

THE JUDICIAL POWER AND DEMOCRACY

Michel Troper*

A simple and naive stance could have as a consequence of phrasing the question in the following terms: “is it in conformity with the principle of democracy that legal proceedings are not dealt with by the people, as was the case in certain antique democracies, but by judges”? The starting position here would be the point of origin of installing a democratic society, where we would hesitate to entrust the resolution of judicial proceedings to judges rather than the people. Of course, the question is not framed as such by anyone, and today there is no system under which the people would directly settle disputes. Nonetheless, the question itself loses its naivety when it is posited whether the power to settle a dispute a trial, given to professional judges, actually makes them a ‘power’? And when subsequently this question is answered affirmatively; whether that power is compatible with democracy?

One must resist the temptation of seeking to resolve the issue through examining the nature of judicial power, and subsequently that of democracy, given that the answer would depend on the choice of definitions; i.e., the concepts linked to the essence of democracy and judicial power.

Therefore, if we are trying to avoid the metaphysical level, it is necessary to limit oneself to a purely descriptive approach starting from a single conclusion: either because certain constitutions expressly institute a judicial power declaring their democratic nature; or they want to recognise the existence of a judicial power while still considering themselves as democrats, a large number of jurists support the thesis that it is compatible with democracy. Based on this, they then advance a certain number of definitions and arguments.

These theses are the ones under scrutiny through analysing the strategies and argumentative restraints that lead to them being adopted.

Firstly, it is argued that there is no judicial power. However, as the expression ‘judicial power’ has two principal meanings in legal language: a functional meaning -i.e., that of “the totality of acts which lead a trial to be adjudicated”- and an organic meaning -i.e., “a totality of courts which represent certain structural exigencies”. Therefore, the thesis of absence of judicial power is equally bifurcated: there is no judicial power in the organic sense; and judges exercise a function which does not give them any

real power.

When these two arguments fail, it has become increasingly commonplace to resort to a third argument: there can be judicial power, but democracy is not what a vain people desire, and it cannot be generally identified with the power of the majority. True democracy is the power of the judiciary.

I. THE QUESTION OF ORGANIC JUDICIAL POWER

One must from the start avoid the common way of approaching the issue, which is founded on linguistics. Often certain practices are invoked, notably the fact that in the language of several constitutions, one uses -or to the contrary one consciously avoids to use- the expression of judicial power. For example, in France, many discussions focus on the fact that Title VIII of the Constitution is entitled “de l’autorité judiciaire” [of the judicial authority] rather than “du pouvoir judiciaire” [of the judicial power]. Nonetheless, if these terms favour the extension of competences to courts, or their independence, they do not shape the whole of different juridical rules. For example, Article 64 of the 1958 Constitution disposes that “the president of the republic is the guarantor of the independence of the judicial authority”, while the 1848 Constitution contained a title “the judicial power”, but not different rules from other constitutions. Therefore, these expressions have but a mere symbolic significance.

If linguistics offers no help, one can proceed along the path through which the existence of a legislative or executive power is determined: this is said to be true when there is an authority, principally charged with a function in which it is specialised. Thus, it is necessary that each of these authorities accomplishes all these actions, be they legislative or executive, by themselves. Without a doubt there is never a perfect specialisation, but nonetheless one can consider a power to be executive when almost all executive acts, and the most important ones are accomplished by the same authority. Thus, it is easy to identify the legislative power with parliament or with the government.

Conversely, one cannot transpose this solution to the judicial power, because there is never a single tribunal, but several. One must thus reason in the same way as with other powers in the presence of several authorities. The linguistic practices are not uniform: there are various mayors in a single country taking administrative decisions, but this does not mean that one finds in that country an administrative power in the organic sense, or an municipal power; in contrast, one considers that there is a legislative power even though there are two chambers or an executive power, and

even though there is a president of the republic and a plurality of ministers. In reality, these differences can be accounted for.

First of all, in the case of parliament or the executive power, the diverse authorities of which it is composed; i.e., the chambers or the ministers, do not produce juridical acts in a parallel fashion, but converge in doing so as co-authors. The chambers do not make laws independently, but vote on the same text which subsequently becomes law. Ministers equally converge in drawing up decrees; while in contrast mayors, take their decisions independently from each other.

Moreover, the acts of the chambers or the ministers are not attributed to these authorities, but to the group of authorities to which they belong; i.e., the parliament or the government.^[1] On the contrary, acts of mayors are only attributed to themselves, and not to some administrative or municipal power.

According to this framework, one can only consider that there is a judicial power, if and only if:

- (1) The tribunals collaborate in the production of acts, of which they are co-authors, rather than produce decisions of which they are the individual authors;
- (2) The acts which they fulfil are not attributed to the tribunals themselves, but to the judicial power as a whole.

It is obvious that neither of the two conditions is fulfilled.

Nonetheless, if one cannot transpose the process through which one has identified the legislative or executive power one can nonetheless speak of a judicial power in a different way.

- (a) If the authorities are hierarchically structured. One must evidently refer to a flexible rather than strict concept of hierarchy. According to the strict notion, the inferior authority is legally bound to follow the instructions of the superior authority, with a risk of disciplinary sanctions if it does not do so. It is a hierarchical model as it is found in the army or an administration. Following the flexible notion, it is sufficient that the superior authority is endowed with the means of exercising a determining influence on the substance of the decisions taken by the inferior authorities. It is clear that among tribunals there exists a hierarchy which conforms to the flexible notion, as supreme courts, whether supreme courts in the strict

sense, or Cours de Cassation, can effectively influence the decisions of inferior courts.

(b) If the superior authorities have a discretionary power at the decision-making level. The existence of a hierarchy in the strict or flexible sense is indeed not sufficient for there to be a judicial power. For example, in the tax administration, where one finds a strict hierarchy, the authorities can solely decide upon the amount of the tax through performing the arithmetic operation prescribed by tax legislation. In this sense, regardless of the hierarchy, it cannot be said that the superior authorities dispose of the fiscal power.

One thus only speaks of the existence of a judicial power when superior courts -in the exercise of their influence on inferior courts- perform more than the sole application of a pre-existent law, or impose the application of that law. In that fashion, there is only a judicial power in the organic sense when there is a judicial power in the functional sense.

It is however precisely this second aspect which is at the heart of the debate. The problem of reconciling democracy only arises if there exists a judicial power as we have just defined it, and where democracy is a system where the general rules are created by the people.

II. THE QUESTION OF THE POWER OF JUDGES

In order to maintain that the role of tribunals is in conformity with democracy, one either should deny that they dispose of a discretionary power, and claim that they limit themselves to the application of a pre-existing law without the ability of expressing ideological preferences or making axiological choices, or one should conceive an organisation in which they are not endowed with such a discretionary power.

I. The denial of discretionary power

So as to deny that judges dispose of a discretionary power, the usual approach is to employ some variant of the theory of judicial syllogism, the origin of which can be traced back to Montesquieu. This theory is thus not solely linked to the theory of democracy, even if certain theories of democracy make use of it.

It is evidently not necessary to expand on the well known theory of syllogism, which derives from Montesquieu, but was first enunciated by Beccaria and became a true official doctrine under the French Revolution.

The most transparent formulation was given by Clermont-Tonnerre: “judicial power, what is improperly called judicial power, is the application of the law or the public will to a specific fact, thus in its final analysis it is nothing more than the execution of the law”.^[2] It is thus clear from this formula that if a judgment is nothing but the product of a syllogism, there is no judicial power. The same idea has been picked up and developed by numerous authors and political figures -Kant, Condorcet, Robespierre-, and if it is not exclusively linked to the theory of democracy, it is in full conformity with it.

Its justification can be found in the principle of legality, which itself is closely linked to the conception of political liberty as it existed during the Enlightenment. The expression ‘political liberty’ indeed had two meanings at that time. In the broad sense, it is the liberty of those who are only subject to the law. They are free because in society, as in the physical world, they are capable, if they know the law, to evaluate of their actions, and thus make informed choices. Liberty is thus simply legal predictability or security.

This is why, if the judge did anything else than apply rules, if for example he or she could create or recreate the rules at the point of application, we would live under a despotic system. Governing according to its whim, or despotism, is thus defined by the absence of separation of powers; i.e., the system in which the one who executes the law can also make or remake that law according to the circumstances. Despotism is not only a system in which there is a single despot, and a system where a multitude of judges could do something else than apply the law could also be considered as such. For that matter, in pre-revolutionary France, the power of sovereign courts, *les parlements*, was considered as despotic.

Political liberty in the broad sense is thus protected even if the government is not democratic, but in a democracy it is liberty in the strict sense which is guaranteed, as one is only subjected to laws to which one has consented.

In spite of its appearance, the model of Kelsen does not differ much from this one. He without a doubt denies the existence of distinction between law creation and law application, and he posits that judges are norm creators, as the judicial decision itself is a norm. He equally posits that laws always leave judges with an important margin of appreciation, for example when they allow the judge in criminal law to choose between a maximum and minimum penalty; or when in civil law he is entrusted with the determination of the amount of damages, or with the ordering of measures which serve some kind of interest: the interest of the child, of the

company, of society, etc.

However, Kelsen maintains that the judge does not create general norms, and that thus there is no jurisprudence, except in the case where the law authorises the creation of general rules through the judicial process. Democratic theory is thus saved, because even if judges do not make decisions which are the logical consequence of the application of the law, they undoubtedly rule on cases in a discretionary fashion, but in a way that is at least compatible with laws adopted in a democratic fashion.

Another version of the thesis which posits that judges do not dispose of a discretionary power is the Dworkinian theory of the 'one right answer'. According to Dworkin, the judge does not apply law as a syllogism, but he nonetheless finds the solution on the legal system as a whole, and does not exercise law-creation powers.

However, this theory of the syllogism is by no means satisfactory. It presents itself as a simple technical norm: to insure the rule of law, one should reduce the judge to the production of syllogisms. This technical norm itself is the translation of a proposition which describes a causal relationship: If the judge limits himself to the production of syllogisms, this ought to have as its consequence the exclusive reign of the law.

But as a technical norm, the theory fails if such a limitation proves to be impossible. It is never true, and it cannot be true that the decision is but a conclusion of a syllogism, of which the premises are independent from the judge. Firstly law prescribes nothing for a single case, but for a class of cases. One must thus determine first to which class the case to be judged belongs to. In other words, one must start by determining the minor premise, which is not a given, but the result of an intellectual operation. A similar act can be for example tried as rape or as an indecent assault. The decision to subsume it under one or the other category is discretionary. In other terms, one must decide to apply this law, or another. Secondly, once it is decided which law will be applicable, one must then interpret the text; i.e., determine the major premise, which is equally not a given but a construction. The law is indeed not a general norm, but is an expression, the significance of which is a general norm. Thus one must interpret that expression to determine the general norm it contains, and interpretation is a free-will activity; i.e., a discretionary process.

For that matter, one finds that operations on the major and the minor are linked because it is not possible to determine whether a case belongs to a certain class without at the very least having an idea of the meaning of the expression which defines that class.

Thus, even if our reasoning is based on the wholly imaginary case of on a perfectly codified criminal law which foresees but only one fixed punishment for any category of crimes, there nonetheless remains a margin of discretionary power. But of course, such a hypothesis does not occur, and the law never limits a judge to such a specific conduct but, as one has seen with Kelsen, it leaves him always with a margin of appreciation. That is why, even if the law was adopted democratically, it is impossible that the decision of the judiciary be considered democratic because it would be derived from the law.

But there is more: if the judge redrafts the law, it is the law itself that ceases to be democratic. Yet, the judge can do so by interpreting the law, or even by changing it retroactively, as the law is supposed to have the meaning which it is given by the judge not at the day of interpretation, but at the day of its adoption by the parliament. And as the interpretations produced by supreme courts are respected by the inferior courts simply because of the hierarchy of courts, mentioned above, there is legislative power in the hands of tribunals.

The conclusion is that one can never consider that judges are reduced to the production of syllogisms. Accordingly, judges dispose of a margin of discretionary power, and above all of the power to choose the applicable law, and subsequently to determine its meaning. Citizens are thus subject to individual norms which are not deduced from democratic laws, or to general norms which were not adopted democratically.

One can thus attempt to imagine procedures which would limit the power of judges.

2. *The mechanisms to prevent the exercise of a discretionary power*

The first option is to draw up codes, systematised systems drawn up in a coherent and clear fashion. These codes would contain rules covering all possible cases, so as to make sure that there is no more room for discretionary power, or for interpretation.

It is well known how codification has failed to reach this objective. First of all it is impossible to avoid *lacunae* or contradictions, not in the least because the legislator can simply not foresee all future cases, in particular those which emerge from technical or social evolutions. Moreover, these codes are drawn up in a vague and ambiguous language, which renders interpretation simply inevitable. Finally, if decisions could be the target of legislative oversight, the separation of powers, and even the principle of

political liberty itself is breached because the legislature could always revise the laws depending on the circumstances. Viewed differently however, if they are not prone to oversight by the legislative power, nothing can stop judges to redraft the law under the cover of interpretation.

All attempts during the French Revolution to deny judges the option of interpreting the law, and prescribing them to refer back to the legislature have failed, as they did under Frederic II. One can even argue that this prohibition had the effect of strengthening the power of judges in a concealed way, as now interpretation is presented as simple application of a law which is presumed to be clear, without the necessity of justifying the choice of a certain meaning.^[3] Yet this meaning is itself a general norm. Whichever way one looks at it, it cannot be denied that general rules are produced by judges and that there indeed is a judiciary power, which belongs more specifically to Supreme Courts.

Those who seek to avoid this conclusion underline that judges, even those in the supreme courts, are subjected to various constraints: they cannot decide by themselves to deal with a situation; they decide according to a certain procedure; they are held to justify their decisions, thus not allowing them to pass judgment as is possible for a parliamentary majority which can do so by simply affirming its will. For that matter, all statements by judges are testimony of the fact that they have the feeling themselves not of a discretionary power, but of the fact that they are tied, which often emerges from the fact that they adjudicate in a fashion opposing their political views, because the law prescribes the given outcome.

All this might be true, but unfortunately irrelevant. All power, including the absolute kind, is subjected to factual constraints, and even Louis XIV could not act as he pleased. Well then, the restraints mentioned in this context are merely factual ones. Thus, the question is not to know whether judges justify their decisions and whether these justifications realistically reflect the reasoning followed or mere window-dressing, but solely to know if, should the judge have wished to do so, he or she could have taken one decision, or another one. The affirmative answer is inevitable, as the greatest support for that option of choice can be found in the voting procedures in collegial jurisdictions, where each decision could have had a different or even contrary outcome based simply on a different configuration of votes, which would be equally valid. Thus, when appeal is no longer possible, every decision regardless of its content, even if it is absurd, is legally valid and part of the legal order.

One could even go so far as to say that even if there is a good answer, as it

is claimed by Dworkin, that would not change the simple fact that a bad answer has the same legal value, as a bad law is equally prescriptive as a good one.

A final remark needs to be made: it has been argued that there could be a judicial power in the organic sense, because there is one in the functional sense where judges can create rules under the oversight of the Cour de Cassation. However, this approach has been followed because, in seeking to deny the existence of a judicial power, it has been claimed that there is no unity and thus no judicial power as there is a legislative one. But frankly that element is not essential since the problem of compatibility with democracy does not pose itself in similar terms if there is no system of centralised tribunals. In the France of the Ancien Regime, there was no hierarchy whatsoever between the parlements, each of which could produce general rules within their jurisdiction without having to take into account those of the others.

It matters little that there is a judiciary power as long as there is any judiciary power. Thus the question remains: since we are subjected to general rules produced by judges, can we say that we live in a democracy? Evidently not if one applied the classical definition of democracy as a system in which the general rules are adopted by the people or the representatives of the people. If one wishes to maintain the thesis of compatibility, it is necessary to change that definition.

III. THE DEFINITION OF DEMOCRACY

It is necessary to highlight that no attempt is made here to confront the judicial power with true democracy, but rather to examine several theories of democracy which aim to see judges as a democratic institution. The different theories presented here will not be analysed in terms of true or false, but solely from the perspective of whether they are useful, and whether they more or less fulfil their function of justifying power, rather than -in the absence of power- denying the existence of a judicial power *per se*. In reality, none of these theories fulfils its role perfectly, and none can truly be applied in practice, since one always runs into their internal contradictions or the implications of the notions they imply. I choose to consider two groups of theories. One can maintain that judges exercise the power of making general rules in the name of the people, or one can assert that democracy is not at all the power of the people, but a whole of principles, or finally that the people is a more complex notion that we could think at first glance.

1. *Democracy is not the power of the people, but a power exercised in the name of*

the people

According to a first version of this doctrine, judges form a democratic institution because democracy does not demand from the people that they exercise this power themselves or through elected representatives. It suffices that it is exercised by delegation, a delegation which is not necessarily explicit.

Thus, it can be asserted that there is always an implicit legislative reference, through the fact that the legislative power can always make a new law which reverses a rule produced by the Cour de Cassation of which it disapproves, as for example the French parliament has done in the Perruche Case.^[4] If it does not do so however, then it implicitly accepts the general rule created by the judged, and consequently judges produce rules pursuant to an implicit delegation given by the legislative power.

Three objections can be levelled at this justification, which show that this theory does not solve the problem of compatibility with democracy.

Firstly, one is presented with a considerable modification to the definition of democracy, as democracy becomes nothing more than a system in which the people adopt general rules. It is no longer, as with Kelsen,^[5] a system of autonomy, or even as in a representative democracy, a system in which the majority of voters delegates the power to produce general rules to an elected legislative authority, but it becomes a system in which the elected delegates themselves delegate their power. The people is thus no longer the whole of citizens whom are in turn authors and subjects of norms, or even the whole of those that choose whom exercises this power, but solely the entity in whose name this power is exercised, the one whose name is invoked, almost as is done with god, without the necessity to establish a correspondence between an expressed will and another actual will. Sometimes it is argued that judges, in some cases, are elected. But the difference with parliamentary elections, they cannot be elected based on a manifesto promising the creation of certain general rules.

The second objection is of a practical nature: the legislative power can never be sure of its ability to impose its will, because a new law too can be the object of an interpretation which reintroduces the ancient case-law.

The third objection is of an equally practical nature. In various cases, the review is not actually exercised, and it is even difficult to do so. This is not only true for the cases in which parliament is not informed of the decisions of the courts, but also those occurrences in which the creation of a rule by

the judge is based on a supra legislative principle, which the parliament cannot touch. This can be a constitutional rule, or even an international rule, in systems where, as in France, the latter rules have a superior authority to that of laws.

One can attempt to avoid the final objection by maintaining that the constitutional rule which stops parliament from setting aside this jurisprudence is not an obstacle, but to the contrary a guarantee for democracy.[6]

Substantially, that is the argument that Kelsen makes to justify constitutional review of legislation: by deciding that a law is contrary to the constitution, a constitutional court does not pronounce itself on the substance, and does not oppose parliament, but what it in fact does is limit itself to declaring that a certain rule can only be adopted in the form of a constitutional law; i.e., with a stronger majority. In that fashion, the court is an instrument of democracy because the requirement of a qualified majority guarantees that a larger number of citizens will be subjected to rules to which they themselves consented, or lacking that, their representatives.

Dean Vedel had put forward a similar argument: without contesting that the decision concerns the substance and not solely procedural elements, he underlines that this decision can always be reversed by the constitution-making power, by the sovereign 'bathing in justice'.[7]

Nonetheless, these two approaches run into considerable difficulties, two of which are worth mentioning here. The first is that, from the perspective of the theory of democracy, they do not explain the impossibility for the people or its representatives to reverse a jurisdictional decision, when this decision is founded on an international norm. One can indeed not present an international norm as the expression of a popular will superior to that of an elected parliament. The second difficulty is that of reconciling the idea that the constitution-making power expresses better the will of the sovereign people with the notion which is fundamental to a representative democracy: the fact that a law decided upon by parliament is the expression of the general will. If indeed the parliament represents the sovereign people, it does not express that will less well than the constitution-making power does, as sovereignty does not come in degrees. In the version of Georges Vedel, through the application of the metaphor of the 'bath of justice', it constitutes the confession that the constitutional judges initially raise themselves against the initial will of the sovereign prior to bowing to it.

According to the second version of the theory which claims that the judge speaks in the name of the people, the judge does not exercise a power delegated tacitly by parliament, but he himself is the representative of the people. This thesis, elaborated only to a limited extent, bases itself on the theory of representation developed by the National Constituent Assembly in 1791, notably by Barnave.^[8] It is argued that the law is the expression of the general will, which means that those which adopt the law express the general will rather than their own. They are thus the representatives of the subject of that will, the representatives of the sovereign. Representation is thus not linked to elections and the king must be considered as a representative, as, through his vetoing right, he participates in the law-creating process. This reasoning can be transposed: if the judge participates in the creation of general rules, he himself is a representative. This is true of the constitutional judge, who can cancel laws adopted by parliament, but also of the ordinary judge who can interpret them.

It is quite apparent that this justification consists simply of a change of the theory of democracy, which no longer consists of a system of autonomy, or one of power exercised by the people through its elected representatives, but solely of a power exercised in the name of the people by representatives of which only some are elected. But there are other ways of modifying the definition of democracy.

B. Democracy is not the power of the people but a set of principles, the rule of law

At this point we are confronted with a pure product of politico-juridical argumentative restraints. Certainly, say the defenders of the ideology of the rule of law [état de droit], the system which we praise runs counter to the principle of democracy, but only if one identifies this principle with the majority rule. Yet democracy cannot be limited to that, as the will of the people is not the will of the majority of the people, and even less that of the parliamentary majority. Because of this impossibility of identifying this will of the people, one must necessarily consider that it manifests itself in a certain number of fundamental principles which constitute the rule of law. By guaranteeing the respect for these principles, the judges are the upholders of democracy.

This idea, which presents itself in diverse variations, equally runs into important difficulties. The first one is of a definitional nature, which leads one to consider as democracy an enlightened despotism which nonetheless respects fundamental rights. The second is linked to the relationship between the constitution and fundamental rights: if judges only demand respect for those rights enshrined in the constitution, that is not

guaranteeing the rule of law as it was defined, but solely the supremacy of the constitution, which would have been defending whatever its content, irrespective of the fact that it contained rights or not. If, on the other hand they guarantee all fundamental rights, whether or not they are included in the constitution, by virtue of their sole intrinsic value, then the rule of law does not entail a constitutional state. Finally, and above all, in all the cases the list and the content of fundamental rights are thus defined in a totally discretionary fashion by judges. It is thus not very difficult to prove that the government of judges is perfectly democratic.

IV. CONCLUSIONS

It is important to keep in mind that the above is but an analysis of the discourse, and not of reality, and we refused to pronounce ourselves on the reality of the democratic or non-democratic nature of the judicial power. All depends on the definitions, but a single thing is clear: if one maintains the classical definition of democracy (a system in which the power is solely exercised by general rules adopted by the people or by its elected representatives), the government under which we live today is not democratic, since a large number of general rules are created by unelected judges. Still resorting to classical definitions, that government can be qualified either as a mixed regime (because power is exercised through both the democratic element of parliament, and the aristocratic element of judges) or as a polysynody, an aristocratic regime in which the power is exercised by a number of collegial aristocratic organs, where only the procedures of composition differ.

REFERENCES

* Université de Paris X-Nanterre, Institut Universitaire de France.

[1] Here ‘attribution’ is not used in the normal technical sense. In that technical sense, one must always say that acts are attributed to the state, and not to parliament or to the government. However in daily language, one identifies an organ as the author of this act, and in doing so it is either parliament or government which are identified.

[2] A.P., Vol. 15, p. 425.

[3] M. TROPER, *Le droit, la théorie du droit, l'état*, Paris, PUF, 2001, p. 163.

[4] The law of 4 March 2002 aimed at reversing the rule emerging from the decision of the Cour de Cassation of 17 November 2000.

[5] H. KELSEN, *La démocratie, sa nature, sa valeur*, 2nd ed., 1929, transl. [C. EISENMANN, Paris, Sirey, 1932]; Presentation of M. TROPER, 2nd ed., Paris, Economica, 1988.

[6] M. TROPER, “La logique de la justification du contrôle de la constitutionnalité des lois”, in *Mélanges Pactet*, 2003, pp. 911-ff.

[7] Translation of the French expression ‘dans une sorte de lit de justice’; G. VEDEL, Schengen et Maastricht, with regard to the decision of the Constitutional Council, 25 July 1991, No 91-294 DC, RFDA, March-April 1992, pp. 173-ff.

[8] It is however elaborated on by Pierre Rosanvallon: “the representatives of the people are of course first those who are elected; but not only; can also be considered as representatives those that speak, act and decide ‘in the name of the people’; it is the case of judges, whether judicial or constitutional, but also, by extension, the case of several regulatory authorities”; P. ROSANVALLON, *La démocratie inachevée: Histoire de la souveraineté du peuple en France*, Paris, Gallimard, 2000, p. 407. Among jurists, Dominique Rousseau defends a similar concept; D. ROUSSEAU, *Droit du contentieux constitutionnel*, 5th ed., Paris, Montchrestien, 1999; “La jurisprudence constitutionnelle: Quelle ‘nécessité démocratique?’”, in G. DRAGO, B. FRANÇOIS and N. MOLFESSIS, *La légitimité de la jurisprudence du Conseil constitutionnel*, Paris, Economica, 1999, pp. 363-376; see, for my comments and the response of D. Rousseau: *Ibid.*, pp. 377-382.