointment of judges to the Constitutional Court follows a widely publicized process of consultation: it is the balance of power at the time that determines the ascendancy of some or others, which is very visible when the appointment process is described. Technically, the President appoints all the judges, according to a process that requires consultation, but which is still likely to give him a certain ascendancy. The Judicial Service Commission draws up a list of at least four names for each vacancy, including those of the President and Vice-President of the Constitutional Court. It sends out a lengthy questionnaire to the candidates, who reply in writing, and interviews them for many hours, sometimes rudely. These hearings are televised, making the nominations part of the public

[265] Constitutional control in Greece is diffuse, and is therefore exercised in the last instance by the highest courts, the Court of Cassation and the Council of State.
[266] See Varalika Dev, *op. cit.*
[267] *Ibid.*

debate, which also involves the various political forces represented in Parliament.[268] In the end, the Commission issues a recommendation. Administratively, it is on this basis that the Department of Justice submits proposals to the President of South Africa, who then exercises his power of appointment. Yet in February 2022, he appointed the President of the Court against the recommendation of the Commission.[269]

If the reality of power depends on practice, the reality of what is happening in Japan is particularly delicate, and there is no agreement on the subject. Some speak of a "stranglehold" by the executive on Supreme Court appointments,[270] while others believe, on the contrary, that it is the judiciary that retains control over Supreme Court appointments, by having a decisive power of proposal.[271] Both interpretations no doubt stem from the fact that, as noted above, the relative weight of the judicial system in Japan downplays the importance of the process: in both cases, judicial audacity is fairly low, and even when the Supreme Court does control its own appointments, it does so based on a conception of justice that is not very intrusive vis-à-vis the political authorities.

Among the countries that give the judiciary a decisive role in the entire procedure for appointing guardians of the Constitution, some have set up a specific appointment body. In Israel, for example, there is an independent selection committee made up of the President of the Supreme Court, two Supreme Court judges, the Minister of Justice, another member of the government appointed by the Minister, two members of the Knesset, and two members of the Bar Association. This committee proposes all appointments to the President, who has no choice but to appoint the proposed candidates. Given the power relations that can play out within the committee, and according to the origin of each committee member, a 2004 revision clarified that each committee member does not represent the institution from which he or she comes, but must select judges according to his or her preferences.[272] In addition, since 2008, each appointment must be proposed by a majority of seven out of nine members. The February 2022 proposals illustrated the difficult balance to be struck in this practice,[273] and the coalition in power at the beginning of 2023 stated its intentions to change the method of appointing judges, considering them an obstacle to achieving the necessary reforms.[274]

In most cases, the judiciary is involved in the process of appointing guardians of the constitution through the power of nomination of judges by the Supreme Judicial Council. In Denmark, Supreme Court judges are appointed by the Minister of Justice on the recommendation of an independent Judicial Council made up of a Supreme Court judge, a High Court judge, a District

[268] In South Africa, there is a non-governmental organization called *Judges Matter,* founded on the idea that "good judges make good judgments," which aims to provide an overview of the structure and processes of the Judicial Service Commission (information, documents and videos on the selection and appointment processes of judges) and to improve civil society's control over judicial appointments (website: https://www.judgesmatter.co.za/).
[269] See also Romain Chanson, "Afrique du Sud: d'un Z qui veut dire Zondo" [South Africa: Z for Zondo], *Jeune Afrique* website*,* March 11, 2022 (www.jeuneafrique.com).
[270] Eric B. Rasmusen and J. Mark Ramseyer, "Why Are Japanese Judges So Conservative in Politically Charged Cases?," *American Political Science Review*, 2001, Vol. 95, No. 2, pp. 331-344.
[271] Nathan Béridot, *op. cit.* p.223.
[272] On this point see Maoz Rosenthal's working paper, *Political Power, Core Values, and the Rule of Law: Israel's Political Elite Facing the High Court of Justice*, Reichmann university, October 2021, p. 10 (https://www.runi.ac.il/media/jtipri4n/working-paper-constitutional-populism-2.pdf)
[273] "Supreme Court: groundbreaking appointments of an Arab judge and a judge of Sephardic origin," *Times of Israel* and *AFP*, February 21, 2022 (en.timesofisrael.com).
[274] See Louis Imbert, "En Israël, la coalition attaque la Cour suprême," [In Israel, the coalition attacks the Supreme Court], *Le Monde*, December 25-26, 2022.

Court judge, a lawyer and two public representatives.[275] In Iceland, the Act of March 15, 1998, created a committee to examine the qualifications of candidates before they are appointed by the President. This committee is made up of five members elected for five years, two of whom are appointed by the Supreme Court itself, and one of whom will chair the committee. Another member is appointed by the Supreme Council of Justice, another one still by the Bar Association, and finally another judge is appointed by Parliament. The opinion of the assessment committee indicates the council's position on the most qualified candidate for the position, bearing in mind that it may rank two or more candidates equally. In practice, the system seems to work well, even if it does not prevent the politicization of appointments, as revealed in the book published to mark the centenary of the Supreme Court in 2022.[276] In Nigeria, the Federal Judicial Service Commission draws up a list of candidates, and the Commission is made up of the Minister of Justice (who chairs it), the President of the Court of Appeal, the First Advocate General, the President of the Federal High Court, two persons recommended by the Bar Association, and two persons appointed by the President of Nigeria. It is then the President of Nigeria who appoints the candidates chosen on the recommendation of the National Judicial Council, a body also chaired by the Minister of Justice and comprising over twenty members drawn from the highest courts of the State, including the Supreme Court, but also from religious judicial authorities, namely a Grand Kadi (appointed by the Minister of Justice from among the Grand Kadi practicing in the Sharia Courts of Appeal) and a President of a Customary Court of Appeal (appointed by the Minister of Justice). In the end, the chosen candidates are then confirmed by the Senate.[277]

In Paraguay, it is the Superior Council of the Judiciary that draws up lists of three candidates for each position on the Supreme Court of Justice, and it is the Senate that selects the candidates to be appointed, with the agreement of the executive power, i.e., mainly the President.[278] Surprisingly, however, the Council does not include any magistrates other than the one appointed by the Supreme Court of Justice. It comprises a representative of the executive, a senator and a deputy appointed by their respective chambers, two lawyers elected by their peers, and two law professors elected by their peers, one from a public university and the other from a private university. In all countries where the judiciary has the right to propose guardians of the constitution, its real weight in their appointment depends on the culture and configuration of powers at any given time, giving the judiciary either a decisive authority in the appointment of guardians of the constitution or, on the contrary, a minor one.

The constitution may also make the judiciary a direct appointing authority for constitutional judges: due to the prevalence of the political conception of constitutional justice, this “risk" is not taken by many countries. It is rather rare in the democracies of Western Europe, and somewhat less so in the new democracies of Eastern Europe. This situation can be found in a few constitutions in Africa and South America. In all cases, it concerns only a fraction of the seats to be filled in a supreme or constitutional court. The proportion of seats falling within the remit of the judiciary is generally the same as that reserved for other appointing authorities, albeit according to different formulas. This is the case, for example, in Italy (of the fifteen judges, five are elected by the President of the Republic, five by the Parliament and five by the judicial authorities, three by the Court of Cassation, one by the Council of State and one by the

[275] Administration of Justice Act.
[276] Kristján Kristjánsson, “Jón Steinar segir að lögbrot hafi verið framið þegar hann var skipaður hæstaréttardómari" [Jón Steinar says that a crime was committed when he was appointed a Supreme Court judge], February 10, 2022, *DV* website (www.dv.is).
[277] Article 231 of the Constitution.
[278] Article 264 of the Constitution.

Court of Auditors), Georgia (three members are appointed by the President of the Republic, three by Parliament and three by the Supreme Court, but it should be remembered that the members of the Supreme Court are themselves appointed by the President), Lithuania (all judges are appointed by the Parliament, but three are proposed by the President of the Republic, three by the Speaker of Parliament and three by the President of the Supreme Court), Bulgaria (four judges are appointed by the President of the Republic, four are elected by Parliament and four by the general assembly of judges of the Supreme Court of Cassation and the Supreme Administrative Court), Ukraine (the President of Ukraine, the Supreme Rada and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine), Moldova (of the six judges, two are appointed by Parliament, two by the Government and two by the Supreme Council of the Judiciary), Guatemala (of the five members of the Constitutional Court, one is appointed by the plenary session of the Supreme Court of Justice, one by the Congress of the Republic, one by the Council of Ministers, one by the Higher University Council of the University of San Carlos de Guatemala, and one by the Bar Association), or Mali (three members are appointed by the President of the Republic, three by the National Assembly and three by the Superior Council of the Judiciary). Chile, whose Constitutional Court has ten members, divides the power of appointment between three authorities as follows: three are appointed by the President of the Republic, four by the National Congress (two by the Senate and two by the Chamber of Deputies) and three are elected by the Supreme Court. In Latvia, the eight members of the Constitutional Court are all elected by Parliament, but three are proposed by at least ten of its members, two by the Government and two by the plenary of the Supreme Court. In Portugal, the judiciary's appointment quota is lower than that of the political authorities, since it appoints three judges out of the thirteen who make up the Constitutional Tribunal. However, the originality of the Portuguese system lies in the fact that the first ten judges appointed to the Constitutional Tribunal by the Assembly of the Republic who co-opt the three remaining judges. Despite the low quota of appointments, this power of appointed judges can be of capital importance, since it is the judges who also designate from among their number the person who will exercise the function of president of the Tribunal.[279]

The specific question of how the president of the constitutional or supreme court is appointed may be symptomatic of the political authorities' desire to retain control over the institution, depending in particular on the powers available to him or her. In its study on the composition of constitutional courts, the Venice Commission notes that, more often than not, the president of a constitutional court is a *primus inter pares*, who merely presides over the court without exercising any jurisdictional function superior to that of the other judges.[280] However, the president may also have a casting vote in the event of a tie, as in Belgium, Lithuania, Spain, France and Italy. In Austria, the Chair votes only when there is no unanimity and when an opinion receives at least half the votes. Occasionally, the Chair is empowered to give instructions to the other judges concerning their activities,[281] or to allocate cases to be dealt with individually by one of the judges as rapporteur, as in Armenia, France, Italy, Lithuania or Romania. The French case is well-known here, where one of the former members of the Constitutional Council states that he was appointed rapporteur only three times in his nine years in office.[282] If we consider that the President of the French Constitutional Council is appointed

[279] Even if, in the case of Portugal, the origin of a judge's appointment – by co-optation or appointment by the Assembly – does not appear to be a criterion for eligibility to the presidency of the Tribunal.

[280] It then cites the following countries: Albania, Argentina, Armenia, Canada, Czech Republic, Denmark, Germany, Hungary, Iceland, Ireland, Japan, Latvia, Former Yugoslav Republic of Macedonia, Norway, Poland, Portugal, Slovenia, Sweden, Switzerland, Ukraine, in Venice Commission, 1997, CDL-STD(1997)020, *The Composition of Constitutional Courts*, p. 15.

[281] The Commission also cites Armenia, Romania, Russia and Ukraine, *ibid.* p.15.

[282] Pierre Joxe, *Cas de conscience,* [A case of conscience], Labor et Fides, 2010.

by the President of the Republic and not by his peers, this provides information about the political rather than judicial conception of this institution.

To avoid over-politicization of the presidential office, some countries use simple appointment mechanisms: in Sweden, for example, the most senior judge is appointed President of the Supreme Court, while in Greece, the older person among the Presidents of the Council of State and the Court of Cassation is the President of the Special Supreme Court. In Belgium, each of the two presidents elected by his or her linguistic group on the court holds the effective presidency alternately every other year. In many cases, the term of office of the president is shorter than the term of office of the judge, allowing for the frequent renewal of the office, which may help to curb the temporary ambitions of the incumbent, as is the case in Italy, where the presidency is held in shifts. Finally, it can be seen that the president of a constitutional or supreme court is more often elected by his or her peers, and that there is a slight tendency for the president to be more than a *primus inter pares* and to be appointed by a political authority, rather than by his or her peers. This is also true for the United States and South Africa (the case of France has just been mentioned).

3.2 Appointing guardians independent of the audited authorities

The question of what is meant by a judge's "independence" is far from self-evident. The question of what independence means in terms of the human personality poses a challenge, insofar as questions of determinism, free will and the unconscious are not themselves very well-known. This difficulty means that, more often than not, independence is conceived minimally, in an exclusively functional way, excluding consideration of what is linked to the very personality of the judge. An independent judge is someone who is not constrained by an objective hierarchy, and whose activities do not depend on external conditions, such as ensuring a sufficient standard of living from his or her pay, so that they do not need to depend on demands that could affect the free exercise of their mission. Numerous, factors have traditionally contributed to the independence of judges, particularly those on constitutional or supreme courts: incompatibilities between the functions of judge and other functions, notably political, but also commercial or administrative; the principle of non-revocability of judges; the principle of non-renewability or non-restriction of their term of office; and the financial and organizational autonomy of the Court.

However, these various measures are not enough. There are many facts and rules that can undermine a judge's independence. Moreover, being able to be independent thanks to a statute, and being independent in practice, are two different things. Being independent is a way of being, a habit. To this extent, legal training and experience can provide a valuable foundation for judicial independence (sub-Section 3.2.1). But in terms of the justice delivered, the advantages they bring are not always appreciated (sub-Section 3.3.2).

3.2.1. Thinking about the independence provided by legal experience vis-à-vis audited authorities

Thinking and acting independently presupposes the experience of such thinking. Everyone can experience it, as they detach themselves more or less easily from a system of thought to which they have become accustomed through training, an environment or a position. Yet, independence cannot be improvised, it *has to be practiced*, and is therefore not simply the

consequence of status. It is a quality that is preserved by an appropriate status, but this is not the same thing. Thus, France's great jurist Charles Eisenmann, in a letter published in *Le Monde* in 1959 (following the first appointments to the newly-created Constitutional Council), noted that these habits vis-à-vis the political power they had to control seemed to be lacking in Council's first appointees.[283]

Prior involvement in politics poses two major problems for constitutional justice: a structural problem of independence from the power that must be controlled,[284] and a learning problem necessary for the identification, interpretation, articulation and consequentialization of legal rules in order to implement "legal sovereignty," if such sovereignty is indeed the principle on which the rule of law is based.[285]

The ability to question the links between several legal rules, to foresee the consequences of applying or not applying a legal rule, the different interpretations and their possible consequences, all necessarily form a singular learning process, in which the previous exercise of political functions may be an obstacle. Involvement in politics and political skills are not an asset. They are a burden, which newly appointed judges cannot shed simply by virtue of their new status.

There are therefore objective reasons for examining the need for judges to be independent *prior to* taking up their duties as guardians of the constitution. These reasons are linked both to the function of judging and to the specific nature of the mission of constitutional or supreme courts. Thinking *with* and *through* the exercise of political power is very different from thinking *outside* it: i.e., when one is not subject to political action in the making. Judging cannot be improvised, and even less so when it involves judging people or powers with whom one is or has been familiar. Independence is not the mechanical consequence of a rule of law: to "make" a judge independent by the mere instantaneous effect of their status is, alas, an illusion that is very well maintained. The law cannot achieve what is impossible, it can only assert the fiction of independence. For example, in a hearing before members of parliament in 2022, a recent minister in a French government, who had been nominated to sit on the Constitutional Council, declared somewhat brazenly and forcefully that there could be no doubt about her "future" independence from the power she was leaving, given the status she would acquire as a constitutional judge.[286]

If, as we have seen, almost all countries require specific skills and experience in the legal profession to be eligible for a seat on a constitutional or supreme court,[287] then it may be argued

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[283] Letter published in *Le Monde*, dated March 5, 1959, entitled *Palindrome ou stupeur?* [Palindrome or stupor?].
[284] Katalin Kelemen believes that it would be more accurate to say that constitutional judges "become independent" rather than "be independent," since most of them are appointed with the support of one or more political parties, "Appointment of Constitutional Judges...," *op. cit.*, p. 6.
[285] Even though the content of this legal sovereignty is always determined by the political sovereign, theoretically the people, or their so-called representatives.
[286] Jacqueline Gourault, audition before the Law Commission of the National Assembly, February 23, 2022.
[287] Two countries even eliminated this problem by composing their courts exclusively on the basis of the judicial organization chart. In Tunisia, for example, whose Constitutional Court had not been established since the 2014 constitution came into force, the new constitution that came into effect in September 2022 states that "The Constitutional Court is an independent jurisdictional body, composed of nine members appointed by decree. The first third of the members is made up of the longest-serving presidents of chambers at the Court of Cassation, the second third is made up of the longest-serving presidents of cassation chambers or advisory chambers of the Administrative Court, and the final third is made up of the longest-serving members of the Court of Auditors" and that, "when a member reaches retirement age, he is systematically replaced by the member who follows him in seniority (...)" (Article 125). For its part, the Constitution of Luxembourg states that the Constitutional Court "is

that such training does facilitate their independence, even though this choice is debatable in terms of its effects on the diversity of judges and the justice they deliver. Not only have trained lawyers already learned about the law and justice, but the experience required of a constitutional guardian may also imply a form of habituation to independence. The advantage of experience in the legal profession is that it is backed by a statutory independence that sets it apart from other professions. Training and experience in the legal profession should thus ensure, at the *very least,* the independence of the guardians of the constitution when they take up their duties. Judges are independent of the other branches of government, as required by the principle of the separation of powers. Lawyers – especially those who are not salaried employees – exercise their profession in a "freelance" manner, and are therefore in principle independent of any hierarchy whatsoever. As for university professors, they are also independent, in as far as they alone primarily determine the content of their teaching and the direction of their research. In other words, the legal profession is not just about acquiring a certain competence, but also about working with a certain independence, which has yet to be established in some countries. When, from the 1990s onwards, post-Soviet countries instituted their constitutional courts, they always chose to require a high level of legal training and extensive experience. As Natasa Danelciuc has pointed out: "it was obvious that the granting of broad jurisdiction and the introduction of individual appeals would give rise to litigation requiring a good knowledge of procedural law and the use of legal language to provide legal reasoning, which non-lawyers cannot master."[288] And one of the greatest advocates of constitutional justice in France in the 1970s and 1980s, the constitutional scholar Louis Favoreu, pointed out in a seminal article that the strong presence of university professors in most European constitutional courts can be explained "by the fact that it was in their ranks that *independent* figures were more easily found during the transition from authoritarian to democratic regimes."[289] At that time – in the early 1990s – the independence of judges was much less guaranteed, and the mere reference to the status that members of constitutional or supreme courts acquire on joining them did not seem sufficient.

3.2.2. The impossible choice between the prevalence of opinions and legal qualifications

Among the three countries that have chosen not to require guardians of the constitution to have specific qualifications and/or experience are two of the "major contemporary democracies"[290] – France and the United States. Having never been a criterion for the recruitment of constitutional judges, the question of what specific qualifications they should have is nevertheless the subject of discussion in France,[291] to the extent that, unlike the USA, the appointing authorities do not make it a criterion of their practices.[292] By contrast, while the political authorities in the USA do not really question the practice of appointing highly qualified jurists to the Supreme Court, there is a great deal of discussion in the academic literature and the media about the qualities required to join the Supreme Court, particularly as regards the criteria relating to the very personality of the judges. Reform proposals are regularly put forward: For example, it is proposed that the President should only be able to choose his or her

composed of the President of the Superior Court of Justice, the President of the Administrative Court, two members of the Court of Cassation and five magistrates appointed by the Grand Duke" (Article 95 ter (3)).

[288] Natasa Danelciuc-Colodorovischi, *op. cit.* p. 151-152.

[289] Emphasis added. Louis Favoreu, "La légitimité du juge constitutionnel" [The legitimacy of constitutional judges], *Revue Internationale de Droit Comparé*, 1994, p. 578.

[290] For this expression, see Philippe Lauvaux, Armel Le Divellec, *Les grandes démocraties contemporaines*, [The major contemporary democracies], PUF, 2015.

[291] See, for example, Dominique Rousseau, "Il est temps de rendre la justice constitutionnelle aux juristes" [It is time to return constitutional justice to the jurists], *Actu-juridique.fr*, March 9, 2021.

[292] This has been the case in all the parliamentary hearings of French appointees since 2010.

nominee from a list drawn up by the Senate itself, which would imply a more "qualified" composition of the Court – *a more intellectually and legally distinguished bench*[293] – just as it is also suggested that Senators should not be able to take into account the philosophical or political opinions of judges,[294] thus ensuring them greater independence.[295]

In all these discussions, what is expected of constitutional justice seems to determine how judges are recruited. If, for example, it is felt necessary to disregard the ideas expressed by judges, we must ask why. On closer examination, it appears that judges' political and philosophical ideas are more likely to influence their decisions than their legal qualifications and experience. This seems to take precedence over gender, language, community or ethnicity. Two American experiences illustrate this very well: the challenge to segregation in 1954 and the challenge to abortion in 2022. In the first case, the Court was composed of just one person who had been a judge before joining it, starting with its new chairman, Earl Warren, who had not been a judge but a US Attorney (a politically elected office in the USA), and Governor of California for three consecutive terms until he joined the Supreme Court in 1953. After the Court's landmark *Brown vs. Board of Education* decision the following year, which ended segregation in schools, critics portrayed Warren as the embodiment of an untrained politician masked in the new robes of judgehood conferred by his Supreme Court tenure. In their view, experienced justices adhering to well-established precedent would never have overturned *Plessy vs. Ferguson*, the 1896 case establishing the *separate but equal* doctrine. Pointing to this lack of judicial experience as the reason for the judges' erroneous decisions, Senate Judiciary Committee Chairman James Eastland complained to Senator Joe McCarthy at the time: "We have politicians instead of lawyers on the court."[296] Dwight Eisenhower, who had appointed Earl Warren, then inaugurated the approach of appointing to the Supreme Court only persons with extensive experience as judges. This has not been called into question since, and is now referred to as the *judges-only approach*. Regretting his choice of Warren, a decision he would later regard as "the biggest mistake" he ever made, his next four appointments came from the ranks of the judiciary, as did two of Richard Nixon's four appointments. Since then, every judge appointed by a Republican president has come to the Court with judicial credentials. After Johnson, Democratic presidents have also chosen nominees drawn exclusively from the judiciary, Elena Kagan being the only exception since she was Solicitor General when she was nominated. As a result of this approach, all the current members of the Supreme Court, including the three nominated by Donald Trump and the one nominated by current President

[293] Lee Epstein, Jack C. Knight, and Olga Shvetsova, "Comparing Judicial Selection Systems," *William & Mary Bill of Rights Journal*, 2001, vol. 10, n°1, p.8, referring to Charles McC.Mathias, Jr. in "Advice and Consent: The Role of the United States Senate in the Judicial Selection Process," *The University of Chicago Law Review*, 1987, vol. 54, n°1, pp.. 201-202, to Glenn Harlan Reynolds, "Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process," *Southern California Law Review*, 1992, vol. 65, p. 1577 and to David A. Strauss and Cass R. Sunstein, *op. cit.*

[294] Lee Epstein, Jack C. Knight, and Olga Shvetsova, "Comparing Judicial Selection Systems," *op.cit.* referring to Richard D. Freidman, "Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations," *The Yale Law Journal,* 1986, vol. 95, p. 1283 (reviewing Laurence H. Tribe, *God Save this Honorable Court: How the Choice of Supreme Court Justices Shapes our History*, Random House, 1985, and to Randall R. Rader, "The Independence of the Judiciary: A Critical Aspect of the Confirmation Process," *Kentucky Law Journal, 1989,* vol. 77, no. 4, p. 767.

[295] For a review of proposals to reform the procedure for appointing justices to the US Supreme Court, see the references cited by Sunstein and Strauss, *op. cit.*

[296] See. Michael Bobelian, "Op-Ed: Why Biden should look beyond the judiciary for his Supreme Court nominee," *Los Angeles Times*, February 15, 2022.

Joe Biden, have excellent credentials as judges on the federal and state circuits.[297] This exclusively "judicial" composition of the Supreme Court did not, however, stand in the way of a reversal of jurisprudence on the issue of abortion on June 24, 2022,[298] illustrating that it is indeed the ideas and intentions of the justices that count, more than their legal training and experience. These experiences underline the fact that it is up to the appointing authorities whether or not to choose personalities known in advance for a certain societal and/or philosophical commitment.

Yet many jurists make no such claim. Judges in particular often claim to be able to set aside their personal or political ideas in order to judge, and declare that they speak only in the name of the law.[299] This does not prevent disparities in judgment between courts and judges, which are evident in almost every country in the world. Judges have a bias, no matter what, even if it is true that this bias leads them to more or less clear-cut decisions. While it is sometimes claimed that citizens are reassured by the advanced legal qualifications of nominees,[300] others assert the opposite: that it is what the judge does that is more important than the expert qualities held by each individual.[301] A survey carried out by the famous blog on the American Supreme Court to identify the most popular judges placed Earl Warren at the top, who was not a judge before joining the Supreme Court, just ahead of John Marshall, the mythical president of the first third of the 19th century, who was already a judge before his tenure on the Supreme Court, even if he also had a political career.[302] We can also identify Supreme Justices who have remained famous, particularly for legal theory, despite their absence or limited experience as judges before joining the Supreme Court. Louis Brandeis, for example, who sat on the bench from 1916 to 1939, was a lawyer and is known for having encouraged arguments that went beyond the pure elements of law[303] and for having worked in favor of a very liberal conception of freedom of expression. Hugo L. Black, who served from 1937 to 1971, had a brief stint as a lawyer, a brief stint as a police court judge and then as a prosecutor, before embarking on a real political career, serving as a senator for 10 years.

It is true that, beyond the obvious,[304] the requirement of legal skills and experience for all or some of the members of a constitutional or supreme court must be assessed in the light of the task to be accomplished, what is expected of the exercise of this mission and the conditions in which it is carried out. This requires examining what the prior mastery of legal technical reasoning brings to constitutional justice that other experience cannot bring.

At the heart of constitutional systems built around the famous concept of *political liberty* (which historically precedes the idea of democracy) lies deliberation and the balancing of the various

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[297] The four justices are also characterized by their relative youth, which is important because they are appointed for life. Neil Gorsuch was appointed at the age of 50, Brett Kavanaugh at 53, Amy Coney Barrett at 48 and Ketanji Brown Jackson at 51.

[298] *Dobbs v. Jackson Women's Health Organization* judgment of June 24, 2022.

[299] See the article by Denis Salas, "La part 'politique' de l'acte de juger" [The 'political' dimension in the act of judging], *Les Cahiers de la justice*, 2011, n°2, p. 113.

[300] Benjamin G. Engst, Thomas Gschwend and Sebastian Sternberg, "Who reaches the Bench?...," *op. cit.* referring to Gibson, James L. and Gregory A. Caldeira, "Confirmation politics and the legitimacy of the US Supreme Court: Institutional loyalty, positivity bias, and the Alito nomination," *American Journal of Political Science*, 2009, vol. 53, n°1, p.139.

[301] Lee Epstein, Jack C. Knight, and Olga Shvetsova, "Comparing Judicial Selection Systems," *op. cit.*

[302] James Romoser, "The 'great chief' and the 'super chief': A final showdown in Supreme Court March Madness," *SCOTUS blog*, April 14, 2021 (www.scotusblog.com).

[303] Theory known as the *Brandeis Brief*.

[304] Guillaume Tusseau, basing himself on decision theory, considers that the requirement of legal competence is merely "apparent common sense," *Contentieux constitutionnel comparé*, *op. cit.* n°520 p.494.

interests that exist in a society. This means that it is impossible to envisage the organization of a review of the constitutionality of norms which is not capable of achieving this balancing of interests. Irrespective of the individual personalities of the members of the supervisory body, it is the fact that they come together that counts. Thus, in February 2022, Michael Bobelian, a journalist specializing in the US Supreme Court, wrote that, by focusing on the category of nominable federal judges on the Supreme Court, "Biden may be forgoing an opportunity to select someone from outside the judiciary who can bring a brand of expertise that has been missing from the court for decades."[305] For his part, American law professor Adrian Vermeule opined in 2010 that, "The Supreme Court Needs a Justice Who Isn't a Lawyer", because "given that the Court decides many cases that involve high politics, one might think that having at least a few Justices who served in elected office or in the upper reaches of the executive branch might usefully diversify the Court's base of experience and information."[306] Furthermore, referring to the work of Scott Page, he considers that "in the more cognitively diverse groups, errors in various directions tend to cancel out, and the right answer tends to prevail. The less diverse groups, by contrast, tend to err badly as to matters in which their biases all point in the same direction. Diversity of training and profession is correlated with cognitive diversity; conversely, professional homogeneity creates likemindedness." Felix Frankfurter, an equally legendary member of the Supreme Court from 1939 to 1962, who was a lawyer and law professor, not a judge, also admitted that "[a]part from meaning that a man had sat on some court for some time, 'judicial service' tells nothing that is relevant about the qualifications for the functions exercised by the Supreme Court."[307]

Nevertheless, almost all countries have opted for constitutional justice to be dispensed by a panel of "legal professionals," and the political orientation of nominees and appointments is often raised as a problem that the minimal expertise of nominees is supposed to compensate for – at least a little. Céline Maillafet, for example, describes the constraints placed on appointing authorities in connection with a new appointment to the Italian Constitutional Court: "The importance of the choice of judge in changing the direction of the Constitutional Court's jurisprudential policy is well known. Therefore, over and above a candidate's political sensitivity, he or she had to be an expert in the fields that have concerned constitutional matters in recent years."[308] In any case, the possibility or impossibility of taking into account the political, philosophical or societal ideas expressed and/or held by the practice of persons qualified for nomination is not susceptible to the rule of a specific law, except to formulate that persons who would have expressed their disagreement with the very principle of constitutional justice cannot be appointed constitutional judges, a rule that would still be open to interpretation.

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At the end of this lengthy examination of the various aspects of the appointment of guardians of the constitution, which has shown above all *how* constitutional justice is intended to be

[305] Michael Bobelian, *op. cit*.
[306] Adrian Vermeule, "The Supreme Court Needs a Justice Who Isn't a Lawyer," *Big Think*, August 6, 2010 (bigthink.com).
[307] Felix Frankfurter, "The Supreme Court in the Mirror of Justices," *University of Pennsylvania Law Review*, 1957, no. 6, vol. 105, p. 785.
[308] Céline Maillafet, "L'alliance gouvernementale fait élire le nouveau juge constitutionnel Luca Antonini" [Government alliance elects new constitutional judge Luca Antonini], *La lettre d'Italie, Revue Droit et Vie politique italienne*, Centre de droit et de politique comparés Jean-Claude Escarras, Université de Toulon, 2019, p.19.

delivered, only one question remains unanswered: What kind of constitutional justice do we want, in terms of its *content* and *ambition*? To find out, we would undoubtedly have to agree on what the constitutional project entails. However, the disputes and conflicts surrounding the decisions of the constitutional or supreme courts, as well as the disputes and conflicts within the courts themselves, show that, on this point, views are very much divided. What is at stake in terms of rights and freedoms and democracy, as can be seen from how the guardians of the constitution are appointed, does not lead us to posit a perfect correlation between the latter and the constitutional justice that is delivered. This is because other elements – both endogenous and exogenous – interfere with the correlations actors find desirable, just as other analyses do not establish these same correlations.

It is undoubtedly a very contemporary exaggeration to have given in to the dogma of legality clearly being separated from morality and/or ethics. Everything – or almost everything – points to the pitfalls of this thinking, and it is not by making the rules more sophisticated that it is possible to achieve what is actually claimed. As constitutional justice is not yet delivered by intelligent machines, it will always depend, perhaps fortunately, on the strength and weakness of the men and women who deliver it, just as its appreciation will depend on the strength of the men and women who receive it. But this in no way prevents us from maintaining an ethical attitude at every stage of the appointment process.