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[From Germany to Israel, it's 'the will of the people' v the rule of law. Which will win? | Paul Taylor | The Guardian](#)

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In liberal democracies, populists are setting two core principles at odds – and putting freedom and human rights in danger

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A protest against the Israeli government's plan to overhaul the judiciary in Tel Aviv, Israel, July 2023. Photograph: Jack Guez/AFP/Getty Images

The will of the people expressed in free elections and the rule of law upheld by independent courts are two of the pillars of a liberal democracy, or so we were taught at school. Yet these two core principles keep colliding in increasingly polarised societies from Washington to London, Paris to Berlin and Warsaw to Jerusalem, with populist politicians demanding that “the will of the people” override the constitution, treaties or the separation of powers.

It is vital for the long-term health of democracy that the judges prevail. If politicians are able to break or bend fundamental legal principles to suit the mood of the moment, the future of freedom and human rights is in danger.

In the United States, the supreme court [will soon rule](#) on whether Donald Trump should be allowed to run again for president after having encouraged and condoned the storming of the Capitol by his supporters on 6 January 2021 in a violent attempt to prevent Congress certifying the election of Joe Biden as his successor. Two states, [Colorado](#) and [Maine](#), have barred him from the ballot.

The [14th amendment](#) of the constitution, adopted right after the civil war, states that no person shall “hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath (...) to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof”.

If the court applies the constitution literally, it's hard to see how it can let Trump stand in November's election, even though he may not be found guilty by a court over the insurrection. However, to deny the runaway favourite for the Republican nomination a chance to regain the White House would ignite a firestorm of outrage among his supporters, and perhaps a wider sense of a denial of democracy.

Even some Trump-haters contend that it would be wiser for him to be defeated in an election than prevented by judges from running for office. The fact that the supreme court is dominated by conservative justices appointed by Trump and his Republican predecessors might not be enough to convince millions of Americans that they were robbed of a free vote.

The same kind of issue has arisen repeatedly in the UK, where the high court [ruled in 2016](#) that even after the Brexit referendum, the government still required the assent of parliament to give notice of Britain's intention to leave the European Union. The Daily Mail infamously branded those judges "[enemies of the people](#)". In 2019, the [supreme court overruled](#) Boris Johnson's proroguing of parliament, and more recently it [ruled unanimously](#) that Rwanda was not a safe country to send people seeking asylum in Britain. Each time, populist politicians denounced what they call "rule by judges" and vowed to find ways to limit their powers.

Of course, it is politically inconvenient when judges tell a government, or a parliament, that it is acting illegally or unconstitutionally, but it is an essential safeguard of our democracy that those rulings be respected and implemented faithfully.

While Britain lacks a written constitution and is governed by a mixture of laws and informal conventions, its courts are bound to uphold the [European Convention on Human Rights](#), to which the UK is a founding signatory, and the jurisprudence of the European court of human rights that derives from it.

In France, the constitutional council last week [struck down](#) substantial parts of an immigration law passed by parliament last month. Les sages (the wise persons) annulled more than a third of the measures, including provisions that would have obliged parliament to set annual immigration quotas, discriminated between French nationals and foreigners, and between working and non-working foreigners in entitlement to welfare benefits, and denied automatic citizenship to French-born children of foreign nationals.

Emmanuel Macron had referred the law to the council as soon as the conservative opposition forced his minority government to accept a severe toughening of its original bill, drawing charges of hypocrisy since his party voted for the legislation knowing that parts of it were likely to be ruled unconstitutional.

As expected, the council's ruling was denounced as a "[legal coup](#)" against the will of parliament and the people by mainstream conservative Republicans and Marine Le Pen's hard-right National Rally, who demanded that the constitution be changed to permit a referendum on immigration quotas. But [amending the constitution](#) is a lengthy process that requires both houses of parliament to adopt identical wording and then a three-fifths majority at a special congress of both houses. Don't hold your breath.

In Germany, the federal constitutional court [ruled last year](#) that the government's attempt to divert money left over in an off-budget special fund for Covid-19 recovery for investment in the country's green energy transition was unconstitutional. The ruling has left the chancellor, Olaf Scholz, with a massive hole in his budget that the government is struggling to fill.

The court decision has prompted the beginnings of a sensible debate on amending a [constitutional debt brake](#) enacted during the global financial crisis in 2009, which severely restricts budget deficits except in times of emergency. At least no one in Germany has branded the justices "enemies of the people" or demanded their heads on pikes.

In Israel, an attempt by Benjamin Netanyahu's hard-right government to curb the independent supreme court's right to interpret quasi-constitutional basic laws to overrule government decisions and appointments and to reject legislation passed by the single-chamber parliament caused [months of civil unrest](#) last year.

Netanyahu, who is on [trial on corruption charges](#) and seeks to exert political control over judicial appointments, argued that the will of the people should prevail over an unelected judiciary. Far-right members of his government contend that Jewish religious law should trump the basic law anyway. The supreme court this month overturned a law that would have prevented it using the principle of "[reasonableness](#)" to quash government decisions.

In Poland, a democratically elected nationalist government defied the EU to dismantle the independence of the judiciary by packing the constitutional court and prosecutors' offices with loyalists and creating a politically controlled body to discipline judges for their rulings. Now a pro-European government is trying to reverse the damage wrought by its predecessors, but faces accusations of violating the rule of law itself by ignoring the packed court's rulings.